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The fifth administration has recently concluded, thus marking the end of first quarter of a century of democratic rule in South Africa. Many institutions have been established by the previous democratic administrations in this period, none more important than the competition authorities. The political gains of the first 25 years of democratic South Africa would have been meaningless, had there not been the corollary of looking to find similar gains in commerce and industry – for effecting the broader socio-economic objectives that are imbedded in our constitution and sacred for the protection of the democracy itself. Competition law and policy regulation is thus an integral feature of, and foundational to, our democracy.

This importance was identified in President Mandela’s administration with the promulgation of the Competition Act in 1998, for implementation and effect from 1999. This instrument remains the most significant economic legislation that has been impressively regulated by the competition authorities to date.

Most recently, in February this year, President Ramaphosa signed into law the Competition Amendment Bill. The Bill represents the most substantial series of amendments in the past 20 years, where the focus was on revamping and strengthening the Competition Act so as to place greater focus on economic transformation and inclusivity. The main objective of these amendments is to open up the economy to small and medium enterprises and to Black South Africans. The bill addresses two persistent structural constraints on dynamic and inclusive growth in South Africa: (1) The high levels of economic concentration; and (2) the skewed ownership profile of the economy.

The signing of the Competition Amendment Bill marks the culmination of 20 years of regulation, where we find ourselves closest to meeting the objectives that were identified in the RDP of 1994:

“[T]o remove or reduce the distorting effects of excessive economic concentration, collusive practices, and the abuse of economic power by enterprises in a dominant position. In addition, the policy will ensure that participation of efficient small and medium-sized enterprises in the economy is not jeopardised by anti-competitive structures and conduct.”

In light of the above, it is most appropriate that the sixth administration, coinciding with the third decade of competition law and policy regulation, will commence in a regulatory environment that has never been better suited to addressing the shrinking economy and continued high levels of economic concentration (both factors that see consumers seriously squeezed), all in an attempt to meet the objectives highlighted above and in section 2 of the Competition Act. This will, indeed, do much to help deliver President Ramaphosa’s “New Dawn”.

Ebrahim Patel
Minister of Trade, Industry and Competition
As policy makers, the department has to continue to find ways of engaging all stakeholders (especially business) to try and make for a conducive commercial environment, such that the competition authorities and business can find each other quicker, and in a manner continuously less adversarial. It is this that has led, in part, to the merging of the Economic Development Department and the Department of Trade and Industry. This merger will be completed within the ensuing financial year, and shall (1) bring together 17 agencies with the capacity to provide targeted industrial and transformation funding; (2) regulate the consumer and corporate environments to foster a vibrant business ecosystem; and (3) open up the economy for real and inclusive growth. The opportunities that come with the pooling of government resources to form the Department of Trade, Industry and Competition must be seized, and indeed maximised in order to deliver the much-needed alignment in government policy and programmes.

Finally, the opportunity to celebrate cannot, and must not, be lost. In 1999, as mentioned earlier, the Competition Act came into force. This Act, singularly, has done much to advance the socio-economic transformation that is demanded by the Act itself. The Commission (and the Tribunal) has grown into an effective institution, developing a sterling track record in competition law and policy regulation that commands the world’s respect. The stability in leadership over the last two decades has also allowed for the Commission to earn the public trust. And because of this earned trust, more and more people look to it for protection, especially small and medium businesses.

The Commissioner, Tembinkosi Bonakele, assisted by the Deputy Commissioner, Hardin Ratshisusu, and the entire staff of the Commission (past and present) continue to deliver despite ever changing conditions. I wish to thank them for another wonderful year. We look forward to celebrating 20 years of competition law and policy regulation this year, as we enter the third decade determined to making optimal use of the Commission’s unique contributions to protecting our nation’s democracy and development.

Ebrahim Patel
Minister of Trade, Industry and Competition
It is my pleasure to present the Commission’s report in celebration of 20 years of competition enforcement. For the past five years our motto has been “competition regulation for a growing and inclusive economy”. This positioning reflects more than our hope for the future of the competition agencies. It reflects the journey we have travelled in 20 years of administering the Competition Act 89 of 1989.

The earliest economic ideals of the current democratic government can be traced back to the Freedom Charter of 1955 which expressed that:

“The national wealth of our country, the heritage of South Africans, shall be restored to the people; The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole; All other industry and trade shall be controlled to assist the well being of the people; All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.”

The architects of our modern democracy never lost sight of these goals and, from 1994, saw to it that these goals were weaved into various new laws set to govern the new dispensation. One such law was the Competition Act 89 of 1998. The Act set out to level the playing fields for corporate South Africa so that consumers would enjoy the benefits of competition: the best price and quality a competitive market could deliver. Much like the traditional Western competition laws South Africa borrowed from, these founding objectives found their application in the current merger regulations and provisions prohibiting anti-competitive conduct. The Act also established the Competition Commission and the Competition Tribunal to deliver on these goals.

In our establishment years, which represents the first stage of the Commission’s existence, we focused our efforts on staffing the organisation, establishing systems and processes and on developing our investigative, research and prosecutorial skills. We were assisted, in this task, by the compulsory merger notification regime which meant that all firms above a certain value threshold were compelled to notify their mergers and acquisitions to the Commission. Our consequential access to the inner workings of markets led us to identify competition failures and thus turn our attention to anti-competitive conduct taking place in the market. With the help of the Corporate Leniency Policy, which we established in 2004, the Commission was able to detect and prosecute cartels in many different industries: the wheat and maize milling industry being one of the first. It was around this time when the public at large became more aware of the Commission and
began to participate meaningfully in its work. This valuable input from our communities and ongoing interaction undoubtedly set the tone for the stages of development that would soon follow.

The collective voice of our stakeholders made it clear to us in those days that South Africa was a unique community with its own development goals separate from those of the developed economies we initially borrowed our competition laws from. The public demanded a responsive competition authority with its finger firmly on the pulse of South Africa’s need for an inclusive economy. I remember the calls for executives to be jailed for corporate theft following the revelations of the bread cartel. These calls became even louder after the large scale construction cartel came to light. I can recall the week long protest outside the Commission building when it looked like Wal-Mart Inc, an American based retail giant, might threaten the development of small business in South Africa. I heard civil society’s concerns for food security when Pioneer Hi-Bred International, a global plant genetics company, sought to gain ownership of South Africa’s maize germplasm. These interactions influenced the Commission’s decision to identify priority industries and target these for pro-active interventions designed to promote South Africa’s growth and development. The public’s input also led to the introduction of personal criminal liability for executives who knew of, or participated in, cartel conduct.

With the Corporate Leniency Policy working to eradicate cartels from our economy, the Commission pursued the abuse of dominance which was evident in some priority sectors and beyond. Although the Commission had some success in this area – such as the Tribunal’s finding of excessive pricing against Sasol Chemical Industries (Pty) Ltd or its finding of predatory pricing against Media24 Ltd – these decisions were overturned on appeal. Once again it became clear that in order to effectively tackle abuse of dominance, the competition agencies would need laws and regulations that would strengthen the agencies’ ability to do so. In pursuit of this goal, the government recently promulgated far reaching amendments to the Competition Act, prompting the beginning of the competition agencies’ next stage of competition regulation.

I have witnessed and fully participated in the first 20 years of the Commission’s development. In all this time I have supported, whole heartedly, the noble objectives of our law and I am grateful for the opportunity to contribute to the Commission’s history. I have been immensely privileged to partner with the hard working men and women staffing the Commission in our efforts to deliver on the uniquely South African goals of competition regulation. Now at the start our third decade on this journey, I am confident that the Commission will work even harder to fulfil the important mandate the South African public has placed on us.

_Tembinkosi Bonakele_  
Commissioner of the Competition Commission
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UNLEASHING MORE RIVALRY
OVERVIEW
In 1994, South Africa emerged from a long and damaging history of racial inequality. Prior to this, the right-wing Nationalist government had adopted an apartheid policy which created and maintained an inferior quality of life for black South Africans. An inevitable consequence of apartheid policy was the economic isolation of black South Africans. The resulting skewed development of business in South Africa lead to many weaknesses in the actual operation of local markets. Some of these weaknesses were:

- exceptionally high levels of concentration and monopolisation;
- low levels of consumer choice and highly priced basic commodities;
- a poorly developed small-medium enterprise sector;
- ownership structures that benefitted a handful of citizens at the expense of the majority; and
- low levels of productivity that resulted from excessive rent-taking in the economic process.

To illustrate the above, by 1994 the largest five conglomerates controlled entities accounting for 84% of the capitalisation of the stock exchange, and the largest conglomerate alone accounted for 43%. In addition, the conglomerates were characterised by a network of cross-holdings and shared directorships which enabled control to be exerted over far reaching pyramid structures.

Diagram 1 tracks how these figures have evolved from 1990 to 2018. Data shows that by July 2018, seven shares made up 50% of the market capital of shares listed on the JSE and top 20 shares made up 67% or two thirds of the overall market capital.
Therefore, when many South Africans and the international community began to strongly oppose apartheid, there was a growing understanding that economic emancipation was necessary in order to achieve lasting equality amongst all the people of South Africa. Accordingly, in the struggle for ideals such as freedom of movement, freedom of expression and freedom of association, economic freedom featured prominently as a tool for lasting liberation.

In fact as far back as 1955 the Freedom Charter, which contained a list of demands for a new South Africa, declared that:

“The national wealth of our country, the heritage of South Africans, shall be restored to the people; The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole; All other industry and trade shall be controlled to assist the well being of the people; All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.”

These ideals were maintained in varying forms throughout the liberation struggle and in 1992, the African National Congress (ANC) in its Policy Guidelines for a Democratic South Africa specified the broad outline of the approach they proposed: “The concentration of economic power in the hands of a few conglomerates has been detrimental to balanced economic development in South Africa. The ANC is not opposed to large firms as such. However, the ANC will introduce anti-monopoly, anti-trust and merger policies in accordance with international norms and practices, to curb monopolies and continued domination of the economy by a minority within the white minority and to promote greater efficiency in the private sector.”

In 1994, when the left-of-centre ANC government came into power, it produced its Reconstruction and Development Programme (RDP) for South Africa which, once again, outlined its policy framework to redress apartheid’s inequalities and dealt specifically with competition in the economy. The ANC stated that the RDP would introduce strict competition legislation to create a more competitive and dynamic business environment. The objectives of such legislation would be, amongst other things, to discourage the system of pyramids which had lead to over-concentration and inter-locking directorships and to abolish numerous anti-competitive practices.

Competition policy also linked with the new priorities of the Department of Trade and Industry (DTI) under the ANC government. The DTI had prioritised small business development, export promotion, market access and investment prior to addressing competition policy. While trade and industrial policy did not explicitly address competition issues, the emphasis on expansion and creating new entrants into the South African economy were consistent and complementary to the policy objectives of South Africa’s new competition law.

Competition policy thus became firmly entrenched as one of the mechanisms to address the imbalances of the past and to eradicate harmful business practices.

Shortcomings of the old competition regime

Prior to the present regime, competition was regulated in terms of the Maintenance and Promotion of Competition Act 1979 (Act No. 96 of 1979), which was administered by the Competition Board. Act No. 96 of 1979 was ostensibly designed to address problems of anti-competitive behaviour and market failures however it had not done its work. The two decades of its existence were characterised by an increasing concentration of economic power and widespread abuse.

The powers of the Competition Board were narrowly circumscribed and its ability to act was limited. The limited influence of the Competition Board and Act No. 96 of 1979 reflected the then government’s lack of commitment to even the limited objectives incorporated in that Act.

Further to the above, under Act No. 96 of 1979, the decisions of the Competition Board were subject to review and approval by the Minister of Trade and Industry. The Competition Board thus lacked independence, and was criticised for making decisions subject to political influence.

Some of the criticism levelled at the Competition Board was that a lot of informal dialogue seemed to have taken place between its staff and parties to some of the merger transactions, resulting in informal decisions being made on some transactions.

Even before Act 96 of 1979, the Regulation of Monopolistic Conditions Act passed in 1955 was widely regarded as a feeble piece of legislation. In this respect, the 1976 Mouton Commission of inquiry concluded that the Act and the way it was implemented had had “but a modest impact as an instrument for ensuring competition.”

Following these pieces of legislation and the economic context within which they had operated, there was a need for an effective law which would, unlike its predecessors, achieve the objectives it had set for itself.

Adopting the new law

It took just over four years for the Competition Bill to be brought to Parliament. Representatives of business and labour in a tripartite negotiating forum known as Nedlac, and state officials, all took part in the drafting of the legislation. Crucial for the policy process was the prioritisation given to it by the Minister of Trade and Industry. Equally
important was the rise of competition policy on the international agenda at the point when South Africa was re-establishing international relationships and undergoing liberalisation of trade and capital markets.

Under the impetus of the Minister of Trade and Industry, competition policy principles were negotiated by business, labour and government representatives in Nedlac. This followed the ethos of participatory policy making and negotiated outcomes which characterised the transition as a whole. The Parliamentary Committee on Trade and Industry received over 30 written submissions on draft legislation and conducted public hearings over four days. These processes enjoyed the participation of a range of organised and powerful groupings who had an interest in competition policy.

The drafters of South Africa’s new competition law benefited from their interaction with international expertise and best practice. Practitioners and academics from no fewer than eight countries, as well as from multi-lateral agencies and academic institutions commented on draft legislation, and interaction with regulators in other jurisdictions helped in the actual design on South Africa’s institutions. The South African approach drew heavily from the experience and practice of developed countries. However, the Competition Bill also contained provisions which were unique to the development agenda of South Africa, specifically the public interest factor and the provisions for exemption, which are discussed further below.

The international and domestic aspects to the policy development process were both very important in building the commitment of key groupings in the economy to competition policy principles. In so doing they laid the foundation for the credibility of the new institutions.

Upon presenting the Competition Bill, the DTI acknowledged the role of business and labour in Nedlac as well as the numerous state officials. The DTI also reiterated the previously expressed view that it considered the Competition Bill as an important pillar in the overall economic policy framework. In addressing the necessity of competition policy for the South African economy, the DTI stated that:

The Bill seeks to encourage competition, not because we wish to adhere to some textbook ideal, but rather because of what it can contribute to realising some of these important economic and social objectives. We need to ensure efficiency and adaptability if we are to survive in the global economy. Consumers must have access to a wide range of high quality products and services at the lowest possible prices. It is essential that we see the development of a vibrant small, medium and micro enterprise sector. There is necessity for a diversification of ownership in favour of historically disadvantaged communities. These are the potential outcomes of high levels of competition and these are the objectives enshrined in the Bill before this House.

Establishing the law and its administrators

The Competition Act of 1998, as amended, ("the Competition Act" or "the Act") commenced certain sections on 30 November 1998 and the Competition Act became fully operational on 1 September 1999. In its preamble, the Competition Act reflects the concerns that led to the development of competition policy and the enactment of competition legislation. In particular it states that:

The people of South Africa recognise:

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.

IN ORDER TO:

provide all South Africans equal opportunity to participate fairly in the national economy;

achieve a more effective and efficient economy in South Africa;

provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;

create greater capability and an environment for South Africans to compete effectively in international markets;

restrain particular trade practices which undermine a competitive economy;
regulate the transfer of economic ownership in keeping with the public interest;

establish independent institutions to monitor economic competition; and

give effect to the international law obligations of the Republic.

The new Competition Act prohibited:

- restrictive horizontal practices in general and, in particular, price fixing, market allocation and collusive tendering;
- restrictive vertical practices in general and, in particular, minimum resale price maintenance;
- abuse of dominance through, inter alia, general exclusionary acts and through specific exclusionary acts such as predatory pricing, product bundling, the buying up of scarce resources, inducements not to deal with a competitor and price discrimination.

The Competition Act also provided for the mandatory filing of mergers and acquisitions, a departure from the previous competition law, and provided for the filing of exemption applications.

Further to this, the Competition Act established new competition authorities with enhanced powers of investigation and adjudication. These were the Competition Commission (Commission), the Competition Tribunal (Tribunal) and the Competition Appeal Court (CAC) which are all discussed in further detail below.

There were significant institutional and procedural differences between the Competition Act and the old dispensation, the most striking of which were:

- the independence and accountability of the new institutions implementing the Competition Act; and
- the development objectives of the Competition Act.

Independence and accountability of South Africa’s competition authorities

In the discussions leading up to the promulgation of the Competition Act, the independence of the institutions which were to regulate competition in South Africa played a key role in shaping the framework of the institutions and the provisions of the Act.

Under the Maintenance and Promotion of Competition Act, the decisions of the Competition Board, which as stated above, was the predecessor to the present competition authorities, were subject to review and approval by the Minister of Trade and Industry. The Competition Board thus lacked independence, and was criticised for making decisions subject to political influence. Moreover, the Board was criticised for making informal decisions on merger transactions.

Consequently, in drafting the current legislation, political independence was seen as an element crucial to ensuring the success and competence of the

**BOX 1:**

**EXPLOSIVE BEGINNINGS**

How was independence drafted into the law? Well that is a matter of circumstance. Dave Lewis recalls, in his book, that the early drafts of the Competition Bill gave the competition authority an unusual degree of independence, a move that represented a controversial policy change. However just as the then Minister of Water Affairs – jokingly referred to as the Minister of All Affairs for his tendency to intervene in all affairs – queried this degree of independence, State officials received news of a bomb that had exploded in the vicinity of their discussions. This derailed their meeting and left the minutes of that meeting unclear on the subject.

When he was later approached for clarity, the then Minister of Trade and Industry advised that the meeting had approved the bill and the minutes were signed off accordingly.

The rest, as they say, is history.
The independence of the competition authorities from the influence of each other, the state and private stakeholders is now entrenched in the provisions of the present Act as well as in the design of the competition institutions.

The competition authorities' responsibility to account for its activities are entrenched in the formal reporting requirements set out in the Competition Act and the internal procedures which the institutions have developed. The public and private stakeholders of the institution also hold the authorities to account in various forums.

The development objectives of the Act

Another significant difference from the previous competition regime and from most other jurisdictions was that the Act specified a range of objectives to be served by competition law and to be promoted by the agencies responsible for its enforcement.

Some of these objectives were contrary to pure competition policy, however, the South African government opted to take development objectives into account in decision making, particularly given the economic and political context within which the competition law was implemented.

The development objectives of the Competition Act were particularly set out as a factor in the evaluation of mergers, namely the public interest grounds, and in the criteria provided for the assessment of exemption applications. These areas of the law are discussed further in chapter 3 and 4 below.
The Competition Act initially ousted the Commission’s jurisdiction in all industries that were under public authority but, confusingly, gave the Commission exclusive jurisdiction over all competition issues. The amendment gave the Commission concurrent jurisdiction with other regulators.

The amendment introduced a new class of “small mergers” and gave the Commission powers to require parties to small mergers, in specific circumstances, to notify the merger within six months of implementation.

The Competition Amendment Act of 2009 introduced criminal sanctions against directors and managers who participate in cartel conduct or tacitly consent to such conduct. Previously only corporate entities could be penalised for cartel conduct within the civil regime.

The amendment introduced a market inquiry provision thus enabling the Commission to inquire into the state of competition in a particular market without being limited to the conduct of individual firms within the market.

The amendment introduced leniency provisions in order to authorise the Commission’s Corporate Leniency Policy and to protect whistleblowers.

• In terms of the February 2019 amendments:
  • small and medium businesses, and firms controlled by historically disadvantaged persons, enjoy protection against price discrimination and unfair purchasing practices by dominant firms;
  • the rules applicable to dominant firms have been refined, particularly as regards predatory pricing, margin squeeze, and excessive pricing, including a “reasonableness” justification for the latter;
  • the penalty regime has been strengthened in that the scope of first-time offences subjected to administrative penalties has increased and repeat offenders can incur higher administrative penalties;
  • the competition authorities have greater flexibility in granting exemptions that promote economic development, transformation and growth;
  • the competition authorities are mandated to consider additional competitive and public interest factors in a merger review;
  • the National Executive can intervene in relation to mergers that affect the national security interests of South Africa;
  • the Commission has the power to conduct impact studies;
  • the Minister of Economic Development is empowered to require that the Commission conduct a market inquiry, after consultation; and
  • the Commission’s findings and actions following a market inquiry are binding, unless challenged in the Tribunal.

