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Metropolitan Momentum merger summary

The recent merger between Metropolitan Life and Momentum raises interesting issues with regard to the management of job losses that emanate from mergers. It also brings into sharp relief the question of how competition authorities balance interest considerations and competition issues in their merger assessment. The Commission approved this merger subject to the condition that the merging parties implement measures to mitigate against job losses.

The Tribunal, after National, Education, Health and Allied Workers Union's intervention, ruled that there should be no retrenchments for two years, except for senior managers. At the time of writing the merging parties had lodged an appeal against the Tribunal's ruling.

The Commission will now confront the challenge of addressing employment issue more vigorously going forward. Merging parties will have to proactively show the likely impact of the transaction on employment than has been the case to date.

In this case the primary acquiring firm was Metropolitan Holdings Limited ("Metropolitan") a public company listed on the JSE. Metropolitan is involved in various markets in the financial services sector such as long-term insurance, medical insurance,



By: Grashum Mutizwa

retirement fund administration, asset management and property investment. The primary target firm was Momentum Group Limited ("Momentum"), which is wholly owned by First Rand Limited, a public company listed on the JSE. Momentum controlled several subsidiaries operating in different facets of the financial services industry offering various financial products, services and solutions aimed at protecting wealth, health and wellness. Upon completion of the transaction, Momentum became a wholly owned subsidiary of Metropolitan. The transaction was a large merger.

There were a number of markets that were affected by the transaction. In particular, the overlapping activities mainly related to long term insurance, medical insurance, retirement fund administration, asset management and property investment industries. However, there were no major competition issues arising in any of these markets identified as the merged entity continues to face

Editorial Note

It is a pleasure to write this maiden editorial note.

In this edition we lead with two merger cases. The first case highlights the impact of mergers on employment arising from recent cases. The Commission had approved the merger between Metropolitan Life and Momentum subject to the condition that the merging parties put in place a programme to address the job losses. In particular, the parties had to commit to a re-skilling exercise to enable the workers that are likely to lose their jobs to find alternative employment. However, following intervention by the National, Education, Health and Allied Workers' Union (NEHAWU), the Tribunal ordered that there should be a moratorium on job losses for two years, except for senior managers. The parties had lodged an appeal against this decision at the time of writing. Going forward Competition Authorities are challenged to be more rigorous in assessing public interest considerations, especially employment, in their assessment of merger transactions.

In the second case, the Commission approved BANKSERV's acquisition of NOMAD and EMID subject to several conditions. BANKSERV processes a substantial portion of payments through the National Payment System and it is the only appointed Payment System Operator for facilitating interbank payments and clearing. It is apparent that BANKSERV is diversifying its business by acquiring firms like NOMAD and EMID. EMID provides transaction and account management solutions or back-office services or a retail bank. NOMAD provides transaction service to merchants, especially switching of funds. The merger involve complementary services. This presents BANKSERV with an opportunity to bundle its inter-bank clear services with EMID and NOMAD services. It also has the incentive to reduce inter-operability or rival vendors' transaction. Against this background the Commission approved the transaction subject to certain behavioural conditions and prohibited the parties from bundling BANKSERV's payment with affected EMID AND NOMAD services.

The newsletter also features articles on the recent Annual Competition Conference and the OECD Workshop on *Information Exchange between Competitors*. In addition there is an overview of a number of international engagements and conferences attended by the Commission staff. In particular, there is an article on the recent ICN Workshop on Cartel Detection.

As usual the newsletter provides insight into how the Commission analysed merger cases.

Finally, there is an article highlighting the Commission's work in training government procurement officials to detect bid rigging. The adoption of the Certificate of Independent Bid Determination by the National Treasury is a significant milestone in combating bid rigging of government tenders.

Happy reading!

Oupa Bodibe

significant constraining influence from several competitors in each of these markets concerned. None of the third parties engaged raised any concerns about the competitive effects of the transaction.

However, the only major concern arising from the merger related to public interest issues, in that the merger would have likely resulted in 1,500 employees being made redundant. Given this negative effect on employment, the Commission therefore recommended the Tribunal to impose conditions that would largely involve making sufficient endeavours to limit the number of retrenchments. Further, the parties would be required to set aside funds to train and up-skill

the retrenched employees so that they could easily be re-absorbed into the markets. However, the Tribunal rejected the proposed conditions, citing that the efficacy of such initiatives proposed by the Commission were questionable as the results of past experience were mixed. The Tribunal was not convinced that the parties had adequately justified the need to retrench 1,500 employees, and therefore imposed a moratorium that there should not be any retrenchments as a result of the merger, save for a few (18) positions at executive level. The decision emphasized South Africa's Competition Authorities' mandate to safeguard employment, particularly given the high unemployment rate in the country.



Bankserv acquisitions approved with conditions

The Commission approved South African Bankers Services Company Ltd's ("BANKSERV") acquisition of EMID (Pty) Ltd ("EMID") and Nomad Information Systems (Pty) Ltd ("Nomad") subject to certain behavioral conditions. Most importantly, the Commission prohibited the parties from bundling BANKSERV's payment clearing services with the affected EMID and Nomad services.



By: Mfundo Ngobese

The South African Reserve Bank is also considering the separation of BANKSERV's core and non-core services. Furthermore, an emphasis was placed on providing interoperability to third parties that are similar to Bankserv's own subsidiaries.

In its Overview of the Payment Environment of May 2008 - the Banking Association of South Africa notes that the National Payment System ("NPS") can be described as a mechanism which enables the transfer of money between its participants. Accordingly, the NPS is one of the main mechanisms required for effective functioning of the South African economy. This is considered to be well illustrated by the following comparison: *"Payment and settlement systems are to economic activity what roads are to traffic: necessary but typically taken for granted unless they cause an accident or bottlenecks develop."*¹

A well functioning NPS does not only require the prevention of systemic risk but must also be accessible to diverse methods of effecting payments. Thus access should not be hindered, in particular by creation of artificial entry barriers that do not result from

the natural workings of the NPS. Bankserv's proposal to acquire EMID and Nomad presented specific issues concerning the likelihood of leveraging of market power from a dominated market to related competitive markets and hence the concomitant heightening of barriers to entry in all affected markets.

