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The financial year comes to a close, so this is our last edition for the period. It has arguably been another exciting year for the Commission as we continue to ride the crest of the wave in terms of the positive impact of our work.

Notwithstanding our financial challenges imposed by the general austerity measures faced by all government institutions, the Commission has recorded significant successes in its efforts against anti-competitive conduct.

The range of captivating stories covered in this edition is, to some extent, a rundown of some of the major activities and developments that took place during this financial year.

Importantly, the highlight of the year must be President Cyril Ramaphosa’s signing of the Competition Amendment Bill into law after an extensive consultation process led by the Minister of Economic Development, Ebrahim Patel. This is a very critical piece of legislation for the Commission as an instrument for fighting concentration and anti-competitive behaviour.

Further, the Minister promulgated amendments to Rule 15 which effectively cleared the confusion that was brought by some litigants charged by the Commission who demanded access to documents before pleading to the allegations.

In a landmark development, the Tribunal found Computicket guilty of abuse of dominance and ordered the ticket distribution company to pay a fine that is almost 10% of its annual turnover. This matter dates back to 2008 and was delayed by protracted litigation.

The edition extensively covers articles about prohibitions, cartel conduct consent agreements, exemptions and mergers.

One of the good things about the financial year end is that it also ushers in a new year with opportunities and new challenges.

This year we bid farewell to two Commission’s EXCO members, the Chief Economist, Prof Liberty Mncube and Chief Financial Officer, Mr Molatlhegi Kgauwe.

Undoubtedly, both these outstanding colleagues played a critical role and significantly contributed to the achievements of the Commission in the recent past.

You will be more familiar with Prof Mncube who, until recently, was a distinguished member of the editorial team. He was pivotal in the strategic vision and direction of this newsletter and as the head of our research division, provided invaluable insights and expertise content. Even when his time was required elsewhere particularly the demand for him to be an expert economic witness in many of our cases, he remained a great friend of this publication.

We wish them well and have no doubt that they will continue to be ambassadors of the Commission.

Disclaimer: The articles, views and opinions expressed in this edition are those of the authors and do not necessarily reflect the official policy or position of Competition Commission (SA).
In February this year President Cyril Ramaphosa signed the Competition Amendment Bill into law this is after the Bill was approved by the National Assembly on 23 October 2018 and endorsed by the National Council of Provinces in December 2018.

The signing took the form of a “media photo-opportunity” at which the President was joined by the Minister of Economic Development, Mr Ebrahim Patel, President of the Competition Appeal Court, Justice Denis Davis, chairman of the Competition Tribunal, Norman Manoim, and Competition Commissioner, Tembinkosi Bonakele.

In an official statement the Presidency said the amendments are a major boost for pursuit of a growing and inclusive economy particularly with regards to SMEs and economic inclusion and opens up the economy to fresh investment and innovation.

“It also provides a clear mandate to the competition authorities to address economic concentration in a balanced manner and to promote economic transformation. The Bill provides greater clarity to firms and investors on prohibited practices and what constitutes abuse of dominance. Another expected benefit is improved administrative efficiencies in the work of the competition authorities and facilitative powers to the Executive,” said the Presidency.

The Office of the President went on to say the amended legislation sought to combat concentration and economic exclusion as core challenges that contribute to slower and less dynamic growth, lower employment and greater inequalities, as well as socio-political conflict.

“The amendments enable a more effective approach to concentration, with a focus on improving outcomes for small and black-owned business, and strengthen the institutions involved in managing competition policy and law. These changes are in the long-term interest of both business and organised labour and benefit small to medium-sized companies through a pro-growth, transformation model that can help lift investment and advance economic inclusion”, the Presidency said.

Speaking earlier in the day during the President’s State of the Nation debate in National Assembly Minister Patel said the key strategic priority was now deeper, faster, bolder economic inclusion — growing the economy and transforming it so that millions more young people and the unemployed can find opportunity as entrepreneurs or workers.

He said the government was committed to address monopolies and the structure of the economy in order to boost growth and economic inclusion. “ (We) commit… to ensure competition authorities have the legal power to address the problems of monopolies, the excessive economic concentration and abuse of dominance by large players that keep SMMEs and cooperatives out of the mainstream economy; and ensure broad-based ownership, including worker ownership, in companies during merger proceedings.”

He said the law directly responds to the call for a more inclusive economy in which young people, small businesses, new entrants and young innovators can enter markets and large incumbents are not allowed to create closed-shop markets. “It responds to the big imbalance in power between small spaza shop owners and large supermarkets; between township panel-beaters and the insurance industry; between small clothing manufacturers and large retail chains; between small tilers and bricklayers and large construction companies.

“The law is the first on our statute books that promotes the inclusion of workers in shareholding structures of companies and the next logical step will be to have workers represented on boards of large companies. The law is about opportunity, about enterprise, about inclusion. It supports innovation and investment. Big players who dominate markets have left millions of our people as hewers of wood and drawers of water. This law is a step to change that. It is about giving effect to the Freedom Charter’s call for the wealth to be shared by all… signal of our focus not on grandstanding, but on action and implementation”, he said.

THE COMMISSION WELCOMES THE AMENDMENTS

This Competition Amendment Act is good for the implementation of competition law in South Africa as it makes it easier for the Commission to prosecute dominant firms that impose unfair trading conditions on SMMEs that they supply inputs or that supply to the dominant firms finished products. It also empowers the Commission to deal with levels of concentration in and market structure of different industries in South Africa through market inquiries.

At the conclusion of market inquiries the Commission can impose binding remedies to deal with the harm identified during a market inquiry. It also empowers the Commission to evaluate its work through impact studies. These development empowers the Commission to make decisions relating to confidential information and thus shorten proceedings in the prosecution of competition law cases. It further empowers the Tribunal to impose penalties for all competition law contraventions. The controlling firms or parent companies are also now liable for the administrative penalties of the contraventions of their subsidiaries if they knew or should have known about the conduct of their subsidiaries that contravene the Competition Act. Thus the turnover of the of the parent companies is also taken into account when calculating the penalties.
The new provision in section 9(3) says: “When determining whether the dominant firm’s action is prohibited price discrimination, the dominant firm must show that its action does not impede the ability of small and medium enterprises and firms controlled or owned by historically disadvantaged persons to participate effectively”.

EXCESSIVE PRICING
The new provision in section 8(1)(d)(vii) says:

“It is prohibited for a dominant firm to engage in any of the following exclusionary acts, unless the firm concerned can show technological efficiency or other pro-competitive gains which outweigh the anti-competitive effect of requiring a supplier which is not a dominant firm, particularly a small and medium business or a firm controlled or owned by a historically disadvantaged person, to sell its product to the dominant firm at a price which impedes the ability of the supplier to participate effectively”.

REFUSAL TO DEAL
The amendment in section 8(1)(d)(ii) says:

“It is prohibited for a dominant firm to engage in any of the following exclusionary acts, unless the firm concerned can show technological efficiency or other pro-competitive gains which outweigh the anti-competitive effect of refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible”.

PREDATORY PRICING
The amendment in section 8(1)(d)(vi) says:

“It is prohibited for a dominant firm to engage in any of the following exclusionary acts, unless the firm concerned can show technological efficiency or other pro-competitive gains which outweigh the anti-competitive effect of selling goods or services at predatory prices.

a. predatory prices means prices for goods or services below the firm’s average avoidable cost or average variable cost;

b. average avoidable cost means the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm had not produced an identified amount of additional output; and
c. average variable cost means the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product.

**EXEMPTION PROVISIONS**

The amendment in section 10(3)(b)(ii) says:

“The Competition Commission may grant an exemption only if the agreement or practice concerned, or category of agreements or practices concerned, contributes to the promotion of the effective entry into, participation in and expansion within a market by small and medium business, or firms controlled or owned by historically disadvantaged persons”.

The amendment in section 10(10) says:

“The Minister may, after consultation with the Competition Commission, and in order to give effect to the purposes of this Act as set out in section 2, issue regulations in terms of section 78 exempting an agreement or practice or category of agreements or practices from the application of this Chapter.”

**MERGER PROVISIONS**

The amendments to section 12A(1) and 12A(1A) says:

“When 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. Despite its determination, the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds”.

The amendment to section 12A(3) says:

“When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in and expand within the market”.

The amendment to section 17(1)(c) says:

“Within 20 business days after notice of a decision by the Competition Tribunal in terms of [a merger], an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by the Minister on matters raised in terms of [public interest], where the Minister participated in the Competition Commission’s or Tribunal’s proceedings in terms of section 18 or on application for leave to appeal to the Competition Appeal Court”.

**MERGER INQUIRIES**

The amendments to 43A(3) read together with 43B(1), 43C(1) and (2) and with the powers in 43D(1) says:

“The Competition Commission, may conduct a market inquiry at any time, subject to [certain procedural rules], if it has reason to believe that any feature or combination of features of a market for any goods or services impedes, distorts or restricts competition within that market; or to achieve the purposes of this Act.

“Any reference to a feature of a market for goods or services includes:

- The structure of the market, including levels of concentration and barriers to entry in a market;
- The outcomes observed in the market, such as ownership, prices, innovation, employment, and the ability of national industries to compete in international markets; and
- The conduct in that or any related market.

“In a market inquiry, the Competition Commission must decide whether any feature, including structure and levels of concentration, of each relevant market for any goods or services impedes, restricts or distorts competition within that market.

“In making its decision in terms of subsection (1)(a), the Competition Commission must have regard to the impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons.

“Subject to the provisions of any law, the Competition Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition.”

**ADMINISTRATIVE PENALTIES**

The amendment to section 59(1) says:

“The Competition Tribunal may impose an administrative penalty for a prohibited practice, [including all types of restricted horizontal practices, restricted vertical practices, abuse of dominance and price discrimination].”

The amendments to sections 59(2A), 59(3)(d) and 3A says:

“An administrative penalty imposed in terms of subsection (1) may not exceed 25 per cent of the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice.

“When determining an appropriate penalty, the Competition Tribunal must consider the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon small and medium businesses and firms owned or controlled by historically disadvantaged persons.

“In determining the extent of the administrative penalty to be imposed, the Competition Tribunal may increase the administrative penalty to include the turnover of any firm or firms that control the respondent, where the controlling firm or firms knew or should reasonably have known that the respondent was engaging in the prohibited conduct.”

**BENCHMARKS**

The amendment to section 8(4) says:

“The Competition Commission must publish guidelines in terms of section 79 setting out the relevant factors and benchmarks for determining whether the practice set out in subsection (1)(d) (vii) impedes the ability of a firm which is not a dominant firm, particularly a small and medium business or a firm owned or controlled by a historically disadvantaged person, to participate effectively.”

The new definitions say:

“small business means a small firm determined by the Minister by notice in the Gazette, or if no determination has been made, as set out in the National Small Business Act, 1996 (Act No. 102 of 1996).

“medium-sized business means a medium-sized firm as determined by the Minister by notice in the Gazette.

“small and medium business means either a small business or a medium-sized business”.
In January this year the amendment to the Competition Commission Rules, Rule 15, came into effect following a notice in the Government Gazette by the Minister of Economic Development, Ebrahim Patel.

The amendment is that a request for access to the Commission’s records in terms of Rule 15 can no longer be made by a respondent once a matter has been referred for prosecution.

In terms of section 21(4) of the Act, the Minister may, in consultation with the Commissioner, and by notice in the Gazette, prescribe regulations for matters relating to the functions of the Commission including access to confidential information and procedures.

The Commission approached the Minister after the ArcelorMittal South Africa Ltd and Others (ArcelorMittal) matter.

Rule 15 provides a general right to members of the public to inspect or copy any record of the Commission provided it is not restricted. The purpose of Rule 15 is to enable members of the public to access any record of the Commission, it being a public body.

The rule has, however, been used by companies facing prosecution by the Commission before the Tribunal to bypass the ordinary rules of litigation governing the disclosure and exchange of documents between the parties to the litigation proceedings.

Ordinarily the respondents in complaint proceedings before the Tribunal are required to respond to the allegations made in the Commission’s complaint referral (charge sheet) before the process of discovery (obtaining more evidence) and exchange of documents, relevant to the case before the Tribunal, takes place.

The aforementioned process is in line with the procedural rules followed in civil and criminal matters before the courts. Instead of following this process, respondents, however, sought to delay filing a response to the Commission’s allegations by requesting the Commission to produce the record of its investigation in terms of Rule 15.

The amended Rule 15 brings the provisions dealing with access to documents under the Competition Commission Rules in line with the provisions of the Promotion of Access to Information Act, No. 2 of 2000 (PAIA).

PAIA regulates access to the information of public bodies. Under the amended Rule 15, a request for access to the Commission’s records in terms of Rule 15 can no longer be made by a respondent once a matter has been referred for prosecution to the Tribunal.

The Commission hopes that the introduction of provisions similar to section 7 of PAIA in Commission Rule 15 will avert the problems that the Competition authorities are currently facing with respondents’ requests for access to the Commission’s record during the litigation proceedings.
It will justifiably limit the application of the general right of access to the Commission’s record if there are proceedings pending before the Tribunal, as well as before civil and criminal courts. The Commission’s record will thus be accessed through the Rules of the Tribunal or the relevant court or in terms of any other law.

This will discipline the litigation process and avoid protracted interlocutory proceedings and limit any abuse of process. Most importantly, this provision will align Rule 15 with PAIA which is the principal legislation that governs access to information of public bodies.

**Background to the Amendment**

Rule 15 was interpreted by the Supreme Court of Appeal (SCA) in *Competition Commission vs ArcelorMittal South Africa Ltd and Others (ArcelorMittal)* to mean that any person, including a respondent in complaint proceedings, also have a general right of access to the Commission’s record provided that the document is not privileged, restricted or confidential. Following the SCA’s judgment in *ArcelorMittal*, respondents in complaint proceedings have taken advantage of Rule 15 in order to gain access to the investigation record and to delay the finalisation of cases.

As a result of the SCA’s decision in *ArcelorMittal*, the Commission proposed an amendment to Rule 15(1) with the object of incorporating a provision similar to section 7 of Promotion of Access to Information Act, No. 2 of 2000 (PAIA) in Rule 15.

**Recent legal developments on the interpretation of Rule 15**

Following the SCA’s judgment in *ArcelorMittal*, the Commission received an avalanche of requests for access to the Commission’s record in various cases during the pleading stage, but before the filing of answering affidavits.

The respondents in complaint proceedings used the SCA’s judgment in *ArcelorMittal* to circumvent the normal discovery process, which ordinarily happens after the close of pleadings. In some cases, the respondents refused to file their answering affidavits before receiving the Commission’s record.

This resulted in protracted interlocutory applications for access to the Commission’s record resulting in a negative impact on the length of the litigation process.

Since the SCA’s decision in *ArcelorMittal*, the Commission has been inundated with legal challenges and requests for the Commission’s record. This has led the Commission to oppose respondents’ requests for access to the Commission’s record under Rule 15 before close of pleadings.

These challenges are costly and resource intensive, and negatively impacted on the effective function of the Commission, as it results in enormous delays on cases being heard on the merits.

Prominent examples of the impact of Rule 15, as previously formulated, in delaying cases being heard on the merits are *Group Five Ltd v The Competition Commission* and *The Standard Bank of South Africa Ltd v The Competition Commission*.

1. 2013(5) SA 538 (SCA)
2. Section 7 of PAIA states as follows:
   a. That record is requested for the purpose of criminal or civil proceedings;
   b. So requested after the commencement of such criminal or civil proceedings, as the case may be; and
   c. The production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.
3. Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.
5. The Standard Bank of South Africa Ltd vs the Competition Commission (160/CAC/Nov17)
In Group 5, the Commission had referred a complaint against Group Five Ltd (Group 5). The Commission alleged that Group 5 together with two other construction companies had rigged a tender in respect of a road rehabilitation project for the South African National Roads Agency Ltd. Group 5 had not filed its answer to the Commission’s referral and contended that it was entitled to the Commission’s investigative record in terms of Rule 15 prior to filing its answering affidavit. The Commission argued that Group 5 was only entitled to the record after close of pleadings. This has resulted in delaying the hearing of the merits of this case.

In Group 5, the Competition Tribunal (Tribunal) held that access to the Commission’s record had to be given within a reasonable time. The Tribunal found that it could align the general right of access to the Commission’s record with the discovery rights afforded in the Tribunal Rules. The Tribunal also considered that a reasonable time to provide the record amounts to the time for production of discovered documents in terms of the Tribunal Rules, namely after the close of pleading. This meant that a litigant who had requested access to the Commission’s record would only obtain such record during the discovery process.

In addition, the Tribunal noted that the right contemplated in Commission Rule 15 did not aim to facilitate a defence by the respondent. The Tribunal accordingly found that Group 5’s request for access to the Commission’s record before filing its answering affidavit was premature, and dismissed Group 5’s application for access to the Commission’s record before close of pleadings.

Group 5, however, appealed the Tribunal’s decision to the Competition Appeal Court (CAC). On appeal, the CAC engaged with the interpretation of Rule 15(1) and confirmed the SCA’s decision in ArcelorMittal that “any person” in Rule 15 included a litigant.

The CAC thus found that Group 5, as a litigant, was entitled to access the Commission’s record save for any documents that were restricted in terms of Rule 14(1). The CAC accepted the Tribunal’s finding that access to the Commission’s record needed to be given within a reasonable time.

The CAC, however, criticised the Tribunal for finding that a reasonable time was affected by the position of the respondent as a litigant. The CAC remarked that the determination of a reasonable period within which the Commission must give access is not affected by the status or identity of the requester.

The CAC found that a litigant’s entitlement to discovery is distinct from a general right of access such as the right envisaged under Rule 15(1). The CAC found that the Tribunal
In essence, the amendment entails a new sub-rule 5 and the insertion of the words “subject to sub-rule 5” at the beginning of Rule 15(1). This means that the general right of access to the Commission’s record will be subject to the new sub-rule 5. The new sub-rule 5 contains a provision similar to the restriction contained in section 7 of PAIA.

should not have relied on cases dealing with the interpretation of section 7(1) of the PAIA. This is because Group 5 had sought access to the Commission’s record in terms of Rule 15(1) and not in terms of PAIA. Section 7(1) expressly excludes PAIA’s operation in the following instances:

1. the record is requested for the purpose of criminal or civil proceedings;
2. the record is requested after the commencement of such proceedings;
3. Any other law provides for access to the record in question.

The CAC remarked that Rule 15 does not contain the kind of qualification found in section 7 of PAIA. Nevertheless, in rejecting the Tribunal’s reliance on section 7(1) of PAIA for the reasons set out above, the CAC remarked that the policy considerations underlying section 7 of PAIA might justify the introduction of similar qualifications in Rule 15.

Accordingly, the CAC noted that a justifiable restriction would be similar to the one contained in section 7 of PAIA that will restrict access with reference to the purpose for which the record is requested and not with reference to the identity of the requester. However, the CAC noted that Rule 15, as framed at the time, does not contain that kind of restriction, hence hinting on the need to incorporate such a qualification if one wanted to ensure that right to access is not abused during the litigation proceedings.

In Standard Bank the Commission referred a matter to the Tribunal against various banks alleging that they had engaged in collusive conduct with regard to trading in foreign currency (the Forex case). Instead of filing an answering affidavit, Standard Bank amongst others, applied to the Tribunal for access to the Commission’s record in terms of Rule 15.

The Tribunal dismissed Standard Bank’s application that the record should be produced within 5 days and directed the Commission to provide Standard Bank with the record at the same time as it produces discovery in the Forex case. Standard Bank appealed the Tribunal’s decision to the CAC.

In allowing Standard Bank access to the Commission’s record under Rule 15, the CAC reiterated the remarks it had made in the Group 5 matter. The CAC noted that there might be legitimate cause for amending Rule 15, but as it was written at the time, Rule 15 does not provide for the restrictions contained in section 7 of PAIA.

Restrictions similar to those contained in section 7 of PAIA would essentially say that a person cannot use Rule 15(1) to access the Commission’s record, if the record is requested for litigation purpose and if the litigation process has already started.

The CAC noted that Rule 15 does not expressly exclude PAIA’s operation in the Forex case. Instead, it is implied that Rule 15(1) of a provision similar to section 7 of PAIA would essentially say that a person cannot use Rule 15(1) to access the Commission’s record, if the record is requested for litigation purpose and if the litigation process has already started.

In essence, the amendment entails a new sub-rule 5 and the insertion of the words “subject to sub-rule 5” at the beginning of Rule 15(1). This means that the general right of access to the Commission’s record will be subject to the new sub-rule 5. The new sub-rule 5 contains a provision similar to the restriction contained in section 7 of PAIA. The new sub-rule 5 of Rule 15 reads as follows:

“(5) Sub-rule (1) does not apply if-

(a) That record is requested-

i. for the purpose of proceedings in criminal or civil proceedings or proceedings before an administrative body, including the Competition Tribunal; and

ii. after the commencement of such proceedings referred to in sub-paragraph (i); and

(b) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in, or may be determined in terms of, any law or rules of any court or administrative body, including the rules of the Competition Tribunal.”

The amendment also introduces a new sub-rule 6 which reads as follows:

“All record obtained in a manner that contravenes sub-rules (5) is not admissible as evidence in the proceedings referred to in that sub-rule unless the court or administrative body, as the case may be, determines that the exclusion of the record in question would, in its opinion, be detrimental to the interests of justice.”

5 Para 16 of the CAC’s decision in Group 5.
6 Para 16 of the CAC’s decision in Group 5.
7 Para 16 of the CAC’s decision in Group 5.
8 Para 16 of the CAC’s decision in Group 5.
9 Paragraph 33 CAC decision in Standard Bank
These are media owners that compete in the provision of advertising space in South Africa. The Media Credit Coordinators (MCC), a non-profit company, is an association of these media owners. The media companies are, therefore, in a competitive (horizontal) relationship within the meaning of section 1(xiii) of the Act, while MCC is an association of firms in a horizontal relationship as contemplated in section 4(1) of the Act.

