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Cartels 2023

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South Africa: Law & Practice
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Bowmans



SOUTH AFRICA



Law and Practice

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1. Basic Legal Framework

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

Cartel conduct is prohibited under Section 4 of the Competition Act, No 89 of 1998, as amended (the “Competition Act”).

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

Competition Authorities

The South African competition authorities comprise the Competition Commission (“the Commission”), Competition Tribunal (“the Tribunal”) and the Competition Appeal Court (CAC).

The Commission acts as the investigative arm and the primary point of contact between the competition authorities and the public. In the first instance, the Commission is the recipient of merger filings and complaints relating to alleged prohibited practices. When investigating matters, the Commission may invoke its extensive investigative powers, including the right to issue summonses and conduct search and seizure operations (commonly known as “dawn raids”). If appropriate, under the market inquiry provisions contained in the Competition Act, the

Commission could launch a broader inquiry into the state of competition in terms of the market.

The Tribunal acts as the adjudicative arm of the competition authorities and, even though its procedures are less formal, operates in a manner similar to a civil court. A Tribunal hearing is typically presided over by a panel of three members who have the required qualifications and experience in business, law, economics or industry. The Tribunal adjudicates on prohibited practices and imposes penalties for non-compliance with the Competition Act.

The CAC is the specialist appeal and review authority in competition matters. The CAC may hear appeals arising from Tribunal decisions and can issue any order it considers appropriate, including confirming, amending or setting aside the Tribunal’s decision or remitting the matter back to the Tribunal.

Fines and Penalties

The Tribunal may impose an administrative penalty (fine) in relation to a prohibited practice, provided that the fine does not exceed 10% of the relevant firm’s annual turnover in South Africa and its exports from South Africa during the preceding financial year. In the case of a repeat

offence, the Tribunal can impose an administrative penalty not exceeding 25% of the relevant firm's annual turnover in South Africa and its exports from South Africa during the preceding financial year.

The Tribunal may increase the administrative penalty to include the turnover of any firm or firms that control a firm found to have engaged in a prohibited practice if the controlling firm or firms knew – or reasonably should have known – that the controlled firm was engaging in a prohibited practice. The Tribunal may order that the controlling firm or firms be jointly and severally liable for payment of the administrative penalty.

Any person or firm who has suffered loss or damage as a result of a prohibited practice may institute action through civil court proceedings for the assessment and awarding of damages.

A person commits an offence if, while acting as director of a firm or while engaged (or purporting to be engaged) in a position of management authority, they either:

- cause a firm to engage in cartel conduct; or
- knowingly acquiesce in the firm engaging in cartel conduct.

A person convicted of such an offence is subject to a fine not exceeding ZAR500,000 or to imprisonment for a period not exceeding ten years (or to both a fine and imprisonment).

1.3 Private Challenges of Cartel Behaviour/Effects

If the Commission decides – upon investigating a complaint submitted by any party in relation to an alleged prohibited practice – that the complaint cannot be sustained or is without sufficient merit and therefore does not refer said complaint

to the Tribunal for adjudication, then such a party may itself refer the complaint to the Tribunal for adjudication.

1.4 Definition of “Cartel Conduct” Prohibited Practices

Although the Competition Act does not expressly refer to or define “cartels” or “cartel conduct”, Section 4 of the Act prohibits certain conduct by firms (or associations of firms) in a horizontal relationship – ie, by competitors or potential competitors.

Although not expressly defined, cartel conduct is understood to occur where competitors (or potential competitors) agree to – or develop a practice in which they – co-operate rather than compete with one another regarding certain business activities.

Cartel conduct can occur through an agreement or a concerted practice. The concept of “an agreement” is interpreted widely and – when used in relation to a prohibited practice – includes a contract, arrangement or understanding (whether legally enforceable or not). A “concerted practice” is defined as co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action but which does not amount to an agreement.

Section 4(1)(a) of the Competition Act prohibits an agreement or concerted practice between firms – or a decision by an association of firms – in a horizontal relationship if the agreement, decision or concerted practice substantially prevents or lessens competition, unless any technological, pro-competitive or efficiency gains that outweigh the anti-competitive effect can be proven. As such, Section 4(1)(a) allows for a “rule of reason” analysis and an “efficiency defence”

based on any technological, pro-competitive or efficiency gains resulting from certain conduct that may outweigh the anti-competitive effects of such conduct.

