Competition News

The official newsletter of the competitioncommission

Towards a fair and efficient economy for all.

Edition 6 • December 2001

IN THIS EDITION

Concurrent jurisdiction in the banking sector

Turf war or constructive co-operation?

The amendments to the Competition Act 89 of 1998 expressly provide for concurrent jurisdiction between the competition authorities and sector specific regulators.

In its Annual Report 2000, the Banking Supervision Department of the South African Reserve Bank (SARB) expressed concerns regarding concurrent jurisdiction, arguing that "concurrent jurisdiction with the Competition Commission on matters affecting the banking industry might lead to uncertainty." This, the Department asserts, may negatively impact on banking stability issues, which in its view, are internationally regarded as more important than competition issues.

The report also highlights, somewhat exaggeratedly, the potential problems that could arise where there is disagreement between the two regulators on a particular application. "A deadlock in respect of an application would cause undue uncertainty in an industry in which certainty is of paramount importance from both a stability and a public-interest perspective. The issue of the Competition Commission having concurrent jurisdiction also begs the question what the purpose

CONTINUED ON PAGE 2

FROM PAGE 1

would be of the consultation process prescribed by Section 37(2)(b) of the Banks Act." Clearly what is required here is not a futile exercise in semantics, but rather an amendment to the Banks Act.

With an air of even greater doom, the Department predicts that the power granted to the Minister of Finance, in terms of Section 18(2)(b) of the Competition Act, to preclude the Competition Authorities jurisdiction, "could be viewed as direct political interference in banking matters and could lead to litigation against the Minister." This concern appears to neglect the fact that the provision is intended to curb the Department's earlier anxiety that banking stability may suffer where competition issues are completely divergent from the particular interests of the banking sector.

Sections 21(1)(h) and 82(1) and (2) of the Competition Act provide for the negotiation of agreements between the Commission and each sector regulator. These agreements are intended to outline procedures, which facilitate the proper application of concurrent jurisdiction, and to promote co-operation between the specific regulator and the Commission. However, the Banking Supervision Department "is not convinced that such an agreement would remove all of its concerns, or that such an agreement would deter market participants from practising regulatory arbitrage." This lack of conviction is indeed somewhat premature, since the Department has not yet embarked on the negotiation process with the Commission.

It is interesting to note that Darryl Biggar, an expert from the Organisation for Economics Cooperation and Development (OECD) on the interaction between competition and regulation in a number of different sectors of OECD economies, including banking and insurance, addressed this very debate in a paper delivered at the April 2000 Competition Conference. Biggar cogently argues that in the presence of high quality regulation and competition law, the pursuit of competition is fully compatible with other public policy goals.

Furthermore, Biggar asserts that even where the pursuit of competition does occasionally conflict with other public policy goals, there exist well-established mechanisms to balance these other public policy objectives alongside competition objectives. Identifying three such mechanisms, Biggar encouragingly noted that the South African Competition Act contained examples of all three approaches.

Essentially, Biggar's thesis is that concerns about conflict between competition and other public policy goals are more illusory than real and, where they exist, are primarily the fault of imperfect regulation. When competition appears to be in conflict with other public policy objectives, the appropriate response, says Biggar, is not to restrict competition but to improve the quality of the regulatory regime.

In a concerted effort to do just that, the Commission has called upon the SARB to amend its legislation and thereby bring the Banks Act in line with the concurrent jurisdiction provisions of the Competition Act. To date these calls remain unheeded.

In an even greater effort to improve the quality of regulatory regime, under the auspices of the concurrent jurisdiction provisions in its Act, the Commission initiated the formation of a Regulators' Forum.

While it is not clear why the necessary amendments to the Banks Act have not been implemented or even initiated, it is clear that the proper facilitation of concurrent jurisdiction requires co-operation between the sector regulators and the competition authorities.

The message is unambiguous: amend the Banks Act and give constructive co-operation a chance!

[1] Does Competition Law Enforcement Conflict with other Public Policy Objectives in the Banking Sector? Darryl Biggar - Competition Law Conference 17th and 18th April 2000, Midrand, SA.

Regulators' Forum

On the 30th of May 2001, the Competition Commission of South Africa hosted a dinner for regulators to discuss the possible formation of a Regulators Forum. Delegates from 15 regulatory institutions attended the initial presentation and dinner.

The purpose of such a forum is to address the need for coherence and integration in the South African regulatory framework, which remains fragmented and often contradictory. Since the late 1980s, government has entrusted specific regulators with powers to directly specify technologies, marketing methods and prices charged in sectors such as electricity, broadcasting and telecommunication. A further complicating factor is the government restructuring and privatisation process initiated in many of the sectors, resulting in a more critical role for both the competition authorities and the relevant sector regulators. Furthermore, a need to differentiate types of regulation has emerged. The Organisation for Economics Cooperation and Development (OECD) identifies the following categories of regulation:

Competition law and policy

This involves the adoption, interpretation and enforcement of the framework and rules that ensure markets are as efficiently "self regulating" as possible. It also prevents firms from concluding anti-competitive agreements, abusing dominant positions and carrying out anti-competitive mergers.

Economic regulation

This involves directly controlling or specifying production technologies, eligible providers (granting and policing licences), terms of sale (output process and terms of access) and standard marketing practices (advertising).

Technical regulation

This involves setting and enforcing product and process standards designed to deal with safety, environment and switching cost externalities, as well as the allocation of publicly owned or controlled resources.

With the removal of Section 3(1)(d) in the Competition Amendment Act 39 of 2000, the Competition Commission now has jurisdiction over competition matters across all sectors. Although the removal of section 3(1)(d) creates concurrent jurisdiction between the competition authorities and the specific sector regulators, both the Commission and sector regulators need to develop approaches and strategies in dealing with broad issues affecting regulation in the Republic.

The Regulators' Forum is designed to assist regulators in promoting a more integrated regulatory framework and is vital in facilitating the process of information sharing and interaction between regulators. It would serve as a platform for regulators to discuss issues of common interest, developing broader solutions to problems affecting sectors. Information sharing could also be extended to include the discussion of problems common to all regulatory bodies, such as funding, regulatory independence and resource constraints.

Generally, all the participants indicated that they support the concept and the initiative of establishing a broader Regulators' Forum. It was further agreed that the forum would initially operate on an informal basis in order to allow for flexibility. The delegates further proposed and adopted the establishment of an Interim Steering Committee, comprising of Adv. Menzi Simelane from the Competition Commission, Ms. Gill Marcus of the South African Reserve Bank and Dr. Xolani Mkhwanazi of the National Electricity Regulator. Since the inaugural dinner, the members of the Forum have met once to have further discussions about the operationalisation of the Forum. A further meeting is due to take place at the end of the year.

From establishment to enforcement of the Competition Act

The Competition Commission's Annual Report for 2000/1 was tabled in Parliament during November 2001

The year under review held many challenges, but also marked significant achievements for the Competition Commission. During this period the Commission dealt with 407 mergers and 176 prohibited practice investigations.

An overview of merger activity

Of the 407 merger notifications, only three were prohibited. The Commission prohibited the Tongaat-Hulett/Transvaal Suiker Beperk merger as it not only posed competition concerns in the existing market, but was also at risk of foreclosing the market to future potential competition. The Competition Tribunal upheld the decision.

The Commission expressed concerns regarding the JD/Ellerines merger and found it would primarily affect low-income consumers buying furniture on credit and the merger would significantly affect consumer choice, reduce competition in an already concentrated market and create opportunities for possible abuses of market power. The merger was initially prohibited, but after the parties offered to divest 150 shares to an independent purchaser, the commission recommended an approval. The parties failed to show that the purchaser would be a strong competitor and the tribunal ruled that the transaction be prohibited.

Subsequent to a merger notification, the Commission recommended to the Tribunal that the joint venture between Shell (SA), BP South Africa, Caltex Oil and Trident Logistics be prohibited as there were no mitigating factors that would lessen the anti-competitive effects of the joint venture and there were also no public interest grounds for approval.

Other mergers of note included the Glaxo Welcome/SmithKline Beecham, Seardel/Frame and the Greater Johannesburg Metropolitan Council/ Egoli Gas mergers that were approved.

An overview of enforcement activity

Of the 176 complaints lodged during the period under review, 123 were resolved and 53 were still under investigation at the end of the period. Many of the firms that filed complaints were small businesses.

Cases investigated included the Nationwide Airlines vs. SA Airways in which the Commission concluded that the practice of travel agent overriding incentives and travel agent employee travel incentives constituted a prohibited practice. Other complaints included the Commission vs. Nutri-Health for minimum resale price maintenance and the Scotprop complaint against Property Networks. Both resulted in consent orders.

The Commission furthermore initiated a number of complaints and investigations involving the cement and Alcoholic Beverage Industries. Investigations are still underway.

Amendments to the Act

Amendments to the Competition Act became effective on 1 February 2001. Key amendments included the removal of Section 3(1)(d), which resulted in the

Competition Authorities having concurrent jurisdiction over all areas of the South African economy. Another key change was the lowering of the fees and increasing of the notification thresholds of mergers. The changes to the thresholds reduced merger workload by 60%.

Impact on Employment

The increase in South African merger activity means that at some point jobs will be lost. The Commission concerns itself with such merger-related job losses.

