

## Overview

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The competition law regime in South Africa is governed by Competition Act No. 89 of 1998 as amended (the Act), which came into force on 1 September 1999, as well as the regulations promulgated in terms of the Act. Three competition authorities are responsible for implementing the Act: the Competition Commission, the Competition Tribunal and the Competition Appeal Court (CAC). The Commission is responsible for the investigation and prosecution of prohibited practices in the Act and the assessment of mergers, as well as having an advocacy role. The Commission also adjudicates small and intermediate mergers, and is empowered to grant or refuse applications for exemptions. The Tribunal is an adjudication body for prohibited practices and large mergers. It also acts as an appeal body for decisions of the Commission in respect of intermediate and small mergers, non-referrals, and exemptions. The CAC, a division of the High Court, reviews the decisions of the Tribunal and considers appeals against the Tribunal's decisions.

The government's Economic Development Department is responsible for the policy oversight and strategic direction of the Competition Commission and Competition Tribunal.

### Recent trends

The Commission has continued to be highly active in adopting a robust enforcement of the Act, and has used a prominent public profile approach towards encouraging complaints from companies and the public to uncover and prosecute anti-competitive practices, particularly price fixing, bid rigging and other collusive conduct. In its 2012–2013 annual report, the Commission stated it had identified three sectors of the economy in which to direct and prioritise its resources: construction and infrastructure; food and agro-processing; and intermediate industrial products such as basic metals and chemicals. In 2012–2013, the Commission's Cartel Division started 18 investigations, seven of which were in the priority sectors, and received seven complaints relating to alleged collusive conduct. Of these investigations, 15 were commenced after information was received from firms applying for immunity via the Commission's Corporate Leniency

Policy (CLP). The CLP has played a prominent role in identifying cartel conduct, which peaked with a total of 244 leniency applications received in the 2011–2012 year, 231 of which related to the Commission's Construction Fast Track Settlement Process.

More recently, in April 2014, as part of its investigation into collusive conduct in the markets for the manufacture and supply of edible oils and margarine, the Commission conducted a search and seizure operation at the offices of Unilever South Africa and Sime Darby Hudson and Knight. In July 2014, it conducted a similar operation at the offices of two motor vehicle repair companies as part of an investigation of collusive activities in that market. Other notable cases this year are the Commission's referral to the Tribunal in March 2014 of its findings of price-fixing and market allocation against a number of companies supplying electric cables to wholesalers, distributors and original equipment manufacturers, and in the same month its referral of two companies alleged to have divided the market for the supply of horse mackerel in certain markets.

The Commission's Enforcement and Exemptions division, which investigates complaints of anti-competitive conduct such as abuse of dominance and horizontal and vertical restrictive practices, has also been highly active. In 2012–2013, the division investigated 177 complaints from the public as well as four complaints initiated by the Commission.

One of the outcomes of the Commission's work in this area was the important abuse of dominance case adjudicated by the Tribunal, which found in June 2014 that Sasol Chemical Industries (SCI) had charged excessive prices for purified propylene and polypropylene during the period January 2004 to December 2007, in contravention of section 8(a) of the Act. The Tribunal's decision was based on price-cost tests, a comparison of domestic prices with prices in other geographic markets and a comparison of SCI's export prices with prices charged in the domestic market. Notably, the Tribunal took into account the historical context of Sasol as a former state-owned enterprise and the significant government support and protection accorded to the company in the past. The Tribunal found that

SCI's market dominance and position as a low-cost, highly profitable supplier, 'were not the result of risk taking and innovation on its part [...] but rather due to past exclusive or special rights in particular very significant historical state support for a considerable period of time'.

The Tribunal decided on a total administrative penalty of 534 million rand and certain behavioural remedies. SCI has lodged an appeal against the decision with the Competition Appeal Court. The decision by the Tribunal is a controversial one: if the CAC confirms the Tribunal's finding, it is likely to have substantial effects on the pricing policies and profitability of companies that are considered dominant in their markets and cannot demonstrate that their cost advantages are based on risk taking or innovation, or if the companies have received state support.

The Commission's merger and acquisition division finalised 327 mergers in 2012–2013, an increase of 10 per cent compared to the previous year. The division approved 278 mergers unconditionally, 37 mergers conditionally, and did not prohibit any mergers. The remaining mergers were either withdrawn or the Tribunal found it had no jurisdiction to adjudicate. The Tribunal decided fewer merger cases in 2012–2013 (76 cases) than in the previous year (85 cases) but, according to the chairperson of the Tribunal, the cases were of increased complexity. High profile cases included the *Glencore/Xstrata* merger and *Nestlé/Pfizer*, a merger involving the companies' infant food products. The Tribunal approved 57 cases and approved 19 cases with conditions. No cases were prohibited.