Per Se Offences

Section 4(1)(b) prohibits any agreement, decision or concerted practice if it involves the following restrictive horizontal practices:

- directly or indirectly fixing a purchase or selling price, or any other trading condition;
- dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- collusive tendering.

These prohibited practices are deemed outright or “per se” offences, as conduct falling within the provisions of Section 4(1)(b) is not subject to a rule of reason analysis. The anti-competitive effects of a per se offence are presumed to exist and cannot be justified or defended on the basis of any alleged technological, efficiency or other pro-competitive gains resulting from the relevant conduct. An efficiency defence is, therefore, not available under Section 4(1)(b).

Exemptions

The Competition Act applies to all economic activity within or having an effect within the Republic of South Africa. The following do not amount to a violation of the Competition Act:

- legitimate joint ventures between competitors or potential competitors; and
- concerted conduct designed to achieve a non-commercial socioeconomic objective or similar purpose.

The Competition Act and its regulations do not identify specific sectors or industries exempt

from the provisions of the Act. However, Section 10 provides that firms may apply to the Commission for an exemption from the application of provisions prohibiting certain conduct between competitors or potential competitors. The Commission has one year within which to grant or refuse the exemption.

Section 10 stipulates that an exemption may be granted in the case of agreements or practices that concern the exercise of IP rights or that contribute towards the following objectives:

- maintenance or promotion of exports;
- promotion of the effective entry into, participation in or expansion within a market by SMEs or by firms controlled or owned by historically disadvantaged persons;
- change in productive capacity necessary to stop a decline in an industry;
- the economic development, growth, transformation or stability of any industry designated by the Minister responsible for the administration of the Competition Act (having consulted with the Minister responsible for that particular industry); or
- competitiveness and efficiency gains that promote employment or industrial expansion.

In terms of Schedule 1 (Part A) of the Competition Act, trade associations may apply to the Commission for an exemption if – in terms of internationally applied norms – any restriction contained in the rules of the associations is reasonably required in order to maintain professional standards or the ordinary function of the profession.

1.5 Limitation Periods

Section 67 of the Competition Act provides that a complaint in respect of prohibited practices (including cartel conduct) that ceased more than

three years before the complaint was initiated may not be referred to the Tribunal. The Commission may still investigate conduct that ended more than three years before the complaint was initiated, but it cannot refer such conduct for prosecution.

The three years do not commence on the date of the conclusion of the agreement or the concerted practice but, rather, from the date that the effects of the agreement or concerted practice are no longer experienced in the market.

A party who wishes to rely on prescription in litigation proceedings is required to raise it as a special plea.

The three-year prescription period provided for in Section 67 of the Competition Act operates as a procedural time-bar and is not an absolute substantive time-bar, as it is capable of condonation by the Tribunal in terms of Section 58(1)(c) (ii) of the Competition Act. Condonation is not a mere formality. The Commission must apply for condonation and show good cause why historical conduct should be prosecuted. Such condonation applications are considered on the facts of each case.

1.6 Extent of Jurisdiction

As previously mentioned in **1.4 Definition of “Cartel Conduct”**, the Competition Act applies to all economic activity within or having an effect within the Republic of South Africa. In the context of Section 4, the Competition Act applies to agreements that are concluded outside South Africa but which have an effect within South Africa. In practice, it might be difficult for the competition authorities to act against firms who are domiciled outside their jurisdiction but whose conduct has an effect in South Africa – espe-

cially where foreign firms have no local office or physical presence in the country.

The Commission may establish personal jurisdiction over foreign or offshore corporations with no presence or business operations in South Africa if the Commission is able to allege adequate connecting factors between the relevant forum adjudicating the dispute (ie, the Tribunal) and the conduct sought to be adjudicated upon (ie, cartel conduct).

The Commission generally permits the electronic submission of documents, as well as accepting written statements from individuals who are not able to be in the country.

1.7 Principles of Comity

Section 1(2)(b) of the Competition Act prescribes that the Act must be interpreted in compliance with the international law obligations of the Republic of South Africa.

