Competition News
The official newsletter of the competitioncommission
Edition 30 • March 2009
Towards a fair and efficient economy for all.

In this Edition

Cartel exposed in pre-cast concrete industry

By: Lebogang Madiba

Friday the 13th of February 2009 was the day reality caught up with nine firms who have run a hard core cartel in pre-cast concrete products for more than three decades. On this day the Commission referred yet another cartel case to the Competition Tribunal for adjudication, citing Rocla, Aveng as a holding company (hereafter referred to as Infraset), Southern Pipeline Contractors (SPC), Cobro, Concrete Units, Cape Concrete, Concrite Walls, Grallio, Craig Concrete, and D&D Concrete (hereafter referred to as "the Rocla matter"). On the same day as the Commission referred these charges to the Competition Tribunal, the Commission settled certain particulars of the complaint with Aveng, including an administrative penalty of R46 million.

The case is the first major one to be resolved in the construction industry following the Competition Commission's prioritisation of competition concerns in infrastructure and construction from mid 2007. This focus of the Commission is linked to the importance of infrastructure investment in the government's growth strategy, as well as the extensive collusion uncovered in this sector in other jurisdictions such as the UK and the Netherlands with which the Commission has interacted.

Rocla, a subsidiary of Murray & Roberts, was granted conditional leniency by the Commission after coming forward in December 2007. Rocla complied with the Commission's Corporate Leniency Policy (CLP) in providing information which implicated itself and its competitors in price fixing and fixing of trading conditions, market allocation and pre-cast concrete products such as pipes, manholes and culverts. This information revealed a textbook example of a classic cartel, complete with well written *modus operandi*, sanctions for non-compliance, payments to keep competition out of the market, intent and ability to raise prices and effective monitoring mechanisms.

Given the secret nature of cartel arrangements in general, credit must be given to the Commission's corporate leniency policy for without it perhaps we may not have been able to crack some of the hardcore cartels permeating our economy such as the one discussed here. At the very least it greatly assists in obtaining information on the full nature and extent of the conduct.

Editorial Note

Two breakthrough cartel cases in construction products are covered in this edition together with articles on three other cartel cases at different stages of investigation and prosecution. These cases are reflective of the sharp increase in hard core cartel work undertaken by the Commission in recent years, most assisted by a leniency applicant under the Commission's Corporate Leniency Policy (CLP). The applications also signal that firms are becoming increasingly aware of competition law and are taking steps to avail themselves of the opportunity provided by the CLP by undertaking thorough internal investigations and bringing any problematic conduct to the Commission's attention. The applications also followed the Commission's proactive focus on sectors of concern, led by construction and infrastructure.

In the lead article Lebogang Madiba describes the case of cast concrete products, such as pipes, recently referred to the Tribunal. Shortly after the Commission's mid 2007 announcement that we were looking into infrastructure products, Rocla, a subsidiary of Murray & Roberts, applied for leniency regarding a cartel that had extended over three decades. The Commission's investigation revealed a cartel with extensive arrangements, with members fully aware of their illegality, reflected in the use of code numbers to identify participants and instructions to destroy documents. Several members, including Infraset, a division of Aveng Manufacturing, have already settled with the Commission.

Some cartel members suggested that the cartel's impact was limited because there were substitute products in the form of plastic pipes. Ironically, at around the same time the Commission was also uncovering a long-running cartel in plastic pipes. As set out by Itumeleng Lesofe, concerns identified in a merger investigation led to a leniency application filed by one of the merging parties. The investigation uncovered extensive collusive arrangements throughout South Africa with the involvement of nine players.

These two cartels have directly affected the costs of investing in water reticulation. Furthermore, the long running and extensive nature of the cartel arrangements confirms the Commission's concerns about the possibility of widespread collusive conduct in infrastructure and construction, and many other investigations are underway. As highlighted in the later article by Mulalo Shandukani, infrastructure spending has also been a concern of the Commission's annual Public Sector Consultative Forum, held with government departments and public institutions. The Forum is an important opportunity for engagement on the Commission's priorities, to identify the linkages and complementarities with the work of other public institutions. The Commission looks forward to strengthening these links.

Of the three other articles relating to major cartel cases, two describe cases being resolved and the third covers investigations recently initiated. Avish Kalicharan reports on the settlement reached with Foodcorp in the bread cartel case. Dumisani Motsamai outlines the settlement at the Tribunal stage of the case against the American Natural Soda Ash Corporation (ANSAC), ending what had been the longest running case in the history of the Commission, with important legal tests being established along the way. Neo Chabane writes about investigations begun in recent months, into petroleum products and gas following leniency applications received from Sasol. These are apparently the result of far-reaching internal investigations being undertaken by the company and suggest the extent to which competition law is now being taken much more seriously by firms.

While much of the focus in recent months has been on cartels, there have also been several major merger investigations. One of the largest mergers ever evaluated by the Commission was the proposed global acquisition of Rio Tinto by BHP-Billiton. While the merger was subsequently abandoned, the Commission had conditionally approved the deal after an extensive assessment of the many products involved. Other mergers assessed include MTN's acquisition of Verizon South Africa, where the Commission recommended approval, and Investec's acquisition of RJ Southey, which was conditionally approved.

Based on the information provided by Rocla, the Commissioner initiated a complaint alleging that Rocla, Infraset, Cobro, Cape Concrete, Grallio, D&D Concrete, Southern Pipeline Contractors, Concrete Units, Craig Concrete and Concrite Walls ("respondents") were guilty of operating a cartel in the precast concrete industry within South Africa.

Pursuant to the complaint initiation, the Commissioner summoned key representatives of firms implicated in the complaint and subsequently held enquiries with such representatives. During the enquiries, which were held over a period of several months, individual representatives of firms initially denied their involvement in the cartel arrangements but then succumbed and revealed all concealed arrangements when confronted with evidence provided by the CLP applicant.

As highlighted by David Lewis, the Chairman of the Competition Tribunal, at the hearing of the consent order reached with Aveng for the participation of its Infraset division, "the Competition Commission should make it clear who is participating in these things. 35 years – imagine what

the country has paid for these things". We briefly tell the story here.

Story of a classic cartel

It all began in 1973 when enforcement of competition laws was not as rigorous as it is has now become under the democratic dispensation. Rocla embarked on a strategy to co-operate with its competitors rather than compete with them, buy out any firm that posed a serious threat to its market share, and split up regions within which each firm could operate (produce and sell precast concrete products), whilst at the same time reserving certain regions for itself.

