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Presentation to SA Readymix Association

Competition Act and Information Exchange



Competition Commission SA

Date: 13 February 2015

TOWARDS A FAIR AND EFFICIENT ECONOMY FOR ALL



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OUTLINE OF THE PRESENTATION

- Objectives and application of the Competition Act 1998 (“the Act”) as amended.
- Competition Authorities & its functions.
- Regulation of horizontal practices.
- Exemption Application.
- Industry associations & information exchange.
- Corporate Leniency Policy (“CLP”).
- Advisory opinions .

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ROLE OF COMPETITION IN THE ECONOMY



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Mandate derived from the Competition Act:

- To promote and maintain competition in order to:
 - Promote efficiency and development of the economy;
 - Provide consumers with competitive prices and product choices;
 - Ensure that South Africa participates in world markets & recognising the role of foreign competition in the Republic; and
 - Ensure SMME's an equitable opportunity in the economy .

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Application of the Competition Act 89 of 1998



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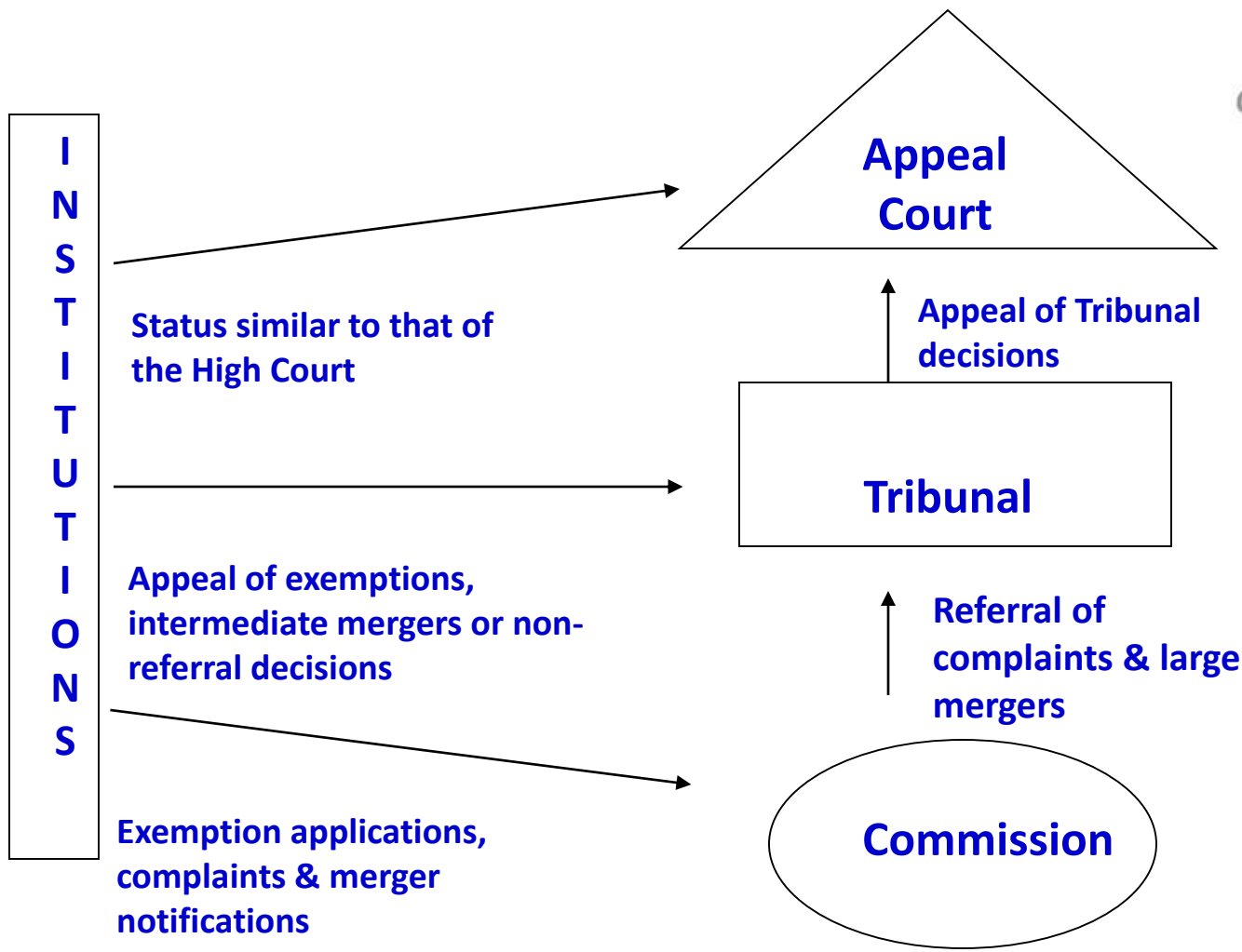
It applies to:

