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The Official Newsletter of the Competition Commission of South Africa

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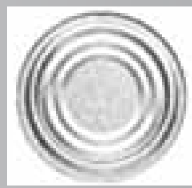

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Commission's investigation in the construction sector

Makgale Mohlala

The Commission initiated two major investigations relating primarily to contracts in the construction sector. The first investigation was initiated on 1 February 2009 regarding tenders for the construction of 2010 FIFA World Cup stadia. This investigation covers all tenders for the construction of new stadia and tenders for the refurbishment of the existing stadia. The scope of the investigation covers the main tenders as well as subcontracts. The second investigation was initiated on 1 September 2009 and covers all big and small tenders for construction projects.

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EDITORIAL NOTE

The beginning of 2011 saw the Commission take a major step in its long-running concern with anti-competitive conduct in construction with the launch of the 'fast-track' settlement process, as described by Makgale Mohlala. The two following articles by Lebogang Madiba and Yongama Njisane provide a good illustration of the type of conduct which the Commission has found permeates the sector. In referrals of cartel conduct in both pilings and rebar the Commission has found that firms have engaged in agreeing market shares, pricing practices, and allocating contracts through 'cover pricing' type arrangements. It is notable that both cartels involve subsidiaries or associates of the construction majors, and both include the rigging of inputs or components of very large projects.

The other major enforcement matter reported on for the quarter is the supermarkets investigation. As described by Trudi Makhaya, the Commission has identified serious competition concerns in one area, that of exclusive lease agreements between supermarkets and shopping malls, while in other areas of concern the Commission has not identified a contravention of the Act.

The rejection of Grain SA's application for exemption from the provisions of the Competition Act, reported on by Lameez Vania and Mapato Rakhudu, raises issues of competitors wishing to coordinate when they are under pressure. Grain SA on behalf of maize farmers argued that very low prices due to the large excess production required a coordinated mechanism to export the grain. The Commission rejected the application (which would likely have increased maize prices) while noting that there may be concerns that government could address.

Merger activity continues to pick-up by comparison with the previous year. This included several problematic transactions. As described by Genna Robb, the Commission prohibited the acquisition of local seed company, Pannar Seed, by Pioneer Hi-Bred International, a large multinational biotechnology firm, due to concerns including the increase in local market concentration and the control of Pannar's 'library' of seed varieties (known as germplasm).

Somewhat similar issues of ensuring competitive rivalry going forwards underpinned the conditional approval by the Commission of Softline's acquisition of Netcash. As explained by Raksha Darji and Mfundo Ngobese, the Commission's analysis found that the merger had likely anti-competitive implications without the conditions that sought to preserve a competitive landscape for those using Softline's software to provide related services.

By comparison, in the third merger reported on here, by Lindiwe Khumalo, the Commission only imposed remedies related to employment in the acquisition by Rhodes Food Group of its competitor Del Monte Fruits. Although this was a horizontal merger in an already concentrated market, the Commission found that considerations of export competitiveness combined with the exit of Del Monte in any event were important motivations.

Maarten van Hoven then briefly describes the Commission's approach to prior implementation of mergers emphasising the need to ensure companies comply with the Act, as well as the factors the Commission will take into account in penalising firms who fail to notify mergers.

This newsletter rounds off with an interview with Norman Manoim, the chair of the Competition Tribunal, covering his reflections on the job 18 months after stepping into the role.

Simon Roberts,
Editor-in-Chief

Commission's investigation in the construction sector

continues...

Following the initiation and investigation of these cases, the Commission received about 150 marker applications and 65 CLP applications which implicated the majority of medium and large firms in the construction industry in bid-rigging conduct. The Commission's investigation and processing of these CLP applications revealed that bid-rigging conduct is rife in the construction sector. In fact, from the evidence obtained, it was apparent that bid-rigging conduct has been a culture of doing business in the construction sector. This led the Commission to develop and launch a fast track settlement procedure in order to expedite resolution of these bid rigging cases and to rid the industry of this egregious conduct.

On 1 February 2011, the Commission launched an invitation to firms in the construction sector to settle bid-rigging cases ("fast track settlement procedure"). The fast track settlement procedure is aimed at encouraging firms in the construction sector to disclose all the projects which they were involved in that were subjected to bid-rigging conduct, and settle all these projects on financially advantageous terms.

It is very important to highlight that firms can still apply under the Commission's corporate leniency policy (CLP) for any cartel contravention that they identify. Where the firm is first to come forward with a particular contravention then, under the CLP, no penalty will apply and there is no need for this to be included under the fast-track settlement. If a firm applies under the CLP (including for a 'marker') and finds it is not first then it can take advantage of the terms of the fast track settlement.

The Commission requires the firms to disclose all the projects that they were involved in which were rigged irrespective of whether the project is prescribed or not (that is, was more than three years before the Commission initiation) but, when calculating penalty, the Commission will only consider projects that are not prescribed.

The firms that choose to participate in the fast track will benefit from substantially lower penalties. In terms of the fast track settlement, firms that disclose all the projects that they participated in which were subjected to bid rigging will have the penalty calculated on the projects taken together, calculated per major subsector and then summed across subsector for an 'all-in' settlement. This is a far reduced penalty as compared to where a firm is fined a percentage of its annual turnover per project.

