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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SOUTH AFRICA

-- 2010 --

This report comprises reports submitted by the South African Competition Commission and the the South African Competition Tribunal to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 19-20 October 2011.

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I. ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SOUTH AFRICA

Submission by the Competition Commission

Executive Summary

1. The annual report records the activities that took the Competition Commission through the period 01 April 2010 to 31 March 2011. In its fight against anti-competitive conduct in South Africa the year under review has been characterised by several accomplishments as well as a number of challenges.

2. Among its greatest accomplishments over the period under review have been achievements in settling enforcement cases and addressing bid-rigging in the construction sector. The Commission also managed increased workload due to increase in merger notification. The Commission's merger work continues to generate public debate in the policy arena. In both merger regulation and enforcement, the policy context of the markets under consideration necessarily has bearing on how a matter is treated by the competition authorities. A clear sign of the maturity of our institutions is the ability to ensure fairness and legal certainty in the pursuit of policy outcomes.

3. The greatest successes achieved during the period under review related to enforcement. 22 settlements were reached with a total of R794 million in administrative penalties. This included a R500 million penalty for Pioneer Foods (Pty) Ltd (Pioneer Foods) and a R112 million penalty for Sasol Chemical Industries. The Commission also constructed creative behavioural and structural remedies to ameliorate anti-competitive effects in the markets concerned. A proportion of the penalty has been earmarked to set up an Agro-processing Competitiveness Fund to be administered by the Industrial Development Corporation (IDC). The settlement with Sasol Chemical Industries also extended beyond a penalty by requiring the divestiture of five of its six fertilizer blending facilities and a commitment to equitable pricing in its ammonium nitrate-based fertilizers. The majority of cases under investigation or prosecution were in priority sectors. This included food (storage of and trade in grain, and the processing of fruit and fish), intermediate industrial products (polymers, tyres and fertilizers) and construction (rebar, copper tubes and pilings).

4. The Commission was faced with the challenge of a number of adverse rulings by the higher courts on procedural grounds which affected the conclusion of a number of long-standing cases. Notwithstanding a leniency application and evidence of a milk cartel, the Commission had to abandon a case against eight large milk distributors following a ruling by the Supreme Court of Appeal that the Commission's complaint initiation and subsequent summons were invalid. A subsequent ruling by the Competition Appeal Court granted an appeal to firms in the fertilizer industry when it found that the Commission could only refer the complaint in the prescribed form and could not refer any other behaviour uncovered during the course of its investigation. The Commission will tighten up its case management but also intends to appeal the decisions of the higher courts.

5. The Commission, with the support of the OECD and the Dutch competition authorities, embarked on a country-wide programme to train government procurement and supply-chain officials on detecting and reporting bid-rigging. Close to 500 officials were reached through this programme.

6. The Commission received a number of accolades during the year under review including being recognised as agency of the year by the Global Competition Review (GCR) in February 2011 in the category Africa, Asia and the Middle East. In addition the Commission was ranked 9th place out of 60 different jurisdictions on merger regulation in the Global Merger Control Index. The successes achieved by the Competition Commission during the period under review are entirely due to the professionalism and dedication of its staff.

Shan Ramburuth
Commissioner, Competition Commission South Africa

1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation

7. None.

1.2 Other relevant measures

8. The Competition Commission's three-year strategic plans are designed to give direction and vision to its activities and to enable it to use its resources intelligently. The strategic plan for 2006 to 2009 introduced a more proactive approach to the Commission's enforcement work through prioritisation of four sectors: food, agro-processing and forestry; banking and financial services; intermediate industrial products; and construction and infrastructure. The Commission prioritises its work in those markets that affect low income consumers and where there is likely existence of anti-competitive conduct. This is guided by its knowledge of markets through complaints and investigations. It is also guided by government's economic development objectives, such as the New Growth Path and Industrial Policy Action Plan (IPAP). The Commission's strategic focus for 2010 to 2013 is to achieve demonstrable competitive outcomes in the economy through prioritisation of sectors and cases. The Commission reviewed its criteria for prioritisation and formulated guidelines to apply the criteria. It is also developing a framework for assessing its impact. This will be piloted in the next year.

1.3 Government proposals for new legislation

9. The Competition Amendment Act was signed by the president of the Republic of South Africa in August 2009. The amendments will only become effective on a date yet to be proclaimed by the president. The new law will bring about four key amendments to the existing Act relating to concurrent jurisdiction, the corporate leniency policy, the introduction of personal criminal liability and complex monopoly conduct.

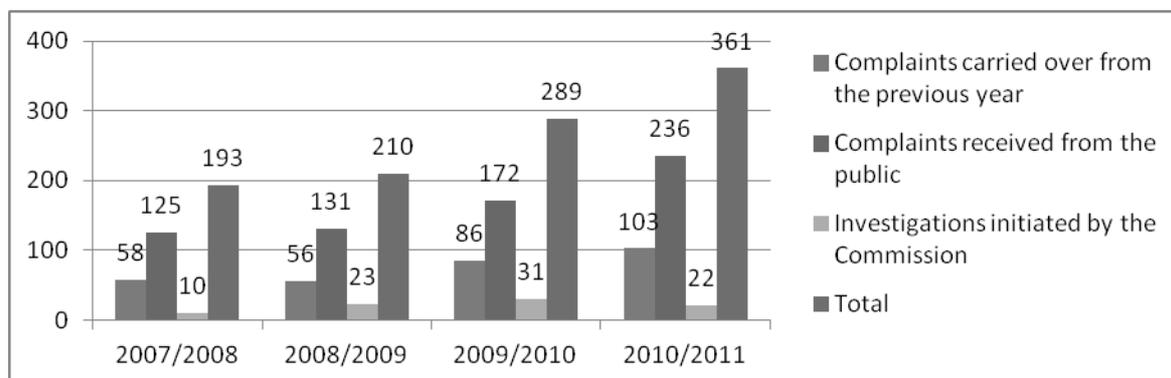
2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

2.1.1 Summary of enforcement activities

10. During the period under review, the Commission investigated 361 complaints. The Commission received 236 complaints from the public. This represented a significant increase over the 172 complaints received in the previous year. A further 22 complaints were initiated by the Commissioner. A total of 103 complaints were still under investigation and carried over from the previous year (see Figure 1 below).

