



**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR098Oct12/SA245Nov17

In the matter between:

The Competition Commission

Applicant

And


Chevron South Africa (Pty) Ltd
Engen Petroleum Limited
Shell Downstream South Africa (Pty) Ltd
Total South Africa (Pty) Ltd
BP Southern Africa (Pty) Limited
Sasol Limited
South African Petroleum Industry Association

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent**

Panel	:	Y Carrim (Presiding Member) A Ndoni (Tribunal Member) M Mokuena (Tribunal Member)
Heard on	:	08 February 2018
Addendum received on	:	29 March 2018
Decided on	:	03 May 2018

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and the above-mentioned respondents annexed hereto marked "A", together with addendum market "A1".


**Presiding Member
Ms Y Carrim**

**03 May 2018
Date**

Concurring: Ms A Ndoni and Mrs M Mokuena

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CT Case No. GR088Oct12
CC Case No. 2009Jan4223

In the matter between

COMPETITION COMMISSION	Applicant
And	
CHEVRON SOUTH AFRICA (PROPRIETARY) LIMITED	First Respondent
ENGEN PETROLEUM LIMITED	Second Respondent
SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD	Third Respondent
TOTAL SOUTH AFRICA (PTY) LTD	Fourth Respondent
BP SOUTHERN AFRICA (PTY) LIMITED	Fifth Respondent
SASOL LIMITED	Sixth Respondent
SOUTH AFRICAN PETROLEUM INDUSTRY ASSOCIATION	Seventh Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND THE
RESPONDENTS IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION
4(1)(b)(i) AND (ii) OF THE COMPETITION ACT 88 OF 1998, AS AMENDED

The Competition Commission and the Respondents hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms of section 49D of the Competition Act as read with section 27(1)(d) of the Competition Act, on the terms set out below:

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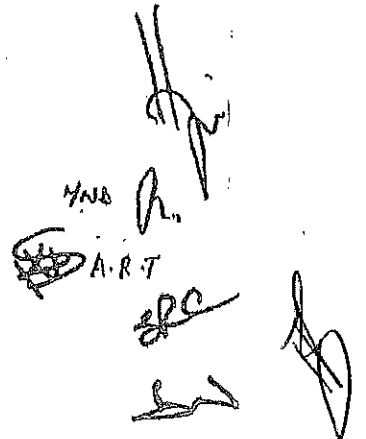
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- Below: *Two R*
- Below: *A.R.T*
- Below: *see*
- Below: *[Signature]*
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- 1 For the purposes of this Settlement Agreement, the following definitions shall apply:
- 1.1 "BP" means BP Southern Africa (Pty) Limited and its subsidiaries and any entity controlled by BP Southern Africa (Pty) Limited and/or any of its subsidiaries;
 - 1.2 "Chevron" means Chevron South Africa (Pty) Ltd and its subsidiaries and any entity controlled by Chevron South Africa (Pty) Ltd and/or any of its subsidiaries;
 - 1.3 "CLP" means the Corporate Leniency Policy prepared and issued by the Commission as a guideline, to clarify the Commission's policy approach on matters falling within its jurisdiction in terms of the Competition Act and published as Government Notice No. 628 of 23 May 2008, published in Government Gazette No. 31084 of 23 May 2008;
 - 1.4 "Commercial Diesel" means diesel fuel products supplied to commercial customers (as alleged in the Complaint Referral; i.e. sales to all customers other than retail customers via service station forecourts);
 - 1.5 "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act, with its principal place of business at Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
 - 1.6 "Commissioner" means the Commissioner of the Commission, appointed in terms of section 22 of the Competition Act;
 - 1.7 "Competition Act" means the Competition Act 89 of 1998, as amended;
 - 1.8 "Complaint" means the complaint initiated by the Commissioner in terms of section 40B of the Competition Act under case number 2008JAN4223 on 12 January 2008;