Firms that choose not to participate will remain exposed to the risk of being implicated by other firms and they will be prosecuted. The Commission will likely seek the maximum penalty of 10% of the firm's annual turnover for each project they subjected to bid-rigging. These firms also run a risk of being barred from government tenders and their registration with Construction Industry Development Board's registrar of contractors can also be removed. This will make it impossible for the firm to get tenders for public sector and difficult to get tenders from the private sector.

Applications for the fast track settlement close on the 15 April 2011 and after this closing date, the Commission will begin the process of evaluating the applications.

After the completion of the evaluation process, the Commission will investigate firms that did not participate in the fast track settlement process. The investigation will be followed by prosecution of these firms at the Competition Tribunal. Now the ball is in the firms' court to come forward and disclose all the projects they subjected to bid-rigging or run the risk of being prosecuted and fined heavily.

Commission refers cartel conduct in pilings, lateral support, groutings, and geotechnical exploration and investigation services

Lebogang Madiba

On 02 March 2011 the Commission referred yet another far-reaching cartel case in construction related activities to the Competition Tribunal. In 2009 the Commission received information from Grinaker-LTA, under the Commission's corporate leniency policy (CLP), that its ground engineering division, GEL, has colluded with its competitors in the markets for provision of pilings, lateral support, groutings and geotechnical exploration and investigation services by rigging tenders, dividing markets and fixing prices.

The Commission's year-long investigation revealed that the cartel comprised Grinaker LTA GEL[1], Rodio, Franki, Esor, VNA, Gauteng Piling, Diabor, Geomechanics, Dura and Fairbrother (participants). The cartel conduct involved formal and *ad hoc* arrangements whereby tenders/projects for pilings, lateral support, groutings and geotechnical exploration and investigation services were divided amongst participants mainly in accordance with a scorecard that corresponded with each participant's agreed market shares. The cartel had a national presence but mainly focused on players in Gauteng, KZN and the Western Cape.

Participants followed a more or less similar *modus operandi* to that seen in other leading cartel cases finalised by the Commission such as the concrete pipes cartel. Secret meetings were held, monitoring mechanisms were developed, rules for allocation of projects were drafted and agreed upon, compensatory payments occurred, false invoices were generated and cover prices provided.

Rules of allocation of work were prepared and agreed upon by the participants. The rules detailed how tendering process should be conducted by each participant once a tender is advertised, in order to ensure that the tender is awarded to a participant whose turn it was to get the work.

Each participant's agreed market share (volume allocation) and tenders allocated to each of the participant during a given point in time were recorded in a scorecard also known as "The Book". During currency of the cartel, there were Books for piling projects, grouting and lateral support services projects in Gauteng and KwaZulu-Natal. The Books also served as a good monitoring tool for the cartel as it recorded and reflected tenders received by each participant which could be used to determine which participant had exceeded his allocated market share. A participant who was found to be ahead was required either to stay back in the next tendering phase or effect a compensatory payment to a participant who was behind in order to achieve a balance.

In order to achieve the allocation scheme parties would in addition to allocating tenders in accordance with the agreed proportion of work to be allocated to each participant:

- Pay each other off to stay out of a tender allocated to a particular participant. These compensation payments (payments for losing bids) were called add-ons; and
- Provide each other with cover prices in order to ensure that the tender is awarded to a particular participant whose turn it was to win the bid in terms of the scorecard.

In order to monitor the arrangements, regular meetings were held between the Respondents to discuss, *inter alia*, the following issues:

- new projects,
- whose turn it was to bid and at what price,
- Cover prices (which had to be at least 5% higher than the lowest bidder)
- Market share percentages that each was entitled to in each region and the consequent agreed market share split,
- Add-ons/compensatory payments that needs to paid;
- Performance of each participant in terms of the scorecard;

The piling meetings were held at guest houses in Auckland Park, in Fourways and the lateral support meetings were held at Franki and/or Esor's offices. Some of the important projects that were rigged by participants include:

- Gautrain
- Lesotho Highlands Water project
- Moses Mabhida Stadium
- Braamhoek Dam

1 GEL and Rodio operated joint venture entity known as Rogel

Rebar Cartel

Yongama Njisane

The cartel referred by the Commission on 01 February 2011 details extensive collusive conduct on the part of firms in the market for the cutting, bending and supply of reinforcing steel in South Africa. The initiation of the investigation on 26 January 2009 followed the leniency application received from Murray and Roberts Steel (Pty) Ltd, filed on behalf of its subsidiary, Reinforcing Steel Contractors (Pty) Ltd. In this application, M&R submitted that competitors in the rebar market, had engaged in the prohibited practices of fixing prices, dividing markets by allocating customers, and collusive tendering. The investigating team uncovered cartel conduct by firms in six different regions, namely Gauteng, Limpopo, Mpumalanga, Cape Town, George and KwaZulu-Natal.

In Gauteng, the investigating team found that between the years 2004 and 2007, the respondents had contact in the form of meetings and telephone calls for purposes of fixing prices. The start of these meetings was during a period when there was a price war taking place in the market and the primary aim of the meetings as described by respondents was to create "stability" in the market and "sanity" in their pricing behavior. This led to the creation of a recommended or suggested price list in terms of which pricing levels for the Gauteng region were set.

