

# Presentation to Portfolio Committee: Trade Industry and Competition

Presentation by the Competition Commission - Commissioner Doris Tshepe

7 March 2023

*competition regulation for a growing and inclusive economy*



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# Introduction – The Purpose of the Act

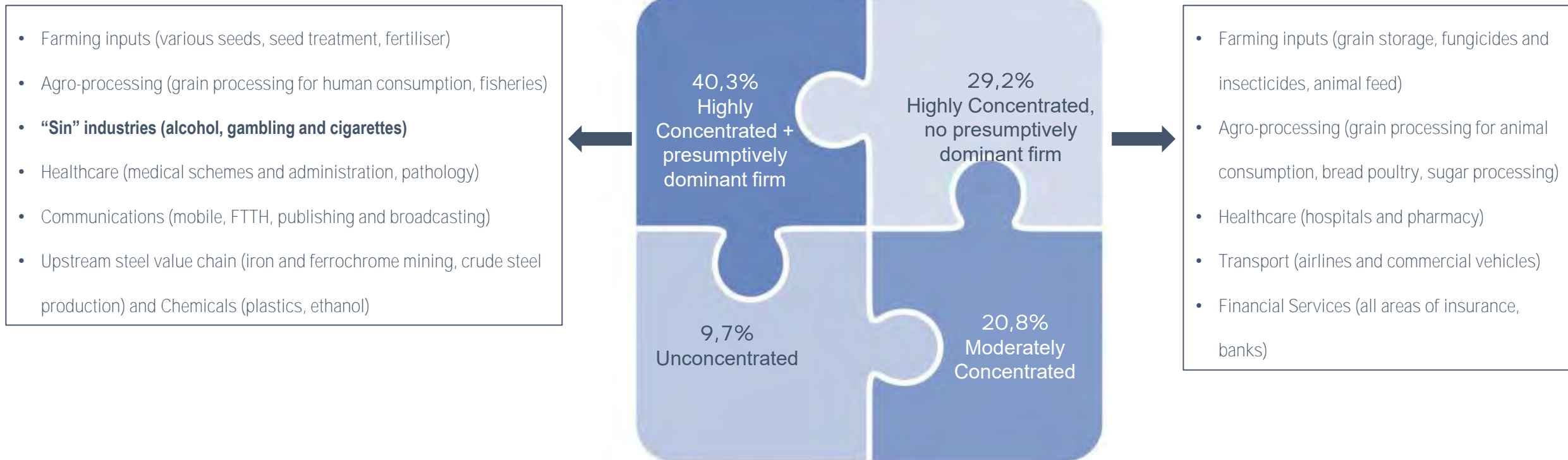
- The purpose of the Competition Act is to;
  - promote an efficient economy with competitive prices for consumers and participation in global markets,
  - promote employment and the economic welfare of all South Africans, in particular SMEs and HDPs that were excluded from the economy.
- This recognises that the economy we inherited is concentrated, which creates both a competition and an exclusion issue.
- Addressing exclusion is not only about addressing inequality, it is also about removing barriers to new businesses that can contribute to growth, employment and a more competitive economy.

# Introduction – Amendments to the Act

- The amendments to the Act have provided more tools to address competition and exclusion.
- On ability to enforce, the amendments include;
  - the removal of the yellow card,
  - greater specificity in excessive pricing, and
  - powers in market inquiries to improve competition, not just prevent it from getting worse.
- The amendments to the Act focuses on:
  - Promoting growth,
  - Removing exclusion,
  - The amendments to the act have also included the new public interest grounds; in merger control, e.g. promotion of greater spread of ownership,
  - New abuse of dominance contraventions against SMEs/HDPs, e.g. price discrimination on inputs and buyer power on outputs.

# Introduction - Context underpinning our interventions

The Concentration Study has shown persistent high levels of concentration in the SA economy as illustrated below:



- Low levels of participation more generally but especially in concentrated sectors; numerous concentrated sectors with broader participation of smaller fringe firms unable to scale.
- SMEs represent 95% of firms, 38% of employment but only 24% of value by tax-paying firms, compared to OECD average of 50-60% of value.

# Introduction – Lessons learnt from the Covid-19 Pandemic

- Emerging out of Covid-19 there is a challenging economic environment with high food and energy inflation globally, slower economic growth, high unemployment, and an electricity crisis.
- As demonstrated during the Covid-19 Pandemic, even during such challenges, strong competition law enforcement remains highly relevant but must also pivot to give priority to the immediate challenges even whilst laying the foundation for a competitive economy for the future.
- During the Covid pandemic, the Commission shifted resources to address price gouging, combat food inflation, exempt cooperative responses to the pandemic, and support for the Economic Reconstruction and Recovery Plan.

