

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

Cancels & replaces the same document of 20 October 2015

**Global Forum on Competition**

**ENDEMIC COLLUSION IN THE SOUTH AFRICAN CONSTRUCTION INDUSTRY: REASONS & IMPLICATIONS**

**Note by Robert Wilson**

-- Session IV --

*This paper by Robert Wilson, partner in the Competition Practice at Webber Wentzel, Johannesburg, was submitted as background material for Session IV of the Global Forum on Competition to be held on 29-30 October 2015.*

*The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.*

*More documentation related to this discussion can be found at [www.oecd.org/competition/globalforum](http://www.oecd.org/competition/globalforum)*

**JT03385659**

**Complete document available on OLIS in its original format**

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

## **ENDEMIC COLLUSION IN THE SOUTH AFRICAN CONSTRUCTION INDUSTRY: REASONS & IMPLICATIONS<sup>1</sup>**

**-- Robert Wilson<sup>2</sup> --**

### **1. Introduction**

1. As an economy develops, investment in infrastructure is an important engine of growth, creating jobs and facilitating further investment. Large infrastructure projects are commissioned by government and typically put out to tender, and are often undertaken by local construction firms. However, given the amounts of money involved and the market and regulatory conditions in a country, these processes may give rise to cartels.

2. This paper presents a case study on the extent of collusion in the South African construction industry. It starts by giving background to the Competition Act, and explains the cartel provisions in the Act and the powers of the competition authorities. The paper then provides background on the industry and describes how numerous cartels were uncovered through the Competition Commission's immunity and leniency policies.

3. The paper then analyses the number of adjudicated cartel cases, the value of cartel penalties, and the methodologies used to determine these penalties since the first penalty was imposed by the Competition Tribunal. From this, the paper concludes that until recently collusion was endemic in the South African construction industry.

4. The paper goes on to identify possible reasons for this extensive collusion, as well as the implications for future competition law enforcement. The paper proposes that the Competition Commission must carefully balance its detection and prevention policies. At the same time, the Commission must customise its advocacy policies in order to deter cartels on infrastructure projects.

### **2. South African Competition Act**

#### ***Background***

5. The South African Competition Act of 1998<sup>3</sup> (Competition Act) came into full effect in 1999 and repealed the Maintenance and Promotion of Competition Act of 1979.<sup>4</sup> The origins of the Competition Act mirror the dramatic developments that occurred in South Africa during the 1990s.

---

<sup>1</sup> This paper was prepared at the request of the OECD Secretariat for the 14th OECD Global Forum on Competition to be held in Paris on 30 October 2015.

<sup>2</sup> Partner in the Competition Practice at Webber Wentzel, Johannesburg. I wish to thank Lea Pavese for her research assistance.

<sup>3</sup> Act No. 89 of 1998

<sup>4</sup> Act No. 96 of 1970

6. In 1994, South Africa held its first ever democratic election. This resulted in the previously exiled African National Congress (ANC) coming to power. Prior to the election, the ANC had set out its key economic objectives in its *Reconstruction and Development Programme* (RDP). The RDP noted the excessive economic concentration in the hands of a minority of the population, the small number of large conglomerates that dominate across a number of sectors, and the high degrees of anti-competitive tendencies in certain industries. The RDP thus proposed new antitrust laws and institutions to "create a more competitive and dynamic business environment".

7. The new government's *White Paper on Reconstruction and Development* repeated what was said in the RDP. However, it went on to state that the new antitrust policy would ensure the participation of small and medium-sized enterprises in the economy and safeguard the interests of workers. In 1996, the government introduced the *Growth, Employment and Redistribution* programme (GEAR) to stimulate economic growth in order to meet the country's social needs. One of the core elements of GEAR was the strengthening of competition policy. It further noted that the review of competition policy then under way would be reflected in strengthened new legislation.

8. In November 1997, the Department of Trade and Industry (DTI) published its proposed guidelines for competition policy entitled *A Framework for Competition, Competitiveness and Development* (Policy Guidelines). This was critical of the current antitrust legislation and institutions and proposed new ones. The Policy Guidelines also noted that competition policy needed to balance the promotion of efficient markets with other policies aimed at developing the economy and distributing the country's wealth.

9. The Policy Guidelines were used for negotiations between business, government and labour at the National Economic Development and Labour Council (NEDLAC). In May 1998, a NEDLAC agreement on competition policy was concluded and that same month the DTI published the Competition Bill of 1998. Following public consultations, a new Competition Act was passed by the South African Parliament in September 1998 and assented to by the President the following month.

### ***Objectives and application***

10. Against this background it is unsurprising that the Competition Act is both reflective and aspirational in its objectives. The preamble recognises, *inter alia*, that apartheid and other discriminatory laws and practices resulted in inadequate restraints against anti-competitive practices; that credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy; and that an efficient, competitive economic environment that is focussed on development will benefit all South Africans.

11. The multiple objectives of the Competition Act are further particularised in its purpose provision.<sup>5</sup> While the Act is generally said to promote and maintain competition in South Africa, this is in order to, *inter alia*, promote the efficiency, adaptability and development of the economy; advance the social and economic welfare of South Africans; ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

---

<sup>5</sup> Section 2

12. The Act applies to all economic activity within, or having an effect within South Africa. The only exceptions relate to collective labour agreements, as well as conduct designed to achieve a non-commercial socio-economic objective or similar purpose.<sup>6</sup>

### *Institutions*

13. The Competition Act established three new institutions, each with distinct functions and independent of one another. The Competition Commission (Commission) generally has an investigative and prosecuting function, although it may make decisions relating to exemption applications, as well as small and intermediate mergers.<sup>7</sup> The Competition Tribunal (Tribunal) is an adjudicative body, making decisions on prohibited practices, including interim relief and consent orders, large mergers and referrals regarding small and intermediate mergers.<sup>8</sup> The Competition Appeal Court (CAC) reviews decisions of and considers appeals against decisions of the Tribunal. The CAC has the status of the High Court and is constituted of judges hearing cases outside their regular duties.<sup>9</sup>

### *Prohibited practices*

14. The Competition Act prohibits collusion between competitors, as well as exploitation and exclusion by a dominant firm.

15. An agreement or concerted practice by, or a decision by an association of, firms in a horizontal relationship (i.e. between competitors) is prohibited outright if it involves fixing prices or other trading conditions, dividing markets or collusive tendering.<sup>10</sup> All other restrictive horizontal practices are prohibited if their anti-competitive effect outweighs any resulting pro-competitive gain (commonly referred to as "net anti-competitive").<sup>11</sup>

16. Dominant firms are prohibited from charging an excessive price to the detriment of consumers, refusing to give a competitor access to an essential facility, or, if net anti-competitive, engaging in general or specified exclusionary acts (including price discrimination).<sup>12</sup> A firm is dominant in a market if it has at least 45% of that market, or at least 35% but less than 45% of that market unless it does not have market power, or less than 35% of that market if it does have market power.<sup>13</sup>

17. An agreement between parties in a vertical relationship (i.e. between a firm and its suppliers, its customers, or both) is prohibited if it is net anti-competitive.<sup>14</sup> Furthermore, the practice of minimum resale price maintenance is prohibited outright, save that a supplier or producer may recommend a minimum

---

<sup>6</sup> Section 3

<sup>7</sup> Sections 19-25

<sup>8</sup> Sections 26-35

<sup>9</sup> Sections 36-39

<sup>10</sup> Section 4(1)(b). The prohibition does not apply to agreements between a holding company, its direct and indirect wholly owned subsidiaries, or a combination of them, and between firms in a "single economic entity" similar in structure to such a group of companies.

