Towards a free and fair economy for all

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Towards a free and fair economy for all

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Commission Questions Conduct of Anti-retroviral Companies

The Commission has found that pharmaceutical firms GlaxoSmithKline South Africa (Pty) Ltd (GSK) and Boehringer Ingelheim (BI) have contravened the Competition Act of 1998 and will refer the matter to the Tribunal. The firms were found to have abused their dominant positions in their respective anti-retroviral (ARV) markets. In particular the Commission has found that the firms have engaged in the following restrictive practices:

1. Denied a competitor access to an essential facility
2. Excessive pricing
3. Engaged in an exclusionary act.

The Commission's investigation revealed that each of the firms has refused to license their patents to generic manufacturers in return for a reasonable royalty. The Commission believes that course of action is feasible and that consumers will benefit from cheaper generic versions of the drugs concerned.

Furthermore, the Commission believes that granting licenses would provide for competition between firms and their generic competitors. The Commission will ask the Tribunal to make an order authorising that any person be able to exploit the patents to market generic versions of the respondents' patented medicines or fixed dose combinations that require these patents, in return for the payment of a reasonable royalty. In addition, the Commission will recommend a penalty of 10% of the annual turnover of the respondents' sale of ARVs in South Africa for

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each year that they are found to have violated the Act.

These practices violate the Competition's Act of 1998 prohibiting against excessive pricing (section 8(a)), refusing access to essential facilities (section 8(b)) and exclusionary acts that have an anti-competitive effect that outweighs technological, efficiency or other pro-competitive gains (section 8(c)).

Indeed the very goals of the Competition Act - promoting development, providing consumers with competitive prices and product choices, advancing social and economic welfare and correcting structural imbalances - have been made difficult in this context by the refusal of the respondents to license patents.

The original complaint in this matter was filed by Hazel Tau and others alleging that GSK and BI were charging excessive prices to the detriment of consumers for their patented ARV medicines. GSK and BI hold patents on certain anti-retroviral (ARV) medications used to treat HIV/AIDS. GSK holds patents in South Africa on AZT (branded as Retrovir), Lamivudine (branded as 3TC) and AZT/Lamivudine (branded as Combivir). BI holds patents in South Africa on Nevirapine (NVP) (branded as Viramune).

A concern is that this decision could raise fears among multinationals investing in South Africa, resulting in them not doing business with South Africa if they could be ordered to give a voluntary licence. Competition law does make provision for voluntary licensing, or forced licensing, where a party that owns a patent becomes dominant, because of ownership of that particular patent and competitors of that firm need those particular ingredients in order to become competitive. Therefore, competition law does allow for a dominant player, for a monopoly owner of the patent, to be forced to give a voluntary licence. However, this would only be done in very specific instances. In this case the parties holding the patent are dominant in the specific market of the drugs concerned. Secondly, the drugs are not affordable. The generic manufacturers, or any other party for that matter, in order to compete with the players that own this particular patent, cannot do so unless they have access to the formula that the other parties have. Thirdly, in order for them to be able to have access to that particular formula, they need the permission of the owners of the patent.

This is not the first time competition law has been used to force a dominant owner of a patent to make a particular formula available. The EU enforced such an order earlier in the pharmaceutical industry. However, HIV/AIDS affects us all and also affects the bottom line of all business. It is the Commission's opinion that cheaper anti-retrovirals should be made available to the public sector.

Competition and the Law

Concurrent Jurisdiction: Competition Act & Labour Law

The primary focus of a merger or acquisition is driven by business related considerations. However, the implementation often presents unexpected employment issues. It is often the case that labour law issues receive consideration at a very late stage of the merger evaluation process. This often leads to difficulties. For example, one of the conditions attached to the approval of a merger transaction between Arvin Industries Deutschland GmbH and Zeuna Starker GmbH & Co KG[1] was that, because of limited time frames, parties would further negotiate on the terms of the retraining of employees to enable them to secure alternative employment opportunities.

The Commission for Conciliation Mediation and Arbitration (the CCMA) is an independent body established in terms of the Labour Relations Act No. 66 of 1995 (LRA), as amended. Its primary functions are to resolve disputes brought before it and to interpret provisions of labour legislation such as the LRA, Basic Conditions of Employment Act, the Employment Equity Act, etc.

Section 3(1A)(a) of the Competition Act No. 89 of 1998, as amended, provides that in so far as this Act applies to an industry that is subject to the jurisdiction of another authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.

A question to ask is whether the CCMA is the only independent body that can monitor the application and interpretation of the LRA?

Does the Commission have jurisdiction to deal with employment issues resulting from the proposed merger?

The creation of job opportunities is regarded as one of the major structural economic problems facing South Africa today. Employment loss will always be an issue in merger proceedings as a result of redundant positions. According to Statistics in South Africa,[2] the official unemployment rate is estimated to be 30.5%. However, if we consider an expanded definition, unemployment can be estimated at around 40%. Section 2(c) states that the purpose of the Competition Act is to promote and maintain competition in the Republic in order to promote employment and advance the social and economic welfare of South Africans.

1 Competition Commission merger case No. 2003, Jun 514.
2 Stats SA: Labour Force Survey, September 2002.

When determining whether a merger can or cannot be justified on public interest grounds, the Commission and the Competition Tribunal must consider the effect that merger will have on employment.[3]

The purpose of this article is to highlight the essential labour law issues that must be considered in order to ensure the successful conclusion of a proposed merger or acquisition transaction brought before the Commission.

Purpose of the LRA and the Establishment of the CCMA

It is clear from the LRA that the overall purpose of the legislation is the advancement of economic development, social justice, labour peace and the democratisation of the workplace. The LRA's intentions are to achieve, amongst others, the following objectives:

- to give effect to section 27 of the Constitution;
- to regulate the organisational rights of trade unions;
- to promote and facilitate collective bargaining at the workplace and at sectoral level;
- to promote employee participation in decision-making through the establishment of workplace forums;
- to provide a framework in which employees and their unions, employers and employer organisations can bargain collectively to determine wages, terms and conditions of employment and other matters of mutual interest and formulate industrial polices;
- to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the CCMA is established), and through independent alternative dispute resolution services accredited for that purpose;
- to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;
- to provide for incidental matters.

The LRA calls for an establishment of the Bargaining councils, CCMA and Labour courts. Bargaining councils consist of employee organisations and the employer or employer organisations. The LRA contains no compulsion to bargain, but does provide that disputes arising from a refusal to bargain should be submitted to relevant institutions, such as the CCMA and Labour Courts. Bargaining councils use provisions of the LRA to bargain and if settlement is reached, a collective agreement is signed. If a dispute arises from a disagreement, the CCMA can be a resolution.

Application of the Competition Act in Respect of Employment

Section 3(1) provides that the Act "applies to all economic activity within, or having an effect within, the Republic, except:-

a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No. 66 of 1995);
b) a collective agreement, as defined in section 213 of the LRA."

Collective bargaining can be defined as a process whereby employers and employees or employee organisations and employer organisations meet in good faith for the purpose of resolving the labour issues among

3 Chapter 3 section 12A(3)(b): Competition Act No. 89 of 1998.

Competition and the Law continued ...

and parties to a merger are collectively bargaining on employment issues that result from a merger transaction. This does not mean that the Commission cannot encourage the parties to bargain and reach a settlement.

