

Unclassified

DAF/COMP/GF/WD(2016)44

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

24-Nov-2016

English - Or. English

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

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

Contribution by South Africa

-- Session IV --

1-2 December 2016

This contribution is submitted by South Africa under Session IV of the Global Forum on Competition to be held on 1-2 December 2016.

Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

JT03406169

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.

DAF/COMP/GF/WD(2016)44
Unclassified

English - Or. English

SANCTIONS IN ANTITRUST CASES

-- South Africa --

1. Introduction

1. Over the past ten years, South Africa has seen a number of important decisions on sanctions in competition cases. There have been developments in the method used to determine penalties and the current approach is based on the EU Guidelines.¹ South African competition authorities have also imposed alternative remedies aimed to change behaviour and address the harm caused in the market. Developments also include an increase in claims for civil damages, as well as the introduction of criminal sanctions for cartel conduct in the South African's Competition Act.

2. In response to the OECD's invitation to make a written contribution to the "*Roundtable on Sanctions in Antitrust Cases*", the Competition Commission of South Africa ("the Commission") submits this paper which presents the Commission's experience with sanctions in competition cases. The paper covers the following:

- Instances in the Competition Act 89 of 1998, as amended ("the Act"), under which administrative penalties are imposed;
- Criteria for determining administrative penalties, including the methodologies adopted by the competition authorities;
- Practical issues that the competition authorities consider in determining the amount of fines;
- The Leniency Policy;
- Alternatives to fines;
- Civil claims and criminal sanctions.

2. Administrative penalties or fines

3. The South African Competition law provides for the imposition of administrative penalties or fines by the Competition Tribunal ("the Tribunal"), which is responsible for adjudicating anti-competitive conduct, in various instances, namely in respect of:

- Cartel conduct,² resale price maintenance,³ charging excessive price,⁴ refusal to give access to an essential facility,⁵ specific exclusionary acts.⁶

¹ Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation no. 1/2003 (2006/C 210/02)

² Section 4(1)(b) of the Act prohibits an agreement between, or concerted practice by, firms, or a decision by an association of firms, if such agreement is between parties in a horizontal relationship and if it involves any of the following restrictive horizontal practices: (i) Directly or indirectly fixing a purchase or selling

- An agreement between competitors that has the effect of substantially harming competition,⁷ exclusive agreement,⁸ exclusionary act,⁹ or price discrimination,¹⁰ if the conduct is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice.
- Failure to notify a notifiable merger and/or implementing a notifiable merger without the approval of the Competition Commission of South Africa (“Commission”) or the Tribunal, as required by the Act.¹¹

3. Penalties 2011 - 2016

4. Penalties worth USD232 410 225 have been imposed between 2011 and 2016. The diagram below shows the detail for each financial year.

price or any other trading condition; (ii) Dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or (iii) Collusive tendering.

³ Section 5(2) of the Act prohibits the practice of minimum resale price maintenance

⁴ Section 8 of the Act stipulates that it is prohibited for a dominant firm to: (a) Charge an excessive price to the detriment of consumers; (b) Refuse to give a competitor access to an essential facility when it is economically feasible to do so; (c)...;(d) Engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act – (i) Requiring or inducing a supplier or customer to not deal with a competitor; (ii) Refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;(iii) Selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract; (iv) Selling goods or services below their marginal or average variable cost; or (v) Buying-up a scarce supply of intermediate goods or resource required by a competitor.

