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Free Trade and Competition Policy in Africa

Introduction

Trade liberalizing and competition policies can be complementary, since by removing trade barriers that may inhibit foreign firms from competing in national markets, trade policy enhances competition. The incorrect introduction of trade and competition policies might, however, curtail economic growth and poverty reduction in less developed countries if they are not formulated to take into account the various developmental challenges faced by these countries. This article examines the links between competition and trade policies in African countries in order to establish possible solutions for implementation of competition policy in African countries.

The Relationship Between Free Trade and Competition

Considerable thrust for persisting development in international commerce stems from trade liberalization. Similarly, globalization and liberalization of the world economy have brought to the forefront deliberations on issues of fair competition in global trade. It has also been acknowledged that competition and trade policies are complementary in nature.

Whilst competition policy is undeniably concerned with the realization of economic efficiency, encompassing allocative, productive and dynamic efficiency, trade liberalization also contributes to these efficiencies by eliminating barriers that may

thwart foreign firms from competing effectively in national markets. This would be reflected in the quality of products or services and competitive prices that the consumer would ultimately pay.

The crux of the relationship between trade and competition policy is that, in an environment where firms are increasingly organizing their operations on a global scale and where trade barriers between nations are falling, firms are more exposed to the regulatory systems and business practices that exist in the economies of their main trading partners.

The Application of Free Trade and Competition Policy in Africa

During the past twenty years, a number of Less Developed Countries (LDCs), including those in the African continent, have implemented development strategies based on trade liberalization[1]. LDCs have also introduced domestic economic reform measures to complement trade liberalization. Amongst these reform measures are privatization, deregulation and financial sector liberalization. In addition, most LDCs have adopted some form of competition policy over the past decade. In some quarters it is felt that trade liberalizing measures have been part of an exercise to get financial aid and have therefore not been as effective achieving the purpose they were intended to serve, namely the promotion of competition principles.

Economic challenges faced by the developed and developing economies are different. Whilst developed countries are bracing themselves for new technological development, developing countries are still under pressure to provide basic needs to society. Cernat and Holmes[2] summarized the challenges faced by LDCs as being; employment generation, promoting investment, enhancing competitive ability and removing supply side constraints.

Competition Policy in Africa

While researchers and leaders in the international arena have generally acknowledged that competition policy and law is required for all the countries regardless of their level of economic development, it is also important to look at the main hindrances that may impede the effective execution of these policies. The underlying objectives of competition policy in Africa do not differ from those in developed countries, whereby they largely relate to the promotion of free and fair markets for the ultimate benefit of consumers.

The United Nations, and the Economic Commission for Africa[3] lists the following problems and constraints that African countries and other LDCs experience. While some of them are unique to LDCs, others are also experienced in other countries.

(a) Conflict with other policy objectives

Governments in Africa tend to be opposed to the idea of implementing competition policy owing to the extended belief that applying competition policy unnecessarily constrains the ability of governments to achieve other "genuine" policy objectives. For example, LDC governments are reluctant to expose their small and medium enterprises (SMEs) to foreign competition because they doubt the latter's potential to create job opportunities.

(b) Resistance from vested interests

The issue of vested interests, or resistance to competition, within LDCs and developing countries in Africa seem to surface from both business firms and politicians. Opening up borders to competition is seen as dangerous for the survival of national firms. It is understandable that change is uncomfortable or even threatening; as a result, businesses would definitely try to avoid competition as far as possible[4]. It is however important for policy makers to demonstrate and weigh the long-term costs and benefits of competition policy and law implementation, so as to get business support.

(c) Lack of good governance

Many African LDCs do not implement competition policy measures because of lack of good governance. In many cases, governments provide concentrated benefits to a small favoured organized group of the population, e.g. a business lobby. In the process the widely dispersed and unorganized groups, e.g. consumers, forfeit the benefits of competition. These types of activities can be linked to the corruption activities prevalent in some African countries.

(d) Tension with sector-specific regulators

In most instances, competition authorities are put in place to regulate the overall economic activities within a country, including those sectors under the ambit of sector-specific regulators. However, competition authorities cannot explicitly deal with issues such as redistributive policy and universal service obligations[5]. In this regard, sector-specific regulators will continue to play the role for which they were created: to make optimal

1 United Nations Conference on Trade and Development (2004). UNCTAD/DITC/CLP/2004/1 Competition, competitiveness and development: Lessons from developing countries, p54 – 62;UNCTAD and Commonwealth Secretariat (2001). Duty and Quota Free Market Access for LDCs: An Analysis of Quad Initiative, London and Geneva, p1 - 12.
2 Cernat, L and Holmes, P. (2004). Competition, Competitiveness and Development: Lessons from developing countries, published by the United Nations.
3 Ibid
4 Lachmann, W. (1999). The Development Dimension of Competition Law and Policy, UNCTAD, New York and Geneva, p19.
5 Tirole, J. (1999). The Institutional Infrastructure of Competition Policy, prepared for the roundtable on New Comparative Economic Systems, June 21, World Bank-CAE conference on Governance, Equity and Global Markets, Paris.

arrangements for the supply of public goods, while ensuring that natural monopolies do not abuse their position in the market. Confusion sometimes exists between competition and other regulators as to who has jurisdiction over certain matters. To avoid conflict and confrontation between a general competition authority and a sector specific regulator, a Memorandum of Understanding (MOU) is often entered into.[6] This aims to ensure that an industry is not subjected to duplicative or conflicting intervention by regulators.[7]

(e) Capacity constraints

Competition authorities have to unsuccessfully compete with the private sector for skills and resources. As a result, capacity constraints seem to accelerate some of the challenges faced by LDCs in implementing competition policies and laws. This is exacerbated not only by the financial crises that most of these countries face, but is also the lack of political backing of competition policy.