The CAC has considered and been cognisant of the principles of international comity in its adjudication of cases that affect foreign firms. In the *Ansac v Botash* appeal to the CAC, the CAC considered whether principles of comity would argue against the exercise of jurisdiction by the South African authorities in the prosecution of the cartel conduct of foreign firms. The CAC noted that *Ansac* did not operate in the USA and, if it had, its activities would have been in breach of the Sherman Act. Accordingly, the CAC held that there was no conflict between South African and US law and therefore no reason to find that international comity precluded the South African competition authorities from exercising their jurisdiction in terms of the Competition Act.

In the *Ansac v Botash* appeal to the CAC and the appeal to the Supreme Court of Appeal (SCA),

the courts indicated that there was no real conflict between the legal requirements imposed on the parties and that there may be very little room to deny jurisdiction to the South African authorities on the basis of comity.

The Tribunal noted in *Ansac v Botash* that it is easy to appreciate the dangers of treating foreign firms differently. Those who wished to collude in the local market would simply find themselves an offshore cartel haven with which to collude in order to trade in South Africa, knowing that evasion would be simpler than if they were located domestically. It seems unlikely that the legislature intended to favour foreign firms with a defence not available to domestic firms.

1.8 COVID-19

In March 2020, the national government issued regulations limiting unjustified price hikes and product stockpiling to protect consumers.

Several block exemptions were issued in response to the declaration of the COVID-19 pandemic as a National State of Disaster in South Africa. Block exemptions were issued for the healthcare, banking, retail property and hotel sectors (among others), thereby exempting certain agreements or practices from the application of Section 4 (restrictive horizontal practices) and Section 5 (restrictive vertical practices) of the Competition Act in order to mitigate the negative economic and social impact of the pandemic.

Following the lifting of the National State of Disaster by President Cyril Ramaphosa in April 2022, the block exemptions issued for the above-mentioned sectors are no longer in effect, and parties can again be held liable for contraventions of Sections 4 and 5 of the Competition Act.

In response to the economic consequences of the COVID-19 pandemic, the South African government developed the Economic Reconstruction and Recovery plan. One of the interventions mapped out by the plan to promote inclusive growth and employment in the domestic economy is increased localisation. Draft guidelines for collaboration between competitors on localisation initiatives were published by the Commission in August 2021 for public comment. In line with the recovery plan, the draft guidelines were finalised in March 2022.

Several firms were investigated and prosecuted for hiking prices and “price gouging” in relation to products such as face masks, sanitisers, toilet paper, flu medication, essential food items, and polymerase chain reaction (PCR) and antigen tests for COVID-19.

The Commission remains fully functional and, from March 2022, resumed holding meetings with stakeholders in person at its offices in Pretoria.

Tribunal and CAC hearings are conducted virtually or in person.

1.9 Changes in the Regulatory Environment Affecting Competition Regulation

There have been no changes to the regulatory environment in South Africa to this effect.

2. Procedural Framework for Cartel Enforcement – Initial Steps

2.1 Initial Investigatory Steps

Initial investigatory steps include researching the relevant market, issuing summonses or requests for information to industry participants, and con-

ducting dawn raids. The Commission also has the power to launch an inquiry into the structure of and the levels of concentration – along with the general state of competition – in a market for particular goods and services, without necessarily referring to the conduct or activities of any particular named firm. Following its market inquiry, the Commission may take action against identified firms if cartel conduct is suspected or uncovered.

2.2 Dawn Raids

The Competition Act allows the Commission to conduct dawn raids (ie, unannounced visits and searches at a firm's premises). The Competition Act provides mechanisms by which the Commission may enter and search premises with a warrant or, in limited circumstances, without a warrant. A judge or magistrate may issue a warrant to enter and search any premises if – based on information provided under oath or affirmation – there are reasonable grounds to believe that:

- a prohibited practice has taken place, is taking place or is likely to take place on or in those premises; or
- anything connected with an investigation under the Competition Act is in the possession of a person who is on or in those premises.

The Commission has conducted dawn raids on companies in various industries, including cement, furniture removal, scrap metal, tyres, liquefied petroleum gas, vehicle glass, particle board, fibreboard, packaging material, edible oils, cargo shipping and, most recently, long-term insurance.

Restrictions on Dawn Raids

A dawn raid may only be executed during the day unless the warrant determines otherwise. (A warrant generally provides the Commission 24 hours within which it must complete the raid.) Dawn raids must be conducted in accordance with the rights afforded by the Constitution of the Republic of South Africa and with strict regard to decency, freedom, security and privacy. A firm may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.

