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## Global Forum on Competition

### SERIAL OFFENDERS: INDUSTRIES PRONE TO ENDEMIC COLLUSION

#### Contribution from South Africa

-- Session IV --

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## **SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION**

### **-- South Africa --**

1. The Competition Commission of South Africa (“the Commission”) in providing a response to the OECDs request for submission presents its input in terms of the broad areas of focus proposed by the OECD, namely, (i) sectors prone to repeated collusion, (ii) factors likely to lead to repeated collusion, and (iii) the implications for the enforcement in South Africa. Within each area of focus the Commission first outlines relevant case studies in South Africa where applicable and thereafter outlines key findings and principles emerging from these case studies in respect of each area of focus.

#### **1. Sectors prone to repeated collusion**

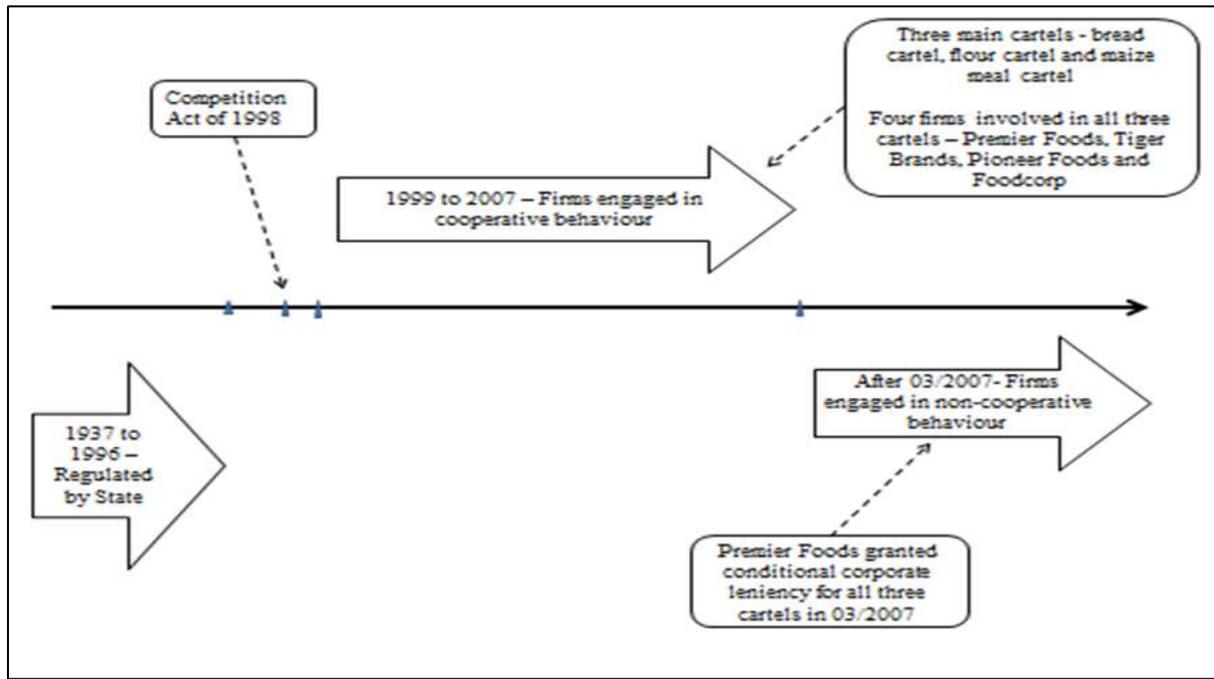
##### ***1.1 Cartel conduct in the food sector***

2. The legacy of apartheid in South Africa, largely due to extensive regulation and state support, resulted in an economy that was highly concentrated. Protectionist policies were aimed primarily at encouraging industrialization. Post-apartheid, the South African government took significant steps to liberalize many of the formerly price regulated markets. Industry restructuring led to the break-up of regulated cartels, but what lagged behind was the strict enforcement of the cartel prohibitions to ensure that competition was being preserved. It turns out that liberalization inadvertently, by increasing competition in formally price regulated markets, increased the incentives for firms to participate in cartels. Hence, many formerly price regulated industries turned to illegal collusion after liberalisation.

