INTRODUCTION

Impact assessments measure or estimate the effectiveness, costs and benefits, or value of the authorities’ interventions. These assessments serve to ensure competitive outcomes, monitor compliance with conditions attached to penalties, and can be used as a tool through which to leverage government support to encourage competitive behaviour. The decision to conduct an impact assessment on the Agro-Processing Competitiveness Fund (APCF) provides an opportunity to examine the effectiveness of the remedy designed in conjunction with government stakeholders and may inform future remedies.

Firstly, we will provide a brief summary of the cases in which Pioneer Foods was implicated as well as the consent and settlement agreement, following which the objectives and structure of the APCF are outlined. Secondly, we will provide an analysis of the impact of the APCF since inception – this is done by comparing the actual impact of the Fund to its potential macroeconomic impact which is calculated using Social Accounting Matrix (SAM) multiplier analysis. Thirdly, we conclude and provide an evaluation of whether the APCF has achieved its objectives.

BACKGROUND TO THE APCF

Until the 1990s, the marketing of agricultural products in South Africa was governed by the Marketing Act of 1937 (consolidated in the Marketing Act of 1968). However following deregulation in 1996, private anti-competitive arrangements took hold and replaced public controls. One such instance of this misconduct was during the period 1999-2007 in which Pioneer Foods together with other millers were found to have been involved in several cases relating to anti-competitive conduct spanning the wheat and maize milling, baking, poultry
The first referred complaint related to the white maize products cartel. This cartel comprised of all major players in the market including Tiger Brands, Pioneer, Foodcorp and Premier. In its investigation the Commission found that the respondents had contravened section 4(1)(b)(i) of the Competition Act. Evidence to this effect included numerous meetings and telephone conversations during which consensus at the national and international level was reached regarding price fixing of white maize products, the creation of a uniform price list for wholesale, retail and general trade to customers as well as the timing of price increases and the implementation thereof.

The second referred complaint related to the milled wheat products cartel. In this case the Commission alleged that Pioneer, Tiger Brands, Pioneer Foods, Foodcorp and Godrich Milling had engaged in collusive activities in contravention of section 4(1)(b) (i) and (ii) of the Competition Act. Similar to the white maize cartel the respondents were found to have participated in numerous meetings and telephone conversations mirroring the above conduct as well as allocating customers amongst firms.

The Commission also received and investigated complaints regarding the alleged predatory conduct engaged in by Pioneer, through Sasko Bakers, against small independent bakers in the Western Cape. The Commission had also initiated investigations in the poultry and eggs industries after Pioneer applied for conditional leniency for conduct contravening sections 4(1)(b)(i) and (ii) of the Competition Act.

Following Pioneer’s admission to contravening the Competition Act, the Commission entered into consent and settlement negotiations with Pioneer. The cumulative effect of Pioneer’s conduct across the various industries listed above was likely to have harmed consumers through higher prices for essential food items together with stifling entry and expansion by competitors, particularly small and medium enterprises. The Commission’s remedy sought to address these anti-competitive effects. In this regard, Pioneer undertook to (i) desist from engaging in conduct which infringed or might infringe the Competition Act; (ii) adjust the prices of specific flour and bread products over a defined period to reduce its gross profit margin by R160 million; (iii) increase capital expenditure by R150 million over and above its current capex budget; and (iv) pay an administrative penalty of R500 million to the National Revenue Fund, of which R250 million was allocated for the establishment of the APCF.

Whilst the Commission has previously analysed the effectiveness of the consent and settlement agreement focussing on the commitment to reduce prices\(^1\), this assessment considered the likely impact of the APCF on entry and expansion within the agro-processing and beverages sector, with emphasis on those subsectors which were affected by Pioneer’s anti-competitive conduct.

The Objectives and structure of the APCF

Industrial Development Corporation (IDC) was appointed as the administrator of the Fund on behalf of the Economic Development Department (EDD). The objective of the APCF is to facilitate increased competition, growth, job creation and development in agro-processing through the provision of funding to non-dominant players in the agro-processing and beverages sector. In order to achieve these outcomes, the Fund is capitalised with R250 million allocated across three distinct channels; an investment channel (R225 million); Business Support Channel (R12.5 million); and Research Grants Channel (R12.5 million).

The APCF is aimed at providing affordable loan finance and business support to enterprises which meet specific qualifying criteria. These criteria require, among other things, that the enterprises are (i) involved in agro-processing or beverages sector activities; (ii) at start-up or expansion phase; (iii) able to show sustainability from a financial, technical and environmental perspective; and (iv) do not hold a dominant position and must be unlikely to obtain third-party funding from commercial banks. The Fund encourages rivalry and the expansion of consumer choice by facilitating the entry and expansion of businesses within the agro-processing sector, thereby contributing to eroding the dominance of large players within the previously cartelised industries.

Actual impact of the APCF

Since the establishment of the APCF in April 2011 to end September 2014, funding to the value of R183 million (73 percent of the total fund size) has been approved to 29 enterprises. Of the approved funds, R157.8 million has already been disbursed to beneficiaries. The average size for each investment is R6.3 million.

The Fund has crowded-in co-funding from various third parties, including contributions by the enterprise owners themselves, as well as the commercial banks which have contributed to the financing of some of the businesses. The largest co-financier is the IDC, which has approved funding to the value of R172.8 million over the duration of the Fund. This sees the total value of funding approved rise to R355.6 million for qualifying enterprises.

In terms of job creation, it is estimated that 2 266 jobs have been created through APCF loan finance and IDC co-funding. These jobs figures are estimated at approval stage and could vary as business plans are implemented. Start-ups have contributed to the creation of 969 jobs with a further 1 297 jobs created through expansion of existing enterprises.

As mentioned, one of the objectives of the APCF is to facilitate increased competition through the provision of funding to non-dominant players in the agro-processing and beverage sector. The success of the APCF in achieving this objective is assessed by evaluating; (i) the number of start-up and expansion firms which have received support; and (ii) the sectoral spread of these firms across the sectors which were affected by Pioneer’s conduct. Table 1 below summarises this information.

### Table 1

<table>
<thead>
<tr>
<th>Phase of enterprise development start-up and expansion stage</th>
<th>Start-up</th>
<th>Expansion</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No of enterprises funded</td>
<td>8</td>
<td>21</td>
<td>29</td>
</tr>
<tr>
<td>No of jobs created</td>
<td>969</td>
<td>1 297</td>
<td>2 266</td>
</tr>
<tr>
<td>APCF funding</td>
<td>R31 160 775</td>
<td>R151 512 515</td>
<td>R182 673 290</td>
</tr>
<tr>
<td>IDC co-funding</td>
<td>R82 037 710</td>
<td>R90 847 931</td>
<td>R172 885 641</td>
</tr>
<tr>
<td>Total value of funding</td>
<td>R113 198 485</td>
<td>R242 360 446</td>
<td>R355 558 931</td>
</tr>
</tbody>
</table>

**Source:** Industrial Development Corporation

\(^1\) See Mncube, L. and Ngwenya, A., 2011, South Africa’s Pioneer Settlement: an innovative way to remedy competition law violations in developing countries?
Let me start with one general observation about the practice of competition enforcement in South Africa which relates to the limited participation of consumers and consumer organisations in the administration of competition law. To me this is one of the key limitations of our system. While labour and business groups have been active participants in investigations and before the Competition Tribunal (Tribunal), the voice of consumer groups is missing. The positive impact of competition to the attainment of a growing and inclusive economy can only be furthered by empowered consumers. The major question for competition authorities is how to get consumers and consumer groups involved in the competition enforcement processes.

Over the last 16 years, we have developed enough history with the practice of competition enforcement and advocacy to evaluate our actions and the outcomes in markets, instead of proceeding based on guess-work and hope. Today, no one doubts that the proper measure of our actions is not the output of cases, but its demonstrated ability to solve competition problems in order to contribute towards a growing and inclusive economy.

The articles by Thulani, Michelle and Thembalethu offer valuable insights on market outcome following from the Agro-Processing Competitiveness Fund and the Massmart Supplier Development Fund. The purpose of the Agro-Processing Competitiveness Fund was to facilitate increased competition, growth, job creation and development through the provision of affordable loan finance and business support to smaller firms in the agro-processing sector. As of the end of September 2014, the Fund has created an estimated 2,266 jobs. While the Massmart Supplier Development Fund, established as a condition to Walmart's acquisition of Massmart, continues to assist small and medium enterprises, particularly black-owned, black-empowered or local manufacturers, to enhance the quality of their products and improve production capacity, thereby enabling their integration into Massmart's supply chain. These two articles go to the very heart of conceptions about what the Commission ought to do and how its effectiveness ought to be measured.

Still on measuring impact, Hariprasad’s review of the Commission’s construction fast track settlement process looks at whether the process had any effect on the share prices of three listed major construction firms in South Africa.

Portia and Nompucuko briefly summarise the Clover-Nkunzi milkway merger which was conditional approved by the Tribunal. Khalirendwe and Sunel discuss the Commission’s findings in its investigation of the Imerys South Africa and Andalusite Resources merger. The Commission determined that this merger would result in the removal of a close and effective competitor in the market for fine and medium grade andalusite, a significant input in the manufacture of refractories which are used in downstream industries such as steel and cement. Given that this was a merger to monopoly, which would have limited the choice of suppliers locally, the Commission prohibited the transaction. The matter will be adjudicated at the Tribunal in the coming months.

The Holcim-Lafarge transaction also provides some interesting insights into the question of cross-shareholdings and the potential tacit coordination concerns that such arrangements may raise. Although not heard at the Tribunal due to the parties withdrawing their review application after the Commission filed its expert report, Viresh Ranchod looks at how the Commission approaches the assessment of cross-shareholdings, particularly in previously cartelised industries.

In this edition of the Competition News, we also feature an interview with acting Deputy Commissioner Hardin Ratshisusu who provides some riveting thoughts about the role of the Commission and the strategic direction it will take going forward. Do not miss this insightful article.

It is appropriate that I end by announcing that the Commission has been honoured and entrusted with the responsibility of hosting the 4th International BRICS Competition Conference at the Inkosi Albert Luthuli International Convention Centre in Durban on 10 – 13 November 2015. This global platform provides for leading experts, academics and practitioners to come together and engage on developments in the enforcement of competition policy in the BRICS countries. We look forward to having you attend and participate at this prestigious event.
Of the enterprises funded through the APCF, eight are start-up companies and 21 are existing enterprises which qualified for funding to expand their business operations. Several of the enterprises supported are active in those subsectors which were cartelised by Pioneer. The remaining firms are active in other agro-processing activities, including the beverages sector (see Table 2).

Table 2: Sub-sectors supported through APCF funding

<table>
<thead>
<tr>
<th>Sub-sector</th>
<th># of enterprises</th>
<th>Start-up</th>
<th>Expansion</th>
<th>Sub-sector</th>
<th># of enterprises</th>
<th>Start-up</th>
<th>Expansion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chicken producer</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Sweet manufacturer</td>
<td>4</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Animal feed</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Tea producer/marketer</td>
<td>3</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Flour producer</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Breweries and wine producers</td>
<td>3</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Pasta producer</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Bees and honey</td>
<td>1</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Soya flour producer</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Mushroom producer</td>
<td>1</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Gluten free bakery</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Water and fruit juice producer</td>
<td>1</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Pastry producer</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Cherry Pepper processor</td>
<td>1</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Biscuits manufacturer</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Fruit canning</td>
<td>1</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Cake producer</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Mango producer</td>
<td>1</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Sorghum malt producer</td>
<td>1</td>
<td>✓</td>
<td></td>
<td>Oil manufacturer</td>
<td>1</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Milk production</td>
<td>2</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Industrial Development Corporation

Table 3 shows the provincial spread in terms of the total value of funding approved and the number of enterprises funded through the APCF. Investment has been allocated to various rural-based enterprises across the provinces. Of the 29 total approvals, 16 are located in rural areas of which 7 are start-up enterprises. The remaining 9 enterprises received investment for the purpose of business expansions. A combined investment of R91.6 million was allocated to these rural-based businesses.

Table 3: Provincial spread of funding and enterprises funded

<table>
<thead>
<tr>
<th>Province</th>
<th>Total funding approved through APCF</th>
<th>As % of total value approved</th>
<th># of enterprises funded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gauteng</td>
<td>R53 498 042</td>
<td>29%</td>
<td>6</td>
</tr>
<tr>
<td>Western Cape</td>
<td>R37 564 000</td>
<td>21%</td>
<td>7</td>
</tr>
<tr>
<td>Free State</td>
<td>R35 373 000</td>
<td>19%</td>
<td>5</td>
</tr>
<tr>
<td>Limpopo</td>
<td>R19 222 428</td>
<td>11%</td>
<td>3</td>
</tr>
<tr>
<td>KwaZulu-Natal</td>
<td>R16 500 000</td>
<td>9%</td>
<td>3</td>
</tr>
<tr>
<td>Eastern Cape</td>
<td>R13 870 000</td>
<td>8%</td>
<td>3</td>
</tr>
<tr>
<td>North West</td>
<td>R5 500 000</td>
<td>3%</td>
<td>1</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>R1 145 820</td>
<td>1%</td>
<td>1</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>0</td>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>R 182 673 290</td>
<td>100%</td>
<td>29</td>
</tr>
</tbody>
</table>

Source: Industrial Development Corporation

Another benefit realised by APCF beneficiaries is non-financial business support. Since inception, business support grants\(^2\) to the value of R2.9 million have been approved to 11 enterprises. Two of the support grants were allocated to businesses funded through the APCF, whilst the remaining 9 grants were allocated to companies that require pre-investment support such as compiling marketing and business plans.

The APCF has also made research grants available to finance academic and applied research projects on a sector-wide, sub-sector and/or company level, the benefits of which are expected to accrue to the sector or sub-sector as a whole. Research topics are confined to the agro-processing sector, particularly with regard to opportunities and challenges experienced in rural agro-processing initiatives. To date, the APCF has approved research grants to the value of R7.9 million to 11 applicants. The sectors in which research is to be conducted include horticulture (citrus and Sharon fruits), poultry, aquaculture, flax fibres, tomatoes, sugar and rural apiculture development (beekeeping).

Potential impact of the APCF using SAM Model\(^3\)

The intention of this analysis is to compare the actual impact of the APCF to the Fund’s potential impact, based on the value of funding approved, using output and employment multipliers. The output and employment multipliers are calculated using the 2011 Social Accounting Matrix (SAM) model\(^4\) developed for EDD. The change in output and employment is then estimated using the calculated multiplier. The multiplier enables the measurement of the potential pass-through effect of the investment the APCF represents in the agro-processing sector.

\(^{2}\) Through Business Support Grants, enterprises are able to secure funds for, amongst other things, conducting feasibility studies, business plan development, market strategy development, the implementation of management systems and procedures, policy development, and staff training.

