

Fixing price fixing

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The Competition Commission in South Africa has been investigating allegations of price collusion in the food industry for several years, with specific focus on the wheat and maize milling industry and the bread and milk production industries.

The investigations extend not only to the producers of the finished food products, but also to producers and processors of raw materials. Therefore, in the bread production industry, the investigation has been extended not only to the millers but also to the storage of grain, trading and processing.

The Competition Commission believes that price fixing and collusion are significant factors that contribute to higher food prices.

In terms of the act

Section 4(1)(b)(i) of the Competition Act prohibits an agreement between, or concerted practice by, firms, or a decision by an association of firms, between parties in a horizontal relationship fix the purchase or selling price or trading condition directly or indirectly in a market. Firms are typically in a 'horizontal relationship' when they are at the same level in the supply chain, ie they would normally be competitors.

Collusive practices that would be considered to be in contravention of the act would include two or more firms agreeing to fix prices or divide markets, either by geographical areas or by categories of customers. Firms found guilty of collusion stand to be penalised by up to 10% of their annual turnover.

The 2006 bread collusion

In 2006, following an investigation into the bread production industry, Tiger Brands was fined approximately R100 million for colluding with certain other major bread producers. In addition, Tiger Brands and Premier Foods agreed to assist and provide information to the Competition Commission of other players in the industry who were involved in collusive activities, particularly price fixing. As a result, the Competition Commission investigated the maize and wheat industries. The Competition Commission's investigation revealed that a series of meetings took place around South Africa between 1999 and 2007. The cartel was operated by senior people within the various companies involved.

Earlier this year, the Competition Commission referred a complaint to the Competition Tribunal against Pioneer Foods, Foodcorp, Godrich Milling, Progress Milling, Pride Milling, Westra Milling, Brenner Mills, Blinkwater Mills, TWK Milling, NTK Milling, Carolina Mills, Kalel Foods, Bothaville Milling, Paramount Mills, Keystone Milling, Premier Foods and Tiger Brands for price fixing in the white maize industry. The Competition Commission alleged that in its investigations it ascertained that the above firms discussed pricing, agreed on price increases and the timing of such increases.



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They had discussed this at meetings and during telephone conversations. In addition, the commission referred a complaint to the Competition Tribunal against Pioneer Foods, Foodcorp trading as Ruto Mills, Godrich Milling, Premier Foods and Tiger Brands. The Competition Commission alleged that the above firms had engaged in price fixing and dividing markets by allocating customers. This was allegedly facilitated through secret meetings and telephone calls.

The 2005 dairy investigation

In February 2005, the commission launched an investigation into irregularities in the dairy industry and found evidence of price fixing for raw and processed milk, as well as evidence of the manipulation of the market to restrict competition, which included the exchange of information between competitors and market allocation. Dairy producers implicated in the alleged prohibited practices included Clover Industries, Clover SA, Parmalat, Ladismith Cheese, Woodlands Dairy, Nestlé SA and Milkwood Dairy.

In January, Lancewood Cheese agreed to pay a R100 000 penalty in respect of its participation in a cartel in the dairy industry. The fine represents less than 1% of Lancewood's annual turnover. The commission agreed to accept this (relatively) light penalty, in exchange for Lancewood's cooperation with the commission in the prosecution of the other dairy producers implicated in the alleged prohibited practices.

In all of the referrals, the commission has indicated that it is willing to settle the complaints if the firms involved come forward with information on cartel behaviour.

A potential cause for concern is that in all cases, some of the larger players, who appear to a large extent to have instigated and directed the collusive conduct, have received immunity from the commission for exposing the cartel, while

the smaller players, who were often unwilling participants and whose businesses received little or no benefit from their participation in the cartels, have remained liable to prosecution.

It is undoubtedly true that parties involved in cartels must be penalised, in order to deter them from participating in future. However, the commission and the tribunal need to act judiciously in determining whom to prosecute and what an appropriate penalty would be in each case. The fines imposed on the smaller companies, instead of achieving greater competition in the food industry, may have a negative affect on competition. First, the high penalty may drive the firm penalised out of business, thereby reducing competition in the relevant market.

Conversely, a high penalty may result in higher prices for consumers as the firm penalised attempts to recover its losses and continue to compete with its competitors and stay afloat.

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