

1. Competition Commission on competition cases completed

2. Committee: [Economic Development](#)

3. Chairperson: Ms E Coleman (ANC)

4. Date of Meeting: 10 Mar 2015

5. Summary

The Competition Commission briefed the Committee on its role in combating anti-competitive practices in South Africa over the past 15 years. It had been successful in identifying and taking action to address anti-competitive mergers and had prohibited certain business practices in different markets, including basic food products, industrial inputs important for industrialisation, HIV/Aids drugs, banking and telecommunications, and had imposed conditions on mergers with an adverse impact on public interest considerations. In the past ten years, the Commission had imposed total penalties of R4.779 billion -- R579 million between 2004 and 2008, and R4.2 billion from 2009 to 2013.

The Commission gave details of major issues in which it had become involved. It had set conditions for the mergers of Walmart-Massmart and Nestle-Pfizer; it had taken on the "bread cartel," resulting in reduced bread prices; collusion had been uncovered in the construction industry during the building of stadia for the soccer World Cup; and it had addressed abuse of dominance cases, although these had proved complex because of the time it took to investigate and prosecute these cases, and the uncertainty associated with the investigations.

In November, there would be a conference with the theme "Competition and Inclusive Growth" in Durban. The forum would be attended by officials from the BRICS countries, and a ministerial delegation on trade and development. Invitations would be sent to certain organisations, as well as to other countries.

Members commended the good work the Commission was doing and urged it to do more, since it was ranked eighth in the world by the World Economic Forum (WEF) on competition laws.. Members were also interested in knowing how the Commission dealt with repeat offenders, the effect of uncovering a cartel on consumers, and whether the Commission stopped its investigations when a firm confessed its wrong doings.

The Commission felt that it had not been complemented by other policies which could be dealt with through regulation. As a result, it was compelled to work with the court processes. These were slow in outcome, with cases taken to court for reviews and appeals, and when

an appeal was lodged, the previous order was suspended. The approach of the courts in some of the cases had been problematic and it was better to deal with them through legislation. The Commission had started discussions with the Minister, indicating where clarification of legislation was needed.

6. Minutes

The Chairperson welcomed Members, officials from the Competition Commission and visitors to the meeting.

Briefing by Competition Commission

Mr Thembinkosi Bonakele, Commissioner, Competition Commission, said that in November there would be BRICS competition forum in Durban. In the past ten years, the Commission had imposed total penalties of R4.779 billion -- R579 million between 2004 and 2008, and R4.2 billion from 2009 to 2013. Examples of notable penalties included:

- Sasol, with fines of R250 million and R117 million in 2009 and 2010 respectively;
- Pioneer foods, 500 million (2010);
- Telkom, R449 million in 2012 and R200 million in 2013;
- Several construction firms -- R1.46 billion.

It had been successful in identifying and taking action to address anti-competitive mergers and had prohibited certain business practices in different markets, including basic food products, industrial inputs important for industrialisation, HIV/Aids drugs, banking and telecommunication, and had imposed conditions on mergers with an adverse impact on public interest considerations.

In May 2011, the Commission had approved the Walmart-Massmart merger with conditions. These were that there should be no retrenchments from the merged entity's operations in South Africa for a period of two years; that the parties must reinstate 502 employees that had been retrenched during 2009 and 2010; Existing labour agreements with SACCAWU must be honoured for at least three years; and Massmart must establish a supplier development fund (SDF) with R242 million set aside to assist eligible small enterprises to operate in five years.

In 2012, the Commission had recommended the merger of Nestle and Pfizer Inc, conditional on a transitional rebranding remedy which envisaged Nestlé divesting the Pfizer brands to an independent third party over a ten-year period. The Commission had acted against the "Bread Cartel," whose members included Premier Foods, Tiger Brands, Pioneer Food and Foodcorp. Premier Foods had been granted leniency for disclosing its role in the bread cartel, flour cartel and maize meal cartel, while Tiger Brands was also granted leniency for proving further evidence on the flour cartel and maize meal cartel.