In 125 merger cases evaluated, a net loss of 197 jobs occurred. 77% of these job losses can be attributed to mergers within concentrated industries, i.e. industries with a combined market share of 60%-100%. Merger activity in industries with lower levels of concentration was responsible for only 18% of the above job losses.

In certain sectors, like mining, international competitiveness is very important. A depressed gold price forced companies to consolidate in order to cut costs and increase productivity. These mergers meant job losses. In a recent merger between two gold mines, Randfontein Estates Limited and Anglogold Limited, the Commission had to consider a situation in which 5000 jobs would be lost if the merger was not approved, but only 2000 if it were approved.

In making its decision, the Commission took into account the fact that the gold price was, and had been, depressed for a while, and that the merged firms' high domestic market share would not impact on the international market for the production and sale of gold. The Commission approved the merger unconditionally on the basis that only 2000 of the potential 5000 jobs would be lost.

The year ahead

In a developing country such as South Africa, the Competition Commission's role is to ensure that the Competition Act (as amended), remains a relevant tool when dealing with transnational mergers and acquisitions. The Commission must also be able to amend the Act to bring it in line with improved methods of dealing with prohibited restrictive practices or anti-competitive mergers.

TABLE 1. THE TABLE BELOW PROVIDES AN OVERVIEW OF CASES DEALT WITH BY THE COMMISSION.

Case Type	Number of cases notified		Number of cases finalised		% of cases finalised		Total number of investigators		Average number of cases finalised per investigator		Average number of cases finalised per investigator per month	
	1999/ 2000	2000/ 2001	1999/ 2000	2000/ 2001	1999/ 2000	2000/ 2001	1999/ 2000	2000/ 2001	1999/ 2000	2000/ 2001	1999/ 2000	2000/ 2001
Mergers	331	407	236	414*	71%	78%	9	8.5	26	48.7	3.7	4.1
Complaints	122	114	37	128*	30%	64%	7	10	5	12.8	0.8	1.1
Exemptions	3	12	1	7*	33%	57%	1	4	1	2	0.08	0.17
Advisory Opinions & Clarifications	71**	123	59**	132*	83%**	98%	2	2	30**	66	4.3**	5.5

* Includes cases brought forward from the previous financial year.

** Excludes clarifications provided.

The other role of the Commission would involve the investigation of prohibited restrictive practices and exemption applications. Analysing the impact of international cartel activities on the economies of developing countries is also a priority. The Commission is well placed to deal with such activities through the Act, which empowers the Commission with sufficient instruments.

The new economy and growth encourages restrictive practices, but also ensures SMMEs have access to markets. Government therefore needs to be vigilant in its strategy to develop SMMEs in key areas.

The Commission also has to ensure consistency in applying South Africa's competition law.

Joint Ventures

A bird's eye view of joint ventures in terms of the Competition Act

Introduction

Since the Competition Act 89 of 1998[1] ("the Act"), came into operation on 1st September 1999, practitioners and company advisors have raised questions about the application of merger provisions contained in Chapter 3 of the Act to joint ventures. Consequently, this article aims to clarify the Commission's position and to assist business in complying with the requirements of the merger provisions of the Act.

What does Chapter 3 of the Act entail?

Since section 3 of the Act provides that the Act applies to all economic activity within, or having an effect within, the Republic, all joint ventures, in whatever form, which take place in the Republic, or outside the Republic with an effect in the Republic, clearly fall within the ambit of the Act.

Chapter 3 of the Act deals with mergers, the term "merger" includes amalgamations, takeovers or acquisitions. For this purpose, section 12 of the Act defines a merger as occurring when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm, including as a result of purchase or lease of the shares, an interest or assets of the other firm in question. (A "firm" is defined for the purpose of the Act to include a person, partnership or a trust). The words "one or more" firms in the definition clearly indicate that a merger may involve the acquisition of either sole or joint control.

In the premise, it is evident that for a merger to occur, there must be a change of control in the firm that is being acquired. Section 12(2) of the Act goes on to enumerate various formats that control may take. Any acquisition of control by a firm through any means, not necessarily included in the definition, may constitute a merger. Section 12 does not distinguish between permanent and short-term acquisition of control and, therefore, the duration of the venture does not appear to be relevant for the purpose of determining notifiability.

What is a joint venture?

A joint venture is generally defined as a business arrangement in which two or more parties undertake a specific economic activity together, on a formal or informal basis. A joint venture is usually created to perform a project that is beyond the capacity of a single entity.

Under European competition law, a joint venture has been defined as an undertaking which is jointly controlled by two or more other undertakings[2]. A distinction has been drawn between "concentrative" joint ventures and "co-operative" joint ventures. Concentrative joint ventures are described as those that bring about a lasting change in the structure of the undertakings concerned, while co-operative joint ventures are conceived for a specific purpose.

The view that appears to be predominant limits the notion of a joint venture to agreements that create a new and separate business entity under the joint control of independent parent firms. In light of the above definitions, a joint venture appears to be a separate business enterprise over which two or more independent parties exercise joint control, and is created for a specific purpose. Furthermore, joint ventures may be distinguished into various types according to their purposes, which include: research & development, production, distribution, purchasing, advertising and promotion, and networking.

How do merger provisions apply to joint ventures?

As joint ventures take various forms, which may result in a merger or anti-competitive conduct by the parties involved, the merger control provisions are understood to be applicable to joint venture transactions under South African law. The concept of change of control is an essential element of the merger provisions in the Competition Act. Where a joint venture does not result in a change of control, the transaction may be examined under Chapter 2 of the Act for possible anti-competitive behaviour by the parties involved, particularly for possible collusion.

Thus in determining whether or not a joint venture falls within the ambit of the merger provision, the fundamental enquiry will seek to ascertain whether it constitutes a change of control of the business entity. Clearly not all joint venture transactions will constitute a merger as contemplated in the Act. However, joint ventures which result in a change of control by way of a shift from sole to joint control of an existing entity, or ventures that may constitute joint control of a separate entity by independent parent firms, may be notifiable.

It should, however, be noted that this stage of the analysis does not take into account the competitive effects of the transaction. The competitive effects of a transaction are considered only in deciding whether to approve or reject the transaction.

When will a joint venture be notifiable?

An example of a notifiable joint venture transaction would be where the parties to the joint venture transfer assets or interests into a newly created or existing entity. In this case, the joint venture would be acquiring the transferred assets, thus establishing joint control over part of the business of the creating parties. On the basis of the transfer of interests, assets or business into the venture, the transaction in question would clearly constitute a merger contemplated in section 12 of the Act.

Another instance where a joint venture would be notifiable is where two or more companies may acquire joint control over an existing entity, or any part of the business thereof, in which none of them had control prior to the said transaction. Through the acquisition, the creating parties will control the business for the purpose of which the joint venture is proposed. This would constitute a merger as defined in the Act since control of the acquired entity will change.

On the other hand, the creation of a separate entity in which they jointly exercise control while the parties remain independent would not, on its own, amount to a merger. There would be no change of control over any of the firms or businesses, as the creation of the venture would not affect their independence with respect to the control structure.

In certain instances, the transaction may involve the issue of shares by the acquiring companies in consideration for the acquisition. Therefore, depending on the amount of shares issued, the share issue may result in a further notifiable merger. That may be the case if, for instance, the acquiring companies issue shares that confer control over their businesses or a part thereof to the seller.

It must be appreciated that the application of merger control provision to joint venture transactions is not straightforward. Furthermore, the growing complexity of these transactions makes it difficult to formulate a blanket approach.

[1] As amended by the Competition Second Amendment Act 39 of 2000

[2] See Commission Notice (98/C 66/01) p.101, para. 3, of the Introduction.

Consent Orders:

Negotiated settlement or prosecution?

When there is agreement between the Competition Commission and a party accused of allegedly committing a restrictive practice, an alternative avenue to a Tribunal referral is available to resolve the case. A party alleged to have committed a prohibited practice might agree with the Commission on an appropriate consent order. The Competition Tribunal may confirm this order as a consent order in terms of sections 49D and 58 of the Act.

Such agreements may be entered into during, on or after the completion of an investigation, preferably after completion of the investigation when all the facts are available. After hearing the motion for confirmation of a consent order, the Tribunal may grant an order either confirming the agreement in its original draft form, or the Tribunal may order changes that it deems fit. The Tribunal, when indicating changes that must be incorporated into the agreement, must give the parties involved the opportunity to consider whether the changes are acceptable, before such agreement can be confirmed.

The following consent orders have been negotiated since the inception of the Competition Commission:

The Competition Commission and Nutri-Health Africa

The Competition Commission initiated a complaint against Nutri-Health for contravening Section 5(2) of the Act.

Nutri-Health was involved in the practice of minimum resale-price maintenance. This it did by stating a minimum selling price on the package labels of its products. In terms of the consent order Nutri-Health agreed to:

CONTINUED ON PAGE 8

FROM PAGE 7

- remove the words “minimum selling price” from the package labels of its products, and
- only recommend a resale price on the package labels of its products.

The Competition Commission and Skye Products

Casual Boyz, a private retail company, lodged a complaint against Skye Products for refusing to supply them with Brentwood and Dickies products. The Competition Commission investigated and found that Skye Products contravened section 8(d)(ii) of the Act, in that they were “refusing to supply”.

The Commission and Skye Products arrived at an agreement that Skye’s refusal to supply is a prohibited practice in terms of the Act.

