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Towards a free and fair economy for all

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Can Black Economic Empowerment address poverty?

Black Economic Empowerment (BEE) seeks to give increased ownership and control over businesses to historically disadvantaged persons (HDPs) and to increase the amount of procurement spending going to BEE firms. Indeed, section 2(f) of the Competition Act states that one of its purposes is to romote and maintain competition in order to promote a greater spread of ownership, in particular to increase the ownership stakes of HDPs. Certainly, increasing ownership stakes of wealthy and even middle-income HDPs is easy enough, but the real challenge is to make BEE deals broad-based to the extent that they empower the masses. But can BEE really address the problem of poverty that affects so much of South Africa's population?

Poverty, or being very poor, indicates a shortage of both wealth and income, where the wealth of a household might be the accumulated stock of assets acquired by inheritance and by means of spending flows of income. Importantly, wealth can be converted back into income by selling assets, ideally in later years of life, as older family members retire and, in the absence of any wage income, might have to survive by liquidating their stocks of accumulated wealth as well as relying on savings. Unfortunately, for the poverty-stricken, each day might be a quest for survival, in which any assets acquired might have to be sold to finance consumption, rather than being accumulated as wealth.

For households on or below the poverty line (whatever level of income that might be), consumption is equal to income and savings are therefore zero. In fact, if a household's income is not sufficient to finance consumption in a particular period, then it must resort to dissaving or selling of any liquid assets. Economists refer to a concept known as the "marginal propensity to consume". This is the measure of a consumer's tendency to spend a certain portion of additional income received, and it ranges from 0 to 1 (or 0% to 100%). Wealthier, or higher-income consumers have enough income to save a portion each month, so their marginal propensity to consume is less than 1 – that is, they do not spend all of their last rand of income on consumption. But the poor must lead a hand-to-mouth existence and so they will tend to spend all (100%) of their income – in other words, their marginal propensity to consume is 1. When households are given non-cash assets, those with enough income to provide for their day-to-day needs might keep those assets as wealth, whereas the poor must convert them into income, to spend on satisfying their immediate consumption needs.

The implication is that an empowerment scheme that gives (or sells at a favorable price) shares to poor people

will not necessarily increase the wealth of the recipients. Sadly, the shares will most likely be sold and thereby converted into income to be spent on food, transport, accommodation and clothing. Of course, the proceeds of these shares will yield short-term benefits, and arguably the poorest households would benefit the most, if extra income were presumed to be most beneficial to those with the least of it. But the empowerment exercise will simply be a one-off shot in the arm, a poverty-relief effort rather than empowerment in the sustainable, empowering sense that was intended by the various pieces of empowerment legislation (including the Competition Act). Nor will businesses involved in such BEE transactions be able to claim the BEE credentials for creating a class of poor black shareholders: in all likelihood, those already in a privileged position will have bought the shares from their original recipients.

Therefore, there are difficulties involved in ensuring that the benefits of BEE transactions are spread widely and to the poorest parts of the population. That is surely the reason why certain structures have been devised to hold shares on behalf of the ultimate beneficiaries. For example, some transactions involve partnership arrangements, workers' participation schemes that facilitate empowerment, or the sale of shares to employee groups or union groups.

These difficulties apply not only to the private sector, but also to the sales of shares in state enterprises. Naturally, it seems that Government would still prefer to have control and sustainable ownership in these organizations passing to HDPs. But for Government there are other obvious options: for example, giving away the shares to the public (on the understanding that those who need the money instead will resell them), or selling them to the highest bidders and then applying the proceeds to Government expenditure programmes. This choice of options should depend on whether Government feels it has already made sufficient provision for poverty alleviation, in which case it will have space to pursue other objectives, such as BEE, in the sale or partial sale of its state-owned enterprises.

By Geoff Parr,
Manager, Policy and Research

Looking at confidentiality claims

Section 44 of the Act confers a right on informants to claim confidentiality when submitting information to the Commission. A written statement in the prescribed form[1] explaining why the information is confidential must support any claim for confidentiality. Confidential information is unambiguously defined as trade, business or industrial information belonging to a firm not generally available or known by others, having particular economic value. Opinions and interpretations of publicly known information are not considered to be confidential information.

The Commission has taken the view that improper confidentiality claims in respect of information that does not conform to the definition of confidential information should be challenged, as inappropriate claims complicate swift and transparent investigations and hearings. This view is in response to the tiresome waiving procedures that have recently preceded merger hearings involving Harmony Gold Mining Company Ltd and Gold Fields Ltd; as well as Chemical Services (Pty) Ltd and Chemiphos SA (Pty) Ltd.

As such the Commission will, as a matter of proper procedure, require parties to revise claims in accordance with the definition of "confidential information" as set out in the Act. In the event of claims not being revised to the satisfaction of the Commission, the Commission will refer the claim to the Competition Tribunal to determine whether or not the information is indeed confidential information.