In construction SA was stuck with big construction firms, given they were the ones with capacity. The Construction Industry Development Board (CIDB) grading system discouraged small firms from engaging in huge construction projects. The cement sector was notorious around the world because it was dominated globally by a few European firms. The main critical challenge going forward was to have an industry-wide discussion to avoid construction cartels happening again, given the huge infrastructure roll-out in South Africa. In June 2008, the Commission had started an investigation into cement producers PPC Cement, Lafarge, Afrisam and NPC-Cimpor, alleging they had entered into restrictive horizontal agreements. Consumer savings as a result of the cartel being uncovered ranged from between R 4.5 billion to R 5.8 billion for the period 2010 to 2013. In addition, there had been a noticeable change and dynamism in the market, with firms entering territories they previously had not traded in.

The Commission had also initiated an investigation into the construction of FIFA 2010 stadia, and in phase one of the fast track settlement programme, 15 firms had reached a settlement agreement of R1.46 billion. Phase 2 was concerned with the construction cases/projects that were not settled under phase 1. 24 firms were implicated in construction cases/projects, but did not participate in phase 1. The Commission has since referred all remaining cases, and aims to close the chapter on construction by March 2015.

The Tribunal had decided on about 11 abuse of dominance cases over the past 15 years, finding that abuse had occurred in eight. However, only two cases had been subject to a penalty imposed by the Tribunal.

The Commission had over the decade been involved in investigations and prosecutions against Sasol and Mittal. Whilst there had been some positive decisions in favour of the Commission on some of these matters, the fundamental issues relating to excessive pricing remain unresolved. This continued to have a detrimental effect in downstream industries, given the importance of the intermediate inputs in industrial development.

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Discussion

Ms C Matsimbi (ANC) said it was good for the Commission to offer incentives to allow offenders to come forward. However, what happened when the Commission discovered that there were more contraventions than those listed when an offender came forward? She asked the regrets of the Commission over the past fifteen year against its successes.

Mr S Marais (DA) asked to what extent market forces influenced the wine industry in the Western Cape. The listing fees were so huge that they prevented smaller companies from competing with big companies. In the case of the Walmart supplier development fund, only R733 000 had been disbursed against an amount of R92 million, which was worrying. He

asked the extent to which smaller manufacturers were empowered to manufacture goods needed by Walmart. The Commission's cases had focused mainly on the period ending 2012 -- what had happened in the years after 2012? Had there been no cartels or abuse of dominance?

Mr S Tleane (ANC) said the Commission was doing a good job. South Africa was ranked number eight in terms of competition laws, but it should always aim for the best. He asked what the countries above South Africa were doing, so that South Africa could copy them and do better. Given that South Africa was chairing the Africa Competition Forum, he asked if companies penalised in South Africa were doing the same things in other African countries. Did the Commission stop investigating when a company confessed? What was the Commission's view on companies that made the process a "merry-go-round" -- for instance, Sasol and Mittal? The R215 million fund was not enough to enable smaller companies to compete against bigger companies. The Walmart-Massmart merger was conditional on two years of no retrenchments -- what happens after two years?

Mr P Atkinson (DA) said that much of the report focussed on the past, and asked what the Commission envisaged going forward.

Mr I Pikinini (ANC) said the report was clear to everyone. The R215 million SDF fund was inclined towards agro-processing, and asked what was happening beyond agro-processing. In approving mergers, the Commission must always stipulate local beneficiation as a condition.

Mr M Cele (ANC) congratulated the Commission for moving South Africa forward through its work. He asked what happened to repeat offenders. He asked what was happening to the pricing of mealie meal, which remains unresolved.

The Chairperson asked whether there had been other areas of concern at the World Economic Forum (WEF), beyond anti-monopoly laws. She asked if the Commission had looked beyond the annual report of Massmart in determining disbursement of the SDF. How many small to medium manufacturing enterprises had been created by the Massmart SDF? What had been the price of bread before, during and after the bread cartel was discovered? She asked about the effect of the cement cartel on consumers.

Mr Bonakele replied that abuse of dominance was a very complex issue. There were two problems related to this. First was the time it took to investigate and prosecute these cases, and the uncertainty associated with the investigations. Telkom, for example, had been prosecuted for over a decade, fined a lot of money and ordered to separate its operations, as it was using its infrastructure to squeeze out other service providers. However, Telkom today was not the Telkom of yesterday, as its dominance had largely been mitigated by the mobile telecom companies.

