

The Official Newsletter of the Competition Commission of South Africa

CompetitionNEWS

Towards a fair and efficient economy for all

Senwes
acquires Bunge

04

Commission
concerned
with exclusivity
in shopping
complexes

08

The South
African
petroleum and
refinery industry

14

Intersection
between
competition
policy and
entrepreneurship

16

Commission blocks GWK's acquisition of fertilizer blending facility

Werner Rysbergen

In giving effect to a settlement agreement entered into by Sasol Chemical Industries Ltd (SCI) and the Competition Commission, SCI divested its liquid fertilizer blending facility in Kimberley to Griekwaland Wes Korporatief (GWK).¹ The divestiture transaction was notified as a merger to the Commission for approval. The Commission's investigation, however, showed that the transaction is likely to result in a substantial prevention or lessening of competition and was subsequently prohibited. The Commission's analysis in reaching its decision is set out in more detail below.

IN THIS ISSUE...

- 01 Commission blocks GWK's acquisition of fertilizer blending facility
- 02 Editorial Note
- 04 Senwes acquires Bunge
- 06 Aurora/Life Healthcare merger
- 08 Commission concerned with exclusivity in shopping complexes
- 10 Merger review July 2011 – September 2011
- 12 The predation case: Berkina Twintig vs. Media 24
- 14 Conditional exemption granted: The South African petroleum and refinery industry
- 16 Intersection between competition policy and entrepreneurship
- 18 5th Annual Competition Law, Economics and Policy Conference



competitioncommission
south africa

EDITORIAL NOTE

The main story over the quarter from July to September was the continued strong growth in the number of mergers notified. There were also a number of complex mergers, reflected in the fact that seven mergers were subject to conditions and one was prohibited. As described by Werner Rysbergen, the Commission prohibited the acquisition by GWK of Sasol's liquid fertilizer blending facility in Kimberley due to the local dominance that would result.

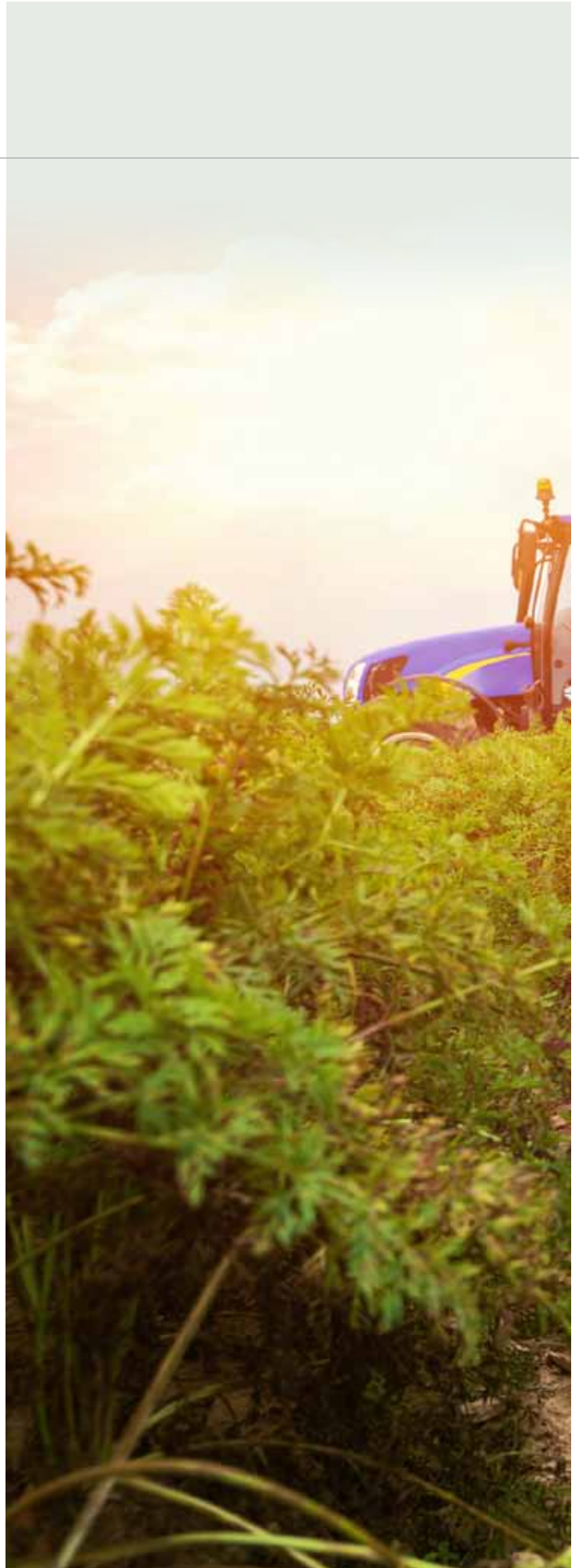
Grashum Mutizwa, Lameez Vania and Lindiwe Khumalo review three of the mergers on which conditions were imposed. In the Senwes - Bunge joint venture the conditions guarded against the type of exclusionary conduct which the Commission had previously alleged against Senwes in grain storage. The conditions in the Life - Aurora acquisition sought to protect a vulnerable group of patients, being those identified the Quadraplegic Society of South Africa, which had been receiving favourable treatment. The third merger, reviewed here by Lindiwe Khumalo, also related to addressing possible harm in the form of exclusive lease agreements for the Kwa-Mashu shopping centre which was changing ownership.