The Competition Commission

The Commission is a statutory body constituted in terms of the Competition Act. It is one of three independent competition regulatory authorities established by the Act, with the other two being the Tribunal and the CAC. While the Commission is the investigative and enforcement agency, the Tribunal is the adjudicative body and the CAC considers appeals against decisions of the Tribunal. The Competition authorities are functionally-independent institutions, but are administratively accountable to the Economic Development Department (EDD).

The functions of the Commission, as set out in the Act, are to:
  • implement measures to increase market transparency;
  • implement measures to develop public awareness of the provisions of the Act;
• investigate and evaluate alleged anti-competitive conduct;
• conduct formal inquiries in respect of the general state of competition in a market;
• grant or refuse exemptions from the application of the Act;
• authorise, with or without conditions, prohibit or refer mergers notified to it;
• negotiate and conclude consent orders;
• refer matters to the Tribunal and appear before the Tribunal when required;
• negotiate agreements with any regulatory authority to coordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and ensure the consistent application of the principles of the Act;
• participate in the proceedings of any regulatory authority;
• advise – and receive advice from – any regulatory authority;
• review legislation and public regulations, and report to the Minister concerning any provision that permits uncompetitive behaviour; and
• deal with any other matter referred to it by the Tribunal.

The Competition Tribunal

The Tribunal adjudicates competition matters in accordance with the Act and has jurisdiction throughout South Africa. It is independent and subject to the constitution and the law. According to the Act it must be impartial and perform its functions without fear, favour or prejudice. When a matter is referred to it in terms of the Act the Tribunal must:

• adjudicate complaints of prohibited conduct;
• impose a remedy;
• award costs;
• grant an order for interim relief;
• authorise or prohibit a large merger; and
• decide appeals from the Commission’s decisions on intermediate mergers and exemption applications.

The Competition Appeal Court

The CAC may consider any appeal from, or review of, a decision of the Tribunal. Its status is similar to that of a High Court and it has jurisdiction throughout the Republic.

Before 2012 the Supreme Court of Appeal (SCA) could hear appeals from the CAC however the Constitution Seventeenth Amendment Bill restricted the SCA’s jurisdiction in certain matters.

The amendment provided that the SCA “may decide appeals in any matter arising from the High Court of South Africa or a court of a similar status to the High Court of South Africa, except where an Act of Parliament provides otherwise”.

The Competition Act set out a number of matters over which the Tribunal and CAC shared exclusive jurisdiction, including the interpretation and application of chapter 2 (prohibited practices), chapter 3 (merger control) and chapter 5 (investigation and adjudication proceedings) of the Act, and certain of the functions of the Commission, Tribunal and CAC.

The effect of the constitutional amendment was that the CAC became the final court of appeal in respect of these matters. The amendment, however, did not affect the right to appeal any constitutional matter arising in terms of the Competition Act to the Constitutional Court.
Diagram 6: Structural and Functional Overview of the Competition Agencies

- **Prohibited Practices**: Investigates and prosecutes.
- **Interim Relief**: Hears appeals or reviews and decides the outcome.
- **Small Mergers**: May assess and decide to approve or not.
- **Intermediate Mergers**: Assesses and decides to approve or not.
- **Large Mergers**: Assesses and recommends on outcome.
- **Exemption Applications**: Assesses and decides to grant or not.
- **Procedural Matters**: Arise from any of the above vary greatly in procedure.
- **Consent Orders**: Settles prohibited practice case or non-compliance with merger regulations.
- **Competition Commission**: Investigates and prosecutes.
- **Competition Tribunal**: Adjudicates and imposes penalty or remedy; Hears directly from complainant.
- **Competition Appeal Court**: Hears appeals or reviews; Hears the settlement and decides to conform or not.
- **Constitutional Court**: Hears appeals or reviews if constitutional matters arise.
- **High Court**: Awards damages arising from a Tribunal order.

We often underestimate the amount of work done prior to the transition to democracy and in the first ten years of that dispensation. Many important institutions were put in place that are central to the functioning of a modern industrial economy. Now we tend to take these for granted, not fully appreciating the important role that they play in the economy. The Competition Commission is one such important institution and twenty years on it is appropriate to reflect on its formation and functions.

Economic policy in the transition was largely informed by research projects the Alliance had been involved in prior to transition. These were undertaken by COSATU and the ANC – the former inside and the latter outside South Africa. By 1992 these projects were being brought together in meetings in London, Paris and Harare. With the formation of the Economic Transformation Committee, in the ANC, the work was increasingly coordinated and aired in major conferences - Ready to Govern and the Reconstruction and Development Programme. The Alliance was fortunate in having a major solidarity movement around the world that it could draw on. This gave us access to individuals and institutions with massive experience and resources and we benefitted from the range of practical and theoretical inputs that this provided.

In a movement as broad as the Alliance there is an inherent tension between those on the left, who see a key role for the state, and those closer to the centre, who place the decisive influence with the market.

The challenge, as we see in successful development elsewhere, is not to follow dogma, but to evolve the correct balance of forces that suit both the structure and conjuncture of an economy.

The question of competition policy is one of these areas. For the far left competition is just another word for capitalism and for the orthodox neo-classical economists competition is essential to the efficient working of capitalism. Neither position is particularly helpful or accurate – more dogma than analysis.

We had to work out our own position. An important workshop on the issue was organised – as I recall Tito Mboweni was the coordinator. Much debate ensued, but cutting a long story short we agreed that a competition commission was necessary. Once government was formed Dr Alistair Ruiters was tasked with setting it up.

Key factors that were taken into account were the exceptional concentration in the economy and the strategy to open our economy in a managed fashion. This led to important provisions in the law, namely, we accepted that size would be necessary if the market was global and we allowed for interventions in mergers to achieve specific objectives (we learnt this from the EU and Minister Patel used it in deals such as Massmart).

The point here is that the Competition Commission is an important structural institution that must intervene intelligently in order to achieve sophisticated and important objectives in the political economy. It is one of the most nuanced and effective forms of regulation, if well implemented.

Twenty years seems like yesterday in our battle to build a better life for all.

Alec Erwin
Former Minister of Trade and Industry
In 1997, the Department of Trade and Industry initiated a regulatory reform process concentrating on all consumer related legislation. Driven by South Africa’s history of social and economic exclusion and a negligible consumer rights culture, the reform process was both urgent and necessary. Furthermore, the new constitution instructed the devolution of certain consumer related and sector specific functions to SA’s embryonic nine provinces. Lastly, there was a growing consensus that a comprehensive overhaul of SA’s outdated, racially and economically exclusive corporate legislation was required.

Working together with several international, national and provincial government departments, interest groups, constituencies, international aid agencies and consultants, the Usury Act, Liquor Act, Trade Metrology Act, the Consumer Affairs Act, Gambling Act, Lotteries Act, parts of the Intellectual Property Acts and the Companies Act were all replaced by new or amended legislation.

In comparison to the more archaic pieces of legislation, the Competition Act of 1987 was relatively new. The Competition Board, led by Dr Pierre Brooks, was seen as soft regulator. The Board’s focus was on anti-competitive behaviour and not economic concentration. Between 1995 and 1998 several new Competition Board members were appointed by Ministers Manuel and Erwin to strengthen the Board.

Against the backdrop of SA’s highly concentrated economy and with a long history of unchecked anti-competitive conduct by SA business, the RDP and several ANC resolutions called for a new, more robust competition law. Since 1995 two attempts had been made to draft a new competition law. Both were false starts, in part because of organisational difficulties and opposition from business. They argued that the 1987 Competition Act was sufficient and should be amended. Notwithstanding the opposition, Minister Erwin announced the start of the competition policy process in 1997. An agreement was reached with the Nedlac constituencies that there would be active engagement and consultation on the policy process but limited consultation on the legislation itself. Further legal consultation, it was agreed, would be facilitated through the parliamentary process which would include both the National Assembly and the NCOP.

To kickstart the policy process, the DTI circulated a policy paper amongst key constituencies. The Nedlac secretariat was used to facilitate the process. Lengthy negotiating sessions were arranged to work through policy positions. Key to the success of the process were both formal and informal negotiating sessions. Given the tight time constraints. The DTI setup a legal drafting team to begin work on the legislation in tandem with the policy process. As each position was agreed the legal drafters would convert a policy position into a drafter’s memorandum, which then served as the basis for drafting the legislation. Working with three documents simultaneously, the process was expedited. At key points in the process we convened panels of experts, from Australia, the EU, Norway, the USA and Canada to review the policy positions and the Act.

Key drafters and government policy advisors were also given the opportunity to interact in global policy fora and were exposed to World Bank training opportunities. Wherever possible colleagues from SADC were included in all of the training opportunities.

And the act started to take shape. Work started in January 1999 to setup the three institutions and in particular to manage the transition process from the Competition Board to the Commission.

These were certainly nine busy months. Using a combination of DTI secondees and donor funds, the beginnings of the Competition Commission, Tribunal and Competition Appeal Court started to take shape. Over the next few months we recruited, trained staff, developed a case management system, an IT system, a very
specific corporate identity, moved into a new building, all while the new legislation had not been passed. We worked closely with all of the role players and in particular with the Trade and Industry Portfolio Committee chair Rob Davies, to ensure that by the time the Act came into force, the institutions were ready to function. It was a fine balancing act as we were also aware that we could not run ahead of ourselves by anticipating or pre-empting Parliament’s right to legislate and therefore assume that the final piece of legislation would be exactly the same as the one we submitted. The process was led by Minister Erwin who shepherded all role players and constituencies to ensure the success of a time compressed and rigorous process.

By September 1999 as the act came into force, we were able to transition from the Competition Act of 1987 to the Competition Act of 1999. We also successfully navigated the winding down of the Competition Board, and all the concomitant transitional measures, to the Competition Commission and the Tribunal. On 1 September 1999 we opened our doors and the competition authorities were born.

Twenty years on and it now seems a long time ago. The excitement and the energy created during this process is however still palpable. Bound together by a common vision of a more competitive economy all role players worked to ensure a positive outcome. At the same time, it would have been impossible to anticipate all of the challenges that our economy and society would face. But through the management of the policy process, the drafting of the legislation and the setting up of the institutions we spawned a new legal discipline. Furthermore, we created a solid foundation for a piece of legislation that has stood the test of time. And finally, created a set of institutions which have recognised both nationally and internationally as amongst the best.

Notwithstanding the process achievements and the outcome of both the legislative and institutional process, the key question still remains as to whether we achieved our policy objectives? We may need to ask ourselves honestly, have we progressed? In this regard our country is still characterised by many of the social and economic characteristics that defined it in 1997 at the start of this process. We may, indeed, need to fundamentally revisit both the law and the institutions that are watchdogs to our economy.

Dr Alistair Ruiers
Former Competition Commissioner
CHAPTER 5: ADVOCACY AND COMPLIANCE
IMPACT ASSESSMENTS
The Commission conducted its first impact assessment in the year ended March 2012, paving the way for impact assessments to feature regularly in the work of its Economic Research Bureau (ERB).

An impact assessment is defined as any activity that is designed to measure or estimate, (1) the effectiveness, cost and benefit to society of competition decisions, or (2) the effectiveness, cost and benefit of competition policy as a whole.

Several factors led to the Commission’s decision to conduct impact assessments.

The need to assess the direct impact of the agencies competition interventions arose partly out of the Competition Commission’s prioritisation process. In its quest for agency effectiveness the Competition Commission, during 2008, identified specific industries for pro-active and targeted competition interventions.

These sectors were selected for their potential to drive economic growth in South Africa. Impact assessments became the means by which to measure the agencies effectiveness, particularly in the priority sectors identified, and to determine if the Commission was indeed achieving demonstrable competitive outcomes in the economy. Secondly the Commission observed a growing call amongst social, business and political stakeholders to show the benefits of competition policy enforcement. The Commission was increasingly being required to account for its contribution to transformation and empowerment, in line with the objectives of the Act and in response to past exclusions.

Impact assessments have yielded two main benefits for the competition agencies: (1) they have helped to increase transparency and awareness of the agencies activities; and (2) they help the Commission to learn from past performance in order to improve the quality of analysis and decision making in the future.

The Commission’s work on impact assessment falls into three distinct categories. First, for selected cases, it involves ex-post evaluation and monitoring. An ex-post evaluation involves the assessment, a few years after a decision has been made, of the actual effects of that individual decision. Since competition decisions require some time to produce their effects, this implies that ex-post evaluations can identify and assess the actual effects they generate.

Second, for selected cases, it involves impact estimation assessments. Impact estimation assessments determine the likely impact of competition decisions on the basis of assumptions. Finally, research is conducted on an ongoing basis into the wider benefits of the activities of competition authorities including factors such as the deterrent effect of competition policy.

Impact assessments are set to gain statutory backing when the 2019 amendments to the Competition Act become effective as the new law expressly provides for the Commission to conduct impact studies.
Concrete outcomes

The Commission’s review of the concrete pipes market, following its investigation of a long running cartel in the industry, was among the first impact assessments the Commission conducted.

As a result of a leniency application by Rocla (Pty) Ltd (Rocla), in December the Commission uncovered a 34-year-old cartel in the precast concrete products market. In its application, Rocla informed the Commission that, together with nine other firms, it had engaged in anti-competitive conduct involving price fixing, market allocation and collusive tendering in the production and supply of precast concrete pipes, culverts and manholes.

Members of the cartel agreed to divide the market both in terms of the products they manufactured and the geographical areas they traded in. Their conduct covered Gauteng, KwaZulu-Natal and the Western Cape. Firms that were allocated market shares in each of the three provinces agreed to only supply within a 150 km radius of Johannesburg and in defined areas around Durban and Cape Town.

Only Rocla was allowed to supply outside these areas across the remainder of South Africa. Cartel members also agreed to charge similar prices and to increase these prices by the same percentage twice a year. The cartel operated at both national and regional levels. In Gauteng the cartel members monitored their collusion by meeting on the second Tuesday of every month, after their Concrete Manufacturers Association (CMA) meetings. The cartel was so effective that the Tribunal would later note that, throughout its existence, its members “enjoyed a quiet and hugely
profitable life” as evidenced by the testimony of Aveng Africa Ltd (Aveng) during the hearing.

Some of the main clients affected by the cartel were the Department of Water Affairs and Forestry, Rand Water Board and various municipalities with projects to deliver essential services such as water and sewage, which were critical sectors for South Africa’s development.

All firms except Gralio admitted to their involvement in the cartel. As a result, the Tribunal imposed various fines on all the respondents except Rocla and Gralio. Two of the implicated firms, Southern Pipeline Contractors (SPC) and Conrite Walls, lodged appeals with the CAC against the level of the fines imposed on them. The CAC ruled in favour of the two firms and imposed lesser fines. The CAC held that the penalty calculation should have taken account of the extent of extra profits earned and the higher prices charged under the cartel – evidence that had not been presented in this case.

Given that precast concrete products fell into the prioritised infrastructure industry, and in response to the CAC’s criticism of the fining methodology followed by the Tribunal, the Commission conducted a study of the impact of the Commission’s intervention in the precast concrete products market. The first phase of the study assessed changes in the market structure by looking at: expansion into previously reserved markets by cartel members; entry into cartelised markets by new firms; price changes after the uncovering of the cartel and a simple estimation of the cartel overcharge.

The study found evidence of increased competition after the Commission had uncovered the cartel and prosecuted its members.

The increased competition came about through more expansion into formerly restricted geographic and product markets by former cartelists, and entry into cartelised markets by new firms. It should be noted however that rivalry took time to unfold and to have an impact on prices.

In particular, the Commission’s study found that after the cartel conduct ceased:

- SPC, which during the cartel period did not make any culverts, started supplying the whole product range that was covered by the cartel and far outside the 150km radius around Gauteng within which it had agreed to stay under the cartel;
- Cobro Concrete (Pty) Ltd (Cobro), which had agreed to compete only within the Durban area, started delivering in the northern parts of the Eastern Cape. Cobro also extended its product range after having agreed not to make culverts;
- Concrete Units (Pty) Ltd (Concrete Units), which under the cartel was limited to the regions around Johannesburg and Cape Town, started competing as far as Limpopo, Mpumalanga and the Free State on a regular basis, and added concrete pipes to its product range in the Western Cape;
- five new players entered various product and geographic markets which were previously the reserve of the cartel. This pointed to the fact that the stability of any cartel lay in its ability to prevent new entry;
- while concrete pipe prices in the Durban and Johannesburg areas did continue to increase for some 18 months after the uncovering of the cartel the study estimated that, from mid-2009 to June 2011, prices declined by 37% in the Durban area and 27% around Johannesburg. During the existence of the cartel, customers were overcharged by an estimated 51% to 57% in the Durban area and an estimated 16.5% to 28% in Johannesburg. These estimates were very high by international comparison and suggested that this was a very damaging cartel.

However the study also revealed that the cartel members continued to share monthly sales volume data at the national level through the CMA after the cartel had been uncovered although the formal cartel arrangements came to an end.

**Considering the indirect effects of competition enforcement**

During 2017 the Commission sought to measure the deterrent effects of competition enforcement for the first time in its history. The Commission reasoned that while the competition agencies work in the past had clearly demonstrated a direct effect on the specific firms and markets involved in any given case, competition enforcement also had an indirect effect on firms decisions and on the market as a whole. For instance it was possible that, as a result of competition enforcement, firms decided not to engage in a particular practice that would be considered prohibited or not to pursue a particular merger transaction even though the Commission was unaware of the potential conduct or merger. These were the indirect, unquantified effects of the competition agencies enforcement activities that the Commission sought to measure and in themselves carried a benefit to competition and the broader economy.

In conducting this impact assessment, the Commission relied on three categories of information, covering the period 2006 to 2016: (1) a business survey; (2) legal survey; and (3) various internal sources of information within the Commission and Tribunal.

Some of the more noteworthy observations arising from the study are
The survey results suggested that the level of awareness regarding competition law and competition enforcement as well as clarity with respect to the Commission’s approach could be improved to better allow businesses to comply with competition law but also to allow firms to identify where they have in fact contravened the Act.

67% of the respondents agreed that the Commission was effective in deterring cartels, 72% agreed that the Commission was effective in deterring other forms of anti-competitive agreements and 68% of the respondents agreed that the Commission had a significant effect on their company’s merger and acquisitions activity.

Respondents to the business survey considered the most important factors driving deterrence of anti-competitive behaviour to be criminal sanctions (71% of the respondents viewed it as ‘very important’), disqualification of directors (68% of the respondents viewed it as ‘very important’), financial penalties (66% of the respondents viewed it as ‘very important’), and negative publicity (64% of the respondents viewed it as ‘very important’).

Respondents to the legal survey considered the Corporate Leniency Policy (CLP) to be the most effective driver of cartel deterrence with 40% of the respondents viewing it as ‘very important’ and a further 20% considering it as ‘mostly important’.

A frequently cited suggestion for improving cartel deterrence was greater advocacy and education in the public domain regarding the conduct. Other suggestions cited were greater certainty and improved guidelines.

High profile cases, such as the abuse of dominance case against Sasol Ltd case; the Commission’s interventions in the cement industry; and the Commission’s investigation into MultiChoice (Pty) Ltd were highlighted by respondents as having a significant effect on their company’s commercial behaviour.

Overall the study revealed that awareness of high profile cases boosts behavioural change amongst businesses, particularly in the sectors where the Commission had intervened. Businesses also noted the deterrent effect of possible negative publicity which suggested that both publicity and enforcement action were necessary to ensure competitive outcomes in the market.

