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South Africa refers International Air Cargo Cartel Case

On 28 July 2010, the Commission referred a case of cartel conduct in South Africa's international air cargo trade against certain airlines namely, British Airways Plc, South African Airways (Pty) Ltd, Air France Cargo-KLM Cargo, Alitalia Cargo, Cargolux International S.A., Singapore Airlines, Martinair Cargo and Lufthansa Cargo AG ("the airlines"). The case is notable because of its international dimensions, the importance of the industry for the economy and also because of the insights it provides into the determination of cartel penalties in different countries.

The Commission's investigation and referral followed an application for immunity by Lufthansa under the Commission's Corporate Leniency Programme. The application was filed at the beginning of 2006 with the Commission and the complaint was subsequently initiated in March 2006.

The airlines are all members of the International Air Transport Association (IATA), an international trade association for major passenger and cargo airlines established over sixty years ago.

The Commission referred two distinct cases against the airlines. The first is that the airlines concluded agreements, or engaged in a concerted practice, the effect of either of which was to fix the rate of fuel surcharges on



By: William Kganare



By: Azraa Mohamed

international cargo, this conduct was still continuing in February 2006. The Commission brought the second case only against Cargolux, Air France, and KLM which involved price fixing of cargo rates, that is, the rate at which airlines ship cargo on behalf of their respective customers. This conduct was still continuing in August 2005.

The background to the conduct goes back to the mid 1990s. During



Editorial Note

This edition of *Competition News* reflects the continued growth in enforcement work, especially involving cartels. As large numbers of firms take advantage of the Commission's Corporate Leniency Policy to come clean, the Commission has to investigate and, in recent months, is increasingly involved in concluding settlements.

Our lead story relates to one of the biggest global cartel cases in recent years, involving airlines coordinating air cargo rates. South Africa is just one of many countries prosecuting this conduct, and the article by William Kganare and Azraa Mohamed highlights some of the penalties that have been imposed and settlements reached.

Notable settlements were reached in several other cases. As described by Mervin Dorasamy, the Commission reached separate settlements with Sasol and Foskor regarding two abuse

of dominance cases involving fertilizer products. Sasol was also the subject of a referral of cartel conduct and excessive pricing regarding propylene and polypropylene, explained in the article by Itumeleng Lesofe and Pamela Nqojela, while the Commission settled with Safripol, the other party to the alleged cartel conduct. And, there was also a settlement with Power Metals regarding a non-ferrous scrap metal cartel, reported by Jabulani Ngobeni.

Enforcement actions continue against large and small companies. In the quarter the Commission conducted two raids, in the airline and electric wire industries. Small companies have also been under the spotlight for cartel conduct, with the referral of conduct in the sale of bicycles and a settlement involving government tendering.

Merger activity has begun to pick-up somewhat after the recession, as indicated in the month on month comparison with the previous year,

yet these still reflect low levels when a longer time period is taken into account. The quarter under review also included the contested Bedrock - Mondi merger analysed by Alex Constantinou. In addition, the Commission has highlighted that it is paying greater attention to small mergers and asking companies to voluntarily notify, especially where there are competition concerns being assessed as part of enforcement investigations.

Lastly, the articles by Liesl Van Der Rede and Molebogeng Taunyane highlight the issue of agency effectiveness under increased pressures and expectations. This is the subject of an International Competition Network working group in which the Commission is involved, and also a key part of the Commission's new strategic plan developed in the past year and now going into implementation.

Simon Roberts (Dr)
Editor-in-Chief

1996 there was a substantial increase in the price of jet fuel, so much so that, for the first time, the airlines decided to introduce a surcharge on cargo they carried on behalf of customers. In January 1997, at a meeting in Geneva, IATA proposed a resolution by which a general surcharge mechanism would be introduced. The resolution was proposed to be applicable to all routes and sought to introduce a mechanism/formula by which airlines would decide when and how to charge a surcharge on cargo and determine the introduction and suspension thereof. This worked as follows:

- IATA would on a weekly basis monitor the average spot price of jet fuel. This was to be done against a postulated base of 100 (which in turn was an equivalent of US\$0.535 per gallon, the average price of fuel for the month of June

1996). A fuel price index, starting from 100 as a base value, would then be compiled by IATA;

- If the IATA fuel price index equalled or exceeded 130 for two consecutive weeks, then a surcharge would be introduced;
- If the IATA fuel price index was lower than 110 for two consecutive weeks, then a surcharge would be suspended;
- If the IATA fuel price index was higher than 150 for two consecutive weeks, then IATA would convene a special meeting to discuss a course of action.

These events were known by IATA members as "trigger events". The surcharge was to be levied, on a per kilogram basis, on the weight of cargo as it appears on the waybill.

It was decided in January 1997, in view of the importance of an industry agreement, to delay the adoption of the resolution because of opposition to it by some IATA members. IATA thereafter circulated amongst its members a revised version of the resolution which provided for the exact amounts, in local currency, to be imposed as a surcharge should the relevant trigger event occur. For example, in respect of cargo out of South Africa to other African countries, a surcharge of 25 cents per kilogram was to be levied; and, in respect of cargo to countries outside of Africa, a surcharge of 50 cents per kilogram was to be imposed.

There was another important part to the revised resolution: it pertained to those airlines which, having voted for the resolution, nevertheless wanted to introduce their own surcharge rates.



In that event, the resolution provided that the relevant airline ought to file its proposed rate with IATA, together with reasons for the proposed deviation. Then IATA would upon receipt of the proposed deviation circulate it amongst its members, who in turn would within 10 days have an opportunity to protest against such proposed increase. The protesting party would file its reasons

and a compromise proposal. If there was no protest, then the proposed deviation would be allowed.

The resolution, as revised and circulated, was adopted in August 1997 and was intended to take effect in October 1997. All the carriers voted in favour of the resolution as revised and circulated. By these acts, the

airlines allegedly agreed to impose surcharges in concert with each other, by some pre-determined method, the application of which resulted in the fixing of prices in breach of section 4(1)(b)(i) of the Competition Act. Some of the airlines have indicated willingness to settle the matter with the Commission and the parties are now engaging in settlement processes.

Recent settlements by airlines in other jurisdictions

This case has been settled in a number of jurisdictions. We highlight the example of the USA before briefly discussing some of the other countries.

USA

British Airways

The USA determined the penalty to be paid by British Airways as a base fine of 20% on the turnover of British Airways cargo sales originating from the US totalling \$488.7mn in the relevant year. Multipliers of 1.6 and 3.2 were then applied to this base fine of \$97.7mn, resulting in a fine in the range of \$156mn - \$313mn. The court decided on \$200mn as appropriate, that is, above 40% of the turnover, given that the turnover only included shipments from the USA and not also those into the USA.

For a second count relating to passenger travel BA was fined \$100mn.