The Commission should consider, as a condition, an agreement entered into by the parties in resolving employment issues that result from a merger transaction. If the Commission's encouragement fails, a final independent decision should be taken. If the employment issues are as a result of a merger transaction before the Commission, then the issues should be dealt with accordingly by the Commission.

Collective agreement is a process whereby two parties write down their agreement in a form of a contract. In this regard, the Commission has no legal power to amend the signed agreement. Procedures for settlement of disputes regarding the interpretation of the application of a collective agreement must be specified in such an agreement and must provide for conciliation as a first resort and thereafter arbitration by the CCMA or the Labour Court. Section 13A(2) of the Competition Act also provides for the parties to the merger, the primary acquiring firm and the primary target firm, to provide a copy of the merger notice to any registered Trade Union that represents a substantial number of its employees or the employees concerned or the representative of the employees concerned, if there are no such registered trade unions.

The Competition Act regards trade unions' and employees' involvement in a merger transaction as very important. It is for this reason that parties to a merger are required by the Act to submit proof of delivery of merger documents to the trade union/employees when filing with the Commission. Schedule 2 of CC 4(1) requires that a summary of the effect the proposed merger will have on employment should be attached to the notice.[4] The purpose of this provision is to ensure that employee representatives are provided with the necessary information to enable them to make representations during merger proceedings, if they so wish.

The primary concern of employees would obviously be the effect of the merger on employment. The number of people who might lose their jobs determines the effect on employment. Parties to the merger, together with trade union/employees, should be responsible for a due-diligence study on the effect the merger will have on employment and then collectively bargain, if there is a need. Keeping this information from trade unions, deprives them not only of the right to access information that the legislature clearly gives them, but also their right to make meaningful representation to the Competition authorities on an issue that directly affects their interests.

Furthermore, the Commission's Rule 37 provides that a person who receives a notice [CC4(1) & CC4(2)] in terms of Section 13A(2) may notify the Commission of his or her intention to participate in merger proceedings by filing Form CC5(1) within five business days after the date on which that person received the notice. The aim of these provisions is to give trade unions/employees a right to make their submission to the Competition authorities and bargain, if possible, with parties to the merger. If an intention to participate form is filed, further submissions to support or oppose a merger should be attached.

Summary and Conclusion

It is clear from the reading of both legislations, the Competition Act and the Labour Relations Act, that their purpose is to promote the economic welfare of South Africans. When analysing a merger transaction, the Commission has a responsibility to look into employment issues resulting from the transaction. The CCMA and Labour courts only get involved on employment issues when there is a dispute and if it is brought before them to be resolved.

The LRA encourages the establishment of collective bargaining councils. Parties to the collective agreement are legally bound by the agreements entered into. Trade unions should make their demands to the employer and if the employer agrees to the demands, they are legally binding. The Commission cannot interfere in a collective bargaining process or collective agreement between the two parties, but it can attach each or both as conditions on approving a merger transaction.

The Commission should always encourage negotiations, if there is no agreement between the companies and the trade union/employees. The parties to the merger can submit the agreement as an undertaking and, if breached, the Commission will have the power to apply section 15 of the Act.[5] The Commission's decisions are independent from submissions made by both the parties to a merger and trade unions/employees, but its findings are as a result of submissions from both parties. For example, in a merger transaction between Arvin Industries Deutschland GmbH and Zeuna Starker GmbH & Co KG, the Commission approved a transaction where a union (NUMSA) accepted an employer's offer as a condition. The offer, since it was accepted, should be regarded as a collective agreement and it is binding. The Commission cannot amend the agreement, but if any party breaches the agreement, the other party will have a right to bring the matter to the Commission.

This article is in memory of our dear departed colleague, Lesiba Matjila.

4 Competition Commission's Rule 27(1)(c), Competition Act No. 89 of 1998.

5 The Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if the approval was obtained by deceit or a firm concerned has breached an obligation.

All Aboard

The case for Private Sector Participation in Port Operations

Introduction

The strategic nature of ports and their role in the areas of globalisation, international trade, economic development and Africa's own Nepad programme cannot be overemphasised. Ports provide an interchange between land and water transport operations, serving different modes of transport, mainly maritime, road and rail. They act as points of entry and exit for a country's imports and exports. Up to 98% of South African exports are conveyed through ports. The traffic handled at ports includes general bulk cargo, breakbulk cargo, containerised cargo and passenger services.

Opening the South African Maritime Academy in Cape Town, President Mbeki alluded to the importance of having efficient and well-run ports in the continent as drivers of growth, development and increased trade with the rest of the world.[1] The 2002 White Paper on National Ports Policy[2] (the White Paper), and the 2003 National Ports Authority Bill (the Bill), highlight government's thinking on port operations. In terms of these two documents, government plans to reduce and phase out its direct involvement in terminal operations by granting lease contracts or concessions to private firms in order to allow for a more competitive environment and ensure that efficiency is achieved in port operations.

Trends in Port Reform

The restructuring of ports is not something peculiar to South Africa. Globally, the private sector has gradually been getting involved in what used to be public sector turf, as far as port operations, management and control are concerned. Between 1990 and 1998 there were no less than 112 projects involving private sector participation (PSP) in ports in 28 developing countries, most of them in Latin America and the Caribbean. With four projects, sub-Saharan Africa had the lowest number, compared to 48 projects from Latin America and the Caribbean. These projects accounted for more than US$9 billion[3] in investment funds. Restructuring of ports can take many forms, including commercialisation, corporatisation, liberalisation, privatisation and concessioning.

The South African government has indicated through the White Paper and the Bill that restructuring at port level will take the form of concessions to the private sector. This is a popular model, adopted in most countries that have undertaken port reforms. The advantage of this model is that government remains the landlord, concentrating on providing other services, investing in basic infrastructure and performing a regulatory function. The private sector provides the major investment and runs the operations. Although the concessioning

1 Chalmers, R. Ports vital to SA's growth, says Mbeki. Business Day, September 11, 2003.
2 The White Paper on National Ports Policy. 2002. www.polity.org.za/html/govdocs/white_papers/transport.
3 Sommer, D. 1999. Private participation in port facilities – recent trends. *Public Policy for the Private Sector.* Note No. 193. Van der Veer, JP. 2001. Private sector involvement in ports: Economics and policy. NERA, No. 24.

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of the Durban Container Terminal (DCT), identified as the pilot privatisation project, was expected within the first half of this year,[4] there has been talk of this process being put on hold for at least 18 months,[5] sparking a series of criticisms from various quarters. However, the ministry of Public Enterprises has allayed such fears by indicating that an announcement on the DCT concession is imminent.[6]

Why Private Sector Participation?

In a rapidly regionalising and globalising world where policy convergence is encouraged, it is common for governments to undertake certain policies simply because it is fashionable to do so. It is thus critical for our government not to lose sight of why it undertakes certain projects, especially in the context of the debate on the restructuring of state-owned assets. In light of this, the following are some of the reasons cited by central governments and, in certain instances, by our government[7] for involving the private sector in the provision and management of port services:

- Increase operational efficiency
- Attract private investment in port infrastructure
- Enhance competition among and within ports
- Facilitate entry into certain markets and promote international trade
- Prevent abuse of monopoly and market power by firms, government or labour
- Adapt to changing global trends
- Reduce government deficits
- Reduce government subsidies
- Redistribute wealth.