<sup>11</sup> Section 4(1)(a)

<sup>12</sup> Sections 8 & 9

<sup>13</sup> Section 7

<sup>14</sup> Section 5(1)

resale price.<sup>15</sup> Arguably, the former prohibition will only apply to a dominant firm<sup>16</sup> while the latter seems to be aimed at cartels amongst suppliers.

18. Not all practices that appear to involve price fixing, market division or collusive tendering will necessarily constitute a cartel. In *American Natural Soda Ash Corporation and Another v Competition Commission and Others*<sup>17</sup> (Anzac case), the Supreme Court of Appeal held that the price-fixing provision of the Competition Act did not necessarily hit every form of horizontal co-operation that influenced pricing among competitors. The court explained as follows:

*"[t]he essential enquiry . . . is to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of: this is a factual enquiry. In ordinary language this can be termed "characterising" the conduct – the term used in the United States, which Anzac has adopted."*<sup>18</sup>

19. The court went on to say that price-fixing necessarily involves collusion between competitors aimed at eliminating competition between them as opposed to merely having this incidental effect.<sup>19</sup> The court referred with approval to the majority opinion of the US Supreme Court in *Broadcast Music, Inc. v Columbia Broadcasting System, Inc.*<sup>20</sup> where "literalness" in interpreting the term price-fixing was criticised.

20. Notwithstanding criticism of the judgment,<sup>21</sup> more recently in *Competition Commission v South African Breweries Limited & Others*,<sup>22</sup> the CAC analysed characterisation as it has evolved in South African jurisprudence starting with the Anzac case. The CAC said that the key characterisation question is whether an arrangement which possesses both horizontal and vertical elements must be examined under the one or the other or both the provisions dealing with restrictive practices between firms in a horizontal or a vertical relationship.

### ***Consequences of contraventions***

21. The Tribunal may make various orders for contraventions of the prohibited practices provisions of the Competition Act. These include imposing an administrative penalty of up to 10% of a firm's annual turnover in and exports from South Africa.<sup>23</sup> The Competition Act lists the factors that the Tribunal must consider when determining an appropriate penalty. These include whether a respondent has previously

---

<sup>15</sup> Sections 5(2) & (3)

<sup>16</sup> Since for a vertical agreement to have a net anti-competitive effect, one of the parties must surely have market power.

<sup>17</sup> 2005 (6) SA 158 (SCA)

<sup>18</sup> Para. 47

<sup>19</sup> Paras 48 & 49

<sup>20</sup> 441 US 1 (1978) at 9

<sup>21</sup> Lewis, D, *Thieves at the Dinner Table: Enforcing the Competition Act*, Jacana, 2012 at pp. 213-216.

<sup>22</sup> [2015] ZACAC 1

<sup>23</sup> Sections 58(1)(a)(iii) & 59. A contravention of the *per se* anti-collusion provisions can result in an administrative penalty for a first time contravention.<sup>23</sup> The Tribunal may only impose an administrative penalty for rule of reason prohibited conduct if it is substantially a repeat by the same firm of conduct previously found by the Tribunal to be prohibited.

been found in contravention of the Act.<sup>24</sup> Penalties are paid to the Commission, which in turn pays them into the National Revenue Fund.<sup>25</sup>

22. Following the judgment of the CAC in *Southern Pipeline Contractors and Another v Competition Commission*<sup>26</sup> (SPC case) the Tribunal in *Competition Commission v Aveng (Africa) Ltd t/a Steeldale and Others*<sup>27</sup> (Aveng case) developed the following six step methodology for the determination of administrative penalties:

- Step 1 - determination of the affected turnover<sup>28</sup> in the relevant year of assessment;<sup>29</sup>
- Step 2 - calculation of the base amount being 0-30% of the value determined in step 1, taking into account the nature and gravity of the contravention, any loss or damage suffered as a result of the contravention, the circumstances in which the contravention took place, and the level of profit derived from the contravention;<sup>30</sup>
- Step 3 - Multiply the value determined in step 2 by the number of years for which the contravention lasted;
- Step 4 - round down the value determined in step 3, if it exceeds the cap of 10% of the total turnover of the firm;<sup>31</sup>
- Step 5 - award a discount or premium expressed as a percentage of an amount that is either subtracted from or added to the value determined in step 4, considering a number of factors such as the behaviour of the firm, the level of profit derived from the contravention, the degree of cooperation with the authorities, and whether it is a first time or a repeat contravention;<sup>32</sup> and
- Step 6 - round down the value determined in step 5, if it exceeds the cap of 10% of the total turnover of the firm.<sup>33</sup>

---

<sup>24</sup> Section 59(3)

<sup>25</sup> Sections 59(4). The National Revenue Fund is established under section 213 of the Constitution of the Republic of South Africa of 1996 (Act No. 108 of 1996).

<sup>26</sup> [2011] ZACAC 6

<sup>27</sup> [2012] ZACT 32

<sup>28</sup> Affected turnover is based on the sales of goods or services that can be said to have been affected by the contravention. See the Aveng case at para. 134.

<sup>29</sup> The relevant year of assessment will generally be the the last complete year in which the conduct occurred. See the Aveng case at para. 135.

<sup>30</sup> See the Aveng case at paras 140-147. The factors considered at this step are the ones listed in section 59(3) (a) (b) (d) & (e) of the Competition Act. Also, the level of profit derived from the contravention may be considered either at step 2 or 5.

<sup>31</sup> The year considered in this context is the financial year preceding the imposition of the penalty. See the SPC case at para. 61 and the Aveng case at paras 114-115.

<sup>32</sup> See the Aveng case at para. 153. The factors considered at this step are the ones listed in section 53(3) (c) (e) (f) & (g) of the Competition Act.

<sup>33</sup> Same as for step 4 above, the year considered in this context is the financial year preceding the imposition of the penalty. See the SPC case at para. 61 and the Aveng case at paras 114-115.

23. On 1 May 2015, the Commission published its *Guidelines for the Determination of Administrative Penalties for Prohibited Practices* ("Penalty Guidelines"). These non-binding guidelines broadly follow the six step methodology in the Aveng case, but also provide that the Commission may make further adjustments by applying settlement discounts and/or considering a respondent's inability to pay the penalty.