An important development in competition policy in recent months has been the start of the Commission's formal market inquiry into private health care and the announcement in June 2014 of an inquiry into the liquefied petroleum gas (LPG) market. The power to conduct these inquiries was granted to the Commission following the commencement of section 6 of the Competition Amendment Act, which came into effect on 1 April 2013. The Commission can initiate an inquiry if it has reason to believe that market outcomes indicate a lack of effective competition in a particular market. The results of a market inquiry may include:

- recommendations for new and amended policies, legislation or regulations;
- recommendations to other regulatory authorities; and
- the initiation of a complaint against any firm investigated as part of the inquiry.

## Outlook

The robust implementation of the Act by the competition authorities is likely to continue, supported by government economic policies directed at strengthening the implementation of competition policy. In particular, the government is concerned at the low levels of effective competition in some sectors of the economy where there are high levels of concentration and dominant firms.

In the next year, of particular importance for competition policy will be:

- the possible outcome of Sasol Chemical Industries' appeal against the Tribunal's finding of excessive pricing by the company;
- further progress towards the settlement with companies relating to the Commission's investigation into collusive tendering in the construction industry;
- the Tribunal's adjudication of the Commission's complaint of price fixing and market division in the supply of diesel fuel by the country's major oil companies; and
- the progress of the Commission's private health-care market inquiry.

The private health-care market inquiry is the first to be conducted by the Commission. It covers the markets for financing health care (medical aid schemes, medical aid scheme administrators, managed care organisations and insurers), medical consumables and providers of medical services including hospitals, clinics and medical practitioners. The panel appointed by the Commission to conduct the inquiry has issued a statement of issues for comment including its proposed theories of harm. These theories include:

- market power and distortions in health-care financing;
- market power and distortions in relation to health-care facilities and health-care practitioners;
- barriers to entry and expansion at various levels of the health-care value chain;
- imperfect information; and
- the regulatory framework.

The Commission expects the panel to complete its work of gathering evidence, public hearings and consultations and its report by the end of November 2015.



### Mike Holland

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Mike Holland is an economist and director of PriceMetrics (Pty) Ltd, an economic research company specialising in competition and regulatory economics. Mr Holland has advised companies, legal firms and other organisations on a wide range of competition and regulatory policy issues including mergers and acquisitions, restrictive horizontal and vertical practices, and abuses of dominance such as excessive pricing, exclusionary practices and price discrimination. Clients include private and public sector companies in the agriculture, banking and financial services, minerals, petroleum, engineering, vehicle manufacturing, telecommunications, pharmaceuticals, building materials, physical distribution, transportation and leisure industries. He has also advised companies on competition and regulatory policy issues arising from government inquiries into the banking and petroleum

industries in South Africa. His other consultancy work includes advising companies on pricing strategies and policies.

He has substantial experience of the banking industry and financial markets in South Africa, including positions as head of research and development in the treasuries of leading banks in the country. Other experience includes economic and financial analysis for UK companies, including several years as an economist in the motor industry.

Mr Holland lectures in economics and business strategy on MBA and other graduate courses at the Gordon Institute of Business Science, University of Pretoria.

A British citizen, he holds a BSc (Econ) degree from the University of London and an MSc (administrative science) degree from City University, London.

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PriceMetrics is a consultancy specialising in the economics of competition, regulation and price management. We use economic theory and quantitative analysis to provide a range of research and advisory services to companies, law firms and other organisations involved in issues relating to the Competition Act and regulatory policies in South Africa.

Our expertise covers economic appraisals of horizontal and vertical agreements; the impact of mergers including unilateral and coordinated effects, the analysis of potential efficiencies and remedies; and the analysis of market power. We provide econometric and financial analyses of markets including demand and price projections, market definitions, elasticities of demand, financial modelling, investment appraisals, the assessment of economic profitability, cost of capital and the valuation of companies.

Recent cases include advising clients regarding mergers and acquisitions, cartel behaviour, and excessive pricing. We have also advised companies on competition policy issues arising from competition authority inquiries into the retail banking, petroleum industries, and private health care markets in South Africa.

Our price management services help companies improve profitability through more effective pricing decisions. We also advise clients regarding the design of pricing policies to meet the requirements of the Competition Act and regulatory authorities.

Our clients include large private and public sector South African and multinational companies in the agriculture, banking and financial services, building materials, commodity recycling, engineering, food manufacturing, health care, leisure, medical care, minerals, petroleum, pharmaceuticals, physical distribution, retail, telecommunications, and transportation industries.