(f) Lack of political will and independence

The absence of political support and the interference on the activities of competition authorities undermines the institutions' independence as custodians of competition. Because competition regulators are exclusively dependent on state for funding, the competition authorities' independence is indirectly undermined[8].

Conclusion

The above discussion explored the positive impacts and practical problems relating to the implementation of competition and free trade policies. These policies contribute to the enhanced economic performance of countries, regardless of the stage of development. However, one size does not fit all. The reason being that challenges facing developing and developed countries are different. It is therefore imperative that each country formulates its own policies to address its own specific needs.

By Louise du Plessis

Blaming the legislature?

Looking at the Competition Act 89 of 1998, with only 84 clauses and 3 Schedules, it is easy to conclude that it must be one of the easy laws to implement. The Act is short and makes interesting reading. But over the past five years of applying, interpreting, advising on the Act, it has proven to be extremely complicated and difficult. There are indeed many practical challenges in administering this Competition Act, but this article will focus on difficulties arising from anticompetitive clauses contained in various pieces of legislation. In particular, the intention of the legislature is questioned.

The objectives of the Competition Act appear to be ambitious and optimistic, which is acceptable, but the Act does not seem to provide for adequate means and mechanisms to achieve these objectives. Thus, it seems to raise hopes of vulnerable consumers and small businesses, most of which look up to the regulators for immediate solution to their problems. Objectives should be crafted in a realistic way, taking into account powers and remedies available in the legislation to achieve such objectives. Also, where regulators are given specific functions to carry out, such functions must be possible and practicable. It is common cause that drafters do look into these issues, but it is doubtful if this is done in a coordinated and consistent manner.

Prior 1998, competition regulation was fragmented with various regulators being mandated to deal with competition matters. In 1998, the Competition Act was passed to introduce a new regime for competition law, which established independent and specialized agencies to deal with competition issues. The creation of this regime anticipated that old laws would be revised to be in line with the current competition regime, but this, it seems, was pure wishful thinking. Most Acts are still as they were and worse, new laws that are drafted perpetuate the fragmentation that the country sought to address.

The Competition Act prohibits anticompetitive practices and the competition authorities are mandated to deal with perpetrators that violate competition laws. However, there are Acts that permit this type of practices in various industries and the industry players are quick to invoke the relevant clauses when

6 The South Africa Competition Authority has entered into MOUs with the country's telecommunication regulator, ICASA and the National Electricity Regulator.

7 In Zambia, a clear overlap exists between the tasks of the Zambian Competition Commission (ZCC) and the Securities Exchange Commission (SEC). In a case where the ZCC required the shares of the acquired entity to be floated on the stock exchange in order to prevent the concentration of stock in the hands of the acquirer, the SEC allowed the acquirer to offer the shares to the minority shareholders. Although this resulted in the acquirer having total control over the company with negative implications for competition, the ZCC could not prevent this as the SEC's decision prevailed. Basant (2001).

8 Adhikari, R. and Knight-John, M. (2003). What type of Competition Policy and Law Should Developing Countries have? In: Competition Policy and Pro-Poor Development, CUTS, Jaipur.

competition authorities attempt to take action. This raises legal arguments as to whether competition authorities should/can take action against 'legalized violations'. With the obvious legal challenges and limited litigation budget, the answer is probably No. But if one thinks about the effect of these practices competition, it is probably worth pursuing despite the limited budget.

Looking at section 21(k), which states that the Competition Commission must over time review legislation and regulations and report to the Minister of Trade and Industry concerning any provision that permits anticompetitive practice, one may argue that the role of the competition authorities in cases of 'legalized violations' ends with reporting them to the Minister. It is, however, not clear what the Minister is expected to do with such report, but what is clear is that this does not provide any timely relief to the person(s) affected by the conduct. It could tarnish the image of the regulator who may be perceived by stakeholders to be ineffective when it is not the case.

An example of this is the Short Term Insurance Act 53 of 1998. This Act allows for competition and consumer welfare to be compromised. While we preach freedom of choice and fair competition, section 43(5)(a) of the Short Term Insurance Act gives banks the prerogative to unilaterally impose an insurance cover of their choice on customers in respect immovable property that banks finance. Following a complaint, the FAIS Ombudsperson recently made an ruling against Nedbank, in which it ordered Nedbank to cancel the insurance cover that it had unilaterally imposed on the customer.

It seems that the interest of the consumer and competition were not paramount when this clause was inserted. Its rationale is also questionable. Why does it not apply to movable property like a motor vehicle? So it is logical that if a bank provides finance for a car valued at R800 000, you may choose your own insurance cover, but if the finance is for a house of the same amount, the bank will choose your insurance cover for you. This, unfortunately, is irrespective of whether the consumer already has an insurance cover or a cover with a lower premium.