Over a period of time and with new entry into the market, Rocla together with Infraset actively influenced and co-opted other new firms such as Cape Concrete, Concrete Units, Cobro, Concrite Walls into the cartel. In order to compel reluctant firms to join the cartel, Rocla threatened such firms with price wars and in fact instilled a sense fear in their corporate minds. These threats were not empty as witness accounts show that some of these threats were actually carried out, specifically in KwaZulu-Natal, where the cartel led by Rocla successfully waged a price war to discipline those that had deviated. Despite the smaller firms in this region even forming a counter-cartel around man-holes, ultimately the firms were brought into line with the Rocla cartel, with D&D Concrete also being bought out of the manhole market by Rocla. Concrite Walls paid handsomely by exiting the manhole market for good. The message was loud and clear "don't play with the big boys if you can't take the heat".

The cartel's *Modus Operandi*

The nature of the markets for precast concrete products such as pipes and culverts meant that the cartel arrangements covered price fixing, allocation of markets and customers and collusive tendering. The essential arrangements were reduced to writing in *Modus Operandi* documents, which were revised as required over the three decades.

Market allocation and collusive tendering

The principal cartel arrangement reached by the respondents related to allocation of contracts or tenders to supply pipes and culverts to construction companies and customers as the construction industry generally operates on the basis of tenders i.e. building construction firms usually secure large contracts to build roads, pipelines, bridges, sewerage systems and other major infrastructural developments through a bidding or tendering process. The contracts were allocated amongst cartel members in accordance with agreed upon market shares in designated regions of Gauteng, KwaZulu-Natal and the Western Cape, as described more fully below.

In terms of the contract allocation arrangement, the respondents would identify and compile a list of all available contracts or tenders and agree amongst themselves whom within the cartel a particular contract or tender would be allocated to ("the allocatee"). These allocations occurred in monthly meetings wherein a list of all available contracts was presented by a cartel member known as the "banker", whose principal role was *inter alia* to compile a comprehensive list of all contracts available and a summary of tons delivered by each respondent during a particular period in order to ensure that participants do not exceed allocated tonnage.

In Gauteng these meetings were held at secret venues on the second Tuesday of each month after formal industry meetings i.e. after adjournment of meetings of the Concrete Manufacturers Association of South Africa (CMASA). The venues changed periodically in order to avoid detection and included Birchwood Conference Centre, Isisango Convention Centre, Werners Grill and Sunward Park Guesthouse. In Cape Town and Natal, meetings were not as regular as in Gauteng but occurred on *ad hoc* basis as and when there was an issue to discuss.

Consistent with the secrecy which characterises cartels, the *Modus Operandi* identified each cartel member by number (not by name, in order to conceal identity of the cartel members) and the agreed percentages of the market that each cartel member is entitled to. In pursuing the contract allocation arrangement, the allocatee would then offer or quote the winning contractor higher discounts whilst non-allocatees would offer no discount or a lesser discount to such contractor or customer in order to ensure that the contract is awarded to the allocatee.

Any respondent who cheated on the arrangements by, for example, exceeding its allocated tonnage or volume allocations, would be "punished" by being allocated less or a reduced amount of work at the next allocation meeting in order to maintain a balance. Similarly, cartel members who were falling behind would claim more work at the next allocation meeting. The contract or tender allocation arrangements were substantially the same for pipes and culverts (sometimes termed box culverts) for each region. Summaries of contracts allocated and allocation lists clearly identifying percentage share of volumes or tonnage allocated to each respondent during a particular period and the respondent's code number were reduced to writing.

The only way that cartel members could increase their market share in the designated regions was through the acquisition of an existing competitor, while Rocla retained their stranglehold outside the three designated regions in Gauteng, KwaZulu-Natal and the Western Cape.

Price Fixing

Along with the contract allocation and market share arrangements, the respondents pursued a robust price fixing arrangement in order to increase the chances of the allocatee being awarded a contract by the winning construction company. In this regard the cartel members agreed on an applicable price list and submitted quotes to contractors in accordance with prices agreed amongst themselves, in order that the tender be allocated to the designated firm, while giving the false impression of competitive tendering.

In addition, the respondents pursued a general price fixing scheme in terms of which they agreed on price increments. In this regard respondents met twice in a year, during April and October, following an increase in prices of raw materials to agree on the percentage price increases to be effected on their list prices. In all regions, price increase meetings were usually initiated by Rocla,

which had a reputation of pushing for highly inflated prices during price discussion meetings. In Gauteng, SPC would compile price lists for each individual participant after each price discussion meeting, for each type and specification of pipe and provide each participant with its own unique revised price list. The price lists per type and specification of pipe were not exactly the same for each participant, so as not to raise suspicions of collusion. According to cartel members this was deliberately done in order to give a false impression of price competition whilst the aggregate price increase over the whole range of products would be more or less the same for all participants. The price fixing arrangements and method of operation were substantially the same for pipes and culverts for each region and were reduced to writing in the *Modus Operandi* document for each region.

Regional arrangements

Separate, but related, arrangements existed between Rocla and Infraset, the two largest producers of precast concrete products in South Africa and in the Southern African region. Frequent meetings were held between these two firms to discuss developments which included the operation of the cartel in the designated regions in South Africa, business and market allocation across the Southern African region, and market developments and investment decisions generally. The timing of the meetings varied depending on the matters which required discussion but on average the meetings were held around once every two months in the period from around 2001 to 2007. The meetings were held in different venues with the most commonly utilised being the Oude Werf Coffee shop and the Holiday Inn, both in Kempton Park. Top management of Rocla and Infraset, namely Jim Wood of Rocla and Chris Visser of Infraset, featured prominently in these meetings. One of the matters which was raised on several occasions in these meetings was whether Rocla was considering entering the production of pre-cast concrete sleepers, both for projects in Southern African countries other than South Africa, as well as in South Africa itself. Rocla gave repeated assurances that it would not enter this market.

Outcomes and Commission's findings

Following referral of this matter by the Commission to the Competition Tribunal for prosecution on 13 February 2009 and settlement reached with Rocla on the same date, the Commission is engaged with other respondents seeking to settle. The Commission will then proceed in the Tribunal against those respondents with whom settlement is not reached.

Competition Commission Initiates Complaints in Piped Gas and Petroleum Products

By: Neo Chabane

In January this year, the Competition Commission initiated two complaints, one in the piped gas industry and another in the petroleum products industry. The complaints were initiated as a result of Sasol Limited and its subsidiaries applying for leniency for having engaged in conduct which, in their view contravenes section 4(1)(b) of the Competition Act, as well as information received by the Commission from other sources.

