EDITION 57 | March 2017

The Official Newsletter of the Competition Commission South Africa

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FIRMS BEWARE, THERE ARE NO ACTIONS WITHOUT CONSEQUENCES –

A glance at sanctions in SA competition law

In a roundtable discussion organised by the OECD in December last year (2016) in Paris (France), the Commission was invited to make a written contribution on its experience with sanctions in competition law cases. The Commission took the opportunity to reflect on the determination of fines, other forms of sanctions, as well as to discuss the efficacy of sanctions in not only punishing but also deterring contraventions of the Competition Act 89 of 1998, as amended ("the Act").

Sanctions in the South African Competition law do not only include administrative penalties imposed in terms of section 59 of the Competition Act. Sanctions may also take the form of behavioural remedies aimed at changing market behaviour and address the harm caused in the market; claims for civil damages; and criminal sanctions for cartel conduct.

Up to at least 2012, one of the methods that the Tribunal used to determine administrative penalties was the allocation of a weighting to each of the section 59(3) factors.[1] The weightings were applied to the facts of the case and an appropriate level of penalty or percentage, not exceeding 10%, in line with section 59(2), was determined.[2]

[1] Factors under section 59(3) include the nature, duration, gravity and extent of the contravention, any loss or damage suffered as a result of the contravention; the behaviour of the respondent; the market circumstances in which the contravention took place; the level of profit derived from the contravention; the degree to which the respondent has cooperated with the Competition Authorities; and whether the respondent has previously been found in contravention of the Competition Act.

[2] Section 59(2) stipulates that the imposed administrative penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the preceding financial year.
For instance, the weighting methodology was used in fining SAA for contravention of section 8(1)(d)(i) of the Act in 2005

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Editorial Note

Dear Reader

The Commission's analysis of deal activity in the calendar year 2016 was incredibly robust. The Commission prohibited 10 mergers, 6 of which were prohibited between April 2016 and December 2016. Some might criticize the Commission for over regulating mergers, suggesting that the Commission should generally be permissive of mergers. Here is why I don't spend a lot of time fretting about this criticism: the Commission only prohibits anti competitive mergers.

The process of reviewing mergers by competition authorities is not always neat, tidy and timely, but eventually right and appropriate decisions are taken. Much like pebbles emerging from a riverbed, the rough edges and imperfections are eventually smoothed away, and what remains is ready to join our collective wisdom.

While, I cannot comment on pending cases, I wish to share with you some insights coming from the Commission's prohibition in the andalusite case and some takeaways from the case.

On 15 December 2016, the Competition Appeal Court heard an appeal by two mining companies, Andalusite Resources (AR) and Imerys South Africa (Imerys), who were objecting to the Competition Tribunal's decision to prohibit the merger of the two companies on the grounds that it would "substantially prevent or lessen competition" in South Africa.

The companies are the only miners and suppliers of andalusite in South Africa, part of an alumina-silicate group of compounds used in high temperature industrial processes. Locally and internationally andalusite is largely used by steel producers.

The Commission prohibited the merger in April 2015 after an investigation, and the merging parties then referred the matter to the Tribunal.

The Commission had received numerous concerns from both producers and end-users of andalusite based refractories regarding the effects of the proposed merger. In particular, producers and users were concerned that, as a result of the proposed merger, they would be deprived of competitive choice between Imerys and AR for andalusite, and that the merged entity would increase the price of andalusite locally or increase the amount it exported.

I was encouraged when the Tribunal rejected argument by the two companies that the absent the proposed merger the two companies would become capacity constrained and raised concerns that the merger could be used to control availability of andalusite in the market. AR and Imerys are by far the largest suppliers of andalusite globally and AR has more than half of SA's market.

I was encouraged further when the Tribunal said it had considered certain behavioural conditions proposed by the merging parties, but in the end found "these proposed conditions in our view are inadequate and do not address the structural market change resulting from the proposed transaction". I agree. In fact, I would add that conduct remedies, are generally inadequate to restore competition to premerger levels.
I am acutely aware of studies that suggests that even if the merging parties abide by the terms of conduct remedies – an uncertainty on its own – the remedies at best only delay the merged firm's exercise of market power. I am sure you will agree that the market power gained in the transaction does not dissipate during the period of the conduct remedy, and this market power could be available for exploitation. It seems impractical to draft longer behavioral commitments because of the difficulties in accurately predicting future market or industry changes that the commitment may need to address.

Even setting all of that aside, from a practical standpoint, the analysis of cost, price, and margin information requires substantial experience and constant monitoring, which may be expensive to come by. Effective price regulation is very difficult, and even more so in the absence of a competitive market. Pricing and other commitments also may be easier to circumvent than structural remedies or may be loaded with so many caveats that they are rendered effectively useless.

For all of these reasons, I remain skeptical that conduct remedies in this case would have been effective in replacing competition lost by the anticompetitive merger.

The appeal was subsequently heard by the Competition Appeal Court in December 2016 and judgment in the matter was delivered on Thursday, 2 March 2017. The appeal was dismissed with costs. This means that the Commission's decision to prohibit the merger was confirmed on appeal.

You may not be aware, but this prohibition is the 10th merger prohibition by the Tribunal and the first for the Competition Appeal Court in 18 years of competition regulation in South Africa.

The significance of this prohibition is that it has prevented monopolization of an important input product which would have added to the costs of users such as manufacturers in the steel industry who are experiencing a challenging global and domestic economic environment.

And with that, I am pleased to share with you also that it is an exciting time in the evolution of competition practice in Africa. Our Commissioner, Tembinkosi Bonakele was re-elected as the Chair of the African Competition Forum towards the end of 2016.

While on this topic, I would be remiss if I did not mention how excited we are that one of our own, Hardin Ratshisusu was appointed as Deputy Commissioner, following Cabinet's approval.

As you can tell, the calendar year 2016 was a busy and very successful year for the Commission – and I'm confident that 2016/17 financial year will be as well.

Happy reading!

Editor in Chief
Dr Liberty Mncube

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In or about 2011, however, the Tribunal saw the need to develop clear fining guidelines.[3] Taking its cue from the Tribunal's remark, on 17 April 2015, after various engagements with relevant stakeholders, the Commission published its guidelines for the determination of administrative penalties for prohibited practices.[4] The guidelines are based on the six-step methodology developed by the Tribunal in the Aveng case.[5]

In developing the six-step methodology, the Tribunal had regard to the EU guidelines published in 2006.

Some of the highlights in the Commission's guidelines include the calculation of the base amount, where such amount is calculated as a proportion of the affected turnover on a scale from 0% to 30%. The more egregious the conduct is, the higher the percentage to calculate the penalty.

Another important consideration in the determination of a fine in terms of the Commission's guidelines is duration. In this regard, the duration element is taken into account by multiplying the base amount by the number of years of participation in the contravention.[6] This is a considerable deterrent factor.

Some special provisions under the Commission's guidelines include the attribution of liability for payment of the final administrative penalty on a holding company (parent company) where its subsidiary has been found to have contravened the Competition Act. In the Delatoy[7] case the Tribunal confirmed that a group of companies may constitute a "firm"[8] for purposes of the Competition Act. In terms of the Competition Act, a fine is to be imposed on "the firm's annual turnover". Some argue that this provision means that the firm liable for a fine can only be the firm that was directly involved in the contravention. Although the Tribunal in the Delatoy case did not decide on whether or not the Delatoy Group was liable for a fine, its decision may assist in arguing that a fine can be imposed on a group of companies and, importantly, the 10% statutory cap can be calculated on a group's annual turnover. The case ended in a settlement before the Tribunal where the firms forming the Delatoy Group all agreed to pay the penalty jointly and severally, the one paying the others to be absolved. This indicates that a group of companies, and close to that a parent company, may be held liable for the payment of an administrative penalty.

Some developments in the history of sanctions also include the innovative settlement process that the Commission adopted in the construction fast track process. Some of the objectives of this process were the speedy resolution of the Commission's investigations in the construction industry and setting the construction industry on a new competitive trajectory. Under the fast track process, construction firms that were involved in collusive conduct were invited to apply for settlement on financially advantageous terms. The process also provided for firms to first apply for leniency in terms of the Commission's Corporate Leniency Policy, and if they were not first through the door, to apply for settlement on favourable terms set out in the Invitation. The construction fast track resulted in settlements with 15 firms imposing a fine of approximately R1,47 billion.

As remarked by the Tribunal in Media 24,9 where an administrative penalty is not competent, other remedies cannot be imposed.[10] In this case, the Tribunal held that a restorative remedy was appropriate and found that "the credit guarantee remedy" was the most appropriate. The credit guarantee remedy was considered after taking into account the fact that one of the major barriers to entry or existence in the market for a community newspaper was not being part of a vertically integrated group which could give access to in-house printing and distribution.[11] The Tribunal observed that one of the difficulties community newspapers faced was the lack of necessary cash flow to secure printing and distribution services on a reliable or consistent basis. [12]Accordingly, in terms of the credit remedy, Media 24 were to provide credit for a community newspaper under certain terms.[13] The case is, however, on appeal and await the Competition Appeal Court's (CAC) decision.