The US therefore imposed a total penalty of \$300mn for both counts. BA made an admission of guilt. This penalty took into account the defendant's substantial assistance in the investigation and prosecution of other cartel members.

Penalties for co-conspirators

Fines imposed on other airlines by the US were mainly penalties on cargo shipments. Virgin Atlantic however was required to pay restitution, and Korean Airlines was charged \$300mn for both cargo and passenger violations. Defendants of only cargo allegations with penalties include Lufthansa (\$85mn), Air France - KLM (\$350mn), Cathay Pacific (\$60mn), Martinair (\$42mn), SAS (\$52mn), Qantas (\$61mn), Japan Airlines (\$110mn), LAN Cargo and ABSA (\$109mn), EL

AL (\$15.7mn), Cargolux (\$119mn), NCA (\$45mn) and Asiana (\$50mn).

Other jurisdictions

The size of penalties has been smaller in other jurisdictions, reflecting both the smaller turnover when only these markets are taken into account, as well as different fining criteria.

In Canada, British Airways was fined \$4.5mn, Qantas \$155 thousand, Air France \$4mn, KLM \$5mn, Martinair \$1mn and Lufthansa \$5.3.

In Australia, Qantas was charged the largest fine of \$20mn, Air France - KLM \$6mn, British Airways, Cargolux, and Martinair each got fines of \$5mn.

In South Korea, Korean Airlines was charged the largest fine of \$39mn, Asiana Airlines \$16.9 and Lufthansa was charged \$9.9. Air France-KLM was also fined, however the exact amount of the fine could not be found. Companies based outside of Korea were issued lower fines, as their actions presumably had a less destructive influence on the Korean market.

Investigations and settlement negotiations are also ongoing in other jurisdictions not mentioned above such as New Zealand, the European Union and Switzerland. The focus of international authorities as well as the magnitude of fines imposed, indicate the impact and the seriousness of the cartel internationally.



Settlements reached in two fertilizer abuse of dominance cases



By: Mervin Dorasamy

The Commission had uncovered cartel conduct with regard to fertilizer products and their key components. These were the subject of a leniency application on the part of Foskor and a settlement by Sasol in 2009 including a penalty of approximately R250mn. There were, however, also investigations of abuse of dominance on the part of Sasol and Foskor, each of which controls a key basic input. In Sasol's case it is practically the only local producer of ammonia, which is the source of nitrogen in locally made fertilizers. Foskor controls the local production phosphate rock which is the source of phosphorous, and through this has price setting power over phosphoric acid.

The Commission recently reached settlements with each of these parties on the abuse of dominance. Both settlements were on the basis of changes in conduct to yield more competitive outcomes, while in Sasol's case there was also a commitment to divest of downstream blending operations to remove the incentive to exclude other participants at this level.

Neither settlement involves a penalty. In the case of Sasol, a substantial penalty had already been set for the cartel conduct, while in the case of Foskor the change in their conduct had been very rapid, and well before the conclusion of the investigation. At the time of writing the confirmation hearing for the Foskor settlement had still to be heard by the Tribunal.

The Commission's Settlement with Sasol

On 20 July 2010 the Competition Tribunal confirmed a settlement agreement entered into between the Competition Commission and Sasol Chemical Industries (Sasol). This settled the two complaints in terms of Section 8 and 9 of the Competition Act, 1989 known as the Nutri-Flo and Profert complaints.

Included in the agreement is a condition specifically guaranteeing supply to existing customers and a monitoring mechanism to ensure that Sasol provides information to the Commission about its compliance with undertakings it has made in the agreement. These were both strengthened at the request of the Tribunal. The conditions will be in force for a minimum of 10 years from the date of the divestitures contemplated in the agreement.

The Commission found that Sasol had, through a range of practices, prevented independent blenders and suppliers, including Nutriflo, from effectively competing and expanding within the downstream fertiliser market. These practices included the pricing structure of wholesale and

retail prices and the refusal to supply certain key products to independent blenders and suppliers.

In these circumstances, the Commission contended that Sasol's conduct constituted an exclusionary abuse of dominance in contravention of section 8(c) of the alternatively section 8(d)(ii) of the Act. The Commission further contended that Sasol's had charged excessive prices for ammonia and ammonium nitrate derivative products in contravention of section 8(a).

With regard to Profert's complaint, covering largely similar ground, the Commission had found that Sasol had further engaged in price discrimination to the detriment of Profert and thus had limited the ability of Profert to compete effectively and/or expand in the fertiliser market.

The undertakings made by Sasol in the July 2010 settlement include:

- to sell all Ammonium Nitrate Based Fertilisers to its customers on an Ex-Works basis from the Premises;
- not to impose any restriction or obligation upon any customer as regards the terms of resale of the abovementioned fertiliser products;
- not to differentiate in its pricing, other than on standard commercial terms such as volume and off-take commitments;
- that any discounts and/or allowances granted shall be transparent and available to all customers willing and able to meet such volume and off-take commitments, while Sasol shall



be entitled to give discounts and/or other allowances for reasons associated with volume and/or off-take commitments, and shall be entitled to give discounts and/or allowances where customers have been subject to specification deviation and supply disruption;

- ceasing all importation of ammonia into the Republic of South Africa within a period of 25 months of confirmation of the Settlement Agreement other than for its own use and those imports on behalf of third parties that may be occasioned due to supply and logistic disruptions and plant maintenance shutdowns, and consequentially adjust its logistics infrastructure requirements;
- to house the Ammonia Plant and business operations relating thereto as a business unit separate from Sasol Nitro and with separately audited books of account.

The Tribunal Chair praised the Commission and Sasol for their constructive approach to settling the matter and Nutri-Flo and Profert for persisting with their complaints despite the fact that it was against a large supplier of theirs.

The Commission's Settlement with Foskor

The Competition Commission has entered into a consent agreement with Foskor in settlement of the phosphoric acid excessive pricing complaint based on Foskor's downward adjustment of the local price after being made aware of the Commission's investigation.

The Commission's investigation was triggered by a complaint in 2007 from animal feed producers (AFPs) alleging that Foskor had contravened the Competition Act, in that:

- It entered into a toll manufacturing agreement with SASOL. The latter would produce phosphoric acids and related products on behalf Foskor and Foskor would market these products.
- It was charging an excessive price for phosphoric acid.

With regard to the first, Foskor admitted the collusion allegations and filed a leniency application with the Competition Commission under which it provided all relevant information regarding its toll production agreement with Sasol. Under the toll production agreement, Sasol undertook to

produce phosphoric acid and related products for Foskor to sell in the local market meaning that, by agreement, local buyers who had been able to choose between Sasol and Foskor, now only had Foskor to turn to. Sasol admitted to this collusive arrangement and settled its part with the Commission in the agreement confirmed by the Tribunal on 20 May 2009.

