

Unclassified

DAF/COMP/AR(2016)49

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

21-Nov-2016

English - Or. English

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

DAF/COMP/AR(2016)49
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SOUTH AFRICA

--2015--

29-30 November 2016

This report is submitted by South Africa to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 November 2016.

JT03405719

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. English

TABLE OF CONTENTS

Submission by the Competition Commission: 1 April 2015 To 31 March 2016	3
Executive Summary	3
1. Changes to competition laws and policies, proposed or adopted	4
1.1 Summary of new legal provisions of competition law and related legislation	4
1.2 Other relevant measures, including new guidelines	4
2. Enforcement of competition laws and policies	6
2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions	6
2.2 Mergers and acquisitions	9
3. The role of competition authorities in the formulation and implementation of other policies,	12
3.1 Inputs into policy and regulation	12
4. Resources of competition authorities	12
4.1 Resources overall (current numbers and change over previous year):	12
5. Summaries of or references to new reports and studies on competition policy issues	13
5.1 Impact assessments	13
5.2 African Competition Forum research	15
5.3 Market inquiries	15
Submission by the Competition Tribunal: 2015/2016	17
1. Changes to competition laws and policies, proposed and adopted	17
2. Enforcement of competition laws and policies	17
2.1 Action against anticompetitive practices, including agreements and abuse of dominant positions	17
2.2 Mergers and acquisitions	17
3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies	18
4. Resources of the Competition Tribunal	18
4.1 Resources overall	18
4.2 Human Resources applied to enforcement, mergers and advocacy: Not applicable	18
4.3 Period covered by the above information 1 April 2015 – 31 March 2016	18
5. Summaries of or references to new reports and studies on competition policy issues	18

**SUBMISSION BY THE COMPETITION COMMISSION
1 APRIL 2015 TO 31 MARCH 2016**

Executive Summary

1. The 2015/2016 financial year brought significant developments for the South African competition agencies: the Competition Commission of South Africa (CCSA) and the Competition Tribunal of South Africa (CTSA). On the legislation and policy front, law makers introduced personal criminal liability for directors or managers who knew about or participated in cartel conduct. The new law became effective in May 2016, which was soon after the financial year end, but because of the far reaching implications of this development in South African law we highlighted it in our 2015/2016 annual report, as we do in the pages that follow. The move was not without controversy but the CCSA is working with relevant agencies to bring about a smooth transition into the new criminal dispensation. The CCSA also published final guidelines on two subjects: (1) its approach to assessing public interest concerns in mergers and (2) its approach to calculating administrative penalties for anti-competitive conduct.

2. The CCSA and CTSA continued their enforcement action against cartels, restrictive vertical agreements and abuse of dominance. The agencies tackled cartels in several industries including construction, car parts, foreign exchange, waste removal and furniture removal. The CTSA handed down its first predatory pricing decision, finding that the CCSA had successfully made out a case against Media24, a multimedia firm, for pushing a rival out of the market for community newspapers. However the Constitutional Court of South Africa dealt the CCSA a blow when it found that the CCSA could not appeal a decision handed down by the Competition Appeal Court (CAC) – effectively finding that Sasol Chemical Industries had not contravened the Competition Act as previously alleged by the CCSA.

3. The retail sector came under the spotlight this year with the launch of a new market inquiry focusing on all levels of the retail chain. The market inquiry derives its powers from a 2013 amendment to the Competition Act which gave the CCSA the power to conduct broad studies into the state of competition in a selected industry.

4. Three major transactions were notified in the telecommunications industry this year. These transactions involved some of the largest telecommunications networks in the country all bidding to take advantage of the next frontier in communication technology. Only one merger, the Telkom / BCX deal, went all the way to a hearing before the CTSA. The other two mergers were abandoned before reaching that point. After a hearing the CTSA approved the Telkom / BCX merger with conditions.

5. Finally we carried out or took part in several studies which assessed the impact of the CCSA and CTSA's interventions after the fact. We have selected some for discussion in this annual report. Included in these were assessments of the local cement industry, the fertiliser industry and the fruit and vegetable industry. For the most part the industries assessed display positive competition developments since the interventions of the competition agencies.

Tembinkosi Bonakele, 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

6. South Africa's Minister of Economic Development announced that, from 1 May 2016, directors or persons with management responsibility who participate in cartel conduct or who are aware of cartel conduct and fail to take appropriate action can be criminally prosecuted. The new provision holds a "director of a firm" or a person "having management authority within the firm" personally and criminally liable for the collusion the company engaged in if the person (1) caused the firm to collude with other firms; or (2) "knowingly acquiesced" in the firm colluding with others. If convicted, the director or manager could face a fine up to R500 000 (\$35 714.28)¹ or up to 10 years imprisonment, or both.

7. Even though the law has now officially been activated, there is still some uncertainty about how it will affect the CCSA's ability to prosecute cartels in the long run, since the CCSA does not have criminal jurisdiction. This rests with the National Prosecuting Authority (NPA), which is a separate state entity formed under different legislation and operating within the Department of Justice. The NPA's prosecution can only proceed after a finding by the CTSA or the Competition Appeal Court that the firm has engaged in cartel conduct or after the firm has admitted to having engaged in cartel conduct by virtue of a consent agreement.

