Ten years of enforcement by the South African competition authorities

UNLEASHING RIVALRY

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1999 – 2009

Competition Commission South Africa
Competition Tribunal South Africa
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Foreword
from the Minister of Trade and Industry

The Competition Act of 1998 and the institutions established under it in 1999 were important parts of the first democratic government's agenda of economic reform. The Reconstruction and Development Programme had clearly identified a more effective competition policy regime as necessary to deal with the excessive concentration of control in the South African economy and its negative consequences for development.

Despite considerable restructuring and unbundling of firms that took place, particularly in the first five year of the Competition Act, these concerns remain today. Our economic sectors are still characterized by high levels of concentration resulting in uncompetitive outcomes which of course is a challenge for our economic development. The recent National Industrial Policy Framework identifies the need for more effective competitive rivalry in furthering industrial development. A dynamic economy implies that the returns earned by firms reward effort and innovation and not the inheritance of a strong market position from the past, or agreements with one's competitors.

In celebrating ten years of existence of our competition authorities, it is important to recognize that it is no small feat to establish such institutions from scratch. Over the period they have established a reputation for rigorous evaluation, independence and transparency. On behalf of the South African government I extend my thanks to all the staff of the institutions who have contributed to this record through their hard work and dedication.

The ten year review, however, also highlights the challenges that lie ahead. Matched against the successes are the set-backs and the areas that have not had the attention they may have deserved. In addition, the Competition Amendment Bill passed by Parliament in early 2009 gives the authorities greater powers in a number of areas. We expect these powers to be used judiciously to enable the authorities to increase their impact in line with the goals of the Act of ensuring an efficient, competitive economic environment to provide all South Africans equal opportunity to participate fairly in the national economy, to promote employment and advance the social and economic welfare of all South Africans.

Dr Rob Davies, MP
Minister of Trade and Industry

Foreword
from the Competition Commission and Competition Tribunal

This review of the first ten years of the activities of the Competition Commission and Competition Tribunal sets out how we have tackled the main areas of our work. Obviously, the authorities are not best placed to critically assess their own performance. This will doubtless be done by others. Rather, this review aims to describe the main patterns and developments, to note the key decisions and discuss their implications.

It is primarily a story about cases. Cases are our daily staple - through case investigations and hearings we learn about competition law and economics, and through decisions the jurisprudence develops. Inevitably in a review such as this there is some selectivity about what to highlight or what is given greater weight. We have sought to provide a balance between different areas, while at the same time bringing out in more detail issues such as the Commission's corporate leniency policy, which has played a very important role in cartel enforcement in recent years.

In addition, we have incorporated short reflections from some of the many participants in our history – trade unionists, business people, journalists, practitioners and past and present office bearers of the institutions. All these have added their personal perspectives to the telling of our story.

We hope you find the review interesting and illuminating.

Shan Ramburuth
Commissioner, Competition Commission

Norman Manoim
Chairperson, Competition Tribunal

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For specific cases the case numbers are given to enable the reader to obtain the relevant Competition Tribunal and Competition Appeal Court decisions from the Competition Tribunal website www.comptrib.co.za

Overview

Background

The Competition Act of 1998, which came into force on 1 September 1999, reflected the commitment of South Africa's first democratic government to strengthen the competition regime in the context of the country's highly concentrated economy. The Act made provisions to establish the Competition Commission, whose main responsibility would be investigating mergers and anti-competitive conduct, and the Competition Tribunal to rule on most cases. The Competition Appeal Court was also established. The mandate of the Competition Appeal Court is to consider any appeal of a decision or review that the Competition Tribunal has made, or confirm, amend or set aside a decision or an order that is the subject of appeal or review by the Competition Tribunal.

The objectives of the Act were articulated in line with the broad imperative of economic transformation, and are included in section 2:

The purpose of this Act is to promote and maintain competition in the Republic in order –

- *(a) to promote the efficiency, adaptability and development of the economy;*
- *(b) to provide consumers with competitive prices and product choices;*
- *(c) to promote employment and advance the social and economic welfare of South Africans;*
- *(d) to expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic;*
- *(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and*
- *(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.*

The Competition Act reflected government's commitment to strengthening the competition regime in the context of the country's highly concentrated economy

The legacy of apartheid

In 1999, the then Minister of Trade and Industry, Mr Alec Erwin, emphasised the pivotal role that the competition authorities were to play in transforming "an economy inherited in 1994 that was rigid, protected, locked up in inefficient institutions, highly monopolised and concentrated". The high levels of concentration were evident in the patterns of ownership and control of companies listed on the Johannesburg Securities Exchange (JSE). Under apartheid, a very small number of conglomerate groupings effectively dominated the economy, with estimates that companies controlled by the Anglo American Corporation accounted for 43 percent of the JSE's capitalisation in 1994 (table 1).

Under apartheid, a very small number of conglomerate groupings effectively dominated the economy

While ownership concentration has declined substantially over the past 15 years, patterns of merger activity, along with prohibited practices cases, suggest that many markets are highly concentrated

Table 1. Summary of control of JSE market capitalisation (% of total)

Group	1990	1994	1998	2002	2006	2009
Anglo American Corporation	44.2	43.3	17.4	20.2	21.0	10.6
Sanlam	13.2	10.5	11.1	6.3	2.3	1.2
SA Mutual/Old Mutual	10.2	9.7	8.8	12.0	5.5	2.8
Rembrandt/Remgro	13.6	13.0	9.0	10.0	7.8	3.8
Directors	6.7	7.0	14.4	7.4	6.7	7.7
Liberty Life/Standard Bank	2.6	7.2	9.5	6.0	3.5	4.3
Black controlled groups			9.6	3.5	5.1	7.0
Foreign (Other)	2.1	2.2	3.9	10.1	20.8	33.1
RMB/FirstRand		0.5	4.8	4.7	3.9	2.5
Sasol		1.7	2.2	3.8	4.6	4.6
Investec/Fedsure		0.4	3.3	1.9	1.2	0.8
Bidvest Group			1.0	1.0	1.0	0.8
SABMiller				4.0	5.7	5.9
State					2.0	1.5
Other/Institutions/Unallocated	7.4	4.5	5.0	9.1	8.9	13.4

Source: McGregors WhoOwnsWhom

Notes:

- Control is assessed by ***McGregors*** taking into account the various cross-holdings of shares that exist and may be associated with a relatively small direct shareholding in any given company. Once control has been allocated, the full market cap of that company is used in the calculation for comparative purposes.
- The drop in Anglo's share in 2009 is related to losing control of AngloGold Ashanti.
- The decline in Rembrandt/Remgro in 2009 is a result of unbundling British American Tobacco, whose separate listing on the JSE is linked to the rise in the Foreign percentage.
- The Black controlled companies and director controlled companies are defined by ***WhoOwnsWhom*** as those listed companies where an empowerment or directors' holding exceeds 26% with no other dominant shareholder. State controlled companies are identified on a similar basis.

The high levels of market concentration and related competition challenges are largely due to the legacy of apartheid policies, which protected major corporations and built several important industries under state ownership, including Sasol and Iscor (now ArcelorMittal SA). Trade protection was extensive, disparate, and the result of company lobbying. Most agricultural markets were regulated by control boards, while there was a government sanctioned cement cartel until 1996. The Mouton Commission in 1977 acknowledged the importance of competition issues and prompted the passing of the Maintenance and Protection of Competition Act in 1979 and the establishment of the Competition Board. However, this legislation made little impact on South Africa's competition problems. Following the end of apartheid, addressing the extent of market power became a key issue of policy debate, with competition policy reflected in the 1994 Reconstruction and Development Programme, ultimately foreshadowing the Competition Act of 1998.

The two main areas of focus of the Act are prohibited horizontal and vertical practices, and mergers

While ownership concentration has declined substantially over the past 15 years, patterns of merger activity, along with prohibited practices cases, suggest that many markets are highly concentrated and that there has been vertical integration in many supply chains[1]. This is notable in particular markets, such as food, construction, important intermediate industrial products including steel, primary chemical feedstocks, and telecommunications. Recent studies have also highlighted negative outcomes from low levels of competition in the form of high price mark-ups, which correlate with low productivity and employment growth[2].

Framing the Act and establishing Institutions

While it was largely articulated around the economic development challenges facing South Africa, the Competition Act also drew from international learning in the way the provisions were framed. Competition law develops in an international arena because of both the

[1] Chabane, N., Roberts, S. and A. Goldstein (2006) "The changing face and strategies of big business in South Africa: more than a decade of political democracy," in *Industrial and Corporate Change*, 15(3), pp. 549–547.

[2] See, for example, Aghion, P., Braun, M., Fedderke, J. (2008), "Competition and Productivity Growth in South Africa", *Economics of Transition*, 16(4), pp. 741–768.

globalisation of business and the international reach of academics and practitioners in the field. The provisions of the Act in the two main areas, of prohibited practices (covered in chapter 2 of the Act) and mergers (covered in chapter 3), drew heavily from laws in jurisdictions such as Canada, Australia and the European Union.

Prohibited practices covers restrictive practices (further distinguished as horizontal or vertical) and abuse of a dominant position, that is, unilateral conduct by a firm to exert substantial market power. A major change from the previous merger regime was the introduction of mandatory pre-merger notification relating to transactions that exceeded specified thresholds defined in terms of assets or turnover of the merging parties. This ensured that merger evaluation would be a main preoccupation of the new authorities, given the large number of transactions to be reviewed.

Setting up new institutions of this nature is a formidable challenge, and one which has certainly been met in this case. From early on, the new South African authorities established processes and developed a reputation for independence, which is reflected in the decisions described in this review. In addition, the authorities are active participants in international forums such as the OECD's Global Competition Forum, the International Competition Network and the United Nations Conference on Trade and Development's (UNCTAD) Intergovernmental Group of Experts on Competition Law and Policy. These forums involve discussion and review of the approach taken in actual cases, as well as debate of key competition issues.

The South African competition authorities also received positive reviews from the OECD in 2003 and the World Bank in 2005. An annual review of competition authorities conducted by the Global Competition Review, mainly through surveying legal practitioners, has recorded varying ratings over the decade for the South African authorities, generally placing them well in line with their peers in other industrialising countries around the two to three range (out of five). For the most recent rating for 2008, the Commission achieved a score of three and a half, placing it in the same category as Canada, Denmark, Finland, Italy, Japan, Korea, the Netherlands, New Zealand and Spain[3].

[3] http://www.globalcompetitionreview.com/features/article/16136/starratings/

Clarity about jurisdiction

From the first day, the competition authorities, and the Commission in particular, faced a large number of mergers, with many being notified in the transitional period from the previous competition regime. In addition, there was uncertainty about jurisdiction in some cases in 1999 and 2000, because of the wording in section 3(1)(d), which excluded the competition authorities from jurisdiction over "acts subject to or authorised by public regulation". This section was given a wide interpretation by the courts and threatened the jurisdictional reach of the competition authorities over many important markets. The Act was amended by the removal of section 3(1)(d) by the Competition Amendment Act (39 of 2000), with the Competition Commission given concurrent jurisdiction over competition matters in regulated markets. In respect of banking mergers, while the competition authorities have jurisdiction, the Minister of Finance is entitled to issue a certificate assuming jurisdiction over these transactions. This is the only instance in which the competition authorities' decision making power is subject to ministerial override. To facilitate the exercise of concurrent jurisdiction on competition matters with other regulatory bodies that had similar competencies, the South African Regulators' Forum was launched to discuss issues of common interest and to make sure that competition policy and other government policies would be consistently and coherently applied.

An amendment to the Act in 2000 gave the Competition Commission concurrent jurisdiction over competition matters in regulated markets

Growth in the number of competition law specialists

Another indicator of the growth of competition enforcement and regulation in South Africa is the increasing number of legal practitioners specialising in competition law. Based on a survey of the firms with specialised competition law practitioners, in 1999 there were approximately 18 legal professionals in private law firms specialising in the competition law field. By 2004, this had grown to 63, and the numbers have continued to rise over the five years to 2009, more than doubling to 158. Senior counsel is

The number of practising competition law specialists has grown dramatically since 1999

The South African competition authorities have actively contributed to the development of competition law internationally

generally briefed in most of the complex competition cases although here, briefing patterns by private parties have remained relatively narrow. The Commission has actively sought to encourage wider participation by senior counsel in competition matters, which is reflected in its wider briefing patterns.

The demand for competition practitioners in private legal practice (and, increasingly, in economics consultancies), combined with significant salary differentials has sometimes made it difficult for the Commission to attract and retain experienced staff. This is a problem experienced in many competition authorities. However, while it remains an issue of some concern, professional training provided by both the Commission and the Tribunal has mitigated the problem and the growing reputation of the authorities has begun to attract skilled practitioners to its ranks from the legal and economic professions. In 2000, the case-related professional staff of the Commission and Tribunal numbered 51. By 2009, this had grown to 81. The government has committed itself to increasing the Commission's professional staff complement.

The evolution of competition law and policy

The nature of competition law and the workings of the institutions mean that competition law and policy develop largely around cases. This is where key principles are debated and questions are framed and answered.

Competition cases are also a process of uncovering and evaluating how the real economy works, as they deal with the actual behaviour and strategies of firms, and their implications for the economy. A major strength of the competition law regime is in fact the emphasis on interrogating through evidence and witnesses how competitive dynamics actually play out in a given market and industry. Competitive outcomes are about relative prices influencing decisions to consume and supply, and about the returns derived by different participants through a supply chain, composed of producers, consumers and markets at different levels.

The cases described here also demonstrate that competition is about opportunity – to enter, expand, and reap rewards based on effort and enterprise. Conversely, anti-competitive conduct entrenches existing positions and the rewards that they yield, and results in a lack of economic dynamism and growth.

While international learning and theory is important, the authorities have repeatedly emphasised the careful case-by-case evaluation required, while taking into account the South African realities. Key debates on competition law internationally are reflected in South Africa, and, through their decisions and participation in international forums, the South African competition authorities have actively contributed to the development of competition law internationally.

It is important to remember that the authorities are administrative bodies, empowered by the Act. This means in practice that the institutional environment is fundamentally a legal one, of contesting evidence and legal interpretation, even where the evidence is economic analysis. At the same time, the authorities have placed great emphasis on the ability of individuals and interested parties to be able to participate in their processes. While the Tribunal hearings often have an intensely adversarial nature, to be expected given the potentially high stakes, the Tribunal also has inquisitorial powers. In this regard it has allowed and sought participation from a wide range of stakeholders in its public hearings (box 1). The legal nature of the authorities' work has also meant many procedural challenges, especially in the early years (box 2).

The nature of the evidence and the transparency of the Tribunal's hearings make the competition authorities a valuable source of information and knowledge on the economy

Lastly, the rigour of the analysis required, the nature of the evidence dealt with in competition matters, and the transparency of the Tribunal's hearings, mean that the competition authorities are a valuable source of information and knowledge on the economy. Indeed, the hearings themselves have played a very important role in opening up the workings of markets and strategies of firms to wider public scrutiny, and have been extensively covered in the media.

The Competition Tribunal

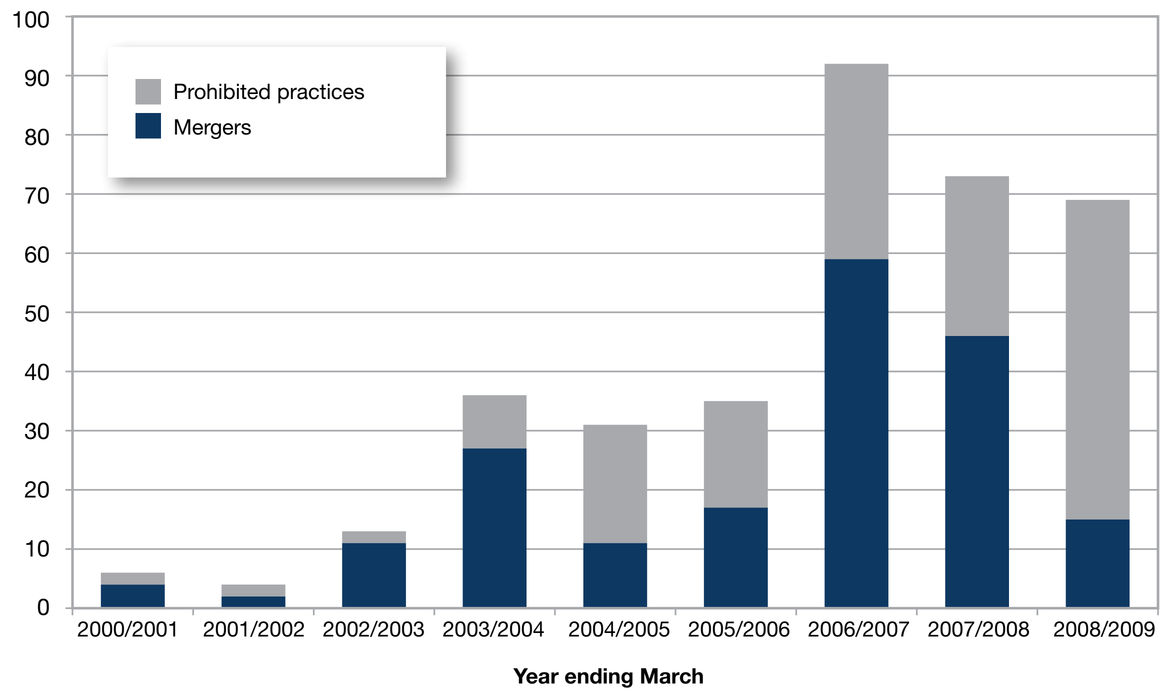
Most of the Tribunal hearings take less than one day as these are to deal with uncontested large mergers or procedural matters. In order to get a better understanding of the amount of substantive hearing time, it would be useful to look at matters that have taken more than one day of Tribunal time (although not necessarily on consecutive days). This reveals a picture of three main phases over the past decade (figure 1). In the first three full reporting years (1 April 2000 to 31 March 2003), the Tribunal spent very few days in hearings. From 2003 to 2006, the Tribunal sat for more than 30 days per year on such matters, with hearings on prohibited practices featuring significantly. In 2006, there was another step change. The 2006/07 reporting year included the Telkom/BCX, Main Street/Kumba, Phodiclinics/New Protector and Primedia/Capricorn merger hearings. In the area of prohibited practices, there were hearings in the South African Airways and Harmony/Mittal cases. While merger hearings have fallen off in the last year, prohibited practices hearings have continued to grow, reflecting a greater emphasis on enforcement, as well as the very lengthy hearings sometimes required for complex matters. In the 2008/09 reporting year, there were lengthy hearings in the matters of Senwes and British American Tobacco of South Africa.

The Competition Appeal Court

Appeals from decisions of the Competition Tribunal, and reviews of decisions of the Tribunal and the Commission, are heard by the Competition Appeal Court. The Court consists of High Court judges who are specifically appointed to perform this task. Cases are heard before a bench of three judges, selected from the pool of judges who have been appointed to the Court as members or acting members.

When the Competition Act was first passed in 1998, the Court was originally conceived to be made up of a bench of three High Court judges and two further members who would be appointed because of their expertise in the field of economics. However, the Judicial Service

Figure 1. Tribunal hearing days, for cases taking more than one day



Source: Competition Tribunal, 2009

BOX 1. THE RIGHT TO PARTICIPATE IN COMPETITION TRIBUNAL HEARINGS

In most hearings, be they mergers or prohibited practice cases, the right of the parties to participate is uncontroversial. The same cannot be said about the participation of third parties, a matter that has attracted much attention in the jurisprudence to date, when their entitlement to participate has been challenged.

In merger cases, the leading case is the decision of the Competition Appeal Court in Anglo American/ Kumba in 2003, where the Court held that the right to participate in a merger hearing was to be construed more widely than in the common law. Essentially, the Court recognised that the Tribunal has the right to admit a party as an intervenor in proceedings if the Tribunal considers that this would assist its adjudicative function. This means that even parties that are neither customers nor competitors of the merging parties, can, if they show that they are able to "add value", be admitted as intervenors in a merger case.

More recently, however, the Tribunal has taken a cautious approach to permitting intervention, to avoid opportunistic interventions that may be designed to delay the merger process rather than address genuine competition concerns. In some cases, the Tribunal has refused an intervenor the right to participate, while in others, it has imposed limits on an intervenor's procedural rights or the scope of the intervention. The Tribunal's right to do this was recognised by the Competition Appeal Court in the Naspers/Caxton case in 2007.

In prohibited practices cases, the right to intervene has typically arisen in cases where the original complainant, or a firm similarly affected, has sought to intervene in complaint hearings that have been referred by the Commission. The Act permits this, provided that the complainant or third party can show that it has an interest not adequately represented by another participant in the hearing.

The approach of the Tribunal thus far has been to recognise a right to participate when the intervenor seeks a different remedy to that sought by the Commission (for example, in the case of the Anglo American Corporation Medical Scheme v the Competition Commission in 2002), or wishes to advance a different theory of harm under a different set of facts, even if this is based on what are the essentially same facts (for example, the case of Barnes Fencing v Iscor Ltd in 2007).

Appeals and reviews heard by the Competition Appeal Court have arisen out of both merger and prohibited practices cases

Commission, the body responsible for appointing judges, took the view that appointing lay economists to an appeal court bench was not constitutional. The Competition Act was duly amended in 2000, limiting the Court's membership to High Court judges. This meant that the Competition Appeal Court began its duties later than the other institutions and the first appeal was only heard on 11 September 2000.

The Act also provided that the Court was the final court on all competition issues other than those that raised a constitutional issue. The Supreme Court of Appeal, however, found in the ANSAC matter that under the Constitution, the Competition Appeal Court could not be a final court of appeal and that, even in non-constitutional matters, appeals could still be made to the Supreme Court of Appeal.

Since its inception, the Court has heard 58 matters. These have ranged from procedural issues, such as the right to intervene in merger hearings and the management of confidential information, to substantive issues, such as the test for determining excessive pricing. The Court has also recognised important powers of the other competition authorities, for example, the Tribunal's powers to interdict unlawfully implemented mergers and to impose administrative penalties. Appeals and reviews heard by the Court have arisen out of both merger and prohibited practice cases. The Court typically sits four times a year during the High Court vacation period.

The Court has had the same Judge President since its inception, but the composition of the additional members has often changed due to retirements, resignations from the bench and members seeking appointment to higher courts.

Box 2. Interlocutory proceedings at the Tribunal

As an ancillary function to its role in adjudicating mergers and prohibited practice complaints, the Tribunal is frequently required to determine a number of procedural issues. These include applications for discovery of documents, access to confidential information and challenges to procedural steps taken by parties to proceedings. A number of these interlocutory proceedings have been filed with the Tribunal, and while these processes are pivotal to ensuring procedural fairness, they can sometimes lead to inordinate delays in the resolution of cases.

The case between the Competition Commission and Botash v American Soda Ash Corporation (ANSAC) et al. is a typical example. In the case, which started in October 1999, Botash alleged that ANSAC was operating an export cartel in South Africa and engaging in predatory behaviour. After the Commission referred the matter to the Tribunal, ANSAC initiated a number of interlocutory applications and appeals over some time.

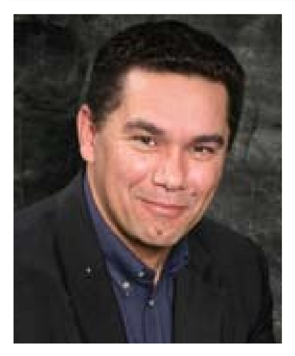
These included technical exceptions to the complaint referral and particulars of complaint, challenges to the jurisdiction of the Tribunal, constitutional challenges to certain provisions of the Act and challenges to the *locus standi* of Botash, the complainant that had been granted intervention in the matter. When the matter was due to come to trial, a further procedural point was taken by the respondent, which alleged that the firm of attorneys representing the complainant should be disqualified from representing it, as a lawyer on its team had once worked on the case for the Commission. Although the point was ultimately dismissed by the Tribunal and confirmed on appeal by the Competition Appeal Court, the process again delayed the start of the hearing on the merits. It took almost ten years for all the interlocutory disputes to be disposed of and for the matter to be decided on the merits. On 4 November 2008, the Commission and ANSAC applied to the Tribunal to confirm a settlement agreement reached between them.

As they are administrative bodies of the state, it is also important that the procedural powers of the Commission and the Tribunal be clearly defined and understood, and that these are exercised in a manner that is beyond reproach. For example, in the Woodlands Dairy case in 2009, Woodlands and Milkwood, *inter alia*, argued that the summonses issued by the Commission were invalid in that they were over-broad and vague. The Tribunal ruled in favour of the applicants, finding that the Commission's summons must at a minimum stipulate the prohibited practice that is the subject of the investigation.

The manner in which the Commission conducted its entry and search procedures came under scrutiny by the Supreme Court of Appeal in the case of Pretoria Portland Cement Company Ltd and Slagment (Pty) Ltd v the Competition Commission et al. in 2001. The judge ruled that the Commission had conducted a search of a company's premises illegally because it had failed to comply with a privacy stipulation made by the judge who granted the search warrant. The judge said that the Court took a serious view of the Commission's conduct and would not allow persons or businesses to be subject to an abuse of power by bodies such as the Commission, which is also subject to the Constitution and the law.

On the other hand, the courts have also rejected certain administrative law challenges to the Commission's procedures. For example, in Menzi Simelane et al. v Seven-Eleven Corporation (Pty) Ltd in 2002, the Supreme Court of Appeal found that when the Commission refers a complaint to the Tribunal, its function is investigative and hence not subject to review, except in cases of ill-faith, oppression, vexation or the like. It was therefore not necessary for the Commission to observe the rules of natural justice, that is, to provide reasons or to give a respondent the opportunity to be heard, before it referred a restrictive practice complaint to the Tribunal.

Drafting and implementing the Competition Act: a short reflection



Getting started

After several false starts, South Africa's competition legislation was finally kicked off in 1997 by the then Minister of Trade and Industry, Alec Erwin. Competition policy had been firmly on the African National Congress' agenda as reflected in the Reconstruction and Development Programme. Moreover, mounting pressure from various parties such as trade unions, small business and consumer groups, contributed to the decision to try to get new competition legislation completed before the second democratic elections in 1999. As Chief Director responsible for the process, the first step was for me to be appointed to the existing Competition Board, then housed within the Department of Trade and Industry. Alongside this was the drawing up of a competition policy guidelines paper proposing principles against a critical review of existing legislation, setting out the process for completing the consultation and a timeline for the establishment of institutions. The Minister announced a three month NEDLAC consultation process, which meant the new legislation could be passed by the end of 1998.

Government, along with the Business and Labour constituencies, put together strong teams for the NEDLAC negotiations. The government's advisors included David Lewis on the economics of competition law, and Norman Manoim and Menzi Simelane on the legal aspects. The Trade and Industry chamber of NEDLAC in which the negotiations took place was convened by Shan Ramburuth. All parties agreed to table only the contentious issues and negotiate around these. Labour pressed for the most far reaching principles such as the break-up of conglomerates and restrictions on cross directorships. Business focused on the detail of the specific provisions to be contained in the legislation and emphasised the need for certainty and protections on the discretionary exercise of powers by the authorities. Despite these differences, the policy paper was tabled, discussed and agreed on in record time. Twelve weeks, as I recall.

Drafting the new legislation

While the negotiations were under way, drafting work started on a new act. The focus was on a drafters' memo, which set out the legislative options for each policy decision contemplated in the guidelines document and agreed upon in the NEDLAC process. The memo compared the legal options that existed in various jurisdictions, assessed their applicability to South Africa, and examined issues such as ease of administration and whether it supported the balance between public interest concerns and economic efficiency. In retrospect, this was perhaps the most important document of all. Our intention was to draft a piece of legislation in simple English, that was easy to understand and administer.

As we prepared to take the legislation to Cabinet we had to resolve issues around overlapping jurisdiction and to avert the likelihood of forum shopping by companies. This was important, as the Minister of Trade and Industry was concerned that other ministers may interpret the new Act as encroaching on their policy mandates. Thus an extensive round of negotiations took place with various sector regulators. The most difficult, I believe, was with National Treasury and the Reserve Bank.

The completed Bill finally went to Parliament with an understanding amongst constituencies that the parliamentary hearings would be an open process but that the NEDLAC partners would not open new issues for discussion. Also, the parliamentary hearings were held simultaneously with the public comment period in order to be able to integrate all comments at once, rather than sequentially as is practice. Although the parliamentary process was, as usual, a nervous time, the process in Parliament was tightly managed by Dr Rob Davies, the chair of the Trade and Industry Portfolio Committee, and Act 89 of 1998 was promulgated days before Parliament closed in 1998.

No work on establishing the institutions could begin prior to the President signing the bill into force. The President was therefore requested to sign into force only those parts that dealt with the institutional arrangements. In the interim, mergers and anti-competitive practices were still under the jurisdiction of the Board. The balance of the Act would come into effect only in September 1999.

The establishment of the competition authorities

Work to set up the institutions began in January 1999 and, with a long to-do list, we set about building the institutions from scratch. A team of no more than four people set about finding a location, staff, developing systems, drafting regulations and forms, and managing the donor budget required as there was still no DTI budget for the institutions. Surrounding the team of core staff was a team of consultants and legal drafters working on various parts of the institutional design and setup.

Until now, managing the passage of the Act and the establishment of the institutions had been one of the many tasks I had to perform at the DTI. I requested that the Minister appoint me as Acting Commissioner to allow me to establish the institution and appoint full time staff, which he did. With this legal authority, we could now proceed to establish the institutions, and by March 1999 we started the process of interviewing the first heads for the various divisions as we needed their input to appoint the remainder of the staff. Tribunal appointments proved more difficult. We needed a combination of people who had both the technical skills and could articulate the public interest issues set out in the Act.

Once we had assembled most of the staff, a three week intensive staff training programme was held. We invited competition and DTI staff from all the SADC countries so that they could also benefit from the training. The best competition practitioners from around the world trained the staff. It was an intense time as, while all of this was taking place, we had to design a case management system and finalise the premises.

The setting up of the Competition Appeal Court was also a testing period. Many judges at the time were not in favour of specialised courts. We had to attend a Judicial Services Committee meeting to answer some tough questions and motivate for a judge with a commercial background or experience to be appointed. In this instance Judge Dennis Davis was appointed.

On 1 September 1999 we opened our doors. Two of the three institutions were in place on time. The Appeal Court would be finalised in the next few months based on the outcome of the JSC process. We had achieved a substantial amount in a very short period of time.

Much of the success was due to a small team of committed people who were able to work together under very tight timelines and subject themselves to a project management process. The Minister also played an important role championing the process throughout and giving advice on all the major policy options that confronted us as drafters of the legislation.

I was appointed as Commissioner in June 1999. In December 1999 I resigned to move back to the DTI, and was succeeded by Menzi Simelane.

Dr Alistair Ruiters
First Competition Commissioner

The incoming Chairperson of the Competition Tribunal remembers the drafting of the Competition Act

What do I recall most about drafting the Act? Hotel rooms at 2 am, with bad coffee and plates of stale chips brought by room service as we struggled to have the next draft ready either for the panel of experts advising us or the portfolio committee hearings in Parliament. The South African system, it's true, has borrowed from many other systems – Europe, Canada and Australia – but it also has many unique homegrown features. Our merger control system is procedurally distinct from any other system – typically they are either purely administrative or engage the judicial system, whereas ours is a hybrid. Then throw in the public interest and rights of representation for employees, and you have a system unlike any one else's, but nonetheless I believe it works well.

I recall the horror with which the public interest test was greeted by outside observers. The idea that a merger could be prohibited by a competition authority on public interest grounds was anathema to them. Yet ten years later this section seems much less threatening and indeed, at time when foreign governments are invoking the public interest to block transactions, it hardly seems that exotic.

Prohibited practices have echoes of Europe, but on closer inspection they too have indigenous variations. We have separated restrictive practices into horizontal and vertical, created presumptions for companies with cross-shareholdings and cross-directorships, and made it reasonably clear what activities are per se unlawful and which are subject to a rule of reason test. In the abuse of dominance section, the thresholds for the presumption of dominance shift the onus according to the degree of market share of the dominant firm. Someone once likened it to a table tennis match with the onus jumping around as the threshold moves. In price discrimination, while borrowed heavily from the United States' Robinson Patman Act, local variation confines the practice to dominant firms and introduces the notion of equivalent transactions.

Despite several amendments to the Act over the years these features have remained intact. Perhaps the stale chips were worth it.

Norman Manoim
Current Chairperson of the Competition Tribunal and a member of the team that drafted the Competition Act

Competition law in the new South Africa: Reflections of an international advisor on the new Act

I was honored to be an advisor to the drafting team when government, labor and industry were debating the contours of a competition law for the new South Africa. I watched from the sidelines when the 1998 Act was adopted, the Commission and the Tribunal were staffed, the competition law system was up and running, and – in amazingly short order – the South African competition system developed a magnetic presence in the world.

How was it possible that the South African competition system gained such prominence and respect so fast? that it became a force in the world; a source of inspiration for developing countries; a contender to the developed world that generated their one-right-answers by computer?