Increase operational efficiency:

The question of poor turnaround times at the Durban and Cape Town Container Terminals has hit media headlines many times in the past. According to the Chief Executive of the South African Port Operations (SAPO), the organisation is beset by unacceptably low levels of productivity, high levels of uncertainty in respect of transit time, reliability and quality, as well as lack of co-ordination between the various modes of transport.[8] The combined effect of this on costs is enormous, thereby compromising the competitiveness of our ports at the international level. The concessioning of port operations to the private sector, when coupled with the introduction of effective competition, should ensure operational efficiency, effectiveness of services, increased productivity and a reduction in shipping costs.

Attract private investment in port infrastructure:

One of the problems facing our network industries, including transport, is ailing infrastructure and lack of investment funds. Further compounding the problem is the fact that the volumes of traffic in South African ports have been increasing over time.

Between 1990 and 1998 port container traffic doubled. Volumes at the Durban terminal outstriped capacity by as much as 26%. An estimated R16 billion is needed to upgrade, revamp and expand the existing port infrastructure to meet increasing traffic. At the Durban terminal alone, approximately R2,5 billion is needed to recapitalise the terminal. It is doubtful whether government has the capability and willingness to commit such large sums of money to these projects. Instead of burdening the national fiscus, government could mobilise private sector investment and transfer the operational and investment risk to the private sector. Money saved this way could then be directed to other pressing social development programmes.

Enhance competition among and within ports:

Competition at the port level may arise firstly from other modes of transport, a concept referred to as 'inter-modal competition'. If other modes of transport, especially land transport, are cheaper than sea transport, users will be attracted away from ports. However, ports have a competitive advantage over trucks, for example, when it comes to value-adding processes. Quayside activities might include further processing of products, packaging and storage, thus playing a vital role in the production chain.

A second source of competition for ports is what is referred to as 'inter-port competition'. Two or more ports within a country may compete for traffic. For instance the DCT may compete with Richards Bay for port users. Alternatively South African ports may compete with a port in Mozambique or Namibia, for example. Inter-port competition is driven by a number of factors including efficiency, service quality and tariffs. A third source of competition for ports is 'intra-port competition', which occurs when service providers in the same port compete for traffic.

International Experience

The results of port reform in other developing countries speak for themselves. The first group of countries to undertake port reforms in Latin America has reported remarkable improvements in operations. In Argentina the concessioning of six terminals to five competing operators in Buenos Aires in 1993 has largely been hailed a success due to the resultant increased throughput, lower costs for port users and a fourfold increase in labour productivity. When Mexico concessioned operations at the Port of Law in 1993, the results included reduced total costs and reduced ship waiting times from an average of 1,4 days in 1991 to 0,6 days by 1994.

As a result of port concessioning, Colombia reports an 85% reduction in average ship waiting time and productivity increases in offloading time from seven containers per hour to 60 containers per hour. Cargo handling tariffs decreased from US$600 per container in 1993 to US$150 in 2001.[9]

Conclusion

Although government has often indicated its commitment to port reform, there have been mixed signals of late. One of the stumbling blocks to this process is the possible effect on employment. It is imperative that port reforms take into account the concerns and needs of organised labour. Although negotiations have been going on between Government and Labour, it is not clear whether an agreement has been reached. With international trade on the increase and investment backlogs piling up, the concessioning process should be accelerated for the good of the country and the continent. The effect of the reforms on labour should be positive over

4 Parr, G. Privatisation offers long-term gains. Business Day, May 21, 2003. Jenvey, N. Local, international firms set sail for ports contracts. Business Day, July 31, 2003.
5 Ensor, L & Phasiwe, K. Ports concession put on hold for 18 months. Business Day, September 18, 2003. Commentary, Ports Priorities. Business Day, October 6, 2003.
6 Durban container concessioning not on hold [says Radebe] http://www.rra.co.za/media. Port concessions due to happen soon. http://www.rra.co.za/media.
7 As reflected in the spirit of the White Paper.
8 Morwe, T. South African Port Operations. Business Day, 11 February 2003.
9 Hoffman, J. 2001. Latin American Ports: Results and determinants of private sector participation. *International Journal of Maritime Economics*. Vol 3 (221-241).

Polymer Pricing Problematic

A Study by the Commission

The Commission has completed its study into excessive pricing in the polymers sector. Polymers are plastics, essentially tiny molecules strung in long repeating chains to form an extensive range of products like pipe, cable, footwear, food packaging and containers, toys, automotive parts, lids and caps, to name just a few.

Investigating possible excessive pricing typically requires two aspects: 1) a review of the underlying conditions of the sector, considering industry structure and strategy, evidence of barriers to entry, and sector-specific demand and supply components, and 2) in line with the Competition Act, an evaluation of industry prices within a suitably defined market.

The chemical sector, contributing around 5% to GDP and approximately 25% to SA's manufacturing sales sector, can be divided into four categories, which principally relate to stages in the conversion of raw materials through to final product: base chemicals, intermediate chemicals, chemical end-products,[1] and specialty chemical end-products. It is in the second stage that the petrochemical building blocks propylene, ethylene and vinyl chloride are polymerised to form the thermoplastics polypropylene, polyethylene and polyvinyl chloride.[2 3 4]

Consolidation in the corporate structure of the South African polymer and plastics sectors has yielded two main corporate groupings, notably Sasol Polymers and Dow Sentrachem, each firm spanning the processing of raw materials to the manufacture of finished products. Using production facilities at Sasolburg and Secunda to process coal, Sasol produces and supplies a range of products like gas, petrol, diesel and various monomers and polymers. Dow is a leading science and technology company worldwide, with

annual sales of approximately US$28b in 170 countries.[5]

Polymer demand is a derived demand, which, together with the fact that differences in product function and use imply differentiation and low substitutability to consumers, means that demand is relatively inelastic.[6] On the supply side, the existing sunk capacity, together with economies of scale associated with the sector, means that entry is relatively unattractive. Regarding barriers to entry, the sector is characterised by:

1) significant economies of scale, in most cases in excess of South African demand, implying a tendency of the industry to move towards a natural monopoly market structure,
2) vertical integration, crucial for firms to have guaranteed supplies of polymers (which requires establishing long-term supply relationships) and
3) protective tariffs (10% ad-valorem on FOB value; tariffs faced by EU imports are to be reduced to 0% by 2012).

The polymer product markets are given as polyvinyl chloride (PVC), polypropylene (PP), PET and polyethylene (PE), the last of which can be further divided into low-density polyethylene (LDPE), linear low-density polyethylene (LLDPE) and high-density polyethylene (HDPE). Note that in South Africa, PET and HDPE are produced by Dow (or a subsidiary) rather than Sasol Polymers, and accordingly are not appraised by the Commission. The functional market concerns the manufacture of polymers, as opposed to their distribution, or indeed further processing downstream. The relevant geographic market for a product can be defined using a combination of shipment and transport cost studies, which together support the aggregate polymer market, as well as the sub-group PP, being considered as global markets, while PVC, LDPE and albeit less conclusively LLDPE, are determined to be national markets.

A firm can only be accused of excessive pricing if found to be a dominant player, as excessive pricing is an abuse of a dominant position. Sasol Polymers is strongly dominant in those markets where the geographic dimension is defined as national i.e. the PVC, LDPE and LLDPE markets. 'Excessive pricing' is defined in the Competition Act as being a price that:

1) bears no relation to the economic value of that good or service, and
2) is in fact higher than that value. Thus, while a dominant firm cannot abuse its position to charge an excessive price, the fact that it is not specifically prohibited from charging the rational monopolist price implies that in only certain cases can the monopolist price be considered excessive.

