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COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in South Africa

-- 2021 --

This report is submitted by South Africa to the Competition Committee FOR INFORMATION.

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

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

1. Not Applicable

1.2. Other relevant measures, including new guidelines

2. The CCSA conducted an impact study where we assessed the impact of the CCSA's work during the Covid-19 disaster, including the impact of the Covid-19 Block Exemptions granted by the Minister of the DTIC and the effects of the CCSA's advocacy efforts, investigations, and prosecutions of price gouging contraventions during the Covid-19 disaster period. The impact study found that the Covid-19 Block Exemptions for the Healthcare Sector, the Retail Property and Banking Sector were a success. The impact study also found that the CCSA's advocacy and enforcement work of the anti-price gouging Regulations have had deterrent effects on price gouging as many retailers and wholesalers of essential products and basic food products were made aware of the laws that prohibit price gouging and refrained from increasing prices by either avoiding increasing prices, increasing prices only when suppliers increased cost prices or sought to keep profit 8 margins at pre-disaster levels. The study also found that the Regulations were effective in achieving the objective of deterring price gouging.

3. The CCSA concluded its Public Passenger Transport Market Inquiry which it initiated in 2017. The CCSA's inquiry focused on land based public transport systems which significantly facilitate economic activity. This inquiry made several recommendations to enhance and improve the land based public transport systems such as greater integration of the different modes of public transport; development of a co-ordinated and equitable subsidy policy; uniform regulation of e-hailing and metred taxi services; improvements to the regulatory regime to facilitate access and participation by new and existing public transport operators; better planning and operator permit allocations.

4. As part of its contribution to deepening industrial development, the CCSA –

- issued draft guidelines on local procurement in the implementation of the South African Value Chain Sugarcane Master Plan to 2030, for public comment. The purpose of the draft Guidelines is to provide guidance to the sugar industry on collaboration in the implementation of industry commitments to increasing sourcing of local sugar as contemplated in the South African Sugarcane Value Chain Master Plan to 2030 ("the Sugar Master Plan"). The draft guidelines were issued in terms of section 79(3) of the Act.
- issued draft guidelines on collaboration between competitors on localisation initiatives for public comment. In terms of the draft Guidelines, a "localisation initiative" is any project or effort to achieve greater levels of local procurement or production. Localisation initiatives may be initiated by Government or private

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players themselves. The CCSA recognises that industry participants/market players may wish to engage in initiatives to increase localisation. Collaboration amongst competitors may be required to advance such localisation initiatives. The draft guidelines have been developed to guide the process by which such collaboration between competitors may occur and aim to provide guidance to industry and government as to how localisation initiatives may be appropriately identified and implemented, in a manner that does not raise competition concerns.

- The CCSA published its fifth food price monitoring report which covered the structural issues in South Africa's food market system and the initiative to develop small-scale, localized farming, the report also tracked essential food pricing during the third wave of the pandemic. The CCSA also conducted research focused on open banking and the importance of consumer data in fostering innovation and competition. The research assists in highlighting key issues where regulatory supervision is required for open banking to be implemented successfully in South Africa. The research also explored whether a market-led, or regulatory-led approach may be adopted in South Africa.
- The CCSA reached two key settlements agreements with private laboratories PathCare, Lancet and Ampath where the three private laboratories will reduce the price of the Covid-19 PCR test to R500 inclusive of VAT, and to immediately reduce the price of Covid-19 Rapid Antigen tests to no more than R150 inclusive of VAT. The undertakings are expected to make the Covid-19 PCR test to be more affordable to the general public.

1.3. Government proposals for new legislation

5. Not Applicable

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 of the competition authorities:

6. The CCSA is empowered under the Competition Act to investigate complaints received from third parties or initiate its own complaints as regards allegations of contraventions of cartel conduct (section 4(1)(b)), vertical restraints (section 5(1)), minimum resale price maintenance (section 5(2)) and abuses of dominance (section 8).

7. The CCSA's enforcement activities were focussed on the following sectors:

- Food and agro processing
- Healthcare
- Intermediate industrial inputs
- Construction and infrastructure
- Banking and financial services
- Banking and financial services
- Information and communication technology

- Energy.