Two important enforcement and exemptions matters were concluded. The Commission completed the investigation and referral of the first major case under the prohibition of predatory pricing. Toto Fiduli describes how the Commission found that Media 24, through its Forum newspaper, excluded a rival community newspaper through below cost pricing. As explained by Shadrack Rambau, the Commission granted the application by the South African Petroleum Industry Association for an exemption from the prohibition on horizontal restrictive practices for arrangements to ensure security of fuel supply.

The very important question of the relationship between competition and entrepreneurship is critically analysed in the article by Trudi Makhaya. Against the backdrop of the emphasis on increased participation and entrepreneurial activity by the National Planning Commission, it is important to understand competition in dynamic terms, not simply about competition between established incumbents.

This issue finishes with Molebogeng Taunyane's report on the 5th Annual Competition Law, Economics and Policy conference, which continued the recent pattern of a growing number of papers, participants, and a widening interest from across the continent.

Simon Roberts



Commission blocks GWK's acquisition of fertilizer blending facility (continues)

Werner Rysbergen

GWK operated a granular blending facility in Potchefstroom and a liquid blending facility in Christiana and Douglas pre-merger. All of the aforementioned facilities are within an approximate radius of 360km from Kimberley and initial indications were therefore that GWK possibly held a strong market position within Kimberley and the surrounding areas.

Information provided to the Commission by customers (farmers) and competitors of the merging parties revealed that liquid and granular NPK fertilizer products belong to separate markets. The Commission considered inter alia the lack of supply side substitutability, labour and equipment costs associated with switching from liquid to granular fertilizer (and vice versa) and the type of farming land ("dry land" versus irrigation) and concluded that liquid and granular NPK fertilizer are separate and distinct products that are not substitutable. This narrower market definition differed from the market definition provided by the merging parties where they indicated that liquid and granular fertilizers are reasonably substitutable from both a functional and price perspective and comprise the same product market.

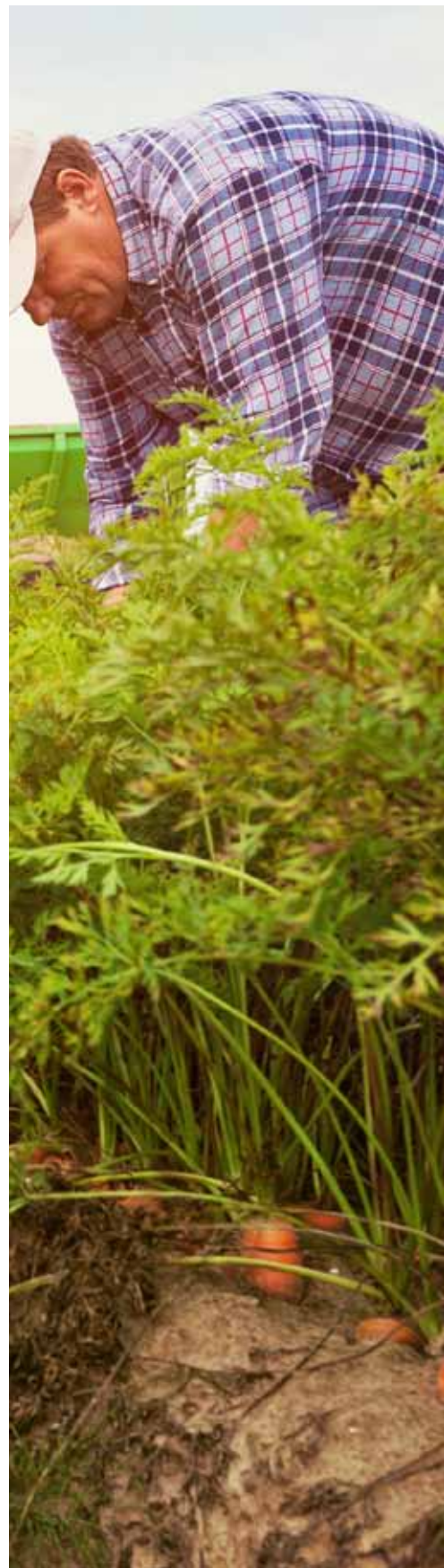
The transport costs for liquid fertilizer are significantly more expensive when compared to that of granular fertilizers. The difference in transport cost is mainly due to the fact that liquid based fertilizers have high water content and a lower concentration of nutrients than granular fertilizer. It therefore follows that a farmer would need to apply more liquid fertilizer to have the same quantity of nutrients added to the soil. The importance to have "just in time" delivery of liquid fertilizer to their farms during planting season was also highlighted by farmers. The Commission proceeded to consider the transport costs and ex works prices of the merging parties and concluded that the maximum economical radius for the transportation of liquid fertilizer is approximately 250km. The merging parties argued for a wider geographic market, but accepted that due to the high transport costs of liquid fertilizer its distribution is limited to areas surrounding the relevant blending facility.