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A.R.T
S.R.C.
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- 1.9 "Complaint Referral" means the complaint referred by the Commission to the Tribunal under Tribunal case number GR088Oct12 on 24 October 2012;
- 1.10 "DoE" means the Department of Energy;
- 1.11 "Engen" means Engen Petroleum Limited and its subsidiaries and any entity controlled by Engen Petroleum Limited and/or any of its subsidiaries;
- 1.12 "Parties" means the Commission and the Respondents;
- 1.13 "Regulatory Stakeholders" means the DoE, the Department of Trade and Industry, the National Energy Regulator of South Africa, the Railway Safety Regulator of South Africa, Transnet National Ports Authority, Local Port Managers, Statistics South Africa, National Treasury, and any other regulator, State institution and/or government department;
- 1.14 "Respondents" means all the firms that are cited as the respondents in the Complaint Referral namely, Chevron, Engen, Shell Downstream South Africa (Pty) Ltd ("Shell"), Total South Africa (Pty) Ltd ("Total"), BP, Sasol Limited ("Sasol") and South African Petroleum Industry Association ("SAPIA");
- 1.15 "Respondent oil companies" means Chevron, Engen, Shell, Total, BP and Sasol;
- 1.16 "SAPIA" means a petroleum industry association representing the collective interests of its members, including the respondent oil companies;
- 1.17 "Sasol" means Sasol Limited and its subsidiaries and any entity controlled by Sasol Limited and/or any of its subsidiaries;
- 1.18 "SIC codes" means the codes assigned to economic activities in the seventh edition of the "Standard Industrial Classification of all Economic Activities" report

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issued by Statistics South Africa in October 2012 (Report no. 09-90-02), as derived from the fourth revision of the International Standard Industrial Classification issued in 2008;

1.10 "the Subject Information" means, as set out in the Complaint Referral, the information of the Respondent oil companies relating to Commercial Diesel sales volumes, disseminated on a monthly basis to all the Respondent oil companies, comprising sales information –

1.10.1 per oil company;

1.10.2 per specific grade of product;

1.10.3 per province and per magisterial district where the sales were made; and

1.10.4 per trade category;

1.20 "Settlement Agreement" means this agreement duly signed and concluded between the Commission and the Respondents;

1.21 "Shell" means Shell Downstream South Africa (Pty) Ltd and its subsidiaries and any entity controlled by Shell Downstream South Africa (Pty) Ltd and/or its subsidiaries;

1.22 "Total" means Total South Africa (Pty) Ltd and its subsidiaries and any entity controlled by Total South Africa (Pty) Ltd and/or any of its subsidiaries;

1.23 "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act, with its principal place of business at the Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng; and

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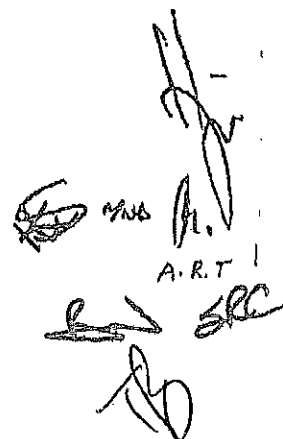
1.24 "WLSP" means Wholesale List Selling Price, being the wholesale price for diesel as published by or on behalf of the DoE from time to time.

COMPLAINT AND INITIATION

- 2 In December 2008 Sasol submitted a leniency application to the Commission in terms of the Commission's CLP ("the leniency application").
- 3 The leniency application covered a number of practices in the white fuels sector and was supplemented by various further submissions and documents provided by Sasol to the Commission.
- 4 The Commission rejected Sasol's leniency application in relation to Commercial Diesel.
- 5 Following receipt of the leniency application and the further submissions and documents, on 12 January 2009 the Commissioner initiated the Complaint in terms of section 49B(1) of the Competition Act in order for the Commission to investigate the possible contravention of the Competition Act. The initiation was amended on 15 September 2011.

THE COMMISSION'S INVESTIGATION AND THE COMPLAINT REFERRAL

- 6 The Commission investigated the Complaint.
- 7 The Commission referred the Complaint to the Tribunal in October 2012 alleging that the Respondents had contravened section 4(1)(b)(i) and 4(1)(b)(ii) of the Competition Act on the basis that –
 - 7.1 the Respondents exchanged the Subject Information both in an aggregated and disaggregated format on a monthly basis; and


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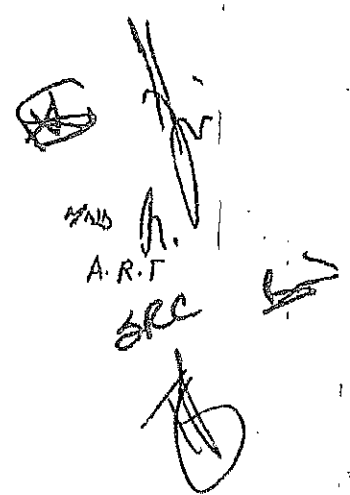
7.2 the Respondent oil companies have been involved in the process of regularly reviewing the WLSP with the D&E. This review process included discussions on and determination of the elements that form part of the price build-up of diesel.