Evaluating the Competition Tribunal’s performance

The second decade of the competition agencies existence saw the Tribunal evaluate the impact of its work on its direct stakeholders. In 2012 the Tribunal embarked on its first stakeholder satisfaction survey. The aim of the survey was for the Tribunal to:

- understand its stakeholders basic needs;
- determine how the Tribunal was perceived;
- ascertain to what extent the Tribunal was or was not meeting its stakeholders needs; and
- ultimately improve the Tribunal’s performance in the selected areas in which it interacts with external stakeholders.

It should be noted that since the Tribunal is an adjudicative body with no discretion to prioritise industries or cases, the survey did not seek to assess the impact of the Tribunal’s decisions on the market but rather to determine perceptions about the Tribunal’s performance in the process of making those decisions.

The Tribunal identified eight functions that it wished to assess and conducted a survey amongst its stakeholders with the assistance of Plus 94, a research company specialising in stakeholder satisfaction surveys.

Plus 94 carried the survey out in two phases: a qualitative phase and a quantitative phase. In the qualitative phase Plus 94 conducted ten in-depth, face to face interviews with a randomly selected stakeholder from each of the Tribunal’s stakeholder groupings.

The purpose of the in-depth interviews was to openly explore stakeholder expectations and experiences in order to determine the scope of the qualitative phase of the survey. The outcome of the qualitative phase enabled Plus 94 to further develop the questionnaire for the quantitative phase of the survey.

In the quantitative phase, Plus 94 carried out telephonic interviews with 50 stakeholders from the Tribunal’s database. The stakeholders consisted of attorneys, reporters, economists, advocates, trade unions, regular clients of attorneys, the communications department of the Commission and the legal services department of the Commission. Plus 94 recorded the findings from these interviews and presented the results to the Tribunal.
Qualitative and quantitative results of the survey

The survey revealed firstly that the Tribunal’s stakeholders had a higher ideal level of expectation from the Tribunal’s performance than the average expectation stakeholders had of government departments’ performance. The Tribunal’s stakeholders expected the Tribunal’s performance to be at the 86% level compared to the benchmark of 70%. Overall the stakeholders rated the Tribunal’s actual performance at 75%.

Plus 94 provided the summary below of stakeholder views of the Tribunal’s services.

- Overwhelmingly the Tribunal appeared to be held in high esteem by respondents across the different stakeholder segments included in this phase of the survey. The Tribunal was perceived to be executing its mandate in a competent and consistent manner.
- The Tribunal members were described as leading the proceedings of hearings in a fairly impartial way. The hearings process, although conforming to Tribunal rules, was said to offer some flexibility to all parties.
- The Tribunal hearings were said to be run as efficiently and expeditiously as possible, with Tribunal members allowing for diverse voices to be heard, within reason.
- The decisions made by the Tribunal seemed to be respected by respondents, with Tribunal members being said to consistently provide well-reasoned arguments for the decisions made in the cases heard by the Tribunal.
- Respondents viewed the Tribunal’s document management systems positively, with some mentioning the great lengths that the Tribunal would go to in order to ensure confidentiality.
- The Tribunal staff was acknowledged as exceeding expectations in delivering services to stakeholders, despite how few staff members the Tribunal had at its disposal. The commitment of the staff extended to the way in which information was efficiently communicated to the media by the Tribunal’s public relations practitioner.
- The areas in which the Tribunal received criticism was in its location in Pretoria, the limited space of its hearing venue, lack of parking, limited language use in Tribunal hearings, inconsistent transcription services and limited public awareness of the Tribunal and its function.
- Although the work of the Tribunal’s public relations practitioner was commended, it appeared that there was insufficient awareness of the existence of the public relations practitioner. Overwhelmingly, respondents felt that it was essential for the public to be made aware of the work of the Tribunal.

The overall quantitative results of the survey, in each of the functions that were assessed, are set out in diagram 7 below.
Observing the Wal-Mart effect

The merger between American retail giant, Wal-Mart, and Massmart Holdings Ltd (Massmart) was a defining case in the second decade of the competition agencies’ existence. Ironically the merger did not raise any pure competition concerns. Rather it was the public interest issues brought about by the union that drew massive local and international interest in the case. For the duration of the Tribunal’s public hearing into the merger diverse interest groups protested the entry of Wal-Mart outside the Commission building wanting the merger to be prohibited or seeking that conditions be placed on the deal. The final decision on the merger would later be handed down by the CAC after the parties to the case had taken the Tribunal’s finding on appeal. Given the public interest in the merger, the creative remedies employed and novel issues raised by the transaction at the time, in 2014 the Commission decided to assess the impact of this merger on the South African market.

In September 2010, Wal-Mart announced its intention to acquire a controlling interest in Massmart (51% of the target firm’s ordinary share capital). On 2 February 2011, the Commission finalised its investigation of the proposed merger and found that the merger was not likely to lead to a substantial prevention or lessening of competition. The only matter of contention was the impact of the merger on public interest issues, namely employment, a particular industrial sector or region, and on small business suppliers.

A major concern from the government (through the EDD and the Departments of Trade & Industry and Agriculture, Forestry and Fisheries) was that the merged entity
produced goods. Such import-substitution would likely compromise the sustainability and participation of SME’s and HDI’s manufacturing and assembly firms in productive sector activities. The knock-on effect would be an adverse impact on domestic employment and a reduction in output in sectors that economic policy aims to develop, both of which would affect broader economic development goals.

These concerns led the CAC to approve the merger on condition, amongst other things, that Massmart establish a R242 million supplier development fund aimed at upskilling and uplifting HDI’s and SME’s in identified sectors.

Upon revisiting the case in 2014 to determine the impact of the CAC’s decision the Commission found that:

- by 2014 over R124 million had been committed to support projects in agriculture (Ezemvelo Direct Farm Programme), manufacturing (Manufacturing SMEs Programme) and support services (Services to Suppliers Programme);
- actual disbursements to qualifying enterprises totalled R71 million to the benefit of 139 smallholder farming enterprises and 24 manufacturing SMEs. Funding assistance would come in the form of zero-interest non-recoverable grants for equipment, materials and factory equipment, secure loans via guarantees issued to commercial lenders, as well as technical assistance.

The aim of the Ezemvelo Direct Farm Programme was to help small to medium-sized farmers enter Massmart’s fresh produce supply chains. The programme was targeted at historically disadvantaged farmers who 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 for farming projects. At the programme’s peak in 2013, 164 smallholder farmers were linked to the supply chain. This decreased to 139 farmers during 2014 due to some projects being discontinued and fluctuating cooperative membership. Smallholder farmers’ sales to Massmart and other retailers totalled R13,1 million, with Massmart accounting for 62% or R8,1 million.

The Manufacturing SMEs Programme was directed towards cluster projects in the building materials (paint, window frames), bricks, processed commodities (maize meal), processed foods, clothing and textiles sectors and general merchandise sectors. As at December 2014, R30,3 million had been disbursed to support manufacturing suppliers, which comprised R23,5 million in grants and R6,7 million in loan guarantees issued by the fund on behalf of SME suppliers. A further R10,6 million had been approved for disbursement during 2015. Of the 24 projects assisted through the fund, 19 were black-owned, five were classified as micro-enterprises3 and eight were small businesses4. The enterprises supported created or sustained 1 417 full-time jobs.

The Developing Wine Brands Programme assisted emerging black-owned and empowered wine brands to gain market access. In particular 15 wine brands were integrated into Massmart’s supply chain and several wines were introduced into Walmart stores in the United States, China and Brazil. Local sales through Massmart totalled R1,7 million while international sales exceeded R12 million.

The Services to Suppliers Programme procured services such as food safety compliance, financial and business management, as well as training, on behalf of enterprise beneficiaries. To this end, Massmart formed partnerships with organisations such as ABSA Enterprise Development to provide commercial financing to SMMEs beyond traditional grants. The fund partnered with intermediaries5 to provide technical training on crop production as well as training and in-field mentorships for smallholder farmers.

In all the Commission impact study found that the Massmart supplier development fund, that was established as a condition to the merger, had facilitated the entry and expansion of suppliers in the agriculture, agro-processing and manufacturing sectors into Massmart’s supply chain and had positively contributed to job creation. The study found that there were no substantial changes to the proportion of imports pre- and post-merger. The study also found that Massmart suppliers were not adversely affected by the entry of Wal-Mart.
It is my pleasure to reflect on the work of the South African competition authorities over the past 20 years. It is my special pleasure, for I have watched the institutions grow and evolve over all of the 20 years, as I was there at the creation.

All three institutions – the Commission, the Tribunal, and the Competition Appeal Court -- are among the very best, and are the best of the developing countries. Each has pulled its weight in the formulation, the interpretation and execution of the laws, and the development of policy, as befits its institutional mandate. Huge challenges lie ahead, including the implementation of the new amendments that are hoped to help transform the society. The institutions are well positioned to take on the challenges, but it will take work and wisdom as well as the commitment that is so embedded in the leaders of the three institutions.

Let me mention two areas of challenge that have confronted the institutions and that have been well addressed (so far, to the extent possible), often presenting models for Africa and for economic development in general. One, more equality; two, mergers: public interest, and the mega-merger challenge.

Equality. The statute says that it is for efficiency and equitable opportunity, among other things. It has always been for equity, and had to be so, in view of the horribly inequitable past. I wondered from the outset how this combination – equity and efficiency – could be implemented. Growing up in antitrust in the West, I was taught that these objectives are not compatible; that equity shrinks the size of the pie. And exposed as I was to the international antitrust community and the pressures to conform to Western standards to be praised for doing things right, I wondered if equity would fall into the bucket of lip service. I have been much enlightened and inspired. I see how the institutions find the points of convergence of equity and efficiency, and I realize how the South African economy can never fulfil its potential for efficiency without economic inclusion and advancement of the majority. The discourse, in cases and in policy-making, is threaded with inclusiveness. The abuse of dominance cases target exclusionary restraints and highlight their effects – in keeping people out; and show how the exclusions harm not only the entrepreneurs but the consumers who profit from their services and from the competitive pressures they bring to the market. The next challenge is the amendments. I worry that they may have been oversold as silver bullets to complete the radical transformation. They cannot do that. But they can make a noticeable difference if wisely applied.

Mergers. The staff cut their teeth on analysing mergers. I remember that from the beginning David Lewis, first chair of the Tribunal, praised the inclusion of merger control in the initial tasks of the Commission on grounds that merger analysis was one of the best learning laboratories to understand markets and market power; thus a backbone of all antitrust analysis. Thus, the Commission developed expertise in merger analysis early on. The big problems and challenges came from two directions. One, the public interest mandate of the law. Again, against the grain of the West, South Africa insisted, and much of Africa insists, that public interest considerations – especially SMEs and workers – had to be taken into account to legitimize merger control. One big challenge was to bring decision-making on public interest into a predictable format consistent with principles of due process. The Commission, Tribunal and Appeals court have all worked to do so. The Commission has adopted guidelines; the Tribunal has established the stages for consideration – competition issues first, public interest issues second; keeping the analysis separate. The Appeals Court, in Walmart/Massmart, has strengthened the evidentiary procedures for establishing what public interests are harmed and whether and how specific proposed remedies are likely to sufficiently address the public interest harms.

There is a second serious problem. This was identified by Commissioner Tembinkosi Bonakele at the Developing Countries programs at my Law School, and other fora as well. South Africa does what it can to alleviate the problems of mega-mergers in South Africa; indeed I sat in on a hearing of the Tribunal under Chair Norman Manoim to deal with the harmful effects in South Africa of the giant Bayer/Monsanto merger. So too, many other harmed developing
countries tried to do what they could to protect their people from this giant combination of seeds and fertilizer – going to the life blood of the farmers and of all people as consumers of life’s greatest necessity – food. But, typically, the developed countries, one by one, approved the merger subject to spin-offs that would protect their country. Developing countries have no power to stop these transactions that hurt developing countries the most, and developed countries have the power but no interest. Indeed, they profit from the merger. Developing countries need a stronger voice. They can get a stronger voice only by combination. Regional organizations exist and are in process of development. So far the promise is greater than the reality, for (with asymmetries, scarce resources, and diverse interests) things fall apart. South Africa has been a leader in coordinating Africa. It holds the chair of the African Competition Forum. If any institution can lay the groundwork for pulling together the competition voice of Africa, it is the South African Competition Commission.

I deeply congratulate all three institutions on the incredible progress in this first 20 years. I look forward to the second 20. The work is not done.

Eleanor M. Fox
Professor of Law, New York University
School of Law
Twenty years is a long period in a person’s career. I joined the Commission on 1 May 1999 when the Commission was in its infancy, without a building and with only six or seven employees. I joined the Commission as Head of IT...without any IT infrastructure. We had an entry-level server which I converted to multipurpose server. Apart from my IT job, I used to visit the building site every day, wearing the contractor’s helmet and at times driving the Commission combi until a driver was appointed. We spent long days and sleepless nights putting the infrastructure in place before the big launch in September 1999. We even had a two-day mock session where employees performed roles of the public walking into the registry, registration of complaints and merger applications, and various other activities of the Commission.

The Commission opened its door to the public on 1 September 1999 in an incomplete, but beautiful building in Faerie Glen. With the beautiful garden and koi ponds and ducks, employees enjoyed the serenity of the office park.

There was a bit of ambiguity on how we manage cases and a case management system which was developed without much deliberation on process and procedures was scrapped within two years. In the first two years of existence, we learned a lot and quickly corrected our mistakes.

During the initial days of the Commission, we were inundated with calls and complaints from people upset at entering competitions and not winning and complaints of being unfairly treated. The then Compliance Division had their hands full educating the public about the Commission.

There were so many ups and downs, both personally and for the Commission, over the last twenty years. Looking back, some of the things that stand out are being given the employee of the year award in 2003 for best performance, being subjected to interrogations by national Intelligence authorities for theft of computer equipment, the leak of the confidential banking inquiry report and much more.

I also looked back at what has changed since we started this journey. We are older, greyer and unfortunately, fatter. But also, a little wiser. We have increased our staff compliment, added and restructured divisions and we have changed offices and our strategy. We have diversified to reduce risk and refocused to improve efficiencies. We have implemented and revised processes. Our systems and processes were benchmarked and adopted by various entities. In some respects, it feels like a cycle with no end. But when I think through the details and the outcomes of the decisions we have made, they have all moved us forward.

In a way, a key reflection here is that we embraced change and continuously strived for improvement.

After twenty years, you definitely accumulate a lot of stories—some are funny, like email messages being blocked because employees used somewhat colourful language to communicate their displeasure with IT as well as colleagues from Competition authorities around the world dancing on tables at Moyos in Cape Town after an ICN conference. Some memories were sad; like the death of fellow colleagues and some were even a little scary: like an employee being threatened for investigating panel beaters. I could fill pages with such stories.

It is amazing how the Competition Commission transformed in the last 20 years with renewed vigour, changes in strategy and a vision and mission that focus on fair business and inclusive markets for all.

And the future looks even brighter. What makes me tick, even after 20 years, is the freedom to explore and experiment, keeping the same level of curiosity, enjoying learning every day, being challenged, empowered, trusted and knowing that it is acceptable to make mistakes but only if you make them once!

My journey to date has been fascinating; not always easy, not always charming, but with plenty of fun along the way and it has been highly rewarding. Just like life.

Binu Idiculla
IT Manager
WELL WISHES FROM THE GAMBIA COMPETITION AND CONSUMER PROTECTION COMMISSION

We owe our growth and development to the benevolence of CCSA. As a young institution; the CCSA nurtured us by sharing their experience.

Amadou Ceesay
Executive Secretary of the GCCPC
I take this opportunity to congratulate and express my gratitude to the Competition Commission of South Africa for its leadership in the operationalisation of the African Competition Forum (ACF) and its great ability to bring a large number of National Competition Authorities from African countries and Regional Competition Authorities of the continent in the effective management of anticompetitive practices.

This leadership, confirmed by South Africa’s Competition Commission, has also resulted in the conduct of cross-cutting studies in different fields and the publication of results of those surveys, which currently serve as a good references for all practitioners of competition both continental and international. Once again, please receive my best wishes for the celebration of your 20th Anniversary, while inviting you to persevere in your leadership, in order to bring the benefits of implementing the competition law for the welfare of consumers in the continent.

Dr Sacko Seydou
Programme Officer on Competition
Economic Community West African States (ECOWAS)
Abuja-Nigeria
INTRODUCTION

A n overview of the last twenty years shows that the competition authorities not only mitigate the anti-competitive effects of a proposed merger but actively seek means to strengthen competition in a market by imposing remedies that lower both the concentration of certain markets and the barriers to entry. These steps are taken alongside the government’s economic growth strategies and issues of public interest, to ensure that merger control is balanced and creates a conducive environment for competitive market activity, so that South Africans reap the benefits of a variety of choices at the lowest prices. Over the last ten years, in particular, public interest has taken centre stage as a means to mitigate potentially negative outcomes of mergers and acquisitions. Moreover the competition agencies have employed creative remedies to address competition concerns, thus giving rise to solutions tailored for the South African context, even when considering mergers with a global footprint. The more noteworthy of these mergers, over the last ten years, are set out below.

A merger takes place when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. This may involve the buying or leasing of shares, an interest or the assets of the other firm, or the formal amalgamation of the two firms. The purpose of merger control is to ensure that a transaction does not lead to a substantial lessening of competition to the detriment of consumers and the public interest.

The passing of the current Competition Act introduced a new competition regime that would significantly change merger review in South Africa. The previous Competition Board had relied on picking up information on planned or implemented mergers from the press or by interested parties bringing it to their attention. Firms could decide to bring a merger to the Competition Board if they thought in advance that it might create problems.

Marking a fundamental shift in the South African merger control regime, the Competition Act made pre-merger notification compulsory. Under the Act, all mergers above determined thresholds, calculated in terms of assets and turnover, had to be notified and therefore evaluated by the Commission. The main aim of defining merger thresholds was to screen out transactions that were unlikely to result in significant effects on competition.

The Act provided that those mergers defined as large had to be decided by the Tribunal once they had been investigated by the Commission, which would then submit a reasoned recommendation to the Tribunal. In the 2001 amendments to the Competition Act, the Commission was also granted oversight of small mergers. Small merger notification was voluntary and the Commission restricted investigations to small mergers it viewed as being problematic due to the previous conduct of the parties; the parties being involved in other investigations; or those in priority sectors.

The thresholds for determining the size of a merger are set by the Minister of the EDD in terms of the combined assets and/or turnover of the merging parties. Since the inception of the Competition Act the thresholds have been revised three times. The first adjustment in February 2001 took into account the Commission’s early experience with the large number of mergers. The revisions in April 2009 and October 2017 were also made in order to manage the number of filings coming through and in order to keep pace with economic growth and inflation.

Both the April 2009 and October 2017 threshold adjustments led to fewer merger notifications as demonstrated by diagram 8 below. Following each merger threshold adjustment the number of mergers, particularly intermediate mergers filed, dropped significantly from previous years.

### Diagram 8: Decrease in Mergers Notified Following the 2009 and 2017 Merger Threshold Adjustments

<table>
<thead>
<tr>
<th>Year</th>
<th>Small</th>
<th>Intermediate</th>
<th>Large</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007/08</td>
<td>13</td>
<td>394</td>
<td>106</td>
</tr>
<tr>
<td>2008/09</td>
<td>9</td>
<td>303</td>
<td>103</td>
</tr>
<tr>
<td>2009/10</td>
<td>10</td>
<td>138</td>
<td>44</td>
</tr>
<tr>
<td>2015/16</td>
<td>13</td>
<td>162</td>
<td>16</td>
</tr>
<tr>
<td>2016/17</td>
<td>6</td>
<td>319</td>
<td>93</td>
</tr>
<tr>
<td>2017/18</td>
<td>9</td>
<td>249</td>
<td>119</td>
</tr>
</tbody>
</table>
Diagram 9 below shows the adjustments in merger thresholds and filing fees over the last 20 years.