8. As regards anti-cartel enforcement during the review period, the CCSA –

- received 4 leniency applications
- did not conduct any dawn raids
- the Competition Tribunal issued 28 decisions, of which 17 resulted in the imposition of fines
- a total of R43 687 697 in fines were imposed[2]
- the average fine per cartel was R2 569 864
- the average calendar days for the conclusion of a cartel investigation stood at 872 days.

9. The CCSA's cartels case load is depicted in table 1 below:

Table 1. Cartels case load

Cases	Q1	Q2	Q3	Q4
Number under investigation	81	68	77	83
Number of cases under litigation	75	75	74	75
Number of complaints received from 3rd parties	10	7	5	6
Number of cases initiated by the CCSA	0	0	0	1
Number of cases finalised	8	12	5	12
Number of cases referred to Competition Tribunal	0	2	1	8
Number of cases non-referred	8	10	4	3

10. As regards market conduct (vertical restraints, abuse of dominance and exemptions) the CCSA conducted the following activities during the review period –

- the highest number of investigations underway at any time was 75
- 2 investigations were launched
- 23 cases were finalised
- 4 cases were resolved through the imposition of behavioural remedies
- 3 exemption applications were received
- 2 exemption applications were granted
- 1 exemption application was refused

2.1.2. Description of significant cases, including those with international implications.

11. The following were some noteworthy cases within the CCSA's market conduct enforcement area:

[2] All monetary amounts provide in this report are in South African rand.

GovChat / Facebook complaint

12. The CCSA received a complaint from GovChat (Pty) Ltd ("GovChat") in November 2020 alleging that Facebook Inc. threatened to terminate GovChat's access to Facebook's WhatsApp Business Application Programming Interface ("WhatsApp").

13. GovChat is an online platform through which the government of South Africa communicates with its citizen through mass push notifications on the WhatsApp platform. The GovChat platform also allows citizen to access information or services pertaining to various government services or programmes such as social grants, COVID19 services or to respond to surveys / polls to rate government services / performance. Thus, GovChat plays a very important role in the lives of South African citizens and is an important interface between the government and citizens. GovChat alleged that the termination of GovChat's access to WhatsApp would constitute a contravention of the following abuse of dominance provisions contained in section 8(1) of the Competition Act –

- refusal to give a competitor access to an essential facility when economically feasible to do so (section 8(1)(b)).
- engaging in exclusionary conduct whose anticompetitive effect is not outweighed by any efficiencies or technological gains (section 8(c)).
- refusal to supply scarce goods or services to a competitor or customer when economically feasible to do so (section 8(1)(d)(ii)).

14. The CCSA's investigation thus far suggests that Facebook has previously and continues to enforce terms and conditions for the access of its WhatsApp platform, that likely contravene the abuse of dominance provisions identified above. This investigation takes place within a context in which big technology firms such as Facebook are under increasing scrutiny by competition regulators globally. This investigation further highlights the need for the CCSA and its peers to deepen co-operation and reassess the enforcement tools required to enforce competition policy within an increasingly digitising and globalising economy.

Covid 19 price gouging - PCR tests

15. On 8 October 2021, the CCSA received a complaint from the Council for Medical Schemes ("CMS") alleging that certain private pathology laboratories were charging between R850 and R900 for a COVID-19 PCR test. The CMS considered these prices to be excessive.

16. The subjects of the CCSA's investigation were Ampath, Lancet and PathCare (the "Respondents"), who are the largest private laboratories and who between them accounted for approximately 84% of the 9 750 238 PCR tests conducted as at the time of investigation. The CCSA's investigation assessed whether the conduct complained of contravened the Price Gouging Regulations issued by the South African government in response to the COVID-19 pandemic and alternatively constituted the charging of an excessive price by a dominant firm, in contravention of section 8(1)(a) of the Competition Act.

17. In responding to the investigation, complaint, PathCare submitted that its prices for PCR tests had reduced from R995 to R850. Lancet submitted that its price had remained unchanged at R850 between 2020 and 2021. Ampath submitted that its price reduced R850 to R720. The CCCA found that these prices were excessive and demanded that the Respondents reduce their prices to no more than R500 inclusive of value added tax ("VAT"). During December 2021, all three Respondents agreed to settle the complaint by

reducing the prices of their PCR tests to no more than R500 inclusive of VAT. These settlement agreements were confirmed by the Competition Tribunal in December 2021.