In terms of the consent order Skye Products undertakes to supply Casual Boyz with their brands, Brentwood and Dickies, as the need arises, under condition that they hold sufficient stock and subject to standard conditions of supply of such products applicable to all other appointed retailers.

The Competition Commission and Myal Industries

Casual Boyz lodged another complaint, this time against Myal Clothing, of refusal to supply Soviet jeans and for entering into an arrangement with a competitor of Casual Boyz that has the effect of substantially lessening competition. The Commission investigated and found Myal Industries guilty of contravening section 5(1) of the Act for entering into a vertical arrangement with a competitor of Casual Boyz that has the effect of substantially lessening competition. Myal Industries was also found to be in contravention of section 8(c) of the Act as engaged in an exclusionary act, by impeding Casual Boyz from expanding in the market for smart casual branded clothing in Estcourt.

Myal Industries and the Commission arrived at an agreement that Myal Industries’ conduct of “refusing to supply” is a prohibited practice in terms of the Act. In terms of the consent order Myal Industries undertakes to supply Casual Boyz with Soviet jeans, as the need arises, under condition that they hold sufficient stock and subject to standard conditions of supply of such products applicable to all other appointed stockists.

The Competition Commission and Property Network

Scottprop, an independent estate agent operating in the Pietermaritzburg area, brought the complaint against Property Network, an association of estate agents who run a multi-listing service, before the Commission. Scottprop alleged that Property Network, in the operation of a multi-listing service, operated as a cartel, and kept smaller estate agents out of the market. Following research on multi-listing services, the Commission concluded that multi-listing services as a product increases efficiency and is therefore pro-competitive. However, a multi-listing service becomes anti-competitive once membership criteria are set to exclude new members from entering the market. The consent order ensured that Property Network changed its membership criteria. The Tribunal confirmed the consent order.

The Competition Commission, Acrylic Products and Plexicor

The complainant, Sphinx Acrylic Bathroomware, advised the Commission that Acrylic Products had an exclusive supply agreement with Plexicor whereby Acrylic was entitled to discounts not available to anyone else in the market. A consent order was signed with the parties in which this supply agreement was declared null and void.

The Competition Commission and Phalaborwa Mining

The Commission investigated the anti-competitive nature of the exclusive agreement between Phalaborwa Mining and Chemserve Perlitite for the supply of crude vermiculite.

The Commission found that:

- Phalaborwa Mining was a dominant firm in the market for the supply of crude vermiculite;
- the exclusive agreement between Phalaborwa Mining and Chemserve Perlitite for the supply of crude vermiculite constitutes an exclusionary act by Phalaborwa Mining in contravention of section 8(c) of the Competition Act 89 of 1998; and
- price discrimination by Phalaborwa is prohibited and in contravention of section 9(1) if the Act.

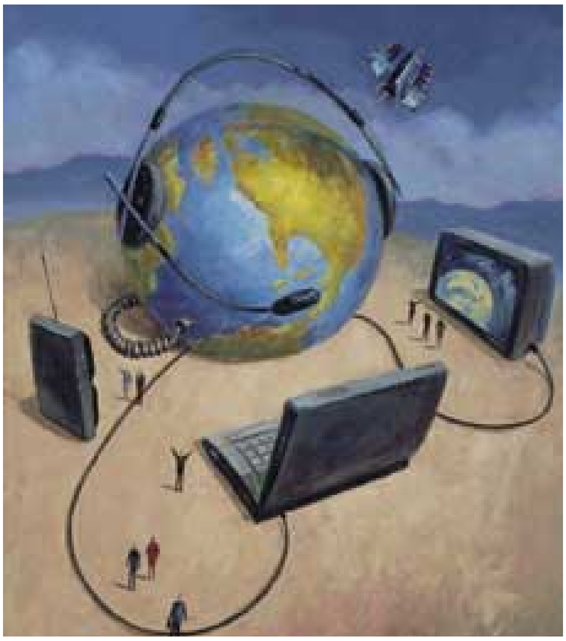
Phalaborwa Mining admitted guilt to the above contraventions and signed a consent order to supply crude vermiculite on a non-discriminatory basis to all customers in South Africa. They also agreed to treat all customers in South Africa equally regarding the availability of supplies and, in the event of shortages, to effect customer cutbacks on a fair and equitable basis.

The consent order between Phalaborwa Mining and the Competition Commission was confirmed by the Competition Tribunal.

Airing competition issues in the broadcasting industry

Introduction

Great changes have occurred within broadcasting[1] and broadcast policy in South Africa over the past years. Historically, broadcasting relied on transmission over the air using a limited allocation of the radio-frequency spectrum. It has been closely controlled and regulated, and all channels were reserved for the public broadcaster. Now, changes in technology and policy mean many services are delivered and South Africa allows private broadcasting and broadcast services across national borders.



Intimately coupled with these changes, is the need for a more active role for the markets and for competition policy. These markets should function as efficiently as possible, making competition policy increasingly relevant in the broadcasting industry. In addition, new and important competition concerns arise.

Market definition

A conventional discussion of market definition involves consideration of demand for all products produced at each of the stages of production. The overall demand for broadcasting services comes from the following sources:

- Advertisers, who wish to promote a particular product or service
- Companies, groups or individuals, who wish to disseminate certain information
- Companies and consumers, who wish to engage in commercial transactions directly with each other
- Consumers who wish to purchase entertainment, information or access to electronic commerce and other interactive services.

A full demand-side analysis makes it immediately obvious that there are potential non-broadcasting substitutes for each of these groups. For example, in addition to broadcasting, advertisers may choose from a range of non-broadcasting media. These would include magazines, newspapers and billboards. Similarly there are a variety of other non-broadcasting entertainment and information sources for consumers, outlets and groups wishing to disseminate information.

Also within broadcasting, many further sub-markets can be identified. Broadcasting products whose primary aim is to provide entertainment, for example, are unlikely to be good substitutes for broadcasting products whose primary aim is to provide information. Furthermore, within the entertainment market, events such as sporting events are unlikely to be good substitutes for, say, feature films. With regard to sporting events, different markets are also being identified for individual sporting events such as live football and Formula One motor racing.

Market entry

The Independent Communications Authority of South Africa (ICASA) is independently responsible for market entry. It has licensed 15 private radio operators, one national free-to-air private television channel, a private broadcasting signal distributor and over 80 community radio stations. Today each segment of the broadcasting market is still characterised by the presence of dominant firms.

In radio and free-to-air television, the SABC still dominates. The signal distribution market is still dominated by Sentech. The terrestrial pay television market is wholly monopolised by M-Net and the satellite pay television market is wholly monopolised by DSTV.

Sentech controls most of the high topographical sites suitable for signal distribution in South Africa, is a dominant firm in terms of the Competition Act and has market power. It has very few real competitors in the terrestrial signal distribution market, although Orbicom, the M-Cell owned transmission company, competes with Sentech in the satellite transmission market. Should another party wish to compete with Sentech in the terrestrial market, Sentech could be vulnerable - that is, if Sentech's high sites are deemed to be essential facilities[2] in terms of the Competition Act. With the prevalence of dominant firms in many of the broadcasting markets, the application of Competition Act provisions relating to restrictive practices and abuse of dominance in the broadcasting industry is of great importance.

CONTINUED ON PAGE 10

FROM PAGE 9

Vertical mergers, agreements and abuse of dominance

Competition concerns are most likely to arise at opposite ends of the chain of production, i.e. in access to certain forms of content (such as major sporting events) and in the market for broadband access to consumers. As a result, policy makers and competition enforcement authorities should be most concerned about two categories of horizontal mergers: those which restrict the number of paths to the consumer and those between two content providers with a strong position in the market for certain categories of content. Some of the most interesting competition problems in this field arise from vertical relationships. As in other markets, dominant firms may seek to use their dominant position to restrict competition within their own market, or in upstream or downstream markets, using vertical arrangements. Two categories of dominant firms are particularly relevant - firms with a dominant position regarding access to the consumer and firms in dominant positions regarding access to particular types of content. An example of this occurs in motor-racing, where those companies which contract to broadcast Formula One motor races are obliged not to broadcast other forms of "open top motor racing".

Application to competition enforcement

In general, abuse of a dominant position is one of the most difficult and finely-balanced issues that competition authorities must address. Anti-competitive behaviour may occur, and there may be situations in which competition intervention is valuable.

However, competition intervention may not always be appropriate, especially when exclusive contractual arrangements are necessary to enhance overall efficiency or where an effective, enforceable remedy is not available. The following principles can, however be set out:

- First, as in all competition analysis, the definition of the relevant market and establishing dominance is critical. Exclusive vertical arrangements should not normally be challenged, unless one of the firms within the arrangement can be shown to be in a dominant position with respect to a particular market, as market power in at least one of the relevant markets is usually a requirement to show that a vertical agreement is substantially lessening competition.
- Second, the desirability of intervention will depend, in part, on whether there are clear efficiency-enhancing properties to the exclusive arrangement. Exclusive arrangements should be tolerated when the period of exclusivity is appropriate in the light of the efficiency justifications.
- Third, mergers, or more extensive vertical arrangements between dominant content providers and infrastructure providers that would prevent other infrastructure providers from having the opportunity to bid for the right to the content in the long term, should be subject to careful anti-trust scrutiny. Such arrangements run a strong risk of creating a dominant position in infrastructure provision. Competing infrastructures should periodically have the opportunity to bid for access to key content.