3. One example of such an industry is the grain industry in South Africa. For instance, the wheat value chain was extensively regulated by the state from 1937 to 1996. The Wheat Board was sole buyer and seller of wheat at predetermined prices. With liberalisation, the expectation was that millers would compete. Competition it was hoped would result in low prices of flour and bread. But instead of competing, the millers simply replaced state regulation with private regulation. A culture of co-operation and discussion was entrenched in the industry over many years.

4. The bread, flour and maize meals cartels were uncovered in 2007 following an application for corporate leniency by one of the cartel firms (see Figure 1). The successful prosecution of the bread and the milled wheat and white maize cartels demonstrates that cartels have pernicious effects on poor consumers despite the obstacles created by legal prohibitions on collusion and individual firm’s incentives to compete rather than to collude.

Figure 1: Timelines



#### a) Bread cartel

5. The bread industry was previously regulated in South Africa up until 1991. This involved an establishment of a quota system, product specifications such as weight, height and width per loaf prescribed, setting prices and volumes and determination of distribution areas for each producer. As a result of this regulated environment, regular meetings took place between bread producers largely, through an industry association, the Chamber of Baking (“the Chamber”) to whom all of the bakers belonged.

6. With deregulation, the legislative impediment to competition was removed. However, bread producers continued with their interaction with regard to common issues. The Chamber also continued as a forum for sharing information on the industry where issues such as deliveries of wheat, quality of wheat, unscrupulous bakers and security concerns were discussed freely and legitimately. Deregulation allowed for the growth in smaller and in-store bakeries.

7. There are four primary bakeries who enjoy a combined market share of between 50- 60 per cent of the domestic bread market in South Africa. Blue Ribbon Bakeries owned by Premier Foods, Albany Bakeries owned by Tiger Consumer Brands, Sasko and Duens Bakeries owned by Pioneer Foods and Sunbake Bakeries owned by Foodcorp. The remainder of the market is served by smaller independent bakeries. The four primary plant bakeries are all vertically integrated. Their milling operations account for more than 90 per cent of all milled wheat. As milling companies they sell flour to the independent bakeries. Plant bakeries and independent bakeries produce similar products and are competitors with each other.

8. In December 2006, the Commission received information of an alleged bread cartel operating in the Western Cape province. Following a preliminary investigation, the Commission initiated a complaint against Premier Foods, Tiger Brands and Pioneer Foods, all of whom allegedly had been involved in a bread cartel.

9. During the Commission's investigation into the Western Cape complaint, Premier Foods applied for leniency, indicating its willingness to fully co-operate with the Commission on its role in the bread cartel. Premier Foods disclosed to the Commission that it was a member of a bread cartel together with Tiger Brands and Pioneer Foods, fixing selling prices and other trading conditions. Premier Foods also revealed that the bread cartel operated in other parts of the country and that the cartel allocated markets. Cartel agreements were used to secure co-ordination at both national and regional levels and were mutually reinforcing. Based on this information, the Commission proceeded to initiate a second investigation into the allegation that a bread cartel operated in other parts of the country.

10. Tiger Brands followed Premier Foods and corroborated the information provided by Premier Foods. Tiger Brands provided further evidence on the bread cartel, including additional information that the bread cartel was also fixing flour and maize meal prices. In November 2007, the Competition Tribunal, South Africa ("the Tribunal") imposed a fine of R98 million on Tiger Brands for its role in the bread cartel. This represented about 5.7 per cent of its turnover from baking for the financial year 2006. Foodcorp, a respondent in the national complaint, entered into a settlement agreement with the Commission and in January 2009 the Tribunal confirmed the settlement agreement and imposed a fine of R45 million on Foodcorp. This represented 6.7 per cent of its turnover for baking operations for the financial year 2006. Pioneer Foods however, at this stage, denied that it was involved in a Western Cape cartel. After contested proceedings, in February, 2010 the Tribunal ruled that Pioneer Foods had engaged in fixing the price of bread products in the Western Cape province and nationally and imposed on Pioneer Foods a fine of R196 million.