# Current Priorities

- **Therefore, we are focusing on;**
  - Competition issues affecting hard-pressed consumers,
  - Exclusion from the economy for SMEs/HDPs and
  - Removal of barriers to economic growth.
  - Supporting the government's response to the energy crisis
- **Our Response includes:**
  - Promotion of SMEs/HDPs both addresses exclusion and promotes growth through unlocking the potential of new businesses & entrepreneurial talent
  - Supporting economic growth and Pro-development cooperation: We have been and continue to open the doors to pro-development cooperation whilst containing the risks of anti-competitive outcomes
  - Implementation of regulations related to the energy crisis once they have been published, and prioritisation of key cases in the energy sector.



# Performance in Q1 & Q2: Overview

## Activity

- 147 mergers notified and 132 finalised of which 30 with conditions
- 12 Cartel cases initiated and 17 completed with 3 referrals
- 1 dawn raid on the life insurance industry
- 188 complaints received with 163 finalised
- 125 cases currently in litigation

## Financials

- 1 clean audit for FY2022 and within budget for FY2023

Total App Targets: 51	Q1	Q2
Applicable targets	24	28
Targets not applicable	27	23
Targets met	17	19
Targets exceeded	4	4
Targets not met	3	5
<b>Total score %</b>	<b>88%</b>	<b>82%</b>

***The Commission expects to conclude the year with an overall performance score of more than 90%***



# Highlights on Financial Information for Q1 and Q2

## Revenue

TOTAL REVENUE	ANNUAL BUDGET	YTD TOTAL	YTD BUDGET	YTD VARIANCE	YTD VARIANCE %
- Mergers & Acquisitions	71,810,286	35,568,500	35,905,143	(336,643)	-1%
- Exemptions	-	100,000	-	100,000	0%
Government Grant	449,518,000	224,759,000	224,759,000	-	0%
Interest Received	7,592,459	8,154,413	3,796,229	4,358,183	115%
Other Income	-	1,290,476	-	1,290,476	0%
<b>TOTAL</b>	<b>528,920,745</b>	<b>269,872,388</b>	<b>264,460,372</b>	<b>5,412,016</b>	<b>2%</b>

## Expenditure

TOTAL PER MAIN ITEM	ANNUAL BUDGET	YTD ACTUAL	YTD BUDGET	YTD VARIANCE	YTD VARIANCE %
<b>Total</b>	<b>528,920,745</b>	<b>235,681,295</b>	<b>264,360,372</b>	<b>28,679,077</b>	<b>11%</b>
Human Resources	324,198,743	142,442,127	161,999,372	19,557,245	12%
Premises & Equipment	20,724,790	9,113,052	10,362,395	1,249,344	12%
Other Operational	12,727,111	5,782,930	6,363,555	580,625	9%
Research & Information	2,272,000	739,411	1,136,000	396,589	35%
IT and system Development	6,779,827	2,520,955	3,389,914	868,959	26%
Educational Awareness	14,650,000	7,976,272	7,325,000	-651,272	-9%
Case Related Costs	97,199,000	49,936,968	48,599,500	-1,337,468	-3%
Capital Expenditure	23,000,000	8,854,903	11,500,000	2,645,097	23%
Depreciation	5,529,075	2,430,485	2,764,538	334,053	12%
Other Programme Costs	21,840,198	5,884,193	10,920,099	5,035,906	46%

## Highlights on Financial Information for Q1 and Q2 (Cont.)

- Total Revenue received for the first two quarters is R269,9 million against a budget of R264 million for the same period
- The fee income received for the period ended 30 September 2022 is R35,5 million which is made up of merger filing fees. This is against a budget of R35,9 million year to date.
- The total expenditure amounted to R234 million (including capital expenditure and lease payments) against a budget of R264 million year to date.
- The expenditure is expected to increase during the financial year and the budget is spread evenly over the year.