- All economic activity within or having an effect within the Republic, except-
 - a) Collective bargaining ...
 - a) A collective agreement, as defined in section 213 of the Labour Relations Act.
- Applies to all enterprises (Private and Public).

COMPETITION AUTHORITIES



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THE COMPETITION COMMISSION

- CCSA fulfills its function through:
 - evaluation of complaints (E&E)
 - prosecution (LSD)
 - evaluation of mergers (M&A)
 - conducting research (P&R)
 - managing stakeholder relations,
including advocacy (ASR)
- Support function from CSD

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THE COMPETITION COMMISSION



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Commission has prioritised the following sectors:

- Infrastructure and construction;
- Food and agro-processing ; and
- Energy
- Intermediate industrial products.

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What practices does the Act regulate?



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PROHIBITED PRACTICES

- In order to monitor business activity, the Act sets out rules for businesses in relation to competitors, suppliers and customers. Certain activities, which would have a major negative effect on competition, are therefore not allowed by the Act.

These activities include:

- illegal arrangements between competitors (restrictive horizontal practices);
- illegal arrangements between suppliers, producers and their customers (restrictive vertical practices); and
- illegal use of market power by large companies (abuse of dominant position).

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WHY DOES THE ACT REGULATE HORIZONTAL AGREEMENTS?



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- The economic rationale for the scrutiny of horizontal agreements by competition authorities is founded on the recognition that competitors seeking to maximise their profits, have an incentive to co-ordinate their behaviour rather than compete vigorously with one another.
- If firms behave collusively, they act in the same manner as a monopolist and are able to increase prices (or reduce output) and thus earn higher profits, collectively as well as individually .
- This behaviour may be to the detriment of consumers.
- Co-ordination enables a group of firms to collectively exert and abuse market power, which they would not be able to do individually.

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WHAT REGULATES HORIZONTAL AGREEMENTS ?

- Section 4 of the Competition Act.
- Section 4(1)(a) is a **rule of reason** prohibition of a horizontal agreement that restricts competition.
- Section 4(1)(b) are the **per se** offences of -:
 - price fixing,
 - market allocation; and
 - collusive tendering.

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WHAT DOES SECTION 4 PROHIBIT?

Section 4(1) prohibits

- an agreement between, or
- concerted practice by, firms, or
- a decision by an association of firms, if it is between parties in a horizontal relationship and if-
- relationship has the effect of substantially preventing or lessening competition in a market, unless a party could prove efficiency, pro-competitive or technological gains, or

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WHAT DOES SECTION 4 PROHIBIT? Cont-

- it involves any of the following restrictive horizontal practices:
 - directly or indirectly fixing a purchase or selling price or any other trading condition;
 - dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
 - collusive tendering.

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DEFINITIONS



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- **'agreement'**, when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable.
- **'concerted practice'** means co-operative or co-ordinated conduct between *firms, achieved through direct or indirect contact, that* replaces their independent action, but which does not amount to an *agreement*.
- **'horizontal relationship'** means a relationship between competitors at the same level.
- **'market power'** means the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.

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WHEN DOES AN AGREEMENT EXIST?

- The Act recognises that an agreement to collude can take place in many ways.
- The co-ordination between competitors can take place in two ways:
 - **Explicit co-ordination** – meetings, formal agreements between members of various companies.
 - **Implicit or tacit co-ordination** – an understanding between members of various companies.

Evidence – price uniformity, acted against self interest, decisions not unilateral, existence of platforms for collusions.