⁵ See section 8(b) above

⁶ See section 8(d) above

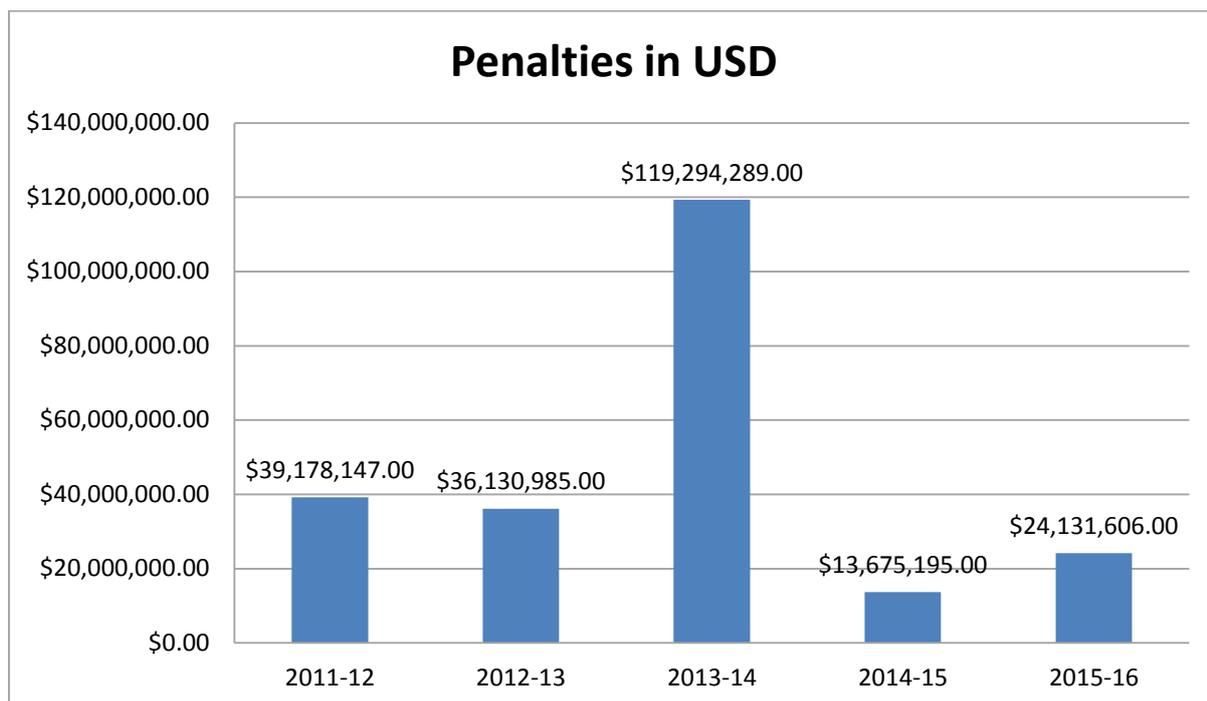
⁷ Section 4(1)(a) of the Act prohibits an agreement between, or concerted practice by, firms, or a decision by an association of firms, if such agreement is between parties in a horizontal relationship and if: (a) It has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.

⁸ Section 5(1) stipulates that an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

⁹ Section 8(c) of the Act stipulates that it is prohibited for a dominant firm to (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

¹⁰ Section 9(1) of the Act prohibits a dominant firm from engaging in price discrimination

¹¹ In general, administrative penalties in cases of failure to notify or prior implementation aim at ensuring compliance with merger regulations.



4. Criteria for determining fines

5. In terms of section 59(3) of the Act, when determining an appropriate penalty, the Competition Tribunal must consider the following factors:

- The nature, duration, gravity and extent of the contravention;
- Any loss or damage suffered as a result of the contravention;
- The behaviour of the respondent;
- The market circumstances in which the contravention took place;
- The level of profit derived from the contravention;
- The degree to which the respondent has cooperated with the Competition Commission and the Competition Tribunal; and
- Whether the respondent has previously been found in contravention of the Competition Act.

4.1 Allocating a weighting to each of the above factors

6. In the SAA case,¹² which was an abuse of dominance case, the Tribunal developed a methodology for determining a fine by allocating a weighting to each of the factors listed under section 59(3) above. The weightings were added up to 10%, being the maximum permissible level for a fine in terms of section 59(2).¹³ The weightings or percentages were allocated as follows:

¹² The Competition Commission vs South African Airways (Pty) Ltd (18/CR/Mar01)

¹³ Section 59(2) stipulates that an administrative penalty imposed in terms of subsection (1) may not exceed 10% of the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year.

Factor	Percentage
Nature, duration and extent of contravention	3%
Loss or damage as a result of the contravention	1%
Behaviour of respondent	1%
Market circumstances	1%
Level of profit derived	0,5%
Degree of cooperation with the Commission and the Tribunal	2%
Found in previous contravention	2%
Total	10%

7. The above weightings were applied to the facts of the case and an appropriate level of penalty or percentage, not exceeding 10%, was determined.

8. However, in the SAA case and many cases that follow, the Tribunal noted the need to develop clear sentencing guidelines.¹⁴

4.2 *Commission's Guidelines on penalties*¹⁵

9. On 17 April 2015, the Commission published its guidelines for the determination of administrative penalties for prohibited practices, which became effective on 1 May 2015.¹⁶ The Commission prepared its guidelines based on the six-step methodology developed by the Tribunal in the *Aveng* case, on how administrative penalties should be calculated.¹⁷ In developing the six-step methodology, the Tribunal had regard to the EU guidelines published in 2006.¹⁸

10. In terms of the Commission's guidelines, and in line with the Tribunal's six-step approach, the Commission follows the following steps:

- Step 1: determine the affected turnover in the base year;
- Step 2: calculate the base amount being that proportion of the affected turnover relied upon;
- Step 3: multiply the amount obtained in step 2 by the duration of the contravention;
- Step 4: round off the figure obtained in step 3 if it exceeds the cap provided for by section 59(2) of the Competition Act;¹⁹
- Step 5: consider factors that might mitigate and/or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it; and
- Step 6: round off this amount if it exceeds the cap provided for in section 59(2) of the Act.