Foskor produces phosphate rock and is the main local supplier of phosphoric acid, an important component in fertiliser and animal feed products. Foskor exports the vast majority of its phosphoric acid. Foskor's position as the main supplier of phosphoric acid enables it to control prices locally. Foskor's price to local buyers included an add-on equivalent to 75% of the freight costs to export customers (mainly in India).

As soon as being made aware of the anti-competitive implications of such pricing in August 2008, Foskor removed this component, substantially reducing prices to local customers. It has since maintained prices to local customers in line with the prices it receives from exports.

Under the agreement reached with the Commission, Foskor has committed to refrain from engaging in excessive pricing of phosphoric acid, and specifically not to revert to its previous pricing policies for the sale of phosphoric acid, phosphate rock, as well as MAP and DAP (two fertiliser products which it now sells directly to the retail farming community). It has also undertaken measures to increase transparency in the downstream market for fertiliser products.

As a result of the quick action and cooperation by Foskor and the significant reduction in prices payable by animal feed producers and end consumers, the Commission is not seeking a penalty against the firm.





The Commission concludes its investigation into the Polymers industry

As the key input to making plastic products, the pricing of polymer chemicals is a large influence on the competitiveness of the plastics sector. And, a competitive plastics industry is a crucial component of sustainable manufacturing growth given the wide range of applications of plastics materials including in the packaging, automotive and domestic sectors. The Industrial Policy Action Plan recognises the importance of addressing polymer pricing. Consistent with this, in October 2007 the Department of Trade and Industry requested the Competition Commission to conduct an investigation into pricing practices within the chemicals sector with specific reference to polymers. While the initial concerns by the DTI related to polymer products, the pricing of polymers is also closely related to the pricing and supply of monomers, which are the key inputs or chemical 'building blocks' in polymer production.

The Commission has completed its investigation and referred charges of excessive pricing case (section 8(a)) against Sasol for polypropylene and propylene, and of collusion (section 4(1)(b)) against Sasol and Safripol in relation to polypropylene, to the Tribunal for adjudication. Subsequently, the Commission and Safripol concluded a Consent Agreement in terms of which Safripol admitted that the latter conduct was in contravention of the Act. The firm also agreed to pay an administrative penalty of R16 474 573, representing 1.5% of its total turnover derived from the sale of polypropylene products. The Commission agreed a low fine in this regard as the supply agreement was encouraged by the Competition Board and, although



By: Itumeleng Lesofe

Safripol benefits from the agreement, the main beneficiary is Sasol. Further the operation of the agreement is such that Safripol cannot punish or retaliate should Sasol infringe the agreement.

The agreement was confirmed as the order of the Tribunal on 25 August 2010.

The investigation and Commission findings of excessive pricing

The Commission first undertook a preliminary analysis of a number of polymer markets (including polyethylene, polypropylene and polyvinylchloride) which resulted in the initiation of a full blown investigation in the polypropylene market. An identified area of particular concern was the terms of the propylene supply agreement between Sasol and Safripol (propylene, a monomer, is the key input into the production of polymer polypropylene), which suggested that the alleged abuse of dominance by Sasol in polypropylene described below may have extended to the monomer market. In 2009, the Commissioner extended the investigation to look into propylene market.



By: Pamela Nqojela

The Commission's investigation established that the markets for propylene and polypropylene are highly concentrated, with Sasol being dominant in both. The polypropylene market is serviced by Sasol and Safripol, with large net exports. The input of propylene is priced by Sasol to Safripol in terms of a formula based on the prices of polypropylene, as set by agreement between Sasol and Safripol.

The Commission found that Sasol uses its quasi-monopoly power in propylene and polypropylene to price polypropylene at import parity price (IPP) levels to local customers in a market where supply far outstrips demand. This pricing at IPP is not related to Sasol's actual costs in any way. The IPP prices include hypothetical transport costs associated with importing polypropylene added to a Free-on-Board (FOB) Hong Kong price to arrive at the local price, and the customer essentially pays as though he imports the product when it is actually produced locally.

Moreover, Sasol has expanded its capacity substantially, based on export prices which are substantially lower





than its domestic prices. This strongly suggests that economic value is at or near the achievable export price. Prices under effective competition would be expected to tend towards export prices achievable.

Instead, local ex-works polypropylene prices at IPP levels are substantially higher than export ex-works prices to China, the largest destination for exported polypropylene from South Africa. Further, local ex-works prices are significantly higher than Hong Kong prices which are derived from a South Korean price. The latter is a large net exporting region like South Africa, and therefore an appropriate benchmark for comparison. In addition, there are strict anti-arbitrage provisions instituted by Sasol to ensure that product destined for export markets is not resold into the local market to undermine excessive local pricing.

The Commission found, using a range of benchmarks, that the local polypropylene prices are excessive in comparison. These benchmarks included local prices in comparison to actual export and indifference prices, as well as local prices in comparison to international prices in a net surplus region. The Commission found that the pricing of propylene, in which Sasol is essentially the only supplier, was excessive based on comparisons with an imputed price of propylene derived from more competitive polypropylene prices.

Sasol uses the polypropylene prices (which, in the Commission's view, are already excessive) as a basis for calculating its propylene prices. This in turn results in the propylene prices being excessive. The Commission also compared the current propylene prices to imputed propylene prices using more competitive PP prices in the existing price formula, and cost benchmarks, and found the local prices to be excessive.



In effect, the pricing of polypropylene and propylene locally is consistent with a situation indicative of relative local scarcity, making imports necessary at the margin, when in fact there is abundant supply, presumably reflecting the relatively low cost, competitive local manufacture. If the exported product was available to local buyers, it would exert downward pressure on local prices. This suggests that the much higher local price of propylene and polypropylene is substantially above economic value. This certainly concurs with the Appeal Court's suggestion in the Harmony – Mittal case that in instances where a dominant producer is able to embark on expansions of capacity based solely on export sales, the export achievable price would be at or above economic value.

Collusion

The Commission also investigated collusion allegations against Sasol and Saffripol, particularly with respect to the operation of the propylene supply agreement and the communication of polypropylene prices. The South African Competition Act prohibits agreements between firms in a

horizontal relationship if it involves directly or indirectly fixing a purchase or selling price or any other trading condition. The Commission found that the supply agreement between Sasol and Saffripol and its operation amounts to the direct or indirect fixing of the selling price of polypropylene with respect to which Sasol and Saffripol are in a horizontal relationship.

In addition to the communication of polypropylene prices, the supply agreement incentivises Sasol and Saffripol to follow each other's price increases, since the increase of price by one of them, through the operation of the formula, raises the price of propylene to the other, thereby reducing the margin of the firm that does not follow the price increase. The agreement also involved Saffripol paying higher prices for increased volumes of propylene along with absolute volume constraints. This undermined incentives to discount. Firms discounting would aim to achieve a larger local market share, but if they are constrained in they simply lower margins on existing sales. Ultimately, the formula incentivises both Sasol and Saffripol to charge the highest prices, the ceiling of which is IPP.