To place matters within context it should be noted that the NPS is divided into payment streams. Payment streams consist of processes, systems and rules between banks which enable the banks to exchange and execute payments between each other. Examples of payment streams include debit order (AEDO and NAEDO), credit card, debit card, Electronic Funds Transfer (EFT) credit, EFT debit, cheque etc. Each payment stream has an appointed Payment Clearing House Systems Operator(s) ("PSO"). A PSO sorts the transactions from various banks per homing bank, and delivers one file containing many payment instructions to the homing bank for processing. This activity is referred to as inter-bank clearing. Bankserv is the only appointed PSO responsible for facilitating the clearing of interbank payments in respect of the following payment streams:

- EFT credit;
- EFT debit;
- AEDO (Authenticated Early Debit Order);
- NAEDO (Non-Authenticated Early Debit Order); and
- RTC (Real Time Clearing)
- Cheque
- Mzansi Money Transfer
- ZAPS (Interbank Credit Payment Service)

Bankserv, MasterCard and Visa are the appointed PSOs in respect of debit card and credit card. However, MasterCard and Visa remain relatively small players in respect of these payment streams. Accordingly, the Commission found that Bankserv has a monopoly or near monopoly position in respect of payment streams in which it participate.

Other than being a provider of managed ICT services EMID also operates in a market adjacent to Bankserv's inter-bank clearing market referred to as the provision of transaction and account management solutions. This is essentially the electronic retail banking platform or the back-office of a retail bank.

Nomad operates in another market that is also adjacent to Bankserv's inter-bank clearing market. However, unlike EMID, Nomad's services are not provided to banks but to merchants. The Nomad system provides technology for the electronic switching of funds from a cardholder's personal bank account to the bank account of Nomad's retail client. The Nomad software ensures that a payment request is sent from the retailer's point of sale (POS) to the retailer's acquiring bank. Nomad also

¹ The Banking Association South Africa, Overview of the payment environment May 2008 p. 1.

provides related value added and reconciliation service.

Thus there was no horizontal overlap in the activities of the merging parties, as the mergers were between firms providing complementary services. Whether it is in the provision of the entire credit and debit card application platform or account hosting for home loans, personal loans or savings account, EMID hosts transaction and account information on behalf of its non-bank and bank clients and ensures that information is ready for submission through the payments system which utilises Bankserv as a platform.

Nomad on the other hand obtains POS transaction information of cardholders from its merchant clients. Nomad submits the information to the merchants' acquiring banks which then send the information to the cardholders' banks via Bankserv-the PSO, for payment.

The EMID transaction presented to Bankserv an opportunity to bundle its inter-bank clearing services (i.e. Payment core) with EMID's transaction and account management services to the detriment of competitors in the transaction and account management market. The inability

of rivals to replicate the bundle due to lack of presence in the Payment core of Bankserv meant that rivals were unlikely to continue to act as a competitive constraint on Bankserv's pricing.

In addition, Bankserv had the ability to reduce the interoperability of rival vendors' transaction switching services in respect of the Nomad transaction and transaction and account management services in respect of EMID since Bankserv controls the interfaces with the payment clearing core. Bankserv's control of access to the functionality of the payment clearing core vests to Bankserv the power to exclude potential rivals that produce complementary products to the payment clearing core by denying them access to the core's functionality.

Relevant for both the EMID and Nomad transactions was the Commission's consideration of Bankserv inability to charge monopoly prices for utilisation of its Payment core due to control by the banks which are both shareholders and customers of Bankserv. Bankserv's inability to exercise market power in its Payment core gives it (Bankserv) sufficient incentives to seek to dominate adjacent markets not similarly constrained. Despite Bankserv's

inability to exercise direct market power it has the incentive to utilise its Payment bottleneck for gain in related markets.

However, the Commission noted that the concerns relating to cross-subsidisation and asymmetric information exchange (i.e. Bankserv allegedly has access to EMID's and Nomad's rivals' competitively sensitive information) are not stand alone cognisable competition concerns. Nonetheless, they can be used to facilitate the effectiveness of identified concerns relating bundling (e.g. to sustain a predatory bundle) and limiting of or refusal of access to the payment core.

In consideration of the likelihood of foreclosure of rivals and the consequent long-run negative effect on banking prices, the Commission concluded that the transactions were likely to substantially prevent or lessen competition in the market for the provision of transaction switching services to merchants and transaction and account management services to banks and non-banks.

To remedy the identified harm to competition the Commission approved the transactions subject to certain behavioral conditions.



The Milk Case



By: Sbusiso Madonsela

Background

On 10 June 2004, the Competition Commission (“the Commission”) received a letter from Mrs Malherbe, a small milk producer in the Eastern Cape. In her letter Mrs Malherbe suggested that three milk distributors Nestle, Parmalat and Ladismith Cheese did not compete with each other, and were guilty of ‘*kartelvorming*’. Subsequent to receiving the letter, the Competition Commissioner (“the Commissioner”) assigned a team of investigators to conduct a preliminary investigation into the allegations. The investigation team obtained confirmation from other sources that corroborated Mrs Malherbe’s allegation and then prepared a memorandum to the Commissioner¹, informing him of their findings that Parmalat and Ladismith Cheese were engaged in price-fixing in the market for the supply of milk, conduct which was in contravention of section 4(1)(b) of the Competition Act 89 of 1998, as amended (“the Act”). Furthermore, the investigating team obtained evidence that Clover might be abusing its dominant position and recommended that a complaint be initiated against Clover for contravening section 8 of the Act.