# Highlights on Merger Control in Q1 and Q2

- Merger control ensures that acquisitions do not undermine competition or the public interest, including employment, SME participation, retention of productive capacity and the promotion of a greater spread of ownership.
- Small merger guidelines were revised to take account of technology markets where turnover or capital assets may be small but the future market impact substantial
- In Q1/Q2 merger conditions yielded a substantial public interest gain to the economy including:

**1 725**

The number of jobs saved and/or created through imposition of merger conditions in Q1 and Q2 2022/23

**8**

The number of cases in which supplier development commitments were imposed in Q1 and Q2 2022/23

**R878 million**

The estimated value of supplier development funds imposed as merger conditions in Q1 and Q2 2022/23

**R30 billion**

The estimated value of procurement commitments relating to small (SMME) and HDP-owned firms in Q1 and Q2 2022/23 with different implementation periods of up to five years.

**8**

New ESOPs introduced as a result of merger conditions imposed in Q1 and Q2.

**R10 billion**

Estimated value of the shares for workers and communities introduced in Q1 and Q2 at the point of the imposition

# Highlights on Merger Control in Q1 and Q2 (Ardagh/Consol Merger)



# Consol

- **Decision:** Merger recommended to the Tribunal with conditions.
- **Condition:** Creation of an ESOP with a 7% shareholding, Investment into the manufacturing capacity of merged entity, other conditions.
- **Outcome/Impact:**
  - 7% in an ESOP
  - +- R 1,5 billion Investment
  - Support to SMMEs through reduction of Minimum Order Quantities Required





# Highlights on Merger Control in Q1 and Q2 (Shoprite Merger)



- **Decision:** Merger recommend to the Tribunal with conditions.
- **Conditions:** Creation of an ESOP, Local Procurement and Skills Development.
- **Outcome/Impact:**
  - Skills Development for over 1,000 HDP Students/ Youth
  - ESOP of 40 million shares
  - Substantial Local Procurement

# Highlights on Merger Control in Q1 and Q2 (Heineken Merger)



- **Decision:** Merger recommended to the Tribunal with conditions<sup>1</sup>.
- **Conditions:** Investment Commitment, ESOP Commitment, Supplier Development Fund, Contribute to Localisation, Tavern Transformation Program and R&D Hub
- **Outcome/Impact:**
  - R 10 billion Investment Commitment
  - ESOP of R 3 billion
  - R 400 million investment over 5 (five) years in SME- and HDP-controlled suppliers to Newco
  - R 200 million on Localisation
  - Tavern Transformation Program R 175 million

## Note:

1. Tribunal Decision still pending on the transaction.





## Highlights on Merger Control in Q1 and Q2 (Cont.)

- The IDC and DTIC recently engaged in macroeconomic modelling of the impact of different BEE initiatives, finding for merger control the following:



**R40.8 billion**

The total contribution of merger conditions to economic activity in the 12 years to 2021/22 (direct contribution R12.4bn)



**77 339**

The contribution to jobs sustained and/or created economy wide due to the economic impact estimated above.



# Highlights on Enforcement

- Enforcement has prioritised sectors such as Energy, food, healthcare and infrastructure which are critical to economic growth and social welfare:
  - **Energy:**
    - The Commission is actively engaged in advocacy around energy policy and electricity pricing to ensure a more competitive and resilient market.
    - A focus is on alternative energy markets, ensuring they develop in a competitive manner, and upstream coal markets.
    - There is also an active investigation of Sasol Gas pricing following proposed price hikes based on higher EU gas price benchmarks
    - The Commission referred a complaint against Vita Gas (Pty) Ltd following a findings of anticompetitive conduct arising from the LPG Handling and Throughput agreement concluded between Vita Gas and Sunrise in 2018. The conduct by Vita Gas constitutes anti-competitive conduct in contravention of section 8(d)(i) and 8(1)(d)(i), alternatively 8(c) and 8(1)(c) of the Competition Act.
    - Merger control is vigilant to ensure consolidation in renewables does not hinder a future deregulated energy market.

# Highlights on Enforcement (Cont.)

## ○ **Food:**

- The Commission has been engaging stakeholders ahead of launching the Fresh Produce Market Inquiry which will focus on upstream inputs of seed and fertiliser, markups down the value chain, municipal markets and barriers to SME and HDP participation.
- There is scoping research on grain, oil and feed markets which are large cost drivers in core protein livestock, poultry and dairy markets.



# Highlights on Enforcement (Cont.)

## ○ **Healthcare:**

- Following PCR tests and the referral of Roche for excessive pricing of breast cancer drugs, investigations have been initiated in life saving drugs and essential vaccines to contain the public and private health costs.
- Engagements with the Dept of Health and CMS are driving scoping studies into diagnostics and other high cost inflation services.