[3] Competition Commission v Southern Pipelines Contractors & Conrite Walls (Pty) Ltd (23/CR/Feb09)
[4] The guidelines became effective on 1 May 2015
[5] Competition Commission v Aveng (Africa) Ltd t/a Steeledale and others (Case no. 84/CR/Dec09)
[6] Step 3 of the Commission's Guidelines [7]Competition Tribunal Case Number CR212Feb15
[8] In terms of section 1(1)(xi) a firm is defined as including "a person, partnership or a trust"
[9] Competition Commission vs Media 24 (Pty) Ltd (CR154Oct11/REM144Sep15) – Tribunal's decision on remedies dated 6 September 2016
[10] Media 24 paragraphs 4 and 5 [11]Ibid at paragraph 89 [12] Ibid at paragraph 96 [13] Ibid at paragraph 99

BY NELLY SAKATA

The Tribunal also confirmed settlement agreements which included alternative remedies in the form of pricing commitment.[14] For example, in the settlement agreement between the Commission and Pioneer, where Pioneer was found to have engaged in collusive conduct with its competitors in the maize and bread market, the Commission and Pioneer agreed on a pricing commitment. This shows that alternative remedies sometime aim to achieve a greater objective in the form of considering and promoting public interest grounds.

In the recent settlement between the Commission and ArcelorMittal South Africa Ltd (AMSA),[15] the parties also agreed on a pricing remedy. The pricing remedy was aimed at addressing the concerns arising from AMSA's pricing policy. AMSA was alleged to have charged excessive prices for its flat steel products in contravention of competition law.

The Competition Act also provides for claims for civil damages in the ordinary civil courts.[16] A civil court will then determine, among other things, whether the loss or damage suffered by a party who brings the claim was caused by the competition law infringement and determine the quantum of the damages.
In South Africa, the process of sanctions through claims for civil damages is still in its infancy and is developing. The enforcement work of the Commission in relation to the bread cartel and widespread collusion in the construction industry in South Africa has spurred claims for civil damages.

In respect of the bread cartel, a group of non-governmental organisations brought a class action in the High Court. The class action was filed by the Children's Resource Centre Trust and eight others (also referred to as the consumers' application) and Imraahn Ismail Mukaddam and two others (also referred to as the distributors' application) against Pioneer Foods (Pty) Ltd ("Pioneer"), Tiger Consumer Brands Ltd ("Tiger") and Premier Foods Ltd ("Premier"). Pioneer, Tiger and Premier are three of the four major bakeries in South Africa.

In a recent High Court judgement,17 the first of its kind, the High Court found that South African Airways ("SAA"), the South African national carrier, was liable to pay damages to Nationwide Airlines (Pty) Ltd ("Nationwide") in the sum of R104 625 Million. In this case, Nationwide had claimed damages for loss of profits from SAA for its anti-competitive practices that contravened section 8(d)(iv) of the Act.

On 1 May 2016, the provisions of section 73A, which introduce criminal sanctions for cartel conduct, came into effect.[18] These provisions criminalise the conduct of a director or a person having management authority, who has caused or permitted a firm to engage in cartel conduct.[19] Accordingly, from May 2016, a director or manager of a firm who are found either to have caused a firm to engage in, or knowingly acquiesced to a firm engaging in cartel-type conduct, will be held individually criminally liable, facing a fine of up to R500 000 or a term of imprisonment not exceeding ten years.

The deterrence effect of sanctions in competition law has increased with not only the clarity and transparency brought by the Commission's guidelines on how fines are determined, but also with more cases where behavioural remedies are imposed. Civil claim actions and the recent criminalisation of cartel conduct also add to the deterrent effect. Firms should therefore take all of this into consideration when conducting business and ensuring compliance with the Competition Act, as if found to have contravened the Act, there will be consequences.

[14] Pioneer settlement agreement with the Commission
[15] Settlement agreement between the Competition Commission and ArcelorMittal South Africa Ltd (confirmed by the Tribunal on 16 November 2016) – Case no. CR092Jan07/SA090Aug16)
[16] In terms of section 65(6)(b)(i) of the Competition Act, a person who has suffered loss or damage as a result of competition law infringements may approach the Tribunal for a certificate confirming that the conduct constituting the basis for the action has been found to be a prohibited practice in term of the Act.
[17] Nationwide Airlines (Pty) Ltd (in liquidation) vs South African Airways (Pty) Ltd - High Court of South Africa (Gauteng Local division, Johannesburg), case no.12026/2012

Exclusive School Uniform Contracts

SHUT OUT LOW INCOME PARENTS

BY TEMBINKOSI BONAKELE

For many it is only about drilling in discipline and and a sense of pride, but for the masses of low income parents school uniforms break down a massive barrier to the realisation of dreams.

Therefore school uniforms do not just instil a shared vision amongst children, but represent a sense of belonging, equality and mutual advancement across race and class differences. Imagine if school uniforms were to be discontinued and children were allowed to dress to their hearts' content.

Many parents over indulge and over compensate - the word "no" doesn't exist in their vocabulary. Children can be slaves to fashion and in no time school grounds will be flooded with expensive labels and brands.

Children of low income or struggling parents will then become the biggest casualties of this fashion avalanche - there will be peer pressure and bullying. Sadly, this may result in all sorts of psychological effects resulting in poor health and drop outs.

Yet, many schools seem to be indifferent to the plight of these parents who have to face artificial obstacles imposed by the continuation of the anti-competitive exclusive agreements. For a long time now, a huge financial burden has been placed on parents through the introduction of designated exclusive suppliers.

In these arrangements, competition is shut out. Where there's no open and competitive tender process, costs hit the roof. These costs, amongst many other things, compel financially squeezed parents to remove their children from school. Thus, they have to compromise the quality of education for the kids.

This goes against the ethos of equality, being the same and inclusivity at school. The Competition Act enjoins us to "provide for markets in which customers have access to, and can freely select, the quality and variety of goods and services they desire". Unfortunately, agreements that are entered into without any competitive bidding substantially prevents and lessens competition thus causing resulting in a financial disadvantage to parents.

Although the Commission - working with the National Department of Basic Education, the provincial education departments and school governing body federations - issued circulars against the continuation of the practise around May 2015, our investigations reveal that the habit may still be widespread. The Commission has endeavoured to be accommodative and granted the various parties enough time to terminate these arrangements, some of which were indefinite.

We have seen lots of progress at tertiary level where universities terminated exclusive agreements and procured through competitive bidding to encourage more competition in the procurement of academic attire and other related material.

The opening of the tender process excessive uniform costs as a barrier for parents when they have to choose schools for their kids. This is particularly important for South Africa because in the past, apartheid through a myriad of institutionalised restrictive and discriminatory practices, foreclosed black people from virtually all spheres of meaningful life.

Further, many of the schools that are involved in this practise are outside traditional black areas and raising uniform costs to a premium, through unilateral appointments of designated suppliers, imposes another hurdle to these schools. Importantly, these parents already have to bear more costs with regards to transport.

Crucially, there's whole hosts of SMMEs, whose owners may be parents to children attending these schools, who are denied an opportunity to compete for business. If the school uniform market is opened up to competitive bidding, uniform costs will certainly go down and the quality of the clothing items will improve. With vigorous competition comes massive incentives for companies to improve efficiency, product superiority and introduce competitive prices.

In our quest to develop a competition regime aimed at reforming markets with anti-competitive practises and ensure an inclusive and transformative economy, the Commission wants to tag along all its key stakeholders including SMMEs and consumers. The aim is to create an enabling environment where enterprises thrive and consumers realise the rewards.

Thus, it became critical, that before we come down like a ton of bricks on the schools, we heighten collaboration, awareness and compliance particularly amongst the SMMEs and consumers. Mindful of the short and long term implications of the decisions we take, the Commission adopts a dynamic view to enforcement.

This has been our approach on this matter since we received the first complaint way back in 2010. We engaged with the Education Departments, provincial and national, and issued warning circulars. The Commission met with various governing bodies, schools and principals that we in breach.

In the face of continued defiance, the Commission has no option but to apply its enforcement powers. That time has now come - the Commission will now start to initiate prosecutions in this regard and penalties will be severe.

COMMISSION RE-ELECTED AS CHAIR OF AFRICAN COMPETITION FORUM

BY ALEX KUHN

The Competition Commission of South Africa was recently re-elected as the chair of the African Competition Forum (ACF) for a second two-year term.

The ACF is a network of national and regional African competition authorities, established in 2011. The ACF's objective is to promote the adoption of competition principles in the national and regional economic policies of Africa.

The ACF and the World Bank Group recently published a report titled "Boosting Competition in African Markets (2016)". It found that most countries in Africa are perceived to have lower levels of competition than other countries around the world. For example, in the services sector, in more than 40% of African countries, a single operator holds over half the market share in telecommunications and transportation. A lack of competition in basic goods in African markets harms all consumers through its effect on prices, but the poorest are hardest hit. The retail price of ten key consumer goods are on average 24% higher in African cities that in other economies around the world. The report is available at: http://www.worldbank.org/en/news/feature/2016/07/27/africa-competition.