11. Pioneer Foods conceded that it had, in respect of the Western Cape complaint, acted in contravention of section 4(1) (b) of the Competition Act (the section that prohibits collusion). This concession only came at the end of the hearings during legal argument. Pioneer Foods admitted that it co-operated with its competitors in fixing the price of standard bread, the discount granted to the agents or resellers and in fixing the price of toaster bread. It also admitted to market sharing arrangements.

#### **b) Wheat flour cartel**

12. There are four major firms that operate in the wheat milling industry in South Africa, namely Premier Foods, Tiger Brands, Pioneer Foods and Foodcorp. These four companies control in excess of 90 per cent of the wheat flour market.

13. The flour industry is highly concentrated and is characterised by multi-market contact, homogenous products and a history of collusion, both at the level of milled wheat and in the main end consumer product, bread. The firms interact in more than one market at the same time. In particular, the firms have extensive presence in a number of geographic markets. They bake bread, mill white maize and produce other food products such as pasta.

14. Private meetings and telephone contacts between the wheat milling firms began in 1999 and carried on until March 2007.<sup>1</sup> It appears that the cartel started subsequent to the de-regulation of the industry. Instead of competing, the flour producers replaced the regulated cartel with private agreements.

15. The cartel meetings were held at regional and national levels. Cartel meetings took place at different locations in the different provinces. For example, in some provinces, the meetings were better known as "church meetings". Indeed, the price fixing meetings were held in church halls and were, quite

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<sup>1</sup> See Commission press release, 13 December 2012 Competition Commission settles milling case with Foodcorp. Available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-settles-milling-case-with-Foodcorp-.pdf>

astonishingly, often preceded by a prayer. In other provinces, the firms organised themselves into regional forums and the meetings were not only structured in the sense that the meeting dates were agreed upon in advance, the meetings were chaired by different people.

16. Premier Foods, Tiger Brands, Pioneer Foods and Foodcorp have all admitted that their conduct contravened section 4 (1) (b) of the Competition Act. They have admitted that during the period between 1999 and 2007, they were all part of a cartel that fixed selling prices as well as the implementation dates of such prices and allocated markets for flour.

17. As already pointed out when Premier Foods applied for corporate leniency in terms of Commission's Corporate Leniency Programme ("the CLP") in the bread cartel case, it also indicated that the cartel extended to the milling industry as well.

18. Tiger Brands corroborated Premier Foods' allegations and entered into a consent agreement with the Commission in November 2007. In terms of the consent agreement, the Tribunal imposed a fine on Tiger Brands for its role in the bread cartel. Tiger Brands co-operated with the Commission in its investigation and was granted conditional immunity from prosecution for its conduct in the milling cartels.<sup>2</sup>

19. The flour cartel complaint was referred to the Tribunal for determination in March 2010. In November 2010, the Tribunal confirmed a consent agreement between the Commission and Pioneer Foods regarding Pioneer Foods' involvement in the milling cartels.<sup>3</sup> In December 2012, the Tribunal confirmed a consent agreement between the Commission and Foodcorp regarding Foodcorp's involvement in the milling cartels and imposed a fine.<sup>4</sup>

### c) **Flour cartels around the world**

20. Cartels in flour have also been discovered elsewhere around the world. In Europe, the Dutch, Belgian and German competition authorities have all recently prosecuted flour cartels. For example, on 22 December 2010, the Netherlands Competition Authority concluded that 15 flour milling firms agreed to share the market in order to limit competition and even went as far as to buy out and shut down rivals that would not join the cartel.