Where figures (such as precise market share information) may be confidential, the Commission will request reasonable, non-confidential estimates. This is common practice in European countries. For example, values are commonly revealed in terms of ranges instead of real numbers.

Regarding confidentiality claims by third parties, the authorities cannot protect information (and certainly not the identity of such parties) if the information falls short of the definition contained in the Act.

Furthermore, parties claiming confidentiality over information submitted to the Commission should be aware that, even if the information is confidential in accordance with the requirements of the Act, fair adjudication requires that at least the legal representatives of parties have access to the confidential information upon the signing of confidentiality undertakings. The Tribunal manages this process of access to confidential information by the legal representatives of parties in that a formal application has to be made to the Tribunal as prescribed in Section 45 of the Act.

Given the established precedent, merging parties and interveners are encouraged to reach agreement on access to confidential documents among themselves before approaching the Tribunal for this purpose. This will ease the administrative burden on both the Commission and the Tribunal where sometimes, dealing with the administrative issues is more burdensome than dealing with the actual investigation and adjudication processes.

By Lizel Blignaut,
Manager, Mergers and Acquisitions

1 Form CC7 with attached table, available on the Commission's website at www.compcom.co.za. All confidentiality claims have to be accompanied by a Form CC7, motivating why the information is confidential. In its absence, the authorities will not treat the information as confidential.

Minerals beneficiation: the debate

Introduction

There is currently a debate raging between policy makers and industry players on minerals beneficiation in South Africa. This article serves to outline the country's beneficiation policy and to present the opposing views from government and industry.

It should be noted at the outset that there is general consensus between industry and government on the necessity and importance of beneficiation. Differences arise as to who is best placed to invest and operate downstream value adding businesses, and whether the environment is conducive for such projects.

The 1998 White Paper on Minerals and Mining Policy for South Africa[1] defines mineral beneficiation as the process of adding value to raw materials at various stages of the production chain. The rationale for beneficiation is that a country like South Africa can maximise the rent it derives from the exploitation of its natural resource base and have it serve as a foundation for further industrial development[2].

Current beneficiation efforts

South Africa's minerals industry can be broken down into five broad categories and these are; gold, diamonds, the platinum group of minerals (PGM), vanadium and coal. The economic importance of this sector is beyond doubt. In 2000, for instance, minerals achieved combined sales revenue of R51.6 billion, representing about 6.5% of the country's GDP. However, a closer look at the downstream industry reveals very little activity in terms of adding value to these minerals.

Diamonds are one of a few minerals that get beneficiated in South Africa. An average of 69% of the South African diamond production is sold locally, by value. The figure for platinum is 13% and that of gold stands at 1%[3]. Although these figures show that there is some amount of beneficiation taking place locally, the question is whether this is enough. According to free-marketers the current levels of beneficiation reflect a market outcome. Because business people act rationally, goes the argument, any opportunities for beneficiation would have been exploited already. Interventionists on the other hand believe that current value adding activities are insufficient and that the private sector will not willingly engage in further beneficiation without government intervention and/or assistance. They therefore argue for active government involvement in economic activity, either directly as a player or indirectly through legislative and policy directives.

Policy initiatives

Until recently, beneficiation has been left to market forces. However, due to poor

1 Department of Minerals and Energy. A Minerals and Mining Policy for South Africa, White Paper. 1998.

2 ibid

3 http://www.tacyltd.com/Research_Materials_Full.asp

results, there is now a strong paradigm shift in favour of government action. To this end, beneficiation as a developmental initiative is now contained in a number of policy documents and legislation driven by the Department of Minerals and Energy. These include the 1998 White Paper on Minerals and Mining Policy for South Africa, the 2002 Mining Charter, the Precious Metals and Diamonds General Amendment Bill (2003/5) and the Minerals and Petroleum Resources Development Act of 2002[4].

Over and above the DME efforts, the Department of Trade and Industry (**the dti**) is currently investigating possible incentives to put in place in order to promote downstream investment. The problem with incentive schemes, though, is that once the incentives are removed, the industry would stop growing. The black economic empowerment codes of good practice are also being used by **the dti** to encourage beneficiation. In this regard, beneficiation is listed as one of the residual factors that companies are encouraged to use in their BEE initiatives. In other words, a company scores points for setting up downstream manufacturing plants and by so doing contributes to its overall BEE rating.

There is talk in the industry of an impending Promotion of Beneficiation Bill, aimed at accelerating the pace of minerals beneficiation in South Africa. Speaking at the tenth Annual Investing in Africa Mining Indaba in Cape Town in February, the former Minister of Minerals and Energy Phumzile Mlambo-Ngcuka hinted the possibility that South African diamond miners that don't beneficiate enough of their product may face an export tax penalty in the future once the requisite law has been enacted[5]. Although the bill has not been made public as yet, industry has already iterated its position, cautioning against punitive measures to facilitate minerals beneficiation. It cites the fact that a high export duty could cause a depression of prices and drive operators "underground". This would then encourage the smuggling of minerals. Efforts to protect the local minerals industry by imposing an export tax are likely to falter due to ineffectiveness. Further, it is doubtful whether National Treasury would support any tax that is not imposed for revenue purposes, but rather to impact the behaviour of an industrial sector.