¹⁴ SAA case at paragraph 343

¹⁵ <http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Guidelines-for-Determination-of-Admin-Penalties-MAY-2015.pdf>

¹⁶ Government Gazette no. 38693 (no. 323), 17 April 2015

¹⁷ Competition Commission v Aveng (Africa) Ltd t/a Steeleedale and others (case no. 84/CR/Dec09) – (“The Aveng case”)

¹⁸ EU Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation no. 1/2003 (2006/C 210/02)

¹⁹ Section 59(2) stipulates that “an administrative penalty imposed in terms of subsection (1) may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.”

4.3 *The base amount*

11. The base amount is calculated as a proportion of the affected turnover on a scale from zero percent (0%) to thirty per cent (30%). The firm's affected turnover is the firm's turnover derived from the sales of products and/or services that can be said to have been affected by the contravention.²⁰ In this regard, the year of the turnover that is selected, namely the *base year*, is the most recent financial year in which there is evidence that the firm participated in the contravention. Such financial year may differ from one firm to the other, as firm A may have stopped engaging in the prohibited conduct in year 1, whilst firm B may have continued and only stopped in year 3. In the *Aveng* case, the Tribunal referred to "*the last financial year of the period for which there is evidence that the cartel existed*".²¹ The case related to the prosecution of a cartel conducted by wire various mesh producers.²² In this regard, the Tribunal remarked that the purpose of the overall determination of the affected turnover is to find a proxy for the harm done, and not an exact calculation of profits or damages.²³

4.4 *Affected turnover in specific scenarios*

12. In its guidelines, the Commission has also indicated what the affected turnover will be under various scenarios, such as where the contravention took place within the auspices of an association of firms and where the association is responsible for aiding, organising and/or executing the contravention. In such cases, the affected turnover will be based on the total revenue of the association or the members' contribution to fees. The guidelines also provide for cases where there is a "once-off bid-rigging" contravention, i.e. where the firms only engage in collusive tendering once and in respect of one project. In this instance, for the firm that was not awarded the tender, but was party to the collusive agreement in respect of the tender in question and submitted or agreed to submit allegedly competitive bids, or where it agreed to not submit a bid, or to submit a bid at a particular level to ensure that the tender is won by another firm, the Commission will consider the affected turnover to be the greater of (1) the value of the bid submitted by the unsuccessful firm in question (2) the value of the contract concluded or to be concluded pursuant to the tender process, or (3) the amount ultimately paid to the successful bidder pursuant to the tender. The Commission is of the view that with this kind of determination for the affected turnover, the principle of proportionality is taken into consideration. In this regard, in the *SPC* case,²⁴ the Competition Appeal Court ("CAC") remarked that *the doctrine of proportionality constitutes a further applicable factor in the determination of an appropriate constitutional penalty*.²⁵ This is because, as noted by the Supreme Court of Appeal ("SCA") in *Woodlands Dairy v Competition Commission*,²⁶ administrative penalties *bear a close resemblance to criminal penalties*.²⁷ The CAC further remarked in *SPC* that "*by using the base line of affected turnover, the implications of the doctrine of proportionality that is between the nature of the offence and benefit derived therefrom, the interests of the consumer*

²⁰ See paragraph 134 of the *Aveng* decision

²¹ See paragraph 134 of the *Aveng* decision

²² Wire mesh is an input into the construction industry. It is used to reinforce concrete. (See paragraph 4 of the *Aveng* decision)

²³ See paragraph 137 of the *Aveng* decision

²⁴ Southern Pipeline Contractors and Conrite Walls (Pty) Ltd vs the Competition Commission (105/CAC/Dec10 and 106/CAC/Dec10) ("SPC" case)

²⁵ SPC case - CAC decision paragraph 9

²⁶ SPC case – CAC at paragraph 10, referring to SCA's decision in *Woodlands*

²⁷ *ibid*

*community and the legitimate interests of the offender can be taken more carefully into account and appropriately calibrated.*²⁸

4.5 Duration

13. Duration of the firm's participation in the contravention is also a factor that must be taken into consideration in the determination of a fine. In this regard, the duration element is taken into account by multiplying the base amount (found from step 1 and step 2 of the methodology) by the number of years of participation in the contravention.²⁹ For contraventions lasting less than 1 year, the Commission will apply a duration multiplier equal to the proportion of the year over which the contravention lasted. For example, if the contravention lasted for 7 months, the Commission will apply a duration multiplier of 7/12.³⁰

4.6 Mitigating or aggravating factors

14. Once the base amount has been determined and multiplied by the duration, it is decreased or increased by a percentage that depends on the balance of mitigating or aggravating factors.³¹ In the Commission's guidelines, mitigating and aggravating factors are based on the relevant section 59(3) factors, as set out above. At this stage, the factors to consider include the behaviour of the firm in the market during the period of the contravention,³² the profit derived from the contravention,³³ the degree of cooperation with the Commission and the Tribunal,³⁴ and whether the respondent has previously been found in contravention of the Competition Act.³⁵