Did the legislature think about how this would affect competition? Many insurance companies see the customers financed by banks as potential clients for insurance covers. With this clause, a bank may choose a certain company to deal with or create an insurance division to provide insurance cover to its customers. The insurance company chosen by a bank or the division of a bank concerned would get an unfair advantage over other competing insurance companies that provide short term insurance. This makes it impossible for insurance companies to compete on equal footing for the custom of clients financed by banks.

Further, a clause like this allows for creation of little monopolies in various segments of the insurance market, and also undermines the spirit of competition. Where a bank is dominant or has market power, forcing a customer to take an insurance company that the bank provides is not far fetched from tying

or bundling product, which is unacceptable under competition law. Moreover, smaller insurance companies may be affected in the process, as their ability to access customers that take up bonds with these banks may be affected. These are small companies that are often marginalized by conglomerates without a benefit of any recourse. Where they do attempt action for recourse, these conglomerate drag them through lengthy court cases that they cannot afford.

Judges and lawyers often talk about the legislature and what the legislature intended. In this case, one may argue that we have more than one legislature in South Africa. If the legislature that drafted the Competition Act and the Short Term Insurance Act were the same, surely these contradictory outcomes could have been prevented. It is also interesting to note that both Acts were passed in the same year. How this contradiction was missed is still a mystery. Maybe the legislature should have been more explicit with the need for consistency in regulation and state in the Competition Act that all laws that contain anticompetitive practices must be amended. Alternatively, the legislature should have made the Competition Act to supersede any legislation that contain anticompetitive clauses or purports to deal with competition issues.

While one can blame the legislature, the regulatory agencies are equally at fault for perpetuating this situation and failing to cooperate and speak with one voice in getting rid of these anticompetitive clauses. Regulatory agencies are in a much better position to drive and influence drafting of legislation, but we have seen few regulators calling for changes of their legislation to amend offending clauses. Government departments are also not helping out in this instance. Instead, we see them drafting more laws, such as the Electronic Communications Bill (previously Convergence Bill), which attempts to amend the Competition Act by including competition regulation in the powers of ICASA. A lot of Acts regulating professions still contain price fixing clauses, thus permitting industry players to circumvent competition laws. It is at this point that one questions if we have more than one legislature.

There is no doubt that old laws need to be amended and that new ones should not contain anticompetitive clauses. There is a need for a serious review and audit of South African laws to eradicate these problems, which are making implementing legislation difficult. This would assist the country to evaluate and see if the laws they pass in the interest of the Republic are worth the paper they are written on. Also, it would help assess if the desired objectives are being achieved.

By Zodwa Ntuli

The Sasol Engen Merger: The Commission's Approach

Introduction

The hearing on the proposed merger between Sasol Oil ("Sasol") and Engen, to form joint venture named Uhambo, was held over 18 days from 3 October 2005 to 11 November 2005. It is the largest to come before the Competition Tribunal since it was established, and if approved, will pave the way for the creation of a major vertically integrated South African oil company. Below is a summary of the Commission's approach to the proceedings, without analyzing the matter as the Tribunal is yet to make its finding.

Background

Upon filing of this merger, it became clear to the Commission that the main products that required a thorough focus of the investigation were the white fuels, particularly petrol and diesel. South Africa does not have any significant oil deposits. Virtually all the crude oil used for the production of fuel is imported. South Africa has over time developed technology and through capacity, through the then state owned Sasol, to use low-grade coal as the main input in the production of fuel, possibly prompted by the desire of the then apartheid government to develop self-sufficiency amidst international (and national) pressure to cut the supply of crude oil to the country because of its racial policies. Sasol has since been fully privatized.

Production of fuel occurs in six refineries namely the Enref in Durban owned by Engen; Sapref in Durban jointly owned by Shell and BP; Calref in Cape Town owned by Caltex; PetroSA owned refinery in Mosselbay ; Natref in Sasolburg owned by Sasol and Total and Sasol owned refinery in Secunda.

All the refineries, except for the PetroSA refinery and Sasol's Secunda refinery use oil as an input. PetroSA uses gas, while Secunda uses coal. Given the high price of crude oil the oil refineries are high cost

producers, while the Secunda coal refinery is the lowest cost producer.

All the major oil companies operating in South Africa are vertically integrated, with the exception of PetroSA, which does not have a retail presence. Until the termination of the Main Supply Agreement (MSA) in 2003, Sasol did not have a retail network of service stations – its retail presence was limited to the blue pumps that were installed in the forecourts of the other oil companies and unbranded stations in the inland region of South Africa. As counterpart for this the other oil companies were required to take up Sasol's production. Since the end of the MSA, Sasol has been engaged in a service station growth strategy, both through organic growth and acquisitions.

The petrol pump price is regulated, while diesel price is regulated at the wholesale level. The price is capped by reference to the Basic Fuel Price, an import parity equivalent. Government has committed itself to a 'managed deregulation' process of the industry, although it is not clear when such a process will be completed and whether it will go as far as introducing price competition in the market.

The Commission's Recommendation

The Commission found that there were significant transport logistical constraints in moving white fuels from the coastal refineries to the inland of the country, where there is the greatest demand for fuel. The three major modes of transport, the pipeline, road and rail do not provide sufficient transport capacity. The pipeline operating company, Transnet t/a Petronet, advised that it was intending to replace the existing pipeline with a bigger pipeline, to be commissioned in 2010, with the capacity to provide sufficient transport for white fuels into the inland.