While the number of African jurisdictions with competition laws tripled in the last 15 years, most competition authorities are under-resourced in human and financial terms and have little interaction with other African authorities. This, despite the similarity in conditions they face and competition issues that they deal with. The ACF provides a forum through which African competition agencies co-operate, share information, co-ordinate enforcement policy and build consensus towards sound competition policy.

To realise its mission, the ACF:

- Encourages and assists African countries that do not have a competition law to adopt one;
- Helps to build the capacity of existing and future African competition agencies through training, cooperation, exchange of information and joint research; and
- Advocates about the benefits of implementing competition laws among governments, the general public and stakeholders.

ACF membership

The ACF currently has 31 national competition authorities and four regional competition bodies as members. Approximately 70% of existing national African agencies are members of the ACF.

Members of the ACF as at January 2017

Algeria	Ethiopia	Namibia	Togo
Benin	Gabon	Nigeria	Tunisia
Botswana	Guinea	Rwanda	Zambia
Burkina Faso	Kenya	Senegal	Zimbabwe
Burundi	Malawi	Seychelles	COMESA
Cameroon	Mali	South Africa	ECOWAS
Cote d'Ivoire	Mauritius	Swaziland	SADC
Congo-Brazzaville	Morocco	Tanzania	WAEMU
Egypt	Mozambique	The Gambia	

The ACF is managed by a Steering Committee of 11 agencies and meets regularly to plan and review its work. The Competition Commission SA is currently the chair, with the Competition Commission of Mauritius holding the vice chair. The Commission also acts as the ACF's Secretariat.

ACF Steering Committee members 2016 - 2018

South Africa (chair)	Egypt	Senegal
Mauritius (vice chair)	Cote d'Ivoire	The Gambia
Morocco (secretary)	Kenya	Zambia
Botswana (treasurer/fundraiser)	Tanzania	

ACF projects

In its almost six years of existence, the ACF has held seventeen capacity building workshops, reaching over 350 participants from 31 competition authorities. Partnering with experts from the OECD, US Federal Trade Commission, UNCTAD and the International Competition Network, training has been delivered on research skills for competition, combatting bid-rigging, investigation techniques and building an effective agency.

The ACF is currently running a cross-country sector research project involving 14 ACF members, looking into markets in telecommunications, construction, cement, fertilizer, liquefied petroleum gas and pharmaceuticals and private healthcare. The study will be completed in April 2017. A similar project was run between 2012 and 2014 in which six African competition authorities researched three industries (cement, sugar and poultry) across six countries. As a result of this study, reforms were made in the legislation of several ACF members to promote better competition and cases of anti-competitive conduct are being investigated and prosecuted.

Impact of the ACF

An independent review of the ACF in 2014 identified 25 measurable impacts that the ACF had at national agency level among its members, including developing a national plan for combatting bid-rigging (Guinea), training government procurement officials to detect bid-rigging (Botswana), developing and launching a five year strategic plan (Kenya) and successfully advocating against the monopolisation of sugar imports (Mauritius). The ACF is uniquely placed to build the specialised management and strong leadership skills needed by competition authorities, and it enjoys a high level of goodwill and solid working relationships with the international competition community.

Benefits of COMPETITION REGULATION

Even in Trying Times

BY TEMOSHO SEKGOBELA

In the last couple of weeks, South Africa yet again sat on the edge of its collective chair with bated breath awaiting our sovereign ratings from the ratings agencies, Moody's Corporation and Standard and Poor's. All of this, amidst high levels of pessimism about the country's well-being as epitomised in newspaper and visual media inundating us with reams of doom and gloom about corruption, student unrest and the breakdown of race-relations, to name a few. Although the announcement by the ratings agencies was not excellent, it also was not the antithesis: junk!

Rather, South Africa was declared very ailing but with the potential for recovery subject to getting our house in order rather urgently. This includes addressing an economy of low growth, high unemployment and a drought amidst rising food prices which is putting a squeeze on the disposable income of all families, especially the poor.

However, despite the negative projections, in the margins of newspapers, in the early mornings and late nights of television news coverage, lies small but significant victories and successes with some institutions still working tirelessly.

It is in these margins that I am reminded of Adrian Gore, Chief Executive Officer of Discovery, who is quoted as stating that South Africa is too negative in its outlook and fails to sufficiently acknowledge its successes which include: rolling out the world's biggest anti-retroviral programme, an economy that has grown in nominal terms four times than it was in 1994, surplus energy and millions of South Africans being lifted out of poverty.

It is in these margins that the Competition Commission is achieving its successes in seeking outcomes for a growing and inclusive economy. Since it opened its doors in 1999 the Competition Commission has been learning and working tirelessly to enforce the Competition Act against transgressions related to cartels and abuses of dominance by large corporations.

By 2013, the Competition Commission had levied administrative penalties of approximately R4,2 billion against various firms. These administrative penalties represent a measure of the illicit gains by these firms which usually manifest in high prices for consumers. In 2016 the Competition Commission continued on this trajectory and concluded a settlement agreement worth R1,5 billion with the steel giant ArcelorMittal South Africa in relation to multiple transgressions.

Mind you, the Competition Commission is not just a regulatory Robin Hood focusing only on retrieving illicit gains from the bank accounts of transgressing firms. On the contrary, the Competition Commission has in a very real and practical sense also contributed to the agenda of poverty alleviation as well as ensuring consumer choice and competition through its work. Three examples come to mind, one of which speaks directly to the success identified by Adrian Gore. In 2003 Ms Hazel Tau submitted a complaint to the Competition Commission against two pharmaceutical companies alleging that the companies were, amongst other things, charging excessive prices for their patented ARV medicines. Following investigation but prior to a public hearing, the two pharmaceutical companies entered into a settlement agreement with the Competition Commission which included granting licences to generic manufacturers, permitting licensees to export ARV medicines to sub-Saharan African countries and capping royalties to no more than 5% of the net sales of ARVs. The net effect of this intervention was to bring down the cost of ARVs which consequently increased access to ARVs to those who needed it most.

In 2007, the Competition Commission recommended the prohibition of a merger between Pick n Pay and Fruit & Veg City based primarily on the fact that Pick n Pay and Fruit & Veg City were effective potential competitors and big purchasers of fresh produce. The competitive constraint between these two companies meant that they are likely to continue competing vigorously through prices and quality to the benefit consumers.

If you are scratching your head trying to thread the pieces together, scratch no more. In prohibiting the merger, the Competition Commission forced Pick n Pay and Fruit & Veg City to continue being competitors. This resulted in the substantial growth of Fruit & Veg City illustrated by Food Lover's Market brand stores increasing from just 2 in 2007 to 75 in 2016 and the rolling out of 220 Fresh Stop stores during the same period.

Brining things a little closer to the present, in June of this year, the World Bank released a study conducted in conjunction with the African Competition Forum which noted that, amongst other things, the Competition Commission's intervention in wheat, maize, poultry and pharmaceuticals markets contributed to reducing prices to consumers, consequently reducing overall poverty by at least 0.40 percentage points. Moreover, the study noted that potentially 202,000 individuals were made better off and lifted above the poverty line through lower prices putting back approximately 1.6 percent back into the pockets of to the poorest 10 percent.

To add a last example to the promised three, one should also note the work of the Competition Commission in relation to public interest in merger regulation. In particular, the Coca-Cola bottling transaction as well as the beer transaction (InBev/SAB) have resulted in the creation of development funds worth R1,4 billion which aim to incorporate and establish small and medium enterprises within the supply chains of these firms, leading to more inclusive growth.

These few examples are something to be optimistic about. This however is not to say there are no real challenges to the work of the Competition Commission including serious setbacks particularly in the prosecution of abuses of dominance. The country as a whole also faces significant challenges in trying to resuscitate the economy to create more jobs.

And to epitomise the state of the nation and the essence of this article, it was with great pride and excitement that the 2016/17 World Economic Forum Global Competitiveness Report ranked South Africa 7th out of 138 countries for its effectiveness of competition policy. However, the same report ranks us 138th in the quality of our math and science education. Some food for thought.

Structure of poultry industry in urgent need of transformation

BY HARDIN RATSHISUSU

The current debate concerning a provisional safeguard duty of 13.9% imposed in December 2016 on European Union imports of bone-in chicken into South Africa has highlighted challenges faced by local producers of poultry products. The poultry industry criticised the provisional duty as inadequate to deal with the crisis caused by the import of bone-in chicken portions from the EU. It applied for a 37% duty citing the need for the local industry to remain viable.

It is not contested that the poultry industry contributes significantly to the South African economy. The South African Poultry Association (SAPA) estimates that the poultry industry provides direct and indirect employment for more than 100 000 people in the wider poultry value chain. Poultry consumption in South Africa, according to SAPA, reached almost 38kg per capita in 2014 with beef consumption a distant second at 18kg per capita. Poultry meat has also consistently been the most affordable source of animal protein since 2009. However, over the past 12 months the average retail price of frozen chicken portions increased by more than 20%, despite the corresponding increase in import volumes over the same period, a sign the local industry is fast losing its competitiveness.