Covid 19 price gouging – Rapid Antigen tests

18. On 12 December 2021, the CCSA received a complaint from a doctor alleging that certain private (pathology) laboratories were charging as much as R350 for a Covid-19 Rapid Antigen test. It was alleged that these prices were excessive, given that the same tests cost R150 from the public sector laboratories.

19. The subjects of the CCSA's investigation were Ampath, Lancet and PathCare (the "Respondents"), who are the largest private laboratories providing Rapid Antigen test. The CCSA found that Rapi Antigen tests typically take only 15 minutes to administer, and the results can be received within minutes, but up to 2 hours. While polymerase chain reaction (PCR) tests remain the gold standard for detecting and diagnosing Covid-19, antigen tests cost less and can have a role to play in regular or mass-testing scenarios. The lower cost of antigen tests also makes them a suitable, albeit less accurate, alternative to PCR tests. On the 14th of December 2021, the CCSA sent requests for information to the Respondents and other laboratories to establish whether the prices charged for Rapid Antigen tests by the Respondents were excessive. The information gathered established that the Respondents' prices were excessive and likely contravened section 8(1)(a) of the Competition Act. Based on the CCSA's findings, the Respondents all agreed to immediately reduce the price of Rapid Antigen tests to no more than R150 inclusive of VAT. These agreements were confirmed by the Competition Tribunal confirmed these agreements on the 22nd of December 2021.

20. The speedy resolution of these cases is particularly laudable given the ongoing economic and other ramifications of the COVID-19 pandemic. This intervention further illustrates the important role that the CCSA and competition policy plays for economic recovery and reconstruction in a post COVID-19 economy.

21. The following were some noteworthy cases within the CCSA's cartel conduct enforcement area:

CCSA vs SAAB Grintek Defence & K.F Computers ("Respondents")

22. The CCSA initiated an investigation against the Respondents in March 2016, following a complaint from the State Information Technology Agency ("SITA"). SITA alleged that the Respondents colluded when bidding to supply Ground Command and Control Systems to the South African Air Force. Following the investigation, the CCCSA referred its findings to the Competition Tribunal for adjudication. Prior to the hearing, the Respondents agreed to settle the complaint by paying administrative penalties. SAAB agreed to pay R2 000 000 and undertook to grow its enterprise and supplier development programme to the benefit of historically disadvantages / black people ("HDIs"). K.F Computers, a small firm, agreed to pay an administrative penalty of R32 135. This settlement agreement was confirmed by the Competition Tribunal.

23. This intervention illustrates that the developmental aspirations of the Competition Act, which are the preserve of the CCSA's merger control regime, can through an innovative approach to remedies, be equally realised in other enforcement areas such as cartel enforcement.

2.2. Mergers and acquisitions

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

24. Section 13A of the Competition Act requires the mandatory notification of all mergers that meet the prescribed monetary thresholds, prior to the implementation of such mergers. The prescribed monetary thresholds are depicted in Table 2 below:

Table 2. Merger notification thresholds

Threshold	Combined turnover / asset value (whichever greater)	Target firm turnover/asset value (whichever greater)	Size of merger	Prescribed filing fee
Lower threshold	R600 000	R100 000	Intermediate	R165 000
Higher threshold	R6 000 000 000	R190 000 000	Large	R550 000

25. Mergers that do not meet either of the monetary thresholds depicted above are referred to as 'small mergers'. Small mergers do not require mandatory notification and can be implemented without notification to the CCSA. However, under section 13(3) of the Competition Act, the CCSA may, within 6 months of a small merger being implemented, require the parties thereto to notify same to the Commission where the CCSA is of the opinion that -

- the small merger may substantially prevent or lessen competition; and/or
- the small merger cannot be justified on public interest grounds.