Another tax proposal aimed at discouraging the export of unbeneficiated minerals is the rail development tariff that will be levied on companies ferrying ore rather than alloys by rail for export purposes[6].

Industry vs government

Industry players see a mistaken perception by government that views beneficiation as a panacea that will automatically add considerable value to precious metals and other mineral commodities to solve the unemployment challenge facing the country[7]. According to the Economist[8], South African mining companies contend that cutting and polishing stones and making jewellery is none of their business. However, even if it were, the high costs of labour would impede such ventures. For instance, diamond polishing costs at between R246 and R308 per carat in South Africa, are some four to five times more expensive than those in India (at R61 to R74 per carat). A counter argument to this is that the conventional belief that diamonds will flow to lowest labour cost countries no longer holds. Instead, evidence, even though anecdotal, shows that diamond cutters are now flocking to the source of rough diamonds, and that includes South Africa, among other countries.

Industry further contends that decisions on whether to undertake manufacturing should be taken by individual companies pursuing well-considered business objectives. Where government feels a need to promote such initiatives, these should not be detrimental to the international competitiveness of unbeneficiated mineral exports. There is also a question of the availability of appropriate skills and technology even before one can consider setting up a manufacturing plant. South Africa with a structural unemployment problem is considered inappropriate a place for manufacturing of finished products from minerals. Furthermore, the country's transport infrastructure is in a bad state. This would render South African products uncompetitive internationally.

Government argues that setting up downstream firms would create jobs and help accelerate the absorption of the previously disadvantaged into the mainstream economy. South Africa's large mineral reserves coupled with low energy costs further add impetus to the case for beneficiation. According to government, it is the duty of mining companies to ensure that minerals get beneficiated locally. The role of government is to simply ensure that the environment is permissive. Government's view on beneficiation can be summarised by an excerpt from President Thabo Mbeki's speech at the tenth Annual Investing in African Mining Indaba in Cape Town in February[9], that "with regard to our own continent, it is our firm view that this cannot be done

4 These documents can be accessed from the DME website at www.dme.gov.za

5 Brown, J. Beneficiation, BEE top Indaba. 10 Feb 2005. www.finance24.com/Finance/Companies.

6 McKay, D. Death, taxes - and beneficiation. Finance Week, 26 March – 1April1, 2005.

7 http://www.bullion.org.za/CurrentIssues/2004/AMMAGM2004Items/

8 Raising Lazarus. The Economist, 5 March 2005 pp 64.

9 Brown, J. Beneficiation, BEE top Indaba. 10 Feb 2005. www.finance24.com/Finance/Companies.

on the basis of the perpetuation of the old relationship according to which we as colonies produced and exported raw materials, and imported high value-added manufactured goods from the colonising countries." At the same meeting the Minister of Foreign Affairs Nkosazana Dlamini-Zuma pledged that the government would do its part to ensure that the legal structures and environment for the flourishing of mining operations was in place. She also admonished business to play its part by investing more in the sector and to stop shifting goal posts.

Conclusion

From a competition perspective, minerals beneficiation aids market entry and development. Government should therefore concentrate on cultivating an investor-friendly environment and providing incentives for the private sector to take up beneficiation opportunities. This calls for a balance between using 'a carrot and a stick' as government tools. Where government uses the 'stick' too frequently to achieve set goals, there is a danger of disengagement by the private sector. There must also yet be another balancing-act between government's supportive and facilitative role versus an operational one. Where government becomes a business player, it crowds out investment by the private sector. Notwithstanding this, the ball is in the private sector's court to respond to the beneficiation call.

By Fungai Sibanda, Head of Policy and Projects, Policy and Research Division

Creating and enhancing employment opportunities through merger regulation

Introduction

The Commission is required, in terms of the Act, to evaluate and approve mergers before they are implemented. However, in respect of large mergers, such as the recent Brimstone/Ahealth and the Harmony/Gold Fields ones it only has the powers to make recommendations to the Competition Tribunal.

In addition to evaluating the impact of these mergers on competition, the Commission has a more difficult task of considering, among other things, employment issues. This consideration is unique to South Africa since most competition authorities do not necessarily grant employment issues such prominence as our Act does. Trudi

Hartzenberg[1] acknowledges that our competition law explicitly includes public interest considerations, in its articulation of its purpose in an attempt to balance efficiency concerns and the broader development priorities in the competition framework.

Merger Activities and Employment

South Africa has high unemployment rate and the requirement to evaluate the impact of merger activities on employment seem appropriate within the South African context.[2] It should be appreciated though that the intervention of Commission is not likely to make a substantial dent on the unemployment rate, as there are other instruments and policies designed specifically to deal with employment issues. However, its role can go a long way in creating an environment that is conducive for creating and enhancing employment opportunities.