1 Deutshe Bank: Global Chemicals (2001) Chemicals for Beginners, 3rd edition.
2 Note that the term "polymer" refers to these polymerised base chemicals. Polymerisation is the linking of individual molecules or "monomers", such as propylene, into the long chains or "polymers", such as polypropylene. This happens in the presence of pressure and a catalyst (Deutshebank, 2001). Five commonly used polymerisation processes are: 1) bulk/gas phase polymerisation, 2) solution polymerisation, 3) slurry polymerisation, 4) suspension polymerisation, and 5) emulsion polymerisation.
3 Plastics can be divided into 2 main categories – thermoplastics and thermosets. Thermoplastics soften on heating and then harden again when cooled. They can therefore often be remoulded, or extruded and, increasingly, recycled. Thermosets never soften once they have been moulded.
4 Crompton, R. (1995) An Industrial Strategy for the Commodity Plastics Sector: Contemporary Policy Issues, UCT Press (Pty) Ltd: Rondebosch.
5 See http://www.dow.com.
6 Malikane, C, Roberts, S and Sikhweni, N (2000) "Competition and Market Structure in the Plastics Sector: A Preliminary Analysis," TIPS Working Paper.

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To extend this conundrum, Sasol Polymers openly prices on IPP principles, but this does not imply excessive pricing either. Indeed, one could argue that IPP is a competitive constraint rather than the outcome of anti-competitive mechanisms. This may be particularly evident if the export market is a dumped market, which appears to be the case.

Applying the 'benchmark' and 'return on investment' tests fails to provide convincing evidence of excessive pricing in the polymers sector, although regarding the latter test, a concern is that the ROI rates are calculated for the whole of Sasol Polymers, rather than per polymer type, which may smooth out excessive profitability expected to be observed from PVC and LDPE production (Sasol Polymers is strongly dominant in these product markets). Further, in light of domestic polymer producers adopting an IPP strategy, the DTI might be well advised to investigate the role of tariffs in artificially holding up the domestic polymer price.

Only a weak case of price discrimination can be presented against Sasol Polymers. In the cases of PVC, LDPE, and LLDPE, markets are found to be national. Thus, firms supplied to in the domestic market, at a lower price because they export, will be exporting into markets in which they are not competing with firms producing for the domestic market only and being charged a higher price. In any case, if other firms decide to export to the same markets, they too can obtain a rebate, implying that there is no price discrimination across the separate domestic and exports market. Rather, a firm being denied an export rebate when another firm is awarded, would more likely constitute price discrimination. In the cases of the aggregate polymers market, as well as PP, the markets are considered global, implying that Sasol Polymers is not dominant, and therefore cannot be accused of price discrimination.

Case Reviews

The iFour Properties Three (Pty) Ltd Went on a Shopping Spree

The Commission unconditionally approved the transaction between iFour Properties Three (Pty) Ltd (iFour) and Corporate Landing (Pty) Ltd; Cidet 433 (Pty) Ltd; Coskin Property Company (Pty) Ltd; McCormick Property Development CC t/a MPD Crossroads; The SLK Trust and Pangbourne Properties Ltd (Pangbourne). Simultaneous with the iFour acquisitions the target firm, Pangbourne, will increase its existing linked units in iFour to being the largest linked unit holder.

iFour is a property holding company with a property portfolio of retail, office and industrial property.

The transaction entailed the multi acquisition by iFour of a number of properties from the above target firms. The Commission identified horizontal overlaps within seven narrowly defined property markets.

The Commission found that the post-merger market shares of the merged firms in all relevant markets are relatively low and concluded that the mergers would not substantially prevent or lessen competition in the relevant markets. In addition, the proposed transaction does not raise significant public interest concerns.

Commission Recommends Merger Prohibition

The Commission recommended that the Competition Tribunal prohibit the proposed merger between Allied Technologies Ltd and NamITech Holdings Ltd.

The Commission is of the view that the transaction would remove an effective competitor from the market and create significant competition concerns in both horizontal (competitor) and vertical (supply chain) relationships.

The companies compete in the area of card technology. Altech has stated that acquiring control over NamITech will complement and enhance its existing smart card technology business both locally and internationally. However, the Commission is of the view that NamITech and Altech individually have high market shares in the combined manufacture of secure and non-secure cards, and that the merger would not lead to any additional synergies.

The acquisition of NamITech by Altech would thus result in the removal of an effective competitor from the market. Pre merger Altech and Namltech compete vigorously in the manufacture of PVC cards for both the banking and non-banking sectors. The Commission further found that as the financial services sector migrates

from secure PVC cards to smart card technology over the next 3 to 5 years, the proposed merged entity will be in a position to monopolise the combined secure PVC magnetic stripe and secure smart card market, as these are the only two local companies with the capability of providing cards to the banking sector.

In addition, the Commission is also concerned that post merger concentrations in the secure and non-secure PVC card market and in the secure smart card market will allow for market power in the form of charging monopoly prices and raising rivals' costs. From a vertical perspective, the competitive concerns arise because Altech is the exclusive South African agent for DataCard personalisation equipment. Competitors have expressed concern that the merged entity will be in a strong position to raise rivals' costs and gain access to confidential business information, which would effectively place them at a significant competitive disadvantage compared to the merged entity.

Finally, the Commission found that the proposed merger raised serious black economic empowerment concerns. Although NamITech's BEE partner, Pamodzi, would benefit handsomely from a BEE shareholding perspective, Gijima, a newly established wholly owned BEE smart card manufacturing company will effectively face insurmountably higher barriers to entry in an already highly concentrated market, particularly with respect to supplying the financial services sector.

The Commission thus concluded that the transaction will substantially prevent or lessen competition and negatively affect the public interest and therefore recommended a prohibition of the merger.

The Competition Tribunal will hear evidence from the Commission and the merging parties in its hearing.

Tribunal Rules a Change of Control: Ethos Private Equity Fund iv and the Tsebo Outsourcing Group (PTY) Ltd Merger

The Commission unconditionally approved the transaction between Equity Fund iv and the Tsebo Outsourcing Group (Pty) Ltd.

The primary acquiring firm is Ethos Private Equity Fund iv (Ethos). Ethos and its group of companies are private equity fund managers, which control a number of companies. Ethos invests in selected companies in exchange for equity shares in such companies. The only relevant subsidiary for purposes of this transaction is Pleasure Foods (Pty) Ltd (Pleasure Foods). Pleasure Foods controls the Wimpy, Whistle Stop and Market Café brands.

The primary target firm is Tsebo Outsourcing Group (Pty) Ltd (Tsebo), a company in which Ethos has invested and subsequently in which it has acquired an equity share. Tsebo, through its subsidiaries, is involved in hospitality and facilities management businesses. The only relevant subsidiary of Tsebo, for purposes of the present transaction, is BJ's Franchising (Pty) Ltd (BJ's).

In terms of the transaction, Ethos intends to increase its share holding in Tsebo from slightly below 50% to slightly above it. The parties, prior to the notification of the merger, had obtained legal advice that the transaction was not a notifiable merger. In response to the aforementioned legal advice, the parties sought an advisory opinion from the Commission, which expressed the view that the transaction appeared to constitute a merger as defined in section 12 of the Competition Act, No. 89 of 1998 as amended (the Act).

