



**International
Competition
Network**

**ANTI-CARTEL
ENFORCEMENT
TEMPLATE**

**CARTELS WORKING GROUP
Subgroup 2: Enforcement Techniques**

**Competition Commission of
South Africa**

30 JUNE 2015

ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning hardcore cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

1. Information on the law relating to cartels

A. Law(s) covering cartels:	Competition Act No. 89 of 1998 as amended http://www.compcom.co.za/wp-content/uploads/2014/09/pocket-act-august-20141.pdf (English)
B. Implementing regulation(s) (if any):	Competition Commission Rules http://www.compcom.co.za/the-competition-commission-rules/ (English) Competition Tribunal Rules http://www.compcom.co.za/the-competition-tribunal-rules/ (English) Competition Appeal Court Rules http://www.compcom.co.za/the-competition-appeal-court-rules/ (English)
C. Interpretative guideline(s) (if any):	There are no overarching interpretive guidelines relating to cartel conduct but there are guidelines for determination of penalties: http://www.compcom.co.za/wp-content/uploads/2014/12/Guidelines-for-Determination-of-Administrative-Penalties.pdf (English)
D. Other relevant materials (if any):	Corporate Leniency Policy http://www.compcom.co.za/corporate-lenieny/ (English)

2. Scope and nature of prohibition on cartels

<p>A. Does your law or case law define the term “cartel”?</p> <p>If not, please indicate the term you use instead.</p>	<p>The Competition Act does not define the term cartel but defines the term “restrictive horizontal practice”.</p> <p>“4 Restrictive horizontal practices prohibited</p> <p>(1) An <i>agreement</i> between, or <i>concerted practice</i> by, <i>firms</i>, or a decision by an association of <i>firms</i>, is prohibited if it is between parties in a <i>horizontal relationship</i> and if –</p> <p>(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the <i>agreement, concerted practice, or decision</i> can prove that any technological, efficiency or other procompetitive gain resulting from it outweighs that effect; or</p> <p>(b) it involves any of the following <i>restrictive horizontal practices</i>:</p> <p>(i) directly or indirectly fixing a purchase or selling price or any other trading condition;</p> <p>(ii) dividing markets by allocating customers, suppliers, territories, or specific types of <i>goods or services</i>; or</p> <p>(iii) collusive tendering.</p>
<p>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas¹) and other types of “cartels”?</p>	<p>Yes, the Competition Act makes a distinction between most egregious horizontal practices and other types of horizontal practices. Section 4(1)(b) deals with most egregious horizontal restrictive practices (namely price fixing, division of markets and collusive tendering) as per se prohibited. Accordingly there is not a requirement to show anticompetitive effects. Section 4(1)(a) on the other hand deals with other horizontal restrictive practices. There is a requirement to show anticompetitive effects in respect of these.</p>
<p>C. Scope of the prohibition of hardcore cartels:</p>	<p>There are no exclusions or defences available for hardcore cartels.</p>
<p>D. Is participation in a hardcore cartel illegal <i>per se</i>?</p>	<p>Cartels are per se illegal in South Africa.</p>
<p>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</p>	<p>It is a combination of administrative offence (in as far as the Competition Authorities can impose an administrative penalty) and a civil offence (in as far as private persons affected by the conduct can sue for damages in civil courts).</p>