The pending retrenchment of 1 350 employees by RCL Foods (Rainbow Chickens), one of the country's biggest poultry producers is cause for concern. This comes after the closure

of Mike's Chickens, a family-owned business in Polokwane which was forced to exit the industry in 2016 after 38 years in existence, which resulted in more than 1 000 job losses.

Country Bird, the third largest broiler producer in the country, has also announced its intention to retrench 1 500 employees. This is worrisome in light of the Competition Commission's previous interventions at the breeding stock level of the poultry value chain.

There is some brief history on Country Bird worth noting here. In 2007 Country Bird lodged a complaint with the Competition Commission regarding exclusionary conduct by Astral Foods through the Elite Breeding Farms partnership which prevented it from gaining access to breeding stock and to become an effective vertically integrated competitor in the market. The Competition Commission found that Astral Foods had engaged in exclusionary conduct in contravention of the Competition Act which Astral Foods acknowledged and subsequently settled the matter with the Competition Commission in 2013.

After Country Bird's exit from the Elite Breeding Farms partnership it was able to introduce a competing breed into the South African poultry value chain. This allowed it to become a successful vertically integrated competitor in the market. However, Country Bird's current challenges suggest that the previous interventions by the Competition Commission in the poultry industry were not sufficient to address all of the broader challenges that still plague the industry.

It is evident that a strong collaborative effort is required between government, business and labour to stem the current tide of job losses and exit of market participants in the poultry industry. More important is the need for a constructive, long-term approach in resolving these challenges. Such an approach should acknowledge that increasing import duties, whilst ignoring some of the other challenges faced by local poultry producers, may not provide a long-term solution to ensure the future sustainability of the poultry industry. Over the past decade the industry has faced several significant challenges that have hindered its growth potential and competitiveness. These challenges are much broader than import penetration alone.

One of the main challenges in South Africa's poultry industry is its highly concentrated nature, an outcome of the significant barriers to entry along the entire poultry value chain. The value chain is dominated by a few large vertically integrated companies that have the capital required to achieve the economies of scale necessary for a sustainable business operation. These firms' subsidiaries are active at all levels of the value chain, from the upstream production of animal feed, to the downstream abattoirs where broilers are slaughtered and processed for consumption; a pre-1994 legacy.

The vertical integration in the domestic poultry industry should be yielding lower production costs and lower prices to consumers, yet that is not the case. This anomaly requires further probing. Small, non-vertically integrated market participants are at a distinct disadvantage to bigger competitors, because they rely on their major competitors for crucial inputs such as animal feed and breeding stock.

Industry transformation should also be prioritised by stakeholders. This can be achieved by assisting new entrants to attain economies of scale, which will in turn ensure that new entrants become sustainable competitors in the market. Incumbent firms should not just demand protection from Government, but provide solutions that would unlock the market structure for new entrants to thrive. Immediate solutions, as also noted by others, could include supplier development, measures to increase market access, vertical separation and collaborative research and development initiatives.

The cost inefficiencies of producing poultry products in South Africa should also be addressed urgently if the industry wishes to secure its long-term sustainability. Of critical importance, and as noted by the University of Johannesburg's Centre for Competition, Regulation and Economic Development, is the high cost of animal feed. The economic inefficiency of local producers implies that the industry will struggle to remain competitive.

For the long-term sustainability of the domestic industry, emphasis should be placed on improving the competitiveness of the South African poultry industry by focusing on improving the overall cost efficiency of production.

Increasing import tariffs may provide short-term relief for domestic producers, but this will not provide a long-term solution for the domestic industry to be sustainable and competitive within a global context. There should be willingness from local producers and policy-makers to acknowledge and urgently address the challenges that the local industry faces on the domestic front and resist the temptation to only look for short-term solutions. Equally, where there is dumping of imports, then the protection of the domestic industry becomes a necessity.

SUMMARY OF CONSENT ORDERS

from 1 October 2016 to 31 December 2016

BY LAYNE QUILLIAM

Commission / Global Sustainable Risk Control Management (Pty) Ltd (CR031Jun15)

On 4 October 2016, the Competition Tribunal confirmed the consent agreement between the Competition Commission (the Commission) and Global Sustainable Risk Control Management (Pty) Ltd (Global) for engaging in price fixing.

Following its investigation, the Commission found that during 2013 Global had agreed with a competitor to fix the price, per learner, for health and safety induction training at R200.

In terms of the consent agreement, Global admitted that during 2013 it had discussions with the relevant competitor about the price, per learner, for such training and also indicated the price that it would charge. Global admitted that such conduct contravened the price fixing provisions of the Competition Act and, as a result, agreed to pay a settlement amount of approximately R400 000 over 4 instalments.

Commission / Geomechanics CC and another (SA108Sep16)
On 19 October 2016, the Tribunal confirmed the settlement agreement between the Commission, Geomechanics CC (Geomechanics) and Geomech Africa (Pty) Ltd (Geomech) for engaging in collusive tendering.

From its investigation, the Commission found that Geomechanics had agreed with certain competitors to allocate certain construction tenders between themselves in order to maintain an agreed market share. For this purpose, these firms agreed to submit cover-bids for tenders, not allocated to them, to facilitate the awarding of the tender to a specific cartelist. A cover-bid is a price that is inflated above a competitive level to ensure that the firm submitting the cover-bid does not receive the tender based on price. In addition, compensation was paid in certain circumstances to those firms submitting a cover-bid to ensure that a specific firm was awarded the tender. Such compensation was also called a “loser’s fee” to, generally, compensate that firm for the costs associated with bidding.

The Commission found that, beyond this formal collusive arrangement, Geomechanics had also collusively allocated the Lesotho Highlands Project with certain competitors.

In addition, the Commission found that Geomech had agreed with certain competitors to collusively allocate certain tenders in a similar manner used in the formal arrangement by using cover-bids. Such collusive arrangements were concluded on an informal and ad hoc basis. The Commission found that Geomech had agreed to allocate certain tenders including certain Gautrain tenders and Braamhoek dam tenders.

In terms of the settlement agreement, Geomechanics and Geomech admitted their conduct contravened the cartel provisions of the Competition Act and agreed to pay a settlement amount of approximately R1.6 million. This amount related to both firms jointly and would be paid over 20 quarterly instalments.

Commission / Aveng (Africa) (Pty) Ltd (CO119Sep16)

On 26 October 2016, the Tribunal confirmed the consent agreement between the Commission and Aveng (Africa) (Pty) Ltd (Aveng) for engaging in collusive tendering.

In September 2009, the Commissioner initiated a complaint relating to suspected pervasive cartel conduct in the construction industry. Subsequent to its investigation, the Commission published a notice to construction firms in February 2011 inviting them to settle the allegations against them in terms of a fast-track process.

Aveng responded to this invitation with information about its involvement in a number of instances of collusive tendering and applied for immunity from a fine in accordance with the Commission’s Corporate Leniency Policy. Aveng was granted immunity in consideration for assisting the Commission in finalising various matters against the other firms implicated by Aveng.

After investigating Aveng’s response to theinvitation, the Commission found that Aveng had concluded various collusive arrangements with certain competitors, including the allocation of certain SANRAL projects. Aveng admitted that its collusive conduct was in contravention of the Competition Act.

The Commission did not seek a settlement amount from Aveng as it had previously granted Aveng immunity from a fine.

The Consent Order finalised the Commission's case against Aveng by confirming Aveng's conduct as a contravention of the Act. This allowed third parties to seek civil damages, where applicable.

Commission / BJ Transport Management Services (Pty) Ltd (CO139Oct16)

On 9 November 2016, the Tribunal confirmed the consent agreement between the Commission and BJ Transport Management Services (Pty) Ltd (BJ Transport) for engaging in collusive tendering.

From its investigation, the Commission found that BJ Transport had agreed with certain competitors to submit cover-bids to facilitate the awarding of tenders to specific firms. The Commission found that such collusive arrangements involving BJ Transport related to certain tenders issued by government departments including the SANDF and SAPS as well as other firms such as PPC.

In terms of the agreement, BJ Transport admitted that its conduct contravened the cartel provisions of the Competition Act and, as a result, it agreed to pay a settlement amount of approximately R700 000 over 25 instalments.

Commission / ArcelorMittal South Africa Limited (SA090Aug16)

On 16 November 2016, the Tribunal confirmed the settlement agreement between the Commission and ArcelorMittal South Africa Limited (AMSA). This agreement settled four complaints against AMSA for alleged anti-competitive conduct relating to long steel, scrap steel and flat steel.

From its investigation, the Commission found that AMSA had previously colluded with certain competitors to fix the price and divide the markets for its long and flat steel products. In addition, the Commission found that AMSA had agreed with certain competitors to fix the purchase price of scrap steel. The Commission also found that AMSA had potentially abused its dominant position in the relevant market by charging an excessive basket price and iron ore surcharge for flat steel.

In terms of the settlement agreement, AMSA admitted that it engaged in the alleged conduct relating to long and scrap steel and that its conduct contravened the cartel provisions of the Competition Act. . AMSA, however, did not admit that it contravened the Act in relation to the complaints relating to flat steel, including the allegation of excessive pricing.