On 11 June 2003, the parties notified the proposed merger to the Commission under protest and maintained that in their view the merger was not notifiable. On receipt of the notification the Commission accepted that it had jurisdiction. During the merger hearing on 20 August 2003, the Tribunal heard arguments relating to the jurisdiction of the Commission as well as the merits of the merger itself. On the same day of the hearing the parties were advised by the Tribunal that whatever decision was taken on the jurisdiction of the

Case reviews continued ...

Commission, the parties may implement the transaction, as it raised no competitive or public interest concerns.

With regards to the jurisdiction of the Commission, Ethos argued that the only effect of the transaction would be that its equity stake in Tsebo would be increased and that its ability to control the firm would remain unchanged, even if its share holding would, post-merger, be more than 50%. The reason for this is that in terms of Tsebo's shareholder's agreement, all decisions of consequence require the approval of 67% of shareholders. Ethos, therefore, contends that it has joint control over Tsebo pre and post merger and there has been no acquisition of control.

The Commission argued that section 12(2) of the Act constitutes "bright lines" which, if crossed, renders a transaction notifiable, irrespective of shareholder arrangements inter se. The Commission submitted that other jurisdictions adopt bright lines because they are mostly consistent with commercial reality and create certainty.

The Tribunal found that when Ethos acquired 50% plus of the issued share capital in Tsebo, it is deemed to have acquired control in terms of section 12(2)(a) of the Act, as it beneficially owns more than one half of the issued share capital. The Tribunal further found that Ethos' ability to control Tsebo on its own is not negated by the existence of another entity which simultaneously exercised joint control over Tsebo.

The Tribunal expressed its concern that if the Commission was found to have no jurisdiction, every acquirer of 50% plus of the issued share capital in a firm could, in future, seek to avoid notification by arguing that in light of some set of circumstances or arrangements between shareholders inter se,
there was no acquisition of control.

The Tribunal concluded as follows: *" In the present case, the shareholders agreement provides for a two-thirds majority vote on a specified number of issues. On the parties' approach, if the shareholders were to amend that arrangement tomorrow and remove some items from the list, it would on each occasion trigger a difficulty of whether sole control was achieved, a question that might be as difficult to answer for the parties as it is for the Commission. It is for this reason that the Act has adopted the blunt approach of recognising instances of control; not just in a legalistic sense, but also as a concept that acknowledges economic and commercial reality as well."*

The Tribunal subsequently found that the transaction is notifiable. The finding is certainly subject to criticism and it remains to be seen whether it will be challenged in the future. Right or wrong the decision does, however, contribute a lot to legal certainty and significantly eased the Commission's task of determining whether there has been an acquisition of control or not.

With regards to the merits of the case, the Commission identified a horizontal overlap in the market for fast food outlets linked to major fuel stations. The Tribunal found that the post merger market share of the merged firm would be below 10%. In addition, there are a number of competitors in the broader market for fast foods (not necessarily outlets linked to fuel stations).

The transaction was approved as it raises no public interest concerns and will not significantly prevent or lessen competition.

Conditional Approval and Fine Recommended for Arvin and Zeuna Merger

The Commission has approved with conditions the intermediate merger between Arvin Industries Deutschland GmbH (Arvin) and Zeuna Starker GmbH & Co KG (Zeuna). In terms of the sale of partnership interests, Arvin acquired 51% partnership interests from the family partners in Zeuna to increase its 49% interests.

In contravention of the Competition Act, the transaction was implemented before the parties notified the Commission. The Commission and the parties have failed to reach a settlement and the Commission will prosecute them for contravening the Act.

The transaction is between international companies that have subsidiaries in South Africa. Locally, US based Arvin is involved in the market for the manufacturing and supply of automotive components to the original equipment manufacturers (OEM) and to the aftermarket. Zeuna, a German company, is also active in South Africa in the broad market of manufacturing and supplying automotive components to the OEMs.

The Commission concluded that while the transaction will not substantially prevent or lessen competition in any markets, the merger has negative effects on employment and on the Ga-Rankuwa region. The parties submitted that a number of retrenchments would occur as a result of the merger.

The parties are to report on the progress of the implementation of these conditions on a quarterly basis up to the time that the conditions have been fulfilled. The conditions will be deemed to have been fulfilled when the Commission is satisfied there will be no further retrenchments as a result of the merger.

The conditions include, amongst others, that the merging parties offer employment with relocation benefits to employees who are directly affected by the relocation of the catalytic converter manufacturing plant, when positions become available at the Cape Town catalytic converter manufacturing plant. In addition, the retrenched employees must be offered retrenchment packages and retraining to enable them to get alternative employment. The employer must also provide counselling to the affected employees, including individual and family counselling, coping with change, personal financial management and entrepreneurial opportunities.

Commission Recommends Unconditional Acquisition of Seven Eleven

The Commission unconditionally approved the acquisition of Seven Eleven by Fluxrab.

The primary acquiring firm Fluxrab Investments No 58 (Pty) Ltd (Fluxrab), is a wholly owned subsidiary of Metcash Trading Limited (Metcash). Metcash is involved in the wholesale, distribution and retail of the fast moving consumable goods (FMCGs).

The primary target firms are Seven Eleven Africa (Pty) Limited (Seven Eleven) and certain assets of Seven Eleven Corporation SA (Pty) Ltd (Seven Eleven Corporation). Seven Eleven is involved in the wholesale, distribution and retail of FMCGs.

In terms of the merger agreement, Fluxrab will acquire inter alia the entire issued share capital in and all claims on the loan account against Seven Eleven on the basis that some of the retail store businesses of Seven Eleven will not be acquired by the primary acquiring firm, but will be taken over by Seven Eleven Corporation and turned into franchisees of the primary acquiring firms. In addition the rights of Seven Eleven and Seven Eleven Corporation in respect of the Seven Eleven franchises will also be acquired.

The transaction results in a horizontal overlap and vertical integration between the merging firms. The horizontal overlap is in respect of convenience retail of FMCGs as well as franchising in the market for convenience retail of FMCGs. The vertical integration is in respect of the wholesale and retail markets for FMCGs.

The Commission concluded that the horizontal overlaps and the vertical integration will not substantially prevent or lessen competition in the relevant markets. In addition, the proposed transaction does not raise significant public interest concerns. It is worth pointing out, however, that all franchise agreements and contracts will remain in force or in effect for franchisees.

The Commission therefore recommended that the proposed transaction be approved without conditions.

Water Clarification Merger Approved

On 18 September 2003, the Competition Tribunal upheld the recommendation of the Commission and unconditionally approved the large merger between Chemical Services Limited (Chemserve) and Ondeo Nalco South Africa (Pty) Ltd (Ondeo Nalco). The transaction comprises the acquisition by Chemserve (a holding company for Chemical Services Group) of the entire issued share capital in Ondeo Nalco. Chemserve currently owns 50% of Ondeo Nalco's issued share capital with Ondeo Nalco Company, incorporated in the United States, holding the balance. The transaction results in a change from joint to sole control over Ondeo Nalco by Chemserve. Post-merger, Ondeo Nalco will be a wholly owned subsidiary of Chemserve. Chemserve is a subsidiary of AECI Limited, a speciality product and service solutions organization active in the chemical industry. Chemserve has a number of subsidiary companies that market speciality chemicals to a range of industries.

