

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 115/CR/Dec05

In the matter between:

The Competition Commission

Applicant

and


Nissan South Africa (Pty) Ltd

Respondent

Order

Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent.



N. Manojm

22 December 2005
Date

Concurring: L Reyburn, M Mokuena

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Held at Pretoria

CT Case No.:
CC Case No.:2004Apr951

In the matter between:

The Competition Commission

Applicant

and

Nissan South Africa (Pty) Ltd

Respondent

**AGREEMENT
BETWEEN THE COMPETITION COMMISSION AND THE RESPONDENT
ON THE TERMS OF AN APPROPRIATE CONSENT ORDER
in terms of section 49D of the Competition Act, 1998
(Act No. 89 of 1998), as amended**

The Competition Commission ("Commission") and Nissan South Africa (Pty) Ltd ("Nissan"), being a Respondent in Competition Commission Case No. 2004Apr951 hereby agree that application be made by the Commission to the Competition Tribunal for a consent order in terms of section 49D of the Competition Act No. 89 of 1998, as amended, on the terms set out below.

1. DEFINITIONS

For the purposes of this agreement and any consent order pursuant hereto, the following definitions shall apply unless otherwise stated or the context otherwise requires:

- 1.1 "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;



- 1.2 “*Commission*” means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.3 “*Tribunal*” means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.4 “*Complaint*” means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2004Apr951;
- 1.5 “*Consent Order Agreement*” means this agreement duly signed and concluded between the Commission and the Respondent;
- 1.6 “*Respondent*” means Nissan South Africa (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at stand 56, Ernest Oppenheimer Street, Rosslyn, Pretoria, Gauteng (hereafter referred to as “Nissan”).



2. BACKGROUND

- 2.1 During April 2004, following an investigation by the Commission in respect of alleged minimum resale price maintenance, Toyota South African Motors (Pty) Ltd ("Toyota") and the Commission concluded a consent order agreement whereby Toyota, *inter alia* agreed to pay an administrative penalty of R12 million.
- 2.2 Thereafter and during April 2004, the Commission commenced an industry-wide investigation in the motor industry to ascertain whether certain prohibited practices were taking place. The Commission summonsed Nissan and certain of its dealers to provide it with certain documentation and to appear in person.
- 2.3 The Commission's investigation encompassed the following:
- 2.3.1 The fixing of prices and/or trading conditions by Manufacturers / Importers and/or Dealers, a contravention of Section 4(1)(b) of the Act;
- 2.3.2 Agreements between Manufacturers / Importers and their Dealers containing restrictions that have the effect of substantially lessening or preventing competition in the market, a contravention of Section 5 (1) of the Act.
- 2.3.3 Minimum resale price maintenance imposed by Manufacturers / Importers on Dealers, alternatively minimum resale price maintenance by agreement between the Manufacturers / Importers and their Dealers, a contravention of Section 5 (2) of the Act; and
- 2.3.4 Excessive pricing by Manufacturers / Importers which are dominant in their respective markets, a contravention of Section 8 (a) of the Act.
- 2.4 As a result of the Commission's complaint, Nissan undertook a comprehensive audit of all of its agreements, practices and



procedures that might have been affected by the provisions of the Act.

- 2.5 Shortly thereafter Nissan, without admitting liability, brought to the attention of the Commission certain provisions in its so-called Fleet Sales Policy that the Commission may have regarded as a minimum resale price maintenance practice.

3. COMMISSION'S INVESTIGATION

Pursuant to its investigation the Commission arrived at the following conclusions:

- 3.1 Nissan sells its motor vehicles through a network of approximately 122-franchised dealerships in South Africa, Botswana, Lesotho and Swaziland.
- 3.2 A vertical relationship as contemplated in section 1 of the Act exists between Nissan and its dealers.
- 3.3 The relationship between Nissan and its dealers is governed by, amongst others, agreements in terms of which Nissan grants individual dealers a non-exclusive franchise to conduct a Nissan dealership within a geographical territory.
- 3.3 The Dealer Agreements are amended and/or supplemented, from time to time, by policies and procedures that are invoked by Nissan, which may provide measurable requirements, against which dealers are awarded rebates and/or financial support.
- 3.4 Nissan from time to time publishes and circulates to its dealers a "recommended price list" or price structure in relation to various models of Nissan motor vehicles.



- 3.5 Dealer bulletins are published from time to time dealing with issues applicable to dealers. In particular, a policy on fleet sales was published which provided, *inter alia*, for recommended maximum discounts per derivative of vehicle and per category of fleet customer.
- 3.6 In terms of the Fleet Sales Policy at that time, rebates were paid to dealers as incentives to support dealer profitability and dealer fleet sales and marketing efforts. These rebates were however payable subject to adherence to Nissan's fleet sales policy, as well as other relevant criteria reflected in bulletins and communications issued by Nissan. In the case of fleet sales, unless otherwise agreed with Nissan, should a dealer have granted a discount in excess of the maximum discount off Nissan's recommended retail prices, the dealer would have, in terms of the Fleet Sales Policy, forfeited the rebate which it would otherwise have received from Nissan.
- 3.7 Nissan conducted regular audits on randomly selected fleet deals. Over-discounting by dealers was noted in the audit reports.
- 3.8 Nissan stopped the above conduct during May 2004, as soon as it became aware that the *Commission* was of the view that its conduct contravened the Act.