The MCC, through an intermediary company called Corex, conducts credit assessments and determines the amount of security to be paid by individual advertising agencies that subject themselves to the assessment. Accredited advertising agencies pay the determined security amount to MCC, and Corex administers the payment. The security amount is used by media owners in situations where advertising agencies default on their obligations to pay for advertisements already placed.

On 19 November 2009, the Commissioner initiated a complaint in terms of section 49B(1) of the Act against six media companies for an alleged contravention of section 4(1)(b)(i) of the Act. These are Media24, Radmark, Avusa (now Tiso Black), Independent Newspapers and Caxton.

On 08 December 2015, the Commissioner amended the complaint initiation to include more media companies, Media 24 Magazines, Carpe Diem, Touchline Media, Primedia, Primedia Outdoor, Comutanet, Mail & Guardian, MTV Networks Africa, SABC, Ramsay Media, Now Media, Associated Media, Associated Hearst, Capro, Trudon, United Stations, Continental Outdoor, Cinemark, Condé Nast Independent Magazines, DSTV Media Sales, Provantage Media, Apurimac Media, Spark Media and the Citizen. They are all members of the MCC.

On 12 September 2017, the Commissioner further amended the complaint initiation to include the Mandla-Matla.

BASIS OF THE PROSECUTION

The complaint referral is based on the Commission’s findings that before 1999, the media companies, as members of MCC, entered into an agreement and/or engaged in a concerted practice to offer similar discounts and payment terms to accredited advertising agents as well as similar discounts and payment terms to non-accredited advertising agents. In addition, the media companies as members of MCC employ services of Corex to negotiate and impose, on advertising agencies, similar terms and conditions of accreditation.

CONDUCT IN CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE ACT

The media companies concluded agreements that contain similar terms with individual advertising agencies that placed advertisements in their respective media platform. The terms of these agreements were amongst others:

1. For accredited agencies, the media companies agreed to offer a discount of 16.5% for all payments made within 45 days of the date of the statement.
2. For non-accredited agencies, the media
companies agreed to offer a discount of 15% for payments made within the same period.

3. For cancellation fee, the media companies agreed to charge 50% cancellation fee in respect of all advertisements that the advertising agencies withdraw 24 hours before publication.

These terms were negotiated and imposed on advertising agencies by Corex on behalf of the media companies as part of the accreditation process. By agreeing or acceding to use Corex as the sole accreditation firm, the media companies agreed on a trading condition in relation to how advertising agencies should be accredited or they at least freely associated themselves with this practice.

The conduct of the companies constituted price fixing and/or fixing of trading conditions in contravention of section 4(1)(b)(i) of the Act.

CONCLUSION AND RELIEF

The collusive agreement or concerted practice by the media companies is egregious and a serious contravention of the Act. Anti-competitive effects are presumed and do not have to be proved. It is conduct that is not open to justification.

The Commission seeks the following relief: an order declaring the companies liable for the payment of an administrative penalty equal to 10% of their respective turnover in terms of section 58(1)(a)(iii), read with section 59 of the Act.

THE BACKGROUND OF THE COMMERCIAL AND MASTER CHANNEL DISTRIBUTION AGREEMENT BETWEEN THE SABC AND MULTICHOICE

On the evidence before it, the Tribunal concluded that the Agreement concluded between SABC and MultiChoice does not amount to a merger as contemplated in section 12(1) of the Act.

APPEAL TO THE CAC

Caxton and Others noted an appeal against the decision and order of the Tribunal to the CAC. On 24 June 2016 the CAC handed down its judgment in the matter and, on the evidence before it, concluded that the agreement concluded between the SABC and MultiChoice did not give rise to a notifiable merger as follows:

- In respect of the Entertainment Channel complaint, that is, the contention that the agreement conferred control on MultiChoice over the SABC’s archives, the CAC found that a license to exploit an asset for a limited period “on its own and without more cannot constitute a merger transaction.”

APPLICATION TO THE TRIBUNAL

The matter was brought directly to the Tribunal by Caxton and CTP Publishers and Printers Limited (“Caxton”), Trustees for the time being, of the Media Monitoring Project Benefit Trust, and S.O.S Support Public Broadcasting Coalition, (collectively Caxton and Others). The complaint raised by Caxton and Others at the Tribunal was that the Agreement constitutes an intermediate merger in terms of section 12(1) of the Competition Act 89 of 1998, as amended (the “Act”), which should have been notified as such in terms of section 13A(1) of the Act.

1 Paragraph 48 of the judgment
Regarding the encryption complaint, that is, that the agreement conferred control over the SABC’s policy on encryption, the CAC found that “on analysis of the evidence provided, it could not be concluded that the agreement fell within the definition of a merger in terms of section 12 of the Act”.

The CAC then concluded that since this case concerns a public broadcaster and is a matter of public interest, a less formalistic and more substantive approach to the case was required.” The CAC then issued an order:

- Setting aside the order of the Tribunal;
- Directing the SABC and MultiChoice “to provide the Competition Commission within 21 days of this judgement - all documentation including but not limited to all correspondence, board minutes, internal memoranda pertaining to the negotiation, conclusion and implementation of the agreement of 3 July 2013”;
- Directing the Commission to “within 30 days of the receipt of the aforesaid information and documentation to file a report with the Competition Tribunal recommending whether or not the agreement gives rise to a notifiable change of control.”
- If the Commission recommends that “the agreement gives rise to a notifiable change of control which falls within the definition of a merger in terms of section 12 of the Act, it is directed that a rehearing of the matter shall be conducted by the Tribunal to determine whether the conclusion of the agreement did entail such a merger as defined”.

It is in the context of the above order of the CAC that the SABC and MultiChoice respectively, filed documents with the Commission on 25 July 2016, and the parties and the Commission had various interactions which gave rise to a dispute that was heard by the CAC and then the Constitutional Court.

The essence of the dispute related to the documents that were submitted by the SABC and MultiChoice which, in the Commission’s view, were inadequate and, therefore, failed to meet the order of 24 June 2016. The Commission sought to use its investigative powers in terms of section 49B of the Act to interview the executives of both the SABC and MultiChoice and obtain the information which was clearly lacking from the documents submitted. The SABC and MultiChoice opposed the Commission’s intention to interview their executives who had participated in the negotiation, conclusion and implementation of the agreement.

On 04 October 2016, the Commission dispatched a letter to the Tribunal seeking a directive on whether it is entitled to conduct interrogations of certain executives of the SABC and MultiChoice in terms of Part B of Chapter 5 of the Act. On 6 October 2016 MultiChoice responded to the Commission’s letter and the SABC responded on 11 October 2016.

Both MultiChoice and the SABC stated that the Commission does not have the powers to conduct interrogations in terms order of the CAC. On 11 October 2016 the Tribunal issued a directive stating that it does not have jurisdiction to issue directions for further conduct of the proceedings or for the further interpretation of the order of the CAC.

**APPLICATION TO THE CAC**

As a result of the dispute between the Commission and SABC and MultiChoice, on 13 October 2016 Caxton and Others brought an application before the CAC seeking an order of the Court to interpret its 24 June 2016 order as permitting the Commission to use its investigative powers in terms of section 49B of the Act, or to issue a fresh order enabling the Commission to use its investigative powers.

The CAC held in its judgment of 28 April 2017 that its order – i.e. its order of 24 June 2016 – did not and cannot be read to grant the Commission powers in terms of section 49B of the Competition Act. It held further that the order was clear and unambiguous and that it expressly confined the source of the inquiry to be conducted by the third respondent exclusively to documentation as set out in the order.

This meant that the Commission would have been limited to the documents furnished to it by MultiChoice and the SABC. Further that, if there are any gaps in the documents furnished, it could not request any of the executives of the two entities to explain the gaps in the documents. It also meant that the Commission could never subpoena any of the past or present employees and executives of the two entities to give oral explanations regarding the circumstances surrounding the conclusion of the Agreement.

**APPEAL TO THE CONSTITUTIONAL COURT**

Caxton and Others brought an application for leave to appeal to the Constitutional Court on 22 May 2017 concerning the ambit of the powers of the Commission in carrying out its investigation into the merger issue. The Commission supported the application for leave to appeal brought by Caxton and Others.

Before the hearing of the matter by the Constitutional Court, Caxton and Others sought to withdraw the application for leave to appeal. The Commission wrote to the Constitutional Court stating that the application for leave to appeal should proceed as set down by the Constitutional Court. The Constitutional Court issued a directive that the matter would proceed as set down and oral arguments were presented by Caxton and Others, the Commission, the SABC and MultiChoice on 23 November 2017.

On 28 September 2018 the Constitutional Court handed down its judgment and order overturning the decision and order of the CAC. The Constitutional Court’s order reads as follows:

“[90] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld, and the Competition Appeal Court’s order of 28 April 2017 is set aside and replaced with following:

    a. It is declared that the order handed down by the Competition Appeal Court on 24 June 2016 does not preclude the Competition Commission from exercising its non-coercive and coercive investigative powers in terms of Part B of Chapter 5 of the Competition Act 89 of 1998 for purposes of discharging its obligations under paragraph 3 of the June 2016 order.

    b. The Competition Commission is directed to file its report with the Competition Tribunal, as contemplated in paragraph 3 of the June 2016 order.

    c. The first and second respondents are ordered jointly and severally to pay the costs of the application, including costs of two counsel”
Pursuant to the order of the Constitutional Court, the Commission invited various former and current executives of the SABC and MultiChoice to come and give evidence under oath. The SABC and MultiChoice submitted further documents to the Commission arising from the oral testimony of the witnesses.

** DOCUMENTS SUBMITTED BY MULTIChoice **

MultiChoice submitted various documents pursuant to the order of the CAC on 24 June 2016. The documents submitted by MultiChoice did not contain business plans, Board Minutes or documents presented to the Board, or any strategic documents relating to the negotiation and conclusion of the Agreement.

The representatives of MultiChoice confirmed when they were giving oral evidence that such documents do not exist. The representatives of MultiChoice could not remember some key information that the Commission requires to assess if the Agreement led to a merger.

** DOCUMENTS SUBMITTED BY THE SABC **

The SABC submitted various documents relating to the negotiation, conclusion and implementation of the Agreement. The documents were analysed by the Commission. The documents submitted to the Commission show that there was a change in the policy of the SABC in 2013 which may have resulted from the negotiation and conclusion of the Agreement.

** COMMISSION’S ANALYSIS **

**Entertainment Channel**

The Agreement before it was amended was very restrictive in what the SABC could do with the content licensed to MultiChoice in respect of the Entertainment Channel. This led to further negotiations on the amendments to the Agreement. The amendments to the Agreement all relate to the Entertainment Channel. The amendments were effected before the launch of the Entertainment Channel in 2015.

On the basis of the evidence made available to the Commission it appears that the relevant clauses in the Agreement relating to the Entertainment Channel did not give rise to a merger as completed in section 12(1) of the Act for, inter alia, the following reasons:

- At all times the SABC had the final say on what went onto the channel. Thus the SABC set up the Entertainment Channel as it deemed fit in terms of content and scheduling; and
- MultiChoice did not have access to the SABC archives and did not control the archives save to request certain programmes to be included on the channel.

**Encryption**

The position communicated by officials of the SABC showed that the policy of the SABC with regards to STB Control was vacillating from time to time.

The evidence provided to the Commission indicates that the policy of the SABC changed materially as a result of the Agreement.

The minutes of the SABC Board and other internal documents made available to the Commission do not point to a clear decision by the Board to support non-encryption prior to at least the signing of the Agreement in July 2013 and this is consistent with other evidence provided to the Commission. The minutes of the SABC Board and other internal documents provided to the Commission rather point to the existence of a stance supporting encryption at least up to after signature of the Agreement.

On a consideration of evidence before the Commission as a whole, the Agreement influenced the SABC’s policy on encryption. The CAC in Distillers Corporation South Africa Limited and Another vs Bulmer (SA) (Pty) Ltd stated the following:

> "It follows that the Act was designed to ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired and this purpose provides a strong pro-pointer in favour of a broad interpretation to section 12 of the Act".

Being able to influence a policy on encryption materially impacted the structure of the market in that it protected MultiChoice’s dominance in the PayTV market in that the STB Control would have enabled new DTT entrants into the market that would have significantly challenged the dominance of MultiChoice particularly at lower LSM segments of the market.

In light of the above, the Commission concluded as follows:

In respect of the Entertainment Channel Agreement, on the basis of the evidence made available to the Commission it appears that the relevant clauses in the Agreement relating to the Entertainment Channel did not give rise to a merger as completed in section 12(1) of the Act; and

In respect of the encryption case, the Agreement resulted in a notifiable change of control as envisaged in section 12(2)(g) of the Act.

The Commission will exercise its rights in terms of the Act to initiate proceedings in the Tribunal against the SABC and MultiChoice as it has found that there has been a contravention of section 13A of the Act.

In view of the fact that the Commission has concluded that the Agreement constitutes a merger as contemplated in section 12(1) of the Act, the Commission recommends that the following procedure should be followed in disposing of the matter:

- The current application launched by Caxton and Others which is currently before the Tribunal as a result of the 24 June CAC order, should be postponed sine die pending the processes mentioned below:
- The Commission will call upon MultiChoice and SABC to file the transaction in terms of section 13A(1) of the Act as a merger; The Commission will exercise its rights in terms of the Act to initiate proceedings in the Tribunal against the SABC and MultiChoice as it has found that there has been a contravention of section 13A of the Act.

This recommendation is consistent with the judgement of the Constitutional Court that the 24 June 2016 CAC order does not limit the powers of the Commission to investigate cases where there is implementation of a merger before it is approved by the competition authorities as that power is derived from the Act. The application by Caxton and Others similarly does not take away the Commission’s powers in terms of the Act to refer a prior implementation case where it has found that a merger has occurred.

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4 CAC Case Number 08/CAC/MAY01
5 Ibid at page 24.
On Friday, 09 November 2018, the Competition Commission (the Commission) filed a report with the Competition Tribunal (the Tribunal) in which it found that the South African Broadcasting Corporation (SOC) Limited (SABC) and MultiChoice (Proprietary) Limited (MultiChoice) implemented a merger transaction without notifying the Commission, in contravention of the Competition Act.

This is pursuant to a judgement and order delivered by the Constitutional Court in the case of S.O.S. Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others [2018] ZACC 37.

On 28 September 2018 the Constitutional Court granted the Commission the right to exercise its non-coercive and coercive investigative powers in investigating whether or not the Commercial and Master Channel Distribution Agreement (“the Agreement”) concluded between the SABC and MultiChoice on 03 July 2013 constitutes a notifiable merger transaction and ordered the Commission to file a report on the matter to the Tribunal within 30 days.

In February 2015, Caxton and CTP Publishers and Printers Limited, the S.O.S Support Public Broadcasting Coalition, and the Media Monitoring Project Benefit Trust, bypassed the Commission and made an application directly to the Tribunal for an order compelling the SABC and MultiChoice to notify the Agreement to the Commission.

The Tribunal dismissed the application on the basis of the evidence that was before it at that time. In a subsequent appeal, in June 2016, the Competition Appeal Court (CAC) also found that on the basis of the evidence that had been provided to the Tribunal, it could not conclude that the Agreement fell within the definition of a merger in terms of section 12 of the Competition Act.

However, the CAC found that, since this matter concerns a public broadcaster and is a matter of public interest, the CAC ordered the SABC and MultiChoice to provide further documents to the Commission and directed the Commission to file a report with the Tribunal recommending whether or not the Agreement gives rise to a notifiable merger transaction.

The Commission found that the documents which were provided to it by the SABC and MultiChoice were not sufficient to enable the Commission to perform its court mandated task. As a result, the Commission sought to interview various executives and officials of the SABC and MultiChoice who were involved in the negotiation, conclusion and implementation of the Agreement. This was opposed by the SABC and MultiChoice, and the question whether the Commission could conduct these interviews was ultimately resolved by the Constitutional Court in favour of the Commission.

Following the judgement of the Constitutional Court, the Commission interviewed under oath various executives and officials of the SABC and MultiChoice who were involved in the negotiation, conclusion and implementation of the Agreement. The Commission also assessed and analysed the documentary evidence which had been provided to it by the SABC and MultiChoice pursuant to the June 2016 order of the CAC.

The Commission found that, on the basis of evidence provided to it, the undertaking made by the SABC to MultiChoice in terms of the Agreement not to encrypt its Free to Air Channels influenced the SABC’s policy on the encryption of the SABC’s Free to Air Channels in contravention of section 13A of the Competition Act. Failure to seek regulatory approval of a merger transaction before it is implemented constitutes a contravention of this section of the Act.
Essentially, in terms of the Agreement, the SABC undertook to MultiChoice, which presently enjoys a dominant position in the pay TV market, that all channel signals in respect of the SABC’s Free to Air Channels as transmitted by the SABC on its Digital Terrestrial Television (DTT) platform shall “be broadcast or transmitted by or on behalf of the SABC, unencrypted and without any conditional access system and shall always be available and receivable by M-Net DTT Set-Top Boxes distributed in South Africa throughout the term, without requiring anything other than the installation of an M-Net DTT Set-Top Box.”

In its report, the Commission found, on the evidence provided to it, that MultiChoice, through the Agreement, influenced the SABC’s position on the encryption of its Free to Air Channels, as the SABC’s position had vacillated at different times between supporting Set Top Box control (including encryption) and not supporting Set Top Box Control.

In the Agreement however, the SABC, categorically and unequivocally undertook in favour of MultiChoice not to encrypt all its channel signals in respect of its Free to Air Channels transmitted on its DTT platform. The Commission found that the encryption of SABC’s Free to Air Channels including Set Top Box Control would have, inter alia, enabled the entry of new entrants into the market and that the Agreement had the effect of protecting MultiChoice’s dominance in the Pay TV market.

In terms of the Competition Act, the ability by one company to materially influence the policy of another company through various legal instruments including an agreement constitutes a notifiable merger transaction which must first be approved by competition authorities before it is implemented.

The reason the Competition Act requires that such agreements should first be scrutinised by the competition authorities before they are implemented is because they could have a significant impact on the competitive process and raise significant public interest issues, which ought to be investigated by competition authorities. In this case, the SABC and MultiChoice failed to seek prior approval of the Commission before implementing the Agreement.

The Commission has recommended to the Tribunal that it should call upon the SABC and MultiChoice to file the Agreement as a merger, and that the Commission will exercise its rights in terms of the Act to initiate proceedings in the Tribunal against the SABC and MultiChoice as it has found that the Agreement has been implemented without the necessary regulatory approval of the competition authorities in contravention of section 13A of the Competition Act.

The Commission also found that a second aspect of the Agreement, which was also the subject of the Commission’s investigation, relating to the licensing by the SABC to MultiChoice of its Entertainment Channel did not constitute a merger transaction on account of the fact that, inter alia, the SABC had the final say on what went into the channel and certain clauses in the Agreement were amended before the launch of the Entertainment Channel in 2015.

The Commission’s recommendation to the Tribunal is not determinative and the Tribunal will in due course make a final determination on the matter. The Commission will request the Tribunal to convene a pre-hearing as soon as possible to issue directives on the matter.

**COMMERCIAL AGREEMENT ENABLED MULTICHOICE TO INFLUENCE THE STRATEGIC DIRECTION OF THE SABC**

In November 2018, the Commission filed a report with the Competition Tribunal (the Tribunal) in which it found that the South African Broadcasting Corporation (SOC) Limited (SABC) and MultiChoice (Proprietary) Limited (MultiChoice) implemented a merger transaction, without notifying the Commission, in contravention of the Competition Act.

This is pursuant to a judgement and order delivered by the Constitutional Court in the case of S.O.S. Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others [2018] ZACC 37.

On 28 September 2018 the Constitutional Court granted the Commission the right to exercise its non-coercive and coercive investigative powers in investigating whether or not the Commercial and Master Channel Distribution Agreement (“the Agreement”) concluded between the SABC and MultiChoice on 03 July 2013 constitutes a notifiable merger transaction and ordered the Commission to file a report on the matter to the Tribunal within 30 days.

In February 2015, Caxton and CTP Publishers and Printers Limited, the S.O.S Support Public Broadcasting Coalition, and the Media Monitoring Project Benefit Trust, bypassed the Commission and made an application directly to the Tribunal for an order compelling the SABC and MultiChoice to notify the Agreement to the Commission.

The Tribunal dismissed the application on the basis of the evidence that was before it at that time. In a subsequent appeal, in June 2016, the Competition Appeal Court (CAC) also found that on the basis of the evidence that had been provided to the Tribunal, it could not conclude that the Agreement fell within the definition of a merger in terms of section 12 of the Competition Act.

However, the CAC found that since this matter concerns a public broadcaster and is a matter of public interest, the CAC ordered the SABC and MultiChoice to provide further documents to the Commission and directed the Commission to file a report with the Tribunal recommending whether or not the Agreement gives rise to a notifiable merger transaction.
The Commission found that the documents which were provided to it by the SABC and MultiChoice were not sufficient to enable the Commission to perform its court mandated task. As a result, the Commission sought to interview various executives and officials of the SABC and MultiChoice who were involved in the negotiation, conclusion and implementation of the Agreement.

This was opposed by the SABC and MultiChoice, and the question whether the Commission could conduct these interviews was ultimately resolved by the Constitutional Court in favour of the Commission.

Following the judgement of the Constitutional Court, the Commission interviewed under oath various executives and officials of the SABC and MultiChoice who were involved in the negotiation, conclusion and implementation of the Agreement. The Commission also assessed and analysed the documentary evidence which had been provided to it by the SABC and MultiChoice pursuant to the June 2016 order of the CAC.

The Commission found that, on the basis of evidence provided to it, the undertaking made by the SABC to MultiChoice in terms of the Agreement not to encrypt its Free to Air Channels influenced the SABC’s policy on the encryption of the SABC’s Free to Air Channels in contravention of section 13A of the Competition Act. Failure to seek regulatory approval of a merger transaction before it is implemented constitutes a contravention of this section of the Act.