Given the importance of the petroleum products and piped gas industries to the economy as a whole, and the fact that these products are also used by all consumers on a daily basis, these investigations have generated a fair amount of public interest.

Piped Gas

This complaint relates to the supply of natural and methane rich gas, which is transported via pipeline network to the end users being households and many industries. Sasol is the major producer of natural gas, which is sourced from Mozambique, as well as methane rich gas which is produced at their Secunda plant. Sasol also delivers more than 120 million gigajoules of pipeline gas a year to over 500 customers.

In this particular market, Sasol Gas has applied for leniency for its part in the conclusion of a series of agreements that it entered into with its competitors, namely Springlights Gas in KwaZulu-Natal and Egoli Gas in Johannesburg. These agreements contained clauses which facilitated customer allocation, the division of markets, and price-fixing – all contraventions of section 4(1)(b) of the Competition Act.

Both Springlights Gas and Egoli Gas are co-operating with the Commission's investigation. The Commission is also investigating whether other such arrangements exist in the piped gas industry.

Petroleum Products

The second complaint initiated by the Commission relates to possible anti-competitive conduct in relation to a range of products in the petroleum products value chain. In this regard, the Commission's investigations will also be guided by the leniency application submitted by Sasol Oil. Sasol Oil's application relates to conduct across a range of products which possibly contravenes Section 4(1)(b) of the Competition Act.

To this end the Commission has cited past and present members of the South African Petroleum Industry Association (SAPIA) and the Southern African Bitumen and Tar Association (SABITA) as respondents in the investigation.

The petroleum products industry is partly regulated by the Department of Minerals and Energy, and operates within their regulatory framework. For example, the retail price of some petroleum products such as petrol is regulated by the Department of Minerals and Energy while the retail price of other products such as diesel and jet fuel is not. The industry, at both refining and marketing levels, consists mainly of a small number of oil companies which are household names. The Commission's investigation is going to entail an extensive assessment of the conduct of these companies at the different levels from the refining through to sales to retail and commercial customers of all the various petroleum products. It will be one of the biggest investigations ever undertaken by the Commission.

The series of leniency applications by Sasol Limited, one of the largest companies in South Africa, has again highlighted the effectiveness of the Commission's Corporate Leniency Policy (CLP) in uncovering cartels, and the Commission continues to encourage companies to come forward in cases where they suspect they may have contravened the Competition Act.

Foodcorp settlement in the bread cartel

By: Avish Kalicharan

On 6th January 2009, the Competition Tribunal approved a settlement agreement entered into between the Competition Commission ("Commission") and Foodcorp (Pty) Ltd ("Foodcorp") over the latter's participation in the bread cartel, which spanned over a number of years. This followed the Commission's investigation of a cartel in the bread industry which operated on a national level and involved both price fixing and market allocation.

The Commission's investigation established that during the period 1995 to 2006, Premier Foods, Tiger Brands, Pioneer Foods and Foodcorp were involved in price fixing and market allocation in contravention of section 4(1)(b)(i) and (ii) of the Competition Act 89 of 1998, as amended, in the national bread market. The Commission found that these firms held telephonic discussions and meetings where they directly fixed the selling price of bread; directly fixed the dates when such agreed price increases would be effective; and divided markets by allocating territories where each firm would be the only one operating a bakery in a particular territory and supplying all distributors in the allocated area. The Commission referred the national bread complaint to the Tribunal in March 2008.

On 1st July 2008, Foodcorp approached the Commission with a view

to settle the case against it. This was followed by several proposals being made by Foodcorp in an attempt to settle the matters before the Commission. Foodcorp had conducted its own internal investigations and agreed that it had contravened Section 4(1)(b) of the Competition Act. Although Foodcorp indicated its intention to settle all matters which the Commission was investigating against it, no proposals were made in so far as a separate but related milling investigation went. Moreover the Commission had, independently of the initiated complaints, received a complaint by a small bakery in the Mpumalanga Province alleging that Sunbake, a subsidiary of Foodcorp, had called a meeting of all bakers in the Malelane area and that it reached agreement with some of the bakers not to sell bread below a certain price. Foodcorp, in its settlement proposals, admitted that it was a participant in the national bread cartel as well as admitted its involvement in the Malelane matter.

In terms of the consent agreement, Foodcorp admitted that Sunbake Bakeries, a subsidiary of Foodcorp, was engaged in fixing the price of bread sold to consumers. Foodcorp agreed to pay an administrative penalty of R45 406 359.82, representing 6,7% of Foodcorp's turnover from all its baking operations for the 2006 financial year. Foodcorp further agreed

- to cooperate with the Commission in the prosecution of any other cartel members; and
- to develop and implement a compliance programme to ensure that the company does not engage in other anti-competitive behaviour.

The percentage of the administrative penalty differed from that given to Tiger mainly because the level of co-operation received from Foodcorp was not to the same degree as that provided by Tiger. Tiger had volunteered to co-operate with the Commission immediately upon becoming aware of the matter and had conducted its own internal investigations and made available the findings of that investigation to the Commission. Foodcorp on the other hand, ought to have been aware of the investigation in February 2007, when the Commission issued a press release, but only made proposals for settlement after the Commission's investigations had been completed and the matter had been referred. Foodcorp further did not make available to the Commission its findings in respect of the investigation.

Nevertheless Foodcorp also agreed to testify against the remaining member of the bread cartel, namely Pioneer Foods, who still maintains that it did not contravene the Competition Act. This matter has been set down for hearing in June 2009.

The Commission considers the level of co-operation offered by a firm to be an important factor when settlement negotiations are being conducted. A firm that offers to co-operate must demonstrate a willingness to co-operate fully.

By: Itumeleng Lesofe

The Commission busts a cartel in the plastic pipe industry

Competition authorities worldwide recognise that cartel conduct is one of the impediments to economic growth. To put in the words of the United States Supreme Court[1], cartels pose an actual or potential threat to the central nervous system of the economy, thus their detection is of great importance. The South African Competition Commission ("the Commission") views this anti-competitive behaviour no different, hence it maintains a robust stance against the conduct.