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<sup>2</sup> The Tribunal imposed a fine of R98 million on Tiger Brands for its role in the bread cartel. This represented about 5.7 percent of its turnover from baking for the financial year 2006. See Commission press statement, 12 November 2007, Tiger Brands admits to participation in bread and milling cartels and settles with Competition Commission. Available at: <http://www.compcom.co.za/2007-media-releases/>

<sup>3</sup> See also Bonakele and Mncube (2012), 'Designing appropriate remedies for competition law enforcement: The Pioneer Foods Settlement Agreement', *Journal of Competition Law and Economics*, for details on the design and objectives of the Pioneer Foods settlement agreement. The remedies that were concluded with Pioneer Foods constitute a major measure of "success" in the enforcement of competition law in developing countries. They included, among others, an administrative fine, part of which by agreement was set aside for the creation of an Agro-processing Competitiveness Fund aimed at lowering the barriers to entry, as well as a commitment to reduce prices on the sale of flour and bread over an agreed period designed to stimulate rivalry while at the same time enabling smaller non-vertically integrated participants to compete in bread.

<sup>4</sup> The Tribunal imposed a fine of about R89 million which amounted to 10 per cent of the affected turnover of its 2010 milling division. See Commission press release, 13 December 2012, Competition Commission settles milling case with Foodcorp. Available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-settles-milling-case-with-Foodcorp-.pdf>

**d) Milk cartel**

21. Historically, milk and dairy boards regulated the industry through the enforcement of minimum price regulation for certain products. While these control boards were abolished in 1998, the Commission has found evidence of milk processors continued price fixing and market allocation, both with respect to buying milk from producers (farmers) and in respect of selling processed milk products to retailers.

22. The Commission referred a complaint against seven milk processors to the Tribunal in December 2006.<sup>5</sup> The processors were Clover, Parmalat, Nestlé, Ladismith Cheese, Milkwood Dairy, Woodlands Dairy and Lancewood. The complaints related to collusion and/or price fixing at the milk procurement level, including exchange of information and exchanging milk between regions between processors instead of entering each other's regions to procure milk, as well as price fixing in the sale of processed milk and dairy products. There was also a complaint relating to exclusive dealing in inducing suppliers not to deal with competitors. However, the Commission was eventually forced to withdraw its case against Clover, Nestle, Parmalat and Ladismith Cheese in April 2011 on legal grounds.

23. The Commission is currently conducting several investigations in the dairy industry, including an alleged abuse of dominance contravention; exemption applications; as well as cartel conduct.

**e) Principles emerging from these case studies**

24. There are a number of lessons to draw. First, the South African competition regime, like elsewhere around the world, prohibits cartels. Yet, firms continue to find collusion to be very profitable. Perhaps one reason for the persistence of cartels is a desire to have a 'quiet life' on the part of managers. Managerial slack may provide a motive of managers forming a cartel that may not show up in the form of profitability but x-inefficiencies. The illegality per se of cartel conduct has not been an efficient deterrent. For this reason, the South African competition authorities have increased their effort to detect and deter cartels.

25. Second, significant industry restructuring (such as the liberalisation, ushered in by the first democratic government) led to the break-up of regulated cartels. Liberalisation alone, without vigorous anti-cartel enforcement, may give rise to increasing cartel activity rather than competition. In the grain industry, liberalisation may have inadvertently, by increasing competition in formerly protected markets, increased the incentives for firms to participate in cartels.

26. Third, since its adoption, the CLP has proved a formidable tool for cartel detection. The uncovering of the bread, flour and maize meal cartels through the CLP illustrates that the detection of one cartel may often lead to the detection of other cartels

**1.2 Construction sector and construction inputs**

**a) Precast concrete pipes, culverts and manholes cartel**

27. The Commission was initially alerted to collusive conduct in the construction sector as a result of a CLP application by Rocla, a subsidiary of Murray and Roberts in 2007. In its application, Rocla informed the Commission that it had engaged in anti-competitive conduct in the form of price fixing, market allocation and collusive tendering in the market for precast concrete pipes, culverts and manholes. The Commission subsequently initiated an investigation in these markets on the 19<sup>th</sup> of March 2008. The

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<sup>5</sup> The Commissioner vs. Clover SA Ltd and 5 others (Competition Tribunal Case Nr 103CRDec06).

Commission investigation revealed that the cartel had been in operation since 1937 and confirmed the various conduct alleged by Rocla.