24. The Competition Act also provides that the Tribunal may declare conduct to be a prohibited practice for the purposes of consequential civil damages claims in the High Court.<sup>34</sup> The latter remains an undeveloped area of South African law. Several cases have been instituted or are threatened, and these are likely to raise complex questions of standing, causation and quantification. The Commission argues that while listed firms currently do not expect to pay damages, they nevertheless do suffer a loss in their share prices.<sup>35</sup>

25. The Competition Act does not make cartel conduct a criminal offence. It is simply a criminal offence to disclose confidential information, hinder the administration of the Act, fail to properly attend when summoned, fail to answer fully or truthfully, undermine an investigation or adjudication, and to contravene or fail to comply with an interim or final order of the Tribunal or CAC.<sup>36</sup>

26. The Competition Amendment Act of 2009<sup>37</sup> does provide that a director or manager of a firm commits an offence if he or she caused or knowingly acquiesced in the firm engaging in cartel conduct. Such a person can be fined up to ZAR 500,000 or imprisoned up to 10 years. However, this particular provision of the Amendment Act will only come into effect on a date to be fixed by the President. It is not yet clear when or if at all the President will do so.

27. Nevertheless, collusive tendering may contravene or may give rise to contraventions of various provisions of the Prevention and Combating of Corrupt Activities Act of 2004 (Anti-corruption Act).<sup>38</sup>

### ***Exemptions***

28. On application by a firm, the Commission may exempt prohibited practices that contribute to the maintenance or promotion of exports; the promotion of the ability of small businesses (or firms controlled or owned by historically disadvantaged persons) to become competitive; change in productive capacity necessary to stop decline in an industry; or the economic stability of any industry designated by the Minister of Economic Development (after consulting the Minister responsible for that industry). The Commission may also exempt prohibited practices that relate to the exercise of intellectual property rights.<sup>39</sup>

### ***Enforcement***

29. The Commission may initiate or receive a complaint against an alleged prohibited practice, and must investigate the complaint as quickly as is practicable.<sup>40</sup> A complaint may not be initiated more than

---

<sup>34</sup> Section 58(1)(a)(v)

<sup>35</sup> Commission, *Competition News*, edition 52, May 2015, p. 12

<sup>36</sup> Sections 69-74

<sup>37</sup> Act No. 1 of 2009

<sup>38</sup> Act No. 12 of 2004

<sup>39</sup> Section 10

<sup>40</sup> Section 49B

three years after the practice has ceased.<sup>41</sup> Once a complaint is initiated, the Commission may summons a person for questioning or to deliver a specified object.<sup>42</sup> The Commission may also enter and search premises (i.e. conduct a "dawn raid") pursuant to a warrant issued by a judge or a magistrate, and in limited circumstances without a warrant.<sup>43</sup> A complainant may apply to the Tribunal for an interim order in respect of the alleged practice, whether or not a hearing has commenced into the practice.<sup>44</sup>

30. If during, on or after completion of an investigation of a complaint, the Commission and the respondent agree on the terms of an appropriate order, the Tribunal, without hearing any evidence, may confirm that agreement as a consent order.<sup>45</sup> Otherwise, at any time after initiating a complaint, the Commission may refer the complaint to the Tribunal. Within one year after a complaint was submitted to it, the Commission must refer the complaint to the Tribunal if it determines that a prohibited practice has been established, or in any other case the Commission must issue a notice of non-referral to the complainant.<sup>46</sup> In the latter event, the complainant may refer the complaint directly to the Tribunal.<sup>47</sup>

31. In 2008, the Commission published its revised *Corporate Leniency Policy (CLP)*.<sup>48</sup> In terms of this policy, the Commission may grant immunity to a self-confessing cartel member which is first to approach the Commission. In order to qualify first for conditional immunity, and later for total immunity, the applicant must comply with the requirements of the CLP. The effect of a successful immunity application is that the Commission will not ask the Tribunal to impose an administrative penalty on the applicant. A successful immunity applicant is not protected against civil damages claims.

### ***Advocacy***

32. The Competition Act also mandates the Commission, and indirectly the Competition Tribunal, to undertake various advocacy activities. These include implementing measures to develop public awareness of the provisions of the Act; negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within an industry or sector; participate in the proceedings of any regulatory authority; advising and receive advice from any regulatory authority; and reviewing legislation and public regulations over time.<sup>49</sup>

## **3. Collusion in the South African Construction Industry**

### ***Background***

33. The South African construction industry has grown significantly over the past 20 years. During the apartheid period, the industry was constrained by racial policies and international sanctions. After the 1994 election, the new democratic government began to redress backlogs in social and economic

---

<sup>41</sup> Section 67(1)

<sup>42</sup> Section 49A

<sup>43</sup> Sections 46-49

<sup>44</sup> Section 49C

<sup>45</sup> Section 49D

<sup>46</sup> Section 50

<sup>47</sup> Section 51

<sup>48</sup> Published under General Notice 628 in Government Gazette 31064 of 23 May 2008 and as amended by General Notice 212 in Government Gazette 35139 of 16 March 2012.

<sup>49</sup> Section 21

infrastructure, including housing, water and electricity. The government also introduced new measures to stimulate growth in the industry. This included the establishment of a Construction Industry Development Board (CIDB),<sup>50</sup> the scheduling of public sector spending through the Medium Term Expenditure Framework process, and programmes to develop emerging black contractors. The industry also grew as a result of the infrastructure boom leading up to the 2010 FIFA World Cup.<sup>51</sup>

34. According to Statistics South Africa, total income for the construction industry in 2011 was ZAR 267 014 million.<sup>52</sup> Expenditure in 2011 amounted to ZAR 256 070 million.<sup>53</sup> The profit margin was 2,8% in 2011.<sup>54</sup> Large enterprises (those with turnover equal to or greater than ZAR 52 million) generated ZAR 171 098 million or 64% of the total income of the construction industry, followed by medium enterprises (ZAR 57 229 million or 21%), and small and micro enterprises (ZAR 38 687 million or 15%).<sup>55</sup> The 20 largest enterprises contributed 25.9% of the total income of the industry in 2011.<sup>56</sup> The private sector (businesses and individuals) was the major client of the construction industry in 2011, contributing ZAR 145 863 million or 58% to the income from services rendered, followed by parastatals (major public entities) (ZAR 58 789 million or 24%) and government (ZAR 44 487 million or 18%).<sup>57</sup>

35. The OECD Competition Committee's 2008 Policy Roundtable on the Construction Industry notes that the South African construction industry is characterised by a small number of large firms that are active in all or many construction markets. Furthermore, there is significant vertical integration in the industry, with the few large construction firms controlling input suppliers of bricks, cement and aggregates. The large firms often form joint ventures to bid for the larger construction projects. There are also a number of barriers to entry, including meeting the financial and capacity requirements of the CIDB in

---

<sup>50</sup> The CIDB was established under the Construction Industry Development Board Act of 2000 (No. 38 of 2000) in order to implement an integrated strategy for the reconstruction, growth and development of the construction industry.