Power Metal Recyclers settles its scrap metal cartel case



By: Jabulani Ngobeni

On 14 July 2010, the Competition Tribunal approved a settlement agreement entered into between the Competition Commission and Power Metal Recyclers (PMR) over the latter's participation in the non-ferrous scrap cartel.

This investigation was sparked by information submitted by the merging parties in the proposed merger involving the New Reclamation Group (Reclam) and SA Metal and Machinery (SAM). The proposed merger was later abandoned after the Commission blocked it.

Soon after the merging parties filed a notice of abandonment the Commissioner initiated a complaint against Reclam, SAM, National Scrap Metal (NSM) and Cape Town Iron and Steel (Cisco) based on allegations of exclusive dealing, price fixing, the fixing of trading conditions and market allocation in relation to ferrous and non-ferrous scrap metal. On the basis of further information submitted by Reclam to the Commission, the Commission expanded the above complaint to include allegations of collusive tendering against Reclam,

SAM, NSM, LO Rall Scrap Dealers CC, Universal Recycling (Pty) Ltd (Universal) and Fine Trading CC alleging that these entities had engaged in conduct aimed at controlling the price of scrap metal sold at auctions by ensuring that bidders co-ordinate their bids and the auction process by ensuring that scrap metal is sold to certain agreed bidders.

In July 2007, the Commission conducted "dawn raids" at the premises of Reclam in JHB, PE and Durban. Thereafter the Commission received information that Reclam, Abeddac Metals (Pty) Ltd (Abeddac), Amalgamated Scrap Metals Recycling CC (AMR), PMR, SAM and Universal were engaged in price fixing and collusive tendering in respect of various types of non-ferrous scrap metal. Soon thereafter (August 2007) Commission initiated another complaint against these respondents. It is this complaint that forms part of the consent agreement entered into

with PMR. For the purposes of PMR's settlement this article will only deal with the Commission's findings with regard to the August 2007 initiation because PMR was only involved in price fixing in respect of non ferrous scrap metal.

Upon concluding its investigations with regard to the non-ferrous scrap cartel, the Commission found that in 2003 PMR and its competitors Reclam, Abbedac, AMR, SAM and Universal who are suppliers and processors of non-ferrous scrap in the inland area agreed to establish a superyard in the inland area. In order to establish a superyard PMR and its competitors formed a joint venture (Greystone). The sole business of Greystone was the buying, selling, transporting and processing of non-ferrous scrap, including stainless steel and chrome steel scrap. After the formation of Greystone but before a superyard was established, a selling committee was appointed by the board of Greystone,





whose responsibility was *inter alia* to determine the prices at which the various classes of non-ferrous scrap would from time to time be sold. The selling committee arrangement was referred to as the “*Joburg non-ferrous agreement*”.

The Commission’s investigation also revealed that before the establishment of the superyard there were numerous discussions, including discussions about the prices at which non-ferrous scrap should be sourced. Although the shareholders of Greystone dissolved it in June 2004 the Commission found that after the termination of Greystone,

the members continued to discuss buying levels on an informal basis until at least 29 May 2007.

Settlement discussions with PMR commenced soon after the Commission’s investigation was completed. On 17 June 2010, the Commission and PMR concluded a consent agreement.

In terms of the consent agreement PMR admits that it has contravened section 4(1) (b) (i) of the Competition Act in that it agreed with its competitors to fix prices in relation to certain non ferrous scrap metals. PMR agreed to

pay an administrative penalty in the amount of R12 773 587.55, being 5% of PMR’s total annual turnover for the year ended February 2006.

PMR has undertaken to refrain from engaging in price fixing and it has also agreed co-operate with the Commission in subsequent prosecutions of parties to the agreements and arrangements which are the subject of the Commissions investigations in the scrap metal cartel. The Commission’s investigation in all of the above investigations is complete and the Commission has referred the complaint to the Tribunal.

Dawn raids



By: Molebogeng Taunyane

In order to successfully conduct such an operation the Commission assembles teams made up of Commission staff, IT specialists and police officers to assist in the identification and seizing of documents relevant to its investigation.

On March 31, 2010 the Commission raided the offices of South African Airways (SAA), Mango Airlines (Mango) and the Airlines Association of Southern Africa (AASA). This search was prompted by the Commission’s suspicion that SAA and Mango might have withheld information crucial to its investigation into collusion by the airlines around the soccer world cup.

Again on May 06, 2010 premises of four electrical cables manufacturers and suppliers based in Gauteng were searched by teams from the Commission on suspicion of price fixing, market allocation and collusive

tendering. This was done subsequent to a complaint initiated by the Commissioner on 16th March 2010 against Aberdare Cables (Pty) Ltd, Alvern Cables (Pty) Ltd, South Ocean Electric Wire Company (Pty) Ltd and Tulisa Cables (Pty) Ltd.

All of these companies produce both high voltage cables for industrial use and low and medium voltage cables for households, which are mostly sold to power supply authorities, municipalities, construction companies and railway and transport authorities.

During the searches the Commission seized documents and electronic data, which are currently being analysed together with information or evidence gathered to determine whether a contravention of the Competition Act has taken place in these matters.

In the last quarter, the Commission conducted two search and seizure operations, in the airline and electric cable industries.

Such an operation is provided for in the Competition Act. In terms of section 48 of the Competition Act, the Commission is authorised to enter and search premises and seize documents which have a bearing on an investigation. Also, Section 46 (2) (b) of the Act authorises a judge or magistrate to issue the Commission with a warrant allowing them and accompanying police officers to enter and search such premises.



Bid-rigging and other cartel conduct by smaller players

With all the Competition Commission's investigations into cartel activity by large companies in major industries,



By: Siphon Mtombeni



By: Samantha Niemann



By: Sbusiso Madonsela

such construction and industrial products, a common misconception is often that the Commission elects to exclusively focus on and expose cartel activities involving these large industries. Although cartel activities in large industries do attract more attention owing to the fact that they have a greater affect on the economy, the Commission does not turn a blind eye to the same activities occurring in smaller industries.

The Commission has found that small industries are also prone to participating in cartel activities as there exists a perception that they may go unnoticed. It is for this reason that the Commission does not simply overlook these anti-competitive practices and also that the aim and purpose of the Commission is to promote and maintain competition in the economy, regardless of the size of the industry.

A prime example of the Commission's intervention in cartel activities in the smaller industries can be found in its investigation of the Cycling industry. Although this investigation was met by mixed reactions by the industry, the Commission continued to investigate allegations of price fixing by cycling retailers and wholesalers and, having finalized its investigation, this matter now stands before the Tribunal for determination.

A further example highlighting the Commission's intervention in the cartel activities of not only small industries, but also with regard to small firms, can be found in the cases of collusive tendering on the part of Anix Trading 739 CC (Anix) and Zedek Trading 799 CC (Zedek) respectively. In these matters the Commission received a

complaint from the National Treasury in March 2009, and following further investigations it was discovered that Anix and Zedek had discussions on pricing relating to their tender submissions for a State tender for the supply and delivery of animal feed to the State.