28. The cartel operated mainly in three provinces of South Africa namely Gauteng, Kwazulu- Natal and the Western Cape. One of the cartel members was designated as the “banker” and their primary function was the compilation of available tenders in a specific period. After all available tenders were compiled; allocation of individual tenders was made to each firm. Discounts were offered from the price lists in order to ensure that “*the allocate*” firm won the specific contract. In addition, to circumvent any suspicion of anti-competitive behaviour, cartel members offered different price lists and discounts in their collusive bidding. As a monitoring mechanism, a monthly summary of all allocated tenders was provided to members in order to ensure that each member was within the allocated volumes.

29. Subsequently all the firms except Gralio admitted their involvement in the cartel and various fines were imposed on them<sup>6</sup>. The case against Gralio was dismissed by the Tribunal in November 2010.<sup>7</sup>

#### **b) Construction projects cartels**

30. The Commission has also uncovered collusive conduct in the construction sector such as the bid rigging and collusive tendering on various construction projects.

31. The Commission initiated an investigation into the construction sector on the 1<sup>st</sup> of February 2009 relating to tenders for the construction of 2010 FIFA World Cup stadia. Shortly thereafter, the second investigation was initiated on the 1<sup>st</sup> of September 2009 and this covered all large and small tenders for construction projects. These included larger construction companies such as Murray and Roberts, Group Five, Stefanutti Stocks, WBHO and Aveng.

32. Given this response from the construction sector, the Commission developed and launched a fast track settlement programme on the 1<sup>st</sup> of February 2011. The principles of the fast track settlement programme were adopted from similar programmes utilised by the Office of Fair Trade (“OFT”) and the Netherlands Competition Authority (“NMA”).<sup>8</sup> The aim of this programme was to incentivise firms to enter into a comprehensive settlement with the Commission which was financially beneficial to them.<sup>9</sup> Through the fast track settlement programme, construction firms admitted to bid-rigging 298 contracts to the value of R111.9 billion. Of these contracts 141 were non-prescribed. The Commission in 2013 concluded settlements with the majority of the firms involved in bid rigging and collusive tendering of projects that took place between 2006 and 2009. The total administrative penalties from that settlement process amounted to R1.46 billion.<sup>10</sup>

<sup>6</sup>See The Commission’s 2011/2012 Annual report page 10 available at : <http://www.compcom.co.za/wp-content/uploads/2014/09/COMPETITION-COMMISSION-AR11-12-LOW-RESWITH-HYPERLINKS.pdf>

<sup>7</sup> See Case no. 23/CR/Feb09

<sup>8</sup> International experience of bidding rigging in the construction sector specifically in the United Kingdom where widespread bid rigging practises was covered between 2000 and 2006 also prompted the Commission to initiate an investigation. Furthermore other international experience of bid rigging in construction projects in the USA, South Korea and Netherlands also prompted the Commission to conduct its own investigation.

<sup>9</sup>See The Commission’s invitation to Firms to Settle Available at : <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf>

<sup>10</sup> See The Commission’s 2013/2014 Annual report page 9 available at : <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-AR-201314-web.pdf>

**c) Principles emerging from these construction cartel case studies**

33. Collusive tendering is endemic in the construction sector. As a result of the investigations, the Commission received approximately 150 marker applications (intention to apply for leniency) and 65 CLP applications which implicated the majority of medium and large construction firms. The Commission's investigation follows similar investigations into bidding rigging in the construction sector specifically in the Netherlands and the United Kingdom.

**2. Factors likely to lead to repeat collusion**

**2.1. The cement industry in South Africa**

**a) History of collusion in South Africa**

34. In the cement industry, for many years in South Africa dating back to the 1940s, cement producers were granted an exemption, 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.<sup>11</sup>

35. The Competition Board, the predecessor to the Commission, withdrew the exemption in 1995. In view of the fact that the cement producers had operated under the auspices of a lawful cartel for decades, they were afforded a grace period until the end of September 1996 to terminate the lawful cartel arrangements.