¹ In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

3. Investigating institution(s)

A. Name of the agency, which investigates cartels:	The Competition Commission
B. Contact details of the agency:	<p>Telephone Number: +27 (012) 394-3200 / 3320</p> <p>Fax Number : +27 (012) 394 0166</p> <p>Email Address: ccsa@compcom.co.za</p> <p>Physical address: (click here for map)</p> <p>The Competition Commission, The DTI Campus, Mulayo (Block C), 77 Meintjies Street, Sunnyside, Pretoria</p> <p>Postal address: The Competition Commission, Private Bag x23, Lynwood Ridge, 0040</p>
C. Information point for potential complainants:	<p>Complainants can approach the Competition Commission at its offices or contact The Manager of Enforcement and Exemptions Division +27 (012) 394-0166 Email: ccsa@compcom.co.za</p> <p>The Manager of Enforcement and Exemptions, The Competition Commission The DTI Campus, Mulayo (Block C), 77 Meintjies Street, Sunnyside, Pretoria</p> <p>Postal address: The Competition Commission, Private Bag x23, Lynwood Ridge, 0040</p>
D. Contact point where complaints can be lodged:	Complaints can either be delivered by hand at the Competition Commission offices, posted or emailed to the above address.
E. Are there other authorities which may assist the investigating agency? If yes,	Investigation of Competition Law infringements can only be undertaken by the Competition Commission.

please name the authorities and the type of assistance they provide.

4. Decision-making institution(s)²

A. Name of the agency making decisions in cartel cases:	<p>The Competition Commission makes decisions on which cartels to refer to the Competition Tribunal for adjudication and the Competition Tribunal adjudicates and makes a decision on cartel matters referred to it.</p> <p>The decisions of the Competition Tribunal are appealable to the Competition Appeal Court.</p>
B. Contact details of the agency:	<p>The Competition Tribunal of South Africa, 3rd Floor, Mulayo, the dti Campus, 77 Meintjes Street, Sunnyside, Pretoria Postal address Directions (click for a better view)</p> <p>Private Bag X24 Sunnyside 0132</p> <p>E-mail address ctsa@comptrib.co.za</p> <p>Web address http://www.comptrib.co.za</p> <p>Telephone Number +27 (12) 394 3300</p> <p>Fax Number +27 (12) 394 0169</p>
C. Contact point for questions and consultations:	<p>The Registry, Competition Tribunal +27 (12) 394 3300</p>
D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.	<p>If the Competition Commission did not receive a formal complaint it must firstly formally initiate a complaint in the prescribed form.</p> <p>After initiating a complaint or on receipt of a formal complaint, the Competition Commission must investigate the complaint.</p> <p>At the end of the investigation the Competition Commission must either refer the complaint to the Competition Tribunal for adjudication or non-refer the complaint.</p> <p>The Competition Commission must prosecute the complaint before the Competition Tribunal.</p>
E. What is the role of the	<p>There are currently no criminal proceedings in South Africa for</p>

² Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

investigating agency if cartel cases belong under criminal proceedings?	cartel conduct .
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5. Handling complaints and initiation of proceedings

A. Basis for initiating investigations in cartel cases:	<p>There are many basis for initiating investigations such as:</p> <p>Ex officio investigations arising from information received from informants, leniency application and information from other investigations such as mergers and market enquiries.</p> <p>Investigations of cartels also ensue from formal complaints received from any person.</p>
B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)?	<p>There is a requirement to complete complaint Form CC1 http://www.compcom.co.za/wp-content/uploads/2014/09/CC1-Complaint-Form.pdf (English)</p>
C. Legal requirements for lodging a complaint against a cartel:	<p>There are no legal requirements for lodging a cartel complaint.</p>
D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect?	<p>The Competition Commission is obliged to review all complaints and to decide whether or not to open the investigation.</p>
E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?	<p>Yes, the Competition Commission is required to adopt a decision not to investigate and to non-refer the complaint.</p>
F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?	<p>The Competition Commission has one year within which to refer a complaint or to adopt a decision to non-refer.</p>

6. Leniency policy³

³ For the purposes of this template the notion of ‘leniency’ covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like ‘leniency’ ‘amnesty’ and ‘immunity’ are considered as synonyms.

