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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SOUTH AFRICA

-- 2011 --

This report is submitted by South Africa to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 24-25 October 2012.

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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 2011 to 31 March 2012. 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. It is not surprising, in light of South Africa's economic history, that there are different visions of the role and scope of competition law in the economy. In the past year, these divergent views were debated in various competition cases, especially as they relate to the Commission's public interest mandate in merger evaluation. The transparency of legal proceedings and coverage of our cases have made the issues accessible to a wider public. We are encouraged and receptive to the public debate that our work elicits. This has resulted in greater appreciation and understanding of the role and limits of competition law as an instrument of public policy.

3. Although the Competition Commission has had a considerable workload and has encountered many challenges over the past year, it has emerged with greater clarity and a heightened sense of purpose. The Commission has also demonstrated institutional integrity by its independence, transparency and objective decision-making.

4. In the past year, we considered 282 merger transactions of which 234 were approved without conditions, within respectable turn-around times. Thirty three transactions were approved subject to conditions and eight were prohibited. Most conditions related to limiting job losses, but also included remedies to restrict information exchange between competitors and, in some instances, divestiture.

5. We are very satisfied with our enforcement activity during the year. Sixteen investigations were prepared for prosecution and eight cases were referred to the Competition Tribunal for adjudication. Settlement agreements were concluded with 28 firms, in various cases, and in particular cases in grain storage and cement. The penalties imposed, all confirmed by the Tribunal, amounted to a total of R548m.

6. The Commission's outputs reflect the successes of our prioritisation framework and corporate leniency policy. The fast-track settlement incentive for construction firms was implemented in the year under review. The significant increase in leniency applications by construction firms indicates the high level of participation in the project. This project will be finalised in the next financial year.

7. The Commission expends substantial resources in litigation before the Tribunal and courts. Following a number of procedural challenges in the courts, a long standing complaint of abuse of dominance against Telkom, was heard at the Tribunal. Three matters were heard by the Constitutional Court, all relating to the powers of the competition authorities. The Commission was successful in the *Senwes matter* where the Constitutional Court affirmed that the Competition Act be interpreted in light of its objectives, and not in a narrow, formalistic manner. The outcomes of the other appeals will provide guidance on the powers of the authorities.

8. For the second time, the Competition Commission won the Delloitte's award for the *Best Company to work for in the Public Sector*. I am grateful to staff for sustaining a stimulating, productive and professional working environment at the Competition Commission.

*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

9. None

1.2 Other relevant measures

10. 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.

1.3 Government proposals for new legislation

11. 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

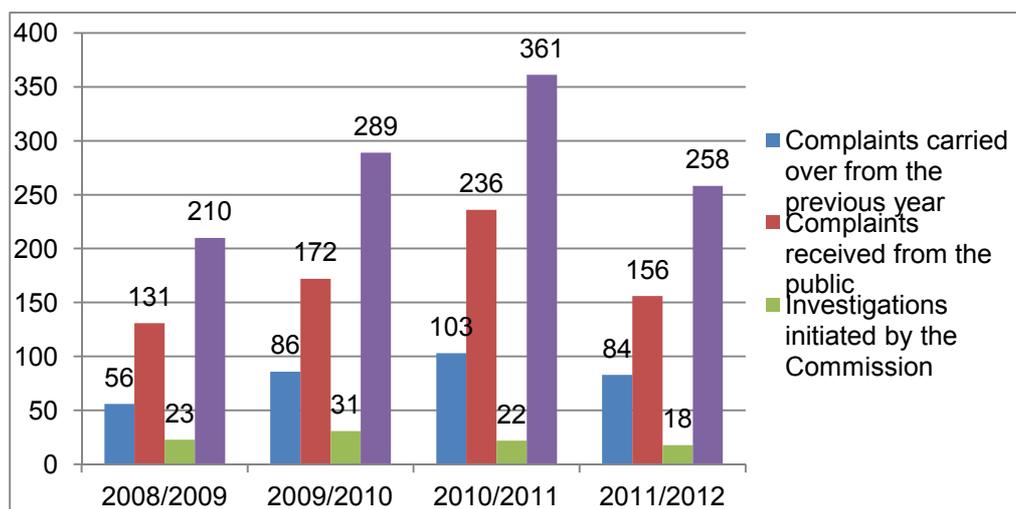
2.1.1 Summary of enforcement activities

12. During the period under review:

- The Commission received 156 complaints and initiated 18 of its own complaints.
- A total of 84 cases were carried over from investigations in previous years.
- Of the 258 cases under investigation, 16 complaints were referred to the Legal Services Division and recommended for prosecution in the Competition Tribunal.
- A total of 138 cases did not proceed beyond screening. The Commission could not establish a substantial lessening of competition in these complaints, which mainly related to allegations of exclusionary conduct. In 18 of these cases, the Commission identified other appropriate institutions, such as the National Consumer Commission and the Independent Communications Authority of South Africa (ICASA), that are competent to deal with the complaints. A total of 22 cases were non-referred after further investigation.

- Three cases were withdrawn.
- Consent agreements were concluded in 28 cases.
- The remainder of the cases were carried over to the next financial year.