4. RELEVANT PROVISIONS OF THE ACT

Section 5(2) prohibits the practice of minimum resale price maintenance. Section 5 of the Act states:

"5. Restrictive Vertical Practices Prohibited:



- 1) *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.*
- 2) *The practice of resale price maintenance is prohibited.*
- 3) *Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –*
 - (a) *the supplier or producer makes it clear to the reseller that the recommendation is not binding;*
 - and*
 - (b) *if the product has its price stated on it, the words “recommended price” appear next to the stated price”*

5. COMMISSION'S FINDINGS

5.1 The Commission is of the view that conduct referred to in paragraph 3 above amounts to minimum resale price maintenance prohibited by section 5(2) of the Act, in that:

5.1.1 the Fleet Sales Policy provided for the payment of fleet sales rebates to only those dealers that did not give a discount that was greater than the published maximum discount;

5.1.2 Nissan conducted audits on its dealership network and monitored adherence to the Fleet Sales Policy; and



5.1.3 adherence to the Fleet Sales Policy was enforced by Nissan withholding or threatening to withhold rebates from those dealers who did not comply with its prescribed price parameters in the case of fleet sales.

5.2 The Commission is further of the view that various restrictions by Nissan on its dealership network, contained in its franchise agreements, constitute prohibited vertical restrictive practices in contravention of section 5(1) of the Act. The Commission has however decided not to refer this alleged contravention to the Tribunal as it was agreed that this would be addressed by the compliance programme that Nissan will institute in terms of this agreement.

5.3 In regard to the other possible contraventions of the Act which were the subject of investigation, the Commission has decided not to proceed with any referral to the Tribunal.

6. AGREEMENT CONCERNING CONDUCT

It is recorded that Nissan does not admit having contravened the Act. Nevertheless, Nissan has taken steps to bring to an end the conduct regarded by the Commission as being in contravention of the Act.

The Commission and Nissan agree that Nissan shall:

- 6.1 not impose a maximum discount structure in respect of fleet sales;
- 6.2 take all reasonable steps to procure that the Nissan dealers terminate their part in implementing the alleged anti-competitive conduct;



- 6.3 not itself or through any officer or employee of Nissan or any person authorised to act on behalf of Nissan notify to dealers, or otherwise publish in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of any Nissan products, and shall not recommend any minimum resale price for such products other than as expressly provided for in section 5(3) of the Act;
- 6.4 refrain in the future from engaging in any of the alleged unlawful conduct in its dealing with its dealers;
- 6.5 circulate to all its dealers within one month from the date of this agreement being confirmed as a consent order by the Tribunal, a statement conveying the substance of the consent order and advising them:
 - 6.5.1 that they are free to sell and display for sale goods supplied by Nissan at whatever price they may choose;
 - 6.5.2 that Nissan does not in any way condone and positively discourages agreement between dealers as to the prices to be charged or quoted for goods supplied by Nissan;
 - 6.5.3 that Nissan will not be party to, or in any way support agreement between dealers as to the prices to be charged or quoted by the dealers for goods supplied by Nissan;
- 6.6 provide copies of this consent order to each of its present directors and during the five-year period following the confirmation of the order provide a copy to any future director on his or her appointment and in each case draw the attention of the director to the content of the order;
- 6.7 institute, within twelve months from the date of this order, a compliance programme designed to ensure that employees and dealers are informed about Nissan's obligations under



competition law and the existence and substance of this consent order;

6.8 submit its compliance programme to the Commission, which programme will include, but not be limited to, a review of Nissan's franchise agreements and establishing a mechanism for dealers and/or consumers to report any contraventions of the Act;

6.9 require its employees to comply with the substance of this consent order and take appropriate disciplinary action against any employee who fails to do so.

7. ADMINISTRATIVE PENALTY

7.1 In accordance with the provisions of section 58(1)(a)(iii) read with section 59(1)(a), 59(2) and (3) of the Act, Nissan has agreed to pay an administrative penalty in the amount of R6 000 000, 00 (SIX MILLION RANDS) in settlement of any contravention of Section 5 (2) of the Act, in relation to the period from 1 September 1999 to the date of signature hereof. Nissan records that the amount does not exceed 10% of its annual turnover during the preceding financial year.

7.2 The administrative penalty will be paid not later than thirty (30) business days after the confirmation of this agreement as a Consent Order by the Tribunal.

7.3 The penalty amount is to be paid directly to the Commission whose banking details are as follows:

Bank: ABSA

Name of Account: The Competition Commission Fees

Branch Name: Pretoria

Branch Code: 323345



Account Number: 4050778576

- 7.4 The Commission will pay over the penalty amount to the National Revenue Fund, referred to in Section 59(4) of the Act.

8. FULL AND FINAL SETTLEMENT

This Agreement, upon confirmation by the Competition Tribunal, concludes proceedings between the Commission and Nissan under Commission Case Number 2004Apr951.

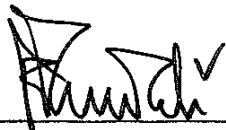
9. EFFECT

Nissan records that nothing in this consent order agreement amounts to an admission of liability on its part.

10. VARIATION

No contract varying, adding to, deleting from or canceling this agreement, and no waiver of any right under this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.

Dated and signed at Pretoria on the 30th day of November 2005.



Julio Panama
Managing Director
Nissan South Africa (Pty) Ltd



22 November 2005

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Dated and signed at Pretoria on the ^{7th} day of ^{December} ~~November~~ 2005.



Shan Ramburuth
Acting Commissioner
Competition Commission