Shortly after being served with the referral papers, the representatives of Anix and Zedek approached the Commission with the view of settling the matter, indicating that they would not be putting up a defense or an answer to the Commission's referral. They indicated that they had no defence to the Commission's allegations and admitted that their conduct had been in contravention of section 4(1)(b)(iii) of the Act in that they had discussed with each other their respective bids and prices in respect of the tender in question. The settlements with Anix and Zedek, whereby they agreed to refrain from engaging in further collusive tendering and became liable for an administrative penalty of R20 000 and R40 000 respectively, were confirmed as orders of the Tribunal on 07 July 2010.

The National Treasury had made submissions to the Tribunal, through the Commission, indicating that Treasury would consider applying remedies available to it in dealing with the parties as a means of curtailing bid rigging in public tender procurement with one of the alternatives being to blacklist the parties from public tender procurement in future tenders or cancel the tender.

Shortly thereafter, on 21 July 2010 National Treasury issued a circular and a Practice Note in terms of section 76 of the Public Finance Management Act



to all Accounting Officers, instructing the public sector procurement mechanisms to use the Certificate of Independent Bid Determination (CIBD) in their procurement processes. Through the CIBD, parties submitting tender to that public institution will be required to certify that their bid has been independently determined and that there has not been any collaboration with any of their

competitors in submitting the bid. The CIBD provides public institutions with additional remedies in dealing with bid rigging be it against small or big companies involved in public tender procurement.

The above cases illustrate the Commission's position with regard to these matters. The Commission will act upon contraventions of the Act, by

any firm, and has several other cases under investigation involving smaller firms. However, the Commission has in many cases adopted a form advocacy with smaller firms, keeping in mind its purpose of promoting and maintaining competition. The Commission does also on a continuous basis engage with small and medium enterprises on an educational basis in order to promote compliance with the Act.



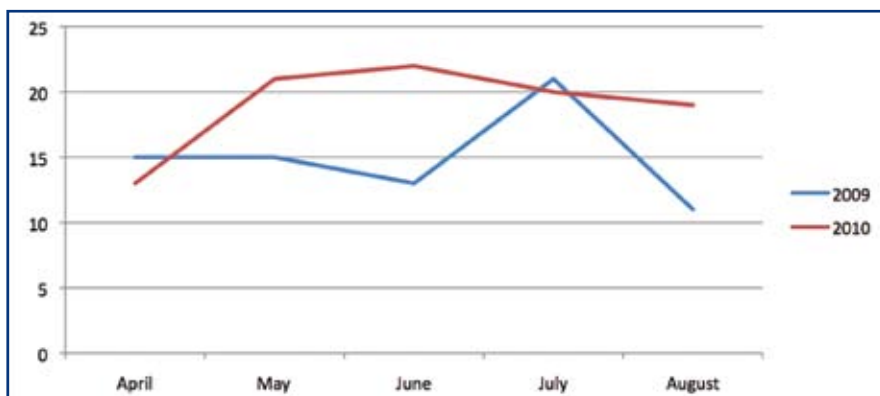
Some pick-up in Merger Activity

A question often asked to the Commission is whether the merger notifications has increased or decreased over time, as a measure of economic activity. As a comparative to 2009 the merger notifications during the last few months appears to increase and stabilize. The average number of merger notifications made to the Commission during the

period between April to August for 2009 was 15 as compared to the average for the same period during 2010 was 19. The table below provides a month to month trend comparing 2009 and 2010 notifications for the same period. These comparatives are like for like considering the merger thresholds were amended as at April 2009.



By: Maarten van Hoven



As stated in the Commission's 2010 revised service standards (published March 2010) most advanced and high performance regulatory agencies have service standards which facilitate both internal productivity and external service delivery expectations.



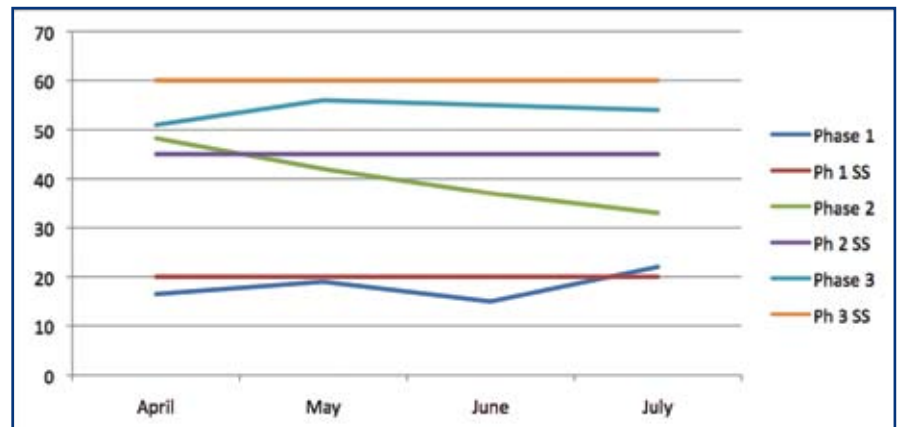
The Commission Service standards in summary are set down below:

Category	2010 Service Standard
Phase 1 (non complex)	20
Phase 2 (complex)	45
Phase 3 (very complex)	60

Since the publication of these standards the Commission has been

able to meet these standards. The table below is a summary of the Commission's ability to meet these

service standards. The Commission will continue to strive to meet these standards.



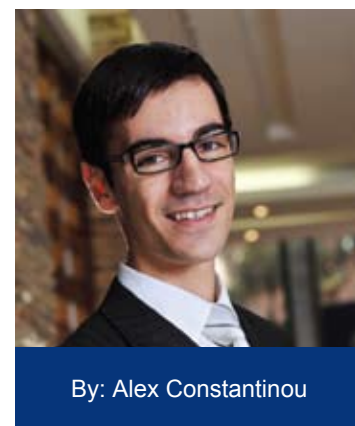
Bedrock and Mondi merger approved subject to three conditions

On 21 April 2010, the Competition Commission prohibited the proposed acquisition by Bedrock Mining Support (Pty) Ltd of the Letaba, Numbi and De Kaap plantations (the target firms) of the Business North Unit owned by Mondi Limited. The Commission prohibited the proposed transaction chiefly on the grounds that potential coordinated effects were likely to arise in the market, in particular from the sale of the Numbi plantation by Mondi to Bedrock. The Competition Tribunal subsequently approved the transaction with three conditions involving two commercial supply contracts in addition to an expert determination clause designed to eliminate information exchange between the two rivals, Bedrock and Reatile. This arose after the merger was taken on appeal to the Tribunal by the merging parties and subsequently the Commission, the merging parties and third parties concluded negotiations

addressing concerns raised by the Commission and third parties.