The Commission's investigation showed that there had not been a new entrant into the liquid fertilizer market in the Northern Cape for the past 22 years. Barriers to enter this market included inter alia financial (capital) constraints and access to ammonium nitrate as an input into the eventual blending of liquid fertilizer. The Commission concluded that there are definite barriers to entry as evidenced by the fact that there had been no entry into this market for more than 20 years.

The Commission's analysis further showed that GWK would, post-merger, have a near monopolist position within the defined market and that GWK would not face sufficient competitive constraints from outside of the defined market. Many farmers interviewed by the Commission also expressed their concern that the proposed transaction is likely to result in a substantial prevention or lessening of competition due to limited sourcing opportunities other than from the merging parties' facilities. On this basis, the Commission proceeded to prohibit the merger transaction.

Subsequent to the Commission's decision GWK applied to the Competition Tribunal for reconsideration of the Commission's decision to prohibit the merger. The reconsideration proceedings have subsequently been terminated. In terms of the settlement agreement SCI has a duty to maintain and ensure that the Kimberley facility remains in a productive and commercially saleable form, which ensures that the facility has commercial and competitive value to a future purchaser. It is expected that SCI will enter into a sale agreement with an alternative purchaser in the near future. This, of course, ensures that farmers will benefit from an alternative source of liquid fertilizer supply and competitive prices.

¹ The settlement agreement was concluded on 25 June 2010 following an abuse of dominance case brought by the Commission against SCI. Our September newsletter incorrectly indicated that the agreement was concluded on 25 June 2011, which is a typographical error.



Senwes acquires Bunge

Grashum Mutizwa

Senwes Ltd and Bunge SA concluded a joint venture agreement in terms of which a separate legal entity, Bunge Senwes Africa Proprietary Limited (“Bunge Senwes”) was formed. Bunge is part of a multinational agro-foods and commodities trading business which is registered in Switzerland.

As both parties are agri-businesses involved in the trading of grain and oilseeds, there was an overlap in terms of the activities of the parties. However, Bunge had no operations in South Africa whilst Senwes does not have any significant global trading operations. As such, there was no direct overlap in terms of the geographic markets in which the partners to the joint venture operate.

Although Bunge had previously sold grains and oilseeds that had found destination in South Africa, these only comprised a very small proportion of the South African market. Senwes’ market share is also less than 10% in any of the three grains and oilseed concerned in South Africa. Thus, there were no major competition concerns of a horizontal nature arising from the joint venture.

However, there was a potential competitive concern arising from the overall relationship between related markets in which the joint venture partners are involved. Senwes is the leading grain and oilseed storage operator in South Africa and was linking up with one of the leading grain traders worldwide. In particular, Senwes may leverage its position in the storage market into the trading market. Senwes had already been the subject of prosecution by the Commission on anti-competitive conduct, particularly margin squeeze, the case of which is still the subject of litigation. Whilst Senwes had submitted that it had since ceased engaging in the margin squeeze conduct, the Commission found that it would be appropriate to impose conditions on Senwes obliging it to provide the same terms and conditions to its customers and competitors as it provides to the joint venture.





Aurora/Life Healthcare merger

Lameez Vania



The Commission recently investigated a merger with an interesting public interest angle that did not relate to employment. This was the merger between the large hospital group, Life Healthcare and a small independent hospital in Port Elizabeth which specialised in physical rehabilitation called Aurora Hospital.

In terms of the transaction Life Healthcare was purchasing Aurora as a going concern with effect from 1 September 2010 and was requested by the Competition Commission to notify this merger in terms of section 13(3) of the Act because the Commission was of the opinion that the acquisition may substantially prevent or lessen competition or may not be justified on public interest grounds, healthcare being one of the Commission's priority sectors. One of the shareholders of Aurora from inception was the Quadraplegic Society of South Africa (QASA).

Both Life Healthcare and Aurora conduct business in the market for private hospital acute and sub-acute rehabilitation services. In particular Life Healthcare provides these services in East London at the St Dominic's hospital and Aurora provided these services from Port Elizabeth where it is situated. The Commission found that the respective hospitals did not compete with each other on a narrow regional level because they served patients from different geographic regions approximating their respective local cities. In addition there was limited competition for specialists at the local level between the Aurora and St Dominic hospitals. Therefore, the Commission concluded that there was no geographic overlap in the activities of the merging parties on a local level.

The Commission also considered a national market for the purposes of assessing competition post-merger for

medical aid tariff negotiations. This is because medical aid administrators negotiate tariffs on behalf of their significant membership and the bigger schemes are able to use their volumes to wield countervailing power. Medical aids' countervailing power is likely to be attenuated if one or a few of the large hospital groups significantly increase their size such that alternatives to the services provided by these groups become limited or less attractive. This could also result in the increase of healthcare costs in the long-run. However, in this case the Commission found that Aurora accounts for a small proportion of the market for acute and sub-acute rehabilitation services and as such does not substantially augment LHG's existing market position. Accordingly, the Commission deemed the merger unlikely to result in substantial prevention or lessening of competition in the broad national and narrow local markets.