8. As such there could be conflict between a firm's desire to confess under the CCSA's corporate leniency policy and the individual's desire not to incriminate himself/herself ahead of a possible criminal prosecution.

9. Anticipating this conflict the new provision states that the CCSA (1) may not request the prosecution of the director if the [CCSA] has certified that the person is deserving of leniency; and (2) may make submissions to the [NPA] in support of leniency for the director if the [CCSA] has certified that the person is deserving of leniency.

10. What remains to be seen is whether the new provisions will send existing cartels underground or whether the new law will act as a sufficient deterrent to collusion. The CCSA is in the process of negotiating a memorandum of understanding with the NPA in order to offer directors and managers a degree of certainty should they contemplate coming forward to confess their role in a cartel.

11. The Ministry of Economic Development has announced its intention to strengthen the competition authority's ability to address abuse of dominance and excessive pricing as well.

1.2 Other relevant measures, including new guidelines

1.2.1 Guidelines on public interest considerations

12. In June 2015 the CCSA published its guidelines on the approach it follows and the types of information it requires when evaluating public interest considerations in terms of the Competition Act. The CCSA did this in an effort to bring some certainty to stakeholders on the way the CCSA assesses public interest factors in merger regulation.

¹ At exchange rate of \$1 = R14.00

13. In the Competition Act public interest considerations include the effect of the merger on (1) a particular industrial sector or region; (2) employment; (3) the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive; and (4) the ability of national industries to compete in international markets. The competition authorities are obliged in terms of the Competition Act to consider both the impact that a proposed merger will have on competition in a relevant market and whether a proposed merger can or cannot be justified on public interest grounds.

14. According to the guidelines the CCSA will, in general, adopt the following steps when analysing each of the above public interest provisions:

- determine the likely effect of the merger on the listed public interest grounds;
- determine whether such effect, if any, is merger specific. A merger specific public interest effect is essentially an effect that is causally related to, or results / arises from, the merger.
- determine whether such effect, if any, is substantial;
- in the first line of enquiry, consider any likely positive effects to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry can be justified which may result in the approval of the merger, with or without conditions; and
- consider possible remedies to address any substantial negative public interest effect.

15. In applying this approach, where an effect is found to be non-merger specific, the enquiry into that effect will stop at that stage. Likewise, where an effect is found to be merger specific but not substantial, the enquiry into that effect will stop at that stage.

16. In preparing the guidelines, the CCSA followed a consultative process which entailed obtaining input from various stakeholders including legal practitioners, business, civil society, and also held workshops in order to discuss comments received and to get more input from stakeholders.

17. The full text of these guidelines can be accessed at <http://www.compcom.co.za/wp-content/uploads/2016/01/Gov-Gazette-Public-Interest-Guidelines.pdf>.

1.2.2 Guidelines for the determination of administrative penalties

18. In May 2015 the CCSA published its final guidelines for the determination of administrative penalties for anti-competitive conduct. They set out the general methodology that the CCSA follows when calculating administrative penalties for consent orders, settlement agreements and for recommending an administrative penalty in cases that the CCSA refers to the CTSA.

19. Prior to the CCSA guidelines the CTSA developed a six-step method for calculating penalties when it handed down its judgment in the *Competition CCSA v Aveng and others* case. The CTSA's approach in this judgment was later endorsed by the Competition Appeal Court. It was this methodology together with guidelines and penal codes developed by other jurisdictions - such as the European Commission, the United States Department of Justice and the Federal Trade Commission and the United Kingdom's Competition and Market Authority – that formed the basis of the CCSA's guidelines.

20. In terms of the guidelines the CCSA applies the following steps when calculating penalties for anti-competitive conduct.

1. Determine the affected turnover in the base year.
2. Calculate the base amount, being that proportion of the affected turnover relied upon.
3. Multiply the amount attained in 2 above by the duration of the contravention.
4. Round off the figure obtained in 3 above if it exceeds the cap provided for by the Competition Act.
5. Consider factors that might mitigate and/or aggravate the amount reached in 4 above by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it.
6. Round off the amount determined in 5 above if it exceeds the cap provided for in the Competition Act.