On 09 February 2005 the Commissioner, taking into consideration the investigating team’s recommendations as well as other historical factors, initiated a full investigation into the entire milk industry in terms of section 49B(1). Subsequent to that initiation, the Commissioner issued summons against various individuals, in particular against Woodlands and Milkwood to attend the interviews with the Commission and to produce the documentation called for in terms of the summons, respectively. Further to the Woodlands interrogations and Milkwoods’ submissions of documents summonsed for, the Commissioner initiated six further complaints against specific firms for various contraventions, in particular sections 4(1)(b)(i) and (ii) and 4(1)(a) of the Act. The Commission referred its findings to the Competition Tribunal (“Tribunal”) on 07 December 2006. There was exchange of pleadings and the discovery process was completed, however, prior to the commencement of the main hearing, a number of applications raising points in *limine* were filed with the Tribunal².

The Woodlands & Milkwood Applications

Milkwood and Woodlands also filed their application with the Tribunal seeking:

- to have the summonses (issued against Woodlands and Milkwood) declared void and set aside for being too broad;
- a declaration that the evidence obtained pursuant to the summonses be declared inadmissible and returned to the applicants; and

- a declaration that by initiating against the entire milk industry in the 09 February 2005 initiation, the Commissioner had exceeded his powers as conferred to him in terms of 49B(1) of the Act, and thus the initiation ought to be found to be unlawful and set aside.

The Tribunal found³ that the summonses issued against the two firms were void in that they were too broad, but did not declare the evidence obtained pursuant to the summonses to be inadmissible and held that questions relating to admissibility would be dealt with during the main hearing of the merits and therefore issued a preservation order. The Tribunal didn’t make a finding on the issue of the initiation. Woodlands and Milkwood accordingly appealed the Tribunal’s decision to the Competition Appeal Court (“CAC”), on the admissibility of evidence and the validity of the initiation process by the Commission on the entire industry. The CAC⁴ found that the Woodlands summons were void and the Milkwood summons were not and found that the Tribunal was not a court as contemplated in section 172 of the Constitution and accordingly could not issue a preservation as it had done. The CAC further found that the Commission ought to return all the documents and remove from the referral affidavit reference to such information received pursuant to the summons found to have been invalid. The difficulty that Woodlands found themselves facing was that the very same information and documents had been discovered through the discovery process and the CAC had given the Commission the go-ahead to use it against them.⁵

¹ Advocate Menzi Simelane, the then Commissioner.

² One such application was the Clover Industries Limited v The Competition Commission 103/CR/Dec06 and 78/CAC/Jul08, one of the points in *limine* raised by Clover was whether Mrs Malherbe’s letter was a complaint as contemplated in terms of section 49B(1) or (2) of the Act. The CAC definitively held at paras [8] to [11] that Mrs Malherbe’s letter was a submission of information as contemplated in terms of section 49B(2)(a) of the Act.

³ Tribunal Case number 103/CR/Dec06.

⁴ Judgment of the CAC handed down on 26 August 2009 under case number 88/CAC/Mar09.

⁵ See the CAC’s clarification order delivered on 07 December 2009, 88/CAC/Mar09.



The Supreme Court of Appeal Decision

Woodlands and Milkwood appealed the decision of the CAC to the Supreme Court of Appeal (“SCA”) citing the fact that the Tribunal had failed to make a finding on the very crucial point of their application: ‘whether the initiation complaint by the Commissioner into the entire milk industry was valid and whether the Commission, by initiating broadly as it did, was acting within the scope of the powers conferred to it, in terms of section 49B(1)’. They argued that CAC’s decision had suffered the same fate.

The SCA, per Harms DJP⁶, made a strange obiter remark that the Commission’s ‘administrative penalties’ bear a close resemblance to criminal penalties, and that the Commission’s procedural powers must be interpreted in a manner that least impinges on the constitutional values and rights⁷. The SCA in its interpretation of section 49B(1), made a few significant findings to the Commission’s procedures going forward:

- that, *inter alia*, an initiation in terms of section 49B(1) must meet

certain jurisdictional requirements that the Commissioner to lawfully initiate must be in possession of information, which information, objectively speaking could give rise to a reasonable suspicion of the existence of a prohibited practice. The reasonable suspicion then confers on the Commission the jurisdictional ground to lawfully use its powers as per the provisions of the Act;

- that the scope of the initiation and subsequent investigation must relate to the information available and /or the complaint filed;
- that, for the Commission to use its invasive powers in terms of section 49A of the Act, there ought to be a valid initiation and/or complaint based on a reasonable suspicion. The Commission may, however, use its invasive powers without an initiation in terms of section 46 because through this process there is judicial supervision;
- rejected the finding of the Competition Appeal Court that because of the difficulty in establishing the existence of a prohibited practice, therefore a generous interpretation of the Commission’s procedural rights would be justified;

- that both the summons and an initiation need particularity and clarity, they must survive the same standard and test of legality and intelligibility. The validity of the summons must appear *ex facie* the document and should not depend on a possible request of further particulars;
- that the scope of a summons may not be wider than the initiation statement.⁸

The Supreme Court of Appeal, found that the Commission’s February 2005 initiation was too broad and was invalid (had no legislative mandate); if the February 2005 initiation was invalid, then information obtained pursuant to that initiation, through the use of the Commission’s invasive powers, ought to be set aside and returned to the appellants; the Commission’s further initiations were all linked to the 2005 February initiation and therefore were all tainted and should also be set aside.

Accordingly the Supreme Court of Appeal set aside the initiations and referral against Milkwood and Woodlands.