Figure 1: Enforcement cases under investigation, by year



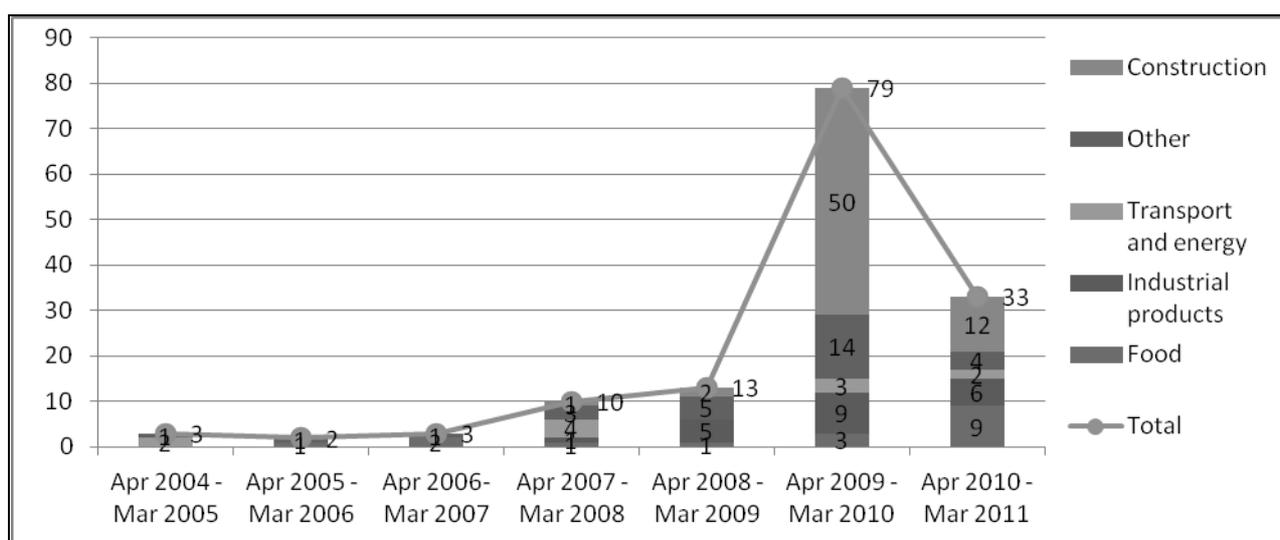
Source: Competition Commission

11. The high number of investigations involving cartels prompted the Commission to form a specialised unit in the Enforcement and Exemptions Division that is dedicated to investigating allegations of cartels. The unit’s primary focus has been the investigation of cartel activity emerging from applications in terms of the Commission’s Corporate Leniency Policy (CLP).

12. The CLP continues to be an effective tool in identifying and investigating cartels. In the year under review, the Commission received 33 leniency applications (see Figure 2 below). This is significantly fewer than the 79 leniency applications received in the previous year. The decline can be attributed, in part, to the large number of applications received in the construction sector in 2009/10, which the unit is addressing through its fast-track process. There has also been a marked increase in the number of applications received in food and agro-processing in the year under review, namely nine applications, in comparison to only three in 2009/10.

13. Complex investigations involving alleged abuse of dominance and restrictive horizontal and vertical practices were conducted in supermarkets, animal feed, energy, steel, aluminium extrusions, media, glass and telecommunications, among others. These investigations were expected to be completed in 2011/12.

Figure 2: Total number of corporate leniency applications received per year



Source: Competition Commission

14. In the year under review the Commission examined three exemption applications, from Grain SA, the South African Petroleum Industry Association (SAPIA) and the Law Society of South Africa (LSSA). Grain SA and LSSA's applications were rejected and SAPIA's was approved. A further four exemption applications were received later in the year which were still under evaluation at the end of March 2011. These were in petroleum, food and agro-processing and airlines. The Commission expects to complete them in the new financial year.

2.1.2 *Description of significant enforcement cases, including those with international implications*

- Settlement with Pioneer Foods

The Competition Commission reached a settlement with Pioneer Foods in November 2010, which was later confirmed by the Tribunal. The settlement follows Pioneer's decision to challenge the Commission's case notwithstanding earlier settlement reached with Tiger Brands and Premier Foods who obtained conditional leniency. In February 2010 the Tribunal found Pioneer Foods guilty of price fixing and market allocation for bread and an administrative penalty of R195, 718,614 was imposed. The settlement concludes several cases involving Pioneer, namely:

- price fixing and market allocation in maize and wheat products
- collusion through information exchange through the National Chamber of Milling and the South African Chamber of Baking
- Pioneer's threat of a price war against small independent bakeries to force them to adhere to fixed prices in the Southern Cape area
- collusion and abuse of a dominant position in poultry breeding, broiler production, poultry feed, the sale of day old chicks to be reared as egg-layers, point of lay hens and the sale of cull (live chickens that are past their production cycle)

The main terms of the agreement are as follows:

- Pioneer will pay an administrative penalty of R500 million to the National Revenue Fund, of which R180 million will be used to set up the Special Agro-processing Competitiveness Fund to be administered by the Industrial Development Corporation (IDC). The aim of the fund is to promote competitiveness, employment and growth in food value-chains through funding investments as well as related activities such as research. The fund will provide finance on highly favourable terms targeted at small and medium enterprises.
- Pioneer will adjust its pricing of flour and bread (600g and 700g loaves) over a defined period to reduce its gross margin by R160 million when compared with a similar period in 2009/10.
- Pioneer will increase its capital expenditure by an additional R150 million from the currently approved capital expenditure (capex) amount. The commitments on capex are aimed at preventing an unintended effect of the agreement on jobs.

- Settlement with Sasol Chemical Industries

The Commission's settlement agreement relating to Sasol's abuse of dominance, excessive pricing, exclusionary conduct and price discrimination in the supply of ammonia and derivative fertiliser products was confirmed by the Tribunal in June 2010. In terms of the agreement, within 12 months of the confirmation of the settlement by the Tribunal, Sasol was to:

- divest five of its fertiliser blending facilities located in Potchefstroom, Durban, Kimberley, Bellville, and Endicott, with the exception of its Secunda plant
- sell ammonium nitrate based fertilisers on an ex-works basis from its plants at Sasolburg and Secunda and depots within 100km of them
- commit not to differentiate in its pricing of ammonium nitrate based fertilisers, other than on standard commercial terms such as volume and off-take commitments, which must be transparent and available to all customers
- house the ammonia plants and business operations relating thereto as a business unit separate from Sasol Nitro and with separate audited books of account.

The parties also agreed that Sasol Chemical Industries would within 25 months of confirmation of the agreement stop all importation of ammonia into South Africa other than imports on behalf of third parties, required because of supply and logistical disruptions and plant maintenance shutdowns.

The settlement did not include an administrative penalty as the Commission was of the view that the structural and behavioural remedies agreed in the settlement, together with addressing cartel conduct that was the subject of the previous settlement with Sasol, would effectively address competition concerns in the fertiliser market. The pricing and divestiture commitments will remove Sasol's incentive and ability to exclude competitors in fertiliser blending and retailing. The divestiture process is underway and is nearing finality. The settlement agreement will remain binding upon Sasol Chemical Industries for ten years after the disposal of the affected assets. A structural remedy of this nature, more common in mergers, is the first of its kind for settlement of an enforcement case.