\(^{3}\) Social accounting matrix (SAM) multiplier analysis is based on a fixed-price, fixed coefficient, demand-driven, economy-wide simulation. In essence the SAM is a tabular representation of all transactions that occur in an economy at a particular point in time. These transactions occur among the agents in the economy: producers, owners of primary factors of production, households, government and the rest of the world.


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Based on the output and employment multiplier analysis, the potential impact of R182.6 million disbursed through the Fund would lead to an increase of R226.4 million in output value. If the value of co-financing through the IDC is included, the combined R355.6 million funding would result in an increase of R440.9 million in output value. Similarly, using employment multipliers, it is anticipated that 1 181 jobs would be created through the APCF approved financial and non-financial support. Including the IDC co-financing, the potential employment creation rises to 2 300 jobs.

It is important to emphasise that this increased co-funding amount contributed by the IDC, and the corresponding output and employment values obtained through the multiplier analysis, were only achieved as a result of the APCF acting as a catalyst to crowd-in IDC co-financing. Based on the APCF funding alone, comparison of the potential and actual results reveals that the APCF has exceeded the expected employment results as estimated through the multiplier analysis. The inclusion of the value of IDC co-financing to the analysis finds that the Fund falls slightly short of the anticipated employment creation under the multipliers analysis.

CONCLUSION

This impact assessment has evaluated the success of the APCF as a remedy through which to provide redress to firms whose entry and expansion was stifled as a result of the cartelisation of the bread, wheat and white maize milling, poultry and eggs industries by Pioneer. This analysis involved evaluating the actual results of the Fund, which were then compared to the Fund’s potential impact as estimated through the output and employment multipliers.

In terms of facilitating the entry or expansion of small and medium enterprises, as per the APCF’s underlying objectives, the results shows that the Fund has supported the entry of eight start-up enterprises and the expansion of 21 enterprises in the broad agro-processing and beverages sectors. Closer evaluation finds that of the enterprises supported, three start-up enterprises and six expansion enterprises are involved in activities in industries which were previously cartelised by Pioneer. This is of interest as one of the main objectives of the APCF was to facilitate entry in sectors affected by Pioneer’s conduct.

The Fund has also successfully crowded-in funding from third-parties by reducing the risk profile of beneficiaries. This co-funding support has included contributions from enterprise owners themselves, as well as commercial banks, although the principal co-financer has been the IDC. The Fund has therefore successfully served as a catalyst in attracting financing into sub-sectors and SMMEs which are likely to encounter difficulties in obtaining third-party funding.

In addition, the Fund has contributed to job creation - it is estimated that 2 266 jobs have been created through APCF loan finance and IDC co-funding. Start-ups have contributed to the creation of 969 jobs with a further 1 297 jobs created through expansion of existing enterprises.
INTRODUCTION
The Wal-Mart - Massmart merger brought to the fore the public interest issues arising from mergers. This merger was publicly debated in various platforms and to some extent raised the profile of competition law and how it intersects with industrial policy as well as general foreign direct investment ideologies. The merger brought expectations of lower prices as a result of Wal-Mart's scale and at the same time brought fears about the likely impact on existing retailers and local suppliers of products to Massmart.

We decided to conduct an ex-post review on the Wal-Mart - Massmart merger to track the implementation of the remedy (Supplier Development Fund – SDF) and to evaluate whether the contentious issues identified during the merger proceedings have been addressed. In conducting the ex-post review, we relied on information sourced from the Massmart 2013 and 2014 SDF Annual Reports.

The report will be structured as follows: firstly we discuss the background to the merger; secondly an overview of the achievements of the SDF is provided in terms of the programmes developed, sectors and enterprises supported, and the integration of beneficiaries into the Massmart and Wal-Mart supply chains. Thirdly, we assess whether the SDF has addressed the potential competition concerns.

Background to the Wal-Mart - Massmart merger and Tribunal & Competition Appeal Court (CAC) decisions
In September 2010, the announcement was made that Wal-Mart intended to acquire a controlling interest in Massmart through the acquisition of 51 percent of the target firms’ ordinary share capital. Walmart is the largest retailer in the world in terms of scale and size of its operations - it has over 11 000 retail outlets in 27 countries and recorded sales of US $473.1 billion in the financial year ended 31 January 2014. Massmart is a wholesaler and retailer of general merchandise, liquor, home improvement equipment and basic food in South Africa.1

In February 2011, the Commission finalised its investigation of the proposed merger. It found that the merger was not likely to lead to a substantial prevention or lessening of competition. The Commission considered the public interest issues arising from the merger, specifically (i) the effect on employment, (ii) the effect on a particular industrial sector or region, and (iii) the effect of the merger on small business suppliers. On the issue of employment, the Commission considered the unions2 concerns regarding the potential casualisation of labour by the merged entity, as had been observed in other jurisdictions. The Commission found that apart from these concerns not being merger-specific, the merged entity would be constrained by South African labour laws, such as the Labour Relations Act (LRA). In particular, section 189 of the LRA prohibits the merged entity from changing the terms and conditions of employment to the detriment of employees. The Commission therefore concluded that the merger would not result in significant changes on employment.

With regard to the impact of the merger on a particular industry or region, the Commission acknowledged that Massmart; (i) likely has sufficient funds such that it can reduce margins thereby driving wholesale and retail competitors out of the market; (ii) has significant

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1 Massmart has four divisions which trade under the names of 10 subsidiaries as follows: Massdiscounters: Game and Dion Wired; Masswarehouse: Makro; Massbuild: Builders Warehouse, Builders Express and Builders Trade Depot, and Masscash: Buy-Rite, Sunshine, Mikea, Cambridge, DF Astor, Savemore and Score.
2 Specifically, the South African Commercial, Catering and Allied Workers Union (SACCWU) and the Food and Allied Workers Union (FAWU).
buyer power which could enable it to source large volumes from suppliers at discounted rates compared to competitors, and (iii) may result in increased concentration through the erection of wholesale and retail stores in remote areas. In considering these concerns, the Commission found that cutting margins would potentially have a net welfare gain in that consumers could benefit from possible price wars between Massmart and its competitors. Further, the establishment of wholesale and retail outlets in remote areas could result in employment creation, and may provide some relief to small businesses in that they need not travel to urban areas to purchase stock. The Commission did, however, concede that the customers may bypass small businesses and purchase directly from the merged entity.

Finally, on the issue of small business, the Commission found that Walmart, by committing to continue sourcing products locally, would benefit local suppliers in South Africa. Furthermore, Massmart had indicated that it did not intend on reducing the number of local SMME suppliers. On engaging with some of Massmart’s SMME suppliers, the Commission learnt that most of the products distributed or supplied through the SMMEs were imported and not manufactured locally. Furthermore, Massmart suppliers were able to supply these products to other local independent retailers or wholesalers.

Based on these considerations, the Commission found that the merger was unlikely to result in any significant impact on the public interest concerns relating to employment, small business or a particular industry or sector. The Commission therefore recommended that the proposed transaction be approved without conditions.

On 31 May 2011, the Tribunal conditionally approved the merger. As per the Commission’s analysis, the Tribunal found that the merger did not raise any competition concerns as Wal-Mart did not compete with Massmart in South Africa, and that its only presence in the country was through its procurement arm which purchased South African produce for the export market. The Tribunal did, however, acknowledge that the merger raised public interest concerns related to employment and the potential displacement of small businesses in markets underserved by large retailers. During the hearing, the merging parties offered various undertakings which they agreed could be imposed as conditions for the approval of the merger. One of these was an ‘investment remedy’ which would see the establishment of a R100 million programme aimed exclusively at the development of local South African suppliers, including SMMEs. In addition, the merged entity would establish a training programme to train local South African suppliers on how to do business with the merged entity and Wal-Mart.

The Tribunal considered the undertakings and converted them into conditions. However, its decision was met with resistance from organised labour and government departments (the intervenors). This led to the matter being brought to the CAC for adjudication on the grounds that the effect of the merger on employment and local procurement had not been adequately addressed through the proposed remedies.

Public interest concerns as raised by intervenors

During the merger investigation, and in the run-up to the Tribunal hearing, government departments commissioned a study to evaluate the public interest implications of the merger. This study provided the impetus behind the review applications, which raised concerns relating to (i) the impact of the merger on current domestic Massmart suppliers, and (ii) the impact of the merger on employment in relation to current and future Massmart employees.

The government departments’ were apprehensive that the merged entity would switch some of its procurement away from domestic suppliers to imports post-merger. Such import substitution would likely compromise the sustainability and participation of SMMEs and HDI firms in productive sector activities. The knock-on effect would be an adverse impact on domestic employment and a reduction in output in sectors which economic policy is aimed at developing, both of which would affect broader economic development goals.

Government departments submitted that these concerns were plausible given the global purchasing power of Wal-Mart, which enables it to source and distribute products globally at low prices. Post-merger, Massmart would have incentive to tend towards import substitution as its access to international imports at cheaper prices would improve through its affiliation with Wal-Mart. It was suggested that given the substantial size of Massmart’s purchases (total procurement value of R42.2 billion) even a small reduction in domestic procurement could have significant effects on both domestic suppliers and employment. In this regard, it was suggested that a form of quota of mandatory domestic purchases be imposed on the merged entity. It was therefore concluded that the merger generated substantial public interest concerns.

Public interest concerns as raised by CAC commissioned studies

Based on the CAC’s consideration of the review application sought by the intervenors, it directed that separate studies be commissioned to determine “the most appropriate means together with the mechanism by which local South African suppliers may be empowered to respond to the challenges posed by the merger and thus benefit thereby.”

The studies submitted by the merging parties and intervenors concurred that the most appropriate mechanism through which to empower local suppliers to participate in the Massmart supply chains was by means of a supplier development fund. It is against this backdrop that the CAC contemplated the purpose, scope and functions of the Massmart Supplier Development Fund.

In terms of the purpose and scope of the SDF, the CAC found that it should be designed to respond to the threat of loss of employment and sales by local suppliers, including SMMEs, through their potential displacement by way of imported goods. The Fund’s target market would include; (i) new and existing suppliers which could benefit from improved market access and capacity development; and (ii) the creation and upgrading of highly focused microenterprise clusters in disadvantaged communities. The CAC ruled that the type of assistance provided should include financial assistance as well as skills development.

Regarding the value of the Fund, the CAC ordered that a maximum amount of R200 million be allocated by Massmart over a 5 year period. This amount is over and above the R40 million already allocated by Massmart. Whilst this figure differed from the merging parties’ and intervenors’ proposed capitalisation

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3 South African Commercial, Catering and Allied Workers Union (SACCAWU)
4 Namely, the Department of Trade and Industry, the Economic Development Department, and the Department of Agriculture, Forestry and Fisheries, along with the South African Small, Medium and Micro Enterprise Forum.
5 The estimated impact of a 1 percent change in Massmart sales switching away from domestic procurement to imports would reduce total domestic procurement by R422 million and would result in a loss of 4 000 jobs.
6 CAC decision of 9 March 2012
7 Following the Tribunal’s Decision in May 2011, the merged entity initiated the development of a Massmart supply development fund. The focus of the initiative was on support for small enterprises from disadvantaged communities. At the time of the hearing before the CAC, the fund had committed R40.4 million to four substantial projects and two small training and auditing projects that had already been initiated.
amounts\(^8\), the CAC importantly noted that “the quantum is not the sole touchstone; integration of local SM[M]E’s into the global value chain of Walmart is the core objective”\(^9\).

**IMPACT OF THE MASSMART SUPPLIER DEVELOPMENT FUND**

**Overall fund performance**

Since the establishment of the SDF in 2012, over R124 million has been committed to support projects in agriculture (Ezemvelo Direct Farm Programme), manufacturing (Manufacturing SMME’s Program) and support services (Services to Suppliers Program). Actual disbursements to qualifying enterprises totalled R71 million to the benefit of 139 smallholder farming enterprises and 24 manufacturing SMMEs. Funding assistance takes the form of zero-interest non-recoverable grants for equipment, materials and factory equipment, secure loans via guarantees issued to commercial lenders and technical assistance.

The Ezemvelo Direct Farm Programme assists small to medium-sized farmers to enter Massmart’s fresh produce supply chains. The programme is targeted at historically disadvantaged farmers which would typically not have been able to access these supply chains due to their size, location and trading history. As at December 2014, R31 million had been disbursed towards farming projects. At the programmes peak in 2013, 164 smallholder farmers were linked to the supply chain. This decreased to 139 farmers during 2014 due to the discontinuation of some projects and cooperative membership fluctuation. Smallholder farmers’ total sales to Massmart and other retailers totalled R13.1 million, with Massmart accounting for 62 percent or R8.1 million. Ezemvelo’s support includes input loans for farming vegetables, technical support, basic financial management skills, logistics and food safety training. The programme is currently active in Limpopo, KwaZulu-Natal, Gauteng and Mpumalanga with plans to expand to the other provinces within the five-year Fund period.

Examples of the financial and non-financial projects available to SDF-supported farmers include the following:

- **Lethabo Milling Company**, owned by Mr. Xolani Ndzaba, received a grant of R1.6 million through the SDF. The company produces maize meal from a mill in Ventersburg in the Free State. Lethabo Super Maize Meal is available at Massmart stores as well as other small and large wholesalers and retailers. The company has recently ramped-up production in order to meet increasing demand.

- **Korema Farm**, a co-operative based in Winterveld in Gauteng, received a R78 008 recoverable grant which has enabled the acquisition of the necessary inputs to plant cucumber and pepper crops under hydroponic tunnels. Since receiving support through the programme Korema Farm has expanded from seven to fourteen greenhouses, employs 15 people, and has been registered as a Massmart vendor. To date, the farm has recorded total sales of over R1 million, of which over R540 000 has been purchased by Massmart.

The Manufacturing SMME’s programme is directed towards cluster projects in the building materials (paint, tiles, glues and adhesives, window and door frames), bricks (clay and cement), processed commodities (maize meal), processed foods (tea, biscuits, fruit juice, baked goods, wine), clothing and textiles sectors (socks and protective clothing), and general merchandise sectors (ceramic pots, cooler boxes, detergents, lamp shades, cosmetics and insecticides). As at December 2014, R30.3 million had been disbursed in support of manufacturing suppliers, which includes R23.5 million in grants and R6.7 million in loan guarantees issued by the Fund on behalf of SMME suppliers. A further R10.6 million had been approved for disbursement during 2015. Of the 24 projects assisted through the Fund, 19 are black-owned, five are classified as micro enterprises and eight are small businesses. The enterprises supported have created or sustained 1 417 full-time jobs. Since inception of the fund, manufacturing SMME’s sales have totalled R106.6 million.

In addition, the developing wine brands programme, which is housed within Manufacturing SMMEs programme, was established to create opportunities and assist emerging black-owned and black-empowered wine brands with market access by supplying their wines through Massmart liquor chains. To date, 15 wine brands have been integrated into Massmart’s supply chain, and several wines have been introduced into Walmart stores in the United States, China and Brazil. Local sales through Massmart totalled R1.7 million whilst international sales exceeded R12 million.

