

Business Law & Tax Review

COMPETITIVE EDGE

Pioneer bears the brunt of landmark cartel decision



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Last month the Competition Tribunal ruled that Pioneer had contravened the provisions of the Competition Act by fixing the price of bread and engaging in other cartel activities in the bread market throughout SA.

It has levied a fine of R195 718 614 — equal to 9,5% of Pioneer's bread and baking turnover in the Western Cape for 2006 and 10% of Pioneer's national bread and baking turnover, less the Western Cape turnover.

Pioneer has also been ordered to desist from its cartel conduct.

This decision is the first of its kind as the tribunal has never before ruled in a contested cartel case. All other finalised cartel matters have resulted from settlement agreements arising, in the main, from admissions of guilt by cartel participants — primarily pursuant to leniency applicants furnishing to the commission material evidence of the cartel. It is particularly unusual that, faced with three parties admitting the cartel conduct, Pioneer elected to defend.

The tribunal's decision concerned two complaint referrals brought against Pioneer and other bread producers regarding their involvement in bread cartels operating in the Western Cape and in the inland region.

In 2007, Premier Foods sought and was granted leniency for its role in the cartel. Shortly thereafter Tiger Consumer Brands entered into a settlement agreement with the Competition Commission in which they agreed to pay a fine equal to 5,7% of the turnover of its national baking operations in 2006. Thereafter, Foodcorp also settled with the commission and agreed to pay a fine equal to 6,7% of its turnover from all of its baking operations in 2006. Tiger and Foodcorp also agreed to desist from such conduct.

Notwithstanding the settlements, Pioneer elected to defend the complaint before the tribunal.

In the Western Cape referral the tribunal found that, among other things, Pioneer and its competitors

had agreed to increase the discounted price of toaster bread and the price of the standard loaf of bread; agreed upon the timing of these increases; and agreed on the level of discounts (commissions) to be paid to agents in Paarl and the Cape Peninsula.

Further, in relation to the inland/national referral, the tribunal found that, among other things, Pioneer and its competitors had divided markets amongst themselves in the South Gauteng, Free State, North West and Mpumalanga regions; entered into a "gentlemen's agreement" in terms of which they resolved that during the period of bread-price increases they would not allow customers to switch suppliers in order to benefit from any differences in the prices provided by each supplier; and agreed not to poach one another's customers.

In addition to the legal findings by the tribunal, the tribunal also made some damaging comments regarding the integrity of Pioneer and its executives and the credibility of

Pioneer's witness was called into question by the tribunal. No doubt this added to the damage caused to Pioneer — not only does it face financial penalties, but also reputational damage.

There is a very real benefit arising from co-operation with the competition authorities. In this case, Premier escaped unscathed. Tiger, next in line, co-operated fully and paid a penalty equivalent to 5,7% of its relevant turnover. Foodcorp was somewhat tardier and paid the price in a 6,7% fine. Pioneer has now, after a full defence, been saddled not only with the maximum penalty but also the full cost of its (wasted) legal defence. With less than a week (at the time of writing) remaining for an appeal against the tribunal's decision and no word yet of an appeal, Pioneer's fate seems to be clear.

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