- Fast-track settlement process in the construction industry

Following the prioritization of enforcement in the construction sector, the Commission was alerted to the extent of collusive tendering through its Corporate Leniency Policy. During the year under review an integrated strategy was put into place to tackle this problem. A fast-track settlement procedure was announced in February 2010 and offers reduced penalties to firms who truthfully disclose their involvement in bid rigging. This initiative is designed to speedily resolve cases and minimize legal costs for both the Commission and participating firms. The Commission- with assistance from the Organisation for Economic Cooperation and Development- has trained over 500 procurement officials to identify and prevent bid rigging in government tenders. National Treasury has issued a directive requiring all firms tendering for government projects to sign an undertaking that their bids were made independently and not in collusion with other firms.

- Supermarket investigation

During the year, the Commission made public its findings in the investigation of four major South African supermarket chains, Pick 'n Pay, Shoprite/Checkers, Woolworths and Spar (who collectively comprise more than 60% of national supermarket/grocery retail sales, by turnover), as well as the two major wholesaler-retailers, Massmart and Metcash. The investigation covered conduct relating to the retail of food, focusing primarily on five key staple foods identified in the Commission Food Strategy, that is, poultry, bread and maize meal, dairy (milk), fats & oils (butter, margarine and basic cooking oil) and canned fish.

The Commission investigation related to allegations of abuse of dominance by placing onerous demands on suppliers, especially small suppliers through practices such as exclusive supply arrangements, listing fees, payment policies and rebates; collusion and/or exclusion of competition via the practice of category management (the decision on product placement, promotion and pricing, executed by the appointment of a “category captain” from the ranks of the largest manufacturers to manage all aspects of that category in the retail store); information exchange of potentially sensitive retail information that may facilitate collusion at the retail and/or supplier level, including through companies collating data (such as AC Nielsen and Synovate); and long-term exclusive lease agreements through anchor tenancy, to the exclusion of potential competitors at the retail level.

The Commission found no evidence to suggest that supermarkets were abusing their buyer power in contravention of the Act. However, the Commission is concerned that certain practices such as the range of allowances and rebates demanded by retailers and adverse payment terms may place smaller suppliers at a disadvantage relative to the big suppliers. The Commission has therefore urged the supermarket chains to facilitate the entry of small suppliers by for example changing their procurement policies and proactive disclosure of information on entry requirements.

In respect of category management, the Commission found no evidence of a contravention of the Act. This practice is limited in the products covered by the investigation. Further, where it does occur, it is largely managed by in-house supermarket personnel rather than the suppliers.

In respect of the allegation of information exchange, the Commission did not find evidence of exchange of information between the supermarkets chains in contravention of the Act. However, the Commission noted that information compiled from scanning data acquired from major retailers may be used for monitoring market shares and limiting competition. The dissemination of highly disaggregated information to suppliers may chill competition at this level of the industry.

The Commission is concerned with long-term exclusive leases particularly where supermarket chains have market power within the relevant local markets. Independent and small retailers are excluded from entering certain shopping malls where the main supermarket chains are anchor tenants. Exclusive leases arise from an industry wide practice and the Commission decided to engage with supermarkets, property developers and banks with a view to finding a solution with the relevant parties. There are also indications that this practice is acknowledged by the industry to be problematic, with a noticeable amount of recent property developments operating successfully without exclusive leases. If a solution cannot be found through these engagements, the Commission will proceed with prosecuting this matter.

- Professional Rules for lawyers not exempted

In March 2011, the Commission rejected the application of the Law Society of South Africa (“LSSA”) for an exemption of its professional rules relating to professional fees, reserved work, organisational forms and multi-disciplinary practices, and advertising, marketing and touting. The Commission consulted various stakeholders within the legal fraternity, including the Department of Justice and Constitutional Development, to solicit their opinions on the exemption application. In addition, it conducted research to ascertain the manner in which other jurisdictions deal with the rules for the legal profession. The exemption was rejected based on the following reasons:

1. Professional fees

This category of rules prohibits attorneys from accepting remuneration for professional services other than that at the tariff prescribed by law. The Commission found that this is tantamount to price fixing which is in contravention of the Act. As such, legal practitioners are not allowed to discount below the set fees, thus inhibiting price competition. While the current rules purport to protect the public from over-reaching or exorbitant legal costs the setting of minimum restricts price competition. One mechanism to protect the public from exorbitant legal fees might include setting of price caps or ceilings.

2. Reserved work

The rules under this category prohibit practitioners from allowing or assisting any unqualified person to obtain payment for any professional work that only attorneys may do; and referring work to persons prohibited from performing such reserved work. The Commission found that these rules should not be exempted because they were likely to harm competition as they prevent other competent service providers from providing legal services to the public. Further, it restricts the number of service providers which in turn limits consumers' choice.

3. Organizational forms and multi-disciplinary practices

Rules under this category prohibit practitioners from sharing fees and offices with non-practicing attorneys. The Commission found these rules were too wide and tend to prevent innovation and development of a fair competitive environment.

4. Advertising, marketing and touting

Under this category of rules, practitioners are prohibited from using certain acts of advertising and marketing which are regarded as unprofessional, dishonourable and unworthy conduct. The Commission found that these restrictions were not necessary for the maintenance of professional standards as they extended beyond standard advertising norms. It is also in the consumers' interests to lift these restrictions on advertising.

Whilst the Commission recognises that in principle it may be necessary to restrict competition to maintain professional standards or to protect the public, it is of the opinion that the current rules are too wide and need to be adjusted. The Commission has therefore engaged the Law Society to redraft the rules in manner compatible with competition principles. The Commission is also currently engaging with the Department of Justice and Constitutional Development on the new Legal Practices Bill which will replace the rules that were the subject of the exemption application.

- Maize pool exemption application not granted

Grain SA filed an application for an exemption in July 2010 on behalf of its members (grain producers) requesting that they be exempted from the provision of section 4 of the Act, so as to enable them to engage collectively in the formation of an export pool, which would be used to export surplus maize from South Africa. The export pool scheme proposed by Grain SA would result in a collective forum where maize producers would cooperate with each other in order to set prices and/or allocate geographical markets for the purposes of exporting the pooled surplus maize. In its application, Grain SA submitted that the conduct was necessary for the maintenance and promotion of exports; due to a change in productive capacity necessary to stop the decline in

an industry; and for the economic stability of the industry designated by the Minister of Economic Development. In December 2010, the Commission rejected the application on the following grounds:

1. Impact on Prices

The surplus should under normal market conditions translate into lower prices for consumers including large industrial users of maize such as animal feed producers. The Commission was concerned that the proposed scheme is likely to artificially keep prices in South Africa high, when they should be falling.

