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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

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**COMMITMENT DECISIONS IN ANTITRUST CASES**

-- Note by South Africa --

**15-17 June 2016**

*This document reproduces a written contribution from South Africa submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.*

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[www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm](http://www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm)*

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## **1. Introduction**

1. Section 49D(1) of the Competition Act provides that, if the Competition Commission (“Commission”) and a respondent “agree on the terms of an appropriate order,” the Competition Tribunal (“Tribunal”) may confirm the agreement as a consent order.

2. The Tribunal may also make changes to the consent order presented to it as it deems appropriate and/or may refuse to make the order. An “appropriate” consent order is defined as one which is “suitable,” that is, “suitable in the sense that it is an agreement that suits the contending interests of the Commission, as the proxy of the public interest, and the respondent, and in that sense, can be appropriate as between themselves.”

3. However, Section 58(1)(a) of the Competition Act does not provide an exhaustive list of the kinds of orders that the Tribunal may make. The principle of appropriateness constitutes an important limit to the Commission and Tribunal’s discretion in imposing remedies.

4. Put differently, consent orders are therefore settlement agreements reached between the Commission and respondents in a given case and generally after the Commission has completed an investigation. The Tribunal must confirm a consent order in order for it to be legally enforceable.

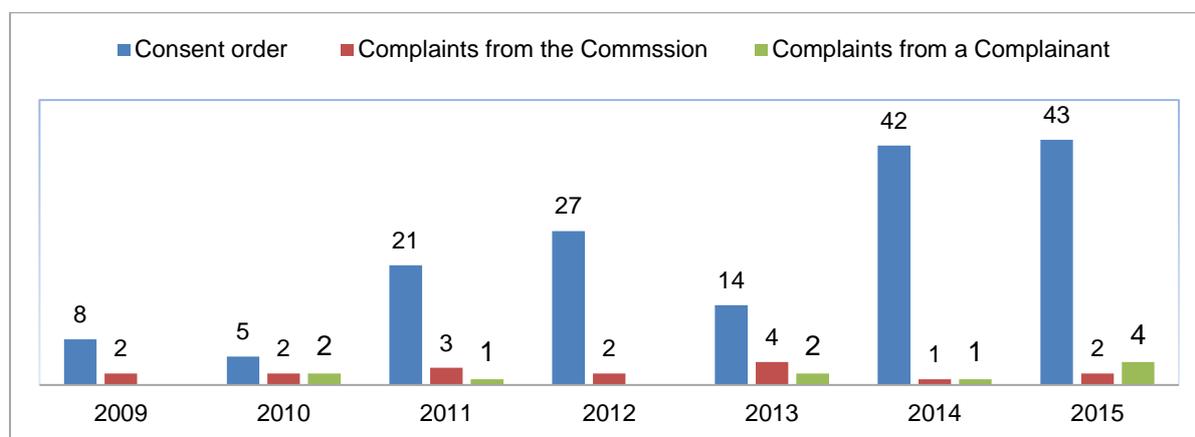
## **2. An Overview of consent orders in South Africa**

5. The Commission has adopted a position, taken by many competition agencies throughout the world, that settlement is an appropriate means of curtailing contested proceedings, provided that the terms of the settlement enable the Commission to achieve an outcome that addresses the anticompetitive conduct and is as close as possible to that it would have achieved upon a successful prosecution of the matter in the Tribunal.

6. When settling matters, the Commission requires that the agreement incorporates the following material terms: an admission of a contravention of the Act; payment of an administrative penalty; cessation of the anticompetitive conduct; implementation of a compliance programme as a tool to empower employees, management and directors and to enable the monitoring and detection of any future contraventions; and cooperation with the Commission in the prosecution of any other respondents. In addition, depending on the conduct that is the subject of the settlement, the implementation of a remedy to address the anticompetitive conduct will be a key feature of the settlement and may have an impact on the quantum of the administrative penalty.

7. Table 1 shows that most cases are resolved through consent orders. To illustrate, for the financial year 2014, the Commission concluded 43 settlement agreements. 18 settlements agreements, involved agreements reached between the Commission and firms in the construction industry, arising out of a Commission investigation into the industry and the Construction Fast Track Settlement Programme. This programme involved the unusual approach of inviting firms to settle alleged past transgressions. Many firms responded positively to the invitation and agreed to settle cases, mostly involving rigging of tenders in respect of both public and private sector projects.

8. Of the 43 cases settled, 39 related to cartel contraventions, three related to abuse of a dominant position and one to a restrictive vertical practice. The Tribunal, however, confirmed 42 consent orders.