A. What is the official name of your leniency policy (if any)?	Corporate Leniency Policy (CLP) http://www.compcom.co.za/corporate-lenency/ (English)
B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?	Our jurisdiction only offers full immunity to the leniency applicant that meets the Corporate Leniency Policy requirements. Other persons can obtain lenient penalties from cooperating with the Competition Commission and settling.
C. Who is eligible for full leniency?	Only the first one to come forward provided he/she meets all the requirements of the Corporate Leniency Policy.
D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation? In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?	Leniency could be granted even after the Competition Commission has information about a cartel provided that such information is insufficient to successfully prosecute the cartel members and the leniency applicant provides sufficient information to do so.
E. Who can be a beneficiary of the leniency program (individual / businesses)?	Any member of the cartel can benefit from the leniency program. South Africa does not have legislation which targets individuals for cartel conduct, accordingly only businesses can benefit from the leniency program.
F. What are the conditions of availability of full leniency:	Full disclosure of evidence of cartelisation, evidence must be sufficient for the Competition Commission to institute proceedings in relation to the cartel, full, expeditious and continuous cooperation with the Competition Commission, cessation of cartel activity, non-disclosure of other cartel members of application for immunity, no concealing, destruction, falsification or misrepresentation of information.
G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment):	There is no partial immunity in South Africa but persons that do not qualify for leniency can approach the Competition Commission for settlement which can entitle them to a lenient penalty.
H. Obligations for the beneficiary after the leniency application has been accepted:	The leniency applicant must provide full, expeditious and continuous cooperation with the Competition Commission.
I. Are there formal requirements to make a leniency application?	The applicant can apply to the Competition Commission to make an application for leniency orally. However, evidence documentary of the cartel in the possession of the leniency applicant must be provided.
J. Are there distinct procedural steps within the leniency	Yes, e.g. an applicant can place a marker which he can subsequently perfect by full leniency application. The Commission has a discretion to grant conditional leniency.

program?	
K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?	At any time during the cartel proceedings.
L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?	The Competition Commission's executive committee makes a decision on whether or not to grant leniency.
M. Does your legislation have a marker system? If yes, please describe it.	The Corporate Leniency Policy makes provision for a marker system. See section 12 of the Corporate Leniency Policy: http://www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-120520081.pdf
N. Does the system provide for any extra credit⁴ for disclosing additional violations?	Disclosure of a hardcore cartel in another market can entitle one to immunity in respect of that particular market provided there is no existing leniency applicant. In addition, as an indication of co-operation with the Competition Commission, disclosure of another cartel can serve as mitigating factor when the ultimate penalty is determined in settlements.
O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.	Yes, as a practical consideration the Competition Commission considers keeping the identity of the beneficiary confidential to assist in its investigation of the cartel.
P. Is there a possibility of appealing an agency's decision rejecting a leniency application?	Decisions of the Competition Commission, including the decision whether or not to grant leniency, are reviewable by the Competition Tribunal.
Q. Contact point where a leniency application can be lodged:	The Manager: Cartels Division +27 (012) 394-0166 Email: ccsa@compcom.co.za The Manager: Cartels Division, The Competition Commission The DTI Campus, Mulayo (Block C), 77 Meintjies Street, Sunnyside, Pretoria Postal address: The Competition Commission, Private Bag x23, Lynwood Ridge,

⁴ Also known as: "leniency plus", "amnesty plus" or "immunity plus". This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

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R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?	<p>Yes.</p> <p>Revocation can occur at any time in respect of conditional immunity.</p> <p>Conditional immunity will be revoked in writing.</p> <p>Revocation will occur in the event of failure by the applicant to meet the conditions for immunity.</p>
S. Does your policy allow for “affirmative leniency”, that is the possibility of the agency approaching potential leniency applicants?	<p>There is neither a prohibition nor specific allowance for affirmative leniency in the Corporate Leniency Policy.</p>