With regards to customer allocation, the investigation revealed that there was a long-standing understanding between the respondents that certain customers in the rebar market belonged to certain competitors, and that targeting such customers would result in retaliation against the offending cartel member. Regarding collusive tendering, the investigation established that the respondents' conduct of allocating customers had an impact on contracts/projects that were available in the market. This is because these players normally tender for rebar supply contracts and therefore the allocation of customers arrangement was achieved through cover pricing where competitors protected each other by submitting higher quotes/ prices to customers not forming part of their customer base.

Evidence gathered shows that the conduct of price fixing between competitors in Mpumalanga was perpetrated through the recommended price list which was developed in the Gauteng region. The players active in this region simply followed the price list devised in the Gauteng region.

In KwaZulu-Natal it was found that the main conduct that took place was collusive tendering. In this regard, the respondents held regular meetings to allocate contracts. As such these players drew an allocation sheet which was used to keep track of contracts that were allocated and those that were pending. Similar to Gauteng and Mpumalanga, a price list was formulated and agreed to by all the firms as a guideline upon which firms would price. Given that the supply of rebar is linked to projects in so far as suppliers would tender for the supply of rebar for various construction projects, the administration of this price list is intrinsically linked to the project allocation.

The Limpopo region was also no exception to the respondents' collusive practices. Evidence shows that meetings were held in the region between various players for purposes of allocating contracts.

The conduct in the Western Cape was split between Cape Town and George. The investigation revealed that there were meetings held in Cape Town between competitors operating in the region. The purpose of these meetings was to allocate work based on each firm's market shares in Cape Town. Similarly, the investigation established that there was customer allocation taking place in George. In this regard, it was found that the respondents had a tacit agreement that certain customers belonged to certain firms and that targeting such customers would result in retaliation.

Heading towards the check-out counter: an update on the supermarkets investigation

Trudi Makhaya

The Commission's investigation into the major supermarket chains for various alleged prohibited practices is at a critical juncture. The Commission has undertaken an extensive investigation into various possible contraventions of the Act. Of the four main areas identified, the Commission has identified serious concerns in the area of long-term exclusive lease agreements and has non-referred in the other three, being the exertion of buyer power, category management practices, and information exchange. With regard to exclusive leases, the Commission is now engaging with the supermarkets and other parties involved in such arrangements.

In June 2009, the Commission initiated a complaint against Pick 'n Pay, Shoprite/Checkers, Woolworth, Spar, Massmart and Metcash. This investigation was sparked by the Commission's preliminary research into the food value chain, which raised concerns about various types of conduct on the part of supermarkets.

Issues regarding the buyer power of the supermarket chains were thought to be evident in certain features of the commercial relationship between supermarkets and their suppliers. These include an array of fees that suppliers may pay to supermarkets such as: listing fees and slotting allowances; policies on payments, returns; promotional discounts and other rebates; and, exclusive supply agreements. These potentially onerous terms on suppliers could have exclusionary effects on both small retailers and small suppliers. Small suppliers who could not meet those terms would be excluded from supermarkets' shelves. Small retailers who would not be able to exercise buyer power over their suppliers could face higher costs than their more powerful rivals. This conduct was assessed as a possible contravention of sections 5(1), 8(c) and/or 8(d)(ii).

In its assessment, the Commission found that supermarkets were not extracting significant margins on key staple foods as a result of buyer power. Most large suppliers did not believe that they suffered any harm from supermarkets' bargaining power and found the relationship to be equal or only tilted towards the retailers. Small suppliers expressed the most concerns yet the Commission found these stemmed mostly from their lack of information and preparedness in meeting regular listing and trading conditions.

The Commission is advocating that (though the terms between retailers and suppliers should remain confidential for competitive reasons) assistance and education should be given to small suppliers to enable them to make informed decisions about trading through supermarkets. Retailers should also be cautious in dealing with their largest suppliers as these have an incentive to offer supermarkets terms that may have the effect of excluding small suppliers. The development of small suppliers should also be encouraged through using them for private and 'no-name brands' and also to supply smaller family type store formats within the large chains.

Small retailers could compensate for their smaller volumes and consequent weaker buying power through forming buying groups. In fact, larger independent retailers are able to get good terms from suppliers, yet exclusive leases, dealt with below, act as a barrier to entry into retail.

Category management is a practice whereby supermarkets delegate the management of a product category to a 'category captain'. The category captain could be appointed from one of the largest suppliers in that category and would take decisions or make recommendations on product placement, promotion and pricing of its own and competitors' products. This was assessed as a possible contravention of section 5(1) of the Act. However, it was found that category management has mainly gone in-house. External parties only make recommendations to the retailer. Pick 'n Pay still uses external category captains but ultimate decision-making rests with its buyers and shelf managers.

The retail industry is served by market research and market intelligence companies such as AC Nielsen and Synovate. These companies capture sensitive sales and price information at an extremely disaggregated level. The Commission was concerned that these information agencies could facilitate information exchange at the retail and at the supplier level. This practice was assessed as a possible contravention of section 4(1)(a) of the Act. It was found that the dissemination of information to retailers is on an aggregated basis. However, the Commission will engage in advocacy on the manner in which retail scanner data is shared with suppliers.