Bedrock is a mine support company which uses hardwood timber sourced from its suppliers to produce timber-based underground support packs and elongates for deep level gold and platinum mines. Bedrock is also active inter alia, in timber and mine yard management and value added services through chemical treatment, logistics and underground technical services. The target firms are forest plantations producing mainly hardwood in the Mpumalanga and Limpopo regions. The transaction therefore represented backward vertical integration in the timber industry.

In terms of the downstream market the parties sought to include other mining support products such as steel roof bolts as competing with timber-based stand up support products. The Commission's investigation however,



By: Alex Constantinou

revealed overwhelming evidence to the contrary, indicating instead that steel roof bolts and timber-based stand up supports constituted distinctly separate markets given the different applicability, durability, yielding factors and relevant product and installation price. This had the effect of reducing the number of major competitors in the downstream market to only two being Bedrock and Reatile. The upstream market was agreed as the



production and supply of hardwood timber.

The Commission's investigation focused on two main areas: input foreclosure and coordinated effects.

Input foreclosure

In assessing input foreclosure concerns three separate geographic regions were considered namely, the Limpopo, Mpumalanga North and Mpumalanga South/North regions. The Commission found that possible input foreclosure concerns were unlikely as there are various alternative sources of hardwood for which the mining support companies may compete. Despite this finding, concerns were raised by two third parties.

The concern raised by Reatile Timrite (Pty) Ltd ("Reatile"), a direct competitor to Bedrock, was chiefly in respect of the Numbi plantation in Mpumalanga North located in the Hazyview and White River area. Some of Reatile's major sawmill operations are located within a 40km radius of the Numbi forests in this area and as such the transport costs are more economically viable than sourcing from other areas further away. Their concerns originate from the fact that Reatile has a supply agreement with Mondi prior to the merger and that post merger, at the expiry of the contract,

Reatile would not have access to mining timber from Numbi given that Bedrock has sufficient capacity and incentive to absorb the entire mining timber resource in Numbi. In light of this concern, a commercial supply agreement was reached between Reatile and Bedrock to the satisfaction of the Commission and the Tribunal which became one of the conditions of the merger.

The other input foreclosure concern was raised by Tshifhire Timbers (Pty) Ltd ("Shefeera"), a small BEE company not in direct competition with Bedrock in the mine support market, but also competing for the same hardwood for its own purposes. Their concern stemmed from the fact that they relied heavily on hardwood from Letaba located in Limpopo and that alternative sources were either competitors to Shefeera, tied up with other customers or too far away to viably to source from. In light of this concern, a commercial supply agreement was reached between Shefeera and Bedrock to the satisfaction of the Commission and the Tribunal which also become a condition of the merger.

Coordinated effects

With respect to potential coordinated effects, some of the factors contributing to the Commission's original concern included the fact that barriers to entry in

the upstream and downstream market were considered high, products sold by Bedrock and Reatile are similar. Thus a likely degree of homogeneity exists between rival products and, by way of a punishment mechanism, Bedrock could reduce the quantity or quality supplied to Reatile given that Bedrock would control Reatile's source of timber in Numbi.

The Commission's main concern, informed by third parties as well as other evidence, was that there are only two main players in the downstream market, namely Bedrock and Reatile. The downstream market thus faces characteristics of a duopoly market structure with fringe competition from other smaller players. Therefore as a direct result of the acquisition, particularly the Numbi plantation (owing to the supply contract Reatile has in place), two rivals in a horizontal relationship in a highly concentrated market would have been allowed to discuss annually the price for a critical input for their operations. The Commission was of the view that this would have created a platform for information exchange in terms of volume and price and as such facilitate a market structure more conducive to coordination among rivals.

To this end an agreement was reached between the Commission and merging parties to impose a third condition by way of an independent expert facilitating the price negotiations rather than Bedrock and Reatile directly discussing them. In terms of the condition, the expert will not disclose pricing information to each of the rival parties. The Tribunal accepted this agreement as an additional condition of the merger. The Tribunal ultimately approved the merger subject to the aforesaid three conditions.



Pictures from New Concept Mining, used with permission.



The Commission's Call for the Voluntary Notification of Small Mergers

In March 2009, the Minister of Trade and Industry issued a notice in the Government Gazette, in terms of which the monetary thresholds for the categorization of intermediate and large mergers were revised. These amended merger notification thresholds came into effect on 01 April 2009.

The classification of mergers as small, intermediate or large determines whether or not an obligation rests upon the merging parties to notify a merger to the Competition Commission, in order to receive approval prior to implementation of a transaction.

Notwithstanding this, in terms of section 13 (3) of the Competition Act the Commission may call upon parties to a small merger, to notify the Commission thereof within six months from implementation of that merger, if after having regard to the provisions in section 12A, the Commission is of the view that the proposed merger shall substantially prevent or lessen competition, or cannot be justified on public interest grounds.

The revision of the merger thresholds, together with the economic downturn, has resulted in more potentially problematic small mergers escaping Commission scrutiny. Under the old thresholds, these small mergers would have been classified as intermediate in nature and therefore subject to analysis by the Commission.

In order to address this concern, the Commission has issued a Guideline on Small Merger Notification, which advises parties to a small merger to voluntarily inform the Commission of the proposed transaction, if such



By: Nazeera Ramroop

transaction meets the following criteria:

- at the time of entering into the transaction any of the firms, or firms within their group, are subject to an investigation by the Commission in terms of Chapter 2 of the Act; or
- at the time of entering into the transaction any of the firms, or firms within their group, are respondents to pending proceedings referred by the Commission to the Competition Tribunal in terms of Chapter 2 of the Act.¹

Parties to small mergers who meet the above criteria are advised to voluntarily inform the Commission, by way of a letter, of their intention to enter into the transaction.

This letter should identify the following:

- the merging parties;
- the turnover and asset value figures which render the transaction a small merger;
- the nature of the proposed transaction;

- the activities of both the acquiring and target firms;
- any horizontal or vertical overlaps in activities;
- estimated market shares;
- identification of competitors; and
- any other information which the parties may deem necessary.

Notwithstanding the fact that the proposed small merger is occurring in a market unrelated to that in which the alleged collusive activity occurred, in order to conduct a meaningful assessment of the proposed transaction and its competitive effect thereof, the Commission requires that the merging parties make a brief submission on the pointers highlighted above.

The Commission undertakes to respond and advise the parties whether or not they are obliged to notify their small merger to the Commission within 10 business days from receipt of the letter setting out the requisite details as published in the guideline.²

Since implementation of the Guideline in April 2009, the Commission has received thirty-two (32) voluntary small merger notifications by way of letter. After analysis of the content of the letter, industry available information and information privy to the Commission as a result of its previous investigations into the parties and their markets, in five (5) instances the Commission took the view that the proposed transaction may result in a substantial prevention or lessening of competition. The Commission then called on parties to formally notify the transaction.