Essentially, in terms of the Agreement, the SABC undertook to MultiChoice, which presently enjoys a dominant position in the pay TV market, that all channel signals in respect of the SABC’s Free to Air Channels as transmitted by the SABC on its Digital Terrestrial Television (DTT) platform shall “be broadcast or transmitted by or on behalf of the SABC, unencrypted and without any conditional access system and shall always be available and receivable by M-Net DTT Set-Top Boxes distributed in South Africa throughout the term, without requiring anything other than the installation of an M-Net DTT Set-Top Box.”

In its report, the Commission found, on the evidence provided to it, that MultiChoice, through the Agreement, influenced the SABC’s position on the encryption of its Free to Air Channels, as the SABC’s position had vacillated at different times between supporting Set Top Box control (including encryption) and not supporting Set Top Box Control.

In the Agreement however, the SABC, categorically and unequivocally undertook in favour of MultiChoice not to encrypt all its channel signals in respect of its Free to Air Channels transmitted on its DTT platform. The Commission found that the encryption of SABC’s Free to Air Channels including Set Top Box Control would have, inter alia, enabled the entry of new entrants into the market and that the Agreement had the effect of protecting MultiChoice’s dominance in the Pay TV market.

In terms of the Competition Act, the ability by one company to materially influence the policy of another company through various legal instruments including an agreement constitutes a notifiable merger transaction which must first be approved by competition authorities before it is implemented.

The reason the Competition Act requires that such agreements should first be scrutinised by the competition authorities before they are implemented is that they could have a significant impact on the competitive process and raise significant public interest issues, which ought to be investigated by competition authorities. In this case, the SABC and MultiChoice failed to seek prior approval of the Commission before implementing the Agreement.

The Commission also found that a second aspect of the Agreement, which was also the subject to the Commission’s investigation, relating to the licensing by the SABC to MultiChoice of its Entertainment Channel did not constitute a merger transaction on account of the fact that, inter alia, the SABC had the final say on what went into the channel and certain clauses in the Agreement were amended before the launch of the Entertainment Channel in 2015.

The Commission’s recommendation to the Tribunal is not determinative and the Tribunal is to expected make a final determination on the matter in due course.
South Africa’s largest beef processing company and cattle feedlot, Karan Beef Balfour (Pty) Ltd (Karan Beef) was fined R2.7 million (two million seven hundred thousand rand) after it concluded a consent agreement in which it admitted to have participated in a cartel conduct in contravention of the Competition Act.

In February 2018, the Commission referred to the Tribunal for prosecution beef processing companies, Irvin & Johnson (I&J) and Karan Beef for cartel conduct. This follows a Commission investigation launched in September 2017, which found that the companies entered into a manufacturing agreement from 2000 to March 2015.

In terms of the agreement:

- Karan Beef would stop producing and marketing frozen beef products in competition with I&J. This meant Karan Beef would no longer sell such products to retail chain stores for the benefit of I&J;
- Karan Beef would stop producing third parties’ brands such as Pick ‘n Pay Choice Chunky Burgers, Hyperama Real Beef Burgers and Spar Premium Burgers;
- Karan Beef would only be allowed to sell processed beef products - similar to those it makes for I&J - to restaurants, delis, fast food outlets and caterers; and
- The products included beef burger patties, steak sizzlers, crumbed beef steaklets, viennas, boerewors, braaiwors and chicken schnitzels.

“The South African consumer faces tough challenges with regards to food prices, amongst many others. Any conduct that seeks to lessen and distort competition through collusion and market division has a great potential of manipulating prices to the disadvantage of the consumer and the economy. The poor are the biggest casualties of such misdemeanour,”

On 20 February 2013, the Commissioner initiated a complaint, in terms of section 49B(1) of the Act, against feedlots and their association, the South African Feedlot Association (“SAFA”) (“the Feedlots Investigation”) for allegedly fixing the purchase price of weaner calves. Karan Beef is one of Karan Beef and I&J in the Feedlots Investigation.

On 14 June 2017, the Commission conducted a search and seizure operation at the premises of a number of feedlots that are Karan Beef and I&J in the Feedlots Investigation. During the search and seizure, the Commission seized a copy of Manufacturing Agreement concluded by Karen Beef and Irvin & Johnson Limited (“I&J”), which divided markets.

In September 2017, the Commissioner initiated a complaint in terms of the Competition Act against Karan beef and I&J for market division by allocating
customers and specific types of goods in contravention of the Competition Act.

The investigation found that in terms of this Manufacturing Agreement, Karan
Beef undertook to cease the manufacture of processed beef products for its own
account and to instead utilise its skill in the manufacture of processed beef products
on behalf of I&J.

This conduct, allocation of customers and specific types of goods amongst
competitors, constitutes division of
markets and is in contravention of section 4(1)(b)(ii) of the Competition Act.

On 12 September 2017, the Commissioner
initiated a complaint against Karan
Beef and I&J for division of markets by
allocating specific types of goods and
customers in the supply of processed

THE CASE AGAINST KARAN BEEF AND
I&J

On or about 2000, Karan Beef and I&J
concluded a Manufacturing Agreement in
terms of which, they agreed to divide the
markets for the supply of processed beef
products.

Their agreement to divide markets by
allocating specific type of goods is
recorded in the Manufacturing Agreement.
In terms of the Manufacturing Agreement,
Karan Beef undertook to cease the
manufacture of processed beef products
for its own account and instead to
utilise its capability to manufacture the
processed beef products on behalf of the
First Respondent.

Further, the agreement between Karan
Beef and I&J to divide markets by allocating
specific type of goods is also recorded
in Clause 3.12 of the Manufacturing
Agreement. In terms of Clause 3.12 of the
Manufacturing Agreement, Karan Beef
agreed not to manufacture, market or
produce any products that are the same
or similar to the contract products.

This conduct amount to division of
markets by allocating specific types of
goods in contravention of section 4(1)(b)(ii)
of the Act.

Subsequent to the above agreement,
Karan Beef and I&J concluded another
agreement recorded in the Amending
Agreement. The Amending Agreement
expanded Karan Beef and I&J market
division agreement referred to above to
include customer allocation.

In terms of the Amending Agreement,
Karan Beef and I&J agreed to delete a
clause in the Manufacturing Agreement
and to replace it with a new clause which
reads as follows:

“3.12 Karan shall not manufacture, market
or produce any products that are the
same or similar to the contract products
or any other processed beef products
other than those specifically provided for
herein. Karan is permitted to manufacture
certain processed beef products that are
similar to the contracts products on behalf
of customers in the Food Services Trade
[own emphasis], provided that Karan
enters into a separate manufacturing
agreement with each of such customers,
which agreement shall specifically provide
for the manufacture of such products
in accordance with such customer’s
specifications and recipes……”.

Clause 2.1.3 of the Amending Agreement
defines “Food Services Trade” as “those
customers whose primary core business is
converting processed beef for immediate
sale and consumption and includes, but
not limited to, restaurants, delicatessens,
fast food outlets and caterers who have
their own trade and brand names”.

Clause 2.1.3 of the Amending Agreement
divide markets by allocating customers as
Karan Beef is now permitted to produce
and supply processed beef to the Food
Services Trade only, which are restaurants,
delicatessens, fast food outlets and
caterers.

The definition of Food Services Trade
customers in Clause 2.1.3 of the
Amending Agreement excludes resellers
of uncooked processed beef products
such as retailers and wholesalers. Karan
Beef and I&J divided markets by allocating
Food Services Trade customers to Karan
Beef and any other customers to the First
Respondent. To amplify this point, whilst
the First Respondent can sell to any
customer, Karan Beef is restricted to sell
to Food Service Trade customers only.

This conduct amounts to division of
markets by allocating customers in
contravention of section 4(1)(b)(ii) of the
Act.

The Manufacturing Agreement and its
Amending Agreement contain clauses that
divide markets by allocating specific types
of goods and customers in contravention
of section 4(1)(b)(ii) of the Act. Accordingly,
the Commission has decided to refer
the complaint to the Tribunal in terms of
section 50 (1) of the Act.
A fire control and protection systems company, Fireco (Pty) Ltd (Fireco) admitted to cartel conduct and agreed to pay an administrative penalty of R2 200 913.85 (two million, two hundred thousand, nine hundred and thirteen rand and eighty five cents).

They concluded a consent agreement with the Commission which was subsequently confirmed as an order by the Tribunal.

This is in connection with an agreement between 2012 and February 2015 wherein Fireco and Fireco Gauteng concluded an agreement to divide markets in the supply, installation and maintenance of fire control and protection systems.

In terms of that collusive agreement, Fireco and Fireco Gauteng agreed to divide markets by allocating customers, territories and specific types of services amongst themselves. The agreement also stated that Fireco would not offer its services in Gauteng and Fireco Gauteng would not offer its services in the Western Cape.

Fireco would pass on all special risk work throughout the country to Fireco Gauteng. In the implementation of this collusive agreement both Fireco and Fireco Gauteng operated under the name “Fireco”. Fireco Gauteng presented itself in the market as a branch of Fireco in Gauteng and Fireco presented itself as the parent company with a head office in Cape Town.

In June 2015, the Commissioner amended the initiation complaint to include Fireco Gauteng (Pty) Ltd, QD Fire (Pty) Ltd and Keren Kula Mechanical (Pty) Ltd as additional respondents.

The Commissioner further amended the complaint initiation, to include Tshwane Fire Sprinklers CC as an additional respondent on 29 March 2017.

On 8 March 2017, the Commissioner amended the complaint again, to include an allegation against Fireco and Fireco Gauteng of market division by allocating territories and customers in the market for the supply, installation and maintenance of fire control and protection systems. The Commission referred the complaint to the Tribunal.
THE BACKGROUND TO THE CASE AGAINST THE FIRE COMPANIES

On 13 March 2015, the Commission initiated a complaint against Afrion Property Services CC, Belfa Fire (Pty) Ltd, Cross Fire Management (Pty) Ltd, Fire Protection Systems (Pty) Ltd, Fireco (Pty) Ltd, Fire Control Systems (Pty) Ltd, QD Air (Pty) Ltd and Technological Fire Innovations (Pty) Ltd for allegedly fixing prices, dividing markets and tendering collusively in the market for the supply, installation and maintenance of fire control and protection systems.

On 26 June 2015, the Commissioner amended this complaint initiation to include Fireco Gauteng (Pty) Ltd, QD Fire (Pty) Ltd and Keren Kula Mechanical (Pty) Ltd as additional respondents. On 29 March 2017, the Commissioner further amended the complaint initiation, under case number: 2017Mar0149, to include Tshwane Fire Sprinklers CC as an additional respondent.

On 08 March 2017, the Commissioner amended the complaint to include an allegation against Fireco and Fireco Gauteng of market division by allocating territories and customers in the market for the supply, installation and maintenance of fire control and protection systems.

On 29 March 2017, the Commission referred the complaint to the Tribunal for prosecution after the investigation revealed the following:

1. During or about the period 2012 to around February 2015, Fireco and Fireco Gauteng concluded an agreement to divide markets in the market for the supply, installation and maintenance of fire control and protection systems.

2. In terms of that agreement, Fireco and Fireco Gauteng agreed to divide markets by allocating customers and territories, and specific types of services, among themselves; and more particularly that Fireco would not offer its services in Gauteng and that Fireco Gauteng would not offer its services in the Western Cape, and Fireco would pass on all special risk work throughout the country to Fireco Gauteng.

3. In implementation of that agreement both Fireco and Fireco Gauteng operated under the name “Fireco”. Fireco Gauteng presented itself in the market as a branch of Fireco in Gauteng, and Fireco presented itself as the parent company with a head office in Cape Town.

4. This conduct contravened section 4(1)(b)(ii) of the Act.

Fireco agreed to prepare and circulate a statement summarising the contents of the consent agreement to its employees, managers and directors within fourteen (14) days. They would also refrain from engaging in conduct in contravention of section 4 (1)(b) of the Act in future.

They also agreed to develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme should include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act;

The compliance programme shall be submitted to the Commission within sixty (60) days of the date of confirmation of the consent agreement as an order by the Tribunal. They undertook henceforth to engage in competitive practices.
## COMPANY JUDGEMENT BACKGROUND FINES

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| TWK Milling (Pty)               | Competition Tribunal | The Commission’s investigation, initiated in 2007, found that TWK Milling colluded with its competitors to fix the price of milled wheat products.  

  The Commission is proceeding with its case against the remaining respondents, Westra Milling and Pramount Mills.  

  The Competition Tribunal expected to hear the matter in April 2019. | R 1 845 863.75 |
| Berg River Textiles             | Competition Tribunal | The Commission uncovered Berg River Textiles and Eye Way colluded with each other when bidding for two separate tenders issued by the Department of National Treasury (Treasury) for the supply of fabric used in the manufacture of uniforms to the Department of Correctional Services, the South African Air Force and the South African Military Health Services.  

  The Commission’s investigation revealed that Berg River Textiles and Eye Way discussed and agreed on the price that will be submitted when bidding for two tenders issued by Treasury. | R 6 170 045 |
| Kawasaki Kisen Kaisha Ltd (K Line) | Competition Tribunal | The Commission’s investigation, which was initiated on 11 September 2012, found that K-Line, Mitsui O.S.K Lines Ltd, Nippon Yusen Kabushiki Kaisha Ltd and Wallenius Wilhelmsen Logistics AS fixed prices, divided markets and tendered collusively in respect of shipment of Toyota vehicles from South Africa to Europe, North Africa, (Mediterranean Coast) and the Caribbean Islands via Europe, West Africa, East Africa and Red Sea (Latin America).  

  All the above companies provide transportation services for motor vehicles, equipment and/or machinery by sea to and from South Africa. This settlement completes the prosecution of this matter. | R98 928 170.05 |
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| MSC SPORTS   | Competition Tribunal | The Competition Tribunal confirmed an order, a consent agreement with Bidvest Media (Pty) Ltd trading as MSC Sports (MSC Sports), a sports agency representing players and coaches mainly in the Premier Soccer League. MSC SPORTS, the South African Football Intermediaries Association (SAFIA) and 35 other football intermediaries were referred to the Tribunal for prosecution in September last year. The Commission uncovered collusion among the total of 37 accused, who negotiated transfer fees and contracts for football players and coaches. The investigation revealed the following, among others:  
  - SAFIA and its members agreed to charge soccer players and coaches a standard 10% commission fee when negotiating transfer fees and contracts on their behalf;  
  - They charged football players a standard 20% commission fee when negotiating commercial contracts; and  
  - They use SAFIA as a platform for collusion.  
In its settlement agreement with the Commission, MSC SPORTS has undertaken to cooperate fully in the prosecution of the other accused companies. This includes testifying before the Competition Tribunal, providing evidence (written or otherwise) and agreeing to refrain from engaging in cartel conduct. MSC SPORTS has also agreed to attend a competition law compliance training programme and to make the training materials available to all employees, managers, directors and agents annually, to ensure they comply with the Competition Act. More football agents have approached the Commission for cooperation. | R 90 013.17    |
| Toyoda Gosei Co. | Competition Tribunal | Japanese manufacturer and supplier of car safety system products, including airbags, Toyoda Gosei Co. (Toyoda) has admitted to charges of price fixing, dividing markets and collusive tendering with its competitors, Takata Corporation (Takata) and Autoliv Inc. (Autoliv). This settlement follows a Commission investigation into collusive conduct by the manufacturers of global car safety system products who supply airbags, seatbelts and steering wheels to companies including Volkswagen, BMW, Toyota, Honda, Peugeot and Daimler AG. The investigation revealed that Toyoda colluded with Takata and Autoliv in respect of two separate requests for quotes issued by Toyota for airbags for its Yaris and Auris models. | R 6 162 958.34 |
On 20 February 2018, the Commission prohibited the proposed merger between SA Airlink (Pty) Ltd (SA Airlink) and Safair Operations (Pty) Ltd (FlySafair). The Commission found that the proposed transaction was likely to result in a substantial prevention or lessening of competition in the market for scheduled passenger services.

The Commission found that the merger was likely to result in the removal of an effective competitor (FlySafair) to SA Airlink particularly on the routes in which FlySafair competes against SA Airlink. FlySafair offers competitive prices and has been growing in the market both in terms of its existing routes as well as entering into new routes.

On the other hand, SA Airlink has monopoly or near monopoly positions on most routes it operates on. FlySafair was also a potential competitor to SA Airlink on those routes which it had not yet entered but could potentially enter in future and, therefore, posed a competitive constraint on SA Airlink. This was especially so bearing in mind that FlySafair’s has competitive pricing on most routes it operated on.

The Commission found that there were significant price differentials between FlySafair and SA Airlink, with FlySafair being cheaper, and that if the merger were to be approved, there was a likelihood of price increases due to the loss of competition from the merger.

The Commission further found that the proposed merger was likely to result in coordinated effects through the potential exchange of competitively sensitive information between South African Airways (SAA) and FlySafair (and SA Airlink) since SAA has a shareholding in SA Airlink.

Such structural links through cross shareholdings and the existing operational agreements were likely to facilitate coordinated outcomes in future. SA Airlink operated under extensive operational agreements with SAA.

In this regard, the Commission found that the merger would likely result in the enhancement and facilitation of coordinated conduct in future. There were no remedies identified that could sufficiently address the competition concerns identified and therefore the Commission prohibited the proposed transaction.

On 07 March 2018, following the prohibition of the merger, SA Airlink and FlySafair brought an application before the Tribunal for the reconsideration of the decision. The Commission opposed the application. The Commission filed documents, expert and factual witness statements in support of its decision. The hearing of the matter was initially set down for July 2018. However, SA Airlink and FlySafair requested for a postponement of the hearing to a later date.

The hearing was rescheduled and set down for the end of November 2018. On 26 October 2018, SA Airlink and FlySafair abandoned the merger altogether.

The Commission’s decision to prohibit the merger therefore stands.

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The Commission’s decision to prohibit the merger therefore stands.
The Commission recommended the approval, subject to conditions, of a merger whereby Sibanye Gold Limited t/a Sibanye-Stillwater ("Sibanye") intends to acquire sole control of Lonmin Plc ("Lonmin").

Upon implementation of the proposed transaction, the existing Lonmin shareholders will hold approximately 11.3% in the enlarged Sibanye Group and Sibanye’s current shareholders will hold the remaining 88.7% of the total issued share capital in the enlarged Sibanye Group.

Sibanye is a public company listed on the Johannesburg Stock Exchange Limited ("JSE") and is not controlled by any firm. Lonmin is also a public company listed on the London Stock Exchange and the JSE.

Sibanye is a holder of mineral reserves and assets allowing it to produce gold and uranium, as well as small amounts of silver as a by-product from its gold production. Sibanye also holds reserves and assets allowing it to produce concentrate containing certain Platinum Group Metals ("PGMs").

Sibanye’s main operative PGM mining operations comprise of the Kroondal Mine, the Rustenburg Mines, the Stillwater Mining located in the United States of America and a 50% joint venture indirect interest in the Mimosa Mine located in Zimbabwe. Lonmin also owns various PGM mines/shafts and PGM reserves, various PGM exploration projects, tailings dams, concentrators, a smelting complex and PGM refining facilities, the majority of which are located in South Africa.

The proposed transaction presents both a horizontal (competitors) and vertical (supplier-customer relationship) overlap. In relation to the horizontal overlap, both Sibanye and Lonmin mine and produce PGM concentrate which is further refined at refineries by companies such as Anglo American, Implats and Lonmin. PGMs are ultimately sold in international markets.

The Commission found that the merged entity is unlikely to exercise market power in any of the PGM markets affected by the merger as both merging parties have relatively low market shares in these international markets.

In relation to vertical overlaps wherein Lonmin currently refines PGM concentrate for other upstream PGM concentrates producers, there were no foreclosure concerns arising since the merged entity is unlikely to have incentives to foreclose other upstream PGM concentrate producers.

The Commission also considered whether downstream refiners of Sibanye’s PGM concentrate would have alternative suppliers of PGM concentrate in the upstream in the event that they are no longer able to purchase the Sibanye PGM concentrate. The Commission found that this input foreclosure is unlikely to arise as other downstream refiners have other upstream PGM concentrate suppliers.

In all, the Commission’s investigation found that the proposed merger is unlikely to result in a substantial lessening or prevention of competition in any of the PGM markets affected by the proposed merger.

However, there were numerous public interest concerns arising from the proposed merger. Some of the public interest concerns were raised by other third parties such as the Association of Mineworkers and Construction Union ("AMCU"), Solidarity, United Association of South Africa ("UASA"), Mining Forum of South Africa ("MFSA") and Bapo ba Mogale Community, among others.

The concerns arising were varied and include concerns on the negative impact
of the merger on employment, concerns relating to procurement from historically disadvantaged persons (“HDPs”), honouring existing arrangements with the Bapo ba Mogale Community and honouring of Social and Labour Plans (“SLPs”). These concerns are discussed in more detail below.

Impact on employment

Lonmin submitted to the Commission that it has been operating under severe financial pressure for a number of years due to, inter alia, weak PGM prices and cost increases, and that Lonmin continued to be hamstrung by its capital structure and liquidity constraints. Despite some action taken by Lonmin to improve its precarious position, none of the measures it had implemented yielded the desired outcome of ensuring the long-term sustainability of its business as a standalone entity.

As a result, in terms of Lonmin’s ‘standalone business plan’, mining operations at Lonmin were marked to be significantly scaled back and a number of its depleting shafts would be placed on Care and Maintenance, resulting in the retrenchment of 12 460 employees (including contractors) from 2018 through to 2020.

Sibanye, in its own independent analysis of the Lonmin’s business, investigated the number of employees it believed Lonmin’s operations could sustain by having regard to its views and assumptions on the potential efficiency of Lonmin’s operations, if optimized and restructured in accordance with Sibanye’s operating model.