In view of the significant transport logistical constraints, the Commission defined the market upstream as coastal and inland. Though Sasol was found to be dominant dominant in the inland market, there was no geographic overlap in the activities of the parties upstream. A concern was raised that taken together with the vertical concerns, the increased concentration levels might lead to the lessening or prevention of competition.

From a vertical perspective, it was found that the merger was likely to substantially lessen or prevent competition because of the likelihood that Uhambo would foreclose on the other oil companies ("the OOC's) by refusing to supply them or raising their costs. The reason for this finding was that the merger would significantly reduce the interdependency between the oil companies in many ways. For example, in the inland market Sasol is long on production but short on retail, while Engen is short on production and long on retail. If the merger proceeds, Uhambo would have access to the large production capacity of Sasol and the large retail network of Engen, making Uhambo less dependent on the OOC's to put its products to bed.

The merger did not raise any significant public interest concerns.

The Commission recommended an approval of the merger subject to conditions intended to secure the supply of the petroleum products by Uhambo to the OOC's until a pipeline exists that is capable of transporting their shortfall volumes to the inland market on reasonable terms.

The Hearing

In the hearing five OOC's participated as interveners, all opposing the merger. 17 witnesses, who included international experts in anti-trust economics and mergers, were called. Significant information that was not previously available to the Commission, as well as the testimony of witnesses, in particular expert witnesses, persuaded the Commission to reconsider its position regarding the merger. Also, useful analysis of horizontal issues was made and elaborated on during the hearing. This included that, in looking at the market shares inland, one must also look at what the other competitors are able to bring into the market. Following this approach there would be a significant accretion in the market shares in the inland as a result of the merger. Furthermore, once the new pipeline is commissioned and addresses the transport constraints, the market would be national, and Uhambo would own about 50% of the national production capacity.

The Commission submitted that the likely scenario is that, absent the merger, when the new pipeline is in operation, Sasol would be compelled to decrease its prices of white fuels to the OOC's in order to maintain production levels, as it would not have a sufficiently large retail footprint to put its products to bed. Without the logistical constraints the OOC's would not be as dependent on Sasol, and Sasol would have to make an attractive offer to the OOC's to entice them to purchase its products. The Commission reasonably expects that some of the price decreases would be passed on to consumers, particularly when the market is deregulated. In contrast, if the merger was approved, Sasol would not have any incentive to show flexibility on the prices it demands for its products, with a potentially detrimental effect to consumers.

In a situation where Uhambo were to increase its prices at production or retail levels (in a deregulated environment), the OOC's would be unlikely to react by following a strategy to capture additional market share through maintaining lower prices due to their own capacity constraints and the fact that Sasol's production costs are lower than theirs. It is likely that the OOC's would rather price follow the increases of Uhambo.

In light of the information arising from the hearing, the Commission came to the view that the competition concerns arising from the merger could not be adequately addressed by a behavioural condition. The Commission was also not in a position, in light of the issues covered during the hearing, to confidently propose any structural remedy that would address the competition concerns.The Commission further submitted that there were no public interest issues or efficiency defences that would rescue the merger.In the circumstances, the Commission did not see an alternative to a prohibition.

The Commission awaits the Tribunal's decision on the matter.

By Thembinkosi Bonakele

Cartels Workshop in Seoul

The International Competition Network (ICN) is a 'virtual' organization of competition authorities worldwide, corresponding in English and primarily by means of email and conference calls. There are working groups dealing with mergers, unilateral conduct, competition policy implementation, tele-communications and cartels. Part of the cartels working group work plan is the hosting of an annual cartels workshop. This year the workshop was held in Seoul, South Korea, from 7-10 November hosted by the Korean Fair Trade Commission (KFTC).

Two representatives from the South African Competition presented papers in panel sessions, dealing with determination of penalties and the use of international co-operation.

The ICN processes are, in the main, closed to the general public and to interested parties and stakeholders, such as academics, defence attorneys and consultant economists. This is because of the sensitive nature of the discussions, especially when it comes to the detection, prosecution and punishment of cartel activity and participants. It is believed that it is not necessarily in the interests of competition authorities to be completely transparent at all stages about their thinking on how to uncover cartels and prosecute cartel members. This is in contrast to some other working groups in the ICN, such as the mergers working group's subgroup on notification and procedures, for which input from stakeholders is considered vital to the

merger consideration process. Nevertheless, the results of much of the behind-the-scenes work of the ICN, is eventually made public in final form on the ICN Website.

Emil Paulis of the EC highlighted some achievements of the various authorities in the preceding year, in the fight against cartels.

Brazil's CADE reported success in their Flintstone case, concerning a crushed rock cartel, for which the individuals concerned were fined 50% of their gross salaries for the next four years.

In the Netherlands, the NMa cracked a massive cartel in the construction sector, and adopted a novel 'accelerated sanctions procedure' to deal with the 345 companies involved in the cartel.

The Japanese authority (the JFTC) had some success with tackling a bridge-building bid-rigging case.

In the USA, the US DoJ fined an Indianapolis concrete firm $29m; Samsung was fined $300m for its role in the D-RAM cartel, and in that case, fines meted out totaled $640m and 18 individuals were sentenced to 13 000 days of jail time.