2. Promotion of Exports

The promotion of exports, as envisaged by the Grain SA is unlikely to be viable through the proposed scheme due to the limited export market available for maize produced in South Africa. The logistical problems associated with exporting grain in South Africa will remain a significant barrier and are not addressed by the proposed scheme. The Commission found that most of South Africa's usual maize trade partners are also currently enjoying surpluses of their own, the greater proportion of maize produced in South Africa is white maize which is not as widely consumed globally as yellow maize is, and there is limited demand in the region for the genetically modified maize produced in South Africa. Further, the total maize surplus that would be pooled for export would still be insignificant in the global market to strengthen the position of local producers.

3. Economic Stability of a sector designated by the Minister of Economic Development

The objective of promoting the economic stability of an industry designated by the Minister fails on procedural grounds. The industry has not been designated by the Minister of Economic Development as required by the Competition Act.

The Commission was also concerned that the proposed scheme was likely to have the undesirable outcomes of increased risk of a threat to the security of supply and accordingly food security; reduced incentives for grain producers to be more efficient and innovative; and produce the same anticompetitive outcomes that resulted from the legally sanctioned cartel of the now disbanded Maize Board. While the existence of the surplus may well result in lower than expected returns to farmers, and financial difficulties for some, the Commission found that alternative less anti-competitive options had not been adequately explored such as crop substitution; bio-diesel; value added products; hedging and use of the Futures' market; storage for future use; and entry by exporter traders.

2.2 Mergers and acquisitions

2.2.1 Statistics on number, size and type of mergers notified and/or controlled under competition laws

15. Chapter 3 of the Act requires merging parties to notify the Commission of a large or intermediate merger before it is implemented if that proposed merger meets or exceeds certain thresholds stipulated by the Minister of Economic Development for intermediate and large mergers. Small mergers may be notified voluntarily or on the Commission's directive. Companies pay filing fees when notifying a transaction. The Commission received R36 million in filing fees in 2010/11.

16. The total number of mergers notified in the year under review increased by approximately 20% to 229 compared with 2009/10 (see table 1 below). Most mergers submitted to the Commission were in the manufacturing, property, wholesale and retail sectors which together account for 58 percent of the total number of notifications.

Table 1: Number of notified mergers to the Commission over the last three years

Category of merger	2008/09	2009/10	2010/11
Small	9	10	19
Intermediate	303	136	150
Large	103	44	60
Total	415	190	229

Source: Competition Commission

17. During the period under review the Commission approved 200 mergers and conducted in-depth investigations into 33, resulting in 2 prohibitions and 14 approval mergers with conditions. Most of the mergers (200) were approved without conditions. The mergers which were prohibited by the Commission were:

- Bedrock Mining Support and Mondi Limited
- Pioneer Hi-Bred International and Pannar

18. The Commission will approve mergers subject to conditions if it believes that they will address significant competition or public interest concerns that it has identified. The conditions could include structural remedies such as divestiture of businesses or behavioural remedies such as supply obligations, conditions addressing public interest concerns or a combination.

Table 2: Summary of mergers approved with conditions in 2010/11

Parties	Market	Condition
Metropolitan Life and Momentum	Various insurance products	Restriction on number of job losses and obligations of re-skilling
Unilever and Sara Lee	Various consumer products	Divestiture of Status deodorant brand
Tsogo Sun & Gold Reef Resorts	Casino gambling	Divestiture of Silverstar Casino
South African Breweries and Boland Beer	Beer manufacturing and distribution	Divestiture of Boland Beer Distributors and obligations on pricing
AECI and Qwemico Distributors	Chemical distribution	Restriction on number of job losses and obligations of re-skilling
The JSE Limited and Managed Account Platform of Momentum	Securities exchange and hedge fund platforms	Obligation to provide access to information
BKB Limited and Eastern Cape Agricultural Cooperative	Agricultural retail outlets	Divestiture of Barkley East retail outlet
Rhodes Food and Del Monte Fruit	Food canning market	Restriction on number of job losses and obligations of re-employment
Nenana Management and Dunlop Industrial Products	Manufacturing and repair of rubber conveyor belts	Restriction on number of job losses and obligations of re-skilling
Afripak and Laminated and coated division of Nampak	Paper packaging	Obligation in respect of the supply of packaging paper
MTO Forestry and Boskor	Forestry and sawmilling	Obligation in respect of the supply of saw-logs to open market
Lexshell and Nomad	Banking settlement	Access to payment clearing infrastructure of Bankserv
Comesa and Emid	Banking settlement	Access to payment clearing infrastructure of Bankserv
Softline and Netcash	Payroll and payment switching	Access to file formats generated by accounting software

Source: Competition Commission

19. The Commission continues to actively monitor compliance with these conditions and the parties and third parties are expected to report and confirm compliance with the Commission and Competition Tribunal orders.

2.2.2 *Summary of significant merger cases*

- Walmart and Massmart

The Commission recommended to the Tribunal that it approve the large merger between Walmart Stores, Inc and Massmart Holdings Limited in the market for the wholesale and retail of general merchandise and groceries in South Africa. Walmart is using this acquisition to enter the South African market. Through this acquisition Walmart will effectively own more than 50% of Massmart. It may also use this transaction as a stepping stone into the rest of Africa. Massmart supported the transaction on the basis that it will support its expansion plans and will help it acquire retail and procurement knowledge from Walmart.

The Commission assessed the merger and found that it was unlikely to substantially prevent or lessen competition in the market in which Massmart competes. Walmart is a new entrant in the market. During the merger investigation, trade unions SACCAWU, SACTWU, NUMSA and FAWU, the Small, Medium and Micro Enterprise Forum and government departments such as the Economic Development Department and the Department of Trade and Industry raised public interest concerns in terms of section 12A (3) of the Act. These concerns related to Walmart's record on labour rights, the effect of its procurement practices on local manufacturers and suppliers and the effect on employment. With respect to these issues, the merging parties assured the Commission that they will honour pre-existing union agreements and abide by South African labour law, and will source the majority of their products locally.