In this process, Sibanye determined that a further 885 positions to what was already contemplated by Lonmin’s standalone business plan would need to be retrenched across the integrated business over a period from 2018 to 2020. Therefore, in total, Sibanye submitted that 13 344 employees would be retrenched post the merger.

The Commission carried out its own investigation on the impact of the proposed merger on employment and found that there are 10 156 retrenchments which were independently determined by Lonmin and which the Commission found to be unrelated to the proposed merger and would likely have taken place whether the merger had been proposed or not.

These retrenchments were driven by operational requirements as alluded to above. The Commission’s own assessment therefore found that 3 189 retrenchments of the proposed total of 13 344 retrenchments as submitted by Sibanye are influenced by the merger and arise directly as a result of this merger. As such, the proposed merger results in a substantial negative impact on employment given these significant retrenchments that are likely to take place post-merger.

In an endeavor to address the retrenchments identified by the Commission to be related to the proposed merger, Sibanye has made commitments to implement some short term projects (the K3, 4B and MK2 Rowland shafts) in order to save some jobs totaling 3 714 over the corresponding three year period spanning 2018 to 2020.

Such job savings are anticipated to be brought about through a combination of avoiding or delaying the closure of shafts/mines Lonmin had earmarked for closure, and/or the development of new projects. A significant amount of these job savings are, however, subject to PGM prices increasing in future and reaching certain thresholds, as well costs of mining at the 4B and MK2 Rowland shafts being maintained at certain levels.

In the event that PGM prices and mining costs for these 2 (two) projects do not reach the prescribed thresholds, the merged entity may not be in a position to save all the jobs contemplated to be saved by the year 2020.

In an effort to further mitigate the negative impact of potential retrenchments on employees especially if PGM prices do not rise in future, Sibanye has undertaken to embark on an Agri-Industrial Community Development Programme in the Rustenburg area, in order to maintain and sustain the livelihoods of any retrenched employees and the communities in which they reside in.

Sibanye is finalising a Memorandum of Understanding with a multi-stakeholder group, for an Agri-Industrial Community Development Programme in the West Rand area. The long term-objective of this programme is to build and support a portfolio of large, medium and small-scale, transformed and financially sustainable agricultural enterprises, capable of operating effectively across the entire agricultural value chain.

This initiative is intended to develop alternative sources of economic activity in parallel with mining and mitigate prospects that mining communities may become distressed mining communities as mining activities inevitably wind down. Once the implementation schedule for the greater West Rand district is finalised, Sibanye is committing to investigate the opportunity to expand this initiative to the Rustenburg area.

This initiative involves a variety of stakeholders (e.g. banks, the Public Investment Corporation and relevant municipalities) each of which has a different role to play in respect of the initiative and the decision on whether or not to proceed with the initiative does not lie with Sibanye alone.

In the event that the feasibility study supports the extension and replication of such a programme in the greater Rustenburg area, Sibanye is undertaking to extend the West Rand project into the Rustenburg area.
OTHER PUBLIC INTEREST ISSUES

On 13 March 2015, the Commission initiated a complaint against Lonmin’s Social Labour Plan.

There are concerns raised by third parties regarding Lonmin’s failure to comply with obligations that have been set out in its SLP. In its current SLP 2 due to expire in September 2018, Lonmin committed to various plans and initiatives aimed at promoting employment and advancing social and economic welfare objectives in respect of its own employees and in relation to the broader communities in which its mines are located.

A new SLP (“SLP 3”) will be agreed with the Department of Mineral Resources (“DMR”) for the following period. Sibanye has committed that it will continue to honour Lonmin’s existing SLP expiring in September 2018 as well as the upcoming SLP 3 once it is agreed.

The Bapo ba Mogale Community

Lonmin leases certain land from the Bapo Traditional Community. In consideration for the aforementioned lease, the Bapo ba Mogale Investments (“BBMI”) holds shares in Lonmin on behalf of the Bapo Traditional Community. In this relationship between Lonmin and the community, the Bapo Traditional Community has an opportunity to participate in Lonmin’s procurement and business value chain.

Babo ba Mogale Community has contracts with Lonmin in terms of which it provides stockpile and waste rock management services, buses for the transportation of Lonmin workers, ore transportation services and supplies personal protective equipment to Lonmin. Sibanye has committed that it will continue to honour the various existing agreements as they existed before the proposed merger.

Lonmin’s procurement

Lonmin has an extensive list of suppliers supplying a variety of goods and services; some of which are HDP entities. The Commission sought to protect HDP entities that currently supply Lonmin by ensuring that the proposed merger will not have any adverse impact on these entities.

Sibanye has committed to continue to honour the existing contracted HDP suppliers’ contracts with Lonmin on their terms as they existed before the merger. Sibanye will also endeavour to continue to procure from non-contracted HDP suppliers on reasonable commercial terms and endeavour that any contracts pertaining to Lonmin’s operations that may be concluded in the future are concluded in a manner that is consistent with Sibanye’s existing HDP procurement policy and, at a minimum, comply with applicable requirements set out in the Mining Charter, as may be determined from time to time.

Other concerns

There were also concerns raised by third parties relating to the operations of Lonmin that Sibanye does not seem to have an interest in investing in the Lonmin operations that have the potential to be mined and thereby preserve employment i.e. investment done in the K4 shaft and also other shafts that could be mined further (Hossy).

The Commission reviewed both the Sibanye and Lonmin business plans submitted and factored those in its overall findings. Some of the shafts such as K4 are already included in Sibanye’s future plans in the event that PGM prices improve in future.

There were also concerns raised in relation to the payment of dividends to employees. However the Commission was of the view the payment of dividends is a commercial issue which the Commission does not have jurisdiction over. Other concerns raised related to Lonmin transfer pricing policies which are designed to evade and/or avoid taxes. There were also concerns raised that Lonmin is manipulating its enterprise value to suit easy purchase by Sibanye, whilst other issues relate to Lonmin unduly declining a viable potential acquisition by Bapo Ba Mogale of the K4 and Rowland assets. Again all these issues fall outside the Commission jurisdiction.

When all the above factors are taken into account, the Commission recommended that the proposed transaction be approved subject to the conditions discussed above.

The Tribunal conducted a hearing in November 2018 and also approved the merger subject to conditions largely similar to those recommended by the Commission, except that there was an additional moratorium period of 6 months imposed on any retrenchments at Lonmin.

AMCU has since appealed the decision of the Tribunal citing positive changes to Lonmin’s operational circumstances since the time the merger was recommended for approval. The matter will be heard at the Competition Appeal Court in early April 2019.
In June 2017 The Commission prohibited a proposed intermediate merger between Greif International BV (Greif) and Rheem South Africa (Pty) Ltd (Rheem).

Greif, a Dutch company, manufactures and supplies industrial packaging and services with a range of rigid packaging products such as steel, plastic and fibre drums, intermediate bulk containers and plastic water bottles.

In South Africa, Greif manufactures and sells steel drums, steel pails, blow moulded plastic drums and knock-down drums.

Rheem, a South African company, manufactures steel drums, cans and pails mainly used for packaging industrial liquids and hazardous chemicals.

In March 2017, the Commission received a notice of the intermediate merger.

Background to the proposed transaction

The proposed merger was first notified to the Commission in 2004 and it was prohibited. In its decision, the Commission noted that the proposed merger would have resulted in the merged entity having a near monopoly position in the market for the manufacturer of large steel drums in KwaZulu-Natal and Gauteng.

The Commission found a limited degree of substitutability between large steel drums and other products such as large plastic drums. The Commission found that it was likely that post-merger, the merged entity would be in a position to unilaterally increase prices.

The instant merger. Why is it called an instant merger?

In the instant merger, the Commission assessed the market for the manufacture and supply of large steel drums in KwaZulu-Natal and Gauteng Provinces. In its assessment, the Commission found that merged entity would enjoy a near monopoly position in the relevant markets. As a result, the Commission found that it was likely that the merged entity would have the ability to unilaterally increase prices of large steel drums.

Further, the Commission found that the proposed merger would result in the removal of Rheem, an effective competitor, in the market for the manufacture of steel drums. In overall, the Commission concluded that the proposed merger would lead to substantial prevention or lessening of competition in the relevant markets.

The merging parties proposed remedies to alleviate the Commission's concerns. Upon testing the remedies with various stakeholders, the Commission concluded that it was unlikely that they would alleviate concerns raised mainly because the concerns were structural in nature while the remedies offered were behavioural.

Subsequently, in June 2017 the Commission prohibited the merger.

Reconsideration at the Tribunal

On 03 July 2017, the merging parties applied to the Competition Tribunal for a reconsideration of the proposed merger. The merging parties argued that the market has significantly changed since 2004 when they first applied for an approval of the merger with the Commission.

They also indicated that there are alternative suppliers in the market. They further proposed structural and behavioural remedies to address the potential concerns raised by the proposed merger.

The Tribunal heard evidence from various witnesses which included experts. The Tribunal further canvassed the proposed remedies with various stakeholders in the market. Following this, the Tribunal concluded that none of the remedies were appropriate to cure the competition concerns which arose because of the proposed merger.

Subsequently, in January 2019, the Tribunal prohibited the proposed merger.
OVERVIEW OF Q2

The Commission received 89 merger notifications during Q2 and finalized 63 mergers in the same period. Quarter on Quarter analysis shows that there has been a noticeable decline of 39.3% in number of cases notified in Q2 of 2017/2018 versus Q2 of 2018/2019 financial year. The expectation is that there will be an increase in the number of merger cases filed with the Commission in Q3 in line with the previous years’ observations. It is therefore important to note that the current headcount (Analyst) in the Division requires an immediate attention in as far as filling vacant positions.

The number of mergers by decision shows that out of the finalised 63 merger cases finalised in Q2, of these transactions 52 (82.5%) were approved without conditions, 9 were approved with conditions (14.3%), 2 cases were prohibited (3.2%) and no case was abandoned or withdrawn. Quarter on Quarter analysis shows that there has been a 81% decline in the number of cases approved without conditions between Q2 of 2017/2018 and Q2 of 2018/2019 financial years. The trend is consistent in respect of the merger cases approved with conditions (100% decline). There has been, however, a 100% increase in number of cases prohibited from 1 in Q2 of 2017/2018 to 2 in Q2 of 2018/2019.

The Division prohibited 2 cases in Q2 being IRL’s acquisition of Mapochs Mine as well as BAT Holdings South Africa’s acquisition of Twisp. In both cases, it was found that the mergers would result in substantial prevention or lessening of competition. In respect of the Mapochs merger specifically, it was also found that the merger would raise significant public interest concerns. More details of the mergers are provided in the report. In Q2, mergers from sectors which grew the most (at quarter-on-quarter annualised rate) are Administration; Information Communication Technology; Agriculture; Transportation and Storage; Construction and Professional and Technical services. The finalised mergers in Q2 were predominantly in Property (27%); Manufacturing (22%); Wholesale (10%); Transportation and Storage (6%).

Property and Manufacturing are the sectors that routinely record the highest number of merger notifications, as was the case in Q2 of 2018/2019 financial year. The data on acquisitions does not show a consistent trend on the ultimate acquiring firm/s. The data indicates that acquisitions are being made by different ultimate acquiring firms across all sectors of the economy.
For Q2, the Mergers and Acquisition Division (Division) met all turn-around time’s targets for Phase 1, 2 and 3 intermediate mergers. On average for Q2, the turn-around times are as follows: Phase 1 intermediate mergers target was met at 14.67 days, Phase 2 Intermediate mergers target was met at 38.4 days, Phase 3 intermediate mergers target was met at 60 days and Phase 3 Large mergers target was met at 98.80 days. At the commencement of Q2, the Monitoring Unit was monitoring 191 cases where conditions have been imposed. At the end of Q2, 6 conditions were closed and 8 new conditions were added to the monitoring list. These statistics will be presented later below under the section dealing with conditions imposed in Q2. As at the end of Q2, the Unit was therefore monitoring 193 conditions.

In terms of future outlook, conditions in South Africa are also predicted to improve, but this will depend on political and economic conditions in the country in the next two years. In South Africa, the forecast shows that growing political risk and a sluggish economy contributed to a halving in total M&A in 2018 versus 2017. However, the forecast predicts that economy should improve in 2019 due to the impact of monetary policy easing and stronger commodity prices. Nevertheless, there seems to be sentiments in the market that suggest that there will be a decline in merger deals owing to both political and economic risks. As such, it is expected that the current trend of decline in cases is expected to persist in the next Quarter.

Q2 STATISTICS

The Commission received 89 merger notifications during Q2 and finalized 63 mergers in the same period. Quarter on Quarter analysis shows that there has been a noticeable decline of 39.3% in number of cases notified in Q2 of 2017/2018 and Q2 of 2018/2019 financial years. This could be alluded partly to the changes in the merger notification thresholds and this is the trend that could be expected to manifest going into Q3 with an expected decline in number of cases notified compared to the prior periods. Figure 1 below shows a summary of cases notified, finalized, decided and abandoned/withdrawals between 2016/2017 till Q2 of 2018/2019 financial years.

From figure 1 below, the number of mergers by decision shows that out of the finalised 63 merger cases in Q2, of these transactions 52 (82.5%) were approved without conditions, 9 were approved with conditions (14.3%), 2 cases were prohibited (3.2%) and no case was abandoned or withdrawn. Quarter on Quarter analysis shows that there has been a 81% decline in the number of cases approved without conditions between Q2 of 2017/2018 and Q2 of 2018/2019 financial years. The trend is consistent in respect of the merger cases approved with conditions (100% decline). There has been, however, been a 100% increase in number of cases prohibited from 1 in Q2 of 2017/2018 to 2 in Q2 of 2018/2019.

![Quarterly summary of mergers notified and finalised in Q2](image_url)
From Figure 2 below, majority of cases that were notified were intermediate merger (59), large mergers (29) and small mergers (1). It is important to note that the Commission generally receives higher number of intermediate mergers compared to the large mergers (across various periods). Therefore, with this increasing number of intermediate mergers, coupled with the tight 60 period deadline, there will be a lot of pressure on analyst in the division going forward.

The expectation is that there will be an increase in the number of merger cases filed with the Commission in Q3 in line with the previous years’ observations. It is therefore important to note that the current headcount (Analyst) in the Division requires an immediate attention in as far as filling vacant positions.

Table 1 below highlights the turnaround times for the different cases finalised in Q2. As noticeable from Table 1, the Division has met turnaround times for all cases. For intermediate mergers, the following are turnaround times: Phase 1 target met at 14.67 days; Phase 2 at 38.42% and Phase 3 at 60 days. For large mergers Phase 3, the Division has also met the target at 98.80 days.

Table 1: Summary of average turnaround times, Q2

<table>
<thead>
<tr>
<th></th>
<th>Turnaround times</th>
<th>Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase 1</td>
<td>14,67</td>
<td>target met</td>
</tr>
<tr>
<td>Phase 2</td>
<td>38,42</td>
<td>target met</td>
</tr>
<tr>
<td>Phase 3 intermediate</td>
<td>60,00</td>
<td>target met</td>
</tr>
<tr>
<td>Phase 3 Large</td>
<td>98,80</td>
<td>target met</td>
</tr>
</tbody>
</table>

Source: M&A’s construction
M&A ACTIVITY AND SECTOR INSIGHTS IN Q4

In Q2, Property and Manufacturing are the sectors that recorded the highest number of merger notifications, as was the case in Q2 of 2018/2019 financial year. The data on acquisitions does not show a consistent trend on the ultimate acquiring firm/s. The data indicates that acquisitions are being made by different ultimate acquiring firms across all sectors of the economy. As observed from Figure 3 below, the finalised mergers in Q2 were predominantly in Property (27%); Manufacturing (22%); Wholesale (10%); Transportation and Storage (6%).

Figure 3: Mergers finalised by sector, Q2.

Source: M&A's construction
In Q2, mergers from sectors which grew the most (at quarter-on-quarter annualised rate) are Administration; Information Communication Technology; Agriculture; Transportation and Storage; Construction and Professional and Technical services. Figure 4 below shows the quarter on quarter growth by sector.

Figure 4: Quarter-on- quarter growth rate in finalised mergers (y/y)

Table 2 below highlight the international transactions notified in Q2. There has been in total 4 transactions that involved international firms acquiring South African entities in Q2. There has not been any transactions finalised in Q2 that involved either business rescue or liquidation proceedings.

Table 2: International transactions notified in Q2

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Primary Acquiring Firm</th>
<th>Primary Target Firm</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018APR0060</td>
<td>BASF SE Germany</td>
<td>The Divestment Business of Bayer AG</td>
</tr>
<tr>
<td>2018FEB0050</td>
<td>Zaad Holdings Limited</td>
<td>Hygrotech Properties Proprietary Limited</td>
</tr>
<tr>
<td>2018JUN0042</td>
<td>International Flavors &amp; Fragrances</td>
<td>Frutarom Industries Limited</td>
</tr>
<tr>
<td>2018JUL0026</td>
<td>Macsteel Global SARL BV</td>
<td>Macsteel International Holdings BV</td>
</tr>
</tbody>
</table>

Source: M&A’s data
KEY CASES IN Q2

PROPOSED MERGER BETWEEN TWISP (PTY) LTD AND BAT HOLDINGS SA

On 25 July 2018, the Competition Commission (Commission) recommended a prohibition to the Competition Tribunal (Tribunal) of the proposed large merger in terms of which BAT Holdings SA intends to acquire Twisp.

BAT Holdings SA is a leading cigarette manufacturer and supplier globally. It supplies over 200 cigarette brands worldwide. In addition to traditional cigarettes, BAT also produces and supplies other tobacco products including fine cut (a roll-your-own tobacco product), snus and cigars. Internationally, BAT is also a leading supplier of e-cigarettes including in Europe and the United States. Twisp is a South African based supplier of bespoke vaping products (e-cigarettes).

The company was established in 2008 and is known as the leading e-cigarette brand in South Africa. Twisp’s products are distributed through its branded kiosks, retail outlets and online channels. Twisp’s suite of vaping products comprise of various bespoke e-cigarette devices, flavours and accessories. The hardware for the devices is procured by Twisp from international manufacturers who work with Twisp’s design team to tailor the devices to Twisp’s specifications. The flavours are created by Twisp’s in-house flavour specialist and produced by a third party on behalf of Twisp.

The Commission found that there are separate markets for the supply of cigarettes and e-cigarettes. The Commission therefore assessed the effects of this transaction in the (i) national market for the supply of cigarettes and (ii) national market for the supply of e-cigarettes including devices, e-liquids and accessories.

The Commission found that the proposed transaction results in the removal of a potential competitor. Given BAT’s presence in the e-cigarette market internationally, the Commission found that BAT could have potentially entered the South African e-cigarette market absent this transaction and it would have been in a position to compete effectively against Twisp, the largest and dominant e-cigarette supplier in the country. Therefore, the merger is likely to result in unilateral effects which may manifest in the form of an increase in prices of e-cigarettes in future (or a reduction in the rate of price reductions that could potentially occur with BAT’s entry) and/or a reduction in the quality or rate of innovation of e-cigarette products offered post-merger.

The Commission also considered the extent to which the instant transaction is likely to lead to exclusionary portfolio effects post-merger. In particular, the Commission found concerns relating to exclusionary practices relating to shelf space by BATSA that may be perpetuated as a result of the proposed merger.

The Commission received a number of concerns from third parties regarding the proposed transaction.

Following the investigation, the Commission found that the proposed merger results in a substantial prevention of competition. Further, the proposed merger raises significant public interest concerns. There were no efficiency justifications or remedies that have been submitted which can alleviate the concerns arising. For this reason, the Commission recommends that the proposed transaction be prohibited.

PROPOSED MERGER BETWEEN IRL (SOUTH AFRICA) RESOURCES INVESTMENT (PTY) LTD AND MAPOCHS MINE (PTY) LTD

The Commission has prohibited the proposed small merger in terms of which IRL (South Africa) Resources Investment (Pty) Ltd intended to acquire the assets of Mapochs Mine (Pty) Ltd (Mapochs Mine) which is currently under provisional liquidation. The IRL Group does not have any mining activities in South Africa.

Mapochs Mine is or was a titaniferous magnetite ore open cast mining operation which produces vanadium bearing ore. Whilst operational, Mapochs Mine produced vanadium bearing ore.

Following the investigation, the Commission found that the proposed merger is likely to substantially prevent or lessen competition. Further, the proposed merger raises significant public interest concerns. In relation to competition concerns, the Commission found that the merged entity will have the ability and incentive to foreclose downstream processors of vanadium bearing ore.

The Commission found that as a result of this foreclosure, there will also be a detrimental effect on public interest with particular reference to the effect on the mining industry and the ability of national industries to participate in international markets.

In order to alleviate these concerns, the Commission proposed remedies to the merging parties. The Commission and the merging parties however were not able to agree on acceptable remedies. Absent acceptable remedies which could alleviate the concerns uncovered by the Commission, the Commission prohibited the proposed merger.

COMPLIANCE AND IMPACT OF REMEDIES IMPOSED IN Q2

In this financial year, the Mergers Notification Unit (the “Unit”) had identified 17 conditions that were due for closing. At the end of Q2, the Unit had closed 6 conditions. The Unit dealt with 2 investigations for an alleged breach in Q2, which 1 is still pending. The Unit finalised 1 investigation where it found that there was no breach of conditions. This report will highlight the number of conditions closed at the end of Q2 as well as the new conditional approvals in Q2.

a. Monitoring Pending Conditions

At the commencement of Q2, the Unit was monitoring 191 cases where conditions have been imposed. At the end of Q2, 6 conditions were closed and 91 new conditions were added to the monitoring list. These statistics will be presented later below under the section dealing with conditions imposed in Q2. Please note that in Q1 fourteen (14) conditions were imposed but the Commission erroneously recorded case number 2018Apr0060 BASF SE Germany and The Divestment Business of Bayer AG as a condition imposed in Q1 whereas it was imposed on 3 July 2018 (being Q2). This erroneous recording resulted in the Commission recording that fifteen (15) conditions were imposed in Q1 instead of fourteen (14) conditions, being the correct position. Therefore, as at the end of Q2, the Unit was monitoring 193 conditions.