**Table 1: Cases decided in this financial year compared to recent years**

Source: Illustration based on Table 1 of Competition Tribunal Integrated Report, 2014/2015

### 3. Examples of some consent orders

9. The Commission has accepted both structural and behaviour remedies in its attempt to craft creative remedies that restore competition below we discuss a few examples of settlement agreements.

#### 3.1 *Telkom consent order*<sup>1</sup>

10. During the period 26 June 2005 to 19 July 2007, the Commission received five complaints against Telkom (regarding its prices of leased lines) from a number of Internet Service Providers (“ISPs”). The Commission referred the case to the Competition Tribunal for adjudication in 2009.

11. Information received by the Commission in the complaints and from its investigation, revealed that Telkom had engaged in exclusionary conduct in the form of a margin squeeze. The Commission also found that Telkom’s prices for high bandwidth national transmission lines (HBTLs) and undersea cable international lines (IPLCs) were excessive; and that the prices for wholesale services to first tier ISPs used to construct their Internet access and IP VPN services (namely Dignet access lines, ADSL access via the IP Connect service, HBTLs and IPLCs) were set at levels that precluded cost-effective competition with Telkom Retail’s own internet access and IP VPN services (accessed by customers via Dignet leased lines and ADSL).

12. The Telkom settlement agreement followed a successful prosecution of Telkom in 2012 regarding complaints stemming from 1999 to 2004 by ISPs relating to the constructive refusal to supply essential infrastructure used to provide IP VPN and Internet access services.

#### 3.2 *The settlement agreement*

13. The settlement package included an admission of guilt; a financial penalty of R200m; functional separation between Telkom’s retail and wholesale divisions along with a transparent transfer pricing programme to ensure non-discriminatory service provision by Telkom to its retail division and ISPs; an

<sup>1</sup> See Competition Commission v Telkom SA SOC Limited (016865 or 55/CR/Jul09, 73/CR/Oct09, 78/CR/Nov09).

effective monitoring arrangements of its future conduct; and wholesale and retail pricing commitments for the next five years estimated to yield R875m savings to customers.

14. To ensure the non-discriminatory treatment of its competitors in comparison to its own retail operations and to allow for monitoring of its conduct, Telkom agreed to implement functional separation between retail and wholesale operations including a transfer pricing programme to regulate transactions in the provision of network services between its wholesale and retail divisions. In addition, Telkom agreed that it will implement a code of conduct for the wholesale division that will ensure non-discriminatory treatment of ISPs and protection of their confidential service information from the competing retail division.

15. Telkom agreed that it will keep separate internal accounts for its own retail corporate VPN and Internet access products to allow for monitoring that it does not engage in a margin squeeze in contravention of the Competition Act in future.

16. Over the 2014, 2015 and 2016 financial years, Telkom agreed that it will reduce the prices of wholesale services implicated in the complaint and used by ISPs to deliver their IP VPN and Internet access services (namely undersea cable international lines, national high bandwidth transmission lines, access to ADSL lines via the IP Connect service and Diginet leased line access) and related retail products (Telkom's VPN Supreme and Internet Access). The price reductions are weighted more heavily in favour of wholesale services (at least 70% wholesale) to bring about a more competitive market and will amount to an estimated R875m savings to the market.

17. Telkom agreed that it will also ensure that any price reductions are not reversed in the 2017 and 2018 financial years.

18. In addition to the above penalty and the undertakings to reduce prices, Telkom agreed that it will provide points of presence at strategic locations in the public sector. This, together with the price reductions undertaken by Telkom, was aimed at creating not only a more competitive market in South Africa, but also aiding government in the provision of public services in a digital economy.

19. The key control mechanism included a requirement that Telkom will undertake an audit for each of the 5 years:

- To confirm that the transfer pricing system between Telkom wholesale and Telkom retail complies at least substantially with the Transfer pricing programme and the retail pricing policy;
- Provide a written report to the Commission of the findings of the audit;
- Grant the Commission access to its transfer pricing and retail product accounts and underlying documents as may be required by the Commission.

20. The Commission has been receiving written reports on the audits and has embarked on its own impact assessment.

### 3.3 *Pioneer Foods consent order*<sup>2</sup>

21. In December 2006, the Commission received information regarding an alleged bread cartel that was active in the Western Cape. The Commission initiated a complaint against Premier, Tiger Brands, Foodcorp, and Pioneer Foods, all of whom had allegedly been involved in the cartel. The four companies are the largest in many food product markets and are vertically integrated into flour and bread production. Premier applied for leniency in terms of the Commission's corporate leniency policy, through which it revealed that bread and milling cartels operated in parts of South Africa and admitted to its involvement. Premier's leniency application was corroborated by a leniency application from Tiger Brands in which it also admitted to its involvement. Subsequently, Foodcorp also admitted to cartel conduct and settled the bread case with the Commission.