# Highlights on Market Inquiries

- The Online Platforms Market Inquiry (OIPMI) was launched to address competition issues in eCommerce, food delivery, app stores, online travel agents, and classifieds which are important channels for SA businesses.
- The Inquiry released its provisional report in July, with extensive findings and proposed remedial action that would assist SA platforms to compete, prevent small business users from being disadvantaged, and promote transformation in the digital economy whilst benefiting consumers. These included proposed measures to:
  - Improve the visibility of small and SA platforms on Google search, whilst preventing Google favouring its own specialist products
  - Reduce high commission fees on Apple App and Google Play stores
  - Improve the visibility and discoverability of SA apps on those stores
  - Eliminate price parity clauses that limit online price competition
  - Promote interoperability of platforms and remove barriers to small platforms getting business support

## Highlights on Market Inquiries (Cont.)

- Measures cont.
- Reduce fee discrimination against small independent restaurants in delivery, and estate agents/auto dealers in online classifieds which raise their costs and reduce competitiveness
- Make advertised and promoted products transparent to consumers
- Prevent self-preferencing of own products on eCommerce platforms and unfair use of seller data to compete with independent sellers
- Enable HDP businesses to compete in the digital economy through onboarding, reduced platform costs, and increased visibility on platforms
- Provision of risk financing for HDP digital entrepreneurs by government and financial institutions
- The Inquiry will conclude in the current quarter with the release of the final report following stakeholder engagements on its provisional findings and remedies.



# Highlights on Responding to Economic Shocks

- The Commission has used the active monitoring of critical markets, firm-level advocacy, guidance on acceptable conduct, accelerated investigations, and consent agreements to correct behaviour in response to economic shocks. This continues to protect consumers from exploitation.
- **Food inflation:**
  - The Commission continues to actively monitor Essential Food Products and this period saw high inflation globally. This can provide a pretext for processors and retailers to raise prices more than costs warrant.
  - Food price monitoring focused on high-inflation products including cooking oil, wheat, and maize products. It exposed that cooking oil producers increased prices far more than their costs which saw prices start to drop immediately after the publicity of the finding.
  - The Commission formally initiated investigations into the producers of all these products to monitor and deter any exploitation.
  - This proactive approach has contributed to lower food inflation than other global markets.

# Highlights on Responding to Economic Shocks (Cont.)

- **Air travel:**

- The exit of Comair removed 40% of capacity from the domestic travel market along with rising jet fuel costs provided the context for large unwarranted price increases from remaining airlines
- The Commission engaged airlines on the day of the announcement setting out clear guidelines on what would be acceptable pricing and how to bring more capacity into the market. An investigation was initiated which enabled proper monitoring of route financial information.
- The guidance and close oversight ensured that price increases were moderated, and margins contained despite the size of the shock. New capacity has also brought the market closer to balance.



# Highlights on Litigation

- **The Commission vs Group 5**
  - On 27 October 2022, the Constitutional Court handed down judgement in the case of Commission v Group Five Construction Ltd. The majority of the Court dismissed the Commission's appeal. The Constitutional Court held that the High Court does have jurisdiction to hear the review, and also held that the Tribunal did not have jurisdiction to adjudicate a Promotion and Access to Justice Act (PAJA) or legality review. The consequence of the judgement is that the Tribunal, as a specialised forum, will not have legality and PAJA oversight over the Commission's decisions due to lack of jurisdiction.
  - ***The Commission is currently working on remedying this situation through proposals for amendment of the Act to restore the Tribunal's jurisdiction to hear legality and PAJA reviews.***

## Highlights on Litigation (Cont.)

- **The Commission vs Coca Cola Beverages**

- On 17 June 2022, the Competition Appeal Court, in the case of Commission v Coca-Cola Beverages Africa (Pty) Ltd upheld the Commission's decision to issue a notice of apparent breach against Coca-Cola Beverages Africa breaching its merger conditions in affecting the merger-specific retrenchment of 368 employees.
- The effect of the judgement is that the 368 retrenched employees will need to be reinstated by CCBA.
- ***The matter has been appealed to the Constitutional Court.***

## Highlights on Litigation (Cont.)

- **The Commission vs Tsutsumani Business Enterprises:**
  - The Commission welcomed the decision by the Tribunal in which Tsutsumani was found to be in contravention of section 8(1)(a) of the Competition Act, read with Regulation 4 of the Consumer Protection Regulations.
  - The Tribunal found that Tsutsumani charged excessive prices for face masks supplied to South African Police Service during hard lockdown.
  - Tsutsumani was given an administrative penalty of R3 441 689.10 (three million four hundred and forty-one thousand six hundred and eighty-nine rand and ten cents) rand, being the maximum permissible amount (10% of turnover).