1 Please note that in Q1 fourteen (14) conditions were imposed but the Commission erroneously recorded case number 2018Apr0060 BASF SE Germany and The Divestment Business of Bayer AG as a condition imposed in Q1 whereas it was imposed on 3 July 2018 (being Q2). This erroneous recording resulted in the Commission recording that fifteen (15) conditions were imposed in Q1 instead of fourteen (14) conditions, being the correct position. Thus for the sake of accuracy, we note the correction as follows in Q1 there were fourteen (14) conditions imposed instead of fifteen (15) conditions as recorded in the Q1 report. The said condition of case number 2018Apr0060 BASF SE Germany and The Divestment Business of Bayer AG is therefore recorded in this Q2 reporting as this is the correct factual position. Thus to date, the Commission has imposed 23 conditions.
b. Closing of lapsed conditions

In the IFCO Africa Holdings PTE. Ltd, Middle East Oils and Grains FZC and FR Waring Holdings (Pty) Ltd and Agvestco (Pty) Ltd and The ASOR Group merger, the conditions required the merging parties not to relocate any of its manufacturing facilities for a period of 3 years post the implementation of the merger. On 18 June 2018, the merging parties wrote to the Commission with a view to vary the Conditions on the basis that there has been unfavourable economic conditions. In essence, the variation application sought the consolidation of some of the manufacturing facilities in order to ensure the sustainability of the business and the mitigation of retrenchments. The variation application has subsequently been accepted and as a consequence, the Conditions have been terminated given that there were no further obligations owed by the merging parties under the conditions.

In the Isuzu Motors South Africa (Pty) Ltd and General Motors South Africa (Pty) Ltd merger, the conditions required the merging parties to retain a specific number of former General Motors South Africa (Pty) Ltd (“GMSA”) dealerships within the IMSA dealership network post-merger. In addition, the conditions also required the merging parties to transfer a specific number of employees from GMSA to Isuzu Motors (Pty) Ltd (“Isuzu”). The various compliance reports submitted by the merging parties indicate that they have complied with the Conditions on the basis that they have retained the required number of dealerships and have also transferred the required number of employees from GMSA to Isuzu. Consequently, the Commission has terminated the conditions.

In the Medpro Pharmaceutica (Pty) Ltd and Allergan Gx merger, the conditions placed an obligation on the merging parties not to exchange competitively sensitive information for as long as Teva/Medpro JV exists and Medpro and Teva are able to appoint individuals to the board of that joint venture. The conditions ceased to be of legal effect following the termination of the Teva/Medpro JV and as a consequence the Commission has terminated the conditions.

In the Afrimat Limited and Cape Lime (Pty) Ltd merger, the conditions required the merging parties to divest the aggregates production business conducted at Afrimat (Pty) Ltd’s Kleurkloof quarry and located in Robertson (“Divestment Business”) to an independent third party. The compliance affidavits submitted by the merging parties as well as the approval of the independent third party and the subsequent divestiture of the Divestment Business is an indication that it has complied with the conditions. As such, the conditions have been terminated.

In the Country Bird Holdings (Pty) Ltd and Sovereign Foods Investments Limited merger, the Commission initially imposed conditions on the merging parties not to retrench any employees and conditions in relation to historically disadvantaged individuals, in particular BBBEE. The conditions have been terminated as a result of a Competition Tribunal order setting aside the decision of the Commission to approve the merger. Consequently, as a result of the Competition Tribunal order, the conditions, in turn, fall away.

In the Investec Bank Limited and Calulo Investments (Pty) Ltd and FFS Refiners (Pty) Ltd merger, the conditions placed an obligation on the merging parties to continue supplying brick manufactures within KwaZulu-Natal, Eastern Cape and the Western Cape with an essential input for a period of 5 years from date of approval. The compliance affidavits submitted by the merging parties indicate that they have complied with the conditions, as they continued supplying brick manufacturers with the essential input for a period of 5 years. Consequently, the Commission terminated the conditions.

c. Investigations on potential breach of conditions

Anheuser-Bush Inbev Sa/Nv (“Ab Inbev”) And Sabmiller Plc (merged entity)

The Commission received a complaint from Grain SA alleging that the merged entity has breached clause 9.2 of the Conditions. Grain SA submits that the merged entity has changed the terms and conditions of the supply agreements that the merged entity has with farmers for the procurement of barley. The terms and conditions that Grain SA complained of relate to the pricing for the procurement of barley from the farmers. The Unit engaged with Grain SA and the merging parties as part of its investigation. Following the investigation, the Unit recommended to the Commission Meeting that the merged entity had not breached Conditions as the evidence indicated that to the contrary, AB Inbev had increased local procurement of barley. The Commission Meeting accepted the Unit’s recommendation and the complaint has been closed.

Regent / Hollard

On 12 June 2018, the Commission received a complaint from CMC regarding a potential breach of the conditions. The complainant alleges that the merged entity has breached the conditions by failing to honour the supply agreements with CMC. The Unit has engaged with both CMC and the merging parties in writing regarding the breach and both Imperial and Regent submit that they have not breached the Conditions. The parties further informed the Commission that CMC has brought the same complaint before Arbitration in terms of the contract. The Unit team has scheduled to meet with CMC and the merging parties in October 2018 to discuss the matter further. The Unit’s investigation is thus still pending.

d. Conditions imposed on cases

During Q2, 9 (nine) cases were approved by the Commission or recommended for approval by the Competition Tribunal, subject to conditions. These cases are depicted in Table 3 below.
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Primary Acquiring Firm</th>
<th>Primary Target Firm</th>
<th>Market</th>
<th>Condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017Nov0015</td>
<td>Off The Shelf Investments 56 (RF) (Pty) Ltd</td>
<td>Chevron South Africa (Pty) Ltd</td>
<td>Petrol, fuel oils, lubricating oils and greases</td>
<td>Public Interest: Industrial Sector or region – maintaining headquarters in South Africa. Acquiring firm obligated to maintain its headquarters in South Africa. Public Interest: Employment – CSA obligated not to retrench any employees. In addition CSA is also obligated to maintain at least the number of employees as are employed in aggregate by CSA as at the implementation date. Public Interest: Industrial Sector or Region – Local Production Commitments: OTS undertakes to invest R6 billion in the refinery infrastructure of CSA by investing in various projects 5 years from implementation. Public Interest: Wholesale and retail chains: OTS obligated to maintain at least the baseline number of independently owned service stations. Public Interest: Local Production Commitments: OTS obligated to fully rebrand the network of CSA's services stations by at least 2024. Public Interest: SMMEs and BEE – Commitments In respect Of The Development Fund: CSA obligated to establish a development fund within 2 years from implementation in order to support small business and black owned business involved in CSA's value chain. CSA also obligated to increase its level of supplies of LPG to Black owned business. Public Interest: Industrial Sector or Region – Local Procurement commitments: OTS will procure that CSA shall maintain or increase the current level (as a proportion) of expenditure on local procurement of goods and services. OTS will procure that CSA shall not substitute current, local, South African owned suppliers with off-shore suppliers of goods or services. Public Interest: BEE – BEE ownership levels: OTS will remain at least 90% Black-owned Business.</td>
</tr>
<tr>
<td>2018Jun0036</td>
<td>Melrose Industrial PLC</td>
<td>GKN PLC</td>
<td>Engineering design and consulting</td>
<td>Public Interest: Employment-Retrenchment moratorium for a period of two (2) years from the Implementation Date.</td>
</tr>
<tr>
<td>2018Jun0008</td>
<td>Procter &amp; Gamble Company</td>
<td>The Consumer Healthcare Business of Merck KGaA</td>
<td>Health Activities</td>
<td>Public Interest: Employment (Third Party Supplier) – Obligation on merging parties to continue sourcing products from one of their suppliers under the terms of their current supplier agreement for a period of 5 years from implementation of the merger in order to preserve jobs within the supplier.</td>
</tr>
<tr>
<td>Case Number</td>
<td>Primary Acquiring Firm</td>
<td>Primary Target Firm</td>
<td>Market</td>
<td>Condition</td>
</tr>
<tr>
<td>-------------</td>
<td>------------------------</td>
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<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>2018Mar0022</td>
<td>Sibanye Gold Limited t/a Sibanye-Stillwater</td>
<td>Lonmin PLC</td>
<td>Mining</td>
<td>Public Interest: Employment – The merging parties commit to satisfy certain variables in order to save 3714 jobs in the period between 2018 and 2020</td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
<td>The Merging parties shall donate approximately 500ha of land in the event that a feasibility study supports the establishment of an agri-processing industrial cluster</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Public Interest: Impact on HDI’s –</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Merging parties shall continue to honour the Contracts entered into with their BBBEE Partner (Bapo Traditional Community) on their terms as they existed on the merger announcement date</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>In addition, the merging parties are obligated to honour the existing procurement contracts with previously disadvantaged persons</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>The merging parties are also obligated to honour the existing social and labour plan (“SLP”) submitted to the Department of Mineral Resources as at the merger announcement date. The aforementioned also includes any commitments made by the target firm in terms of their 2019 SLP.</td>
</tr>
<tr>
<td>2018JUL0058</td>
<td>IAPEF2 Education Holdings Limited</td>
<td>RZT Zelpy 4472 Proprietary Limited</td>
<td>Education</td>
<td>Behavioural: Additional Notifications – The Merging Parties shall, prior its implementation, notify the Commission of the transaction which will facilitate the Second Tranche in the form of a new merger filing in the form prescribed by the Competition Act.</td>
</tr>
<tr>
<td>2018JUL0017</td>
<td>Pure Pharmacy Retail (Pty) Ltd</td>
<td>LJ Farrell and Sons (Pty) Ltd</td>
<td>Human Health</td>
<td>Public Interest: Employment – The merging parties obligated not to retrench any employees as a result of the merger save for 17 employees, which include 10 (“Unskilled”) and 7 skilled.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>In addition, the merging parties are prohibited from retrenching the Unskilled employees within 5 months of the implementation date.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Merging parties are also obligated to set up a training fund to assist in reskilling the Unskilled employees. In addition, the merging parties are also obligated to consider the affected employees for any suitable vacancies arising (The aforementioned is applicable for a period of three years after employment termination of any of the Unskilled employees).</td>
</tr>
<tr>
<td>2018APR0060</td>
<td>BASF SE Germany (BASF)</td>
<td>The Divestment Business of Bayer AG (Bayer)</td>
<td>Manufacture of herbicides</td>
<td>Structural – Divestiture</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Acquiring Firm is obligated to commercialise the LibertyLink technology itself, or through a related company, in South Africa.</td>
</tr>
</tbody>
</table>

Source: Competition Commission

*Note: Please note that in Q1 fourteen (14) conditions were imposed but the Commission erroneously recorded case number 2018Apr0060 BASF SE Germany and The Divestment Business of Bayer AG as a condition imposed in Q1 whereas it was imposed on 3 July 2018 (being Q2). This erroneous recording resulted in the Commission recording that fifteen (15) conditions were imposed in Q1 instead of fourteen (14) conditions, being the correct position. Thus for the sake of accuracy, we note the correction as follows in Q1 there were fourteen (14) conditions imposed instead of fifteen (15) conditions as recorded in the Q1 report. The said condition of case number 2018Apr0060 BASF SE Germany and The Divestment Business of Bayer AG is therefore recorded in this Q2 reporting as this is the correct factual position. Thus to date, the Commission has imposed 23 conditions.*
Table 3 indicates that of the 9 cases, 5 had public interest conditions and 4 had competition conditions. Of the 5 public interest conditions, 3 conditions related purely to employment, while the remaining 2 conditions were a combination of employment and other public interest conditions such as the impact on historically disadvantaged individuals, SMMEs and the impact on a particular sector or region. All 3 competition conditions related to behavioural conditions. Of the 4 competition conditions, 3 were behavioural conditions and 2 related to the prohibition of information exchange and cross-directorships, while the remaining condition related to the merging parties using their best endeavours to conclude a non-exclusive exclusive agreement with third parties. The remaining competition condition related to a structural remedy, being a divestiture.

**FUTURE OUTLOOK**

Conditions in South Africa are also predicted to improve, but this will depend on political and economic conditions in the country in the next two years. Further, economic concerns, the threat of another credit rating downgrade, issues around service delivery, as well as the fact that South Africa is close to its next election means that investors are also holding back, adopting a “wait and see” approach. There are also two major political issues causing uncertainty and affecting investment confidence and appetite, land reform and national health insurance. Within certain sectors there are issues as well. For example, mining sector M&A in South Africa has died down considerably due to regulatory uncertainty as well as the plummeting global commodity prices.

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**M&A QUARTERLY**

**PERFORMANCE REPORT: QUATER 3 (Q3)**

**Contributors:** Grashum Mutizwa, Hlumani Mandla, Mogau Aphane, Phillipine Mpane, Ratshidaho Maphwanya and Amanda Mfuphi

**OVERVIEW OF Q3**

The Commission received 100 merger notifications during Q3 and finalized 112 mergers in the same period. Quarter on Quarter analysis shows that there has been a noticeable increase of approximately 2% in number of cases notified in Q3 of 2017/2018 versus Q3 of 2018/2019 financial year. The expectation is that there will be a decline in the number of merger cases filed with the Commission in Q4 in line with the previous years’ observations.

The number of mergers by decision shows that out of the finalised 112 merger cases, 96 (86%) were approved without conditions, 15 were approved with conditions (13%), 1 case was prohibited (0.8%) and no case was abandoned or withdrawn.

Quarter on Quarter analysis shows that there has been a 13% increase in the number of cases approved without conditions between Q3 of 2017/2018 and Q3 of 2018/2019 financial years. The trend is reversed in respect of the merger cases approved with conditions (16% decline) and for cases that were prohibited there has been a decline of approximately 75%.

The Division prohibited 1 case in Q3 being the merger between Ostrich Skins, Mosstrich and Klein Karoo International. This transaction is further discussed in a section that deals with key cases.

At the commencement of Q3, the Unit was monitoring 193 cases where conditions have been imposed by the Commission. At the end of Q3, 7 conditions were closed and 14 new conditions were added to the monitoring list. These statistics will be presented later below under the section dealing with conditions imposed in Q3. The number of conditional approvals in Q3 relatively increased when compared to the 9 conditional approvals in Q2. Therefore, as at the end of Q3, the Unit was monitoring 200 conditions.

In terms of future outlook, conditions in South Africa are also predicted to improve, but this will depend on political and economic conditions in the country in the next two years. In South Africa, the forecast shows that growing political risk and a sluggish economy contributed to a halving in total M&A in 2018 versus 2017. However, the forecast predicts that economy should improve in 2019 due to the impact of monetary policy easing and stronger commodity prices. Nevertheless, there seems to be sentiments in the market that suggest that there will be a decline in merger deals owing to both political and economic risks. As such, it is expected that the current trend of decline in cases is expected to persist in the next Quarter.
Q3 STATISTICS

The Commission received 100 merger notifications during Q3 and finalized 112 mergers in the same period. Quarter on Quarter analysis shows that there has been a noticeable increase of 2% in number of cases notified in Q3 of 2017/2018 and Q3 of 2018/2019 financial years. This could be alluded partly to the changes in the merger notification thresholds and this is the trend that could be expected to manifest going into Q4 with an expected decline in number of cases notified in line with the previous years’ observations. Figure 1 below shows a summary of cases notified, finalized, decided and abandoned/withdrawals between 2016/2017 till Q3 of 2018/2019 financial years.

Figure 1: Quarterly summary of mergers notified and finalised in Q3

Source: M&A’s data

The number of mergers by decision shows that out of the finalised 112 merger cases finalised in Q3, of these transactions 96 (86%) were approved without conditions, 15 were approved with conditions (13%), 1 case was prohibited (0.8%) and no case was abandoned or withdrawn.

Quarter on Quarter analysis shows that there has been a 13% increase in the number of cases approved without conditions between Q3 of 2017/2018 and Q3 of 2018/2019 financial years. The trend is reversed in respect of the merger cases approved with conditions (16% decline) and for cases that were prohibited there has been a decline of approximately 75%.

From Figure 2 below, majority of cases that were notified were intermediate merger (75), large mergers (24) and small mergers (1). It is important to note that the Commission generally receives higher number of intermediate mergers compared to the large mergers (across various periods). Therefore, with this increasing number of intermediate mergers, coupled with the tight 60 period deadline, there will be a lot of pressure on analyst in the division going forward.

Table 1 below highlights the turnaround times for the different cases finalised in Q3. As noticeable from Table 1, the Division has met turnaround times for Phase 1, Phase 2 AND Phase 3 intermediate merger cases. The Division has however not met the turn-around times for Phase 3 large mergers. This is mainly due to one case, being the Discovery Bank, which took longer to finalise owing to the delays caused by the merging parties.

For intermediate mergers, the following are turnaround times: Phase 1 target met at 17 days; Phase 2 at 40 days and Phase 3 at 56 days. For large mergers Phase 3, the Division did not meet the target at 158 days. This implies that in order for the Division to meet the target for the year, a lot of focus should be payed to turning around atleast 2 or more large merger cases at an average of 84 days.
**Figure 2: Q3 cases by merger category**

*Source: M&A’s construction*

<table>
<thead>
<tr>
<th>Number of cases</th>
<th>Total</th>
<th>Large</th>
<th>Intermediate</th>
<th>Small</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notified</td>
<td>100</td>
<td>24</td>
<td>75</td>
<td>1</td>
</tr>
<tr>
<td>Finalised</td>
<td>112</td>
<td>31</td>
<td>79</td>
<td>2200</td>
</tr>
<tr>
<td>Approved without conditions</td>
<td>96</td>
<td>26</td>
<td>68</td>
<td>0</td>
</tr>
<tr>
<td>Approved with conditions</td>
<td>15</td>
<td>50</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>Prohibitions</td>
<td>10</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Abandoned</td>
<td>10</td>
<td>0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Table 1: Summary of average turnaround times, Q3.**

<table>
<thead>
<tr>
<th>Turnaround times</th>
<th>Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase 1</td>
<td>17</td>
</tr>
<tr>
<td>Phase 2</td>
<td>40</td>
</tr>
<tr>
<td>Phase 3 intermediate</td>
<td>56</td>
</tr>
<tr>
<td>Phase 3 Large</td>
<td>158</td>
</tr>
</tbody>
</table>

*Source: M&A’s construction*

**KEY CASES IN Q3**

**MERGER BETWEEN K2018239983 (SOUTH AFRICA) PROPRIETARY LIMITED AND THE BUSINESS OF HERNIC FERROCHROME (PTY) LTD**

The Competition Commission (Commission) recommended to the Competition Tribunal (Tribunal) that the large merger whereby K2018239983 (South Africa) Proprietary Limited (Newco) intends to acquire the entire shareholding of Hernic Ferrochrome (Pty) Ltd (in business rescue) (Hernic). Upon implementation of the proposed transaction, Newco will control Hernic.

Newco is a wholly-owned subsidiary of Samancor Chrome Limited (Samancor). Samancor is a vertically-integrated producer of ferrochrome in that it conducts upstream activities in relation to the mining of chrome ore and downstream activities in relation to the smelting of chrome ore to produce ferrochrome. Samancor also holds interest in a Joint Venture (JV) which produces electrode paste, an input in the production of ferrochrome and other ferro-alloys. The primary target firm, Hernic is also a vertically-integrated producer of ferrochrome in that it also mines chrome ore and platinum group metals and also produces ferrochrome.

The Commission found that the proposed transaction raises both horizontal and vertical overlaps. Samancor and Hernic are both involved in the upstream market for the mining of chrome ore and the downstream market for the smelting of chrome ore to produce ferrochrome. In addition, the proposed transaction gives rise to vertical integration in relation to electrode paste, an essential input in the production of ferrochrome. Samancor is a party to a 50/50 JV with Ferroveld Partnership for the production and distribution of electrode paste.

The Commission found that the merged entity was unlikely to exert market power in any of the relevant markets as post-merger, the merged entity will continue to face competition from Glencore, Assore, Tharisa, a number of smaller mines in South Africa and from mining companies based in Kazakhstan, China and Finland. In relation to the vertical overlaps, the transaction is unlikely to raise any foreclosure concerns. In all, the Commission’s investigation found that the proposed merger is unlikely to result in a substantial prevention or lessening of competition in any of the relevant markets.

However, the Commission found that the proposed transaction raises public interest concerns. These concerns relate to the negative impact of the merger on employment and adherence to Social and Labour Plans (SLPs). The public interest concerns were raised by third parties such as the National Union of Metal Workers of South Africa (NUMSA) and Greater Lonmin Community (GLC). These relate to the negative impact of the merger on employment as well as the SLPs. The main concerns are discussed in more detail below.
Impact on employment

The Commission received concerns from the trade union, NUMSA. NUMSA was concerned that the proposed merger would result in retrenchments. The Commission noted that the merging parties submitted that there will be no job losses as a result of the proposed transaction. On the contrary, the proposed transaction will result in job savings as Hernic is under business rescue and absent the merger is likely to be liquidated. The Commission was therefore of the view that the proposed transaction will have a positive effect on employment as it will prevent the possible liquidation of Hernic and will save some of the jobs in Hernic, which would have otherwise, without the merger, possibly be lost.

Nonetheless, in order to secure the jobs of the unskilled employees of Hernic, the Commission imposed a moratorium on retrenchments for a period of 12 months from implementation date of the proposed transaction. The Commission was satisfied that the 12 month moratorium period is justifiable in light of Hernic being in business rescue and the likelihood to liquidate in the absence of the proposed transaction. The merging parties were amenable to this condition.