7. Settlement

A. Does your competition regime allow settlement? If yes, please indicate its public availability!	<p>Yes, there are no publically available settlement guidelines.</p>
B. Which types of restrictive agreements are eligible for settlement?	<p>All types of agreements are eligible for settlement including hardcore cartels.</p>
C. What is the reward of the settlement for the parties?	<p>Lenient/reduced penalty</p>
D. May the reduction for settling be cumulated with a leniency reward?	<p>Settlement and leniency in terms of Corporate Leniency Policy are distinct processes.</p>
E. List the criteria (if there is any) determining the cases which are suitable for settlement.	<p>All cases are eligible for settlement.</p>
F. Describe briefly the system!	<p>The authority or the parties can initiate settlement. There is no obligation to settle and settlement can take place at any stage of the investigation.</p>
F. Describe the procedural efficiencies of your settlement system!	<p>Settlements avoid lengthy investigation periods and Competition Tribunal hearings.</p>
G. Does a settlement necessitate that the parties acknowledge their liability for the violation?	<p>Yes</p>
H. Is there a possibility for settled parties to appeal a settlement decision at court?	<p>Settlements entail agreements between the parties and the authority and there is no undue influence exerted on either side. Accordingly, even though there is nothing preventing</p>

	appeal of settlement decisions in court, such an eventuality is rare at best.
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8. Commitment

<p>A. Does your competition regime allow the possibility of commitment?</p> <p>If yes, please indicate its public availability!</p>	<p>Yes, there is no guidelines on remedies for cartel conduct and guidance is sought from decisional practice.</p>
<p>B. Which types of restrictive agreements are eligible for commitment?</p> <p>Are there commitments which are excluded from the commitment possibility?</p>	<p>All restrictive agreements are eligible for commitment.</p>
<p>C. List the criteria (if there is any) determining the cases which are suitable for commitment.</p>	<p>There is no specific criteria for commitment.</p>
<p>D. Describe, which types of commitments are available under your competition law!</p>	<p>Commitment to cease cartel conduct which could entail entry into the markets which were subject of market allocation.</p>
<p>E. Describe briefly the system!</p>	<p>Commitments to cease cartel conduct are normally required by the authority. Other commitments can be initiated by either party depending on the circumstances of each case.</p>
<p>I. Does a commitment decision necessitate that the parties acknowledge their liability for the violation?</p>	<p>Yes</p>
<p>J. Describe how your authority monitors the parties' compliance to the commitments.</p>	<p>Parties could be required to provide reports on a regular basis.</p>
<p>K. Is there a possibility for parties to appeal a commitment decision at court?</p>	<p>The parties could appeal decisions of the Competition Commission.</p>

9. Investigative powers of the enforcing institution(s)⁵

<p>A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids⁶, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</p>	<p>Information requests Summons of information Summons of individuals Search and seizure Interviews Interrogations</p>
<p>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</p>	<p>Search and seizure can occur at any premises where it is suspected that evidence of the contravention is located and there should be authorization by courts to search any premises.</p>
<p>C. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?</p>	<p>Only evidence falling under the scope of the investigation as set out in the warrant may be seized. However, this does not prevent accidental seizure of information not related to the scope of the warrant.</p>
<p>D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</p>	<p>Not aware of any challenges.</p>

10. Procedural rights of businesses / individuals

<p>A. Key rights of defence in cartel cases:</p>	<p>These are protected subject to non-disclosure of confidential information. Only in extreme instances will confidential information be disclosed, but even in those circumstance only to a limited number of persons mainly the parties' legal representatives.</p>
<p>B. Protection awarded to business secrets (competitively sensitive information): is there a</p>	<p>Yes, see 10 A above. Confidential information is protected irrespective of how it was made available to the Competition Commission provided a confidentiality claim in the prescribed form is lodged.</p>

⁵ "Enforcing institutions" may mean either the investigating or the decision-making institution or both.

⁶ "Searches/raids" means all types of search, raid or inspection measures.

difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation?	
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11. Limitation periods and deadlines

A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision in the merits of the case must be made?	Three (3) years
B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision in the merits?	<p>There is a statutory period of one (1) year within which to complete the investigation which arises from a formal complaint lodged by a third party. This period can be extended by further one year period on consent by the complainant or decision of the Competition Tribunal.</p> <p>There is no statutory deadline for investigations initiated by the Competition Commission.</p>
C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions?	There are no statutory periods within which to challenge the commencement or completion of investigations or the decision regarding sanctions.