It was possible because of the law, the institutions, and the people. The competition law and the institutions that enforce it captured the poignancy of the new South Africa, its heritage, and the constant struggle to emerge from apartheid as an equal society with opportunity and dignity for the people. Ensuring the right of competition on the merits, and breaking the power and privilege of the few, fit the country's mandate.

But mostly, the emergence of the system as a contender in the world was possible because of the genius of the individuals who ran it for most of its now ten years.

I will single out one person, even while knowing that competition enforcement is a team effort, which has been so evident in South Africa. I will single out David Lewis, chair until recently of the Competition Tribunal. David's voice, in my opinion, has revolutionized thinking about anti-trust, challenging single-track efficiency models, teaching the importance of context, and formulating approaches that provide models for countries desperate for inclusive growth and development. David's gentle challenges to some established approaches of the industrialized world are not surprising for, after all, the principal competition problem of South Africa is not that anti-trust intervention will chill the freedom and inventiveness of dominant firms but that the brute force and power of dominant firms will crush the incentives and opportunities of those who have, for so long, been left out.

Professor Eleanor Fox, New York
Member of the team that drafted the Competition Act

A fair and efficient economy for all: from policy to enforcement

When David Lewis offered me the job to set up and manage the Competition Tribunal ten years ago, it was an opportunity I could not miss. This was a chance to be involved in implementing policy that was developed in a National Economic Development and Labour Council (NEDLAC) process that I facilitated as a member of its secretariat.

Perhaps the most significant feature of competition policy development was its consultative and inclusive nature. This ensured its acceptance and credibility by a wide range of stakeholders paving the way for effective enforcement. Our competition policy has its roots in the Reconstruction and Development Programme (RDP), the election manifesto of the African National Congress during South Africa's first democratic elections. Competition policy was placed on NEDLAC's agenda at its inception in 1995. But negotiations only began in earnest when the Department of Trade and Industry (DTI) tabled its proposed guidelines on competition policy in November 1997. Priority was given to competition policy in the tripartite negotiating forum, where it was competing for attention with many other pressing policy issues facing the new South Africa. This reflected a commitment to addressing distortions in the economy arising from historically high levels of market concentration and collusive behaviour. Mandated representatives of organised business, labour and government thrashed out the policy principles that would inform new legislation.

My memory of the NEDLAC negotiations was working to tight deadlines in a process that involved the exchange of policy position papers, and long meetings to decide on areas of agreement and disagreement. The NEDLAC social partners were represented by strong delegations. This resulted in robust debate, some compromise, and a lot of reassurance. In the end, there was sufficient consensus on key policy principles, and dissenting views were noted. I recall that contentious issues in the negotiations related to using public interest criteria in decision making, divestiture as a remedy, political interference in decision making, and the right to appeal decisions of the competition authorities.

Concurrent with the NEDLAC process, legislation was drafted to give effect to policy. The DTI consulted with a range of international lawyers, policy experts and enforcers to ensure that the law was consistent with international best practice. Great care was taken to craft legislation in plain and clear language, to design institutions with good regulatory governance, and to ensure that principles of natural justice prevailed in the application of the law. Following well attended public hearings by the Parliamentary Portfolio Committee on Trade and Industry, the Competition Act was promulgated in November 1998 and came into effect in September 1999. The most remarkable thing about South Africa's competition law is the significant number and range of individuals and constituencies that can legitimately claim a level of ownership, or at least influence, over it.

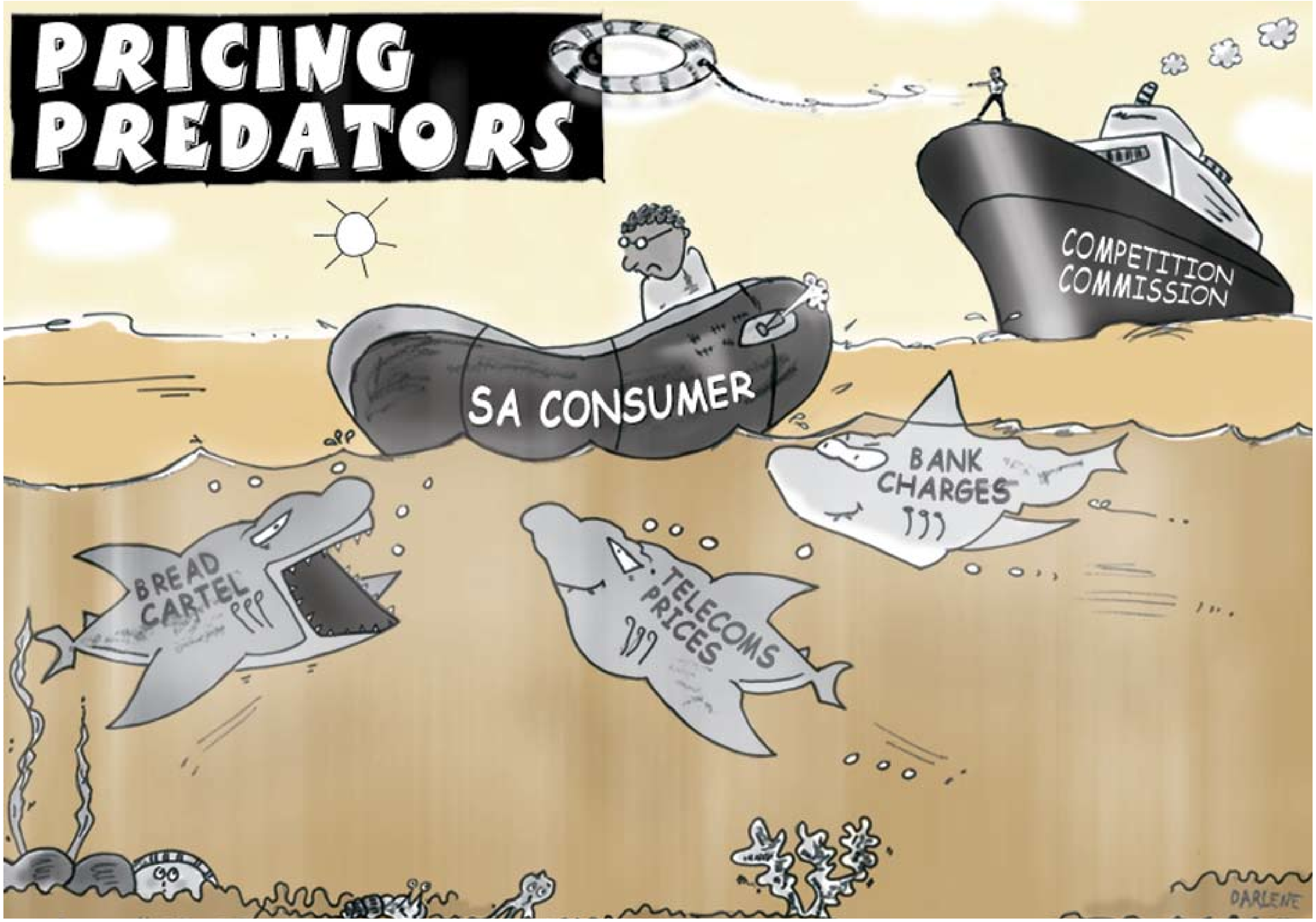
In the years that followed, the competition agencies have given life to the law that emerged from the policy process. Establishing new agencies and developing organisational capacity from scratch is a formidable task. Yet both the Commission and Tribunal plunged into fulfilling their respective mandates through learning by doing, and earned the respect of stakeholders. Earlier fears, particularly from business, that the agencies would be unduly bureaucratic or take arbitrary decisions, proved unfounded. On the contrary, we have created accessible institutions that have demonstrated independence and consistency in decision making.

When I joined the Competition Commission in May 2005, public expectations of the authorities were increasing, and the application of law and economics to competition cases was becoming more sophisticated. This demanded that the Commission work smartly with its limited resources. A strategic planning exercise in the organisation shifted emphasis from merger regulation to enforcement, prioritized work, and addressed human resource development and organizational efficiency. This approach has placed the Commission firmly on the path to being a responsive, learning organization that is effective in its enforcement and advocacy.

In my journey from NEDLAC to the Competition Tribunal and then to the Competition Commission, I have had the privilege to engage with and learn from many highly competent and dedicated people. It has been a pleasure to work with the quality of people that this area of work attracts. Each person who has worked for the competition authorities in the past decade can feel proud of helping to build strong institutions, and of having made a meaningful contribution towards a fair and efficient economy for all.

And yes, I am glad I took the opportunity.

Shan Ramburuth
Competition Commissioner



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Merger Review

Introduction

An overview of the last ten years shows that the competition authorities not only mitigate the anti-competitive effects of a proposed merger, but actively seek means to strengthen competition in a market by imposing remedies that lower both the concentration of certain markets and the barriers to entry. These steps are taken alongside the government's economic growth strategies and issues of public interest, to ensure that merger control is balanced and creates a conducive environment for competitive market activity, so that South Africans reap the benefits of a variety of choices at the lowest prices.

A merger takes place when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. This may involve the buying or leasing of shares, an interest or the assets of the other firm, or the formal amalgamation of the two firms. Whether a change of control actually takes place has been the subject of several rulings of the Competition Tribunal (box 3). The purpose of merger control is to ensure that a transaction does not lead to a substantial lessening of competition to the detriment of consumers and the public interest.

The passing of the Competition Act of 1998 introduced a new competition regime that would significantly change merger review in South Africa. The previous Competition Board had relied on picking up information on planned or implemented mergers from the press or by interested parties bringing it to their attention. Firms could decide to bring a merger to the Competition Board if they thought in advance that it might create problems. Marking a fundamental shift in the South African merger control regime, the Competition Act makes pre-merger notification compulsory. Under the Act, all mergers above determined thresholds, calculated in terms of assets and turnover, have to be notified and therefore evaluated by the Competition Commission. The main aim of defining merger thresholds has been to screen out transactions that are unlikely to result in significant effects on competition.

Those mergers defined as large have to be decided by the Competition Tribunal once they have been investigated by the Commission, which then submits a reasoned recommendation to the Tribunal. In the 2001

The purpose of merger control is to ensure that a transaction does not lead to a substantial lessening of competition to the detriment of consumers and the public interest

The Act's making the notification of all mergers above a certain threshold compulsory marked a fundamental shift in the South African merger control regime

Table 2. Merger thresholds, assets or turnover

	Before February 2001	February 2001–April 2009	Post April 2009
Intermediate merger			
Target firm assets or turnover	R5 million	R30 million	R80 million
Merging parties combined assets or turnover	R50 million	R200 million	R560 million
Large merger			
Target firm assets or turnover	R100 million	R100 million	R190 million
Merging parties combined assets or turnover	R3.5 billion	R3.5 billion	R6.6 billion

Sources: Competition Commission annual reports and the Government Gazette, *Notice 216 of 2009*

Box 3. What is a change of control?

The meaning of control in merger regulation is of great importance because it forms the basis for assessing whether or not a merger has occurred.

Section 12(1)(a) of the Competition Act provides that a merger occurs “when one or more firms directly or indirectly acquire or establish control over the whole or part of the business of another firm”. Section 12 (2)(a)–(f) lists examples of circumstances in which it is considered that a person controls a firm. These include circumstances where a person owns more than half of the issued share capital of a company, the majority of voting rights, the right to appoint the majority of directors and whether or not the company is a holding company of the target firm. Section 12(2)(g) provides that a person is in control of a firm if it has the ability to “materially influence” the policy of the firm in a manner comparable to someone who in ordinary commercial practice can exercise an element of control described in the previous circumstances.

The Tribunal confronted the issue of whether a change in shareholding where two firms are commonly held constitutes a merger in the case of Distillers Corporation (SA) Ltd and Bulmer (SA) (Pty) Ltd[4] in 2001. In that case, the Tribunal found that the merging parties did not constitute a single economic entity and that the transaction therefore constituted a merger within the meaning of the Act. On appeal, the Competition Appeal Court endorsed the approach of the Tribunal and held that section 12 should be interpreted broadly to ”ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired” by the conduct of the parties in any matter being adjudicated upon. The Competition Appeal Court held that section 12 is not only concerned with a change in ultimate control but also with any change in control due either to an indirect or direct change in shareholding. The Competition Appeal Court also held that a firm could be controlled by more than one firm simultaneously.

A change from joint to sole control was addressed in Iscor Ltd[5] Saldanha Steel (Pty) Ltd2 in 2002, and found to constitute a merger. This is because it was not self-evident that such a change leaves the firm’s competitive interests and incentives unchanged, especially where, as in this case, one of the owners is also a competitor. Issues of joint control were also addressed in Primedia Ltd, Capricorn Capital Partners (Pty) Ltd and New Africa Investments Ltd v The Competition Commission and African Media Entertainment Ltd in 2006[6]. In this case, the Tribunal had to determine whether or not Primedia would acquire joint control over Kaya FM after the merger for which approval was being sought. The Commission argued that although the merger did not change the majority shareholder, the acquisition by Primedia of a minority stake constituted a change in control. As a large and experienced player in the industry with stakes in other competing radio stations, Primedia had the incentive and ability to exert control over Kaya FM, such as impacting on the management and business strategy. The Tribunal found that there was neither a convincing argument nor evidence that Primedia would have joint control over Kaya FM post-merger and accordingly approved the proposed merger without conditions. The Competition Court of Appeal held that the Tribunal had to examine the prospect of anti-competitive incentives arising in consequence of the acquisition of minority control of Kaya by Primedia and remitted this question to the Tribunal for its consideration.

In Ethos Private Equity Fund IV v The Tsebo Outsourcing Group (Pty) Ltd[7] in 2003, the Tribunal held that a merger should be notified once the “bright lines in s12(2) had been crossed”. When a merger constitutes a change in control the parties must notify, “notwithstanding shareholder arrangements inter se”. The Commission was concerned that “if in a situation such as this, a firm is not obliged to notify a merger when its shareholding exceeds fifty per cent by virtue of a private agreement between shareholders in which it has diluted its voting powers, then it will become extremely difficult for it to monitor compliance with the Act”.

In Goldfields Ltd v Harmony Gold Mining Company Ltd and The Competition Commission[8] in 2004, the Tribunal held that the acquisition of 35 percent of the target firm’s shareholding motivated by an intention to acquire sufficient control to effect a merger was not notifiable unless the prescribed thresholds were met. The Tribunal also held that an agreement between shareholders in relation to voting on a particular resolution accompanied by an undertaking to conclude a sale of shares did not constitute joint control by those two shareholders. On appeal to the Competition Appeal Court, this decision was overturned and the Court held that the acquisition of 35 percent of the target firm’s shareholding was notifiable because it was an integral part of a merger, even though it was merely the first stage of the scheme. Further, the Court also held that the shareholders’ agreement described above constituted joint control.

[4] Competition Appeal Court case number 08/CAC/May01.

[5] Competition Tribunal case number 67/LM/Dec01.

[6] Competition Tribunal case number 39/AM/May06.

[7] Competition Tribunal case number 30/LM/Jun03.

[8] Competition Appeal Court Case number 43/CAC/Nov04.

amendments to the Competition Act, the Commission was also granted oversight of small mergers. Small merger notification is voluntary and the Commission restricts investigations to small mergers it views as being problematic, due to the previous conduct of the parties, the parties being involved in other investigations, or those in priority sectors.

The thresholds for determining the size of a merger are set by the Minister of Trade and Industry in terms of the combined assets and/or turnover of the merging parties. The thresholds have been revised twice (table 2). The first adjustment in February 2001 took into account the Competition Commission's early experience with the large number of mergers. The more recent revision in April 2009 was made due to the need to keep pace with economic growth and inflation.

Pre-merger notification

Pre-merger notification addresses the concern that firms could attain dominant positions through acquisitions, which would lead to likely anti-competitive harm to the economy.

In retrospect, it is clear that the move to pre-merger notification effectively set the agenda for the new competition authorities' major work in the earlier years, as it meant a large number of competition cases requiring evaluation within defined timelines from the very first day. In the first full year of the Commission's operation, there were 407 mergers notified. In these early years, considerable resources were dedicated to the Commission's Mergers and Acquisitions division (M&A) to review the merger notifications in the required time, as well as to ensure that the decisions were in line with international best practice. Internal guidelines and procedures were produced, and subsequently updated, to deal with the case load efficiently. The success of this is reflected in the OECD's 2003 review, which found that the competition authorities "have shown a confident capacity to deal with complex structural issues in deciding dozens of merger cases".[9]

Non-notified mergers

The Commission's oversight includes monitoring markets for non-notified mergers as well as analysing the markets post-merger to ensure that decisions did not result in anti-competitive behaviour after the fact. In the Commission's early years, non-notified mergers were tracked on an ad hoc basis and small mergers were investigated when complaints were lodged against a transaction. The Commission now tracks transactions to monitor non-notified mergers and actively encourages the notification of small mergers. In terms of monitoring conditions imposed on mergers, the Commission has taken action where these were not observed. For example, in the case of the acquisition of Boskor Timber Processors by Orono Trading 51 (Pty) Ltd[10] in 2002, the transaction was approved after assurances were received that no retrenchments would take place. The Commission later threatened to revoke the merger because retrenchments were initiated; the retrenchments were subsequently cancelled.

Evaluating mergers

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

(a) *the actual and potential level of import competition in the market;*
(b) *the ease of entry into the market, including tariff and regulatory barriers;*
(c) *the level and trends of concentration, and history of collusion, in the market;*
(d) *the degree of countervailing power in the market;*
(e) *the dynamic characteristics of the market, including growth, innovation, and product differentiation;*
(f) *the nature and extent of vertical integration in the market;*

Once they have been investigated by the Commission, mergers defined as large have to be decided by the Tribunal

The Commission tracks transactions to monitor non-notified mergers and it also monitors conditions imposed on mergers

[9] OECD peer review 2003.

[10] Competition Commission case number 2002Nov302.

Companies are incentivised to help the Commission conclude its investigation speedily, so that the merger can be finalised

(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and

(h) whether the merger will result in the removal of an effective competitor.

If the merger is likely to have anti-competitive effects then it is necessary to consider whether there are any technological and/or efficiency gains that may offset them. The Tribunal is also required to consider public interest issues in all mergers, including the effect on employment, which is discussed in more detail below. The public interest examination must be undertaken, regardless of whether or not the merger is found to be likely to give rise to a substantial lessening of competition.

An important implication of pre-merger notification is that companies are incentivised to help the Commission conclude its investigation as speedily as possible so that the merger can be finalised. This acknowledges the fact that evaluating a merger requires a substantial amount of information, which is most often information that is not available in the public domain. According to the Act, the Commission is allowed 20 days from the time of notification to assess the competitive effects of a small or intermediate merger and 40 days for a large merger. If the merger is complex or there have been delays in obtaining information, these periods can be extended on application to the Tribunal.

Market definition

Most mergers do not have anti-competitive effects

The first main step in evaluating the likely impact of a merger on competition is market definition. This is an integral part of the analysis as it involves identifying which firms are competitors, including the merging parties. This usually involves carrying out an exercise to consider whether a group of firms making the same products could profitably implement a small but significant non-transitory increase in price (the so-called SSNIP test). If consumers are able to switch to alternatives, then such a price increase would be defeated and the alternatives need to be included in the market as providing competitive rivalry. This exercise is done starting from the narrowest set of possibilities around the merging entities and is progressively widened until a market is defined. The analysis is undertaken in terms of both different product specifications and the geographic scope. The market definition exercise is a crucial part of the merger analysis as it is the intermediate step necessary to identify whether merging firms are competitors and which other firms also provide sources of effective competitive rivalry. Several contested cases, especially in the earlier years, turned on market definition (box 4).

From the market definition exercise, investigators can assess the market shares of the merging parties, in terms of actual shares, as well as their capacity to supply the market where the nature of the activities might mean that this differs from actual shares. The market shares also allow for the actual calculation of the change in concentration that would result from the merger. This is done through a summary measure known as the Hirschman-Herfindahl Index (HHI)[11]. Changes in the HHI can be used as an initial indicator of whether there are likely to be competition concerns, and the United States anti-trust authorities have identified certain thresholds for this. While the Commission and the Tribunal have paid attention to these thresholds in their work, the likely effect on competition requires a more detailed understanding of the market, including the competitive dynamics.

It is important to note that most mergers do not have anti-competitive effects. In fact, of the thousands of mergers notified, only a very small proportion (less than 8 percent) have been prohibited or have been approved subject to conditions. This is in line with international benchmarks. The high levels of merger activity have taken place in a period of liberalisation and economic restructuring, which, while not being unnecessarily impeded, must be monitored for potential competition problems. The 2008/09 reporting year has, however, seen a change in the trend, with mergers falling off quite sharply. This is clearly linked to the global economic crisis and recession in South Africa.

[11] The HHI is calculated as the sum of the squares of the market shares of the market participants.

Box 4. Market definition

Two early cases emphasised the importance in defining markets of understanding the actual competitive dynamics, and how these may differ in South Africa compared to other countries. This involves taking into account what is termed "practical indicia" (following the case in the United States of Brown Shoe Co v United States), along with other evidence in identifying the boundaries of competitive rivalry.

JD Group Limited and Ellerine Holdings Limited

On 30 August 2000, the Tribunal prohibited the merger between JD Group Limited (JD), and Ellerine Holdings Limited (Ellerine)[12]. The reasons were the extent of concentration and likely price increases that would result in the furniture market for sales on credit to a particular group of customers in the Living Standards Measurement (LSM) range of 3 to 5. The merging parties had argued for a very wide single mass market for furniture and appliances in which their share was relatively small.

The Tribunal's finding identified furniture stores as being in a separate market from large appliance discount stores such as Game and Dion, due to various factors. These included the format, layout and product offerings of the stores and the fact that discount stores are located primarily in urban centres while furniture stores are located throughout the country. The two groups also differed in their competitive strategies, with the furniture stores offering sale on credit to low income consumers while the discount stores rely more on cash sales. Even in instances where the discount stores offer credit, their criteria are usually more stringent.

The importance of credit was also a feature distinguishing the large national furniture chains with sophisticated systems for offering credit, from smaller independent furniture stores. This overlapped with the definition of the geographic market. While it was apparent that when purchasing furniture, consumers often buy from regionally located suppliers, the key question is whether local independent suppliers provide competitive discipline to the large chains. The Tribunal concluded that the market was in fact national as prices and credit conditions were set nationally, without regard to the regional conditions of different stores. Although it was apparent that store managers of the different chains had some latitude, the Tribunal stated that this latitude was actually very limited and that independent stores did not have the same sophisticated credit operations.

The merging parties targeted specific groups of customers based on their income and spending patterns, which also influenced the branding and format of the stores. The retailers used LSM categories in which customers are segmented according to criteria such as education, expenditure, residence, degree of urbanisation, access to household electricity and motor vehicle ownership.

The merger would thus have substantially lessened competition in furniture retail on credit to low income customers (those in the LSM 3 to 5 category), given the high barriers to entry and the fact that the transaction would have resulted in the removal of a credible competitor.

Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery

In the large merger of Distillers Corporation (SA) Limited (Distillers) and Stellenbosch Farm Winery (SFW)[13] in 2000, to form a combined entity called Distell, the market definition issues turned on substitution between groups of alcoholic beverages. Through its subsidiaries, Distillers was involved in the production and wholesale distribution of branded spirits, wine and flavoured alcoholic beverages. SFW was a producer and wholesaler of wine, spirits and alcoholic fruit beverages within South Africa.

The Commission's analysis followed that of European authorities in identifying separate markets for each spirit, that is, a separate market for gin, vodka, whisky and brandy. The Tribunal, however, highlighted four unique features of the South African market for alcoholic beverages: poverty and the skewed distribution of income; the influence of South African's political past on drinking habits; the fact that spirits are mostly consumed in mixed drinks; and consumption of alcohol in South Africa being less occasion based than in other countries where different types of alcohol were perceived to fall in different markets.

The Tribunal noted that a price increase of a particular brand of brandy caused a large reduction in its market share, and a large increase in the sale of vodka in KwaZulu-Natal in 1997/98 indicated substitutability among spirits in the same price category. However, it found that consumer behaviour indicated that there were separate markets across spirits that fell within certain broad price bands, which they identified as premium spirits, proprietary spirits and value spirits.

The Tribunal found that the merger would result in anti-competitive effects in the proprietary spirits market, where a third supplier had been unable to upgrade from the value market and Distell would hold a large market share. The merger was therefore approved subject to Distell terminating several distribution contracts of Martell brands and KWV brands. Further, no director or nominee of KWV was permitted to sit on the Distell board.

[12] Competition Tribunal case number 78/LM/Jul00.

[13] Competition Tribunal case number 08/LM/Feb02.

Merger numbers have declined recently due to the international financial crisis and recession in South Africa

Commitment to an efficient merger review process

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

- there is no product or geographic market overlap among the firms
- mergers are unlikely to have anti-competitive effects, such as property transactions and management buy-outs
- the transactions involve companies in liquidation (failing firms) and where there is a new entrant into the market (as there would be a replacement of one participant by another)
- parties have a post-merger market share of less than 15 percent and the post-merger HHI is below 1,000 points, and the increase in HHI is considered low.

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

- The parties will receive correspondence from the investigator within 3 days of filing, and will be informed about any incomplete filing (in form CC13(2)) within 15 days.
- Parties will be informed about whether the transaction raises any initial competition concerns within 15 days.
- Mergers with no competition concerns will be completed within 20 days, subject to the filings being complete, correct and timeous and accompanied by a comfort letter to trade unions.
- Case investigators will provide regular feedback to parties.

MERGER TRENDS

When the new competition authorities were established, provisions were made for "transitional mergers" to ensure that mergers would not fall into a gap between the review of the old Competition Board and the new authorities. These were defined as mergers that took place between November 1998 and August 1999 and were not approved by the Competition Board. The transitional mergers totalled over 40 percent of the 331 mergers that were notified to the Commission in the first seven months, from 1 September 1999 to 31 March 2000. The high demands that mergers placed on the authorities continued in the first full year, with 407 notified mergers.

The increase in the thresholds in February 2001 reduced the number of mergers notified by just under half (figure 2). However, the number of large mergers notified in 2001 increased by almost threefold, from 16 to 47, and has continued to increase by an average of just over 9 large merger cases per year.

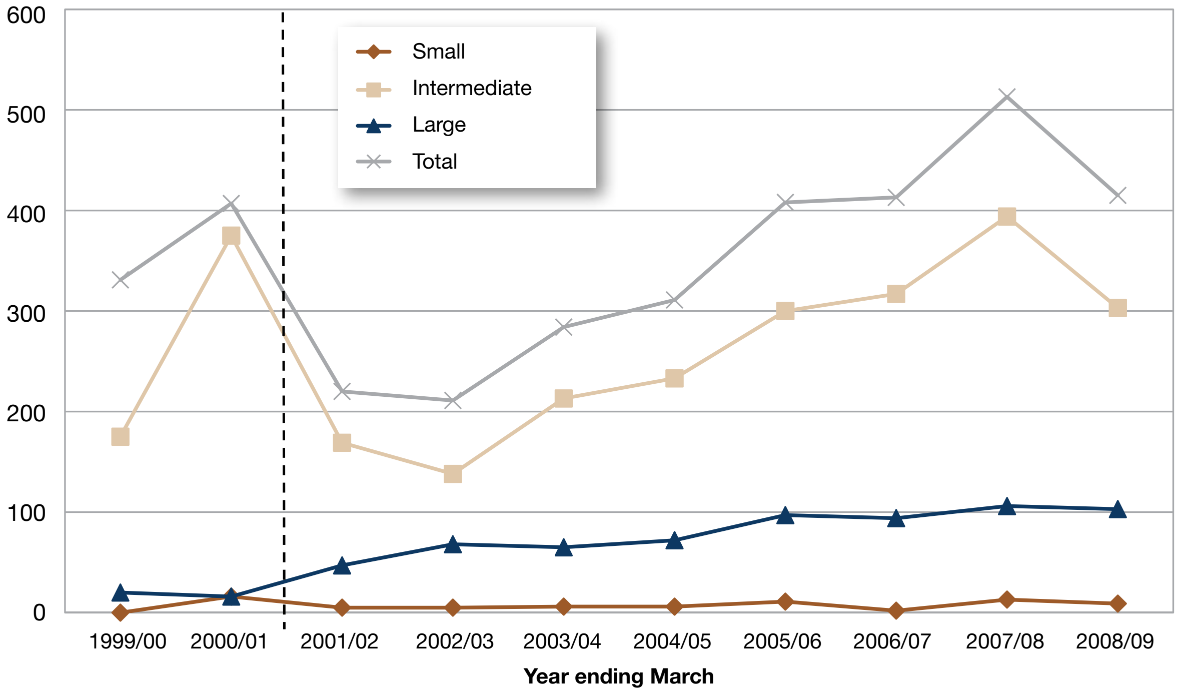
Between 2001 and 2007, the number of merger notifications rose steadily. This is consistent with economic growth and increasing M&A activity in South Africa and internationally over this period (figure 2). In addition, black economic empowerment (BEE) measures in many areas, such as BEE charters and procurement codes, have sought to support increased black ownership, which has also impacted on merger activity. With the international financial crisis and recession in South Africa, merger numbers dropped off in the year to March 2009. The increase in merger thresholds, effective April 2009, is expected to lead to a further decline in numbers, while the Commission is also adopting a more vigorous approach to monitoring small mergers for possible competition concerns.

Mergers by sector

Overall, the manufacturing sector has consistently been the most important driver of merger activity, with an average of 26 percent of merger notifications over the last ten years (figure 3). This has been followed by

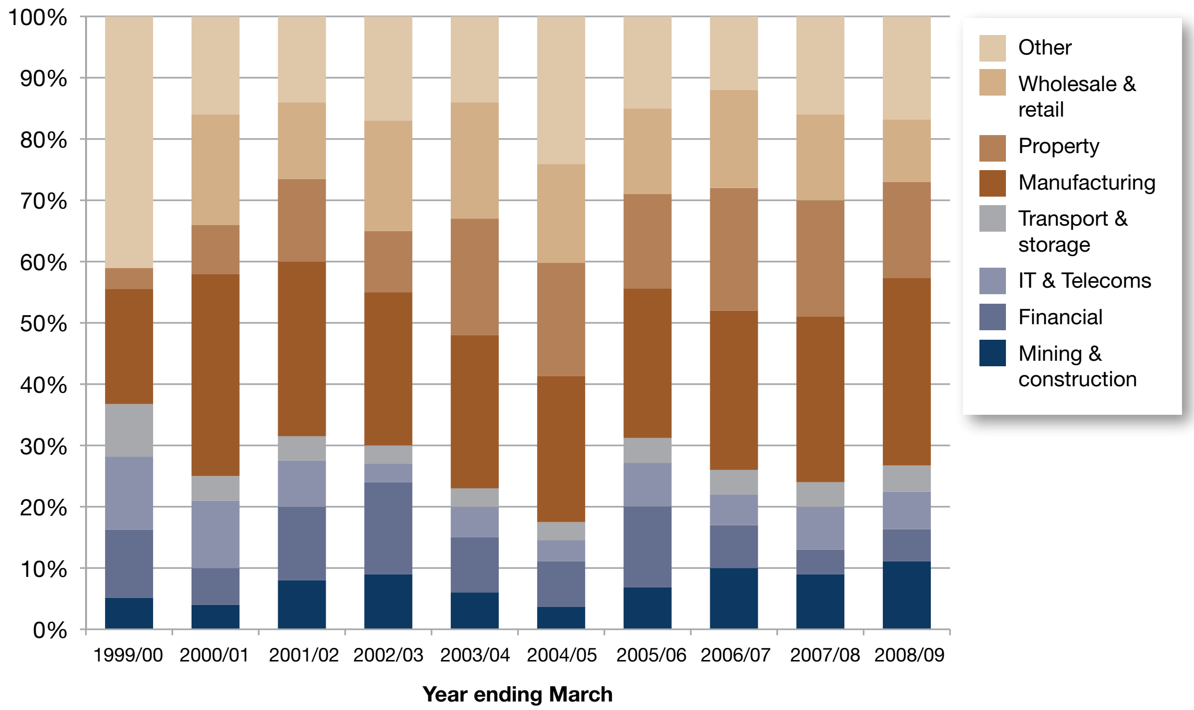
Overall, the manufacturing sector has consistently been the most important driver of merger activity, with an average of 26 percent of merger notifications over the last ten years

Figure 2. Notified mergers



Source: Competition Commission annual reports.
Notes: Dashed line indicates change in thresholds; 1999/00 is only a six-month period

Figure 3. Merger notifications by sector



Source: Competition Commission annual reports

Deregulation and restructuring in the telecommunication, banking and agricultural sectors have proved to be fertile ground for merger activity

There have been a few prohibited mergers in the food, and the retail and wholesale trade sectors

property transactions, which grew in the early years to account for an average of around 20 percent in the past six years. These transactions generally relate to sizeable acquisitions of the major groups in commercial and industrial property. In third place is the wholesale and retail trade sector, averaging around 14 percent of transactions, which have included acquisitions of smaller supermarket groups. This is followed by the finance sector, and then the mining and construction sector.