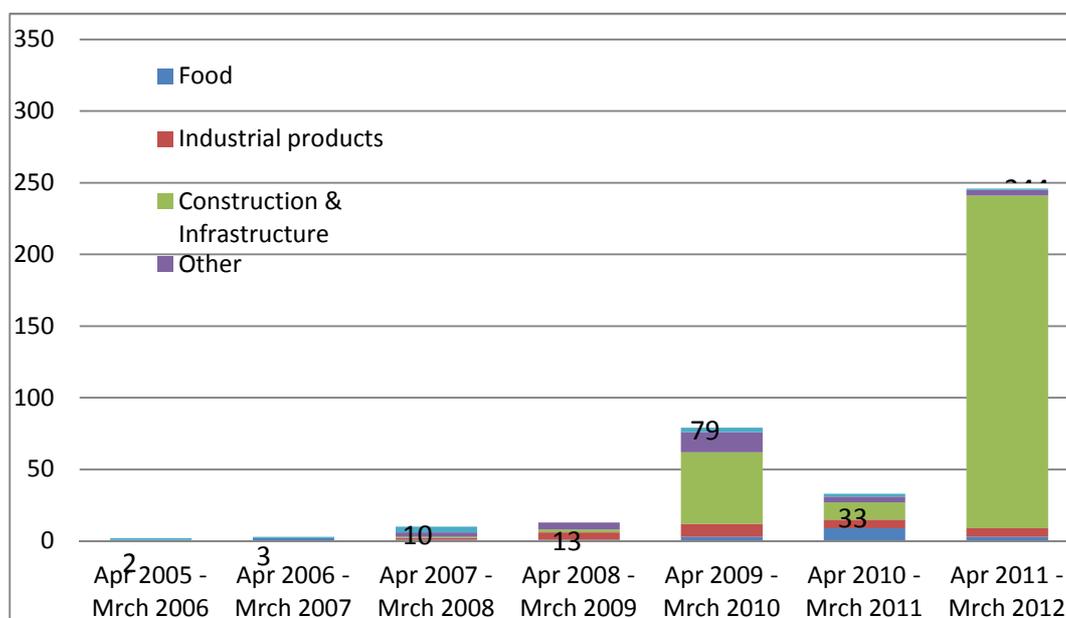
Figure 1: Enforcement cases under investigation, by year



Source: Competition Commission

13. Of the 18 complaints initiated by the Commissioner, 14 are in the Commission’s priority sectors.

Figure 2: Total number of CLP applications received per year



Source: Competition Commission

14. A total of 44 leniency applications were carried over from previous years and 244 were received during the period under review. Of these, 52 received conditional leniency, eight were rejected because they did not meet the requirements as set out in the CLP, and 53 applications were carried over to the new financial year. A total of 175 applications from the construction project were not granted leniency because they related to prescribed projects and/or were not first “through the door”. No corporate leniency applications qualified for total immunity during the year under review.

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

- The cement cartel

In 2008, the Commission initiated an investigation into the cement industry on the basis of internal economic research. This research suggested that the cement producers could be colluding, despite the disbandment of the lawful cement cartel that had operated until 1996 and the Commission’s raid on PPC’s premises in 2000. Subsequently, the Commission raided the premises of PPC, Lafarge Industries South Africa (Pty) Ltd (Lafarge), AfriSam (South Africa) (Pty) Ltd (AfriSam) and Natal Portland Cement Cimpor (Pty) Ltd (NPC-Cimpor). The raids proved to be a success, yielding valuable evidence and a confession from PPC of its involvement in market division. The collusion took place through the exchange of detailed sales information by cement producers through the Cement and Concrete Institute of South Africa (C&CI). After this, the remaining cement producers, with the exception of NPC-Cimpor, confessed to their involvement in collusion.

The confession resulted in PPC securing conditional immunity, while AfriSam and Lafarge paid fines of R124 878 870 and R148 724 400 respectively after concluding consent agreements with the Commission. However, this outcome does not mark the end of the Commission’s journey as the investigation against NPC-Cimpor is still in process. International experience shows that in almost all jurisdictions, cement companies have a tendency to reconstitute a cartel a few years after being fined by the competition authorities. Although the Commission believes that the current investigations would deter the cement companies from colluding again, it remains alert.

- The construction fast-track settlement project

The Commission launched the Construction Fast-track Settlement Project (CSP) on 1 February 2011. The objective of the project was to invite firms in the construction industry to disclose projects and tenders that were subject to bid-rigging conduct in return for lower penalties. The closing date for this invitation was 15 April 2011. Since the launch of the CSP, the Commission has received applications from 21 firms in the construction industry, including the top five construction firms.

After the first-phase assessment of all the applications, the Commission identified 301 different projects and tenders that were subject to bid-rigging.. These projects and tenders included some of the major infrastructure developments in South Africa, including the Soccer World Cup stadiums and the Gauteng Freeway Improvement project (GFIP). During the evaluation process, 24 firms that did not apply for settlement were also implicated in bid-rigging conduct. This conduct is currently being investigated. The estimated value of all the projects and tenders is R29 billion.

After an intensive data collection and analysis process, the Commission evaluated conditional leniency for the firms that had applied for settlement. This evaluation process enabled the Commission to determine the respective projects and tenders that the firms are liable to settle.

The Commission is expected to commence with the settlement negotiations with the respective firms in the first half to the middle of the 2012/13 financial year.

