

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 115/CR/Dec05

In the matter between:

The Competition Commission

Applicant

and

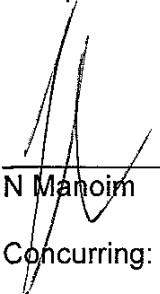
Appointed Dealers of Subaru SA Represented by
the Subaru Dealer Council

Respondents

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 respondents.



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

**Appointed dealers of Subaru South Africa (Proprietary) Limited,
Represented by the Dealer Council of Subaru South Africa (Proprietary)
Limited**

Respondents

**AGREEMENT
BETWEEN THE COMPETITION COMMISSION AND THE RESPONDENTS 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 the appointed dealers of Subaru South Africa (Proprietary) Limited, represented by the Dealer Council of Subaru South Africa (Proprietary) Limited, being the Respondents 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;



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- 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 Respondents;
- 1.6 "*Respondents*" means individual entities which have concluded dealership agreements with Subaru South Africa (Pty) Ltd ("Subaru"), and constitute the dealership network through which Subaru sells and distributes its motor vehicles in the Republic of South Africa;
- 1.7 "*Subaru Dealer Council*" means the Dealer Council of Subaru South Africa (Proprietary) Limited.

2. BACKGROUND

- 2.1 During April 2004, following an investigation by the Commission in respect of alleged 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 under Commission Case Number 2004Apr951 an industry-wide investigation in the motor industry to ascertain whether certain prohibited practices were taking place. The Commission summonsed Subaru 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 Agreement 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.

3. COMMISSION'S INVESTIGATION

Pursuant to its investigation the Commission reached the following conclusions:

- 3.1 The respondents are in a horizontal relationship;
- 3.2 The respondents, through their dealer council, held meetings from time to time to discuss *inter alia*, parts pricing; vehicle pricing; discounting procedures and dealer margins;
- 3.3 An agreement, alternatively, a concerted practice, further alternatively, an arrangement had previously existed between them relating, *inter alia*:
 - 3.3.1 To fixing selling prices of motor vehicles;
 - 3.3.2 Not allowing discount on Forester's or STIs or new WRX;
 - 3.3.3 Not allowing discounts on telephonic requests for quotations;
 - 3.3.4 Allowing a maximum discount of 2.5% for customers actually visiting the dealership for a quotation;
 - 3.3.5 Not allowing out of area discounting; and
- 3.4 Respondents stopped the above conduct in March 2004 shortly before the Commission initiated its investigations.

4. RELEVANT PROVISIONS OF THE ACT

Section 4(1)(b) prohibits the restrictive horizontal practice. Section 4(1)(b) of the Act states:

"4 Restrictive Horizontal Practices Prohibited:

1) An agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-

a)....

b) it involves any of the following restrictive horizontal practices:

i) directly or indirectly fixing a purchase or selling prices or any other trading condition;

ii)...."

5. COMMISSION'S FINDINGS

5.1 The Commission is of the view that conduct referred to in paragraph 3 above amounts to a prohibited practice by section 4(1)(b) of the Act in that there was an agreement between the respondents to fix the selling prices of Subaru motor vehicles.

5.2 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 the respondents and the Subaru Dealer Council do not admit having contravened the Act. Nevertheless, the respondents and the Subaru Dealer Council have taken steps to bring to an end the conduct regarded by the Commission as a contravention of the Act.

The Commission and the respondents represented by the Subaru Dealer Council agree that the respondents and the Subaru Dealer Council shall:

- 6.1 not agree on a maximum discount structure or selling prices on any motor vehicle or Subaru products;
- 6.2 not through any officer or employee of the Subaru Dealer Council or any person authorised to act on behalf of Subaru Dealer Council notify to dealers, or otherwise publish in relation to any goods, a price stated or calculated to be understood as the maximum discount or the selling prices which may be charged on the sale of any Subaru motor vehicles or Subaru products;
- 6.3 refrain in the future from engaging in any of the alleged unlawful conduct in conducting their business;
- 6.4 circulate to all dealers within one month from the date of this Consent Order Agreement being confirmed as a consent order by the Tribunal, a statement conveying the substance of the consent order and advising them:
 - 6.4.1 that they are free to sell and display for sale of goods supplied by Subaru at whatever price they may choose;
 - 6.4.2 that the Subaru Dealer Council 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 Subaru;

- 6.5 institute, within twelve months from the date of confirmation of this Consent Order Agreement, a compliance programme designed to ensure that respondents are informed about their obligations under Competition Law and the existence and substance of this Consent Order Agreement; and
- 6.6 submit its compliance programme to the Commission within twelve months from the date of confirmation of this Consent Order Agreement.

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, the respondents have agreed to pay jointly and severally, an administrative penalty in the amount of R500 000 00 (FIVE HUNDRED THOUSAND RANDS) in settlement of any contravention of the Act in relation to the period from 1 September 1999 to date of signature hereof. It is recorded that the amount does not exceed 10% of the combined turnovers of the respondents 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 Consent Order Agreement as a Consent Order by the Tribunal.
- 7.3 The penalty amount is to be paid 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 Consent Order Agreement, upon confirmation by the Tribunal, concludes proceedings between the Commission, the respondents, the Subaru Dealer Council and Subaru under Commission Case Number 2004Apr951 in respect of all the conduct and complaints alleged therein and constitutes a full and final settlement of any and all disputes, claims, liabilities, concerns, issues and matters of whatever nature and howsoever arising between, on the one hand, the Commission and, on the other hand, the respondents, the Subaru Dealer Council and Subaru as a result of or in connection with the Commission's findings referred to in 5 and the entire subject matter of its investigation under Commission Case number 2004Apr951.

9. EFFECT

The respondents, the Subaru Dealer Council and Subaru record that nothing in this Consent Order Agreement amounts to an admission of liability and/or wrongdoing on their part.

10. VARIATION

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

Dated and signed at *PIETERMARITZBURG* on the *30TH* day of *NOVEMBER* 2005.



Howard Christie
Chairperson
Dealer Council of Subaru South Africa (Proprietary) Limited

Dated and signed at Pretoria on the *7th* day of *December* 2005.



Shan Ramburuth
Acting Commissioner
Competition Commission