The Services to Suppliers programme procures services such as food safety compliance, financial and business management, as well as training on behalf of enterprise beneficiaries. To this end, Massmart has formed partnerships with organisations such as ABSA Enterprise Development to provide commercial financing to SMMEs beyond traditional grants. The Fund has partnered with intermediaries\(^10\) for the provision of technical training on crop production as well as training and in-field mentorships for smallholder farmers.

**CONCLUSION**

The principal merger-specific concern identified by the CAC was the threat of loss of employment and sales by local suppliers as a result of import substitution. This would potentially arise from the merged entity switching some of its procurement away from domestic suppliers to imports post-merger. The anticipated effects of this shift in procurement range from an adverse impact on employment to a reduction in output in sectors earmarked for development.

We observe that the Fund has facilitated the entry and expansion of suppliers into the Massmart supply chain. These enterprises include 24 manufacturers and 139 small scale farmers and farmer co-operatives as at December 2014.

Finally, in terms of local procurement, we are of the view that Massmart has abided by its commitment to procure from domestic enterprises. Of the sales generated by Ezemvelo supported farmers, 62 percent is allocated to Massmart by virtue of their integration into the value chain, with the balance being procured by other retailers. Similarly, manufacturing suppliers have realised sales of over R107 million. Based on the discussion above, we find that the SDF has addressed the public interest concerns; specifically, attention to vulnerable sectors, encouraging entry and expansion of SMMEs into the Massmart’s supply chain, as well as adhering to local procurement commitments.

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\(^8\) The merging parties proposed R100 million whilst the state proposed R500 million to R2 billion over a 5 to 10 year period.

\(^9\) 110111CACJun11 – Walmart Judgement (9 March 2012), page 28

We endeavoured to understand whether the Commission’s construction fast track settlement process had any effect on the selected three companies that were listed on the Johannesburg Stock Exchange (JSE). We note that the press release of 01 February 2011 mentioned that most of the CLP applications were submitted by Group Five. Murray & Roberts as well as Grinaker-LTA (subsidiary of Aveng) were also mentioned in the press release and thus these companies were used as basis for a case study.

The Commission first initiated an investigation into the construction sector in February 2009 with regard to tenders for the construction of 2010 FIFA World Cup stadia. The second investigation was initiated in September 2009 and covered all tenders for construction projects. During the investigation into these projects the Commission received approximately 150 marker applications and 65 CLP applications that implicated the majority of medium and large firms involved in bid rigging conduct.

This led the Commission to develop and launch a fast track settlement procedure on 01 February 2011 to incentivise companies to enter into a financially advantageous comprehensive settlement. The fast track settlement procedure encourages firms to disclose all projects in which they were involved, that were subject to bid rigging conduct. The foremost advantage of this procedure is that it minimises associated legal costs; assists with the speedy resolution of cases for the Commission and strengthens evidence regarding those firms that do not take advantage of this initiative. A company could still apply for leniency after applying for settlement; thereafter the provisions of the CLP process would apply. If a firm is then granted conditional immunity for a particular conduct, it will not pay a penalty for this conduct in terms of the settlement process.

We found that the construction industry is divided into distinct subsectors as specified by the Construction Industry Development Board (CIDB) regulations. The subsectors of the construction industry are classes of construction work as defined in Schedule 9 of CIDB Regulations. Companies were categorised from A to D and the penalty to be paid will fall within a range specified for each category (Table 1).

### Table 1: Fast Track Settlement categories

<table>
<thead>
<tr>
<th>No. of non-prescribed contraventions in subsector</th>
<th>Penalty: Percentage of annual turnover of applicant in subsector</th>
</tr>
</thead>
<tbody>
<tr>
<td>A 1 to 4</td>
<td>1% to 4%</td>
</tr>
<tr>
<td>B 5 to 12</td>
<td>4% to 7%</td>
</tr>
<tr>
<td>C 13 to 22</td>
<td>7% to 10%</td>
</tr>
<tr>
<td>D 23 and above</td>
<td>10% to 12%</td>
</tr>
</tbody>
</table>

Source: [http://www.compcom.co.za/assets/Files/invitation-to-firms-to-settle.pdf](http://www.compcom.co.za/assets/Files/invitation-to-firms-to-settle.pdf)
The Competition Act caps the penalty that can be sanctioned for a contravention of the Act at 10 percent of annual turnover. It must also be noted that sometimes this percentage is levied on relevant turnover rather than total turnover of the business. The fast track settlement programme committed to capping the settlement value at 12 percent of relevant turnover for 23 and more contraventions. This is significantly below what a firm would expect to pay should it have been investigated and the case referred to the Competition Tribunal (Tribunal). With successful prosecution of a cartel, a company would be liable to pay a fine for each infringement.\(^1\)

A dampening element to the fast track programme is that the nature of the South African construction industry is such that there are few companies that have the required grading to conduct big projects. In total there are six such firms, all of which were implicated in the construction cartels. A customer would not be in a position to blacklist these firms as that would mean that there would be no large construction projects that would take place for as long as the firms were blacklisted. Thus the loss that was assessed is the loss in the stock market value of the construction firms, which answers the key question: Did fast-track leniency incentive programmes have an impact on the share price values of the companies concerned?

**EVENT STUDY**

Event study techniques and methodologies are used to assess the extent to which events affect the value of a company as reflected by its stock price. We considered the effect of the announcement of the fast track settlement programme by South African competition authorities on the stock prices of Group Five, Murray & Roberts and Grinaker-LTA, which are listed on the Johannesburg Stock Exchange (JSE). The data used in this study is gathered from various publicly available sources, including JSE share prices over time.

No assessment was undertaken on the announcement of the actual settlement value. The market reacts after the first intimation of a specific piece of information and then adjusts its reaction to the actual event. In this instance the market is expected to react when the Commission announces the settlement programme and will adjust its reaction at the time that the actual settlement value is announced.

The construction fast track settlement programme led to construction firms admitting to bid-rigging to the value of R111.9 billion in 298 contracts. Of these contracts 141 were non-prescribed. This incentivised settlement process has been successful in saving the Commission’s resources by allowing the speedy resolution of the 141 non-prescribed cases.

Leniency policies such as the fast track settlement programme increase the probability of detection, and companies that chose not to participate in the fast track settlement programme ran the risk of being exposed by other companies. The expected loss suffered by a firm found guilty of cartel conduct has the following three facets. (i) the expected penalty that is imposed by the Competition Authority; (ii) the damage claims that are awarded to the affected parties; and (iii) the loss in equity value.

The event date is the date on which the announcement is made, ie, 01 February 2011. That day is thus the basis of our investigation and that is when the changes in share values will be analysed. This date is identified as the day on which either the Commission released a press statement or the stock exchange disclosure by the company in question (or any other date on which the first pieces of information about the sanction filter through to the most information-savvy investors).\(^2\)

The underlying assumption in this approach is that markets are efficient, that the share prices capture the underlying economic value of assets and that these prices fully reflect the expectations that shareholders have about the future probability of a firm’s rate of return. Furthermore, any change in the share price of a company reflects changes in the underlying economic conditions.

A market model used by Motta & Langus (2007) is utilised. This model allows for the assessment of a specific event on the returns of a firm. This model assumes a linear relationship between the market return and the return on financial instruments. The model is thus superior to other models used for event studies as it removes the portion of the returns related to market movement and as such, the variance of abnormal returns detected should have been reduced. In order to assess the extent of the loss in returns, it is required that the returns that could have been realised (counterfactual returns) in the absence of such an event (normal returns) are calculated.

The returns that could have been realised in the absence of the ‘event’ in the form of an announcement by the authorities will be simulated for the selected window periods. The difference between estimated (simulated) returns and the observed returns will represent the ‘abnormal returns’. This is based on the assumption that asset returns are jointly multivariate normal, independently and identically distributed through time.

Non-trading days such as public holidays are excluded in order to avoid distorting the parameters as well as the results of the analysis. An estimation period of 148 days is established, excluding holidays and other non-trading days and after correcting for the return calculation. In avoiding an overlap with the event window days a total of 147 trading days in the estimation period (T0 to T1) is obtained.

\(^{1}\) Though the Competition Act allows for damage claims under section 65(6) (b), there is yet to be a damage claim against a respondent in a competition matter. Thus firms do not expect to pay damage claims. We note that the fast track settlement offer recognises companies that settle with claimants by further reducing the settlement value that they will be liable to pay.

\(^{2}\) It is recognised that the initiation of investigation into stadia contracts on 10 February 2009 and the initiation of construction industry investigation on 01 September 2009 are significant events and linked to our event date, but this will not form part of assessment in this paper. Under the assumption that markets are efficient and fully adjust to new information, it is likely that the market would already have adjusted to the events. Thus these events do not form part of our estimation window and will not be analysed.
The selection of an event window can have a significant impact on the results of the analysis and thus it is common to use an event window for a few days, encompassing the event day itself as well as the following day and the day before the event. This is due to the fact that there is normally a leak in the information in that some investors might have gotten wind of information before it is published. The other element is that even after the information is published, there is a lag in the reaction of investors.

In this regard an event window of 10 or 20 days prior to the event and 10 or 20 days after the event and 21 or 41 days inclusive of the event day (T2 to T3) is used. Taking into account that this was the first time that this programme had been used in South Africa and brought with it an initial announcement, there is a high possibility that some information-savvy investors were able to react quickly even before the fine was announced.

**STRUCTURAL BREAK**

The analysis is on the overview of the trend in stock prices over a period of time with regard to the total JSE market return index as depicted below. Prior to the announcement of the fast track settlement programme, the individual share prices of the different companies are consistently above that of the JSE total return index. This can be a useful proxy to indicate the abnormal returns earned by the different companies prior to the event date. This scenario changes almost immediately after the announcement of the fast track programme and it is observed that there is a significant structural change in the movements of the different shares in relation to the JSE total return index. Thus, looking at the share movements of the different companies in relation to the JSE total return index, there is evidence of a structural break after the announcement of the fast track settlement programme.

**EVENT STUDY RESULTS**

Results of the individual company securities from the study are discussed, bearing in mind the possibility that other factors may have resulted in the movement of the share prices, over and above the actual announcement of the fast track settlement programme.

**AVENG**

The study reveals that 20 days before the event date, Aveng had an abnormal return of 2.95 percent. This abnormal returns changes to a negative 1.34 percent 10 days before the event date. Aveng’s shares lost about 14 percent on the day of the announcement of the fast track settlement programme. The day after the announcement, the abnormal returns showed a negative 13.56 percent. The abnormal returns were about negative 12.57 percent five days after the announcement date and about negative 14.87 percent 10 days after the announcement date. Furthermore, the abnormal returns were negative 15.20 percent 20 days after the event date. It is evident that the abnormal returns were already in a negative trend from about six days before the event date, but the magnitude of the loss in share value showed a sharp decline after the announcement date and it declined at an increasing rate. The results show that the event date itself (10 percent), 10 days (5 percent) and 20 days after event dates (5 percent) are statically significant.

**GROUP FIVE**

The study reveals that 20 days before the event day, the abnormal returns were 0.42 percent. It is only 13 days before the event date that we observe a 1.02 percent decrease in the abnormal returns. This decline in share values decreases constantly until one day before the event date, and there is a sharp decline of 18.01 percent on the day of the event. Thereafter the magnitude of the decline stays in the range of 18 to 25 percent. We observe a
25.85 percent decrease in the abnormal returns 20 days after the event date. It is evident that although the decreasing trend started about 13 days before the event date, this trend increases closer to the event date and maintains the declining trend even after the event date. These abnormal returns are statistically significant at 1 percent levels of significance on the day of the announcement as well as 1 and 5 percent after 10 days of the event and 1 percent after 20 days after the announcement date.

**MURRAY AND ROBERTS**

The Murray and Roberts observation is a little different as even 20 days before the event date there was already a negative trend in the abnormal returns on the share value. Twenty days before the event date, the abnormal returns were negative 4.93 percent, while 10 days before the event we observed a negative 4.51 percent. The day that the fast track programme is announced, we see a 34.62 percent loss in the abnormal returns while by the 10th day after the announcement date there is a 33.92 percent loss in abnormal returns. Twenty days after the announcement date; we observe a 55.66 percent loss in the abnormal returns. Although it is evident that the Murray and Roberts abnormal returns were already on a negative and declining trend, this was, however, compounded closer to the event and this decrease at an increased rate is further observed after the event date. These losses are statistically significant at 1 percent each on the announcement date, 10 days and 20 days after the announcement date.

**CONCLUSION**

Leniency programmes such as the construction fast track settlement programme significantly reduce the offender’s penalty. One can observe that in South Africa firms do not expect that they will pay damage claims, thus they do not consider this loss. The loss that they do not avoid through settlement programmes is the loss in share prices. The construction fast track programme was the first of its kind to be utilised by the South African Commission and the total value of the contested projects was around R47 billion from 2006 to 2010. This was also unique as it was a cartel based on specific ad hoc ‘once off’ projects like the construction of the stadia for the 2010 Fifa World Cup games. We observe that the share prices reacted negatively in a statistically significant manner to the announcement of the contravention and the fast track settlement programme. There is also a structural break observed in the period considered in that after the event date the total JSE return index was above the individual companies’ share prices, which was not the case before the announcement date. The construction firms suffered losses in abnormal returns ranging from 14 to 35 percent on the announcement of the fast track settlement programme.

**Table 1: Fast Track Settlement categories**

<table>
<thead>
<tr>
<th>Event period</th>
<th>Measure</th>
<th>Aveng</th>
<th>Group Five</th>
<th>Murray &amp; Roberts</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 days before event</td>
<td>T stat</td>
<td>-1.33</td>
<td>0.08</td>
<td>-1.23</td>
</tr>
<tr>
<td>10 days before event</td>
<td>T stat</td>
<td>-0.21</td>
<td>-0.98</td>
<td>-1.13</td>
</tr>
<tr>
<td>Event day</td>
<td>T stat</td>
<td>-2.19*</td>
<td>-3.60***</td>
<td>-8.65***</td>
</tr>
<tr>
<td>10 days after event</td>
<td>T stat</td>
<td>-2.29**</td>
<td>-3.71**</td>
<td>-8.48***</td>
</tr>
<tr>
<td>20 days after event</td>
<td>T stat</td>
<td>-2.37***</td>
<td>-5.17***</td>
<td>-13.92***</td>
</tr>
</tbody>
</table>

*Significant at 10 percent ** Significant at 5 percent, *** Significant at 1 percent.

The table above indicates that making use of the abnormal market model, the event date is statistically significant across the share performance of the three companies. This is a clear indication that the event had a significant impact in the loss of share prices as evident from the sharp decline trend of the abnormal returns.

**Table 1: Fast Track Settlement categories**
Background

In December 2014, the Commission prohibited an intermediate merger between Clover S.A. (Pty) Ltd (Clover SA) and the fresh dairy business of Nkunzi Milkyway (Pty) Ltd (Nkunzi). Clover SA is a wholly owned subsidiary of Clover Industries Limited (Clover Industries), collectively referred to as (Clover). Post-merger, Clover would have sole control over Nkunzi.