Procedure of Dawn Raids

During a dawn raid, the Commission may enter premises, examine and copy documents (both in hard and electronic format), seal business premises, and ask for explanations from staff in order to obtain information on suspected infringements. The Commission may attach and remove any documentation or article and may use (or require the assistance of any person on the premises to use) any computer system in order to:

- search any data contained in or available to that computer system;
- reproduce any record from the data; and
- seize any output from that computer for examination and copying.

In most cases, the Commission's investigators copy the hard drives of key personnel's computers. Data from cell phones and other electronic devices, such as tablets, will be reviewed and copied in some cases.

2.3 Spoliation of Information

It is an offence to:

- hinder, obstruct or unduly influence any person exercising a power conferred by the Competition Act;
- fail to produce a book, document or another item as ordered;
- give false evidence or information to the Commission while knowing or believing it to be false;
- do anything calculated to influence the authorities improperly; or
- do anything that would have been contempt of court if proceedings were conducted in such a forum.

2.4 Role of Counsel

Section 1(2)(a) of the Competition Act prescribes that the Act must be interpreted in a manner consistent with the Constitution of the Republic of South Africa. Respondents under investigation by the Commission are afforded all the constitutional rights available to any participant in judicial proceedings, including the right to be represented and assisted by counsel. A firm's in-house counsel may perform this role. The Competition Act does not prescribe that respondents or individuals obtain separate counsel.

Initial Steps Taken by Defence Counsel

Principal steps to undertake during the initial phase of a Commission investigation or complaint referral include:

- obtaining all the relevant facts and corroborating evidence; and
- obtaining clarity from the Commission in respect of the conduct being investigated and the period relevant to the complaint.

If any concerns are identified during the initial phase, consideration should be given to applying for immunity in accordance with the Commission's Corporate Leniency Policy (CLP) or

engaging in "without prejudice" settlement negotiations with the Commission.

2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

The Commission can issue requests for information, which recipients can elect to respond to on a voluntary basis. The Commission can also utilise its statutory investigative powers to, for example, conduct dawn raids and issue firms, entities and individuals with summonses requiring them to provide documents and/or appear for interrogation by the Commission's investigators.

The Commission may also obtain information, documents and evidence from leniency applicants, informants, and respondents who have settled or are engaged in settlement negotiations with the Commission.

Procedure for Obtaining Other Types of Information

The Commission can obtain oral evidence by issuing summonses or from oral submissions or proffers provided by immunity applicants and informants.

As mentioned in 2.2 Dawn Raids, the Commission's investigators will copy the hard drives of key personnel's computers during most dawn raids and, in some cases, data from their cell phones and other electronic devices (eg, tablets) will be reviewed and copied.

2.6 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

The Competition Act applies to agreements or concerted practices concluded outside South Africa by foreign firms, insofar as they have an effect within South Africa. Foreign firms have a duty to reply to requests for documents and

information. In general, firms are required to produce documents and evidence in their possession and located within the Republic of South Africa.

2.7 Attorney-Client Privilege

The Commission's powers of inspection are subject to claims of privilege. Privileged documents do not need to be produced during discovery or in response to a summons. If a firm claims privilege over a document during a dawn raid, the Commission may request that the registrar or sheriff of the High Court remove it for safe custody until the court determines whether that document is indeed privileged.

Other Relevant Privileges

Individuals may be summoned to provide documents and respond to questions from the Commission. However, a question does not have to be answered if it is self-incriminating. The only criminal proceedings in which self-incriminating information may be used are:

- proceedings relating to perjury; or
- proceedings in which a person is tried for:
 - (a) failing to answer fully and truthfully; or
 - (b) causing or permitting a firm to engage in a prohibited practice.

2.8 Non-cooperation With Enforcement Agencies

Firms under investigation generally co-operate voluntarily with the Commission. If firms elect not to co-operate or respond to requests for information, the Commission can utilise its investigative powers (eg, issuing summonses or conducting dawn raids). A firm's degree of co-operation with the competition authorities is one of the factors taken into consideration by the Tribunal when determining the quantum of an appropriate penalty.

2.9 Protection of Confidential/Proprietary Information

When submitting information to the Commission, firms may claim all or part of that information as confidential by describing the information and explaining why it is confidential. The Competition Act defines confidential information as trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others.