21. The full text of these guidelines can be accessed at <http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Guidelines-for-Determination-of-Admin-Penalties-MAY-2015.pdf>

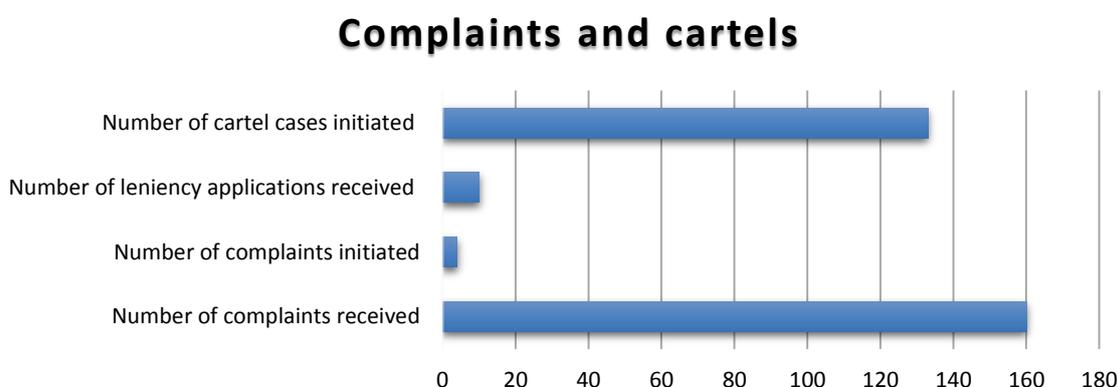
2. Enforcement of competition laws and policies

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

2.1.1 Summary of activities

22. The CCSA's enforcement actions comprise complaints against vertical restraints and abuse of dominance. These are simply referred to as complaints in the diagram 1 below. Enforcement actions also comprise cartel investigations. In this financial year the CCSA initiated 133 cartel investigations and received 10 applications for corporate leniency. In the same period the CCSA received 160 complaints against vertical restraints and abuse of dominance from external parties while it initiated 4 complaints. The CCSA conducted five dawn raids during 2015/16, an increase from the four dawn raids conducted in 2014/15.

23. Most of the cartel cases the CTSA dealt with this year were settled by way of consent orders between the relevant respondents and the CCSA. The CTSA imposed fines of R337.25 million (\$24 million) on 19 firms for collusion in various industries such as construction (20.10% of the fines imposed) and transportation (62.67% of the fines imposed).

Figure 1: Enforcement activities of the CCSA

2.1.2 Description of significant cases, including those with international implications

- **Automotive components**

24. In this financial year the CCSA initiated 119 investigations against manufacturers of automotive components. These included Maruyasu Industrial Company Limited, Hitachi Company Limited, Denso Corporation, Mitsubishi Electric Corporation, Tokai Rika Company Limited, NGK Spark Plug Company Limited, Mikuni Corporation, Aisin Industries Company Limited, Panasonic Corporation, Futuba Corporation and Fijistu-Ten Limited.

25. These companies colluded when bidding for tenders to supply car parts to original equipment manufacturers, such as BMW, Mercedes Benz, Toyota, Ford and Nissan.

- **Foreign exchange cartel**

26. In a case with far reaching international implications, the CCSA initiated an investigation into several global banking and financial institutions. These included Barclays Bank Plc, BNP Paribas and Citigroup. The financial institutions allegedly colluded when trading in foreign currency – specifically the US Dollar and South African Rand currency pair – in that they directly or indirectly fixed the prices of bids, offers and bid offer spreads. The investigation is ongoing.

- **Construction cartel**

27. The case against WBHO Construction (Pty) Ltd and Group Five Construction Ltd was referred to the CTSA for prosecution. The two competitors in the construction industry allegedly colluded by fixing contractual conditions relating to a local road construction project.

28. The CCSA's investigations found that WBHO and Group Five held a meeting through the South African Federation of Civil Engineering Contractors Association (SAFCEC) during which they discussed and agreed on contractual conditions they needed for the N17 tender issued by the South African National Roads Agency Limited (SANRAL). They then requested SAFCEC to approach SANRAL on their behalf and demand that SANRAL change its tender conditions and issued the tender with the conditions they agreed on.

29. The CCSA alleged, before the CTSA, that this conduct amounts to fixing of trading conditions which is prohibited in the Competition Act.

- **Furniture removal cartel**

30. The CCSA referred cartel complaints against several furniture removal companies to the CTSA for prosecution. This followed its investigations which included a dawn raid in November 2010. The investigation revealed that over 3 500 relocations tenders were subjected to collusion by the 66 companies providing furniture removal services. In terms of the collusive arrangement, the firm that was contacted first regarding a request for quotation for furniture removal services would offer to source two or more quotations on behalf of the customer, and would then contact two or more of its competitors and request the competitors to submit cover prices. The majority of the furniture removal firms settled with the CCSA leaving only 13 respondents before the CTSA for prosecution.

- **Bicycle cartel**

31. In this matter, the CCSA concluded 17 settlement agreements with various firms implicated in the bicycle cartel on the basis that each of the firms admitted to fixing the price of bicycles and accessories in contravention of the Competition Act. The firms agreed to fully cooperate with the CCSA in the prosecution of the remaining respondents. The 17 settlement agreements did not include an administrative penalty.

32. The CTSA subsequently imposed a fine of R4 627 412.00 (\$330 529.42) against Omnico and a fine of R4 250 612.00 (\$303 615.14) against Coolheat for contravening the Competition Act.

- **Civil claims**

33. Two cartel cases this year were referred to the CTSA for purposes of ensuring that affected consumers retained the right to claim damages from the cartel members. The respondents in both cases were construction companies which had received conditional immunity from prosecution from the CTSA after confessing their respective roles in two separate construction cartels. Since the Competition Act only affords affected consumers the right to claim damages after the consumer has obtained a declaratory order from the CTSA confirming that the respondent participated in a cartel, it was necessary that the CCSA refer these two companies to the CTSA despite them being granted conditional immunity from prosecution.