However what separated Aurora from most other hospitals in that region was that, even though Aurora was always operated on a commercial, profit oriented basis it had a strong social responsibility element built into its operations. This is in the form of an arrangement between the Aurora hospital and the Quadraplegic Society of South Africa in which Aurora would provide a pro bono services to all quadraplegic patients identified by the Quadraplegic Society of South Africa's board as deserving of such treatment. The treatment was to the value of R250 000 per annum. The fact that QASA was also a shareholder in Aurora contributed to a certain extent in ensuring that Aurora continued to provide this pro bono service in the region.

This agreement was always an informal one and although Life Healthcare had undertaken to continue to honour the

arrangement post-merger, without a binding agreement or a condition it was likely that adherence to this undertaking would be uncertain. As such the proposed transaction gave rise to a public interest concern. In order to guarantee the continued provision of this service and to prevent the effects of its cessation in this region the Commission sought and obtained an agreement from the merging parties that the arrangement between Aurora and QASA for the provision of this pro bono service be made a condition for approval of the transaction.

The Commission therefore approved the proposed transaction with the following condition:

Aurora shall continue to provide pro bono services to quadriplegic patients approved by QASA to the value of R250 000 per year. This amount is not subject to inflationary increases and shall persist indefinitely for as long as LHG controls Aurora. Compliance with this condition shall be monitored by QASA.

Commission concerned with exclusivity in shopping complexes

Lindiwe Khumalo



This is an interesting transaction which was initially phased as a non-complex transaction based on market shares and competitive effects. During the investigation the investigating team was faced with a complex public interest issue which had merger specificity.

The primary acquiring firm was Synergy Income Fund Ltd. Synergy was established and managed by Capital Land Asset Management (Pty) Ltd (“Capital Land”) through its close association with the Spar Group Ltd. Interestingly the rationale for the transaction was centred on the investment and developing of specialised convenience retail shopping centres anchored by Spar Group, amongst other things.

The primary target of the acquisition was the property letting enterprise known as Kwa-Mashu Shopping Centre, owned by Sipan I (Pty) Ltd and Superstrike Investments 53 (Pty) Ltd. Kwa-Mashu Shopping Centre is located in the Springfield/Durban North/Umngeni node.

In that regard, the Commission found no geographic overlap in neighbourhood centres; as Synergy did not own any neighbourhood centre in Springfield/Durban North/Umngeni node. In this regard, the Commission found that the merger was unlikely to raise any serious competition concerns as Synergy would have approximately 6% of the rentable retail space market in the Springfield/Durban north/Umngeni node.

The proposed merger raised public interest issues as the lease agreement between the landlord and tenants has an exclusivity clause. The agreement precluded the tenant from building or operating any business in the centre which is in the form of a butchery, liquor store, bakery, superette, amongst others. The Commission acknowledged that the lease itself is not being entered into as a result of the merger, but found that the merger does bring about a change in the position of Spar relative to the property owner, and more importantly relative

to its competitors (for the space in the shopping centre) and hence this was explored further.

The merging parties submitted that the fact that the lease agreement was already in place and they were merely inheriting it absolved them from responsibility for its potential effects, they argued that this implied that this was not merger specific. This argument failed on two grounds: The merger alters Spar’s position within the centre from being just another tenant to being a shareholder in the management company in charge of the running of the centre. The parties submitted that the Fund Manager is not an investor in Synergy.

The merging parties submitted that post-merger; Synergy will be managed by Capital Land Asset Management (Pty) Ltd in which Spar only has a 20% share. However, as conceded by the merging parties, this may change Spar’s incentives when dealing with its own



franchisee's position within the shopping centre. The merging parties argued that there is a separation of powers between the Spar Group and their franchisee at Kwa-Mashu centre, but the Commission felt that the success of the Spar group as a franchisor is entrenched in part on the success of its franchisees.

The second reason why the merging parties' argument could not stand was centred on the Synergy group's strategy. As mentioned above the Synergy group's strategy is to acquire convenience shopping centres anchored by Spar stores. In acquiring the Kwa-Mashu shopping centre, the Spar franchisee moves from being a tenant who would have had to bid to maintain his/her position within the centre against other retailers like Shoprite and Pick n Pay when the lease currently in place comes to an end, to being the sole retailer with a guaranteed position within Kwa-Mashu shopping centre. This change brought about by the merger challenges the merging parties' view that the merger

does not change the competitive condition around Kwa-Mashu as the Spar store is now certainly assured of its position with the centre.

The clause appears to have been enforced to the letter as upon observation¹ the team was able to conclude that none of the stores excluded as per clause are present within the centre, or in any of the two centres in the Kwa-Mashu retail node.² As discussed above, the change in Spar's position (in the vertical chain) will alter the competitive conditions within the Kwa-Mashu retail node. The Spar franchisee post-merger will have an untenable position within the Kwa-Mashu centre; this means they will face no competition for their position within the mall when the lease expires as the strategy employed by Synergy ensures that the Spar franchisee will remain the anchor tenant at their shopping centres. The exclusivity clause on the other hand ensures that the Spar franchisee succeeds in excluding its rivals from the centre, which post-merger could be indefinitely.

The Commission concluded that the change in Spar's position within the vertical chain will change the competitive conditions within Kwa-Mashu. The Spar franchisee moves from being a tenant who would have had to bid to maintain his/her position within the centre against other retailers like Shoprite and Pick n Pay when the lease currently in place comes to an end, to being the sole retailer with a guaranteed position within Kwa-Mashu shopping centre. For this reason the Commission was concerned about the exclusivity clause in the lease which prevented their rivals from gaining access to the centre.