The industry-wide practice of imposing restrictive terms, such as product and size exclusivity provisions, into long term leases between supermarkets and property developers remains the only contravention under investigation. Product exclusivity occurs where supermarket leases restrict the product range that other tenants can offer in a shopping centre. For instance, a lease would provide that only the anchor tenant can provide food products, butchery, bakery, deli etc. Exclusivity is also sometimes expressed as a size restriction, meaning that potential competitors can only sell food or the restricted products within a specified maximum area.

Exclusive leases are currently being investigated as a possible contravention of section 5(1), 8(c) and 8(d)(i) of the Act. Various other complainants have come forward on the exclusive leases matter, including small traders, speciality shops and a competitor chain.

As parts of the supermarkets investigation draw to a close, advocacy efforts have begun around empowering small suppliers and preventing the exchange of sensitive information.

Exemption application by Grain South Africa[1]

Lameez Vania & Mapato Rakhudu

Grain South Africa (GSA) a voluntary organization which represents grain producers applied for an exemption in terms of section 10(1)(b) of the Competition Act which provides that a firm may apply for an exemption from the application of Chapter 2, for a category of agreements or practices, if the category of agreements or practices meets certain requirements.

GSA approached the Commission regarding the removal of an estimated 3 million tonnes surplus of maize in the country through the creation of an export pool which, if implemented, would create possible anti-competitive effects. The case gripped national interest as it involved the country's maize farmers who have claimed that they are under water as a result of low prices from the surplus maize produced over the last two years. It also raised the question of crisis cartels[2] and whether or not it would be pertinent to justify an exemption as a result of the economic downturn. According to GSA, attempts to deal with the surplus maize through normal free market activities had failed.

GSA approached the Commission with a proposed scheme to create a coordinated export pool that can export surplus maize from South Africa. In terms of the scheme, a portion of the current surplus would be isolated from the inland market for the sole purpose of export and maize producers would be free to deposit maize within the pool on a voluntary basis. The maize subject to the application was both

yellow and white maize of genetically modified (GM) and non GM varieties. GSA applied for an exemption on the grounds that the exemption is required in order to achieve the objectives set out in sections 10(3)(b)(i), 10(3)(b)(iii) and section 10(3)(b)(iv) of the Competition Act, namely the maintenance and promotion of exports, change in productive capacity necessary to stop decline in an industry and the economic stability of an industry designated by the Minister of Economic Development.

The Commission's investigation found that:

- The promotion of exports, as envisaged by the GSA is unlikely to be viable through the proposed scheme due to the limited export market available for maize produced in South Africa. The logistical problems associated with exporting grain in South Africa will remain a significant barrier and are not addressed by the proposed scheme. The Commission further found that most of South Africa's usual maize trade partners are also currently enjoying surpluses of their own, the greater proportion of maize produced in South Africa is white maize which is not as widely consumed globally as yellow maize, and there is limited demand in the region for the genetically modified maize produced in South Africa.

- In so far as the export scheme related to a change in productive capacity which was necessary to stop decline in an industry, the Commission found that the surplus in itself is not indicative of an industry in decline. Surpluses and deficits arise due to changing market circumstances and markets adjust accordingly. There is no evidence that this industry cannot survive such an adjustment. Indeed there have been improvements in productivity which have contributed in part to the surplus. The Commission recognises however, that the existence of the surplus may well result in lower than expected returns to farmers, and financial difficulties for some. Ultimately this may negatively affect the country's productive capacity of maize in the long run. The surplus poses a challenge for government and the industry to consider alternatives that

may on, balance benefit, the country and consumers. These include options such as crop substitution, biodiesel, hedging and use of the futures market, value added products and entry by export traders.

- The objective of promoting the economic stability of an industry designated by the Minister fails on procedural grounds. The industry has not been designated by the Minister of Economic Development, as required by the Act.

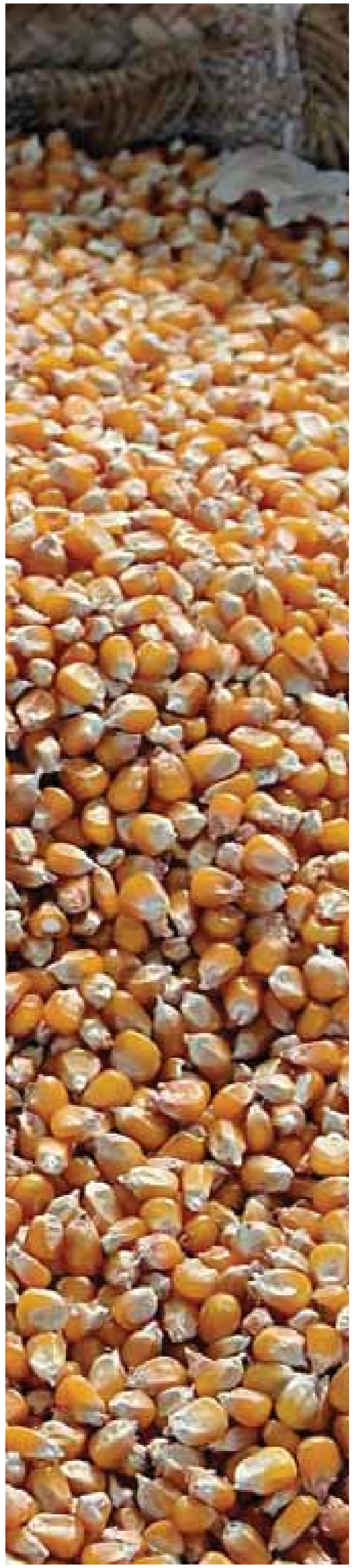
The Commission was further concerned that the proposed scheme is likely to have the following undesirable outcomes:

- Increased prices to consumers
- increased risk of a threat to the security of supply and accordingly food security;
- reduced incentives for grain producers to be more efficient and innovative; and
- produce the same anticompetitive outcomes that resulted from the legally sanctioned cartel of the now disbanded Maize Board.