⁶ Woodlands Dairy v Milkwood Dairy (105/2010) [2010] ZSCA 104 (13 September 2010), now reported as Woodlands Dairy v The Competition Commission 2010 (6) SA 108.

⁷ The issue whether the Commission’s proceedings are criminal or civil has long been settled by the CAC in Federal Mogul Aftermarket Southern Africa (Pty) Ltd v The Competition Commission and others [2004] 1 CPLR 25 (CAC). I submit that it does not seem that the SCA intended to depart from this widely accepted view in its obiter remark.

⁸ This may seem to suggest that the target of the Commission’s investigation will now have to demand to see the initiation statement and the documents attached to the complaint form CC1 to see if the summons is valid and that the summons are not wider than the initiation. However, I submit that it doesn’t seem, though, that the SCA’s decision was meant to adopt that route in light of the implications it would have on the Commission Rule 14(1)(c) and that could not have been intended to be a departure from the SCA decision in Simelane and others NNO v Seven-Eleven Corporation 2003 (3) SA 64 (SCA) at para [22] at 78E to I wherein the SCA rejected an argument that at investigating stage the Commission would have to put its cards on the table, tell the target of its investigation what the evidence was and give the target of the investigation an opportunity to refute it. This is especially because this particular point was not canvassed by either of the parties.

The Commission refers a complaint of cartel in the Tyre Manufacturing Industry



By: Nelly Sakata

On 31 August 2010, the Competition Commission (“the Commission”) referred a complaint of price fixing against four tyre manufacturers in South Africa, known in the industry as the “South African Tyre Manufacturers”, as well as against the industry association, to the Competition Tribunal (“the Tribunal”) for adjudication. The respondents were Bridgestone South African (Pty) Ltd (“Bridgestone”), Apollo Tyres South Africa (Pty) Ltd (“Apollo”), former Dunlop Tyres International (Pty) Ltd, Goodyear SA (Pty) Ltd (“Goodyear”), Continental Tyre SA (Pty) Ltd (“Continental”) and the South African Tyre Manufacturers Conference (Pty) Ltd (“SATMC”).

The investigation against the South African Tyre Manufacturers was prompted by a complaint lodged in October 2006, in which the complainant alleged that:

- all the major tyre manufacturers in South Africa, namely Bridgestone,

Apollo, Continental and Goodyear unilaterally adjusted their prices at a similar time, within the same parameters, for reasons such as the change in the exchange rate and the escalating costs of raw materials;

- they used “*clever*” marketing structures and pricing techniques to disguise their price fixing; and
- they worked together in order to manipulate their pricing mechanisms and prices for their products. This co-operation amongst the tyre manufacturers was commonly referred to as “*coffee table talks*” in the transportation industry.

Following on the above complaint, the Commission conducted an investigation in respect of the alleged conduct. Further probing led the Commission to expand the investigation to potential activities of dividing markets, collusive tendering and price information exchange in respect of tyre products in contravention of section 4(1)(b)(i),(ii) and (iii) of the Competition Act 89 of 1998, as amended (“the Act”).

As part of the investigation, the Commission also conducted a search and seizure operation into the premises of Bridgestone, Apollo and the SATMC on 4 April 2008. The raid included the seizure of a number of documents as well as the electronic data of the relevant companies.

The Commission’s investigation revealed that representatives of tyre

manufacturers discussed dealer price list, agreed on the timing for requesting price adjustments from the State Tender Board, and coordinated the percentage and timing of price increases in relation to various tyre products.

Subsequent to the raid and as part of the investigation, the Commission interviewed several parties and summoned those alleged to be involved in the collusive activities to appear and provide evidence regarding the alleged collusion. Pursuant to the Commission’s investigation and interrogations, Bridgestone applied for an application for leniency in which it confirmed the complainant’s allegations and some of the Commission’s suspicions. Bridgestone stated further that the coordination on general price increases started as far as 1999.

Furthermore, Bridgestone, through the testimony of some of its former employees, provided evidence of not only collusion in relation to the general price increases, but also confirmed the collusion in relation to pricing to the Original Equipment Manufacturers (OEMs), as well as collusion around the dealers’ price lists. In its leniency application, Bridgestone admitted that it had met with its competitors to discuss the coordination, timing and average percentage price increase of tyres. They had also agreed on the discount structure to be given to tyre dealers and messages to be given to the market explaining the increase. The cartel operated until at least 2007.

The relevant tyre products on which collusive activities took place included passenger tyres (PSR), light truck or commercial tyres (LTR/LTS), truck and bus tyres (TBR/TBS), off-the-road tyres (OTR), Agricultural tyres (AG) and Earthmover tyres.

As a background to the industry, the tyre manufacturers sit at the supplier level of the industry. They supply tyres to three (3) customer groups, namely, the tyre dealers, the Original Equipment Manufacturers ("OEMs") and the Government. Tyre dealers purchase tyres for supply to consumers in what is referred to as the "replacement" market, also known as the "aftermarket". The OEMs are vehicle manufacturers, and the supply of tyre products to the Government is done through a tender process managed by the State Tender Board ("STB").

The manner in which tyre manufacturers price their tyre products to the above groups of customer differs from one group to the other. Pricing to the tyre dealers is done through a list price, also known as the "dealer price list". Each manufacturer

has a list price and sells its tyres to the dealers at a discount (and sometimes other kinds of rebates) off the list price. In other words the actual price at which the manufacturers sell to the dealers, also known as the "net price" is that price list less a discount. Manufacturers generally try to keep the same discount structure for a specific tyre product, such as passenger tyres, light truck, etc. The discount structure is also claimed to be confidential to that manufacturer as it is what gives a manufacturer a competitive edge over its competitors.