Merging parties have also, at their own initiative notified the Commission

¹ Guideline on small merger notification, General Notice 386 of 2009 published on 17 April 2009.

² Merger and Acquisitions Division Service Standards 2010.



of small merger transactions by way of a complete filing. These filings were particular to the Banking Industry, the Poultry Industry, the Pharmaceutical Industry, the fishing industry as well as acquisitions made by larger corporate of smaller independent traders in a market.

The Commission has remained vigilant in tracking and monitoring merger activity in the economy, and in addition to its own monitoring, has

been assisted by the public in the alerting of possible anti-competitive transactions. With this information in hand, the Commission has called upon parties to make written submissions briefly describing the small merger acquisitions that they have entered into and implemented.

The Commission's Guideline on small merger notifications has empowered the Commission to close the gap between potentially problematic small

mergers and transactions wherein notification is mandatory. The Guideline, together with the Commission's own tracking and monitoring and the assistance of the public (competitors and customers alike) has facilitated in the identification of small mergers which may require notification. Given the sometimes problematic impacts that small mergers present, the Commission encourages that all parties with relevant information to make submissions to the Commission.

Agency Effectiveness Workshop

The ICN held an Agency Effectiveness Workshop for Agency heads, hosted by the Office of Fair Trading, in London from 11- 13 July 2010.

The work group for Agency Effectiveness is a reflection of the ICN's increasing focus on agency performance issues, in addition to the established and ongoing focus on the content of Agency work.

This workshop formed part of the process to generate a manual for ICN member agencies to provide guidance and share practices based on real Agency experience. The Agency Effectiveness Working Group undertook to produce guidance chapters over the next 1-2 years

that focus specifically on Human Resources and Knowledge Management. The broad themes for the workshop were agency culture/ organisational identity and people, and within this framework a number of key considerations concerning the strategic approach to Human Resources and Knowledge were examined. Through plenary and breakaway sessions, representatives from agencies of varying locations, size and years since establishment shared experiences and challenges facing competition agencies around the globe.

The topics focused on included: Current challenges faced by competition agencies; establishing and implementing principles and values;



By: Liesl van der Rede

essential elements of an agency's organisational identity which enable the agency to be effective; attracting and retaining new talent, career development and skills building; how to capture and disseminate learning; staff secondment / movements of



people between competition agencies; leadership and succession planning.

In the current global economic climate, the Human Resources and Knowledge Management challenges facing all competition agencies are remarkably similar and not entirely unexpected.

Common challenges in the strategic management of people include budgetary constraints for compensation, restrictions on recruitment, competing with private sector organisations, career path management for technical specialists, succession planning and obtaining and retaining appropriate skills and talent.

For knowledge management, there are challenges of transparency

versus confidentiality, information overload, retaining tacit knowledge, formal versus informal sharing and managing content versus management information. For the Competition Commission here in South Africa, effectively managing these issues is

a priority on the strategic agenda. Including Human Resources and Knowledge Management objectives in the Commission's Strategic Plan ensures both receive ongoing attention and action from both the Management and Executive Committees.



An overview of 2009/10 activities

The 2009/10 year was another year of increased caseload on the enforcement side although mergers declined sharply due to the global recession. At the same time, the Commission continued to be active in areas such as advocacy and international antitrust bodies.

Cases

In terms of casework in the 2009/2010 year, the Commission continued to be inundated with applications for corporate leniency. Over the 12 months to March 2010 a staggering 79 CLP applications were received. The trend continued with a further 23 being received in the quarter April to June 2010. Infrastructure and construction sector constitute the highest number. This indicates that firms are becoming increasingly aware



By: Molebogeng Taunyane

of competition law and are using the opportunity afforded to them by the CLP process to voluntarily comply with the law. It also indicates the pervasive nature of cartel conduct in the South African economy.

Only five consent and settlements were concluded in the year under review. This resulted in the Commission levying a total of more

than R487 million in administrative penalties through consent orders. The most significant one settlement was with Sasol – which agreed to pay R250 million for taking part in the fertiliser cartel. This is the highest settlement agreed upon to date between the Commission and a respondent.

Another significant outcome was when the Tribunal found in the Commission's favour concluding the bread cartel case. It found that Pioneer Foods had indeed colluded with fellow bakeries to fix the selling price of bread and to allocate markets amongst themselves. The Tribunal then imposed a penalty of R195 million, being 10% of Pioneer Foods baking division's turnover for 2006, rather than its group turnover. The Commission is appealing this decision as it does not believe that the criteria applied by the Tribunal to determine



the penalty are appropriate to deter cartel behaviour.

In total the Commission had 289 cases under investigation - with 172 complaints from the general public, 31 initiated by the Commissioner and 86 complaints carried over from the previous year. Only two exemption applications were filed during this period. Of the 31 cases initiated, 20 were in the Commission's priority sectors while 11 of the investigations were spread across sectors such as media, transport, packaging and property. Furthermore, 26 of these investigations involved cartel behaviour.

Notified mergers plunged to 190 over this period compared to 415 mergers in the previous year. Most of these mergers were intermediate (136), with 44 large mergers and 10 small mergers.