The Commission recommended to the Tribunal that the merger be approved without conditions. This was also informed by the fact the government, labour and the merging parties were engaged in talks to address several concerns and to clarify the merging parties' commitments. The Commission informed the Tribunal that it would have to consider further representations on these issues at its hearing. The interveners would also make representation at the tribunal hearings

- Metropolitan Life and Momentum

The merger between Metropolitan Life and Momentum raised interesting issues with regard to the management of job losses that result from mergers. It also brings into sharp relief the question of how competition authorities balance public interest considerations and competition issues in their merger assessment. The only major concern arising from the merger related to public interest issues, in that the merger would have likely resulted in 1,500 employees being made redundant. The Commission approved this merger subject to the condition that the merging parties implement measures to mitigate against job losses. Further, the parties would be required to set aside funds to train and up-skill the retrenched employees so that they could easily be re-absorbed into the markets. However, the Tribunal rejected the proposed conditions, saying that the efficacy of such initiatives proposed by the Commission were questionable as the results of past experience were mixed.

The Tribunal was not convinced that the parties had adequately justified the need to retrench 1,500 employees, and therefore imposed a moratorium that there should not be any retrenchments as a result of the merger, save for 18 positions at executive level. The decision emphasized the competition authorities' mandate to safeguard employment, particularly given the high

unemployment rate in the country. The Commission will now confront the challenge of addressing employment issues more vigorously going forward. Merging parties will have to show more proactively than has been the case until now, the likely impact of the transaction on employment

- Bedrock Mining Support and Mondi Limited

In April 2010, the Competition Commission prohibited the proposed acquisition by Bedrock Mining Support of the Letaba, Numbi and De Kaap plantations (the target firms) owned by Mondi. T. The transaction represented backward vertical integration in the timber industry, Bedrock being one of only two players in the downstream market for the production of timber-based underground mining support products and the target firms being upstream players in the market for the supply of the timber used in sawmills.

The Commission was concerned about the potential of coordinated effects, since barriers to entry in the upstream and downstream market were considered high, products sold by Bedrock and its competitor Reatile are similar and thus a likely degree of homogeneity exists between rival products and that, by way of a punishment mechanism, Bedrock could reduce the quality or timber constituent in the supply timber to Reatile given that Bedrock would control Reatile's source of timber in Numbi plantation. However, the Commission's main concern was that there are only two main players in the downstream market, Bedrock and Reatile. Therefore as a direct result of the acquisition, particularly of the Numbi plantation (owing to the supply contract Reatile has in place), two rivals in a horizontal relationship in a highly concentrated market would have been allowed to discuss annually the price for a critical input for their operations. The Commission was of the view that this would have created a platform for information exchange in terms of volume and price and as such facilitate a market structure more conducive to coordination among rivals. The merger was therefore prohibited by the Commission.

The Commission's decision was taken on appeal to the Tribunal by the merging parties. The Commission, the merging parties and third parties concluded negotiations addressing concerns raised by the Commission and third parties. This led to the Tribunal ultimately approving the merger subject to three conditions (effectively remedying the Commission's concerns) involving two commercial supply contracts and an expert determination clause designed to eliminate information exchange between the rivals Bedrock and Reatile.

- Pioneer Hi-Bred International and Pannar

The Competition Commission prohibited the intermediate merger in the maize seed market in South Africa between Pioneer Hi-Bred International, a US based multinational seed producer controlled by DuPont, and the locally based seed company, Pannar Seed. This market is characterised internationally by increasingly high levels of concentration and collaboration between firms in the cross-licencing of intellectual property.

Pioneer's major activity includes extensive research and product development using technologies and innovations to develop hybrid maize and other commercial seeds. Pannar is also a seed company involved in developing and breeding seed germplasm and improving cultivars or hybrids for distribution to commercial farmers. The South African market comprises three major firms – the merging parties and the multinational, Monsanto. Monsanto is the leading company with an estimated market share of around 50%, Pioneer with 30%, and Pannar 18% of the proprietary maize seed market. As both parties are involved in the seed breeding business, there was a horizontal element arising from the transaction specifically in the hybrid maize seed

market. The proposed transaction would have resulted in a duopoly market of two almost equal companies in size, with Pioneer/Pannar at around 48% and Monsanto at around 50% market share of proprietary products.

The merging parties claimed that the transaction would lead to technological, efficiency and pro-competitive gains from combining their germplasm and introducing new breeding technologies. Seed breeding occurs in an innovation market. As such, the parties put forward a number of efficiency gains arising from the transaction. These largely include research and development technologies that include complementing the parties' germplasms as well as introducing advanced breeding technologies that will improve Pannar's existing breeding technologies.

There were also a number of third party competitive concerns arising from the proposed merger relating mainly to further concentration in the industry which may lead to higher prices, lower and/or reduced customer choices, a high likelihood for collusion to take place and further increases in entry barriers which would deter new entrants. In addition, there were also a number of public interest issues arising, particularly that the merger would lead to South Africa losing food sovereignty if maize seed production is exclusively placed in the hands of two large foreign companies and that genetically modified seeds would proliferate further in the country at the expense of non-genetically modified seeds which are preferred by smaller farmers.

Another concern in this industry is the apparent lack of competition as a result of IP protections that incumbents enjoy, particularly on their germplasms, breeding technologies and traits. Such protection has the effect of keeping potential competition out of the market, thereby further entrenching incumbents' positions and limiting competition. Taken as a whole, the Commission had two significant issues to balance namely, substantial prevention or lessening of competition emanating from this three-to-two merger on one hand and strong efficiency arguments on the other. The Commission decided that the anti-competitive effects of the merger were likely to be significant and that the efficiency gains would not be sufficient to outweigh these effects. The merging parties have approached the Tribunal to reverse the Commission's decision. The following parties have since applied to participate in the merger hearing: Food and Allied Workers Union, Biowatch and Biosafety.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

20. The Commission made inputs to the development of the New Growth Path championed by the Economic Development Department. In the course of its work the Commission also engaged other government departments including National Treasury, Public Works, Agriculture, Forestry and Fisheries, the Department of Trade and Industry and export councils. In addition, the Commission made submissions with regard to the consideration of competition concerns with respect of the following government policies and laws:

- Preferential Procurement Policy;
- Combat of Corrupt Activities Act; and the
- Animal Feed Bill

21. The Commission entered into negotiations on memoranda of understanding (MOUs) with the National Gambling Board and the Financial Services Board during the reporting period. The aim of the MOUs is to provide clarity on the respective mandates of each of the authorities and to create a framework

for managing overlapping jurisdiction as required by the Competition Act. The Commission initiated discussions on MOUs with the Council for Medical Schemes and the newly established National Consumer Commission.

22. The Commission's advocacy to implement the recommendations of the Banking Enquiry also came to fruition during the year under review. National Treasury has committed itself to establishing a market conduct regulator for retail banking, the South African Reserve Bank is revising policy on the National Payment System and the Banking Association of South Africa has undertaken to address consumer concerns identified by the Banking Enquiry.