Clover is a branded consumer goods company in the food and beverage industry in South Africa and certain other African countries. Clover’s product portfolio comprises a range of dairy and non-dairy products such as milk and milk powders, cheese, butter, cream, amasi and non-alcoholic beverages. Nkunzi primarily manufactures fresh dairy products. Nkunzi’s product range comprises mainly Ayrshire, organic and lactose-free items. Nkunzi manufactures short-life juices and non-dairy substitutes, e.g. soya and lactose-free yoghurt and milk. The vast majority of Nkunzi’s revenue is derived from the sale of fresh dairy products to Woolworths, but it also produces Nkunzi-branded products.

Effect on the dairy market

The activities of the merging parties overlap in relation to the manufacturing and sale of full cream, short-life juices, fresh cream, amasi and yoghurts. From the market share estimates provided, Nkunzi has minimal market share. However, the Commission found that there is an opportunity for Nkunzi to grow over time, and this merger allows for an already large entity to take advantage of Nkunzi’s potential growth in the market. The Commission found that minimal market share accretions alone are not sufficient to conclude that the merger does not substantially prevent or lessen competition. In that respect, the Commission found that the merger raises potential competition concerns in that Clover is taking over the processing capacity of a smaller player, which may impose a competitive constraint on the big established processors of dairy products in the medium to long term.

During the investigation, the Commission received concerns in relation to Clover possibly increasing its basket of goods to Woolworths, thereby compromising the businesses of smaller suppliers/processors of dairy products because of Clover’s relative position in the market. Further concerns related to the exclusivity of supply of Ayrshire products to Woolworths in that wider access to the products would widen consumer choice and introduce greater competition.

Effect on the raw milk market

The Commission also received concerns pertaining to the proposed transaction from a number of farmers and representing organisations that Clover may not pay farmers the correct value for the Ayrshire milk that makes it sustainable and profitable for producers to continue to breed Ayrshire cows. The Commission is of the view that the farmers’ concerns in relation to Clover as an existing large firm and the impact that their entry would have on the prices paid to Ayrshire milk farmers may be detrimental to the market. Clover is gaining an additional (even if minimal at this time) foothold in the procurement of raw milk through Nkunzi and is thereby taking up even more milk supplies from farmers.

Other concerns received in relation to the procurement of raw milk were from Nkunzi’s competitors in relation to the supply of Ayrshire products to Woolworths. The competitors submitted that there is a shortage of Ayrshire milk in the country and the concern is that Clover may poach the competitors’ independent suppliers of Ayrshire milk by offering them a better price in order for Clover to increase its own supply to Woolworths. In that instance, competitors would not be in a position to supply Woolworths and may therefore lose Woolworths as a customer.

Effect on small business

The Commission found that most of the farmers that supply milk to Nkunzi are small enterprises. In the event that Clover does not pay a fair price to the farmers, most farmers indicated that they would look to supply other processors or would opt to close their businesses. This would be anti-competitive and lead to more farmers exiting the market, which raises public interest concerns. It seems that on their own, the farmers may not be in a position to negotiate better terms with Clover as they would with Nkunzi. Even though Woolworths is likely to be the middle man between the farmers and processors, the Commission was of the view that this may not be sufficient to ensure that these farmers remain sustainable and grow in the supply of raw milk. Therefore the ultimate exit of these farmers cannot be ruled out.

In conclusion, the Commission prohibited the merger, as it was likely to lead to a substantial prevention or lessening of competition in the market for manufacturing and supply of dairy products and raise public interest concerns in the market for the procurement of raw milk. The Commission and the merging parties settled with the Tribunal on conditions that address the farmers’ and third party concerns.
On 15 January 2015, the Commission received notice of an intermediate merger whereby Imerys South Africa (Pty) Ltd (Imerys), owned by Imerys S.A., a French company, intended to acquire Andalusite Resources (Pty) Ltd (Andalusite Resources), a South African company. The merging parties are the only miners and suppliers of fine and medium grade andalusite in South Africa.

Andalusite forms part of the alumina-silicates group of compounds that possess heat resistant properties and are widely used in high-temperature industrial processes, e.g. in furnaces, kilns, crucibles and ladles, which require refractories for steel, cement, aluminium and glass applications. With the exception of andalusite and chamotte, all other alumina-silicates are not mined in South Africa and are imported from countries such as China, France, Brazil, USA, Russia, Australia and Germany.

The proposed merger gives rise to a horizontal overlap as both the merging parties are active in the mining and supply of fine and medium grade andalusite. The proposed merger also creates a vertical overlap, as Calderys South Africa (Pty) Ltd (Calderys), a downstream subsidiary of Imerys, manufactures monolithic refractories which use alumina-silicates, including andalusite, as a key input.

Outcome of the Commission’s investigation

The Commission’s investigation found that the proposed merger would result in the merged entity gaining substantial market power as a result of the structural change in the market from a duopoly to a monopoly. It was found that it is likely that the merger would result in the merged entity profitably raising prices and/or reducing output (or reducing the quality or variety of the grades of andalusite supplied) as a result of the elimination of competitive rivalry between the merging parties. Manufacturers of refractory products contacted by the Commission indicated that they regard the merging parties as close competitors in the market for fine and medium grade andalusite and that pre-merger they exerted some competitive constraint on each other, which would be eliminated as a result of the proposed transaction.

The Commission’s investigation also revealed the lack of competitive constraints that would discipline the merged entity should it wish to increase prices or reduce output or quality or variety of the grades of fine and medium grade andalusite supplied. This would be to the detriment of its domestic customers, as no alternative sources of andalusite would be available in the market to which domestic customers could resort post-merger.

No evidence was found during the investigation that the customers of the merging parties would have countervailing power post-merger, e.g. through imports or negotiating tactics.
that would allow them to credibly threaten the merged entity. Further, the Commission found that barriers to entry in the mining and supply of andalusite are relatively high. This is because the capital requirements and regulatory requirements are significant, and a new entrant would require access to deposits. As a result, the Commission did not find any evidence suggesting that a timely, likely and sufficient entry in this market would impose a competitive constraint on the merged entity post-merger.

Furthermore, Calderys, the downstream arm of Imerys, is also one of the major players in the supply of refractory products. The investigation found that the merged entity would have an incentive and ability to deny Calderys’ competitors downstream access to fine and medium grade andalusite, which is a critical input in the manufacturing of refractories. Concerns were also raised during the investigation that the merged entity may indirectly foreclose the competitors of Calderys by granting them access to andalusite, but at terms and conditions that would make them uncompetitive. Lastly, given that the investigation determined that the supply of export markets is more lucrative than supplying the domestic market with andalusite, this may be to the detriment of competition in the relevant downstream market.

With regard to public interest considerations, the proposed transaction would have an impact on producers of refractories (including both the manufacturers and the end-users of refractories). The iron and steel industries consume the vast majority of alumina-silicate-based refractories. Alumina-silicate-based refractories are also consumed in the industrial minerals applications such as casting, abrasive and ceramics. Further, the merging parties anticipated that 3.6 percent of the employees are likely to be retrenched as a result of the proposed merger. The Commission is of the view that the merging parties have failed to provide evidence on how the proposed transaction would enable them to become more competitive globally, given that they are currently the main players (particularly the Imerys group) in the global market for andalusite.

During the investigation, the Commission received concerns from both the producers and the end-users of refractories who are concerned that the proposed transaction removes competition as there will be no alternative supplier of andalusite locally, post-merger.

In response to the concerns raised, the merging parties proposed a supply condition limited to two to three years for fine and medium grades of andalusite. The Commission tested the proposed remedies with customers that were contacted during the investigation. The customers’ general view was that the merger should not be allowed and that the proposed remedy would not address their concerns with the proposed transaction.

The Commission is of the view that the structural change in the market brought about by the proposed transaction is not addressed by the proposed remedy. The merger would create a monopoly in the South African andalusite market, thereby limiting the choice of suppliers and significantly preventing competition.

In conclusion, the Commission’s investigation determined that andalusite is a significant input in the manufacture of refractories used in downstream industries such as steel and cement. These industries require competitively priced inputs to stay competitive in the markets in which they compete. The Commission found that the merging parties are close competitors and the proposed transaction would result in the removal of an effective competitor in the market for fine and medium grade andalusite. The Commission therefore concluded that the proposed transaction is likely to lead to a substantial prevention or lessening of competition in the market for the mining and supply of fine and medium grade andalusite in South Africa. The proposed transaction was accordingly prohibited on 16 April 2015.
Introduction

It is widely accepted in South Africa and internationally that cartel conduct is the most egregious form of competition law infringement by companies. The implication of cartel conduct in terms of merger analysis is an area that does, however, produce some debate. The South African Competition Act (the Act) in terms of section 12A(2) (c) (Competition Act) explicitly notes that the history of collusion in the market is a relevant factor for the consideration of mergers. The acquisition of Lafarge by Holcim analysed in detail in this review provided an opportunity for the Commission to examine the scope of this area of the Act.

Background to the merger

In 2014, the Commission investigated the major international merger between Holcim Limited (Holcim) and Lafarge. Both companies are global giants in the production and distribution of cement and the production, processing and distribution of aggregates (crushed stone, gravel and sand) as well as ready-mix concrete. In this regard, the European Commission noted in its own assessment of the merger that:

The proposed transaction concerns assets worth several billion euros and will create the world’s largest cement producer with operations in 90 countries.

Despite significant global overlaps in the merging parties’ activities, the South African leg presented no direct overlaps. This was due to Holcim not having any operations in South Africa. Lafarge conducted its business through Lafarge South Africa Holdings (Pty) Limited and its wholly owned subsidiaries being Lafarge Aggregates South Africa (Pty) Ltd, Lafarge Gypsum (Pty) Ltd and Lafarge Industries South Africa (Pty) Ltd, collectively herein referred to as Lafarge SA. There was therefore no pre-merger geographic overlap between the parties in South Africa and the Commission therefore did not conclude on the exact scope of the relevant market. The Commission nevertheless proceeded to analyse the merger in the South African cement and cementitious product markets broadly.

The findings of the Commission’s investigation

The key competition concern raised by the Commission in its investigation related to structural links between competitors in South Africa introduced by the merger. This specifically focused on Holcim holding a small minority shareholding (less than 5 percent) in a direct competitor of LafargeSA in South Africa, Afrisam (Pty) Ltd (Afrisam). In light of the previous history of collusion in the cement and cementitious product markets in South Africa, the Commission found that the merger was likely to facilitate tacit coordination between Holcim and Afrisam post-merger.

The following provides a summary of the history of collusion in the cement and cementitious industry in South Africa:

The South African cement and cementitious industry operated under auspices of a legal cartel prior to 1996 through the South African Cement Producers Association and the Cement Distributors South Africa. Post-1996 a price war erupted with the result that various meetings were held between the major producers including Afrisam, Lafarge and Pretoria Portland Cement (PPC) during 1997 and 1998 to stabilise the industry. Between 1999 and 2002, producers met in order to implement the market stabilisation agreements. The agreements focused on allocating market shares throughout South Africa on a provincial basis, the pricing parameters for the various types of cement products and the scaling back of marketing and distribution activities in certain regions in the country.

From about 2002 to 2009 producers agreed to exchange detailed information (for example, total regional sales on a weekly basis) through the Cement and Concrete Institute (C&CI). The cartel in its various forms was eventually uncovered by the Commission through the combination of a dawn raid and a corporate leniency application by PPC in 2009. Consent orders were thereafter confirmed by the Tribunal between the Commission, Afrisam and Lafarge in 2011 and 2012 respectively.

In order to address the Commission’s concerns the merging parties proposed that the shareholding in Afrisam be held in a trust such that no competitively sensitive information would be shared between Afrisam and Holcim post-merger. The Commission was partially satisfied with the remedy. However, the residual concern remained the ability and incentive of Holcim to engage in tacit coordination post-merger. In order to directly address this competition concern, the Commission proposed that the minority shareholding be held in trust and thereafter divested after a specific period of time.

The review of the Commission’s findings

It was ultimately the imposition of this divestiture condition by the Commission in its decision dated the 01 October 2014 that formed the basis of the merging parties’ decision to review the Commission’s decision at the Tribunal.

The Commission through the submission of an expert economic report argued that the divestiture condition was necessary to mitigate the competition concerns relating to tacit coordination. In addition it argued that the trust remedy alone was insufficient to address these concerns. The foundations of the Commission’s arguments are provided below:

References:
1 Refer to decision in Competition Commission vs Pioneer Foods, cases 15/CR/Feb07 and 50/CR/May08, at paras 143 to 148.
2 The South African Competition Act No. 89 of 1998 (as amended).
3 The proposed transaction was structured such that Holcim were offering new Holcim shares to Lafarge shareholders in a public exchange offer governed by French Law.
4 Refer to European Commission – Press Release dated 15 December 2014 – Commission approves acquisition of Lafarge by Holcim, subject to
5 Refer to Tribunal Consent Order, CC vs Afrisam, Case No: 93/CR/Nov11 and Tribunal Consent Order, CC vs Lafarge Ltd, Case No: 23/CR/Mar12.
1. The relevant market for cement and cementitious products displays a number of key structural features that makes it very conducive to tacit coordination. This includes the following:

(i) High barriers to entry. Financial costs to establish a new plant are significant and economies of scale are required to realise a profitable return. Access to raw material inputs like limestone can be challenging due to limited deposits being openly available in South Africa. Transportation costs are also significant due to cement being a high-weight low-value product.

(ii) Relatively homogenous product. The major cement producers in South Africa all produce Portland cement which forms the basis of their product offerings and therefore competition in the relevant markets. There are also three SANS standards for cement: 32.5, 42.5 and 52.5 Megapascals,\(^7\) which limits the variation between producers.

(iii) Few active competitors. There are five cement manufacturers in South Africa, with the three largest, namely, PPC, Afrisam and Lafarge, controlling approximately 80 percent of the whole South African market in terms of capacity.\(^8\)

(iv) Multi-market contacts. PPC, Afrisam and Lafarge have an extensive presence across a significant number of geographic markets, not only within South Africa but also across Southern Africa.

2. The extensive history of collusion including the merging parties acting individually, in concert with each other and in concert with competitors provided significant evidence of the coordination mechanism that existed. In particular:

(i) The history of collusion involving Lafarge in South Africa is outlined earlier. Both merging parties, acting in concert with each other and other competitors, were involved in collusion for varying lengths of time in the European Union, Brazil and India during the period 1983 to 2006. On an individual basis, the merging parties were convicted of collusion in the European Union, Australia, Poland, Honduras, Colombia, Argentina and the United Kingdom between 2002 and 2014.

3. The merger between the parties is likely to result in a substantial prevention or lessening of competition due to the likelihood of tacit coordination, for the following reasons:

(i) The merger introduces a structural link between Holcim and Afrisam post-merger. While this does not raise a competition issue pre-merger the acquisition of Lafarge by Holcim makes this structural link objectionable post-merger.