36. In anticipation of this termination, in May 1995, there were various multilateral discussions among cement producers that took place. These discussions culminated in an agreement among the cartel members to allocate market shares ("the 1995 agreement"). Broadly, in 1995 the respondents agreed to target market shares as follows:

- i) PPC was allocated a market share of 42 – 43%;
- ii) Afrisam was allocated a market share of 35 – 36%; and
- iii) Lafarge was allocated a market share of 22 – 23%.

37. At this stage NPC was still jointly owned by PPC, Afrisam and Lafarge. The 1995 agreement included NPC's market share within each of the primary producers' allocated share. NPC's market share was estimated to be about 11% – 12%, resulting in PPC's, Afrisam's and Lafarge's allocated share's being approximately 39%, 31% and 18% respectively.

38. On 02 June 2008, the Commission initiated an investigation against the cement producers alleging that PPC, Lafarge, Afrisam and NPC-Cimpor had entered into restrictive horizontal agreements. In pursuance of its investigation the Commission raided the premises of the four cement producers on 24 June 2009. Subsequently, PPC applied for leniency and confirmed the existence of a cartel among the four cement producers.

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<sup>11</sup> These institutional arrangements included the Cement Distributors (South Africa) (Pty) Ltd ("CDSA"), Cape Sales (Pty) Ltd ("Cape Sales") and the South African Cement Producers Association ("SACPA"). As part of these institutional arrangements, NPC, Slagment and Ash Resources (Pty) Ltd were jointly owned by PPC, AfriSam and Lafarge.

39. However, this was not the first raid the Commission has instituted on cement producers. As early as 1999, the Commission dawn raided cement producers following a suspicion of cartel activity in the market. This operation was successfully challenged by PPC on legal grounds, which resulted in the Commission having to return all seized documents.

40. On 01 November 2011, Afrisam admitted that it had entered into agreements and arrangements with PPC, Lafarge and NPC to divide markets and indirectly fix the price of cement.<sup>12</sup> Lafarge has also admitted that it entered into agreements and arrangements with PPC and Afrisam that extended to NPC to divide the market through allocation of market shares and indirectly fix the price of cement.<sup>13</sup> The Commission is pursuing its case against NPC-Cimpor.

41. To illustrate the problem of detection in the cement industry, consider the fact that in 2000, the Commission issued summons (later withdrawn in July 2000) and raided PPC and Slagment (a firm involved in the processing of blast furnace slag which is used as an extender in some cements) in August 2000. Slagment was owned in equal shares by PPC and two other cement producers, known as Alpha (later known as Holcim and now known as Afrisam) and Lafarge. PPC managed and controlled Slagment.

42. PPC and Slagment challenged the raid successfully resulting in the return of the raided documents. Because of the successful challenge, it would take the Commission another 8 years to investigate concerns of coordination.

43. In 2008, the Commission conducted a scoping study which led to the initiation of an investigation against the cement producers alleging that PPC, Lafarge, Afrisam and NPC-Cimpor were involved in a cartel. Shortly after the initiation, PPC applied for leniency and confirmed the existence of a cartel among the four cement producers.

44. Without the leniency application there is no telling on whether or when the explicit cartel would have been discovered.

#### **b) Cement cartels around the world**

45. Cartels in the cement industry have been uncovered by various competition authorities over the past 20 years. A brief summary highlighting firms that are operating in South Africa and also implicated for cartelising in other jurisdictions is provided below:

<b>Country and cartel period</b>	<b>Respondent/(s)</b>	<b>Decision</b>	<b>Description</b>
<b>EU (1983-1993)- grey cement</b>	Lafarge, Holcim and others	1994	Market and customer allocation, information exchange and collective boycotting
<b>EU (1982-1988)-white cement</b>	Lafarge, Holcim and others	1994	Market and customer allocation, information exchange and collective boycotting
<b>Germany(1992-1998)</b>	Lafarge, Holcim and others	2003	Market division
<b>Romania (2000-2004)</b>	Lafarge, Holcim and others	2005	Price fixing
<b>Brazil (2002-2006)</b>	Lafarge, Holcim and others	2006	Price fixing and dividing markets

<sup>12</sup> Tribunal Consent Order, the Commission vs Lafarge Ltd, Case No.: 93/CR/Nov11.