The Commission figures for September 1999 to March 2004 indicate that a total of 13 452 jobs were lost and about 26 070 were either saved or created, resulting in a net gain of 12 618 jobs[3]. The Tribunal in the Unilever/Robertsons case, articulated the need to balance competition and public interests in its decisions while the same is not a requirement in the Labour Relations Act and other collective bargaining arrangements.[4] Moving from a zero base, it seems that the competition authorities are continuously building precedence in balancing these aspects and applying remedies that seeks to advance the interests of both business and labour.

Having reviewed the merger cases thus far, the following are cases that seem significant to draw from:

Nedcor/ Stanbic

In 1999 Nedcor launched an application for the hostile takeover of Stanbic, which would have resulted in about 10 000 job losses. Though the Commission's jurisdiction on this transaction was successfully challenged by Nedcor in the High Court, the Commission recommended to the Minister of Finance that the proposed takeover be turned down as it would not only reduce the number of players in the sector, but that it would impact negatively on employment. Consequently, the deal was not allowed to go through.

Mweb/Tiscali

In a more recent merger between M-Web and Tiscali, 160 out of 220 Tiscali employees were to lose their jobs as a result of the merger. Though the merger did not raise competition concerns, it would have been difficult for the Commission to allow 75% of the workforce be laid off. A conditional approval was recommended wherein the Commission indicated that no retrenchment should take place within the first six months after the merger approval and that not more that 160 employees could be retrenched within a period of 12 months.

Harmony /Goldfields

In the Harmony Gold Fields merger, the Commission recommended conditions to curb job losses that were likely to result from this deal, despite the fact that the deal itself did not raise competition concerns. Job losses were speculated to be at between 7 000 and 14 000 and the Commission's condition curbed the possibility to 1 500.

In its statement on the recommendation, the Commission indicated that the conditions recommended therein would address employment concerns without hampering the ordinary running of the merged entity's business. As if that was not enough, the Tribunal capped the number of job losses at 1000 when they approved the merger as opposed to the 1500 recommended by the Commission.

Conclusion

From the decisions of the three cases above it seems that though it is not its role, the Commission does play a role in saving jobs. The fact that the Commission is often required to deal with conflicting information from the merging parties, trade unions and sometimes other interested parties, makes their investigations even more complex.

Though the conditions imposed could not save jobs as such, conditions of this nature provides an opportunity for affected employees to seek alternative employment. Moreover, it makes employers think about employees also when negotiating takeovers or acquisitions and to come up with remedies to minimize the negative impact.

Further, judging by the small number of cases that were approved with conditions since 1999, it seems that the merging parties have started thinking about the impact on employment in advance. Also, the nature of conditions imposed seems to suggest that these are matters that could have been agreed upon upfront by unions and merging parties had proper consultation occurred prior to filing mergers with the Commission.

By Johnson Matshivha,
Advocacy and Education Co-ordinator

1 Competition Policy and Enterprise Development: Experience from South Africa – Draft Paper prepared for UNCTAD (30 April 2004) by Trudi Hartzenberg (Tralac)

2 Official Statistics SA unemployment rate in March 2004 was 27,8% while the expanded unemployment rate (which does not require active job search by the unemployed) was 41,2%

3 Mergers and Acquisitions Activity: The Financial Year 2003/04 – Competition News: Edition 16 – June 2004

4 Unilever/Robertsons 55/LM/Sep01

Pascal Lamy on trade talks and a new DG for the WTO

On the evening of Tuesday, May 10th, Pascal Lamy addressed the SA Institute of International Affairs (SAIIA) at Wits University. Lamy is the former EU trade commissioner, and has now been chosen to succeed Supachai Panitchpakdi as Director-General of the World Trade Organisation (WTO) in September.

Pascal Lamy pointed out that there have been changes to world trade negotiations in the last fifteen years or so: there are new actors and new issues, and new channels of trade negotiation have opened up. But there are also elements of permanency, such as the continuing tension between economic and political considerations.

New actors, issues and channels.

Developing countries now comprise some two-thirds of the WTO member countries, which gives a lie to the impression that the WTO is somehow dominated by the developed countries. Recent trade growth has been especially strong in developing countries (DCs) and emerging countries like South Africa, India, China and Brazil. South-south and south-north trade growth has increased markedly. Some 60% of DC exports still go to the north, and 40% to the south, but the rate of DC export growth to the south is rising 50% faster than export growth to the north. Accordingly, there is a strengthening in the position of new trade blocs such as the G-20 and G-90 groups of developing countries, relative to the established blocs of the USA, the EU and Japan.