### Diagram 9: Revisions in Merger Thresholds and Filing Fees Over 20 Years

<table>
<thead>
<tr>
<th>February 2001</th>
<th>Lower threshold</th>
<th>Intermediate merger</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>R200 Million</strong></td>
<td><strong>R30 Million</strong></td>
<td><strong>R75 000</strong></td>
</tr>
<tr>
<td>Combined turnover or asset value</td>
<td>Target turnover or asset value</td>
<td>Filing fee</td>
</tr>
<tr>
<td><strong>R3,5 Billion</strong></td>
<td><strong>R100 Million</strong></td>
<td><strong>R250 000</strong></td>
</tr>
<tr>
<td>Higher threshold</td>
<td>Large merger</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>April 2009</th>
<th>Lower threshold</th>
<th>Intermediate merger</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>R560 Million</strong></td>
<td><strong>R80 Million</strong></td>
<td><strong>R100 000</strong></td>
</tr>
<tr>
<td>Combined turnover or asset value</td>
<td>Target turnover or asset value</td>
<td>Filing fee</td>
</tr>
<tr>
<td><strong>R6,6 Billion</strong></td>
<td><strong>R190 Million</strong></td>
<td><strong>R350 000</strong></td>
</tr>
<tr>
<td>Higher threshold</td>
<td>Large merger</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>October 2017</th>
<th>Lower threshold</th>
<th>Intermediate merger</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>R600 Million</strong></td>
<td><strong>R100 Million</strong></td>
<td><strong>R150 000</strong></td>
</tr>
<tr>
<td>Combined turnover or asset value</td>
<td>Target turnover or asset value</td>
<td>Filing fee</td>
</tr>
<tr>
<td><strong>R6,6 Billion</strong></td>
<td><strong>R190 Million</strong></td>
<td><strong>R500 000</strong></td>
</tr>
<tr>
<td>Higher threshold</td>
<td>Large merger</td>
<td></td>
</tr>
</tbody>
</table>

**How mergers are assessed**

The main test that the Competition Act requires is for the competition authorities to determine whether a merger will mean that competition is substantially prevented or reduced. This involves considering a range of factors relating to actual and potential competition in the relevant markets, as set out in section 12A.2:

1. the actual and potential level of import competition in the market;
2. the ease of entry into the market, including tariff and regulatory barriers;
3. the level and trends of concentration, and history of collusion, in the market;
4. the degree of countervailing power in the market;
5. the dynamic characteristics of the market, including growth, innovation, and product differentiation;
6. the nature and extent of vertical integration in the market;
7. whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
8. whether the merger will result in the removal of an effective competitor.

If the merger is likely to have anti-competitive effects then it is necessary to consider whether there are any technological and/or efficiency gains that may offset them. The competition authorities are also required to consider public interest issues in all mergers, including the effect on employment, which is discussed in more detail below. The public interest examination must be undertaken, regardless of whether or not the merger is found to be likely to give rise to a substantial lessening of competition.
An important implication of pre-merger notification is that companies are incentivised to help the Commission conclude its investigation as speedily as possible so that the merger can be finalised.

This acknowledges the fact that evaluating a merger requires a substantial amount of information, which is most often information that is not available in the public domain. According to the Act, the Commission is allowed 20 days from the time of notification to assess the competitive effects of a small or intermediate merger and 40 days for a large merger. If the merger is complex or there have been delays in obtaining information, these periods can be extended on application to the Tribunal.

**Developments in merger evaluation practice**

The substance of merger evaluation has not changed since the start of the current competition regime, twenty years ago. However there have been developments in the Commission’s merger evaluation practice since that time. The more significant of these, over the last ten years, have been (1) updating the Commission’s service standards; (2) establishing a unit to monitor the implementation of merger conditions; and (3) establishing a merger notification unit for purposes of screening mergers.

**Updating service standards**

During March 2002 the Commission published service standards to the business community which indicated the likely outputs which could be expected in the process of assessing mergers.

<table>
<thead>
<tr>
<th>Phase 1 (non-complex)</th>
<th>Phase 2 (complex)</th>
<th>Phase 3 (very-complex)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Small</strong></td>
<td><strong>Intermediate</strong></td>
<td><strong>Large</strong></td>
</tr>
<tr>
<td>Service standard</td>
<td>Competition Act</td>
<td>Service standard</td>
</tr>
<tr>
<td>20 days</td>
<td>60 days</td>
<td>20 days</td>
</tr>
<tr>
<td>45 days</td>
<td>60 days</td>
<td>45 days</td>
</tr>
<tr>
<td>60 days</td>
<td>60 days</td>
<td>60 days</td>
</tr>
</tbody>
</table>

These standards were reviewed in March 2010 in order to bring them in line with the changed regulatory environment, most notably the 2009 merger thresholds, as well as the resources available to the Commission.

By 2015 the Commission noted that the nature and complexity of merger activity had increased over time, leading to (1) an increase in the number of merger filings; and (2) more complex merger assessments. Moreover the Act set out timeframes for merger investigations without regard to their level of complexity. For these reasons the Commission revised the service standards again in order to manage the service delivery expectations of stakeholders.

The 2015 service standards classify notified mergers as either phase 1 (non-complex), phase 2 (complex) or phase 3 (very complex) mergers, depending on the complexity of the competition or public interest issues they raise. Diagram 10 displays the timeframes set out in the Commission’s service standards and the maximum allowable timeframes set for merger assessments in the Act.

**Monitoring merger conditions**

The number of mergers that are approved with conditions by the competition authorities has grown over the years. With this, the need to ensure that merger conditions were fully complied with also grew. Therefore the Commission established a unit within its M&A division specifically to monitor compliance with merger conditions imposed by the Commission or the Tribunal. After a merger has been approved, with conditions, by the Commission or Tribunal the unit follows up with the merged parties on the dates set out in the milestones recorded in the conditions to ensure that the conditions have indeed been met.

One example is when a merger is approved subject to employment related conditions. This would follow a merger assessment wherein the Commission or Tribunal would have determined the likely job losses resulting from a merger and would have imposed appropriate conditions. Most merger conditions dealing with employment issues are intended to preserve jobs rather than create new jobs. Therefore, in such a case, the unit measures the number of jobs saved through the merger.

Conditions that require parties to make an investment are more likely to result in job creation. In these cases the number of jobs created is measured and specified under the monitoring requirements. In order to accurately measure these numbers the unit requires parties to provide details on the number of jobs created, the type of jobs created and the relevant sectors applicable to these employment figures, prior to the
conditions terminating. Furthermore, the Commission communicates decisions on employment conditions on a regular basis to trade unions where those unions had participated in the merger review process.

Merger screening for maximum efficiency

The Commission has a responsibility to the public to carry out its work expeditiously and efficiently. To do this, the M&A division sets annual goals for the turn-around times of cases and the cost-effectiveness of the investigations. The Commission has adopted an initial screening process for mergers, to identify cases that are very unlikely to have competition implications and that can be fast-tracked. These include mergers where:

- there is no product or geographic market overlap among the firms;
- mergers are unlikely to have anti-competitive effects, such as most property transactions and management buyouts;
- the transactions involve companies in liquidation, also referred to as failing firms, and where there is a new entrant into the market - as there would be a replacement of one participant by another;
- parties have a post-merger market share of less than 15% and the concentration levels in the relevant market are considered low.

These kinds of measures ensure that the turn-around time for mergers and costs per case can be kept to a minimum. The Commission is also committed to maintaining the following service standards:

- the parties will receive correspondence from the investigator within 3 days of filing, and will be informed about any incomplete filing within 15 days;
- parties will be informed about whether the transaction raises any initial competition concerns within 15 days;
- mergers with no competition concerns will be completed within 20 days, subject to the filings being complete, correct and timeous and accompanied by a comfort letter to trade unions; and
- case investigators will provide regular feedback to parties.

Merger trends

Trends in merger decisions

Diagram 11 below show the number of mergers notified and decided upon over the last ten years by the Commission. Much the same as the first decade the Commission continued to approve, unconditionally, the majority of mergers notified. The number of prohibited mergers fluctuated year on year with the highest number for the Commission recorded in the 2017/18 financial year.

Mergers by sector

Overall, the manufacturing sector has consistently been the most important driver of merger activity, with an average of 23% percent of merger notifications

| DIAGRAM 11: MERGERS NOTIFIED TO, AND DECIDED BY, THE COMMISSION OVER THE LAST TEN YEARS |
|-----------------------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| Notified | 190 | 229 | 291 | 324 | 320 | 395 | 391 | 418 | 377 | 348 |
| Approved | 190 | 200 | 234 | 278 | 302 | 321 | 364 | 349 | 325 | 287 |
| Approved with conditions | 8 | 14 | 33 | 37 | 22 | 43 | 37 | 31 | 52 | 41 |
| Prohibited | 1 | 2 | 8 | 0 | 1 | 5 | 7 | 5 | 12 | 4 |
| Withdrawn/no jurisdiction | 9 | 4 | 7 | 12 | 4 | 6 | 5 | 3 | 9 | 4 |
| Cases finalised | 208 | 220 | 282 | 327 | 329 | 375 | 413 | 385 | 388 | 336 |

| DIAGRAM 12: MERGER TRENDS BY SECTOR SINCE 2009/10 |
|-----------------------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| Manufacturing | 21% | 26% | 29% | 23% | 22% | 20% | 20% |
| Property | 16% | 15% | 20% | 27% | 28% | 20.26% | 23.85 |
| Retail | 9% | 8% | 9% | 8% | 7% | N/A | N/A |
| Financial | 7% | 7% | 2% | 4% | 3% | 6.75% | 10.7% |
| Wholesale | 12% | 7% | 5% | 3% | 5% | 12.47% | 15.9% |
| Mining | 11% | 6% | 12% | 7% | 7% | 5.19% | 6.15% |
| Transport | 1% | 5% | 1% | 6% | 2% | 4.94% | 2.3% |
| Telecommunications and Information technology | 6% | 6% | 4% | 3% | 6% | 7.27% | 4.8% |
| Construction | 2% | 2% | 0% | 2% | 2% | 2.08% | 2.56% |
| Agriculture | 1% | 2% | 4% | 2% | 3% | 3.90% | 1.79% |
over the last ten years. This has been followed by property transactions, which have accounted for between 15% and 24%. These transactions generally relate to sizeable acquisitions of the major groups in commercial and industrial property. In third place is the wholesale and retail trade sector, which have included acquisitions of smaller supermarket groups. The Commission observed largely the same trends in its first ten years of operation.

Public interest

The Competition Act enjoins the authorities to consider the effect of a merger on the public interest prior to deciding on it. In terms of the Act public interest considerations, on their own, can lead to the prohibition or approval of a merger regardless of the competition issues raised by the merger.

In this regard section 12A(1)(b) of the Competition Act states that:

Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

When the public interest criteria were included in the Competition Act during the policy and legislative process, entrenched business interests became concerned about the possible arbitrary use of public interest criteria. However, the argument which triumphed contended that competition policy could not ignore the social needs of the people and that competition was a value in its own right but only in so far as it met socially desirable objectives. So in addition to the key competition objectives of efficiency and consumer welfare, the Competition Act includes objectives like protection of small and medium sized enterprises (SME’s), promotion of employment and the growth of black-owned enterprises.

When reviewing the first 10 years of competition enforcement, the Commission observed that government departments had not participated much in the merger processes of the Commission and Tribunal. That trend shifted in the second decade with several government departments making submissions in mergers before the Commission and the Tribunal, mainly on matters of public interest. Examples include: (1) the 2016 AB Inbev / SAB Miller deal in which the merging firms agreed with the EDD that they would set aside R1 billion over five years for the development of the South African agricultural outputs for barley, hops and maize, and for promoting the entry of emerging black farmers; (2) the SAB Miller / Coca Cola deal, also in 2016, where the merging firms agreed with EDD to set aside R800 million to support small businesses; (3) the 2014 international merger between AgriGroupe Holdings and local agricultural commodity trading company, AFGRI, in which the merging firms agreed to make available loan funding for emerging farmers and provided for the continuation of benefits to small farmers which existed before the merger; and (4) the 2011 Wal-Mart Stores Inc / Massmart Holdings Ltd merger which drew non-merger commitments from the merging firms as a result of EDD and other government department interventions.

Here the EDD led a government request that a supplier development fund be set aside for the benefit of emerging suppliers. Through court proceedings this amount was eventually set at R200 million. The details of this ground breaking merger, and the extent of the government’s participation in it, are set out in box 2 below.
On 31 May 2011 the Tribunal approved the Wal-Mart Stores Inc (Wal-Mart) and Massmart Holdings Ltd (Massmart) merger with conditions. The merger did not raise any competition concerns as Wal-Mart, a new entrant in the retail sector in South Africa, did not compete with Massmart in South Africa. Its only presence in the country was a small procurement arm that sourced products for its stores globally. The merger did however raise public interest concerns relating to employment, collective bargaining and the procurement of local products.

The Commission assessed the transaction and, upon referring the case to the Tribunal, recommended that the Tribunal approve the deal without conditions. The merging parties had initially argued for an unconditional approval of the merger, a position initially supported by the Commission.

Opposed to this view were three government departments: EDD, Trade and Industry (DTI) and the Department of Agriculture, Forestry and Fisheries (DAFF), who had proposed that the merger be approved, but subject to conditions to protect the public interest.

Also intervening were the South African Commercial, Catering and Allied Workers’ Union (SACCAWU) which was recognised by Massmart, the South African Clothing & Textile Workers’ Union (SACTWU), other unions organising workers in industries which sell products into the retail sector and their federation Congress of South African Trade Unions (COSATU). The unions had proposed that the merger be approved subject to a wide range of public interest conditions, but that if this was not possible, that the merger should be prohibited.

The Tribunal hearing took place from 11 – 16 May 2011 during which the Commission, the merging parties and the interveners all made their submissions. The Tribunal also called Shoprite to the hearing in order for it to elaborate on its likely course of action should the merger be approved. On the final day of this hearing the merging parties offered certain undertakings to the Tribunal which they agreed might be imposed as conditions for the approval of the merger. These undertakings were made to address labour and local procurement concerns raised by intervening parties during the course of the hearing. The merging parties made it clear that, in their view, the undertakings were not required legally in order for the merger to be approved, but were offered to meet adverse perceptions about the effect of the merger on the public interest.

Having heard the evidence presented in the week, the Commission also changed its initial recommendation and requested the Tribunal to approve the transaction with two conditions. These were: that 503 employees, who were retrenched by Massmart in early 2010, be reinstated and that the new merged entity had to honour existing agreements with trade unions for at least three years.

The approach that the Tribunal followed was to examine the undertakings, on the assumption that the public interest concerns had been established, to see whether the undertakings by the merging parties were adequate to remedy the public interest concerns.

The Tribunal concluded that they were adequate.

First the interveners believed the merger would have a negative impact on employment in that the merger could result in retrenchments by the new merged entity. The Tribunal held that Wal-Mart’s expansion plans suggested that retrenchments of the existing work force were unlikely and that increased employment was more likely. Since the merging parties had given an undertaking that there would be no merger related retrenchments at Massmart for two years, and in light of the fact that post-merger retrenchments were not likely, the Tribunal found that the undertaking was adequate.

Still related to employment, a hotly contested issue during the merger was whether the retrenchment of approximately 503 Massmart employees, in June 2010, was in anticipation of the merger. The Tribunal concluded that whilst the retrenchments coincided with the commencement of the merger negotiations there was no conclusive evidence that the merger was the cause. Despite this the merging parties agreed, during the proceedings, to give preference to re-employing those retrenched workers if vacancies arose and to recognise past seniority for that purpose. The Tribunal accepted this undertaking.

Another concern of the unions was that the merger would likely lead to a diminution of their collective bargaining rights. The Tribunal found that the merging parties’ undertaking to honour existing collective bargaining rights, and to not challenge the status of SACCAWU as the largest representative of workers in its divisions, addressed this issue. The Tribunal stated that the creation of additional rights not enjoyed by the unions at that stage was neither related to the merger nor appropriately part of the Tribunal’s limited public interest mandate. The merging parties invited the Tribunal to determine the
appropriate period for which this condition should hold and the Tribunal determined that it should operate for three years.

Finally the parties offered an undertaking to address the local procurement concern raised by the interveners. The interveners were concerned that, as a result of Wal-Mart’s global purchasing power which dwarfed that of Massmart, the new merged firm would be able to source cheaper imports and hence switch some of Massmart’s procurement away from local manufacturers to imports, with adverse effects on those employed in these local sectors. The merging parties disagreed with this assertion. Again this concern was the subject of indeterminate evidence from either side. In response to this fear, the merging parties offered to invest R100 million, over a three year period, to make local industry more competitive to meet international competition. The Tribunal concluded that, even if the concern was valid, the undertaking for an investment remedy as suggested by the merging parties was appropriate, proportional and enforceable.

The Tribunal’s decision was taken on appeal and through court proceedings the amount of the fund to make local industry more competitive to meet international competition was eventually set at R200 million.
By far the most prominent public interest issue arising from merger assessments over the last ten years has been employment. The first merger in which the Tribunal was unconvinced by the merging parties’ claims to have carefully considered the number of retrenchments they intended to implement, following the merger, was the amalgamation of Metropolitan Holdings Ltd and Momentum Group Ltd to form MMI Holdings – which was set to become the third largest insurance company in South Africa at the time. The Tribunal imposed a temporary moratorium on job losses in that matter, signalling a more rigorous approach to assessing merger related retrenchments. Further details of the MMI transaction are set out in box 3 below.

**TRIBUNAL SETS CRITERIA FOR ASSESSING JOB LOSSES IN A MERGER**

On 14 October 2010 the Tribunal approved the merger between Metropolitan Holdings Limited (“Metropolitan”) and Momentum Group Limited (“Momentum”) on condition that the merged entity, MMI Holdings, had to ensure that there would be no retrenchments in South Africa, resulting from the merger, for two years after the merger implementation date. This condition however did not apply to senior management. The merging parties were also directed to advise their employees of this condition.

This decision followed a hearing before the Tribunal in which the merging parties proposed to limit the number of merger related job losses to 1,000 in the first three years after implementing the merger. The merging parties also offered to provide support, such as core skills training to affected unskilled and semi-skilled employees, outplacement support and counselling, and to use their best endeavours to redeploy affected employees within the merged entity.

The Commission, after assessing the merger, accepted the merging parties’ undertakings which had improved on the merging parties’ original undertakings and recommended to the Tribunal that the merger be approved subject to the implementation of these support measures.

The Tribunal, in its reasons, held that when the merging parties expect that there would be large retrenchments as a result of the transaction the parties had to justify the substantial loss of jobs flowing from the merger. The Tribunal indicated that the following criteria must be satisfied in deciding whether the retrenchments are justified:

1) that a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e. that the reasons for the job reduction and the number for jobs proposed to be shed are rationally connected; and

2) the public interest in preventing employment loss is balanced by an equally weighty but countervailing public interest for instance where the merger is required to save a failing firm, that justifies the job loss which is cognisable under the Act.

In considering the above elements the Tribunal found that the merging parties had arrived at the figure in an arbitrary manner and had failed to demonstrate that there was a rational connection between the efficiencies sought from the merger and the job losses claimed to be necessary to the merger. It therefore imposed a moratorium on all merger related retrenchments for a period of two years. The moratorium excluded senior employees and voluntary retrenchments or other forms of incentives for employees to resign such as early retirement packages, where the methods chosen were non-coercive.
Public interest guidelines

On 8 June 2016 the Commission published its final guidelines for how it would assess public interest factors when considering a merger. It did so in line with the Act, which states that the Commission may adopt guidelines to indicate its policy approach on any matter falling within its jurisdiction.