<sup>51</sup> Cottle, E, "The Transformation of the Construction Sector in South Africa since apartheid: social inequality and labour", *Global Labour Column*, No. 198, April 2015, University of the Witwatersrand

<sup>52</sup> Statistics South Africa, "The Construction Industry 2011", Report No. 50-02-01 (2011), p. 1. The largest contributor to the total income was 'construction of civil engineering structures' (ZAR 104 670 million or 39%), followed by 'construction of buildings' (ZAR 68 553 million or 26%), 'other building installations' (ZAR 20 402 million or 7%), and 'electrical contractors' (ZAR 15 234 million or 6%).

<sup>53</sup> Statistics South Africa, p. 3. The largest expenditure was on 'purchases' (ZAR 110 743 million or 43%), followed by 'payments to construction sub-contractors' (ZAR 53 672 million or 21%), 'salaries and wages' (ZAR 48 111 million or 19%) and 'depreciation' (ZAR 6 859 million or 3%).

<sup>54</sup> Statistics South Africa, p. 2. 'Site preparation' had the highest profit margin at 5,5%, followed by 'electrical contractors' at 5,2% and 'other building installation' at 4,9%. 'Renting of construction or demolition equipment with operators' had the lowest profit margin of -4,4%.

<sup>55</sup> Statistics South Africa, p. 1

<sup>56</sup> Statistics South Africa, p. 2. 'Site preparation' had the highest concentration ratios in all three categories: CR5 (57.5%), CR10 (71.1%) and CR20 (82.7%). 'Other building completion' had the lowest concentration ratios in all three categories: CR5 (4.2%), CR10 (7.1%) and CR20 (11.5%).

<sup>57</sup> Statistics South Africa, p. 5

order to be awarded certain tenders,<sup>58</sup> and being able to attract and retain engineers, technologists and technicians who are in short supply.<sup>59</sup>

36. The South African construction industry has performed poorly in recent times. PwC reports<sup>60</sup> that the 2014 financial results of listed heavy construction and construction materials companies were mixed. The aggregate market capitalisation of these firms declined throughout 2014. This is in stark contrast to other companies listed on the JSE Securities Exchange.<sup>61</sup> The cyclical nature of construction activity might explain the decline in 2014. However, it may also reflect a sustained downward trend in the industry.

37. There are a number of reasons for this downward trend. First, the South African economy was not immune to the 2008 global economic crisis and its growth since then has been sluggish. Second, despite the government's stated commitment to public infrastructure investment, public institutions such as Eskom (power), Transnet (ports, rail, pipelines and logistics) and SANRAL (roads) are spending less on capital projects.<sup>62</sup> Third, the mining industry has significantly reduced its capital expenditure as a result of reduced margins arising from volatile commodity prices and labour unrest.<sup>63</sup> The decline in private sector expenditure has been partially ameliorated by sustainable energy investments in solar and wind farms.<sup>64</sup> Other reasons for the poor performance of the industry include volatile and violent industrial unrest, loss of skills and expertise, the investments needed in new projects and delays in their commercial close-out.<sup>65</sup>

38. Despite the poor financial performance of the construction industry, PwC notes that the industry adds significant value to South Africa through the monetary benefits received by a number of stakeholders, including employees and their families, trade unions, individual investors, pension funds, mutual funds, investment companies, suppliers, customers, and government as regulator and custodian of income tax.<sup>66</sup> Nevertheless, the South African construction industry is relatively untransformed more than 20 years after the end of apartheid. PwC reports that only 35% of board members of the companies it analysed are historically disadvantaged individuals, and only 18.9% are women. Significantly, 47.8% of board members were white, predominantly male, and 50 years old or more. Furthermore, 37% of the board members in the construction sector and 21% in the construction materials sector comprise engineers.<sup>67</sup>

### ***Early cartel cases***

39. In the middle of 2007, the Commission prioritised competition concerns in infrastructure and construction owing to the importance of infrastructure investment in the government's growth strategy, as well as the Commission's interactions with competition authorities in other jurisdictions who had

---

<sup>58</sup> The CIDB is required to keep a national register of contractors to facilitate public sector procurement. The CIDB rates construction firms according to certain criteria and registers them in 20 categories and nine grades. For example, a Grade 2 contractor may only tender on projects up to ZAR 650 000 in value, a Grade 5 contractor up to ZAR 6 500 000, and a Grade 9 contractor with no limit.

<sup>59</sup> OECD, *Competition in the Construction Industry*, DAF/COMP(2008)36, pp. 144-148

<sup>60</sup> PwC, SA Construction, 2<sup>nd</sup> edition, November 2014.

<sup>61</sup> PwC, pp. 4 & 5

<sup>62</sup> PwC, pp. 6-8

<sup>63</sup> PwC, p. 8

<sup>64</sup> PwC, p. 9

<sup>65</sup> PwC, pp. 14-16

<sup>66</sup> PwC, pp. 22-25

<sup>67</sup> PwC, pp. 36 & 37

uncovered collusion in this industry. In December 2007, Rocla, a subsidiary of Murray & Roberts, applied for immunity in terms of the Commission's then applicable corporate leniency policy.<sup>68</sup> Based on this information, the Commission initiated a cartel investigation against a number of firms that supplied pre-cast concrete products such as pipes, manholes and culverts. The Commission subsequently interrogated numerous individuals over several months and eventually referred the complaint to the Tribunal in February 2009 for adjudication.<sup>69</sup> Other construction and materials firms soon followed Rocla in applying for immunity in respect of other cartel conduct. One such firm, DPI Plastics, did so as a result of cartel conduct that was uncovered during a merger investigation. Many firms that did not qualify for immunity eventually settled with the Commission and paid administrative penalties.

### ***Fast Track Settlement Process***

40. On 10 February 2009, the Commission initiated an investigation into cartel conduct in the construction of the stadiums for the 2010 FIFA World Cup. Following a number of applications for immunity, on 1 September 2009, the Commission broadened its investigation to the entire construction industry, including both heavy construction and construction materials. During these investigations, the Commission received approximately 150 marker applications and 65 immunity applications.<sup>70</sup>

41. Based on these and other investigations, as well as various settlements and referrals, the Commission concluded that cartel conduct was widespread in the construction industry. In the interests of a cost-effective, comprehensive and speedy resolution of these cases the Commission decided to invite construction firms that were involved in cartels to apply to enter into settlement discussions. In 1 February 2011, the Commission published its *Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act* ("Invitation"). This was aimed at, *inter alia*, incentivising firms to admit their cartel conduct by proposing settlements on financially advantageous terms.<sup>71</sup>

42. The Commission categorized applicants into different categories according to the number of "non-prescribed prohibited practices"<sup>72</sup> they disclosed. The Commission then determined the penalty based on a range of percentages of turnover<sup>73</sup> for each category. This is illustrated in Table 1 below.

---

<sup>68</sup> The CLP replaced the Commission's first corporate leniency policy, which came into effect on 6 February 2004.

<sup>69</sup> This referral eventually led to the CAC judgment in the SPC case discussed above.

<sup>70</sup> Commission, *Competition News*, edition 52, May 2015, p. 10

<sup>71</sup> Invitation, p. 2

<sup>72</sup> Cartel conduct in the construction industry that is on-going or has not ceased three years before the 10 February 2009 or 1 September 2009 complaints.