4.7 Compliance programme

15. The fact that a firm has a compliance programme and still engaged in a prohibited practice should, in the Commission's view, be regarded as an aggravating factor. A compliance programme is a corporate governance tool designed by a firm to ensure that its employees, management, directors and agents are aware of the provisions of the Competition Act and do not engage in contraventions of the Competition Act. A compliance programme is required to include a mechanism for the monitoring and detection of any contravention of the Act. Accordingly, engaging in a prohibited practice whilst having a competition compliance programme may be regarded as negligence and be considered under the "behaviour of the firm" element in the determination of aggravating and mitigating factors.

4.8 Other special provisions under the Commission's Guidelines

16. The Commission's Guidelines also make provisions for the attribution of liability for payment of the final administrative penalty on a holding company (parent company) where its subsidiary has been found to have contravened the Competition Act. In determining whether to impute liability on the parent

²⁸ SPC case - CAC decision paragraph 51

²⁹ Step 3 of the Commission's Guidelines

³⁰ *Commission v DPI Plastics & others*, the Tribunal applied a 7/12 duration multiplier on MacNeil's for its 7 month participation in the contravention

³¹ *Aveng* decision at paragraph 153

³² Section 59(3)(c)

³³ Section 59(3)(e)

³⁴ Section 59(3)(f)

³⁵ Section 59(3)(g)

company, the Commission will consider whether the parent or holding company: (i) wholly owned the subsidiary; (ii) directly controlled the subsidiary or had decisive or material influence over the commercial policy of the subsidiary; (iii) had knowledge of the subsidiary's participation in the contravention; or (iv) derived substantial benefit from the activities of the subsidiary. If the Commission imputes the liability of paying the administrative penalty on the parent or holding company, the statutory limit in step 6 will be calculated on the consolidated annual turnover of that parent or holding company during the preceding financial year.³⁶

17. In the case of the *Competition Commission vs Delatoy Investments (Pty) Ltd and Others* (“the *Delatoy case*”),³⁷ the Tribunal confirmed that a group of companies may constitute a “firm”³⁸ for purposes of the Competition Act. This is a precedent setting decision because in terms of the Competition Act, a fine is to be imposed on “the firm’s annual turnover”, thereby suggesting that the firm liable for a fine can only be the firm that was directly involved in the contravention. It is important to note that in reaching its decision as to whether the Delatoy Group³⁹ constituted a “firm”, the Tribunal considered the common shareholding of the Delatoy Group, the structural changes within the Delatoy Group, the fact that the loser’s fee had been paid to one of the companies within the Delatoy Group (instead of the direct perpetrator); the revenue, loans and investments (i.e. financial activities) between the companies within the Delatoy Group, and the fact that the companies in the Delatoy Group were mere instruments in the hands of the common directors, who were the ultimate controllers of the Delatoy Group.

18. In its assessment, the Tribunal was concerned not only about the activities of the entities within the Delatoy Group, but also the relationship of how they conducted themselves within the group. The Tribunal relied on the European Community’s approach on the economic activity of an entity when deciding the question of single economic activities by not fixating on the structure of a collection of entities, but rather concentrating “on how the entities are put to work in a fashion, which does not observe the separation of persons”.⁴⁰ Although the Tribunal in the *Delatoy case* did not pronounce on whether or not the Delatoy Group was liable for an administrative penalty, its decision may assist in arguing that an administrative penalty can be imposed on a group of companies and, importantly, the 10% statutory cap in terms of section 59(2) of the Act may be calculated according to the group’s annual turnover and exports from South Africa in its preceding financial year. This decision may also signal the more frequent application of clause 8 of the Commission’s Guidelines for the Determination of Administrative Penalties for Prohibited Practices which provide that the payment of an administrative penalty may be imputed on a parent company where its subsidiary has been found to have contravened the Act.⁴¹

19. Although the Commission is not obliged to consider the firm’s inability to pay in the calculation of administrative penalties, the Commission’s Guidelines have provided for such an eventuality. This was mainly done bearing in mind that the objective of a fine is not to push a firm out of business, which may lead to a significant reduction in competition, but to ensure that a firm assumes the consequences of its

³⁶ See paragraph 8.5 of the South African Competition Commission’s Guidelines (page 19)

³⁷ Competition Tribunal Case Number CR212Feb15

³⁸ In terms of section 1(1)(xi) a firm is defined as including “a person, partnership or a trust”

³⁹ The Delatoy Group was composed of Delatoy Investments (Pty) Ltd, Delatoy Group Holdings (Pty) Ltd, ATPD Properties (Pty) Ltd, Dream World Investments 344 (Pty) Lt, Dream World Investments 345 (Pty) Ltd, the PDD Family Trust and the Andrew Toy Family Trust