The host authority, the KFTC, imposed total surcharges of 146 billion Won (about US$146m) on telecom firms for fixing prices in Internet cafes, amongst other offences.

In the EU, DG Comp handed out penalties of 66m in respect of an animal feed cartel; 270m for an MCAA (a chemical) cartel; the Italian authority successfully prosecuted a raw tobacco cartel; and a German insurance cartel was also brought to book.

It is evident form this brief review of the past year that some spectacular successes have been made in the fight against cartels, which are universally regarded as the most serious of all offences against competition law. It is also clear that in certain jurisdictions, the authorities are able to make use of fines against individuals, and in some cases, jail sentences. Other sanctions include the disqualification of individuals as directors of firms. The Korean authority has even introduced a somewhat controversial 'informant reward programme'. Other countries have signed 'positive comity' agreements so that they can rely on each other to beat the participants of international cartels.

Despite the many achievements of the past year, there are equally many challenges facing competition authorities. The occurrence of cartels worldwide was traditionally thought to be mainly confined to construction, cement and chemicals industries, but has now spread to new and perhaps surprising fields, such as football shirts, beer, pork, bakeries, bananas, airconditioners, insurance, credit card merchant fees, banking fees generally, toys, and even coffins and funeral directors!

Much of the efforts expended by the ICN members of the cartels working group is devoted to promoting convergence among ICN members on adopting best practice techniques for combating cartels wherever they may arise. Further progress on achieving the goals of the cartels working group will be discussed at the ICN Annual Conference in 2006, to be held in Cape Town on 3-5 May.

By Geoff Parr

Cases

Commission recommends forestry merger to be approved unconditionally

The Commission recommended to the Tribunal that the proposed merger between Steinhoff Africa Holdings (Pty) Ltd ("Steinhoff Africa") and North Eastern Cape Forest Joint Venture ("NECF") and shares in Goeiehoop Farming Ltd ("Goeiehoop") be approved unconditionally.

Steinhoff Africa, an integrated saw milling, wood processing and furniture manufacturing entity, intends to acquire interests in North Eastern Cape Forest Joint Venture ("NECF") and shares in Goeiehoop Farming Ltd ("Goeiehoop"). NECF is a partnership between Mondi South Africa Limited, Goeiehoop and Industrial Development Corporation. NECF owns forest plantations grown on the Goeiehoop farm.

The transaction does not result in an overlap in the activities of the merging firms.

The Commission also found that the proposed transaction is unlikely to have negative effects on competition on the downstream markets, which depend on forestry plantations as a source of raw materials. The transaction does not raise any significant public interest concerns.

Recommendation that the Massmart and Moresport merger be prohibited

The Commission recommended to the Tribunal that the proposed merger between Massmart and Moresport be prohibited. Massmart operates as a mass retailer the Makro, Game and Dion outlets countrywide. Massmart has also in the recent past acquired the Builders Warehouse, Fed's DIY and various other hardware and building materials outlets. Moresport operates three retail brands namely, Sportsmans Warehouse, Outdoor Warehouse and Sport Shoe World.

According to the Commission, Massmart (primarily through Makro, Game and Dion) and Moresport (primarily through Sportmans Warehouse and Outdoor Wareshouse) compete in various markets relating to sports and outdoor goods.

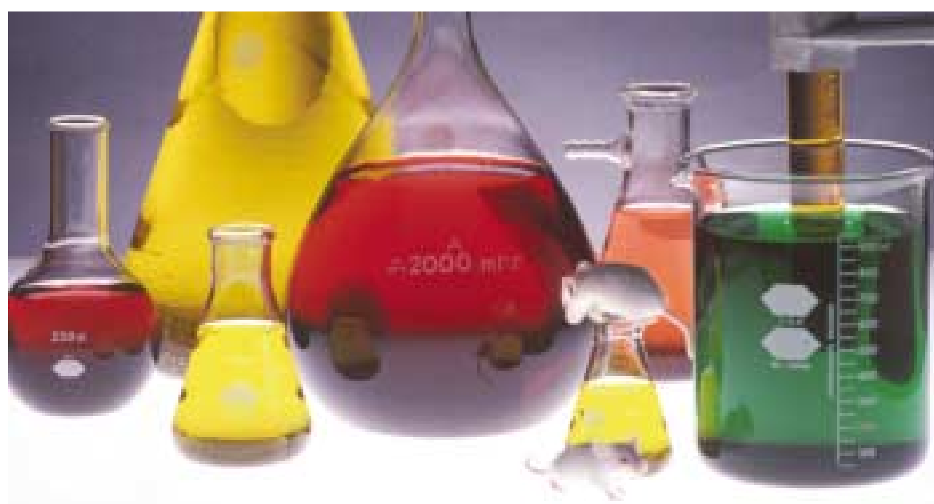
The markets that raised particular concern were the general sports equipment and outdoor equipment markets, where it was found that only a limited number of firms operate national chains that compete with the merging parties. The only significant competitor in the general sports equipment market identified was Totalsports. It was however found that Totalsports sells a narrow range of sports equipment as compared to Massmart and Moresport. With regards to outdoor equipment, it was found that although various retailers specialize in outdoor goods the majority focuses on apparel and footwear as opposed to equipment. The only significant competitor in the outdoor equipment market is Cape Union Mart. The Commission found that Moresport is an effective competitor to Massmart and that the merger is likely to further concentrate the already concentrated market.