Ondeo Nalco is a manufacturer of speciality chemicals and a provider of water treatment solutions. The Commission identified a horizontal overlap in the narrowly defined market for the provision of water clarification and solid liquid separation solutions within South Africa. The parties argued there is no horizontal overlap due to the fact that the two merging firms focus their water treatment operations on different customer segments. The Commission did not accept the distinction made by the merging firms based on customer segmentation or application of the product. The Commission based its finding on interviews with competitors and industry experts.

The Competition Tribunal found that even if it were to accept that the merging firms operate in the same market, the transaction would not significantly prevent or lessen competition. The Commission further investigated the vertical effect of the transaction and concluded that the transaction would result in Ondeo Nalco being backwardly integrated with a supplier of chemicals used in the provision of water treatment solutions. The transaction would further result in Chemserve being vertically integrated with a supplier of water treatment solutions. The Tribunal ruled that the transaction would not result in foreclosure, as it would not be economically feasible to do so. It upheld the Commission's recommendation.

The Drilling Industry Consolidates Through Two Major Mergers

During the last few months, the Commission investigated two mergers, which took place in the drilling industry.

The first transaction was between Altas Copco South Africa (Pty) Ltd (Copco), which acquired two local firms, Professional Diamond Drilling Products (Pty) Ltd (PDDE) and Mining and Drilling Services (Pty) Ltd (MDS).

The second transaction involved Boart Longyear, a division of Anglo American Operations Limited (Boart) which acquired another local firm, Huddy (Pty) Ltd (Huddy).

PDDE and MDS are primarily active in the sale of core drilling equipment used for exploration drilling, and compete directly with Boart and Huddy. The transactions would effectively cause two competitors to be removed. During the investigations the Commission found certain market participants were both manufacturers and sellers of the products and certain were only selling the products.

Consequently the Commission made a distinction between two relevant functional markets, manufacturing and sales. The Commission thereafter proceeded to identify the relevant product markets in which the merging parties competed. The Commission identified four relevant product markets in which Boart, Huddy PDDE and MDS compete; these being sale of diamond drill bits, reaming shells, core barrels and drill rods in a national market.

Notwithstanding high concentration levels, the Commission concluded that the barriers to entry into the different markets are relatively low. The Commission identified various international manufacturers with whom distribution and agency agreements could be entered in order to import products.

The Commission accordingly approved the Copco, PDDE and MDS transaction without conditions.

In addition to the above-mentioned product markets the Commission identified various other markets in which Boart and Huddy compete, in particular in the industrial diamond tools industry and percussion drilling industry.

With regard to the different markets identified in the above-mentioned industries, the Commission found that the merger would only lessen competition in two markets, those being the markets for screw fed hydraulic drills and screw fed pneumatic drills used in the underground core drilling industry. It therefore recommended a divestiture of a division of the target firm manufacturing these drills.

Win or Lose

The Battle Never Stops

The recent Competition appeal court ruling pertaining the Patensie case[1] was a major triumph for small businesses and the Commission because it highlighted that competition will be protected by all means and that no one is above the law. It also demonstrated that size did not matter when it came to competition issues. This also showed fairness in the Competition Act by proving that Competition Authorities (Authorities) process and proceedings could be appealed if a party or parties were not happy with any judgement handed down by the Commission or the Tribunal. This judgement served as a catalyst in highlighting the need for participation by Authorities and the impact this could have on small businesses.

The satisfaction derived from this major victory was somewhat diluted by a crushing blow dealt to the empowerment and promotion of small businesses when the Appeal Court handed down its judgement in the JD Group's appeal. "Ruling leaves small furniture makers vulnerable" (Business Day, 26 September 2003) highlighting that the JD Group had won its appeal against the Competition Tribunal's ruling, which had required that the JD Group purchase from the independents, at least in the same proportion as from their other suppliers for the next three years, after which the condition will fall away.

This judgement served as a reminder and reinforcement of the independence of all the Competition Authorities from each other. It also raised a host of questions around advancement, protection and empowerment of small businesses by the Authorities.

The Competition Act was passed to promote and maintain competition in order to, amongst other things, ensure equitable participation of small and medium enterprises in the economy and to create a greater spread of ownership especially amongst previously disadvantaged persons. Therefore, Authorities in their assessment of competition issues should try at the same time to balance these with public interest issues.

"Appeal ruling offers protection for small farmers," claimed Advocate Simelane, and "we were pleased that the Appeal Court concurred with our position. It shows that the system does work..."

Legalbrief, 10 July 2003.

Does this mean that the Authorities should promote public interest issues at the expense of competition? How do you balance the two when competition or survival of a business entity will be severely affected by the promotion of public interest issues? Do you ignore the public interest issues to the detriment of up and coming entrepreneurs by putting your focus on competition issues? In the case of Metrorail and others vs the Rail Commuters Action Group, the appeal court judges laid into their high court colleagues, arguing their judgment had no basis in law. The carrier's statutory obligation to run a commuter service "in the public interest", three of the five appeal judges averred, meant only that Metrorail must administer the service "with due regard to the total transport needs of the republic."

These may be separate incidents but they all deal with public interest issues. Should we therefore conclude from these judgements that public interest issues do not carry much weight in our country and should this stop people from coming out and stating their dissatisfaction? On the contrary, these judgements should highlight the need for more participation in issues that affect our safety, businesses, society and any other aspects of our lives.

They also prove that our democracy is alive and well, because just as a complainant has a right to tell his/her story, the respondent also has a right to be heard and protect his or her interest (whether justified or not) and also means that going through the first hurdle does not mean the end of the fight or struggle.

As South Africans we need to know, understand and appreciate all legislation that may have an impact on our lives. Not only that, but we should also put it into practice. Both Competition Appeal Court and Supreme Court rulings may have an adverse impact on public interest issues but that should not mean defeat or the end of the road - it should be a wake up call for all concerned. Affected parties should take part in these proceedings and support each other, because two or more voices carry more weight than a lone voice.

As a small businessperson you may not have been affected by the JD Group judgement,

1 Two farmers lodged a complaint with the Commission against Patensie Sitrus Beherend Beperk, alleging that Patensie held exclusivity agreements to pack and market the citrus crops of its members. The Appeal Court concurred with the Commission's decision that this conduct was anti-competitive. This judgement will ensure that farmers are able to deal with any of the independent pack houses and will now be able to shop around for the packing and export of their produce.

Win or Lose continued ...

but this is not and will not be the last case to pass through the Commission. There may be other transactions taking place within your industry that may have an impact on your business. For instance, the removal of an effective competitor or supplier may result in your closure or high entry barriers into certain markets. Therefore, you should ensure that your voice is heard where it matters most, by protecting your business interests.

As South Africans we should move away from apathy and start ensuring that our voices are heard by the authorities - show your dissatisfaction, take part and protect yourself, but at the same time taking note that just as you have the right to be heard, the other party also has a right to state his/her case. Also remember that the Act does provide for parties to appeal the Commission or Tribunal's decisions. Competition is about ensuring that you get your market share of the pie and that means no business or public interest groups should accept any decision that is harmful to them without defending - so be proactive, take part and let your voice be heard.