Pascal Lamy identified new issues that have come to the fore in the current Doha round of WTO negotiations. These are agriculture, services trade and new instruments of protection. Agriculture is a particularly important item on the agenda, and DCs are pushing hard for progress on market access and a reduction in trade barriers. Already, the EU has committed itself to eliminating export subsidies. Subsidised agricultural exports have the effect of artificially increasing output in the developed countries and reducing prices of agricultural produce on the export markets. This makes it extremely difficult for agricultural sectors in the DCs to survive, faced with competition from subsidized imports. An elimination of agricultural export subsidies would reduce the surplus output from developed countries, and these volumes could be replaced by increased production in DCs. That would allow the natural comparative advantage enjoyed by many DCs in agricultural goods to be revealed. Agriculture is still an important industry for DCs – on average, it accounts for about 30% of gross national product (GNP).

There are also important negotiations underway in services trade. The services sector is larger than the primary sector (agriculture, fisheries and mining) and secondary sector (manufacturing) in most countries, and even in DCs, accounts for an average of 50% of GNP. So far, not much progress has been made on freeing up services trade in the Doha Round of WTO talks.

Mr Lamy also noted changes in the way that protectionism is applied. Traditional instruments of protection such as tariffs and quantitative restrictions (e.g. quotas and voluntary export restraints) are declining in importance, only to be replaced by more intractable non-tariff barriers to trade (NTBs). These include technical barriers to trade (TBT) and sanitary/phyto-sanitary (SPS) barriers to trade.

Finally, there is a change in the channels through which trade negotiations take place. Increasingly, and especially in Asia and Latin America, regional and bilateral negotiations and agreements are being pursued. Some of these are motivated by frustration with WTO processes. Others are embarked upon because they present photo opportunities for trade officials and politicians, and because they seem easier to conclude than multilateral agreements. South-south agreements also tend to have less onerous rules of compliance, and more such agreements are entered into and they often contain more substance. The flipside is that unlike WTO agreements, the WTO cannot enforce compliance with these regional or bilateral accords. Some DCs have run into problems by entering into

regional/bilateral agreements in which they give away concessions, but when they get to the WTO talks, they have nothing left to offer. Mr Lamy noted that some poorer countries had fallen into this trap by giving generous trading concessions in exchange for promises of development assistance.

Mr Lamy pointed out that South Africa has pursued a mix of multilateral talks, bilaterals and regional agreements. Examples of South Africa's bilateral agreements (either complete or under negotiation) are those with the 'north' – the EU, the USA and EFTA, and the 'south' – China and Latin America. SA also has regional agreements (the SACU and SADC agreements). There are obvious problems of complexity and possible inconsistencies that arise (the so-called spaghetti bowl of agreements and commitments). In addition, there are questions of priority and compatibility that must be addressed, for there is limited capacity of existing negotiating resources.

Economics v. the politics of trade

The main element of permanency, as Mr Lamy sees it, is the continuing tension between the economics and the politics of trade. There is consensus among trade economists that opening up of trade is good for economic welfare, as it allows for the exploitation of comparative advantages and the international division of labour. But politically, decisions to liberalise involve votes, and votes can swing the results of political elections. Lamy also noted the importance of asymmetry of information about the benefits of trade. Consumers are not generally aware of the benefits of free trade, whereas producers are acutely aware of (and vocal about) the impact of cheap imports on employment in their sectors.

Mr Lamy had to respond to several rather pointed questions about whether (if chosen as the DG of the WTO) he would act in the interests of DCs rather than the EU and other developed countries. He dispelled the illusion that the DG is the "boss" of the WTO. The WTO has a small executive, without many powers, and so it is the member states of the WTO who are in "control" (unlike the IMF or World Bank). Decisions are made by consensus, and because two-thirds of members are DCs, Lamy feels that negotiations cannot evolve against their interests. He did state, however, that the DG could have tremendous influence. The way he put it, influence is far more volatile than power. Influence is lent to the DG, and depending on how it is spent, that influence may increase or decrease. Lamy's opinion is that the role of the new DG would be the single-minded driving of the current Round of trade negotiations to its successful conclusion.

Progress on the Doha Round of multilateral trade negotiations has been sporadic: the Seattle and Cancun meetings were failures, but both the Doha and Geneva meetings have been successful. At the end of 2005, there will be a Ministerial meeting in Hong Kong, after which it will be possible to say whether the Round will be (for example) half complete, or two-thirds complete. The Doha Round is expected to be completed in 2006.

Questions and answers

An interesting question was asked by a representative of the US Embassy. Can WTO rules deal with the trade problems created by one country's persistently undervalued currency? This was clearly a veiled reference to China, which artificially maintains a very weak exchange rate. As a result, Chinese exports (for example of clothing and textiles) are available on world markets at very low prices. Where suppliers in other countries are damaged by low-cost imports as a result of export subsidies or dumping, or where countries have surges in imports that unduly affect the balance of payments, there are WTO remedies available, in the form of countervailing duties, anti-dumping duties, and safeguard mechanisms (respectively). In fact, South Africa has just announced safeguards against imports of Chinese clothing.