- Telkom

The 21 complaints lodged by the South African Value-added Network Services Association (SAVA) and other complainants against Telkom in 2002 were heard before the Competition Tribunal from 17 to 27 October 2011, 1 to 9 December 2011 and 15 to 17 February 2012. After finalising the investigation of these complaints in 2003, the Commission consolidated the complaints and referred them to the Tribunal for adjudication in February 2004. Telkom immediately brought a review application to the Pretoria High Court (the TPD as it then was) to set aside the referral on the grounds that the Commission and the Tribunal did not have jurisdiction to deal with the referred issues, as only the Independent Communications Authority of South Africa (ICASA) had such jurisdiction. Telkom further raised alternative arguments: that the Commission had failed to follow proper procedures, including complying with the provisions of its Memorandum of Understanding (MoU) with ICASA; and that the Commission was biased and did not refer the complaint within the prescribed period in terms of the Act. The Commission opposed the application and raised two points: the decision to refer and the referral itself were not administrative acts subject to review, and the forum to raise Telkom's objections and review was the Tribunal and not the High Court.

The court ruled in favour of Telkom by setting aside the Commission's decision to refer the complaint to the Tribunal for adjudication. The Commission appealed against the entire judgment of the High Court to the Supreme Court of Appeal (SCA). On 2 November 2009, the SCA heard the matter and subsequently delivered its judgment in favour of the Commission on 27 November 2009. In its judgment, the SCA held that the decision to refer and the referral by the Commission did not amount to administrative action, but were of an investigative nature and were accordingly not reviewable in terms of the Promotion of Administrative Justice Act of 2000 (PAJA). The SCA further held that the Commission's reliance on a report produced by the Link Centre Report was not evidence of bias. The SCA dismissed Telkom's claim that the Commission had failed to procure a lawful extension of its investigation period and the claim that the Commission did not comply with the MoU. It took almost two years for the matter to be heard before the Tribunal as Telkom brought a series of convoluted interlocutory applications that delayed the hearing.

SAVA is an industry organisation that represents independent value-added network service (VANS) providers. Broadly speaking, VANS describes the network communication services provided by large IT companies to corporations with multiple geographic locations and significant intra-company communication requirements. Independent VANS providers developed South Africa's virtual private network (VPN) technology, which greatly reduced companies' communication costs.

SAVA complained that since 1999, Telkom had attempted to prevent independent VANS providers from selling VPN services and hampered their ability to compete effectively against Telkom's own VANS provider. SAVA's specific allegations centred on Telkom's refusal to grant some independent VANS providers access to its network or to expand their existing access (the so-called "freezing" of independents' networks), as well as Telkom's policy of granting its own VANS provider access at preferential prices. Disputes over this conduct were lodged with the South African Telecommunications Regulatory Authority (SATRA) in 1999 which ruled in SAVA's favour but the ruling was later overturned in the High Court.

Telkom’s network was an essential input for any VANS provider’s business because Telkom was a de jure monopoly. No independent VANS provider was legally allowed to replicate the network infrastructure in which Telkom had invested. The limits of Telkom’s exclusivity lie at the root of all of the disputes between Telkom and independent VANS providers. Telkom believed that VPN services fell within its exclusivity rights, such that no other company could legally provide them. Independent VANS providers, SATRA and later ICASA, all disagreed.

The Commission’s case established Telkom’s dominance, and argued that Telkom’s pricing conduct contravened the price discrimination and excessive pricing prohibitions in the Competition Act. The Commission argued that Telkom’s freezing of independent VANS providers’ networks constituted an illegal refusal to grant access to an essential facility. Telkom’s actions also induced customers not to deal with its rivals. Finally, the Commission argued that Telkom’s conduct also contravened the Competition Act’s prohibition of “general exclusionary conduct” by dominant firms.

In its defence, Telkom denied certain allegations outright, particularly the alleged refusal to grant access or supply services to independent VANS providers. In the alternative, it argued that its conduct or policies were approved by the sector regulators of the day (first SATRA and later ICASA).

Telkom also argued that the impact of this conduct – particularly its attempt to enforce its exclusivity rights – had not resulted in the exclusion of a significant number of independent VANS providers from the VPN market. Finally, Telkom argued that it was at all times within its rights to enforce its exclusivity rights, and indeed was required to do so by law. After about seven years of delays, the merits of this matter have finally been heard in the appropriate legal forum.

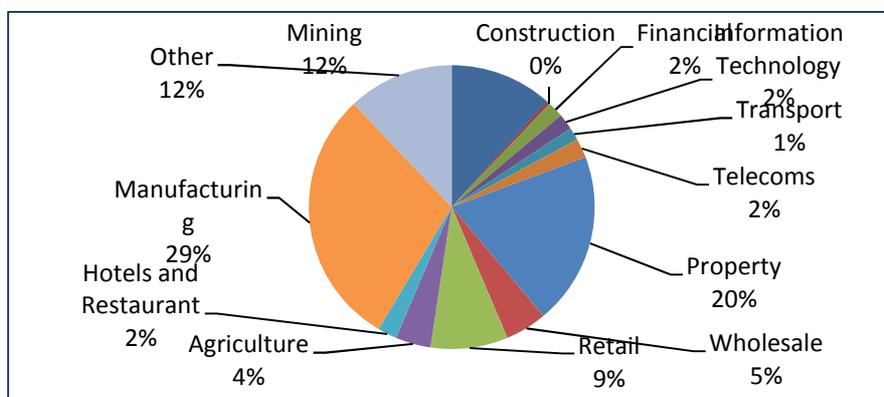
2.2 Mergers and acquisitions

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

15. During the period under review, the Commission was notified of 291 mergers. This is an increase of 21% on the previous year. The majority of the cases filed were intermediate mergers.