As a result, AMSA agreed to pay a settlement amount of R1.5 billion over five years. It also agreed to further remedies such as capital investment, industry support as well as a pricing remedy relating to flat steel. In terms of these further remedies, AMSA undertookto invest approximately R4.6 billion in capital expenditure, economic environment permitting, in an effort to retain and create jobs. AMSA further undertookto support local industry by endeavouring to continue with such strategic and export rebates. The pricing remedy for flat steel, essentially, contemplates a cap on the margin at which AMSA may sell its flat steel products to South Africa for the next five years.

This consent order was significant in that it settled a number of long running matters and included the largest settlement amount to date.

Commission / Top n Nos Services CC (SA141Oct16; SA142Oct16)

On 23 November 2016, the Tribunal confirmed the settlement agreement between the Commission, Top n Nos Services CC (Top) and Zara Cleaning Services CC (Zara) for engaging in collusive tendering.

Following a complaint from a third party, the Commission found that Top and Zara had agreed with another competitor on how to price various items in their bid documents. The tender related to cleaning services for the Stellenbosch offices of the Western Cape Department of Agriculture.

In terms of the settlement agreement, Top and Zara admitted that their conduct contravened the cartel provisions of the Act and, as a result, Top agreed to pay a settlement amount of approximately R36 000 in six instalments. Zara agreed to pay a settlement amount of approximately R160 000 in 12 instalments.

Commission / Raite Security Services and Consulting CC and another (SA167Nov16; SA166Nov16)

On 30 November 2016, the Tribunal confirmed the settlement agreement between the Commission, Raite Security Services and Consulting CC (Raite) and Today's Destiny Trading and Project 81 CC (Today) for engaging in collusive tendering.

Following a third party complaint, the Commission found that Raite and Today had co-ordinated their pricing patterns and included the same price for the same cost items in their bids for certain tenders. These bids related to tenders for the provision of security services to the Council for Geosciences.

In terms of the settlement agreement, Raite and Today admitted that their conduct was a contravention of the cartel provisions of the Act. As a result, Raite agreed to pay a settlement amount of approximately R1.6 million. Today was not required to pay a settlement amount.

Commission / Pelchem SOC Limited (CO150Oct16)

On 7 December 2016, the Tribunal confirmed the consent agreement between the Commission and Pelchem SOC Limited (Pelchem) for alleged abuse of dominance and restrictive vertical practices.

Following its investigation, the Commission found that Pelchem had entered into numerous evergreen exclusive supply agreements with certain firms. These contracts related to the supply of fluorination services for certain plastic products such as HDPE plastic pipes. At the time of the investigation, Pelchem was the sole provider of such services in South Africa.

In terms of these contracts, Pelchem was precluded from providing fluorination services to any other firm with the same plastic product that formed the subject of one of these exclusive contracts. The Commission was of the view that such contracts were anti-competitive as they excluded other firms from accessing Pelchem's fluorination services.

To address the Commission's concerns, Pelchem undertook to remove exclusive supply agreements from its fluorination supply contracts. In addition, Pelchem undertook that it would not include exclusivity provisions in its future fluorination contracts. Taking these pro-competitive undertakings into account, the Commission did not require a settlement amount from Pelchem.

[1] Port users include terminal operators, shipping lines, ship agents, cargo owners and the clear and forward industry.
[2] Department of Performance Monitoring Evaluation. 2010. Delivery Agreement for Outcome 6: An Efficient, Competitive and Responsive Economic Infrastructure Network.
[3] Companies such as Kangra Coal, Exxaro Coal, ARM Coal and Glencore Operations South Africa offer port services through the Richard's Bay Coal Terminal..

Commission / Premium Brand Distributors (Pty) Ltd (SA156Nov16)

On 7 December 2016, the Tribunal confirmed the settlement agreement between the Commission and Premium Brand Distributors (Pty) Ltd (Premium) for co-ordinating the advertised price of certain Nikon branded photographic equipment.

Following a complaint received from a third party, the Commission found that Premium distributed its Nikon branded equipment to customers through a network of retailers. The Commission found that Premium had co-ordinated the advertised price of its network of retailers for its Nikon products. Based on this finding, the Commission was of the view that such conduct constituted the practice of minimum re-sale price maintenance in contravention of the Act.

In terms of the settlement agreement, Premium admitted its conduct of co-ordinating the advertised price of its retailers but not that such conduct constituted a contravention of the Act. As a result, Premium agreed to pay a settlement amount of R300 500 within three months of the order.

Commission / Phambili Pipelines (Pty) Ltd (SA181Dec16)

On 21 December 2016, the Tribunal confirmed the settlement agreement between the Commission and Phambili Pipelines (Pty) Ltd (Phambili) for engaging in collusive tendering.

In September 2009, the Commissioner initiated a complaint relating to suspected pervasive cartel conduct in the construction industry. Following its investigation, the Commission published a notice in February 2011, inviting construction firms to settle the allegations against them in terms of a fast-track process. . Phambili responded to this invitation with information about its involvement in certain collusive tendering and applied for immunity from a fine in accordance with the Commission's Corporate Leniency Policy. Phambili was granted immunity in consideration for assisting the Commission in finalising the matter against the other firms implicated by Phambili.

After investigating Phambili's response to the Invitation, the Commission found that Phambili had agreed with certain competitors to inflate their respective bids by an agreed amount for a tender. In terms of the collusive arrangement, the winner of the tender would then pay an agreed "loser's fee" to the other cartelists involved in the tender. The tender was a closed tendered for the Thabazimbi pipeline project and was ultimately awarded to Cycad Pipelines (Pty) Ltd which paid out approximately R1 million to Phambili, as the agreed "loser's fee".

The Commission did not seek a settlement amount from Phambili as the Commission had previously granted Phambili immunity from a fine. This consent order finalised the Commission's case against Phambili by confirming its conduct as a contravention of the Act. This, in turn, would allow third parties to seek civil damages, where applicable.

LAW SOCIETY'S RULES

Not Immune from Prosecution

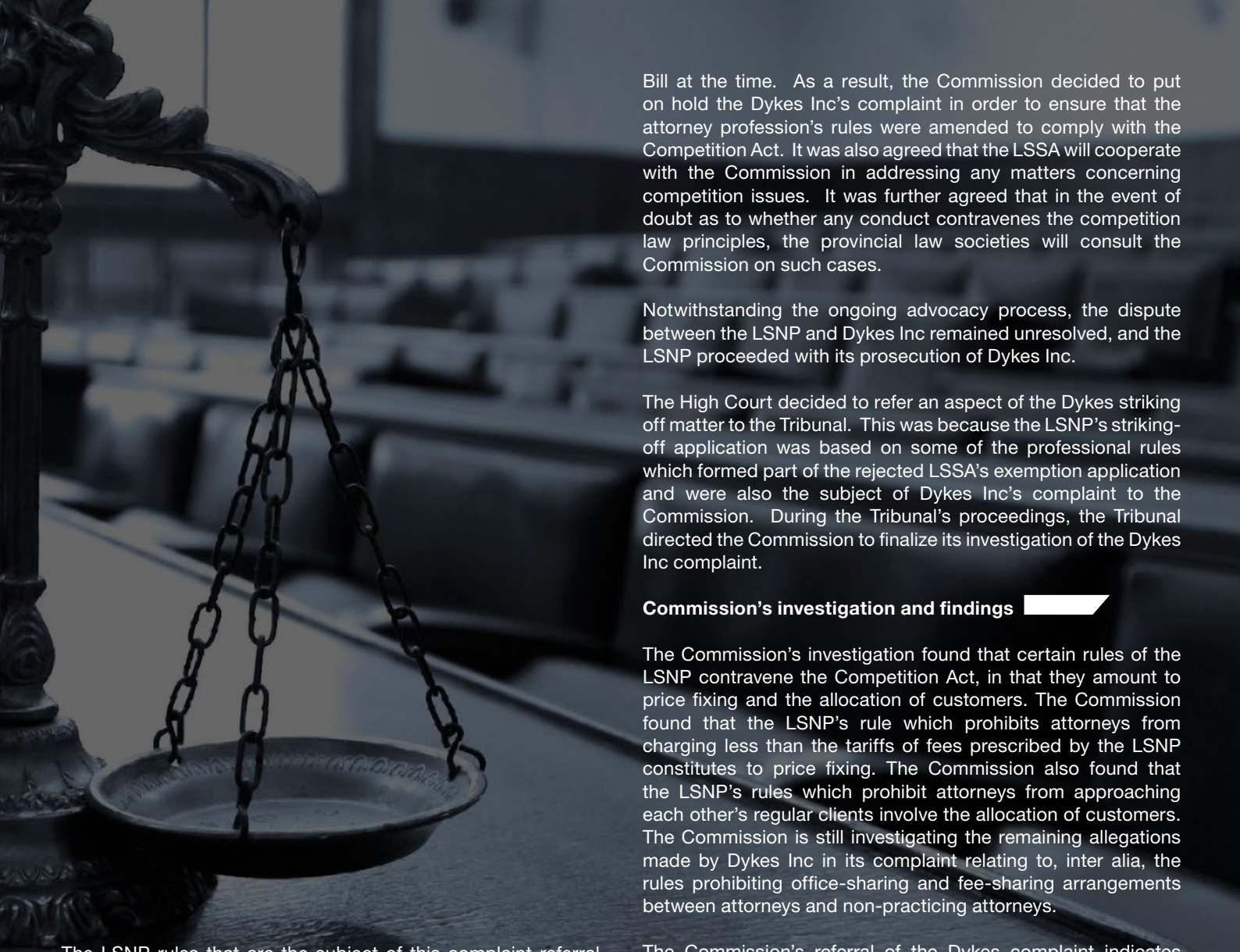
BY NELLY SAKATA

On 29 July 2016, the Competition Commission (Commission) referred a complaint against the Law Society of the Northern Provinces (LSNP) to the Competition Tribunal (Tribunal) for adjudication. The Commission referred this matter following an investigation which revealed that certain of the LSNP's rules for the attorneys' profession within its jurisdiction amount to price fixing and the allocation of customers, in contravention of the Competition Act 89 of 1998, as amended ("the Competition Act"). This investigation emanated from a complaint filed by Dykes Inc, a firm of attorneys.