12. Types of decisions

A. Please list which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1.	Finding of an infringement, ordering to bring the infringement to an end and imposition of fines.
B. Please list which types of decisions on the merits of the case can be made in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 10/A).	Behavioural remedies could be ordered such as support to small and medium enterprises.

<p>C. Can interim measures⁷ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both⁸.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</p>	<p>Interim measures could be ordered by the Competition Commission to a leniency applicant such as non-disclosure of the leniency application.</p>
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13. Sanctions for procedural breaches (non-compliance with procedural obligations)⁹

<p>A. Grounds for the imposition of procedural sanctions / fines:</p>	<p>There are no separate sanctions for procedural breaches but non-co-operation provides grounds for the imposition of higher merits penalties.</p>
<p>B. Type and nature of the sanction (civil, administrative, criminal, combined):</p>	<p>Administrative. A criminal charge of perjury could be brought for intentional provision of false information to the Competition Tribunal or when placed during the investigation.</p>
<p>C. On whom can procedural sanctions be imposed?</p>	<p>On the business and on individuals in respect of perjury charges.</p>
<p>D. Criteria for determining the sanction / fine:</p>	<p>As noted, there is no separate sanctioning of procedural breaches in the Competition Act but procedural breaches will be taken into account in the determination of the penalty on the merits. For example, the extent of co-operation with the authority is a consideration in the determination the merits penalty.</p>
<p>E. Are there maximum and / or minimum sanctions / fines?</p>	<p>Maximum merits sanction is 10% of annual turnover of the party concerned in the preceding financial year. Again note that this is not a separate fine from the merits fine.</p>

⁷ In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case.

⁸ Only for agencies which answered “yes” to question 2.C. above

⁹ In some jurisdictions non-compliance with procedural obligations (e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.) can be sanctioned.

14. Sanctions on the merits of the case

<p>A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):</p> <p>On whom can sanctions be imposed?</p>	<p>The Competition Act provides for an administrative penalty on the businesses, association of companies and individual companies.</p> <p>While the amendment to the Competition Act to provide for criminalisation of cartel conduct was enacted by Parliament in 2009, the provisions relating to the criminalisation of cartel conduct have not yet come into force through proclamation by the President.</p>
<p>B. Criteria for determining the sanction / fine:</p>	<p>a) the nature, duration, gravity and extent of the contravention;</p> <p>(b) any loss or damage suffered as a result of the contravention;</p> <p>(c) the behaviour of the <i>respondent</i>;</p> <p>(d) the market circumstances in which the contravention took place;</p> <p>(e) the level of profit derived from the contravention;</p> <p>(f) the degree to which the <i>respondent</i> has cooperated with the Competition Commission and the Competition Tribunal; and</p> <p>(g) whether the <i>respondent</i> has previously been found in contravention of <i>this Act</i>.</p>
<p>C. Are there maximum and / or minimum sanctions / fines?</p>	<p>The maximum merits penalty is 10% of annual turnover.</p>
<p>D. Guideline(s) on calculation of fines:</p>	<p>Yes, Guidelines for Determination of Administrative Penalties http://www.compcom.co.za/wp-content/uploads/2014/12/Guidelines-for-Determination-of-Administrative-Penalties.pdf (English)</p>
<p>E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?</p>	<p>Yes, it is not necessary to apply for suspension separately.</p>

15. Possibilities of appeal

<p>A. Does your law provide for an appeal from a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of</p>	<p>Yes, grounds of appeal include questions of law or fact and breaches of procedural requirement.</p>
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law or fact or breaches of procedural requirements?	
B. Before which court or agency should such a challenge be made?	The challenge of the Competition Commission's decision can be made in the Competition Tribunal. The challenge of the Competition Tribunal decision can be made in the Competition Appeal Court.