16. Most mergers fell within the manufacturing, property and mining sectors, which together account for 61% of the total investigations completed.

Figure 3: Mergers notified by sector



Source: Competition Commission

17. The Commission investigated 14 cases involving prior implementation where parties implemented notifiable mergers prior to obtaining the Commission's approval. These investigations are still on-going.

18. Merger investigations may be classified into three phases based on their complexity:

- Phase 1 – merger investigations raise no serious competition or public interest concerns and can be concluded easily
- Phase 2 – investigations require further analysis
- Phase 3 – investigations require in depth and complex analyses

2.2.2 *Summary of significant merger cases*

19. The year under review has seen an increase in litigation and the contestation of merger cases in the Tribunal and the Competition Appeal Court.

20. The merger between Pioneer Hi-Bred International Inc and Pannar Seed (Pty) Ltd was contested in the Tribunal and the CAC. This merger involved the maize seed market and has a bearing on food security. The Commission prohibited the merger as it would reduce the number of players in the market from three to two. Following reconsideration proceedings instituted by the merging parties, the Tribunal confirmed this prohibition. The parties further appealed the Tribunal's decision to the CAC.

21. The Commission was also involved in litigation involving two mergers in the media market; the merger between Paarl Media (Pty) Ltd and Primedia (Pty) Ltd (involving advertising in community newspapers); and the merger between Media24 Limited and Natal Witness Printing and Publishing Company (Pty) Ltd (operating in the printing market). In the first of these mergers, Caxton and CTP Publishers and Printers Ltd, who were intervenors in this merger, successfully reviewed the Commission's decision to approve the merger between Paarl Media (Pty) Ltd and Primedia (Pty) Ltd with the matter being sent back to the Commission for reconsideration. In the latter merger, the Commission approved the merger with conditions and the merging parties reviewed this decision in the Competition Tribunal. the division assessed a number of complex investigations:

22. Some noteworthy merger decisions include:

- Walmart required to divest stores as a condition to acquire Rhino

In November 2011, the Commission recommended that the Competition Tribunal approve the acquisition of Rhino stores by Mystic Blue, subject to divestiture conditions. Mystic Blue is ultimately controlled by Walmart through Masscash Retail. The stores to be divested were two wholesale (grocery and liquor) stores located in Matatiele and two retail (grocery and liquor) stores located in Nongoma.

In this transaction, Mystic Blue was acquiring 16 Rhino stores located mostly in KwaZulu-Natal and the Eastern Cape. It was a horizontal transaction and the activities of the merging parties overlapped in respect of the wholesaling and retailing of grocery and liquor products. The geographic markets affected by the transaction were Ulundi, Lusikisiki, Mtata, Mtubatuba, Matatiele and Nongoma. However, no competition concerns arose in any of these markets other than in Matatiele and Nongoma.

The Commission was concerned that this transaction was likely to give rise to unilateral effects, since it would result in the removal of Rhino as an effective competitor in the wholesaling of grocery and liquor products in Matatiele and the retailing of grocery and liquor products in Nongoma. Rhino (trading as Matat Wholesalers) is the only effective competitor to Walmart/Massmart (trading as Browns Cash and Carry) in both the wholesaling of grocery products and liquor products in Matatiele. Other competitors in that area do not exert significant competitive constraints to the merging parties. Barriers to entry in the wholesaling market are also relatively high due to scale requirements. The removal of Rhino as an effective competitor would enable the merged entity to unilaterally increase prices to the detriment of its low-income customers.

In Nongoma, the Commission found that the retailing market was highly concentrated and the merged entity had a significant share of this market. Cambridge (owned by Walmart/Massmart) and Rhino are the closest competitors. Although there were other retailers in Nongoma, they did not pose any significant competitive constraint to the merging parties due to their location, target market and lack of necessary buyer power, among other factors. Therefore, the merger would result in the removal of Rhino as an effective competitor in the retailing of grocery and liquor products in Nongoma.

To maintain competition in these areas, the Commission recommended to the Tribunal that the transaction be approved on condition that the merging parties divest the Rhino stores located in Nongoma and Matatiele. The Tribunal accepted the Commission's recommendations and approved the transaction subject to conditions.

- Ardutch and Defy merger approved subject to investment conditions

The Commission approved the proposed acquisition by Ardutch BV (Ardutch) of Defy Appliances (Pty) Ltd (Defy) with conditions.

Ardutch, a subsidiary of Arcelik AS (Arcelik), is involved in the durable goods sector which includes the manufacture of large domestic appliances such as refrigerators, washing machines, dishwashers, dryers and gas stoves. It produces these goods at various plants located globally. Similarly, Defy manufactures and distributes domestic appliances in southern Africa. Its local operations are the largest in South Africa, manufacturing through its three facilities located in Durban, Ladysmith and East London. Its local operation thus serves as an essential customer base for some of its local suppliers.

Before the merger, Arcelik and Defy shared a vertical relationship, as Arcelik supplied Defy with various fully assembled products such as washing machines, dryers and refrigerators. Given this vertical dimension, the Commission assessed the likelihood of foreclosure of local suppliers from both a competition and public interest perspective. From a competition perspective, the Commission found that there is no incentive for the merged entity to foreclose upstream suppliers given the importance of local (close-range) sourcing.