In conclusion, one could ask if the Appeal Court's decision was good or bad? It really depends on which side of the fence you are standing on. This may actually be good for independent suppliers, because they may start looking for other business opportunities and get into ventures with other firms in different industries. Competition is all about making business sense and protecting competition, rather than competitors.

Taking Competition into the Future

Commission Contributes to Shaping a Competitive Business Environment

The Commission's investigations and merger analysis have started having a profound impact on business activities within the South African economy. The achievements and focus highlighted in its annual report, which was released in September 2003, confirm that the Commission is progressing well.

Responses by parties to some of the Commissions investigations - even before the recommendations have been referred to the Tribunal - have convinced the Commission that in its fourth year, it has begun meeting its objectives to regulate and transform the economy. During this financial year, the Commission continues to seek more prosecutions, test the law and create precedents across all areas of our influence, e.g. the Federal Mogul Case whereby the Tribunal imposed a fine of R3 million for having contravened Section 5(2) of the Competition Act (minimum resale price maintenance).

Cartels remain an area of primary focus for the Commission, as well as outreach and advocacy activities. A key objective for this year is to engage with government departments and encourage them to take into account the provisions of the Competition Act as they restructure state owned enterprises and produce legislation to deal with the transformation of industries under the direct control of the state.

The Commission believes that it has a role to play in developing entrepreneurs, particularly those from previously disadvantaged backgrounds. The Commission is developing a policy document on participation for SMEs and black owned businesses in Commission proceedings, actively encouraging these stakeholders to take part in relevant proceedings, taking into account the provisions of the Broad Based Black

Taking Competition into the Future continued...

Economic Empowerment legislation, policies and industry specific empowerment charters. The Commission also seeks to expand ties with institutions that deal with SME and black business issues.

Last year, the focus was on service delivery and the average turnaround times have improved significantly. Turnaround for Mergers & Acquisition analysis averaged 27 business days; 173 days for complaints and exemptions, less than 18 days for advisory opinions for the 2002/2003 financial year.

Highlights of the Commission Annual Report for 2002/2003

Mergers and Acquisitions

The Commission received 211 merger notifications. Of these, 68 were large mergers, 138 intermediate and five small. The number of notifications represents a slight decrease in the total received the previous year, although the number of large mergers had increased from 47 to 68, whilst intermediate mergers decreased from 169 to 138. Merger activity occurred mainly in the manufacturing sector. The chief drivers for mergers were management buy-outs. These were as a result of large companies divesting of their non-core businesses, rescuing failing firms, black economic empowerment initiatives - particularly in the mining and petroleum industries - and financial services restructuring.

There was little merger activity involving BEE and SMEs during this period, except in the mining sector, where mergers were driven by the empowerment charter. Mining comprised 9% of all mergers notified to the Commission. The poor levels of M&A activity involving BEE and SMEs on other sectors may be attributed, largely, to the difficulties these entities face in raising finance for buying other interests.

Enforcements and Exemptions

The Commission received 82 complaints and initiated seven investigations in 2002/2003. Some were carried over from the year before, so the total number of complaints under investigation for the year was 152. The seven investigations initiated by the Commission involved sectors in which cartels are operating, and the Commission wanted to establish whether collusive practices were taking place. Notably, the Commission referred the findings of its investigation into price fixing in the healthcare industry to the Tribunal for determination.

The Commission dealt with seven exemption applications and approved two.

Precedent and Key Decisions

Three important decisions and clarifications on the application of the provisions of the Competition Act were handed down during the year.

The first is that the Commission is entitled to extend an investigation more than once, provided the extension is obtained before the lapsed date or the expiry of the investigation period. Second, that when investigating minimum resale price maintenance, all the Commission needs to show is that the practice exists in order to bring the case before the Tribunal. The onus is on the respondent to prove that it is not engaged in the practice. Finally, the Competition Appeal Court found that during the course of an investigation, the Commission may investigate beyond the scope of the complaint if there is sufficient information to justify a broader investigation.

Promoting employment and advancing social and economic welfare of South Africans

Compliance outreach and education programmes have meant greater stakeholder participation. For example, trade union participation in merger activities has grown and now includes, in some cases, entering into negotiations with parties to the merger.

The most active unions were NUMSA and SACCAWU.

The Commission had reviewed the impact of mergers and acquisitions on employment. From September 1999 to March 2003 a total of 11818 job losses occurred, with gains of about 24 920 - a net gain of 13102 jobs. The Commission also found that although there were job losses emanating from certain transactions, they were of a smaller magnitude than those published by Statistics SA. Indeed, it found that mergers within less concentrated industries resulted in job gains.

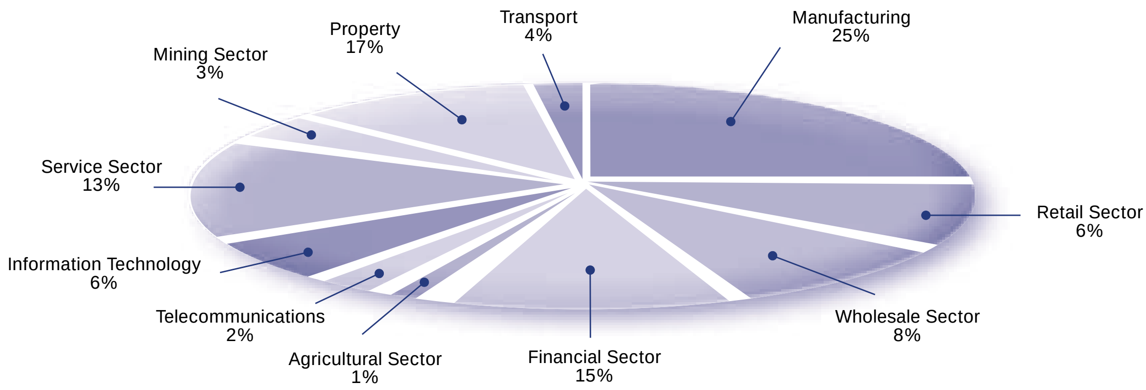
Promoting greater spread of ownership, especially the ownership stakes of historically disadvantaged persons

Aside from M&A activity in the mining sector, a noteworthy transaction referred for approval in the motor industry was the notification of six large mergers by Daimler Chrysler. This involved the implementation of their new dealer network strategy which aimed at improving the competitiveness of dealer networks owned by BEE Firms.

Merger Review

April 2003 - September 2003

During the period under review the Commission received a total of 127 merger notifications. Of the total notified cases, 77% (98) were intermediate mergers, 22%(28) large and 21%(1) was a small merger. There were 121 cases approved, one withdrawal and one which was a non-notifiable case and the remaining cases were still under investigation. It is evident from the diagram below that the manufacturing sector has continued to dominate, followed by property (17%), financial (15%) and service sectors (13%).



Overview of the WTO's 5th Ministerial Meeting in Cancun, Mexico

Introduction

The Commissioner, Adv. Menzi Simelane, attended the WTO's 5th Ministerial meeting in Cancun, Mexico from 10-14 September 2003 as a member of the South African delegation. It was important for the Commission to be present at the meeting, as competition policy's potential inclusion in the WTO formed a crucial part of the negotiations.

The collapse of the WTO's 5th Ministerial Meeting was a result of a deadlock on the four major subjects negotiated at the conference. These subjects were: agriculture, non-agricultural market access, development issues and the Singapore issues. The Singapore issues are global rules in trade and investment, trade and competition policy, transparency in government procurement and trade facilitation.