23. The Commission and the National Treasury officially launched the certificate of independent bid determination (CIBD) in August 2010. The purpose of the CIBD is to ensure that reasonable steps are taken to deter bid-rigging by accounting officers of departments, constitutional institutions and accounting authorities of public entities listed in schedules 3A and 3C to the Public Finance Management Act of 1999 (PFMA). By signing and submitting the certificate the company warrants that it did not rig the tender or communicate with its competitors with the purpose of collusive tendering. National Treasury's supply chain management general conditions of contract have been amended to provide for the prohibition of collusive tendering.

24. With effect from 21 July 2010 bidders are now required to complete, sign and submit the CIBD together with the bid documentation. If a bidder fails to submit the SBD9 or MBD9 with the bid documentation, it must be requested in writing to submit the signed form to the entity issuing the bid within seven working days of notification. Failure to do so may result in the invalidation of the bid.

4. Resources of Competition Commission

4.1 Resources overall (current numbers and change over previous year)

25. At the end of the period under review, the Commission had 163 staff members which represents an increase of 18 percent (25 employees) compared with 2009/10. This number includes 13 graduate trainees recruited as part of its successful graduate trainee programme, through which the organisation develops high-potential graduates in the field of competition law and economics. The Commission has a predominantly young workforce, with the average staff age being 34 years. About 112 staff members are directly involved in competition enforcement.

4.1.1 Annual budget (in ZAR and USD)

26. The revenue increased from R111 million (14,200,000 USD) in 2010 to R161 million (20,600,000 USD) in 2011.

4.1.2 Staff turnover over

Table 3: Turnover rate of Commission staff 2007/8 to 2010/11

Year	% turnover
2007/08	26%
2008/09	16%
2009/10	15%
2010/11	9.14%

Source: Competition Commission

4.1.3 *Number of employees*

- Economists - 33
- Lawyers - 66
- Support staff - 46
- Graduates trainees – 13
- Other - 5
- All staff combined – 163

4.2 *Human resources applied to:*

- Enforcement against anticompetitive practices- 47
- Merger review and enforcement - 22
- Advocacy and communication efforts – 10
- Policy and research – 25
- Legal services - 20
- Corporate services – 25

4.3 *Period covered by the above information:*

- 01 April 2010 to 31 March 2011

5. **Summaries of or references to new papers, reports and studies on competition issues**

27. Staff of the Commission presented a number of papers at international and local conferences on competition policy and economics, as well as publishing journal articles (table 4). In addition ten briefing papers were prepared for internal use in the Commission while a series of seminars and capacity building sessions were hosted with external presenters.

Table 4: Conference Papers and Publications

Author	Publication
N. Ngepah	'Inequality and agricultural production: with focus on large-scale / small-scale sugarcane farms in South Africa', <i>African Journal of Agricultural and Resource Economics</i> 6(1)
N. Ngepah	'Socioeconomic impacts of biofuels: methodologies and case study examples', in Amezaga, J. M., G. von Maltitz and S. Boyes (Eds) 2010 <i>Assessing the Sustainability of Bioenergy Projects in Developing Countries: A framework for policy evaluation</i>
N. Ngepah	'Comparative analysis of poverty effects of various candidate biofuel crops in South Africa', <i>Journal of Development and Agricultural Economics</i> , 3(2)
C. Corbett, R. das Nair & S. Grimbeek	'The importance of information exchange in dampening competition industries historically characterised by regulation', The Amsterdam Centre of Law & Economics Conference, 22 April 2010, Amsterdam
J. Greenberg, S. Grimbeek & C. Corbett	'The importance of information exchange in dampening competition industries historically characterised by regulation', Fifth International Conference on Competition and Regulation, 2 - 4 July 2010, Cresse, Greece
S. Grimbeek	'An econometric analysis of the South African Competition Commission's merger decisions', ZEW conference, 21 - 22 October 2010, Mannheim, Germany

- C. Corbett, R. das Nair, S. Roberts 'Countervailing power, bargaining power and market definition: a reflection on two mergers', The Fourth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 2 September 2010, Johannesburg
- J. Khumalo, Y. Njisane & P. Nqojela 'Cover pricing in the construction industry', The Fourth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 2 September 2010, Johannesburg
- A. Ngwenya & G. Robb 'Theory and practice in the use of merger remedies: considering the South African experience', The Fourth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 2 September 2010, Johannesburg
- G. Muzata & K. Mnisi 'Are anti-trust fines excessive to the detriment of companies concerned and consumers in general?', The Fourth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 2 September 2010, Johannesburg
- A. Sylvester 'Using profitability measures in competition policy analysis in South Africa', The Fourth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 2 September 2010, Johannesburg
- N. Nontombana & I. Lesofe 'Do cartels change behaviour post-investigations?', The Fourth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 2 September 2010, Johannesburg
- T. Ravhugoni & M. Ngobese 'Disappearance of small independent retailers in South Africa: the waterbed and spiral effects of bargaining power', The Fourth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 2 September 2010, Johannesburg
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Source: Competition Commission

II. ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SOUTH AFRICA

Submission by the Competition Tribunal

Executive Summary

1. The Competition Tribunal is the adjudicative arm of the South African competition authorities. We decide prohibited practice cases and where appropriate, impose remedies. Where our sister agency the Commission has entered into consent agreements we are required to approve them. In merger cases we clear what are defined in our law as large mergers and we hear appeals in respect of what are defined as intermediate mergers. We also have to decide a large number of procedural issues that arise in the merger and prohibited practice cases we hear.

2. A healthy trend during this financial year has been the increase in prohibited practice cases that are being brought to us and the number which are settled as a result of consent agreements being entered into between the Commission and the particular respondent. The fact that these cases are being referred to us is, in part, a measure of the success of the Commission's leniency policy for cartel cases and its increased focus on this area.

3. This increase in prohibited practice cases is best illustrated by our own hearings statistics. In the previous financial year we heard 10 prohibited practice cases, this year we heard 30. Fines imposed increased from R 292 m in 2009/2010 to R 788 m in 2010/2011. Of the number of prohibited practice matters we heard, consent orders or settlements, accounted for the bulk comprising 73.33% of the cases heard.

4. There has been a moderate increase in the number of merger cases heard which may suggest a return of business confidence.

5. Our overall number of hearing days increased significantly by 42% from last year. In the table below, we detail the number and type of cases heard comparing them to the previous financial year.