However, from a public interest perspective, there was a concern that if Arcelik were to vertically integrate with Defy and supply it with the inputs required in the manufacture of domestic appliances, local suppliers would be foreclosed from the merged entity's value chain. In this regard, Arcelik might import certain inputs (in part or in whole) at the expense of local suppliers or relocate production entirely to one of its other international plants. In this case, more than 2 500 jobs in the value chain in South Africa would be at risk. However, the merging parties gave undertakings that there would be no job losses as a result of this merger and suggested that, given

the increased output from the planned investments in expanding capacity at the local plant of Defy, there might even be increases in employment.

To this end, the Commission imposed conditions to safeguard against the immediate foreclosure of local suppliers and to ensure that the investment undertaking by Arcelik is fulfilled. The conditions are as follows:

- For a period of one year after the approval date, the merging parties shall not, outside of commercial reasons, terminate supply arrangements with Defy Appliances’ local suppliers.
 - In the event that the merging parties intend to terminate the supply arrangements with Defy Appliances’ local supplier, the merging parties will notify the local suppliers at least 6 months prior to the termination of the arrangement, giving the reasons thereof.
 - Arcelik shall invest in the local production capacity of Defy Appliances after the approval date and improve its technology.
- Commission prohibits mergers in the horseracing industry

The Commission prohibited a set of proposed transactions in the horse-racing industry involving Kenilworth Racing (Pty) Ltd (Kenilworth). The first transaction entailed the acquisition by Kenilworth of the Western Cape business of Gold Circle (Pty) Ltd (Gold Circle WC). The second transaction involved the take-over by the Thoroughbred Horseracing Trust of Kenilworth. These transactions were interdependent and could not be carried out individually.

As part of the transactions, Phumelela would manage Kenilworth and Gold Circle WC through a management agreement between Phumelela and Kenilworth (Phumelela and Gold Circle WC administer the sport of horse-racing and associated betting, and televise horse-racing events. Kenilworth is a shelf company created for the purposes of this transaction).

Gold Circle currently holds the totalisator licence (a licence that allows certain betting and gambling activities in South Africa) in the Western Cape and KwaZulu-Natal, and Phumelela holds the licence in the remaining provinces. As a result of the transactions, Phumelela would operate in eight of the nine provinces while Gold Circle would remain in KwaZulu-Natal only. This would substantially increase Phumelela’s share of the market for the administration of horse-racing and the associated betting activities in South Africa.

The transactions would allow Phumelela to entrench its already strong position such that it would be able to exert market power in horse-racing administration, horse-racing television rights, as well as the betting markets. This would most likely lead to a lessening of competition as the market structure after the merger would entrench existing barriers to enter the market at all levels of horse-racing in South Africa to the exclusion of other firms, particularly small and emerging horseracing entities. The merging parties also submitted that the merger would save jobs in the operations of Gold Circle WC as the firm was most likely to fail otherwise.

The Commission recommended that the merger be prohibited on the grounds that it would lead to a significant lessening of competition, that Gold Circle WC was not likely to fail and that there were other potential buyers. The merging parties appealed the prohibition of the merger in the Tribunal.

The Commission also approved a separate but unrelated merger transaction in the horse-racing industry involving the acquisition of the Clairwood Racecourse in KwaZulu-Natal by Global Pact 225 (Pty) Ltd, a property developer. As a result of this merger, the Clairwood Racecourse will be redeveloped into an industrial and commercial park linked to the Durban harbour expansion.

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

23. The Commission signed Memoranda of Understanding (MoUs) with the National Gambling Board and the National Consumer Commission and made the following submissions with regard to the consideration of competition concerns with respect of the draft government policies and laws:

- Submission on the Legal Practice Bill to the Department of Justice and Constitutional Development
- Submission on the Marine Living Resources Act to Department of Agriculture, Forestry and Fisheries
- Submission on the Sugar Act to the Department of Trade and Industry
- Submission on the Superior Court Bill to the Department of Justice and Constitutional Development
- Submission to the Department of Environmental Affairs on the Recycling and Economic Development Initiative of South Africa (REDISA) Plan

4. Resources of Competition Commission

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

24. The Commission’s staff complement increased to 171 by the end of the year, as opposed to 163 staff members at the end of the previous financial year. Of this, 112 staff members are directly involved in competition enforcement. The organisation also employed 14 graduate trainees. Although the Commission’s organisational structure was revised to ensure that it fulfils its mandate, with provision made for expanding its staff complement, severe space constraints prevented the Commission from expanding any further.

4.1.1 Annual budget (in ZAR and USD)

25. ZAR 174 135 million (USD 20 319 million)

4.1.2 Staff turnover over

26. At 11.44%, the Commission’s annual turnover rate is below the rate experienced in South Africa’s public sector (12.6%) but has increased in comparison to the previous year.

Table 1: Turnover rate of Commission staff

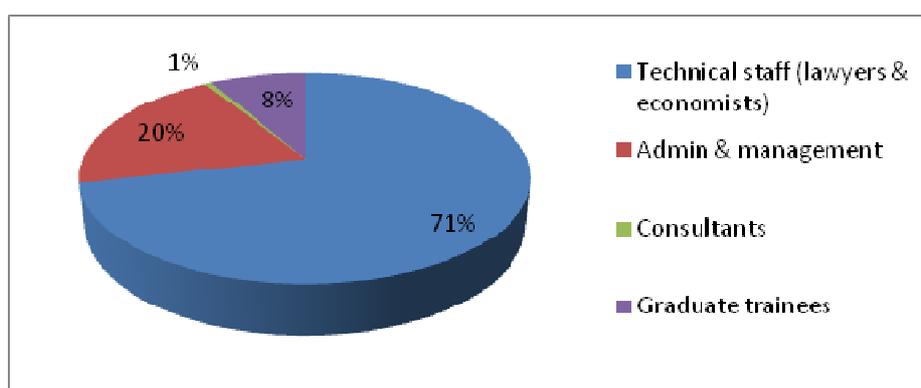
Year	Percentage staff turnover
2007/08	26%
2008/09	16%
2009/10	15%
2010/11	9.14%
2011/12	11.44%