34. This approach by the CCSA paves the way for consumers affected by these cartels to claim damages in the civil courts.

- **Excessive pricing case against Sasol**

35. In the 2014/15 financial year, the CTSA found that Sasol Chemical Industries Ltd (Sasol) had charged excessive prices for propylene and polypropylene between 2004 and 2007, to the detriment of customers. Propylene and polypropylene are polymers used in the manufacture of plastic products. The CTSA imposed an administrative penalty of R534 million against Sasol for the excessive pricing contravention.

36. The matter was taken on appeal to the Competition Appeal Court (CAC). In its finding the CAC accepted most of the evidence presented by Sasol, effectively rejecting the evidence presented by the CCSA. The CCSA then applied for leave to appeal to the Constitutional Court, the highest court in South Africa, against the CAC decision.

37. In November 2015 the Constitutional Court refused the CCSA's request saying that it had no prospects of success.

- **Procedural matters**

38. In the course of enforcing competition law, the CCSA constantly faces challenges to the manner in which it initiates, investigates and finally prosecutes cases of anti-competitive conduct. In this year the courts provided clarity in several procedural matters, some of which are listed below.

- In July 2015 the North Gauteng High Court delivered a judgment in favour of the CCSA and dismissed a review application brought by the Allens Meshco Group of Companies (AMG) challenging the CCSA's refusal to grant them leniency for their participation in a cartel in the wire and wire products market. The court's judgment clarified that the filing of a marker application does not amount to an application for leniency, and for the CCSA to grant leniency to a party, such party will have to provide it with sufficient information to establish the cartel conduct involving the applicant and any other cartel members.
- In the CCSA's August 2015 case against Pioneer Fishing (Pty) Ltd (Pioneer Fishing) and others, the Tribunal clarified the level of specificity required in a complaint initiation. In this matter, Pioneer Fishing brought an application to challenge, amongst other things, the scope of the CCSA's investigation and its subsequent referral of the case to the Tribunal.
- In November 2015, the Supreme Court of Appeals (SCA), the court that hears appeals from the high court or the CAC in South Africa, found that the CTSA had no power to issue a declaratory order against a firm which had been granted conditional immunity by the CTSA, had been cited in the court papers before the CTSA and against whom no relief was sought in the papers. A declaratory order gives an affected consumer the right to claim damages from a cartel member. The CTSA sought to appeal this finding with the Constitutional Court but subsequently withdrew its appeal when the parties involved reached a settlement.
- In January 2016 the CTSA dismissed Group Five's application to compel the CCSA to produce certain documents supporting its complaint referral. In dismissing the application, the CTSA held firstly, that there was not sufficient reference of the requested documents in the complaint referral to give rise to any entitlement. Secondly, that the Competition Act gave a right of access to a record held by a public body, but not the right for a litigant to compel premature discovery in legal proceedings. Accordingly, the CTSA held that the right of access to the documents was not in question in this matter, but the matter concerned the timing of production of documents. When a matter was at litigation stage, the reasonable time in which access could be granted was at discovery stage, after the close of pleadings. The matter subsequently went on appeal to the appellate courts.

2.2 *Mergers and acquisitions*

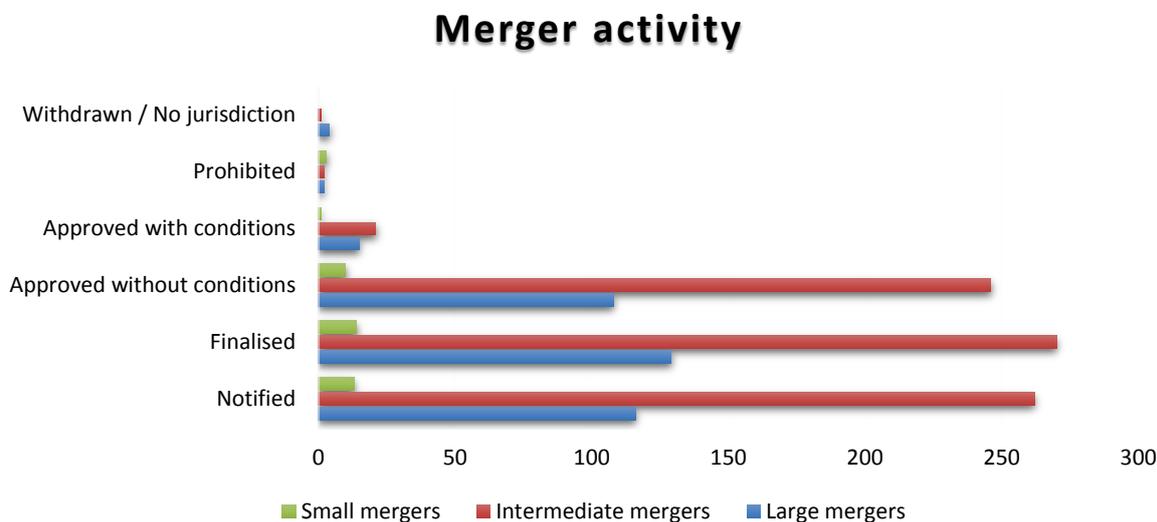
2.2.1 *Statistics on number, size and type of mergers notified and/or controlled under competition laws:*