26. The duration of the CCSA's assessment of small, intermediate and large mergers is prescribed in sections may assess mergers is stipulated in sections 13, 14 and 15 of the Competition Act respectively. Notwithstanding these statutory timeframes, the CCSA has committed to certain service standards[3] for the review of small and intermediate mergers, depending on the complexity thereof, as depicted in Tables 3 below:

Table 3. Merger assessment time frames for small and intermediate mergers

Phase of merger	CCSA service standard	Competition Act
Phase 1 (non-complex)	20 Days[4]	60 Days
Phase 2 (complex)	45 Days	60 Days
Phase 3 (very complex)	60 Days	60 Days

- Phase I mergers raise no competition or public interest concerns;
- Phase II mergers are slightly more complex and require more detailed analysis but, at an initial stage of evaluation, are identified as being unlikely to raise very serious competition concerns; and
- Phase III mergers are very complex and require in-depth analysis due to the complex nature of the products, the structure of the relevant markets and/or the public interest issues the transaction gives rise to.

[3] https://www.compcom.co.za/wp-content/uploads/2019/02/Service-Standards_2015_Final.pdf

[4] "Day" refers to any day that is not a weekend or public holiday, in South Africa.

27. The position as regards large mergers, is depicted in Table 4 below.

Table 4. Merger assessment time frames for large mergers in 2021

Phase of merger	CCSA service standard	Competition Act
Phase 1 (non-complex)	20 Days	40 Days initial period with ability to extend by up to 15 Days at a time
Phase 2 (complex)	45 Days	40 Days initial period with ability to extend by up to 15 Days at a time
Phase 3 Large (very complex)	120 Days	40 Days initial period with ability to extend by up to 15 Days at a time

28. Table 5 below depicts the average days it took for the CCSA to complete its assessment of various categories of mergers, for each quarter of the 2021 calendar year. As evident from Table 5, the CCSA was able to meet its service standards for Phase 1 (all sizes), Phase 2 (all sizes) and Phase 3 intermediate mergers. The service standard for Phase 3 large mergers was not met due to several highly complex and contest cases, namely Cashbuild Management Services (Pty) Ltd / The Building Company (Pty) Ltd ("**Cashbuild**"), and DH Brothers (Pty) Ltd and Seaboard Corporation's proposal to acquire RussellStone Protein (Pty) Ltd ("**RussellStone**"). The CCSA recommended the prohibition of these matters.

Table 5. Quarterly and annual average merger assessment turnaround times in Days

Merger Size	Q1	Q2	Q3	Q4	2021 average
Phase 1 (all sizes)	19	14	16	23	18
Phase 2 (all sizes)	38	36	37	42	38
Phase 3 intermediate	59	0	56	0	58
Phase 3 large	168	118	0	109	132

29. During the 2021 calendar year, the CCSA received a total of 241 merger notifications and overall, a total of 281 merger cases were finalised. Of the cases, finalised, 60 were approved subject to conditions, whilst 217 were approved without conditions. Of the remaining 4 cases, 2 were prohibited and 2 were abandoned by the parties. These statistics are depicted in Table 6 below:

Table 6. Mergers reviewed by size during 2021 calendar year

	Jan – March	Apr-Jun	Jul - Sep	Oct - Dec	Total
Notified	48	69	77	47	241
Large	17	19	24	31	91
Intermediate	30	49	53	13	145
Small	1	1	0	3	5
Finalized	64	76	76	65	281
Large	21	27	24	20	92
Intermediate	41	49	52	42	184
Small	2	0	0	3	5
Approved with conditions	8	19	13	20	60
Large	5	11	6	5	27
Intermediate	3	8	7	15	33
Small	0	0	0	0	0
Approved without conditions	56	54	63	44	217
Large	38	14	18	15	85
Intermediate	16	40	45	26	127
Small	2	0	0	3	5

2.2.2. Summary of significant cases.

30. We provide below, summaries of the most significant merger cases finalised during the 2021 calendar year:

Cashbuild

31. This merger involved the retail and wholesale markets for building and hardware materials in South Africa. These markets fall within one of the CCSA's priority sectors for competition law enforcement and advocacy efforts.

32. Cashbuild is one of South Africa's largest retailers of building and hardware materials and has large national footprint of stores. The Building Company (Pty) Ltd ("BUCO") is also a retailer of building materials, but also conducts the wholesale of such materials to various retailers, including Cashbuild.

33. The CCSA found that the merger results in a horizontal overlap as regards the retail of building and hardware materials. The merger further results in a vertical overlap as the merging parties are active at different levels of the building and hardware materials value chain.