(ii) The merger increases transparency between Holcim and Afrisam due to Afrisam not being a listed company and the merger providing Holcim access to information influencing competition that is not publically available. (This assumes the non-implementation of the trust remedy and conditions preventing information flows.)

(iii) The merger reduces the incentive for effective competition between Holcim and Afrisam. Post-merger it is likely that Lafarge under Holcim’s ownership may be less eager to price-cut on tacit coordination outcomes. This is because it would absorb a portion of Afrisam’s losses from this price-cut. This change in incentives also extends to deviations from tacit coordination outcomes, or engaging in a price war to punish deviations from these outcomes.

4. The trust remedy alone (without subsequent divestiture) proposed by the merging parties was insufficient to address tacit coordination, for the following reasons:

(i) The extreme difficulty in detecting tacit coordination. Where a competition authority observes that the market is oligopolistic it cannot initially differentiate what form of market interaction is linking the actions of the firms. For instance, firms may interact in the market in different ways, including effective competition, tacit coordination or explicit coordination. The challenge for a competition authority is to establish that tacit coordination is the only cause of the observed outcomes, among the several forms of company interaction.

(ii) If a competition authority observes in practice that a group of companies is not competing vigorously in a market whose features are conducive to tacit coordination, and furthermore suspects the existence of tacit coordination, it can find it very difficult to establish whether this is a result of a tacit coordination or a result of explicit dialogue. The illegality of overt coordination encourages firms to hide evidence of coordination.

(iii) The costs and effectiveness of monitoring the trust post-merger. Given the structure of the market and the history of collusion, the propensity to tacitly coordinate does not diminish, especially when the parties to the merger are recidivists (repeat offenders) who have been found contravening competition laws by coordinating their behaviour in several countries, including South Africa. This represents a significant challenge for the Commission from both a cost and effectiveness perspective.

The merging parties through their own economic expert argued that the trust remedy proposed by the merging parties inclusive of conditions removing the shareholding rights and information flows were sufficient to remedy the Commission’s competition concerns around coordination. The key analysis by the merging parties’ economic expert in terms of coordinated effects focused on addressing information flows between Holcim and Afrisam post-merger. No analysis was undertaken of the tacit coordination specifically in terms of the market structure and associated factors. There was also no view taken on the likelihood that the merger may adversely impact on both Holcim and Afrisam incentives through the structural link post-merger and its implications for tacit coordination post-merger.

The Tribunal hearings were scheduled for 26 and 27 March 2015 but did not proceed due to the merging parties withdrawing their review application on 18 March 2015.

Conclusion

This case, had it been heard at the Tribunal, would certainly have provided useful guidance on the assessment of tacit coordination in the context of cross shareholding and a history of collusion. But it nevertheless remains important for firms to be aware of the Commission’s approach in assessing concomitant cross-shareholding in previously cartelised industries. This case also presents clear guidance that the Competition is most likely to propose very stringent remedies for merger-specific competition concerns arising in previously cartelised industries.

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\(^{7}\) A Megapascal [MPa] is a unit of pressure. These categories are classified in terms of strength obtained 28 days after pouring. (should this read “over 28 days” MM)

\(^{8}\) The estimate of 80 percent was based on capacities in millions of tons per annum sourced through publicly available information and cited in a ‘WhoOwnsWhom’ Report on the Manufacture of Cement, Lime and Plaster dated July 2014.
1 OVERVIEW OF QUARTER

The number of mergers notified to the Commission in quarter 4 was lower than the notification received in the first three quarters of the financial year (see Figure 1). According to Zephyr1 “After hitting a two-year high in the final three months of 2014, mergers and acquisitions (M&A) targeting companies based in South Africa in the first quarter of 2015 returned to levels more usually seen”.

This is largely due to closure of firms during the festive break in December, which noticeably reduces the number of productive business days. This lower merger notified to the Commission in quarter 4 did, however, not reduce to the total number of mergers notified and finalised by the Commission in the year under review.

The Commission received 395 merger notifications by the end of the last quarter and it finalised 375 mergers over the same period. Table 1 shows that the total number of mergers notified for the year under review increased by approximately 23 percent. Since 2011, mergers notified increased by approximately 35 percent. These are relatively significant increases, especially given that they were not accompanied by an equivalent increase in human resources. Given the statutory time period in which mergers need to be finalised, together with the need to meet service standards, the increased number of merger notifications place extreme pressure on human and financial resources of the division.

Table 2 provides an overview of the mergers notified and finalised by the Commission by size. There are negligible differences over the four quarters on mergers notified by size, with intermediate mergers accounting for the largest number. Worth noting is that the number of intermediate mergers notified to the Commission dropped from 81 in quarter 3 to 44 in quarter 4. Given the statutory timeframe for intermediate mergers that only allow for a single extension, it is important that the division continuously monitors and appropriates resources teams to ensure that the merger service standards are adhered to.

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1 Zephyr is a database of M&A, IPO, private equity and venture capital deals with links to detailed financial information on companies. For more information visit www.zephyrdealdata.com.
With respect to the type of decision the Commission took in relation to the 92 merger cases it finalised in the fourth quarter, it blocked two, approved six with conditions and approved 83 without conditions.

The numbers of mergers that raise competition and/or public interest concerns declined by over 50 percent in the last quarter, from 14 to 7 in the previous quarter. However, in comparison with the previous financial year, mergers that raise competition and/or public interest concerns increased by close to 100 percent from 22 in 2013/2014 to 43 in 2014/2015. This suggests that with the increased number of mergers notified the division is under increasing pressure to deal with concerns arising from mergers in a timely manner and to ensure that greater public interest issues and consumers are protected from potential harm.

Notwithstanding the increase in the number of mergers that raise competition and/or public interest concerns, over 80 percent of all the mergers finalised by the Commission remain benign to competition and public interest concerns in their respective markets (see Figure 2).

**FIGURE 2:** Mergers by decision – quarter on quarter for the past two financial years

![Mergers by decision – quarter on quarter for the past two financial years](image_url)

2 **KEY CASES IN QUARTER 4**

The Commission prohibited two mergers which involved the acquisition of Sandton Convention Centre by Hosken Consolidated Investments Limited and the acquisition of two casinos in Western Cape by Tsogo Sun.

The Commission found that the merger between Hosken Consolidated Investments Limited (HCI) and Atterbell Investments (Pty) Ltd (Atterbell), trading as Gallagher Convention Centre (GCC), created an overlap with respect to the provision of conference and exhibition facilities in South Africa and more specifically in the Johannesburg area.

HCI offers these services through the Tsogo Sun range of hotels and casinos as well as the Sandton Convention Centre (SCC) business, whilst Atterbell offers the services through the GCC business.

In evaluating the merger, the Commission took into account the history behind the acquisition, the anti-competitive effects likely to arise from the merger, the counterfactual arguments presented by the merging parties and public interest concerns arising from the merger.

The Commission found that SCC and GCC were the closest competitors in the market for the provision of exhibition venues and exhibition facilities, in particular in the Johannesburg area, with there being no alternative for some exhibitions. The transaction would therefore not only result in the merged entity being dominant post-merger, but would also elevate the concentration levels by reducing the number of players from four to three. The post-merger common ownership of SCC and GCC would therefore likely result in unilateral effects in that it would allow the merged entity to exert its market power and raise prices in SCC and GCC post-merger to the detriment of exhibition organisers.

Although the merging parties argued a counterfactual of GCC exiting the market should the merger not be approved, the Commission found that there was no guarantee that the GCC business would remain in the market even if the merger was approved. Further, at the investigation stage, the merging parties had not presented sufficient evidence to confirm the counterfactual or GCC’s inevitable exit from the market.

The second transaction that was prohibited in the last quarter involved the Tsogo Sun Holdings Limited (Tsogo Sun) bid to acquire 40 percent equity interest in SunWest International (Pty) Ltd (SunWest) and Worcester Casino (Pty) Ltd (Worcester) respectively. SunWest and Worcester are controlled by Sun International (South Africa) Limited (SISA) and Grand Parade Investments Limited (GPI). The Commission was of the view that the acquisition by Tsogo Sun is likely to substantially prevent or lessen competition in the casino market within the general Cape Metropole and Winelands area. The Commission has found that the merging parties are likely to coordinate their behaviour post-merger. In the absence of rivals and no possibility of new entry, the acquiring and target firms have the ability and incentive not to invest in innovation, offer poor quality services and increase hold ratios. Therefore customers (users) of casino facilities and competition in the relevant market will be reduced.

Other transactions worth highlighting were in the diesel distribution market. The Commission approved two interconnected mergers, whereby in the first transaction, Overberg Agri Bedrywe (Pty) Ltd (Overberg) acquired 51.05 percent of the share capital in MOOV Fuel (Pty) Ltd (MOOV). In the second transaction, TP Hentiq (Pty) Ltd (TP Hentiq) acquired 13 filling stations from Overberg.

Overberg and MOOV are active in the market for the supply and distribution of fuel (diesel). The Commission found that the merged entity would have a post-merger market share of approximately 59 percent with an accretion of approximately 51 percent in the Bredasdorp, Caledon and Riviersonderend region in Western Cape. However, farmers in this area confirmed that there are alternative suppliers if the merged entity were to increase prices post-merger. Customers monitor the recommended published price and would switch suppliers if prices increased substantially. Therefore, the Commission found that the proposed transaction is unlikely to substantially prevent or lessen competition in this market.

Furthermore, there was no evidence to suggest that the implementation of the proposed merger would lead to coordinated effects even though the Commission has previously found that various firms supplying commercial diesel engaged in collusive conduct. Several structural features that facilitate coordination in this market, e.g. transparency, existed pre-merger.

In the second transaction, the activities of the merging parties do not overlap and therefore there were no competition concerns.

Some noticeable consolidation also took place in clothing manufacturing and retail markets in the last quarter. The Commission evaluated at least three key mergers in this sector. First, Truworths International Limited (Truworths) wholly
acquired two clothing retail firms, namely Earthchild Clothing (Waterfront) (Pty) Ltd (Earthchild) and ZA One (Pty) Ltd (Naartjie) from their respective shareholders. The Commission found that the merger was unlikely to prevent or lessen competition in any of the affected markets as the transactions do not significantly change the dynamics of the retail clothing market.

Earthchild and Naartjie primarily retail children’s apparel and related fashion accessories; however neither is regarded as a significant player in these markets. The Commission’s investigation also confirmed that this market is fragmented and Truworths will continue to face competition from significant players such as Edcon, Woolworths, Foschini, Mr Price and Pepkor. In recent years, retailers such as Zara, Mango, Topshop, Cotton On, Cape Union Mart International Limited and Topman have also entered the domestic market.

The South African retail clothing market is also characterised by high levels of imports. The Commission found that the proposed transaction is unlikely to change the importing strategies of the merging parties going forward, as Truworths, Earthchild and ZA One will continue importing as before. However, Truworths submitted that it will review the supply base critically over the medium term and will endeavour to replace imported merchandise with South African manufactured merchandise when suitable opportunities arise.

Secondly, Edcon Limited (Edcon) acquired Celrose (Proprietary) Limited (Celrose) and Eddels Shoes (Proprietary) Limited (Eddels). Celrose is a clothing manufacturer situated in Tongaat, KwaZulu-Natal. It manufactures clothing for men, women and supplies clothing to the Edcon Group and other retailers operating in South Africa and Zimbabwe. Eddels is a shoe manufacturer situated in Pietermaritzburg, KwaZulu-Natal, that manufactures footwear for men, women and children under the following brands, inter alia John Drake, QC, Riccardo, Aeroflex and Freedom. The footwear manufactured by Eddels is supplied to the Edcon Group and other retailers operating in South Africa and Zimbabwe.

The proposed transaction did not present horizontal overlaps in activities between the merging parties. However, it does give rise to several vertical overlaps between the merging parties in that the Edcon Group is a clothing and footwear customer of Celrose and Eddels. Given the vertical overlaps, the Commission considered both input and customer foreclosure.

The Commission’s evaluation of the three high profile mergers in the telecommunications sector, which involve MTN/Telkom RAN asset, Vodacom/Neotel and Telkom/Business Connection transactions are ongoing. These transactions individually or combined are likely to change the competitive landscape of the telecommunications sector and due consideration of all possible implications is required which informs the unprecedented extended review periods for each of the cases.

3 M&A ACTIVITY AND SECTOR INSIGHTS IN QUARTER 4

M&A activity has increased in almost every sector of the economy – reversing the trend of the past few years, in which consolidation deals have spiked in certain industries, such as technology, masking fragility in the wider market.

Figure 3 shows that finalised mergers in the last quarter of the 2014/2015 financial year were dominated by Property (27.2 percent), Manufacturing (20.7 percent), Wholesale (15.2 percent), Retail (8.7 percent), Mining (4.3 percent) and Information & Communication (4.3 percent). Other sectors which experienced increased merger activity during the same period include Accommodation, Agriculture, Construction, Education, Engineering, Energy, Professional Services, Recreation, Scientific and Technical Activities. The data does not show a consistent trend on the ultimate acquiring firm. The data suggests that acquisitions are being made by different ultimate acquiring firms across all sectors of the economy. The only exception was in the Property sector where Accelerate Property Fund Limited and Vukile Property Fund acquired five and two properties respectively. Another exception was in the Wholesale sector where Ascendis Health Limited made two acquisitions.

*Other includes Accommodation, Agriculture, Construction, Education, Engineering, Energy, Professional Services, Recreation, Scientific and Technical Activities, with each accounting for 1.1 percent of finalised cases in the fourth quarter.

Figure 4 shows that in the fourth quarter of the 2014/15 financial year, the sectors which grew (quarter-on-quarter annualised) include Wholesale, Retail, Finance and Manufacturing, which grew at a quarter-on-quarter annualised rate of 180 percent, 60 percent, 50 percent, 33 percent and 19 percent respectively. The Education sector recorded no quarter-on-quarter annualised change. Sectors which decelerated include Property, Agriculture, Construction, Consultancy, Distribution, Health, Hospitals, Hotels, Insurance, IT, Publishing, Renting and Telecommunications. Some sectors grew from a low base in the fourth quarter of the 2014/15 financial year and recorded some finalised cases. These include Accommodation (1), Engineering (1), Electricity (2), Energy (1), Information and Communication (4), Professional (1), Recreation (1), Scientific and Technical Services (1), Transport (2) and Waste Management (2).
4 COMPLIANCE AND IMPACT OF REMEDIES IMPOSED IN QUARTER 4

4.1 STATUS REPORT ON PENDING CONDITIONS

At the commencement of quarter 4, the Unit was monitoring 111 conditions. At the end of quarter 4, five cases lapsed and six new cases were added to the monitoring list. The Unit is therefore monitoring 112 cases at the end of quarter 4. In quarter 4, there were fewer new conditional approvals as compared with previous quarters. These statistics are presented under the section dealing with conditions imposed in quarter 4.