39. In the year under review, the CCSA received 391 merger notifications. The CCSA finalised 413 merger cases. This is a significant increase from previous years, in which 327, 329, and 375 cases were finalised, respectively. Several cases in strategic industries were evaluated, including telecoms and intermediary products, such as steel. Out of the 413 mergers finalised, 37 were approved with conditions and seven were prohibited. See Diagram 2 below.

40. In terms of the Competition Act, the CCSA decides on small and intermediate mergers and the CTSA decides on large mergers, after receiving a recommendation from the CCSA. The CTSA cleared 133 mergers of which 124 were large mergers and the remainder small or intermediate transactions. Public

interest conditions were added as conditions in 28 mergers of which 19 cases concerned employment related conditions.

Figure 2: Merger activity 2015/16



• **Telecommunications**

41. The need for access to high-demand spectrum bands came to the fore in two significant mergers notified in the telecommunications industry. These spectrum bands are required to build the fourth-generation wireless broadband networks, without which the prospects for satisfying growing demand for high-speed data connections appear limited.

42. The year under review saw much merger activity undertaken by South Africa’s largest telecommunications networks. Vodacom (Pty) Ltd made a bid to acquire Neotel (Pty) Ltd; while Mobile Telephone Networks (Pty) Ltd (MTN), a subsidiary of the MTN Group, intended to acquire certain radio access network assets of Telkom SA SOC Ltd (Telkom). The CCSA recommended approval of the Vodacom and Neotel merger with structural and public interest conditions. The most significant of these was the condition that Vodacom not use Neotel’s spectrum until 31 December 2017. The CCSA recommended the prohibition of the MTN and Telkom deal on competition grounds. The parties involved eventually abandoned the transactions for various reasons.

43. In the merger between Telkom SA SOC Ltd (Telkom) and Business Connexion Group Limited (BCX) the CCSA recommended to the CTSA that this deal be approved with conditions. This was the second attempt at a merger by the same companies after their first deal was prohibited several years earlier.

44. In South Africa Telkom is the largest provider of wholesale leased lines to downstream customers and a former state-owned monopoly. Given its market position the CCSA believed that Telkom had the ability to foreclose its downstream rivals from access to these wholesale leased lines which were essential inputs for the provision of downstream services which included managed network services, value-added network services and hosting and information technology services. The CCSA also believed that the merger would result in the merged entity having the ability and incentive to engage in bundling strategies that could result in anti-competitive behaviour. To address these concerns, the CCSA recommended certain behavioural and employment conditions. The CTSA approved the merger with conditions.

- **Bottling companies**

45. Following a recommendation from the CCSA, the CTSA conditionally approved a large merger in which various companies sought to combine the bottling operations of their non-alcoholic beverages (NABs) businesses in South Africa under a single entity to be known as Coca-Cola Beverages South Africa (Pty) Ltd (CCBSA). The CCSA's investigation of the proposed merger found the several competition and public interest concerns arising from the deal including a negative impact on employment. The CCSA and the merging parties agreed on a set of remedies, which was approved by the CTSA.

- **Gas companies**

46. The CCSA assessed the merger in which Totalgaz Southern Africa (Pty) Ltd (Totalgaz) acquired the LPG storage, supply and distribution business of Kaya Gas (Pty) Ltd and certain assets associated therewith (Kaya Gas). Both Totalgaz and Kaya Gas were distributors of LPG in South Africa. The CCSA found that Kaya Gas had positioned itself to supply LPG in 5 kg cylinders into the low-income areas of the Western Cape, which differentiated it from other distributors.

47. The CCSA was concerned about the prospect of Totalgaz not maintaining the Kaya Gas distribution network, which would have led to a lessening of competition and public interest harm, as the 5 kg cylinders were important to low-income households.

48. The CCSA therefore imposed conditions on the merger parties aimed at ensuring that Totalgaz continued to supply LPG in 5 kg cylinders in the low income areas of the Western Cape. The CCSA also imposed conditions related to South Africa's policies for the empowerment of previously disadvantaged communities and for the development of small LPG retailers in the townships.

- **Water tanks merger prohibited**

49. The CCSA prohibited a small merger in which JoJo Tanks (Pty) Ltd intended to acquire the operating assets and liabilities of the Nel Tanks business as a going concern. The CCSA found that the activities of the merging parties overlapped in the markets for the manufacture and supply of vertical water tanks and horizontal transport tanks in the Western Cape province of South Africa or within a 300 – 400 km radius of their operation in the Western Cape.