Commission recommends prohibition of transaction involving merchant grade phosphoric acid

The Commission recommended to the Tribunal that Foskor should not be allowed to purchase Sasol's Phosphoric Acid Business since this will have serious negative effects on competition in South Africa.

The proposed transaction will effect competition both horizontally and vertically. Sasol's Phosphoric Acid Business, situated in Phalaborwa, produces merchant grade phosphoric acid ("MGPA"). Foskor, at its phosphate rock plant at Phalaborwa, is the only producer and seller of phosphate rock in South Africa. Phosphate rock is an essential input in the manufacture of MGPA. Foskor is already the largest producer of MGPA in South Africa at its plant in Richard's Bay. Foskor further uses the MGPA to manufacture granular fertilisers. MGPA is mainly used as raw material in the manufacturing of fertilisers and animal feeds. The Commission's market investigation found that there are no real substitutes for MGPA in a large number of applications, for example in the chemical production of fertilizers and in the production of liquid fertilizers and animal feeds.

Should the proposed transaction be allowed to proceed, then Foskor will acquire the second largest producer of



MGPA in South Africa from Sasol. The Commission found that it is highly unlikely that new players would enter this market in future because of the very high capital costs involved.

Phosphoric acid is a highly hazardous and corrosive product. The market investigation of the Commission showed that the importation of MGPA into South Africa at present and in future is either not possible or not viable for firms other than Foskor and Sasol. This is due to a lack of infrastructure to handle and store phosphoric acid in the South African harbours, more specifically at the Richard's Bay port.

The Commission found that, should the deal proceed, Foskor would have a near monopoly in the market for the production and sale of MGPA in South Africa based on sales to third parties. The Commission concluded that the instant deal would remove an effective, and in fact the only real competitor to Foskor, from the MGPA market in South Africa.

From a vertical perspective, the market investigation of the Commission confirmed that potentially disadvantaged downstream competitors of Foskor, i.e. other manufacturers of MGPA, would not be able to source phosphate rock from any other party than Foskor after this proposed transaction. It is not economically viable for parties other than Foskor to import phosphate rock into South Africa since the phosphate content of the rock is too low to economically import and transport it. This vertical relationship also raises competition concerns.

Given the magnitude of the competition concerns the Commission is of the view that the proposed transaction is likely to negatively effect consumer welfare. The price of MGPA influences the price of final products like fertilizers and animal feeds. Millions of South African consumers could be affected should these prices increase.

Strate, Eyethu and Ultra Registrars merger prohibited

The Commission has prohibited a small merger involving Eyethu Registrars (Pty) Limited ("Eyethu") and Ultra Registrars (Pty) Limited ("Ultra"), in terms of which Eyethu intended to acquire the entire business undertaking of Ultra comprising transfer secretarial services.

Upon conclusion of the transaction, STRATE Limited ("STRATE") would control more than half of the issued share capital of Eyethu and Management and certain Black Economic Empowerment firms would hold the remaining shareholding of Eyethu. STRATE is a self-regulatory organisation licensed by the Financial Services Board ("FSB") and is currently the only Central Securities Depository ("CSD") in South Africa. Through its authority as regulator STRATE hold rights to gain access to information from Central Securities Depository Participants ("CSDP's"). Furthermore, STRATE holds and has access to material shareholder information used by transfer secretaries in their ordinary course of business. Ultra is a firm, which provides share registry services to issuers listed on the JSE Securities Exchange.

In the Commission's view, STRATE and Ultra stand in a vertical relationship in that STRATE controls shareholder information, which is used by Ultra in compiling complete share registers for issuers. Currently the only other competitor to Ultra is Computershare Limited ("Computershare"), which is also a CSDP regulated by STRATE. In this regard, STRATE is the only entity, which has access and can supply transfer secretaries with information essential to their business operations. It is highly unlikely that a new or second CSD would enter the market in which STRATE operates.

The Commission has considered various aspects, which influence the markets in which the parties compete. In particular the market dynamics of the securities industry as well as the structure of STRATE has been taken into consideration. This transaction would create structural links between STRATE and Ultra, thus resulting in the following potential competition concerns:

STRATE would have access to proprietary information of Computershare considering the fact that Computershare is both a CSDP and a transfer secretary and that STRATE will via its regulation of Computershare obtain access to this information.

STRATE could discriminate between Computershare and Ultra in supplying input (shareholder information) to them in terms of the type of information the intervals at which information is provided.

The Commission is therefore of the view that the transaction is likely to lead to a substantial prevention or lessening of competition in the transfer secretarial market. It is the Commission's view that Ultra is an effective competitor in the market and that it would remain competitive in the absence of this transaction.

The Commission has also considered various remedies to address the concerns raised by this transaction and none of them seemed to adequately address them. Also, the Commission is of the view that the efficiency gains that are likely to arise from this transaction are unlikely to offset the negative effect on competition. The Commission therefore had no alternative but to prohibit the transaction.

Afgri and National Cereal Holdings merger approved conditionally

The Commission recommended that the transaction be approved subject to the certain conditions.