The publication of these guidelines was an important step in contributing to South Africa’s development goals, as set out in various policy documents, because the public interest factors listed in the Act speak directly to employment, economic transformation and building a world-class economy. Furthermore, the assessment of public interest factors has drawn both support and controversy in the Commission’s 18-year history, making it more and more important to offer clarity and a level of certainty to the Commission’s stakeholders on this critical aspect of competition regulation.

The document offers guidance to the public on the Commission’s approach to analysing mergers and sets out the approach that the Commission is likely to follow and the types of information it may require when evaluating the public interest grounds that appear in the Act.

In preparing these guidelines, the Commission followed a consultative process, which entailed obtaining input from various stakeholders, including legal practitioners, business and civil society, as well as holding workshops to discuss comments received and to get more input from stakeholders. The Commission revised the guidelines to incorporate input from stakeholders before publishing its final version.

**Merger remedies**

In merger cases there can be three outcomes – approval, prohibition or conditional approval. If it is found that a merger would contravene the Act, either as a result of being anti-competitive or being contrary to the public interest, the competition authorities will attempt to impose a remedy by conditionally approving a merger before prohibiting it.

In redressing anti-competitive effects, the competition authorities have imposed both structural and behavioural remedies. In some cases, structural remedies have entailed the selling off of whole businesses and in other cases it has entailed the selling of brands or business units.

Behavioural remedies have varied from case to case however in the past ten years the Commission and Tribunal have crafted more creative remedies than in the first ten years of competition enforcement. This became necessary because of the more complex nature of mergers and public interest issues coming before the competition agencies.

One example of a merger that had to balance the multi-jurisdictional nature of the transaction with its unique local implications was the South African leg of the global merger between Nestlé SA (Nestlé) and the infant nutrition business of Pfizer Inc (Pfizer).

In this transaction - a merger involving two firms producing infant formula products with strong brands - the Tribunal imposed a novel set of divestiture conditions that involved the compulsory licence of a trademark by the acquiring firm and then provision for it to be re-licenced back to the acquiring firm after ten years.

This approach balanced the need for competition authorities in smaller jurisdictions to impose remedies appropriate to their circumstances but still allow an international merger to be successfully implemented. In larger jurisdictions the merger had been approved unconditionally because there was greater competition in their domestic markets. The details are set out in box 4 below.
On 11 February 2013 the Tribunal approved, with conditions, the South African leg of the global merger between Nestlé S.A. and the infant nutrition business of Pfizer Inc. Infant formula, which was the subject of the merger, was a product with unique characteristics and in many instances was the sole source of nutrition for infants where breastfeeding was not possible for medical reasons or by choice. In addition, given the fragile nature of newborns and infants, infant formula was often an emotional purchase for parents. Nestlé’s trade marks in the infant nutrition market included NAN, Lactogen and Nespray. They were widely sold in the overall infant formula market in South Africa, where Nestlé had a large market share. Pfizer Nutrition’s main trade marks were S-26, SMA and Infasoy. Pfizer’s products were largely targeted at preterm babies, hungry babies, picky eaters and children with food allergies. The merger was part of a world-wide series of transactions. In South Africa, where Nestlé already had a large market share, Nestlé was to acquire Pfizer Nutrition’s business but, as a condition of approving the merger, sell to a third party (who was not yet identified at the time of the Tribunal’s hearing) the rights to manufacture the products and, for a period of ten years, to brand them under the Pfizer Nutrition trade marks in terms of a ‘transitional re-branding’ programme. In effect this was a complex licensing arrangement under trade marks and other intellectual property. In that period the acquirer would introduce its own trade marks although still being entitled to use the Pfizer Nutrition manufacturing technology. After a further ‘black-out’ period of ten years Nestlé would be entitled, if it so wished, to re-enter the market with products under the Pfizer Nutrition trade marks. This was the first time the Tribunal had considered a transitional re-branding arrangement in a merger case. Having imposed this transitional rebranding remedy on the merged entity, the Tribunal averted the likely price increases and/or quality deteriorations of the merging parties’ infant nutrition products that could have taken place as a result of the merger. The objective of the transitional re-branding programme was to maintain, in the short term, the competitive landscape that existed before the merger while creating an independent and viable competitor to Nestlé in the medium to long term. In its reasons the Tribunal said the re-branding condition created an opportunity for the emergence of a viable, stand-alone competitor, independent of Nestlé and without any association or link to the Pfizer brands in the long run. The Tribunal found that the version of transitional re-branding finally proposed by the merging parties adequately addressed the competition concerns arising from the merger. However the Tribunal made it clear that the adequacy and success of transitional re-branding, as a solution to a potentially anti-competitive outcome, would depend on the identity and characteristics of the purchaser of the divested business. Accordingly, the Commission would have to approve the purchaser.

In its decision the Tribunal advised the Commission to review the licence agreement between Nestlé and the purchaser in order to forestall potential collusion in the infant nutrition markets.

**BOX 4:**

INFANT NUTRITION DEAL BALANCES LOCAL AND INTERNATIONAL CONSIDERATIONS
Dear Mr. Tembinkosi Bonakele, On behalf of the Federal Antimonopoly Service (FAS Russia) and me personally please accept our sincerest congratulations with the 20th anniversary of the Competition Commission of South Africa.

The joint work of the Competition Commission of South Africa and the FAS Russia is an example of effective cooperation designed to achieve practical results. As part of the implementation of the Memorandum on Understanding between our authorities, we jointly analyze socially significant markets, hold consultations on cases, consider mergers and acquisitions, as well as organize joint investigations.

I thank you for the constructive cooperation and support in solving our common problems and express the hope that our success will increase in the future. The activities of competition authorities play an important role in ensuring the effective development of national economies, and over these 20 years you have reached great heights both at the national and global levels!

I sincerely wish you success and new achievements, preservation of our antimonopoly traditions aimed at the growth and well-being of the population of our countries!

With my best wishes,

Igor Artemiev
Head of the FAS Russia
UNLEASHING MORE RIVALRY
PROHIBITED PRACTICES
INTRODUCTION

While merger regulation is about preventing firms from occupying a dominant position, many South African markets are already dominated by a single firm, or are characterised by a tight oligopoly, that is, a small number of large firms. High levels of concentration across the South African economy and close relationships between firms in the same industries are important conditions for anti-competitive conduct.

Firms in these arrangements are well placed to engage in conduct to earn returns that reflect market power, and to protect themselves from the rise of effective competitors.

The Competition Act seeks to prohibit anti-competitive practices that have the effect of allowing dominant firms to abuse a position of market power. The abuse can take the form of preventing active rivalry from firms with better products or services, meaning that effort and innovation are not rewarded.

Competitive rivalry also tests managers, while anti-competitive conduct can make managers complacent. In the South African context, many dominant firms have their roots in the apartheid economy, but retain and have extended their dominance to this day. The consequences are damaging as firms that are in dominant positions are rewarded simply because of historical privilege. Furthermore, they may effectively constrain the entry and growth of other players. The most prominent case which traversed this ground in the last ten years was the Commission’s investigation and prosecution of Sasol Chemical Industries (Pty) Ltd in 2014. The outcome of the Tribunal’s judgment and reasoning in this matter is set out in box 5. However this decision was later overturned by the CAC on appeal.

Dominance and its abuse is probably the most contested area of competition law. However, the area that attracts the greatest attention of competition authorities is where the market structure allows for competition, but where the existence of only a few firms is also conducive to firms agreeing to collude. As with single firm dominance, cartels in South Africa have generally been made up of long established market participants continuing to reap unjustified rewards from anti-competitive conduct to the detriment of consumers. The increasing number of cartels uncovered by the Commission shows that collusive conduct is more widespread than previously thought. Moreover the Commission’s decision to prioritise certain industries over the last ten years has helped to uncover collusion in strategic sectors, thereby assisting national efforts towards economic development.

The provisions of the Competition Act are thus mainly concerned with effective competitive rivalry and the consequences of its being lessened, absent, or overcome. This is also in line with economic thinking on the conduct of firms, which emphasises the diversity of strategies that firms can use to exert and maintain market power. However, the approach in the Act demands a lot of the competition authorities. For example, very little abusive conduct is assessed on a per se basis; rather, the investigation must establish both the theory of harm, and the evidence to demonstrate that this has occurred or is likely to occur. In addition, many provisions of the Act dealing with prohibited practices allow for firms to defend their conduct by invoking countervailing pro-competitive, technological or efficiency-enhancing effects of their conduct.

The parts of the Competition Act that deal with prohibited practices are sections 4, 5, 8 and 9. Section 4 is concerned with direct and indirect coordinated horizontal behaviour among competitors (collusion). Section 5 deals with restrictive vertical practices, among them being minimum resale price maintenance. This is the sole restrictive practice which is a per se violation and so does not require any weighing up of pro- and anti-competitive effects. Section 8 prohibits unilateral anti-competitive abuse by dominant firms. Here only the charging of an excessive price and the denial of access to an essential facility – both extremely difficult to prove – are judged on a per se basis, while in the case of the other abuses listed and general exclusionary conduct, a pro-competitive defence is available to the dominant firm. Finally, section 9 of the Act precludes firms from engaging in price discrimination if it has the effect of substantially preventing or lessening competition.

Finally, in February 2019 the President signed into law amendments to the Competition Act which are designed to, amongst other things, strengthen the powers of the Commission and Tribunal to assess and prosecute abuse of dominance. The date for when the amendments will become effective has not yet been set but the Presidents act of signing them into law signals the political will to tackle abuse of dominance more aggressively than in the first twenty years of competition enforcement. As regards abuse of dominance, the amendments seek to:

- protect small and medium businesses and firms controlled by historically disadvantaged persons against price discrimination and
BOX 5:
TRIBUNAL REACHES GROUND BREAKING FINDING ON EXCESSIVE PRICING

In June 2014 the Competition Tribunal found Sasol Chemical Industries Limited (“SCI”), a subsidiary of Sasol Ltd (“Sasol”), guilty of charging domestic customers excessive prices for purified propylene and polypropylene between January 2004 and December 2007.

The Tribunal stated that the price SCI charged Safripol, SCI’s only external customer for purified propylene and a competitor of SCI downstream, was to Safripol’s detriment and inhibited its ability to effectively compete with SCI. In addition, SCI’s locally charged polypropylene prices have had a significant adverse effect on the local plastic converters and caused them harm during the complaint period.

The Tribunal imposed a penalty of R205.2 million in respect of purified propylene and R328.8 million in respect of polypropylene. It also imposed remedies for determining SCI’s future pricing of both purified propylene and polypropylene that would see SCI’s prices charged to local customers drop.

Purified propylene, produced from feedstock propylene, was an input in the production of polypropylene. Polypropylene was a key input for plastic converters who manufacture industrial and household plastic products. Hence the price of both purified propylene and polypropylene, as intermediate products, had significant relevance to the price of household plastic goods such as buckets, brooms, storage containers and industrial products such as motor car parts, water tanks and the like.

The Tribunal’s finding came after a lengthy hearing into allegations of excessive pricing brought by the Competition Commission against SCI. The hearing ran over several months, starting on 13 May 2013, with final submissions in the case being made on 09 May 2014. In its complaint the Commission alleged that SCI was a dominant market player and that, between 2004 and 2007, it had charged excessive prices for purified propylene and polypropylene to the detriment of consumers and in contravention of the Competition Act. SCI denied the allegations. During the proceedings the Tribunal heard the evidence and testimony of 13 witnesses including 8 experts comprising industry, financial and economic experts on both sides.

Much of the Tribunal’s judgment focused on the historical context within which Sasol was established, the significant State support and the protection which Sasol received over the years. These measures, the Tribunal found, contributed to Sasol Synfuels becoming one of the lowest cost producers of feedstock propylene, a by-product of Sasol’s fuel production. Because of Sasol Synfuels’ low feedstock propylene costs, SCI was a low cost producer of purified propylene and one of the lowest cost polypropylene producers in the world. SCI argued in the hearing that the Tribunal should ignore this cost advantage in arriving at its decision while the Commission argued that the cost advantage should be taken into account. The Tribunal decided to take the cost advantage into account, finding that SCI’s market positions in the markets under scrutiny were not the result of risk taking and innovation on its part since it has not engaged in any significant innovation in the production of either purified propylene or polypropylene, but rather due to past exclusive or special rights, in particular very significant historical state support for a considerable period of time.

After having regard to the nature of the products, their importance as intermediate inputs in industrial development, market characteristics and circumstances, the objects of our Act understood in the context of the South African economy, the history of the dominant firm and how it acquired its dominance, we find that the purified propylene and polypropylene prices charged by SCI during the relevant period bear no reasonable relation to the economic value of these products, the Tribunal said in its judgment. Thus the Tribunal found that, based on the above, the prices charged by SCI were excessive.

Instead of imposing only an administrative penalty, the Tribunal opted for a reduced monetary penalty together with a forward-looking remedy that would directly change SCI’s pricing behaviour since this would provide both relief and certainty to SCI and its customers and would therefore be more appropriate. Hence the Tribunal imposed a method for determining SCI’s future pricing of both purified propylene and polypropylene.

The Tribunal concluded that SCI’s exercise of market power and its excessive prices have resulted in a missed opportunity for innovation and development for the domestic manufacture of downstream plastic goods. Cheaper polypropylene prices for local plastic converters could enhance local production thereby enabling them to compete more effectively with imported final plastic products, manufacture locally rather than overseas and introduce new products to South African consumers adding to their choice of product through greater innovation.

SCI subsequently appealed the Tribunal’s decision and this finding was overturned by the CAC. Nevertheless the Commission’s prosecution of the matter in both the Tribunal and CAC enhanced the Commission’s experience in excessive pricing cases and contributed to the recent amendments now included in the Competition Act.
unfair purchasing practices by dominant firms;
• refine the rules applicable to dominant firms, particularly as regards predatory pricing, margin squeeze, and excessive pricing - including a “reasonableness” justification for the latter; and
• strengthen the penalty regime by increasing the scope of first-time offences subjected to administrative penalties and imposing higher administrative penalties for repeat offenders.

How investigations are initiated

Investigations by the Competition Commission into prohibited practices can be initiated in different ways. Anyone can lodge a complaint with the Commission. The Commission receives hundreds of complaints every year. The Commission undertakes a preliminary investigation of each complaint to ascertain whether there are in fact competition issues to be examined and what they are. It is important to note that while many of the complaints raise concerns about a particular kind of conduct, these are not necessarily best addressed under the Competition Act, but may belong better in other areas, such as the consumer protection regime, or they may relate to contractual disputes.

The Commission can initiate a complaint itself. This can follow an informant providing information to the Commission, or it can be based on concerns raised more widely by different groupings, including the Department of Trade and Industry, or it can be based on the Commission’s own research and insights gained from its work in merger evaluation.

Complainants can take their issues themselves to the Tribunal in two circumstances. First, if the complainant is facing serious or irreparable damage, it can make an application for interim relief, and the Tribunal must then evaluate the evidence of the alleged prohibited practice, the possible harm to the applicant, and the balance of convenience in making an order (section 49(C)). Second, if the Commission investigates a complaint and decides not to refer a case to the Tribunal, the complainant can then do so independently. When a private party refers a complaint to the Tribunal, however, it bears the costs of the prosecution and, if it does not succeed, risks having an adverse costs order imposed on it.

The Commission’s powers of investigation

The Competition Act authorises the Commission to conduct investigations using a range of tools and techniques. As part of its powers the Act entitles the Commission to enter and search any premises based on a reasonable suspicion of a prohibited practice taking place, or having taken place, or because there is something connected to an investigation that is in the possession or control of a person on the premises. Investigators may examine documents, request further information and explanations, take extracts from and make copies of all documents that are relevant to the investigation, and attach and remove evidence, including reproducing electronically stored information.

This power to search and seize (sometimes termed “dawn raids”, although they seldom happen at dawn) was first used in 2000 as part of an investigation into the cement industry. The search and seizure warrant obtained by the Commission was set aside by the Competition Appeal Court because of the procedural irregularities in the Commission’s executing of the warrant. The Commission refrained from using its search and seize powers of information gathering for a few years, until 2006, when it conducted a raid in its investigation of anti-competitive behaviour in the milk industry.

Over the last ten years the Commission has made much more use of its powers to search and seize than it did in its first decade of existence. Diagram 13 displays the increase in raids since 2009/10.

The Commission makes referrals of cases of alleged prohibited practices to the Tribunal, believing that a case has been established following its investigations. The Tribunal has powers related to the hearings to require additional witnesses and information to be heard.

Following the hearing of the case, the Tribunal issues a decision. Where the Tribunal decides that there has been a contravention of the Act, it can make an appropriate order, including interdicting the practice, imposing an

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of raids</th>
<th>Firms raided</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009/10</td>
<td>1</td>
<td>Pretoria Portland Cement Company Ltd, Afrisam, La Farge Industries South Africa and the Natal Portland Cement Company</td>
</tr>
<tr>
<td>2014/15</td>
<td>4</td>
<td>Investchem (Pty) Ltd and Akulu Marchon South Africa (Pty) Ltd; Sime Darby Hudson &amp; Knight (Pty) Ltd and Unilever Bestfoods Robertsons (Pty) Ltd; Belfa Fire (Pty) Ltd, Cross Fire Management (Pty) Ltd, Fireco Gauteng (Pty) Ltd &amp; Fireco (Pty) Ltd, Technological Fire Innovations (Pty) Ltd and Fire Control Systems (Pty) Ltd; and Eldan Auto Body CC and Precision &amp; Sons (Pty) Ltd</td>
</tr>
<tr>
<td>2017/18</td>
<td>37</td>
<td>Seven beef producers, 17 automatic fire sprinklers installers, 13 suppliers of set top boxes and accessories</td>
</tr>
</tbody>
</table>
Administrative penalties can be imposed for a first contravention of sections 4(1)(b), (fixing a purchase or selling price, dividing markets or collusive tendering), 5(2) (or 8(a), 8(b) or 8(d) of the Act. If a firm structures its conduct so that it falls under another prohibited section covered in chapter 2 of the Act (dealing with all prohibited practices), that constitutes a repeat of substantially the same conduct that was already found to be a prohibited practice by the Tribunal, the Tribunal is also entitled to impose an administrative penalty. The penalty may not exceed 10% of the firm’s annual turnover in South Africa and exports from South Africa during the firm’s preceding financial year. Divestiture may further be ordered for contraventions of section 8 if the practice cannot otherwise be adequately remedied or if it is substantially a repeat of conduct previously found to be a contravention.

Prioritising inclusive growth and development

Arguably the most influential step towards shaping the Commission’s direction over the last ten years, and one that will form part of the agency’s legacy over the long term, is its decision to focus its proactive enforcement efforts on a few selected industries.

As one of the economic role players, around 2008 the Commission resolved that it had a responsibility to contribute solutions to South Africa’s challenges. These challenges required a strategic approach where the Commission was both responsive to the environment and proactive in contributing solutions.

Against this ideal, and with regard to various national development plans, the Commission chose to target priority sectors for proactive intervention. New sectors were added over time, reflecting the changing economic landscape and new national priorities. At the end of the 2018/19 financial year the Commission’s priority sectors were (1) food and agro processing; (2) healthcare; (3) intermediate industrial inputs; (4) construction and infrastructure (5) banking and financial services; (6) information and communication technology; (7) energy; and (8) transport.

The sectors were selected taking into account South Africa’s economic policies, the volume of complaints received in these sectors and market failures which the Commission had identified through past investigations and scoping exercises. The Commission believed it had a duty to promote competitiveness in these sectors, to level the playing fields and open up the markets with a view to promoting economic growth.

Besides the market inquiries initiated by the Commission in the last ten years, diagram 14 reflects more noteworthy interventions of the Commission in its priority sectors since 2009.