The LSNP is a professional statutory association of attorneys. The Attorneys Act empowers the LSNP to govern and regulate the attorneys' profession in Gauteng, Mpumalanga, North West and Limpopo provinces. The LSNP, together with the Cape Law Society, the KwaZulu-Natal Society and the Law Society of the Free State are part of the Law Society of South Africa (LSSA), which is the umbrella association of attorneys' societies.

Background to the complaint referral

On 21 July 2004, the LSSA, on behalf of all the provincial law societies, including the LSNP, applied to the Commission for an exemption of certain of the provincial law societies' rules that could potentially infringe the Competition Act.



The LSNP rules that are the subject of this complaint referral were also part of the rules in the LSSA's exemption application.

During the Commission's assessment of the LSSA's exemption application, the LSNP applied in the North Gauteng High Court to strike the directors of Dykes Inc off the roll of practising attorneys for, inter alia, touting for work of a professional nature, sharing offices with persons who were not practising attorneys, and sharing professional fees with persons other than practising attorneys. Dykes Inc then filed a complaint with the Commission alleging that the rules forming the basis of the LSNP's striking off application were the very same rules that the LSSA sought to exempt in its exemption application and which the Commission did not exempt because the rules were inter alia anti-competitive. Given that the Dykes Inc's complaint was against some of the LSNP rules which were also part of the LSSA's exemption application, the Commission decided to keep the Dykes Inc's complaint in abeyance pending the finalization of its assessment of the exemption application.

After assessing the rules in terms of the Competition Act, the Commission decided not to exempt them. The Commission found that the rules were anti-competitive and were not reasonably required to maintain professional standards or the ordinary function of the legal profession.

Subsequent to the Commission's decision to reject the LSSA's exemption application, the Commission decided to engage in advocacy with the LSSA and the Department of Justice and Constitutional Development owing to the legislative processes of amending the rules as well as finalising the Legal Practice Bill at the time. As a result, the Commission decided to put on hold the Dykes Inc's complaint in order to ensure that the attorney profession's rules were amended to comply with the Competition Act. It was also agreed that the LSSA will cooperate with the Commission in addressing any matters concerning competition issues. It was further agreed that in the event of doubt as to whether any conduct contravenes the competition law principles, the provincial law societies will consult the Commission on such cases.

Notwithstanding the ongoing advocacy process, the dispute between the LSNP and Dykes Inc remained unresolved, and the LSNP proceeded with its prosecution of Dykes Inc.

The High Court decided to refer an aspect of the Dykes striking off matter to the Tribunal. This was because the LSNP's striking-off application was based on some of the professional rules which formed part of the rejected LSSA's exemption application and were also the subject of Dykes Inc's complaint to the Commission. During the Tribunal's proceedings, the Tribunal directed the Commission to finalize its investigation of the Dykes Inc complaint.

Commission's investigation and findings

The Commission's investigation found that certain rules of the LSNP contravene the Competition Act, in that they amount to price fixing and the allocation of customers. The Commission found that the LSNP's rule which prohibits attorneys from charging less than the tariffs of fees prescribed by the LSNP constitutes to price fixing. The Commission also found that the LSNP's rules which prohibit attorneys from approaching each other's regular clients involve the allocation of customers. The Commission is still investigating the remaining allegations made by Dykes Inc in its complaint relating to, inter alia, the rules prohibiting office-sharing and fee-sharing arrangements between attorneys and non-practicing attorneys.

The Commission's referral of the Dykes complaint indicates that rules of a professional association are not immune from prosecution. In Johan Venter vs The Law Society of the Cape of Good Hope and others (24/CR/Mar12 – 014688), the Tribunal in deciding on the validity of the rule prohibiting touting and overreaching, remarked that its finding that the rule did not contravene the Competition Act did not serve to immunise this rule, or its analogue in other Law Societies' books, from future challenge in terms of the Competition Act. This essentially means that rules of the Law Societies may be subject to the Competition Act scrutiny. In fact, the exemption provisions in the Competition Act already confirm that professional rules may be subject to the Act. The Commission's referral is also an indication that the implications of the Commission's refusal to exempt the LSSA's rules are that the Commission can prosecute the Law Society for enforcing rules that, based on the evidence, contravene the Competition Act. There is therefore a need for professional societies to develop rules that are compliant with the Competition Act.

On 26 February 2016, the LSSA published new rules in the Government Gazette. However, the current Commission's referral to the Tribunal is in relation to the LSNP's previous rules which were found by the Commission to have an adverse effect on competition.

As part of the complaint referral, the Commission has requested the Tribunal to declare the LSNP's relevant rules void and impose a fine equal to 10% of the LSNP's annual turnover.

THE RELATIONSHIP BETWEEN

COMPLAINTS AND MARKET INQUIRIES

BY Hildah Maringa

The Competition Act No. 89 of 1998, as amended ("the Competition Act") provides for a complaint investigation and adjudication system in terms of which any member of the public may lodge a complaint with the Competition Commission ("Commission") alleging a transgression of the Act. The Competition Act enjoins the Commission to investigate such complaints and if it finds that there is merit to the complaint to refer such complaints to the Competition Tribunal ("Tribunal") for adjudication. If the Commission finds that there is no merit to the complaint it may issue a notice of non-referral. Where the Commission issues a notice of non-referral, the complainant who filed the complaint, has the right to take the matter to the Tribunal themselves for adjudication (a process which we have referred to below as ("self-referral") in terms of the Competition Act.

The Competition Act was amended on 1 April 2013 to provide for a market inquiry process in terms of which the Commission may conduct a formal market inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular firm.

Recently the Tribunal had an opportunity to clarify the relationship between complaint proceedings and market inquiries. In two unrelated cases, the Tribunal was called upon to decide whether complainants have the right to refer complaints to the Tribunal in circumstances where the Commission has non-referred those complaints and the reason for the non-referral relates to the fact that the issues raised in the complaints may have a bearing on the wider issues which are the subject matter of the Commission's market inquiries.

The relevant decisions are discussed below:

1. Council for Medical Schemes' complaint referrals

On 21 May 2012, the Council for Medical Schemes ("CMS") filed two complaints with the Commission, one being against the Society for Cardiothoracic Surgeons of South Africa ("SOCTSA") and the South African Medical Association ("SAMA"), and the other against the South African Paediatric Association ("SAPA") and SAMA. The complaints relate to certain billing guidelines which were approved by SAMA. The CMS alleges that the above-named parties have engaged in the direct or indirect price fixing in contravention of section 4(1)(b)(i) of the Competition Act. On 31 May 2013, the Commission issued notices of non-referral in respect of both complaints. The Commission advised the complainant that it had formulated a view that there was a likely contravention of section 4(1)(b)(i) of the Competition Act. However, the Commission non-referred the complaints because the conduct complained of in CMS's complaints were to be considered by the then upcoming market inquiry into the Private Healthcare Sector ("healthcare inquiry")[1].

Following the Commission's non-referral of CMS's complaint, CMS referred the same complaints to the Tribunal.[2] Since the CMS's self-referral, there has been several interlocutory challenges (including an appeal to the Competition Appeal Court) resulting in a delay in the matter being on its merits. In this article, we only deal with SAMA's application to the Tribunal seeking clarity about the validity of CMS's complaint referrals before the Tribunal given the fact that the Commission is conducting a healthcare inquiry which is considering the very same issues raised by CMS in its complaint referrals.

Tribunal's decision

With regards to SAMA's request for clarity on whether CMS can refer a complaint despite the work of healthcare inquiry, the Tribunal found this to be not a proper legal basis for challenging the CMS's referral. The Tribunal pointed out that the Commission's healthcare inquiry is not concerned with the specific effect of the conduct complained of in CMS's complaint but is concerned with the rising costs of healthcare and the use of tariff guidelines in general. The Tribunal clarified that "the fact that there is an Inquiry underway in the rising costs of healthcare in general ought not to be a basis for delaying the enforcement of specific allegations of anti-competitive conduct and the addressing of possible harm to consumers due to contraventions of the Competition Act." In addition, the Tribunal relied on the Competition Appeal Court's ("CAC") finding in CMS v SAMA that it would be undesirable to grant a stay of proceedings where harm to consumers would continue due to contraventions of the Competition Act. The Tribunal went on to point out that in the CMS v SAMA case the CAC further explained that, in balancing the urgency of this type of complaint against the prolonged litigation in the High Court and the further appeal processes which might follow, it would be in the interests of justice and more convenient for all parties and the benefit of the public at large to have continued the process rather than grant a stay.