Conclusion

Careful effective competition enforcement will be necessary to prevent firms from acquiring, through mergers or agreements, exclusive rights to key content or a dominant position in the market for broadband access to consumers.

[1]Broadcasting is defined here as the business of producing interactive information content and distribution via telecommunication services. Under this definition, it is distinguished from the dissemination of information that does not involve telecommunications services such as publishing of a newspaper.

[2]An essential facility is an infrastructure or resource that cannot reasonably be duplicated and without access to which competitors cannot reasonably provide goods or services to their customers.

Preferred Provider Organisations: Healthy for competition?

In the managed health care industry a preferred provider organisation[1] (PPO), or a preferred provider network, is a network of doctors, hospitals, or other healthcare practitioners, who have agreed to contract together in order to jointly sell their services to medical aids or health care management companies. The resulting PPO does not provide heath care directly, but contracts the preferred providers, i.e. practitioners, who then provide the service on its behalf.

How does a PPO operate?

The PPO contracts with a medical aid in the form of a preferred provider agreement. A preferred provider agreement is a contract between a medical aid and a service provider or a provider network with the aim of ensuring an exclusive volume of service from the medical aid in return for a discounted fee. In order to maintain the volume of service flowing to the preferred providers, a certain degree of exclusivity is required. One method adopted by the PPO to

maintain exclusivity, is to allow only a finite number of providers to join the network. Thereafter, it becomes closed. Another method employed by the medical aid to maintain volumes is to reward patients who utilise providers within the network. Preferred provider agreements vary widely, and may often include different terms and conditions.

Competition issues in PPOs

As far as the consumer is concerned, their choice is restricted to providers from within the network. In most cases, medical aids employ an enforcement mechanism to deter members from seeking care outside of the provider network. If a member sees a provider from outside the network, the patient will pay more and the medical aid will pay less or the patient may have to pay the practitioner outside the network directly, thereafter claiming the money back from the medical aid.

In most cases, however, medical aid members are given the choice of selecting a provider from within the network. Even though their choice may be limited to within the network, there are still many providers within the network from which they can choose. Further, most PPOs do allow members to select providers from outside the network, even if it is at a higher cost. It is important to note that the purpose of restricting a health care consumer's choice is to ultimately maintain quality while offering lower prices to consumers.

In the United States of America, medical aids or health care plans have to inform their members of restrictions in provider choices before they join the health plan. If the member still joins the plan, then any restriction in provider selection experienced is not considered to be anti-competitive. Furthermore, restriction in provider selection is more serious in closed medical aid schemes since members do not have a choice in the selection of a scheme.

In terms of providers, exclusivity clauses may create competition concerns. However, not all exclusive agreements are anti-competitive. Of great concern is the exclusion of non-network members from provider networks. As explained above, the PPO will take in a specific number of providers and thereafter close up the PPO. The providers outside the network are therefore foreclosed from providing services to medical aid members contracted to that medical aid. However, as long as the medical aid members are offered the opportunity to select providers from outside the network, the non-network provider may in fact get the opportunity to treat a member of the medical aid.

In markets where the medical aid is dominant, i.e. representing 35% or more of the medical aid population within a relevant geographic market, and has an exclusive arrangement with a provider network, foreclosure to non-network providers will be greater. Many factors need to be taken into account in determining the level of foreclosure to non-network providers. These are:

- The number of other medical aids in the market with which the non-network providers can contract (the medical aids in the market must be willing and able to contract with provider groups)
- Whether the non-network providers can provide treatment to other medical aid patients or in some cases to other non-medical aid patients depending on the market definition
- The percentage of providers making up the PPO in relation to the provider population in the relevant geographic market.

In the United States of America, the percentage of providers in an exclusive network may not exceed 20% of the providers within the relevant geographic market. In a non-exclusive network it should not exceed 30% of the providers within the relevant geographic market. This information is necessary in order to determine whether the practitioners outside the network can form another network that can compete with the existing network on a reasonable basis (among other factors, a reasonable basis is determined by the level of skills, expertise and experience of providers within both networks). If the practitioners outside the network cannot provide a service to other medical aids and cannot reasonably form another PPO to compete with the existing one, then foreclosure will be substantial.

CONTINUED ON PAGE 12

FROM PAGE 11

Furthermore, the exclusive contract between the medical aid and PPO would create barriers to entry, and will prevent PPOs further entry into this market. It may further allow the PPO to become dominant and maintain its dominance.

PPOs, and more specifically managed care, is changing the face of competition in health care markets. Healthcare providers no longer only compete in terms of service, but also in terms of price. Dominance in the upstream and downstream markets allows medical aids and the PPO to increase prices above the competitive level, and they can maintain this dominance due to the barriers to entry.

Collusion

In terms of competition, the PPO arrangement may have more of a horizontal implication. It facilitates the coming together of competitors in an organisation. The practitioners within the PPO practice independently, yet they contract together to sell their services. In selling their services they jointly determine pricing and other trade conditions. They may also communicate on prices charged in individual practices. This creates a platform for collusion. However, it is important to note that most collusion concerns arise due to fear of increasing prices. In this case collusion may, however, facilitate lower prices[2].

Furthermore, providers may contract together to achieve cost efficiencies and the maintenance of high standards. They may also experience greater financial integration and risk sharing through capitation systems.

Other jurisdictions

In the United States of America PPOs are not regarded as outright anti-competitive. They are analysed under a “rule of reason” analysis. The anti-trust authorities will consider: a) the nature and structure of the PPO or the provider agreement, b) the purpose and motivation behind its formation, c) exclusivity vs. non-exclusivity, d) financial risk sharing, e) the percentage of the providers making up the PPO. They would also consider the reasons for the establishment of the PPO, whether the PPO could achieve its objectives by less restrictive means, the foreclosure of medical aids and other PPOs, the PPO’s ability to raise prices above competitive levels, the ability of other providers to provide services and the efficiencies achieved through the PPO’s structure.

Efficiencies

The PPO negotiates with, and engages in, preferred provider arrangements with a health practitioner, pharmacy or hospital in an effort to obtain discounted prices. Consumers can therefore obtain good quality health care at lower costs.

Under a capitation system, where the provider is paid a fixed fee per patient per month in advance, the consumer may make significant cost savings, because the capitation system offers a measure of protection against the over-prescribing and over-servicing of certain fee-for-service practitioners. Under a fee-for-service system, the practitioner receives a fee each time the patient visits the doctor. The doctor therefore has an incentive to treat the patient more often, as he will simply earn more. In a capitation system, the doctor’s fee will be the same whether they treat the patient four times or one time in that month.

The main benefit to providers is that they are guaranteed a volume of service from the medical aid company to which the PPO has contracted. They are therefore guaranteed an income. With a fee-for-service model, where the practitioner depends on each consultation for his income, there is no guarantee of services and hence no guarantee of income. In a PPO capitation system, the doctor has a definite list of people who have signed on as patients. The doctor is thus paid a monthly fee regardless of whether they have consulted the doctor that month or not.

It is argued that provider networks offer incredible risk sharing to providers within the network through a capitation system. In this system, the risk is shifted from the medical aid to the provider since providers are reimbursed on a “capitated” basis. The providers face the risk of fluctuations in the cost of treatment above the capitation rate. Although some of the risk may be under the provider’s control, most of it is not. The risk that a patient may suddenly fall ill, or may contract an expensive illness to treat, is beyond the provider’s control. Furthermore, a PPO contracting with an association or group of doctors may pay the entire group on a “capitated” basis. The network of providers helps spread the risk, each provider sharing in the risk pool. So considered, such networks provide significant efficiencies to providers.

The greatest benefit to medical aid companies is reduced costs. This is achieved via managed care principles such as utilisation review, peer review, capitation and the “gatekeeper” model. The use of such principles allows medical aids to save on hospitalisations, which are less frequent, and referrals become properly controlled. The practice of preventative medicine enables the PPO practitioner to detect, diagnose and treat a condition before it arises. The medical aid therefore saves on the cost of potentially expensive treatments.

Conclusion

The nature and structure of PPOs offer significant benefits. However, these are only possible if the PPO is properly implemented. There are also many competition concerns that cannot be ignored. These concerns need to be weighed against the possible efficiencies PPOs offer.

[1]Preferred provider organisations/networks/agreements are not restricted to the health care industry. The insurance sector often makes use of these types of agreements. For the purpose of this article PPOs refer to those in the health care industry.

[2]Price fixing is, however, a per se contravention of section 4 of the Competition Act and thus does not allow for pro-competitive defences.

Reduction in supply versus refusal to supply:

testing for abuse of dominance

Section 8 of the Competition Act prohibits the abuse of dominance. Specifically, Section 8(d)(ii) refers to a dominant firm's refusal to supply scarce goods to a competitor. The question arises, though, when analysing whether the firm's actions constitute abusive behaviour, whether the reduction of supply should be treated the same way as the complete withdrawal of supplies.

EC Competition Law

United States of America: Anti-trust Law
An "arbitrary"[1] refusal to deal or supply by a monopolist cannot be unlawful unless it extends, preserves, or threatens to create significant market power in some market- which could be either the primary market in which the monopoly firm sells or a vertically related or even collateral market. Refusals that do not accomplish at least one of these results do not violate Section 2 of the Sherman Act, no matter how much they might harm the person or class of persons that are declined service. Nor are such refusals an "abuse" of monopoly power (using power in one market as "leverage" to increase advantage in another market).