For these reasons the Commission rejected the exemption.

In conclusion, one of the overall economic aims of the Act is the safeguarding of competition whilst maximising social welfare gains. In order to give effect to this, public interest objectives such as the change in industry capacity as well as the economic stability of an industry are considered in exemption applications. It would not be difficult for firms, in times of economic downturn, to apply for an exemption based on the above grounds. However exemptions that have been granted on these criteria are few and far between.

1 *2010Jul5262*
2 *A crisis cartel is public cartel in which a government is involved to enforce the cartel agreement, and the government's sovereignty shields such cartels from legal actions in order to protect an industry or sector in a period of economic crisis*



Seed company merger prohibited by Commission

Genna Robb

In December 2010, the Commission prohibited the acquisition of local seed company, Pannar Seed, by Pioneer Hi-Bred International, a large multinational biotechnology firm. Both parties are currently active in the breeding, production and distribution of seed in South Africa across a range of markets, but the Commission's concerns centred on the market for hybrid maize seed where there are currently only three players: Pannar, Pioneer and a third party, multinational biotech firm, Monsanto.

Hybrid maize seed is the product of a process whereby seeds are cross-bred many times over successive generations in order to confer particular characteristics such as a certain length of maturity and resistance to a type of disease. It may also include a genetic "trait" or gene transplanted from a different type of organism which would lead to the seed being classified as "genetically modified" (GM).

Hybrid seeds generally provide significantly greater yields than traditional non-pollinated varieties and in South Africa commercial farmers use them almost exclusively. In addition, around 75% of maize seed sold in South Africa is GM. Differences in climate, soil-type, pests etc. mean that hybrid seed is bred specifically for a given region, suggesting a geographic market which is national at best and potentially even more localised.

The parties to the merger are both active in the hybrid maize seed market in South Africa, although both license their biotech or "GM" traits from Monsanto, who is the only holder of licensed biotech traits in the country.

The Commission found that the merger would have led to substantial anti-competitive effects. The proposed transaction was a three-to-two merger, where the parties both had a significant market share in the market for hybrid maize seed, resulting in a large increase in concentration. The investigation revealed that Pannar is an important competitor in the maize seed market, with a strong reputation built through over 50 years of breeding maize seed for South African conditions. Given the characteristics of hybrid maize seed described above, Pannar's strong locally adapted germplasm (library of seed varieties) represents a key competitive advantage. The Commission was therefore concerned about upward pressure being exerted on seed prices if Pioneer was able to acquire its competitor, Pannar.

Furthermore, the Commission found that the merger would substantially increase entry barriers in the market for breeding hybrid maize seed, since it would remove the last remaining independent local seed company and source of locally adapted germplasm such that new entrants would have no access to local seed varieties. Finally, there was concern that the reduction in competition in the industry could lead to declining levels of innovation which would have a negative effect on product quality.

The Commission also considered the potential efficiency gains that were raised by the parties. It was submitted that the combination of the parties' germplasm would lead to significant improvements in product quality due to their complementary characteristics and that post-merger, Pannar would

have access to Pioneer's Advanced Breeding Technologies which would allow it to speed up and improve the precision of its breeding process. In addition, the parties suggested that it was Pioneer's intention to build a "technology hub" in South Africa which would result in significant investment in breeding technologies and ultimately allow the merged entity to provide improved products to farmers. Furthermore, the parties suggested that together they would be able to be a stronger competitor to Monsanto, the dominant player in the market.

Finally, a number of public interest concerns were raised with the Commission by stakeholders. These mainly centred around the fact that the merger would result in maize seed breeding and production being concentrated in the hands of two large multinationals, which could potentially have implications for South Africa's food sovereignty. Another point that was raised was that the merger could result in the greater proliferation of GM seed in South Africa to the detriment of traditional non-GM seeds which are preferred by small farmers.