As a result, the Commission approved the merger with the condition aimed to remove the exclusivity clause. The Commission is looking into similar acquisitions by Synergy.

¹ Field investigation by the Competition Commission to the Kwa-Mashu retail node on 23/09/2011.

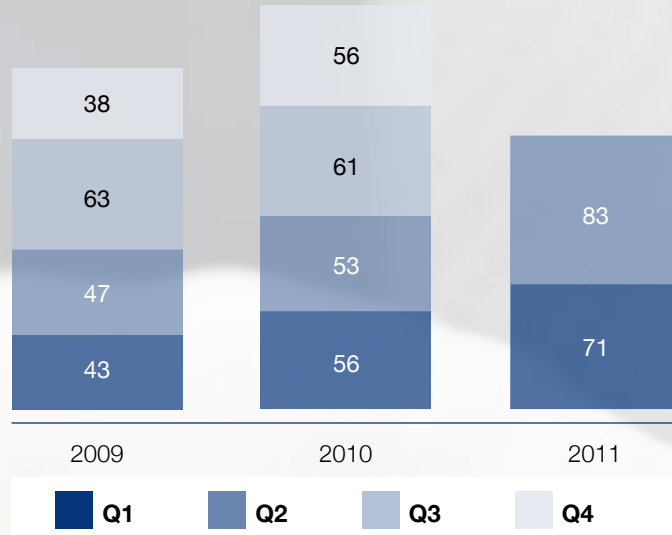
² Ithala Centre and Cambridge stores

Merger review July 2011 – September 2011

Maarten van Hoven

Mergers continued to pick up, with 83 mergers notified in the period, a 57% increase over the same period in the previous year (Figure 1).

Figure 1. Quarterly merger notifications since 2009.



Source: Competition Commission

The Commission continued to deal with a wide range of complex matters and approved seven matters subject to conditions and prohibited one matter (see Table below).

Mergers approved with conditions

Parties	Type of condition	Reason
Life Healthcare & Aurora	Behavioural	Public interest concern
Astral & Corpglo	Behavioural	Public interest concern
Media 24 & Natal Witness ¹	Behavioural	Competition concern
Shoprite & Metcash 7/11 Distribution	Behavioural	Public interest concern
La Groupe Lactalis & Parmalat	Behavioural	Public interest concern
Senwes & Bunge	Behavioural	Competition concern
Fruit & Veg City & Everfresh	Behavioural	Competition concern

The Commission prohibited the acquisition by Griekwaland Wes Korporatief Ltd of the Liquid Fertiliser facility of Sasol Nitro located in Kimberly, an intermediate merger which came about as a result of the settlement agreement entered into between the Competition Commission and Sasol during 2010. According to the Commission the merger would have likely substantially prevented or lessened competition in that the proposed transaction will result in GWK having an almost monopoly position within the liquid fertiliser market in the Northern Cape and therefore, post-merger, be in a position to likely increase the price of liquid fertilizer to the detriment of the buyers.

¹ This matter still subject to a public hearing and determination by the Competition Tribunal.



The predation case: Berkina Twintig vs. Media 24

Toto Fiduli

On 30 January 2009 the Competition Commission received a complaint from Berkina Twintig (Pty) Ltd, trading as Gold Net News. Gold Net News is a community newspaper in the Goldfields area, located in a small mining town of Welkom in Free State. It was established in November 2000 to publish, print and distribute community newspapers. The community newspaper is distributed once a week for free to formal households in Welkom and other neighbouring areas.

Gold Net News alleged that Media 24 engaged in predatory pricing. Gold Net News submits that Media 24, through its subsidiaries Vista and Forum, abused its dominant position in the market for community newspapers, by selling local advertising rates below average variable costs in contravention of section 8(d)(iv) of the Competition Act, as amended.

Vista and Forum are community newspapers wholly owned by Media 24, operating in the Goldfields area in Welkom. The community newspapers are published, printed and distributed on different days of the week, in competition with Gold Net News.

Community newspapers derive revenue from selling space to advertisers, and they normally contain 40 per cent community news and 60 per cent advertising space. Advertising space is sold per column centimetre and it is the main source of revenue for community newspapers.

Pleading a successful predation case requires the Commission to define the product and the geographic market where the conduct is alleged to have occurred, and demonstrate that the firm accused of predatory pricing is dominant in the market. Thereafter, the Commission has to show in terms of the Act that the pricing was below marginal or average variable cost.

The Commission conducted its investigation and thereafter referred the complaint to the Competition Tribunal on 31 October 2011. In its referral the Commission defined the product market as the market for advertising in community newspapers and for readers of community newspapers. The geographic market was defined as the Goldfields region.

The Commission found that Media 24 is dominant in the market for community newspapers in the Goldfields area. Furthermore, the investigation revealed that over the period

of the complaint, Forum operated at a loss. The duration of the predation was substantial, in that Forum was run at loss from January 2004 – February 2009. The Commission found that, despite the fact that Forum was making losses, it was kept in the market to deter Gold Net News. Media 24 strategic documents revealed that Forum was used to defend Vista's market, hence Forum advertising rates were always low compared to both Gold Net News and Vista.