22. In February 2010, and after contested proceedings, the Tribunal ruled that Pioneer Foods had engaged in fixing the price of bread products in the both Western Cape province and nationally, and imposed a fine of R196 million on the company. Following this, Pioneer Foods approached the Commission with the intention of settling all the other cases that had been referred to the Tribunal for adjudication or that were currently under investigation by the Commission and in which it was a respondent.

- The settlement agreement

23. The settlement agreement reached with Pioneer Foods had the purpose of enhancing and restoring competition in the relevant markets. First, Pioneer Foods undertook to desist from any conduct that infringes or may infringe on the Competition Act, and would continue compliance programmes to prevent future infringements, as well as cooperate with the Commission in its prosecution of other firms.

24. Second, Pioneer Foods agreed to pay a fine of R500 million to the National Revenue Fund of which R250 million was allocated to the establishment of an Agro-Processing Competitiveness Fund ("APCF"). The APCF sought to address the structure of the affected markets by facilitating entry and expansion in the agro-processing value chain, particularly by small and medium enterprises in the domain of historically disadvantaged South Africans.

25. Third, Pioneer Foods agreed to a price reduction remedy through which it would decrease the prices of certain products for an agreed period of time to the total value of R160 million. Although the South African bread baking industry is characterised by low exogenous entry barriers, the existence of the cartel in the flour market mitigated the ability of independent bakers to enter and expand within the industry.

26. The condition was intended not only to compensate consumers for the previously higher fixed prices, but also to undermine the effects of Pioneer Food's admitted anti-competitive conduct on prices in the relevant markets. The latter would be achieved by stimulating more intense rivalry in the market whilst simultaneously enabling smaller non-vertically integrated participants to enter and expand in the bread market. To avoid unintended predatory outcomes, the price reductions were targeted at those products with sufficiently high gross margins. Finally, Pioneer agreed to increase its approved capital expenditure by R150 million with the aim of increase the company's output for certain product lines as well as contributing to job creation.

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<sup>2</sup> See Competition Commission v Pioneer Foods (Pty) Ltd (10/CR/Mar10, 15/CR/Feb07) [2010] ZACT 9 (3 February 2010) and see also Bonakele and Mncube (2012).

27. The Commission has conducted impact assessment studies on the different aspects of the settlement in order to demonstrate impact. The findings of the Commission's impact assessment suggest that the Commission has been successful in restoring competition in the affected markets.

### **3.4 Sasol divestiture consent order<sup>3</sup>**

28. The Commission reached a settlement agreement with Sasol Chemical Industries Limited ("SCI") in June 2010 which was confirmed by the Tribunal in July 2010, finalising the abuse of dominance aspect of the fertiliser case. This followed the settlement reached with Sasol on the collusion part of the case in which Sasol was fined R250 million.

- The settlement agreement

29. This settlement related to SCI's abuse of dominance, exclusionary conduct and price discrimination in the supply of ammonia and derivative fertilizer products. In terms of the agreement, Sasol agreed that it will:

- divest five of its fertiliser blending facilities located across the country with the exception of its Secunda plant;
- sell ammonium nitrate based fertilisers on an ex-works basis from its plants at Sasolburg and Secunda and depots within 100km of them;
- commit not to differentiate in its pricing of ammonium nitrate based fertilisers, other than on standard commercial terms such as volume and off-take commitments; which must be transparent and available to all customers;
- house the ammonia plants and business operations relating thereto as a business unit separate from Sasol Nitro and with separate audited books of account.

30. While this settlement did not include an administrative penalty, it was the first settlement agreement to include a structural remedy in an enforcement case. The Commission believed that the structural and behavioural remedies agreed in this settlement, together with addressing cartel conduct which was the subject of a previous settlement with SASOL, will effectively address competition concerns in the fertiliser market. The pricing and divestiture commitments removed SASOL's incentive and ability to exclude competitors in fertiliser blending and retailing.

31. The Commission has recently conducted an impact assessment study on the settlement agreement in order to demonstrate impact. The findings of the Commission's impact assessment suggest that the Commission has been successful in restoring competition in the affected markets.

## **4. Benefits associated with the use of consent orders**

32. There are significant benefits associated with the use of consent orders. The benefits accrue to the competition authorities, the firms involved in these proceedings, and the economy. The benefits include savings (in terms of litigation costs, time and allocation of resources) to the Competition authorities and the firms involved, and swifter restoration of effective competition in the market. Given the number of cases

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<sup>3</sup> See Competition Commission v Sasol Chemical Industries (Pty) Ltd (31/CR/May05) and Competition Commission v Sasol Chemical Industries (Pty) Ltd, Kynoch Fertiliser (Pty) Ltd, African Explosives and Chemical Industries Ltd (45/CR/May06).

referred to the Tribunal each year, concluding cases through the settlement process has helped to clear case backlogs, reduce the case load and at the same time swiftly restore competition in the affected markets. The settlement process has also reduced the timeframe within which cases are finalized.