CONTINUED FROM PAGE 16

The Ministerial Meeting lasted five days, and on each of these days the four subjects were discussed in both formal and informal meetings of the ministers.

The Cancun Ministerial was intended as a stocktaking exercise half way through the Doha Development Round,[1] which was launched in Qatari, Doha in November 2001, with a deadline of December 2004. To date, all deadlines have been missed and there was little evidence of progress in the negotiations until August, when two advances were made; the first being the deal allowing developing countries to import cheaper generic drugs in national emergencies and the second being a joint proposal by the EU and the US to liberalise agricultural trade.

Why the Ministerial Failed

At the risk of oversimplification, Cancun's failure can be attributed to the EU and the US's unwillingness to totally reform their agricultural policies, whereby enormous subsidies[2] are paid to sustain non-competitive agricultural sectors at the expense of farmers in developing countries.

The Economist (20 September 2003, 13) supports this explanation when it lays the blame squarely on the developed countries' agricultural support. The following examples were cited:

- The US's cotton subsidies
- Japan's support of its rice farmers
- The EU's 'unsuccessful' attempt at reforming its Common Agricultural Policy (CAP). The reform did not reduce the overall level of subsidisation but instead shifted payments from one form to another (Draper, 2003: 1).

The pressure exerted by the EU and other developed countries (excluding the US) on developing countries to enter into negotiations on the Singapore issues, exacerbated the agriculture issue and the result was a deadlock.

How the Singapore Issues Contributed to the Failure

As the Commission, we should be the most interested on how the topic of a Multilateral Framework on Competition (MFC) being negotiated in the WTO influenced the outcome of the negotiations. The role of competition policy in the WTO is one of the so-called Singapore issues, as it was at the first Ministerial Meeting held in Singapore in 1996 when a Working Group was set up to explore the possibility of a MFC.

Firstly, it is important to understand why so much attention has been focussed on the Singapore issues. The EU and other developed countries (in particular the Group of 10[3] countries) argue that by harmonising rules in investment, competition policy, transparency in government procurement and trade facilitation, trade flows will increase and become more predictable and thus development will be enhanced. However, developing countries are more cynical about the EU's preoccupation with the Singapore issues and they claim that the EU is using the Singapore issues to divert attention away from agriculture.

The diverging views on what the Singapore issues actually are about contributed much to the controversy surrounding this subject. Draper (2003, 2) describes the EU's view on the Singapore issues as being about 'establishing minimal rules governing each area in an effort to harmonise trade procedures', whilst the developing countries see them as rules with the intention of 'levering open developing country markets for exploitation by multinational corporations from the developed world.'

From the outset of the conference it was clear that it was divided along development lines: in general, the EU and its partners in the Group of 10 countries wanted movement on the Singapore issues but were unwilling to budge on agriculture, whilst developing countries (including South Africa)[4] refused to consider the Singapore issues if their particular concerns were not addressed.

On day two of the Ministerial, over ninety countries signed a letter stating that they were not prepared to enter into negotiations on the Singapore issues. Various reasons were put forward for this by the developing countries, the most common being the fear of losing national sovereignty and not wanting to overburden negotiators.

The draft ministerial text gave two options with respect to the treatment of the Singapore issues: the first was to launch negotiations in Cancun and the second was to refer the issues back to Geneva for clarification. At Cancun it emerged that the WTO members were

1 The aims of the Doha Round are:
- Agriclture: the reduction of trade distorting farm support such as tariffs on agricultural import tariffs and export subsidies
- Industry: reduce industrial tariffs specifically in areas (such as textiles) where developing countries have a comparative advantage
- Services: freer trade
- Global Rules in Competition, investment, transparency in government procurement and trade facilitation.

2 According to press reports, the subsidised industrial countries pay per day to their farmers amounts to more than $1 billion - this is six times more than their foreign aid payments (Business Day, 8 September 2003).

3 Including Japan, South Korea, Switzerland, Norway, Israel and Taiwan.

4 A new block of co-operating developing countries was formed prior to Cancun in order to tackle the EU and US over their agricultural policies. This group was called the G21 countries and at the time of the ministerial the following countries were members: Argentina, Bolivia, Brazil, Chile, China, Columbia, Costa Rica, Cuba, Ecuador, Egypt, Guatamala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Phillipines, South Africa, Thailand, Venezuela. The block proved to be “well organised and professional” and alliance to be taken seriously as it represented half the worlds population and two-thirds of its farmers (Economist, 20 September 2003, 30).

Overview of the WTO continued ...

Most developing countries opted for the second alternative in conjunction with not allowing this decision to obstruct progress in the other areas. Other countries (mostly developed but a few developing) disagreed with this stance and stated that the failure to negotiate the Singapore issues would result in the collapse of the other negotiations. They stated that the seven years since Doha, had been ample time for the Singapore issues to be clarified. Another smaller group of developing countries suggested that the four Singapore issues be dealt with separately and that the time was right for negotiations on trade facilitation and transparency in government procurement, but that it was premature to negotiate investment and competition policy.

Eventually, on the final day of the meeting, the EU offered to drop two of the four Singapore issues - competition and investment. However, this concession failed to save the meeting, as without commitments on agricultural reform, the developing countries refused to consider negotiations on the Singapore issues.

Conclusion

The WTO trade Ministers will meet again before 15 December 2003 in Geneva to continue with the talks. As expected, there are widely diverging views as to whether or not the Doha Development Round can be saved.

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Obituary

Lesiba Abram Matjila
7 June 1975 - 25 October 2003

It is with sadness that we record the recent death of Mr. Lesiba Abram Matjila, in Hammanskraal, at a tender age of 28.

Lesiba, started working for the Commission as an Intern in December 2000 and continued in that capacity until November 2001. In December 2001 he became a Consultant until his appointment in April 2003 as a Labour Liaison Officer in the Compliance Division.

He possessed a powerful analytical mind. His occupation was with labour issues and, at the time of his death, Lesiba was responsible for assisting labour organisations in participating in Commission case proceedings, presentations/ workshops and writing of articles.

From the time he was employed full-time, Lesiba had a keen interest in developing a position on labour issues and the Competition Act. For the major portion of his work he was a dedicated educator. He published numerous articles on the subject in various publications. Lesiba was a formidable debater as a result of his passion for Labour Relations issues.

Lesiba was a loyal friend and colleague who will be missed by many.

A letter received from one of the stakeholder's Lesiba dealt with

Dear Advocate Simelane

It is with great shock that Sactwu learnt last week about the passing away of the Competition Commission's Lesiba Matjila.

Sactwu and its research wing, the South African Labour Research Institute (Salri), often dealt with Lesiba regarding competition matters, specifically mergers. Not only was Lesiba very helpful and efficient, he was also a pleasure to deal with - always friendly and courteous. His knowledge of competition law made him an important resource for this - and surely many other trade unions. Lesiba went out of his way to assist Sactwu in matters that affected our members. His efficiency contributed to our ability to deal effectively with mergers.

We are sure that the world is a poorer place without Lesiba and that the Commission will find it difficult to replace him.

Kindly pass our condolences on to Lesiba's family.

For Sactwu
Etienne Vlok
Senior Researcher

Southern African Clothing and Textile Workers' Union (Sactwu)

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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