THE RESPONDENTS' POSITION

- 8 Chevron, BP, Shell, Sasol, Total and Engen each filed exceptions alleging that the Complaint Referral does not contain the necessary averments to disclose a cause of action under section 4(1)(b) of the Competition Act.
- 9 Notwithstanding the Commission's allegations, the Respondents contend that they were not engaged in any unlawful conduct in contravention of section 4(1)(b)(i) and (ii) of the Competition Act.

SETTLEMENT AGREEMENT

- 10 Prior to the hearing of the exception applications, the Commission considered its position in proceeding with the Complaint Referral and the Complaint and the benefits to the public interest. The exchange of the Subject Information alleged in the Complaint Referral had ceased by 2009, and thus the Commission's Complaint and Complaint Referral related to historic conduct. The Commission concluded that the interests of consumers and competitors in the relevant market would be better served by not proceeding any further with the Complaint Referral and by obtaining undertakings from the Respondents as to future conduct. The parties also acknowledge that the Commission is in the process of preparing Information Exchange Guidelines, which guidelines will aid the respondents when assessing their conduct in future.
- 11 The purpose of this Settlement Agreement is to settle the Complaint Referral and the Complaint and to provide clarity in relation to the Commission's views in respect of the

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exchange between the Respondents of the Subject Information which gave rise to the Complaint and the Complaint Referral.

- 12 The Respondents do not make any admission of liability in relation to any prohibited conduct under the Competition Act arising from the conduct described in the Complaint or the Complaint Referral.

AGREEMENT CONCERNING THE RESPONDENTS' FUTURE CONDUCT

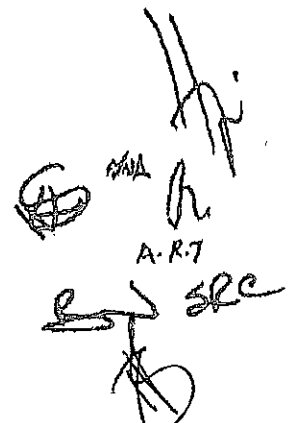
- 13 The Respondents undertake that they will not be party to any agreement, or practice, among the Respondents pursuant to which the Subject Information will be shared among the Respondent oil companies, save as provided for in this Settlement Agreement. Any exchange of the Subject Information will be permitted if it is made in accordance with the following conditions. For avoidance of doubt, these conditions must all be met at the time of sharing or disseminating the Subject Information --

13.1 the Respondents must provide data only to an independent third party, appointed by SAPIA, who will collect and aggregate the data provided by the Respondents; and

13.2 the Subject Information that is disseminated by the designated third party to the Respondent oil companies and/or Commercial Diesel market participants and other stakeholders (other than to Regulatory Stakeholders) should be aggregated across all market participants who provided the Subject Information; and

13.3 the Subject Information that is disseminated should be not less than 3 months in arrears; and

13.4 the Subject Information that is disseminated by the designated third party should be aggregated no narrower than by province; and

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13.5 the Subject Information that is disseminated by the designated third party should contain aggregated information relating to not less than four Commercial Diesel market participants; and

13.6 the Subject Information that is disseminated by the designated third party to the Respondent oil companies (and/or other Commercial Diesel market participants and stakeholders) may be broken down by trade category provided that it should contain aggregated information per trade category for no less than four market participants per trade category per province and furthermore that all trade categories are aggregated to at least the double digit "Division" level of the relevant SIC code,¹ except that -

13.6.1 total sales volumes pertaining to fuel diesel retailers may be reported separately, collated by the third party from such various levels of the SIC codes as represent all sales to fuel retailers;² and

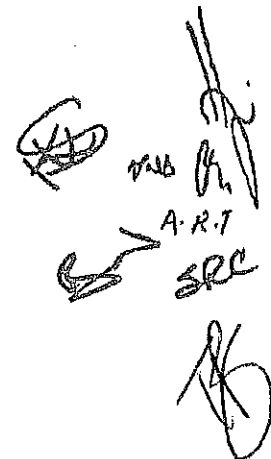
13.6.2 total sales to diesel wholesalers may be reported separately, collated by the third party from such various levels of the SIC codes as represent all sales to fuel wholesalers;³

In accordance with the schedule annexed to this agreement, reflecting the SIC codes for the trade categories currently reported to the DoE, provided that in the event that there is a material amendment to the SIC codes set out in the aforesaid schedule, the Commission may on good cause shown apply to the

¹ For example, in the case of the "Agriculture" trade category the data must be aggregated to the SIC "Division 01" level covering all sales volumes related to "Crop and animal production, hunting and related services activities", and may not be disseminated at a more disaggregated level, e.g. to SIC "Group 011" (Growing of Non-Perennial Crops) or narrower still to SIC "Sub-Class 01110" (Growing of cereals (except rice), leguminous crops and oilseeds).