The Commission recently referred a cartel complaint against the manufacturers of polyvinylchloride ("PVC") and high density polyethylene ("HDPE") pipe products (collectively referred to as "pipe products") in South Africa to the Competition Tribunal for adjudication. The Commission's decision to refer this matter was made pursuant to its findings that, for many years, DPI Plastics (Pty) Ltd ("DPI Plastics"), Marley Pipe Systems (Pty) Ltd, Petzetakis Africa (Pty) Ltd, Swan Plastics CC, Amitech (Pty) Ltd, Flo-tek Pipes and Irrigation, Andrag (Pty) Ltd, Gazzelle Plastics (Pty) Ltd and MacNeil Agencies had been engaged in anticompetitive practices of fixing prices, rigging tenders and dividing markets by allocating contracts and customers. This article seeks to give an overview of the plastic pipe industry, the circumstances that led to the Commission's investigation and the outcome of the investigation.

The industry

The plastic pipe industry is one of the sectors that falls within the ambit of government's infrastructure plans. A total amount of R 787 billion has been budgeted for infrastructure projects, including projects relating to the installation of water systems and the development of municipal infrastructure.[1] The success of government's plans in this regard is largely dependent on, *inter alia*, healthy and fair competition among market participants in industries such as the plastic pipe industry.

According to the Southern African Plastic Manufacturing Association, South Africa produces about 130 000 tons of plastic pipe per annum which represent sales of more than R2 billion. The piping products manufactured by the industry have different applications, including water distribution and wastewater disposal, gas and chemical distribution, plumbing and in the mining sector for the conveyance of potable water, cooling, slurries and air[2].

The above-mentioned companies comprise nine manufacturers and suppliers of pipe products in South Africa and collectively enjoy the major share of the market for the supply of the pipe products. Their competitors are firms that have a smaller share of the market. The manufacturers in the industry use merchants to distribute their products. Most of these manufacturers are vertically integrated and therefore utilise their vertically integrated merchants for distribution. The end-users of plastic pipes in South Africa include municipalities, construction companies and private individuals.

The Investigation

The Commission's investigation into collusion in the plastic pipe industry was triggered by, among other things, its findings in the merger between DPI Plastics and Incledon Cape ("Pty) Ltd ("Incledon Cape"). In terms of the merger, DPI Plastics intended to acquire the entire business of Incledon Cape as a going concern. During the course of the merger investigation, the Commission found information that suggested that various manufacturers of the pipe products in Western Cape were engaged in the conduct of rigging bids in contravention of section 4(1)(b)(iii) of the Competition Act 89 of 1998, as amended ("the Act"). On the basis of the existence of collusion and other grounds, the Commission prohibited the merger on 10 January 2008.

Prior to the prohibition of the merger, on 09 January 2008, DPI Plastics applied for immunity from prosecution and fines in terms of the Commission's leniency policy. In support of its application for immunity, the company provided the Commission with evidence of the existence of collusion in the markets for the manufacture of PVC and HDPE products involving the major manufacturers. DPI Plastics was subsequently granted conditional immunity. Pursuant to the information uncovered during the merger investigation as well as

[1] United States v Socony-Vacuum Oil Co., 310 US 150 (1940).
[2] SA 2009 budget speech by Mr. Trevor A Manuel.
[3] www.sappma.co.za

DPI Plastic's leniency application, the Competition Commissioner ("the Commissioner") initiated a complaint against the manufacturers of pipe products throughout the country. In the complaint, the Commissioner alleged price fixing, market or customer allocation and collusive tendering as potential contraventions of the Act.

The Commission's investigation revealed that collusion between the manufacturers of pipe products dated back to the 1980s. Then, discussions regarding various collusive activities were limited to representatives of Marley, Petzetakis and DPI Plastics. Later on, other players in the industry such as Swan Plastics and Amitech joined the cartel. The cartel activity was driven mainly through meetings that took place in hotels, restaurants, coffee shops, golf clubs and rarely at the companies' offices. To maintain secrecy, no agendas were prepared and minutes were not kept.
The Commission also found that the cartel not only operated in Western Cape but throughout South Africa. Regarding the conduct of price fixing, it was found that the major manufacturers of the pipe products would take turns to determine the appropriate price increases for products. The manufacturer whose turn it was would review the standard price list that was used in the industry and make proposals to other manufacturers. Once its proposals were accepted, the reviewing manufacturer would publish its price lists to the market and the other manufacturers would follow suit. Investigation further revealed that the manufacturers would also meet to discuss the appropriate levels of discounts to be applied in respect of pipe products.

With regards to collusive tendering, the Commission found that the respondents held meetings from time to time wherein it was agreed *inter alia* that contracts would be allocated to individual manufacturers so as to reflect their pre-existing market shares in specific regions. When tenderers asked for quotes, the cartel members would agree on prices that each would quote. A job register was kept to record contracts awarded and their values. It bears mention that some of the tenders that were rigged were municipality tenders.

The Commission has referred this complaint under section 4(1)(b)(i), (ii) and (iii) of the Act and seeks the Tribunal to impose an administrative penalty against each respondent of up to 10% percent of the annual turnover of each manufacturer in the Republic and their exports from the republic during the relevant financial year. At the time of writing this article, the Commission was engaging in settlement negotiations with some of the respondents.

By: Dumisani Motsamai

Curtain finally rolls down on ANSAC

During the first week of November 2008 the Competition Commission ("the Commission") announced a consent order agreement between itself and the American Natural Soda Ash Corporation ("ANSAC"), bringing to an end what had been the longest pending case in the history of the Commission.[1]

ANSAC is an association of four major soda ash producers in the United States of America ("USA") incorporated during the 1980's in terms of the United States Export Trade Act of 1918, commonly known as the Webb-Pomerene Act, who export soda ash from the USA to various countries excluding Canada. In order to facilitate the sale of its soda ash in South Africa, ANSAC appointed CHC Global (PTY) LTD ("CHC") as its agent to canvass orders.

During 1999, the Commission received a complaint from Botswana Ash (PTY) LTD ("Botash") alleging amongst others that the members of ANSAC were fixing the selling price of soda ash and dividing markets in contravention of section 4(1)(b)(i) and 4(1)(b)(ii) of the Competition Act 89 of 1998, as amended ("the Act"). Following its investigation, the Commission concluded that ANSAC's members were fixing the price of soda ash through the ANSAC membership agreement in contravention of section 4(1)(b)(i) of the Act and referred this complaint to the Competition Tribunal ("the Tribunal") for adjudication. It should be noted that, unlike section 4(1)(a) of the Act, a referral under section 4(1)(b) presumes that the conduct of the respondents is illegal price fixing per se and does not provide for technological, efficiency or other pro-competitive justification to be argued in defence of the agreement.

