

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 115/CR/Dec05

In the matter between:

The Competition Commission

Applicant

and

Volkswagen South Africa (Pty) Ltd

1st Respondent

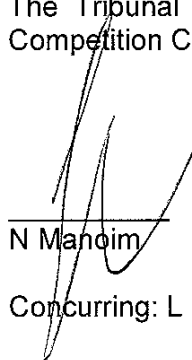
Gauteng Volkswagen Franchised Dealers
duly represented by Gauteng Dealer Council

2nd 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 respondents.



N Mandoim

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

Volkswagen South Africa (Pty) Ltd

First Respondent

**Gauteng Volkswagen Franchised Dealers duly
represented by the Gauteng Dealer Council**

Second Respondent

**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**

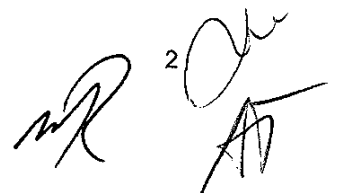
The Competition Commission ("Commission") and Volkswagen South Africa (Pty) Ltd ("VWSA") and the Gauteng Volkswagen Franchised Dealers duly represented by the Gauteng Dealer Council ("Dealer Council"), being Respondents in Competition Commission Case No. 2004Apr951 hereby agree that application be made 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;
- 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 Volkswagen South Africa (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its registered office alternatively its principal place of business at 103 Algoa Road, Uitenhage, South Africa and authorized Volkswagen and Audi

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Franchise Dealers in Gauteng, duly represented by the Gauteng Dealer Council.

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 VWSA and certain of its dealers to provide it with certain documentation and to appear in person.
- 2.3 The Commission's investigation under case number 2004Apr951 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 preventing or lessening competition in the market, a contravention of Section 5(1) of the Act;
- 2.3.3 Minimum retail price maintenance imposed by Manufacturers / Importers on Dealers, alternatively minimum resale price maintenance by agreement between Manufacturers /

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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 this initiative undertaken by the Commission and meetings between members of the Commission, VWSA and Dealer Council, VWSA and Dealer Council provided all the information/documentation requested by the Commission.

3. COMMISSION'S INVESTIGATION

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

- 3.1 VWSA sells its new motor vehicles through a network of approximately -148 franchised dealerships countrywide.
- 3.2 A vertical relationship as contemplated in section 1 of the Act exists between VWSA and its dealerships.
- 3.3 The relationship between VWSA and its dealers is governed by, amongst others, agreements in terms of which VWSA grants individual dealers a non-exclusive franchise to sell products supplied by VWSA within a geographical territory.
- 3.4 VWSA from time to time determines, publishes and circulates to its dealers a recommended retail price list for new VW motor vehicles. The recommended retail price list is circulated to, and is used by, all the authorised dealers countrywide.

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- 3.5 The authorised dealers of VWSA belong to Dealer Councils. There is a National Dealer Council which comprises representatives elected by the VWSA authorised dealers. It has a National Chairperson. There are also various Dealer Advisory Councils in the Provinces. The Dealer Advisory Councils send representatives to the National Dealer Council.
- 3.6 At Gauteng Dealer Council meetings representatives of the authorised dealers and VWSA discussed maximum discounts that authorised dealers should offer on certain new VW motor vehicles. It was further agreed between authorised dealers in Gauteng and VWSA that no discount should be given on Polo which was launched during 2002. Minutes of the meetings recording the above discussions were circulated to VWSA Marketing Management.
- 3.7 VWSA also received complaints from certain dealers relating to the failure of other dealers to adhere to the limits on discounting discussed at certain Gauteng Dealer Council meetings whereafter it addressed communications to its dealers querying and requesting explanations for the discounts.

4. RELEVANT PROVISIONS OF THE ACT

- 4.1 Section 4(1)(b)(i) prohibits restrictive horizontal practices which directly or indirectly fix a purchase or selling price, or any other trading condition

Section 4(1) of the Act states:

"4. *Restrictive horizontal practices prohibited.*

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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 price or any other trading condition;

ii..."

4.2 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)..."

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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 between VWSA and its dealers prohibited by section 5(2) and price fixing between VWSA Gauteng dealers prohibited by section 4(1)(b)(i) of the Act in that:

5.1.1. there was an agreement between both the Gauteng dealers themselves and the Gauteng dealers and VWSA regarding the price at which the dealers should on-sell certain vehicles.

5.1.2. the understanding was monitored by certain Dealers who reported non-compliance to VWSA who then queried the discounts.

5.2 The Commission is further of the view that various restrictions by VWSA 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 VWSA will institute in terms of the 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.

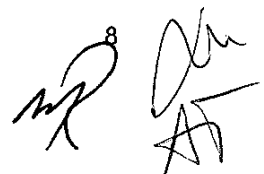
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6. AGREEMENT CONCERNING CONDUCT

VWSA and the Gauteng Dealer Council have taken steps to bring to an end the conduct regarded by the Commission as contraventions or possible contraventions of the Act.

The Commission and VWSA agree that VWSA shall:

- 6.1 not impose a maximum discount structure in respect of new vehicle sales;
- 6.2 to take all reasonable steps to procure that VWSA dealers terminate their part in implementing the alleged anti-competitive conduct as set out in paragraph 3.
- 6.3 not itself or through any officer or employee of VWSA or any person authorised to act on behalf of VWSA 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 VWSA products, and shall not recommend any maximum discounts 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 conduct with its dealers which may contravene the Act.
- 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 of goods supplied by VWSA at whatever price they may choose;



- 6.5.2 that VWSA 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 VWSA;
- 6.5.3 that VWSA 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 VWSA.
- 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 VWSA'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 VWSA'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.

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The Commission and the Gauteng dealers agree that the Dealer Council and Gauteng dealers shall:

6.10 cease and desist from engaging in any restrictive horizontal practice that may involve directly or indirectly fixing a selling price.

6.11 not through any officer or employee of the Dealer Council or any person authorised to act on behalf of 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 selling prices which may be charged on the sale of any motor vehicles or Volkswagen products.

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, VWSA and the Gauteng Dealer Council have agreed to pay jointly and severally, an administrative penalty in the amount of R5 000 000, 00 (FIVE MILLION RANDS) in settlement of any contravention of section 5(2) and section 4(1)(b)(i) 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 annual turnovers of either VWSA or the combined turnovers of the Gauteng Dealer Council members 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.

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MR. [Signature] . AT

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, VWSA and all its authorised Dealers under Commission Case Number 2004Apr951 in respect of all the conduct and complaints alleged therein.

10. EFFECT

VWSA and the Gauteng Dealer Council record that nothing in this consent order agreement amounts to an admission of liability on their part.

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11. 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 *Midrand* on the *30* day of November 2005.



**A Tostmann
or any Director of VWSA, duly authorised**

Dated and signed at *MIDRAND* on the *30* day of November 2005.



**S Gibson
Chairperson
VWSA Gauteng Dealer Council**

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



**Shan Ramburuth
Acting Commissioner
Competition Commission**