⁴⁰ Tribunal’s decision at paragraph 52

⁴¹ “A group of companies found to constitute a ‘firm’ under the Competition Act 89 of 1998, as amended” Competition Commission Newsletter article written by Kriska-Leila Goolabjith and Nelly Sakata

deeds and is deterred from engaging in any contravention of the Competition Act. To borrow the words of the CAC, “*the purpose of s 59 is not to crush the business of the affected firms, but to deter.*”⁴²

20. The Commission’s Guidelines also stipulate that at the Commission may, at its sole discretion, offer a discount of up to 50% off the administrative penalty derived from applying the six-step methodology.⁴³ In determining a discount, the Commission will consider, amongst others, the firm’s demonstrated willingness to expeditiously conclude settlement with the Commission; the extent to which the firm assists in the prosecution of other firms involved in the contravention; the firm’s initiative in approaching the Commission with information of the possible existence of anti-competitive conduct.

5. Practical issues in determining the amount of fines

21. A decision of the Tribunal imposing an administrative penalty may, however, be appealed. In the *SPC* case,⁴⁴ Southern Pipeline Contractors and Conrite Walls (Pty) Ltd appealed the Tribunal’s decision on the basis that the administrative penalties imposed on them respectively were calculated in contravention of the framework laid out in section 59 of the Act and as a result was excessive.⁴⁵ After considering the parties’ submissions, the notion of proportionality and after developing an approach that takes all of the section 59(3) factors into consideration, the Competition Appeal Court (CAC) decided to reduce the fines imposed by the Tribunal.⁴⁶

22. In the *Aveng* case,⁴⁷ RMS and Vulcania also appealed the Tribunal’s decision imposing administrative penalties on each of them. The Commission also cross-appealed against the administrative penalties imposed on these companies on the basis that the penalties imposed were too lenient. The CAC, however, dismissed both the respondents’ appeals and the Commission’s cross-appeal and found that the penalties imposed by the Tribunal were justified.

23. In a recent decision (*Isipani*),⁴⁸ the Tribunal accepted that two instances of cover pricing by two firms engaged in the same collusive tendering constituted two separate contraventions of collusive tendering. The Tribunal, however, decided on the facts of the case to impose only one penalty, instead of two. In this case, the Tribunal observed that it has *the discretion based on the facts of each case in the interest of fairness and the doctrine of proportionality to decide how to levy an appropriate administrative penalty pursuant to section 59(3) of the Competition Act.*⁴⁹ The case is currently under appeal.

⁴² Reinforcing Mesh Solutions (Pty) Ltd and Vulcania vs the Competition Commission (case no. 119/120/CAC/May2013) at paragraph 62

⁴³ See clause 6 of the Commission’s Guidelines on penalties

⁴⁴ Cite the case

⁴⁵ Southern Pipeline Contractors and Conrite Walls (Pty) Ltd vs the Competition Commission (case no. 105/CAC/Dec10)

⁴⁶ The Tribunal had imposed an administrative penalty of R16 882 597 on SPC and an administrative penalty of R6 192 457 on Conrite Walls. The CAC decided to reduce these penalties to R8 720 000 to SPC and R2 037 000 to Conrite Walls

⁴⁷ Competition Commission v Aveng (Africa) Ltd t/a Steeleedale and others (case no. 84/CR/Dec09) – (“The Aveng case”)

⁴⁸ Competition Commission vs Isipani Construction (Pty) Ltd and Neil Muller Construction (Pty) Ltd (case no. CR128Nov14) – Tribunal decision

⁴⁹ Ibid at paragraph 20

5.1 Collection of fines

24. With regard to the collection of fines imposed on companies, in terms of the Competition Act,⁵⁰ the Competition Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative penalty imposed by the Competition Tribunal. In cases where the firm liable for payment of the administrative penalty does not pay, the Commission is entitled to request the registrar of the High Court to issue a writ of execution⁵¹ to enable the Commission to enforce the order of payment of the fine by the liable firm. Under the threat of a writ the firm generally makes the necessary payment. The recovery of a fine becomes, however, difficult when the company on which the fine has been imposed has gone into liquidation.