Conceptually, predation is about a dominant firm sacrificing profits in the short run in order to drive out competitors and earn above competitive returns. The predatory behaviour can also establish the dominant firm a reputation for fighting those who challenge it, deterring others from entering. In this case, using Forum as a fighting brand prevented Gold Net News from expanding into other areas and created a reputation for toughness. Such a reputation allows Media24 to enjoy monopoly profits in other markets without the cost of fighting a price war in each one of them. In addition, the use of Forum as a fighting brand allows them to limit their losses to the lower cost publication, whilst protecting the more profitable Vista.

This case is also significant as it will determine how variable costs should be measured. The Commission found that operating Forum in this way was a discrete decision that Media 24 could vary. Alternatively on narrower definitions of variable costs Forum's prices were below average variable cost for a significant portion of the predation period.

The Commission also referred the case under the broad prohibition of exclusionary conduct under 8(c), where it is necessary to demonstrate anti-competitive effects. The investigation found that there was sufficient evidence that Media 24's conduct had a significant anticompetitive effect. In addition, the investigation revealed that Media 24 is likely to recoup the losses it sustained. This is reinforced by the fact that in April 2009 Gold Net News closed down and as a result Vista and Forum were the only two community newspapers in the Goldfields area. Subsequent to the demise of Gold Net News, in January 2010 Media 24 closed down Forum as well, leaving Vista as the only publication.

The Commission requested that the Tribunal order Media 24 to pay an administrative penalty equal to 10% of its turnover in terms of section 58(1)(a)(iii), read with section 59(2), of the Act.



Conditional exemption granted: ***The South African petroleum and refinery industry***

Shadrack Rambau

On 3 October 2011, the Commission took a decision to grant the South African Petroleum Industry Association and its members (SAPIA) an exemption from section 4 of the Competition Act in order to coordinate in various ways in order to maintain the stability of the industry, especially related to ensuring the security of fuel supply. This follows designation of the petroleum and refinery industry granted by the Minister of Trade and Industry on 5 June 2009¹.

In granting the exemption, the Commission concluded that there are severe infrastructure bottlenecks in the industry. The Commission found that increased demand has placed great pressure on infrastructure built to deal with lower liquid fuel volumes. Improved communication between stakeholders in the industry was therefore found to be necessary to optimize the use of existing infrastructure.

The exemption granted to SAPIA commenced immediately and will come to an end on 31 December 2015.

SAPIA applied for a further exemption following the end of the short-term exemption granted to it for purposes of the 2010 FIFA Soccer World Cup. The exemption application related to a wide range of cooperation agreements and practices required by SAPIA to ensure the continuity and stability of liquid fuels supply to various sectors and geographic locations of the South African economy.

During its assessment of the application, the Commission received two representations in response to the notice which was published on 30 July 2010 in terms of section 10(6)(b) of the Competition Act².

The first representation came from the National Association of Automobile Manufacturers of South Africa (NAAMSA). NAAMSA pledged its support for the application. It argued that coordination of activities in the petroleum industry is necessary to optimize the existing infrastructure and to ensure that there is stable supply of liquid fuels in South Africa.

The second representation came from the South African Petroleum and Energy Guild and Others (SAPEG). SAPEG argued in its submission that the cooperation agreements and/or practices which form the basis of SAPIA's application are inconsistent with the industry regulatory framework. It cited a specific example where licensees who operate storage facilities around the country are required by National Energy Regulator of South Africa (NERSA) regulations to publish what is referred to in the petroleum and refinery industry as the Allocation Mechanism. The Allocation Mechanism is intended to inform third party suppliers about the terms and conditions of access to the fuel storage facilities. SAPEG alleged that at the time of its submission the licensees had not yet published their Allocation Mechanism as required, and were in fact in breach of their license conditions. In summary, SAPEG's objection centered on getting third parties access to the national infrastructure at different levels of the liquid fuels supply chain.



In assessing SAPEG's representation, the Commission found that there are regulations in place which are intended to give Historically Disadvantaged South African wholesalers such as SAPEG, and other third parties, access to infrastructure in the industry. However the Commission concluded that it is largely the responsibility of the Department of Energy (DOE) and/or NERSA to ensure compliance with industry regulations.

Notwithstanding the above, the Commission imposed a condition that requires SAPIA to comply with all industry regulations which have the force of law and directly relate to competition in the industry. This condition is intended to address some of the concerns raised by SAPEG in its submission. Further the Commission imposed additional conditions aimed at minimizing anticompetitive outcomes and promoting greater participation in the sector. These include:

- SAPIA and its members may not share competitively sensitive information,

except for the purpose described in the exemption application;

- SAPIA and its members may not share information relating to setting margins, imposition of levies and/or the approval of tariffs unless required to do so by the Department of Energy or NERSA; and
- SAPIA must open up its membership to accommodate both existing and potential marketers in the petroleum and refinery industry on fair, reasonable and transparent grounds.