The Commission felt that it had not been complemented by other policies which could be dealt with through regulation. As a result, it was compelled to work with the court processes. These were slow in outcome, with cases taken to court for reviews and appeals, and when

an appeal was lodged, the previous order was suspended. The approach of the courts in some of the cases had been problematic and it was better to deal with them through legislation. The Commission had started discussions with the Minister, indicating where clarification of legislation was needed. If left to the courts, sometimes they interpreted legislation in a way that was problematic.

The issue of imposing conditions was a defensive issue in the short term, but it afforded labour the opportunity to settle with a new company. During discussions on mergers, companies consider only executive positions and tend to forget lower level staff. Jobs created come only from manufacturers being able to compete with other manufacturers. The Commission did not really dwell much on retail issues, as it had once engaged in a retail issue, involving supermarkets, which had not yielded a positive result. Retailers sometimes had long-term lease agreements, where new players were unable to enter.

He said that Walmart had been giving regular updates on compliance and the Commission had also verified the information given. The effect of Walmart's entrance had not yet been seen, as it was also struggling in the food sector. One could also not assess the impact from suppliers. A full study on the impact on local suppliers and manufactures had to be done. The SDF had to be assessed on its effect on the growth in the sector, beyond just listing disbursements. There was also a need to study if South African companies replaced domestic suppliers when they put their roots in other countries.

Cases being investigated had not just ended in 2012, but some cases were in sensitive stages, such as the inquiry into private health care costs. The Commission also had a huge investigation into suppliers to auto manufacturers, largely based in Japan, and was collaborating with international actors on this. Collusion was still a problem -- for example, furniture removal companies that had been affecting the Departments of Defence, Police and Health on rotation and pricing. On repeat offenders, the law took this into account, and it became an aggravating factor when determining a fine.

The Commission was competing with the best organisations in the world, such as Digicom, United Kingdom and other two United States authorities. These countries had better skills. For instance, in Europe a commission might have 80 PhD graduates, while there were only three locally and a lot of analytical work was involved. It was working closely with Wits University and the University of Johannesburg to sponsor a centre on competition law.

The cement cartel was a Southern African Development Community (SADC) cartel. Officials from Botswana had come to ask if they could share the fight, since the suppliers were usually the same. For instance, fertiliser companies supplied Namibia, Lesotho, Swaziland, Zambia and Zimbabwe.

The Commission could not avoid the merry-go-round scenario, because people had the right to approach the courts. Fortunately, the Supreme Court no longer heard cases based on merit, but only the legal issues in competition cases.

Ms Wendy Mkwanzani, Chief Legal Counsel, Competition Commission, said that the Act allowed the Tribunal to consider whether a firm had cooperated or not in dealing with the Commission, in determining a penalty. It did not stop investigations when there was a confession, but the firm became a part of the investigations. The leniency policy only protected against fines, and not third party damages. Even if a firm cooperated in future, it was treated as a repeat offender. The Commission had also taken a case to the Constitutional Court so that it would not be limited in investigating what it started investigating, but would be allowed to investigate everything uncovered in investigations, including the fruits of investigations.

Mr Liberty Mncube, Chief Economist, Competition Commission, said that the price discount on bread had been designed as an experiment to a value of R160 million, which had been covered in four months. The condition was that the bakers could not discount below their costs. Instead of increasing bread prices, they were stable in December 2010, and further reduced by more than thirty cents. Subsequently, bread prices had started to increase because of market forces and higher operational costs. After collusion, people became smarter, and instead of meeting to collude they followed one another on pricing -- which amounted to collusion again.

Mr Bonakele added that the solution on bread was to allow new entrants, because bread was easy to bake. The larger bakers had scale and could transport over long distances. If the market was flagged, they would be no sustainable cartels. The WEF competitive report was comprehensive and available on their website. In the overall index, South Africa was number 53.

The Chairperson said she expected further briefings by the Commission when other issues had reached a conclusion.

The meeting was adjourned.