The factors driving the merger boom to its peak in the 2007/08 reporting year have both cross-cutting and sectoral dimensions. The liberalisation and restructuring of the South African economy, combined with the growth of global financial markets and private equity activity, are the primary driving factors of changes in the market structure. The old South African conglomerate structures have, in some cases, responded by unbundling and focusing on a few selected key areas. (Most notable among these is the Anglo American Corporation.) At the same time, there have been moves to consolidate within sectors and to vertically integrate with suppliers and into distribution, depending on the dynamics within a particular sector. Deregulation and restructuring in the telecommunication, banking and agricultural sectors have proved to be fertile ground for merger activity. Although for ease of exposition we refer to mergers by broad sector or industry, it must be remembered that each sector comprises a diverse array of product markets. For example, while the food sector as a whole is quite concentrated, within it there are markets of relatively low concentration in which mergers have been approved by the competition authorities.

Agriculture and agro-processing

In agriculture and agro-processing, deregulation, with the closing of the marketing boards (the former control boards) coupled with the conversion of most of the cooperatives into private and listed companies, has underpinned high levels of merger activity. Many of the firms that held dominant positions in the regulated market have, over the past decade, extended their control over the vertical and horizontal channels through which they produce and market. For example, the former Ost-Transvaal Ko-operasie (OTK) has become Afgri Operations. Afgri Operations has extended horizontally through acquiring other former cooperatives together with their fixed infrastructure such as grain silos[14]. Afgri Operations has also extended its range of services offered to farmers on the input side as well as on the output side as a buyer, trader and processor of agricultural products.[15]

In the poultry industry, Astral's acquisition of National Chicks[16] in 2001 (approved with conditions) and Earlybird Farms[17] in 2004 increased Astral's total broiler production to just below that of Rainbow Chickens. Rainbow Chickens expanded its operations through the acquisition of Vector Logistics[18] in 2004, which resulted in the firm becoming even more vertically integrated in the poultry supply chain. The merger between Afgri Operations and Daybreak Farms, approved in 2006, resulted in the creation of another vertically integrated player in the poultry industry, by merging a feed manufacturer with a producer of broilers.

An example of a prohibited merger in the food sector is the proposed Tongaat-Hulett Group/Transvaal Suiker Beperk merger in 2000[19]. This was a large horizontal proposed merger that was prohibited by the Tribunal in a food market that is highly concentrated. The merger would have resulted in the acquisition of the third largest sugar producer (Transvaal Suiker Beperk, controlled by Rembrandt) by the Tongaat-Hulett Group, a subsidiary of the Anglo American Corporation.

Retail and wholesale trade

There have been a variety of developments in the retail and wholesale sector (supermarkets) that are related to growth in retail stores and changing buyer patterns of both consumers and retailers. Mergers and acquisitions have included the proposed acquisition by Pick n Pay Retailers of Fruit & Veg City, which was blocked by the Commission in 2007,[20] and the merger between Pick n Pay and Boxer Holdings[21] in 2002, as well as the

[14] For example, Afgri Operations acquisition of Natal Agricultural Co-operative in 2004. Competition Tribunal case number 17/LM/Mar04.
[15] For example, in 2004 Afgri Operations acquired Nedan Oil Mills. Nedan Oil was a bulk supplier of refined edible oils, fats and soya protein. Competition Tribunal case number 107/LM/Dec04.
[16] Competition Tribunal case number 69/AM/Dec01.
[17] Competition Tribunal case number 57/LM/Aug04.
[18] Competition Tribunal case number 74/LM/Sep04.
[19] Competition Tribunal case number 83/LM/Jul00.
[20] The merger was withdrawn after the Commission indicated its opposition.
[21] Competition Tribunal case number 52/LM/Jul02.

approved Shoprite Checkers' acquisition of Foodworld Group Holdings[22] in 2005. In addition, Massmart acquired Jumbo Cash & Carry[23] in 2001, Top Spot Supermarket[24] and Cambridge Food[25] in 2008, while the proposed Massmart/Moresport merger was prohibited by the Tribunal in 2006.[26] Of the various mergers involving the major furniture companies, only the proposed merger of the JD Group and Ellerine Holdings was prohibited by the Tribunal in 2000 (box 4).

Private healthcare

In the private healthcare sector, a succession of acquisitions by the big three hospital groups of smaller private hospital groups and independents has meant growing concentration at this level. This market structure is not unique to South Africa, as larger hospitals are better able to negotiate rates with very large medical aids. The failure of private hospital groups has added to this concentration. An example is Macmed, which was liquidated in 1999, but restructured to form the Community Hospital Group, of which the majority shareholder Netcare took full control in 2007[27].

Many of the hospital acquisitions have come before the competition authorities, with some being evaluated in lengthy contested hearings before the Tribunal. The major merger cases to come before the competition authorities include the Afrox Healthcare acquisitions of Amalgamated Hospitals (2001) and Wilgers Hospitals (2002[28]), and Medi-Clinic's acquisitions of Curamed (2002), the Wits University Donald Gordon Medical Centre (2005), and the Protector Group (2006[29]). The merger of Afrox Healthcare and Business Ventures Investments 790[30] was approved by the Tribunal in 2005, with conditions relating to the elimination of cross-holdings and cross-directorships, as well as the restriction of the sale of equity in the target firm. This followed the withdrawal of an earlier version of the transaction in which Medi-Clinic would have had a 25 percent stake in the merged entity and joint control along with Afrox. The merging parties had at first used the BEE partners to attempt to mask the actual acquisition of control by Medi-Clinic. When this was exposed, Medi-Clinic withdrew, and the acquisition by the BEE entity of Afrox was approved.

Some moves were made to limit this growing concentration in the private healthcare sector, such as the Tribunal's prohibition in 2005 of the Medicross Healthcare Group's proposed acquisition of Prime Cure Holdings. The Tribunal found that "the removal of a rival – Prime Cure – to Netdirect and Medicross, increased the likelihood of a relationship between Netcare, on the one hand, and Medi-Clinic and Life Healthcare on the other".[31] The merger was prohibited by the Tribunal on the grounds of the potential horizontal and vertical effects, but the decision was subsequently overturned by the Competition Appeal Court.[32] Some stakeholders in the healthcare industry, such as the Council for Medical Schemes and the Department of Health, have held that private healthcare groups are among the main reasons for inflation and high prices in this sector.[33]

The private healthcare sector has seen growing concentration, with big hospital groups acquiring smaller groups and independents

Construction

The construction industry in South Africa experienced an upsurge in merger activity between 1999 and 2008 as a result of increased government expenditure and investment in infrastructure. Merger activity in this sector has largely been driven by vertical integration by the five largest firms in the construction industry, while there have also been several horizontal mergers notified to the Commission. Notable construction mergers have included WBHO (Pty) Ltd's acquisition in 2007 of Let Construction (Pty) Ltd[34], a construction firm that also specialises in reinforced concrete structures, approved on the basis of low market shares in the market for civil engineering services. Murray & Roberts' acquisition of Concor Ltd in 2005 also had both horizontal and vertical effects. Despite a finding of high market share and

Merger activity in the construction sector has largely been driven by vertical integration by the five largest firms in the industry

[22] Competition Commission case number 2005Apr1538.
[23] Competition Tribunal case number 39/LM/Jul01.
[24] Competition Commission case number 2008Jun3784.
[25] Competition Commission case number 2008Aug3899.
[26] Competition Tribunal case number 62/LM/Jul05.
[27] Competition Tribunal case number 68/LM/Aug06.
[28] Competition Tribunal case numbers 53/LM/Sep01, 15/LM/Feb02 and 105/LM/Dec05, respectively.
[29] Competition Tribunal case numbers 74/LM/Oct02, 75/LM/Aug05 and 122/LM/Dec05, respectively.
[30] Competition Tribunal case number 105/LM/Dec04.
[31] Competition Tribunal case number 11/LM/Mar05.
[32] Competition Appeal Court case number 55/CAC/Sep05.
[33] See Business Report, 29 July 2008, "Private healthcare sector's big three give upward kick to prices, says economist" by S. Khanyile, for opinions on this matter by UCT HEU economist Professor Di McIntyre and the then Minister of Health, Manto Tshabalala-Msimang; the Department of Health website and the Council for Medical Schemes reports.
[34] Competition Tribunal case number 54/LM/May07.

As horizontal mergers involve a reduction in the number of competitors, they are generally viewed with more caution

The Commission approved over 92 percent of notified mergers

concentration in the construction market, the Tribunal held that, amongst other considerations, the bidding nature of the market would constrain any possible anti-competitive effects as a result of the merger.[35] Other horizontal transactions include Alpha/Slagment[36] in 2004, Group Five Construction/Quarry Cats[37] in 2006 and the Stefanutti & Bressan Holdings mergers with Skelton & Plummer Investment[38] in 2007 and then with Stocks Limited[39] in 2008, the Basil Read mergers with Roadcrete Africa[40] in 2008 and V&V Holdings in 2009[41], and Lafarge South African Holdings/Ash Resources[42] in 2009.

Vertical mergers have been premised on the major construction firms stating that they want to ensure future supply of inputs as well as diversify their product offering. This is largely seen in Murray & Roberts' acquisition of Oconbrick Manufacturing and Others[43], manufacturers of various types of bricks, in 2005. Again, the merger was approved on the basis that the market was deemed to be of a bidding nature. Group Five's acquisition of Quarry Cats[44], a downstream supplier of sand and stone, ready-mix concrete and mortar, as well as crushing services, was also approved for the same reasons.

Although the majority of merger notifications are domestic, there has been a positive international trend in cross-border mergers. It should be noted that international mergers are notified to the Commission and Tribunal if they operate in South African markets. These are generally notified with several competition authorities.

Types of mergers

When mergers are considered where there is a relationship between the merging parties, more than half are of a horizontal nature, that is, between two firms in the same market line. Firms that are in a vertical relationship make up a much smaller portion (table 3).

The effects of vertical and horizontal mergers on competition are quite distinct, as they raise different competitive concerns. While a horizontal merger involves a reduction in the number of competitors, vertical mergers do not in and of themselves change the market shares at each level. Horizontal mergers are thus generally viewed with more caution in merger analysis, although the significance of the effects has to be evaluated carefully; they also sometimes give rise to public interest or even pro-competitive gains. For example, a horizontal merger between small players can lead to economies of scale, which would allow the merged entity to compete better in the market place.

Vertical mergers are more often than not viewed as pro-competitive strategies to improve coordination

Table 3. Types of mergers where relationships existed between the parties, percent

	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09
Horizontal	65	51	56	54	49	57	48
Vertical	6	8	9	11	8	6	9
Horizontal and Vertical	4	7	8	0	17	0	13
Others*	25	34	27	35	26	37	30
Total	100	100	100	100	100	100	100

Source: Competition Commission annual reports.
Note: Includes management buy-outs and conglomerate mergers

[35] Competition Tribunal case number 101/LM/Oct05.
[36] Competition Tribunal case number 27/LM/Jun03.
[37] Competition Commission case number 2006Dec2658.
[38] Competition Commission case number 2007 Oct 3259.
[39] Competition Tribunal case number 43/LM/Apr08.
[40] Competition Commission case number 2008July3887.
[41] Competition Commission case number 2009Feb4282.
[42] Competition Commission case number 2008Sep4018.
[43] Competition Tribunal case number 51/LM/Jun05.
[44] Competition Tribunal case number 107/LM/Dec06.

of activities through a supply chain. A vertical merger of firms at two different levels of a supply chain may, however, provide the merged entity with the incentive and ability to restrict its rivals' ability to compete through foreclosing their access to inputs or to customers. These factors are considered in more detail below.

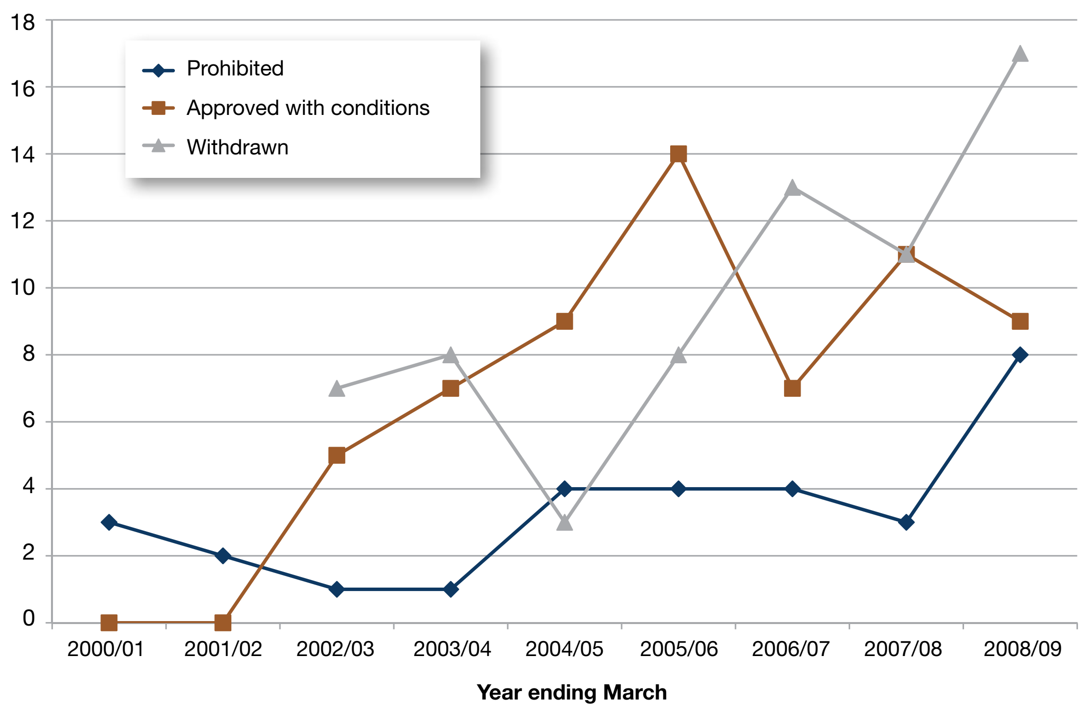
MERGER ASSESSMENT BY THE COMPETITION AUTHORITIES

The Commission approved over 92 percent of notified mergers, reflecting the OECD peer review observation that "the legal standards for merger control are general and evidently permissive" in line with international norms[45]. In the case of intermediate mergers, the Commission can decide to prohibit or impose conditions, while for large mergers the Commission makes a recommendation to the Tribunal. The number of mergers raising competition concerns has increased slightly over the last ten years, reflected in mergers either being prohibited, approved with conditions or withdrawn (mostly following the Commission indicating concerns) (figure 4). Most of the jurisdictional opposition to the competition authorities' role in merger review stemmed from the wording of section 3(1)(d) of the Competition Act, which excluded the competition authorities from jurisdiction over "acts subject to or authorised by public regulation".

Following the amendments to the Act in 2001, the competition authorities have had jurisdiction over all mergers, except in the case of banking mergers, when the Minister of Finance may issue a certificate revoking the competition authorities' jurisdiction.

In the case of banking mergers, the Minister of Finance may issue a certificate revoking the competition authorities' jurisdiction

Figure 4. Number of Competition Commission merger decisions or recommendations[46]



Source: Competition Commission annual reports

[45] Wise, M. (2003) "Competition Law and Policy in South Africa", OECD Global Forum on Competition Peer Review, Paris, 11 February 2003.
[46] This number omits the 47 mergers that were not evaluated between 2000 and 2002 due to issues with jurisdiction or due to their being withdrawn.

Of cases where the Commission has identified competition concerns, more have been approved subject to conditions than those that have been prohibited outright

Mergers raising competition concerns

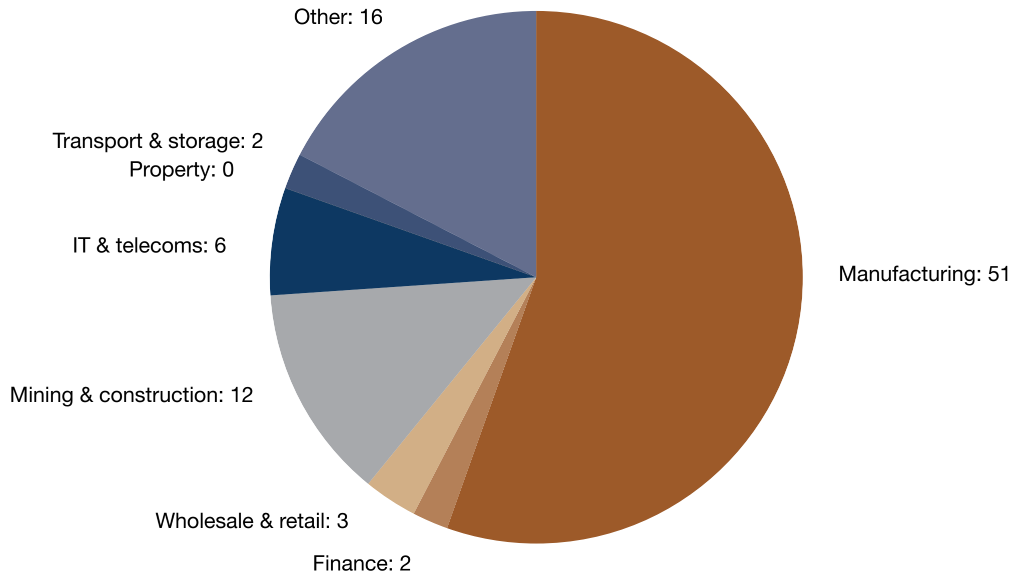
Of cases where the Commission has identified competition concerns, more have been approved subject to conditions than those that have been prohibited outright. The Commission has made greater use of imposing conditions to remedy competition concerns in later years, although the Tribunal decisions showed this tendency earlier on. This was to achieve the desired effect of the enhanced efficiencies a merged firm enjoys while mitigating the negative aspects of a merger. These include potential abuse of a post-merger dominant position, foreclosure concerns, job losses and information sharing.

The conditions imposed have been at times behavioural and at other times structural, requiring actions such as the divestiture of conflicting business interests or the prohibition of cross-directorships. That the authorities choose to impose conditions on problematic mergers rather than to prohibit a transaction indicates a determination to use more advanced techniques and assessment tools to draw out the positive aspects of a merger, while guarding against the negative ones. Over time, cases have also increasingly been withdrawn before they reach the Tribunal if the Commission finds anti-competitive effects. These include recent proposed mergers by companies dealing in construction related materials such as Much Asphalt and Gauteng Asphalt, Cape Gate and Transvaal Gate, Aveng (Africa) and Silverton Reinforcing, as well as Mittal Steel SA and Duferco Steel Processing.

Of the mergers where the Commission either prohibited or imposed conditions (including where these were recommendations to the Tribunal) the larger share has been in manufacturing, followed by mining and construction (figure 5). The number of mergers raising competition concerns in the financial sector is, however, markedly lower than merger activity in this sector suggests, and no merger in the property sector has raised substantial competition concerns.

The competition authorities are now more able to apply advanced techniques and assessment tools to draw out the positive aspects of a merger, while guarding against the negative ones

Figure 5. Number of prohibitions and conditional approvals by the Commission by sector: 2000–2009



Source: Internal Commission case reports

The early merger evaluations involved a natural process of establishing precedents and the appropriate tests through the Commission and Tribunal processes, in which some early prohibition recommendations by the Commission of large mergers were overturned by the Tribunal, as were several of the Commission's recommendations for approval. As precedents were established by the Tribunal, and as the Commission has developed its merger investigation skills and experience, there have been fewer differences. The mergers that are now contested are generally more complex, as firms tend not to notify mergers that raise obvious competition concerns. This has meant longer and more involved hearings before the Tribunal for those cases where there are substantive competition issues.

The Commission prohibited 27 intermediate and small mergers between inception and the end of 2008. These decisions may be appealed to the Tribunal. A small number of the Commission's decisions have in fact been appealed. On one occasion, involving the acquisition by Primedia of Nail in 2006, the Commission gave conditional approval for the transaction. The acquiring party appealed the imposition of the condition and this appeal was ultimately upheld. The Tribunal is also entitled to decide applications to review the procedures employed by the Commission when deciding intermediate and small mergers. On one occasion, a competitor of the parties to an intermediate merger in the sawmilling industry reviewed the Commission's decision to approve the transaction, alleging that the Commission had not applied its mind properly in arriving at its decision. The Tribunal upheld the Commission's decision on the basis that it had followed the correct approach. All large mergers are decided by the Tribunal, which has prohibited eight of these transactions and conditionally approved a further 52. In addition, merging parties can appeal the Tribunal's decision to the Competition Appeal Court.

On occasion, the Tribunal has prohibited transactions that the Commission has recommended be approved, just as it has approved transactions that the Commission has recommended be prohibited. Examples of the Tribunal overturning prohibition decisions or recommendations of the Commission are the Bidvest/Paragon merger in 2002, and the Netcare/Community Health Group merger in 2007. In each of these cases, the Tribunal unconditionally approved the mergers based on expert and factual testimony presented in the hearings. In the case of Bidvest/Paragon, the expert witness produced

The early merger evaluations involved a natural process of establishing precedents and the appropriate tests through the Commission and Tribunal processes

Table 4. Competition Commission and Tribunal merger decisions: 1999 to 2009

	Commission decisions/recommendations						Tribunal decisions					
Year	Large mergers			Intermediate mergers			Large mergers			Intermediate mergers		
	Total	Prohibited	Conditionally approved	Total	Prohibited	Conditionally approved	Total	Prohibited	Conditionally approved	Total	Prohibited	Conditionally approved
1999/00	12	1	0	91	1	0	14	0	0	0	0	0
2000/01	24	1	0	387	2	0	35	2	4	5	0	2
2001/02	42	1	0	179	1	0	42	1	3	2	0	1
2002/03	68	1	2	129	0	2	62	1	4	2	0	2
2003/04	59	1	2	214	0	4	60	0	9	1	0	0
2004/05	65	0	7	229	3	2	62	0	7	3	0	0
2005/06	101	3	0	284	0	7	100	2	12	1	0	0
2006/07	91	4	4	315	0	3	85	1	5	1	0	0
2007/08	100	1	1	370	2	9	98	1	8	3	0	0
2008/09	106	1	5	341	6	4	102	0	4	2	0	0

Source: Competition Commission and Competition Tribunal annual reports.

Notes: The total number of large mergers is not the same each year for the Commission and Tribunal, as a case may be taken to the Tribunal the year after it is notified to the Commission; intermediate mergers are referred to the Tribunal only where a party contests the Commission's decision

Two of the largest cases to come before the Competition Tribunal involved the major players attempting to acquire important rivals, in regulated markets in which deregulation was on the cards

In line with international trends, the competition authorities are increasingly vigilant about identifying instances where mergers create a platform for collusion

market shares calculated by a different method, which indicated lower market concentration than that accepted by the Commission. In the case of Netcare/ Community Health Group, the Tribunal decided that the merger was unlikely to lead to a significant lessening of competition as the main competitive rivalry was that between the three main hospital groups, and not the rivalry posed by the independent hospitals.

Conversely, there have been mergers in which the Tribunal has either imposed conditions or prohibited mergers that the Commission recommended. For example, the Commission recommended an unconditional approval of the Nampak/Burcap merger but the Tribunal imposed conditions in 2007. Nampak and Burcap's activities overlap in the manufacturing of a variety of containers for the food and industrial markets. The Commission found that the substitution of metal containers with plastic ones removed the threat of anti-competitive behaviour post-merger. However, the dominance of Nampak in the industrial containers market, and the practical obstacles to plastic containers adequately substituting for metal containers in the near future, convinced the Tribunal that the merger would result in the removal of an effective current and future competitor from the market. The conditions imposed also allayed the Tribunal's concerns about the merger raising barriers to entry, as they prevented the merged entity from concluding exclusive agreements with customers for three years after the merger.

Two of the largest cases to come before the Competition Tribunal involved the major players attempting to acquire important rivals, in regulated markets in which deregulation was on the cards. In the proposed merger, in the liquid fuel industry, of the interests of Sasol and Engen to form uHambo, the Tribunal focused on the vertical issues, with the proposed merger effectively involving the country's largest producer of refined fuel and the firm with the largest distribution and service station network. The Commission had initially recommended approval of this transaction but, on evaluating the testimony provided during the hearings, ultimately recommended that the transaction be prohibited. The Tribunal prohibited the merger in 2006. In 2007, in the proposed Telkom/BCX merger, the Tribunal found that the substantial lessening of competition was mainly in the horizontal change with regard to managed network services (box 5).

Vertical mergers

The same test of whether there is a substantial prevention or lessening of competition is applied whether a merger is vertical or horizontal in nature.

The record on vertical mergers points to characteristics of the South African economy that are shared by other developing countries, and that have given cause for closer scrutiny than is typically the case in large, industrialised economies. The main feature is that the economy is small and concentrated, and extensive cross-holdings between the major firms are fairly common. The South African economy is also located far from other industrial economies and has historically had high levels of protection and extensive regulation of several sectors through state marketing boards and other arrangements. It is not uncommon for there to be a dominant firm or duopoly in upstream and/or downstream markets. The South African competition authorities have thus been wary of vertical mergers that may have the effect of shielding firms from increased competitive forces, such as from importers, as well as mergers that potentially provide better monitoring and scope for retaliation against deviations from collusive arrangements, increasing the likelihood of coordination or its continuation. The standards for vertical mergers were addressed in several key cases in the early years of the competition authorities, including two cases that also went to the Competition Appeal Court (box 6).

Coordinated effects

The majority of the Commission and Tribunal conditional approval and prohibition decisions have been related to the unilateral effects that a merger may have on the market. However, in line with increased practice internationally, in more recent years, coordinated effects have increasingly become the focus of the competition authorities. While concerns related to coordinated effects are primarily dealt with through divestiture conditions and the prohibition of

Box 5. Mergers stifling actual and potential competition under planned deregulation

The proposed Sasol/Engen (uHambo) merger: "A new cartel that will destroy the promise contained in further deregulation of the price of fuel in South Africa."

In 2005, the competition authorities assessed one of the biggest cases of the decade, the proposed merger in the oil industry between Sasol and Engen to form uHambo[47], with the Tribunal giving reasons for its prohibition on 23 February 2006. The merger was planned against the backdrop of extensive regulation, with plans for deregulation having been announced by government. While the merger would involve both the supply of refined fuel and the marketing and distribution interests of the two parties, a major part of the Tribunal's reasoning was based on the impact in the light of planned deregulation. A key consideration in this was that through the merger, Sasol, as the largest refiner, would be linked with the largest distribution and retail network in the country, operated by Engen.

Sasol, established by the then government in 1950, but now a privatised corporation, had been restricted from expanding into the retail market in exchange for obligations on the other oil companies (OOCs) to uplift its product in the inland area, largely from its oil-from-coal refinery at Secunda. This commitment was embodied in the Main Supply Agreement (MSA) brokered by government and had existed, in periodically amended form, since Sasol first started producing fuels in the 1950s. The MSA effectively provided for an allocation of markets between Sasol and the other oil companies. At the time of the merger, the far-reaching regulation by government also included controls on prices, restrictions on imports and exports and the production of certain products, as well as restrictions on the allowable degree of vertical integration in the industry.

In 1998, the government had published a draft white paper on energy policy, setting out its intentions with regard to deregulation in phases, and starting with the creation of opportunities for the participation of historically disadvantaged South Africans. This was to be followed by the removal of retail price regulation, import control and government support of the service station rationalisation plan, with government monitoring the industry for possible problems arising out of deregulation.In 1998, Sasol gave the stipulated five-year notice to the other oil companies to terminate the MSA agreement, which duly ended in December 2003. This left Sasol free to expand into the retail market, and the OOCs with the ability to negotiate for cheaper wholesale prices for fuel from Sasol for the inland market. Sasol was, however, restricted in the speed with which it could set up petrol stations by regulatory provisions governing this market. This meant that it was in effect dependent on the OOCs for uplift of its product, something which the OOCs attempted to leverage into a discounted price. At the same time, Sasol moved ahead with the proposed merger with Engen.

While the merger had a horizontal dimension at the refining level, the logistics constraints between the coastal refineries in Durban and the inland area meant that the Tribunal identified this area as a separate market and focused on the dynamics here between Sasol and the OOCs. Much of the hearings thus turned on the ability and incentive of the merged entity to foreclose the OOCs in this inland market and the OOCs' ability to overcome the logistics constraints from the coast and/or to exert countervailing power on the proposed merged entity, uHambo. As the Tribunal found, the crucial issue was whether a credible threat of foreclosure existed such that uHambo would be able to maintain prices and ensure "a reconstituted cartel, though, unlike the MSA, this cartel will be under the clear leadership of Uhambo. This new cartel will eliminate the competition already ushered in by the termination of the MSA and it will destroy the promise contained in further planned deregulation." The Tribunal found that this was probable and prohibited the merger.

Telkom/BCX merger: stifling the benefits of deregulation and an attempt to stifle innovation

The proposed acquisition of BCX by Telkom[48] was planned against a similar backdrop of deregulation and the promise of increased competition, with the introduction of a second national operator, Neotel, to compete with the fixed-line incumbent, Telkom. It was prohibited by the Tribunal on 28 June 2007. The case turned on the importance of managed network services (MNS) that both Telkom and BCX provide.

The Tribunal found that the merger would take place at a time when the industry was moving towards convergence with the MNS market, described as the battleground for convergence. The Tribunal found that the merger would result in the removal of BCX as an important competitor in the MNS market. In addition, the Tribunal noted that Telkom wanted to defend its monopoly revenues in its core markets, namely fixed line voice and infrastructure, from the impact of deregulation (convergence), competition and further price regulation in the corporate and middle to large enterprise segments of its business.

The existence of vibrant and independent competitors in the MNS market was important in that, according to the Tribunal "if Telkom does not remove credible MNS competitors and gain access to their customers, it stands to lose the most lucrative segment of its business. Alternatively, it will be providing Neotel with an opportunity to partner with any of these enterprises and take a greater share of the MNS market than that predicted by Telkom." The Tribunal further found that in addition to stifling the benefits of deregulation, Telkom was attempting throuh the merger to stifle innovation in order to maintain its monopoly margins in infrastructure and voice services.

In making this finding, the Tribunal found that, contrary to the merging parties' contention that Neotel would be a formidable competitor in the MNS market, Neotel was far from entering the MNS market in a manner that is both sufficient and quick enough to exert a significant competitive constraint on Telkom.

[47] Competition Tribunal case number 101/LM/Dec04.
[48] Competition Tribunal case number 51/LM/Jun06.

Box 6. Precedent-setting decisions on vertical mergers

In two early merger cases, decided in 2001 and 2002, the competition authorities faced the assessment of the competition implications in vertical mergers. In cases where a supplier is merging with a customer rather than with a competitor, there is no direct change in concentration in the markets of either the supplier or the customer (which can be viewed as upstream and downstream markets). Rather, the likelihood of a substantial prevention or lessening of competition has to be assessed in terms of the incentive and ability of the merged entity to impact negatively on competition through strategies such as foreclosing its rivals or raising rivals' costs in terms of an input or market, raising barriers to entry, or increasing the likelihood of coordination. For there to be competition concerns, there must be market power in at least one of the markets. In South African cases where competition concerns have arisen, the upstream supplier of an input generally has a large market share. The concerns related to whether, after acquiring one of its customers, it would be able to affect competition negatively in the downstream market by not supplying independent firms on the same terms as its newly acquired entity.

Schumann Sasol and Price's Daelite[49]

The proposed merger between Schumann Sasol (South Africa) (Pty) Ltd and Price's Daelite (Pty) Ltd was prohibited by the Competition Tribunal in May 2001. The merger was the first significant vertical transaction that the Tribunal dealt with. Schumann Sasol was the dominant supplier of candle wax with a share of around 75 percent, and sought to acquire its largest customer, namely Price's Daelite, which had a 42 percent share of the market for household candles. The two firms were thus in a vertical supplier/customer relationship and the two relevant markets in South Africa with which the Tribunal was concerned were the supply of candle wax (the upstream market) and the production and marketing of household candles (the downstream market). In assessing whether the merger would be likely to have the effect of substantially lessening or preventing competition, the Tribunal observed that Schumann Sasol's normal commercial interest would be impacted by the fact that wax could not be economically stored and is a by-product of a larger chemical production process. This meant that, while having a 75 percent market share, its ability to exert market power depended on its relationships with customers to ensure off-take, notwithstanding fluctuating demand for candles. Tying in customers could also have the effect of raising barriers to entry in the supply of wax, as such competitors upstream would need customers to be viable.[50]

Under a supply agreement, Price's Daelite had procured the lion's share of its wax input from Schumann Sasol. It was also permitted to source a small amount of wax from other suppliers. Price's Daelite had run up a significant trading debt with Schumann Sasol, and there was also a significant conflict (referred to arbitration) between the parties with regard to the terms and performance of the contract. Before arbitration, Schuman Sasol had offered to acquire Price's Daelite to overcome the issues of the outstanding debt.The Tribunal found that at stake was the potential loss of a major customer, and that the merger thus reduced the likelihood of entry in the supply of candle wax, whether in the form of imports or a competing local supplier. The acquisition would enable Schumann Sasol to secure a share of the candle wax market that was not subject to the vagaries of a disputed contract and to the possibility of a hold-up by its largest customer. The Tribunal further argued that Schumann Sasol could engage in anti-competitive behaviour in the downstream market, squeezing out competing candle makers and further raising entry barriers in wax supply by requiring entrants to simultaneously enter the downstream candle market.The Competition Appeal Court overturned the decision and approved the merger. In the Court's view, there was not substantial evidence that foreclosure strategies would succeed and specifically that other candle manufacturers had ready access to imported wax.