What followed was a protracted legal battle which took place in the Tribunal, then the Competition Appeal Court ("CAC"), thereafter the Supreme Court of Appeals ("SCA") and finally back in the Tribunal again. Throughout the 9 year long proceedings ANSAC argued that it was a legitimate joint venture which was pro-competitive rather than anti-competitive and that the ANSAC membership agreement had to be characterised according to its true nature, thus falling to be assessed under section 4(1)(a) of the Act and not simply viewed as price-fixing prohibited by section 4(1)(b)(i).

While the Tribunal and the CAC rejected ANSAC's arguments, the SCA ruled that it was not all arrangements between competitors entailing the ultimate supply of goods that would fall within the ambit of agreements proscribed by section 4(1)(b) of the Act. The Court said;

"It is not difficult for instance to envisage a bona fide joint venture that is embarked upon by competitors for a legitimate purpose, through the vehicle of a separate entity, which must necessarily set a price for goods that it supplies (emanating from the competitors) merely as an incident to the pursuit of the joint venture".

In these circumstances, the SCA held that there was no a priori reason to assume that such an arrangement constitutes prohibited price-fixing as contemplated in section 4(1) (b). The SCA held that it was necessary, over and above reading the agreement, to characterise the nature and conduct of the vehicle for the joint venture to establish whether same is a genuine single entity that supplies its own goods to the market, though individually produced by the individual members thereto, in respect of which a price must of necessity be set by the vehicle, or whether the vehicle was merely a smoke screen for collusive behavior designed to ensure that the goods of competitors were supplied to the market at non-competitive prices.

The SCA then directed that the matter be returned for further proceedings before the Tribunal in order for the latter to characterise the conduct of ANSAC for purposes of the application of section 4(1)(b).

Tribunal Hearing

Throughout the ensuing Tribunal hearing, which essentially lasted from 23 July to 26 August 2008, ANSAC

[1] Botash and Chemserve Technical Products (PTY) LTD ("Chemserve") were later joined as interveners in the proceedings.

maintained that it was a legitimate logistics joint venture and that the alleged price fixing was ancillary to this main objective. Accordingly, ANSAC argued, the Commission's case should have been brought under section 4(1)(a). On the other hand, the Commission and Botash argued that ANSAC:

- was an association of competitors whose sole purpose, as per its membership agreement, was to fix the prices at which these competitors sold soda ash into the South African market, in contravention of section 4(1) (b) of the Act; and
- was in fact a price raising cartel which deprived South African consumers the benefit of competition amongst its individual members.

Closing arguments on the matter were due to be heard from 04 to 06 November 2008, subsequent to which the Tribunal would have ordinarily delivered its judgment.

Settlement

However in September 2008, ANSAC approached the Commission to discuss settlement, stating that it had made a commercial decision to withdraw from the South African market and accordingly wished to enter into an appropriate settlement agreement solely for the purposes of settling the matter.

Following negotiations, on 3 November 2008, the Commission and ANSAC concluded a settlement agreement in terms of which ANSAC:

- admitted that its membership agreement had the effect of eliminating price competition between its members in export sales to South Africa in breach of section 4(1)(b)(i) of the Competition Act ;
- agreed to pay an administrative penalty of R9 696 846,96 (nine million six hundred and ninety-six thousand, eight hundred and forty-six rand and ninety-six cents) representing 8% of its soda ash annual turnover in South Africa ;
- undertook to make no further export sales to South Africa for delivery in the period commencing in May 2009 going forward ;
- undertook to amend its membership agreement to allow its members to negotiate and contract directly with, and make sales to, South African consumers should the members choose to do so.

The signed settlement agreement was on 04 November 2008 presented before the Tribunal and subsequently confirmed by the latter as an order of the Tribunal in terms of section 58(1) (b) of the Act, effectively lowering the curtain on the longest soap opera ever to grace its stage.

Commission holds annual public sector consultative forum

By: Mulalo Shandukani

Following upon last year's first ever public sector consultative forum ("PSCF"), the Competition Commission ("the Commission") held its annual PSCF on the 13th of February 2009 at Sheraton hotel in Pretoria. The PSCF is a platform where the Commission not only reports on its work progress, but vigorously debates with various public sector representatives on issues of common interest. Apart from the Commission staff in attendance, this year's PSCF was attended by 48 representatives from government departments, parastatals, state owned enterprises and regulatory authorities. The agenda for the day was divided into three sessions within which senior Commission staff members and public sector representatives were allocated time to make presentations on the Commission's identified priority sectors, escalating food prices and managing costs in infrastructure projects.

In his welcoming address, our Deputy Commissioner, Mr. Tembinkosi Bonakele, stressed the importance of the Commission's drive to engage and establish effective working relationships with all its stakeholders. He pointed out that the PSCF is a platform for frank and robust discussion with the main objective of soliciting views that would help the Commission to initiate or strengthen its strategic work goals. An important point emphasised was the complementary relationship that exist between the Commission's work and that of various public sector role players. Whereas the Commission regulates competition matters in all sectors of economic activity, the public sector institutions have the responsibility of initiating pro-competitive legislation as well as running procurement programmes that promote the entry of new firms.

The Deputy Commissioner informed the house that 2009 not only marks the review of our three (3) year strategic exercise but also our ten (10) year anniversary. To celebrate our anniversary, the Commission is planning a big competition indaba that is expected to provide a platform for a robust review of Commission's milestones and competition law or policy in general. People who are interested in writing papers for the indaba must contact the Commission's Chief Economist, Dr. Simon Roberts.

The theme for the keynote address by the honourable Rob Davies, Deputy Minister of Trade and Industry, was "strengthening the competition regime and the links to industrial policy". This highlighted the importance of the new system of competition regulation, embodied in the 1998 Competition Act, for broad-based growth and development. However, the Deputy Minister noted that despite the new law and all other structural changes that have taken place after 14 years of democracy, ownership patterns in our economy are still characterised by high levels of concentration. Nevertheless, the Deputy Minister enthusiastically praised the Commission for recently becoming more active in dealing with a host of competition issues in different sectors of our economy.

The focus of the Deputy Minister's speech on the need to consistently align the objectives of the competition authorities with those of the National Industrial Policy Framework emphasised the links between the two areas. The deputy minister stated the pertinent points listed below:

- The investigation by the competition authorities into steel pricing highlighted the extent to which pricing practices of a dominant steel manufacturer in this country were having detrimental effects on downstream customers who are smaller firms identified as a key source of growth, employment and export in the Industrial Policy Action Plan.
- The Department of Trade and Industry is committed to supporting the competition authorities in playing a more active role geared towards the promotion of a more competitive economic environment which is fundamental to the objectives of both industrial policy and protection of consumers. Cartel activity is undermining the ability of our economy to grow jobs and also contributing to poverty by raising prices of basic goods.
- Both industrial policy and consumer issues lay behind the 2008 Competition Amendment Bill which deals with provisions relating to market inquiries, complex monopolies, personal liability of directors and/or managers who cause firms to engage in collusive practices, as well as concurrent jurisdiction.