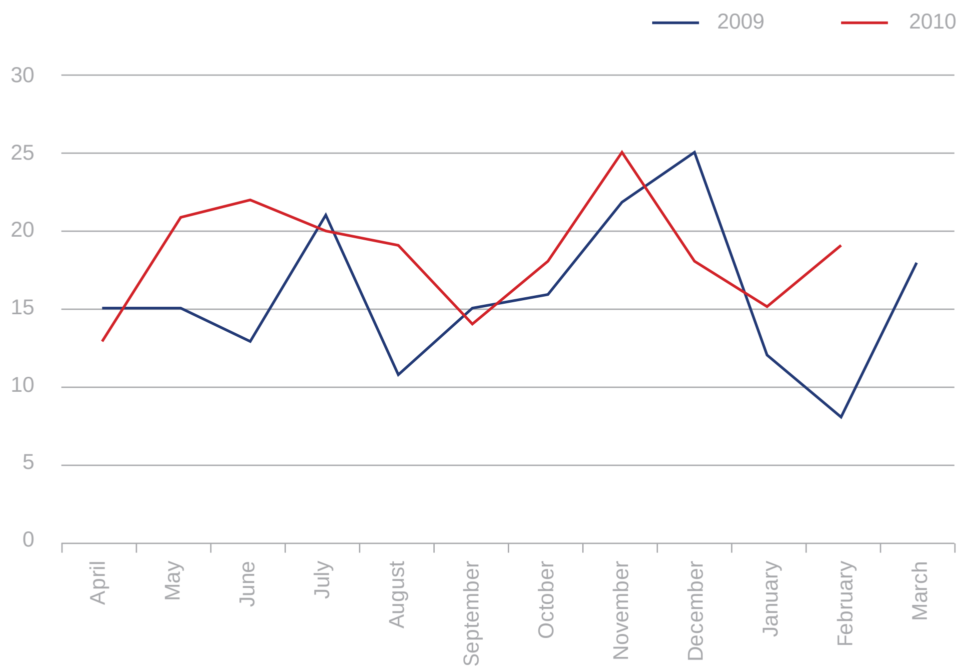
Overall the Commission decided that the anti-competitive effects of the merger were likely to be significant and that the efficiency gains related to the transaction would not be sufficient to outweigh these effects. The merger was therefore prohibited. The parties, however, appealed the Commission's decision and the appeal will be held in the Tribunal later this year.

Merger review (October – December 2010)

Maarten van Hoven

The third quarter of the Commission's financial year is usually the quarter in which we receive the most merger notification and this year was no exception. In total the Commission received 60 merger notifications of which 40 were intermediate, 16 were large and 4 small mergers. This compares with 63 mergers in the same period of the previous year. During the period the Commission successfully finalized 50 mergers which vary from non complex to very complex mergers. The Commission concluded these mergers in an average turnaround time of 32 days.

From an annual perspective the diagram below records the number of merger notifications per month comparing 2009 and 2010. Overall it is clear that the current financial year has seen more filings than last year and the Commission expects that the merger notifications to be approximately 15% higher than the previous financial year.



Although the number of transactions has increased during the past year it is further apparent that the complexities of transactions have also increased. The market definitions, analysis and likely effects have caused the Commission to allocate significant resources to these transactions.

During the last quarter the Commission had various contentious mergers to consider including, the Tsogo Sun & Goldreef transaction (which was ultimately approved by the Tribunal without conditions), the SAB & Boland Beer transaction which is subject to the Competition Tribunal adjudication in the next few months, the Pioneer Hi-Bred International & Pannar Seed (an intermediate merger which the Commission prohibited) and is now in the Tribunal to be heard in September 2011.

Softline acquires Netcash

Raksha Darji & Mfundo Ngobese

Significant competition concerns with the acquisition by Softline (Pty) Ltd of Netcash (Pty) Ltd led the Commission to approve the merger subject to conditions to preserve a competitive landscape for those using Softline's software to provide related services.

Softline is involved in the provision of enterprise business management software which includes accounting and payroll software. Softline's Pastel accounting and payroll software is acknowledged by competing software providers, accounting software dealers, the accounting profession and customers as the leading system utilised by small, medium and micro enterprise ("SMMEs").

Netcash is a third party payment service provider offering transaction processing services and also acting as a system operator. Third party payment providers, also known as Electronic Funds Transfer ("EFT") Bureaux, are non-banks which participate in the payment system. Essentially Netcash has developed an internet based system for collection and payment of monies on behalf of their clients who are predominantly SMMEs.

Netcash provides transaction processing services in three primary areas:

- Debit order collections
- EFT Payment
- Credit card transaction processing.

The Commission found that there is no existing horizontal overlap in the activities of the merging parties. However, the merging firms provide complementary services. Softline develops payroll and accounting software as such it has files which are used to instruct payments into banks or third party payment providers' systems for processing. Payment providers often need to interface with the payroll and accounting systems provided by companies such as Softline in order to carry out the transaction processing function for clients. As a developer of accounting and payroll software, Softline wants its products to enable its clients to conduct EFT payments and debit orders in bulk when paying their employees or collecting payments. Currently, Softline's software can export payment information to pre-defined, bank-specific export files, e.g. NetBank Business, FNB CAMS / PACS, Standard Bank CATS / EFTS etc. This is essentially the same as most other payroll or accounting systems.

Some banks require their clients to have special software installed to use these files, rather than just allowing their clients to upload the file into the normal internet banking. When using an EFT Bureau, such as Netcash, the client effectively gives the EFT bureau authorisation to run debit orders on its account. The payroll system then generates a file according to the bureau's specifications. The client can then either manually hand this file over to the bureau or ask the payroll system to do it for them. The EFT bureau then does a debit against the client's account and credits each individual employee. This is one example in which Softline's product, in particular the payroll system, interfaces with the EFT Bureaux services.

Similar interface of EFT Bureaux services with the client's accounting and payroll system offered by companies such as Softline exists since EFT Bureaux facilitate the transfer of money from or to their client's bank account to or from the client's customer, supplier, creditor or debtor's bank account, e.g. tax payments and refunds, accounts receivable and accounts payable.

In short whilst Softline can be seen as back-office of its client, Netcash is essentially a front-end service provider.