Number and type of cases heard compared to previous year

Type of Case	2010/2011	%	2009/2010	%
Large Mergers	55	47.42	52	61.18
Intermediate mergers	1	0.86	0	0
Procedural matters	30	25.86	23	27.05
Prohibited practice	30	25.86	10	11.76
	116	100	85	100

6. Various recent higher court decisions have led to a very strict interpretation of the powers of the Commission to refer complaints to the Tribunal. As a result a number of important complaint referrals brought by the Commission have been dismissed by the higher courts on procedural grounds and will not be tried on their merits before the Tribunal. These higher court decisions are binding on the Tribunal and will likely impact a number of other cases pending before us where respondents have indicated an intention

to raise similar objections. Although the Commission intends appealing some of these decisions to the highest court in the country, the Constitutional Court, unless that court reverses some of the earlier decisions, we expect this trend to continue.

Norman Manoim
Chairperson Competition Tribunal

1. Changes to Competition Laws and policies, proposed or adopted

7. Please refer to the South African Competition Commission's Report.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

8. The value of the settlements agreed to in consent orders by the Tribunal totalled Rand 787m. Consent orders are settlements that the Commission reaches with respondents in a prohibited practice case which the Tribunal must either confirm or refuse or request that changes be made to it. Consent orders normally include an administrative penalty which the respondent must pay within a specified time. 22 consent orders were heard, 21 were decided and 21 orders were granted during the reporting period.

2.1.1 Description of significant cases

- The Precast Concrete Products Cartel

On 13 February 2009 the Commission filed a complaint referral with the Tribunal against 10 members of an alleged cartel in the market for precast concrete products. It accused them of fixing the selling price and dividing the market for the production of pipes, culverts and manholes. It also accused the cartel members of engaging in collusive tendering in respect of the supply of precast products to certain suppliers. The accused were: Rocla (Pty) Ltd and D & D (Pty) Ltd which it had acquired in 2006, Southern Pipeline Contractors (Pty) Ltd ("SPC"), Concrete Units (Pty) Ltd, Aveng Africa Ltd, Grallio (Pty) Ltd, Cobro (Pty) Ltd, Cape Concrete (Pty) Ltd Conrite Walls (Pty) Ltd, Craig Concrete Products (Pty) Ltd.

The Commission was informed of the cartel by Rocla in 2007 when it applied for leniency and was told that the cartel had been operating since 1973 until 2007 when it was disbanded. It had operated both nationally and regionally in Gauteng, KwaZulu Natal and the Western Cape.

Shortly after the Commission filed the complaint with the Tribunal four of the Respondents entered into the following settlement agreements:

- Aveng paid a penalty of R46 277 000, representing 8% of Infraset's 2008 turnover
- Concrete Units paid a penalty of R5 763 743, representing 7% of its 2008 turnover
- Cobro Concrete paid a penalty of R4 022 568, representing 6.5% of its 2008 turnover
- Cape Concrete paid a penalty of R4 371 386, representing 7% of its 2008 turnover

Three players remained. SPC and Conrite Walls acknowledged that they were part of the cartel but contested the size of the penalties sought by the Commission while Grallio denied involvement in the cartel and opposed the Commission's referral.

The Tribunal heard the case against SPC and Conrite Walls on 2-3 August 2010 and on 29 November 2010 imposed the maximum penalty of 10% of total turnover on SPC, amounting to R16.8 million and a slightly lower penalty of 8% of total turnover on Conrite Walls, amounting to R 6.1 million. SPC, who played an active role in the cartel and was a member of the cartel for 13 years, was imposed with a large penalty because and it presented "*a textbook example of a successful firm that could easily have entered into related concrete markets but elected not to because of its collusive arrangements with competitors*" an act which had the effect of raising prices in the concrete products market. In Conrite Walls' case the Tribunal found mitigating factors noting that its role in the cartel was related only to markets in KZN and concerned fewer products.

In its judgment the Tribunal noted that the concrete pipes cartel was the "most enduring, comprehensive and stable cartel prosecuted to date... It operated in such secrecy that members were referred to by number and not name." The Tribunal also noted that the cartel members "enjoyed a quiet and hugely profitable life", as evidenced by the testimony of Aveng that, in their estimation, prices of concrete pipes fell between 25-30% after the cartel disbanded in 2007.

The Tribunal heard the matter against Gralio on 5, 6 and 12 August 2010 in a separate hearing and on 29 November 2010 the Tribunal dismissed the complaint against Grallio Precast stating that "*Gralio's actions were diametrically opposed to the consensus of the cartel*" and that the Commission had not shown that Grallio had been a party to the agreement or concerted practice.

- Pioneer settlement agreement in the maize and wheat milling cartels and other restrictive practices complaints

Pioneer Foods (Pty) Ltd participated in cartels in concerning the milling of maize and wheat. The Competition Commission was also investigating complaints of exclusionary conduct against Pioneer in the poultry industry.

In light of these investigations against it Pioneer and the Competition Commission reached a settlement agreement which was confirmed by the Tribunal on 30 November 2010. In terms of the confirmed agreement, Pioneer undertook to pay R500 million to the National Revenue Fund. It also undertook to adjust its pricing of flour and bread such as to reduce its gross margin by R160 million. In addition Pioneer will also to maintain its current capital expenditure as well as increase it by R150 million. At the hearing the Commission explained that the purpose of the latter was to ensure that Pioneer would not reduce its output on account of the penalties Pioneer has to pay. Amongst other commitments, Pioneer has also implemented a compliance programme aimed at ensuring that Pioneer employees adhere to competition laws.

The agreement settles all the cases which the Commission was investigating against Pioneer except those for which Pioneer has requested leniency from the Commission. The Commission's leniency programme gives firms an opportunity to confess their role in contravening the Competition Act, in exchange for immunity from prosecution.

- Foskor's settlement agreement with the Competition Commission in the fertilizer industry

The Commission found that Foskor (Pty) Ltd had during 2007/08 engaged in excessive pricing in phosphoric acid as well as dividing markets through a toll manufacturing agreement with Sasol whereby Sasol would produce phosphates on behalf of Foskor and Foskor would market the phosphates.

In its settlement agreement with the Competition Commission which was confirmed by the Tribunal on 28 February 2011 Foskor undertook to refrain from engaging in excessive pricing and to adopt measures aimed at increasing transparency in the downstream market for fertiliser products. Foskor had also adopted a new pricing policy in 2008 which had brought down Foskor's prices to local customers significantly. Furthermore, until July 2008 Foskor as producer of two phosphoric acid rich products used in the fertiliser industry, namely MAP and DAP sold these two products only to the wholesale market. Since August 2008, however, Foskor sells bulk MAP and DAP consignments at the wholesale price directly to the retail farming community. In light of its remedial action it was agreed that Foskor would not pay an administrative penalty.

