

Business Law & Tax Review

COMPETITIVE EDGE

Zero tolerance displayed for cartel contraventions



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Sasol's record R250m fine is proof that penalties for collusion are increasing

AS LONG ago as the late 1700s, Adam Smith (regarded by many as the father of economics) said that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices".

It is safe to assume officials from competition authorities worldwide, when they get together, will turn to a discussion on how to detect and deter this most egregious of anticompetitive offences against consumers.

In SA, the approach of the authorities to increasing the risk and effect of detection has been threefold:

1. To establish a corporate leniency policy, granting immunity against prosecution (and hence penalties) to those who confess and co-operate with the Competition Commission;
2. To gather information on cartel behaviour in industries through merger investigations; and
3. To increase the impact of detection and risk of contravention by imposing more significant penalties.

This article focuses on the level of the authorities' penalties to punish and deter cartel behaviour. To this end, parties under investigation by the commission can, in terms of section 49D of the Competition Act, enter into consent orders with the commission, which the Competition Tribunal may confirm without hearing any evidence. Further, the tribunal may, in terms of section 59 of the Competition Act, impose administrative penalties of up to 10% of a company's turnover.

The tribunal has set out a mechanical test that takes into account specific factors when calculating penalties for contraventions of section 8 (abuse of dominance) of the act. However, the tribunal has not yet set out a similar test for contraventions of section 4 (collusion), as companies investigated for cartel behaviour have opted to settle the matters by means of consent orders with the commission,

rather than have their matters decided by the tribunal in public hearings.

The commission's penalties for cartel behaviour have increased significantly. In the most recent case, Sasol Chemical Industries Limited (Sasol) settled two fertiliser complaints with the commission, admitting it had contravened section 4(1)(b) of the Competition Act (which prohibits cartel conduct). Sasol agreed to pay a penalty of R250m.

This was calculated as 8% of the turnover of Sasol's Nitro division. This is the highest settlement reached with the commission to date.

Historically, the administrative penalties for cartel contraventions have been based on the affected turnover of the contravening party in the market in relation to which the offence took place (the turnover attributable to the anticompetitive conduct). Although percentages of penalties in relation to affected turnover are not publicly available, it

seems in the early days of penalty settlements percentages gravitated towards the lower end of 10% of the contravening company's affected turnover. As can be seen from the table below, it appears both the amount and percentage level of the cartel settlement penalties has increased in recent years, with penalties moving to 8% of total turnover.

Absolute values of settlement penalties range from the seemingly modest R223 000 levied on the Association of Pretoria Attorneys in 2003-2004 to the R250m levied on Sasol. However, the absolute value of the penalty is obviously not a significant indicator of the impact of the penalty (given the discrepancies in the turnovers of the firms concerned).

Furthermore, although the authorities have in the past imposed fines on affected turnover, it is not restricted to this and a company's entire turnover may in fact be the basis for the fine. The commission has been

pushing for penalty calculations to be based on the contravening company's entire turnover.

Large penalties tend to grab the media's attention and are felt in the purses of even the biggest firms.

The media and public interest in cartel prosecutions and penalties has serious implications for public perceptions and the public relations of firms engaging in such conduct, another factor companies will take into consideration when they engage in cartel conduct.

Even though the penalties for cartel behaviour have been increasing, there have still been appeals for stricter penalties by consumer unions, arguing fear of prosecution and the resulting fine has not deterred business from colluding to increase their profits. There is a debate among international competition enforcers and academics as to the optimal level of fines (and other sanctions) necessary to achieve deterrence, and to what extent the effect of reputational harm, or the company's ability to pay, should be taken into account in setting penalties.

A potential risk associated with the increasing penalty levels is it places even more pressure on the authorities to set a "record" fine in every instance, and that this trend will eventually lead to penalty levels that may have the effect of bankrupting companies who have contravened the Competition Act.

The authorities have been vociferous in their commitment to tracking down and breaking cartel behaviour. This is likely to encourage companies to root out any non-compliance within their businesses, and may lead to a flood of applications to the commission for leniency from prosecution under the commission's corporate leniency policy in exchange for assisting the commission in prosecution of other cartel members.

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Trends in the Competition Commission's penalties for cartel behaviour, 2003 - 2009

Year	Respondent	Penalty	% of affected/ total turnover
2003-04	The Association of Pretoria Attorneys	R223 000	Not publicly available
2004-05	SA Medical Association	R900 000	Not publicly available
2004-05	Hospitals Association of SA	R4.5m	Not publicly available
2004-05	United SA Pharmacies	R250 000	Not publicly available
2004-05	The Institute of Estate Agents of SA	R522 000	Not publicly available
2004-05	Board of Healthcare Funders of SA	R500 000	Not publicly available
2005-06	USA Citrus Alliance	R400 000	Not publicly available
2006-07	South African Airways	R40m	Not publicly available
2006-07	Lufthansa	R8.5m	Not publicly available
2006-07	Zip Heaters	R78 500	Not publicly available
2007-08	Tiger Brands	R98m	5.7%
2007-08	Nedschroef Jhb	R200 000	Not publicly available
2007-08	CBC Fasteners	R300 000	Not publicly available
2008-09	Aveng	R45m	8%
2008-09	Lancewood	R100 000	Not publicly available
2008-09	Food Corp	R45 000	6.7%
2008-09	Ansac	R10m	8%
2008-09	Adcock Ingram	R54m	8%
2008-09	Dismed	R1.2m	6%
2008-09	Thusanong	R287 415	5%
2008-09	Reclam Group	R146m	6%
2008-09	Sasol	R250m	8%

Source: Competition Tribunal Annual reports and Competition Commission press releases