<sup>13</sup> Tribunal Consent Order, the Commission vs Lafarge Ltd, Case No.: 23/CR/Mar12.

<b>India (various episodes between 1990 and 2006)</b>	Lafarge, Holcim and others <sup>14</sup>	2012	Restricting supply and price fixing
<b>EU (Germany, France, UK, Benelex)<sup>15</sup></b>	Lafarge and others	2002	Information Exchange; concerted price increases
<b>Italy</b>	Holcim and others	2004	Cartel activity
<b>Australia</b>	Holcim and others	2008	Concerted exclusionary practices
<b>Poland</b>	Lafarge and others	2009	Price fixing; market sharing
<b>Honduras</b>	Lafarge and others	2010	Price fixing; market sharing
<b>Colombia</b>	Holcim and others	2010	Price coordination; customer allocation
<b>Argentina</b>	Holcim and others	2013	Price fixing; market sharing; information exchange
<b>Belgium</b>	Holcim and others	2013	Concerted actions
<b>United Kingdom</b>	Holcim and others	2014	Collusion, exclusionary practices

Source: Commission research based on Kluwer Competition Law Database

46. It is evident that in addition to its involvement in the South African cement cartel, Lafarge was also implicated in most of these cartels uncovered in different jurisdictions. Based on fact that there is a clear repetition of the price fixing and market and/or customer allocation conduct globally, it appears the cement industry displays underlying structural features that make it prone to collusion. The key factors with reference to South Africa are examined in the section that follows.

### c) Key factors that facilitated repeated collusive conduct

47. The history of the “legal” cartel and market characteristics, facilitate an environment conducive for repeat collusion in this industry.

48. With reference to market characteristics, the high barriers to entry, homogeneity of the cement product and few active players in this industry were some of the structural factors that aided in the formation of the cartel. The large economies of scale, the need to access key inputs such as limestone and the importance of transport infrastructure all contribute to high barriers to entry.

49. For example, since 1934 it was only in January 2014 that South Africa experienced the first greenfield entry in the cement industry (Sephaku cement)<sup>16</sup>. Although Sephaku cement obtained its first limestone mining right in the financial year ending February 2009<sup>17</sup>, it took Sephaku cement about 5 years and R5 billion after having secured limestone mining rights to commence producing cement.<sup>18</sup>

## 3. Implications for enforcement of competition law in South Africa

### 3.1. Treatment of serial offenders in South Africa

#### a) Administrative penalties

50. Section 59(3) (g) of the Competition Act no 89 of 1998 as amended states that:

<sup>14</sup> The matter is currently under appeal.

<sup>15</sup> Case No COMP/E-1/37.152 – Plasterboard, Decision 2005/471/EC (summarised in OJ 2005 L 166, p. 8).

<sup>16</sup> WhoOwnsWhom Report: Manufacture of Cement, Lime and Plaster, July 2014, p.1.

<sup>17</sup> See Sephaku Holding’s Financial Statements for the 2009 financial year accessed at <http://www.sephakuholdings.co.za/investors.html>

<sup>18</sup> Sephaku casts R1.8bn project in cement, *Business Report Online*, April 21 2011, accessed at: <http://www.iol.co.za/business/companies/sephaku-casts-r1-8bn-project-in-cement-1.1060296>

*“When determining an appropriate penalty, the Competition Tribunal must consider the following:  
(g) Whether the respondent has previously been found in contravention of this Act.”*

51. The above consideration indicates that both the Commission and Tribunal treat serial offenders in a very strict manner when adjudicating their matters.