50. The CCSA prohibited this merger for the following reasons, amongst others:

- the merged entity would be able to increase prices post-merger as it would have market power and would not face significant competitive constraints;
- the merger removed an effective competitor and by so doing raised the level of concentration in the market;
- the proposed merger weakened the ability of customers to bargain against the two largest players who were now merging.

51. The CCSA also found that the market was structured in such a way that competitors focused on certain segments of the market. Therefore this was likely to further enhance the ability of firms to coordinate their activities in the Western Cape. The remedies proposed by the merging parties were not sufficient to address the competition harm arising from the proposed transaction.

3. The role of competition authorities in the formulation and implementation of other policies,

3.1 *Inputs into policy and regulation*

52. During the period under review, the CCSA made inputs into the five policies set out below.

- The Draft Infrastructure Sharing Discussion Document published by the Independent Communications Authority of South Africa.
- The World Trade Organisation (WTO) Review of Trade and Competition Policy in the Southern African Customs Union as requested by the Department of Trade and Industry.
- Aspen's Application for a Rebate Facility for Preparations for the Manufacture of Food for Infants and Young Children as requested by the International Trade Administration CCSA of South Africa.
- Publication of the Payment Systems Information Return Industry Report in response to a request by the South African Reserve Bank.
- The National Pricing Strategy for Waste Management Discussion Document published by the Department of Environmental Affairs.

53. In this year the CCSA also collaborated with policy and regulatory bodies in an effort to promote the ends of competition in various sectors. These included:

- the Independent Regulatory Board for Auditors;
- the Ports Regulator of South Africa;
- the International Trade Administration CCSA of South Africa; and
- the National Department of Agriculture Forestry and Fisheries.

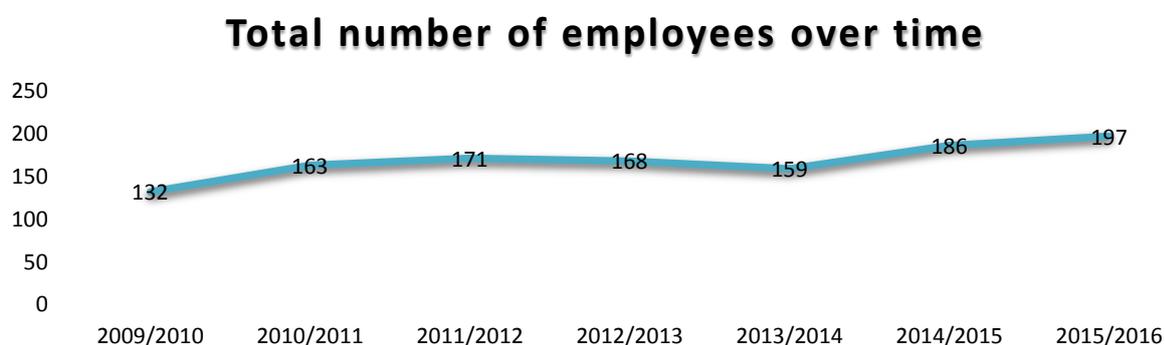
4. Resources of competition authorities

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

4.1.1 *Annual budget*

Item	2014/2015	2015/2016	Percentage increase
CCSA revenue	R 248 million (\$ 18 million)	R 295 million (\$ 21 million)	19%
CCSA income from grant (government allocation and transfers)	R 188 million (\$ 13 million)	R 228 million (\$ 16 million)	21%
CCSA income from filing fees	R 52 million (\$ 3,7 million)	R 55 million (\$ 4 million)	7%
CTSA annual budget	R 33 million (\$ 2,3 million)	R 38 million (\$ 2,7 million)	15%

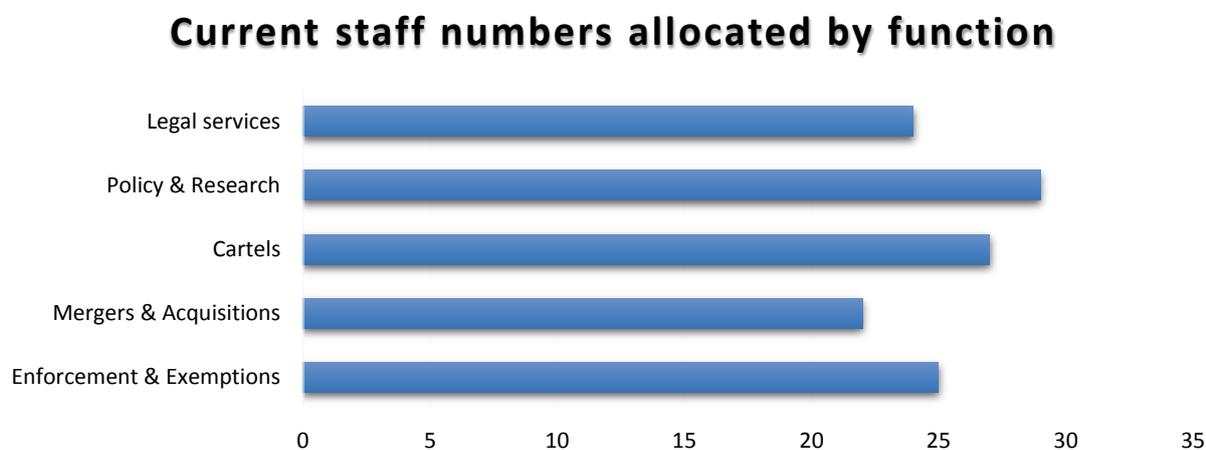
4.1.2 CCSA number of employees



4.1.3 CCSA employees by expertise

Expertise	Number of employees	Percentage of total
Lawyers	60	30%
Economists	64	32%
Other professionals	4	2%
Support Staff	69	35%
All staff combined	197	100%