The primary acquiring firm is Main Street 301 (Pty) Ltd ("Main Street"). Main Street is controlled by Afgri Operations Ltd that is in turn controlled by Afgri Ltd ("Afgri"). The primary target firm is National Cereal Holdings (Pty) Ltd ("NCH") that controls amongst others, Premier Foods Limited ("Premier"). NCH is 100% controlled by Established Investments (Pty) Ltd ("EI"). Nedbank Limited ("Nedbank") holds 45% of the shares in EI and Fabvest Investment Holdings Ltd ("Fabvest") holds the remaining 45% interest in EI.Main Street is a wholly owned subsidiary of Afgri and was incorporated as a special purpose vehicle for the funding of the restructuring leg of the transaction. It does not trade in any markets. Afgri Operations is the primary operating subsidiary of Afgri. It provides a diverse range of products and services to farmers, processors and users of agricultural products. Afgri Operations trades through three operating divisions: Afgri Products, Afgri Commercial and Producer Services and Afgri Financial and Logistics services.

Premier is the only trading entity within the group. It is involved in the milling, marketing, selling and distribution of bread, maize and wheat products. In terms of the proposed transaction, Afgri via Main Street will provide a specific funding structure in order to enable the EI Group to enter into the restructuring transaction. In order to mitigate against any default by NCH in respect of its obligations, a risk mitigation mechanism is attached. In the event of default by NCH, Afgri, through Main Street, will take effective control over NCH.

There is no overlap in respect of the activities of the merging parties. However, the transaction gives rise to certain vertical issues. Afgri is a supplier and procurer of grain to millers. It also provides handling, storage and logistics services to milers for grain supplied. Afgri has a number of arrangements with farmers and millers that range from broker-agent relationships to more extensive procurement relationships governed by agreements. The Commission has not had access to details of all agreements and relationships that exist in this industry. However, Afgri has an extensive procurement relationship with Premier and some of the other millers.

The Commission found that due to the nature of this relationship, should Afgri attain control over Premier it would place the competing millers at a competitive disadvantage. Premier has high market shares in the flour and maize meal markets. Firstly, in times of shortages, Afgri could supply Premier first and then supply other millers with whatever supplies remained. This would imply that other millers would face supply constraints and would be bound to the existing supply arrangements due to their dependency on Afgri.

Secondly, Afgri has insight into extensive trading data on most millers competing with Premier through the Safex facility it offers to millers. Afgri is also privy to other millers' costing, and trading data. It would be able to use this information to increase supply prices or prices of other services provided to millers.

While other sources of supply remain in the market, Afgri is the main procurement agent, and provides extensive services to Premier and other millers including the buying of grain from suppliers, stock keeping, and grain trade and exchange

facilities. It is unlikely that its services can easily be replaced or terminated due to their dependency on Afgri. Hence, millers could to an extent be forced to accept higher supply prices before procuring grain on their own. Again, higher supply prices would eventually result in higher flour prices leading to loss of customers to larger brands like Premier. Smaller millers may be forced to exit the market in the long term thereby increasing concentration in the downstream flour supply markets.

Should Afgri attain control over Premier, it is likely to raise serious competition concerns in the downstream market for the supply of wheat and maize flour. No significant public interest issues arise from the merger that could mitigate the potential anti-competitive concerns raised.

Due to the potential concerns that are likely to arise should Afgri attain control over Premier, the Commission has recommended to the Tribunal that the transaction be approved upon condition that Agri shall, inter alia, dispose of its interest in NCH within a specific period when it obtains control over NCH.

Update on Commission Activities

Report on breakfast meeting with practitioners

The Commission recently hosted a breakfast meeting with the legal practitioners in and around Gauteng province. The breakfast meeting was held at Hilton Hotel, Sandton on 11 November 2005. Legal Practitioners, which included attorneys, advocates, legal consultants and legal advisors in the private sector involved in merger cases were invited.

The objective of the Commission was to get a broader understanding of the concerns that practitioners have in respect of employment in merger proceedings and to share concerns raised by trade unions with practitioners. This exercise was undertaken in order to balance the practitioners' concerns with those of trade unions.

The Acting Commissioner Mr Shan Ramburuth in his introduction stated that there has been an increase in mergers notified with the Commission in the last quarter. He emphasized that trade union participation was government policy choice and therefore it is crucial that unions must be involved in the merger process. Mr Ramburuth also touched on the issue of the trade unions' capacity to adequately deal with mergers and acquisitions. Further, he stressed that the quality of filing determines the investigative period needed by the Commission to finalise a merger and urged practitioners to ensure that their filing is complete and of quality.

Mr Johnson Matshivha shared the trade union issues with practitioners. These related to confidential claims made by practitioners in merger cases, which affect the ability of unions to make meaningful submissions. Further, he requested practitioners to also give notice of mergers to head offices of affected unions as the capacity of most unions is often at head office level.

Unions have proposed that merging parties should provide undertaking on employment, which should be made conditions of the merger on approval by the Commission. Another issue raised by the trade unions related to cross border transactions. Unions feel that the employment issues are not dealt with adequately in cross border transactions and submit that due diligence on employment should be conducted for all legs of the transaction when filing is made to the Commission.

Ms Lizel Blignaut emphasized the sophisticated nature of merger analysis and the importance of submitting correct complete information. It is important that practitioners start consulting the trade unions as early as possible on the proposed merger. During the filing of the merger notification the parties must provide detailed information on the effects on employment and the possible alternative remedies to deal with matters like training programmes, first option in new vacancies, relocation to other places where there are vacancies within the merging parties etc.