The question is: are WTO mechanisms available to deal with low-cost imports coming about due to an exporter's undervalued exchange rate? Lamy stated that this would be a problem for the IMF, rather than the WTO, and that such exchange rate vagaries are usually of a short-term nature. Strictly speaking, Mr Lamy is correct, but the problem of an undervalued Yuan has been around for some time, just as an over-valued US Dollar was a problem for years and led to so-called [trade] "deficits without tears". The manipulation of the Chinese exchange rate has even started to influence negotiating stances at the WTO, for example there are now calls for renewed protection against cheap Chinese clothing and textiles exports, despite a lengthy process of getting used to the idea of living without the protection afforded (until recently) by the Multi-Fibre Arrangement.

Now, just as trade distortions might be caused by a country's exchange rate policy, they might also be caused by practices illegal under the competition law of the destination country, but quite consistent with the competition law of the country of origin of those exports. For example, the activities of export cartels or the predatory intent of dominant producers wanting to expand their activities into neighbouring countries. Again, the remedies of countervailing duties, anti-dumping duties or safeguards might not be appropriate in such cases, and so the WTO dispute settlement system would be powerless to address such problems. Therefore it is essential that by the next Round of WTO negotiations (post 2006), the "Singapore" issue of competition policy be put firmly back on the agenda.

By Geoff Parr

Cases

Sasol Chemicals, Kynoch and Omnia Fertiliser referred to the Tribunal

The Commission has referred a complaint against Sasol Chemical Industries (Pty) Ltd (" Sasol"), Kynoch (Pty) Ltd (also known as "Yara") and Omnia Holdings Ltd ("Omnia") to the Tribunal for alleged anti-competitive conduct in the fertiliser industry. This follows an investigation by the Commission of a complaint lodged by Nutri Flo CC ("Nutri-Flo") alleging that Sasol is abusing its dominance in the markets for fertilisers by charging excessive prices for certain fertilisers. Nutri-Flo further alleged that Sasol colluded to fix prices of certain fertilisers with its competitors such as Kynoch and Omnia.

Both Sasol and Omnia are involved in the market for the manufacturing and supply of fertilisers in which Sasol is the dominant player in the production of basic raw materials and intermediates for nitrogen based fertilizers. Nutri-Flo is a small fertiliser-supplying firm. Nutri Flo sources most of its raw materials and straight fertilisers from Sasol, and compete with Sasol, Omnia and Kynoch in the retail market.

In its investigation, the Commission found evidence which indicated that Sasol is dominant in the markets for straight nitrogen fertilisers such as Ammonia, ANS and LAN, and that it has abused its dominance by charging excessive prices for LAN and ANS. This is evidenced by excessive price increases by Sasol iro these fertilisers and inflated costs linked to import parity pricing.

The Commission also found that there was a coordinated practice and/or understanding between Kynoch, Omnia and Sasol whereby the price of fertilisers was fixed and maintained at certain levels. This was done through various committees such as the Import Planning Committee ("IPC") and Nitrogen Balance Committee ("N Balance") consisting of these firms at which information relating to cost, prices and specific volume figures for locally produced and imported fertilisers was exchanged.

The Commission concluded that through these committees, the respondents conspired to limit price competition amongst them in order to fix, raise and maintain higher prices of fertilisers as well as to maintain their market share. These practices amount to price fixing within the meaning of the Act and are outrightly prohibited.

In its referral the Commission requests the Tribunal to determine the matter and impose a maximum penalty of up to 10% of the turnovers of the respective firms should they be found to be involved in the alleged contraventions.

The Commission refers collusion allegations against SAA, SA Express, SA Airlink and Nationwide to the Tribunal

The Commission has referred the complaints against the South African Airways (Pty) Limited ("SAA"), SA Airlink (Pty) Limited ("SA Airlink"), South African Express Airways (Pty) Limited ("SA Express"), who are members of the Airlines Association of Southern Africa ("AASA"), and Nationwide Airlines (Pty) Limited ("Nationwide") to the Tribunal for a ruling on alleged collusion.

This follows an investigation initiated by the Commissioner, Adv. Menzi Simelane, on 19 May 2004 against AASA and its members, including British Airways ("Comair"), following announcements published during May 2004 indicating that several domestic airlines would simultaneously introduce a fuel surcharge of equal amount on the price of tickets for carriage on all legs of domestic flights, which resulted in price increases. During the investigation, Comair has successfully applied for corporate leniency under the Commission's Corporate Leniency Policy. Comair has admitted that its conduct was in contravention of the relevant section of the Act and undertook to assist the Commission in the proceedings before the Tribunal. Comair is therefore not cited as one of the respondents in the referral papers to the Tribunal.