² Explanatory Note: It appears that the SIC codes under which these sales are currently reported to the DoE do not report under one SIC Division.




³ Explanatory Note: At present the DoE requires these sales to be reported under SIC code 46010 and an aggregation above this level would render the data uninformative.

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Tribunal for a modification of this paragraph 13.6 in order to address any information exchange concerns arising from such amendment.

- 14 For the avoidance of doubt, the undertakings under paragraph 13 shall not operate to prevent any individual Respondent or company from obtaining information relating to one or more of the other Respondent or companies or Commercial Diesel market participant where that information is required for legitimate commercial purposes arising in the ordinary course of business.

- 15 The Commission is also aware of the fact that Regulatory Stakeholders require the submission of detailed information on an *ad hoc* or ongoing basis to fulfil their regulatory roles and may make available such information from time to time. As such, nothing in this Settlement Agreement shall preclude the Respondents from providing any information to any Regulatory Stakeholder in the format required by it, or from performing such calculations as may be required by any Regulatory Stakeholder (for example, the calculations performed by SAPIA in respect of the Cumulative State balances for the DoE) or from receiving any information from such Regulatory Stakeholder.

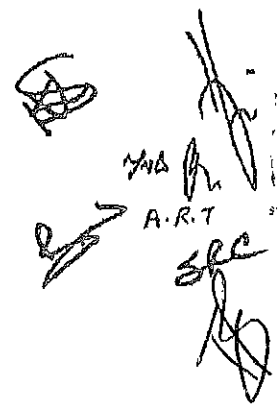


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MONITORING

- 16 The Commission must request, on an annual basis, that SAPIA, or any third party appointed by SAPIA in accordance with paragraph 13.1 above, submit a report to the Commission confirming compliance with paragraph 13 of this Settlement Agreement during the preceding calendar year. SAPIA shall procure preparation and delivery to the Commission of any such reports. Following receipt of such a report, the Commission may request copies of, or access to, any information collated and disseminated for the purposes of paragraph 13 by SAPIA or the appointed third party during the period covered by the relevant report.

GENERAL

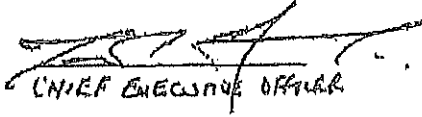
- 17 Nothing in this Settlement Agreement precludes any Respondent from applying for an exemption in terms of section 10 of the Competition Act; nor does it derogate from any exemption granted by the Commission.
- 18 The undertakings in this Settlement Agreement shall apply for a period of five years from the date that it is made an order of the Tribunal.
- 19 Any Respondent shall be entitled to apply to the Tribunal for a waiver, relaxation or modification of any of the terms of this Settlement Agreement.
- 20 This Settlement Agreement is in full and final settlement of all complaints against the Respondents arising from the Complaint and the Complaint Referral under Commission case number 2009Jan4223.
- 21 This Settlement Agreement may be signed in counterparts.



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Dated and signed at CENTURY CITY on the 11TH day of NOVEMBER 2017

For Chevron


CHIEF EXECUTIVE OFFICER


Dated and signed at CAPE TOWN on the 16TH day of NOVEMBER 2017

For Engen


Chief Executive Officer

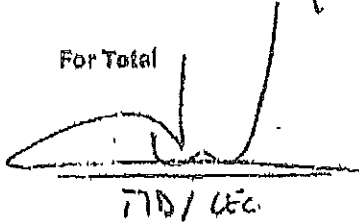
Dated and signed at SANDTON on the 10th day of November 2017

For Shell

 HLOMIPHIZWE J. MTOLO
Chairman




Dated and signed at Rosebank on the 9 day of November 2017

For Total


770 / U.C.

Dated and signed at Barktown on the 14th day of November 2017

For BP


A.R.T
 SPC


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Chief Executive Officer Acting Managing Counsel

Dated and signed at SANDTON on the 13TH day of NOVEMBER 2017

For Sasol

Stuart R. Cornell and [Signature]
Joint Chief Executive Officers

Dated and signed at SANDTON on the 13th day of November 2017

For SAPIA

[Signature]
Chief Executive Officer DIRECTOR

Dated and signed at PRETORIA on the 24th day of NOVEMBER 2017

For the Competition Commission

[Signature]
Competition Commissioner

[Signature]
A.R.T.
[Signature]

LOWEST SIC CODE LEVEL AT WHICH VOLUME DATA MAY BE EXCHANGED FOR DOES CURRENT TRADE CATEGORIES
(refer clause 13.6)