34. The CCCSA's investigation established that the proposed merger would result in the creation of the single largest retailer of building and hardware materials in South Africa. This market is highly concentrated with only four retailers that have a national footprint. These national retailers are only effectively constrained by other retailers of building and hardware materials. Of the four national retailers, three are corporate retailers while the fourth is a buying group comprised of independent franchisees. Cashbuild, is the largest corporate retailer based on number of stores at the national level. BUCO is the second largest corporate retailer at the national level (including BUCO stores and other specialist/single specialty stores). Therefore nationally, the merger would substantially increase market concentration.

35. At a local level, the CCSA's fund that whilst there appeared to be ample alternatives to the merging parties, these alternatives were independent retailers or regional retailers.

The CCSA found that these alternatives were unlikely to constrain the merging parties (or other national retailers) as they lacked comparable scale, distribution network, product range and quality, amongst others.

36. At both local and national level, the CCSA found that the merging parties are close competitors, and the merger thus results in the removal of an effective competitor (i.e., BUCO) in an already concentrated market. BUCO had the potential to expand and compete effectively in the retail market. The CCSA also found that barriers to entry are high and therefore the likelihood of new entry to ameliorate the merger's effect on competition, was unlikely.

37. Considering the above, the CCSA found that the merger will enable the merged entity to unilaterally increase prices or change trading terms to the detriment of competitors and consumers. The increased scale of the merged entity can enable it to abuse its 'buyer power' and squeeze the margins of its suppliers, particularly smaller suppliers. The ability to abuse buyer power could enable the merging parties to exclude their rivals from competing effectively or growing and expanding in their respective geographic market. In this regard, the merging parties need only pass on a small portion of the lower purchase price to consumers on a limited number of key value items such as cement, which the CCSA understands to be a footfall driver in this market. Unlike independents, large retailers can recoup these margins on other products and across a range of stores. The Commission concluded that the merger results in a substantial prevention and lessening of competition as regards the retail supply of building and hardware materials.

38. The CCSA's investigation also found that the merger raises public interest concerns. These concerns pertained to the impact that the merger would have on, amongst others, smaller competitors and suppliers and employment.

39. The CCSA and the merging parties could not agree on a package of remedies to address the competition and public interest concerns identified. The CCSA therefore recommended that the Competition Tribunal, prohibits the merger. During the proceedings before the Competition Tribunal, the merging parties abandoned the merger.

Africa Forestry Fund II Limited and Vuka Timbers

40. The acquiring firms in this merger were Africa Forestry Fund II Limited ("AFF"), a Mauritius incorporated firm that is ultimately controlled by Criterion Africa Partners ("CAP"), a private equity firm. Pre-merger, CAP's relevant activities in South Africa are comprised of the management and operation of eucalyptus (hardwood) plantations situated in Mpumalanga province. These activities are conducted by MTO Forestry (Pty) Ltd ("MTO"). CAP, AFF and MTO are referred to as the "Acquiring Group."

41. The ultimate target in this merger was Vuka Timbers (Pty) Ltd ("Vuka"), a firm involved in the treatment of timber poles in Mpumalanga province. Vuka's pole treatment facility produces transmission poles (for use in electricity transmission and distribution) and building and fencing poles (for use in agriculture, conservation, and building). Vuka does not own any forestry assets and therefore must procure pole logs from external parties.

42. The merger would result in vertical integration as the merging parties are active at different levels of the timber pole value chain. In particular, the Acquiring group is a supplier of timber poles, whilst Vuka treats timber poles for use as transmission poles and building / fencing poles.

43. The parties filed this merger in September 2021. However, in 2019, the Acquiring Group's proposal to acquire Vuka had been prohibited by the Commission because it resulted in input foreclosure as regards the supply of transmission timber poles (the "2019

Merger"). That foreclosure would result in a substantial prevention and lessening of competition in the relevant markets. At the time of the 2019 Merger, the Acquiring Group owned both MTO and Peak Timber Plantations ("PTP"), both of whom accounted for up to 45% of the supply of timber poles to timber poles treatment facilities. In order to ameliorate the competition concerns identified in the 2019 Merger and in preparation of another attempt to acquire Vuka, the Acquiring Group sold its interest in PTP in 2020.