4.2 CLOSURE OF CONDITIONS THAT LAPSED

We closed 19 lapsed conditions in quarter 4, compared to 12 in quarter 3, 10 in quarter 2 and 11 in quarter 1. Overall, the Monitoring Unit closed 52 conditions in the 2015/2016 financial year. The Unit has therefore met the annual target set out in the Business Plan.

(i) Property transactions closed in quarter 4

Six of the nineteen cases closed in quarter 4 related to the issue of exclusivity clauses in lease agreements. The Commission has imposed conditions in various property mergers where it discovered exclusivity clauses in lease agreements with the view that these clauses have the effect of preventing entry and the expansion of small businesses in shopping centres.

Although in previous quarters the Commission had seen some success in the removal of these clauses, in this quarter none of parties was successful in persuading their tenants to remove the exclusivity clauses.

In the merger involving Sizanai and the Heathway Shopping centre, Sizanai was to use reasonable commercial endeavours to negotiate with Pick n Pay to remove the exclusivity clause contained in a lease agreement. Pick n Pay, however, did not agree to the removal of the exclusivity clause.

In the Rapfund/Atterbury Investment merger, Rapfund was to use reasonable commercial endeavours to negotiate with Pick n Pay to remove the exclusivity clause contained in the lease agreement. Pick n Pay did not agree to the removal of the exclusivity clause contained in the lease agreement.

In the merger involving Mergence Africa/Shoprite Pretoria North and others, Mergence was to use reasonable commercial endeavours to negotiate with Shoprite to remove exclusivity clauses in various lease agreements. Shoprite, however, did not agree to the removal of the exclusivity clauses.

In the merger involving Ziningi Properties and Thina Bantu the deal fell through after the Commission had approved the transaction. In the end, the mall was not transferred to the purchaser and therefore there was no need for Ziningi to negotiate with Shoprite to remove the exclusivity clauses as contemplated in the conditions.

In the Octodec and Premium Properties merger, Octodec was to use reasonable commercial endeavours to negotiate with Pick n Pay to remove the exclusivity clauses contained in the lease agreements. Pick n Pay did not agree to the removal of the exclusivity clauses.

In the merger involving Mergence Africa and Redefine, Mergence was to use reasonable commercial endeavours to negotiate with Shoprite and Pick n Pay to remove exclusivity clauses in the lease agreements. Neither Pick n Pay nor Shoprite agreed to the removal of the exclusivity clauses contained the lease agreements.

Evident from the previous property transactions in which the anchor tenants successfully removed exclusivity clauses, it appears the non-cooperation by one large retailer (Pick n Pay) had a ripple effect that has seen other large retailers refusing to cooperate to remove exclusivity clauses that may affect the ability of SMME market to grow.

(ii) Employment conditions that ceased

Nine of the nineteen cases had employment conditions aimed at addressing concerns around job losses.

In the Wispeco/Xline merger, the conditions required the merged entity to offer all affected employees alternative positions. The majority of employees remained employed with the Wispeco Group, while some opted to resign or take voluntary severance packages. In the Oceana/Phamobili Fisheries merger, the conditions required that Oceana not retrench any employees for a period of two years from the approval date.

Oceana’s submissions indicate that the conditions have been complied with as Oceana did not retrench any employee as a result of the merger for a period of two years after the approval date.

In the merger involving Capital Property Fund and Clairwood...
Further, the merging parties were required to report to the training of the employees that qualified for the training benefit and to provide funding for the additional affected by the merger and to ensure that they do not retrench more than 13 employees were to ensure that the merged entity invest in the South African production capacity of Defy and retain Defy’s local suppliers, unless commercial reasons warrant termination. Upon examining the information received from the merged entity, the Commission satisfied that the merged entity met the investment condition.

In the mergers involving Kenilworth Racing and Gold Circle and the Thoroughbred Horseracing Trust and Kenilworth Racing, the purpose of the conditions was to ensure that Kenilworth Racing did not retrench any employee as a result of the merger. Based on the information received from the parties, there were no retrenchments as a result of the merger for a period of two years from the effective date of the merger.

In the mergers involving Tecsa (Pty) Ltd and Reco, a division of African Oxygen Ltd, the merged entity could not retrench any semi-skilled employee during the moratorium period. The merged entity was also not allowed to retrench more than 11 skilled employees as a result of the merger during the moratorium period. Based on the information submitted by the merged entity, no semi-skilled employee was retrenched during the moratorium period and only six skilled employees were retrenched as a result of the moratorium period. This is below the cap of 11 skilled employees that the merged entity could not surpass in terms of the conditions.

In the Faurecia/Cummins merger, Faurecia was required to verbally announce and place a notice on notice boards at the Rosslyn plant for the 24 employee positions required at its Port Elizabeth facility and to give first preference to any CES employees for those 24 positions. Based on the merging parties’ submissions, Faurecia advertised and offered employment to the former CES employees.

In the Tourvest and Three Cities merger, the merging parties were required to report to the Commission by 15 May 2015 detailing the number of employees that applied for training, their names, the course selected by each, the duration of the training course, the cost of training, and proof of payment for each course. Based on the information received, 13 employees were retrenched. Only one employee qualified for the additional training benefit. However, the employee refused to accept the offer and was not interested in pursuing the training.

### (iii) Other public interest remedies that ceased in quarter 4

The Ardutch/Defy merger dealt with remediying other public interest concerns such as an impact on a particular industrial sector or region and the impact of a merger on the ability of small, medium businesses or businesses controlled by historically disadvantaged individuals to compete. The purpose of the conditions was to ensure that the merged entity invest in the South African production capacity of Defy and retain Defy’s local suppliers, unless commercial reasons warrant termination. Upon examining the information received from the merged entity, the Commission satisfied that the merged entity met the investment condition.

In CA Sales and Pack ’n Stack, the conditions required CA Sales to advise the Commission in writing if the call option was exercised within 90 days of CA Sales receiving Pack ’n Stack’s audited financial statements for the year ending 28 February 2014. If CA Sales had exercised its call option after this date, 27 July 2014, it would have to seek the Commission’s approval prior to implementing the acquisition. CA Sales exercised the call option on 19 June 2014, within the 90-day period in which CA Sales received Pack ’n Stack’s audited financial statements. This was before 27 July 2014 and therefore CA Sales was not obliged to seek any further approval from the Commission.

In Yara and Kemira Growhow, Yara was supposed to make urea available for sale to qualifying customers on certain terms and conditions. The conditions had no reporting obligations, the Commission received confirmation that the qualifying customers were aware of the conditions and did not complain about any breach. The Commission contacted a few customers to ascertain whether the merged entity complied with the conditions and received feedback from some customers. The customers informed the Commission that Yara supplied and offered urea to the market on a regular basis and there was no shortage of urea in the local market during the term of the conditions.

### (iv) Behavioural conditions imposed in quarter 4

In Zeder and Agri Voedsel, Zeder was required to implement the transaction within 12 months from the approval date, that is, by 25 February 2015, failing which it would forfeit the approval and would thus have to notify the transaction again if it was to proceed with it. Based on the report submitted by Zeder, Agri Voedsel was acquired within the 12-month period.

In CA Sales and Pack ’n Stack, the conditions required CA Sales to advise the Commission in writing if the call option was exercised within 90 days of CA Sales receiving Pack ’n Stack’s audited financial statements for the year ending 28 February 2014. If CA Sales had exercised its call option after this date, 27 July 2014, it would have to seek the Commission’s approval prior to implementing the acquisition. CA Sales exercised the call option on 19 June 2014, within the 90-day period in which CA Sales received Pack ’n Stack’s audited financial statements. This was before 27 July 2014 and therefore CA Sales was not obliged to seek any further approval from the Commission.

### (v) Synoposis of conditions imposed in quarter 4

During the quarter, six cases were approved with conditions. These are presented in the Table below. This is a drop from the previous quarters of 14 in quarter 3, 15 in quarter 2 and 8 in quarter 1. All six conditions were aimed at addressing public interest concerns in mergers.

#### i) Employment conditions

Table 3 outlines all cases approved with conditions, with a brief description of the nature of the condition placed on each of the transactions.
Overall, there were 43 mergers approved with conditions for this financial year, compared with 25 in the previous financial year. In 2013/2014, conditions were imposed in 13 cases to address public interest concerns. In this financial year, conditions were imposed in 39 cases to address public interest concerns.

ii) Impact of mergers on jobs in Quarter 4.

In Quarter 4, the Commission imposed conditions on six mergers as indicated above. In all cases, remedies were imposed to address a negative impact on employment. Table 4 illustrates the number of jobs lost, saved and created by the various mergers reviewed in the last quarter.

In the fourth quarter, eight cases had an impact on employment. These were largely in the manufacturing sector. Overall, 182 jobs were lost, 1,970 jobs were saved and no jobs were created. There was a positive effect overall on employment in quarter 4.

Overall for the current financial year the net effect on employment was positive for the financial year. As shown in Table 5, quarter 3 had the greatest impact on jobs, with 16 cases having an impact on employment. Quarter 1 had the smallest impact on jobs. The most number of job losses was in quarter 2, while the most number of jobs saved was in quarter 4.

### TABLE 3: List of cases approved with conditions in Quarter 4

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Primary Acquiring Firm</th>
<th>Primary Target Firm</th>
<th>Market</th>
<th>Condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014Oct0605</td>
<td>Noorfed Eiendoms Beperk</td>
<td>Empangeni Milling (Pty) Ltd</td>
<td>Manufacturing of milled maize products</td>
<td>Public Interest: Restriction on the number of job losses at 78.</td>
</tr>
<tr>
<td>2014Nov0663</td>
<td>Bytes People Solutions, a division of Bytes Technology Group South Africa (Pty) Ltd</td>
<td>Inter-Active Technologies (Pty) Ltd</td>
<td>Information technology</td>
<td>Public Interest: Restriction on the number of job losses at 70.</td>
</tr>
<tr>
<td>2014Dec0741</td>
<td>Famous Brands Management Company (Pty) Ltd</td>
<td>City Deep Storage (Pty) Ltd and Cater Chain Food Services (Pty) Ltd</td>
<td>Supply and processing of meat related products</td>
<td>Public Interest: Obligation to continue supply for a period of 2 years.</td>
</tr>
<tr>
<td>2014Dec0747</td>
<td>Sasfin Bank Ltd</td>
<td>Fintech (Pty) Ltd</td>
<td>Banking</td>
<td>Public Interest: Restriction on the number of job losses to 8.</td>
</tr>
<tr>
<td>2014Dec0763</td>
<td>Mario II Finance Corp</td>
<td>Sigma Aldrich Corporation</td>
<td>Manufacture of chemical products</td>
<td>Public Interest: Obligation to continue with distribution agreement and restriction on job losses to 6 for a period of 2 years.</td>
</tr>
<tr>
<td>2014Dec0723</td>
<td>Deltrade 83 (Pty) Ltd</td>
<td>The JHI Retail Division, of JHI Properties (Pty) Ltd and LP Manco, the Property Management Business of Liberty Holdings Ltd</td>
<td>Property</td>
<td>Public Interest: Moratorium on retrenchments for a period of 2 years.</td>
</tr>
</tbody>
</table>

### TABLE 4: Summary of the Impact on jobs in Quarter 4

<table>
<thead>
<tr>
<th>Month</th>
<th>Jobs lost</th>
<th>Jobs saved</th>
<th>Jobs created</th>
<th>No of cases</th>
<th>Net effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>148</td>
<td>1204</td>
<td>0</td>
<td>2</td>
<td>+1056</td>
</tr>
<tr>
<td>February</td>
<td>0</td>
<td>90</td>
<td>0</td>
<td>1</td>
<td>+90</td>
</tr>
<tr>
<td>March</td>
<td>34</td>
<td>676</td>
<td>0</td>
<td>5</td>
<td>+642</td>
</tr>
<tr>
<td>Total</td>
<td>182</td>
<td>1970</td>
<td>0</td>
<td>8</td>
<td>+1788</td>
</tr>
</tbody>
</table>

### TABLE 5: Jobs report for the current financial year (2014/2015) per quarter

<table>
<thead>
<tr>
<th>Quarter</th>
<th>Jobs lost</th>
<th>Jobs saved</th>
<th>Jobs created</th>
<th>No.of cases</th>
<th>Net effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1</td>
<td>224</td>
<td>1,429</td>
<td>0</td>
<td>7</td>
<td>+1,205</td>
</tr>
<tr>
<td>Q2</td>
<td>1,887</td>
<td>47</td>
<td>0</td>
<td>13</td>
<td>-1,840</td>
</tr>
<tr>
<td>Q3</td>
<td>301</td>
<td>1,894</td>
<td>126</td>
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<td>+1,593</td>
</tr>
<tr>
<td>Q4</td>
<td>182</td>
<td>1,970</td>
<td>0</td>
<td>8</td>
<td>+1,788</td>
</tr>
<tr>
<td>Total</td>
<td>2,594</td>
<td>5,340</td>
<td>126</td>
<td>44</td>
<td>+2,746</td>
</tr>
</tbody>
</table>
ii) Behavioural conditions imposed in quarter 4

In the Famous Brands Management Company Proprietary Limited-City Deep Storage Proprietary Limited and Cater Chain Food Services Proprietary Limited merger, the Commission found that the proposed transaction was unlikely to lead to a substantial prevention or lessening of competition in any market. However, the Commission found that the intention of the acquiring firm to self-supply post-merger was likely to result in the existing Halaal suppliers and the existing pork suppliers scaling down their processing operations. This would result in job losses. In order to address the concerns, the Commission imposed a condition that the acquiring firm continue procuring Halaal processed meat products from the existing Halaal suppliers for a period of 12 months and for the existing pork suppliers for a period of 24 months from the implementation date.

OUTLOOK FOR NEXT FINANCIAL YEAR (2015/2016)

With the new financial year approaching, there is anticipation of a further surge in merger activities. According to the Deutsche Bank South Africa, the global outlook for mergers and acquisitions in 2015 is robust, although activity could be more volatile due to looming changes in monetary policy in key global markets such as US and EU. There is significant desire in Europe and the US for mergers and acquisitions to bolster growth, and Africa and the Middle East will continue to be hot spots for merger activities.

Ernest and Young’s (E&Y’s) 11th Biannual Global Capital Confidence Barometer shows that there is an increasing appetite for expansion in Africa. E&Y expects expansion by African companies to remain stable, with 23 percent of companies anticipating pursuit of acquisitions in the next 12 months, compared with 19 percent in 2013. Despite its challenges, South Africa will continue to attract mergers and acquisitions, given its role as springboard to the rest of Africa.

Some of the transactions have already been announced in the media. Early in January 2015, Afrisam indicated its intentions to acquire PPC. However, this deal fell through for undisclosed reasons. Although PPC may have declined a merger proposal from Afrisam, the indication is that it may merge with another company. German-based Heidelberg Cement, the world’s third-largest cement firm, has indicated its intentions to invest in South Africa and PPC may be a perfect fit. Therefore, a merger in the cement industry is foreseeable in the 2015/2016 financial year.