ANNEX

SIC CODE	DESCRIPTION
01	Crop and animal production, hunting and related service activities
02	Forestry and logging
03	Fishing and aquaculture
05	Mining of coal and lignite
07	Mining of metal ores
08	Other mining and quarrying
10	Manufacturing of food products
12	Manufacturing of tobacco products
13	Manufacturing of textiles
15	Manufacturing of leather and related products
16	Manufacturing of wood and of products of wood and cork, except furniture; manufacture of articles of straw and plastic materials
17	Manufacturing of paper and paper products
19	Manufacture of coke and refined petroleum products
20	Manufacture of chemicals and chemical products
23	Manufacture of other non-metallic mineral products
24	Manufacture of basic metals
28	Manufacture of machinery and equipment n.e.c.
30	Manufacture of other transport equipment
40	Construction
435	Retail of automotive fuel in specialized shops
488/1	Wholesale of solid, liquid and gaseous fuels and related products
49	Land transport and transport via pipelines
51	Air transport
82	Public administration and defence; compulsory social security

HVB

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)


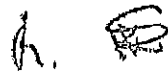

CT Case No. CR098Oct12
CC Case No. 2009Jan4223

In the matter between

COMPETITION COMMISSION	Applicant
And	
CHEVRON SOUTH AFRICA (PROPRIETARY) LIMITED	First Respondent
ENGEN PETROLEUM LIMITED	Second Respondent
SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD	Third Respondent
TOTAL SOUTH AFRICA (PTY) LTD	Fourth Respondent
BP SOUTHERN AFRICA (PTY) LIMITED	Fifth Respondent
SASOL LIMITED	Sixth Respondent
SOUTH AFRICAN PETROLEUM INDUSTRY ASSOCIATION	Seventh Respondent

ADDENDUM TO THE SETTLEMENT AGREEMENT BETWEEN THE COMPETITION
COMMISSION AND THE RESPONDENTS IN RESPECT OF AN ALLEGED
CONTRAVENTION OF SECTION 4(1)(b)(i) AND (ii) OF THE COMPETITION ACT 89 OF
1998, AS AMENDED

The Commission and the Respondents hereby agree that the Settlement Agreement between
them relating to the complaint under case number 2009Jan4223 and the complaint referral
under CT Case CR098Oct 2012 be amended as follows:


 via A.R.T.



Paragraph 13.1 of the Settlement Agreement shall be replaced by the following:

The Respondents must provide data only to an independent third party, appointed by SAPIA after 10 business days' notice is given to the Commission, who will collect and aggregate the data provided by the Respondents; and

Paragraph 13 of the Settlement Agreement shall be replaced by the following:

"SAPIA, or any third party appointed by SAPIA in accordance with paragraph 13.1 above, shall annually submit a report to the Commission confirming compliance with paragraph 13 of this Settlement Agreement.

13.1 *SAPIA shall procure the preparation and delivery to the Commission of such reports.*

13.2 *Each annual report shall be submitted to the Commission by no later than 1 March each year and shall relate to compliance with paragraph 13 of the Settlement Agreement during the preceding calendar year.*

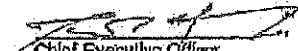
13.3 *For the sake of clarity, the first report will be due on 1 March 2018, and shall cover the period from confirmation of the Settlement Agreement by the Tribunal, until 31 December 2018. All subsequent reports will be due on 1 March, and will cover the period of the preceding calendar year (1 January to 31 December).*

13.4 *Following receipt of such a report, the Commission may request copies of, or access to, any information collected and disseminated for the purposes of paragraph 13 by the appointed third party during the period covered by the relevant report.*

ART

Dated and signed at CAPE TOWN on the 28th day of FEBRUARY 2018

For Chevron


Chief Executive Officer

Dated and signed at CAPE TOWN on the 26th day of FEBRUARY 2018

For Engen


Chief Executive Officer

Dated and signed at Bryanston on the 9 day of March 2018

For Shell


Chairman

Dated and signed at Pretoria on the 28th day of February 2018



For Total


Managing Director / Chief Executive Officer

Dated and signed at Pretoria on the 9th day of March 2018

For BP


Acting Managing Counsel



A.R.T.

Dated and signed at SANDTON on the 8th day of MARCH 2018

For Sasol
John R. Concell
John R. Concell
John Chief Executive Officers

[Signature]

Dated and signed at SAPTA (SANDTON) on the 26th day of FEBRUARY 2018

For SAPTA
[Signature]
Executive Director

Dated and signed at PRETORIA on the 26th day of MARCH 2018

For the Competition Commission

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Competition Commissioner

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