AASA is an association of approximately 15 airlines that operate in the Southern Africa region. During the investigation, the Commission also found that Nationwide, though not a member of AASA, had insight into correspondence, dealings and undertakings between members of AASA relating to the imposition of the said levy, and went on to implement it. SAA, SA Airlink, SA Express, Nationwide and Comair are competitors in the provision of passenger airline services within South Africa and as competitors, the Commission is of the view that they contravened section 4(1)(b)(i) of the Act by agreeing to simultaneously introduce a fuel levy, which was initially R28 and subsequently increased to R40 per ticket carriage. Section 4(1)(b)(i) of the Act prohibits any agreement that involves fixing of a purchase or selling price or any trading condition by competitors.

The Commission has, however, decided not to pursue the case against AASA as a body based on the fact that the agreement to fix prices was not taken by the body itself, but by the four members who are competitors in the domestic market.

The cases have been referred to the Tribunal for determination with a proposal to fine the above-mentioned AASA members and Nationwide up to 10% of their turnover in the previous financial year. This fine is to be imposed to each of the members separately. Comair is not referred to the Tribunal, but this is only subject to leniency not being withdrawn.

Metro and Sony transaction given the green light

The Commission unconditionally approved the transaction between Metro Goldwyn Mayer Inc ("MGM") and Sony Picture Entertainment ("Sony"), two large players in the global entertainment industry. The merger would have unlikely resulted in a substantial prevention or lessening of competition in the identified markets.

Three vertical relationships prevail, including the buy-sell relationships between the international "studios" and three local markets, i.e. (i) exhibition, (ii) home entertainment and (iii) TV broadcasting markets.

Regarding the markets for exhibition and home entertainment, Fox distributes the products of MGM to NuMetro on an exclusive basis. Sony distributes product to Ster Kinekor on an exclusive basis. The merger will therefore result in Sony acquiring MGM, thus Fox, diverting revenue from NuMetro to Ster Kinekor. However, NuMetro advised that the revenue stream was insignificant, that independents prevailed and that the industry and industry-relationships were fluid.

Regarding the broadcasting market, local broadcasters purchase rights from all the international studios (as well as independents). Since the upstream market would only reduce from six to five players, no significant impact would result due to the merger.

In addition, no significant public interest issues arise.

Commission prohibits merger in shade netting industry

The Commission prohibited a merger between Multiknit 2000 (Pty) Ltd ("Multiknit") and Alnet (Pty) Ltd ("Alnet"). This decision was made on the grounds that the transaction is likely to substantially prevent or lessen competition in the markets for the manufacturing and marketing of agricultural and decorative shade netting in which both the companies compete.

The proposed transaction entailed the acquisition of Alnet by Multiknit. Multiknit is a manufacturer and supplier of knitted synthetic bags and fabrics as well as synthetic shade net fabric and has manufacturing facilities in Mpumalanga. Alnet is a manufacturer and supplier of synthetic textiles and netting such as fishnets, decorative shade netting and agricultural shade netting and has factories in Cape Town. The parties are significant players in the markets for the manufacturing and marketing of agricultural and decorative shade netting. If approved, the merger would have further entrenched this by increasing the parties' market shares to approximately 74% and 91% respectively. It further appears from the Commission's investigation that there are no other effective competitors in these markets.

According to the Commission, the merger was likely to diminish competition because the merging firms may have found it profitable to change their behaviour unilaterally following the acquisition by increasing price. The Commission further considered whether the merger could not be justified on public interest and/or efficiency grounds but came to the conclusion that the public interest and efficiency benefits would not outweigh the potential anticompetitive effect of the merger concerned.

Agricultural merger approved

The Commission unconditionally approved the mergers between Kaap Agri Beperk ("Kaap Agri"), WPK Landbou Beperk ("WPK") and Boland Agri (Eiendoms) Beperk ("Boland Agri"). The target firms are agricultural firms, supplying a range of services and products to the farming community.

The Commission analysed the transaction based on broad and a narrow relevant markets, none of which raised concerns. With respect to the market for the handling and storage of grain, the Commission found the parties to be operating in different geographic markets. Even considering a broad storage market, the Commission found the merged entity to unlikely affecting competition in the market.

No significant public interest issues arose from the transaction.

Complaint in vehicle tracking and recovery industry referred

The Commission has referred two complaints involving possible collusion and collective abuse of dominance against 5 vehicle tracking and recovery companies and 15 manufacturers of mechanical gearlocks and electronic alarm/immobilizers to the Tribunal for adjudication. These companies are members of the Vehicle Security Association of South Africa ("VESA"), allegedly the only standards and regulation body dedicated to promoting and protecting the vehicle security industry and consumers in South Africa. The Commission's investigation followed complaints that were lodged against these companies by Tracetec (Pty) Ltd ("Tracetec") and Ivan Miller t/a CB Radio Installation Services.