**DIAGRAM 14: NOTEWORTHY INTERVENTIONS IN PRIORITY SECTORS SINCE 2009/10**

<table>
<thead>
<tr>
<th>Priority sector</th>
<th>Type of intervention</th>
<th>Summary</th>
</tr>
</thead>
</table>
| Food and agro-processing | Complaints          | • A complaint lodged by Khoisan Tea Import and Export Pty Ltd against Rooibos Ltd for abuse of dominance in the procurement of rooibos from farmers.  
                          |                      | • The Commission’s complaint against Holland HZPC and Western Free State Potato Growers Pty Ltd for an alleged exclusive dealing arrangement.  
                          |                      | • The Commission’s complaint against Wilmar and others for price fixing and the fixing of trading conditions in the supply of edible oils.  
                          |                      | • Commission v Wilmar Continental (Pty) Ltd and six others. The allegations are that the respondents entered into an agreement to fix prices of edible oils, including baking fats and margarine.  
                          |                      | • Commission v various feedlots. The allegations are that the respondents, who are members of South African Feedlots Association, agreed to fix the price they pay when purchasing weaner calves which are ultimately inputs in the production of beef.  
<pre><code>                      |                      | • Commission v Karan Beef and I&amp;J. The allegations are that the respondents agreed to divide the market by allocating specific type of products and customers of processed beef products. |
</code></pre>
<table>
<thead>
<tr>
<th>Priority sector</th>
<th>Type of intervention</th>
<th>Summary</th>
</tr>
</thead>
</table>
| Settlements    | • On 9 July 2014, the Competition Tribunal confirmed a settlement agreement concluded between the Commission and Premier Fishing (SA) (Pty) Ltd (“Premier”) in respect of Premier’s involvement in a cartel with other fish processors in the pelagic fishing market (CC vs Premier Fishing SA (Pty) Ltd, 2008Jul3827). Pelagic fish is canned fish, often consumed by the poor, and falls within Commission priority sector of food.  
• The Commission concluded settlements to the value of R613 million with: Pioneer Foods (Pty) Ltd; Foodcorp (Pty) Ltd; Carolina Roller Meule (Pty) Ltd; Keystone Milling (Pty) Ltd; and Blinkwater Mills |
| Scoping study  | • A study into staple food prices  
• A study on the fresh produce market |
| Impact assessment | • The Commission conducted an assessment of an agricultural support fund that was set up in 2014 as part of the conditions to a merger between the then newly incorporated AgriGroupe Holdings and local agricultural commodity trading company AFGRI Ltd. The purpose of the impact assessment was to establish whether the fund’s programmes adequately addressed the public interest concerns raised by third parties during the merger proceedings of 2014.  
• The Commission conducted a study into the developments in the pelagic fish market since 2013, when the CAC approved the Oceana Group Ltd’s acquisition of Foodcorp (Pty) Ltd’s fishing business. The study revealed that the merger is unlikely to have had a significant effect on competition at the downstream marketing level of the canned pilchards value chain and on the end-consumers of canned pilchards, and that the merger is likely to have led to a positive impact on the public interest.  
• The Commission conducted an assessment to test the direct and indirect impact of the Commission’s decisions to grant several exemptions to citrus producers since 2006. The findings from the study indicated that there have been real and positive benefits to the South African economy as a result of the exemptions granted.  
• The Commission assessed the impact of the settlement agreement it concluded with Sasol Nitro in 2009. The purpose of the impact assessment study was to determine whether the Commission achieved its objective of bringing about more competitive outcomes to the fertiliser market through its interventions. |
| Information and communication technology | Complaints | • Complaint by Cell C (Pty) Ltd against both Vodacom (Pty) Ltd and Mobile Telephone Networks (Pty) Ltd on on-net/off-net call rates in mobile telephony.  
• Complaints against MultiChoice SA Holdings, MultiChoice Africa (Pty) Ltd and Supersport International (Pty) Ltd relating to exclusive broadcasting rights for content, especially premium sporting events.  
• Complaint against Vodacom Group (Pty) Ltd. It is alleged that the agreement between Vodacom and Treasury, for Vodacom to supply mobile communication services to the government, is likely to distort competition and is likely to result in exclusionary conduct in contravention of the Act.  
• The Commission referred a case of abuse of dominance against Media24 alleging that it had engaged in predatory pricing, in contravention of section 8(d)(iv) of the Competition Act. The Commission asked the Tribunal to levy an administrative penalty of 10% on Media 24’s turnover. The Tribunal subsequently found in the Commission’s favour however this decision was overturned on appeal. |
<table>
<thead>
<tr>
<th>Priority sector</th>
<th>Type of intervention</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scoping study</td>
<td>• Scoping study into mobile phone contracts</td>
<td></td>
</tr>
<tr>
<td>Merger</td>
<td>• In July 2011, the Commission referred the merger between Media24 Limited and Paarl Coldset, and Natal Witness Printing and Publishing Company (Natal Witness) to the Competition Tribunal for adjudication. Caxton acted as an intervenor in this matter. In this merger, Media24 sought to acquire a 100% shareholding interest in the Natal Witness (a firm jointly owned with Lexshell 496 Investments). The Commission's investigation found that the merger would result in Media24 gaining control of a range of community newspaper titles (prior to the merger it only directly controlled paid-for titles in the province), as well as African Web (a key input provider to potential competitors in the community newspaper space). The Tribunal subsequently approved the merger with conditions.</td>
<td></td>
</tr>
<tr>
<td>Advisory opinion</td>
<td>• Treasury sought an opinion on the possible competition effects of an exclusive agreement it intended to conclude with a major telecommunications network in South Africa. The Commission advised that it was undesirable for the government, as the largest purchaser of telecommunication services, to enter into exclusive agreements that would distort competition in the market.</td>
<td></td>
</tr>
</tbody>
</table>
| Advocacy: comments on policy and legislation | • The Commission considered the draft white paper on the national integrated ICT policy and offered comments on the aspects that had a bearing on the Commission’s operations.  
• The Commission made submissions on the white paper on the audio-visual and digital content policy for South Africa. |
| Impact assessment | • The Commission evaluated the efficacy of an earlier settlement agreement the Commission entered into with Telkom SOC Ltd in remedying the anti-competitive outcomes of Telkom’s conduct. The assessment found that, notwithstanding some contributing regulatory and market developments, the settlement agreement had a positive and significant impact on the market. |
| Construction and infrastructure | Complaints | • Various complaints against construction companies for colluding on the construction of 2010 World Cup stadia and other projects.  
• The Commission's complaint against Afrimat Ltd and its subsidiary for alleged excessive pricing of clinker ash aggregate.  
• The Commission’s complaint against Blurock Quarries (Pty) Ltd and Procon Precast CC for alleged abuse of dominance in the supply of crusher dust and the manufacture and supply of bricks and blocks.  
• The Commission’s complaint against ArcelorMittal for collusion, information exchange and excessive pricing.  
• The Commission’s complaints against Transnet SOC Ltd alleging excessive pricing and price discrimination in the provision of freight rail services and excessive pricing in the provision of port services. We also alleged exclusionary practices in the prioritisation of cargo and berthing at port terminals.  
• The Commission’s complaint against Cross Fire and others for alleged price fixing and collusive tendering of fire sprinkler systems.  
• Competition Commissioner v Transnet SOC Ltd (ports and rail). The Commissioner initiated two separate complaints Transnet SOC Ltd during 2016. The first complaint is against Transnet and its two divisions, namely, Transnet National Ports Authority (“TNPA”) and Transnet Port Terminals (“TPT”) – and alleges that TNPA and TPT have engaged in excessive pricing in the provision of port services and exclusionary practices in the prioritisation of cargo and berthing at port terminals, respectively. |
<table>
<thead>
<tr>
<th>Priority sector</th>
<th>Type of intervention</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Merger</td>
<td></td>
<td>The Commission prohibited the proposed intermediate merger between Much Asphalt and 5 Roadspan asphalt plants. Having filed their appeal of the Commission’s decision, the parties later abandoned the merger.</td>
</tr>
<tr>
<td>Scoping study</td>
<td>Scoping study on Transnet (Ports) and Transnet (Rail).</td>
<td></td>
</tr>
</tbody>
</table>
| Intermediate industrial inputs | Complaints | • Four cases involving price fixing, division of markets and collusive tendering along the paper manufacturing and packaging value chain.  
• The Commission’s complaints against Glasfit and another for price fixing and market division of automotive glass  
• Commission v PG Bison (Pty) Ltd and Sonae Novoboard (Pty) Ltd. The allegations are that the respondents agreed to fix the price of wood-based panel products including particle board and medium-density fibre board.  
• Commission v Scott Bader and NCS Resins. The allegations are that the respondents agreed to fix the price and divide the market by allocating customers of resin, ancillaries (gel coats, pool coats, flow coats, pigments, bonding pastes) and accessories.  
• Commission v Totalgaz and five others. The allegations are that the respondents agreed to fix the price of liquefied petroleum gas cylinders.  
• Commission v Afrox and Easigas. The allegations are that the respondents agreed to fix the price of liquefied petroleum gas.  
• Commission v Mpact, Corruseal, Nampak and New Era. The allegations are that the respondents agreed to fix price and divide market by allocating customers of packaging paper. |
| Advocacy: comment on policy and legislation | • The Commission had engagements with ITAC on the potential impact of the preference price system (“PPS”) on competition in the scrap metal market. The pricing of scrap metal in South Africa was conducted under the PPS guidelines which were aimed at curbing scrap metal exports to ensure that domestic end-users of scrap metal were able to access sufficient volumes of good quality scrap metal at reasonable prices. |
| Settlement     | • On 7 December 2016, the Tribunal confirmed as an order a consent agreement between the Commission and Pelchem, a state owned entity, in which Pelchem agreed to remove exclusivity clauses in the agreements it entered with firms it provided with surface fluorination for various uses. The consent agreement ensured that surface fluorination services in South Africa were opened up and no longer restricted through evergreen exclusivity agreements by Pelchem, the sole supplier in South Africa. |
| Scoping study  | • A study on plastic packaging material |
| Healthcare     | Settlement          | • The Commission entered into a consent agreement with Life Healthcare Group (Pty) Ltd (LifeHealth) and Joint Medical Holdings Ltd (“JMH”). The settlement recorded the highest penalty ever imposed on firms for failing to notify a merger to the Commission. In the agreement, which the Tribunal confirmed on 1 April 2016, LifeHealth and JMH agreed to jointly pay an administrative penalty of R10 million and to undergo competition law compliance training. |
| Banking and financial services | Complaints | • The cartel case the Commission referred against 17 local and international banks. The Commission alleged that the banks were colluding by agreeing the terms for trading currency pairs – in our case the US dollar / Rand currency pair – in ways that affected the currency prices in their favour. This has been happening since 2007. |
### Priority sector | Type of intervention | Summary
--- | --- | ---
Transport | Complaints | • Competition Commissioner v SA Taxi Finance Holdings (Pty) Ltd. It was alleged that the respondent may have abused its dominant position and engaged in excessive pricing in the market for the provision of credit to finance minibus taxis to the detriment of consumers.  
• Commission v British Airways and others. The allegations were that the respondents agreed, as members of Oneworld Airline Alliance, to fix the price of airfares and divide the market by allocating routes.  
• Commission v Maersk and four others. The allegations were that the respondents agreed to fix price of shipping of cargo travelling between South Africa and Asia.  
• Commission v Professional Movers Association and others. The allegations were that the respondents agreed to fix the price paid as an e-toll levy to customers transporting furniture using the tolled Gauteng highways.  
• Commission v Stuttaford Van Lines and others. The allegations were that the respondents agreed as members of Professional Movers Association to fix the rate of insurance premium paid by customers for the risk of transporting furniture.  
• Commission v SA Airlink and others. The allegations were that the respondents agreed to fix prices of air fares and divide the market by allocating routes for domestic and regional passenger air services.

### Developments in prohibited practice regulation over ten years
Notable developments in the practice of investigating prohibited practices have taken place in the last ten years. These were (1) the criminalisation of cartel conduct; (2) the provision of powers to conduct market inquiries; and (3) amendments to the Competition Act aimed at strengthening enforcement against the abuse of market power. The latter development was discussed on page … above.

Aside from the legislative changes that have taken place in the second decade of competition enforcement, the Commission increased its focus on more complex investigations – such as excessive pricing and price discrimination cases against dominant firms. With this the Commission has pursued more creative remedies to the complex competition concerns presented. These cases highlighted the difficulty of bringing abuse-of-dominance cases before the adjudication system and, in part, led to the 2019 amendments to the Competition Act.

### Introducing criminal liability for cartel conduct
The provision that profoundly changed the world company directors, and those with “management authority”, operate in passed into law on 1 May 2016. Until then only companies could be held responsible for engaging in cartel conduct, that is: price fixing, market allocation and collusive tendering. For that reason, only companies could get immunity from being prosecuted by the Commission if they came forward, offered new information on a cartel it was part of, in line with the Commission’s corporate leniency policy, and assisted the Commission in its prosecution of the remaining cartel members. Once caught, these companies would be fined up to 10% of their annual turnover.

The actual staff of the firm engaged in the price fixing could not be held personally liable, even if they called the cartel meetings, participated in collusive discussions and concluded anti-competitive agreements with their competitors.

But since 1 May 2016 that has changed.

Almost eight years after it was initially introduced, the President signed into law a new section of the Competition Act which holds a “director of a firm” or a person “having management authority within the firm” personally and criminally liable for the collusion the company engaged in if the person (1) caused the firm to collude with other firms; or (2) “knowingly acquiesced” in the firm colluding with others. If convicted, the individual could face a fine up to R500 000 or up to 10 years imprisonment, or both. However in terms of the legislation the Commission (1) may not request the prosecution of the director if the Commission has certified that the person is deserving of leniency; and (2) may make submissions to the National Prosecuting Authority [NPA] in support of leniency for the director if the Commission has certified that the person is deserving of leniency.

The criminal provisions came after years of sustained calls from interested stakeholders to introduce harsher punishment for engaging in cartel conduct arguing that civil penalties could not sufficiently deter cartel firms from engaging in collusion. Over the years
consumer groups, trade unions and other representatives of civil society have likened collusion to theft and called for tougher sanctions for the company directors involved. The 2013 construction cartel investigation brought with it a new wave of calls to hold company CEO’s personally responsible for the widespread corruption that had plagued the industry for decades.

The Commission is currently working with the NPA in order to provide more certainty to affected firms and individuals about the implications of the criminal provisions for corporate leniency applications which, to date, has been the Commission’s most effective tool for detecting cartels.

All of the Commission’s market inquiries have covered the abovementioned priority sectors. Through this mechanism the Commission has recommended pro-competitive interventions in industry and worked with affected stakeholders to implement these recommendations. Diagram 16 lists the market inquiries the Commission has instituted and the salient recommendations to come out of them.

### Diagram 15: Number of Corporate Leniency Applications Over the Last Ten Years

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of applications received</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009/10</td>
<td>79</td>
</tr>
<tr>
<td>2010/11</td>
<td>33</td>
</tr>
<tr>
<td>2011/12</td>
<td>244</td>
</tr>
<tr>
<td>2012/13</td>
<td>15</td>
</tr>
<tr>
<td>2013/14</td>
<td>5</td>
</tr>
<tr>
<td>2014/15</td>
<td>121</td>
</tr>
<tr>
<td>2015/16</td>
<td>10</td>
</tr>
<tr>
<td>2016/17</td>
<td>6</td>
</tr>
<tr>
<td>2017/18</td>
<td>2</td>
</tr>
<tr>
<td>2018/19</td>
<td>7</td>
</tr>
</tbody>
</table>

**Powers to conduct market inquiries**

In April 2013 the Act was amended to give the Commission powers to conduct market inquiries into the general state of competition in any industry. Market inquiries are different from investigations in that, while investigations target specific firms engaged in specified anti-competitive conduct, market inquiries look into any feature or combination of features in a market which may have the effect of distorting or restricting competition without targeting any one firm.
## Diagram 16: Market Inquiries Instituted

<table>
<thead>
<tr>
<th>Inquiry</th>
<th>Priority sector</th>
<th>Main concerns raised</th>
<th>Salient recommendations / Progress</th>
</tr>
</thead>
</table>
| Banking inquiry              | Banking and financial services | • Bank customers were unable to understand and compare product offerings and prices, nor switch providers easily and cost effectively  
• Opaque and excessive pricing on inter-bank services and other banking services  
• Lack of access, by non-banks, to the payment system | • A range of actions to help consumers understand the offerings from different banks, to allow for easy comparisons of different banking products and to make switching between banks much easier  
• A system of direct charging for ATM services be implemented with the aim of putting information and choice back into the consumer’s hands when he or she chooses to use an ATM  
• An access regime that included non-bank providers of payment services should be developed so as to allow for their participation, under effective regulation and supervision, in both clearing and settlement activities in appropriate low-value or retail payment streams |
| Liquified petroleum gas inquiry | Energy                  | • A misaligned regulatory environment that: (1) hinders the ability of competitors to enter and/ or expand in the market; and (2) hinders the speedy investment into import, loading and storage facilities  
• Dialogue between market participants on setting uniform deposit fees;  
• Widespread practice of long-term contracts and agreements favouring incumbent LPG wholesalers over LPG wholesalers with short-term contracts, or LPG wholesalers who rely on the spot market to receive their supply of LPG from refineries;  
• Restrictions on bulk customers ability to switch seamlessly due to barriers incumbent LPG wholesalers put in place. | • Recommendations in favour of price deregulation;  
• Recommendations to cap the duration of evergreen contracts in the LPG market;  
• Recommendations in favour of aligning the activities of regulators. |
<table>
<thead>
<tr>
<th>Inquiry</th>
<th>Priority sector</th>
<th>Main concerns raised</th>
<th>Salient recommendations / Progress</th>
</tr>
</thead>
</table>
| Data market inquiry         | Information and communication technology | • Exclusive, high and opaque pricing of data  
• Market structure;  
• General adequacy and impact of the current regulatory regime;  
• Strategic behaviour by large fixed and mobile incumbents;  
• Costs faced and profits earned by fixed and mobile network operators;  
• Current arrangements for sharing of network infrastructure;  
• Investment in infrastructure by operators and access to or allocation of spectrum as this relates to data services price and competition concerns;  
• Adequacy of regulation to promote new South African entrants. | Preliminary recommendations include:  
• immediate relief on data pricing and the reduction of headline tariffs;  
• zero rating of public benefit and educational institution websites;  
• assigning spectrum in a way that improves affordability and enhances competition;  
• extension of regulations for the leasing of facilities;  
• increased regulatory scrutiny at the wholesale level;  
• alternative infrastructure should be developed to provide data in low income areas;  
• considering State sponsored public Wi-Fi. |
| Private health care inquiry | Health care                  | • High cost of private health care  
• Potential over-servicing in the provision of private health care services;  
• Increasing cost of medical aid premiums;  
• Confusing medical aid products;  
• High health care utilisation rates;  
• Inadequate implementation of regulations or lack thereof;  
• Lack of competition between medical aids, practitioners and hospitals. | The inquiry has released its provisional report and is set to release its final report by September 2019. |
| Transport market inquiry    | Transport                    | • Price setting mechanisms;  
• Price regulation;  
• Route allocation, licensing and entry regulations;  
• Allocation of operational subsidies;  
• Transport planning; and  
• Transformation in the land based public passenger transport industry. | Ongoing inquiry. |
| Grocery retail market inquiry | Food and agro-processing | • Presence of national retail chains in rural and peri-urban areas;  
• Prevalence of exclusive lease agreements in shopping centres;  
• Impact of regulations and by-laws on independent retailers;  
• Competition dynamics between local and foreign retailers. | Inquiry released its provisional report in May 2019. |
UNLEASHING MORE RIVALRY

On 17 July 2013 the Tribunal confirmed a settlement agreement between the Commission and Telkom SA SOC Limited (Telkom) which resolved a series of complaints lodged against Telkom by Internet Service Providers or ISPs and was referred to the Tribunal in October 2009. In the settlement agreement Telkom agreed to pay a penalty of R200 million and admitted that it had contravened the Competition Act by squeezing the margins of its competitors in the ISP space and, in that way, put them at a disadvantage when competing against Telkom in the market. What was most significant about the settlement agreement though was not the R200 million penalty Telkom agreed to pay for its contraventions but the changes in future pricing behaviour, which Telkom committed to through this agreement.