<sup>73</sup> The annual turnover of the applicant in the relevant sub-sector in South Africa and its exports from South Africa for the financial year preceding the date of the Invitation.

**Table 1: Calculation of fast track settlement penalty<sup>74</sup>**

Category	Number of non-prescribed contraventions by applicant in subsector <sup>75</sup>	Penalty: percentage of turnover of applicant in subsector (%)
A	1 to 4	1 to 4
B	5 to 12	4 to 7
C	13 to 22	7 to 10
D	23 and over	10 to 12

Source: Commission

43. Twenty-one firms responded to the Invitation disclosing approximately 300 instances of collusive tendering on construction projects to the value of close on ZAR 112 billion.<sup>76</sup> This collusive tendering took the form of allocating customers and profit margins, cover pricing, paying a loser's fee to a bidder that submitted a cover price, and subcontracting to losing bidders.<sup>77</sup> Three of the firms qualified for conditional immunity so did not need to settle with the Commission.

44. Since the Invitation only applied to construction projects that were concluded after February or September 2006, the Commission eventually concluded settlements with 15 construction firms in respect of 140 instances of collusive tendering. Thirteen of these 15 firms had engaged in multiple contraventions of the Competition Act. Some of the firms that responded to the Invitation implicated a further 24 firms involving 31 projects.<sup>78</sup>

45. During 2013, the 15 firms agreed to penalties totalling ZAR 1.46 billion. The Tribunal confirmed these settlements on 22 and 23 July 2013. The highest penalty was ZAR 311 288 311 and the lowest ZAR 155 850. Table 2 lists the size of the penalty agreed by each of the 15 firms.

<sup>74</sup> Invitation, p. 7

<sup>75</sup> Subsectors are the classes of construction work defined in Schedule 3 of the CIDB Regulations.

<sup>76</sup> Commission, *Competition News*, edition 52, May 2015, p. 10

<sup>77</sup> Commission, *Annual Report 2012/2013*, p. 19

<sup>78</sup> Van Niekerk, A, *Calculating Cartel Follow-on Damages: General considerations and application to South African construction sector*, 2015, pp. 2-5. Unpublished paper presented at the Zimbabwean Competition and Tariff Commission and the University of Johannesburg's Centre for Competition, Regulation and Economic Development Annual Competition and Economic Regulation Week on 20 and 21 March 2015.

**Table 2: Fast track process administrative penalties<sup>79</sup>**

No.	Firm	Penalty (ZAR)
1	WBHO	311 288 311
2	Murray & Roberts	309 046 455
3	Stefanutti Stocks	306 892 664
4	Aveng	306 576 143
5	Basil Read	94 936 248
6	Raubex	58 826 626
7	Haw & Inglis	45 314 041
8	Rumdel	17 127 465
9	Guiricich Bros	3 552 568
10	Vlaming	3 421 662
11	Tubular Technical	2 634 667
12	Liverio & Son	2 011 078
13	Hochtief	1 315 719
14	Norvo	714 897
15	Esorfranki	155 850
<b>TOTAL</b>		<b>1 463 814 394</b>

Source: Commission

46. The value of the non-prescribed construction projects amounted to ZAR 37.1 billion and prescribed projects to ZAR 9.9 billion. Of both these categories, 225 projects were in the public sector and 75 in the private sector. In value terms, ZAR 28 billion worth of projects were in the public sector and

<sup>79</sup> Commission, *Construction firms settle collusive tendering cases with R1.5 billion in penalties*, media release, 24 June 2013

ZAR 19 billion in the private sector. The major public sector projects included the construction of the 2010 FIFA Soccer World Cup stadiums.

47. Although the Commission has stated that it is satisfied with the outcome of the fast track settlement process, given the value of the projects and the size of possible damages, several public institutions have instituted or are contemplating civil damages claims in the High Court.

### *Subsequent cartel cases*

48. On conclusion of the fast track settlement process, the Commission said that it would investigate and prosecute alleged cartel conduct of firms that had not responded to the Invitation, and of firms who had responded but who had not disclosed conduct in which they had been implicated by another applicant.<sup>80</sup> The Commission subsequently referred to this as "phase 2" of the process and distinguished between firms that (i) settled certain projects under phase 1 but refused to settle others in which they had been implicated, (ii) participated in phase 1 but refused to settle projects they had disclosed, and (iii) did not participate at all in the settlement process but were implicated in projects.

49. The Commission settled with 7 firms, referred 19 cases to the Tribunal for prosecution, and decided not to prosecute 20 cases involving 14 firms where there was insufficient evidence or they had been liquidated. On 26 October 2015, the Commission announced that it had referred to the Tribunal the last case arising out of the fast track settlement process and that its focus would be on the litigation of cases that had been referred to the Tribunal.<sup>81</sup>

50. When settling with firms, the Commission used a penalty calculation methodology in phase 2 that was more stringent than that used in phase 1.<sup>82</sup> Table 3 lists these more recent penalties.

**Table 3: Phase 2 administrative penalties<sup>83</sup>**

No.	Firm	Penalty (ZAR)
1	B & E International	8 158 447
2	Cycad Pipelines	3 394 151
3	Civcon Construction	798 385
4	N17	424 121
5	Harding Allison	78 821
<b>TOTAL</b>		<b>12 853 925</b>

Source: Commission

### *Case Analysis*

51. Although the Competition Act came into full effect in 1999, the Tribunal only imposed the first cartel penalty in 2003.<sup>84</sup> This section contextualises the extent of collusion in the South African

<sup>80</sup> Commission, *Annual Report 2013/2014*, p. 34

<sup>81</sup> Commission, *Competition Commission finalises its investigation of the construction sector*, 26 October 2015

<sup>82</sup> Commission, *Annual Report 2014/2015*, p. 51

<sup>83</sup> *Ibid*

construction industry with reference to the total number of adjudicated cartel cases, the value of cartel penalties and the methodologies used to determine these penalties since 2003.<sup>85</sup>

52. In approximately 238 cases, the Tribunal and the CAC imposed administrative penalties for contraventions of both the prohibited practices and the merger control provisions of the Competition Act. Only 18 of these cases involved the prior implementation of a notifiable merger. The total value of penalties that have been imposed is ZAR 4.899 billion, of which only ZAR 5.4 million was for merger control contraventions. This means that nearly all of the cases involved prohibited practices (i.e. restrictive practices and abuses of dominance).

### **Number**

53. Of the approximately 220 prohibited practices cases, 192 were for contraventions of the cartel provisions of the Competition Act. Approximately 92 cases were for price fixing, 10 cases for market division, and 55 cases for collusive tendering. Some cases involved a combination of these outright prohibited practices. There were approximately 17 cases involving price fixing and market allocation, two cases price fixing and collusive tendering, two cases market division and collusive tendering, and 14 cases all three forms of cartel conduct. Construction and materials firms were respondents in 51 of these cases. Of these, 38 cases involved multiple contraventions by a single firm of the cartel provisions of the Competition Act. This is illustrated in Table 4 below.