33. To illustrate some of the benefits associated with consent orders consider the example below.

#### **4.1 Construction consent orders<sup>4</sup>**

34. The Commission first initiated an investigation into the construction sector on 1 February 2009 regarding tenders for the construction of 2010 FIFA World Cup stadia. The second investigation was initiated on 1 September 2009 and covered all big and small tenders for construction projects.

35. During the investigation of these projects the Commission received approximately 150 marker applications (intention to apply for leniency) and 65 CLP applications which implicated the majority of medium and large firms in bid rigging conduct<sup>5</sup>. This led the Commission to develop and launch a fast track settlement programme on 1 February 2011 to incentivise firms to enter into settlement arrangements.

36. In order to cope with the magnitude of transgressions and to come to a cost-effective, comprehensive and speedy resolution, the Commission embarked on a fast track investigation in 2009 by publicly inviting firms that were involved in collusive conduct and bid-rigging to disclose such conduct and engage in settlement negotiations with it.

37. As a result, 21 firms in the construction industry came forward with information on 300 projects worth an estimated R47 billion. Of these, 160 were no longer eligible for prosecution under the Act, which left 140 projects susceptible for prosecution.

38. It took the Commission close to four years to investigate these allegations. During its investigation the Commission considered the entire life-cycle of each construction project, ascertained who the participants were in each project, how the tender process was managed and the results achieved.

39. The Commission had to cross-reference all the submissions made by the various firms in order to ensure that the information received corresponded. The Commission then settled with 15 of the construction firms. These were firms that admitted their involvement in the collusion and agreed to pay administrative penalties, collectively totalling R1.46 billion.

40. Given the massive public outcry about the construction cartel, even before the 15 firms appeared before the Tribunal, the Commission could have elected to prosecute each firm individually in a contested proceeding.<sup>6</sup>

41. But in the Tribunal's very conservative estimation, the cost of such proceedings would have been R9 226 282.64 to the Tribunal alone, and the cases would have taken more than two and half years to conclude once they were ready for trial.

42. The settlement proceedings therefore clearly saved the justice system much time and money through the two-day hearing that took place in these matters during the 2014 financial year.

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<sup>4</sup> This section draws largely from the Competition Tribunal Annual Integrated Report 2013/2014

<sup>5</sup> Competition Commission newsletter "Competition News" edition 38 March 2011

<sup>6</sup> This approach would have had the effect of extending the finalization of these matters by at least another 11 years at considerable cost to the Commission.

43. The Tribunal calculated the time and money the construction cartel would have taken to hear in response to a parliamentary question.

44. In arriving at the total, the Tribunal made the following key assumptions:

- the Commission would have divided up the prosecutions into three separate cases in respect of each segment of the industry, namely civil engineering, general building and mechanical engineering;
- on average, each case would have involved four respondents as one firm would typically have received immunity from prosecution;
- based on past experience, each project would take three days to hear if witnesses for the Commission and respondent firms were to testify and face cross examination;
- each case would be heard by one full-time Tribunal member and two part-time members, one of whom would be from out of town.

45. Using the above assumptions, the schedule below shows what the construction cartel hearing would have cost the Tribunal to run.

46. The schedule does not include the costs the Commission would have incurred to participate in the hearings or the costs to the private sector who would be respondents in the matter.

	Number of projects	Total preparation, hearing and decision writing days	Case manager costs, fulltime members costs and part-time members costs	Transcription costs	Total costs
General building projects	21	112,5	R 2 336 833,49	R 134 100,22	R 2 470 933,71
Civil engineering projects	75	327,5	R 5 916 541,90	R 236 647,45	R 6 153 189,35
Mechanical engineering projects	5	30	R 572 578,65	R 29 580,93	R 602 159,58
Total	101	470	R 8 825 954,04	R 400 328,60	R 9 226 282,64

Source: Competition Tribunal Annual Integrated Report 2013/2014

47. This calculation shows the time and cost benefits of having concluded settlements in the construction cartel case.

## 5. Conclusion

48. In conclusion, the increase in consent orders issued by the Tribunal, has largely been driven by the increase the settlements of cartel cases. This provides a clear indication of the success of the Commission's Cartel division and the leniency policy that underpins the uncovering of cartel cases.

## 6. Reference

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