Telkom undertook to no longer discriminate in pricing between its competitors (who were forced to purchase basic telecommunications infrastructure and services from Telkom in order to provide a value added service to end consumers) and its own retail operations. To this end Telkom agreed to implement functional separation between its retail and wholesale operations, including a

Box 6: TERMINATING HIGH PRICES

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“The Telkom settlement is certainly the most impressive consent agreement that I have seen here in my years at the Tribunal. No doubt, it took a lot of hard work and many hours of negotiation.”

Box 6 sets out the details of this case and the pro-competitive outcomes observed in the market after the case was concluded.

The Commission, however, has seen limited success in the prosecution of cases under the Act’s abuse of dominance provisions. The Tribunal’s decision which went against Media24 Ltd for predatory pricing, for instance, was overturned on appeal. So too was the Tribunal’s decision against Sasol Chemical Industries (Pty) Ltd on excessive pricing. These challenges contributed to the legislative changes which have now been introduced. The amendments try to make it easier for the Commission to prosecute abuse of dominance by imposing reverse onuses, for example, requiring dominant firms to show, in the case of a “prima facie” case of price discrimination, that the differential pricing does not impede effective participation of SMMEs and HDPs; in the case of a “prima facie” case of contravening the buyer power provision that its purchase prices or trading conditions are fair; and in the case of “prima facie” excessive pricing that its price is reasonable.

Increased focus on abuse of dominance

In the former competition regime, during the existence of the Competition Board which administered the Maintenance and Promotion of Competition Act of 1979, no single case of abuse of dominance was prosecuted by the Competition Board. Under the current regime, the Commission increased its focus on abuse of dominance. Since the promulgation of the Competition Act more than 30 cases of abuse of dominance cases have been considered by competition authorities and courts. These cases can be divided into three categories: (1) cases considered on the merits - a category that includes cases prosecuted by the Commission and private litigants; (2) interim relief applications - cases brought by complainants who have filed complaints with the Commission and seek interim relief; and (3) cases resolved through settlement agreements.

While this increased focus called on the Commission to employ complex investigative and analytical strategies, it also required the competition authorities to impose more creative remedies to the competition concerns than in the past. One example of a case that demanded all of the above from the Commission and the Tribunal was the case brought against Telkom SA SOC Ltd for several instances of abusing its dominance. The comprehensive settlement agreement eventually signed by Telkom and the Commission in this case prompted the chairperson of the Tribunal to state that

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transfer pricing programme to regulate transactions in the provision of network services between its wholesale and retail divisions. In addition, it would implement a code of conduct for its wholesale division that would ensure non-discriminatory treatment of ISP’s and protection of their confidential service information from the competing retail division.

Telkom would also keep separate internal accounts for its own retail corporate VPN and internet access products to allow for monitoring and, in that way, ensure that it does not engage in a margin squeeze in future. Telkom went further in the settlement agreement and committed to various price reductions. Over the 2014, 2015 and 2016 financial years Telkom would reduce the prices of wholesale services implicated in the complaint and used by ISP’s to deliver their IP VPN and internet access services (namely undersea cable international lines, national high bandwidth transmission lines, access to ADSL lines via the IP connect service and Diginet leased line access) and related retail products (Telkom’s VPN Supreme and Internet Access). The Commission and Telkom estimated that these price reductions would amount to an estimated R875 million in savings to the market.

Telkom would also ensure that any price reductions were not reversed in the 2017 and 2018 financial years.

In addition to the above penalty and the undertakings to reduce prices, Telkom committed to provide points of presence at strategic locations in the public sector. This, together with the price reductions undertaken by Telkom, was aimed at creating not only a more competitive market in South Africa, but also aiding government in the provision of public services in a digital economy.

**Effect of the settlement**

According to media reports [Brainstorm, September 2013], Dominic Cull – who was then the head of Ellipsis Regulatory Solutions and regulatory advisor to the Internet Service Provider’s Association – lamented that there had not been more time for industry participants to comment on the settlement agreement but described it as “significant” saying that it provided “substantially greater transparency between Telkom wholesale and retail.” He added that a lack of transparency was what resulted in the complaints and it is what the settlement sought to address. “Greater transparency can only be a good thing as it will make it far harder for Telkom to engage in predatory pricing practices, levelling the local playing field substantially.”

The Commission stated that it was satisfied with the terms of the settlement and Telkom was reported to have hailed the settlement as “a good outcome”. It was not long before the market started to experience the direct benefits of the settlement agreement. Just two months later, on 19 September 2013, Richard Cutcher [Telkom abides by competition rules with price reductions, 19 September 2013], a journalist with HumanIPO reported that “From October 17, Telkom Wholesale will reduce its tariff prices on IP Connect by 8%, Diginet by 4%, CHIPAC by 4%, Ethernet Express by 6%, Metro Clear by 6% and IPLC by 25%.”

Sipho Maseko, Telkom’s group chief executive officer, said these undertakings were “aimed at stimulating increased competition in the market with a large emphasis on wholesale.” He went on to say “Telkom is committed to fully complying with the provisions of the settlement agreement which is proof of a higher level of transparency within Telkom and ultimately a further expression of the foundation of a new Telkom”.

**CHAPTER 4: PROHIBITED PRACTICES**

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Exemptions

Firms may apply for their conduct to be exempt from the application of provisions of the Competition Act that prohibit anti-competitive practices. Exemption applications may be filed with the Commission in terms of section 10 or schedule 1 of the Act. Section 10 allows for exemptions from the prohibited practices provisions where arrangements are required to attain certain objectives, while schedule 1 relates to the rules of professional associations.

Under section 10, the Commission may grant an exemption from the prohibition of anti-competitive conduct in chapter 2 of the Act, if the arrangements are required for the following objectives:

- maintenance or promotion of exports;
- the promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive;
- a change in productive capacity necessary to stop decline in an industry;
- the economic stability of any industry designated by the Minister of Trade and Industry after consulting with the minister responsible for that industry. The Commission may also exempt an agreement or practice, or category of either agreements or practices that relates to the exercise of a right acquired or protected in terms of intellectual property legislation (such as copyrights, patents and trademarks).

Schedule 1 provides that a professional association may apply to the Commission to have all or part of its rules exempted from the provisions of chapter 2 under defined circumstances. In the event that there is a substantial prevention or lessening of competition in the market, an exemption may be granted provided that, and having regard to internationally applied norms, the restrictions are reasonably required to maintain professional standards or to maintain the ordinary function of the profession.

Review of exemption applications

When it receives an exemption application, the Commission will consider whether or not the agreement or practice concerned, or category of agreements or practices concerned, meets the abovementioned requirements as set out in the Act. If it does, the Commission may grant a conditional or unconditional exemption for a specified term. Before granting an exemption, the Commission gives notice of the application in the Government Gazette and takes into account the representations of interested parties.

The Commission has received more than 40 exemption applications since 2009/10. Diagram 17 sets out the number of exemptions received and the decisions made concerning these.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of exemption applications received</th>
<th>Exemptions granted</th>
<th>Exemptions rejected</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009/10</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>2010/11</td>
<td>13</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>2012/13</td>
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<td>1</td>
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</tr>
<tr>
<td>2018/19</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>
It is now 10 years since the end of my term of office at the Competition Tribunal. I still recall vividly the camaraderie with extraordinary colleagues, the intellectual stimulation and the sense of purpose that characterized that life-altering experience. I am immensely proud to have been present at the birth of what I consider to be the first set of institutions that held powerful private business interests accountable to the rule of law and the interests of the public.

I have, since leaving the Tribunal, been engaged with Corruption Watch, a non-governmental organization encouraging and enabling public participation in the fight against corruption. My prior experience in competition work, has sensitized me to the role played by corruption in distorting market outcomes and raising barriers to entry. I have been struck by the role played by corruption in facilitating and concealing the rigging of public procurement contracts. And I have been particularly impressed at the insistence by the many members of the public with whom we regularly engage that cartel conduct be viewed as corruption. I concur with this view – we have indeed argued that collusion could be prosecuted under the anti-corruption statutes – but have also noted that of the 25000 reports of corruption that we have received since 2012 not one has alleged collusion. This is not because collusion is not viewed as a pernicious act of corruption nor because it does not occur, but rather because, by contrast with the other criminal justice authorities, the public have confidence in the ability and the willingness of the competition authorities to deal with this conduct.

In the wake of the devastating decade of state capture, South Africa is, with considerable difficulty, attempting to reconstruct its key public institutions. The competition authorities are amongst the few institutions that avoided capture by money interests. I have no doubt that this is because of its resolute respect for its independence. To ensure that its successes of the past 20 years are extended into the next 2 decades it will have to remain vigilant in the face of inevitable attempts to constrain its independence.

A luta continua!

David Lewis
Former Tribunal Chairperson
ADVOCACY AND COMPLIANCE
Advocacy and compliance are essential components of enforcement. Drawing too sharp a distinction between advocacy and compliance will always tend to understate their essential overlaps. Nevertheless, it is useful to think of compliance as being directed principally at firms, the object of the competition authorities’ enforcement actions, while advocacy is directed at building support for competition principles among the broader public, including the public sector itself. Advocacy and compliance thus comprise:

- education and training;
- issuing advisory opinions;
- communications;
- influencing legislation and policy; and
- building domestic and international stakeholder relations.

Depending on the Commission’s strategic outlook at the time, these functions have been housed in different departments over the last ten years.
The Commission published a draft code of conduct for competition in the automotive industry on 22 September 2017. The code of conduct is aimed at resolving the competition problems in the automotive aftermarket sector, following multiple complaints received. The Commission is concerned about the exclusive arrangements between original equipment manufacturers (OEM's) and approved dealers, repairers and parts suppliers in carrying out in-warranty service and repair work. These exclusive arrangements have the effect of limiting the participation of some players in the market, especially small and medium sized enterprises (SME’s). The arrangements concerning the sales, distribution and use of spare parts also limit competitiveness in this market. The Commission is also pursuing broader reforms in the sector, including promoting the increased ownership of dealerships by historically disadvantaged persons. The Commission is also advocating for transparency in the pricing of vehicles, including the unbundling of vehicle costs from the costs of a maintenance and service plan. The Commission engaged stakeholders on their views of the code of conduct.

**BOX 7: DRIVING CHANGE IN THE AUTOMOTIVE INDUSTRY THROUGH ADVOCACY**

Education and training

The Commission’s education and training drive has taken the form of workshops, seminars, consultative forums and conferences with stakeholders in the public and private sector. Workshops, seminars and consultative forums typically target a defined group of stakeholders and are aimed at a predetermined outcome, depending on the Commission’s priorities in that period. For example, the Commission’s ongoing investigation into exclusive agreements between schools and school uniform suppliers prompted the need for a universities’ legal practitioner’s forum in April 2016; a Vaal University Council’s risk management workshop in June 2016; and a school principal’s forum in August 2016. The purpose of these was to highlight, to educational institutions, the competition risks of concluding exclusive supply agreements with uniform manufacturers and thus encourage them to seek pro-competitive avenues for the procurement of school uniforms and other academic wear. Another example is the three bid rigging training sessions the Commission conducted in April, July and September 2017. These training sessions targeted procurement officials in National Treasury, the City of Cape Town and the Nelson Mandela Metropolitan Municipality respectively and trained all the officials how to identify, detect and report bid rigging when evaluating tenders. The need for training in this area was sparked by, amongst other things, the Commission’s investigation into the wide spread construction cartel in which firms colluded on the construction of the 2010 World Cup stadia, costing the State huge amounts of money in inflated bids.

Conferences, on the other hand, are open to all stakeholders. They facilitate the exchange of ideas and keep participants updated on competition law and policy developments. The annual competition law, economics and policy conference hosted by the Commission and Tribunal has become a highlight for competition practitioners throughout the country. This event also draws international and regional visitors who come to contribute ideas and share experiences with their counterparts. In 2017, for instance, the Commission and the Tribunal hosted the 11th annual conference on competition law, economics and policy at the Gordon Institute of Business Science (GIBS) on 31 August and 1 September 2017. A highlight of the conference was the keynote speech by then Deputy President Cyril Ramaphosa on 1 September 2017. The conference was also addressed by, among others, Judge Dennis Davis of the CAC; Andrey Tenishev of the Federal Antimonopoly Service of the Russian Federation; Ania Thiemann of the OECD; Enoch Godongwana, Chairperson of the Economic Transformation Committee of the ANC and the Economic Freedom Fighters (EFF) as well as global experts. In addition to hosting its own annual conference as part of
its education and training drive, Commission staff also regularly participate in conferences hosted by other stakeholders and use these platforms to further educate and train attendees on competition law and policy.

Issuing advisory opinions

Up until 2018 the Commission offered an advisory service to ensure that firms understood the Act, its interpretation and application, to their day to day operations. An advisory opinion is a written opinion of the Commission’s position on a set of facts submitted by external parties. It offers guidance on the interpretation and application of the Act, as well as the approach the Commission is likely to take when assessing transactions, agreements or practices. An advisory opinion is based entirely on the written facts provided to the Commission, taking into account relevant case law, policies of the Commission and previous opinions issued. These opinions are not binding on the Commission or the parties requesting them. However, when based on complete and accurate facts they offer the necessary guidance and clarity to stakeholders.

On 23 January 2018, however, the Commission suspended its advisory opinion service pending the outcome of its application to appeal an earlier CAC judgment concerning the legal consequences of the Commission’s advisory opinions. As things stand, the CAC decision creates a precedent which can be used by parties to challenge a non-binding advisory opinion issued by the Commission if they do not agree with it. The Commission believes, however, that nonbinding advisory opinions should not be the subject of litigation and cannot be used to sidestep investigative processes set out in the Competition Act.

What led to the current series of court proceedings was a request, by Hosken Consolidated Investments Limited (HCI), for an advisory opinion on whether a transaction between HCI and Tsogo Sun Holdings Limited (Tsogo) constituted a notifiable merger. The Commission concluded that it did and advised HCI to file the merger notification.

HCI did not agree with the Commission’s non-binding advisory opinion and approached the Tribunal for a declaratory order that it should not file its proposed transaction with the Commission. The Tribunal dismissed HCI and Tsogo’s application and found, among others, that it did not have jurisdiction to hear the matter because there was no “live dispute” between the parties and that if HCI wished to challenge the Commission’s views about whether or not the transaction must be filed with the Commission, HCI should have used the dispute resolution procedures set out in the Competition Act for resolving disputes relating to the notification of mergers.

HCI and Tsogo then filed an appeal with the CAC against the Tribunal’s decision. The CAC set aside the Tribunal decision and found, among others, that the Tribunal had jurisdiction to hear the matter and that there was a “live dispute” between the parties. In addition, the CAC found that the proposed 2017 transaction did not require notification to the competition authorities for reasons set out in the judgment.

The Commission subsequently applied for leave to appeal to the Constitutional Court against the CAC’s decision. The Commission’s application for leave to appeal seeks to safeguard the interests of employees who may possibly be retrenched as a result of the integration of the businesses of Niveus and Tsogo. This matter is yet to be heard by the Constitutional Court.

Aside from the setback to the Commission’s advisory function described above, the Commission assisted many companies with its guidance until the 2018. Diagram 18 consolidates the number of advisory opinions issued over this period.

Communications

The Commission and Tribunal communicate with the public mainly through their websites, traditional forms of media and on social media. The agencies’ websites remain the gateway to knowledge about the Commission’s work and the Tribunal’s decisions, both within South Africa and beyond.

The media community remains one of the key stakeholders in this regard as they are the most effective means of informing the public about competition cases and other developments. The media have played a very important role in increasing awareness of the Competition Act, especially in reporting on contraventions uncovered by the competition authorities. The extensive coverage of Tribunal hearings means that no business person should be able to claim that they are unaware of the existence of the Competition Act.

Amongst all the functions of the Commission and Tribunal, it is the communications function that has arguably undergone the greatest transformation in the last ten years. During this period both
agencies have grown their media database, revamped their websites and established a social media presence. It follows that, as a result of this, both agencies have increased the number of stakeholders they reach each year. Statistics reveal, for instance, that the Tribunal’s website is visited by stakeholders from all over the globe. Figures for the 2016/17 and 2017/18 financial year offer a snapshot view of the statistics over two years.

While the Commission had no social media presence in its first ten years of operation, by the end of the 2017/18 financial year the Commission had a presence on several platforms reaching a greater audience than it could in the past. A comparison of the 2016/17 financial year against the 2017/18 year reveals the growth in numbers over this time.

Influencing legislation and policy

One of the ways in which the Commission promotes compliance with the Competition Act is to influence the government to adopt pro-competitive policies and draft laws that promote, rather than hinder, competition. Achieving this requires the Commission to dedicate resources to keep updated on new laws, new policies and amendments to existing laws. With this knowledge the Commission is able to influence legislation and policy in the law making process. The Commission does so by engaging in dialogue, drafting submissions and forming joint working groups to address matters that may require more time and broader consultation to complete.

Section 21 of the Competition Act identifies the Commission’s advocacy-related functions as:

a) “Implement measures to increase market transparency
b) Implement measures to develop public awareness of the provisions of the Act
c) Conduct formal inquiry in respect of the general state of competition in a market
d) Negotiate agreements with any regulatory authority to coordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and ensure the consistent application of the principles of the Act
e) Participate in the proceedings of any regulatory authority
f) Advise – and receive advice from – any regulatory authority
g) Review legislation and public regulations, and report to the Minister concerning any provision that permits uncompetitive behaviour
h) Deal with any other matter referred to it by the Tribunal

The various aspects of advocacy, such as market inquiries, are undertaken by divisions across the Commission. However, the advocacy function is specifically responsible for:

- forging and maintaining relationships with stakeholders;
- engaging with respondents in an effort to resolve cases through non-enforcement means;
- reviewing and responding to Government policy and regulation, in order to promote alignment with competition objectives;
- undertaking education and awareness initiatives and programs;
- negotiating and entering into memoranda of understanding with other economic regulators and entities.
The second decade of competition enforcement has seen many highlights in this respect. Three noteworthy initiatives in this regard are the Commission’s interventions in the school uniform industry, the automotive parts industry and its ongoing work raising awareness of bid rigging in public procurement.

The Commission’s interventions in the school uniform industry

The Commission has received several complaints over the price of school uniforms in its second decade. Consequently the Commission has dedicated much time and resources to encouraging pro-competitive reforms in this industry. One of the highlights of the Commission’s interventions in this industry was the circular the Commission drafted in order to assist the National Department of Education in promoting competitive bidding for the procurement of school uniform by schools in South Africa. The purpose was to encourage a move away from the common practice of exclusive agreements between schools and school uniform suppliers. The department issued the circular to all provinces in May 2015.

Thereafter the Commission undertook a survey to test the extent to which schools had complied with the department’s circular. The preliminary report indicated that some schools had taken measures to implement competitive bidding in the procurement of school uniforms.

Encouraging pro-competitive reforms in the automotive aftermarket

Following multiple complaints received in the automotive aftermarket sector, in September 2017 the Commission published a draft code of conduct for competition in the automotive industry. The draft code of conduct address the Commission’s concerns about exclusive arrangements between original equipment manufacturers (OEM’s) and approved dealers, repairers and parts suppliers in carrying out in-warranty service and repair work. These exclusive arrangements had the effect of limiting the participation of some players in the market, especially small and medium sized enterprises (SME’s). Arrangements concerning the sales, distribution and use of spare parts also limited competitiveness in this market. Through the draft code of conduct the Commission was also targeting broader reforms in the sector, including promoting the increased ownership of dealerships by historically disadvantaged persons. The Commission is also advocating for transparency in the pricing of vehicles, including the unbundling of vehicle costs from the costs of a maintenance and service plan.