**Table 4: Cartel case analysis (number)**

Conduct	Total	Construction industry	Multiple contraventions
Price fixing	92	4 (4 % of all cases)	1 (25% of construction cases)
Market division	10	0	0
Collusive tendering	55	31 (57% of all cases)	22 (71% of construction cases)
Price fixing / market division	17	4 (24% of all cases)	3 (75% of construction cases)
Price fixing / collusive tendering	2	1 (50% of all cases)	1 (100% of construction cases)
Market division / collusive tendering	2	1 (50% of all cases)	1 (100% of construction cases)
Price fixing / market division / collusive tendering	14	10 (71.4% of all cases)	10 (100% of construction cases)
<b>Total</b>	<b>192</b>	<b>51</b>	<b>38</b>

*Source: Tribunal and CAC cases*

<sup>84</sup> *Competition Commission v The Association of Pretoria Attorneys and All the members of the Association of Pretoria Attorneys*, 33/CR/Jun03

<sup>85</sup> This analysis is as at 16 October 2015 based on Tribunal decisions and approved consent agreements published on the Tribunal's website at <http://www.comptrib.co.za>.

54. If the outright prohibition against minimum resale price maintenance was intended by Parliament to prevent cartels, then a further 12 cases must be included in this analysis (none of which concerned construction and materials firms). These cases stand in stark contrast with the handful of non-cartel collusion and abuse of dominance cases.

### *Value*

55. From a value perspective, the Tribunal and the CAC have imposed penalties totalling ZAR 4.894 billion in prohibited practices cases, of which ZAR 4.578 billion was in cartel cases. Penalties imposed on construction and materials firms accounted for approximately ZAR 2.241 billion. This includes the fast track settlement penalties, meaning that approximately ZAR 777 million in penalties have been imposed on construction and material firms outside this process. The construction industry therefore accounts for nearly half (49%) of all penalties that have been imposed by the Tribunal and the CAC in cartel cases. Approximately ZAR 2.198 billion in penalties were imposed on construction and materials firms for multiple contraventions of the Competition Act, or nearly all (98%) the cartel penalties that were imposed on these firms. This is illustrated in Table 5 below.

**Table 5: Cartel case analysis (value - ZAR)**

Total	Construction industry	Fast track settlement	Non fast track settlement	Multiple contraventions
4.578 billion	2.241 billion (49% of total)	1.463 billion (65% of construction industry)	777 million (35% of construction industry)	2.198 billion (98% of construction industry)

Source: Tribunal and CAC cases

### *Methodology*

56. It is by no means clear from most of these cases what methodology was used to determine an administrative penalty. The Competition Act provides that the Tribunal may impose an administrative penalty of up to 10% of a firm's annual turnover in and exports from South Africa. A "firm" is defined as including a person, partnership or a trust.<sup>86</sup> This means that a division of a company, a company alone or a group of companies can constitute a firm. In the earliest cases no mention is made of the percentage of turnover of the firm. Even in those cases where reference is made to a percentage, this is either to the "affected" or the "annual" turnover of the firm without clearly identifying what the firm comprises. The cases have been no clearer after the judgment of the CAC in the SPC case and the introduction of the six step methodology by the Tribunal in the Aveng case. The Commission and the Tribunal appear to have continued determining a penalty based simply on the turnover of a firm. Where they have purported to apply the methodology, this is not consistent with the methodology. It is therefore not surprising that percentages range from 0.3% to 9%, although of what remains open to question.

## **4. Reasons for Endemic Collusion in the Construction Industry**

57. The CLP and fast track settlement process uncovered a number of cartels in the South African construction industry. Most of these involved the same firms contravening the Competition Act on multiple occasions. Some cartels endured over long periods of time, while others were more short-lived. The only inference can be that collusion is or until recently was endemic in the South African construction industry.

<sup>86</sup> Section 1

58. This might seem surprising given that the Competition Act has been effective since 1999 and grants the Commission significant powers to investigate and prosecute cartels. Furthermore, the outright prohibition of price fixing, market division and collusive tendering is relatively unequivocal, and the Tribunal may impose a significant penalty for a first time contravention of these provisions.

59. However, this might not be so surprising when taking into account the experience of collusion in the construction industry in other jurisdictions. It is therefore necessary to consider further the reasons for the extent of collusion in the South African construction industry. In doing so, it is useful to broadly distinguish between enforcement and industry related factors.

### ***Apartheid legacy***

60. The contribution submitted by South Africa for this session notes that the legacy of apartheid is a factor for collusion in a number of industries. This is because the apartheid state pursued an industrialisation strategy that relied on extensive regulation of the economy and support for key firms and industries. Competition policy was not a priority and markets were concentrated. This resulted in collusion in many markets, which was often overlooked or even condoned by the erstwhile Competition Board. Following the democratic elections of 1994, the new government liberalised many markets and dismantled various state-sanctioned cartels. However, this did not necessarily lead to greater competition between firms. Indeed, it may even have encouraged firms to find more covert ways to continue coordinating with one another.

### ***Early enforcement priorities***

61. While this liberalisation process was taking place in the 1990s, the new antitrust laws and institutions were still being considered. The Competition Act, with its then novel public interest provisions, only came into effect in 1999. The new authorities developed their capacity and established their credibility by initially focusing more on mergers than prohibited practices.<sup>87</sup> Also, the early prohibited practices cases required a number of procedural issues to be determined. The few cases that dealt with substantive issues were vigorously contested, resource intensive and protracted. The first cartel penalty was only imposed by the Tribunal in 2003, which related to an arguably naive decision by an industry association rather than a naked cartel. It is therefore not inconceivable that firms that were colluding at the time simply decided to wait and see if the new authorities had the will and means to prosecute them.

### ***Immunity policies***

62. The Commission only adopted its first Corporate Leniency Policy on 6 February 2004. Prior to this, very few cartel complaints were submitted to or investigated by the Commission. Most complaints related to alleged abuses of dominance. This is unsurprising given the typically secretive nature of cartels.

63. The first immunity application was submitted in 2004 by Comair relating to fuel levy charges in the airline industry. The number of applications increased exponentially from then onwards. Lavoie argues that this is largely due to immunity applications in respect of cartels in the milk and bread industries, and public support for the Commission's subsequent investigations of these industries.<sup>88</sup> Other immunity applications followed relating to cartels in the construction, transport and energy industries.

---

<sup>87</sup> Commission, *Annual Report 2003/2004*, p. 1

<sup>88</sup> Lavoie, C, "South Africa's Corporate Leniency Policy: A Five-Year Review" in Moodaliyar, K and Roberts, S (eds), *The development of competition law and economics in South Africa*, HSRC Press, 2012, pp. 136-159

64. The construction industry immunity applications led to the Commission prioritising the industry for investigation, which eventually led to the fast track settlement process discussed above. Many of the cartels that were disclosed in this process related to conduct that preceded the first corporate leniency policy of 2004. This conduct may have been detected earlier, and possibly even deterred, if the policy had been introduced sooner.