4.1.3 Number of employees

27. 171 employees

4.2 Human resources applied to:

Figure 4: Staff complement for 2011/12



4.3 Period covered by the above information:

28. 01 April 2011 to 31 March 2012

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

29. Commission staff members presented a number of papers at international and local conferences on competition policy and economics. Twelve briefing papers were prepared for internal use, while a series of seminars and capacity-building sessions were hosted with external experts. Five articles were also published in local and international journals.

Table 2: Conference papers and publications

Author(s)	Title and conference/publication
Makhaya, G, Mkwanzani, W Roberts, S	How should young institutions approach enforcement? Reflections on South Africa's experience <i>South African Journal of International Affairs</i> , 2012, 19(1), 43–64. Also presented at the Amsterdam Centre for Law and Economics Competition Conference, 20 April 2011.
Roberts, S	Administrability and business certainty in abuse of dominance enforcement: An economist's review of the South African record <i>World Competition</i> , forthcoming, June 2012. Also presented at Fifth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 4 and 5 October 2011.

Author(s)	Title and conference/publication
Das Nair, R, Khumalo, J & Roberts, S	Corporate conduct and competition policy in intermediate industrial products <i>New Agenda</i> , First Quarter, 2012 16–21.
Ngwenya, A & Robb, G	Theory and practice in the use of merger remedies: Considering South African experience <i>Journal of Economic and Financial Sciences</i> , 4, 203–220.
Corbett, C, Das Nair, R & Roberts, S	Bargaining power and market definition: A reflection on two mergers <i>Journal of Economic and Financial Sciences</i> , 4, 147–166.
Ngepah, N	Exploring the impact of energy resources on production, inequality and poverty in simultaneous equations models for South Africa <i>African Development Review</i> , 23(3), 335–351
Bonakele, T & Mncube, L	Designing appropriate remedies for competition law enforcement: The Pioneer Foods Settlement Agreement <i>Journal of Competition Law and Economics</i> , forthcoming, June 2012. Also presented at Fifth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 4 October 2011.
Mncube, L & Ngwenya, A	South Africa's Pioneer Settlement: An innovative way to remedy competition law violations in developing countries? Presented at the Amsterdam Centre for Law and Economics Conference, 20 April 2011.
Darji, R, Grimbeek, S & Muzata, G	The impact of anti-trust fines on firm valuation in South Africa. Presented at Cresse Sixth International Conference, 1 July 2011, and Fifth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 4 and 5 October 2011.
Grimbeek, S	The consistency of merger decisions in a developing country Presented at Economic Society of South Africa Conference, Stellenbosch, 5 September 2011.
Sekgobela, T	Can socioeconomic justice be adequately addressed through the competition law system: A look at the efficacy of structural remedies in abuse of dominance matters in light of the structure of South Africa's economy Presented at Fifth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 4 and 5 October 2011.
Ravhugoni, T	Interpretation of market shares, countervailing power, barriers to entry and innovation in a differentiated products market Presented at Fifth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 4 and 5 October 2011.

Author(s)	Title and conference/publication
Sakata, N	Are southern African competition law regimes geared up for effective cooperation in competition law enforcement? Presented at Fifth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 4 and 5 October 2011.
Alves, P	ATM pricing and retail bank competition in South Africa Presented at Fifth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 4 and 5 October 2011.
Kariga, R	Between a rock and a hard place? A closer look at the Competition Appeal Court. Presented at Fifth Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 4 and 5 October 2011.

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.
2. The past year has seen a marked increase in the number of matters we considered. The most notable was the 47.3% increase in large mergers, from 55 the previous year to 81 this year. In addition, nine intermediate mergers were referred to the Tribunal for consideration. In the previous year four were referred to us. Hopefully this increase in mergers portends an increase in business confidence in the economy post the 2008 slump.
3. We also saw a slight increase in procedural matters and consent orders in prohibited practice cases.
4. Our overall number of hearing days increased by 38.30% to 146 hearing days. There has been a decline in our turn-around figures, both as regards getting orders out and the writing of decisions. This is attributable to the increase in our workload as these figures set out below show, but also to a reduction of the number of active tribunal members available to us to hear matters and write decisions. At present the Tribunal has three vacancies amongst its Tribunal members. The appointment of members, as opposed to staff, is an executive prerogative so we cannot appoint new members ourselves. The matter is receiving attention.