Other public interest issues

The Commission received concerns from GLC. GLC’s main concern was that both Samancor and Hernic have failed to comply with the Social and Labour Plans (SLP) as per the Department of Mineral Resources (DMR) regulations. Further, GLC submitted that both the merging parties have also failed to implement a large portion of their SLP commitments. The GLC wanted to understand what will happen to Hernic’s current and upcoming SLP obligations post-merger. In this regard, GLC wanted to know whether Hernic’s current and upcoming SLP obligations will be transferred to the acquiring firm and how the merged entity will ensure compliance with the SLP.

The Commission is of the view that compliance with the SLP by Hernic and/or the merged entity is critical. Moreso, the communities in areas where Hernic’s operations are located are likely to suffer the most in the event that the merged entity does not comply with its SLP obligations. The Commission therefore found it necessary that a condition be imposed that seeks to ensure that Hernic and/or the merged entity does not renege on its SLP requirements.

Ostrich Skins (Pty) Ltd (Ostrich Skins), Mosstrich (Pty) Ltd (Mosstrich) and Klein Karoo International (Pty) Ltd (KKI)

The Commission has prohibited the intermediate merger between Ostrich Skins, Mosstrich and KKI. KKI and Mosstrich are both active in the production of ostrich meat, leather and feathers. KKI and Mosstrich have two abattoirs each at which they slaughter ostriches and obtain ostrich meat, raw feathers and skin. Both merging parties have ostrich meat processing facilities and tanneries.

The Commission found that the production and supply of ostrich meat constitutes a separate market from other types of red meat such as beef and lamb. The Commission found that ostrich meat is considered to be a healthier alternative to red meat as it is leaner compared to other types of red meat. Ostrich meat serves the needs of customers who are looking or a healthier alternative to other types of red meat such as beef and lamb. As such, the Commission found that ostrich meat is in a separate market. The Commission also found a separate market for the production and supply of ostrich leather. With regards to ostrich feathers, the Commission identified an upstream market for the production and supply of unprocessed feathers and a downstream market for the production and supply of processed feathers.

The Commission found that the merger is likely to result in unilateral effects in the market for the production and supply of ostrich meat. The Commission found that the merged entity will have combined market share in excess of 90% in South Africa post-merger. In effect, the proposed merger is a merger-to-monopoly in the ostrich meat market and the Commission found that the merged entity will likely be able to exercise significant market power post-merger. The remaining players in this market are relatively small and are unlikely to sufficiently constrain the merged entity.

The Commission found that prices for ostrich meat are likely to increase post-merger as the merger will effectively eliminate competition from Mosstrich. Further, post-merger customers will have limited bargaining power due to the loss of competitive rivalry between the merging parties. In addition, the barriers to entry in this market are high. The Commission received a number of concerns from third parties in this market who raised similar concerns as alluded to above. In all, the Commission found that the proposed merger is likely to result in a substantial lessening of competition in the ostrich meat market in South Africa.

The Commission found that for the market for the production and supply of ostrich meat, the merging entity will likely be in a position to exercise market power post-merger. However, as ostrich leather is mainly exported, it is therefore unlikely that there will be significant competition harm to customers in South Africa.

With regards to ostrich feathers, the Commission found that the merging parties are likely to foreclose downstream processors of feathers post-merger since they will likely have the ability and incentives to do so. There were a number of concerns received from third parties in this regard.

The Commission also found that the proposed transaction may lead to a chilling of competition through coordination in the markets for the production and supply of ostrich meat as well as ostrich feathers due to the prevalence of common shareholdings and structural links among players in the market.

When all the factors above are taken into account, the Commission found that the proposed merger results in a substantial lessening of competition. There were no sufficient efficiency, technological or pro-competitive justifications or workable remedies submitted that alleviate the concerns arising. For this reason, the Commission prohibited the proposed transaction.

COMPLIANCE AND IMPACT OF REMEDIES IMPOSED IN Q3

In this financial year, the Mergers Notification Unit (the “Unit”) had identified 17 conditions that were due for closure. At the end of Q3, the Unit had closed 7 conditions. The Unit dealt with 1 investigation for an alleged breach in Q3, which was finalised in the same quarter wherein the Unit found that there was no breach of conditions. This report will highlight the number of conditions closed at the end of Q3 as well as the new conditional approvals in Q3.

(a) Monitoring Pending Conditions

At the commencement of Q3, the Unit was monitoring 193 cases where conditions have been imposed by the Commission. At the end of Q3, 7 conditions were closed and 14 new conditions were added to the monitoring list. These statistics will be presented later below under the section dealing with conditions imposed in Q3. The number of conditional approvals in Q3 relatively increased when compared to the 9 conditional approvals in Q2. Therefore, as at the end of Q3, the Unit was monitoring 200 conditions.
(b) Closing of lapsed conditions

In the Mpact Limited and Remade Holdings (Pty) Ltd and The Property Companies merger, the conditions required the merging parties to comply with the terms of the supply agreements it concluded with certain suppliers. In addition, the conditions required the merging parties to not retrench any employees for a period of 2 years from the implementation date. The compliance affidavits submitted by the merging parties indicate that they have complied with the terms, as they complied with the terms of the supply agreements and the merging parties did not retrench any employees for a period of 2 years. As such, the Commission was of the view that the merging parties complied with the Conditions. Consequently, the Commission has terminated the conditions.

In the SeReli Holdings (Pty) Limited, Free State Petroleum Distributors (Pty) Ltd and Metabis Properties (Pty) Ltd merger, the conditions required the acquiring group to divest of petroleum retail licences (Divestment Business) within 12 months of the approval date but prior to the implementation of the merger. The compliance reports submitted by the merging parties confirmed that the acquiring group disposed of the Divestment Business to an independent third party within 12 months of the approval date. The merging parties further submitted the signed disposal agreement to the Commission. As such, the Commission was of the view that the merging parties complied with the Conditions. Consequently, the Commission has terminated the conditions.

In the Peugeot S.A. and General Motors LLC In Respect of the Opel Business merger, the conditions placed an obligation on the merging parties to notify the acquisition by Isuzu Truck South Africa of the Isuzu light commercial vehicle business conducted by GMSA and the acquisition by Peugeot SA of the indirect control of General Motors business. In addition, the conditions prohibited any retrenchments related to those transactions until the transactions were notified and approved by the Commission. The merging parties notified the Isuzu transaction on 22 August 2017 and the Peugeot SA transaction was notified on 30 August 2017. The Commission approved these transactions on 22 November 2018. Further, there were no retrenchments as required by the Conditions. As such, the Commission was of the view that the merging parties complied with the Conditions. Consequently, the Commission has terminated the conditions.

In the Schmitz Cargobull AG and GRW Holdings (Pty) Ltd AND GRW Sales (Pty) Ltd merger, the conditions required the merging parties to allocate at least 30% of its procurement spend to local suppliers for a period of twelve (12) months on reasonable commercial terms. The compliance affidavit submitted by the merging parties confirmed that its local procurement spend was at 49%, which was more than the required 30% by the Conditions. As such, the Commission was of the view that the merging parties complied with the Conditions. Consequently, the Commission has terminated the conditions.

In the Super Group Trading (Pty) Ltd and Corsair Logistics (Pty) Ltd merger, the conditions require the merging parties to ensure that Corsair to continue using the services of the small medium sized enterprises (SMMEs) in its freight forwarding and clearing services. On 27 September 2018, the merging parties’ legal representatives informed the Commission that the merger was never been implemented and submitted the Form CC 6 Notice of Abandoned Merger to formally abandon the merger. As such, the Commission found that the conditions are not applicable or legally enforceable as the merger was never implemented and formally abandoned. Consequently, the conditions, in turn, fall away and have been terminated.

In the AFGRI Operations Limited and Pride Milling Company (Pty) Ltd merger, the conditions required the merging parties to notify the Commission the acquisition of sole control on Pride Milling (Tranche B Sale) by 1 April 2018. On 14 May 2018, and in response to the Commission, the merging parties’ legal representatives informed the Commission that AFGRI did not implement the merger in its entirety and as such submitted the Form CC 6 Notice of Abandoned Merger to formally abandon the merger. As such, the Commission found that the conditions are not applicable or legally enforceable as the merger was never implemented and formally abandoned. Consequently, the conditions, in turn, fall away and have been terminated.

In the Hebei Iron & Steel Group Co. LTD and Durfecto International Trading Holding S.A. merger, the conditions required Hebei to not retrench any employees as a result of the transaction and it was further required to invest a certain amount into its local steel plant. The various compliance reports submitted by the merging parties confirmed that Hebei exceeded the investment commitment made in terms of the conditions and the reports confirmed that the merging parties did not retrench any employees as a result of the merger. As such, the Commission was of the view that the merging parties complied with the Conditions. Consequently, the Commission has terminated the conditions.

(c) Investigations on potential breach of conditions

Regent / Hollard

On 12 June 2018, the Commission received a complaint from CMC regarding a potential breach of the conditions. The complainant alleges that the merged entity has breached the conditions by failing to honour the supply agreements with CMC. The Unit has engaged with both CMC and the merging parties in writing regarding the breach and both Imperial and Regent submit that they have not breached the Conditions. The parties further informed the Commission that CMC has brought the same complaint before Arbitration in terms of the contract. Following the investigation, the Unit recommended to the Commission Meeting that the merged entity had not breached Conditions because the products complained of by CMC are now owned by the Imperial Group. The Commission Meeting accepted the Unit’s recommendation and the complaint has been closed.

(d) Conditions imposed on cases

During Q3, 14 (fourteen) cases were approved by the Commission or recommended for approval by the Competition Tribunal, subject to conditions. These cases are depicted in Table 1 below.
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Primary Acquiring Firm</th>
<th>Primary Target Firm</th>
<th>Market</th>
<th>Condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018Jul0052</td>
<td>Ekapa Mining (Pty) Ltd</td>
<td>Crown Resources (Pty) Ltd</td>
<td>Mining</td>
<td>Public Interest: Employment – Restriction on the number of retrenchments to 10 employees for a period of 2 years. The merging parties are required to re-instate 7 employees that were retrenched pre-merger approval. The Merging parties are also required to provide in-house portable skills to the retrenched 10 employees.</td>
</tr>
<tr>
<td>r2018Jul0035</td>
<td>Neopak (Pty) Ltd</td>
<td>APL Cartons (Pty) Ltd</td>
<td>Manufacturing</td>
<td>Public Interest: Employment – Restriction on the number of retrenchments to 29 employees for a period of 2 years. The merging parties are also obligated to set up a development fund to either re-skill the retrenched employees or provide them with seed capital to set up a small business.</td>
</tr>
<tr>
<td>2018Aug0051</td>
<td>Eurolux (Pty) Ltd</td>
<td>Radiant Group (Pty) Ltd</td>
<td>Wholesale</td>
<td>Public Interest: Employment – Restriction on the number of retrenchments to 25 employees for a period of 2 years.</td>
</tr>
<tr>
<td>2018Jul0024</td>
<td>K2018239983 (SA) (Pty) Ltd</td>
<td>The business of Hermic Ferrochrome</td>
<td>Mining</td>
<td>Public Interest: Employment – Moratorium on retrenchments for a period of 1 year.</td>
</tr>
<tr>
<td>2018Sep0029</td>
<td>Canyon Resources (Pty) Ltd</td>
<td>Union Fenose South Africa Coal (Pty) Ltd</td>
<td>Mining</td>
<td>Public Interest: Employment – Restriction on the number of retrenchments to 8 management employees.</td>
</tr>
<tr>
<td>2018Sep0037</td>
<td>Tourvest Financial Services (Pty) Ltd</td>
<td>Travelex Africa Foreign Exchange (Pty) Ltd</td>
<td>Finance</td>
<td>Public Interest: Employment – Restriction on the number of retrenchments to 14 employees for a period of 2 years. The merging parties are also obligated to set up a training fund to re-skill any unskilled retrenched employees.</td>
</tr>
<tr>
<td>2018Jul0058</td>
<td>IAPEFE Education (Pty) Ltd</td>
<td>RZT Zelpy 4472 (Pty) Ltd</td>
<td>Education</td>
<td>Self-monitoring: Behavioural: Additional Acquisitions – Should the Second Tranche be implemented within a period of 24 months from the Approval Date, IAPEFE shall inform the Commission of this implementation within 15 Business Days thereof by way of an affidavit deposed to by the Managing Director of Investec Asset Management, Guernsey Limited. Should the Second Tranche be implemented after a period of 24 months from the Approval Date, IAPEFE shall notify the Commission of its intention to acquire the Second Tranche, in the form of a new merger filling in the form prescribed by the Competition Act, provided that at the time the relevant merger notification thresholds are met.</td>
</tr>
<tr>
<td>2018Jul0020</td>
<td>Country Bird Holdings (Pty) Ltd</td>
<td>Opti Agri (Pty) Ltd</td>
<td>Manufacturing</td>
<td>Public Interest: Employment – The target firm will use reasonable endeavours to conclude a Recognition Agreement with NUFBWSAW within 90 (ninety) Days of the Approval Date, granting NUFBWSAW organisational rights at the Target Firm based on the same thresholds and related rights which apply to the main agreement of the grain industry bargaining council. Within 30 (thirty) Days of the Implementation Date, the acquiring firm shall initiate the transfer of the Affected Employees to the Alexander Forbes Retirement Fund.</td>
</tr>
<tr>
<td>Case Number</td>
<td>Primary Acquiring Firm</td>
<td>Primary Target Firm</td>
<td>Market</td>
<td>Condition</td>
</tr>
<tr>
<td>-------------</td>
<td>------------------------</td>
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<td>-----------</td>
</tr>
</tbody>
</table>
| 2018Aug0020 | Westinghouse Air Brake Technologies Corporation | The transportation unit of General Electric Company | Manufacturing | Public Interest: Employment – Moratorium on retrenchments for a period of 2 years.  
Public Interest: Effect on Industrial Sector or Region – The merged entity is required to provide any support or maintenance on its radio distributed power systems that have been supplied by Wabtec to Transnet Freight Rail on its locomotives for the lifespan of those locomotives (15 years). |
| 2018Aug0050 | Leroma Investment (Pty) Ltd | The Caltex Mpumalanga South Business of Royale Energy (Pty) Ltd | Wholesale | Behavioural: Restraint Clause – The conditions reduced the restraint period from 10 years to 5 years. |
| 2018Sep0051 | Independent Institute of Education (Pty) Ltd | Monash South Africa | Education | Public Interest: Employment – Restriction on the number of retrenchments to 50 employees for a period of 2 years.  
The merging parties shall provide the retrenched employees the right of first refusal should there be any employment opportunities within the merged entity. |
| 2018Jun0035 | Robor (Pty) Ltd and Masteel Service Centres South Africa (Pty) Ltd | Masteel in respect of its tubes and pipes business (being acquired by Robor) and Robor (being acquired by Macsteel) | Manufacturing | Public Interest: Employment – Restriction on the number of retrenchments to 311 employees.  
The merging parties are required to fill any vacancies within the merged entity with the retrenched employees who have the required qualifications, skills, know-how and experience.  
The merging parties shall offer the retrenched employees re-employment commensurate with their qualifications, skills, know-how and experience, in the event that employment opportunities avail themselves for a period of 3 (three) years from the implementation date.  
The merging parties are required to comply with the provisions of the New Consolidated MEIBC Main Agreement in as far it is applicable to the Merging Parties and remains in force and effect. |

Source: Competition Commission

Table 2 above indicates that of the 14 cases, 10 had public interest conditions and 4 had competition conditions. Of the 10 public interest conditions, 9 conditions related purely to employment, while the remaining 1 condition was a combination of an employment condition and a condition on the impact on a particular sector or region. All 4 competition conditions related to behavioural conditions. Of the 4 competition conditions, 2 related to the prohibition of information exchange and cross-directorships, 1 related to the reduction of a restraint of trade clause while the remaining condition related to the merging parties notifying the Commission of additional acquisitions.

**FUTURE OUTLOOK**

Conditions in South Africa are also predicted to improve, but this will depend on political and economic conditions in the country in the next two years. Further, economic concerns, the threat of another credit rating downgrade, issues around service delivery, as well as the fact that South Africa is close to its next election means that investors are also holding back, adopting a “wait and see” approach. There are also two major political issues causing uncertainty and affecting investment confidence and appetite, land reform and national health insurance. Within certain sectors there are issues as well. For example, mining sector M&A in South Africa has died down considerably due to regulatory uncertainty as well as the plummeting global commodity prices.
On 16 August 2018, the Constitutional Court (ConCourt) heard the matter between the Commission and HCI/Tsogo. On 01 February 2019, the ConCourt handed down its judgment against the Commission as set out below.

Background

In 2017, HCI sought to increase its shareholding in Tsogo to more than 50%. HCI already exerted de facto control over Tsogo pursuant to an unconditional prior merger approval issued by the Tribunal in 2014. The increase in shareholding would be in the form of the restructuring and consolidation of all of HCI’s gaming interests (other than its sports betting and lottery interests) owned indirectly by one of its subsidiary companies (Niveus) under Tsogo through the transfer of gaming to Tsogo.

Prior to effecting this transaction, HCI approached the Commission requesting an advisory opinion confirming whether the proposed consolidation of HCI’s gaming interests under Tsogo would constitute a notifiable merger.

In issuing the advisory opinion, the Commission identified two issues, namely; whether or not the proposed internal restructuring would amount to a change of control and whether or not the change of control was already considered in the merger decision issued by the Tribunal in 2014.

Further, the Commission noted in its advisory opinion, the standard disclaimer setting out that the advisory opinion, “…does not constitute a decision or a finding by the Commission as to whether or not the proposed transaction constitutes a notifiable merger as defined in section 12 of the Act. It merely serves as a guide on the approach the Commission is likely to adopt in assessing the matter. The Commission ordinarily needs to conduct an investigation before it makes a decision.”

The Commission concluded, in the advisory opinion, that the proposed transaction by HCI crossed “a bright line” by acquiring control in terms of section 12(2)(a) of the Act and was, therefore, notifiable.

HCI and Tsogo disagreed with the Commission’s advisory opinion and subsequently approached the Tribunal on an urgent basis for an order declaring that the proposed transaction does not require notification and approval by the competition authorities. The Commission opposed the application.

Decision of the Tribunal

In issuing its decision, the Tribunal considered, inter alia, the implications of sections 27(1) and 58 of the Act and concluded that:

- It did not have jurisdiction to consider whether or not a merger falls within the ambit of the Act as this is only triggered once notification of the merger transaction had been given to the Commission
- It does not have the power to grant declaratory relief as the merger was not before it
- The Commission’s advisory opinion is not binding

Decision of the CAC

HCI and Tsogo appealed the decision of the Tribunal to the Competition Appeal Court (CAC) and asked that the CAC consider whether or not:
The Tribunal had jurisdiction over the matter.

An acquiring company, having already obtained prior merger approval from the Commission to acquire sole control of an entity, must again obtain merger approval before entering into a subsequent transaction with that entity.

In overturning the decision of the Tribunal, the CAC concluded, that the powers conferred on the Tribunal in terms of sections 27(1) and 58 are wide enough to include a declaratory order and the Tribunal has in other instances assumed such jurisdiction to grant declaratory orders.

The provisions of section 62 of the Act confer exclusive jurisdiction on the Tribunal and CAC on issues falling within their respective jurisdictions. Therefore, once within this ambit and in the event the Tribunal declines jurisdiction over a matter, a party would not be able to approach the High Court for declaratory relief, depriving that party of the right to access courts, as enshrined in the Constitution.

The CAC held that the Tribunal's jurisdiction was triggered despite the fact that the merger had not been notified in terms of section 13A of the Act. Given this, the CAC went on to consider whether or not the declaratory ought to have been exercised in favour of the merging parties. In considering this, the CAC noted that section 12(2) does not list different kinds of control but simply illustrates the different ways in which control may be acquired.

Once de facto control has been acquired in terms of any one of those examples under section 12(2), a party need not again notify and seek approval from the Commission for the transaction when control is subsequently acquired in one of the other ways. Merger approval is thus a “once-off affair”.

Given that merger approval had already been granted to HCI in 2014 for the acquisition of sole de facto control over Tsogo, any subsequent increase in shareholding will not constitute a notifiable merger.

**Decision of the ConCourt**

The Commission appealed the decision of the CAC to the ConCourt. In relying Tribunal's Ethos' decision, the ConCourt noted that section 12(a) of the Act is an example of the “bright line” where de jure control is acquired, as it results in the beneficial ownership of more than one half of the issued share capital of a firm. The ConCourt went on further to note that this however, “…does not…mean that the other instances of control listed in sub-paragraphs (b)-(g) do not also draw a so-called “bright line” they are just not considered as bright and, in the instance of section 12(2)(g), “anything but bright”. Whether the bright lines appear in the obvious instance of de jure control contemplated in section 12(2) (a) or in terms of the “catch all” in section 12(2)(g), the lines set to trigger notification are couched sufficiently wide in order to allow for the Commission’s wide investigating powers.”

In agreeing with the CAC, the ConCourt held that the acquisition of control is a once-off affair for which notification is only required upon the initial acquisition. The implication of this is that once the Commission has been notified in terms of any of the forms of control under section 12(a)-(g) of the Act and subsequently approves this merger, it should not be notifiable again.

However, the ConCourt went on to qualify the absoluteness of this principle by setting out that, “...the once-off principle should not be understood to shackle the Commission from investigating where it suspects potential irregularities or is privy to information in a new economic context.”

This finding was premised on the fact that in 2014 HCI/Tsogo gave undertakings to the Commission on how the transaction will be implemented and the likely impact on public interest issues. To this end, the ConCourt held that sections 15 and 16 of the Act, confers on the Commission powers to recommend the revocation of a merger approval based on a breach of commitments or conditions.

Therefore, the Commission would be entitled to investigate the impact of the 2017 transaction should it have an effect on the “assurances” that the HCI/Tsogo made in relation to 2014 transaction and public interest considerations.

