OECD GLOBAL FORUM ON COMPETITION

SOUTH AFRICAN CONSTRUCTION INDUSTRY

ENDEMIC COLLUSION

Robert Wilson
COMPETITION ACT 1998

• Effective 1 September 1999

• Recognizes the legacy of apartheid

• Promotes an inclusive economy

• Balances the interests of workers, owners and consumers

• Focused on development

• Applies to all economic activity in or having an effect within South Africa
COMPETITION AUTHORITIES

- **Competition Appeal Court**: Hears appeals from and reviews the Tribunal's decisions (highest court for competition matters since December 2012)
- **Competition Tribunal**: Adjudicates large merger and prohibited practices referrals
- **Competition Commission**: Investigates, mergers, prohibited practices, and refers complaints and large mergers to the Tribunal
PROHIBITED PRACTICES

• Collusion
  o Outright prohibited
    • Price fixing
    • Market division
    • Collusive tendering
    • [Minimum resale price maintenance]
  o Potentially prohibited
    • Net anti-competitive effects

• Exclusion
  o General
  o Specified

• Exploitation
  o Excessive pricing
ADMINISTRATIVE PENALTIES

• Up to 10% of a firm's annual turnover in and exports from South Africa
• Competition Act lists the factors the Tribunal must consider
• Cases have developed a six step methodology
  o 1 – determine the affected turnover in the relevant year of assessment
  o 2 - calculate the base amount (0-30% of the value in 1)
  o 3 - multiply the value in 2 by the number of years of the contravention
  o 4 - round down the value in 3 if > 10% of the total turnover of the firm
  o 5 - discount off or add premium on the value in 4
  o 6 - round down the value in 5 if > 10% of the total turnover of the firm
ENFORCEMENT

Procedures

• Complaint

• Investigation

• [Interim relief]

• Referral

• Adjudication

Powers & Policies

• Summons

• Enter and search

• Immunity
  
  ○ Corporate Leniency Policy (CLP)

• Leniency
  
  ○ e.g. Construction Industry Fast Track Settlement Process
CONSTRUCTION INDUSTRY

• Grew in the lead-up to the 2010 FIFA World Cup
• Low profit margins
• Concentrated
  o Large enterprises generate 64% of the total industry income
  o 20 largest enterprises contribute 26% of the total industry income
• Vertically integrated
• Joint ventures
• High barriers to entry
  o Construction Industry Development Board (CIDB) requirements
  o Scarce human resources
• Significant employer
• Relatively untransformed boards and management
• Performed poorly in recent times
CONSTRUCTION INDUSTRY CARTELS

Early cases

• mid 2007 – Commission prioritises industry for enforcement
• December 2007 onwards – several immunity applications and settlements
• 2008 – Commission investigates pre-cast concrete suppliers
• February 2009 – Commission refers case to Tribunal
• February 2009 – Commission investigate FIFA World Cup stadium contractors
• September 2009 – Commission broadens investigation to entire industry

Fast Track Settlement

• February 2011 – Commission invites settlements on financially advantageous terms
• 15 firms settle with the Commission
• 13 firms in multiple contraventions
• 140 disclosures of collusive tendering
• projects worth ZAR 37.1 billion
• most projects in the public sector
• total penalties – ZAR 1.46 billion
• highest penalty – ZAR 311 million
• 25 other firms implicated
• 5 subsequent settlements on more stringent terms
• 17 cases referred to Tribunal
FAST TRACK SETTLEMENT CALCULATOR

• Exclude cartel conduct that ceased three years before the 2009 investigations were initiated
• Penalties based on the applicant's annual turnover in the relevant industry subsector in South Africa and its exports from South Africa for the financial year preceding the invitation to settle

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of non-prescribed contraventions by applicant in subsector</th>
<th>Penalty: percentage of turnover of applicant in subsector (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>1 to 4</td>
<td>1 to 4</td>
</tr>
<tr>
<td>B</td>
<td>5 to 12</td>
<td>4 to 7</td>
</tr>
<tr>
<td>C</td>
<td>13 to 22</td>
<td>7 to 10</td>
</tr>
<tr>
<td>D</td>
<td>23 and over</td>
<td>10 to 12</td>
</tr>
</tbody>
</table>
### ANALYSIS OF ALL CARTEL CASES (NUMBER)

<table>
<thead>
<tr>
<th>Conduct</th>
<th>Total</th>
<th>Construction industry</th>
<th>Multiple contraventions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Price fixing</td>
<td>92</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(4% of all cases)</td>
<td>(25% of construction cases)</td>
</tr>
<tr>
<td>Market division</td>
<td>10</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Collusive tendering</td>
<td>55</td>
<td>31</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(57% of all cases)</td>
<td>(71% of construction cases)</td>
</tr>
<tr>
<td>Price fixing / market division</td>
<td>17</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(24% of all cases)</td>
<td>(75% of construction cases)</td>
</tr>
<tr>
<td>Price fixing / collusive tendering</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(50% of all cases)</td>
<td>(100% of construction cases)</td>
</tr>
<tr>
<td>Market division / collusive tendering</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(50% of all cases)</td>
<td>(100% of construction cases)</td>
</tr>
<tr>
<td>Price fixing / market division / collusive tendering</td>
<td>14</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(71.4% of all cases)</td>
<td>(100% of construction cases)</td>
</tr>
<tr>
<td>Total</td>
<td>192</td>
<td>51</td>
<td>38</td>
</tr>
</tbody>
</table>
### ANALYSIS OF ALL CARTEL CASES (VALUE)

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Construction industry</th>
<th>Fast track settlement</th>
<th>Non fast track settlement</th>
<th>Multiple contraventions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>4.578 billion</td>
<td>2.241 billion</td>
<td>1.463 billion</td>
<td>777 million</td>
<td>2.198 billion</td>
</tr>
<tr>
<td></td>
<td>(49% of total)</td>
<td>(65% of construction industry)</td>
<td>(35% of construction industry)</td>
<td></td>
<td>(98% of construction industry)</td>
</tr>
</tbody>
</table>

- 6-step methodology not always used
- Basis of turnover not consistent – affected, division, company, group etc.
- Wide range of percentages – 0.3% to 9%
## REASONS FOR CONSTRUCTION INDUSTRY CARTELS

### Industry related
- Apartheid legacy
- Market structure
- Industry performance
- Tender requirements
- Commercial dealings
- Personal relationships
- Compliance culture

### Enforcement related
- Early priorities
- Immunity policies
- Low penalties
- Penalty methodology
- Personal criminal liability
- Civil damages
- Reputational harm
**IMPLICATIONS FOR ENFORCEMENT**

Enforcement and Advocacy

### Enforcement
- Prevention and detection
  - Significant penalties
  - Significant risk of detection
  - Transparent immunity / leniency policies

### Advocacy
- Other relevant authorities
- Regulatory interventions
- Procurement interventions
- Firm interventions

Quantitative and qualitative analysis
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