The pricing to the OEMs is done differently than that of the replacement (tyre dealer) market. Usually, when an OEM is manufacturing a new model of a car, it would send a Request for Quotation ("RFQ") or tender to the various tyre manufacturers, who would then respond with quotations and suggested tyres that would best fit the OEMs needs. Often the OEM will select at least two tyre manufacturers that will produce the specific tyre for the new model. The selected manufacturers will supply the tyres according to the OEM's production needs by splitting up the supply

volumes between themselves. As the arrangements between the OEMs and the tyre manufacturers are for long periods, the prices are reviewed and changed periodically, and the tyre manufacturers would request price increases on account of increases in raw material cost and fluctuating exchange rates. The investigation revealed that the tyre manufacturers were colluding on the price increases they would request from the OEMs.

The "Government" market works on a tender basis. The State Tender Board ("STB"/National Treasury) issues tenders for procurement of tyres and related services for state owned vehicles and fleet used by various state departments. The pricing for government tenders is done in response to a Request for Tender ("RT") from the STB. Request for price adjustments or price increases by the tyre manufacturers are only accepted after the first 12 months of the contract duration. The price adjustments are based on an "escalation formula." The investigation revealed that the tyre manufacturers had various discussions on price adjustments and timing of increase with regard to tyre tenders issued by the STB. These discussions generally occurred through the medium of the SATMC meetings.

The Commission noted in its investigation that the timing of price increases to each of the above group of customers, the implementation thereof and the quantum of increases were important for each tyre manufacturer and tyre dealer. Increases which were out of synch with competitors could result in loss of sales and ultimately market share.

Bridgestone was granted conditional immunity from prosecution and a fine in terms of the Commission's Corporate Leniency Policy (CLP). The matter is now before the Tribunal and the other parties are now expected to respond to the Commission's referral.



The Fourth Annual Conference on Competition Law, Economics and Policy

The fourth annual Competition Law, Economics and Policy Conference was held at the University of the Witwatersrand on the 2nd of September, 2010. The conference was co-hosted by the Competition Commission, the Competition Tribunal and the Mandela Institute. It aims to expand the profile of competition law and economics in South Africa by bringing together economists, lawyers, academics and regulators in the field of competition economics and law.

The keynote speaker at the conference was Professor Massimo Motta, who is ICREA Research Professor at Universitat Pompeu Fabra and the Dean of the Barcelona Graduate School of Economics. He is also the author of the well known competition economics textbook titled 'Competition Policy: Theory and Practice'. The theme of Professor Motta's speech was "The Theory and Practice of Exclusionary Practices". Historically, this topic has been the subject of intense debate by scholars and practitioners alike in different camps. For instance, the Chicago School camp has traditionally been associated with scepticism about the ability and incentive of dominant firms to engage in exclusionary conduct. To the contrary, the post-Chicago School has studied firm strategic behaviour using game theoretic models to analyse the possibilities of abusive exclusion by dominant firms.

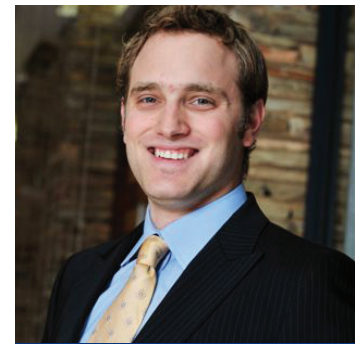
According to Professor Motta, the models used to analyse different exclusionary practices all require the



By: Raksha Darji

presence of scale economies. He pointed out that in Europe and the US; there are two extreme approaches which are equally misled. In the US, they believe that market dominance has come about from efficiencies and they therefore take an approach of not intervening in these markets, and require a very high burden of proof on the complainant. In Europe, they tend to intervene in these markets and have a more per se type approach. Fortunately, the South African law and current practice by the Competition Tribunal is that of a more balanced approach where there is the possibility to trade-off anti-competitive and pro-competitive effects arising from the exclusionary practice. Similar to the European approach, South African competition authorities are also likely to intervene, although with an effects based approach. Professor Motta concluded with a warning to watch out for industries characterized by entrenched dominant positions, scale economies and fragmented or uncoordinated buyers.

The conference was divided into four parallel sessions in which a total of twenty eight papers were presented



By: Josh Greenberg

(including seven papers from the Competition Commission) under the following themes: Cartels; Abuse of Dominance; Penalties; Mergers; Exclusionary Abuse; Competition Policy & Development; Network Industries; and Market Definition. A robust debate and critique followed each presentation, stimulated by a discussant.

One paper of interest was by Nompucuko Nontombana and Itumeleng Lesofe of the Commission under the Cartels session. This paper discussed the detection of cartels in industries with structures that make it difficult to detect cartels without a whistleblower or leniency applicant, using the South African long steel cartel as a case study. Under the Abuse of Dominance session there were two papers that discussed the use of profitability measures in assessing abuse of dominance cases such as excessive pricing. Another paper from the Commission by Gilbert Muzata and Kholiswa Mnisi under the Penalties session addressed two general beliefs about fines: (1) high fines lead to the bankruptcy of the companies in question, and (2) post

imposition fines lead to higher prices to the detriment of consumers. They discussed the role of fines in deterring companies from anti-competitive conduct and contemporary arguments on the effect of fines on the economic viability of the companies concerned and on consumer welfare particularly relating to price levels post imposition of the fine. They referred to the Tiger Brands and Pioneer Foods cases as case studies for assessing the effects of antitrust fines on company viability and/or consumer welfare through higher prices post imposition.

A paper by Laurie Binge and Johann Van Eeden of Econex, under the Mergers session, investigated the design and implementation of remedies of competition cases in South Africa. Lizél Blignaut, Louise du Plessis and Judd Lurie of Edward Nathan Sonnenbergs (ENS) presented their paper under the Exclusionary Abuse session. Their paper examined the economic theory underpinning

efficiencies and foreclosure or exclusionary concerns arising from organic forward integration and assessed how these theories have been viewed by scholars and courts in multiple jurisdictions. They proposed the legal and economic framework for the analysis of refusal to supply as a result of organic forward integration applicable to the South African market and they provided practical guidance to dominant firms facing these dilemmas.