Mondi Ltd and Kohler Cores and Tubes[51]

In 2002, Mondi Ltd, a supplier of paper products, including those used in the manufacture of cores and cubes, sought to acquire Kohler Cores and Tubes, a supplier to and a customer of Mondi. Mondi supplied Kohler with Ndicore core board and kraft paper, which Kohler used to manufacture cores and tubes. These cores are used by Mondi, along with other customers, in other product markets, including paper, textiles and some metal sheets. The other South African producer of paper products, Sappi, was also a significant supplier of core board (with a product called Spirawind) and was simultaneously a customer of Kohler for its own cores and tubes. Mondi and Sappi each had a 38 percent share of core board (paper product supplies to the cores and tubes market) and Kohler had a 45 percent share in the market for heavy industrial cores and tubes. The Tribunal found that the merger would substantially lessen competition through allowing the integrated entity to self-deal, placing Sappi in an effective monopoly position with regard to the other manufacturers of cores and tubes. In effect, the merger would lessen competition in the supply of industrial core board, and lead to higher prices of this product. The impact on the cores and tubes market would also be negative in raising the costs of Mondi's rivals in this market and thus enabling its newly acquired cores and cubes division to capture a large share of this market. The Tribunal rejected the merging parties' argument that imports would undermine any attempts at input foreclosure, as imports were a poor alternative to local supplies of core board because of the costs of imports and the effects of the exchange rate. The Tribunal therefore found that the transaction raised the risks of both input and customer foreclosure and that the merger would facilitate coordination between Sappi and Mondi in the upstream market. The Tribunal's prohibition was upheld by the Competition Appeal Court.

49 Competition Appeal Court case number 10/CAC/Aug01.
50 Note that Sasol was heavily fined by the European Commission in 2008 for the role played by a European subsidiary in a paraffin wax cartel.
51 Competition Appeal Court case number 20/CAC/Jun02.

cross-directorships, the Commission and Tribunal have been vigilant in their analysis of proposed mergers so as to identify instances where mergers create a platform for collusion.

A case in point was the proposed Comcorp merger[52] in 2004, a small merger in which the four big banks – ABSA, First Rand, Nedbank and Standard Bank – proposed entering into a joint venture to control Comcorp. Comcorp is involved in the development and provision of software to the home loan origination market. The banks intended acquiring Comcorp to establish an industry-wide switch for the electronic submission of mortgage bond applications, with all mortgage applications having to be submitted via a single channel, the switch. Apart from other anti-competitive concerns, the Commission found that "joint control over Comcorp creates a platform for collusion that could reduce inter-bank competition". The proposed merger was prohibited. "Mergers prohibited on the grounds of information sharing were highlighted, which is in line with the issue of the Commission dealing with more complicated mergers and their greater knowledge of platforms that engender collusion".

Merger decisions of the competition authorities approve or prohibit changes to the structure of the economy. Part of the merger evaluation is the assessment of the impact of the merger on potential competition and on barriers to entry. In fact, the proposed Tongaat–Hulett/Transvaal Suiker Beperk merger was prohibited on the basis that it would substantially lessen or prevent competition in the event that the market for sugar is deregulated. The Tribunal offered this explanation for the prohibition of the merger: "While it may be difficult, given the low baseline, to assert with confidence that competition will be 'substantially lessened', we are satisfied that potential competition will be 'prevented' by this merger."

Failing firm defence

The failing firm defence provides for the approval of a merger with possible anti-competitive effects, which are outweighed by the damage caused to the market by the exit of assets. The key case decided on these grounds was that between Iscor and Saldanha Steel[53], approved by the Tribunal with conditions in February 2002.

The Tribunal concluded that the merger would lessen competition, as the firms were competitors in the South African market[54] for flat steel. The horizontal effects of the merger were hard to quantify, however, as Saldanha Steel never competed in the local market because of conditions imposed upon it, conditions which the Tribunal also struck down. The merger was approved on the basis that Saldanha was a failing firm, and, were the merger prohibited, the Saldanha plant would have closed down, with adverse effects on the surrounding region.

Key to the Tribunal's analysis of the failing firm defence was evidence that there was no less anti-competitive alternative than the merger. The Tribunal further found that the extent of failure or its imminence must be weighed up against the evidence of the anti-competitive effect, and the greater the anti-competitive threat the greater the requirement to show that failure is imminent. The onus is squarely on the merging firms to establish the evidence necessary to invoke the doctrine of the failing firm.

The Tribunal was satisfied that Saldanha Steel was likely to fail and that there was no other credible purchaser. It approved the transaction subject to a condition stipulating that no conditions could be placed on the main local purchaser of Saldanha Steel, Duferco Steel Processing (Pty) Ltd, in relation to the sale of its products.

Efficiencies

The key Tribunal decision on efficiencies in merger evaluation is that for the merger of Trident Steel (Pty) Ltd and Dorbyl Ltd, approved by the Tribunal, with reasons issued in 2001[54]. The Tribunal decided that the efficiencies to be attained prevailed over the likely anti-competitive effects of the merger. This transaction involved Trident's acquisition of three steel processing plants from Dorbyl Ltd.

The failing firm defence provides for the approval of a merger with possible anti-competitive effects, which are outweighed by the damage caused to the market by the exit of assets

Sometimes the efficiencies to be attained by a merger may prevail over the likely anti-competitive effects

[52] Competition Commission case number 2004Jan839.
[53] Competition Tribunal case number 67/LM/Dec01.
[54] Competition Tribunal case number 89/LM/Oct00.

The effects of a merger on employment, small business development and international competitiveness are common issues of public interest

The Tribunal found that there would be anti-competitive effects in the improved surface finish market, where the merging parties were the only local competitors, with 35 percent share each, and imports made up the remainder. Barriers to entry were high, owing to the significant capital investment requirements. The Tribunal was not satisfied that imports would constrain the pricing behaviour of the merged firm as they were generally in a different form. There was evidence that Baldwins intended to exit the market anyway, which would thus reduce the level of competition.

Although the Tribunal concluded that the merger would result in a substantial lessening of competition in the market, it decided that the efficiency gains would offset any anti-competitive effects.

With reference to the Act and the treatment in other jurisdictions, the Tribunal found that efficiency gains could be divided into three main categories. These are, in order of decreasing importance, dynamic efficiencies, production efficiencies and pecuniary efficiencies. The most beneficial dynamic efficiencies are those associated with innovation, because these are efficiencies in product or service quality, which are precisely those benefits yielded by competition. However, they are very difficult to measure.

Production efficiencies are those most commonly claimed by parties to a merger. This type of efficiency involves increased output, reduced costs, and/or an improvement in the quality of output. There are also different types of production efficiencies, such as plant level economies; distribution, procurement and capital cost economies; and research and development. Critical to the evaluation of these efficiencies are reasonable and objectively verifiable explanations about why these efficiencies will be achieved and why they cannot be achieved other than through the merger.

At the other end of the scale are pecuniary efficiencies, for example, tax savings or lower input costs resulting from improved bargaining power with suppliers. These may be the easiest to quantify, but are not considered real savings in resources, as they are effectively just transfers between entities that do not lead to net gains in efficiency.

One of the most controversial issues in assessing claimed efficiencies is who should benefit from the claimed efficiencies. To address this, the Tribunal proposed the following test: if the efficiencies can be proved to result from the merger, there is less need to show a benefit to consumers. If the efficiencies are less compelling, then evidence that the benefits will be passed through to consumers will be more important.

In the Trident Steel/Dorbyl Ltd merger in 2000, three groups of efficiencies were advanced: plant scale efficiencies and plant use efficiencies, supply production efficiencies, and volume discounts. As the plant use and supply production efficiencies were “real” and qualitative, it was not necessary to show the pass-through of benefits to the consumer, but the volume discounts did not represent real efficiencies.

Public interest issues

A range of public interest factors needs to be taken into account in relation to mergers, including the effect of the merger on a particular industry or region, on employment, on the abilities of small businesses or firms controlled by historical disadvantaged persons to become competitive, and on the international competitiveness of South African industries. These factors suggest that three groups would typically take up the public interest issues: various departments of government, trade unions and consumer groups. Trade unions are regular participants in the merger process where employment issues are at stake. However, there has been very little participation by government departments or consumer groups in merger proceedings to date.

Employment concerns

In the early days, the trade unions’ engagement with the competition authorities was limited, but through general education and interaction with them, they have become much more involved. Employees have also been more involved in merger negotiations since 2001, with merging firms required to provide a summary of the employment effects of the merger. From time to time, the Tribunal has had to insist on the disclosure of employment information, such as in the Unilever Plc/Unifoods merger in 2002, where the Tribunal determined that “the prime concern of employees would obviously be the effect of the merger on employment… keeping this information confidential deprives labour of not only the right to access to information that legislature clearly gives to them, but also their right to make a meaningful representation to the competition authorities on an issue that directly affects their interests”.[55] The proposed Bonheur 50 General Trading (Pty) Ltd/Komatiland Forests (Pty) Ltd merger[56] was blocked in 2004, partially to address the likely job losses of about 1,200 workers, while the Multichoice Subscriber Management (Pty) Ltd/Tiscali (Pty) Ltd merger[57] in 2005 resulted in the imposition of conditions to limit job losses.

A significant number of mergers has been approved with conditions aimed at minimising job losses. A novel condition imposed on the merger between Tiger Brands Ltd and Ashton Canning Company Ltd and Others[58] in 2005, ensured that the merged entity fund skills training for retrenched seasonal farm workers in the Ashton community. As yet, the competition authorities have not prohibited a merger based solely on public interest grounds, but have made their decisions with reference to limiting the negative impact of mergers.

Black economic empowerment

Black economic empowerment (BEE) has featured significantly in some merger hearings. It is generally invoked when the merging parties argue that any anti-competitive effects of their proposed merger are mitigated by its promotion of BEE. However, in the merger between Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd in 2001, the Commission opposed a merger where a black-owned firm sold a struggling wholly owned subsidiary to Shell in exchange for a minority shareholding in Shell’s distribution arm. The Commission recommended prohibition of the transaction on the grounds that it undermined BEE.[59] However, the Tribunal approved the transaction because it found that there was no purpose to preventing the merger in order to keep a failing firm on life-support merely because it satisfied the BEE criterion. The Tribunal also pointed out that the owner of the target firm was itself a BEE entity that had decided that its best commercial course lay in selling its subsidiary. Another notable case where the empowerment of historically disadvantaged persons was considered was the acquisition of Exel by Sasol Oil in 2003.

Remedies

In merger cases there can be three outcomes – approval, prohibition or conditional approval. If it is found that, if implemented, a merger would contravene the Act, either as a result of being anti-competitive or being contrary to the public interest, the competition authorities will attempt to impose a remedy by conditionally approving a merger, if possible, before deciding that it be prohibited. In redressing anti-competitive effects, the competition authorities have imposed both structural and behavioural remedies. In some cases, structural remedies have entailed the selling off of whole businesses, as in the case of the Lafarge/Kula Enterprises[60] in 2006 and the Evraz Group/Highveld Steel and Vanadium Corporation merger in 2007[61]. In other cases it has entailed the selling of brands such as in the Unilever/Bestfoods/Robertson Foods Joint Venture in 2002,[62] and in the Distillers/Stellenbosch Farmers Winery merger, in 2003.[63]

Behavioural remedies have varied. In the Coleus Packaging/Rheem Crown Plant merger[64] in 2002, where a dominant beverage manufacturing firm merged with the dominant manufacturer of crowns (bottle caps), the Commission concluded that the merger would lead to two types of concerns: input and customer foreclosure. As a remedy with the consent of the merging parties, the Tribunal approved the merger subject to the merged firm entering into an agreement to provide a guaranteed minimum contract to the rival crown maker to ensure its efficient minimum scale viability. On the input side, the

A significant number of mergers has been approved with conditions aimed at minimising job losses

Black economic empowerment has featured significantly in some merger hearings

In a merger that is approved with conditions, structural and behavioral remedies may be imposed

[55] Competition Tribunal case number 55/LM/Sep01.
[56] Competition Commission case number 2004Jun1077.
[57] Competition Tribunal case number 72/LM/Sep04.
[58] Competition Tribunal case number 46/LM/May05.
[59] Competition Tribunal case number 66/LM/Oct01.
[60] Competition Tribunal case number 63/LM/Jul06.
[61] Competition Appeal Court case number 04/LM/Jan07.
[62] Competition Appeal Court case number 31/CAC/Sep03.
[63] Competition Tribunal case number 31/CAC/Sep03.
[64] Competition Tribunal case number 75/LM/Oct02.

merged firm agreed to provide contracts to rivals of its beverage company, to ensure that they had a competitive choice in Crown manufacturers.

In the Trident Steel/Dorbyl Ltd merger in 2000,[65] a potential essential facility problem was resolved by requiring the merged firm to lease out a portion of a quayside area it leased from the harbour authority. Some remedies have involved prohibiting the appointment of directors on competing boards in order to prevent opportunities for information sharing.

Because the Act also recognises public interest concerns, some remedies have been fashioned to redress the harm to the public interest. Where employment loss would arise specifically because of the merger, the Tribunal has sometimes ordered that a cap be set on merger specific retrenchments. While the Tribunal has been reluctant to set caps independently, the cases have usually involved obliging a firm to respect the retrenchment figures that it originally communicated to unions. Employment conditions have sometimes been unusual, such as a contribution to a retraining scheme for casual workers affected by a merger in the canning industry.

Remedies may also address public interest concerns, such as the potential loss of employment arising from a merger

In the Shell/Tepco merger[66] in the petroleum sector in 2001, involving a large firm and a BEE company, the firms wanted to merge the empowerment company's branded retail stations into that of the larger firm Shell. The Commission imposed a remedy on the merged firm to prevent the elimination of the empowerment firm's brand and business from the market. The Commission's argument was that empowerment in the sector would be set back if the black-owned brand and business lost its separate identity in the market. The merging parties opposed the condition and successfully appealed to the Tribunal, which set the conditions aside.

[65] Competition Tribunal case number 89/LM/Oct00.
[66] Competition Tribunal case number 66/LM/Oct01.

Black Sash commends the work of the competition authorities

Our mission at the Black Sash is to empower marginalised communities and individuals to speak out in order to effect change in their social and economic circumstances. Through our rights education, advice giving, and advocacy programmes, we educate and inform individuals and groups about their rights in order to empower them to take action to access these rights. Therefore our cooperation with the Competition authorities is informed by more than just abstract principle. The lives of ordinary people are negatively affected by uncompetitive behaviour, so our involvement with the authorities not only promotes compliance with legislation, but advances a human rights culture. The Black Sash congratulates the Competition authorities on reaching their first decade! Anniversaries have the strange effect of making us think about the past rather than the present. That is so, as we celebrate ten years of mutually beneficial cooperation between the Competition authorities and civil society organisations such as the Black Sash. After all these years of working together, we are proud of the significant contribution this cooperation has made to improve the quality of the lives of the poor in our country. The responsiveness of the authorities to our collective input over the years has demonstrated their desire to promote fair, transparent and efficient regulation.

Ten years may seem a short period of time, but the world today looks very different from the way it did in 1999 when the authorities began their work. In affirming the relevance of the Competition authorities today, we can legitimately reflect on the important role they have played in our society towards creating the developmental state that South Africa aspires to be. The cases of cartel activity before the authorities in 2009 have occurred in an environment of high unemployment and fuel prices, coupled with low wages, chronic poverty, and a sharp decline in purchasing power and food security. In this context, the Black Sash expressed its outrage at revelations that companies producing staple foods such as bread and milk have been involved in cartel activities that have artificially raised the prices of basic food products.

Price fixing, market allocation and collusive tendering by companies are eroding the gains made to rid our young democracy of the scourge of poverty, and they frustrate government's ability to achieve the Millennium Development Goals through the delivery of basic services.

Government has relied on the private sector to deliver basic services, and the Black Sash has been particularly concerned with the regulation of this relationship. Recent investigations by the Competition Commission found that representatives of some companies have held telephone discussions and meetings prior to the submission of their respective tenders. In these "private chats" they collaborated over their responses, and discussed and agreed on prices. This concerned the manipulation of prices for pharmaceutical and hospital products. It is such uncompetitive and unethical behavior that has informed Black Sash's parliamentary submissions and our welcoming of the subsequent amendments to the Competition Act and the Companies Act in 2008. These amendments confirmed legislative and other measures to ensure that companies found guilty of the offences of price fixing, market allocation and collusive tendering are prohibited from pitching for state tenders for a determined period. We remain concerned, however, that companies found guilty of collusion have nonetheless gone on to win substantial state tenders, and we will be advocating for stricter application of this provision in the future.

We also welcomed measures to strengthen the enforcement provisions of the Competition Act including holding individual directors accountable for price fixing, market allocation and collusive tendering. We at the Black Sash agree with the Competition authorities that the greatest deterrent should be the likelihood that offenders – both the company and individuals – will be apprehended, penalised and punished through heavy fines and loss of future state tenders and tax incentives.

We have argued, however, that the fines imposed on companies found guilty of contravening the Act should be used to support poverty alleviation programmes, in the spirit of restorative justice. We will continue to advocate for the targeted use of the income derived from fines and will be approaching the Department of Trade and Industry to consider mechanisms to achieve this.

Price fixing, market allocation and collusive tendering are a form of corruption that undermines the democratic ethos and principles of our Constitution while at the same time eroding the social contract between citizens and the state. For the next decade at least, it is clear that our society needs the ongoing efforts of a vigorous Competition authority, which works closely with civil society organisations. We will need to work together to ensure that the values of good corporate governance permeate the structures, practices and principles of the state, business and civil society sectors together with a deeper commitment to the process of moral regeneration and adherence to a value system of ethical conduct.

Nkosikhulule Nyembezi
The Black Sash

A reflection from the legal profession

The competition authorities have come a long way over the past ten years. A number of aspects of their work raised eyebrows initially and created some consternation for lawyers. The liberal attitude to allowing interventions by third parties in Tribunal proceedings created long and unnecessary delays in disposing of cases and considerably increased the legal costs of the parties. Two prime examples were the Anglo American/Kumba merger and the Sasol/Engen merger. In the latter case, there were no fewer than five intervenors! In the last few years, however, this approach was somewhat tempered, and although a lot of time (perhaps too much time) is still spent in public hearings, only the most deserving of objectors are now allowed in as litigants.

The proactive use of the media to publicise developments in cases being processed by the competition authorities was out of the ordinary for administrative bodies. South African lawyers mostly eschew litigation being carried on through the press and were therefore surprised by this approach. In a few instances this practice went too far, such as in the Pretoria Portland Cement case, where a search and seizure summons was quashed by the High Court primarily because the Commission alerted the media before the summons was executed. In another case, the Commission's haste to publicise a cartel prosecution led to the unwarranted disclosure of confidential information relating to the defendant, Reclam. But, all things considered, the extensive use of the media has contributed immensely to making businesses aware of their legal obligations in the competition sphere and to the competition authorities being taken seriously. It has alerted consumers to their rights and galvanised civil society. It is partially responsible for the significant successes of the corporate leniency policy. Competition policy will in the long run only be successful if it becomes part of business culture. It is undeniable that the fourth estate has a big role to play in that regard.

Paul P J Coetser
Head of Competition Department, Werksmans Attorneys
Chairman, Competition Law Committee of the Law Society of South Africa

A personal reflection from Organised Business

I can well remember the passionate debates about competition policy that were held in the transitional years of 1990–1994 and in the early years after the 1994 democratic election. As Anglo American's chief rottweiler, I was sent in to do battle with what were then perceived from the business side to be a bunch of ideologues and idealists who were determined, in a memorable phrase, to "dismember the conglomerates" by using an aggressive form of US anti-trust policy.

We are all older and wiser now, having described our different learning curves as we create a united non-racial nation in a stable market democracy. The need for more competition in both the private and the public sectors – a point stressed by both the Harvard Panel and OECD analysis of the South African economy in the recent past – in order for the country to improve its growth, competitiveness and overall prosperity, is now more widely shared. Debates about competition policy are contested at the margin, rather than at the core.

Key to achieving, the kind of stability, certainty and predictability that business craves have been the highly professional competition authorities under the able leadership of David Lewis. What has particularly struck me about Lewis is the combination of toughness, independent-mindedness, but ultimately the fairness of his approach. Business can expect no favours, but it can generally be confident that the law will be fairly applied. There is much work still to be done, as anti-competitive practices still thrive in both the public and private sectors, but South Africa is lucky to have a strong and respected set of institutions in the competition policy arena to help it address these particular challenges. David Lewis can pass the leadership baton confident in the competition authorities' ability to do the job.

Michael Spicer
Business Leadership South Africa

COSATU salutes the Competition Commission on the occasion of its tenth anniversary

On behalf of its 2 million members the Congress of South African Trade Unions (COSATU) salutes the Competition Commission (Commission) on the occasion of its tenth Anniversary. Despite resource constraints and the fact that many of the issues it has to uncover happen in secrecy, we are happy that throughout its ten years of existence the Commission has carried out its mandate exceptionally well. It is one of the institutions that serve as a model of a government agency, which is funded through tax payers' money, should conduct itself.

When it was launched ten years ago, the Commission was given a difficult task of dealing with excessive economic concentration and ownership, collusive practices and abuse of economic power by firms, and to ensure socio-economic equity and development. The Commission has worked diligently to advance these objectives and has left its footprints in almost all the sectors of the economy, including chemicals, petroleum, food and agro-processing, wholesale and retail, steel and scrap metal, financial services, telecommunication, infrastructure and construction, and health care.

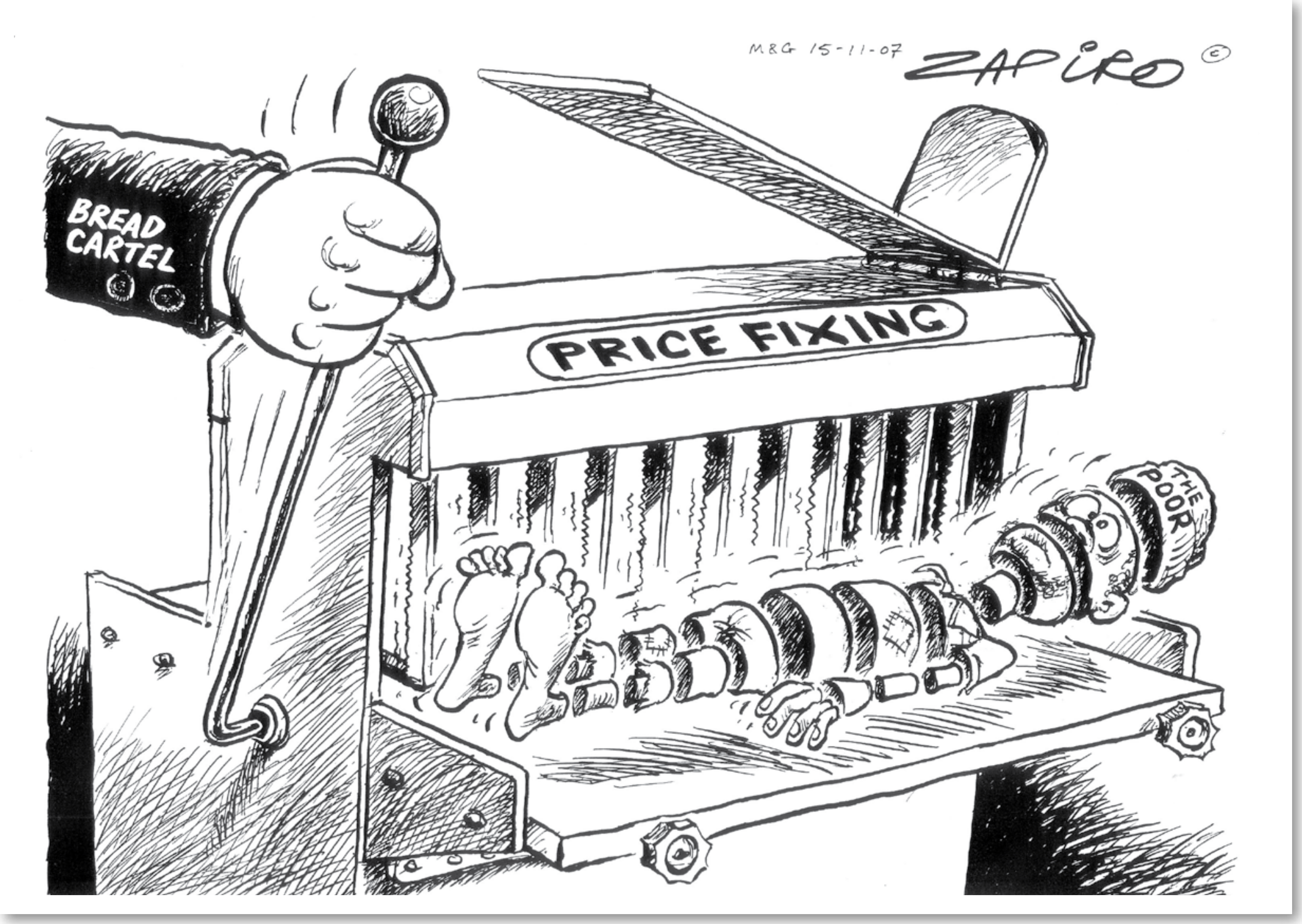
In most instances there had been price collusion which negatively affected workers and the economy broadly through high prices of strategic inputs like steel and high prices of basic foodstuffs like bread and milk. The collusive behaviour of major companies is not only causing prices of basic commodities used by the poor majority to escalate, but it also makes it impossible for SMEs to survive as they are pushed out of the market through these illegal practices.

There are areas where we think the Commission might have acted differently on issues relating to acquisitions and mergers, particularly during the early stages of the Commission's existence. In terms of workers' experiences, mergers and acquisitions normally result in job losses, despite assurances the parties involved may give. There are of course many other instances where the Commission refused mergers and acquisitions and this is welcome.

In our view job consideration must be an overriding condition that influences decisions of the Commission when dealing with issues like mergers and acquisitions. This is particularly important now when the country has put the creation of decent work at the heart of all government programmes in the next five years. We appreciate that the Commission is the implementer of the law developed by other competent authorities. But the Commission is also in a much better position to influence legislative reform with the view of achieving this objective of creating decent work. Among other changes we have been campaigning for and needed the support of the Commission is the criminalisation of collusive behaviour by firms, and holding of their directors and CEOs directly liable. It has been clear that the 10 percent administrative penalty had not been an effective deterrent to collusive conduct by firms. What is even more disconcerting is the fact that once the Competition Tribunal had awarded penalties these are normally passed on to the consumers through further high prices.

COSATU wishes the Commission many more years of service delivery to the masses of our people. Through the Commission's less than 100 dedicated staff members, we have got no doubt that even the mightiest of companies in the country must be thinking twice before engaging in any illegal activities. We will continue to advocate for more resources for the Commission to continue and expand its sterling work.

Bheki Ntshalintshali
COSATU Deputy General Secretary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PRICE FIXING
THE POOR

Prohibited Practices

Introduction

While merger regulation is about preventing firms from occupying a dominant position, many South African markets are already dominated by a single firm, or are characterised by a tight oligopoly, that is, a small number of large firms. High levels of concentration across the South African economy and close relationships between firms in the same industries are important conditions for anti-competitive conduct. Firms in these arrangements are well placed to engage in conduct to earn returns that reflect market power, and to protect themselves from the rise of effective competitors.

The Competition Act (1998) seeks to prohibit anti-competitive practices that have the effect of allowing dominant firms to abuse a position of market power. The abuse can take the form of preventing active rivalry from firms with better products or services, meaning that effort and innovation are not rewarded. Competitive rivalry also tests managers, while anti-competitive conduct can make managers complacent. In the South African context, many dominant firms have their roots in the apartheid economy, but retain and have extended their dominance to this day. The consequences are damaging, as firms that are in dominant positions are rewarded simply because of historical privilege. Furthermore, they may effectively constrain the entry and growth of other players.

Dominance and its abuse is probably the most contested area of competition law. However, the area that attracts the greatest attention of competition authorities is where the market structure allows for competition, but where the existence of only a few firms is also conducive to firms agreeing to collude. As with single firm dominance, cartels in South Africa have generally been made up of long established market participants continuing to reap unjustified rewards from anti-competitive conduct to the detriment of consumers. The increasing number of cartels recently uncovered by the Commission shows that collusive conduct is more widespread than previously thought.

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

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

High levels of concentration across the South African economy and close relationships among firms in the same industries are important conditions for anti-competitive conduct

The Act's approach to prohibited practices demands a lot of the competition authorities, as very little abusive conduct is assessed on a *per se* basis

As part of its more proactive approach, the Commission has identified priority areas in which it may initiate investigations

firm. Finally, section 9 of the Act precludes firms from engaging in price discrimination if it has the effect of substantially preventing or lessening competition.

Institutional factors are also important in understanding the enforcement effort in uncovering and prosecuting prohibited practices. New institutions such as the Competition Commission take time to build up skills, capacity and expertise. With the Commission's growing capacity, there has been an increasing focus on its prohibited practices work, in addition to the ongoing merger reviews.

How investigations are initiated

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

Altogether, the Commission has conducted six search and seizure operations

The Commission can initiate a complaint itself. This can follow an informant providing information to the Commission, or it can be based on concerns raised more widely by different groupings, including the Department of Trade and Industry, or it can be based on the Commission's own research and insights gained from its work in merger evaluation. The Commission does not receive many complaints that relate directly to cartels. This is because many of cartels' collusive activities are conducted in secret, away from the public eye.

In recent years, the Commission has adopted a more proactive approach to its work, identifying priority areas for attention (box 7). It usually conducts research into the priority area first, and if there are good grounds for concern, an investigation can be initiated.

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

The powers of the competition authorities in relation to prohibited practices

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

This power to search and seize (sometimes termed "dawn raids", although they seldom happen at dawn) was first used in 2000 as part of an investigation into the cement industry. The search and seizure warrant obtained by the Commission was set aside by the Competition Appeal Court because of the procedural irregularities in the Commission's executing of the warrant. The Commission refrained from using its search and seizure powers of information gathering for a few years, until 2006, when it conducted a raid in its investigation of anti-competitive behaviour in the milk industry. Altogether, six search and seizure operations or dawn raids have been undertaken. Two of these have related to cement, while the others have related to milk, scrap metal, tyres and steel. Following some of the search and seizure operations, at

Box 7. How the Commission prioritises its work

As part of its strategic planning in 2006, the Commission developed a prioritisation framework to ensure greater impact from its enforcement actions. The approach relates both to determining priority sectors and the basis on which specific cases will be prioritised.

The three main criteria for the prioritisation of sectors and cases are: the impact on poor consumers; their importance for accelerated and shared growth; and the likelihood of substantial competition concerns based on information that the Commission gathers from complaints and merger notifications. As the most egregious breach of the Competition Act, cartels are unsurprisingly a focus in their own right, and the Commission's corporate leniency policy is proving to be effective in increasing their detection and prosecution.

The Commission is also taking a more proactive stance in its four selected priority sectors. In each sector, the Commission is reviewing available data and evidence on potential anti-competitive conduct. This may then lead to more specific investigations and the initiation of formal complaints in what will generally be a multi-year programme of work. The sectors identified in the 2007/08 reporting year are as follows.

- **Food and agro-processing**
  Agricultural markets were among the most regulated by the apartheid government. In 1996, two years after the first democratic elections, the government did away with the control boards that had governed the marketing and price determination of most agricultural products in the interests of the predominantly white farmers. These farmers had also been supported by tariffs and quotas on imports and subsidised finance. Cooperatives had also had a very important role to play in the provision of inputs and the storage, processing, and packaging of products. The cartel behaviour uncovered in recent years in areas such as dairy products, bread, and maize meal suggests that the many private firms in agro-processing and food have engaged in far-reaching anti-competitive behaviour to the disadvantage of both consumers and farmers. The importance of affordable food to poor consumers and the high levels of poverty in South Africa mean this has had a particularly negative impact on welfare.