In terms of the declaratory order, the ConCourt held that there was a live dispute before the Tribunal between the Commission and HCI/Tsogo based on the contents of the advisory opinion. Given this, the Tribunal had the jurisdiction to consider the application for declaratory relief.

This matter had a broader impact on the work of the Commission in relation to the nature of advisory opinions and whether or not they can be relied upon by parties to institute proceedings before the Tribunal where they disagree with the contents of the Commission’s advisory opinion. This very question led to the Commission suspending its advisory opinion services pending the outcome of the decision of the ConCourt. To this the ConCourt stated, at paragraph 87, “…no special status should be attached to an advisory opinion. Although I agree that an advisory opinion has no binding force on the Commission, it still, as the Competition Appeal Court pointed out with reference to Seagram reflects the views of the Commission on whether a transaction constitutes a notifiable merger. In Bulmer, the Tribunal likewise agreed that the distinction between an advisory award and a decision is “highly artificial and without substance.”

Reading this, it appears that the issuance of advisory opinions by the Commission has legal implications that can be the basis to institute proceedings before the Tribunal and beyond.

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2 Ethos Private Equity Fund IV v The Tsebo Outsourcing Group (Pty) Ltd Case No: 30/LM/June03
In January this year the Tribunal found the ticket distribution company, Computicket (Pty) Ltd, guilty of abuse of dominance and ordered the company to pay an administrative penalty of R 20 000 000 (Twenty Million Rand).

The Tribunal found that Computicket’s exclusive agreements with inventory providers (such as theatres, buses, events companies, etc) had resulted in anticompetitive effects during the period 2005 to 2010.

The Commission was able to show that the agreements resulted in foreclosure of the market to effective competition.

The Tribunal accepted evidence concerning supra competitive pricing effects, a decrease in supply by inventory providers, a reluctance by Computicket to timeously make use of available advances in technology and innovation and a lack of choices for end consumers, all of which cumulatively established the anti-competitive effects of the agreements.

The Tribunal furthermore found that Computicket was unable to demonstrate that its exclusive agreements were justified based on efficiency grounds.

The matter was referred to the Competition Tribunal in 2010, although the hearing of this matter only commenced in October 2017.

Between 2008 and 2009 the Commission received five complaints from Strictly Tickets, Artslink, Going Places, TicketSpace and Ezimidlalo Technologies (the complainants) against Computicket. The complainants alleged that Computicket engaged in anti-competitive practices by concluding exclusive agreements with inventory providers for the provision of outsourced ticket distribution services for the entertainment industry which covers events such as sports, cinemas, theatres, festivals and live events.

The Commission consolidated the complaints into a single case as all the complaints raised similar allegations and were against the same respondent.

On 30 April 2010 the Commission referred the case to the Tribunal on the basis that the exclusive agreements between Computicket and inventory providers contravened section 8(d)(i) alternatively section 8(c) and/or section 5(1) of the Competition Act No. 89 of 1998, as amended (“the Act”).

On 3 October 2018, the Commissioner amended the initiation to include Shoprite Checkers, Computicket’s holding company, as the second respondent. In December 2018, the Commission referred this matter to the Tribunal for prosecution.

The Tribunal found that Computicket’s exclusive agreements with inventory providers (such as theatres, buses, events companies, etc) had resulted in anticompetitive effects during the period 2005 to 2010.

The Commission was able to show that the agreements resulted in foreclosure of the market to effective competition.
In December 2018, the Commission referred to the Tribunal (Tribunal) for prosecution ticket distributors, Computicket (Pty) Ltd (Computicket) and Shoprite Checkers (Pty) Ltd (Shoprite Checkers), for anticompetitive conduct.

The two companies have been charged with signing and enforcing exclusive agreements in contravention of the Competition Act.

These agreements, with anti-competitive features, were concluded by Computicket with inventory providers in the entertainment industry from 2013 to date. In terms of the terms of the agreements, Computicket is appointed as the sole provider of ticketing services to the inventory provider or customer in question.

In 2005, after the acquisition of Computicket by Shoprite Checkers, Computicket changed the duration of its exclusive contracts to a standard period of three years. The exclusive agreements are staggered in respect of when they were signed and in respect of when they expire.

In these agreements, Computicket has the ability to price discriminate between its large and small inventory provider customers. The contractual terms of the agreements extend the foreclosure in that third parties, who are not necessarily contracted with Computicket, are required to deal with Computicket, to the exclusion of Computicket’s competitors, in the event that such third parties contract with Computicket’s customer.

Computicket’s larger customers are able to negotiate better rates from Computicket than smaller customers, based on their size. This allows Computicket to isolate the competitive pressure arising from those inventory providers who may find the option of self-supply more attractive. The Commission has asked the Tribunal to impose an administrative penalty of 10% of Computicket’s and Shoprite Checkers’s annual turnover.

BACKGROUND

On 18 June 2013 the Commission received a complaint lodged by Twango (Pty) Ltd, trading as Groupon South Africa (“Groupon”). The complaint was lodged in terms of section 49B(2)(b) of the Act. Groupon alleged in its complaint that Computicket has exclusive contracts with the majority of theatres, theatre owners, producers and event organisers in the South African entertainment industry.

In particular, Groupon alleged, inter alia, that Computicket’s contracts with these inventory providers contain a clause that prevents or restricts the inventory providers from utilising the services of any other ticket distributor and marketing firm for the duration of the contract with Computicket.

On 09 May 2014, before expiry of the investigation period in terms of section 50(5) of the Act, Groupon agreed to an extension of the investigation period up to and inclusive of 31 December 2014.

On 11 September 2014, Groupon withdrew its complaint in terms of Rule 16(1) of the Rules for the Conduct of Proceedings in the Competition Commission (“the Commission Rules”). Following Groupon’s
withdrawal of the complaint, the Commission took a decision, in terms of Rule 16(2) of the Commission Rules, to continue investigating a complaint against Computicket.

As such and on 20 November 2014 the Commission initiated a complaint against Computicket in terms of section 49B(1) of the Act, read with Rule 16(2) of the Commission Rules, for an alleged contravention of sections 8(d)(i), 8(c) and 5(1) of the Act.

On 3 October 2018 the Commissioner amended the complaint to include Shoprite Checkers in the initiation.

The initiation, as amended, in summary, alleges that Computicket has entered into exclusive agreements with the majority of the inventory providers in the South African entertainment industry. Further, the agreements contain a clause that forbids the inventory providers from utilising services of any alternative ticket distributor and marketer, whilst contracted with Computicket.

Pursuant to its investigation of the complaint, the Commission concluded that a prohibited practice had been established on the part of Computicket and Shoprite Checkers in contravention of section 8(d)(i) and alternatively section 8(c) of the Act. The Commission referred the complaint to the Tribunal in terms of section 50(1) of the Act.

The period of the conduct that is the subject of the complaint referral begins in January 2013 and is alleged to be continuing.

BASIS OF THE REFERRAL

This referral concerns the lawfulness of exclusive agreements imposed by Computicket and Shoprite Checkers in respect of outsourced ticketing services to inventory providers in South Africa. The agreements that are the subject of this complaint referral are agreements concluded by Computicket with inventory providers in the entertainment industry during the period January 2013 to date. These agreements have, inter alia, the following anti-competitive features:

In terms of the contractual terms of the agreements, Computicket is appointed as the sole provider of ticketing services to the inventory provider or customer in question. Computicket has an “all or nothing” policy in terms of which it refuses to contract with any inventory providers other than on an exclusive basis. In 2005, after the acquisition of Computicket by Shoprite Checkers, Computicket changed the duration of its exclusive contracts to a standard period of three years.

The exclusive agreements are staggered in respect of when they were signed and in respect of when they expire. Computicket has the ability to discriminate between its large and small inventory provider customers during the relevant period.

The contractual terms of the agreements extend the foreclosure in that third parties, who are not necessarily contracted with Computicket, are required to deal with Computicket, to the exclusion of Computicket’s competitors, in the event that such third parties contract with Computicket’s customer.

These exclusive agreements covered 99,5% of the inventory sold by all of Computicket’s inventory provider clients. Computicket’s “all or nothing” policy in terms of which it refused to contract with any inventory providers other than on an exclusive basis, given Computicket’s incumbency advantage and the extent of its dominance over the relevant period, meant that the coverage of Computicket’s exclusivity regime was 69% on average, of the market over the relevant period. The staggered nature of the exclusivity regime exacerbated the exclusionary and anti-competitive effects of the exclusive agreements, because it inhibited new entrants from having access to the necessary stock of available ticketing inventory to enter and expand effectively in the market.

Computicket has the ability to price discriminate between its large and small inventory provider customers during the relevant period. Computicket’s larger customers are able to negotiate better rates from Computicket than smaller customers, based on their size. This allows Computicket to isolate the competitive pressure arising from those inventory providers who may find the option of self-supply more attractive.

Computicket strictly enforced the terms of its exclusive contracts over the relevant period. Agreements with the features described above, when concluded by a dominant firm, like Computicket, is likely to foreclose current and potential rivals of the dominant firm. Computicket’s exclusive contracts cover a large proportion of the relevant market.

These features of the agreement, among others, ensure that at any given point in time, competitors are unable to gain access to a sufficient customer base that would afford them sufficient scale to compete effectively with Computicket. Computicket’s and Shoprite Checker’s conduct in signing and enforcing this exclusivity regime constitutes anti-competitive conduct in contravention of section 8(d)(i), alternatively 8(c) of the Act. Computicket’s conduct foreclosed the entry and expansion of competing outsourced ticketing services providers into the market, resulting in a substantial anti-competitive effect in the market, to the detriment of both the inventory provider clients and end-consumers.

The alleged conduct by Computicket and Shoprite Checkers covers the period January 2013 to date (“the complaint period”). Computicket and Shoprite Checkers’ conduct is ongoing.

INDUSTRY BACKGROUND

Outsourced ticketing distribution is characterised by three main players: inventory providers, ticket distributors and the end-consumers. In what follows, I briefly discuss each of these market participants.

Inventory providers

Inventory providers is the collective name for firms, such as theatre owners, theatre producers, promoters, music/film production companies and festival event organisers, who provide content or seats for shows or events and who require the selling of tickets in order for end-consumers to consume the particular event or show.

In general, two channels exist in which inventory providers can sell tickets to end-consumers: firstly through outsourced ticket distribution services (or OTS) and secondly, through self-distribution/self-supply.

The self-supply channel involves the use of internally managed ticketing distribution systems.

The OTS channel mainly occurs in two distribution modes: firstly, the use of an external ticketing service provider (or ticket distributor) which manages the sales and distribution of tickets and, secondly, a business-to-business ticketing solution where the ticket distributor licenses software to inventory providers to host a sale and booking platform on the inventory provider’s own website.
Last year, the Commission granted the National Hospital Network (NHN), a co-operative venture of medical enterprises, a five year exemption commencing from 01 November 2018 to 31 October 2023.

The exemption covers collective bargaining, global fee negotiations and centralised procurement.

An exemption, effectively gives permission for applicants to contravene specific sections of the Competition Act 89 of 1998 as amended (the Competition Act).

The NHN is a non-profit company, a co-operative venture that is controlled by its members, a group of independent private hospitals who run medical establishments such as day clinics, sub-acute facilities and psychiatric facilities. These members are broadly competitors in the provision of private healthcare services.

For the last 12 years and 10 months, the Commission had granted the NHN exemption which allowed the network to engage in collective bargaining with medical schemes and medical scheme administrators on behalf of its members. In August 2017, the NHN, in addition to the collective bargaining exemption, applied for another exemption to also engage in global fee negotiations with medical schemes, administrators, the state and healthcare providers (professional associations) and to undertake collective or centralised procurement on behalf of its members.

Ordinarily, this conduct constitutes price fixing prohibited under section 4 of the Competition Act. However, the Commission may grant an exemption in terms of subsection 10(3)(b) only if the agreement or practice concerned, or category of agreements or practices concerned, amongst others, contributes to the following objective: “(ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.”

On 17 September 2017 the Commission, through a notice in the Government Gazette, invited relevant stakeholders to make submissions in relation to the application.

In granting the exemption, the Commission took into account the fact that the market dynamics in the healthcare industry largely remain the same. The sector is characterised by high levels of concentration and high barriers to entry. Overall, the Commission found that the pro-competitive gains that would arise from the exemption will enable NHN members to compete effectively in the market.

The Commission granted the exemption subject to the following conditions:

i. The NHN when entering into global fee arrangements shall limit the use of carve-outs or exclusions from these agreements and that global fees be negotiated on the premise of full risk sharing between the medical aid schemes and administrators and the providers of healthcare services. Moreover, the negotiation of global fees agreements must also include transparent performance measures; and

ii. INHN is required to submit information to the Commission on an annual basis as would be required to monitor the impact of the measures taken to meet the objective relied upon and to assess whether the NHN is meeting the objective on an on-going basis.

In addition to the above conditions, the Commission has imposed another condition requiring NHN members who do not meet the legislative criteria to be classified as either small businesses (“SMME”) or firms owned by historically disadvantaged persons (“HDP”) to transform their ownership structures within a period of 24 months in order to meet the legislative criteria as stipulated for firms owned or controlled by historically disadvantaged persons.

The conditions imposed are intended to enable the NHN to fully achieve the objectives in the exemption application and for the Commission to effectively monitor implementation.
This year the Commission has been inundated with complaints from businesses and the public with 200 new complaints already between April and December 2018. In the first quarter alone, there was an increase of 65% in new complaints as compared to the same period in the previous financial year.

In turn, by the end of the third quarter, the Commission’s screening unit completed 173 preliminary investigations, including complaints carried over from the previous financial year, 2017/18. Further the number of preliminary investigations completed also increased by 30% in the last three quarters as compared to the same period during the last financial year.

Below in Figure 1 it’s an overview of screening cases received by the Commission by the end of the third quarter of this financial year compared with the same period last financial year. The figure shows that the number of completed screening cases increased by 7.5%, from 160 cases in 2017/18 to 173 cases in 2018/19.

Out of the 173 complaints finalised by third quarter, there were 152 that were non-referred, representing 88.37%, 6 representing 3.4% were transferred to Market Conduct, 8 (4.6%) to Cartels and 3 (1.7%) to M&A for further investigation. Advocacy received 2 (1.15%) and another 2 (1.15%) were withdrawn.
Figure 2 below indicates the number of case completed in each quarter for the financial year 2017/18 and 2018/19. It is clear from the figures below that the cases completed in 2018/19 has increased by 7.5%, from 160 cases in 2017/18 to 173 cases in 2018/19.

Figure 3 and 4 below show the distribution of complaints filed with the Commission by the general public between QUARTER 1 and QUARTER 3 of this financial year. The complaints finalised between QUARTER 1 and QUARTER 3 were in the following main sectors Intermediate Industrial products, Construction and infrastructure, Information & Communication, Healthcare, Energy and Food & Agro processing. The Screening Unit found that the sectors which grew the most during this period as compared to the same period in the previous financial year were Healthcare and Construction and Infrastructure. Whilst the sectors which decelerated the most were Education and Retail.
A (A) The efficiency of the Commission between QUARTER 1 and QUARTER 3 (2018/19)

Figure 5 below shows that the TAT has been fluctuating in the last three quarters. The TAT decreased by 4.16% in quarter 2 but increased again by 20% in quarter 3. Therefore, the average TAT of complaints completed in the first three quarters of this financial year is 50.66 days.

**Figure 5: Average TAT for the Screening Unit per quarter for the period 2018/19**

Source: DCT, Screening Unit
(B) The general trends in types and sources of complaints received by the Commission

1. Healthcare

The Commission continues to receive complaints against medical schemes regarding their exclusive Designated Service Provider (DSP) arrangements. In particular, the Commission has received complaints either from individual healthcare service providers or private hospital groups whose applications for DSP have been rejected due to exclusive agreements which some medical schemes have concluded with incumbent service providers. The Commission found that some medical schemes have concluded exclusive DSP agreements with larger service providers to the detriment of smaller players in the market.

The Commission has also received a number of complaints from providers of healthcare services such as renal, pathology and dieticians. These service providers have complained that they are being prevented by certain private hospital groups from operating within the premises of the hospitals due to exclusive agreements which they have concluded with incumbent service providers. The Commission investigated these complaints as exclusionary conduct and has concluded that such agreements have the likely effect of foreclosing the relevant market by artificially raising entry barriers to potential entrants.

The Commission has since managed to resolve the majority of the complaints received in this sector.

2. Construction & infrastructure

There has been a slight shift in the kind of complaints that the Commission has received against body corporates or home owners association in the residential estates. The majority of the complaints received by the Commission in the past were from individual homeowners in the residential estates who complain about lack of choice of service providers who operate in the estates.

For example, a homeowner would file a complaint with the Commission that the body corporates or home owners association in the residential estate in which s/he lives has accredited only one estate agent to operate in the estate and that s/he is compelled to use only the accredited estate agent when intending to sell her/his property. The Commission has embarked on advocacy work to inform the body corporates about the importance of?

This does not seem to be the case anymore. It appears that most residential estates have heeded the Commission’s call to accredit sufficient number of service providers during (1) our investigation of similar complaints in the past.

On the contrary, the Commission is currently receiving complaints from service providers, particularly in the built environment who are complaining that some residential estates exclude draughtspersons and technologist from offer their services in these estates.

It should be noted that these residential estates continue to allocate work in terms of the identification of work (IDOW) rules despite the fact that the Commission has previously rejected the exemption applications brought by the Council for the Built Environment (on behalf of its professional councils) for the IDOW rules.

The IDOW rules were intended by the professional councils to create different categories of registrations and to identify work based on these categories. In rejecting the exemption, the Commission concluded that all persons registered with their respective professional councils are qualified and/or competent to perform the work and that the exclusion intended by the proposed IDOW rules is not justifiable and not based on competency or skills of the persons.

3. Automotive

The complaints received by the Commission in this sector relate to (1) the refusal by Original Equipment Manufacturers (OEMs) to allow Historically Disadvantaged Individuals (HDIs) to undertake in-warranty service and maintenance as well as auto-body repairs and (2) the refusal by OEM to allow HDIs to own OEM dealerships.

The Commission has recently published its Draft Code of Conduct for Competition in the South African Automotive Industry (the Code) for comment by stakeholders. The Code seeks to promote transformation, inclusive growth and aims to address various anti-competitive conduct that substantially prevent or lessen competition within the automotive aftermarket industry.

It will bind the various OEMs, insurers, government bodies and industry associations that become signatories to it. The Code requires the signatories to publish the terms and conditions used to assess and select service providers to become approved service providers within their network, implement specific measures to give preference to HDIs in appointments to own OEM dealerships and to undertake OEM work.

4. Other sectors

The complaints received by the Commission in other sectors such as Banking and Financial Services, Energy and Food & Agro processing relate to motor vehicle insurance claims, high electricity tariffs charged by municipalities as well as retail space in shopping centres.
The Commission has noted the article by Tim Cohen, senior editor of the Business Day, titled “Competition bill is based on dodgy numbers” published in the Business Day on 5 October 2018. In the article, Mr Cohen states that he is not “an economist or expert on competition, but a quick examination of the data suggests the notion of ‘concentration’ is either overstated or false. I wish someone would re-examine the factual premises more thoroughly and scientifically than I am able to. I might be wrong…”

In order to facilitate a more rigorous and informed debate, the Commission wishes to re-share its market concentration study which it published earlier this year as a working paper.

In order to facilitate a more rigorous and informed debate, the Commission wishes to re-share its market concentration study which it published earlier this year as a working paper.

There are a number of different ways to measure concentration. Concentration indexes measure the ability of firms to raise price above the competitive level. The first step is to define the relevant market. Market definition is a tool used to identify and define the boundaries of competition between firms. The relevant market contains the most significant competitive alternatives available to the customers whilst the relevant product market is the set of products that customers consider to be close substitutes.

The Herfindahl-Hirschman index (HHI) is the most commonly accepted measure of market concentration. The HHI takes account of the differences in the sizes of market participants, as well as their number. The HHI gives a score that can range from close to zero (when a market is occupied by a large number of firms of relatively equal size) to 10,000. The HHI takes the value of 10,000 in the monopoly case and declines as the level of concentration decreases.

For instance, the U.S. Department of Justice considers markets below 1500 to be un-concentrated; those between 1500 and 2500 to be moderately concentrated, whilst those above 2500 are classified as highly concentrated. As regards the HHI, in the UK any relevant market with a post-merger HHI exceeding 1,000 may be regarded as concentrated and any relevant market with a post-merger HHI exceeding 2,000 as highly concentrated. The Commission followed these two guidelines to identify highly concentrated markets in its study.

The study analysed 2,150 Commission merger reports from January 2009 to March 2016 in order to identify the relevant markets, estimated market shares and calculate the corresponding HHIs. The identified firms in a relevant
market together with their respective market shares form the basis of the HHI calculations.

The study finds that the average market share of the identified dominant firms in defined markets and across sectors is about 52.5%. If the sample is limited to markets with firms defined as presumptively dominant in the Competition Act the average market share, across sectors, is about 62%. Table 1 provides further information on the average market share estimated for the dominant firms in defined relevant markets identified within each sector deemed priority by the Commission.