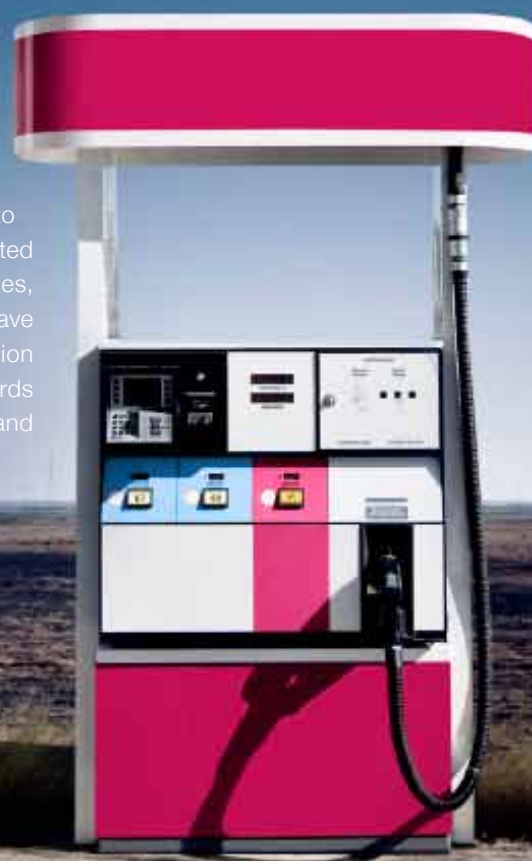
The Commission believes that the opening up of SAPIA membership, which is currently restricted to refineries, will allow existing and potential marketers to benefit from the exempted agreements and practices, which otherwise would not have been the case. The condition will therefore contribute towards leveling the playing field and

promoting competition in the petroleum and refinery industry.

It should be noted that Gas 2 Liquids (Pty) Ltd, one of the parties which made representations during the assessment of the application has since appealed the Commission's decision to grant SAPIA an exemption. The appeal was made in terms of section 10(8) of the Competition Act.

¹ Notice 692 of 2009, Gazette No: 32281.

² Notice 731 of 2010, Gazette No: 33399.



Intersection between competition

Trudi Makhaya

The South African economy is characterised by high levels of concentration in many sectors and, compared to other developing countries, low rates of new business formation. This apparent lack of competition and dynamism is often attributed to various factors, most notably the size of the local market and the legacy of state-centred, protectionist apartheid capitalism.

The National Planning Commission and the Development Bank of South Africa, to name just two institutions, have placed entrepreneurship and new business formation back on the agenda as forces for capability development, employment generation and economic growth. Current thinking in South Africa has emphasised access to finance, skills and economic infrastructure as the major obstacles to the formation and durability of new businesses. The structure of the economy and the nature of rivalry and power dynamics in the market have not been paid as much attention in addressing the entrepreneurship challenge.

One of the purposes of competition policy in South Africa, as articulated in section 2 (d) of the Competition Act 89 of 1998 (as amended), is to “ensure that small and medium-sized enterprises have an equitable

opportunity to participate in the economy.” Read in conjunction with other parts of section 2 which call for the promotion of efficiency and adaptability of the economy, as well as a greater spread of ownership in the economy, it can be argued that this legislation takes a positive stand in favour of economic freedom and entrepreneurship.

This is not unusual. For instance, the Competition Commission of Singapore sees its role as encompassing the protection of the competitive process, as it is this process that “allows new businesses to enter and existing competitors to develop new ways to compete in a market.” The interaction between customer choice and business responsiveness to those choices is seen as the basis for innovation, efficiency and improvements in productivity and quality. The roots of US anti-trust can also be found in the desire to limit the ability of conglomerates to act anti-competitively towards their competitors and suppliers.

In linking competition policy to entrepreneurship, it is especially useful to examine the pervasiveness of barriers to entry and exit across the economy. The level and intensity of competition within a market is closely associated with the nature of barriers to entry and exit in that

market. New entry has been defined by the OFT as a “situation in which both a new undertaking is established in the industry and that new productive capacity is set up in the industry”. Entrants into an industry can be expected to drive down profits towards their long run competitive level and also bring innovation and dynamism into the market. Barriers to entry and exit limit both allocative and dynamic efficiency.

Where an industry includes a profitable, super-dominant firm, it is expected that there may be some barriers to entry that protect this firm from the entry of potential rivals, and also that it will have an incentive to heighten those barriers through its conduct. The key options facing a dominant incumbent when faced with the prospect of entry is to either deter that entry altogether or to accommodate it and share the market. If, before entry of the new player, the incumbent makes investments that can sustain anti-competitive behaviour post-entry, the threat of a price war or other forms of aggressive behaviour becomes a commitment and deterrence becomes credible. Where entry occurs, various strategies are available for a super-dominant incumbent to push the entrant completely out of the market or to prevent it from expanding (or to consign it to a niche

policy and entrepreneurship



in the market). Such strategies include conduct that raises rivals' costs or reduces rivals' revenue. Cartels also have the effect of preventing new entry into markets, as cartelists have an incentive to make sure that their collusive profits do not attract "disruptive" entry.

Within the South African context of concentrated industries, some with super-dominant firms, and given expectations about the incentives and behaviour of incumbents and in light of the practices that have been revealed through the Competition Commission's enforcement practices, the intersection between competition policy and entrepreneurship becomes very important. Competition policy has a bearing on the climate for entrepreneurship as it is a tool for challenging abusive and restrictive practices that stifle entrepreneurship.