### ***Low penalties***

65. The early cartel penalties were imposed on industry associations and were not particularly high.<sup>89</sup> Only from about 2006 were penalties typically in excess of ZAR 1 million. The first truly significant penalty (ZAR 99 million) was imposed on Tiger Brands in 2007 for its participation in a bread cartel.

66. The first large penalty that was imposed on a construction firm (Aveng) was in 2009 and in the amount of ZAR 46 million. This was followed by penalties imposed on a few other construction firms in the low multiple of millions of Rands. Shortly after this, the Commission initiated the fast track settlement process, which led to a number of construction firms agreeing to pay reduced penalties.

67. Although the process resulted in total penalties to the value of approximately ZAR 1.476 billion, it might be argued that no single construction firm has yet faced a potential maximum penalty permissible under the Competition Act. This may change with the Commission having now referred 17 cases to the Tribunal against various firms that did not settle with it in both phases of the fast track settlement process.

### ***Inconsistent methodology***

68. The Competition Act lists the factors that the Tribunal must consider when determining an appropriate penalty. Following the CAC's judgment in the SPC, the Tribunal introduced the six step methodology described above. However, both before and after these cases, it was unclear what methodology would be used to determine an administrative penalty. This may have undermined the deterrent value of the provision in the Competition Act empowering the Tribunal to impose an administrative penalty of up to 10% of a firm's annual turnover in and exports from South Africa. The counter argument is that the very uncertainty of the size of a penalty may have a far greater deterring effect.

### ***Personal criminal liability***

69. The Competition Act does not yet make cartel conduct a criminal offence for individuals. This, together with the relatively low cartel penalties that were imposed on construction firms both before and during the fast track settlement process, may not have sufficiently deterred individuals from causing their firm to engage in cartel conduct. Also, no individual has yet been prosecuted under the Anti-corruption Act for participating in a collusive tendering, which may have undermined the deterrent function of both statutes.

### ***Civil damages***

70. Civil damages claims arising from contraventions of the Competition Act remain an undeveloped area of South African law. Quantifying follow-on damages is not easy, and particularly so in the construction industry where projects are often unique and once-off, and where price and other comparator

---

<sup>89</sup> Board of Healthcare Funders of Southern Africa, Association of Pretoria Attorneys, Hospital Association of South Africa, South African Medical Association, Institute of Estate Agents of South Africa, USA Citrus Alliance.

data are not available. The low prospects of damages claims may therefore have not deterred construction firms from colluding.

### ***Reputational harm***

71. The fast track settlement process followed soon after the first construction cartels were uncovered. There is no doubt that the firms implicated in these cartels suffered and continue to suffer some degree of reputational harm. However, given the number of firms involved in the process as well as the number of cartels that were disclosed, it is arguable that firms were able to hide behind the broad condemnation of the industry. Construction firms may have been better deterred from colluding if an individual firm had been prosecuted much earlier and faced significant public censure.

### ***Market structure***

72. Similar to other jurisdictions, the South African construction industry is characterised by a small number of large firms that are active in all or many construction markets. Large enterprises generated 64% of the total income of the construction industry and the 20 largest enterprises contributed 25.9% of the total income of the industry in 2011. The barriers to enter these markets are high. These and other structural characteristics of the market, together with the reasons discussed in this section, may have contributed to the extensive collusion in the industry.

### ***Industry performance***

73. Despite the significant growth of the industry over the past 20 years, in more recent times it has performed poorly. This is partly due to the 2008 global economic crisis, but in no small measure also due to government not performing on its stated commitment to public infrastructure investment. Some construction firms may have seen greater chance in limiting the decline in their margins through coordination, than increasing their revenue through rivalry.

### ***Tender requirements***

74. Only a few local construction firms meet the CIDB's requirements to be graded to work on large construction projects. South Africa is also geographically removed from markets where there may be foreign firms that could meet these requirements. There is therefore limited competition in domestic construction markets, which arguably incentivised large construction firms to collude.

75. This was exacerbated by the timing and requirements of various infrastructure projects for the 2010 FIFA World Cup. In the lead up to this event, many construction firms were capacity constrained. Some public sector institutions required a specific number of firms to tender for a project, failing which they said they would not award the contract. At the same time they said that they would blacklist or at least look poorly in the future on firms that chose not to tender for a project. This may have incentivised firms to provide cover prices so that they appeared to be tendering competitively with one another. It is notable that these firms chose to collude rather than apply for exemption under the Competition Act.

76. Furthermore, before tendering on large contracts, construction firms are typically required to attend site visit meetings together to discuss the project and terms of tender with the prospective client and its advisors. This may have removed an element of competitive uncertainty around a tender and to have encouraged firms to improperly or inadvertently communicate their respective intentions to one another.

### ***Commercial dealings***

77. In addition to there being only a small number of large construction firms in South Africa, there is significant vertical integration in the industry, with the few large firms controlling input suppliers that supplied one another. Furthermore, the large firms would often form joint ventures with one another to tender for the larger construction projects. These commercial dealings, while *ex facie* legitimate, may have provided the forum for firms to collude.

### ***Personal relationships***

78. The senior management of the large construction firms are mostly white males with engineering qualifications. There is also relatively high employee mobility between firms as they compete over scarce technical human resources. This may have encouraged a degree of solidarity between senior managers, particularly in the then demanding times in the industry. The ties that connected these managers may have also provided further opportunities for collusion.

### ***Compliance culture***

79. Finally, the culture of competition law compliance may have contributed to the extent of collusion in the construction industry. The fast track settlement process led to in settlement agreements that included provisions requiring construction firms to implement and enforce competition law compliance programmes. The Commission was clearly of the view that these firms had previously not undertaken sufficient competition law training, and furthermore had inadequate oversight protocols of their employees. While it may be that some individuals were ignorant of the law, given the lengths many others went to keep their dealing secret, it is more likely that they were knowingly taking risks.

## **5. Implications for Future Enforcement**

80. These and other possible reasons for the extent of collusion in the South African construction industry have important implications for the future of competition law enforcement in the country. The Commission needs to better balance its detection and prevention policies when enforcing the Competition Act. At the same time, the Commission must develop advocacy policies to deter cartels reoccurring in the construction industry, including through strategic engagements with other authorities. Each of these is discussed further below.