Accordingly, the Tribunal clarified that, although the market inquiry was still underway and could continue for a considerable length of time, the stay application could not be granted on the basis that a market inquiry is underway.

2. Massmart Holding Limited's complaint referral

On 31 October 2014, Massmart Holding Limited ("Massmart") filed a complaint with the Commission against Shoprite Checkers (Pty) Ltd, Pick 'n Pay Retailers (Pty) Ltd and Spar Group Limited ("Respondents") alleging that the Respondents had engaged in vertical restrictive practices in contravention of section 5(1) of the Competition Act, and/or abuse of dominance in contravention of sections, 8(d) and/or (c) of the Competition Act. On 12 May 2015 the Commission issued Massmart with a notice of non-referral based on the Commission's decision to conduct an inquiry into the Grocery Retail Sector market ("grocery inquiry").

Pursuant to the Commission's decision to non-refer Massmart's complaint, Massmart referred the complaint against the respondents to the Tribunal on 9 June 2015[3]. The respondents objected to Massmart's self-referral by filing exception applications. In addition, Spar also brought an application, which was supported by Shoprite, to stay the Tribunal proceedings pending the finalisation of the grocery inquiry. In this article, only the stay application is dealt with. The main basis for the stay application was that there would be an overlap between Massmart's complaint referral and the Commission's grocery inquiry and a risk of either the complaint referral pre-empting the grocery inquiry or vice versa as well as a risk of conflicting findings by the Tribunal and the Grocery Inquiry. Spar and Shoprite alleged that the issues raised by Massmart in its referral are the same issues covered by the Commission's investigation in the grocery inquiry, and having the two processes running parallel would result in a duplication of efforts and resources.

Tribunal's decision

In view of the fact that the Commission had issued a notice of non-referral well before the expiry of the one-year period that it has to investigate a complaint[4] and that this was done at about the same time of its decision to institute a grocery inquiry, the Tribunal inferred that the Commission was content to see the referral and the grocery inquiry running at the same time.

In dismissing the stay application, the Tribunal applied the following test: whether Spar and Shoprite would have a reasonable prospect of success in the grocery inquiry; whether it would be in the interests of justice to stay the Tribunal's proceedings; and where did the balance of convenience lie. The Tribunal reasoned as follows:

- Spar and Shoprite has failed to meet the prospect of success because a market inquiry only makes recommendations and does not constitute adjudicative proceedings nor is a market inquiry determinative of issues or rights of parties. Furthermore, the complaint referral to the Tribunal and the market inquiry would not deal with the same issues.

- With regards to whether it would be in the interests of justice to stay the Tribunal's proceedings, the Tribunal considered inter alia whether there was an overlaps of issues, a risk of conflicting findings. The Tribunal found that the complaint referral process and the market inquiry are not the same in nature. The market inquiry provides recommendations and the Tribunal is the sole institution with adjudicative powers over complaint proceedings under the Competition Act. Therefore there was no overlap of issues or risk of conflicting findings.

- In determining the balance of convenience, the Tribunal considered Spar and Shoprite's submissions that the Tribunal process and the market inquiry may lead to different and competing determinations and an unnecessary duplication of expenses and deployment of resources. Accordingly, Spar and Shoprite submitted that the balance of convenience favoured the staying of the self-referral proceedings pending finalisation of the market inquiry. The Tribunal found no merit to the argument regarding duplicity of efforts because the issues to be determined by the two processes are not the same.

Accordingly, the Tribunal dismissed the application to stay the proceedings pending the market inquiry. The Massmart complaint referral proceedings will therefore continue to run in parallel with the Commission's grocery inquiry.

Conclusion

It is clear from the two decisions above that market inquiries do not automatically preclude complainants from approaching the Tribunal for relief if there is a specific allegation of anti-competitive conduct which may warrant consideration by the Tribunal. The Tribunal's decisions communicate a message that firms that are alleged to be transgressing the provisions of the Competition Act should not use the fact that there is a concurrent process of a market inquiry in order to delay the Tribunal's adjudication of specific allegations of anti-competitive conduct. In this regard, the Tribunal has asserted the complainants' rights to refer complaints raising specific allegations of anti-competitive conduct to the Tribunal and has clarified the relationship between complaints and market inquiries.

[1] The Healthcare Inquiry has since commenced on 29 November 2013.
[2] Council for Medical Schemes ("CMS") vs Society for Cardiothoracic Surgeons of South Africa ("SOCTSA") and South African Medical Association ("SAMA") (Tribunal case no CRP066JUL13); and CMS vs South African Paediatric Association ("SAPA") and SAMA (Tribunal case no CRP065JUL13);

COMMISSION /POWER CONSTRUCTION (PTY) LTD AND OTHERS

BY LAYNE QUILLIAM

On 25 July 2016, the Competition Tribunal (Tribunal) heard the in limine legal points raised by Power Construction (Pty) Ltd (Power) and Power (West Cape) (Pty) Ltd (Power (WC)).

These points related to the Competition Commission's (the Commission) referral against the respondents where the Commission alleged that Power (WC) had tendered collusively with a competitor, Haw & Inglis (Pty) Ltd (H&I), for the maintenance of the N1 from Touws River to Langsberg.

This collusive arrangement included Power (WC) submitting a cover-bid, where it submitted an agreed upon inflated bid to ensure it was not awarded the tender based on price. Power (WC)'s cover-bid facilitated the awarding of the tender to H&I. Power (WC) admitted to this conduct as a contravention of the cartel provisions of the Competition Act but raised certain legal points in its defence.

The first legal issue related to the Commission's complaint. This compliant was initiated by the Commissioner at that time, in September 2009. This 2009 complaint followed an investigation by the Commission into alleged collusive tendering for certain soccer world cup stadiums. This investigation seemed to indicate pervasive collusive conduct in the construction industry. This complaint formed the basis of the Commission's 2011 invitation to firms in the construction industry to engage in settlement of contraventions of the Competition Act.

The in limine issue relating to this complaint was that neither Power nor Power (WC) were expressly cited in the 2009 complaint. Rather, the complaint indicated that "other firms" may be involved. In the Tribunal's reasons for decision, the Tribunal held that no formalities are required for the Commissioner to initiate a complaint, which may even be initiated tacitly. The Tribunal further held that such an initiation must be based on a reasonable suspicion of a prohibited practice but may be formulated in broad terms where the Commission lacks information, at the time of initiation, implicating a certain firm. Based on this analysis, the Tribunal concluded that the Commissioner's 2009 complaint was valid as it contemplated Power (WC) under the rubric of "other firms".

For the avoidance of any doubt, the Tribunal went further and commented that, in any event, the 2009 complaint would have been amended to include the relevant details of the collusive conduct when the Commission received information resulting from the invitation.

The second issue was that the collusive conduct may have prescribed in terms of the Act. To determine whether certain collusive conduct has prescribed, the date of the relevant complaint - that contemplates the conduct as well as the date when the relevant conduct ceased - would need to be determined. As mentioned above, the Tribunal held that the 2009 complaint was valid, which could then be used as the date of the initiation of the relevant complaint.

In respect of the duration of the collusive conduct, the Tribunal confirmed that the duration would include the relevant effects of such conduct. With this in mind, the Tribunal held that the collusive arrangement in this case extended to, at least, when the final payment for the tender was received by H&I. Further evidence would need to be led to determine any further effects of the conduct. Based on this finding, the Tribunal held that the relevant collusive conduct had not prescribed.

The third point relates to Power which currently holds the business of Power (WC) as Power (WC) sold its business to Power as a going concern after the collusive conduct occurred. This means that Power (WC) is currently a shell with no means of paying a fine that may be imposed on it. With this in mind, the Commission seeks to hold Power liable for the collusive conduct of the business of Power (WC) where the business is currently held by Power. This concept is also called economic successor liability. The respondents argued that it would be inappropriate to import such a concept into our law to transfer liability to another firm in this way. On this point, the Tribunal held that it had insufficient information before it on the papers to determine this issue. As a result, the Tribunal held this issue over for evidence in the main hearing.

The fourth in limine point, essentially, argued that the relevant conduct should not be characterised as prohibited cartel conduct, as Power (WC)'s bid was in fact illusory and did not influence the price ultimately paid by the client as this was set independently by H&I. On this characterisation point, the Tribunal mentioned that this point may turn of Power (WC)'s intention when submitting its bid but held that this issue would need to be held over for evidence at the main hearing.

The Tribunal's order has been taken on appeal for a re-consideration of the legal in limine points.