Percentage change in the types of cases heard from 2011 to 2012 financial year

TYPE OF CASE	2012/2011	% CHANGE	2011/2010
Large mergers	81	47.30	55
Intermediate mergers	6	500	1
Complaint referrals	5	(37.50)	8
Consent orders	27	22.70	22
Interim relief applications	1	100	-
Procedural matters	38	26.30	30
Total	158		116

5. Administrative penalties associated with the 27 consent orders issued totalled ZAR R 549 million. The largest penalty was imposed on Lafarge Industries SA (Pty) Ltd, being R 148 724 400.00 for cartel activity.
6. Important cases we heard during this financial year were the Wal-Mart/Massmart merger: a merger approved subject to public interest conditions, but later appealed to the Competition Appeal Court (CAC), who have approved some conditions and varied others; the Pioneer/Pannar merger: a merger in the modified seeds industry, which we prohibited but later, on appeal to the CAC, was varied to a conditional approval.
7. An important decision by the Constitutional Court was delivered in this financial year in the Senwes case, which deals with the procedural powers of the Tribunal. This is the first Competition Act case to reach the Constitutional Court. The Court interpreted the Tribunal's powers broadly, allowing it to become the master of its own proceedings, subject of course to being fair to all parties concerned.

*Norman Manoim,
Chairperson, Competition Tribunal*

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

8. 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 abuse of dominant positions***

2.1.1 *Summary of activities*

9. The value of the settlements agreed to in consent orders by the Tribunal totalled R 549 million. Consent orders are settlements that the Commission reaches with respondents in prohibited practice cases which the Tribunal must either confirm or refuse or request that changes be made to it. It normally includes an administrative penalty which the respondent must pay within a specified time. This year 27 consent orders were heard of which 24 were decided and granted.

2.1.2 *Description of significant cases*

- The Cement Cartel

Before 1995 Cement Producers in South Africa were granted exemptions in terms of legislation then in force to conduct the manufacture and distribution of cement under the aegis of a lawful cartel. A set of institutional arrangements was put in place to manage the activities of the lawful cartel. However, in 1995 the Competition Board, the predecessor of the current Competition Commission, withdrew the exemption. However, the Cement Producers were afforded until the end of September 1996 to terminate the lawful cartel in order to sort out logistical difficulties. On 2 June 2008 the Competition Commission initiated a complaint against PPC, Lafarge, AfriSam, NPC and Slagment investigating certain restrictive horizontal practices, restrictive vertical practices and abuse of dominance conduct. The Commission, in its investigation, found that following the demise of the lawful cartel in 1995, the Cement Producers had agreed among themselves to continue to target the market shares each producer had enjoyed under the lawful cartel. However, during 1996 a price war ensued among the cement producers after PPC gained market share in excess of the agreed market shares. In order to stabilize the market and end the price war the cement producers between 1997 and 1998 held a series of meetings to fix prices and allocate market shares between them. Lafarge admitted to entering into agreements and arrangements with PPC and Afrisam which had the effect of indirectly fixing cement prices and to allocate market shares in contravention of the Act. It paid an administrative penalty of R 148 724 400.00.

2.2 ***Mergers and acquisitions***

10. Two mergers stand out when we review our cases in the 2011/12 financial year. The first is the Wal-Mart/Massmart large merger transaction which enjoyed considerable public attention and the second is the Pioneer/Pannar transaction which was an intermediate transaction which was prohibited by the Competition Commission and then referred to the Tribunal for reconsideration. Large mergers are defined as having a combined turnover/asset value of merging parties of R6,6 billion and the target turnover/asset value of R190 million and for an intermediate transaction it is R560 million combined turnover/asset value and target firm turnover/asset value R80m.

11. Some statistics:

- Total number of new large merger cases received 92
- 11 large mergers were approved with conditions
- 12 intermediate mergers were files
- 4 were conditionally approved and 1 was prohibited

2.2.1 *Summary of significant cases*

- Pioneer Hi-Bred International Inc and Pannar Seed (Pty) Ltd merger

This intermediate merger, in which Pioneer sought to acquire 80% of the issued share capital of Pannar, was initially prohibited by the Competition Commission after which the merging parties applied to the Tribunal to reconsider it. Two parties intervened in the proceedings before the Tribunal.

Pioneer is a developer and supplier of advanced plant genetics to farmers worldwide. It has one of the largest maize germplasm pools in the world and its activities include extensive research and product development using technologies and innovations to develop hybrid maize and other commercial seeds. Pannar is involved in the breeding, development and sale of improved seed varieties including hybrid maize seed adapted to African conditions. According to them the merger would enable Pioneer to enhance the value and unblock the potential of Pannar's proprietary germplasma and other assets in South Africa and Sub-Sahara Africa.

The Tribunal's main area of concern in this transaction was the breeding, production and sale, in South Africa of maize seeds. There are three significant players in this sector, namely, Monsanto, the largest player, Pioneer, the second largest and Pannar, the third largest which collectively account for approximately 95% of any potential relevant market, as well as a number of very small independent seed companies that sell primarily licensed hybrid maize seed. Post the transaction only two significant players would remain namely, Pioneer and Monsanto.

The Tribunal found that barriers to entry in the breeding of maize hybrids were compelling and would significantly deter any timely and sufficient potential new entry. The three largest players were the only three firms in South Africa with substantial locally adapted germplasm pools and evidence showed that such a germplasm pool was a requisite for timely and effective new entry in the hybrid maize breeding market. The Tribunal said that if the proposed merger raised no significant competition concerns on the merits, then this would not be an issue, but if it did and one wanted to preserve a market structure with at least three effective competitors then the pairing of the proposed two of the three incumbent firms would not be a possibility. The Tribunal furthermore found that the proposed transaction was likely to give rise to very significant anticompetitive unilateral price effects which would not be offset by cognizable efficiencies.

The Tribunal also considered the counterfactual should the transaction not proceed, Pannar could either continue to compete or it could search for a partnership with another international seed company that could grow its competitive position. The Tribunal found the last option to be a viable alternative. It concluded that Pannar would not let its germplasm become obsolete as opportunities exist for it to be commercially exploited through strategic partnerships with one or more other global seed companies.