- **Infrastructure and construction**
  An important component of the government's plan to achieve more rapid growth is a far-reaching programme of investment in infrastructure. After sustained economic growth over the past decade, inadequate infrastructure is proving to be a major bottleneck, particularly in the transport and energy sectors. The problem is being urgently addressed, led by investments in transport and energy by the relevant parastatals. Anti-competitive behaviour increases the costs of the state-led investment initiative, as well as raising the costs of investment by private firms. This is clearly a global problem, as high profile investigations into construction and infrastructure projects have revealed. These include investigations by the Netherlands competition authority and the UK's Office of Fair Trading, which have uncovered extensive bid-rigging. In South Africa, the close-knit nature of the South African business community and the apartheid legacy of regulation by government and industry groups have provided favourable conditions for collusive behaviour. Several leniency applications from firms in this broad sector have already been received, in relation to structural steel products, cast concrete products, and plastic pipes, and related investigations and prosecutions are under way.

- **Banking**
  Following mounting concern about the level of bank charges and the arrangements governing the payments system, the Competition Commission launched an enquiry into these issues with an independent panel of experts in 2007.[67] Although participation was voluntary, all the major banks participated. The enquiry report was completed in June 2008, and the Commission then began its review of the recommendations in consultation with other relevant stakeholders, such as National Treasury and the Reserve Bank.

- **Intermediate industrial products**
  The South African economy is unusual in that it has developed a strong industrial base in heavy industry, but its capacity in more diversified manufacturing is relatively weak. The comparative advantage in capital-intensive intermediate industrial products comes despite the high levels of unemployment, especially among those with low skill levels. The skewed industrial base is due to South Africa's resource endowment, its artificially low electricity prices, and selected sectors and firms receiving extensive support from the apartheid government. Under apartheid, the government sought to develop strategic industries such as steel, often at the expense of encouraging labour-intensive manufacturing. The apartheid government also did not support broad-based consumer demand, seeking instead to limit the participation of black people in the economy, including in education and training. The legacy of this is entrenched dominant industries with a low cost base, but that may charge local customers monopoly prices on an import parity basis, even where there are substantial net exports.

Before the Commission initiates specific investigations into these sectors, it conducts research to better identify the possible types and likelihood of anti-competitive conduct. In several cases and often in conjunction with concerns expressed by other parties, the research has led to the Commission initiating complaints. In areas such as infrastructure, there have also been several applications for corporate leniency.

[67] For details of the enquiry, inlcuding terms of reference and submissions, see the Competition Commission of South Africa, Banking Enquiry, at http://www.compcom.co.za/banking.

Where the Tribunal decides that there has been a contravention of the Act, it can make an appropriate order, including interdicting the practice, imposing an administrative penalty and ordering divestiture

There has been a substantial increase in the number of contraventions relating to hardcore cartels

least one firm has applied for leniency (discussed further below).

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

Following the hearing of the case, the Tribunal issues a decision. Where the Tribunal decides that there has been a contravention of the Act, it can make an appropriate order, including interdicting the practice, imposing an administrative penalty and ordering divestiture. Administrative penalties can be imposed for a first contravention of sections 4(1)(b), (fixing a purchase or selling price, dividing markets or collusive tendering), 5(2) (or 8(a), 8(b) or 8(d) of the Act. If a firm structures its conduct so that it falls under another prohibited section covered in chapter 2 of the Act (dealing with all prohibited practices), that constitutes a repeat of substantially the same conduct that was already found to be a prohibited practice by the Tribunal, the Tribunal is also entitled to impose an administrative penalty. The penalty may not exceed 10 percent of the firm's annual turnover in South Africa and exports from South Africa during the firm's preceding financial year. Divestiture may further be ordered for contraventions of section 8 if the practice cannot otherwise be adequately remedied or if it is substantially a repeat of conduct previously found to be a contravention.

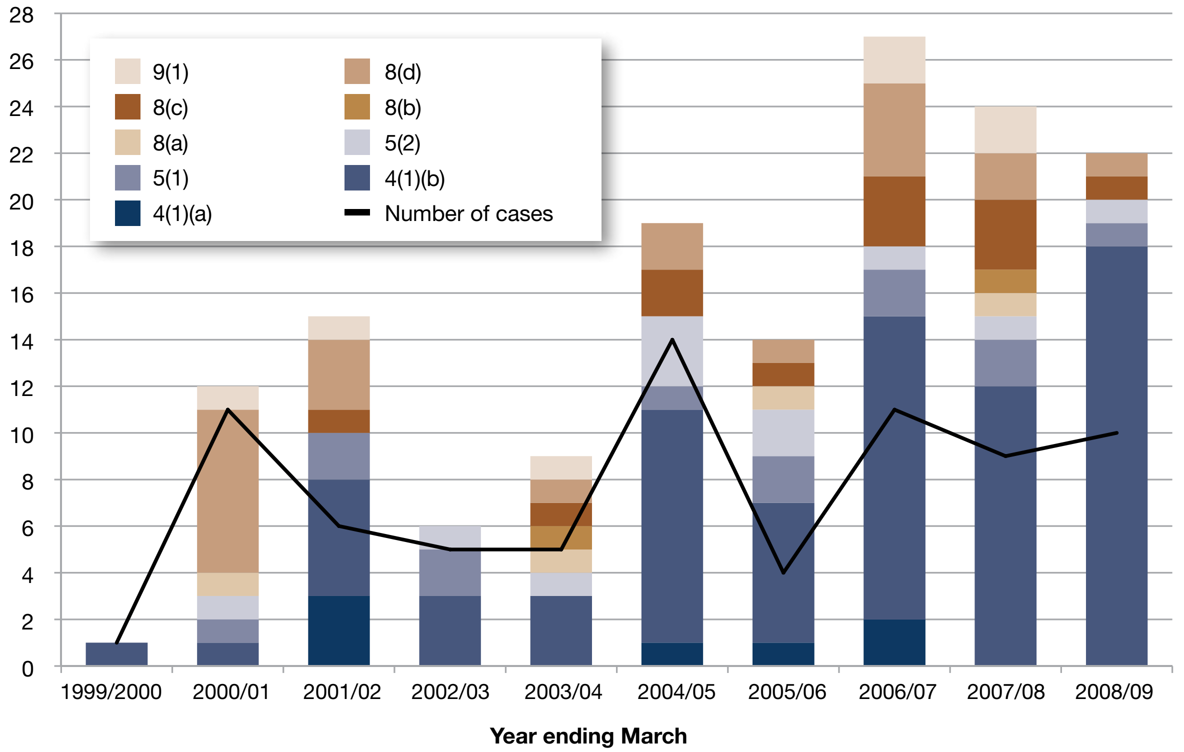
Breakdown of prohibited practices cases

The number of cases referred by the Commission to the Tribunal (including consent orders and settlements) has fluctuated over the period, with a peak in the 2004/05 reporting year, at 14 (figure 6). Referrals can cover several sections of the Act, which means that the number of alleged contraventions of sections of the Act has been substantially greater in most years than the number of cases referred. There has been a substantial increase in the number of section 4 contraventions referred, especially of the hardcore cartel contraventions of 4(1)(b). Of the vertical restrictive practices under section 5, there have been three to four each year, with just under half involving resale price maintenance. Five of the resale price maintenance cases relate to the motor industry.

The abuse of dominance covers a range of possible contraventions, outlined in more detail below. A very few related to either excessive pricing (8(a)) or refusing access to an essential facility (8(b)), with three referrals in each of these categories. Most of the section 8 contraventions referred have related to exclusionary abuses, under 8(c) and 8(d). In most years there have been one or two referrals of prohibited price discrimination (9(1)).

The size of administrative penalties imposed by the Tribunal has increased substantially over time (table 5). This has largely been associated with the uncovering of hardcore cartel conduct by the Commission. In fact, most penalties have been for cartels in contravention of section 4(1)(b), followed by resale price maintenance. Both of these forms of conduct are *per se* contraventions, meaning that anti-competitive effects do not have to be proven. The largest penalty to date has been the R250 million fine imposed on Sasol Chemical Industries in the consent and settlement agreement of cartel conduct in fertiliser related products. The Tribunal imposed a higher fine of R692 million on Mittal Steel SA for excessive pricing, but the Competition Appeal Court set aside the decision and remitted the matter to the Tribunal, instructing it to apply a different excessive pricing test from that used in the Tribunal's decision.

Figure 6. Referrals by the Commission to the Tribunal of complaints, consent orders and settlements



Source: Competition Commission and Tribunal, 2009

Note: Each sub-section referred is counted separately, so, for example, where a cartel case is referred under price fixing and market allocation, it is reflected as two counts

Table 5. Prohibited practices contraventions: 2002–2009

Reporting year ending 31 March	Respondent	Penalty	Contravention
2002/03	Federal Mogul	R3 million	5(2)
	Hibiscus Coast Municipality	No penalty	5(1)
	Patensie Sitrus Beherend Beperk	No penalty	8(d)(i)
2003/04	The Association of Pretoria Attorneys	R223 000	4(1)(b)(i)
2004/05	SA Medical Association	R900 000	4(1)(b)(i)
	Hospitals Association of South Africa	R4.5 million	4(1)(b)(i)
	United SA Pharmacies	R250 000	4 (1)(b)
	The Institute of Estate Agents of South Africa	R522 400	4(1)(b)
	The Board of Healthcare Funders	R500 000	4(1)(b)
	Toyota South Africa	R12million	5(2)
	J Melnick & Co	R200 000	5(2)
2005/06	USA Citrus Alliance	R400 000	4(1)(b)(i)
	Subaru SA	R500 000	4(1)(b)(i)
	Nissan SA	R6 million	5(2)
	South African Airways	R45million	8(d)(i)
	DaimlerChrysler SA	R8 million	5(2)
	Volkswagen SA	R5 million	5(2) & 4(1)(b)(i)
	Citroen SA	R150 000	5(2)
	BMW SA	R8 million	5(2)
	General Motors SA	R12million	5(2)
	GlaxoSmith and BI	No penalty	8(a) and (b)
	Italtile Franchising	R2million	5(2)
2006/07	Oakley	R212 100	5(2)
	South African Airways	R15 million	8(d)(i) and(c)
	South African Airways, SA Airlink, SA Express Airways	R20 million	4(1)(b)(i)
	South African Airways, SA Express Airways	R20 million	4(1)(b)(i)
	Deutsche Lufthansa AG	R8.5 million	4(1)(b)(i)
	Zip Heaters	R78 500	4(1)(b)(ii)/(i)
	SA Orthotic and Prosthetic Association	No penalty	4(1)(b)(i)
2007/08	Tiger Consumer Brands	R98 million	4(1)(b)(i) & (ii)
	Nedschroef Jhb	R200 000	4(1)(b)(i) & (ii)
	CBC Fasteners	R300 000	4(1)(b)(i) & (ii)
	Uitenhage & Dispatch Independent Practitioners Association and Members	No penalty	4(1)(a)
2008/09	Aveng (Africa)	R46 million	4(1)(b)
	Lancewood	R100 000	4(1)(b)(i)
	Food Corp	R45.4 million	4(1)(b)(i)
	ANSAC	R10 million	4(1)(b)(i)
	Adcock Ingram	R54 million	4(1)(b)(iii)
	Dismed Criticare	R1.2 million	4(1)(b)(iii)
	Thusanong Healthcare	R287 415	4(1)(b)(iii)
	Reclam Group	R146 million	4(i)(b)(i) & (ii)
	Netcare and Community Hospital Group	R6 million	4(1)(b)(i)
2009/10	Sasol Chemical Industries	R250 million	4(1)(b)
	Senwes	Pending	8(c)

Source: Competition Tribunal, 2009

Note: The Tribunal's largest administrative penalty to date, an order of R692 million to Mittal Steel South Africa in 2007, for contravention of section 8(a), was remitted to the Tribunal by the Competition Appeal Court, and the Tribunal is yet to issue its amended decision.

Horizontal restrictive practices

"Effectively fighting cartels requires that cartels be discovered, discovered cartels be successfully prosecuted, and successfully prosecuted cartels be penalised. Operating effectively in all three stages – detection, prosecution, and penalisation – is crucial to disrupting existing cartels and deterring new ones from forming." – Joseph Harrington, "Behavioural Screening and the Detection of Cartels"[68]

Introduction

Cartels are the best known area of competition enforcement. Instead of offering better products and keener prices to consumers, the cartel arrangement involves competitors meeting to agree on these and other terms such as discounts, with the main objective of keeping prices to customers high. They thus ensure an easier environment for themselves and higher profits at the expense of consumers.

For collusion between competitors to be sustained, three factors need to be present: the ability to reach agreement, the ability to monitor adherence to the agreement, and the ability to punish deviation from the agreement. Cartels are inherently unstable because each member has an incentive to cheat (such as by offering secret discounts) to increase its own share of the higher margin market that has resulted from the cartel. If all members do this, aggressive competition results and the cartel falls apart. Monitoring other cartel members, such as through volumes sold, is one way of maintaining stability in the pricing arrangements. A firm will cheat and offer secret discounts to increase its market share but, if changes in market share are closely monitored to prevent this, then the incentive to cheat will be minimised. Cartels need their members to reach a common agreement and make sure that the agreement is observed.

Besides the obvious price effects, non-price effects, which may include a lack of competitive dynamism and innovation, as well as poor quality and service delivery, also harm the consumer and general economic efficiency. Under the Competition Act (section 4(1)(b)), agreements to fix prices or other trading conditions, to allocate customers, suppliers or territories, or to collude on a tender, are all illegal *per se*, meaning that no anti-competitive effect has to be demonstrated to prove a contravention. In addition to cartel prohibition, the Competition Act also covers a broader prohibition (section 4(1)(a)), relating to agreements, concerted practices, or decisions by an association of competitors that have the effect of substantially lessening or preventing competition in a market where the effect of the arrangement has to be evaluated. Furthermore, while the Act separately prohibits price fixing, market allocation and collusive tendering, the Commission often finds that in tightly knit cartels, all three are present. Far from being separate, they may be interlinked in ways that are mutually reinforcing. In addition, if market allocation is agreed (such as by territory or by customer) then this removes the need for price fixing as the firms are effectively agreeing not to compete head to head.

If found guilty of contravening section 4(1)(a) or (b), the Competition Act allows the competition authorities to impose a financial penalty up to a maximum of 10 percent of one year[69] of a company's affected turnover. While financial penalties are not levied for first-time contraventions of section 4(1)(a), they are imposed for section 4(1)(b) contraventions, regardless of whether it is a first time or repeat contravention.

Because of the big incentives for companies to collude, firms need to be strongly persuaded of the benefits of not colluding, apart from avoiding the severe punishment they will receive if caught. They need to be persuaded that there are potentially greater returns from their engaging in and winning a competition, rather than colluding. While cartel investigations may uncover collusive practices in an industry, they do not assess the actual magnitude of the anti-competitive effects. Ensuring more competitive outcomes involves monitoring whether collusion is re-established in other ways and assessing whether there are other factors that reinforce anti-competitive outcomes. These include raising barriers to entry to prevent new firms from competing in the market. For a cartel to be

For collusion to be sustained, competitors need to be able to reach agreement, monitor adherence to the agreement, and punish deviation from the agreement

While the Act separately prohibits price fixing, market allocation and collusive tendering, the Commission often finds that in tightly knit cartels, all three are present

[68] Forthcoming in Ehlermann, C-D. and I. Atanasiu (eds.) *European Competition Law Annual 2006*: *Enforcement of Prohibition of Cartels*, Hart Publishing, Portland, Oregon.

[69] The relevant year is the financial year immediately preceding the referral of the final decision by the Commission to the Tribunal.

sustained, either the profits must be disguised and/or there must be ways in which potential entrants can be kept out. In some cases, the Commission has found exclusionary conduct existing alongside cartel activity.

There is a strong focus on cartels internationally and in South Africa, as competition authorities are stepping up their enforcement efforts

The global picture

The increased emphasis on cartels in South Africa is in line with developments globally, as competition authorities have stepped up their enforcement efforts, with a growing number of investigations and higher penalties. And some cartels have in fact been global in their scope. It is intersting to note that the largest single sector in which cartels have been uncovered internationally is in intermediate industrial goods, where high levels of concentration are combined with relatively standard (homogenous) products.

A key tool in these investigations, used internationally and in South Africa, is the corporate leniency provision, whereby the first firm to provide information on a cartel to the authority receives leniency in exchange for its full cooperation. Whistleblowers can also play an important role in providing information. Since the early 1990s, at least 94 amnesties (equivalent to full leniency) have been granted for cartels internationally, with 43 in the United States, and 37 in the European Union.[70] Detection rates of international cartels have increased eightfold from the early 1990s to recent years. This has been driven mainly by Asian (particularly Korean) and European authorities, with African and Latin American detections increasing rapidly but from a low base, and United States and Canadian detection rates remaining fairly constant.

In South Africa, the high levels of concentration in many sectors, together with the tight oligopolies of only a few producers, provided favourable conditions for anti-competitive conduct

In those jurisdictions that provide for personal liability, at least 373 executives were penalised for their role in these cartels, hundreds more guilty executives were given immunity, and thousands more were guilty but simply not prosecuted. The value of total known sales affected by cartels during this period was approximately USD16.6 trillion. Cartel fines and private settlements over the period were approximately equivalent to each other, totalling USD60 billion, but showed rapid increases over time in all jurisdictions. The average period from investigation to the first penalty is around two to three years, varying somewhat across jurisdictions.

Cartels in South Africa

Cartels are so prevalent in South Africa because the conditions that facilitate their creation have existed in many of the country's industries. They are rooted in the apartheid economy, which was built on close relationships among established players in key sectors, literally old (white) boys' clubs. With the state's approval, industry associations often agreed on how to regulate their activities. In some sectors, such as cement, the state explicitly sanctioned a cartel so that production volumes were planned collectively. In many other sectors, the industry bodies were forums for discussing a common approach and for monitoring members' activities and outputs, including their sales volumes. The high levels of concentration in many sectors, together with the tight oligopolies of only a few producers, provided favourable conditions for anti-competitive conduct.

Agreements among competitors were a common and unquestioned way of conducting business. These would include prices being adjusted at certain times of the year, customers being allocated to specific firms, and market shares being closely monitored. A clear example is the cartel in cast concrete products (mainly pipes and culverts), which was formally established in the mid-1970s (box 8). A *modus operandi* was agreed and recorded, including how firms would simulate competition in bidding for the business, while in actual fact, allowing the previously agreed firm to "win" the business. In this tightly controlled environment, the only way for a firm to increase its market share beyond the agreement was to acquire one of the other cartel members. With the new Competition Act of 1998, however, the firms became more circumspect about their meetings and were meant to destroy records (although some were retained), but otherwise they continued as before.

In the light of this history, it is not surprising that the Commission has been uncovering collusive behaviour in a number of sectors. And as it strengthens and refines

[70] See Connor, J. (2008) "Cartels and Antitrust Portrayed: private international cartels 1990-2008", http://www.antitrustreview.com/archives/1617.

Box 8. Anatomy of a cartel: fixing markets for cast concrete pipes and culverts

In 2007 and 2008, the Commission uncovered an extensive cartel in cast concrete products, specifically concrete pipes and culverts. While the Commission had been examining the construction industry and related products, this particular cartel was brought to light through the December 2007 application for leniency by Murray & Roberts for the conduct of its Rocla subsidiary. On 25 February 2009, the Tribunal confirmed the consent agreement and R46 million penalty between the Competition Commission with Aveng (Africa) Ltd, regarding the participation of its Infraset division.[71] Proceedings, including reaching settlements, are continuing against the other members of the cartel.

The concrete pipes and culverts cartel is notable for several reasons. Its detailed arrangements illustrate a textbook example of a cartel, complete with mechanisms for implementing agreements and ensuring they are adhered to in practice. It operated for 34 years, rigging markets in South Africa and across the southern African region. Given its extent and duration, and the large number of different managers from the respective companies involved over time, it raises wider questions about practices in the construction industry. And the products involved are key to investment in improved infrastructure, such as for water reticulation.

Around 1973, Rocla embarked on a strategy to cartelise the market in South Africa. The core agreement with competitors was that within three defined areas of the greatest demand, namely around Johannesburg, Cape Town and Durban, the competitors fixed market share and prices, and the other firms agreed not to compete with Rocla for business in the rest of the country. The nature of the sales of concrete pipes and culverts, in the form of bidding for contracts to supply these products to projects, meant that the agreed market shares involved allocating the available work among the cartel members on a contract by contract basis.

Documents titled “Modus Operandi” set out how this worked in each region, with the agreed market share of each firm. The firm designated the “banker” would compile a comprehensive list of all contracts available and the firms would agree on the “allocatee” for each. The pricing of each firm was agreed in the form of the range of discounts that would be offered from the list prices to ensure that the designated firm would be certain to win the contract. Neither the price lists nor the discounts were identical across firms, to ensure that customers perceived them to be in competition with each other. A monthly summary of volumes delivered by each firm was kept to ensure that participants did not exceed allocated tonnages. To conceal the identity of the firms, they were denoted in the documents and data spreadsheets only by a number. In addition, all documents were meant to be destroyed, although some copies were retained and have been obtained by the Commission.

The arrangements illustrate the importance of monitoring to maintain cartel agreements, especially in a market with fluctuating demand and many different buyers. In this cartel, regular meetings were held. For example, in Gauteng these meetings were held at different venues on the second Tuesday of each month after formal industry meetings of the Concrete Manufacturers Association of South Africa. The venues changed periodically to avoid detection. Good communication and trust among participants clearly aids the maintenance of cartel agreements.

The arrangements in this case also illustrate the role of sanctions for keeping members in line, given that each member would be tempted to try to win business and increase its sales without the rest of the cartel knowing. The main threat that the larger cartel members applied for keeping the smaller players in line was to institute a price war in a given region. This practice rarely needs to be used if the monitoring is effective in keeping members in line. There is at least one example of its being used in this case, in KwaZulu-Natal. This was apparently because, following the new Competition Act, a smaller firm thought the cartel arrangements would cease, and it started selling beyond the allocated volumes and outside the designated geographical area. It was soon disabused of this notion. The need to “stabilise” markets and deal with “reckless” behaviour, as in this instance, is terminology that has emerged in several other cartel cases.

The collusive arrangements in the concrete pipes and culverts market were also notable for their scope, extending across southern Africa. Frequent meetings were held from 2001 and 2007 between managers of the two largest producers, Rocla and Infraset, whose operations extended across the region. At these meetings, which were commonly held at coffee shops or hotels close to OR Tambo International Airport, participants discussed which countries each would operate in, as well as market developments and investment decisions more generally. These arrangements emphasise the need for cooperation among countries for effective cartel enforcement.

[71] Consent Order (24/CR/Feb09), http://www.comptrib.co.za/comptrib/comptribdocs/1023/24CRFeb09.pdf

its detection mechanisms and builds its competition and industry expertise, it is uncovering evidence that this conduct is widespread.

The corporate leniency policy and the more proactive investigations have contributed to the recent success in uncovering widespread collusive activity

The Competition Commission's increased focus on collusive conduct

The Commission had very few cartel cases in its first seven years. Many of these were not secret, but were horizontal arrangements that the firms involved thought were justified in other terms and so would not breach the cartel prohibition. For example, the Hospital Association of South Africa collectively negotiated with the Board of Healthcare Funders. Each of these groupings consisted of competitors and involved fixing prices and other trading conditions. These arrangements breached the *per* se prohibition in section 4(1)(b).

One reason for the small number of cartel cases is that it is extremely difficult for the competition authorities to uncover activity that is generally undertaken in secretive forums with little written evidence or record kept. These meetings happen in informal venues such as coffee shops, bars, hotels and sports clubs.

In recent years, the Commission has sharply stepped up its enforcement activities against cartels and has uncovered widespread collusive activity in the economy beyond what might have been expected. There are two reasons for the recent successes. The first is the corporate leniency policy (CLP) introduced in 2004 and revised in 2008 (box 9). The second is a move to more proactive investigations to identify likely cartel activity, associated with rooting out anti-competitive conduct in the Commission's priority sectors. As the Commission's cartel work has gained prominence in the media, members of the public, more engaged with the concept of price-fixing, have also approached the Commission as informants. Together, these factors have resulted in firms being more serious about conducting internal audits to identify collusive conduct within their ranks and to come forward to the Commission with this information to apply for leniency or seek a settlement. In return for their cooperation, firms escape a penalty if they are the first to bring the information to the Commission, or they receive a reduced penalty if they are not the first but reach settlement. Such firms also avoid an extended Tribunal hearing and the related harm that prosecution will cause to their reputation.

The "prisoner's dilemma" created by the corporate leniency policy is an effective incentive in the race for cartel members to be "first through the door"

The corporate leniency policy

The Commission's corporate leniency policy markedly increases the risk of detection for hardcore cartels (those contravening the *per se* prohibition), as firms have to weigh up the possibility of fellow cartel members making use of this policy. If cartel members believe that others may take this route, then it is in their interest to be "first through the door", as the reward in terms of conditional immunity is great. The policy significantly changes the incentives to cooperate with the Commission. Economists call this the "prisoner's dilemma": whatever the choices made by the other players (firms), the best option is to confess. This means that cartel members are unable to fully trust fellow cartelists, as they are each aware that it is in their competitors' interests to be the first to file for leniency. The leniency policy is complemented by cooperation being rewarded through lower penalties for those who come forward proactively but not quickly enough to be first. On the other hand, the harshest possible penalties are sought for those firms that continue to deny involvement.

According to attorneys practising in competition law, as surveyed by the Commission, the most important factor prompting firms to apply for leniency is the fear that other cartel members will apply first (figure 6). This confirms the effectiveness of the "prisoner's dilemma" intention behind all leniency policies, in that they create uncertainty about the intentions of other cartel members and the clear incentive to race to apply first. This factor is closely followed by the more recent and growing awareness among firms that their activities contravene the Competition Act, suggesting that the authorities had not, until recently, done a very good job of raising awareness. In third place is the fact that cartels have been uncovered by the Commission in related product areas, including through leniency applications. Together, these observations suggest that the best way to raise awareness is successful enforcement, and that the CLP

Box 9. The Competition Commission's corporate leniency policy

On 6 February 2004, the Commission issued its corporate leniency policy (CLP), which aimed to serve as an incentive for cartel members to blow the whistle on their cartel partners in exchange for immunity from prosecution. This kind of leniency policy has proved effective in dealing with cartel behaviour in Canada, the European Union, the United States and the United Kingdom. The CLP is essentially designed to uncover cartels that would otherwise go undetected and also to make the ensuing investigations more efficient. For this reason, the benefits of immunity are spelt out from the outset to serve as an incentive for applicants to come forward. Granting of immunity under the CLP is not based on the fact that the applicant is viewed as less of a cartelist than the other cartel members, but rather on the fact that the applicant is the first to approach the Commission with information and evidence regarding the cartel.

A firm applying for leniency must:

(a) [make] complete and truthful disclosure of all evidence, information and documents relating to any cartel activity
(b) be the first to provide information, evidence and documents sufficient to allow the Commission to institute proceedings in relation to a cartel activity
(c) [offer its] full and expeditious cooperation concerning the reported cartel activity until the Commission's investigations and proceedings in the Tribunal and the Competition Appeal Court are completed
(d) immediately cease engaging in the cartel activity
(e) not alert other cartel members or a third party of its application for immunity
(f) not destroy, falsify or conceal information, evidence and other relevant documents
(g) not make a misrepresentation concerning the material facts of any cartel activity.

Other important factors for would-be CLP applicants include first, the fact that cartel activities need not have been carried out in South Africa; all that is required for CLP eligibility is that the cartel activity has had an effect in South Africa. Second, immunity granted by another competition authority does not automatically qualify a firm for immunity under the South African Competition Act if the cartel activity has an effect in South Africa. Third, immunity is granted in respect of separate and various cartel activities if the applicant meets the requirements for each contravention reported. The only exception would relate to contraventions that cannot be severed and therefore may be considered as one contravention. Finally, only a firm that is "first through the door" to confess and provide information to the Commission about the cartel in accordance with the CLP qualifies for immunity under the CLP. If other members of the cartel wish to come clean about their involvement in the same cartel, the Commission may explore other processes outside the CLP, which may result in the reduction of a fine, a settlement agreement or a consent order.

On 23 May 2008, the Commission published amendments to its CLP following a review process undertaken in the 2007/08 reporting year. The amendments focus on providing greater legal certainty about the application process.

First, they make it clear that in line with international best practice, instigators of cartels are now eligible for leniency. Second, the amendments introduced an oral statements procedure to enable applicants to submit information about the cartel orally. Third, a marker procedure was introduced, enabling a potential applicant to request the Commission to reserve its place in the queue of applications for immunity while it collects the information necessary to make a formal leniency application. The new marker procedure has been particularly successful in aiding potential applicants, and most recent applications for leniency have been preceded by marker applications.

The fact that leniency applications have risen dramatically in the past year indicates that firms are becoming more aware of competition law

has played a major role. The fact that leniency applications have risen dramatically in the past year indicates that firms are becoming more aware of competition law and are putting more effort into establishing whether they are contravening the Act or not. This may be because the firm is being investigated in other jurisdictions – a very important consideration, with the fourth highest rating. This rating reflects the CLP applications for international cartels, as well as the effect on specific firms, such as Sasol, of being caught for cartel conduct overseas.

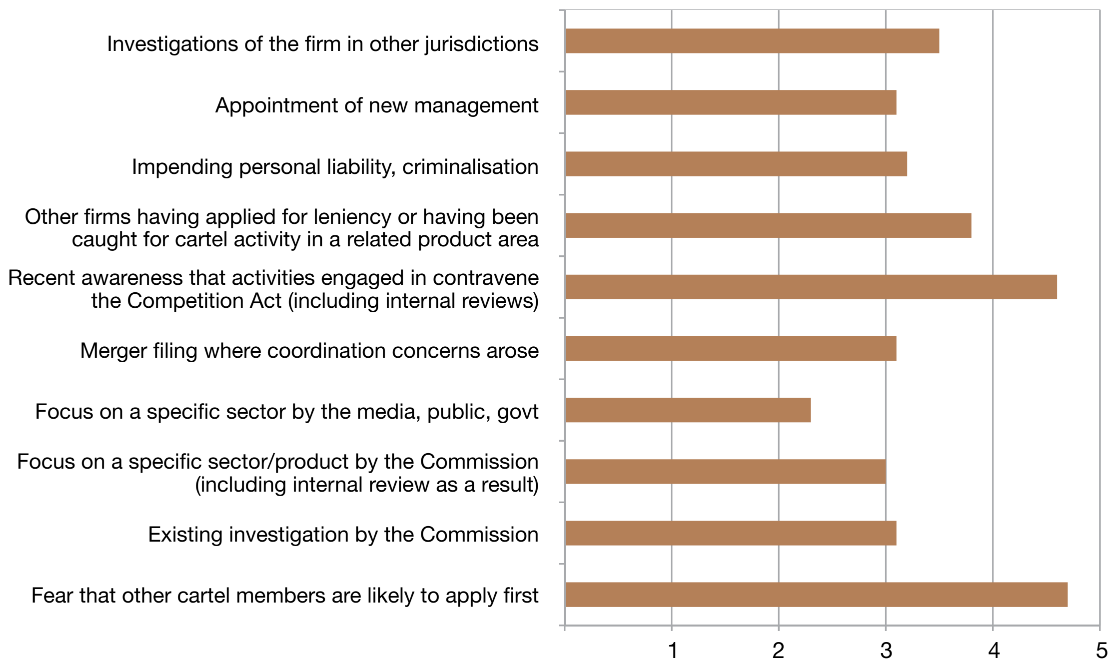
Various actions by the Commission may also influence applications for leniency. In addition to the "domino effect" of cartels being uncovered in related product areas, existing investigations, concerns about coordination arising from mergers, and the Commission's focus on particular sectors are important, scoring at around 3. The prospect of the criminalisation of individual managers is also a driver in some firms making leniency applications, as is the appointment of new management (figure 7).

Figure 8 shows that the growth in full CLP applications (not just marker applications) in the past two years has been dramatic.

Since mid-2008, CLP applications have averaged three per month. Considering that each application requires the firm in question to admit to a contravention of the Act and provide all relevant information to the Commission, then, in effect, each of these represents a hardcore cartel case. There are also a few investigations where whistleblowers have provided the Commission with information on likely cartel activity. Approximately one-third of all cartel cases referred to the Tribunal has included leniency applications. Given the rise in the use of leniency, this proportion is likely to increase greatly as the Commission is able to resolve and refer the cases of recent applications more quickly. The number of applications received after July 2008 was much higher than in many other jurisdictions.