### Table 2: Average market share estimates of dominant firms in defined markets identified across priority sectors

<table>
<thead>
<tr>
<th>Priority Sectors</th>
<th>Average market shares (entire sample)</th>
<th>Average market shares (firms defined as presumptively dominant)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information communication technologies</td>
<td>49.3%</td>
<td>55.2%</td>
</tr>
<tr>
<td>Energy</td>
<td>50.1%</td>
<td>60.8%</td>
</tr>
<tr>
<td>Financial services</td>
<td>62.2%</td>
<td>68.8%</td>
</tr>
<tr>
<td>Food and agro-processing</td>
<td>52.9%</td>
<td>60.5%</td>
</tr>
<tr>
<td>Infrastructure and construction</td>
<td>45.5%</td>
<td>52.6%</td>
</tr>
<tr>
<td>Intermediate industrial products</td>
<td>51.4%</td>
<td>63.3%</td>
</tr>
<tr>
<td>Mining</td>
<td>57.1%</td>
<td>62.0%</td>
</tr>
<tr>
<td>Other</td>
<td>51.8%</td>
<td>61.5%</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>52.4%</td>
<td>59.6%</td>
</tr>
<tr>
<td>Transport</td>
<td>57.1%</td>
<td>67.4%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>52.5%</strong></td>
<td><strong>61.6%</strong></td>
</tr>
</tbody>
</table>

The study also finds that the average HHI across the defined product markets is approximately 2,986 (see table 2). When considering the static measure of concentration across the Commission’s defined priority sectors, the study shows that all priority sectors have product markets with HHIs above 2500. The sector with defined markets that have the highest level of concentration is the Information Communication Technologies sector (at 3,539) while the financial services sector has an average HHI of 2,788.

### Table 2: Average HHI in defined markets per priority sector identified by the Commission

<table>
<thead>
<tr>
<th>Sector</th>
<th>Average HHI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information communication technologies</td>
<td>3,539</td>
</tr>
<tr>
<td>Energy</td>
<td>2,832</td>
</tr>
<tr>
<td>Financial services</td>
<td>2,788</td>
</tr>
<tr>
<td>Food and agro-processing</td>
<td>2,861</td>
</tr>
<tr>
<td>Infrastructure and construction</td>
<td>2,859</td>
</tr>
<tr>
<td>Intermediate industrial products</td>
<td>2,958</td>
</tr>
<tr>
<td>Pharmaceutical</td>
<td>3,003</td>
</tr>
<tr>
<td>Transport</td>
<td>3,254</td>
</tr>
<tr>
<td>Other</td>
<td>2,891</td>
</tr>
</tbody>
</table>

In interpreting this information, it is evident that the static level of market concentration is quite high in South African product markets. The IMF, the OECD and the World Bank have noted the lack of competition and concentration in South Africa. For example, the World Bank has twice in 2014 and 2016 found that South African manufacturing and export markets have high market concentration with a few firms accounting for the bulk of the market, including non-mineral exports where the top 5 percent of firms account for 93 percent of total non-mineral exports.

The Commission’s study is a comprehensive empirical account of the extent of concentration in product markets in South Africa. The Commission is satisfied with the methodology and analysis in identifying concentration in product markets in South Africa.

The Commission has published a working paper on the study and is available on its website at http://www.compcom.co.za/working-paper-series/
COMPETITION COMMISSION HOSTS GLOBAL COMPETITION WORKSHOP AND ANNUAL CONFERENCE

By Salma Kagee

The Competition Commission (Commission), together with the Competition and Regulation European Summer School (CRESSE) and the University of Witwatersrand hosted a joint workshop on 5-7 September 2018 presenting an in-depth view of some fundamental competition economics topics.

The programme provided attendees with insights from academia featuring globalized course content from faculty of top global universities while also providing the opportunity to engage and contribute to the forefront of the public debate in the area of competition economics, by interacting with other competition and regulatory economists.

The programme drew delegates from a broad spectrum of South Africa’s competition and regulatory economics space, including representatives from the Commission, the Competition Tribunal, private consultancies, law firms and academia.

The workshop featured three renowned, international academics: Professor Tom Ross from the University of British Columbia, Professor Yannis Katsoulacos from the Athens University of Economics and Business, and Professor Patrick Rey of the Toulouse School of Economics.

The workshop, which took place at the University of Witwatersrand’s Wits Club, kicked off with a special open seminar on Wednesday, 5th September, presented by Professor Patrick Rey. He presented a paper, co-authored with Dr Jean Tirole, entitled “Price Caps as Welfare-Enhancing Coopetition”.

In his presentation, Professor Rey noted that price caps allow firms to solve the multiple marginalisation problem in much the same way that mergers would, without stifling price competition or incentivising foreclosure as would be the case with mergers. As such, he argued that price caps can be used to enhance competition outcomes through cooperation, inspiring the adoption of the term “coopetition”.
Over the two days, the workshop programme explored fundamental topics in competition economics. Professor Tom Ross initiated the workshop proceedings with a lecture on the fundamentals of game theory for competition policy.

In his presentation, Professor Ross provided a detailed treatment on the theory and application of the types of games used in competition policy: static or simultaneous games, sequential and multi-stage games, and repeated games. Thereafter, Professor Yannis Katsoulacos presented his lecture on the fundamentals of market definition and market power. His presentation reviewed the current practice of market definition and the assessment of market power in competition enforcement, the criticisms and weaknesses of this current approach and the proposed alternatives that are recently influencing and may influence enforcement in future. Professor Patrick Rey also presented a lecture on the economics of foreclosure and highlighted the Chicago critique of this concern as well as the various responses to this critique, such as the profitability of foreclosure when products are not perfect complements.

Professor Tom Ross presented on the common methods of detecting and screening for cartels and the estimation of damages, including presenting a short video clip of the footage obtained of the Lysine cartel conspirators at work.

Professor Rey then followed with a lecture on the economics of vertical restraints, noting that these could be assessed according to purpose, namely: to solve coordination problems, to solve the double marginalization problem, and to induce retailer effort.
Thereafter, Professor Ross presented his lecture on possibly the most economics intensive of competition matters: merger review. A naturally dense topic for discussion, some of the highlights included the cross-jurisdiction comparison of safe harbours or screens of concentration levels and the exposition on empirical techniques for merger review.

Professor Katsoulacos spoke on pricing abuses, providing a detailed treatment on the two broad categories of abuse, namely exploitative abuses and exclusionary abuses. Each type of abuse contained within these categories were supplemented with a detailed discussion of case examples.

The final lecture of the workshop was jointly presented by Dr. Liberty Mncube, Yongama Njisane, Thembalethu Buthelezi and Khalirendwe Ranenyeni. The panel presented a selection of recent cases assessed by the Commission and the approach adopted in each. The cases presented included the Computicket and Uniplate exclusive dealing complaints, the proposed merger between Mediclinic South Africa and Matlosana Medical Health Services, the merger between Imerys and Andalusite Resources, and the proposed merger between Greiff and Rheem.

The Commission and CRESSE have been organising capacity building workshops for economists since 2015. These efforts reflect on the Commission’s initiatives to build relationships with the international community of competition economists to keep abreast of the latest developments in the global competition economics landscape and to improve the use of economic reasoning and economic tools in case practice.

Later in November, the Commission in partnership with the Competition Tribunal and the University of Witwatersrand hosted international policy experts, economic consultants, scholars and academics in Johannesburg for the 12th Annual Competition Law, Economics and Policy Conference. The conference focused on 20 years of Competition Law in South Africa and Key milestones, Developments and Challenges. The Minister of Economic Development, Ebrahim Patel was the guest speaker. Other speakers included Commissioner, Tembinkosi Bonakele, and competition experts from Russia, Zambia and Botswana.
Speaking at the International Competition Network (ICN) Unilateral Conduct Workshop held in South Africa at the beginning of November last year, Commissioner Tembinkosi Bonakele, said the ICN remained the pre-eminent global network of competition agencies and nongovernmental actors and forums.

He said these were critically important in building capacity, sharing insight and advancing best practice in the application of competition law across the globe.

The ICN Unilateral Conduct Working Group (UCWG) was established in May 2006, at the fifth annual ICN conference. Its primary objectives are to examine the challenges involved in analysing unilateral conduct of dominant firms and firms with substantial market power.

It also facilitated greater understanding of the issues involved in analysing unilateral conduct, and to promote greater convergence and sound enforcement of laws governing unilateral conduct. The group continues to develop a “workbook” on the analysis of unilateral conduct.

The ICN Unilateral Conduct Workbook is a compilation of the approaches used by ICN Members to analyse unilateral conduct. Each chapter explores techniques and approaches to various aspects of unilateral conduct, often by specific type of conduct.

The workbook is based on the Group’s conduct work, recommended practices on dominance, and reports on the objectives of unilateral conduct laws, assessment of dominance, and state-created monopolies.

Held at the Stellenbosch University in the Western Cape Province from 01 to 02 November, the workshop was also attended by 160 delegates from 34 countries in six continents, and with representatives from three multilateral bodies - the United Nations, the OECD, and the European Commission.

The Working Group developed an outline of topics to be addressed and drafted chapters on the Objectives of Unilateral Conduct Laws, the Assessment of Dominance/Substantial Market Power, Predatory Pricing Analysis, Exclusive Dealing/Single Branding and Tying and Bundling.

The focus of the workshop was on excessive pricing, rebates, exclusive dealing and predatory pricing. The workshop took the form of plenary sessions with interactive panel presentations and smaller breakout sessions.

Bonakele said it was a testament to the continued importance of the work of the ICN, then in its 17th year of existence; that the workshop brought together so many participants from all over the world to the southern tip of Africa.

He added that South Africa played a key role in the evolution of competition policy in the African continent, and was retained as the chair of the African Competition Forum in October 2018. “The Unilateral Conduct Workshop took place at a time when there was and still is a renewed focus in South Africa on the issues of concentration and transformation of the South African economy. 2018, marked twenty years of competition law in South Africa.

Bonakele added that it was an opportune time to reflect not only on the successes of competition law enforcement, but also on how competition enforcement can be optimised, and whether or not there was a need to re-design the legal framework in order to achieve the desired objectives of more competitive, efficient, and inclusive markets for all South Africans.

He went on to say the debates occurred in the context of the Competition Amendment Bill which was making its way through the parliamentary process and was spearheaded by the Minister of Economic Development, Ebrahim Patel. Over the past twenty years, South Africa established strong competition authorities and had achieved notable successes, having finalised more than 6200 mergers and having investigated 6 272 merger cases. The Commission finalised nearly 1000 cartel cases; more than half of which were received as a result of the Commission’s successful corporate leniency policy.
He reiterated that the Commission was seen as a leading jurisdiction in the assessment of public interest in South Africa’s merger regime and the design of innovative remedies to protect employment, increase competition, reduce barriers to entry and promote transformation.

However, the numbers showed that there were significant challenges in successfully prosecuting unilateral conduct. Since 1998, the Tribunal had considered a total of 25 unilateral conduct cases and one case of the excessive pricing of antiretroviral medication, was settled prior to reaching the Tribunal.

Of the 25 cases brought before the Tribunal, eight were consent orders; 10 contested cases were brought by the Commission and seven cases were self-referred by private parties. In the 10 contested cases brought by the Commission, the Tribunal found that the Act had been contravened in 8 cases, two of which were overturned by the Competition Appeal Court.

Of the six cases in which the finding of a contravention thus stood, 4 were against current state-owned companies (SAA and Telkom) and the other two were against firms in agricultural markets. Of the seven cases self-referred by private parties to the Tribunal, a positive finding of a contravention was made in only two cases, one of which was overturned by the Supreme Court of Appeal (Nationwide Poles) and the other (Mittal) was remitted back to the Tribunal and subsequently settled.

He said the amendments were developed against the backdrop of this difficult enforcement history and much public debate about the extent to which the standards and tests set out in the current Act constrained effective enforcement. The Amendment Bill placed renewed focus on how competition authorities could effectively address concentration and anticompetitive conduct of large firms to ensure that current and future competitors have an equitable opportunity to compete.

He added that the intention was to reinvigorate the South African economy and ensure that South Africa had the competitive dynamism needed to put it on a new and inclusive growth path.

Extensive research conducted by the Commission and the World Bank had shown that concentration has remained stubbornly high across all key sectors of the South African economy. In those circumstances, it was clear that anticompetitive unilateral conduct ought to remain one of the core focus areas of the Commission.

Additionally, South Africa was also not unique in that regard. In many developing countries with smaller markets, dominance may be more widespread – sometimes for completely understandable reasons such as economies of scale. This dominance was, of course, not a per se concern. But, it was incumbent upon competition authorities to continuously evaluate whether or not dominance was maintained through pro-competitive activity that delivered value to consumers, or whether it was maintained through exclusionary and exploitative conduct that undermined rivalry and raised barriers to entry.

In jurisdictions with a longer history of competition enforcement, the Commission had also seen continued focus on the behaviour of large firms, particularly in the technology sector where the interface between dominance, competition, privacy and personal data had increasingly come under focus, such as in cases against Google and Facebook. It was noted that in BRICS a high level panel on digital markets had been set up. The panel led by Professors Eleanor Fox and Joseph Stiglitz; including other prominent academics would be a fulcrum of competition policy for emerging economies and developing countries.

Bonakele said that to ensure that markets were open to fair and effective competition, there was a need to strengthen the ability of competition authorities to detect, investigate and effectively prosecute anticompetitive conduct, including exclusionary and exploitative conduct by large firms.

That was the reason the workshop had an explicit focus on practical, case-study based application of theoretical concepts and principles to assess unilateral conduct. The Workshop had the benefit of panel discussions by leading practitioners in competition law during the plenary sessions.
The Commission and its eSwatini counterpart, the Swaziland Competition Commission, signed a historic memorandum of understanding (MoU) to solidify relations and cooperation on competition enforcement policy between the two bodies.

The signing ceremony took place in Manzini, eSwatini on 25 June 2018.

The MoU forms part of multilateral competition initiatives, with particular attention to the fight against international hard core cartels.

The MoU aims to create favourable conditions for the development of bilateral relations; ensure conditions for the effective functioning of markets for goods and services; stress the role of competition in the effective development of the economy; and is based on the principles of equality and mutual benefit.

According to the MoU, cooperation may include the following activities in the field of competition law, enforcement and policy:

a. Providing the fullest mutual assistance possible in investigations or enforcement proceedings pertaining to violation of any laws or regulations under the scope of the MoU;

b. sharing experiences in the practical enforcement of competition law;

c. exchanging views on substantive competition policy issues;

d. doing joint work on the development of scientific and methodological research in the field of competition law enforcement and policy;

e. rendering technical assistance and exchanges of expert studies;

f. participating in the exchange of non-confidential information;

g. participating in staff exchanges; and

h. cooperating in other areas that may be jointly decided upon by the Parties.

Speaking at the signing ceremony which was also addressed by the eSwatini Competition Commission CEO, Thabisile Langa, and the Principal Secretary in the Ministry of Commerce, Industry and Trade, Robert Dlamini, Commissioner Tembinkosi Bonakele said the government and the people of South Africa and eSwatini had a shared history and long-standing bilateral relations and multilateral cooperation. Just recently, the baton of leadership of SADC moved from eSwatini to South Africa and the friendship and he envisioned the cooperation growing stronger as both parties moved forward into the future, for they were not only bound by history but by destiny too.

Mr Bonakele added that Competition regulation was not the only instrument to drive economic inclusion and change. Other interventions such as industrialisation, infrastructure and investment were equally important to achieve higher levels of growth and competitiveness.

The MoU provides for the opportunity to strengthen bilateral cooperation on cross-border mergers and cartel enforcement. Both parties recognise the cross-border nature of business between the two countries and in the neighbourhood.

As chair of African Competition Forum (ACF) and the SADC Competition and Consumer Law and Consumer Policy Committee (CCOPOLC), the Competition Commission appreciated the crucial role and contribution of eSwatini in the development of a competition law and policy regime for the region. The countries’ common interests were better served if they continued to emphasise the ‘developing country perspective’ on competition issues at regional and international multilateral platforms.

South Africa signed similar agreements with other African competition authorities including the Fair Trading Commission of the Republic of Seychelles, Namibian Competition Commission, Competition Authority of Kenya, and Competition Commission of Mauritius. The Commission also signed an agreement with SADC cooperation in the field of competition policy and law enforcement.

The signing of the MOU marked a significant milestone in the bilateral relations as competition authorities. Henceforth, the two authorities would use the opportunity presented by the MOU to ensure that they succeeded in making their respective economies competitive and inclusive for all.
Cooperation among competition authorities was an integral part of effective competition enforcement. It was for this reason that the Commission has had very close relations with its counterparts on the continent and abroad since its establishment 20 years ago.

In October 2018, the Commission participated in the biennial conference in Marrakech, Morocco. The biennial conference takes place every two years. Mauritius hosted the previous conference in 2016.

South Africa was elected chair of the continental competition body, the ACF. The body which comprises 31 members and five regional competition agencies voted for three including the chair, vice chair and the steering committee at the conference in Marrakech, Morocco.

Tunisia and Mauritius were elected vice chair. Algeria, Botswana, eSwatini, Kenya, Mauritius, Senegal, South Africa, The Gambia, Tanzania, Tunisia and Morocco were elected into the steering committee.

ACF was established in 2011 in Nairobi, Kenya by 19 founding members. ACF is an informal network of African national and multinational competition authorities. It aims to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries, in order to alleviate poverty and enhance inclusive economic growth, development and consumer welfare by fostering competition in markets, and increase investment, productivity, innovation and entrepreneurship.

The Commission has been working towards deepening cooperation in the SADC region and ensuring cross-border enforcement.

In October, the Commission hosted the SADC technical team of experts in Pretoria. Deputy Commissioner, Hardin Ratshisusu and the SADC technical team reviewed the cooperation framework on competition and consumer law and policy. Ratshisusu gave the opening remarks at the working group meeting.

The team of experts looked at two themes:
1. competition and consumer law and policies in SADC; and
2. existing forms of cooperation and collaboration within the SADC CCOPLC.

The SADC members also discussed the level of convergence in relation to the procedural and substantive provisions within the relevant laws and policies across SADC.

**OUR INTERACTIONS IN SADC**

The Commission is committed to sharing its experiences in the practical enforcement of competition law and participating in training through exchange programs. In 2019 already, the Commission has collaborated with the Fair Trading Commission Seychelles on an extensive training program. Senior Investigator, Katlego Monareng conducted the cartel program. In the program, Monareng engaged with Minister of Finance, Trade, Investment and Economic Planning, Ambassador Maurice J. L. Loustau-Lalanne and CEO, Fair Trading Commission Seychelles, Francis Lebon.

In March, Director, Mergers and Monopolies, Nomathemba Dladla and Analyst, Othusitse Oletile from the Competition Authority of Botswana took part in a one week staff exchange program in the Commissions Mergers and Acquisitions division.
<table>
<thead>
<tr>
<th>DATE</th>
<th>PLACE</th>
<th>EVENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>04 – 08 March 2019</td>
<td>Pretoria, South Africa</td>
<td><strong>Botswana benchmarking exercise</strong>&lt;br&gt;• Capacity training for Botswana a week in the Mergers division</td>
</tr>
<tr>
<td>12 March 2019</td>
<td>Pretoria, South Africa</td>
<td><strong>Signing of MOU</strong>&lt;br&gt;• Signing of Memorandum of Understanding with the World Bank (International Finance Cooperation)</td>
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<tr>
<td>13 – 15 March 2019</td>
<td>Berlin, Germany</td>
<td><strong>19th International Conference on Competition</strong>&lt;br&gt;• Size or competition – What drives innovation and investment?&lt;br&gt;• Platforms, networks, big data – Do competition authorities get it right?&lt;br&gt;• Economic theory – Ready for the digital world?&lt;br&gt;• Modern cartel enforcement - Yesterday’s success stories – Tomorrow’s failures?</td>
</tr>
<tr>
<td>15 – 16 March 2019</td>
<td>Mauritius</td>
<td><strong>OECD /Mauritius</strong>&lt;br&gt;Speaker&lt;br&gt;• Competition regimes in the African region, focussing on South Africa</td>
</tr>
<tr>
<td>18 – 22 March 2019</td>
<td>Nairobi, Kenya</td>
<td><strong>CCSA Economist support to CAK</strong>&lt;br&gt;• CAK has requested an Economist from CCSA</td>
</tr>
<tr>
<td>01 – 05 April 2019</td>
<td>Geneva</td>
<td><strong>UNCTAD IGE on E-Commerce and the Digital Economy</strong>&lt;br&gt;• Invitation to speak on “Regulatory issues and challenges”,</td>
</tr>
<tr>
<td>08 April 2019</td>
<td>Geneva</td>
<td><strong>UNCTAD-Discussion Group on International Cooperation</strong>&lt;br&gt;• Ad hoc team meeting</td>
</tr>
<tr>
<td>14 – 18 May 2019</td>
<td>St Petersburg, Russia</td>
<td><strong>St. Petersburg International Legal Forum</strong></td>
</tr>
<tr>
<td>14 May 2019</td>
<td>Cartagena, Colombia</td>
<td><strong>IBA-ICC Pre-International Competition Network Forum</strong></td>
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<tr>
<td>15 – 17 May 2019</td>
<td>Cartagena, Colombia</td>
<td><strong>ICN Conference</strong></td>
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<tr>
<td>16 May 2019</td>
<td>Cartagena, Colombia</td>
<td><strong>ACF Steering Committee meeting</strong>&lt;br&gt;• ACF Workplan&lt;br&gt;• Funding model&lt;br&gt;• AU Competition Protocol update&lt;br&gt;• ACF – WBG Benchmarking study</td>
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<tr>
<td>May 2019</td>
<td>Cartagena, Colombia</td>
<td><strong>Signing of Zambia MOU</strong>&lt;br&gt;• Signing side-lines of the ICN</td>
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<tr>
<td>23 May 2019</td>
<td>London</td>
<td><strong>Chatham House</strong>&lt;br&gt;• Speaker: Competition Policy</td>
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<tr>
<td>June 2019</td>
<td>Gaborone, Botswana</td>
<td><strong>SADC CCOPL Meeting</strong></td>
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<tr>
<td>6 – 8 June 2019</td>
<td>St Petersburg, Russia</td>
<td><strong>St. Petersburg International Economic Forum</strong>&lt;br&gt;• Meeting of the BRICS Coordination Committee on Antimonopoly Policy&lt;br&gt;• BRICS vs Big Pharma</td>
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<tr>
<td>3 – 7 June 2019</td>
<td>Paris, France</td>
<td><strong>OECD Competition Committee meetings</strong></td>
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</tbody>
</table>
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