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PER SE OFFENCES – s 4(1)(b)

- There are three restrictive horizontal practices that are prohibited outright. No defence is allowed for these unfair arrangements (per se).
 - the direct or indirect fixing of prices (e.g. agreeing to keep a price at a specific level, price fixing);
 - the agreed division of markets (e.g. splitting regions between companies or market sharing); and
 - collusive tendering (e.g. making secret agreements to apply for government work).

PRICE FIXING



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- It is prohibited for competitors to agree on prices.
- The fixing of prices occurs whenever a **contract, arrangement or understanding** has the effect or likely effect of **fixing, controlling or maintaining prices**.

This can be done through **discounts, allowances, rebates or credits** in relation to goods or services bought or sold by any party in competition with one another.



- Prices can be controlled not only by direct price-fixing agreements, but also indirectly by agreement amongst firms not to compete with one another, i.e. Market allocation.
- If Firm A agrees not to sell in the area of Firm B and vice versa then they both can fix the prices at a higher level than if they vigorously competed against each other.

COLLUSIVE TENDERING



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- Collusive tendering is where firms agree to bid either high or low depending on what role they will play. The party within the agreement that garners the tender then either re-allocates work on a subcontract basis or does not participate in the next tender in reciprocity or actively pursues a losing role.
- Collusive tendering is anti-competitive as it results in market allocation or market division.
- Collusive tendering distorts the competitive process.



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EXEMPTION APPLICATION – Section 10 of the Act

Evaluating Exemption Applications

Prohibited agreements or practices are exempted to fulfill one of the following objectives

- Export promotion
 - Small business & black business competitiveness
 - Decline in industry
 - Designated industry
-
- Intellectual property rights

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Schedule 1 Exemptions

Evaluating Schedule 1 Exemptions:

Rules of Professional Associations exempted if:

- Substantially prevent or lessen competition, and
- Required to maintain professional standards or ordinary functioning of a profession

Types of Professional Associations

- Statutory ones, e.g. Accountants & Auditors, Estate Agents, Attorneys & Advocates
- Miscellaneous

INDUSTRY ASSOCIATIONS - COMPLIANCE



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- There are industry associations in almost every sector.
- Commission is not against the establishment and meetings of industry associations.
- Commission recognizes that industry associations may carry on legitimate activities beneficial to its members, e.g. Lobbying and improving safety of products.
- However, it becomes a competition problem when industry associations are used as fora for facilitating collusion.

Information Exchange and Associations



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Two categories of risk in Information Exchange:

Risks beyond your control

- Market structure
- Product differentiation
- Price sensitivity of sales
- Public availability of information

Information Exchange and Associations - cont



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Risks within your control

- Parties that exchange information.
- Kind of information exchanged.
- The currentness of information involved.
- Whether the information is direct or through a third party.
- The level of detail in the information exchange.
- The identities of competitors.
- The competitive purpose of the exchange.

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Information Exchange and Associations - Cont



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- Information exchange is allowed **but** avoid discussing:
 - ✓ Current and future prices
 - ✓ Decreases or increases in prices
 - ✓ Standardisation or stabilisation of prices
 - ✓ Cash discounts
 - ✓ Credit terms
 - ✓ Restrictions on supply
 - ✓ Allocation of customers or markets
- Avoid disseminating fee guidelines

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Corporate Leniency Policy - CLP

- Implemented in 2004.
- Pro-active tool, integral to detect and eradicate cartel conduct [section 4(1)(b)].
- Indemnity to firms providing information of a cartel.
- “First through the door” but *marker system* also applies.



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Corporate Leniency Policy - Cont

- Must cooperate fully with and assist Commission.
- Applications received in the Commission's major cartel investigations division.
- Revised CLP applicable effective from 23/05/08.
- Amendment Act – to incorporate CLP into Act and introduce new aspects e.g. market inquiries and criminal liability of directors or managers found to have caused a firm to engage in cartel conduct.



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ADVISORY OPINIONS

- A statutory fee of R2 500 is payable upon request for an advisory opinion.
- Clarity on the application of the provisions of the Competition Act.
- Advice given only applies to the facts as contained in the request.
- Requests for advisory opinion must be directed to the manager of legal services.



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Conclusion

Riskiness of information exchange varies with age

“The exchange of historical data is least risky, the exchange of current data is more risky, and the exchange of future plans, except under very limited circumstance, is extremely risky”.



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Questions & Clarification

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THANK YOU

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