Our Chief Economist, Dr. Simon Roberts wrapped up the first session by giving an overview of the Commission's work in priority areas. The sectors identified by the Commission as priority areas are infrastructure (including construction), food, agro-processing, intermediate industrial products and financial services. Dr. Roberts pointed out that the Commission's prioritisation approach is aimed at proactively identifying competition problems so as to improve our effectiveness through better resource allocation and utilisation. He stressed that prioritisation does not mean that the Commission will neglect cases in non-prioritised areas but is just a strategic way of streamlining our focus.

The second session was dedicated to issues relating to escalating food prices. Both Billy Morokolo (Director Marketing: Department of Agriculture) and Oupa Bodibe (Competition Commission) presented on the roles of their respective institutions in the food sector. Whilst admitting that the food value chains are dominated by few large firms, Mr. Morokolo's main message was that global factors must also be taken into account when analysing escalating food prices. Furthermore, he said that food affordability and not availability is the main challenge facing this country. Mr. Bodibe highlighted that the Commission's interdivisional food team is conducting studies into key areas related to the price of staple foods including poultry, vegetable fats and oils, fish, animal feed, as well as food retail. In addition, the Commission will be pursuing cases that have been referred to the Competition Tribunal in the dairy, grain milling and baking sectors.

The last session on managing costs in infrastructure projects was comprised of presentations from Mr. Mehleli Mpofu (Acting Deputy Director General: Manufacturing, Department of Public Enterprises), Ms. Lebo Letsoalo (Capital Procurement Manager ESKOM) and Ms. Nompucuko Nontombana (Competition Commission). Ms. Nontombana detailed the specific infrastructure-related hard-core cartels that the Commission has recently unearthed as a result of its internal infrastructure study and also leniency applications received from industry players. The hard-core cartels involved bid-rigging, price fixing and market allocation in precast concrete market, building, civil engineering, mining and agricultural sectors. In summary, the common message coming from both presentations of Eskom and DPE was that long term planning and proper decision-making at appropriate times are key to successful managing costs of infrastructure projects.

The panel discussions that followed after each session were very engaging. In response to some of the issues raised from the floor, the Commission clarified that public sector institutions can hold meetings with industry players to discuss efficiency motivated issues. However, such discussions should not extend to issues which have the potential to contravene the Competition Act provisions such as coordinating prices. Though some attendees were advocating for the direct unbundling of major firms in the economy, there was consensus that attacking ownership per se is not necessarily the solution, but rather that curbing anti-competitive practices would facilitate viable downstream economic activity. The Commission was encouraged to unravel the complicated agro-processing structure, look at the transport sector as it is an important component of food supply costs, to consider the energy sector as a priority sector, as well as to interact more with the International Trade Administration Commission of South Africa.

In closing this year's PSCF, the Commission's Mziwodumo Rubushe thanked everyone for participating and reiterated our commitment to work together with public sector stakeholders.

Mergers & Acquisitions Summaries

Mobile Telephone Networks (Pty) Limited and Verizon South Africa (Pty) Limited

By: Grashum Mutizwa

The transaction was the subject of an intervention application in the Competition Tribunal. The Tribunal granted leave of intervention to Altech Limited ("Altech"), a company that had eventually lost out to Mobile Telephone Networks Holdings (Pty) Limited ("MTN") in the bid for Verizon South Africa (Pty) Limited ("Verizon SA"). The Commission had recommend an unconditional approval of this transaction between MTN and Verizon SA. Altech withdrew its intervention application the day before the hearing that was scheduled for 8 January 2009. The Tribunal unconditionally approved the transaction as heard on the same day.

The transaction had a horizontal as well as a vertical dimension. The Commission's assessment focused on five markets in which there were horizontal overlaps and three markets in which there were vertical or conglomerate relationships, or markets in which Verizon SA was a potential competitor to MTN either as a potential recipient of an Electronic Communication Network Services (ECNS) licence or a beneficiary of the Altech self-provision litigation, both of which would have afforded Verizon the ability to build its own telecommunications infrastructure.

In respect of the horizontal markets, particularly in MPLS/IP VPN and wholesale internet access, the merged entity will be the third largest provider of these services in South Africa. In these markets, Telkom and Internet Solutions will remain considerably larger than the merged entity, a scenario that was prevalent before the merger. As such, the merger was not a conduit into a dominating position in any of the horizontal markets. Furthermore, to the extent that Verizon was to be a substantial potential competitor in mobile voice and data and end to end leased lines markets, there are a range of other potential competitors that would be capable of entering too. This potential entry could either be as a consequence of Altech's success in a High Court proceeding that allowed all value added network services providers (VANS) to self-provide, or if only a limited number of VANS would be successful in applications for new licences.

The Commission received a number of concerns from third parties, all competitors, during the market enquiry. The concerns were largely around bundling, input and customer foreclosure, the removal of an effective upstream infrastructure rival and avoidance of regulation. In particular, competitors were concerned that the merged entity would be in a stronger position to discriminate against its rivals in respect of infrastructure, interconnection and gateways both locally and internationally. The Commission was of the view that the merged entity is unlikely to exclude rivals, by virtue of its position in the horizontal and vertical markets and the transaction would not lead to a substantial prevention or lessening of competition in the affected markets. The Commission therefore recommended an unconditional approval of the transaction.

Investec Bank Limited and RJ Southey (Pty) Ltd

By: Lindiwe Khumalo

The Commission recommended that the merger between Investec Bank Limited ("Investec") (acquiring firm) and RJ Southey (Pty) Ltd ("RJ Southey") (target firm) be conditionally approved. Investec intended acquiring 45% shares in RJ Southey.

The merging parties are active in three relevant markets namely ship repair, marine blasting and painting and manufacturing, sale and rental of scaffolding. The merging parties provide ship repair services to vessels and ships through Dorbyl Marine and Dormac Marine respectively. Marine blasting and painting is provided through Nautilus Marine and Southey Contracting, scaffolding is provided by Unispam and Okapi respectively.

The post-merger market share in the market for the manufacturing, sale and rental of scaffolding is 12%. This market did not raise any competition concerns.