To apply Section 2[2] to arbitrary refusals to deal or supply, that one would first have to adopt one of the following postulates:

- A monopolist may not refuse to deal where the effect creates a monopoly in the buyer's market
- A monopolist may not refuse to deal with a buyer competing with the monopolist's other customers
- A monopolist must deal in a non-discriminatory manner with all would-be purchasers, whether or not they are in competition with each other.

Areeda and Hovenkamp[3] state that Section 2 should not be applied, as the danger of "abuse", through arbitrary refusals to deal, seems quite low. Substantial monopolies, run by directors responsible to stockholders, will generally behave rationally and make all profitable sales. One might conclude that the burden on courts to review arbitrary refusals would be low. Yet to grant the cause of action is to invite a barrage of suits charging arbitrary refusals to deal or discrimination by alleged "monopolists". These ultimately are a waste of judicial resources and a waste of government resources that could be put to better use.

When interpreting whether or not refusal to supply or reduction in supply is anti-competitive, anti-trust considers the same principles, i.e. it considers freedom of trade, and the right to stop dealing,taking into account your trade. The law looks at the intention - is the act of refusing to supply to create, extend, or preserve market power in some market or is it simply a strategy to make one's business more profitable?

EC Competition Law

From the case law, the following legal conclusions can be made: the European Court of Justice (ECJ) looks at the effect of the arbitrary refusal to supply. If the refusal will have anti-competitive effects, for example, by eliminating a competitor to the detriment of the general public, then the (ECJ) will find for the complainant. Furthermore, the (ECJ) look at possible justifications: for example, the firm taking reasonable steps that its produce is properly sold.

The South African View

In an interim relief application by York Timbers, the Tribunal stated that: "A reduction in supply - as opposed, that is to a complete withdrawal - may well constitute a refusal to supply."

CONTINUED ON PAGE 14

FROM PAGE 13

It is not clear what the Tribunal meant by this. The Tribunal failed to give further guidelines and only analysed the probable purpose of the reduction and the effects of the reduction on York's business. This is similar to the cases in EU and USA. The effects of the reduction were considered instead of distinguishing between reduction and a complete withdrawal.

In the interim application, York Timbers requested that the Tribunal interdict Safcol (South African Forestry Company Limited) from reducing the extent of its guaranteed log supply to York Timbers. The applicant averred that the reduction constituted an abuse of dominance on Safcol's part. The applicant invoked the provisions of Section 8(d)(ii) of the Act[4], alternatively Section 8(c)[5] in support of its case.

Therefore, the question remains: does a reduction in supply - as opposed to a complete withdrawal - constitute a refusal to supply?

As set out earlier, the Tribunal stated that a reduction in supply may well constitute a refusal to supply. The Tribunal went further and stated the following:

"Even if we had been satisfied that the reduction in the guaranteed supply is equivalent to a reduction in actual supply, the applicant (York Timbers) has still not persuaded us that the alleged refusal constitutes a prohibited practice in terms of the Competition Act."[6]

The underlying principle laid down by the Tribunal is that a pure reduction can amount to a refusal to supply if it meets the same test that should be met before a refusal to supply can be prohibited by the Act. The only difference between Section 8(c) and Section 8(d)(ii) is the burden of proof. Section 8(c) places a heavier burden on the applicant, but the test is still the same.

Whether or not the application before the Tribunal vis-à-vis the reduction in supply, is based on Section 8(c) or Section 8(d)(ii), it still remains for the applicant to establish the "anti-competitive effect" of the practice, in other words, to show that market power has been created or extended in consequence of the alleged act. Even if anti-competitive effects have been established, the applicant would have to show that these outweighed the pro-competitive gains.[7]

Conclusion

Refusal to supply is not prohibited if it can be justified, done in a bona fide manner and in good faith. From the case law, there are only two cases that deal with the reduction in supply, McGeorge v Leyland[8] and the United Brands case.[9] In both cases, the courts applied the same principles as it does when determining "refusal to supply". In United Brands the court enquired as to whether the reduction could be justified. The same "test" was applied in Commercial Agents[10], in which the court held that there might be a justification for not supplying.

The Court applies the same tests and does not distinguish between a complete withdrawal and a reduction. What the court looks at is any possible effect the change will have on the party concerned, the anti-competitive effects of the change and the intention of the respondent in terms of good faith.

The Tribunal's view is that it is not the reduction of supply or the refusal to supply that is the deciding factor but rather the weighting of any anti-competitive effects of the decision made by Safcol against any pro-competitive gains.

The Court considered the role of Zoja in the common market, with specific attention being given to the fact that it had partially overcome the barriers to entry. The Court gave judgement in favour of Zoja, taking into account the above factors.

[1]Ref: Areeda Hovenkamp (Antitrust Law) Volume IIIA 1996.

[2]Section 2 of the Sherman Act states the following: "every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person, to monopolise any part of the trade or commerce shall be deemed guilty of a felony, and, or,...imprisonment not exceeding three years."

[3]Areeda and Hovenkamp at P171-172.

[4]Section 8(d)(ii) states that: "It is prohibited for a dominant firm to:
(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effects of its act -
(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible."

[5]Section 8(c) reads: " It is prohibited for a dominant firm to engage in any exclusionary act other than an act listed in paragraph (d) if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain."

[6] p18 para 87 of the judgement.

[7]P23 para 100 of the judgement.

[8]David R McGeorge Car Co. Inc. v Leyland Motor Sales 1974-2 Trade cases P75,257. Brief facts: In October 1969, Leyland Motor Sales, Inc., began cutting McGeorge's supply of Triumphs in an attempt to persuade it to reconsider the Rover and Land Rover proposal. Whereas the supply of Triumphs was off 10 to 20 percent nationally in 1969, McGeorge's supply was cut by 50 percent in that year and an additional 16 percent in 1970. Conversely, other Virginia Triumph dealers who had accepted Rover and Land Rover experienced only a 25% cutback in 1979 and increases. When in May of 1970 it became clear that McGeorge's rejection of Rover and Land Rover was final, Leyland Motor Sales, Inc., recommended to British Leyland that McGeorge's Triumph dealership not be renewed and in September of 1970 David R. McGeorge's brought this action. The Court held that Leyland's conduct in "shorting" McGeorge in the delivery of Triumphs in an attempt to compel it to accept the Rover and Land Rover lines constituted a lack of good faith on its part.

[9]United Brands 1995 E.C.R I-743. Brief facts: United Brands reduced its supplies to Olesen. The decision to reduce supply was made by United Brands, after having felt that Olesen was selling less of its products while deliberately pushing the product of its competitor. The Court considered whether or not United Brands was justified and held that a dominant firm can take only reasonable steps to ensure that its produce is properly sold. The Court considered the fact that United Brands` conduct had interfered seriously with the independence of small and medium sized firms.

[10]Commercial Solvents v The Commission. The Court held that it was abusive to refuse to supply the raw material from which the drug for curing tuberculosis, (ethambutol), derives to Zoja, one of three markets of enthambutol in the common market. It was, however, suggested that there might be a justification for not supplying a product over which a firm is dominant. The Court decided the refusal to supply was anti-competitive. Notwithstanding the latter, the court ruled that there were pro-competitive reasons for objecting to the elimination of Zoja as an independent maker of ethambutol. Commercial Agents was the only maker of the raw material in the world and barriers to entry, consisting of know-how, seem to have been high.

Overview of M&A Activity

FIGURE 1. CASES FINALISED AND UNDER INVESTIGATION FOR THE FIRST QUARTER 2001

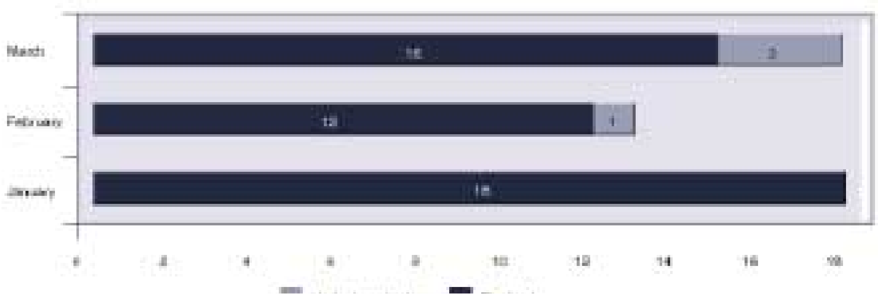


FIGURE 2. CASES FINALISED AND UNDER INVESTIGATION FOR THE SECOND QUARTER 2001

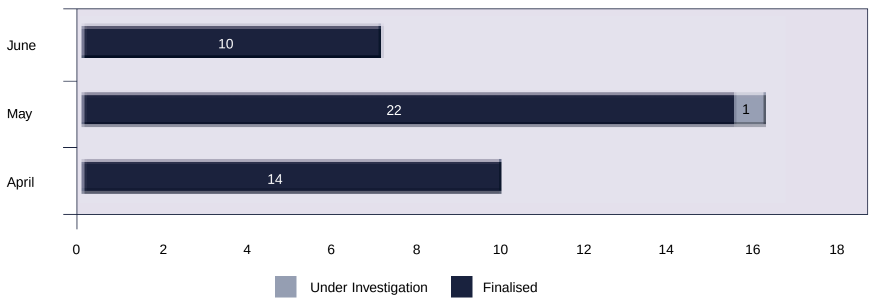
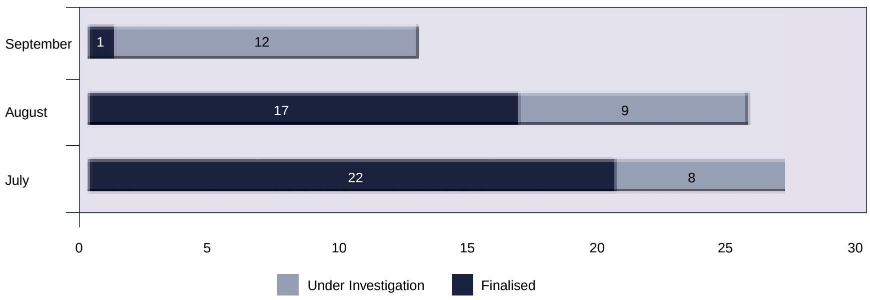