The competition authorities explicitly dealt with this nexus between competition policy and small business in *Nationwide Poles* (case number 72/CR/Dec03). In this case, *Nationwide Poles*, a small pole manufacturing firm complained that *Sasol* did not supply it with a key input on the same terms as its larger competitors. The Competition Tribunal argued that the Act had the development of small business in

mind, as demonstrated by its preamble and, looking back in time, the explanatory memorandum that accompanied it. The "special treatment" accorded to price discrimination, with its own section separate from other abuse of dominance provisions, is also seen as reflecting legislative concern with maintaining accessible and competitively structured markets in which entrants can compete effectively against incumbents.

Though the Tribunal did not succeed in its particular use of the public interest arguments in favour of small business in *Nationwide Poles* (where it was arguing for a different standard of showing substantiality where a small business is harmed), its remarks about the potential of competition law to contribute to an enabling environment for small business development have merit. The Competition Appeal Court was careful to make it clear that its decision did not seek to diminish the ability of small and medium businesses to "use the Act to protect their ability to compete freely and fairly" (case number 49CACAPRIL05).

Though entrepreneurship and small business development have not been invoked explicitly in most of the competition

authorities' decisions, it is clear that the proximate victims of exclusionary and abusive conduct in many cases have been entrants and small enterprises. Recent debates in the competition community have centred on the role of competition policy in promoting the public interest. This has been brought to the fore in the merger control arena, especially with regards to employment but also with regards to the displacement of small firms by imports.

In applying its prioritisation framework, the Commission already takes into account conduct that retards small business development and entrepreneurship, such as cartelisation. It is expected that this approach should go some way towards addressing obstacles to entry and expansion that arise from anti-competitive conduct. The Commission's prioritisation framework also calls for the consideration of the nature of barriers to entry in an industry in making screening decisions.

In this way, competition policy can be supportive of the broader entrepreneurship policy agenda, especially as it relates to the ability of small, independent or specialist firms to bring innovation, choice, and dynamism to the market, with long term benefits to consumers.

5th Annual Competition Law, Economics and Policy Conference

Molebogeng Taunyane

The fifth annual Competition Law, Economics and Policy Conference took place on October 4-5, 2011 at the University of Johannesburg (UJ), bringing together lawyers, economists, academics and regulators. There were approximately 250 attendees.

This year's conference was co-hosted by the Competition Commission, Competition Tribunal, the Mandela Institute and the newly inaugurated UJ Centre for Competition Economics.

The conference focused on three main themes, reflecting important current developments:

- The relationship of the competition regime to government policies, in the context of development challenges.
- The development of competition law and economics across the African continent.
- Decisions of the Competition Appeal Court and Supreme Court of Appeal and their implications.

In his opening address Commissioner Shan Ramburuth highlighted the common thread of "understanding the nature and harm of anti-competitive behaviour, and the role of competition authorities in addressing it, in terms of both principles and practicalities". There are obviously strong interactions between competition policy and many other government policies. Competition enforcement is also

becoming increasingly regional in scope – as the same companies operate across the continent, so authorities need to cooperate with each other in addressing anti-competitive conduct. And, in South Africa, appeal court decisions have had important implications for the practicality of investigations.

Key note speakers talked on each of the main themes, while many of the papers presented addressed related questions. The key note speakers included: heads of competition authorities in Southern and East Africa; Prof David Lewis, the previous Competition Tribunal Chairperson; Adv Adila Hassim of Section 27; Prof Steve Davies, from the University of East Anglia and also advisor to the UK's Office of Fair Trading; and, Prof Adam Habib, UJ Deputy Vice Chancellor, Research. The strong Africa wide emphasis was also bolstered by the presence of representatives from the authorities of Botswana, Egypt, Kenya, Mauritius, Morocco, Namibia, Seychelles, Singapore, Swaziland, Tanzania, Zambia and Zimbabwe.

Twenty one papers were presented on a wide range of topics. These included eight papers from staff of the Competition Commission. The presentations were followed by a critical review from an invited discussant and vigorous debate.

Prof Adam Habib officially launched the UJ's Centre for Competition Economics on the first day of the conference.

Follow this link <http://www.compcom.co.za/fifth-annual-conference-on-competition-law-economics-and-policy-in-south-africa/> to access the conference papers.







Where to get hold of us

Visit the Competition Commission online at www.compcom.co.za for more information about the Commission and the Act. You may also forward enquiries, comments and letters to:

THE EDITOR

Advocacy and Stakeholder Relations Division

Private Bag X23, Lynnwood Ridge, 0040

E-mail: CCSA@compcom.co.za

Tel: (012) 394 3200

Fax: (012) 394 0166

Competition News is issued quarterly and if you would like to receive future copies, you can subscribe at www.compcom.co.za/subscription to enable us to add your details to the distribution list.

© Please note that the information contained in this document represents the views of the authors and does not necessarily constitute the policy or the views of the Competition Commission. Any unauthorised reproduction thereof will constitute copyright infringement. Persons interested in this information should not base their decisions thereon without obtaining prior professional advice.



competitioncommission
south africa