**b) Merger regulation**

52. Section 12 A (2) of the Act reads:

*“When determining whether or not a merger is likely to substantially prevent or lessen competition, the Commission must assess ... the probability that the firms in the market **after** the merger will behave competitively or **cooperatively**, taking into account any factor that is relevant to competition in the market including.....**the history of collusion in the market.**” (Our emphasis)*

53. The history of collusion is one factor that the Commission considers in merger regulation. For example, given the history of collusion in the cement industry in South Africa and globally, the Commission recommended that the proposed merger between Holcim and Lafarge be approved with the conditions. Although Holcim were not active in the South African market prior to this transaction, the Commission raised a concern regarding the structural links between competitors brought about by the proposed merger. Holcim had a 2.03% shareholding in Afrisam, a direct competitor of Lafarge SA. The Commission was of the view that the structural link was likely to aid and facilitate tacit coordination in this market taking into account the history of collusion. Accordingly the Commission proposed the following conditions to remedy the concerns:

- i) Holcim shall transfer its 2.03% shareholding in Afrisam to a Trust within 6 months from approval of this transaction;
- ii) Holcim shall divest of its shareholding in Afrisam within 3 years from date of approval of this transaction; and
- iii) Holcim shall notify the Commission in the event that it re-acquires any controlling and/or non-controlling shareholding interest in Afrisam and/or any other entity which is active in the cement and cementitious products market in South Africa.

54. The merging parties were initially not in agreement with the proposed divestiture condition and applied for a review with the Tribunal. Both the merging parties and the Commission filled economic expert reports regarding the treatment of structural links in merger reviews. Shortly thereafter before the Tribunal could commence with the hearing proceedings, the merging parties agreed to divest its 2.03% stake in Afrisam.

55. In addition, the Tribunal normally follows a six step approach when calculating fines for firms that have engaged in collusive conduct and wish to settle the matter with the Commission. As part of the six step approach, the Tribunal also considers factors that might mitigate and/or aggravate the initial base settlement amount. One of the factors that the Tribunal would consider in this determination of aggravating factors is whether the firm in question is a first time offender or a serial offender. Thus if a firm is a serial offender, the base amount will be increased by an appropriate amount.

**c) Implications for enforcement planning and priorities in South Africa**

56. Based on the history of repeated cartel conduct in the construction services; cement and concrete and food sectors, the Commission has prioritised certain sectors in its merger review and enforcement functions. Accordingly construction services; cement and concrete and food sectors all form part of priority sectors amongst other sectors. This prioritisation gets reviewed on a yearly basis and depending on what transpired in these sectors, amendments are made on the prioritisation of sectors.

57. Furthermore, the Commission in the construction case has demonstrated a willingness to engage in a fast track settlement process in order to alleviate any burden in terms of investigations and prosecutions of cartel conduct, particularly involving repeat offenders.

58. Finally, Competition Authorities in South Africa have also found creative remedies in addressing instances where there have been repeated cartel conduct including commitments to reduce pricing and increase capital investment as outlined in the Pioneers Food settlement agreement below.

**d) Other conditions imposed on cartel conduct in South Africa**

59. The Pioneer Foods settlement agreement had, among others, the purpose of enhancing and restoring competition in the relevant markets. The agreement sought to promote competition in pursuit of the objectives and purposes of the Act. Pioneer Foods undertook in terms of the proposed settlement agreement to the following:

60. First, it would desist from the conduct that infringed or might infringe the Act, continue its compliance program to prevent future infringements, and cooperate with the Commission in its prosecution of others.

61. Second, it would pay a fine of R500 million to the National Revenue Fund. In addition, the Commission, the National Treasury, and the Economic Development Department (“the EDD”) separately agreed that the EDD would submit a budgetary proposal and business case motivating for the creation of an Agro-processing Competitiveness Fund of R250 million drawn from the penalty and to be administered by the Industrial Development Corporation (“IDC”).

62. Third, it would reduce the prices of certain of its products for an agreed period of time up to the total value of R160 million. Fourth, it would maintain its capital expenditure budget and just increase it by R150 million.

63. Pioneer Foods’ conduct also affected the structure of the relevant markets. This conduct, coupled with the legacy of the previous regime with its state-sanctioned cartels, created an environment that did not encourage or facilitate entry.

64. The Commission regarded it as its mandate, not just to address the cartel conduct through punishment and deterrence, but also to address the structure of these markets through the Agri-fund. The Agri-fund is aimed at facilitating new entry into the value chain in the agro-processing industry, specifically by small to medium enterprises (SMEs) that are also the domain of historically disadvantaged South Africans.