FIGURE 3. CASES FINALISED AND UNDER INVESTIGATION FOR THE THIRD QUARTER 2001



The first quarter of 2001 (January to March) saw a total of 49 notifications. Ten of these filings were smaller mergers that had been filed under the old thresholds[1]. With the change in thresholds the filing fees paid by the parties were refunded and the mergers proceeded without investigation by the Commission. Of the remaining 39 notifications, two were no jurisdiction cases, while 33 were finalised and four remained under investigation at the end of the period. Figure 1 illustrates the situation for the first quarter.

73% of the mergers were intermediate, 18% were large and 9% were small mergers. 61% of the 33 finalised and investigated cases were horizontal, involving a merging of competitors; 24% were conglomerate mergers with acquiring firms diversifying their interests; 9% involved a mix of horizontal overlap and vertical integration; and the remaining 6% split evenly between one purely vertical merger and one management buy-out. Mergers largely involved firms buying into real estate, financial services, manufacturing, the wholesale and retail trade, as well as other services. A breakdown according to the first digit of the SIC is presented in Table 1 for comparison with the second and third quarter.

In the second quarter (April to June 2001) a total of 47 merger notifications were filed with the Commission. Figure 2 shows the situation for the second quarter.

The month of May saw a significant jump in the number of notifications (23) but this was followed by a relatively quiet June, with only ten notifications. A total of 46 notifications for the second quarter show little change in comparison to the previous quarter. Again, most of the mergers were intermediate (68%). There were more large mergers (27%) than the first quarter. Small mergers constituted five percent of notifications.

As to the type of mergers taking place over this period: 56% were horizontal, 15% purely vertical, 27% conglomerate, with the remaining 2% consisting of management buy-outs and a horizontal/vertical mix. The

CONTINUED ON PAGE 16

FROM PAGE 15

financial services sector dominated this period with manufacturing following in second place.

The third quarter (July to September 2001) includes a greater number of cases still under investigation. This period saw significantly more notifications than the first two quarters respectively. In July there were 30 notifications and in August there were 26. However, September saw fewer notifications with only 13. The situation in the third quarter is reflected in Figure 3.

As many of the cases for this period remain under investigation and data from some of the finalised reports has not yet been captured, we are only able to provide a preliminary overview of the third quarter. As more data becomes available, the figures may change. At least five large mergers were notified over this period, the rest being intermediate. Most of the mergers are horizontal. The trend for mergers in services such as financial intermediation and real estate appears to be continuing.

TABLE 1. M&A ACTIVITY. THE FIRST THREE QUARTERS OF 2001: A COMPARISON

	Quarter I	Quarter II	Quarter III (Provisional)
Classification			
• Large	19%	27%	5%
• Intermediate	75%	69%	70%
• Small	6%	3%	9%
Type			
• Horizontal	61%	56%	86%
• Vertical	5%	18%	2%
• Horizontal/Vertical	9%	1%	2%
• Conglomerate	24%	27%	5%
• Management buy-out	2%	1%	5%
Sectors			
• Manufacturing	34%	22%	9%
• Wholesale and retail trade	24%	14%	6%
• Financial intermediation, insurance, real estate	27%	44%	62%
• Transport, storage and communication	3%	13%	6.9%
• Mining and quarrying	3%	1%	6.9%
• Agriculture, hunting and related services	6%	0%	6.9%
• Community, social and personal services	10%	0%	6.9%

The revision of thresholds has had a significant impact (60% reduction) on the number of mergers notified. Since the amendments have become effective, the average number of mergers notified per month (excluding small mergers) has decreased to 16.

Enforcements and Exemptions

As at October 2001, 69 cases remain under investigation by the Commission. Table 1 shows the number of cases investigated under the different provisions of the Act. The trend that most cases under investigation have an abuse of dominance dimension[1] continues, with more than 75% of the cases being investigated under Section 8 of the Act. This phenomenon is indicative of the concentrated nature of the South African economy.

TABLE 1. CASES OF PROHIBITED PRACTICES UNDER INVESTIGATION OCTOBER 2001

Provision of the Act	Number of cases	Percentage of total[2]
Horizontal restrictive practices (S4)	15	21.7
Vertical restrictive practices (S5)	26	37.7
Abuse of dominance and price discrimination (S8 and 9)	52	75.4

38% of cases under investigation have a vertical dimension whilst 22% percent have a horizontal dimension.

One-third of all cases are investigated under more than one section of the Act, i.e. they have either a combination of vertical and horizontal, horizontal and abuse of dominance or vertical and abuse of dominance dimensions to the investigations. Notably Section 5 restrictive practices often (in 26,9% of all cases, go together with some kind of abuse of dominance. For vertical practices to have a competitive effect, market power should be present in one or more of the relevant markets.

TABLE 2. MULTI-DIMENSIONAL CASES

Provision of the Act	Number of cases	Percentage of total[2]
Sections 4 and 5	8	11.6
Sections 4 and 8/9	4	5.8
Sections 5 and 8/9	14	20.3

The Enforcement and Exemption Division is currently investigating three applications for exemptions: one in the pharmaceutical industry, one in the liquid fuel industry and one in the financial services industry. Two of the exemption applications relate to restrictive horizontal practices and one to restrictive vertical practices.

[1] The percentages in this statistical breakdown cannot be compared to those in other editions of Competition News as the method of calculations has changed in order to incorporate the many cases investigated under more than one provision of the Act.

[2] The percentages do not add up to 100, as some complaints are investigated under more than one section of the Act.

Commission Cases

Property transactions can raise competition concerns

The South African Property Owners Association (SAPOA) has again recently claimed that property transactions do not raise any competition concerns. Moreover, the Chairman of SAPOA has indicated that property transactions should be exempted or that the thresholds for filing property transactions should be even higher. He also said that no property transactions have raised competition concerns.

However, the fact that no property transactions to date have yet been prohibited by the Commission does not imply that these transactions may not raise competition concerns. If these transactions go unchecked, they could, for example, lead to a player attaining market power with the possible negative consequence of increasing rental costs.

The Commission recently reviewed the acquisition of certain properties by ApexHi Property Limited, from Compass Property Holdings Limited. Although the transaction was approved, a thorough investigation needed to be conducted before the approval was granted.

While the above transaction involved the purchase of properties in various areas, the part of the transaction that raised initial concerns was the purchase of C Grade property in the Pretoria CBD. Government departments and smaller businesses are the primary customers of C Grade office property in this area. In the absence of countervailing factors, a high market share would have given ApexHi the opportunity to raise prices unilaterally. The matter is further complicated by the fact that, according to a Cabinet decision, government departments may not relocate out of the Pretoria inner-city area. Thus, a captive market could be assured and unilateral price increases become a possibility. Upon further investigation, the Commission established certain factors. These include the following:

- B grade properties are downgraded to a C grade status as deteriorated buildings are not renovated
- The Pretoria inner-city area includes Arcadia and Sunnyside - consequently, government departments have the opportunity to move out of the CBD into these adjacent areas, provided that sufficiently large office space is available

CONTINUED ON PAGE 18

FROM PAGE 17

- There appears to be a degree of vacancy in the Pretoria CBD, which may constrain price increases.

Although the above transaction was approved by the Competition Commission on the basis of the above factors, this case highlights the need to evaluate property transactions of a certain size on their own particular merits. Market factors also need to be investigated in some detail, especially with increasing concentration in certain areas.

Is SASOL behaving anti-competitively?

Earlier this year, the Competition Commission initiated a complaint against Sasol with regard to possible contraventions of Chapter 2 of the Competition Act. The Commission was initially made aware of a potential problem through newspaper reports of a dispute over contract clauses between Sasol and TEPCO, an empowerment company in the petroleum sector. Further information of possible contraventions was obtained through a meeting with TEPCO. TEPCO has submitted documentation to the Commission to substantiate their claims.

The issues, which raised concerns for the Commission, and which will be investigated, are primarily the alleged abuse of Sasol's dominance, in particular the requirement in its contracts that ties unrelated products to supply. According to TEPCO, it is an industry standard that purchasers of certain Sasol products are forced to take up products for which there may be no demand. While this arrangement may not prove onerous for larger firms, it may result in precluding new entrants into the market or force the exit of smaller players. A major concern for the Commission is the facilitation of market access, especially for historically disadvantaged companies.