Tribunal prohibited the transaction which it found would bring a significant and permanent change to the market structure by reducing the number of competitors of significant size in the market from three to two players and increasing concentration in an already highly concentrated pre-merger market.

- Walmart Stores Inc and Massmart Holdings merger

On 31 May 2011 we conditionally approved the much publicized Walmart Stores Inc and Massmart Holdings Ltd merger. It was common cause that the merger did not raise any competition concerns as Walmart, a new entrant in the retail sector in South Africa, did not compete with Massmart in South Africa. Its only presence in the country was a small procurement arm that sourced products for its stores globally. The merger did however raise public interest concerns relating to employment and more specifically retrenchments, collective bargaining and domestic procurement of local products. Three government departments intervened namely Economic Development, Trade and Industry and Agriculture, Forestry and Fisheries. Also intervening were the South African Commercial, Catering and Allied Workers' Union (SACCAWU), the South African Clothing & Textile Workers' Union ("SACTWU"), and the Congress of South African Trade Unions ("COSATU"). The Government and Unions had proposed that the merger be approved subject to a wide range of and far reaching public interest conditions, failing, that the merger should then be prohibited. On the final day of the hearing the merging parties offered certain undertakings to the Tribunal which they agreed might be imposed as conditions for the approval of the merger in order to meet adverse perceptions about the effect of the merger on public interest.

The approach that the Tribunal followed was to examine the undertakings and the evidence relating to each undertaking to see whether the undertakings by the merging parties were adequate. The Tribunal came to the conclusion that they were adequate.

One of the concerns raised by the intervenors relates to the effect of the merger on employment. The effect on employment may not be confined to the jobs of those employed by the merged firm – it may extend to those not employed by the firm, but whose jobs may be threatened as a result of the merger. Further, employment concerns may not only relate to jobs lost, but also, as we explained in our reasons, have an adverse effect on conditions of employment. We examined the employment issues on the assumption that the merger will have certain adverse effects on employment and conditions of employment. However, Walmart's expansion plans suggested that retrenchments of the existing workforce were unlikely and that increased employment was more likely. Since the merging parties had given an undertaking that there would be no retrenchments at Massmart for two years for merger specific reasons and in light of the fact that post merger retrenchments were not likely we found that the undertaking was adequate.

A hotly contested issue during the merger was whether certain retrenchments that took place in June 2010 affecting certain Massmart employees were merger specific. Whilst the retrenchments coincided with the commencement of the merger negotiations there was no conclusive evidence that it was the cause. Despite this the merging parties agreed during the proceedings to give preference to re-employing those retrenched workers if vacancies arose and to recognise past seniority for that purpose.

A major concern articulated by the union intervenors was that the merger would likely lead to a diminution of their collective bargaining rights. We found that the undertaking to honour existing collective bargaining rights addressed that concern and that the creation of additional rights not enjoyed by the unions at that stage was neither merger specific nor appropriately part of our

limited public interest mandate in respect of effects on employment. In our view the undertaking went further in that the merging parties said that they would not challenge the status of SACCAWU as the largest representative of workers in its divisions. The parties also invited the Tribunal to determine the appropriate period for which this condition should hold and we determined that it should operate for three years.

Finally the parties offered an undertaking to address the local procurement concern raised by the intervenors. The intervenors were concerned that as a result of Walmart's global purchasing powers, which dwarfed those of Massmart, the merged firm would be able to source cheaper imports and hence switch some of Massmart's procurement away from local manufacturers to imports, with adverse effects on those employed in these sectors. No specific figure could be given to this apprehended substitution by the intervenors, and the merging parties contested this, alleging that at worst local importers would be replaced by direct imports and that there would not be a significant decrease in net procurement from local manufacturers. Again this concern was the subject of indeterminate evidence from either side. However, even if the concern was valid, the undertaking for an investment remedy as suggested by the merging parties was in our view appropriate, proportional and enforceable. It avoided concerns that the conditions suggested by some intervenors to impose a form of quota of mandatory domestic purchases on the merged entity, could violate the country's trade obligations, be anti-competitive or be incapable of practical implementation.

Furthermore the investment undertaking was a more positive response to the procurement concerns. Instead of insulating local industry from international competition for a period it sought to make local industry more competitive to meet international competition. Whilst at a macroeconomic level the remedy was modest, at the level of a single firm commitment it was not. Expenditure of R 100 million over a three year period is significant. Further the remedy sought to engage those very critics of Walmart in the decision making process over the disbursement of the funds, including representatives of small, medium and micro enterprises ("SMMEs").

3. **The role of competition authorities in the formulation and implementation of other policies e.g. regulatory reform, trade and industrial policies**
12. Please refer to the South African Competition Commission's Report.
4. **Resources of the competition authorities**
 - 4.1 ***Resources overall (current numbers and changes over previous year):***
 - 4.1.1 *Annual Budget:*
 13. R27 million/ USD 3.3 million

4.1.2 *Number of employees (excludes full-time and part-time Tribunal members)*

- Economist: 1 Researcher
- Lawyers: 5 Researchers
- Support Staff: 8
- 14 staff members in total

4.2 ***Human Resources***

14. The 6 Researchers manage all restrictive practice cases and merger cases.

4.2.1 *Period covered by the above information:*

15. 1 April 2011 to 31 March 2012

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

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