The Commission found that the merged entity would create a bundle of Softline's accounting and payroll software and Netcash's transaction processing system which rivals cannot replicate with their own effectively competitive bundle(s) to the detriment of EFT Bureaus active in the transaction processing market. Having large volumes of transactions is essential for realisation of cost savings in the payments clearing space.

The Commission found that Softline has in access of 70% market shares in the market for the supply of accounting and payroll software to SMMEs, a market characterised by, amongst other factors, high barriers to entry. Accordingly, Softline was found to possess a significant degree of market power to be regarded as dominant.

Investigations revealed that there are limited possibilities for Netcash's competitors to replicate the bundle principally because existing competitors of Softline are relatively small compared to Softline. This means that Softline's competitors are unlikely to bring transactions of a scale comparable to that which Netcash is likely to enjoy in its association with Softline and this could place these competitors at a significant competitive disadvantage in consideration of significant economies of scale characterising the transaction processing market.

The Commission found that Softline cannot extract all profits through its dominant platform due to the relative independence in consumption of accounting and payroll software on the one hand and transaction processing services on the other. Also the Commission found that existing customers are more likely to switch from their current providers of transaction processing service in order to adopt a Softline/Netcash bundle than to switch from the Softline accounting package to alternative software.

Nonetheless, the Commission found that Softline's software package spans across various sizes of businesses. Accordingly, Softline is also likely to gain a substantial proportion of payments business from bundling its accounting and payroll software with Netcash transaction processing from customers currently serviced by banks, a welcomed injection of competition for bank customers.

Accordingly, the merger was approved subject to certain conditions on access to file formats, a creation of a link in Softline's software to alternative payment providers' sites and interoperability.

The Rhodes - Del Monte merger

Lindiwe Khumalo

The acquisition by Rhodes Food Group of the business of its competitor Del Monte Fruits (S.A) (Pty) Ltd involved two major firms active in the canning of deciduous fruit, fruit concentrate and pulp and puree. The merged entity would have a market share of more than 30% based on sales of fruit per ton and also on turnover, with L&AF (a Tiger subsidiary) having more than 60% of the market for the production and supply of canned deciduous fruit.

It was further found that customers have a limited degree of countervailing power as they can only switch between two suppliers, Rhodes and L&AF. There are regulatory requirements in the canning market and the industry depends on realising economies of scale, while brand loyalty is also a potential impediment, thus the barriers to entry are significant.

The Commission found that the horizontally transaction was likely to result in a substantial prevention or lessening of competition in the market for the production of canned deciduous fruit. In the market for the production of fruit puree the merging parties would have approximately 25% market share. Although there was a history of collusion in the puree market it was unlikely that there would be a substantial prevention or lessening of competition as barriers to entry are low, customers have countervailing power and there are a number of alternative sources in the market.

The primary reason for the Commission's approval was one of export competitiveness. At current output levels the parties submitted that the Western Cape fruit canning operations were not viable in the long run. The firms compete in the export market where they face competition from countries which are subsidised in agricultural products. The canning of fruit is seasonal and there has also been a decline in the consumption of canned products as consumers become health conscious.[1]

On public interest considerations the merger had a negative effect on employment as about 1000 seasonal employees could lose their jobs during the next canning season. This was due to the consolidation of the canneries which further resulted in a negative effect in a rural agricultural dependent area of the Western Cape.

Given that the transaction would allow the merged entity to compete effectively in the export market and the counterfactual that Del Monte was exiting the South African market to focus on production in its Greek operations, which resulted in increased job losses at Tulbagh,[2] and a limited range (peach and apricots only) available in the market, the Commission therefore approved the proposed transaction with behavioural conditions to address employment issues.

1 *Consumers prefer fresh fruit to preserved fruit.*

2 *One of the canneries.*

Prior implementation of mergers

Maarten van Hoven

In terms of Section 13A(3) of the Competition Act, the parties to an intermediate and large merger may not implement that merger until it has been approved, with or without conditions by the Commission or Tribunal. In terms of Section 59 of the Competition Act the Tribunal may impose an administrative penalty if the parties have failed to give notice and proceeded to implement the merger.

During the last 10 years various parties have implemented mergers in contravention of the provisions of the Act and the fines levied by the Tribunal had varied from R 1 (Dorbyl & Structa Technologies) to R 500 000 (Tiso & Nail).

The Tribunal in its judgment involving Netcare & Community Hospital Group in respect of the settlement agreement (during 2007) made mention of the fact that change was needed to the approach adopted in the past. This Commission took this to heart and during 2010 developed a more robust approach to these contraventions which will result in effective prosecution.

As a consequence of the new approach the Commission requires more detailed investigation and analysis to determine whether the parties were either bona fide, negligent or willful in their behavior in non-notifying or implementing the merger in contravention of the Act. According to the Commission the high-water mark for South African firms to claim non compliance with the act was a bona fide error is very high today. The Competition Act has been in operation for 10 years and firms must know their obligations to comply with the provisions of the Act.

Merger regulation compliance is a key part of ensuring compliance with all provisions of the Competition Act. Furthermore, in terms of the Act all parties to a merger are obliged to notify the Commission of transactions and therefore the parties should be held jointly liable in the event of offence and not only the acquiring firm. In the consideration of fines the Commission will consider, in addition to the parties behavior, factors such as level and willingness to cooperate with the Commission, the duration and extent of the offence, whether profit was derived or whether the merger resulted in an lessening of competition and whether the parties had any previous contraventions.