Under the Competition Policy & Development session, Michelle Le Roux of Group 621 discussed possibilities of a new conceptual and normative approach to efficiency in competition law which may further all of the stated objectives of the Competition Act 89 of 1998. Her paper proceeds from the assumption that a new normative framework is needed to understand the goals and policy of competition regulation as expressly set out in the preamble and

section 2 of the Act. Peter Grootes of ICASA presented his paper under the Telecomms, Broadcasting session. His paper focused on the implementation of the objective to enhance competition on the ICT sector as envisaged by Chapter 10 of the Electronic Communications Act, using the regulation of call termination services as an example.

Finally a paper by Catherine Corbett, Reena Das Nair and Simon Roberts of the Commission, under the Market Definition session, highlighted the importance of understanding bargaining power as part of the nature of competitive rivalry using the Competition Tribunal's approach in evaluating two mergers and the implication of this for market definition.

This year's conference was well attended by lawyers, economists and academics from a wide range of organisations and backgrounds.

Information exchanges between competitors addressed at recent OECD meetings

As part of the recent OECD Competition Committee meetings a roundtable on information exchanges between competitors was held on 28 October 2010. In addition to country contributions and the OECD staff paper, there were inputs from experts including economics professors Kai-Uwe Kuhn and Jorge Padilla.

There was a high degree of consensus on the core issues of anti-competitive information exchange between competitors, while

acknowledging the diversity of ways in which information can be shared, the different types of information and the importance of market conditions. At the heart of limiting competition through horizontal coordination is establishing collusive norms and monitoring adherence, in order to trigger punishment. Information exchanges must be evaluated against this, and balanced with possible efficiency reasons.

There was widespread agreement that sharing disaggregated information



By: Simon Roberts

on current and/or future price or sales volumes was particularly problematic

where this information relates to individual firms or the market is so concentrated that there are only two or three firms in any information category. The nature and history of the market is also very important for the collusive norms, such as where there may have been previous cartel arrangements or regulation. The South African submission further highlighted the significance of these factors, along with circumstances where there are well understood monopoly pricing points.

More generally, the existence of features which make collusion more likely are an important part of the assessment. Under circumstances of prior cartels, regulated outcomes, or conducive conditions for collusion, the monitoring of market shares is particularly problematic in so far as it may yield coordinated rather than competitive outcomes in terms of price and market division.

The importance of whether the information was public or private, and whether it was shared directly or through third parties, was played down. Indeed, while publicly shared information has often been viewed as less significant than privately shared

information, Prof Kuhn referred to experimental economics evidence that 'cheap talk', such as about what market players should be doing in response to a change in conditions, can be important for a shared understanding to bolster anti-competitive outcomes. Such communication could also happen through forums such as industry associations.

There is little efficiency gain from such information, while the anti-competitive rationale is clear. By comparison, historic information on average costs and performance, enabling firms to benchmark themselves and their productivity, is much less concerning and is likely to have efficiency benefits.

A more difficult area is where there may be efficiency gains in the form of better planning of investments, where information on future demand can assist in decision-making. First, such information on future trends can be relatively aggregated and does not necessarily require firms to share detailed information with each other. Second, competition is not meant to be a comfortable state for firms, especially when compared to the quiet life under coordination through a cartel. Competition is in reality

about firms continuously looking for advantages over their rivals, to take market share. If firms know that such successes will be picked up quickly and responded to then it will dampen the incentive to compete in the first place.

This goes to the very heart of policy decisions to have liberalized markets rather than regulated ones.

The South African cases are particularly pertinent in this regard. Other countries' submissions highlighted similar concerns in some of the same industries. For example, in Poland, there has recently been prosecution of coordinated conduct in the cement industry through the exchange of detailed information on firm volumes and sales. In Korea a recent case dealt with information exchange between flour millers.

Tribunal decisions on some of the major cases likely to be referred in the coming months in South Africa will provide greater certainty for firms but it is to be expected that the decisions will take into account the core factors addressed in different jurisdictions, as reflected in the OECD roundtable.

ICN Cartel Workshop

The 2010 International Competition Network (ICN) Cartel Workshop was hosted by the Japan Fair Trade Commission (JFTC) in Yokohama, Japan from 5 to 7 October 2010. This year's theme was "*The efficient detection, investigation and punishment of cartel conduct – making the best use of agency resources.*"

The workshop was attended by representatives from nearly 50 competition authorities worldwide to

discuss the latest methods, tools and systems for investigative efficiency and maximizing agency resources.

The main topics focused on cartel awareness; outreach and compliance; ex officio detection methods; detecting, selecting and prioritizing cases; investigating international cartels; the decision to request leniency; prosecutions; alternative case resolutions; settlement and sentencing; and preparing evidence for presentation at trial and administrative hearings.



By: Mervin Dorasamy



Mervin Dorasamy attended the workshop with Nelly Sakata (R) and Tribunal's Londiwe Xaba (L).

The session on investigating international cartels proved to be very valuable as the Commission is increasingly receiving leniency applications from multi-national companies that have taken part in an international cartel. Some jurisdictions view international cartels as more damaging than local cartels and tend to allocate more resources on such investigations. There is even a view that developing countries are more vulnerable to international cartels than developed countries.

Another interesting topic was on the decision to request leniency, which was presented in a form of a demonstration or "moot" case by Non-

Government Agencies, mostly made up of lawyers. One of the first elements that a legal counsel for a leniency applicant would consider in deciding whether to request leniency (i.e. in case of international cartels) – is which jurisdictions are likely to take action? South Africa was regarded as one of the agencies likely to take effective action

depending on the circumstances of the case.