# Highlights on Litigation (Cont.) (Competition Commission v Coca Cola Beverages Africa)



- **Decision:** In June 2022, the Competition Appeal Court, upheld the Competition Commission's decision to issue a notice of apparent breach against Coca-Cola Beverages Africa (CCBA) for breaching its merger conditions in affecting the merger specific retrenchment of 368 employees
- **Issue:** The Court reaffirmed that the correct test is whether there is a connection between the retrenchments and the incentives of the new controller.
- **Outcome/Impact:** The effect of the judgement is that the 368 retrenched employees will need to be reinstated by CCBA. The matter has been appealed to the Constitutional Court.



## Highlights on Litigation (Cont.) (Competition Commission v Computicket & Shoprite Checkers Settlement)



- **Decision:** In June 2022 the Tribunal confirmed the settlement agreement as agreed to and proposed by the Competition Commission, Computicket (Pty) Ltd and Shoprite Checkers (Pty) Ltd to settle a prosecution against it by the Commission for abuse of dominance in contravention of section 8(d)(i) or 8(c) of Competition Act, 89 of 1998. (Act).
- **Issue:** In the complaint referral the Commission alleged that Computicket and Shoprite Checkers, acting as a single economic entity, had concluded, and had been enforcing, exclusive agreements with numerous inventory providers (such as theatre owners, promoters, and other event organisers) resulting in exclusion of Computicket's Competitors from the market. Computicket has previously been found guilty of similar conduct by the Tribunal and the Competition Appeal Court.
- **Outcome/Impact:**
  - The consent agreement records that the exclusivity provisions in Computicket's agreements have, from 23 October 2019, been removed, and takes cognizance of the changes in the events sector and market generally, giving rise to the settlement.
  - Computicket agreed to pay a fine of R11 317,000.00 to settle a prosecution



# Highlights on Combatting Cartels

- The Commission conducted search and seizure operations (dawn raid) at the premises of eight insurance companies operating in Gauteng, KwaZulu-Natal, and Western Cape provinces. The Commission has reasonable grounds to suspect that BrightRock Life; Discovery; FMI, a division of Bidvest Life; Hollard Insurance; Momentum; Old Mutual; PPS, and Sanlam have engaged in collusive practices to fix prices and/or trading conditions in respect of fees for investment products such as retirement annuity and premiums for risk-related products, namely, life insurance covers such as dread disease cover / chronic medical condition cover, disability cover, life cover and funeral assistance benefits in contravention of section 4(1)(b)(i) of the Competition Act.
- The Commission received voluminous information in physical documents and electronic data from the raid and is currently analyzing the data as part of continuing investigation.

## Highlights on Combatting Cartels (Cont.)

- The Commission continues to see a rise in cases related to bid rigging with some of the firms involved being small firms that are colluding with bigger firms.
- In addition to enforcement work in this area, the Commission has intensified its advocacy with small firms and with procurement officials of various government institutions/departments on compliance with the Competition Act, including the detection of potential bid rigging and the process of reporting such to the Commission.



# Highlights on Advocacy

- The Commission provided training to Agricultural Economics students at the University of Limpopo in a Student Exposure Workshop organised by the **dtic** in collaboration with the University of Limpopo.
- In June, the Advocacy Division hosted online training sessions for Eskom procurement officials. Over 550 attendees participated in these training sessions.
- The Commission exhibited at the Rand Show at the Nasrec Showgrounds in Johannesburg where the Commission showcased some of its cases and projects that have had an impact on general consumer welfare as well as on the entry and participation of Small Medium, and Micro Enterprises (SMME) in South African economy.

## Highlights on Advocacy (Cont.)

- In addition to the above, the Commission continues with its work in promoting compliance with the Commission published Guidelines for School Uniform Procurement jointly with the Department of Basic Education (DBE) in 2020.
- The Commission hosted an in-person Youth in Business Exhibition at the **dtic** Campus in Sunnyside, Pretoria in September 2022 to assist young entrepreneurs to access government services in relation to business regulation and funding.
- This initiative is aimed at reducing some of the common barriers affecting the entry, participation, and sustainability of youth in business.