6. Leniency Policy

25. The Commission has a leniency programme, the Corporate Leniency Policy (CLP)⁵², which was initially developed in 2004 and amended in 2008. The CLP has been an effective tool in detecting and fighting cartel conduct. In terms of the CLP, a firm that is first to approach the Commission, confesses to its participation in cartel conduct and provides information to institute proceedings against the cartel may be granted immunity by the Commission from prosecution before the Tribunal.⁵³ The CLP also provides that if other members of the cartel, which is the subject of a leniency application, want to come forward and also confess to their participation in that cartel conduct, the Commission may consider other processes which may result in the reduction of a fine, a settlement agreement or a consent order.⁵⁴ Accordingly, the CLP applicant who is ‘*first to the door*’ may be granted leniency in that it will not pay a fine, whilst any other firms who are part of the same cartel may reach a settlement with the Commission in terms of which the amount of the fine may be reduced. The construction fast track process, through the Invitation to firms in the construction industry to engage in settlement of contraventions of the Competition Act, is one of the processes where the Commission combined the CLP process and favourable settlement terms to attract firms in the construction industry to come forward and self-confess to their participation in cartel conduct in the construction industry. The construction fast track process provided for firms to first apply for leniency in terms of the CLP, and if they were not first through the door, to apply for settlement on favourable terms set out in the Invitation. The construction fast track resulted in settlements with 15 firms imposing a fine of approximately USD 8,193 million (ZAR1,47 billion).

7. Alternatives to fines

26. The South African competition authorities may also consider alternative remedies apart from fines, private enforcement by members of the public or criminal sanctions. Alternative remedies that are considered are those which can address the tort caused in the market. This is to ensure that competition is

⁵⁰ Section 64 of the Competition Act

⁵¹ A writ of execution is a document issued out by the court directing the Sheriff to attach and take into execution the movable goods of a firm for the purpose of paying the person who obtained an order against the firm

⁵² <http://www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-12052008.pdf>

⁵³ See clause 3.3. of the CLP: “Immunity in this context means that the Commission would not subject the successful applicant (i.e. meeting all the requirements under the CLP) to adjudication before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration.” Footnote4: “Adjudication means a referral of a contravention of Chapter 2 to the Tribunal by the Commission with a view of getting prescribed fine imposed on the wrongdoer. Prosecution has a similar import to adjudication herein.”

⁵⁴ See clause 5.6 of the CLP

restored in the market.⁵⁵ As remarked by the Tribunal in *Media 24*,⁵⁶ it does not mean that other remedies cannot be imposed where an administrative penalty is not competent.⁵⁷ In the merits of the *Media 24* case, the Tribunal found that Media 24 (Pty) Ltd (“Media 24”) had abused its dominant position in the market for the supply of community newspapers in the Goldfields area⁵⁸ by engaging in predatory conduct to remove one of its competitors, Gold Net News (“GNN”).⁵⁹ The allegations were that Media 24 used Forum, one of its community newspapers, as a predatory vehicle or “fighting brand” to exclude GNN from the market. Further, having achieved the removal of GNN from the market, Media 24 closed down Forum. Media 24 was then able to recoup the losses made with Forum with its only remaining title, Vista.

27. The Tribunal found that a restorative remedy was appropriate. In deciding on the type of remedy, the Tribunal considered the “interdict” remedy and “investment” remedy proposed by the Commission and the “credit guarantee remedy”, which it eventually adopted. The Tribunal further agreed with the Commission that the remedy proposed by Media 24, namely the “goodwill gesture remedy”, was inadequate and was the least likely to restore competition to the market.⁶⁰

28. The “interdict” remedy proposed by the Commission stipulated that Media 24 would be prohibited for a period of six years from publishing more than one community newspaper in English or Afrikaans in the Goldfields market.⁶¹ The Tribunal found that such interdict remedy was not an appropriate remedy on the facts of the case. It also found that *the declaratory order and the fact that for a repeat contravention Media 24 would face the possibility of an administrative penalty even if the finding is made under section 8(c) of the Act,*⁶² constitute a sufficient disincentive for Media 24 to repeat the conduct found in the merits case to have contravened the Act.⁶³

29. The investment remedy proposed by the Commission was on the terms that Media 24 would be required to fund a new entrant into the Goldfields market to the amount of R10 million.⁶⁴ The funding money would be paid to the Media Diversity Development Agency (“MDDA”), a government fund that funds new media. The MDDA would decide on an appropriate candidate and would administer the funds. The amount had been calculated based on the budget a hypothetical new entrant would require over three years as start-up capital.⁶⁵

30. The Tribunal found that the investment remedy would not be effective. It found that with such remedy, there was very little certainty that the recipient would use the funding to compete effectively with

⁵⁵ Media 24 paragraph 12

⁵⁶ Competition Commission vs Media 24 (Pty) Ltd (CR154Oct11/REM144Sep15) – Tribunal’s decision on remedies dated 6 September 2016

⁵⁷ Media 24 paragraphs 4 and 5

⁵⁸ The Goldfields area is located in the Free State province in South Africa

⁵⁹ Competition Commission of South Africa vs Media 24 Ltd (CT case no. 013938/CR154Oct11) – The Tribunal found that Media 24 had contravened section 8(c) of the Competition Act

⁶⁰ Media 24 paragraph 53

⁶¹ Media 24 (Tribunal’s decision on remedies) paragraph 24

⁶² A contravention of section 8(c) of the Competition Act only attracts a fine if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice

⁶³ Media 24 (Tribunal’s decision paragraph 76)

⁶⁴ Media 24 paragraph 77

⁶⁵ Media 24 (Tribunal’s decision on remedies) paragraph 77

Vista (Media 24's community newspaper). It also found that although the fund was not restricted to one recipient it had been designed for one recipient.⁶⁶ The Tribunal also remarked that there was no guarantee that the recipient of the fund would be successful and compete directly with Media 24 as opposed to differentiating itself from it or that it would not use the subsidy up and then exit the market.⁶⁷ As a result, the Tribunal decided not to grant the investment remedy.⁶⁸

31. The Tribunal then looked at the credit guarantee remedy, which it eventually adopted. The credit guarantee remedy was considered after taking into account the fact that one of the major barriers to entry or existence in the market for a community newspaper was not being part of a vertically integrated group which could give access to in-house printing and distribution.⁶⁹

32. The Tribunal first considered distribution, as one of the largest nominal expenses of a community newspaper, after printing and salaries.⁷⁰

33. It was observed that the reason community newspapers cannot match Media 24's efficiencies in printing and distribution is that they do not have the necessary cash flow to secure these services on a reliable or consistent basis.⁷¹ Accordingly, the Tribunal found that the credit guarantee remedy was an attempt to address these problems, i.e. of not having the necessary cash flow to secure printing and distribution services.⁷² In terms of the credit remedy, Media 24 undertook to provide credit for a community newspaper for a period of 90 days if they print with Paarl Post Web in Bloemfontein. The same credit guarantee is extended to the newspaper if it uses ON the Dot, a Media 24 business, for distribution.⁷³

34. Accordingly, the Tribunal ordered that the credit offer be available to any publications that meet certain criteria.

35. The Tribunal found that with the credit guarantee remedy a major barrier to entry, namely, the cash flow difficulty, would be eliminated. This is because a publication could use the credit facility to pay printers and distributors and use this credit period to collect its advertising revenues for that edition, before it has to pay for printing and distribution.⁷⁴

36. The Tribunal also found that the credit guarantee facility would be available to any publication that met the necessary criteria, in that the potential candidate publication would have to potentially constitute competition for Vista in terms of content, print order and pagination. The potential candidate publication would also get the credit for 90 days.⁷⁵

⁶⁶ Ibid at paragraphs 84 and 85

⁶⁷ Ibid at paragraph 86

⁶⁸ Ibid at paragraph 87

⁶⁹ Ibid at paragraph 89

⁷⁰ Ibid at paragraph 91

⁷¹ Ibid at paragraph 96

⁷² Ibid at paragraph 97

⁷³ Ibid at paragraph 99

⁷⁴ Media 24 (Tribunal's decision on remedy) paragraph 100

⁷⁵ Ibid at paragraph 106

7.1 *Pricing remedies in settlements*

37. The Tribunal also confirmed settlement agreements which included alternative remedies in the form of pricing commitment.⁷⁶ For example, in the settlement agreement between the Competition Commission and Pioneer, where Pioneer was found to have engaged in collusive conduct with its competitors in the maize and bread market, the Commission and Pioneer agreed on a pricing commitment. In terms of the pricing commitment clause, Pioneer undertook to adjust its pricing during a certain period in respect of a selection of wheaten flour and bread products. The pricing commitment amounted to a reduction of R160 000 000 in gross profit of Pioneer.⁷⁷ The Commission and Pioneer also agreed a “capital expenditure” commitment.⁷⁸ In terms of this provision, Pioneer undertook not to reduce the committed capital expenditure as a result of the settlement agreement, and further committed to increase the capital expenditure by a further R150 000 000. This was linked to certain anticipated capital programmes. The settlement agreement also stipulated that although economic, market or other conditions may require Pioneer to depart from these programmes and specific investments, Pioneer’s firm intention is to retain the overall investment level together with the additional spend of R150 000 000, to contribute to the creation of job.⁷⁹ This shows that alternative remedies sometime aim to achieve a greater objective in the form of considering and promoting public interest grounds.

38. In the recent settlement between the Commission and ArcelorMittal South Africa Ltd (AMSA),⁸⁰ the parties agreed on a pricing remedy. The pricing remedy was aimed at addressing the concerns arising from AMSA’s pricing policy. AMSA was alleged to have charged excessive prices for its flat steel products in contravention of competition law. In terms of the Act, a dominant firm is prohibited from charging an excessive price to the detriment of consumers.⁸¹ In terms of this remedy, for a period of five years from the date on which the settlement agreement is made an order of the Tribunal, AMSA is not permitted to earn an EBIT (earnings before interest and tax) margin percentage greater than 10% relating to flat steel products (produced at Vanderbijlpark) sold in South Africa over a 12 (twelve) months period, subject to certain conditions. This pricing remedy was aimed at addressing excessive pricing concerns.⁸²

39. Sanctions, as a form of enforcement of competition law, are not only seen through the imposition of fines by the Competition authorities, but also enforcement by private individuals or firms.