The draft code of conduct has since been the subject of robust engagement throughout the industry with all participants taking note of its intended outcomes and implications.

Ongoing efforts to curb bid-rigging in public procurement

One of the Commission’s key focus areas over the last decade has been bid rigging in public procurement. The extent of the damage caused by collusion in public sector procurement was highlighted by the Commission’s investigation into the construction cartel. The investigation revealed, amongst other things, that the construction of the 2010 World Cup stadia involved bid rigging on a large scale potentially costing local municipalities billions of rand in lost revenue.
In an effort to promote the early detection of bid rigging, the Commission has engaged in workshops, seminars and training of public sector officials throughout the country. The Commission’s efforts in this area led to the National Treasury – in July 2010 – issuing a practice note in terms of section 76 of the PFMA. The practice note included directives on the certificate of independent bid determination or CIBD. The CIBD is a declaration by bidders that they have prepared and submitted their bids independently of any other competing bidder. It also provides for additional penalties for collusive tendering or bid rigging.

The CIBD serves a dual purpose: (1) it helps to raise awareness amongst firms about collusive tendering and its consequences; and (2) it serves to deter firms from engaging in collusive tendering. According to the National Treasury regulations the CIBD must be issued by the purchaser as part of the standard bid documentation. Bidders must sign the CIBD and submit it to the purchaser.

Building domestic and international stakeholder relations

Domestic relations

The Competition Act encourages the participation of the broader public and civil society in the promotion of fair competition. It does so by providing for advocacy, which the Commission implements in the ways described above, but also by prescribing the participation of trade unions and other affected parties in merger assessments. This is why, in the hearings confirming consent orders between the Commission and colluding firms, the Tribunal has chosen to permit and encourage the participation of civil society organisations in the hearings, rather than to make them perfunctory, rubber stamping exercises. In addition, both the Commission and Tribunal have taken steps to safeguard the right of trade unions to participate in Commission processes and Tribunal hearings. The Commission has dedicated resources to follow up with trade unions and ensure, not only that they are duly informed about mergers as they occur but that they have been adequately consulted with throughout the process. The Tribunal has remained flexible in its proceedings, preferring informality and accessibility in order for trade unions to participate in what would otherwise be formalistic and rigid court proceedings bound by legal rules.

In the proposed transaction between BB Investment Company (Pty) Ltd (“BB”) and Adcock Ingram Holdings (Pty) Ltd (“Adcock”) the Tribunal found that the merging parties had not properly justified the number of job losses that would flow from their merger “as the process of consultation has not been properly followed and prima facie there is at least some evidence in the record that had it been, the merging parties view may have been contested, by either the employees, the Commission or both”. In this case the Tribunal outlined its expectation of meaningful consultation with trade unions in the course of a merger. The extract below indicates the Tribunal’s attitude in this regard.

The legislature regarded consultation with employees as a high priority in the merger process and hence made it a statutory obligation to do so before a merger is implemented in terms of section 13A(3). This legislative policy is also reflected in the granting to employees a right to appeal a merger decision - a right not even granted to the Commission.

The right to consultation is the right to receive proper information about the proposed retrenchments and this should even extend to whether the firm considers contemplated retrenchments as operational as the employees have the right to dispute this and the opportunity to make submissions on this point to the Commission and Tribunal, if they hold a contrary view. In a case before the Labour Appeal Court, where the question was whether the dismissal of an employee who had been retrenched for operational grounds was fair, the Court made the following instructive comment on the adequacy of consultation that we think would apply equally to the consultation process in terms of the Competition Act. The court observed:

“There also rests a duty on the employer or its representatives with relevant and sufficient information that would place them in a position to make the informed representations and suggestions on the subjects specified for the consultation”.

Maintaining relations with trade unions and other stakeholders has thus enhanced the Commission and Tribunal’s ability to deliver on their mandate. However, the work of ensuring more competitive outcomes across the economy, in the interests of economic growth, development and lower prices to consumers, goes far beyond the competition authorities. As competitive outcomes depend on many aspects of the environment within which economic activity takes place, they are affected by a wide range of government policies, laws and regulations. There are specific regulators in sectors such as telecommunications, while many government departments have regulatory responsibilities with implications for competition. The Commission actively engages with these different public institutions.

The roles of the competition authorities and regulators are essentially complementary. While the Commission may uncover problems with past conduct, the regulators can use this as one consideration in designing rules for better future outcomes. The concurrency of jurisdiction
that this implies can be open to opportunistic manipulation by firms which could seek to play off the competition authorities against the regulator to frustrate attempts by both to address problematic conduct by powerful industry players. The Competition Act explicitly provides for a mechanism to guard against this in allowing for a memorandum of understanding (MoU) to be agreed between the Commission and a regulator to govern the interactions between them. Diagram 20 below lists the regulators the Commission has an MoU with and the date on which the agreement was concluded. Most of the MoU’s were concluded in the Commission’s second decade of existence.

Finally, the competition authorities also report regularly to Parliament’s Portfolio Committee on Economic Development on their ongoing work and key competition issues as they affect the economy.

<table>
<thead>
<tr>
<th>Sector regulator</th>
<th>Date of MoU</th>
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<tr>
<td>Federation of Governing Bodies of South African Schools</td>
<td>November 2018</td>
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<tr>
<td>(FEDSAS)</td>
<td></td>
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<tr>
<td>South African Bureau of Standards</td>
<td>August 2017</td>
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<tr>
<td>Broad Based Black Economic Empowerment Commission</td>
<td>June 2017</td>
</tr>
<tr>
<td>Construction Industry Development Board</td>
<td>June 2016</td>
</tr>
<tr>
<td>Department of Agriculture, Forestry and Fisheries</td>
<td>March 2016</td>
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<tr>
<td>Ports Regulator of South Africa</td>
<td>November 2015</td>
</tr>
<tr>
<td>ITAC</td>
<td>August 2015</td>
</tr>
<tr>
<td>North West Gambling Board</td>
<td>August 2014</td>
</tr>
<tr>
<td>Auditor General of South Africa</td>
<td>July 2014</td>
</tr>
<tr>
<td>Council for Medical Schemes</td>
<td>September 2012</td>
</tr>
<tr>
<td>National Gambling Board</td>
<td>September 2011</td>
</tr>
<tr>
<td>National Consumer Commission</td>
<td>July 2011</td>
</tr>
<tr>
<td>National Liquor Authority</td>
<td>July 2008</td>
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</table>
International relations

A number of the activities of the Commission and the Tribunal involve interaction and collaboration with international competition bodies and competition authorities in other countries. There is a very strong international community in the area of competition law practice because, although enforcement is national, many businesses are competing in international markets, where cartels may form and cross-border mergers take place. So international cooperation and networks not only involve members learning from each other, but are also concerned with joint enforcement and ensuring the smooth and consistent review of international mergers. The Tribunal and Commission have benefited from relationships with a number of international institutions and agencies, and have made contributions in several competition forums. The notable contributions of the Commission’s international network of competition partners in the last ten years were the BRICS competition committee and the African Competition Forum.

Organisation for Economic Cooperation and Development

The Commission and the Tribunal have participated in the Global Competition Forum of the Organisation for Economic Cooperation and Development (OECD) since 1999, when the South African competition authorities were established. South Africa was the first non-member country of the OECD to undertake a peer review exercise in 2002 which yielded largely positive results. The reviews have continued on a rotation basis and the Commission has benefited immensely from them. The OECD has also assisted in capacity building initiatives and seminars on various areas of competition law and economics in the earlier years of the South African competition authorities.

Towards the end of 2005, South Africa became one of only nine countries to be granted official observer status to the OECD’s Competition Committee. As observers, the competition authorities must undergo peer review exercises, make written contributions to the Committee’s roundtable discussions, attend and actively participate in the Committee’s meetings and events, re-apply for observer status at the end of every two years, and be guided by the recommended best practice. The OECD Competition Committee and working parties hold three working sessions each year on topics of current importance. The Commission and Tribunal participate in all three meetings and contribute papers to the round table discussions on the basis of experiences and cases.

In effect, these sessions provide a platform for robust debate about the ways in which different agencies have approached competition questions, with reference to specific cases. The meetings have also proved to be enormously useful in building links with different institutions, where similar issues are being faced. For example, links with the Netherlands authority around its investigations into construction were made through these sessions. The Commission and Tribunal also submit a report on competition developments annually to the OECD.

International Competition Network

The International Competition Network (ICN) is a worldwide virtual network of government competition authorities, established to provide developed and developing countries with a platform for addressing practical competition enforcement and policy issues. The ICN does not exercise any rule-making function and individual competition authorities decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate. The ICN functions through exchanging ideas and drafting best practices, which are formally adopted at every annual ICN conference. The ICN is guided by a 15-person steering group composed of representatives of ICN member agencies. Today the ICN comprises 138 competition agencies from 125 jurisdictions.

The South African competition authorities formed one of the 15 founder members of the ICN and participated in its first annual conference held in Naples, Italy, in September 2002. Both the Commission and Tribunal have continued to be actively involved since the network’s inception by hosting conferences and contributing to the growing body of competition knowledge. In particular the South African competition authorities have played a leading role in questioning assumptions regarding competition policy and law that are derived from the circumstances of highly industrialised countries.

ICN members produce work products through their involvement in flexible project-orientated and results based working groups. Members of working groups work together largely by internet, telephone, fax and video conference. Working groups have been formed over the years to address advocacy, anti-trust enforcement, cartels, market studies, mergers, unilateral conduct, and competition policy implementation.

South Africa’s active participation, together with other major developing countries, has provided an important voice for developing countries in a field that has been largely dominated by developed countries.

United Nations Conference on Trade and Development

The South African competition authorities participate in the United Nations Conference on Trade and Development’s (UNCTAD’s) Intergovernmental Group of Experts on Competition Law and Policy, which is held annually. UNCTAD promotes the integration of developing countries into the world economy. South Africa’s competition authorities have participated in UNCTAD’s annual intergovernmental expert meeting on competition law and policy since 1999.

UNCTAD has also been involved with capacity building initiatives and the South African competition authorities have hosted workshops conducted by UNCTAD officials and attended by delegates from other African countries. The Commission has also sent its representatives to other African countries to facilitate UNCTAD workshops.
In June 2016, the World Bank published a report: Breaking Down Barriers: Unlocking Africa’s Potential through Vigorous Competition Policy, a study it conducted in partnership with the ACF. This study reviewed the status of competition frameworks and implementation in Africa and zoomed in on three important sectors for Africa’s competitiveness: cement, fertilisers, and telecommunications. More than 70% of African countries rank in the bottom half of countries globally in terms of intensity of local competition and prevalence of fundamental policies for market based competition. This report was a collaborative effort between the World Bank and members of the ACF, reflecting a shared vision for promoting competition policy and effective competition law enforcement across Africa.

Information for this report was gathered through questionnaires, to which 22 jurisdictions responded. This report expanded the scope of earlier ACF studies, considering not only the status of competition law enforcement and competition policy in each economy as a whole but also providing an overview of competition dynamics and challenges in selected markets of key sectors. Through this report, the ACF and World Bank sought to take a step forward in the application of region-wide analytical tools to understand key risks to competition in vital input sectors, in particular cement, fertiliser, and telecommunications. Competition issues in road freight, air transport, and retail are also explored. The analysis showed that the effects of industry characteristics, regulations, and trade policies shaped the competitive dynamics of these sectors and often spanned borders. There was scope, therefore, for national and regional competition authorities to increase their impact by taking a regional perspective when assessing cases within their jurisdictions.

This report brought home the importance of strong co-operation between agencies involved in implementing competition policy. The study’s findings on the range of competition policy frameworks in place across Africa – and the richness of experience in enforcing those frameworks – highlighted the great potential for peer-to-peer learning, both within the region and across regions. The evidence presented in this report showed how competition policy helped African countries boost inclusive growth and sustainable development.

The report found that eliminating competition constraints in food markets could lift families out of poverty. For example, a 10% reduction in the prices of principal food staples is estimated to have the effect of lifting approximately 500 000 people out of poverty in three countries. Fundamental market reforms to increase competition in key input services would also boost economic growth. For example, reforming professional services markets would deliver an additional 0.16–0.43% of additional annual growth in gross domestic product. While the benefits of competition were clearly observable in Africa, there was still considerable effort required to ensure effective implementation of competition laws and policies across the continent. This study provided an overview of factors to be considered in pursuing that effort.
BRICS

BRICS is a grouping of five major emerging developing or newly industrialised economies made up of Brazil, Russia, India, China and South Africa. BRICS combines three billion people (making up approximately 43% of the world population). Each of these five countries, located on three continents, have significant influence in their respective regions and in the world.

Competition policy enforcement has a very important role to play in the developmental trajectory of BRICS economies and the attainment of inclusive economic growth. The achievement of the developmental objectives necessitates that competition policy must be designed and applied according to the structure of the markets in BRICS countries and must respond to the conditions and needs of BRICS countries.

BRICS competition authorities are well positioned to provide leadership in the competition community on what it means to create and enforce competition law and policy in developing economies which comes with its own particular challenges and opportunities. These perspectives serve to enrich the global knowledge base in competition enforcement.

For this reason the South African competition authorities consider their membership in BRICS as key to ensuring that the African perspective is taken into account in the global development of competition law. As a member of the BRICS competition committee, since ..., the South African authorities have participated in capacity building and in the robust exchange of ideas. Through the BRICS network the Commission intends to grow the body of competition knowledge, particularly as it applies to the developing world.

The 4th BRICS International Competition Conference took place in Durban, South Africa under the theme “Competition and Inclusive growth”, a reference to the need to understand the role of competition in not just promoting growth, but also to focus on the pattern or distribution of growth.
UNCTAD assists developing countries in drafting and implementing competition laws and in strengthening the authorities’ enforcement capacities. UNCTAD is also engaged in competition advocacy to enhance the role of competition law and policy for economic growth and inclusive sustainable development.

UNCTAD and the South Africa Competition Commission have been working together in several common projects over the last years. In our effort to build capacities in Africa, the Competition Commission of South Africa has always provided support, by associating its experienced staff members in UNCTAD’s technical assistance programmes. The Commission also constantly participates in UNCTAD’s expert group meetings, sharing its valuable experience with representatives from developing and developed countries. Furthermore, the Commission sets a very good example in terms of competition law enforcement from an economic development perspective not only for other countries in the continent but for all developing countries. The Commission has also contributed to competition policy debates at the regional and international levels to the ongoing work on African Competition Forum, where it has a leading role, as an active member of BRICS.

In addition, the Commission has contributed to the discussion of the African Continental Free Trade Agreement negotiations phase, which includes competition issues. Recently, the Commission has been very supportive to UNCTAD’s work on enhancing international cooperation to effectively address cross-border anticompetitive practices under the UN Set of Principles and Rules on Competition. In this regard, throughout several international meetings, South Africa’s position has been instrumental to raise awareness of the need to better use the United Nations wider membership and UNCTAD as a platform to openly discuss these global issues in a constructive and consensus-building manner.

As a result, South Africa Competition Commission is a key partner of UNCTAD’s Competition and Consumer Policies Branch, being actively involved in all of its activities and in the dissemination of its products. UNCTAD sincerely congratulates the South Africa Competition Commission on its 20th anniversary, an important milestone. We celebrate your accomplishments with our best wishes for a continued effective enforcement of competition law in South Africa and a pivotal role in the competition international community.
South Africa’s Competition Commission and Competition Tribunal are strong and highly respected members of the international competition community. In my capacity as Chairman of the International Competition Network (ICN) Steering Group, I want to express my congratulations and thanks for the engagement, commitment and success particularly in the ICN where South Africa has played an important role from the very start in October 2001, when top antitrust officials from 14 jurisdictions including South Africa launched the ICN.

The ICN is the most important network of competition authorities worldwide. It comprises 139 competition agencies from 126 jurisdictions. But as a virtual organization, the ICN depends on its members’ willingness to take on responsibility and to fill demanding leadership roles. South Africa’s institutions, the Competition Commission and the Competition Tribunal, have successfully taken on this responsibility. Both are not just members of the ICN, but play a vital role in the network.

Together the Competition Commission and the Competition Tribunal invited the competition community to Cape Town to celebrate the 5th ICN Annual Conference in May 2006. Competition Tribunal Chairperson David Lewis took over the position as ICN Chair in 2009 and the Competition Commission hosted the ICN Cartel Workshop in Cape Town in October 2013 and the ICN Unilateral Conduct Workshop in Stellenbosch in November 2018. The Competition Commission is active in the ICN as Working Group Co-Chair, currently in the Unilateral Conduct Working Group and before that inter alia in the Cartel Working Group. As a member of the ICN Steering Group, Commissioner Tembinkosi Bonakele is part of the network’s leadership and the Competition Commission was on board as a founding member of the latest ICN Framework, the ICN CAP – Framework for Competition Agency Procedures.

This engagement in the ICN is important and highly appreciated. It moves the ICN forward and ensures its success, particularly today at a time where calls for international cooperation become stronger as the world becomes smaller in the face of globalization and its driver, digitalization. Cooperation between agencies is obviously helpful for us as enforcers, but cooperation in fair and effective competition law enforcement is important for companies and ultimately it is important for consumers.

I am looking forward to continuing this close and successful relationship and wish all the best for the coming 20 years.

Andreas Mundt
ICN Chair and President of the Bundeskartellamt, Germany
Glossary of Terms

For the purposes of this report, the meaning of the following terminology is explained below:

"Abuse of dominance" means engaging in prohibited practices as provided in section 8 and 9 of the Act.

"Advisory opinion" refers to a non-binding written opinion provided by the Commission to a requester, who may be an individual or a firm, setting out the Commission’s likely view on the subject matter of the opinion.

"Advocacy" refers to activities aimed at the promotion of voluntary compliance to the Act, through non-enforcement mechanisms.

"Consent agreement" refers to an agreement concluded between the Commission and a respondent, and which is confirmed as an order of the Competition Tribunal in terms of Section 49D of the Act, setting out: (i) the alleged contravention, (ii) where appropriate, an admission by the respondent, (iii) a penalty where applicable and (iv) where applicable, a remedy addressing the harm occasioned by the alleged contravention of the Act. Also referred to as a settlement agreement.

"Enforcement" refers to the investigation and/or prosecution of anti-competitive conduct.

"Exemptions" refers to the granting of exemption from prosecution to firms for engaging in anti-competitive conduct for a specific period of time, through the process and criteria prescribed in Section 10 of the Act.

"Non-referral" means that, after conducting an investigation, the Commission has decided not to refer a particular case to the Competition Tribunal for prosecution.

"Public interest" refers to the consideration of socio-political and economic issues, as prescribed in Section 12A of the Act, in the evaluation of merger and acquisition notifications.

"Referral" refers to the submission by the Commission of a complaint to the Tribunal for prosecution, upon completion of its investigation.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Act</td>
<td>Competition Act 89 of 1998</td>
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<td>CAC</td>
<td>Competition Appeal Court</td>
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<td>CLP</td>
<td>Corporate Leniency Policy</td>
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<tr>
<td>Commission</td>
<td>Competition Commission of South Africa</td>
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<tr>
<td>Competition Act</td>
<td>Competition Act 89 of 1998</td>
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<td>DAFF</td>
<td>Department of Agriculture, Forestry and Fisheries</td>
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<td>DTI</td>
<td>Department of Trade and Industry</td>
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<td>EDD</td>
<td>Department of Economic Development</td>
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<td>ERB</td>
<td>Economic Research Bureau</td>
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<tr>
<td>HDI</td>
<td>Historically disadvantaged individual</td>
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<tr>
<td>HHI</td>
<td>Herfindahl-Hirschman Index</td>
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<tr>
<td>ICN</td>
<td>The International Competition Network</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
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<tr>
<td>SCA</td>
<td>Supreme Court of Appeal</td>
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<td>SME</td>
<td>Small and medium enterprises</td>
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UNLEASHING MORE RIVALRY