Tracetec, which operates a vehicle and movable asset identification, tracking and recovery system, alleged that Netstar (Pty) Ltd ("Netstar"), Matrix Vehicle Tracking (Pty) Ltd ("Matrix"), Tracker (Pty) Ltd ("Tracker"), Global Telematics SA (Pty) Ltd ("Orchid") Bandit Ltd ("Bandit") are using the VESA committees as a platform for collusion and collective abuse of dominance within the vehicle tracking system industry. Collectively, these respondents hold almost 100% of the relevant market of supplying products and services for the tracking and recovery of motor vehicles in South Africa. This makes them the only significant competitors in this relevant market, the most dominant players being Netstar (46,2%) and Tracker (39,8%).

Furthermore, it is alleged that these companies within the VESA Stolen Vehicle Recovery Committee determine the membership criteria for VESA accreditation, thereby raising barriers to entry into VESA. It is also alleged that it is almost impossible for other

competitors to enter the market for vehicle tracking and recovery without VESA accreditation, as VESA accreditation is required to qualify for insurance related work.

The other complainant, CB Radio Installation Services, which is a small business that specialises in the installation of gearlocks, immobilisers and car radios, alleged that VESA implemented a non-supply initiative, whereby VESA members were not allowed to supply products such as alarms, gearlocks etc. to non-VESA fitment centres, thereby excluding new entrants from the market for immobilising security devices. However, the Commission established that the said initiative was never implemented.

The Commission concluded that there were contraventions of the Act, however, only the Tribunal can make the determination on whether the respondents are guilty or not. It appears that VESA members within the Stolen Vehicle Recovery Committee agreed on accreditation requirements for new applicants into the committee in a manner that excluded any new entrants to the market from receiving VESA approval. It was also found that the respondents have engaged in a restricted horizontal practice as referred to in section 4(1)(a), as well as a prohibited exclusionary act as referred to in section 8(c) of the Act, in that the agreement between or concerted practice by the respondents impeded or prevented Tracetec and other competitors from entering or expanding within the market for the supply of products and services for the tracking and recovery of motor vehicles in South Africa. This exclusive conduct in the industry further entrenched the dominance of Netstar and Tracker to the detriment of other competitors or potential competitors.

The Commission has thus asked the Tribunal to declare the conduct of Netstar, Tracker, Matrix, Orchid and Bandit as prohibited practices and thus illegal.

During this investigation the Commission uncovered information suggesting other unacceptable conduct in this industry. In this regard the Commission initiated an investigation against 15 members of the VESA Mechanical Committee and the VESA Electronic Committee respectively for possibly colluding by agreeing within their committees in implementing agreements to fix minimum prices for VESA electronic alarm/immobilizer products and mechanical gear-lock products.

To the extent that the respondents are competitors in this market, section 4(1)(b)(i) which prohibits price fixing among competitors is contravened and to the extent that they are in a vertical relationship with the installation or fitment centers for the supply of gear-locks and alarms/immobilizers, section 5(2) of the Act is contravened.

It its referral papers against the 15 manufacturers, the Commission has asked the Tribunal to impose a fine of up to 10% of the annual turnover on each of the 15 manufacturers should they be found guilty of these contraventions.

Notice

The Competition Commission Deregistered for VAT

The Commission announced its deregistration as a VAT vendor with effect from 1st April 2005. The change was precipitated by the amendments to the VAT Act of 1991, which came in the Revenue Laws Amendment Acts Nos. 45 of 2003, and 32 of 2004 and took effect in April 2005.

The VAT treatment of government departments, which were generally not liable to register for VAT was extended with effect from 1st April 2005, to include National and Provincial Public Entities and Constitutional Institutions listed in schedules 1, 3A and 3C of the Public Finance Management Act, 1999 ("PFMA"). This was done by including the aforementioned entities in the amended definition of "public authority" in section 1 of the VAT Act.

The Commission as a public entity will no longer operate as a VAT vendor effective from 1st April 2005. The Commission therefore undertakes to refund all stakeholders who filed/paid monies to the Commission inclusive of VAT as from the 1 April 2005. The Commission further requests those that are still going to file or pay monies over to the Commission to do so without the VAT portion.

With immediate effect, filing fees paid to the Commission are as follows:

Exemptions:

- Single Exemption
  R5 000 plus an annual fee equal to R500 times the number of years for which the exemption is granted.
- Category Exemption
  R100 000 plus an annual fee equal to R1000 times the number of years for which the exemption is granted.
- For a Schedule 1 exemption
  R100 000

Advisory Opinion

R2 500

Merger Notice:

- Intermediate merger
  R75 000
- Large merger
  R250 000

These fee structures are contained in the Rules, and can be accessed through the website: www.compcom.co.za.

The Commission will therefore no longer charge output VAT and in turn cannot claim input VAT. In line with the amendments, the Commission has adjusted all input VAT that was claimed with respect to invoices on all expenditure from 1 April 2005. However, the Commission will claim VAT for invoices received during April 2005 and thereafter, in respect of all services that the Commission received during or prior to 31 March 2005.

Stakeholders are urged to adhere to this request when filing notifications, and the Commission would like to thank all stakeholders for their continued compliance with the provisions of the Act.

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:

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