Ship repair encompasses various types of work such as steel and pipe repair, electrical and mechanical work, engine work, hydraulic work and underwater repairs. The Commission did not conclude on the relevant geographic market for ship repair but analysed the effect of the transaction on competition in the local market, specifically the Cape Town Harbour. The merging parties' combined post-merger market share in this market would be approximately 30%, creating the largest competitor in this market. The Commission found that the ship repair market was characterised by high entry barriers which included dry docking facilities, equipment and skill, accreditation and insurance and the importance of relationships with customers.

Marine blasting and painting involved blasting, high and ultra pressure blasting, industrial cleaning, tank cleaning, waste disposal, anticorrosion measures, insulation and cladding of vessels and fixed structures in the harbour. The Commission found that the market is highly concentrated with the merging parties' combined post-merger market share at around 60%. The Commission found that barriers to entry were high in the market and the merger may lead to unilateral effects in the marine market.

Post-merger Investec would hold 43% and 45% shares in DCD Dorbyl and RJ Southey respectively, with minority protection. In the blasting and painting market DCD Dorbyl has a 50% joint venture with Globe Engineering, Nautilus Marine, which competes with Southey Contracting. The Commission was concerned that the structural links were likely to lead to

coordinated effects in the affected markets. Further, Investec would be in a position to influence the strategic direction of both RJ Southey and DCD Dorbyl, another concern was that the merger was likely to result in the removal of an effective competitor in the affected markets by what might be the equivalent to a merger between the two marine divisions of Dorbyl Marine and Dormac Marine.

The Commission concluded that this transaction is likely to substantially prevent or lessen competition in the markets for ship repair and marine blasting and painting. The Commission also found that this transaction is likely to lead to co-ordinated effects in the same markets.

The Commission approved the transaction with a condition that Investec would divest of its shares in RJ Southey within a specified period.

Proposed merger between BHP Billiton Ltd and Rio Tinto Ltd

By: Hardin Ratshisusu

BHP Billiton Plc and BHP Billiton Ltd ("BHP Billiton") intended to acquire Rio Tinto Plc and Rio Tinto Ltd ("Rio Tinto"), in a hostile takeover bid.

BHP Billiton and Rio Tinto are major global mining houses active in the mining of gold, copper, aluminium, mineral sands, uranium, thermal coal, metallurgical coal, diamonds, iron ore, molybdenum, sulphuric acid, nickel, cobalt and silver. The activities that were relevant for the assessment of the effect of the transaction on competition in South Africa were mainly iron ore, metallurgical coal, uranium, thermal coal, mineral sands and primary aluminium. The Commission did not find any competition concerns regarding the supply of iron ore, metallurgical coal, uranium, thermal coal and mineral sands into South Africa that could be linked to the transaction, but for primary aluminium.

Through its smelters in Richards Bay, namely, Hillside and Bayside, BHP Billiton is the only producer of primary aluminium in South Africa. Although Rio Tinto supplies a small volume of primary aluminium into South Africa, it was, at the time of the merger, at advanced stages of constructing a primary aluminium smelter in the Coega Industrial Development Zone of South Africa in Port Elizabeth (Coega smelter).

In its investigation, the Commission established that the Coega smelter would have brought about competition to BHP Billiton in South Africa. This would, in addition, enhance the benefits to firms that use the metal in South Africa. In the Commission's view, BHP Billiton had adopted a pricing regime that reduced the benefits to these downstream firms. This pricing regime has however been recently revised in response to the prospect of the entry of the Coega smelter.

To address these concerns BHP Billiton offered to divest of the entire interest to be acquired by it in the Coega Project through the implementation of the proposed transaction. This remedy was sufficient a condition on which the Commission recommended an approval of the proposed merger. BHP Billiton later filed a notice to abandon the transaction before it could be heard before the Competition Tribunal (Tribunal).

The transaction was also considered by the European Commission (EC), the Competition Bureau of Canada, the Australian Competition & Consumer Commission (ACCC) and the USA's Department of Justice (DOJ). The ACCC and DOJ unconditionally approved the transaction whilst the EC had raised significant concerns on the iron ore market.

MTN (Pty) Ltd and iTalk Cellular (Pty) Ltd

By: Thabelo Masithulela

In recent years, there have been a series of mergers involving acquisitions by mobile network operators of their service providers. The mergers involved Vodacom GSM, Vodacom Teljoy Holdings, Vodacom Smartcall, Vodacom Tiscali, Vodacom Africell and Vodacom Glocell/Telematics. Similarly, MTN SP, which is MTN's own service provider, also acquired Cell Place. The Commission recommended unconditional approval of these mergers, which in turn were given the green light by the Tribunal.

In essence, there is an increasing trend amongst network service providers to vertically integrate downstream, by buying up their service providers and providing the services themselves. This is also in line with international trends.

On 14 November 2008, the Commission recommended to the Tribunal the unconditional approval of the above large merger involving an acquisition by MTN of the remaining 59% of the shares in iTalk, from the Bebinchand Seevnarayan Trust ("the S Trust"). Prior to the merger, MTN held 41% of the shares in iTalk. Both MTN and the S Trust exercised joint control over iTalk pre-merger. Post-merger, MTN intended to hold 100% of the total issued share capital in iTalk, and therefore exercise sole control over iTalk. The significance of the transaction is that MTN, which was prior to the merger a joint controller of iTalk, becomes its sole controller.

As part of the rationale for the transaction, MTN submitted that its strategy is to increase its distribution footprint through ownership and increased control of the distribution channel. MTN has its own branded channel distribution strategy with the aim of providing its customers with a common customer experience.

Background to the transaction

Notwithstanding MTN's strategy set above, the transaction came about because the S Trust decided to sell its 59% interest in iTalk. However, MTN was not its first choice of buyer because on 28 January 2008 a sale of shares agreement was signed between the Huge Group ("Huge") and the S Trust in terms of which Huge agreed to purchase the S Trust's 59% shareholding in iTalk. In its intervention application filed with the Tribunal in the MTN-iTalk merger, Huge asserted that the purpose of the acquisition was to enable Huge to acquire and distribute MTN's products at a significant discount afforded to iTalk in terms of the Service Provider Agreement. Huge submitted that such an acquisition would have enabled it to aggressively compete with MTN SP and other independent service providers, in providing MTN's products to individual customers and in particular to Huge's significant corporate customer base. The Huge-iTalk transaction was notified to the Commission as an intermediate merger in February 2008 and approval was granted. After the conclusion of the Huge transaction agreements, MTN exercised its pre-emptive rights in terms of the iTalk shareholders agreement so as to purchase the S Trust's shares itself. The proposed transaction was then notified to the Commission and the Huge transaction was never implemented.