MMI also communicated its expansion plan in the African continent. MMI indicates that it is considering opportunities in 12 African countries, particularly East and West Africa, where it does not have the scale. It is also looking for potential acquisitions in South Africa, possibly to build its short-term insurance business or to grow in the middle market, where it was underrepresented. Therefore, the short-term insurance industry is also expected to experience some merger activity at least for the first and second quarter of the 2015/2016 financial year. Generally, the 2015/2016 financial year will experience increased merger activities. Some key drivers identified include stability in macroeconomic environment in key global markets and companies’ corporate strategy focused on growth and cost efficiencies.
ALL HANDS ON DECK SAILING TO UNCHARTED TERRITORY

“I foresee a future where we’ll be able to open up a lot of opportunities for businesses and meaningfully contribute to other broader national policy objectives as captured in the National Development Plan,” says acting Deputy Commissioner and Manager of Mergers and Acquisitions (M&A) Hardin Ratshisusu when asked about the role of the Commission.
Hardin has been with the Commission for a cumulative period of 10 years, having joined in 2004 in the M&A division and subsequently holding various positions within the organisation, including advisor to the Deputy Commissioner and acting manager for M&A. He says the journey has been an exciting one in which he’s learned a lot, and welcomed each challenge as an opportunity to contribute and utilise his experience.

Hardin currently wears two hats, as Manager of M&A as well as acting Deputy Commissioner. The Deputy Commissioner role includes overseeing the core divisions, which comprises M&A. With such added responsibility, Hardin credits the “capable team of executives and their strategic guidance on operations” for making his oversight responsibilities much lighter.

“With the competition authorities turning 15 years, we’ve had to assess our past performance and the strides we’ve made against objectives of the Competition Act,” explains Hardin. “Although the authorities achieved a lot, including the dismantling of cartels in the bread, flour, cement, construction and concrete pipes industries, there are still a lot of challenges in the South African economy, such as poverty, high levels of unemployment and limited participation of small businesses in the mainstream economy.”

“The objectives of the Competition Act talk about addressing the economic inequalities of the past, promoting small, medium and micro enterprises (SMMEs) and having an efficient economy. Looking at the tools we have at our disposal, we believe we can contribute broadly to the economy, to ensure that we achieve inclusive growth,” says Hardin.

The assessment triggered a strategic planning process in which the Commission discussed its vision and mission in detail. That engagement produced a long term vision dubbed ‘Vision 2030’, which aims to work towards a Growing and Inclusive Economy. This has ushered in a new era, and it’s not going to be business as usual. “We are going to look at merger control differently.

“We want to do more and partner with all economic actors to ensure that we realise the economic objectives that the country has set itself,” he adds.

Despite his hectic schedule, Hardin, who hails from Maelula village in Limpopo, still finds time to plough back to his community, to which he pays homage for the role it played in moulding him. He is the chairperson of the Management Sciences Alumni association at the University of Venda, where he actively participates in meetings of convocations and motivation seminars. Hardin has a BCom (Hons) from the University of Venda, a MCom (Economics) from the University of the Witwatersrand and an MBL from the University of South Africa.
Introduction and overview

In February 2015 we completed a scoping study research project into potential anti-competitive behaviour in the South African red meat value chain. The purpose of the scoping study was to provide preliminary evidence on whether or not there are any indications of potential competition concerns in the red meat sector that may be a contributing factor to increasing retail and wholesale level prices of red meat, which is at levels above inflation.

It is important to note from the outset that the scoping study only focused on beef (cattle) and lamb (sheep) meat as the major contributors to total red meat consumption in South Africa, excluding other red meat products such as chevon (goat), venison (game) meats and ostrich.

In recent times the media and other stakeholders have raised concerns with respect to persistent increases in red meat prices. For instance, on average red meat prices (beef and lamb) increased by 57 percent between January 2008 and October 2014. This contrasts with meat CPI growth of 47 percent and headline CPI growth of 48 percent during the same period. The persistent increase in red meat prices above meat CPI and headline CPI growth raise concerns about the consequences of such price increases on economic well-being and consumer welfare given the importance of the red meat sector in South Africa.

The scoping study relied solely on publicly available information. The main source of information was literature published by different bodies in the red meat sector, such as the South Africa Feedlot Association (SAFA) and the Red Meat Abattoir Association (RMAA). Previous studies on red meat carried out in South Africa by academic institutions also provided important insights. Statistical information on red meat such as red meat consumption, red meat retail prices, red meat consumer price indices and red meat producer price indices was also collected from Statistics South Africa (StatsSA) and analysed.

In the early 1990s, the red meat sector changed from being a highly regulated sector to one that is currently totally deregulated. Before deregulation, the red meat sector was characterised by various policies, such as the distinction between controlled and uncontrolled areas, compulsory levies payable by producers, restrictions on the establishment of abattoirs, the compulsory auctioning of carcasses according to grade and mass in controlled areas, the supply control via permits and quotas, the setting of floor prices, removal scheme, etc. Deregulation of many of the policies resulted in the allocation of markets and limited effective competition.

The deregulation of the red meat sector took full effect in 1997 when the Marketing of Agricultural Products Act, No 47 of 1996, replaced the Marketing Act of 1968. The National Agricultural Marketing Council (NAMC), established through the Act, replaced various control boards when it started operating in 1997. Changes in market structures have been observed in the red meat industry, in particular with regard to backward and forward integration along the value chain as a result of mergers between players operating at different levels of the value chain.

The red meat industry has also seen a period marked with protection of the domestic producers of red meat against trade distorting practices via tariffs on imports. Tariffs replaced all direct controls on imports with South Africa applying a 40 percent per kilogram freight on board (FOB) ad valorem tariff for beef and lamb (zero for Southern African Development Community (SADC) countries). This rate does not, however, reflect the true cost of exporting red meat to South Africa for some countries, because of subsidies prevailing within their borders. The Brazilian beef market, for instance, has subsidised credit. Other countries, notably the United States of America (USA), and countries from South America, Oceana, and the European Union (EU), which are major sources of South African red meat imports, experience low production costs as a result of massive feed subsidies. Even so, imports continue to supplement domestic production of red meat to meet excess demand for red meat in South Africa. Another feature of deregulation was the establishment of industry associations that perform different functions in the industry to ensure the smooth functioning of the red meat industry.
Contribution of the red meat sector to the South African economy

The red meat sector plays an invaluable role in South Africa because of its contribution to food subsistence and economic well-being of the country. Food forms an important part of human livelihood worldwide and in the food basket red meat is the main source of protein. For example, beef provides higher protein concentration of 1.5 to 2.0 percent compared with about 0.05 percent and about 0.1 to 0.3 percent protein concentration from chicken and pork respectively. The economic contribution of red meat is mainly in terms of employment creation and contribution to Gross Domestic Product (GDP). For instance, the red meat sector's long-term average contribution to the total gross value of agricultural production was estimated to be 14.2 percent from 2000/01 to 2011/12.

Livestock farming for red meat production is the largest agricultural sector in South Africa in monetary terms, generating over R6.7 billion per annum of which 74.6 percent is attributed to beef production.

The meat sector employs over 1 million people of whom approximately 40 percent are in the informal sector. The red meat sector contributed about 25 percent of total meat production and 14.8 percent of total agricultural production in 2009, making the sector one of the most important industries in the country. Regarding food subsistence, red meat is the main source of protein and as such contributes significantly to human livelihood.

The supply of red meat marginally increased during the period between 2000 and 2012 but this was outweighed by the increase in red meat demand resulting in excess demand of red meat. The excess demand of red meat in South Africa has been supplemented by imports which may potentially increase the pressure on red meat prices.

Conclusion on competition dynamics in the South African red meat sector

The different levels of the red meat value chain are closely linked from the production level to the wholesaling and retailing level. The upstream level comprises sourcing and supplying of livestock while the downstream level comprises marketing and distribution segments. Furthermore, the upstream level has strong linkages with grain production, which is the primary livestock feed. Increases in grain prices are therefore expected also to reflect in the final price for red meat at the retail level. The role players at the upstream level include animal producers, agents, feedlots and abattoirs. The role players at the downstream level include wholesalers and retailers of red meat.

The study established that most of the market players in the beef and lamb subsectors are vertically integrated and have their own feedlots, abattoirs, processors and distributors. The bulk of sheep and cattle are slaughtered by vertically integrated abattoirs. This may raise concerns about potential foreclosure of non-vertically integrated players considering the decline of service abattoirs to less than 10 percent of beef slaughtering in the sector. However, there are insufficient indications of potential input foreclosure because of low concentration levels at the feedlot level, which may hamper the ability of feedlots to foreclose the abattoirs.

The study found that all levels of the red meat value chain are characterised by many players and relatively low levels of concentration. None of the players can be considered to be individually dominant according to the dominance thresholds defined by the Competition Act. The study established the existence of a thriving informal sector accounting for an estimated 40 percent of the meat sector in South Africa. Although the informal sector was not part of the scoping study, it is important to understand the competition dynamics in the sector vis-à-vis the formal sector.

In addition the study established that there are high price mark-ups, particularly at the wholesaling and retailing level of the value chain. The price mark-ups between the abattoir level and the wholesaling and retailing level are in excess of 100 percent between January 2013 and December 2014 for both lamb and beef. It is difficult, however, to establish the reasonableness of the price mark-ups because we did not have access to company-level costs given that this is commercially sensitive information and not available in the public domain.

Further, the study also found that the red meat sector is characterised by high economies of scale and relatively high barriers to entry and exit at all levels of the value chain, specifically at the upstream production level. It is important to note that although there are seemingly high barriers to entry and exit in the production of red meat, they don’t seem insurmountable because of the existence of many players at all levels of the red meat value chain and the low levels of concentration in the industry.

Based on the findings of the study, we conclude that there are no preliminary indications of potential competition concerns from publicly available information that would provide reasonable grounds for the Commission to consider initiating an investigation into the red meat sector. However, persistent increase in prices and higher price mark-ups between the abattoir selling prices and retail prices in a sector with many players and relatively low levels of concentration is worrying unless the prices are justified by high costs. Therefore, the study recommended that there is a need for further research in order to better understand the source of high price mark-ups of red meat at the wholesaling and retailing level.
Introduction and background

The dairy industry is divided into the raw milk and dairy products (pasteurised milk, cheese, butter, milk powders and UHT (ultra-high temperature) milk) segments. Historically, milk and dairy boards regulated the industry through the enforcement of minimum price regulation for certain products. While these control boards were abolished in 1998, the Commission has found evidence of continued price fixing and market allocation by milk processors, both with respect to buying milk from producers (farmers) and selling processed milk products to retailers.

The Commission referred a complaint against seven milk processors to the Tribunal in December 2006. The processors were Clover, Parmalat, Nestlé, Ladismith Cheese, Milkwood Dairy, Woodlands Dairy and Lancewood. The complaints related to collusion and/or price fixing at the milk procurement level, including exchange of information and exchanging milk between processors in different regions instead of entering each other’s regions to procure milk, as well as price fixing in the sale of processed milk and dairy products. There was also a complaint relating to exclusive dealing in inducing suppliers not to deal with competitors.

The Commission settled with one company, Lancewood, in January 2009. Lancewood admitted that it was involved in price information exchanges as alleged by the Commission. In the Commission’s view Lancewood’s conduct amounted to a contravention of section 4(1)(b)(i) of the Competition Act, directly or indirectly fixing procurement prices of raw milk or other trading conditions. Lancewood faced only one count out of the six that were subject to the Commission’s referral.

However, the Commission was eventually forced to withdraw its case against Clover, Nestlé, Parmalat and Ladismith Cheese in April 2011 after a Supreme Court of Appeal (SCA) ruling in September 2010 in which the Court upheld Woodlands Dairy’s and Milkwood Dairy’s objections to the Commission’s initiation and investigation. The SCA ruled that the Commission’s initiation of an investigation into anti-competitive conduct in the milk industry was unlawful because it did not specify allegations faced by each firm and was not based on a reasonable suspicion that all firms in the industry were engaged in such conduct.

In 2008 a research study conducted by the Commission on competition dynamics and developments in the South African dairy sector showed that the rapid liberalisation of the sector over the preceding 10 years had not yielded the desired policy outcomes, in that cartelisation among the processors and alleged anti-competitive practices on the part of the retailers had prevented the efficient allocation of goods in the sector. At the time it was also noted that while there are low barriers to entry in respect of entry by a processor on a small scale in order to sell to large retailers, substantially more than an ability to pasteurise products is probably needed. The Tribunal has indicated that imports discipline local producers in respect of some processed dairy products. However, there was evidence of pricing power by local dairy processors, particularly in light of milk...
surpluses and the processors’ ‘milk surplus removal’ scheme. At the time, price evidence obtained from arrangements between retailers and processors could be of concern, as it may lead to an increase in prices paid by end-consumers of dairy products.

A further study conducted by the Commission in 2012 discovered that in certain respects there had been a change in the behaviour of firms in the dairy industry following the Commission’s investigation and referral of the complaint against the dairy processors in 2006. Exclusive supply agreements between processors and farmers and long-term surplus exchange and removal agreements between processors were found to be no longer common practice in the industry. Furthermore, the Commission observed at the time an on-going trend towards consolidation, cooperation and vertical integration among dairy farmers, which may be giving them greater power in negotiations. This had been reflected in price trends, with the producer price of raw milk growing faster than the producer price of dairy products. At the time of the study a number of role players still raised concerns about the level of buying power held by the processors and also by the large retailers.

**Dairy producers in South Africa**

Milk farming involves the rearing of cows for the purposes of producing raw milk, i.e. milk that has not been pasteurised, processed or homogenised. Raw milk is highly perishable and has to be processed within 48 hours after milking. It is used to produce various dairy products such as yoghurt, butter, ice cream, cheese, fresh milk and long life milk, as well as powdered milk.

In South Africa, raw milk is mainly produced from Holstein-Friesland (Friesland) and Jersey cows. Friesland and Jersey cows make up about 51 and 39 percent of the dairy cow population respectively. The key difference between these breeds of dairy cows is that Friesland cows produce more raw milk per day when compared with Jersey cows, whereas Jersey cows produce raw milk with higher protein and butterfat content, which thus fetches a higher price per litre compared with Friesland cows.

Our investigation revealed that the number of milk farmers in South Africa declined significantly from just over 7,000 in 1998 to less than 2,000 in 2014, thus showing a decline of 72 percent over this period. Moreover, information obtained from the Milk Producers Organisation (MPO) show that 96 percent of the farmers that exited the dairy industry over the period 1998 to 2014 are regarded as small farmers, with a herd size of less than 200 cows. This has adversely affected employment in the sector, which declined from 66,000 in 1998 to 23,000 in 2013. By contrast, the raw milk production volumes over the same period increased by 36 percent.