The changed approached has effectively been implemented in a recent matter involving WBHO & Edwin Construction where the Commission found that the parties were negligent in their behavior in not notifying the Commission of an intermediate merger and implementing the transaction without approval. The merger was implemented for a period of four years before the Commission was informed of the transaction. The parties, however, then cooperated with the Commission. The Commission found that the merger did not lead to a lessening of competition. The Commission entered into a consent agreement with both parties requiring fines of R1 000 000 and R100 000 for the acquiring firm and target firm respectively. The consent agreement was made an order of the Tribunal during November 2011. The approach adopted by the Commission accords with international best practice and is currently being applied to various pending cases in which parties have contravened these provisions of the Competition Act.

“Keeping the show on the road”

By Molebogeng Taunyane

Competition Tribunal chairperson, Norman Manoim

Eighteen months ago Norman Manoim took over the reins as Competition Tribunal chairperson. In an interview with Competition News he chats to us about his role and its challenges.

You were appointed to lead the Tribunal a little over 18 months ago – what has it been like?

I travel to work each day on the highway from Johannesburg. I see the highway as a metaphor for my job. Some days it flows smoothly, some days you think you will never reach your destination, but in the end you always do and realise no matter the frustrations on the way, the trip was worthwhile.

How does this role differ from your last one as a full-time member of the Tribunal?

As chairperson the buck stops with you. I am much more involved in administrative issues, dealing with Parliament and our line department as well as members of the public and overseas agencies than I was as a full time member.

What has been your proudest achievement in this role?

It’s not appropriate to single out any event or case. I think I am proud of the fact that when people have a case before us they think they will receive a fair and considered hearing. That’s by no means my personal achievement – it’s thanks to the good work of tribunal members both past and present.

What is the most difficult part about your job? Or, what do you find most challenging about your role?

Keeping the show on the road! We want to get to the merits of cases – that’s what we are here for.

In President Jacob Zuma’s state of the nation address he mentioned that government is working on strengthening the Act. What is your view on this?

I think everyone has their own ideas on what needs to be done. As a first reform I would make administrative penalties a competent remedy for all first time contraventions. At the moment certain contraventions are only susceptible to a fine if the conduct is substantially a repeat of conduct previously found to be a prohibited practice. The reason for this was that at the time the Act was introduced it was felt that firms did not understand competition law and that this might lead to punishing the ignorant unduly. Twelve years later that argument no longer holds water. We have enough experience of competition law for people to familiarise themselves with the law and even if they haven’t, there are a lot of competent people out there who can advise firms. Secondly, I think the appeals process is unduly prolonged and needs reform. To have three shots at an appeal post a tribunal decision is a luxury we cannot afford.

What guides you in decision making process as a “judge”?

We ask is there a theory advanced by the party to support its case, is the theory coherent, does it fit the facts before us and if the conclusions from those facts is disputed, which is the more probable explanation.

A couple of months ago you were quoted as saying “slow justice is no justice.” What did you mean about this?

That if cases take too long to resolve even though someone may have got justice at the end, it is no comfort if it took too long in coming. This applies both to the complainant and the respondent. The complainant may have got its relief too late when it already has one foot in the grave, the respondent may have been deterred from engaging in activity ultimately found to be lawful.

What can be done about this? What are you doing about this?

Everyone can do their bit to improve this situation as I suggested in my speech. I think recently the Commission has been settling the majority of its matters and shown great creativity in finding remedies. This means we only have to hear matters where there are material disputes of fact and law. This trend is to be encouraged. From our side we are looking at alternatives to some of our procedures that could expedite the time taken between the referral of a case and completion of the hearing.

What would you like to achieve during your tenure? Or, what kind of legacy would you like to leave when your tenure comes to an end?

To feel we have made a difference.

What is your background?

I am an attorney by profession. Prior to joining the Tribunal in 1999, I was in private practice with a law firm. My background was not in this area at all. I was a human rights lawyer but I was brought in to help work on drafting the present Act in 1998, and I’ve stayed with it since then joining the Tribunal as a full time member in 1999.

The Tribunal is a small organisation reputable for its successes – what do you attribute this to?

I think our small size is our strength not our weakness. We also have an advantage as our work is so focussed. We are given a case to adjudicate and we have to make a decision. We don’t have to deliberate on what our strategic direction is. We just walk downstairs and hear the case. I think we have also been fortunate in the calibre of people appointed as tribunal members over the years, their attitude to the work and their integrity. We have been seen as independent both of government and the Commission and not captured by any sectoral interest. We are also well supported by our full time staff both on the administrative and research side. The fact that our staff complement has remained fairly constant over the years means we have people who know their jobs well and have helped us retain an institutional memory.

Given that you are so small – how do you deal with your increasing workload?

The design of the Tribunal is such that we can temporarily expand when necessary to meet an increased workload, but not make this a permanent expansion so we don’t have overcapacity in quieter times. This is because of our ten members, only 3 are full time. When the case load increases we can call more on our part timers to help out. In quieter times we call upon them less, but because they are not full time employees they are not dependant on us for an income. We have also used free-lancers who we use as back up to our research department in busy times.

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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