International relationships

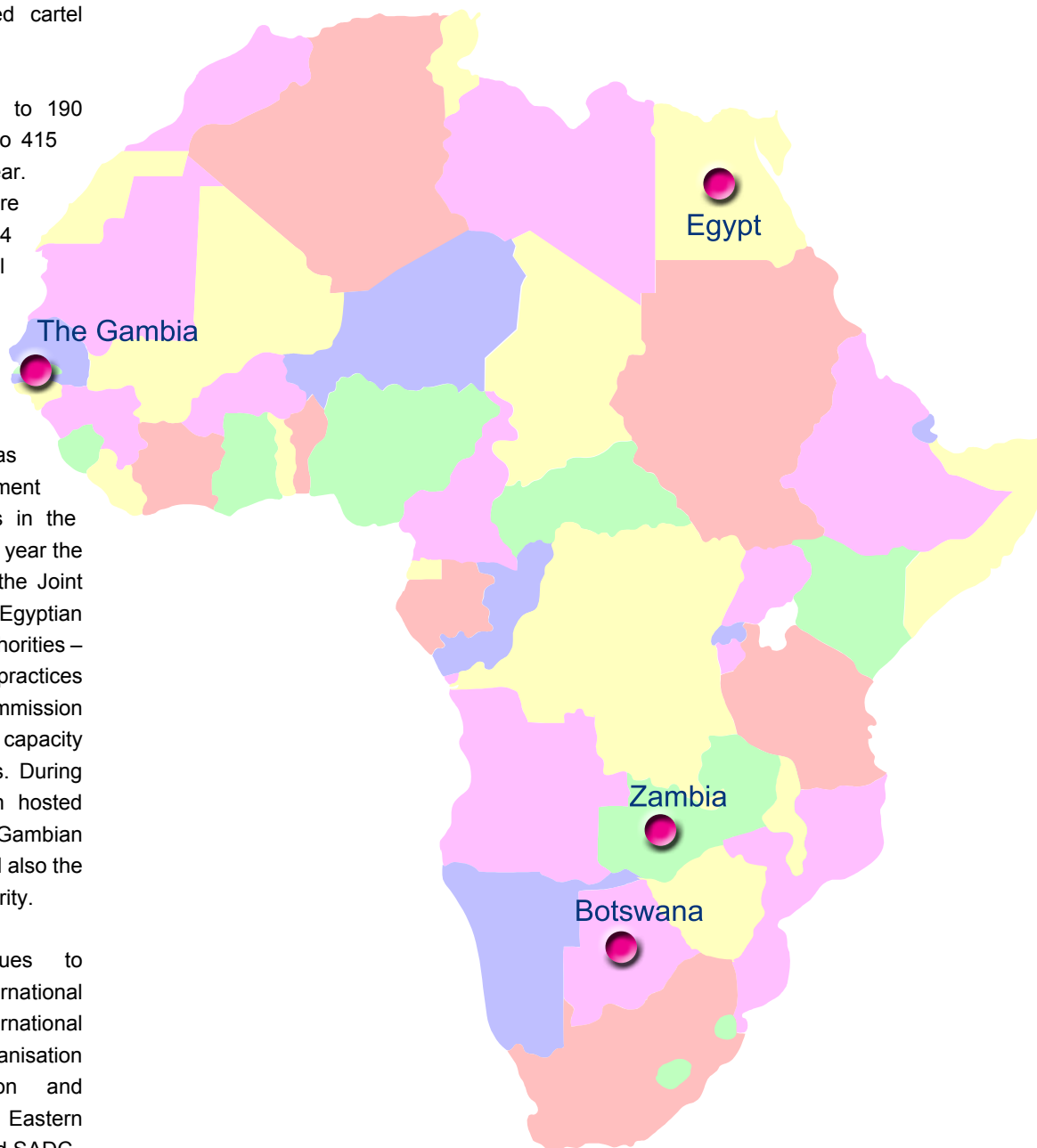
The Commission has also increased its involvement with Competition Authorities in the African continent. During this year the Commission participated in the Joint Food Project together with the Egyptian and Zambian competition authorities – to examine anti-competitive practices in food products. The Commission is also engaged in building capacity in some of these institutions. During this period the Commission hosted delegates from the Gambian Competition Commission and also the Botswana Competition Authority.

Furthermore, it continues to participate in international organisations such as the International Competition Network, Organisation for Economic Cooperation and Development, Southern and Eastern Africa Competition Forum and SADC.

Strategic planning and management

The 2009/10 year saw the Commission work on a new three-year strategic plan to kick off from April 2010. This occurred against the backdrop of significant successes, especially in priority sectors and cartel enforcement. The new plan aims to enable the Commission to meet the challenges of increased expectations and case-loads through working towards three key goals: improved prioritisation

for impact; increased stakeholder engagement; and building a high performance competition authority. In order to achieve these goals the Commission recognises that it needs strong leadership within the organisation. Middle Managers were identified as key to assisting with the management of the organisation. This resulted in middle managers attending a Management Development Programme, which aims to empower them to share in the management responsibilities of the organisation.



Impact of cartel activities on business: An ethical perspective

The bread cartel matter that was exposed by a whistleblower from the Western Cape has raised wide-ranging questions about the ethics of business, and the relationship with competition law compliance.

Cartels are often equated with theft by firms from consumers. However, the Competition Act does not use the word cartel. Rather, the Act prohibits an agreement between competitors in a horizontal relationship from: directly or indirectly fixing a purchase or selling price or any other trade condition; dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or engage in collusive tendering.

Cartels denote groups of business people who engage in outright anti-competitive fixing of markets in this way, to the detriment of consumers. It further reflects the fact that this activity is particularly likely to happen in mature industries with well established networks in trade associations and similar organisations.¹

Defining Business Ethics, and Ethics in Business

Ethics are defined as “relating to morals”, “a set of principles of morals”, and as “rules of conduct”.² Charles Powers and Davis Vogel (in Chryssides and Kaler, 1992:53) define ethics as “concerned with clarifying what constitutes human welfare and the kind of conduct necessary to



By: Zibuyile Jafta



By: Andile Mangisa

promote it”.³ Most ethics literature in considering ethics as a philosophical enquiry, uses the terms “ethics” and “morals” interchangeably. Most writers in this field refer to ethics as it reflects beliefs about right and wrong conduct or questions of moral right, wrong, duty and obligation and moral responsibility.⁴

Business ethics applies these ideas in concentrating on moral standards as they apply to systems and organisations through which modern societies produce and distribute goods and services, and to people who work within these organisations.⁵ Weiss (1987:7) cites Laura Nash (1990:5) as pointing out that business ethics “... is not a separate moral standard, but the study of how the business context poses its unique problems for the moral person who acts as an agent of this system”. It considers the implications of economic activity on the interests of all who are affected by such activity and seek to ensure that business does not detrimentally impact on the

interests of its stakeholders. As such, business ethics attempts to address the ethical impact of economic activity and the economic impact of being ethical.

Some believe that ethical behaviour hinders one’s success. However, that is not the case. In his book *‘Business Ethics’*, Deon Roussouw argues that business should make ethical sense, but ethics can also make business sense.⁷ Roussouw further asserts that the greatest challenge faced by Africa is that the current neglect of ethical values in business turns into beliefs about the ways business should be done. Such beliefs, which function as myths that legitimize and sustain unethical business practice, can play a powerful role in reinforcing an unethical behaviour. This is directly relevant to understanding cartel behaviour, where such conduct appears to have become a norm, a belief about how business should be done. This is now explored in the case of the bread cartel.

¹ Signfrid, N., Wrangel, C., Levinsohn, M. & Olsson, G.: European Cartels report (2000). Sweden: Lund University.

² The Concise Oxford Dictionary.

³ Chryssides, G.D. & Kaler, J.H. (1993). *An Introduction to Business Ethics*. London: Chapman & Hall.

⁴ Beauchamp, T.L. & Bowie, N.E. (1983). *Ethical Theory and Business*. New Jersey: Prentice-Hall Inc
Shaw, W.H. & Barry, V. (1995). *Moral Issues in Business*. (6th Ed), Belmont, California: Wadsworth.

⁵ Velasquez, M.G. (1998). *Business Ethics: Concepts and Cases*. New Jersey: Prentice Hall.

⁶ Weiss, J.W. (1998). *Business Ethics: A Stakeholder and Issues Management Approach*. Forth Worth: The Dryden Press.

⁷ Rossouw, D. (2004). *Business Ethics*. Cape Town: Oxford University Press.

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