Each leniency application requires the firm to admit to a contravention of the Act and to provide all relevant information to the Commission

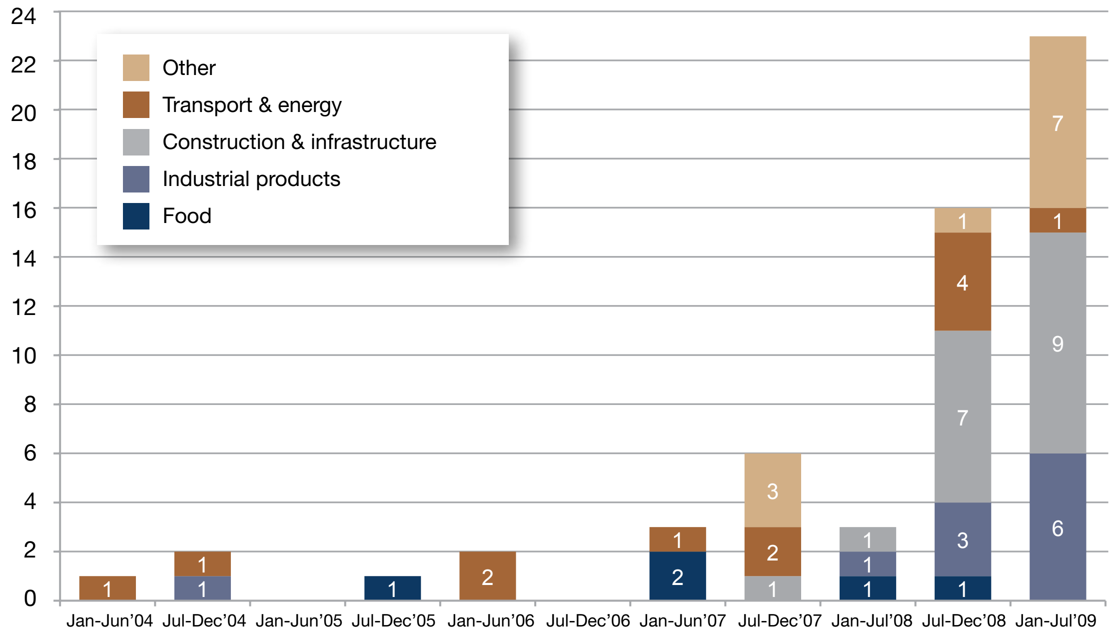
Figure 7. Drivers of leniency applications on a scale of 1 (not important) to 5 (very important)



Source: Competition Commission 2009

Note: Responses were weighted according to the number of marker and leniency applications that respondents were involved in, as well as seniority. Respondents included attorneys in all the major law firms working on competition matters.

Figure 8. Number of corporate leniency applications by broad sector



Source: Competition Commission 2009

Most recent applications have been in the areas of construction and infrastructure, and industrial products. This is in line with international experience. As noted earlier, a large number of cartels have been uncovered in industrial products, while investigations into construction markets in countries such as the United Kingdom and the Netherlands in recent years have shown them to be rife with collusive conduct.

Some of the key factors motivating CLP applications are also evident from specific cases. In the case of Scaw Metals, its application for conditional leniency in 2008 came days after a search and seizure operation into reinforcing steel producers. The application by Premier Foods in 2007 with regard to bread followed shortly after the Commission had initiated an investigation, based on information received from a distributor. The application by Murray & Roberts' Rocla division in 2007 relating to a cartel in cast concrete products was filed by new management, following the Commission's focus on infrastructure products (box 8). Some firms, such as Sasol, have decided to undertake far-reaching internal investigations across their businesses. Although the Commission has only conducted six search and seizure operations, they were followed by a number of leniency applications. About 18 percent of the CLP applications over the period were international in scope. Applications for leniency in relation to international cartels typically involve a member applying for leniency in the jurisdictions in which the cartel operates and where there are CLP provisions.

Greater publicity and a proactive approach

The publicity associated with some of the cartels that have been uncovered in recent years has undoubtedly led to a wider understanding of cartel conduct, and the fact that it constitutes a clear contravention of the Competition Act. This greater awareness has led to the Commission also receiving information from whistleblowers and informants who generally remain anonymous. The investigation into the bread cartel was started in this way, and more information on cartel activity in other markets across the economy has been received from similar sources in recent years.

Some firms, such as Sasol, have decided to undertake far-reaching internal investigations across their businesses

The investigation into the bread cartel was based on information provided by a whistleblower

The Commission's approach to settlement agreements and the size of the fines reflect the principle of encouraging early and full cooperation, and of punishing guilty parties' litigious strategies

The success of the corporate leniency policy requires firms to understand that they may be caught and that it is in their interests to come forward and apply for leniency as early as possible. A key part of the Commission's work has been proactively initiating investigations into suspected anti-competitive behaviour, and not only relying on complaints lodged by consumers. Customers and consumers are usually unaware of the cartel, as part of the collusion involves the parties agreeing on how to give the impression of competition.

The high number of leniency applications filed with the Commission in the construction, industrial products and food sectors, in which the Commission had proactively started investigations, shows that cartel members are aware that the risk of their fellow members filing for leniency is higher when an investigation is already under way. The Commission's proactive approach to investigating collusive behaviour is a key factor in the higher detection rates and more efficient prosecutions. The Commission is able to apply this approach more and more as it gains in-depth knowledge about the different industries and players.

Cooperation and settlements of cartel cases

The Commission and the Tribunal have made it clear that full and early cooperation is also rewarded when determining the size of the penalty that has to be paid in a settlement agreement. Although the Commission always values proactive cooperation, this is particularly so in cartel investigations because, under section 4(1)(b) of the Act, confirmatory evidence is all that is required to resolve an investigation and refer the case to the Tribunal. Cooperation by respondents therefore saves public time and resources and provides the Commission with a fuller picture of what the contravention entails.

The Commission's approach to settlement agreements and the size of the fines reflect the principle of encouraging early and full cooperation, and of punishing guilty parties' litigious strategies that often frustrate the competition authorities' ability to quickly and efficiently prosecute and halt collusive behaviour. The Tribunal imposes higher penalties on firms that do not cooperate. Other factors that impact on settlements include any previous anti-competitive conduct and the period over which the cartel has been operating. An admission of guilt is generally a necessary part of any consent order that enables affected parties (either direct, individual customers or consumer groups) to initiate civil action against cartel members. Initially, consent agreements did not always include an admission of guilt by the companies involved, but the Commission has increasingly been insisting on this, with the Tribunal publically encouraging affected customer groups to seek claims for damages.

Once the Commission and respondent(s) have reached a settlement agreement, they must appear before the Tribunal for this to be confirmed. Members of the public and media may attend these hearings to witness the Tribunal questioning the guilty parties and the Commission on the details of the conduct, and hearing the explanation for how the fine has been agreed on and structured. Interested parties may also make representations to the Tribunal at this time. To date, the Tribunal has refused to confirm only one consent agreement (for a contravention by Netcare and the Community Hospital Group relating to setting private hospital tariffs), sending it back to the Commission for further consideration on certain issues. The affected party took the Tribunal's decision on appeal to the Competition Appeal Court, which set aside the Tribunal's decision and confirmed the consent agreement as originally set out by the Commission.

The evolution of investigations into horizontal restrictive practices

In its early years, the Commission launched some major cartel investigations, but progress was slow. For example, in October 1999, the Commission initiated an investigation into price fixing and market allocation by the American Natural Soda Ash Corporate (ANSAC), which was finally concluded in 2008 (box 10). The Commission also investigated possible collusive activity in the cement industry and conducted the first search and seizure operations in 2000. However, the investigation did not progress further, after a successful legal challenge to the way in which the Commission had conducted the search and seizure operation.

Box 10. The ANSAC case

Following a complaint, the Competition Commission undertook an investigation into possible price-fixing and market allocation by the American Natural Soda Ash Corporation (ANSAC) in October 1999. ANSAC is an industry association incorporated in accordance with the United States' Webb-Pomerene Act. The Act allows for US associations that are engaged solely in export trade and whose activities do not restrain trade within the United States, to be exempted from the Sherman Act, the key anti-trust statute of the United States. The board of directors of ANSAC, to which each member is entitled to nominate the appointment of two directors, makes certain decisions, including the export price of its members' soda ash as well as other trading conditions relating to the sales.

The Commission's investigations revealed a contravention of the Competition Act and the complaint was referred to the Tribunal on 14 April 2000. ANSAC opposed the referral on the grounds that the agreement was not a contravention of the Act, but rather was integral to the operation of a legitimate and transparent corporate joint venture, which existed for the promotion of export sales, generated significant logistics efficiencies and impacted pro-competitively on the South African market.

Between February 2000 and July 2008, the case was held up by extended litigation involving points *in limine* and appeals. In May 2005, the Supreme Court of Appeal decided that the matter be heard before the Competition Tribunal, to characterise the relevant conduct for purposes of the application of section 4(1)(b) of the Act. Tribunal hearings into the merits of the case began in mid-2008, and ANSAC closed its case within a month. In September 2008, ANSAC and its fellow respondent and South African agent, CHC Global, approached the Commission to discuss a settlement, stating ANSAC's intention to exit the South African market and its desire to avoid further litigation and expense.

ANSAC admitted that its membership agreement eliminated price competition between its members in relation to export sales in South Africa, and that it therefore amounted to price-fixing as defined by the Act. Furthermore, ANSAC undertook to make no further export sales to South Africa, to amend its membership agreement to allow its members to negotiate and contract directly with and make sales to South African consumers if they wished, and to pay an administrative penalty of R9.7 million (8 percent of the annual soda ash turnover in South Africa).

Despite the protracted and costly litigation, and ANSAC's last-minute cooperation, the Commission did not push for a penalty of 10 percent of turnover, as ANSAC had given its commitment to release its members to operate independently in South Africa – a result that the Commission would not have achieved in the Tribunal.

Despite the number of objections to the referral by the respondents, the issue of uncertainty in relation to joint ventures and potential contraventions of section 4(1)(b) of the Act remains unresolved.

By the end of March 2004, only a handful of consent agreements for collusive conduct had been finalised. They did not involve particularly onerous fines,[72] and the respondents were not obliged to admit to having contravened section 4(1)(b). The 2004/05 reporting year saw the conclusion of four consent agreements in one year, three of which involved penalising industry bodies in the medical sector for the way in which healthcare provider fees had been collectively negotiated.

In 2005/06, the Commission concluded consent agreements involving resale price maintenance and prohibited horizontal coordination with three retail motor companies, imposing a total fine of R13.5 million, of which BMW had to pay the highest (R8 million) and Subaru the lowest (R500 000).

In 2006/07, the Commission concluded a number of consent agreements with airline companies for fixing fuel surcharge levies and coordinating flights, revenues and sales incentives in relation to codeshare flights. The country's national carrier, South African Airways, was made to pay R20 million, the authorities' highest penalty to date.

The reporting year 2007/08 marked a major milestone, with the uncovering of the bread cartel and the settlement reached with Tiger Brands. The fact that bread is such a basic product and a staple food of the poorest consumers captured the public's attention. It significantly raised awareness about the problem of cartels, and in turn, about the Commission's work. Tiger Brands agreed to pay what was then an unprecedented R99 million for its role in fixing the price of bread and allocating markets with its competitors.

The case was particularly important for the Commission in another respect: Premier Foods, a competitor to

[72] For example, the Board of Healthcare Funders and the Association of Pretoria attorneys agreed on administrative fines of R500 000 and R223 000, respectively.

The uncovering of the bread cartel captured the public's attention, raising awareness about cartels and the Commission's work

The Commission has achieved better coordination between information obtained through merger and acquisition investigations and enforcement actions

Tiger Brands, made use of the corporate leniency policy (established in 2004, but not much exercised until 2007) to protect itself from a fine and the related harm to its reputation. The leniency application proved the worth of a member of the cartel "confessing all" to the Commission in exchange for immunity from any sanctions. The application resulted in all the secret details of the workings of the cartel being revealed and the investigation into the Western Cape cartel taking less than two months to conclude. The investigation into the cartel's national operations took a few more months.

In December 2007, another major firm, Murray & Roberts, approached the Commission for leniency in respect of a cartel in precast concrete products in which its Rocla operation had participated for an extraordinary period of 34 years. With regard to this cartel, a consent agreement has also been reached with Aveng (Africa) Ltd (in February 2009) relating to its Infraset division in which a penalty of R46 million was confirmed[73] (box 8).

These cases coincided with the Commission's move to a more proactive approach to enforcement. The effect of this approach in relation to cartels is illustrated by its initiation in early 2008 of an investigation into long steel products. This followed concerns arising from both its own research into the construction sector, and those raised by the Department of Trade and Industry, about steel producers and traders. In June of that year, the Commission raided the offices of Highveld Steel and Vanadium Corporation Limited, Cape Town Iron and Steel Works (Pty) Ltd and the South African Iron and Steel Institute. Within a matter of days, Scaw South Africa (Pty) Ltd, a 74 percent owned subsidiary of Anglo American, filed a marker application and subsequently sought and was granted leniency by the Commission, on condition that it gave further and full cooperation in the investigation.

Other notable cases included Tiger Brands' appearance in the Tribunal, less than a year after the bread settlement, for collusive tendering by its wholly owned subsidiary, Adcock Ingram, in the provision of intravenous solutions and accessories to state hospitals. Given the repeat nature of the offence and the fact that an Adcock employee had previously lied to Commission investigators, the authorities imposed a penalty on an unprecedented scale, in relation both to the percentage of turnover determining the fine, and the fact that the calculation was based on the turnover of Adcock Ingram as a whole.

Other cartel offenders included the Reclamation Group (Pty) Ltd (Reclam), which in 2008 paid a then record penalty of R146 million for its role in the price-fixing of scrap metal products. This case illustrates another important factor in the Commission's improved investigation and prosecution of collusive behaviour, that is, better coordination between information obtained through merger and acquisition investigations and enforcement actions. It was during an investigation into Reclam's proposed acquisition of SA Metal and Machinery Company (Pty) Ltd that it was revealed that Reclam had concluded regional market allocation agreements with its competitors in relation to the provision of ferrous and non-ferrous scrap metal products. A consent agreement was subsequently concluded.

Another major success came in 2009, with the settlement and consent agreement reached with Sasol in relation to cartel conduct on the part of its Sasol Nitro division. In May 2009, the Tribunal confirmed the consent agreement between the Commission and Sasol in relation to two cases of collusion in fertiliser products and their constituent chemicals. One of these involved collusion with competitors Omnia and Yara (previously Kynoch) in the supply of nitrogenous fertiliser, referred by the Commission to the Tribunal in 2005. The second involved phosphoric acid, where Foskor (the other producer of phosphoric acid along with Sasol Nitro) had been awarded leniency. In the case involving Omnia and Yara, the Commission and Sasol had been embroiled in various interlocutory litigation and procedural issues following the Commission's referral in 2005 of the complaint originally brought by Nutri-Flo (a small blender and distributor of fertiliser). However, following a record €318 million fine levied against Sasol's global wax operations by the European Commission late in 2008 for cartel conduct, Sasol released statements to the media saying that it was undertaking an extensive internal audit

[73] Consent order (24/CR/Feb09),http://www.comptrib.co.za/comptrib/compitribdocs/1023/24CRFeb09.pdf

to uncover any further anti-competitive behaviour of its managers and/or other staff.

As explained in the May 2009 consent order hearing before the Tribunal, Sasol conceded having colluded with its competitors through various committees in the supply of nitrogenous fertiliser. In this case, the Commission and Sasol had agreed on a penalty of 6 percent of Sasol Nitro's turnover for the year preceding the referral, that is, approximately R188 million. Just days before the Tribunal hearing, in a dramatic move, Sasol approached the Commission with more evidence of blatant collusive behaviour. The Commission raised the penalty to approximately R250 million, representing 8 percent of turnover. This case clearly illustrates the cost to a respondent of failing to cooperate fully and expeditiously. At the hearing before the Tribunal, the Commission commended Sasol for its more recent cooperation, but pointed out that internal investigations into this kind of behaviour could and should have begun as early as the time of the referral in 2005.

Industry associations, information exchange and competitive outcomes

While delivering many benefits to industry and even customers, industry associations can also facilitate horizontal coordination and dampen competition by exchanging information and maintaining relationships among competitors through which they establish a common approach to commercial issues, rather than by pursuing vigorous competitive rivalry. Cross-shareholdings among competitors or related firms also pose potential competition concerns as they are conducive to the sharing of commercially sensitive information. The Commission therefore closely analyses mergers that may lead to situations of direct or indirect cross-holdings and directorships, given their potential to provide a platform for blatant collusion or the exchange of information.

The exchange of information between firms cannot be classified outright as conduct facilitating collusion, as it depends on the nature of the information, and how it is collated and shared. Also, there may be valid efficiency reasons for the exchange. At one extreme, if there are only two firms supplying a given basic product in a given market and they both submit monthly sales figures by magisterial district to an industry association, which then collates and circulates the total, each firm is able to closely monitor the behaviour of the other and competition is negatively affected. At the other extreme is the collation of information by an independent third party at a high level of aggregation across differentiated products with many suppliers, which is very unlikely to enable firms to monitor their rivals effectively.

Such issues have come up in several recent cases. Sasol's settlement with the competition authorities in relation to its admitted collusion with Yara (formerly Kynoch) and Omnia in the supply of nitrogenous fertiliser clearly shows how industry bodies and committees are able to facilitate information exchange and collusion. In addition to the various committees established by the competitors to exchange information about production, demand and supply, market shares, and the estimated landed cost of imported products (which established the pricing points that firms utilised), the competitors were also members of the Fertiliser Society of South Africa, through which data were shared.[74] Meetings were held specifically to monitor behaviour.

Industry associations have featured in several other cases. These include the South African Reinforcing Concrete Engineers Association, which proved to be integral to the supply of cut-and-bend rebar. As the Commission discovered in its investigations, the South African Iron and Steel Institute was apparently involved in regular information exchange and is likely to have facilitated collusion of rebar products further upstream in the same industry. Information exchange is also playing an important part in the case against South African milk producers, which has been referred to the Tribunal but, at the time of going to press, had yet to be heard or decided.

It is important to distinguish the free flow of information among firms from the flow of information from firms to customers that allows customers to shop around and compare a range of offerings, thereby creating

Rather than pursuing vigorous competitive rivalry, industry associations can facilitate horizontal coordination and dampen competition

The Sasol case illustrates the cost to a respondent of failing to cooperate fully and expeditiously

[74] Consent Order (31/CR/May05), http://www.comptrib.co.za/comptrib/compitribdocs/1041/31CRMay05%20CCSasol%20CO.pdf

The exchange of information through industry associations has been a feature of activity in a number of cartels

competition between suppliers of close substitutes. The anti-trust perspective on information sharing is a dynamic one and looks at the information flow between firms. In markets characterised by repeated interactions among a small number of firms, it is accepted that collusion is made much easier when a flow of information makes rivals' actions more transparent and reduces uncertainty about competitors' actions. Firms in an oligopolistic setting therefore have a common incentive to share information. As with outright meetings and agreements, the exchange of commercially sensitive information among competitors, such as through websites or third parties, can also lead to price-fixing, the allocation of customers and bids being indirectly rigged.

Exchange of information could allow agreements to be reached among competitors if the information discloses market strategies, or implicitly recommends particular conduct in the market for the future. The exchange of detailed and sensitive information can thus be used to monitor a firm's adherence to an agreed price or volume. This monitoring, in turn, could lead to swift and more effective punishment of deviators. Therefore, in a dynamic framework, information exchange could facilitate a collusive agreement and lead to clear harm to consumer welfare. It is also important to recognise that, where an explicit cartel has been uncovered, firms may collude in reaching an understanding to ensure a similar outcome without an obvious agreement, if information can be readily shared. Mechanisms for information exchange should be considered in this context if more competitive outcomes are to follow cartel prosecutions.

Sometimes where an explicit cartel has been uncovered, firms may collude in reaching an understanding to ensure a similar outcome, without an obvious agreement

Conclusion

The recent rise in successful cartel investigations and prosecutions in South Africa reflects the growth of the competition authorities' capacity and experience. Improved detection mechanisms and harsher penalties are in line with international practice. The reasons behind South Africa's success are largely the introduction of a highly successful corporate leniency process, coupled with an increasingly proactive approach to cartel investigations through initiating its own complaints where there are signs of possible collusion. The role played by the media and the growing public awareness of competition law have contributed to the success.

The Commission's success in securing large fines and admissions of guilt by cartel members, together with the corporate leniency policy, have prompted many companies to re-evaluate the risks of detection. Other firms have undertaken internal audits of competition compliance and approached the authorities for leniency or favourable settlement terms. Several case studies show the prevalence of collusion in South African firms, with cartel activity going back as far as 34 years in some industries. These factors have all helped the competition authorities to reduce the time and resources dedicated to investigation and prosecution of cartels.

At the time of going to press, the Commission was prosecuting two contested cartel cases in the bread and milk industries. The outcome of these cases will undoubtedly influence the future investigation and prosecution of alleged anti-competitive conduct as they will involve detailed hearings and evidence on the cartel conduct itself.

Vertical restrictive practices

Section 5(1) of the Competition Act prohibits an agreement between a firm and its suppliers or customers (in a vertical relationship) if it has the effect of substantially preventing or lessening competition, unless technological, efficiency or pro-competitive gains that outweigh the effect can be proved. Such arrangements typically restrict one or both parties from dealing with competitors, and hence have the effect of lessening competition. For the effect to be substantial, at least one of the parties to the agreement has market power in terms of its importance as a supplier or customer, or it has control over an important facility. Almost all cases referred by the Commission under section 5(1) have thus also been referred as an exclusionary abuse of dominance (under sections 8(c) or 8(d)). While the vertical restrictive practices prohibition is wider than a section 8 exclusionary contravention, in that it is not required to prove dominance, there is also no penalty for a first contravention. Arrangements that restrict customers from discounting (resale price maintenance) have often also been referred under section 5(1), as these arrangements limit competition between distributors or retailers.

Only two cases have been referred under section 5(1) exclusively, neither of which were heard in the Tribunal. The first case involved league basketball, which was not pursued. The second involved a complaint in 2003 against the Hibiscus Coast Municipality in KwaZulu-Natal regarding a "right of first refusal" clause in favour of SA Airlink in certain of its lease agreements. The Commission embarked on an advocacy exercise to encourage the municipality to remove the clause, because of its exclusionary anti-competitive effect. When the municipality failed to act on its agreement to remove the clause, the Commission initiated a formal investigation so that the conduct could be prosecuted. The municipality subsequently agreed to follow through on its undertaking to remove the offending clause, and the matter was resolved.

Cases where vertical restrictive practices have played a major role include those relating to the packaging and marketing of various agricultural products that were highly regulated in the past. One of the Commission's first cases contained complex issues of alleged vertical and exclusionary restraints by South African Dried Fruit Holdings Ltd (SAD) based on the requirement by SAD that its shareholders (producers of grapes-for-raisins) deal exclusively with SAD.[75] The liberalisation of agricultural markets in the Marketing of Agricultural Products Act (1996) withdrew state recognition of all single-marketing channels.

SAD appeared to have circumvented the provision and intention of the Marketing of Agricultural Products Act by establishing companies with articles of association that perpetuated the old single-channel market, effectively converting the erstwhile co-op members into shareholders of the new corporate entity. Exclusive supply arrangements effectively foreclosed the market to new entrants, such as South African Raisins, the complainant in this case. The Commission found that this conduct constituted a contravention of both section 8(d)(i) and 5(1).

[75] Supreme Court of Appeal case number 176/2000.

Although this was one of the Commission's earliest cases, the complainant and respondent used virtually all of the newly acquired tools at their disposal; the case proceeded through the Tribunal, the High Court and the Supreme Court of Appeal, with an interim relief application alongside the investigation by the Commission. The Commission initially suspended its investigation after the High Court ordered that the Competition Act had no application to the raisin industry, and the Tribunal therefore had no jurisdiction to hear the matter. This was subsequently overturned by the Supreme Court of Appeal, following which the Commission re-instated its investigation and referred the matter to the Tribunal. However, due to the suspension of the investigation, the time in which the Commission is legally able to investigate without an extension had expired, and the Tribunal therefore ruled that the Commission had by default non-referred the matter. The merits of the case were never heard.

In 2000, an Eastern Cape citrus farmer brought an interim relief application against citrus packing and distribution company, Patensie Sitrus, claiming that certain provisions of the company's articles of association contravened sections 5 and 8 of the Competition Act. It was claimed that they locked farmers, who were shareholders in the company, into an exclusive supply arrangement with Patensie Sitrus, thus excluding potential competitors from the market for packing and distributing citrus fruit in the Gamtoos River Valley. The Tribunal[76] found that the articles of association compelled the claimant to deliver his produce to the company in perpetuity, unless the company's directors permitted him to sell his shares, thus contravening Section 5(1). In addition, the Tribunal found that the respondent abused its dominance by engaging in the exclusionary act of requiring or inducing a supplier not to deal with a competitor, as contemplated in Section 8(d)(i).

In 2005, the Commission investigated a complaint against a major tea supplier that had entered into exclusive supply arrangements with the major local packers of rooibos tea. The Commission concluded that these supply agreements foreclosed rivals and new entrants from supplying processed rooibos to domestic

[76] Competition Tribunal case number 66/IR/May00.

Cases where vertical restrictive practices have played a major role include those relating to the packaging and marketing of various agricultural products that were highly regulated in the past

The prohibitions on abuse of a dominant position seek to ensure outcomes that are consistent with effective competitive rivalry

packers, amounting to the foreclosure of 91 percent of the processing of raw and bulk-supplied rooibos to the domestic market. The Commission referred the conduct to the Tribunal as contraventions of sections 5(1), 8(c) or alternatively 8(d)(i) of the Act, and at the time of going to press, the case was due to be heard in the coming year.

Abuse of dominance

Introduction

Competitive rivalry is crucial for a well functioning economy because it disciplines the exertion of market power and ensures that returns are due to effort and innovation. In investigating possible abusive behaviour by a dominant firm, it is therefore important to be able to identify the legitimate rewards that come from astute entrepreneurship and investment, and not to penalise those who have competed vigorously and managed to get ahead. Over-enforcement in cases of this kind of entrepreneurship can dampen active competition by deterring firms from actions that may be misinterpreted as anti-competitive. On the other hand, under-enforcement can facilitate and perpetuate the harm caused by anti-competitive conduct. The prohibitions on abuse of a dominant position seek to ensure outcomes that are consistent with effective competitive rivalry. This is done by addressing the possibility that a firm dominant in a given market may seek to exploit its position to extract supra-competitive returns and to exclude its rivals and potential new entrants, thus protecting and extending its dominant position. The provisions of the Competition Act do not, however, seek to protect competition for its own sake, much less to protect individual competitors. Competition among firms is as vigorous and robust as any competition on the soccer or rugby field, or indeed in the electoral arena. The provisions in section 8 of the Competition Act on the abuse of dominance thus place considerable emphasis on identifying the effects of alleged anti-competitive conduct and, further, explicitly provide in many instances for a pro-competitive defence by the firm in question.

The likelihood of persistent harm from anti-competitive conduct depends on the specific characteristics of a particular economy, including its history

The hurdles for proving abuse of dominance are high, as evident in the extremely small number of cases where abuse has been found and the extensive evidence that has been required for these findings. The Competition Tribunal has decided on only seven abuse of dominance cases over the past decade, finding that abuse occurred in four (on the part of South African Airways, Sasol, Mittal Steel SA and Senwes). However, in two of these the finding was overturned (against Sasol) or set aside and remitted by the Competition Appeal Court (against Mittal Steel SA), with the appeal pending in one other (the finding against Senwes). This means that over the decade under review, only one firm, South African Airways, has conclusively been found guilty of abusing a dominant position. The Commission has not been an aggressive enforcer: of the seven cases decided on, four were referred by private parties, with several further referrals by the Commission awaiting Tribunal hearings.

The likelihood of persistent harm from anti-competitive conduct depends on the specific characteristics of a particular economy, including its history. This applies equally to South Africa as to the United States and Europe, where there have been very vigorous debates about competition enforcement. Sir John Vickers, the former head of the UK's Office of Fair Trading argued that, "there should be transatlantic differences in policies towards abuse of dominance. The European economy has historically been more monopolised than that of the US, and its competitive self-righting mechanisms may be less robust."[77] The implication is that applying the same standards will yield a different likelihood of harm to competition and economic welfare, and hence of enforcement imperatives, because of the different economic conditions. This is recognised by the South African authorities, as former Chairperson of the Competition Tribunal David Lewis noted with regard to the dangers of over- or under-enforcement, "[t]he likelihood, direction and cost of the error – and so the approach towards enforcement – will be significantly influenced by the history and structure of the economy in which unilateral conduct rules are being enforced."[78]

[77] Vickers, J. (2007) "Competition Law and Economics: a Mid-Atlantic Viewpoint", *European Competition Journal,* 3(1), p.6.

[78] Lewis, D. (2008) "Chilling Competition", delivered at the 35th Fordham Annual Conference on International Antitrust Law and Policy, New York, 25–26 September, 2008.

In an economy like South Africa's, with a legacy of concentration and state sponsorship of large firms under apartheid, the abuse of dominance provisions are doubly important for ensuring effective competitive rivalry. It is also clear that where managers' rewards are associated with the size of the business they run as well as its profitability, there are very real concerns about strategies to protect and extend their domain from actual and potential competitors, even where the costs of these strategies to shareholders may not justify the returns.

It is striking that the majority of cases ruled upon involve companies that have attained their position through previous state ownership or support. The current or former state-owned respondents are South African Airways, Mittal Steel SA and Sasol, while Senwes was provided with extensive state support for key assets including its grain silos.[79] Former state-owned enterprises with apparently entrenched dominant positions are also well represented in pending referrals, which include those against Sasol, Mittal Steel SA and Telkom. The consequences of abuse of dominance in inputs such as fixed line telecommunications, steel and basic chemicals can be substantial where these products and services are required for more diversified economic activity. For example, in telecommunications, the Commission has found Telkom to be abusing its position in fixed lines to the detriment of providers of value-added network services, although the case has not been heard due to legal challenges to the referral including the overlap of the Commission with the regulatory regime (box 11).

Defining dominance

Firms are subject to prohibitions on abuse only if they are dominant, but being dominant in itself is not a concern of the Competition Act; it is only the specific conduct that is proscribed. The South African Competition Act uses both market share and market power to define dominance. A firm with a market share of 45 percent or greater is presumed to be irrebuttably dominant. A market share of 35 percent or more, but less than 45 percent, renders a firm dominant unless it can show that it does not possess market power. For a finding of dominance in a firm that has a market share of below 35 percent, it is necessary to show that the firm has market power. Market power is defined in the Act as the power of a firm to control prices, or to exclude competition, or to behave to an appreciable extent independently of its competitors, customer or suppliers.

Few, if any, cases have in fact turned on dominance in terms of simple market share as, in practice, the exercise of market definition involves a detailed analysis of market dynamics. For conduct to meet the tests in the specific provisions, such as having an anti-competitive effect or being able to charge an excessive price, the firm must have substantial market power.

It is useful to think of restrictive practices as either exploitative or exclusionary abuses. Excessive pricing can be viewed as the paradigm for exploitative practice by a firm with substantial market power, while exclusionary conduct is designed to protect or extend a dominant position. This segmentation is not altogether clear in practice, however. An upstream monopolist also present in a downstream market might price excessively as part of exerting a margin squeeze on competitors downstream. Section 8(a) of the Competition Act prohibits excessive pricing, while all the other subsections of section 8 address exclusionary anti-competitive behaviour.

Exploitative abuse – excessive pricing

There have been very few cases regarding excessive pricing and only one in which substantial evidence and argument has been heard so far before the Competition Tribunal. The case involved the pricing of flat steel in the South African market by Mittal Steel SA, heard by the Tribunal in 2006. There are other referrals relating to excessive pricing, such as in the pricing of ammonia, yet to be heard, while a notable complaint lodged relating to the pricing of anti-retrovirals for the treatment of HIV was settled between the parties when the pharmaceutical companies agreed to license their patents in the production of the drugs to a number of other companies.

The Competition Act uses both market share and market power to define dominance

It is useful to think of restrictive practices as either exploitative or exclusionary abuse

It is striking that the majority of cases ruled upon involve companies that have attained their position through previous state ownership or support

[79] The other three respondents in the decided cases are Independent Newspapers, Coca-Cola Fortune and British American Tobacco South Africa.

Box 11. Complaints against Telkom

In February 2004, the Competition Commission referred various complaints against Telkom to the Competition Tribunal, alleging that Telkom was abusing its position to exclude competing providers of value-added network services (VANS). The complaints lodged by the VANS providers in essence contended that Telkom was engaged in various practices, including refusal to supply the necessary fixed-line backbone and access facilities, unless VANS providers agreed to certain restrictive conditions. It was also charging VANS providers higher prices than those charged to its own network services operations.

The common thread running through these complaints is Telkom's practice of leveraging its dominance in its upstream infrastructure market into downstream markets, where it faces competition from VANS providers. By inhibiting competition in these services, the Commission believed that Telkom was limiting the development of a whole set of network services, and ensuring higher prices to users.

The Tribunal had not yet adjudicated the complaints at the time of going to press, because in June 2004, Telkom instituted a review application in the Pretoria High Court. The High Court set aside the Commission's referral in 2008. This decision is being appealed in the Supreme Court of Appeal by both Telkom and the Commission.

The Commission has received a range of further complaints against Telkom, also relating to foreclosure of downstream markets to rivals. Some of these complaints contain allegations of margin squeeze, whereby an upstream owner of a bottleneck good, in this case telecommunications infrastructure, provides its own downstream subsidiary with a lower price for the bottleneck good than it charges its downstream competitors, such as the members of the Internet Service Providers Association (ISPA). This means that the downstream competitors are unable to compete.