2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement

The validity and scope of a summons can be challenged upon receipt of that summons. The validity and scope of a dawn raid can be challenged either during the raid or at its conclusion. Arguments against the merits of a complaint referral, including special pleas, are raised after the Commission has concluded its investigation and the complaint has been referred to the Tribunal for adjudication.

2.11 Leniency and/or Immunity Regime

In accordance with Section 49E of the Competition Act, the Commission has issued a CLP that serves as a framework for granting immunity from prosecution to cartel participants in exchange for information and co-operation with the Commission. The decision to grant immunity (or, where applicable, enter into a settlement agreement) is at the discretion of the Commission, provided that certain requirements and conditions are met by the cartel member. The CLP is applicable in respect of agreements among competing firms to engage in price-fixing, division or allocation of markets, or collusive tendering. These cartel activities need not have been entered into in South Africa but must have had an effect within South Africa.

The CLP envisages a situation not only in which the applicant alerts the Commission of the existence of cartel activity but also one whereby such whistle-blowing culminates in a referral and ultimately in the prosecution of the cartel conduct at the Tribunal. If a leniency applicant complies with the requirements set out in the CLP and dutifully provides the Commission with all available information and documents, leniency is granted.

The CLP has been a very effective enforcement tool in uncovering and prosecuting cartels. It has been applied in numerous cartel investigations across a wide range of industries, including the construction, cement, concrete, bread, milling, glass and airline industries.

Firms are granted immunity from prosecution for engaging in cartel conduct. However, firms that have been granted immunity under the CLP may still be held liable for damages in a civil court.

Qualifying for the CLP

Only a firm that is first to apply may qualify for immunity by:

- completely and truthfully disclosing all the information available to it;
- offering full, expeditious and continued co-operation with the Commission (such co-operation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or the CAC are completed);
- immediately ceasing the cartel activity or acting as directed by the Commission;
- not alerting former cartel members that it has applied for leniency;
- not acting to destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and

- refraining from misrepresenting the material facts of any cartel activity or acting dishonestly.

Leniency applications must be in writing to the Commission. Leniency applications must contain sufficient information to allow the Commission to identify the cartel conduct and participants. The CLP does not allow for blanket immunity and an applicant is required to specify the cartel conduct in respect of which it seeks leniency.

The leniency applicant must submit to the Commission all pertinent information, evidence (whether written or oral) and documents relating to the cartel activity. The Commission's practice is to grant conditional leniency for the duration of the competition proceedings and final immunity at the completion of the matter, provided that the applicant has met the requirements for securing leniency.

Markers

The CLP allows for the submission of a request for a marker, which must clearly indicate in writing that a request for a marker is being made. A marker is typically sought where the firm is aware that prohibited cartel conduct has taken place but requires time to prepare its leniency application and source documentary evidence in support thereof. A marker usually provides the firm with some comfort that it is "first in line" in respect of the leniency application for the conduct in question.

2.12 Amnesty Regime

There is no separate amnesty regime in South Africa. Firms that wish to avoid prosecution for engaging in cartel activity are required to approach the Commission in accordance with

its CLP or engage with the Commission in settlement negotiations.

3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

3.1 Obtaining Information Directly From Employees

The Commission may direct requests for information to employees and issue summonses to employees.

3.2 Obtaining Documentary Information From the Target Company

The Commission may direct requests for information to firms and issue summonses to firms.

3.3 Obtaining Information From Entities Located Outside This Jurisdiction

The Commission may direct requests for information to a peregrinus (an entity not domiciled within South Africa). The regulations provide for an order of substituted service when it is impossible to serve and issue a summons to a peregrinus.

3.4 Inter-agency Co-operation/Co-ordination

There is significant inter-agency interaction between the Commission and other regulators. Insofar as the Competition Act applies to an industry or sector subject to the jurisdiction of another regulatory authority, the Act must be construed as establishing concurrent jurisdiction. The Commission has concluded memoranda of understanding with several sector regulators.

3.5 Co-operation With Foreign Enforcement Agencies

South African competition authorities frequently engage with their international counterparts, particularly in the case of international cartel conduct and international mergers that impact several jurisdictions. The Commission has received assistance from the US Department of Justice and the US Federal Trade Commission and looked to the practice of US authorities in the exercise of its investigative functions.