The Commission will further consider allegations of price discrimination. It is alleged that TEPCO receives shorter credit periods than other customers. Finally, the Commission will also examine broader industry issues relating to vertical integration and the possible exclusion of other players that may be promoted thereby, as well as broader industry supply agreements.

During 1999 Sasol met with the Competition Commission to discuss certain clauses in contracts that could be considered anti-competitive under the then pending new competition legislation. Sasol subsequently applied that certain clauses in their distribution contracts be exempted from the Competition Act. However, exemptions can only be granted under certain conditions and Sasol did not meet any of the requirements. Sasol was advised to apply to the Minister of Mineral and Energy Affairs for a change in status to a designated industry and to then re-apply for exemption. To date, the Commission has not received another exemption application.

Although a contract may be legally binding, as may be the case with the distribution agreements of Sasol, the Competition Act makes provision to address anti-competitive practices, even if they are part of a contract.

Commission investigates allegation of excessive pricing of anti-retroviral drugs

The Commission has received a complaint lodged by Cipla-Medpro (Pty) Ltd (Cipla), a pharmaceutical company based in Cape Town, against alleged excessive pricing of anti-retroviral drugs by Wellcome Foundation Limited (Wellcome), Biochem Pharma Incorporated (Biochem), Glaxo Group Limited (Glaxo), GlaxoSmithKline South Africa (GlaxoSmithKline),Boehringer Ingleheim Pharmaceuticals Incorporated (Boehringer), Dr Karl Thomae (Dr Thomae) and Ingleheim Pharmaceuticals (Pty) Ltd (Ingleheim).

Cipla alleges that it could produce generic versions of anti-retroviral drugs at prices substantially lower than those charged by the respondents. The patentees of the anti-retroviral drugs, by allegedly entering into exclusive licensing and other arrangements, have precluded other entities from being able to distribute or market these products. Cipla alleges that this behaviour constitutes a restrictive vertical practice.

The investigation will have to consider the intellectual property legislation in South Africa, the international agreements on intellectual property signed by the South African government and the current legal position regarding parallel importation in South Africa.

The Commission will only divulge their findings once the investigation is concluded. The case will be referred to the Competition Tribunal, if any anti-competitive practices are found.

Commission clears the Cendant-Galileo deal

Internationally, the move by the property business company Cendant Corporation to acquire Galileo International Inc. attracted much interest, mainly due to such a move's vertical effects.

Cendant inter alia provides vacation exchange or timeshare exchange services to timeshare owners through its Resort Condominiums International (RCI) business.

Galileo is an American company, involved in the business of providing electronic global distribution services for the travel industry. It does this through its computerised reservation systems and an internet-based solution including the online travel service, TRIP.com.

In terms of the merger, Cendant was to acquire control over the electronic reservation system known as global distribution system (GDS).

The initial concern was that Cendant would be able to leverage Galileo's market power in its computerised reservation system (CRS) vertically into Cendant's activities. After a thorough analysis however, the competition authorities approved the transaction.

The South African Connection

The Competition Commission unconditionally approved the South African part of the transaction. Galileo has no physical presence in South Africa, but operates through its exclusive distributor, Galileo Southern Africa. The only business acquired from Galileo in South Africa is that

of the GDS. Galileo SA sells and markets Galileo's electronic GDS to subscribers such as travel agents, direct web sites and corporations in South Africa, thereby affording travel service providers such as airlines, hotels and car rental agencies, access to travel agents, web sites and self-booking corporations.

In the South African analysis, the relevant product markets of the parties differ distinctly from those of the international analyses. The only product sold by Galileo in South Africa is the GDS, a software product sold primarily to travel agents. This product cannot be regarded as a substitute for the products sold by Cendant.

Furthermore, no public interest issues arose as a result of the merger, because both parties are based in the USA; Cendant has only subsidiaries in South Africa. Furthermore, the parties allege that there would be no adverse impact on the employees of Cendant in South Africa, as the employees of Galileo SA will be absorbed into the business of RCI SA on the same terms and conditions as those of Galileo SA.

Keeping business printing in good form: prohibition of Bidvest/Paragon merger

The Competition Commission has recommended to the Competition Tribunal that the merger between the Bidvest Group Limited (Bidvest) and Paragon Business Communications Limited (Paragon) be prohibited. The merger falls within the large merger threshold category and in terms of the act needs to be referred to the Tribunal for final adjudication.

In terms of the proposed transaction, Lithotech Limited (Lithotech), a wholly owned subsidiary of Bidvest, wishes to acquire Paragon. Both Lithotech and Paragon are active in a range of areas in the printing industry. They primarily focus on the wider business forms market, including the printing of various types of business forms, direct mail printing, laser printing, web finishing and the manufacture of labels. Both parties also offer complementary services, such as warehousing, picking and packaging, distribution and procurement services.

The Commission conducted interviews with both competitors and major customers of the parties in all the product markets. In order to determine the market shares of the parties, the Commission undertook extensive research.

In its final analysis, the Commission found that the parties would be dominant post-merger in four of the six relevant markets examined. Furthermore, in most of these markets, the parties have significantly larger market shares than competitors, essentially being the only competitors. The analysis further revealed that no other market participant is able to provide the variety of services and product lines, or the same volumes, as the parties can individually.

Interviews with major customers revealed that many of these require several related products and services, and large volume production to fulfill large jobs. For example, many clients not only require "Business Forms - Continuous" and "Business Forms - Snap Sets" in the same format and style, but also the value-added logistics and fulfillment services that only the two parties can provide. The products and/or services combined are provided to a client as a package.

The parties are the only two players in the business forms printing market that are able to provide these packaged or bundled products/ services. Furthermore, from the market shares and turnover figures of each of the individual product lines it is clear that the parties are the only ones able to fulfill large individual jobs, on a national scale, in different product lines. If these two players are the only two participants that can provide such high volumes on demand for bundled products/services, they are in a league of their own vis-à-vis their competitors.

The proposed merger raised concerns for

CONTINUED ON PAGE 20

FROM PAGE 19

both customers and competitors. Taking all of the above into consideration, it is the Competition Commission's view that the transaction would substantially prevent or lessen competition in the relevant markets. Any efficiency or other pro-competitive gains that might arise would not offset the anti-competitive effects of the transaction. The parties did contend that the business forms market is a declining market, but were unable to satisfactorily substantiate their claims with data or other evidence. Accordingly, it is the Commission's view that the proposed merger should be prohibited.

Massmart deals gets okay from competition authorities

The Competition Commission recommended and subsequently the Competition Tribunal approved the large merger between Massmart Holdings Limited (Massmart), Jumbo Cash & Carry (Jumbo) and Sip 'n Save.

Massmart owns and controls several subsidiaries that are active mainly in the retail and wholesale of grocery, general merchandise and liquor products. The store names are CCW Wholesalers, Makro, Game and Dion. Massmart also owns a voluntary buying association, Shield Buying and Distribution.

Jumbo, Browns and Weirs Cash & Carry stores are wholesalers of groceries and some general merchandise and liquor.

Approach of the Commission

The Commission defined the relevant product markets as: wholesale grocery items, general merchandise and liquor. It focused its investigation on wholesale grocery items, as it is the area with the strongest competitive overlap between the parties.

The Commission found the relevant geographic market to be wider than the local one, as the customer catchment areas of the surrounding 170-200 km overlap markets, leading that the chain of substitution could cover the whole national area. The Commission settled on provincial markets for its analysis.

The Commission found that the merger is not likely to substantially prevent or lessen competition in all of the relevant markets. The parties will not have market power, as their post merger combined market shares would be relatively low. The parties are unlikely to have market power, as customers have countervailing power as well as the ability to discipline price. Barriers to entry were furthermore deemed to be low.

Approach of the Tribunal

In the Tribunal's analysis of the impact upon competition of the transaction, they considered two markets: the grocery products wholesale market in selected geographical areas and the liquor retail and wholesale trade in selected geographical areas.

The Tribunal was persuaded that the transaction would not substantially diminish competition in the grocery products wholesale market.

"While market shares in certain of the geographical areas in question are prima facie cause for concern, we are persuaded that the merged entity will not only face robust competition from other national chains but, given evidence of local determination of prices and competitive strategies, will face competition from well-established independents. The suppliers have a positive interest in facilitating the competitiveness of independents that are, moreover, assisted by the growth of bulk buying groups. Entry into this market is relatively easy. Moreover, the influence of large retailers on the prices of small retailers will act as a countervailing influence upon the ability of the wholesalers to exercise market power over their customers".

Furthermore, in the Tribunal's analysis of market shares in liquor retail and wholesale markets, there are clear indications that there is no prima facie cause for concern.

The Tribunal upheld the Commission's recommendation that the merger would not lessen competition in the relevant markets. Furthermore, no public interest issues arose from the merger and no jobs will be lost as a result of the merger.

International News

GE/Honeywell merger - fundamental disagreement between transatlantic authorities

After close co-operation on the analysis of the proposed $42 billion acquisition of Honeywell by GE, European Union and the United States of America agencies reached inconsistent decisions. The differences between the agencies flowed from an apparent substantive difference on the fundamental issue of the scope of merger control or antitrust law enforcement. Both parties analysed identical product and geographical markets, and both had access to the same facts.