4.1.4 CCSA human resources allocated by function



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

5.1 Impact assessments

54. This year we carried out or took part in six impact assessments. We conducted these assessments in order to understand the effect of the competition authority's past intervention in selected industries. The results of some of these studies are summarised briefly below.

- **World Bank study**

55. The World Bank Group's eighth edition of the *South Africa Economic Update*, published in February 2016, included a special focus section which examined how competition policy could contribute to promoting faster growth and poverty alleviation. The study examined South Africa's strong track record in addressing competition issues.

56. The study explored how competition policy can promote lower prices on key inputs and enhance competitiveness and growth. Using the example of the cement sector, the study showed how stronger competition that resulted from the sanctioning of a cartel in the sector lowered prices of cement (cement accounts for 2% of all industry inputs) and spurred new investment and job creation in the sector. The study found that the sanctioning of cartels in the maize, poultry and pharmaceuticals sectors lifted an estimated 202 000 people above the poverty line through lowering the retail prices of these goods that form a large part of the poor's consumption basket. The study explained what steps could be taken to further promote competition. For example, the study estimated that if South Africa reduces regulatory restrictiveness of professional services sectors, growth in value add in industries which use professional services intensively would, other things being equal, be between \$1.4–1.6 billion. This is equivalent to an additional 0.4 – 0.5 percentage points of GDP growth.

- **Wal-Mart's entry into South Africa**

57. In October 2012, the Competition Appeal Court approved the merger between Wal-Mart and Massmart subject to public interest conditions. At the time, one of the main concerns that arose from the transaction was that the merged entity would switch some of its procurement away from domestic suppliers to imports post-merger. Our study found that the Massmart Supplier Development Fund that was established as a condition to the merger, had facilitated the entry and expansion of suppliers in the agriculture, agro-processing and manufacturing sectors into Massmart's supply chain, and had positively contributed to job creation. The study found that there were no substantial changes to the proportion of imports pre and post-merger. The study also found that Massmart suppliers had not been adversely affected by the entry of Wal-Mart into the South African market.

- **Fertiliser market**

58. After investigations by the CCSA during the period 2003 to 2009, and the subsequent referral of various anti-competitive contraventions in the nitrogenous fertiliser value chain to the CTSA, Sasol – a major petro chemical company in South Africa – admitted to contravening the Competition Act and in May 2009 paid an administrative penalty. Sasol also reached an agreement with the CCSA in respect of abuse of dominance contraventions.

59. The agreement effectively imposed behavioural and structural conditions on Sasol. As regards the former, Sasol undertook to provide fertilisers on an ex-works basis and to refrain from discriminating across customer types (i.e. blenders, traders and end users) and across geographic regions (i.e. inland and coastal regions). With regard to the structural conditions, Sasol undertook to divest five of its blending plants.

60. Our impact assessment found that post-intervention, there have been some positive outcomes in both the upstream and downstream levels of the nitrogenous fertiliser value chain. Importantly, post-intervention Omnia, a competitor to Sasol, entered the upstream ammonia market through its investment in a nitric acid plant. The study also revealed that the CCSA's intervention contributed significantly to the breakdown of artificial barriers to entry in the market. For instance, prior to the intervention, there was

little incentive for such investment in fertiliser production or ammonia imports due to the existence of cartel conduct.

61. In the downstream market, the study found that the structural conditions imposed on Sasol and the divestiture of five of its blending plants contributed to entry and expansion into the blending and distribution market. The entry into fertiliser blending and trading was mainly through the purchase of Sasol's divested facilities as part of the divestiture order in 2010. Other than the acquisition of Sasol's divested plants, the study showed that a significant number of smaller players have entered the market at the blending level post-intervention.

62. Lastly, the study found that the CCSA's intervention contributed to positive price benefits in the fertiliser industry. As a result of the increase in market participants, fertiliser retail prices have become more competitive post-intervention relative to the pre-intervention period.

5.2 African Competition Forum research

63. The CCSA is currently the chair of African Competition Forum (ACF) and in this role facilitated a collaborative study with the World Bank Group (WBG) entitled *Boosting Competition in African Markets*. The study expands the scope of earlier ACF studies by providing an overview of the status of competition frameworks and implementation in Africa, and focused mainly on the competition dynamics and challenges in three important sectors for Africa's competitiveness, namely cement, fertilisers, and telecommunications.