Telkom's foreclosure of downstream markets to rivals was a theme in both the earlier complaint as well as the more recent complaints against it, which are being investigated. Where foreclosure is concerned, one needs to ask why the monopolist needs to foreclose rivals in a related market where there is competition, when it could continue simply to earn the monopoly profits in the upstream market (in this case, fixed line services). One possibility is that, by doing so, the monopolist is able to raise barriers to new entry into its monopoly market by denying customers to new entrants; another is that the monopolist is preventing downstream rivals from achieving critical mass to enter the monopolist's upstream market. Both seem likely.

South Africa has only recently seen the entrance of a second fixed line network operator, Neotel, that will slowly start generating the competition that Telkom has been trying to restrict. In addition, under a High Court judgment[80] and subsequent ruling by the telecommunications regulator, many VANS licensees now have the right to self provide telecommunications infrastructure services.

Telkom's motives were apparently clearly set out in its own strategy documents as, for example, cited by the Tribunal in its ruling when it prohibited the Telkom/BCX merger in 2007.[81]

"We aim to counter arbitrage opportunities, defend fixed to mobile revenue stream and counter revenue erosion to the SNO and other competitors such as VoIP providers, through strategies including long term contracts, bundled discount packages, calling plans as well as volume and term discounts."

[80] Altech Autopage Cellular (Pty) Ltd v the Chairperson of the Independent Communications Authority of South Africa et al., case number 20002/08. The three mobile network operators (MTN, Vodacom and Cell C) have also been granted the right to "self provide" their own fixed links.

[81] Competition Tribunal decision inthe matter between Telkom SA Limited and Business Connexion Group Ltd., case number 51/LM/Jun06 (paragraph 80).

The rulings of the Tribunal on the complaint brought by Harmony Gold and Durban Roodepoort Deep against Mittal Steel SA and Macsteel International BV (a steel trader exclusively responsible for Mittal Steel SA's deep sea export sales), and subsequent appeal, have traversed competition law and the economics of excessive pricing. This case continues, following the Competition Appeal Court's order setting aside the 2007 Tribunal decision that Mittal Steel SA had charged excessive prices and directing that certain evidence and alternative tests must be considered by the Tribunal.

The complainants sought an order in terms of section 8(a) of the Competition Act, which prohibits the charging of an excessive price to the detriment of consumers. They declared Mittal Steel SA's practice of import parity pricing in the South African flat steel market as an abuse of dominance, as it was charging an excessive price. (Import parity pricing involves charging a price from a local supplier to a local customer as set in terms of the price the customer would have to pay for the imported product.) The complainants claimed that the price of steel should be determined by local demand and supply conditions, which would, if free of abusive conduct, produce a significantly lower steel price. They also alleged that Mittal Steel SA required or induced customers not to deal with a competitor, thereby contravening section 8(d)(i) of the Act. It is important to note that this was not about the import parity pricing, as such, but about the pricing practice of Mittal Steel SA, given the large net exports and low costs of steel production in South Africa.

The Tribunal's approach was to assess the structure of the affected markets to see whether conduct constituting an abuse of dominance was possible, to evaluate whether the conduct was indeed taking place, and to address these structural features in the remedies it imposed. Without attempting to establish the precise level of a competitive price, the Tribunal identified the underlying basis for "maintaining prices higher than would be expected in a competitive market" and then sought to eliminate these to allow the competitive features of the particular market to determine a price level.

This two-step approach involved first asking whether the structure of the market in question enabled those that participated in it to charge excessive prices. The Tribunal found that this would normally require overwhelming dominance (or "super dominance") and high entry barriers that would render the market uncontested and incontestable. If the first, very high, hurdle is cleared, the second step, the conduct test, is applied to ascertain whether those structural opportunities were indeed "abused" by imposing excessive prices on customers. If the answer to both tests is affirmative, the excessive pricing should be proscribed by imposing a remedy that addresses the underlying structural basis for the offending conduct.

In this case, the Tribunal found that Mittal Steel SA had passed the first test, in that it was a "super dominant" firm. Mittal Steel SA had, over several years, maintained a market share of above 80 percent in the flat steel product market, a market with very high barriers to entry, with no meaningful constraints on its ability to determine price unilaterally. The Tribunal then analysed Mittal's conduct and found the joint-venture agreement between Mittal Steel SA and Macsteel Holdings to be the essential ancillary conduct whereby Mittal Steel SA abused its structural advantage. It found that Mittal exploited its structural power through reducing local output by diverting excess production into the international market through the joint venture, to increase the local price. The resulting local price closely approximated the import parity price as the ceiling to the exploitation of its market power.

Mittal Steel SA also sold its products in the domestic market through a group of traders whose activities were confined to the domestic market. It further segmented the bulk of its domestic consumers from consumers in market segments, in which it faced more competitive conditions and consequently had to discount its prices. Strict provisions against arbitrage were put in place by Mittal on all the above arrangements to ensure that the high margins in the bulk of the local market were not eroded.

The Tribunal therefore found that Mittal Steel SA had contravened section 8(a) of the Act by charging an

In the case of Mittal Steel SA, the Tribunal found that the company had contravened the Act by charging excessive prices

The Tribunal found that Mittal exploited its structural power through reducing local output by diverting excess production into the international market

In hearing Mittal's appeal, the Competition Appeal Court found that the Tribunal needed to determine the economic value against which Mittal's prices should be assessed

Exclusionary conduct may include a firm denying access to an essential facility or engaging in other types of exclusionary behaviour that has anti-competitive and exploitative effects

excessive price to the detriment of consumers. The Tribunal did not find that Mittal Steel SA had contravened section 8(d)(i) of the Act by inducing its customers not to deal with a competitor. In determining a remedy, the Tribunal did not follow the applicants' requested relief measure of ordering Mittal Steel SA to levy "factory gate prices" in the South African flat steel market "irrespective of whether the product is intended for export or not" on the basis that it was not the function of the competition authorities to declare a particular price to be appropriate or not. Rather, it addressed the Macsteel joint venture arrangement by prohibiting the imposition of conditions of resale on flat steel products, and compelled Mittal Steel SA to make public the details regarding discounts and rebates, to weaken Mittal's ongoing ability to inhibit arbitrage. The Tribunal also imposed an administrative penalty of R691 million, representing 5.5 percent of Mittal Steel SA's total turnover earned on flat steel in both local and international markets.

In hearing Mittal's appeal, the Competition Appeal Court found that the Tribunal needed to determine the economic value against which Mittal's prices should be assessed. While not prescribing what the correct test for economic value should be, the Court suggested, amongst other tests, undertaking reasonable comparisons to prices in situations where long-term effective competition prevails, and assessing price increases without any corresponding increases in input costs. In addition, the Court directed that the representations of Macsteel International BV should be heard, given the importance that the Tribunal had placed on the export arrangements and the impact of the remedy. The Court also determined that the Competition Act made no requirement for finding "super dominance" in order for there to be excessive pricing.

Exclusionary abuse

Exclusionary behaviour by a dominant firm is cause for concern, not only because harm is done to competitors, but because this process of establishing or entrenching a dominant position in a market creates an environment that facilitates exploitative behaviour. It must be noted that competition policy is not concerned with preventing the exit of competitors that may be inefficient, nor with exit in markets with low barriers to entry, and it is definitely not to be used as an alternative arbitration mechanism to solve what are essentially commercial disputes.

Exclusionary conduct is covered under sections 8(b), (c) and (d) of the Competition Act. Section 8(b) prohibits a dominant firm from denying access to an essential facility. Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms, with no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological, efficiency or other pro-competitive benefits. Section 8(d) identifies particular types of exclusionary abuse that are prohibited, where a penalty may be imposed for a first contravention and where the onus is on the respondent firm to demonstrate that technological, efficiency or other pro-competitive benefits outweigh the anti-competitive effect. These types of conduct are specified under section 8(d) as follows:

(i) requiring or inducing a supplier or customer to not deal with a competitor;
(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;
(iv) selling goods or services below their marginal or average variable cost; or
(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

A few key decisions have established the precedents for the main exclusionary abuses. However, in some areas, cases that go to the merit of a particular type of conduct have not yet been heard. These include section 8(b), which prohibits a dominant firm from refusing to give a competitor access to an essential facility, and section 8(d)(iv), which is in effect the prohibition on predatory pricing by a dominant firm. In each of these there have been very few referrals. The two referrals by the Commission involving access to an essential facility both relate to telecommunications, where a network is required in order to be able to provide services, and where a regulatory body exists that can rule on these issues. Neither of these cases has been heard.

By contrast, most years have seen several cases referred under section 8(c) and/or subsections of section 8(d). In assessing these, it is necessary to evaluate whether there is indeed an anti-competitive effect, and weigh it up against any pro-competitive justification. The complainant must demonstrate that the exclusionary act has taken place and that the conduct complained of has an anti-competitive effect.

Over the years, the Tribunal has set standard tests for the existence of anti-competitive conduct, which vary in their application on a case by case basis.

The Tribunal has established that the anti-competitive effect can be shown either through evidence that there is direct harm to consumer welfare and/or that the conduct forecloses a substantial part of the market to a rival. The substantial foreclosure test has been widely used by the Tribunal in most of its decisions. It is necessary to assess whether the firm has the ability to foreclose a market to rivals and whether foreclosure has occurred. The Tribunal has emphasised that the respondent does not need to be dominant in the market in which the effects of its conduct are felt, but it must have the ability to foreclose, generally by being dominant in the supply of the input.

Once substantial foreclosure has been determined, evidence on the effects should be demonstrated. While this has not been explicitly required by the Tribunal, representations have been made in specific cases, showing how rival businesses have declined while those of the respondents have grown.[82] Full foreclosure is not required for a firm to be subject to exclusionary conduct. If this were the case, investigations would be conducted only on the part of firms that had already exited.

If anti-competitive effect has been established, the Act provides for the respondent to offer a justification for the conduct. Justifications must result in benefits that are either passed through to consumers or that expand output. It is also important to determine whether there are other means of reaping the claimed pro-competitive gains with lesser exclusionary effects. In other words, it is necessary to determine whether exclusionary conduct is required for the pro-competitive gains to be realised.[83] After the respondents have provided objective justifications, it remains for the Tribunal to weigh or balance such pro-competitive effects against the anti-competitive effects arising from the conduct.

The main differences in the application of sections 8(c) and 8(d) were highlighted in the Senwes decision (box 12).[84] In particular, the Tribunal has sought to distinguish the broad prohibition on exclusionary conduct in section 8(c) from the specific inducement of a supplier or customer not to deal with a competitor in section 8(d)(i). The case was referred by the Commission to the Tribunal on both of these counts. The Tribunal did find that exclusionary acts had taken place in contravention of section 8(c) in the form of a margin squeeze due to the conditions and pricing of Senwes for grain storage, which impeded or prevented downstream rival traders from competing with Senwes' downstream trading arm. The Tribunal did not find the features necessary to establish inducement, namely persuasion or enticement of either a customer or supplier.

The main case dealing with specific inducement, under section 8(d)(i) of the Act, is that involving South African Airways' (SAA) arrangements with travel agents, where a substantial penalty was imposed by the Tribunal on SAA in 2005[85]. As an early case, it was also central in establishing the principles and their application. SAA was alleged to have engaged in exclusionary conduct through two incentive schemes aimed at inducing travel agents not to deal with SAA's rival airlines in the domestic market and hence having an exclusionary effect on those rivals.

The Tribunal found that there was evidence that travel agents had a financial incentive and ability to move customers to SAA, had done so, and that this exclusionary conduct had had a significant effect that outweighed the pro-competitive rationale (box 13). The facts showed that the business of rivals had declined or slowed down as SAA's business grew, demonstrating that the travel

The Tribunal has established that the anti-competitive effect can be shown either through evidence of direct harm to consumer welfare and/or that the conduct forecloses a substantial part of the market to a rival

[82] See Senwes in Tribunal case number 110/CR/Dec06, and SAA decision in Tribunal case number18/CR/Mar01.

[83] SAA decision Case Number18/CR/Mar01, paragraph 252, page 57.

[84] Case Number 110/CR/Dec06.

[85] Case number 18/CR/Mar01.

Box 12. Competition Commission v Senwes – Assessing exclusion through a margin squeeze

Senwes is both the owner of grain silos in a specific region of the Highveld, where it has the majority of the silo storage capacity, and also a major trader in the grain market. Until 2003, it had a pricing system for storage according to which both traders and farmers who stored their grain at Senwes silos paid a daily storage fee for the first 100 days, with storage free thereafter until the end of that season. This allowed traders the freedom to sell grain late in the season without being burdened by heavy storage costs. In May 2003, Senwes removed the capped tariff from traders and offered it only to farmers, meaning that a trader who stored grain longer than 100 days continued to pay the daily tariff.

Following a complaint laid by a small grain trader, CTH Trading, the Competition Commission found that this conduct was exclusionary in that it amounted to an inducement of farmers not to deal with competing grain traders, and a margin squeeze on traders in that it charged them higher prices than were charged to either farmers themselves or Senwes' own trading arm. On 3 February 2009, the Tribunal found that Senwes had contravened section 8(c) of the Competition Act by denying grain traders the benefit of an annual storage discount, which they had enjoyed before 2003, but that there had not been a contravention of section 8(d)(i).

The Competition Tribunal analysed the margin squeeze and inducement conduct separately. For a margin squeeze by a dominant firm, it was first necessary to establish that Senwes was vertically integrated and that storage was an essential input to the downstream trading market, and hence that the firm could influence prices of both the input and of the product or service in which the input is used. It was then necessary to assess whether the dominant firm's prices would render the activities of an equally efficient rival uncompetitive because the margin that can be made by a rival that is not vertically integrated is too thin. The Tribunal examined this in detail and dismissed Senwes' argument that the difficulties experienced by the non-integrated traders in the market were because they were inefficient. In the Tribunal's view, while some traders might not be as efficient in their operations as Senwes, it is probable that at least some of the traders were as efficient given their large scale and established position in the market, while all made common allegations against Senwes. In addition, the Tribunal noted evidence that the firms being excluded were responsible for innovations in the market such as different contractual arrangements. In the Tribunal's view these are not the actions of inefficient firms.

In addition, the Tribunal found that Senwes could and did capture the sales its conduct had diverted, as most traders had ceased to trade in the period following the first 100 days. The returns from the strategy were evident in that the Tribunal found evidence of direct harm to farmers and processors who were, respectively, paid less and charged more than they would have been had the markets been more competitive. The Tribunal thus ruled that Senwes' conduct had an anti-competitive effect.

In accordance with the Act, following the determination that the conduct was exclusionary and anti-competitive in nature, the Tribunal then considered the efficiency defence (or the objective justification). The Tribunal ruled that Senwes had failed to offer an objective justification and as such no weighing up of this objective justification against the anti-competitive effects would be necessary. The Tribunal is yet to determine the remedies.

Although the Tribunal acknowledged that the grain price is determined by competitive market forces on SAFEX, the price at which grain is purchased and sold in the physical grain trading market is one derived but not set at the SAFEX price, and hence there is the potential for anti-competitive conduct to distort the final price. According to the Tribunal, most of the grain that is sold by traders is sold to the large milling companies in terms of tenders, for delivery at the mill door. The Senwes practice of imposing a margin squeeze on rivals has meant that fewer firms tender for these contracts, resulting in higher grain prices for mills, which are then passed on to consumers.

agent incentive schemes substantially foreclosed the market to rival airlines and harm could be inferred from the extent of foreclosure.[86]

In terms of pro-competitive effects, these kinds of schemes may be used to increase the marketing effort and promotion of a firm's products, and thus make competitive rivalry more intense. The Tribunal considered two main effects: whether the conduct led to an expansion of business and/or whether it would result in lower prices for the consumer. Under both tests the Tribunal found that it was unlikely that consumers would benefit from this kind of conduct, given the nature of the incentives (employees of travel agents benefited and SAA controlled prices, thus preventing pass-through of benefits) and that it was also unlikely that output would expand. At the same time, SAA could have used numerous other ways to reward travel agents for promoting its products without the exclusionary nature of the schemes. The Tribunal therefore ruled that SAA's incentive schemes had an overall anti-competitive effect.

The exclusionary effects of incentive programmes were again evaluated in an extensive case involving a dominant cigarette supplier's arrangements with regard to retail outlets. The complaint was brought by Japan Tobacco International (JTI) against British American Tobacco South Africa (BATSA), and referred by the Commission to the Tribunal in 2005, with JTI also intervening.[87] The matter hinged on allegations that certain agreements between BATSA and selected cigarette retailers, and certain of BATSA's retailer's incentive programmes, induced retailers to give preference to BATSA products over those of competitors, regardless of their prices and/or quality. Alternatively, the agreements and incentives were alleged to give BATSA exclusive access to the point of sale for promotional purposes. In this case the Tribunal stated that "....Ultimately the impact on competition of any form of exclusive arrangement must be measured by the extent of foreclosure that results from the arrangement".

The Tribunal stated further that although BATSA's conduct inhibited competition to a certain degree in the market for the retailing of cigarettes, the foreclosure caused by BATSA's conduct did not amount to abuse of dominance, as it was minimal. The Tribunal stated that "... not only can we not identify consumer harm or find significant foreclosure arising from BATSA's promotional activities; we cannot even ascribe harm to *competitors* from the allegedly anti-competitive conduct." Since anti-competitive effect was not established, the Tribunal did not analyse efficiency gains.

In concluding that no harm to competition could be found, the Tribunal offered a variety of reasons for JTI's travails. The Tribunal stated that the market shares of JTI and other BATSA competitors remained constant or increased during the period of BATSA's conduct, showing that the conduct had minimal effect. The Tribunal also concluded that it was difficult to state categorically the reason why JTI and other BATSA competitors failed to increase their market shares substantially, as the introduction of BATSA's merchandising programme coincided with the advent of the "dark market". The dark market started with the Tobacco Products Control Amendment Act of 1999, which prohibited above the line marketing of cigarettes. This included the print media, billboard advertising, radio, television and cinema advertising and other forms of public sponsorship. It also found that the introduction of Marlboro in the South African market accounted for some of the losses in the market shares or volumes of Camel, a JTI brand, rather than BATSA's conduct in the market. The Tribunal also concluded that the evidence proved that whenever they intended to gain access to certain channels such as hotels, restaurants and catering venues, JTI and Philip Morris International (PMI), the owner of Marlboro, fought and won significant battles against BATSA, thus pouring cold water on the allegation that BATSA's competitors could not compete with it because of its dominance.

With regard to possible harm to consumer welfare, the Tribunal stated that, given that the retail market is competitive, the incentives paid by BATSA were likely to be passed on to consumers, thus benefiting consumer welfare. The Tribunal also stated that pro-competitive gains could be observed from the free provision of cigarette dispensing units by BATSA, maintenance of an orderly point of sale, the existence of a vending machine

The Tribunal has sought to distinguish the broad prohibition on exclusionary conduct from the specific inducement of a supplier or customer not to deal with a competitor

The main case dealing with specific inducement involved SAA's incentive schemes with travel agents

In the case involving BATSA, the Tribunal found that its conduct had brought no harm to competition or consumer welfare

[86] See SAA decision, case number18/CR/Mar01, paragraph 242, page 55.

[87] Case number 05/CR/Feb05.

Box 13. Inducement by South African Airways to exclude competing airlines

In October 2000, Nationwide Airlines Group (Nationwide) lodged a complaint with the Competition Commission, alleging that South Africa Airways (Pty) Ltd (SAA) was trying to exclude it from competing in the domestic airline market through predatory pricing, poaching of key staff, its incentive schemes with travel agents (the override scheme) and the Explorer reward scheme for employees of travel agents. However, in May 2001, following its investigation, the Commission's referral was only in relation to two of the alleged restrictive practices that were in the original Nationwide complaint, namely, the override scheme for travel agents and the Explorer scheme for travel agent employees. The Commission identified the relevant markets as the market for domestic scheduled airline travel and the market for South African travel agency sales of domestic scheduled air travel in South Africa.In its referral, the Commission argued that the override and Explorer schemes had the effect of inducing travel agents to sell more SAA tickets and fewer of those of its rivals, even when agents had an opportunity to do the latter. This was because the incentive scheme's rewards to travel agents increased exponentially as the travel agents met and exceeded their SAA sales targets, with incremental commissions increasing from 14 percent for exceeding the target by 15 percent, to 31 percent for exceeding the target by 35 percent. On the other hand, the base commission rate would also increase by 0.5 percent for sales above a set target for certain contracts, while it would continually increase as travel exceeded the target in other contracts. With the base commission being paid on a “back-to-rand-one” basis, the more a travel agent exceeded the target, the more they would earn from all sales of SAA tickets. The Explorer scheme rewarded individual travel agent consultants with a free international air ticket based on their achieving SAA's sales targets. The Explorer scheme also earned points for the travel agents to which the consultants belonged. It is important to note at this point that the Tribunal ruled that it is not the existence of these schemes that raised competition concerns, as they were a market-wide norm, but the nature of SAA's schemes that raised competition concerns[88].

To assess the exclusionary nature of the conduct, the Tribunal required evidence to show that travel agents had a financial incentive and the ability to move ticket-purchasing customers from rival airlines towards SAA. The Commission showed that the marginal commission rates rate were substantially increased by the override schemes as more SAA tickets are sold by agents and, without achieving a similar level of compensation from a rival, the agent has little or no incentive to sell rival tickets. The Commission also argued that the targets were not transparent as they were based on flown revenue, which the travel agents could only know later on from SAA, so this meant that travel agents would continuously try to sell SAA not knowing whether or not they had met their targets. Evidence from travel agents showed that they definitely had an ability to move customers from one airline to another. The Tribunal thus concluded that travel agents have a financial incentive to divert customers from rival airlines to SAA and can significantly influence customer decisions. The Tribunal also ruled that these exclusionary effects were reinforced by the Explorer scheme. In terms of establishing anti-competitive effect, the Tribunal limited the test to showing substantial foreclosure of markets to rivals, as it concluded that the Commission had not established an adverse effect on consumer welfare (higher prices for domestic airline tickets or less choice in flights or inferior service) except by inference. During the relevant period, domestic airline ticket sales by travel agents accounted for 75 percent of all ticket sales. By the end of March 2001, SAA had 19 override schemes covering all major four groups as well as smaller ones, with a total of 683 agencies being covered. Although this coverage was not expressed as a proportion of the total number of agencies available to market players, the Tribunal regarded it as significant and SAA did not challenge this supposition.

The Tribunal also considered the effect of SAA's conduct on the businesses of rival airlines. Specifically, the Tribunal considered evidence of declines in Nationwide's flown passengers after the inception of the override and Explorer schemes, with the growth rate dropping from a peak of 61 percent to 2.9 percent. Monthly moving average figures also revealed a continual decline in sales between November 2000 and January 2002. British Airways (BA)/Comair's business also declined, with growth slowing from a peak of 11.97 percent in 1996/97 to 0.2 percent in 2000/01. During this time, SAA's performance improved. The Tribunal subsequently ruled that SAA's conduct inhibited rivals from expanding in the market, at the same time reinforcing SAA's dominant position. The Tribunal also inferred that it was likely that SAA's conduct had an adverse effect on consumers by leading consumers into making the wrong choices, of airlines and of the prices of the services.

The Tribunal rejected SAA's pro-competitive justification of its conduct, ruling that SAA could have achieved its claimed efficiencies via other less exclusionary means. The Tribunal subsequently ruled that SAA's conduct contravened section 8(d)(i) of the Act. After examining the factors that affect the level of penalty, the Tribunal decided to fine SAA R45 million (2.25 percent of turnover). In 2004, BA/Comair brought a similar complaint to the Commission against SAA relating to the period from 1999 to 2004. The BA/Comair complaint resulted in a settlement agreement with the Commission, which was confirmed by the Tribunal in December 2006. SAA agreed to pay an administrative fine of R15 million and refrain from future incentive agreements with travel agents. BA/Comair has, however, brought an application contesting the settlement and requesting the Tribunal to declare void certain agreements concluded by SAA and travel agents, as it wants to continue with a civil claim against SAA for which it requires an order from the Tribunal that SAA's conduct was a prohibited practice in terms of the Act. Comair's application was consolidated with that of Nationwide, as Nationwide is seeking a similar order. Nationwide is also of the view that the Tribunal considered SAA's conduct for only an 18-month period from 1999 to 2001 when the conduct was still continuing. The Tribunal's decision regarding these applications is still pending.

[88] See SAA, case number 18/ CR/MAR01, paragraph 141, page 34.

channel and improvements in stocking outlets. The matter is being appealed by JTI.

In another case, in 2004, exclusive arrangements between a newspaper publisher and distributors were evaluated in the interim relief application brought by Mandla Matla (MM) against Independent Newspapers under sections 5(1), 8(c) and/or 8(d)(i) of the Act.[89] In the MM case, part of the complaint involved exclusivity between Independent Newspapers and a certain class of newspaper distributors (exclusive dealing). Citing Gellhorn et al.,[90] the Tribunal set out the three major steps as evidence of substantial foreclosure, duration of foreclosure, and barriers to entry. It found that foreclosure was neither substantial nor sustained, and barriers to entry were also not significant.

Price discrimination

The final prohibition of conduct by a dominant firm is price discrimination, under section 9(1) of the Act. While this appears as a separate conduct, the standards used have much in common with the wider provisions on exclusionary abuse. Whereas a dominant firm is prohibited from discriminating between different purchasers on price or other purchase conditions, this is qualified in two important respects. First, it must be likely to have the effect of substantially preventing or lessening competition. Second, it must relate to the sale in equivalent transaction of goods or services of like grade and quality. This means that the provision does not prevent firms charging different prices or having different trading terms, such as for purchasing different volumes or where customers commit to long-term purchase arrangements.

Over the past decade, there have been very few cases of price discrimination referred to the Tribunal by the Commission. All but one of the cases have also been referred on grounds of other exclusionary conduct. This is because of the requirement of there having to be a likely anti-competitive effect for a case of price discrimination.

The main case in which price discrimination has been assessed in detail, including by the Tribunal and the Competition Appeal Court, was brought by a private complainant after the Commission investigated and decided not to refer it. The complaint was brought to the Tribunal in December 2003 by Nationwide Poles, through its owner Mr Jim Foot, against Sasol Oil (Pty) Ltd (Sasol). At the time of the lodging of the complaint, Nationwide Poles, a pine pole treatment plant, was a small business operating in the Eastern Cape.

In the case brought against Independent Newspapers, the Tribunal looked for evidence of substantial foreclosure, the duration of foreclosure and barriers to entry

Nationwide Poles sourced pine poles from sawmills and impregnated them with the wood preservative creosote, purchased from Sasol Oil. In 2002, Mr Foot became aware that Sasol was charging Nationwide Poles a higher price for creosote than its competitors. After obtaining a copy of the price list from Sasol, Mr Foot confirmed that the price Sasol charged his firm for creosote was higher than that levied on Woodline, a large pole manufacturer that competed with Nationwide Poles. Mr Foot decided to bring a price discrimination claim (under section 9 of the Act) against Sasol.

At the heart of the case was the way in which Sasol set discounts for each three-month period based on a customer's purchases over the preceding 12 months (apparently as an indicator of the purchaser's future demand). Nationwide Poles claimed that the different discounts to itself compared with larger buyers added between 3 percent and 4 percent to its total cost structure, and that the higher cost it paid for its inputs lessened its ability to compete in the market because of the higher variable costs of production.

Both the rationale for the discount structure and the likely effect were hotly contested. It emerged that there was no direct cost link to the volumes supplied as the purchasers all bought in the same units, namely tanker loads, and in these terms the transactions were equivalent. However, Sasol claimed that the discount structure was rationally based in that the nature of creosote production as a by-product from the production of liquid fuels meant that it needed some guarantee of off-take, which it got from ensuring the purchases from the larger customers. This was not evidenced in any adjustments to the pricing structure to reflect commercial considerations and

[89] Case number 48/CR/Jun04.

[90] Gellhorn, E., Kovacic, W.E., Calkins, S., *"Antitrust Law and Economics in a Nutshell"*, Thomson West.

The Tribunal has heard very few cases of price discrimination, because a likely anti-competitive effect has to be shown

The main price discrimination case heard by the Tribunal involved a complaint against Sasol by a small business owner

Sasol acknowledged that the structure had simply been continued over many years. In addition, while Sasol had more than 45 percent of the market for creosote, it appeared to be unconstrained in its pricing decisions by the other major supplier (Suprachem), as Sasol had sharply increased prices without any regard to the likely response of Suprachem.

With regard to effect, the Tribunal stated that the phrase "likely to have the effect of substantially preventing or lessening competition" should be interpreted in accordance with considerations of equity and the participation of small and medium enterprises (SMEs) in the economy. The Act is clearly concerned with promoting market access for SMEs and an important mechanism for doing this is by ensuring "equitable treatment".

According to the Tribunal, the legislature's intention underlying section 9(1)(a) was to create a threshold, but a low one that related not to competitive harm but to competitive relevance. Thus, this section was about removing the irrelevant and trivial, rather than creating a hurdle that small firms could never clear. The Tribunal held that Sasol's pricing differentiation, on the basis of previous volumes purchased, placed Nationwide Poles at a disadvantage relative to its competitors. Furthermore, the Tribunal concluded that it was likely that Nationwide Poles and firms similarly situated in the market as well as new entrants would be less effective competitors as a result of this practice, particularly in such a market where small firms, in an environment without price discrimination, could be effective competitors to their largest rivals. The Tribunal therefore found that Sasol was a dominant firm that had engaged in conduct that met the test required to establish prohibited price discrimination.

Sasol took this decision to the Competition Appeal Court, where it argued, inter alia, that the legislature had made it clear that the ability of small businesses to become competitive was a public interest consideration. This was distinct from being a question about whether particular conduct was likely to have the effect of substantially preventing or lessening competition. Sasol also submitted that the Tribunal had erred in finding that its volume based discount pricing was likely to substantially prevent or lessen competition. This is because there was a robust commercial presence of a large number of small firms using creosote, whose presence had been sustained over the period of operation of its (Sasol) pricing structure.

The Court held that the effect had to be determined by recourse to evidence which could demonstrate that the impugned is capable of having, or likely to have, an anti-competitive effect in the relevant market. The Court found that the evidence was not sufficient to establish that smaller firms could not compete effectively, nor whether such firms had exited pursuant to the operation of Sasol's discount structure. The Court noted that had it been provided with evidence relating to the operations of the remaining small competitors in the market, such as the Commission would have obtained if it had investigated further, then it may have been able, on a balance of probabilities, to conclude that there was a reasonable possibility that Sasol's pricing structure was preventing or lessening competition from taking place within the creosote market. The Tribunal's decision was accordingly set aside. The Court concluded that its decision did not seek to minimise the particular weight which the legislature has given to price discrimination nor to the need to ensure that SMEs are able to use the Act to protect their ability to compete freely and fairly.

Exemptions

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

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

- maintenance or promotion of exports

- the promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive
- a change in productive capacity necessary to stop decline in an industry
- the economic stability of any industry designated by the Minister of Trade and Industry after consulting with the minister responsible for that industry.

The Commission may also exempt an agreement or practice, or category of either agreements or practices that relates to the exercise of a right acquired or protected in terms of intellectual property legislation (such as copyrights, patents and trademarks).

Schedule 1 provides that a professional association may apply to the Commission to have all or part of its rules exempted from the provisions of chapter 2, provided that the rules do not contain any restriction that has the effect of substantially preventing or lessening competition in the market. In the event that there is a substantial prevention or lessening of competition in the market, an exemption may be granted provided that, and having regard to internationally applied norms, the restrictions are reasonably required to maintain professional standards or to maintain the ordinary function of the profession.

Review of exemption applications

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

The Commission has received a total of 42 exemption applications since its inception, with the largest numbers being in transport, healthcare and liquid fuels (figure 9). Applications in the transport sector have been mainly to do with arrangements between airlines such as codeshare agreements. For example, South African Airways applied for an exemption for a codesharing agreement with Australia's national airline Qantas on the Johannesburg to Perth and Sydney routes. The exemption is from section 4(1)(b)(ii), which prohibits competitors from dividing markets by allocating customers, territories or specific types of goods or services. The grounds for the exemption were that the agreements are required to attain two objectives, namely, for the maintenance or promotion of exports, and in respect of a change in productive capacity to stop decline in an industry (sections 10(3)(b)(i) and (iii) of the Act). The Commission subsequently granted the exemption until 2010.

In the healthcare sector, there have been various arrangements for which exemptions have been applied. These include arrangements allowing smaller firms to negotiate collectively with the medical aid schemes. One of these related to Scriptnet, a network of pharmacies, another to the National Hospital Network, a grouping of independent hospitals not controlled by the big three hospital groups, Netcare, Mediclinic and Life. In 2004, Scriptnet applied for an exemption from the provisions of section 4 of the Act in respect of all agreements negotiated with the medical schemes on their behalf. Scriptnet submitted that the agreements were necessary to enable SMMEs and firms owned or controlled by historically disadvantaged individuals to become competitive. These exemptions were granted on the basis of the objective of promoting small businesses, or allowing firms controlled or owned by historically disadvantaged persons to become competitive.