### ***Enforcement***

81. Hammond notes that the detection and prevention of cartels are closely aligned, and require three critical ingredients. First, competition laws must provide for significant penalties being imposed on firms that engage in cartel conduct. Second, firms must anticipate a significant risk of detection by the competition authorities if they engage in such conduct. Third, competition authorities must provide transparency throughout their enforcement processes so that immunity or leniency applicants can predict with a high degree of certainty how they will be treated.<sup>90</sup>

82. Marvão and Spagnolo also point out that while well designed and managed immunity and leniency policies can be beneficial, poor ones may have the opposite effect. A policy that is too generous may mean that firms are not sufficiently deterred from colluding. This in turn might lead to more prosecutions in the future, with all the attendant costs. Competition authorities should therefore guard

---

<sup>90</sup> Hammond, S, *Detecting and deterring cartel activity through an effective leniency program*, paper presented before the International Workshop on Cartels, 21 & 22 November 2000, Brighton

against favouring policies that produce superficial data making them appear successful at the expense of less quantifiable policies.<sup>91</sup>

83. The Competition Act provides that the Tribunal may impose administrative penalties of up to 10% of a firm's turnover in and exports from South Africa. The CAC has provided judicial guidance on how the Tribunal should exercise these powers. In turn, the Tribunal has developed a methodology which the Commission has restated in its Penalty Guidelines. Notwithstanding this, both the Commission and the Tribunal are inconsistent when purporting to apply the methodology, particularly in relation to settlement agreements. This creates significant uncertainty for firms around the likely size of a penalty that might be imposed in particular circumstances. Arguably, this limits the deterrent function of the law.

84. It may be understandable that while the law on penalties was evolving, the Commission focused on immunity and leniency policies to better detect and prosecute cartels. Many cartels were uncovered in the construction industry as a result of the CLP and the fast track settlement process. However, it is questionable whether cartels have now been eradicated from this industry as a result of these policies. Questions also arise as to the extent of cartels in other industries notwithstanding these policies.

85. The total value of penalties that have been imposed under these policies is not insignificant. However, the penalties imposed on individual firms were arguably not so punitive. Firms may be less likely to use the policies for their intended purpose of detection, but instead for their own strategic purposes. This might include implicating competitors in spurious immunity applications that waste their competitors' and the Commission's resources. Furthermore, the Commission's immunity and leniency policies may be undermined by opaque application and decision-making processes, and the time that the Commission takes to decide an application.

86. All said, while the Commission makes much of the apparent success of the CLP and fast track settlement process, this has arguably been at the expense of equally important prevention policies. Going forward, the Commission should move beyond the superficial data. It should critically assess whether it is complying with the precise terms of the CLP. It should also quantify the returns of the CLP and the fast track settlement process, and weigh these up against the costs of undetected cartels.

### ***Advocacy***

87. The South African government has identified a number of goals to grow the economy and create employment. These include through infrastructure development, which will involve significant expenditure of public and private sector money. Given the size of these projects, most if not all will be put out to tender and be undertaken or at least led by the few large local construction firms. At the same time, the construction industry is facing significant financial challenges that may increase the incentives for firms to collude.

88. The Commission should not assume that those firms that had previously contravened the Competition Act will not do so again. Notwithstanding the penalties that were imposed on them and the reputational harm they suffered, some of these firms might again weigh up the risks of detection and prosecution against the profits they may make if they again colluded. These risks could be heightened through if there is greater certainty of a significant penalty and a more transparent immunity policy. However, the Commission should also develop advocacy policies to deter cartels reoccurring in the construction industry, including through strategic engagements with other authorities.

---

<sup>91</sup> Marvão, C & Spagnolo, G, *What Do We Know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence*, Working Paper, Stockholm Institute of Transition Economics, October 2014

89. Ratshisusu describes how the Commission and the CIDB could complement each other in order to deter firms from colluding.<sup>92</sup> He notes that the CIDB has various powers to regulate construction firms that tender for and are awarded public sector contracts. However, some of these powers are currently under review by the High Court. Ratshisusu distinguishes between possible regulatory-, procurement- and firm-interventions, which the Commission could advocate to deter cartels in the construction industry.

90. Proposed regulatory interventions include the following: (i) enhancing the powers of the CIDB to deal with tender irregularities (including through stricter sanctions); (ii) amending the CIDB's grading system so that to construction firms do not undertake projects beyond their capacity; (iii) introducing measures to support emerging firms to participate in large infrastructure projects; and (iv) developing cooperation between the Commission and the CIDB on investigations, particularly those involving collusive tenders.

91. Possible procurement interventions are as follows: (i) distributing expenditure on large infrastructure projects over a longer period of time and aligning this with the capacity of local construction firms; (ii) splitting large construction projects into distinct packages to allow for broad participation by a number of construction firms without compromising the quality of a project; (iii) awarding contracts on a range of the prices rather than the lowest price in order to make it difficult for colluding firms to determine the likely tender price and so limit cover pricing and complementary bidding; (iv) developing standard tender requirements and establishing separate committees to manage specifications, evaluations and awards; and (v) improving project management capacity in the public sector so that projects are completed within the specified price, quality and time.

92. Finally, interventions for both emerging and established construction firms include the following: (i) introducing tender integrity management protocols to improve transparency; (ii) ensuring compliance with a properly mandated CIDB code of conduct; (iii) promoting emerging construction firms through skills transfer by large construction firms; and (iv) encouraging foreign construction firms to tender for large infrastructure projects.

93. Although the CIDB might not be the best or only authority for the Commission to engage with, some of Ratshisusu's advocacy proposals could be used with other authorities, such as the Presidential Infrastructure Coordinating Commission (PICC),<sup>93</sup> or the public institutions that will be issuing, evaluating and awarding the infrastructure tenders.

94. Importantly, these advocacy measures are arguably a more effective way for the Commission to pursue the public interest objectives in the Competition Act, than hope that investigating, prosecuting and penalising cartels will create greater opportunities for small and medium-sized enterprises, and historically disadvantaged persons in the South African construction industry.

## **6. Conclusion**

95. This paper has described how the Commission's immunity and leniency policies uncovered a number of cartels in the South African construction industry. Most of these involved the same firms contravening the Competition Act on multiple occasions. This might seem surprising given that the Competition Act grants the Commission significant powers to investigate and prosecute cartels, and the

---

<sup>92</sup> Ratshisusu, H, *Limiting Collusion in the Construction Industry: a Review of The Bid-Rigging Settlement in South Africa*, Journal of Economic and Financial Sciences, October 2014 7(s), pp. 587-606

<sup>93</sup> The PICC was established under the Infrastructure Development Act of 2014 (No. 23 of 2014) and coordinates the government's multi-billion Rand public infrastructure programme.

Tribunal the power to impose significant penalties for a first-time contravention of the cartel provisions of the Act.

96. The paper then discussed the possible reasons for the extent of collusion in the industry, distinguishing between enforcement and industry related factors. These include the legacy of apartheid, the Commission's early enforcement priorities and immunity policies, the level and underlying methodologies of penalties that have been imposed by the Tribunal, the absence of personal criminal liability, the low likelihood of civil damages, and the avoidance of reputational harm. The paper then described how collusion may have also been caused by market structure and industry performance, tender requirements, commercial dealings between construction firms, relationships between managers of these firms and the culture of compliance.

97. These and other possible reasons have important implications for the future of competition law enforcement in South Africa. The paper proposes that the Commission must carefully balance its detection and prevention policies. At the same time, the Commission must customise its advocacy policies in order to deter cartels on infrastructure projects. In order to support and improve these policies, the paper also proposes that the Commission undertakes regular quantitative and qualitative assessments of these policies.