8. **Civil claims**

40. The Act also provides for claims for civil damages in the ordinary civil courts. In terms of section 65(6)(b)(i), a person who has suffered loss or damage as a result of competition law infringements may approach the Tribunal for a certificate confirming that the conduct constituting the basis for the action has been found to be a prohibited practice in term of the Act. Accordingly, a finding by the Tribunal that a firm has engaged in a competition law infringement is a prerequisite for bringing a civil suit for damages in the ordinary civil courts. A civil court will then determine, among other things, whether the loss or

⁷⁶ Pioneer settlement agreement with the Commission

⁷⁷ Ibid at paragraph 14

⁷⁸ Ibid at paragraph 15

⁷⁹ Ibid at paragraph 15

⁸⁰ Settlement agreement between the Competition Commission and ArcelorMittal South Africa Ltd (confirmed by the Tribunal on 16 November 2016) – Case no. CR092Jan07/SA090Aug16)

⁸¹ Section 8(b) of the Act

⁸² Abuse of dominance by charging excessive prices is a contravention of South African law.

damage suffered by a party who brings the claim was caused by the competition law infringement and determine the quantum of the damages.

41. In South Africa, the process of sanctions through claims for civil damages is still in its infancy and is developing. The enforcement work of the Commission in relation to the bread cartel and widespread collusion in the construction industry in South Africa has given impetus to claims for civil damages.

42. In respect of the bread cartel, a group of non-governmental organisations brought a class action in the High Court. The class action was filed by the *Children's Resource Centre Trust and eight others* (also referred to as the consumers' application) and *Imraahn Ismail Mukaddam and two others* (also referred to as the distributors' application) against Pioneer Foods (Pty) Ltd ("Pioneer"), Tiger Consumer Brands Ltd ("Tiger") and Premier Foods Ltd ("Premier"). Pioneer, Tiger and Premier are three of the four major bakeries in South Africa.

43. More recently, the South African National Road Agency (SANRAL), responsible for maintenance and upgrading of free-ways in South Africa, brought a civil suit against several firms that formed part of the construction cartel. SANRAL's civil claim has, however, been recently withdrawn.

44. In a recent High Court judgement,⁸³ the first of its kind, the High Court found that South African Airways ("SAA"), the South African national carrier, was liable to pay damages to Nationwide Airlines (Pty) Ltd ("Nationwide") in the sum of R104 625 million. In this case, Nationwide had claimed damages for loss of profits from SAA for its anti-competitive practices that contravened section 8(d)(iv) of the Act.⁸⁴ The Tribunal found that SAA, being a dominant firm, had entered into override incentive agreements and TRUST⁸⁵ agreements with various several travel agents that contravened the Act by inducing travel agents to deal exclusively with SAA at the expense of its rivals.⁸⁶

9. Criminal sanctions

45. Recently, on 1 May 2016, the provisions of section 73A, which introduce criminal sanctions for cartel conduct, came into effect.⁸⁷ These provisions criminalise the conduct of a director or a person having management authority, who has caused or permitted a firm to engage in cartel conduct.⁸⁸ Accordingly, from May 2016, a director or manager of a firm who are found either to have caused a firm to engage in, or knowingly acquiesced to a firm engaging in cartel-type conduct, will be held individually criminally liable, facing a fine of up to R500 000 or a term of imprisonment not exceeding ten years. These provisions have, however, come under a lot of criticism regarding their constitutionality and the practicalities around which institutions, between the Commission and the National Prosecution Authority ("NPA") will investigate and prosecute individuals. Accordingly, South Africa has yet to see a case enforcing criminal sanctions.

⁸³ Nationwide Airlines (Pty) Ltd (in liquidation) vs South African Airways (Pty) Ltd - High Court of South Africa (Gauteng Local division, Johannesburg), case no.12026/2012

⁸⁴ To cite the section

⁸⁵ TRUST was an acronym introduced by SAA that stood for "True Partnership, Respect Rules, United focus, Support, Training" (see para 4 of the High Court judgment)

⁸⁶ Nationwide vs SAA – High Court's decision at paragraph 4

⁸⁷ Proclamation no. 25 of 2016 by the President of the Republic of South Africa – Commencement of section 12 of the Competition Amendment Act, 2009 (Act no.1 of 2009), insofar as it relates to section 73A(1),(2),(3) and (4) of the Competition Act 1998 (Act no. 89 of 1998) – Government Gazette , 22 April 2016 (no. 39952)

⁸⁸ Cite section 73A(1), (2), (3) and (4)