Competition authorities must refine their enforcement activities to cope with renewed efforts by cartelists to in trying to conceal their cartel conduct. The criminalisation of cartel conduct caused by individuals is receiving greater emphasis and application worldwide. What was being called for was effective deterrence and prevention rather than reactive measures.

Also, bid-rigging as a cartel conduct received a great degree of attention. Collusive tendering has begun to manifest in the most creative

ways and the state was called upon to play a more meaningful and effective role.

Furthermore, fresh policies and approaches were called for with regard to cartel awareness.

Competition authorities discussed and committed themselves to reviewing available detection methods in order to maximise results. It's now expected that there would be greater cooperation in sharing intelligence.

The investigative component of the workshop looked at how to effectively develop investigation strategy and honing of investigation skills. The delegates discussed problems relating to evidence when conducting paper and electronic searches. While acknowledging limits to the exchange of information between agencies, we did consider factors that play a role when more than one jurisdiction is investigating a case.

One key message we took away with us was that agencies must aim for effective and expeditious case resolution

International Snippets

By: Molebogeng Taunyane and Nerice Barnabas

CC ranked in top 10

The Competition Commission has been ranked in the 9th place out of 60 different jurisdictions on merger regulation in the inaugural Global Merger Control Index.

The Global Merger Control Index is part of the International Merger Control Research Project, which analyses international merger control systems.

CC Interaction with international stakeholders

Over the past few months the Commission hosted a number of delegates from the Botswana Competition Commission (BCC), Namibian Competition Commission (NCC) and a SADC consultant.

The SADC consultant, whose responsibility is to develop a

harmonisation framework of national competition laws and policies in the SADC region visited the Commission on 29 – 30 September – in a bid to identify main areas of harmonisation. Similar consultations were held in Malawi, Zimbabwe and Zambia. This follows a SADC Declaration on Regional Cooperation in Competition and Consumer Policies, which was signed by SADC Heads of States in 2009. The Declaration calls

Merger Review



By: Maarten van Hoven

Once again, this was an interesting and bumper second quarter (July – September) for the Commission’s Mergers & Acquisitions Division. Merger notifications were up 12% as compared to the same time during 2009 (2009 = 47 / 2010 = 53). From an efficiency point of view the Commission finalised 11 more cases during this period than it received during this period, which are all good signs for our stakeholders.

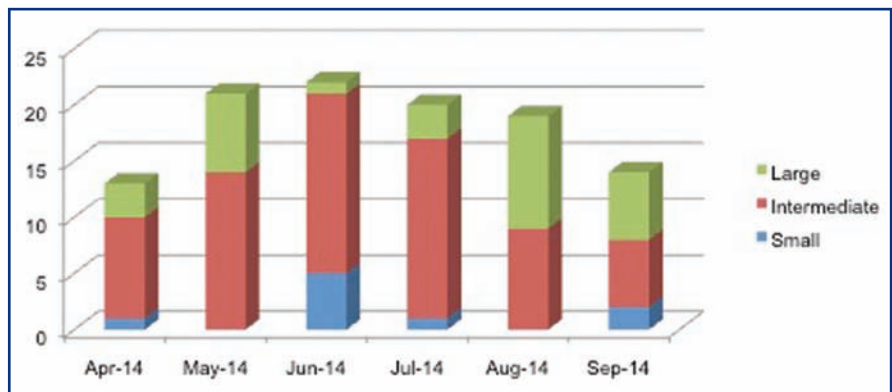
The table alongside reflects the first six months of notifications to

the Commission since the start of its financial year.

It’s clear that the often forgotten public interest mandate of the Commission has become very relevant and the subject of the Competition Appeal Court consideration. During the review period the Commission approved two matters subject to employment conditions. The most significant was the merger between two insurance firms, Metropolitan and Momentum, which the Tribunal approved, subject to no retrenchments occurring (except for senior management). The parties have noted their appeal to the CAC

and everyone is anxious to see how this heightened focus might affect how deals are done in future.

In three other matters the Commission approved the transactions subject to the parties divesting certain assets. In the agricultural retail market the Commission found that a merger between BKB and ECAC would likely substantially lessen competition in the town of Barkley East and therefore have imposed a condition on the parties to divest of one of the trading outlets in the town in order to restore competition to the pre merger position. Unilever’s acquisition of



upon the SADC Secretariat to facilitate harmonisation of national laws, foster cooperation among competition authorities aimed at encouraging soft convergence of laws analysis, common understanding and common competition culture – *while it notes that member countries have adopted different competition models.*

The purpose of BCC three-day visit to the South African Competition Authorities (Commission and Tribunal) in October was for its members to learn about the day to day operations of both these institutions. Whereas the NCC’s two-day visit was on getting case assistance and advice on certain policy issues.

FTC International Fellow

The Commission’s senior merger analyst Grace Mohamed spent three months in Washington DC as an international fellow with the Federal Trade Commission (FTC). FTC international Fellows Program gives staff from agencies around the world an opportunity to go on a staff exchange program ---which can last between 3 – 6 months.

She was stationed at the Bureau of Competition (Merger Section) which reviews mergers and anticompetitive conduct. During her stay she attended an Oral Argument, which is a rare occurrence at the Bureau of Competition as the last time a case

was heard on appeal before the Commissioners of the FTC was in 2004/5.

Sabbatical in Mauritius

Another senior analyst, Reena das Nair went on a sabbatical at the Competition Commission of Mauritius for seven weeks. During her stay there she undertook a 6 week capacity building programme which she jointly ran with a legal advisor from the New Zealand Commerce Competition. She also supervised and participated in five market enquiries, played an advisory role in a cement investigation and also assisted with setting up processes for the economics unit.