Both the Commission and the Tribunal are active participants in the International Competition Network (ICN), and the Commission has previously been granted “observer status” by the Competition Division of the OECD. There is also regular engagement between the Commission and competition regulators in other African jurisdictions on a number of matters – for example, sharing best practices and helping to build the capacity of existing and future African competition agencies. The Commission has also concluded memoranda of understanding with foreign competition authorities.

3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

Criminal prosecution is not conducted by the competition authorities but, rather, through the National Prosecuting Authority (NPA) and the criminal justice system. The Commission may neither seek nor request the prosecution of a firm or person deserving of leniency. The Commission can, however, make submissions to the NPA in support of leniency for a person prosecuted for an offence if it has certified that person as deserving of leniency.

The law relating to criminal prosecution for cartel conduct is undeveloped in South Africa. There

are no reported decisions relating to criminal prosecution for cartel conduct in South Africa.

3.7 Procedure for Issuing Complaints/ Indictments in Civil Cases

As mentioned in 1.2 **Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** (Fines and Penalties), any person or firm who has suffered loss or damage as a result of a prohibited practice may institute action through civil court proceedings for the assessment and awarding of damages. When instituting action in a civil court, a plaintiff must file with the registrar of the relevant court a notice from the Tribunal:

- certifying that the conduct constituting the basis for the action has been found to be a prohibited practice under the terms of the Competition Act;
- stating the date of the finding; and
- setting out the section of the Competition Act under the terms of which the finding has been made.

3.8 Enforcement Against Multiple Parties

Enforcement actions involving cartels are typically brought against multiple parties (including the relevant trade association) in a single proceeding.

3.9 Burden of Proof

The standard of proof is a balance of probabilities, similar to the standard of proof in civil law matters.

3.10 Finders of Fact

The Commission acts as the principal finder of facts. Subject to the discretion of the Tribunal, parties granted the right to intervene and participate in Tribunal litigation proceedings may:

- produce and discover additional documents; and
- call for further discovery by other participants in the proceedings.

3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings

The Tribunal may accept as evidence any relevant oral testimony, document or article, regardless of whether:

- it is given or proven under oath or affirmation; or
- it would be admissible as evidence in court.

The Tribunal may conduct its hearings informally or in an inquisitorial manner. However, the Tribunal must conduct its hearings in accordance with the principles of natural justice at all times.

3.12 Rules of Evidence

Please refer to 3.11 **Use of Evidence Obtained From One Proceeding in Other Proceedings**.

3.13 Role of Experts

Experts are frequently used by the Commission, respondent firms and interveners to provide economic analysis in Tribunal hearings.

3.14 Recognition of Privileges

Privileged documents need not be produced during discovery or in response to a summons. A question does not have to be answered if it is self-incriminating. The law regarding a witness's privilege in a criminal case in a court of law applies equally to a person who provides information during a Tribunal hearing.

According to Section 56(3) of the Competition Act, however, the Tribunal may order a person to answer any question or produce an article or

document – even where such evidence is self-incriminating.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

It is well-established in civil court proceedings that evidence of alleged “similar facts” that seeks to prove other unlawful conduct on the part of the respondent is not relevant because it is highly prejudicial to the respondent and may raise numerous collateral issues that are not probative of the specific complaint in question. However, the Tribunal has broad discretion to regulate its own hearings and to accept as evidence oral testimony, documents and other articles – regardless of whether these would have been admissible in court proceedings.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Imposition of Sanctions

As regards enforcement matters, including cartel and abuse of dominance prosecutions, the Commission does not have the authority to impose sanctions directly and petitions the Tribunal for any sanction that it may deem appropriate in these matters. The Tribunal may adjudicate on prohibited conduct and impose any remedy or sanction provided for in the Competition Act, including:

- levying fines;
- interdicting any prohibited practice;
- ordering a party to supply or distribute goods or services to another party on terms reasonably required to end the prohibited practice;
- ordering access to an essential facility on terms reasonably required; and/or
- declaring the whole or part of an agreement to be void.