In line with the precedent of the Tribunal in a merger transaction between Mweb and Tiscali, Tribunal Case No.: 72/LM/Sep04, at par. 80, the Commission considered it unnecessary to assess the validity or otherwise of Huge's assertion that its acquisition of iTalk would result in a less anti-competitive outcome. The Commission reiterated its position that the duty of the competition authorities in evaluating mergers is not to maximize competition, but to ensure that there is no substantial prevention or lessening of competition as it currently exists in the market. The Commission's views were as follows:

"Whether or not MTN was entitled to exercise the pre-emptive right is of no concern to the Commission – this is clearly a legal dispute between private parties. The relevant test here is whether MTN's acquisition of iTalk would substantially prevent or lessen competition relative to the status quo."

After having properly applied the relevant test in the current merger, the Commission found that the proposed transaction would not result in any substantial prevention or lessening of competition.

In brief, MTN and iTalk are both active in the telecommunications sector. Whilst MTN provides a whole range of services, iTalk is a cellular service provider that contracts with consumers and corporate customers directly for the provision of MTN airtime, handsets and related products. The merging parties submitted that there are at least two types of relevant product markets to consider in the telecommunications sector, that is, the upstream market for the provision of mobile network access and the downstream service provider market. The upstream market is the market for network access, provided by all three cellular networks in South Africa, namely Vodacom, MTN and Cell C. Each of these companies provides access to their individual networks. All three networks are active in the upstream and the downstream markets. In the downstream market, service providers are the links between the consumer and the networks. There are two classes of customer in the downstream market, that is, pre-paid customers who buy airtime to get service each time they need it and customers with contracts, referred to in the industry as post-paid. Post-paid customers are considered more credit worthy and hence they pay after the fact, hence post-paid. In terms of the pre-paid model, the customer buys upfront and the distributor assumes no risk. Many retailers offer pre-paid products. In contrast, service provider firms are primarily concerned with the post-paid customer segment because they assume the risk of non-payment, not the network itself. Service providers receive discounts from the networks to sell the product, give some of the margin to the customer, and keep the rest for themselves.

The Commission's view was that the downstream product market comprised service providers who sell post paid services. However, the Commission did not come to a definitive conclusion as to whether the market might be even narrower than this and confined to service providers who sell packages for a particular network, in this case MTN. The Commission noted that certain post paid customers could not easily substitute between networks and hence the adoption of a narrow market definition might be appropriate. The Commission did not have to come to this conclusion because it assumed the narrowest market as a possibility and still found no reason for concern.

The Commission did not examine the prepaid market in any detail given that prepaid customers constitute a negligible proportion of the overlap between the merging parties' activities. The Commission found that in March 2008 only 2.9% of iTalk's customer base was pre-paid customers, representing a mere 0.02% of MTN's pre-paid base.

The Commission therefore considered whether the proposed merger is likely to substantially prevent or lessen competition in the sale of MTN postpaid contracts. The Commission also considered a wider market consisting of all postpaid contracts.

During the course of the investigation of the proposed transaction, the Commission engaged with both the customers and competitors of the merging parties regarding the proposed transaction. There were two main concerns raised by the merging parties' competitors, namely:

1. That the proposed merger will result in the removal of an effective competitor in the relevant market; and
2. The reduction in the number of independent SPs weakened the ability of those remaining to negotiate Service Provider discounts and Cellular Least Cost Routing discounts (or to attract large discounts) with the network operators.

The Commission considered all the concerns that were raised by competitors of the merging parties and based on its assessment the Commission found that the acquisition of iTalk by MTN would not result in any substantial prevention or lessening of competition. The Commission's finding was informed by the following:

1. The Commission's market share analysis revealed that iTalk is not a major player in the downstream SP market no matter how it is defined geographically;

2. The Commission found that the merging parties' market share accretion post-merger is between 1.4% and 5.1%. for example, MTN SP has a pre-merger market share of 22.7% whilst iTalk has 1.9% leading to a post-merger market share of 24.6%.

3. iTalk does not appear to be a significant competitor that yields pricing discipline in the market, except in the isolated case of its CLCR discount to Huge. Despite high HHI and HHI delta figures when considering a potential market for the supply of MTN postpaid contracts only (relevant for the analysis of sales of MTN contracts to CLCR customers), the Commission's concerns were allayed by the fact that almost 70% of LCR subscribers are supplied by providers who are themselves MTN service providers, notably Autopage, Nashua Mobile and Orion.

4. iTalk's ability to become a tri-service provider (offering contracts of all 3 operators) is not changed by the current merger, as MTN already exerts influence through its partial control, and iTalk has not shown a willingness to offer Vodacom or Cell C products until now despite its ability to do so. Indeed, Vodacom has indicated repeatedly in transactions before this Tribunal that they intend to vertically integrate into their service provider channel and therefore do not intend to issue new SP licences. It is therefore highly unlikely that the other networks will sell their products through a service provider that is partially owned and controlled by a rival network. Even if the transaction were to be prohibited MTN remains a joint controller of iTalk. There was thus no basis for assuming that the proposed transaction would be potentially anti-competitive on these grounds.

5. The Commission examined KwaZulu-Natal, the region in which Italk sells most of its products, as a possible relevant geographic market for the sale of all postpaid subscriptions and found no lessening or prevention of competition in that region.

6. The Commission also considered whether the merger will result in any form of foreclosure (that is, input and customer foreclosure) given that the merger also had a vertical dimension as MTN would be strengthening its position in the downstream service provider market and concluded that MTN's ability to engage in foreclosure is not merger specific and/or is highly unlikely to occur post-merger. The Commission examined a number of theories on vertical foreclosure and on rejoinders to one monopoly profit theory, and no substantial prevention or lessening of competition arises under any of these theories. iTalk has a very small presence in the market and therefore MTN depriving rivals' access to iTalk as a distributor would have a limited effect at worst; for the same reason (Italk's small presence), MTN's ability to reduce competition downstream among its service providers through the merger is unlikely to have increased significantly.

7. Finally, there were no substantial public interest issues emanating from the merger.

The Commission approved the merger without imposing any conditions.

Towards a fair and efficient economy for all

Where to get hold of us

Visit the Competition Commission online at www.compcom.co.za for more information about the Commission and the Act, as well as the rules and amendments to the Act. You may also forward enquiries, comments and letters to:

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