The information required would require employment profiling detailing the numbers of skilled, semi-skilled people affected by the merger. The parties should also provide the Commission with the best and worst case scenario, proper job descriptions of the affected positions, impact on the terms and conditions of employment and plans to mitigate job losses, retrenchment packages, counselling, and retraining or job reservation.

A number of questions were raised on this part of the presentation. One of which was whether or not the interpretation of the Act is favourable to the trade unions? In response to this it was emphasized that the Act deliberately balances competition and public interest aspects and that in assessing mergers, the Commission balances the interest of both merging

parties and those of trade unions or employees.

Mr Hardin Ratshisusu dealt with information required in vertical mergers, Mr Maarten van Hooven shed some light on how to approach market definition in property transactions, while Mr Makgale Mohlala reminded practitioners on how to get their mergers to be fast tracked.

The problems that are prevalent regarding employment in merger transaction were put to the fore and it is hoped that this will keep the debate going between the Commission and practitioners, but more importantly, dispel the perception that employment issues are not equally important in merger proceedings. In this regard the Commission aims to develop a code of practice that will ensure that such common ground can be achieved. The issue now is to find common ground between practitioners mostly representing business and the trade unions affected by the merger regulations.

By Benedict Khumalo

Commission recently went on a Trade Union road show

It is the intention of the Commission to develop a Code of Practice (the "Code") between the Commission, Trade Unions ("Labour") and Legal Practitioners ("Practitioners"). The Commission envisages that an agreement on the code will be reached or the code to streamline interaction and expectations of all the parties in merger proceedings.

As a means of information gathering, the Commission conducted breakfast meetings with labour in six provinces namely the Western Cape, Eastern Cape, Kwazulu Natal, Free State, North West and Gauteng. These series of meetings took place between 31 October and 08 November 2005.

All federations including some unaffiliated trade unions were invited and most of them represented. A brief overview on the Competition Act and the role of labour in merger/acquisition proceedings was given in all the meetings. A better part of each meeting was set aside for questions, discussions and proposals and what follows are issues that were discussed.

Monitoring merger effects on employment

Labour questioned the Commission's capabilities in monitoring approved mergers. It is said that most approved mergers often result in retrenchments and because most shop stewards and union officials are not aware of the Commission and as a result these matters end up not being brought to the attention of the Commission. It was proposed that more awareness campaigns should be brought to the workplace to capacitate as much workers/consumers as possible on the Competition Act and the Commission to maximize the monitoring of approved mergers.

Centralized Commission

Since the Commission is centralized it is not easily accessible to other provinces. Unions indicated that the Commission is located in Gauteng where most companies' head offices are situated; therefore, it would not be in the know of issues taking place at plant levels that are mostly situated in other provinces.

Attracting foreign investors

There was a healthy debate on labour economics with labour pointing out that most mergers approved by the Commission often result in retrenchments and a portion of these ends up in industrial actions. This, in the view of labour contributes to the country struggle to attract foreign investors.

Time frames relating to Union participation

Unions are of the view that the 5-business day period for making submissions in merger proceedings are unreasonable. Unions also stressed that they internally have rules to be followed when handling labour matters, and therefore suggested that the period be extended to 10 business days. This way Unions believe that they will at least be in a position to make meaningful submissions.

Intensification of awareness campaigns

Unions indicated that most of its officials and shop stewards constantly change jobs and as a result there is always a need to train new officials on the Competition Act. They requested that awareness campaigns be conducted constantly to ensure that labour is always informed of its rights and new development in the Competition arena.

Conclusion

Through the roadshow the Commission reached 100 trade union representatives. The views and concerns of labour on mergers/acquisitions have been noted and will be tabled to the Commission's Executive Committee and has also been raised with legal practitioners. All information obtained from the meetings, including the practitioners breakfast meeting, will be consolidated to inform a draft of the code of conduct for comments by the parties concerned.

By Mpho Moseki

The commission recently honored its employees

The Commission held its fourth Employee Awards Ceremony on 28 October 2005 at Gallaghar Estates in Midrand to honour and reward staff for their contribution towards reaching the goals and objectives of the Commission. Staff and their partners, special invited guests attended the function.

The following Commission employees received awards:

Top Performer of the Year:	Middle Management Category – Thanduxolo Lubanga
Top Performer of the Year:	Professional Category: Rudolph Labuschagne
Top Performer of the Year:	Administrative Category: Bellah Kekana
Team Player of the Year:	Makgale Mothlala
Manager of the Year:	Zodwa Ntuli
Employee of the Year Award:	Maarten van Hooven
Academic Achievers Award:	Pascalia Kunaka and Karyna Pierce
Posthumous Award:	the late Lesiba Matjila

By Adelaide Ruiters

Shan and Makgale

Shan and Rudolph

Shan and Thanduxolo

Shan and Zodwa

Shan and Maarten

Shan and Bellah

Towards a free and fair economy for all

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, as well as the rules and amendments to the Act. You may also forward enquiries, comments and letters to:

THE EDITOR
Compliance Division
Private Bag X23
Lynnwood Ridge
0040
E-mail: CCSA@compcom.co.za
Tel: (012) 394 3200
Fax: (012) 394 0166

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