4.2 Procedure for Plea Bargaining or Settlement

During, upon or following the completion of a Commission investigation or market inquiry, respondent firms can agree on the terms of an appropriate settlement. Settlement agreements between respondents and the Commission must be confirmed by the Tribunal as consent orders. The terms of settlement agreements are subject to negotiation between the Commission and the respondents concerned, but will usually include an admission of guilt, provision for the payment of a fine, and the development of a compliance programme. Recently, however, an increasing number of settlement agreements have not involved an admission of guilt.

4.3 Collateral Effects of Establishing Liability/Responsibility

A finding that a firm has engaged in cartel conduct could result in civil damages claims and criminal prosecution of the directors who caused the firm to engage in cartel conduct.

4.4 Sanctions and Penalties Available in Criminal Proceedings

As mentioned in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards (Fines and Penalties)**, a person is guilty of an offence if they are found to have caused a firm to engage in cartel conduct or knowingly acquiesced in the firm engaging in cartel conduct while they are a director of a firm or engaged (or purporting to be engaged) in a position of management authority. A person convicted of such an offence faces up to ten years in prison or a fine of not more than ZAR500,000 (or both).

4.5 Sanctions and Penalties Available in Civil Proceedings

Any person or firm may institute action through civil court proceedings for the assessment and

awarding of damages if they have suffered loss or damage as a result of a prohibited practice. Please see **3.7 Procedure for Issuing Complaints/Indictments in Civil Cases** for further details.

4.6 Relevance of “Effective Compliance Programmes”

The existence of – and the extent to which a firm has applied – a compliance programme may be a factor considered by the Tribunal when determining the quantum of an appropriate penalty.

4.7 Mandatory Consumer Redress

The Competition Act does not provide for mandatory consumer redress.

4.8 Available Forms of Judicial Review or Appeal

Decisions of the Tribunal may be taken to appeal or review. Appeals to the CAC initiated by the Commission and respondent firms are fairly common.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action

Please refer to **1.3 Private Challenges of Cartel Behaviour/Effects**.

5.2 Collective Action

Class actions are possible within the South African legal system. However, the substantive and procedural aspects of class action suits have only recently begun to be tested by the country’s courts. In terms of procedure, litigants must apply for a certification of the action, the class must be appropriately defined, and there must be a triable issue. Although they do not all have

to be identical, there must be common elements to the claims of the members of the class.

5.3 Indirect Purchasers and “Passing-On” Defences

The law relating to civil damages claims is undeveloped in South Africa – with only two reported decisions. The underlying objective of damages claims, and the civil court’s determination of the quantum of damages, is to return the plaintiff to the position it would have been in were it not for the competition law infringement.

5.4 Admissibility of Evidence Obtained From Governmental Investigations/ Proceedings

As mentioned in **3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings**, the Tribunal has the discretion to accept as evidence any relevant oral testimony, document or article – whether or not it is given or proven under oath or affirmation or even admissible as evidence in court.

5.5 Frequency of Completion of Litigation

As discussed in **5.3 Indirect Purchasers and “Passing-On” Defences**, only two decisions regarding civil damages claims in relation to cartels have been reported in South Africa.

5.6 Compensation of Legal Representatives

Costs are awarded at the discretion of the court and are typically awarded to the successful party.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

Please refer to **5.6 Compensation of Legal Representatives**.

5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

Decisions of the civil courts in relation to civil damages claims may be appealed or reviewed in accordance with the High Court uniform rules.

- identify and mitigate conduct that may be anti-competitive; and
- encourage competition through greater participation of SMEs and historically disadvantaged persons.

Other recent guidelines include:

6. Supplementary Information

6.1 Other Pertinent Information

There are no other items of information that are relevant to understanding the process, scope and adjudication of claims involving alleged cartel conduct in South Africa.

- the guidelines on collaboration between competitors on localisation initiatives;
- the final guidelines on local procurement in the implementation of the South African Value Chain Sugarcane Master Plan to 2030;
- final guidelines on small merger notifications, which propose that certain small mergers in digital markets be notifiable; and
- a guide on promoting competition in public procurement.

6.2 Guides Published by Governmental Authorities

The Commission issues guidelines from time to time; however, these are not binding on the Commission or the Tribunal. In July 2021, the Commission published the final guidelines for competition in the South African automotive aftermarket industry, thereby providing firms in the automotive sector with practical guidance on how to:

Most recently, the Commission published *Guidelines on the Exchange of Competitively Sensitive Information under the Competition Act*. These guidelines can be obtained from the Commission's [website](#).

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