Sara Lee resulted in the Commission recommending and the Tribunal endorsing the recommendation for the parties to divest of the Status deodorant brand to a third party. The Commission found that the parties would control a significant portion of the deodorant market in South Africa post merger and hence proposed the remedy. Lastly, the casino merger between Tsogo Sun and Gold Reef Resorts was also recommended to the Tribunal to be approved subject to a divestiture of the SilverStar Casino to the west of Johannesburg.

The Commission concluded that the Gauteng market for casino gambling was highly concentrated and the merger would result in a substantial prevention or lessening of competition. The matter is set down for a trial in the Tribunal for the first week in December.

Other contentious matters considered by the Commission during this review period included the Bankserv acquisitions of Nomad and Emid, two service providers in the financial services environment. These

transactions form part of Bankserv's commercialisation strategy and is the subject of continued criticism from competitors as the transaction according to them will cause the playing fields to be uneven. The Commission approved these transactions subject to conditions in order to ensure that third party competitors are able to continue to effectively compete. These matters are now the subject of a review application brought by the Association of System Operators before the Competition Tribunal.

Advocacy Interventions to Mitigate Bid Rigging



By: Mziwodumo Rubushe

Background

In the three years that the Competition Commission ("Commission") has prioritized the infrastructure inputs and construction services markets, it has initiated several investigations into specific product markets and generally into the construction sector. Anti-competitive conduct has been uncovered in these markets and the Commission has established that bid-rigging in the construction sector is wide-spread. In 2007 and 2008, the Commission uncovered an extensive cartel in cast concrete products, specifically concrete pipes and culverts. This concrete pipes and

culverts cartels detailed arrangement of a textbook example cartel with mechanisms for implementing agreements and ensuring they are adhered to in practice. The cartel operated for 34 years, rigging markets in South Africa and across the Southern African region. Given its extent and duration, it raised wider questions about practices in the construction industry and a need for cooperation between countries for effective cartel enforcement. Due to the severity of the conduct it became evident that the Commission needed to go beyond enforcement to mitigate the risk of bid rigging. Advocacy was identified as the appropriate tool to complement the enforcement work.

Launch of the Certificate of Independent Bid Determination

The Commission and the National Treasury officially launched the Certificate of Independent Bid Determination ("CIBD") on 24 August 2010 in Pretoria. The launch was informed by the Commission's submission which included a draft CIBD to the National Treasury on

5 January 2010. The purpose of the CIBD is to ensure that when bids are considered by accounting officers of government departments and constitutional institutions and accounting authorities of public entities listed in schedule 3A and 3C to the Public Finance Management Act (PFMA), 1999 all reasonable steps are taken to deter any form of rigging.¹

The Commission was represented by the Commissioner Shan Ramburuth while Mr Henry Malinga, Chief Director of Supply Chain Policy represented the Minister of Finance Honourable Pravin Gordan. In his speech, the Commissioner said that the Commission has provided the National Treasury with a tool with which to fight bid rigging in public procurement and that the significance of the CIBD is that it provides for detection of rigged bids prior to the submission of the bids to the purchaser.

Henry Malinga expressed Treasury's view that "the CIBD is a significant policy contribution by the Commission to supply chain policy,

¹ Clause 1.1 of the Practice Note 20100721.



OECD's Hilary Jennings and Antonio Capobianco assisted the Commission with the training of procurement officials.

it will be a very useful instrument for our Evaluation Committees across government and will have far reaching consequences, it will go a long way in mitigating collusive bidding in public procurement” He conveyed the Minister’s support and appreciation of the Commission’s efforts in fighting bid rigging. He urged the Commission to continue working with the National Treasury in addressing other supply chain policy concerns that may arise as a consequence of the implementation of the CIBD.

On 21 July 2010, the National Treasury issued a Practice Note in terms of Section 76 of the PFMA

incorporating the “SBD9 Certificate of Independent Bid Determination”. Treasury simultaneously issued Circular No 52 in terms of the Municipal Finance Management Act to incorporate the “MBD9 Certificate of Independent Bid Determination”. The General Conditions of Contract and the Supply Chain Management General Conditions of Contract have been amended to include paragraph 34 and 35 respectively which provide for the “prohibition of collusive tendering”.

With effect from 21 July 2010 bidders will be required to complete, sign and submit the Certificate of Independent Bid Determination together with the bid documentation at the closing date and time of the bid. If a bidder has failed to submit the SBD9 or MBD9 with the bid documentation, the bidder will be requested in writing to submit the signed form within seven (7) working days of notification. Failure to submit the signed form within seven (7) working days of notification may result in the invalidation of the bid.²

The Training of Government Departments and State Owned Enterprises

Concurrent with the launching of the CIBD was the training of procurement practitioners from government and state owned enterprises which took place from the 23 to the 26 August 2010. The 23 August was a targeted

workshop for the National Treasury and the Office of the Auditor General; the 24 and 25 August was training of government departments while the 26 August was targeted at State Owned Enterprises. A targeted workshop for the Department of Health was held on 29 June 2010. The procurement officials were trained on identifying and detecting bid rigging; designing procurement specifications; bid rigging patterns; international cases and case studies for application. The Commission was assisted by the OECD (Hilary Jennings; Carolyn Calbreath and Antonio Capobianco); and the Dutch Competition Authority (Barry Kieboom). The training included case studies where delegates had to apply the knowledge acquired to detect rigged bids.

Feedback from delegates was very positive, for most, the detection; the design; the experiences of other countries and the case studies was the highlight of their training. A total of 160 senior procurement officials was reached.

Training through PALAMA

At the Commission’s initiative, PALAMA has made an undertaking to train procurement officials on bid rigging. This two-day course will commence on 1 April 2011 and a curriculum has already been developed. Bid Rigging training is now part of the Supply Chain Management Training Programme at PALAMA.

NOTES

² Clause 3.1.2 of Practice Note 20100721.

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