2.2 *Mergers and acquisitions:*

9. Two large mergers stand out when we review our cases in the 2010/2011 financial year. The *Tsogo Sun / Gold Reef* merger received public attention when it was before the Tribunal, primarily because the Commission had recommended that the merging parties should sell-off one of their major casinos, as a condition to the deal, and the merging parties opposed this recommendation. In this case, the Tribunal had to consider if the Commission had presented enough evidence to support its theory of the potential competition harm that would arise after the merger. In the *Metropolitan / Momentum* merger, which also received much media attention because of the size of the merging firms and the public interest issues in the case, the Tribunal had to weigh up the job loss concerns against the benefits the merger would present.

10. Some statistics:

- This year the Tribunal had 62 large mergers on its roll. Of these, we received 57 new mergers during this year and five were received in the previous year.
- We heard 55 matters (one from a previous period). Of those heard, 42 mergers were unconditionally approved and three were approved subject to conditions.
- We issued reasons in 47 of the 55 matters heard during the year and in four matters we heard in the previous period.
- Since our inception the Tribunal has ruled on 767 mergers (on average 63.92 merger decisions per year). We approved 89.44% without conditions.

2.2.1 *Description of significant merger cases*

- Metropolitan Holdings Ltd and Momentum Group Limited

On 14 October 2010 the Tribunal conditionally approved the merger between Metropolitan Holdings Limited ("Metropolitan") and Momentum Group Limited ("Momentum"). Metropolitan acquired 100% of the issued ordinary share capital in Momentum from FirstRand Limited. Momentum and Metropolitan are both diversified service providers within the broader financial services sector focussing, inter alia, on long term insurance and medical aid. Although no competition concerns arose in any of the relevant markets affected by the proposed merger the

Tribunal found that the merger would lead to a substantial loss of employment. The merging parties estimated that 1000 employees would lose their jobs as a result of the transaction.

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

- That a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e. that the reasons for the job reduction and the number for jobs proposed to be shed are rationally connected; and
- The public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, for instance where the merger is required to save a failing firm, that justifies the job loss and which is cognisable under the Act.

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

- Tsogo Sun and Gold Reef Resorts

On 11 February 2011 the Tribunal unconditionally approved the merger between Tsogo Sun Holdings and Gold Reef Resorts. This decision followed a 8-day hearing in which the Competition Commission argued that Tsogo Sun and Gold Reef should only be allowed to merge on condition that they sold Silverstar Casino. The Commission based their argument on their view that Silverstar, which was part of the Gold Reef group at the time, was an effective competitive alternative to Montecasino (part of Tsogo Sun) and the merger would lead to the elimination of Silverstar as a competitor. The Commission submitted that, in the absence of effective competition, this would give the new merged entity an incentive to increase gaming prices or degrade its gaming product offering after the merger.

The merging parties however opposed this view arguing that consumers did not regard Silverstar and Montecasino as competitors and so there would be no need to maintain Silverstar as a “competitive alternative” to Montecasino. The merging parties argued that, after the merger, the merged firm would have no incentives to increase price or reduce the quality of its product offering.

The Tribunal, in its analysis of the case, emphasised the importance of getting the views of affected customers when trying to determine the potential competition effect a merger might have on a defined market. The Tribunal said that in the context of this merger the question of potential substitution between casino gaming and non-gaming leisure would have been best answered by the consumers of these services themselves, evidence which was not forthcoming despite the fact that casino gaming is a consumer market. The Tribunal reiterated that it “is highly supportive of the use of economic analysis in merger cases and that well conducted customer surveys can provide very valuable insights into market characteristics and dynamics, as well as customer behaviour and preferences, specifically in differentiated-goods markets.”

The Tribunal concluded that, based on the evidence presented to it, it could not determine if the merger would create a material incentive for the merged entity to post merger raise prices (in this context raise so-called casino “hold ratios”) or lower the quality of its offer. It therefore approved the transaction without any conditions.

- Freeworld Coatings and Kansai Paint

On 14 December 2010 the Tribunal issued its decision in the case brought by Freeworld Coatings against the Competition Commission and Kansai Paint. Freeworld had alleged that the Commission was wrong to not permit it to file a separate merger filing from Kansai Paint if and when the “proposed merger” between Freeworld and Kansai was notified. Usually merging firms file one common merger application to the competition authorities but, according to the Competition Act, the Commission may allow separate filings if it is reasonable and just to do so in the circumstances.

In arriving at its decision the Tribunal found that the Commission’s legal test for deciding if a proposed merger existed between Freeworld and Kansai Paint was too strict. However, the Tribunal didn’t express a view on whether the Commission’s ultimate decision to refuse Freeworld a separate merger filing was wrong. The Tribunal found that the Commission had based its decision on the fact that intent to acquire control was insufficient to constitute a proposed merger and that only when the offer becomes binding should the merger be notified. The Tribunal said this was too strict and mechanistic a legal test. It explained that according to the CAC’s decision in the Gold Fields/Harmony merger decision, one must “not be too mechanistic about facts when intention is accompanied by events subject to some contingency.” It also pointed out that the Commission’s Rule 28 gave the Commission the discretion, not only to determine whether it is reasonable and just to allow the separate filing, but also to give appropriate directions to give effect to the requirements of the Act.

This decision followed a hearing before the Tribunal in which Freeworld argued that Kansai Paint had, over time, made a systematic but unsolicited attempt to gain control of Freeworld. Freeworld also believed that the merger, if approved, would have given rise to significant competition problems given that these two firms were competitors and together would control a significant portion of the automotive paints market. Because Freeworld saw Kansai’s actions as an attempt at a hostile takeover and because the parties did not agree on the potential competition effect the takeover would have, Freeworld asked the Commission if it could file its merger documents separately from the acquiring firm, Kansai. The Commission’s view, however, was that Freeworld’s request to it was premature since the takeover actions it described did not amount to a “proposed merger” as required in the Competition Act. Kansai also believed the move was premature and said it hadn’t yet made an offer for the remaining shares in Freeworld.

After hearing submissions from Freeworld, Kansai and the Commission, the Tribunal referred the case back to the Commission for the Commission to revisit the decision it made and consider if, on the correct legal test, a proposed merger existed between the parties; and whether in light of that Freeworld should be allowed to file the merger separately from Kansai.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

11. Please refer to the South African Competition Commission’s Report.

4. Resources of competition authorities

12. Resources overall

- Annual budget: Rand 27 million / USD 3.4 million
- Number of employees (excludes full-time and part-time Tribunal members)
 - Economists: 1 Researcher
 - Lawyers: 5 Researchers
 - Support staff: 9
 - All staff combined: 15
- Human resources

13. The Researchers manage anticompetitive practice cases as well as mergers cases referred to the Tribunal. There is no division of cases by class.

- Period covered by the above information: 1 April 2010 to 31 March 2011

5. Summaries of or references to new reports and studies on competition policy issues

14. Please refer to the South African Competition Commission's Report.