# Work Programme

- The additional mandate from the 2019 Amendments is central to the work programme, in particular promoting the participation of SMEs/HDPs in the economy. This is essential to de-concentration, transformation and inclusive economic growth.
- **Guidelines and Business certainty:**
  - The publication of guidelines on how the Commission will enforce different sections of the Act provides business certainty in compliance with the Act. The work programme aims to release guidelines for all amended sections, including the approach to the greater spread of ownership in merger control
- **Developing Jurisprudence**
  - The Commission will adopt a deliberate strategy to investigate and refer cases in areas of the amendments to develop the jurisprudence and provide greater legal certainty on the interpretation of the legislation. This will include the promotion of the constitution and basic rights through competition law in light of the Mediclinic judgement by the Constitutional Court.

# Work Programme (Cont.)

- **Prioritisation**

- There is a deliberate prioritisation strategy to ensure that the work of the Commission has maximum impact in promoting competition and increasing participation in the economy as set out in the purpose of the Act. This includes sector and thematic prioritisation which is responsive to the changing economic environment and government priorities. This is being updated given the new operational context and challenges to the economy.

- **Market Inquiries**

- There is a commitment to expand the number of market inquiries in priority markets where the removal of features adversely affecting competition can unlock growth, achieve greater participation, and benefit consumers. The Commission is scoping two new inquiries to be initiated this quarter.

- **Operational**

- The expanded mandate and budget have necessitated a review of the organisational structure and needs to support an efficient and effective institution. This includes staff, facilities, and enforcement tools.

# Work Programme (Cont.)

- **Responding to the Energy Crisis**
  - As announced by the Minister Ebrahim Patel on 14 February 2023, the Commission will;
    - support actions on the electricity crisis with exemptions for energy users and suppliers to optimise use and build supply.
    - and hope to benefit from the consideration of new measures to speed up hearings on competition cases relating to energy by the Tribunal.





# Work Programme (Cont.)

## • School Uniform Guidelines

- Two years ago, Tshwane-based entrepreneur, Pamela Luthuli sold school uniforms from the boot of her car for two days a week. On a good day, she would sell up to five items per day. Some days she would return home without a single sale.
- Today, Luthuli runs a thriving business producing and supplying school uniforms, tunics, golf shirts, blazers, tracksuits, and related clothing items to 10 schools in and around Tshwane. She used the National Guidelines on School Uniform issued by the Department of Basic Education (DBE) in 2006 and the Circular on the Procurement of School Uniforms and other Learning-Related Material jointly issued by the DBE and the Commission in 2020 (Circular No. 11 of 2020) as a steppingstone to participate meaningfully in the value chain of the school uniform production industry.
- ***The Commission will continue monitoring the implementation of the guidelines.***



*The guidelines have facilitated entry of a Small Enterprise operated by HDP leading to expanded production capacity and creation of additional jobs.*



# Work Programme (Cont.)

- **Automotive Aftermarket Guidelines**

The guidelines are aimed at promoting competition in the automotive aftermarket, specifically to promote economic access, inclusion, and greater spread of ownership for Historically Disadvantaged Individuals (HDIs).

The latest roadshow follows the receipt of several complaints regarding practices perceived as unfair in the automotive aftermarket sector including:

- Unbundling the sale of motor vehicles with value-added products;
- Appointment of service providers to panels by Original Equipment Manufacturers (OEMs) and insurers, and allocation of work;
- Voiding of manufacturer warranties when consumers take their in-warranty vehicle to an independent service provider and
- Access to OEM technical information by ISPs.

The Commission will be handing out educational publications on the automotive aftermarket and charts that can be put up in the workshops containing information on what the Guidelines mean for different stakeholders including consumers, ISPs, OEMs, insurers, and approved dealers.

**Extract from a Media Advisory, 2022**

- ***The Commission will continue monitoring the implementation of the guidelines.***



**RAISING AWARENESS ON THE GUIDELINES FOR  
COMPETITION IN THE AUTOMOTIVE AFTERMARKET**



# Conclusion

- The Commission is committed to ensuring its work achieves this mandate and provides critical support for the economic policies of the government. The current challenges to the economy and enormous hardship faced by consumers, coupled with continued concentration and lack of transformation, have made the work of the Commission more important than ever.
- The Commission continues to strive in becoming an efficient and high performing institution, we are committed to meeting all our targets in the remaining financial year. The Commission also continues to review and allocate resources efficiently to ensure that our mandate is attained.

# THANK YOU

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