**Milk processors**

Milk processors purchase raw milk from milk farmers for further processing at their production plants. The milk processor usually collects the raw milk from an agreed and approved collection point or close to the milk farm. Milk processors buy raw milk from milk farmers at prices negotiated on the basis of different elements. These elements include, inter alia:

(i) The quality of raw milk (protein and butterfat content or the presence of diseases in the raw milk). In general, raw milk with a higher protein and butterfat content attracts a premium on the raw milk price, whereas deviation from the processor’s hygiene and other health and safety requirements attracts a penalty and/or refusal to purchase the raw milk.

(ii) Various premiums and penalties related to the farmer’s milk parlour, particularly the health and safety requirements of the collection point and access by the processor’s milk trucks to and from the milk parlour.

(iii) Location of the milk farmer relative to the processor. The shorter the distance between the farmer to the processor’s plant, the lower the transport costs deducted from the raw milk price paid to the farmer.

Raw milk is highly perishable and has to be processed within 48 hours after milking. As such, specialised trucks that are refrigerated at temperatures less than 40°C are required to transport raw milk. The costs associated with transporting raw milk are therefore high, particularly when compared to the price of raw milk, and increase further when the distance over which the raw milk is transported increases.

**Retailers of dairy products**

Dairy products are mainly sold to end-consumers through retailers of grocery products. South Africa’s wholesale and retail sector is dominated by five large chain stores, namely Pick n Pay, Shoprite/Checkers, Massmart, Spar and Woolworths, that have a network of retail stores across South Africa. These retailers distribute dairy products through these stores and account for more than 90 percent of the total food retail sector in South Africa. The remainder is accounted for by smaller independent retail stores.

Data obtained from Statistics South Africa shows that the retail prices of both fresh and long life milk have increased sharply since the start of 2014. However, we note that the increase in retail prices may be due to input cost increases as observed in higher PPI prices over the same time period.

**Conclusion on competition dynamics in the South African dairy sector**

Our results in respect of concentration levels across the dairy industry value chain revealed that the upstream raw milk farming level of the dairy industry value chain is fragmented, with around 2,000 milk farmers in South Africa dispersed across the provinces. Concentration levels at the milk processing and retail levels are significantly higher, with the six largest milk processors purchasing more than 60 percent of the total annual raw milk production in South Africa, whereas the top five retailers account for approximately 96 percent of the retail sector and approximately 94 percent of retail sales of dairy products. Such differences in concentration levels across the value chain are consistent with unequal bargaining power, in favour of milk processors and retailers.

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4 Other varieties such as Ayrshires and Guernseys make up about 10 percent of South Africa’s dairy herd (see W D Gertenbach, Breeds of dairy cattle, Cedara Agricultural institute; http://www.kzndae.gov.za/ en-za/).

5 This is reflected in the price structures by milk processors that offer higher prices for milk with higher levels of protein and fat content.

6 Raw milk produced from Jersey cows is more suitable for the production of cheese, while that from Friesland cows is mostly used in the production of UHT milk because it has less protein and fat content, although the two can be used interchangeably.


8 MPO submissions to the Commission.

9 Milk SA Lacto Data April 2014.

10 This classification is based on the amount of raw milk that each processor bought from milk farmers.
Our results also show that the ability of milk farmers to switch between milk processors is adversely influenced by a number of factors, such as obtaining a financially stable milk processor, location of the milk farmer, duration of the milk supply agreements and incentive schemes by the processors. However, at the milk processor level, we find that the milk processor’s ability to switch between, or to altogether stop buying from smaller milk farmers, is generally higher, compared with switching between or stopping buying from large farmers. Thus the differences in the ability to switch by milk farmers compared with milk processors is consistent with unequal bargaining power across the different levels of the dairy industry value chain, as firms that can easily switch between suppliers or customers are likely to have more bargaining power than those that face difficulties in switching. Operating profit margins at the different levels of the dairy industry value chain in the Western and Eastern Cape regions, as calculated by the Commission, show that the profits achieved by milk farmers are relatively unstable (and negative in some periods), compared with relatively stable profits of milk processors and retailers. This suggests that there could be a degree of unequal bargaining power across the dairy industry value chain, as firms that have more bargaining power are likely to have the ability to negotiate better trading terms and prices and thus achieve better profits compared with those that do not have bargaining power. However, such results should be viewed in context of the limitations of the data available to us, particularly the differences in geographical scope of the information and data obtained from milk farmers, processors and retailers.

With regard to trends observed in raw milk prices paid to farmers over time, our analysis indicates that raw milk prices tend to closely follow each other in terms of price increases and subsequent declines in the Eastern Cape, Western Cape and Free State regions. The pricing behaviour observed in these regions may be an indication of conscious pricing parallelism. Firms behave interdependently, taking into account the actions of their rivals when considering their market response (in line with the farmers’ representatives). Firms active in the procurement of raw milk market (in the respective regions) may be influenced by the actions of their competitors, and may be conscious of each other’s practices when making business decisions.

It is also important to note that South Africa imports (mainly from New Zealand, France, Uruguay, Ireland and Argentina) and exports (mainly to Zimbabwe, Zambia, Angola, Tanzania and Mozambique) various processed dairy products, but the levels of imports and exports are low relative to the total consumption of dairy products in the country. The study showed that the proportion of exports and imports of dairy products remained consistently below 5 percent of domestic consumption during the period 2002 to 2012.

The Commission is currently conducting several investigations in the dairy industry, including an alleged abuse of dominance contravention, exemption applications as well as cartel conduct. It therefore seems that although the behaviour of industry participants has changed in certain aspects since the Commission’s intervention in 2005, there are still areas of competition concerns that need to be investigated and pursued further, as highlighted from the findings of this research study.

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\[11\] In addition, although the operating profit margins for the sample of retailers used by the Commission are moving in opposite directions, they are, on average steadily increasing over time.
The number of complaints involving local municipalities and other spheres of government are on the rise

In the 2014/15 financial year, the Commission experienced an increase in the number of complaints involving local municipalities and other spheres of government. In particular, the Commission received a total number of 26 complaints involving all spheres of government, either as complainants or respondents. This signifies an increase of approximately 271 percent from seven complaints involving spheres of government received by the Commission in the 2013/14 financial year. The complaints involving government received by the Commission in the 2014/15 financial year range from restrictive horizontal practices such as collusive tendering and tender irregularities to abuse of dominant position by certain spheres of government.

Out of the 26 complaints received by the Commission in the 2014/15 financial year, 57 percent were complaints filed by local municipalities and other government departments, both at provincial and national levels, relating to collusive tendering or bid rigging. This number has increased threefold (by approximately 200 percent) from the 2013/14 financial year where the number of collusive tendering or bid rigging complaints filed by all spheres of government did not exceed five, excluding complaints that were initiated by the Commission. The increase in the number of collusive tendering cases in the 2014/15 financial year could be attributed to bid rigging training provided by the Commission to National Treasury and other government departments (both at national and provincial level), and metropolitan and district municipalities in the 2011/12 and 2012/13 financial years. The main objective of the training was to enable the procurement officials in the public sector to identify, detect and report firms engaging in bid rigging to the Commission.

Out of the 15 complaints of bid rigging filed by spheres of government in the 2014/15 financial year, 46 percent were referred for further investigation, while the Commission issued notices of non-referral on 54 percent of these complaints. Most of the complaints that were recommended for further investigation involve bidders who have submitted similar bids in response to tender invitations, i.e. submission of similar bids in terms of pricing. In other instances the companies competing for the tender have cross-directorship and have submitted similar documents for the tender.

Most of the complaints where the Commission issued notices of non-referral involved misrepresentation on the part of the bidders, i.e. one bidder submits two different bids using two different company names for the same tender. The Commission concluded that such misrepresentation amounted to fraudulent activities on the part of the bidder and that such conduct could result in disqualification.

By the same token, the Commission has received few complaints relating to the manner in which certain spheres of government design their tender specification documents. The Commission has received about three complaints in which it is alleged that the tender specification documents are designed such that they suit or match the specifications of products supplied by a particular manufacturer in the market. Upon investigation by the Commission, it was found that certain governmental bodies implicated in these complaints have only used the product of a single manufacturer or supplier when designing the tender specification documents, to the exclusion of other competing products in the market. The Commission is of the view that such conduct impedes or prevents competition as it automatically disqualifies other manufacturers or suppliers of products that are similar in terms of functionality from competing for that specific tender and makes it difficult for these competitors to effectively compete in the marketplace. The Commission intends to engage in advocacy work in all these matters.
South Africa is hosting the 4th BRICS International Competition Conference (BRICS conference) on 12 and 13 November 2015 in Durban. The theme of the BRICS conference is “Competition and Inclusive Growth” and includes speakers from all the BRICS countries, such as Sun Hongzhi, Vice Minister for SAIC in the People's Republic of China and Ashok Chawla, Chair of the Competition Commission of India.

Sessions include “Competition, economic development and trade” and “Public interest issues in antitrust”. As an African competition authority, the Commission has extended a particularly warm welcome to fellow African authorities not only to the BRICS conference, but also to two other events taking place beforehand:

- 10 November 2015: A workshop on competition and economics jointly hosted by the Commission, CRESSE and the University of KwaZulu Natal
- 11 November 2015: the Commission’s 9th Annual Competition Conference, with the theme “Competition policy and enforcement in BRICS countries”

10 November 2015:
A workshop on competition and economics jointly hosted by the Commission, CRESSE and the University of KwaZulu Natal

The workshop aims to provide a platform to practitioners (including competition agency officials, competition lawyers, competition economic consultants and government policy officials) and academics to exchange ideas on the enforcement of competition law in general. It also explores the interplay between competition and economic development, and how competition policy can contribute towards inclusive growth. Speakers like Prof Frederic Jenny and Prof Massimo Motta will address the workshop.

Sessions include “The role of economic evidence in judging competition law cases” and “The economics of exclusionary conduct”. The programme can be viewed at: http://www.compcom.co.za/wp-content/uploads/2015/06/Pre-BRICS-Joint-Workshop.pdf

11 November 2015:
The Commission’s 9th Annual Competition Conference, with the theme “Competition policy and enforcement in BRICS countries”

The Commission’s annual competition conference has speakers such as William Kovacic, Global Competition Professor of Law and Policy at George Washington University and Vinicius de Carvalho, President of Brazil’s CADE. Sessions include “Procedural fairness and just outcomes” and “The impact of BRICS on the evolution of competition regulation.” The draft programme is attached.

A call for papers for the 9th annual conference has been released. Academics, private practitioners and competition officials, both with a legal and an economic background, are encouraged to submit their research for inclusion in the conference program. We welcome all original research.

Submissions for inclusion in the program (full papers or abstracts) may be sent together with the author’s address information to: ltebogengP@compcom.co.za and yongaman@compcom.co.za.

Final papers must be submitted by the 18 September 2015. Decisions on final acceptance to the programme will be communicated by the 10 October 2015.

The Commission has received a number of complaints from uniform suppliers about the effect of exclusive agreements between schools and some school uniform suppliers since 2010. Some of these exclusive agreements have unlimited duration. Parents have complained about their inability to purchase school uniforms from suppliers other than that appointed by the school; their view is that this leads to more expensive schoolwear. In two cases, involving schools in Gauteng and Mpumalanga, the Commission engaged with the principals of the schools and their governing bodies and explained the effect of these exclusive agreements on competition. Both schools agreed to open up their procurement contracts to tender in order to promote competition.

A Cape Town parent recently lodged a complaint with the Commission against a school and a specialist schoolwear retailer that stocks unique schoolwear and sportswear for over 60 schools in the Western Cape (Slater v School and Leisure). The parent alleged that the school and most others in the area have appointed a service provider as their sole stockist for school uniforms, and that prices charged for various uniforms are too high but consumers are left with no alternatives. It is a concern for the Commission that these long-term exclusive agreements between the schools and stockists or manufacturers of school uniforms are susceptible to a contravention of the Act. Upon completion of this investigation the Commission took a decision also to resolve this case through advocacy. The Commission met with the principal and the deputy principal of Bergvliet High School in Cape Town to discuss the complaint. The objective of the meeting was to open up school uniform procurement to a competitive process. The school agreed to change the school uniform procurement to a competitive process within a period of 18 months.

Due to the repetition of these complaints the Commission resolved to take a holistic approach to the school uniform advocacy. The objective is to address the matter nationally. In this regard the Commission engaged with the provincial education departments and school governing body groups and...
The Competition Act prohibits firms from engaging in particular conduct that may prevent competition and lead to high prices and a lack of choice. In particular, the Act prohibits firms from entering into vertical agreements that prevent or restrict competition. Vertical agreements are agreements between a firm and its suppliers and/or customers, examples of which include supply agreements, distribution arrangements and agency and franchise agreements. Therefore an agreement between a school and its supplier of school uniforms is a vertical agreement within the context of the Competition Act.

The Competition Act also prohibits dominant firms from abusing their dominance by charging excessive prices and excluding their non-dominant rivals from participating in the market. Granting long-term exclusive agreements may result in the creation of a monopoly supplier who may charge higher prices.

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Measures To Address The Potential Anti-Competitive Effect Of Exclusive Agreements

The following measures are recommended to mitigate the potential anti-competitive effect of exclusive agreements in the procurement of school uniforms by schools.

Open up the market to other suppliers of school uniforms

School uniforms should preferably be as generic as possible, such that they are obtainable from many suppliers. Where this is not possible, exclusivity should be limited to such items that the school regards as necessary to obtain from preselected suppliers. Schools are recommended to engage in competitive bidding for the supply of school uniforms. The effect of this is to invite bids for the supply of school uniforms to a school, giving all potential suppliers the opportunity to compete. In this regard, unless there are reasonable practical reasons not to do so, more than one supplier should be appointed so as not to eliminate competition during the duration of the contract.

When schools do engage suppliers in the bidding process, they should be careful that they do not facilitate collusive conduct, which is also prohibited by the Competition Act.

The Competition Act prohibits competing firms, such as different suppliers of school uniforms to schools, from entering into agreements which result in the fixing of prices, the division of markets and/or customers and the rigging of bids.

School uniform contracts must be of a fixed or limited duration

The contract to supply a school with school uniforms should be of a limited duration. This means that the tender awarded to a supplier must be for a specific period of time and should not be indefinite. When the contract expires it should again be open to tender. This process of open, transparent and fair competitive bidding would be to the benefit of schools, students and parents as it will result in more choice, improved quality of services offered by suppliers and a reduction in prices.

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1. Section 5(1) of the Act states that “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. Section 8(1) of the Act states that “It is prohibited for a dominant firm to charge an excessive price to the detriment of consumers”. Section 8(1) of the Act states that “It is prohibited for a dominant firm to engage in an exclusionary act if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain”.
3. Section 41(2) of the Act states that “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 if it involves any of the following restrictive horizontal practices:
   (i) Directly or indirectly fixing a purchase price or selling price or any trading condition
   (ii) Dividing markets by allocating customers, suppliers, territories, or specific types of goods or service
   (iii) Collusive tendering.
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