5.3 Market inquiries

64. In April 2013 the CCSA obtained new powers, through an amendment to the Competition Act, to conduct market inquiries. In terms of the amendment, the CCSA has powers to conduct a formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm. The CCSA can initiate a market inquiry if it has reason to believe that any feature of a market prevents, distorts or restricts competition within that market. The CCSA can issue summons to compel persons to appear before the inquiry and provide evidence.

• Retail sector market inquiry

65. During the period under review the CCSA launched a market inquiry into the grocery retail sector. The grocery retail sector includes all traders that predominantly sell fast-moving consumer goods (for example food, toiletries and/or liquor) whether as a wholesaler, retailer, or both. It encompasses all kinds of shops, from small, informal businesses – locally known as spaza shops, street traders, hawkers and small independent grocery stores – to supermarket chains and wholesale groups and outlets.

66. The scope of the retail inquiry covers the following six areas:

- the impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers;
- the impact of long-term exclusive leases on competition in the sector;
- the dynamics of competition between local and foreign-owned small and independent retailers;

- the impact of regulations, including municipal town planning and by-laws, on small and independent retailers;
- the impact of buyer groups on small and independent retailers; and
- the impact of certain identified value chains on the operations of small and independent retailers.

67. The CCSA appointed a panel to conduct the inquiry on its behalf. The panel will be supported by a team comprising the CCSA's economists and lawyers. The retail inquiry is set to be completed in May 2017.

SUBMISSION BY THE COMPETITION TRIBUNAL: 2015/2016

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

68. Please refer to the South African Competition Commission's presentation

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*

69. Most of the cartel cases we dealt with this year were settled by way of consent orders between the relevant respondents and the Commission. We imposed fines of R337.25 million on 19 firms for collusion in various industries such as construction (20.10% of the fines imposed) and transportation (62.67% of the fines imposed).

70. We heard one abuse of dominance case, concerning a predatory pricing complaint against Media24, which dated back to 2009. In terms of our Act we cannot levy an administrative penalty for a first time transgression of this kind but the Tribunal was considering alternative remedies that may be imposed on the company.

2.1.1 *Significant cases*

71. In a case brought by the Commission against Media24 the Tribunal found that Media24, an owner of two community newspapers, had engaged in a predatory pricing strategy against a smaller rival, Gold-Net News, driving it out of the market by using one of its two titles as a below cost so-called fighting brand. The Tribunal will only hear and consider proposed remedies during the next financial year.

72. The Tribunal also decided remedies in a collusion case, heard during the previous financial year, where we had found that that a local locksmith firm in a town called Welkom had agreed to divide the market for locksmith services with its rival from a neighbouring town. We imposed a novel remedy given that the practice involved market division that had existed for some time. We required each firm to advertise that it also offers its services in the rival's region. Further, each firm had to give its customer list to the Competition Commission who had to write to them informing them of the market division finding and advising them that the firms were now advertising that they could provide services in the other's territories.

2.2 *Mergers and acquisitions*

2.2.1 *Number and type of mergers*

73. The Tribunal cleared 133 mergers of which 124 were large mergers and the remainder small or intermediate transactions. Large mergers are transactions where the combined annual turnover or assets in South Africa of the acquiring and target firms is over R6.6 billion and the annual turnover or asset value in South Africa of the target firm is R190 million. Public interest conditions were added as conditions in 28 mergers of which 19 cases concerned employment related conditions.

2.2.2 *Summary of significant cases*

74. In the large merger between Telkom and BCX, in the fixed line telecommunication and the ICT services markets, the Tribunal imposed conditions that were designed to regulate transactions in the provision of network services between Telkom and its wholesale and retail business divisions in order to ensure that the merged entity's competitors achieve positive margins in the downstream market for ICT services. This came after Dimension Data, a significant player in the South African ICT services market and competitor of the merging parties raised concerns that the conditions proposed by the Commission in its Recommendation to the Tribunal were insufficient to address the anti-competitive effects.

75. In the large merger between Pioneer Foods and Futurelife Health Products the Tribunal, after allowing Pioneer's main competitor Kelloggs South Africa to intervene in the proceedings, approved the transaction subject to conditions. Of concern were the competitive relationship between Pioneer Foods' ProNutro products and Futurelife's nutrient-dense health food product and whether these products were part of a broader breakfast food/functional market or a narrow ready-to-eat porridge market. The Tribunal decided to attach conditions to ensure that the joint venture is managed by the Futurelife CEO who will be in control of the day-to-day running of the joint venture, that the flow of information from the joint venture to employees in Pioneer Foods business, who deal with competing products, be prevented and lastly that investment in the ProNutro brand is maintained at its current levels for a period of two years after the period of the merger

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

76. Please refer to the South African Competition Commission's presentation

4. Resources of the Competition Tribunal

4.1 Resources overall

77. Annual budget: R38 154 219.00

78. The secretariat consists of:

- 1 economist
- 5 lawyers
- 16 administrative and other support staff

4.2 Human Resources applied to enforcement, mergers and advocacy: Not applicable

4.3 Period covered by the above information 1 April 2015 – 31 March 2016

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

79. Please refer to the South African Competition Commission's presentation.