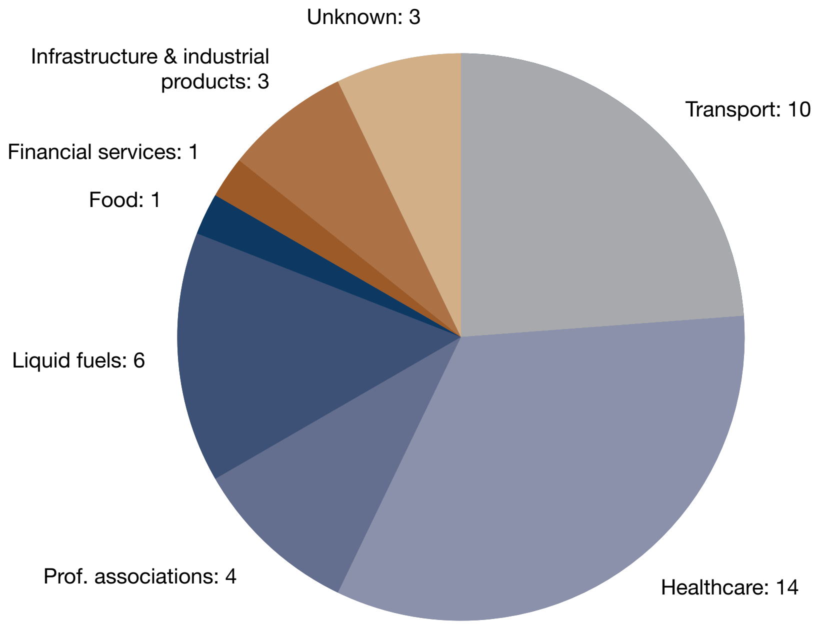
In the liquid fuels industry, exemptions have related to arrangements governing logistics and market allocation. For example, Sasol requested an exemption related to a number of market allocation agreements between it and other oil companies that had been entered into at the behest of government, as a key element of its liquid fuels policy up to the 1990s. Market allocation was based on the support of the synfuel industry. As a quid pro quo, Sasol's involvement in the retail sector was curtailed. Sasol had given the required five-year notice on 1 January 1999 to end the agreements. The Commission was satisfied that the exemption was necessary, and

The Commission may grant an exemption from the prohibiting of anti-competitive conduct, if the conduct is deemed to be necessary for meeting particular socio-economic objectives

The Commission has received a total of 42 exemption applications since its inception

SAA was granted an exemption for a codesharing agreement with Qantas airlines

Figure 9. Number of exemption applications, by sector



Source: Competition Commission

The majority of firms seeking exemptions have been in the healthcare, transport and liquid fuel industries

that an immediate cancellation of the agreements would be impractical, and thus granted an exemption until 31 December 2003.

Finally, the complex nature of the arrangements governing professional associations is well illustrated by the General Council of the Bar's (GCB) application for an exemption for its professional rules in terms of schedule 1 of the Act. Following the Commission's refusal to grant an exemption against some of its rules in 2002, the GCB brought an application in the High Court for a review against the Commission, stating that the Commission was biased and failed to apply its mind in deciding whether or not to grant an exemption, and that it acted *ultra vires* in refusing to grant the exemption. This matter was heard in the High Court and then in the Supreme Court of Appeal later that year. While some rules were exempted by the decision of the Supreme Court, the Court ruled that other rules, which were exempted by the Lower Court, would not be exempted, but that the application for the exemption of these rules should be referred back to the Commission for consideration. The Commission then engaged with the GCB and Department of Justice on its concerns and the matter is under consideration by the Commission.

The outgoing Chairperson of the Competition Tribunal reflects on the competition authorities' achievements

When I reflect on the past ten years, my greatest satisfaction doesn't lie in one or other decision of the Tribunal but rather in the extent to which the work of the competition authorities has become embedded in business decision making and in public life. The work of the Commission and Tribunal receives an extraordinary amount of media coverage of a uniformly high standard. I firmly believe that this has much to do with the open, transparent character of the Tribunal's hearings and by the furnishing and publication of detailed reasons for our decisions. Beyond the substance of competition law itself, this has gone some way towards transforming a secretive business environment into one obliged to account for important strategic decisions and for critical aspects of its conduct, not only to the competition authorities, but also to the broader public. This not only promotes a more competitive and accessible economy, but contributes to the consolidation of our democracy itself.

On the other hand, a significant disappointment has been the manifest weakness of the consumer movement in our country. This is particularly surprising when one considers the role of consumer power in the struggle for democracy.

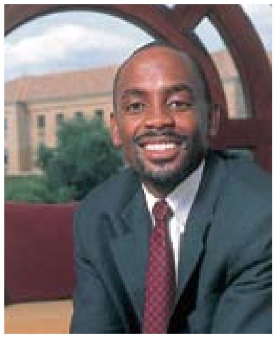
From the potato boycotts of the earlier decades of the last century to the meat and pasta boycotts, to the rent and bus boycotts, consumer power was a vital instrument of the democratic struggle. And yet with a few notable exceptions such as the struggle for antiretroviral drugs, it seems that the beginning of democracy coincided with the end of powerful, demanding consumers. We have, to be sure, seen renewed evidence of this spirit in the very depth of the outrage generated by anti-competitive conduct, particularly price-fixing.

However, the competition authorities must do all they can to empower consumers. We can do this in a variety of ways – by making our proceedings more accessible, by publicising our activities in the popular media such as the radio, by resolutely pursuing and punishing those who fleece the very people whose continued support ensures their handsome profits and salaries, and by assisting consumers to claim recompense for the harm done to them.

I have no doubt that the next ten years will be every bit as productive as the previous decade. I believe that one contribution that the Tribunal can make to this is by streamlining its procedures, by refusing to accept dilatory and vexatious legal stratagems that are, stripped of all the high minded language of fairness and due process, little more than attempts to obstruct justice. In one sense, the low point of the past ten years was the protracted prosecution of ANSAC, the cartel of American soda ash producers. On the other hand, in seeing this prosecution through, the competition authorities demonstrated their determination, whatever the extent of the diversionary tactics employed, so that ultimately justice prevailed. We must not allow ourselves to be treated in this manner again. While I understand that an important aim of our administrative law and of our Constitution itself is to protect private citizens from abuse of state power, we must guard against these principles being invoked by those whose manifest interest is in depriving consumers of their right to quality products at the lowest possible prices.

David Lewis
Chairperson of the Competition Tribunal (1999–2009)

TOWARDS A FAIR AND EFFICIENT ECONOMY FOR ALL



The Competition Commission was set up to undo the "excessive concentrations of ownership and control", the "unjust restrictions on participation" and the "inadequate restraints against anti-competitive trade practices" that were the inheritance of apartheid and other discriminatory laws and practices. As such, the amended preamble to the Competition Act recognises that "an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans".

Sometimes we forget, as we apply our legal and technical minds to the cases brought before the Commission, that the ultimate intention of all that we do is significantly to improve people's lives by "providing all South Africans with an equal opportunity to participate fairly in the national economy".

Back in 1998/99, the Competition Commission's intentions were not welcome guests amongst a previously privileged business community coming to terms with a new and democratic dispensation. The Commission and its sister organisations, the Competition Tribunal and the Competition Appeal Court, faced considerable cynicism and resistance in those early years; but its leadership was more than committed to taking on that resistance, despite the very best legal firms defending the practices that the Commission swiftly brought to light. This commitment by the Competition Commission continues to inform the good work that is being done in exposing practices that are harmful to citizens.

The Competition Commission was started with a young, vibrant, eager to learn, group of employees. We called this time our establishment phase, where we focused on building the capacity of our staff. Thrown into a large melting pot, it yielded staff issues that forced us to develop policies and procedures which formed the character of the Commission. But it is also these principles and challenges that allow one to grow.

Training programmes were conducted by international experts and focused on all areas of competition law. We also invited our colleagues from the SADC region to participate in these programmes. The successes of these capacity building programmes are reflected in the successes of competition authorities in the SADC region. It is worth noting that COMESA has established a regional competition authority and is fully functional. The Competition Commission and Competition Tribunal can claim their rightful contribution to this significant development.

The Commission, Tribunal and Appeal Court have, since then, more than proven their mettle, establishing themselves as globally recognised and world class competition authorities that have absolutely impacted on the way South Africans do business – and, subsequently, on the lives of all South Africans, absolutely as originally intended. The recent rulings in the food sector in particular – and many others, too – stand as testament to this. None of this would have been possible without the truly dedicated and talented professionalism of the people who were prepared to take on this challenge and contribute meaningfully to making South Africa a fairer, more equitable and freer place to live. All the officials of the competition authorities, past and present, should be proud of their work over the past ten years.

I am honoured to have had the opportunity to work with them. I regard these years as some of the most rewarding of my career. And, of course, finally, my congratulations to you all on the occasion of this first decade of achievement – may there be many more decades of success and reward ahead of you!

Advocate Menzi Simelane
Competition Commissioner (2000–2005)

THE MAKINGS OF A SUCCESSFUL AUTHORITY: REFLECTIONS ON THE RISE OF THE COMPETITION COMMISSION

Looking at the past ten years, the Competition Commission has a lot to celebrate. The first five years were formative – setting up institutions, clarifying procedures and processes, and building up a reputation as an independent authority – in a country which had very few competition practitioners and almost no law or economics classes devoted to the craft.

All this work was critical in making successful authorities and an environment where they could flourish. The first five years also saw the vigorous analysis of mergers, enhancing our confidence and sharpening our tools for the battles that lay ahead. Mergers got a lot of attention, in part because all mergers that met the thresholds had to be notified and decided by the authorities within the tight deadlines imposed by statute. Progress in enforcement was very slow, and investigations were complex and often very adversarial. However, it was during this difficult period that many of the lessons that make us a better enforcer were learnt, ranging from investigation planning, issuing summons, and conducting dawn raids to working with corporate leniency applicants and conducting settlement negotiations.

A combination of fate and dedicated effort ensured that the Commission crossed its Rubicon. In 2005 Shan Ramburuth came in as the Commissioner, alongside a new management team.

It was time for soul searching – the new team needed a new path. In 2006 we embarked on an ambitious strategic planning exercise, involving all employees. We began by defining the period as that of consolidation. Institutions were there, but we now had to ask what their contribution was going to be in the transformation of the South African economic landscape, in line with the mandate contained in the Competition Act.

We came up with a strategic plan, which required us proactively to prioritise sectors and cases, establish the Commission as a centre of knowledge and expertise, and recognise staff as the key asset in the business. This also required streamlining the structure and processes to support effective implementation, and improving our knowledge management systems. The strategic planning process did not just help with clarifying priorities, but was also instrumental in rejuvenating staff and giving people a stake in the institution.

After consultations with stakeholders, key priority sectors were identified: food and agro-processing, infrastructure, financial services and intermediate industrial products. At the same time, the Commission identified cartels as a key focus area and reviewed its corporate leniency policy in order to catch the most egregious offenders of competition law, hence the saying, “every cartel a priority”.

The outcome of the strategy was a shift from a focus just on mergers to enforcement and advocacy, and the strategy is paying off. Enforcement against cartels has taken centre stage, and CLPs are the key driver of this work. To illustrate the point, in 2006 there was a total of two CLP applications at the Commission. As we go to press, there are more than 20 applications this year, and we are still counting. Major cartels have been uncovered in critical sectors of the economy such as bread, milling, milk, steel and cement.

It is indeed a time to take a moment off and celebrate.

Tembinkosi Bonakele
Deputy Commissioner


ZAPIRO
SOWETAN 9-9-04
WE'RE CHANGING THE GAME...
GOVT
TELCOMPETITION
LOUSY SERVICE
INTERNET DOMINANCE
RETRENCH WORKERS
TELKOMONOPOLY
HIKE CALL RATE
MASSIVE BOSS BONUS
MASSIVE PROFITS

ADVOCACY AND COMPLIANCE

BACKGROUND

Advocacy and compliance are essential components of enforcement. Drawing too sharp a distinction between advocacy and compliance will always tend to understate their essential overlaps. Nevertheless, it is useful to think of compliance as being directed principally at firms, the object of the competition authorities' enforcement actions, while advocacy is directed at building support for competition principles among the broader public, including the public sector itself.

Promoting voluntary compliance with the Competition Act is a key objective for the Commission. In the earlier years, the Commission placed particular emphasis on its compliance programmes for two main reasons. First, the Competition Act was new and it was important to explain its provisions to stakeholders. Second, it was enacted against a backdrop of business norms that allowed for, or at least did not necessarily condemn, anti-competitive conduct. Extensive communication between competitors on competition-sensitive matters and tight-knit relationships between business people appear to have been common.

The need to tackle the evident lack of respect for competition principles within the business community was complemented by the importance of promoting a "competition culture", and a better understanding of competition principles, on the part of the broader public and their representatives in the various legislative bodies, the executive authorities at the different levels of government and in the judiciary itself. This underpinned the necessity for considerable advocacy work. The Commission's advocacy work has included road-shows, seminars and workshops around the country with different stakeholder groups. These include business, legal practitioners, organised labour, consumer groups, regulatory bodies and the public sector more broadly. Engagements have taken the form of specific targeted forums organised by the Commission, as well as regular speeches and presentations at events such as conferences and industry association meetings.

Compliance is directed mainly at firms, while advocacy is directed at building support for competition principles among the broader public

COMPLIANCE

One of the more important lessons of the past decade is the need for effective enforcement if improved compliance is to be achieved. Firms pay most attention to the Competition Act when anti-competitive conduct has actually been identified and rooted out, especially if it has been in their own or a related market.

The media have played a very important role in increasing awareness of the Competition Act, especially in reporting on contraventions uncovered by the competition authorities. The extensive coverage of Tribunal hearings means that no business person should be able to claim that they are unaware of the existence of the Competition Act. Private sector bodies – in particular law firms and the large consultancies – have gradually developed compliance programmes through which their clients are educated about the requirements of the Act, and the boundaries between robust competitive conduct, on the one hand, and anti-competitive contraventions of the Act on the other.

An important lesson learnt over the past decade is that effective enforcement is necessary for improved compliance

It is essential that the work of the Commission be complemented by both the voices and actions of civil society

The work of ensuring more competitive outcomes across the economy, in the interests of economic growth, development and lower prices to consumers, goes far beyond the competition authorities

A change in stance on compliance with the Competition Act has recently been evident on the part of some very large firms, led by Sasol and Aveng. Sasol has been a respondent in several major prohibited practices cases, and has been involved in notable proposed mergers prohibited by the Competition Tribunal. After consistently denying its part in collusive conduct in the fertiliser industry, referred by the Competition Commission to the Tribunal in 2005, in a dramatic turnaround it reached a consent and settlement agreement with the Commission in 2009, including a full admission of collusion. In the Tribunal hearing to confirm the settlement, Sasol described how, in the second half of 2008, Sasol's chief executive decided to proactively review conduct throughout its various businesses. With regard to possible cartel contraventions, Sasol has approached the Commission, seeking leniency where available or to settle cases where appropriate. In the construction industry, several firms have committed to cooperate with the Commission. For example, Aveng stated to the Tribunal, when settling a cartel contravention on the part of its Infraset operation, that it was conducting an internal investigation similarly to Sasol.

A further important part of compliance is to follow up after rulings or settlements to ensure that any conditions are being honoured. This includes conditions imposed in conditional approvals of mergers. In this regard, customers of firms have a very important role to play in raising concerns with the Commission about conditions not being honoured.

With regard to following up on settlements, the Commission assists firms in developing their compliance programmes. Developing a compliance programme is one of the conditions attached to a settlement agreement. This is aimed at cultivating a culture of compliance within firms after a settlement has been reached.

As part of its advocacy work in promoting voluntary compliance, the Commission has established relations with the Institute of Directors. It is as a result of these engagements that the King III principles for corporate governance now include compliance with the Competition Act as part of the compliance requirements. Also in partnership with the institute, the Commission has engaged directors of companies on the amendments to the Competition Act and their implications, through breakfast meetings throughout the country. This is an additional factor encouraging compliance and contributing to the dramatic increase in corporate leniency applications to the Commission. It once more underscores the complementary role between compliance and enforcement.

As in all areas of law enforcement, if enforcement activities do not have the effect of deterring unlawful conduct, the authorities will be confronted with an impossibly large task. Fortunately, there is concrete evidence of successful deterrence, although there is much that remains to be done, and the effectiveness of deterrence will always depend on robust enforcement.

ADVOCACY, AND RELATIONSHIPS WITH SECTOR-SPECIFIC REGULATORS

Markets depend on the behaviour of business and consumers to remain fair and competitive. The Commission's role is to remove stumbling blocks that business practices may place in the way of competitive forces to the detriment of consumers. However, it is essential that the work of the Commission be complemented by both the voices and actions of civil society. This is why, in the hearings confirming consent orders between the Commission and colluding firms, the Tribunal has chosen to permit and encourage the participation of civil society organisations in the hearings, rather than to make them perfunctory, rubber stamping exercises. At the consent order hearing involving the bread cartel, the Commission invited Grain South Africa, the National Consumer Forum and the Congress of South African Trade Unions (COSATU) to participate in the hearings. The objective was to give a voice to the victims of the anti-competitive conduct, as this assists the Tribunal in reaching its decision. Just as effective enforcement depends on a large degree of voluntary compliance, so too does it depend on an informed and critical public.

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

One mechanism of engagement is through the annual Public Sector Forum held by the Commission. This provides a platform for debating key areas of competition concern. In recent years, the forum has addressed the possibility of bid-rigging on procurement spending. For example, one of the motivations for the Commission's focus on infrastructure and construction was the possible impact of collusive conduct between competitors when bidding for projects in the government's infrastructure programme. The Commission seeks to raise awareness about such issues, as well as the possible recourse to the provisions of the Competition Act.

When understanding the roles of different bodies, a very important distinction can be drawn between the powers of the Commission and of most regulatory bodies. In terms of the Act, the Commission is largely engaged in *ex post* evaluations of firm conduct. Actions by the Commission, including seeking penalties where appropriate, are based on detailed and fact intensive investigations into this conduct on a case-by-case basis. The Commission thus has very strong powers to obtain information, as required to undertake the detailed evaluation required of the past conduct in terms of the provisions of the Act. The main penalties provided for are financial, for deterrent purposes, on the premise that if firms do not engage in anti-competitive conduct there will be more competitive outcomes. The authorities are generally much more limited in terms of regulatory-type remedies for the identified anti-competitive conduct. By comparison, regulatory bodies are generally empowered to engage in *ex ante* regulation, meaning that they set the parameters in a forward looking way within which firms take decisions. These regulations can include licensing firms to participate in a market, setting rules in this regard, as well as setting or approving prices. Regulatory bodies have specialist knowledge on a given industry and a range of objectives to be promoted, although their powers to obtain information may not be as wide as the Commission's.

The roles of the competition authorities and regulators are essentially complementary. While the Commission may uncover problems with past conduct, the regulators can use this as one consideration in designing rules for better future outcomes. The concurrency of jurisdiction that this implies can be open to opportunistic manipulation by firms which could seek to play off the competition authorities against the regulator to frustrate attempts by both to address problematic conduct by powerful industry players. The Competition Act explicitly provides for a mechanism to guard against this in allowing for a memorandum of understanding (MoU) to be agreed between the Commission and a regulator to govern the interactions between them. The Commission has signed MoUs with the Independent Communications Authority of South Africa, the National Energy Regulator of South Africa, the Postal Regulator and the National Liquor Authority.

Another very important part of the Commission's engagement with government departments, and with Parliament, is in making comments and submissions around legislation and regulations. In these submissions the Commission generally seeks to draw from its experience to comment on the implications for competition, including highlighting any unintended consequences that may arise.

The competition authorities also report regularly to Parliament's Portfolio Committee on Trade and Industry on their ongoing work and key competition issues as they affect the economy.

The roles of the competition authorities and regulators are essentially complementary

The Commission actively engages with a range of public institutions, including industry regulators, government departments and Parliament's Portfolio Committee on Trade and Industry

Reflections on the Competition Tribunal and sector regulators: a view from the inside

I was recently asked by a colleague how I had experienced working at the Competition Tribunal. Both of us had served as councillors at the Independent Communications Authority of South Africa (ICASA) at a critical time in the life of that regulator. ICASA is the sector regulator for the ICT sector and is the successor of the Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority. In exercising its mandate, ICASA is required to engage on an ongoing basis with players in the ICT sector, whether in the monitoring of license conditions, conducting technical audits, assessing regulatory accounts, or drafting price or access regulations. ICASA is also responsible for setting technical standards in the sector. Through this ongoing engagement we often became familiar with a range of entities that we intended regulating, gained insights into their operations and became acquainted with people within these firms.

Councillors were often asked to meet with representatives of existing players and potential entrants. While most of this ongoing engagement was legitimate and arguably necessary, such regular contact also provided opportunities for entities to attempt to influence us improperly. The lines between legitimate consultation and improper approach often became blurred and required constant vigilance on our part. This was exacerbated by the fact that almost everybody in the industry knew each other, often meeting at corporate and ministerial functions and policy debates. The network of social engagement stretched across competitors, the regulator and policy makers and was actively encouraged by industry players. ICASA is also required to investigate and adjudicate disputes and complaints. This blurring of functions presented a real concern because parties who were unhappy with an outcome of a complaint often raised it as a ground of review. During our time we attempted to create a degree of separation between the compliance, investigation and adjudication functions through internal guidelines. Because our guidelines were internal and not prescribed in legislation or regulation, there was little sanction attached to improper approaches from industry players.

My experience at the Competition Tribunal has been exactly the opposite. As a general ex post regulator, the Tribunal is concerned with the promotion of competition in all sectors and does this by adjudicating specific cases referred to it. This fundamental difference between ICASA and the Tribunal allowed me to maintain a greater degree of distance from the entities I am mandated to regulate. My first encounter with an entity appearing before the Tribunal is usually in a public hearing. Even if I encounter the same entity regularly in our forum, it is at a distance and the focus of the enquiry is limited to competition issues. Transparency in my work is promoted by the fact that all material decisions relating to a matter are made in public by a panel of three members. The separation between the investigative role of the Commission and the adjudication role of the Tribunal promotes fair administrative decision making and also removes undue pressure from my shoulders that may be created by a blurring of the lines between regulator and the regulated.

Yasmin Carrim
Competition Tribunal Member

Opening up the "smoke-filled rooms": the effects of Competition Tribunal hearings on business journalism

Over the past ten years, the competition authorities have significantly impacted the corporate landscape in this country. They have changed much about the way that business does business; they have ensured that little happens any more in those "smoke filled rooms" about which David Lewis speaks. This of course is all very important for a business journalist. But more important is that over the past ten years the competition authorities have changed much about the way that business journalism does business journalism.

It has opened up a whole new world for us. It has provided a forum in which we can watch as the captains of industry are questioned by a phalanx of well-resourced lawyers who will not be fobbed off by the sort of bland responses that un-resourced journalists are forced to swallow. It has revealed to all of us what true transparency is all about. It has set a standard that makes it very difficult for us to slip back into that information-managed world of "smoke-filled rooms". There is no better way of getting to the bottom of a company or an industry than by attending a Competition Tribunal hearing that deals with that company or that industry. We all became so much more familiar with South African Airways and understood it so much better after its appearance in front of the Tribunal. The petroleum industry was a dense mass of vested interests until the proposed merger between Sasol and Engen shifted the entire industry into the spotlight.

It started off small, back in 1999; with raisins; and then moved onto slightly bigger stuff in the pharmaceutical distribution sector. The aborted merger between JD Group and Ellerine was probably the first big headline grabber. And from there on things just got bigger – airplanes, oil tankers, football stadiums and even bread.

Consumers have certainly benefited from the activities of the competition authorities over the past ten years but there's little doubt that business journalists owe them an even greater debt of gratitude. They have helped us to do the job that we should be doing.

Ann Crotty
Business journalist

International Relationships

A number of the activities of the Competition Commission and the Competition Tribunal involve interaction and collaboration with international competition bodies and competition authorities in other countries. There is a very strong international community in the area of competition law practice because, although enforcement is national, many businesses are competing in international markets, where cartels may form and cross-border mergers take place. So international cooperation and networks not only involve members learning from each other, but are also concerned with joint enforcement and ensuring the smooth and consistent review of international mergers.

The Tribunal and Commission have benefited from relationships with a number of international institutions and agencies, and have made contributions in several competition forums.

Organisation for Economic Cooperation and Development

Global Competition Forum

The Commission and the Tribunal have participated in the Global Competition Forum of the Organisation for Economic Cooperation and Development (OECD) since 1999, when the South African competition authorities were established.

South Africa was the first non-member country of the OECD to undertake a peer review exercise in 2002. This review of South Africa's competition law and policy was discussed in February 2003, at a meeting of the OECD's Global Forum. The review found that the competition authorities were well known and respected organisations and were striving to follow best practice from the experience of international enforcement agencies around the world. However, it also challenged the authorities, recommending that: "More attention should be paid to non-merger matters and probably advocacy as well. Resources are stretched, and there is a critical need to improve the depth and strengthen the capacity of the professional staff."[91]

The Commission has benefited immensely from the peer review. The fact that there has been a demonstrable shift towards enforcement activity in the Commission over the past few years is a sign that the recommendations have been taken seriously. The OECD has also assisted in capacity building initiatives and seminars on various areas of competition law and economics in the earlier years of the South African competition authorities.

OECD Competition Committee and working parties

Towards the end of 2005, South Africa became one of only nine countries to be granted official observer status to the OECD's Competition Committee. As observers, the competition authorities must undergo peer review exercises, make written contributions to the Committee's roundtable discussions, attend and actively participate in the Committee's meetings and events, re-apply for observer status at the end of every two years, and be guided by the recommended best practice.

The OECD Competition Committee and working parties hold three working sessions each year on topics of current importance. The Commission and Tribunal participate in all three meetings and contribute papers to the round

Apart from the learning opportunities they provide, international cooperation and networks are also concerned with joint enforcement and ensuring the smooth and consistent review of international mergers

In 2005, South Africa became one of only nine countries to be granted official observer status to the OECD's Competition Committee

[91] Wise, M. (2003) "Competition Law and Policy in South Africa", OECD Global Forum on Competition Peer Review, Paris, 11 February 2003.

The International Competition Network is a worldwide virtual network of government competition authorities

table discussions on the basis of experiences and cases. More than 50 contributions have been made to round table discussions, with topics ranging from "Prosecuting cartels without direct evidence of agreement" to "Dynamic efficiencies in merger analysis". In effect, these sessions provide a platform for robust debate about the ways in which different agencies have approached competition questions, with reference to specific cases. The meetings have also proved to be enormously useful in building links with different institutions, where similar issues are being faced. For example, links with the Netherlands authority around its investigations into construction were made through these sessions.

International Competition Network

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

South Africa's active participation in the network has provided an important voice for developing countries

The South African competition authorities formed one of the 15 founder members of the ICN and participated in its first annual conference held in Naples, Italy, in September 2002, and continued to be actively involved since the network's inception. South Africa was the first African country selected to host the annual conference of the ICN, which was held in Cape Town in May 2006. The conference, bringing together 94 competition authorities from 83 countries, was a great success and reinforced South Africa's leadership role in the forum. David Lewis, former Chairperson of South Africa's Competition Tribunal, was deputy chair of the network from 2003 to 2009, and was elected chairperson from January 2009 until the end of his office in the Competition Tribunal in June 2009. The Commissioner of the Competition Commission, Shan Ramburuth, was elected to the steering committee at the 2009 conference, where the number of ICN members had grown to 107 competition agencies from 97 countries.

ICN members produce work products through their involvement in flexible project-orientated and results-based working groups. Members of working groups work together largely by internet, telephone, fax and video conference. Working groups have been formed over the years to address advocacy, anti-trust enforcement, cartels, market studies, mergers, unilateral conduct, and competition policy implementation. The Commission participates in a number of the ICN's working groups and has been particularly involved in leading discussions on agency effectiveness, strategic planning and prioritisation. The South African competition authorities have played a leading role in questioning assumptions regarding competition policy and law that are derived from the circumstances of highly industrialized countries.

The South African competition authorities believe that international networks of professionals who are able to meet "virtually" to debate matters of mutual interest and concern, such as the ICN, are becoming increasingly important instruments of international governance. And the inherently international character of markets, with their regulation in the area of competition, lends itself to this kind of network. In addition, South Africa's active participation, together with other major developing countries, has provided an important voice for developing countries in a field that has been largely dominated by developed countries.

United Nations Conference on Trade and Development

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

UNCTAD has also been involved with capacity building initiatives, and the South African competition authorities have hosted at least two workshops, which were conducted by UNCTAD officials and attended by delegates from other African countries. In 2004/05, a training course was held with UNCTAD and the German competition authority on the implementation of competition law for the Commission's staff. The Competition Commission has also sent its representatives to other African countries to facilitate UNCTAD workshops. In 2007, the Commission hosted a delegation from Botswana's Ministry of Trade and Commerce. The visit was facilitated by UNCTAD, and the purpose was to provide the officials from Botswana with information to assist with setting up its own competition authority.

African authorities and forums

The Commission has strong bilateral relations with countries in the Southern African Development Community (SADC) and these have been extended to the field of competition law. Staff members from the Commission have had interactions with a range of African countries including Morocco, Botswana, Namibia, Nigeria and Zambia, supporting them in drafting their competition laws and training staff.

In 2004, the Commission was involved in an exchange programme in the SADC region, with the secondment of two staff members from the Monopolies and Prices Commission (MPC) of Kenya. In return, two of the Commission's staff members were seconded to the MPC for one month. In June 2007, the Commission hosted a workshop to build merger review skills, which was attended by 14 delegates from 8 African countries, in addition to some 40 Commission staff.

Other countries, including South Africa, are members of the Southern African Customs Union (SACU). Assisted by UNCTAD, SACU is encouraging all member states to adopt competition laws. SADC (assisted by the Commonwealth) is also developing a model for cooperation to complement its economic integration programme, which envisages the establishment of the common market by 2018. SADC is currently discussing the establishment of a regional organisation to operate under the auspices of SADC to facilitate cooperation and interaction on competition and consumer protection matters. The Southern and East African Competition Forum comprises a number of countries with common interests, and recently met in Geneva. One of the issues on its agenda was the establishment of the OECD Regional Training Centre.

During 2008, the Tribunal and the Commission hosted a week-long study tour for competition commissioners from Zambia and Swaziland on competition law and the South African experience.

Other competition authorities

Since their inception, the competition authorities have had support from the United States Federal Trade Commission and the Department of Justice. The Commission also has relationships with competition

South Africa's competition authorities have participated in UNCTAD's annual intergovernmental expert meeting on competition law and policy since 1999

The Commission has strong bilateral relations with SADC countries

The Commission has received substantial support from the United States Department of Justice and the Federal Trade Commission

The Tribunal is mandated by the Competition Act to pay close attention to international jurisprudence

authorities in the United Kingdom, Norway, Australia, Canada and the Netherlands.

The Commission convened an intensive training programme on competition law and policy for staff members in July and August 1999. International experts from other competition authorities, the World Bank and the OECD provided the newly appointed staff with both academic and practical training. The course was attended by representatives from competition authorities and government departments from 10 SADC countries.

In 2000, the Commission concluded a cooperation agreement with the Norwegian competition authority. In terms of this agreement, an exchange of staff took place, which facilitated the exchange of information around the approach to the enforcement of competition law in the respective jurisdictions.

Furthermore, the United States Department of Justice and the Federal Trade Commission made at least six consultants available to assist the Commission in its early days, and the Commission has received ongoing support from both entities. For example, in March 2007, officials from the Federal Trade Commission and the Justice Department held a workshop with Commission staff. In addition, a Commissioner of the Federal Trade Commission visited the Competition Commission in February 2007 and gave presentations on developments in healthcare and telecommunications, with reference to recent case law in the United States.

The Tribunal is mandated by the Competition Act to pay close attention to international jurisprudence. It holds an annual Tribunal seminar to which international experts are invited, to ensure that the Tribunal keeps abreast of cutting edge international thinking. International experts participating in these seminars have included leading scholars and jurists.

Donor support from the United States Agency for International Development

The United States Agency for International Development (USAID) has provided funding to the Commission since its inception. A first phase of funding was provided from 1999 to 2005. A second phase, from 2006 to June 2007, aimed at supporting the Commission to consolidate itself as an effective competition authority.

In 2004/05, USAID funded an abuse of dominance workshop and a seminar on cartels for the Commission's staff. In 2006/07, USAID allocated USD106 000 to the United States Federal Trade Commission and the United States Department of Justice to build the Commission's capacity to undertake enforcement actions. Both used the funding to pay for certain of their expert staff to run training workshops at the Commission, the first of which was held in March 2007. Its objective was to develop investigative skills for abuse of dominance cases. Twenty-two participants attended the workshop.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