44. The CCSA found that whilst the Acquiring Group's disposal of PTP reduced its share of the upstream timber pole supply market to less than 35%, that market is characterized by a long tail, with a few large and reputable suppliers as well as numerous small independent growers. However, the latter only served as a supplementary source of timber poles and lacked the capacity to supply the volumes required by timber pole treaters. This was exacerbated by the fact that the merger would leave only one non-integrated supplier of timber poles, SAFCOL. As vertically integrated suppliers of timber poles typically only supply their own downstream timber pole treatment activities, the ability of Vuka's competitors to procure supplies of timber poles post-merger, was uncertain. The ability to foreclose was likely notwithstanding that Vuka's market shares in the treatment of timber poles was low at approximately 24%, the Acquiring Group would remain the largest or second largest alternative supplier of timber poles to Vuka's competitors, post-merger. This was because other suppliers of timber poles lacked the capacity to supply Vuka's competitors should those competitors be foreclosed access to timber poles by the Acquiring Group, post-merger. Considering this, the CCSA concluded that the acquiring Group would have the ability to foreclose downstream rivals, access to timber poles.

45. The CCSA further found that a foreclosure strategy would be profitable, considering Vuka's capacity to absorb more supply from the Acquiring Group and given the large margins at both the upstream and downstream levels of the timber pole value chains. In terms of effects, a foreclosure strategy does not necessarily require the exit of rivals from the downstream market, it only requires the weakening of such rivals through the raising of rivals' costs. In all, the merged entity will implement a partial foreclosure strategy which will inevitably weaken the ability of Vuka's downstream rivals to access reliable supplies of timber poles. Considering the above, the CCSA concluded that the Acquiring Group would have the incentive to foreclosure downstream rivals of supply of timber poles, post-merger.

46. The CCSA considered whether a supply condition would remedy the concerns identified. One of the key questions that arise relate to the duration of such a condition and the terms to supply downstream rivals. In the alternative, the merging parties proposed to limit the volumes of timber poles that Vuka could buy from the Acquiring Group for a certain period. Ultimately, the parties and the CCSA could not agree on an appropriate remedy and prior to a prohibition, the parties abandoned the merger.

Competition Commission of South Africa vs Mediclinic Southern Africa (Pty) Ltd

47. This was a decision by the Constitutional Court ("CC"), the highest court in South Africa, which successfully upheld the CCSA's appeal against the Competition Appeal Court's ("CAC") decision in the merger between two private healthcare providers, Mediclinic Southern Africa (Pty) Ltd ("Mediclinic") and Matlosana Medical Health Services ("MMMHS").

48. Mediclinic is one of the 3 largest corporate national multidisciplinary private hospitals in South Africa. The other corporate national private hospital groups are Netcare and Life Healthcare. There are independent private hospitals competing against the national corporate networks and these hospitals are affiliated to the National Health Network ("NHN"), a non-profit company which negotiates tariffs and other benefits with medical

insurers and other independent private hospitals. This ensures the financial viability of NHN members.

49. Of relevance to this merger assessment, is Mediclinic's private hospital in Potchefstroom, in the Northwest province. MMMHS owned 2 multi-disciplinary private hospitals in the town of Klerksdorp, in the Northwest province. These tariffs are a major component of the total cost to a patient for private hospital care.

50. The background to this matter is that in May 2018, the CCSA concluded its investigation of the merger and recommended that the Competition Tribunal prohibits same. This was because the CCSA found that unilateral price increase were likely post-merger. This was because MMMHS, by virtue of its membership of the NHN, was able to negotiate lower tariffs for its customers, particularly those without medical insurance. Mediclinic charges higher tariffs and post-merger, and these tariffs would apply post-merger, to the detriment of uninsured customers.

51. On 29 January 2019, the Competition Tribunal prohibited the merger as it concurred with the CCSA's findings. The Competition Tribunal further justified the prohibition based on additional concerns. These included a finding that the merged entity would be the dominant provider of multidisciplinary private health services within certain municipalities of the Northwest province, with a market share of 63%. This dominance would undermine the bargaining power of medical insurers, when attempting to negotiate tariffs for their members with Mediclinic post-merger and constrain the public healthcare sector. The merger would also restrict customer choice. Broadly speaking, the Competition Tribunal found that the merger raised concerns under the public interest provisions of the Competition Act as it negatively affected a particular industrial sector or region. In addition, the merger would increase prices and jeopardise access to healthcare services, a right enshrined in section 27 of South Africa's Constitution. The parties offered behavioural remedies to address the competition and public interest harm identified by the Competition Tribunal. However, these were rejected as "inappropriate and inadequate" as same did not address the source of the competition harm and could not be effectively monitored.