GE and Honeywell are both US firms with their headquarters in Connecticut and New Jersey respectively. GE is a diversified manufacturing and services company in such areas as aircraft engines, household appliances, lighting, power generation, industrial controls, medical imaging equipment and engineering plastics. Honeywell is a diversified technology and manufacturing company producing avionic products and services, home, building and industrial controls, automotive products, power generation systems, speciality chemicals, fibres, plastics, electronic and advanced materials.

European Competition Commissioner, Mario Monti said, “The merger between GE and Honeywell, as it was notified, would have severely reduced competition in the aerospace industry and resulted ultimately in higher prices for customers, particularly airlines.” The Commission and GE discussed undertakings intended to address the concerns of the Commission, but the proposed remedies were found not to remove the competition concerns raised by the proposed transaction.

The European Commission concluded that the merger would create or strengthen dominant positions on several markets. The key test for assessing mergers in Europe is whether they create or strengthen a dominant position. European merger control is not about protecting competitors, but about ensuring that markets remain sufficiently competitive in the long run so that consumers benefit from sufficient choice, innovation and competitive prices.

The European Commission’s investigation led to its conclusion that GE alone already had a dominant position in the large commercial and large regional aircraft market for jet engines. Its strong market

position, the company’s financial strength and its vertical integration into aircraft leasing were some of the factors that contributed to the conclusion that GE already has existing dominance. Honeywell is the leading supplier of avionics and non-avionic products, engines for corporate jets and engine starters (an important element of engine manufacturing).

The parties’ combined activities would result in the creation of a dominant position in the markets for the supply of avionics, non-avionics and corporate jet engines. It would also strengthen GE’s already dominant market position. The Commission maintains that the dominance would have been created or strengthened as a result of horizontal overlaps in some markets. The extension of GE’s financial power and vertical integration to Honeywell activities and the combination of their respective complementary products further contribute to this dominance.

Such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. This would have the effect of foreclosing competitors, thereby eliminating competition in these markets, ultimately affecting adversely product quality, service and consumers’ prices.

The ability of the merged company to leverage a dominant position in one industry to gain market share in another, the so-called “portfolio effects”, lies at the heart of the difference in approach to the proposed transaction by the two agencies.

Charles A. James, Assistant Attorney General for Antitrust, said that the Antitrust Division conducted an extensive investigation of the GE/Honeywell acquisition and reached a firm conclusion that the merger, as modified by remedies, would have been pro-competitive and beneficial to consumers. Their conclusion was based on findings that the combined firm could offer better products and services at more attractive prices than either firm could offer individually. That is, to them, the essence of competition.

The Antitrust Division is very critical of the usefulness of the portfolio effects theory. Charles A. James said “in our view, the so-called ‘portfolio effects’ or ‘range effects’ analysis as it has recently been employed is neither soundly grounded in economic theory nor supported by empirical evidence, but rather, is antithetical to the goals of sound antitrust enforcement. We fear that it will result in some pro-competitive mergers being blocked, and others never being attempted, to the detriment of consumers in many countries.” The use of

CONTINUED ON PAGE 22

FROM PAGE 21

the theory may lead to potential merging parties not disclosing in full the efficiencies they hope to realise, in the fear that efficiencies would be viewed negatively, even if these efficiencies were to benefit consumers.

GE and Honeywell have appealed against the EC Commission's decision, not intending to revive the deal, but to have some of the Commission's conclusions reversed. The parties are concerned that competitors may challenge them in court over findings of dominance. Furthermore, the parties are concerned about the finding that the merged entity could have bundled aerospace products and services to squeeze out rivals.

Blowing the whistle on hard core cartels - European Commission considers US-style leniency programme

Leniency programmes designed to fight hard core cartels have proven successful in the United States of America. The United States offers an automatic, rather than discretionary, immunity to the first cartel member to "blow the whistle". This practice caused the rate of whistle blowing to increase from once a year to approximately once a month. The European Commission has now indicated that its draft rules for a leniency programme are under consideration. These draft rules will maximise the European Commission's ability to detect and prosecute cartels.

Leniency programmes are necessary to break the code of silence surrounding hard core cartel activity. Cartels operate in secret and in order to encourage a cartel member to confess and provide information on the cartel (its members and practices) enforcement agencies need to be in the position to offer the whistle blower leniency. Smaller fines, shorter sentences, less restrictive order or complete amnesty would number amongst such leniences.

Such "whistle blowing" incentive programmes work best when they provide the first conspirator to come forward a clear and reliable promise of amnesty. To maximise the incentive to blow the whistle on cartel members, the first one in must receive the best deal. Furthermore, the perceived risk of not being the "first one in" should be high for conspirators. The benefits of staying with the cartel should pale in comparison to the seriousness of the possible penalties if a member is caught out. Tough penalties, including the risk of personal liability, are powerful motivators to seek amnesty or leniency from authorities.

The characteristics of an effective leniency programme are clarity, certainty and priority, both with regard to the penalty and leniency structures. Also, strict confidentiality is needed in order to protect witnesses within leniency programmes. Informants often run the risk of retaliation from other members.

The European Commission has further indicated that these new rules increase the financial incentive to be the "first one in." The first whistle blower will have 100 percent of their fine waived, the second will only get a 30 - 50% reduction.

Interbrew sought judicial review on remedy of Bass Brewers divestiture

The United Kingdom Competition Commission (UK CC) considered the acquisition by Interbrew SA (Interbrew) of the brewing interest Bass plc (Bass Brewing).

The UK CC considered the effects of the merger at three levels of activity in the beer industry's vertical supply chain:

• the supply of beer by brewers
• wholesaling and distribution
• the supply of beer by retailers. The UK CC concluded that the acquisition might go against public interest and have the following adverse effects in Great Britain:

- A shift away from price competition to non-price competition, leading to an increase in net wholesale prices and, ultimately, increased retail prices
- Increased non-price competition in the form of advertising and marketing would raise barriers to entry and expansion, leading to a greater degree of brand rationalisation
- Interbrew and others would be able to promote their own brands at the expense of others
- Independent free trade and independent wholesalers would be rendered less competitive.

The UK CC further concluded that the beneficial effects that consumers would experience would be limited, even if all the claimed efficiencies were to be realised. Having reached such an adverse finding, a range of potential behavioural, structural and divestment remedies were considered.

The UK CC concluded that behavioural or structural adjustments would not remedy the public interest detriments and behavioural remedies would also be difficult to enforce.

The UK CC considered two divestment options - the disposal of either Whitbread Brewing Company or Bass Brewers. On a majority decision, the divestment of Bass Brewers was proposed. It was believed that Bass Brewers was a viable business that could be disposed of without complications.

The Secretary of State for Trade and Industry assessed the UK CC's investigation and agreed with its findings and the proposed remedy. Interbrew, however, sought a judicial review of the remedy on the basis that it was "unreasonable and disproportionate and based on unfair procedures".

The High Court in London did not quash the UK CC's analysis of the adverse effects of the merger, but it held that the UK CC's procedures had been unfair. Interbrew had not been given the opportunity to comment on all of the issues of concern regarding possible divestment. As a result, the court quashed the decision of the Secretary of State to order divestiture. The Secretary of State therefore has to reconsider the question of remedies.

European Commission imposes €71,8 million fine on DaimlerChrysler

The European Commission initiated an investigation into anti-competitive practices by DaimlerChrysler AG, one of the world's leading car manufacturers. Documents used in the investigation were found during inspections in December 1996, at the premises of DaimlerChrysler AG in Germany, as well as at its subsidiaries in Belgium, the Netherlands and Spain.

The European Commission identified three types of infringements of their competition rules. The first infringement constitutes measures that are obstacles to parallel trade. DaimlerChrysler instructed the members of its distribution network, including agents, not to sell cars outside of their respective territories. Furthermore, distributors were instructed to oblige foreign customers to pay a 15% deposit when ordering a car from Germany. The same deposit was not required of German customers. The second infringement had DaimlerChrysler limit the sales of cars by Mercedes agents or dealers to independent leasing companies, if these companies had not yet found lessees for the vehicles concerned. Competition between its own leasing companies and independent leasing companies was thus restricted.

The third infringement amounts to resale price maintenance. DaimlerChrysler participated in a price fixing agreement in Belgium. The aim was to limit the rebates granted by its subsidiary, Mercedes Belgium, and the other Belgium Mercedes dealers to customers. DaimlerChrysler investigated sales policies of dealers by using a "ghost shopper" and the agreement was enforced by DaimlerChrysler which reduced supply to dealers that granted rebates higher than the agreed 3%.

The practices are all infringements of Article 81(1) of the EC Treaty, which prohibits all agreements which may affect trade between member states and which have - as their object or effect - the prevention, restriction or distortion of competition within the single market.

The European Commission took the gravity and the duration of the infringements into account when determining the amount of the fine. The €71,825 million fine should sufficiently deter DaimlerChrysler and other companies in the future.

Erratum

In our B2B commerce article in the September 2001 edition of Competition News we refer to the word "monopsony". In the printed version this is followed by the phrase "(is this a real word?)". We are happy to add that it was the printers asking the question in an informal comment on the draft and not the Commission questioning the existence of the concept. We are, however, saddened that no one contacted us to set the record straight. For the record "monopsony" is a market structure where there is only one buyer - in contrast to a monopoly market structure where there is only one seller.

Where to get hold of us

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