52. The merging parties appealed the Competition Tribunal's prohibition to the Competition Appeal Court ("CAC"). The parties argued that the Competition tribunal did not establish that any post-merger price increase was correlated to any substantial lessening of competition ("SLC") or any change in competition dynamics resulting from the merger. The CAC upheld the appeal as it found that the Competition Tribunal has incorrectly applied the SLC test prescribed in section 12A of the Competition Act. When determining post-merger price effects, could only be considered under the public interest provisions of the Competition Act. Furthermore, the CAC found that the burden proof to establish whether any efficiencies outweighed the identified adverse price effects was not for the merging parties, but for the CCSA to bear. Rather than remitting the matter back to the Competition Tribunal for adjudication, the CAC conducted its own assessment of the evidence and concluded that (i) no SLC had been established due to a lack of evidence; (ii) notwithstanding, the CAC considered that a remedy was required to ensure that tariffs o uninsured patients would not increase above inflation. The CAC considered this a better outcome to protect uninsured patients as the evidence did not sufficiently suggest that absent the merger, MMMHS tariffs would not increase above inflation. The CAC therefore set aside the prohibition and approved the merger subject to the conditions.

53. The CCSA appealed the CAC's decision to the CC arguing (amongst others) that (i) the CAC had no legal basis to interfere with and set aside the Competition Tribunal's findings in the manner in which it did; (ii) the CAC failed to have due regard to section 27 of the Constitution in making its decision; (iii) the CAC did not have due regard to the

purposes of the Competition Act including the aspiration for an more equitable and inclusive economy and society and the high costs of private healthcare.

54. The CC held that the CAC incorrectly found that section 12A of the Competition Act required that an SLC can only be established if a merger resulted in market shares that enhanced market power. Put differently, the CAC ought to have considered the merger's impact on increasing market concentration as de-concentration of markets and market access are some of the purposes of the Competition Act. The CC found that identifying a potential increase in price resulting from increased concentration was sufficient to establish an SLC. The CC also found that the Competition Act does not provide a mechanism for the CAC set aside the Competition Tribunal's order on the basis that the CAC has a different view. That ability only arises where the Competition Tribunal has misdirected itself or was clearly wrong in its key findings and committed a material misdirection regarding a remedy. As that was not the case, the CAC had no basis to set aside the Competition Tribunal's order. The CC further found that the Competition Tribunal and the CAC, as institutions of the South African state, bear an obligation to facilitate rather than impede Constitutional rights such as access to healthcare. Considering the above, the CC upheld the CCSA's appeal and set aside the CAC's order. The merger thus remains prohibited.

55. The CC's decision in Mediclinic will have significant implications for future merger assessment for a number of reasons. Chief among them is the centrality of the Constitution in informing the application of the Competition Act. Secondly, the CC's decision emphasizes the principle that appeal courts should exercise deference to specialist bodies such as the Competition Tribunal.

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

56. Through its advocacy division, the CCSA provides responses and comments to key policies as part of its advocacy activities, to ensure policies and laws are aligned with the Competition Act. We outline below the interventions made in this regard, during the 2021 calendar year.

57. In January 2021, the CCSA provided its recommendations on the draft register of contractors: review of registration criteria to the Construction Industry Development Board ("CIDB"). Its recommendations focused on the following aspects: the registration criteria in so far as it relates to financial and performance capabilities of contractors, the registration grades, the class of work in the Specialised Works categories, registration fees, the transfer records, labour only track record.

58. In May 2021, the CCSA submitted a policy response to the National Energy Regulator of South Africa ("NERSA") in the form of a non-binding advisory opinion. NERSA had sought an advisory from the CCSA regarding the challenges it was facing in obtaining information from its Joint Venture ("JV") Licensees. In its advice, the CCSA indicated that JVs may be a platform for anti-competitive behaviour particularly where they are made up of firms that compete at any level. The petroleum companies that make up the JVs compete in the same market, therefore there would be certain information, particularly confidential and competitively sensitive information that the JVs cannot share directly among each other as this may potentially lead to collusive conduct or other anti-competitive conduct. The CCSA indicated that in collating the information from the JVs, NERSA should consider how information such as; financial information, asset registers, book value of assets and tariff information, which is critical for competitive rivalry of firms, ought to be dealt with in a way that is unlikely to lead to a contravention of the Competition Act.

59. In June 2021, the CCSA submitted a policy response/comment on the draft National Policy on Data and Cloud to the Department of Communications and Digital Technologies ("DCDT"). The Advocacy Division engaged with officials of the DCDT when formulating its comments. The CCSA supported the establishment of a High-Performance Computing and Data Processing Centre for public data processing and storage and cloud services to State entities. The submission was structured according to the following themes: data sovereignty, digitising government services, an open data strategy.

60. In September 2021 the CCSA provided comments to the General Policy on the Allocation of Commercial Fishing Rights (General Policy) and the Draft Policy for the Transfer of Commercial Rights issued by the Department of Forestry, Fisheries and Environment ("DFFE"). The Advocacy Division provided comments to both policies on the management of fishing right applications, ensuring participation by small fisheries and fishers owned or operated by historically disadvantaged individuals. The submission sought to address changes which might raise competition concerns, transform the fishing sector, and promote the entry of small and medium enterprises and historically disadvantaged individuals in the sector.

61. In September 2021, the CCSA provides comments to the National Energy Regulator of South Africa ("NERSA") on its consultation document on the inquiry into the features of the gas distribution level of the South African piped-gas value chain. Its response focused on features of the distribution level of the value chain that may cause market failures and may impede the achievement of the objects of the Gas Act. The CCSA also provided comments to NERSA's amendments to the guidelines used for the assessment of inadequacy of competition in the South African piped gas industry. The recommendations sought to provide guidance on the promotion of entry and the establishment of a new gas supplier in the South African gas supply chain at a scale that would be sufficient to reduce the market power of the vertically integrated dominate firm and that would enable the growth of competing traders in the relevant markets.

62. In September 2021, the Director General of the South African National Treasury ("National Treasury") issued a letter noting that the National Treasury intends to review the Public Finance Management Act (PFMA) and the Municipal Financial Management Act (MFMA), including the associated Regulations, Instructions, Practice Notes and Circulars. The CCSA provided comments focused on the role of the National Treasury, Provincial Treasuries, accounting officers, accounting authorities and other officials in ensuring that public procurement processes and systems are compliant with the provisions of the Competition Act.

63. In October 2021 the CCSA provided written input on two policies, namely; the "Draft General Policy on the Allocation of Commercial Fishing Rights: 2021/2022" (General Policy 2021/2022) and the "Draft Policy for the Transfer of Commercial Fishing Rights: 2021" (Transfer Policy 2021) to the Department of Forestry, Fisheries and the Environment. The policy responses focused on the management of fishing rights applications to promote the purpose of the Competition Act.

64. In December 2021, the CCSA commented on the South African Insurance Association's ("SAIA") Treating Suppliers Fairly Guidelines. The CCSA supports SAIA's rationale for introducing Guidelines aimed at promoting fair treatment of suppliers in the non-life insurance industry. The CCSA identified competition concerns in the financial sector relating to the treatment of suppliers on panels, including the need for transparency, fairness in work allocation and inclusivity on insurance supplier panels.

4. Resources of competition authorities

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

4.1.1. Annual budget (in your currency and USD):

65. The annual budget was R364 457 000, which equates to USD24 600 000[5]. The previous budget was R340 223 000, which equates to USD20 657 134[6].

4.1.2. Number of employees (person-years):

- economists - *73*
- lawyers - *67*;
- support staff including other professionals – *69*; and
- all staff combined – *209*.

4.2. Human resources (person-years) applied to:

- Enforcement against anticompetitive practices – 54 (30 cartels; Abuse of dominance-24)
- Merger review and enforcement - 28;
- Advocacy efforts - 20.

4.3. Period covered by the above information:

66. 1 January 2021 to 31 December 2021.

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

67. Please see above.

[5] Based on an average exchange rate during the 2021 calendar year of R14.79 = 1USD.

[6] Based on an average exchange rate during the 2020 calendar year of R16.47 = 1USD.