COMPUTICKET REVIEW:
A Bittersweet Victory

BY MAYA SWART

The Commission referred a complaint against Computicket to the Competition Tribunal in April 2010, alleging that Computicket was imposing exclusive contracts with inventory providers in contravention of sections 8(d)(i), 8 (c) or 5(1) of the Competition Act. Pleadings closed around July 2010. The matter was to be heard by the Tribunal in July 2011.

Instead of filing its witness statements, Computicket launched an application to dismiss the complaint referral against it, challenging the Commission's decision to refer it to the Tribunal for determination. This set into motion a chain of events ultimately leading to Computicket's dismissal / review application only being heard by the Tribunal on 5 September 2016. The Tribunal issued its order on 21 October 2016 dismissing Computicket's application.

The review relied on two self-standing arguments. Firstly, it was alleged that the decision to refer was made by the wrong person, because it was made by the Commission and not the Commissioner. Secondly, it was alleged that the referral was not justified on the facts placed before the relevant decision-maker and, consequently, it is reviewable based on the principle of legality.

Briefly, in respect of the first argument, Section 50(2)(a) of the Act states that a decision to refer a complaint by a complainant must be made by the Commissioner. However, many other provisions in the Act require decisions to be made by the Commission rather than the Commissioner. In this matter, it was common cause that the decision to refer in this case was taken by the Commission and not the Commissioner acting alone. The decision was made by the Commissioner and the then Deputy Commissioner. The Tribunal could find no policy reason why the one decision should be made by the Commission and the other by the Commissioner and it held that the reference to Commissioner in section 50(2) is a drafting error. Consequently, a referral to Commission is legally competent. The Tribunal therefore dismissed this ground of the review.

The second argument upon which the review was founded, challenged the decision itself. It was common cause that a decision to refer does not constitute an administrative action reviewable under the Promotion of Access to Justice Act No.3 of 2000 and that a decision to refer can be reviewed on the principle of legality. It was this part of the review which posed a significant threat to the Commission's processes, because it was contended by Computicket that the threshold for a legality review can incorporate both rationality and reasonableness, while the Commission contended that the grounds for review are narrow and are confined to whether the decision was ultra vires, irrational, unconstitutional or taken in bad faith.

Rationality imposes a low threshold for validity. In the Democratic Alliance case the Constitutional Court stated that:
"rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."

On the other hand, reasonableness review entails a qualitative assessment of the merits of a decision. The assessment seeks to determine whether the decision was one which could reasonably and fairly have been reached by the decision-maker . A reasonableness standard for a legality review could effectively force the Commission to ventilate the merits of its case against a respondent in advance of the Tribunal hearing. This could potentially result in two sets of hearings in respect of a same complaint, thus duplicating the process laid down in the Act in respect of complaint referrals.

The challenge brought by Computicket was both to how the decision was made and to the factual basis upon which it was made.

The decision was attacked on the basis that: The decision-makers acted as a rubber stamp, as they only considered the report prepared by the investigators and none of the underlying documents gathered during the course of the investigation and available to it to consider. It was not disputed that the report served before the decision-makers on two occasions and that the investigator was present the first time, although the Deputy Commissioner was not. The manager of the team was present at the second meeting, and not the investigator, and it was alleged that he would not have been able to speak to the report. Both the Commissioner and Deputy Commissioner were present at the second meeting. The Tribunal found that the fact that the Commissioner had required more work to be done after the first meeting was inconsistent with Computicket's allegation. Secondly, there was no factual basis for Computicket's allegation that the manager could not speak to the report.

Decision-makers failed to consider relevant facts and took into account irrelevant facts. The Tribunal found that there is no basis for Computicket to assert that the decision makers failed to consider any relevant matter or considered irrelevant matter in coming to their decision. The Tribunal indicated that this argument may have had merit if Computicket could point to some deficiency in the report, which a reader of the full record of the investigation would have detected. Computicket was, however, unable to do so.

The investigators only considered those facts prejudicial to Computicket and the tone and selection of facts underlay this bias. Since the decision-makers were entirely reliant on the report for their decision, it was argued that this bias by extension taints their decision to refer. The Tribunal held that a fair reading of the report shows that the investigation team had considered each element that would have to be proved in the case. The Tribunal further held that even though the report was the only document that served before the decision-makers, it was satisfied that the report set out facts and conclusions that constituted a proper basis for reaching a determination that a prohibited practice had been established. This point of the review was therefore also dismissed.

Having dismissed the arguments made by Computicket, the Tribunal found that it did not need to decide whether the test for review extended beyond rationality to reasonableness. It found that the review would not succeed notwithstanding which standard was applied. The Tribunal, however, added that this case is not authority for the proposition that the test for a legality review of a complaint referral has been extended to include consideration of whether the decision was reasonable.

Seeing that it took more than five years to get to the point of dealing with the merits of the review, one cannot help but express some disappointment that the Tribunal did not take the opportunity to give direction as to the applicable standard for a legality review of the Commission's decision to refer a complaint to the Tribunal. Even if a finding by the Tribunal on this point may have led to the matter being appealed, and the hearing of the complaint referral being delayed further, the certainty regarding the threshold applicable to reviews of decisions to refer, resulting from the process, would have been worth the delay. The hearing for the complaint referral has already been delayed for so long that another year would arguably not make a difference to the outcome of the hearing.

As matters stand, the Commission will continue to be exposed to legality reviews and it remains uncertain what the threshold for this type of review is. Had the Tribunal found in favour of the Commission's contention that the grounds for review are narrow and are confined to whether the decision was ultra vires, irrational, unconstitutional or taken in bad faith, respondents would be much less eager to pursue such a review.

The Tribunal did, however, caution against parties that use reviews too hastily instead of availing themselves of the opportunity to defend themselves at trial. Although the Commission has learned many valuable lessons from the Computicket matter and was able to adjust its processes, the full impact of a legality review of this nature on the Commission's ability to investigate and prosecute cases remains unclear and applications of this nature remain a threat to the Commission's ability to deliver on its mandate.

M&A QUARTERLY
Performance Report – QUARTER 3 (Q3)

OVERVIEW OF Q3

There was an increase in the number of mergers notified in this period, with a 13% increase from 109 in Q2 to 123 in Q3 of 2016/17. The trend experienced in Q3 in relation to the number of notifications is consistent with prior years, wherein the highest number of notifications are received in Q3 especially during the December month. This influx in new notifications was anticipated as highlighted in the Q2 report.

Out of the finalised 130 merger reviews in Q3, 119 of these transactions (92%) were approved without conditions, 10 were approved with conditions (8%) and one was prohibited.

The Division met all the turnaround times as prescribed in the service standards. A notable improvement is evident in the Phase 2 cases which improved from 50 to 44 business days from Q2. This is in spite of the increase in Phase 2 cases finalised in the period from 38 to 45 cases. This achievement in turnaround times is commendable in light of the human resources capacity constraints the Division faced in Q3. The improvement is partly attributable to revision in procedures for Phase 2 cases which require shorter reports.

The finalised mergers in Q3 were dominated by Property (22%), Manufacturing (18%) and Wholesale (15%). Other sectors which experienced some merger activity during the same period include Mining, Transportation, Finance, Health and ICT. There was no consistent pattern on the acquiring firms as acquisitions are being made by different companies in the different sectors. However, it is noteworthy that a number of transactions in the ICT sector notified involved EOH. The Division will keep a close eye on these EOH ICT transactions, particularly to assess if there are any creeping effects arising from such acquisitions.

There were some notable transactions in the quarter which included a prohibition of a merger in the insurance industry, the Hollard/MotorVantage (and others) merger. There were 10 cases approved subject to conditions which included the Clicks/Netcare merger and the Countrybird/Sovereign Foods mergers. These cases will be discussed in more detail in the report.

At the commencement of Q3, the Monitoring and Notifications Unit was monitoring 128 cases where conditions have been imposed. At the end of Q3, 1 case was closed and 11 new cases were added to the monitoring list. At the end of Q3, the Unit is therefore monitoring 138 cases.

In Q3, six cases had an impact on employment. These cases related to the wholesale, mining, manufacturing and health sectors, which is unsurprising given these were the sectors with the leading number of notifications. The number is slightly higher than in Q2 where five cases had an impact on employment. Of these six cases, four were approved with employment conditions.

In terms of upcoming key mergers in Q3, there is the widely publicised acquisition of Bayer by Monsanto. The merger has been publicised for some time now but the Commission has not yet received the notification. The merger is already generating significant interest in competition circles in relation to the chemicals and agro-chemicals sectors. In line with prior years, it is anticipated that there will be a dip in the number of cases notified in Q4. The likely lower case load will allow the Division time to align its human resources constraints.

Q3 MERGER STATISTICS

There was an increase in the number of mergers notified in this period, with a 13% increase from 109 in Q2 to 123 in Q3 of 2016/17. There was a significant increase in the number of finalized cases from 102 to 130 as more cases that were carried over from Q2 were finalized in this quarter. The trend experienced in Q3 in relation to the number of notifications is consistent with prior years, wherein the highest number of notifications are received in Q3 especially during the December month.

Of the 130 transactions finalized in the period, 119 were approved without conditions, 10 were approved with conditions and one transaction was prohibited.

Table 1: Summary of Q3 merger statistics

	Q2 2016/17	Q3 2016/17
Notified	**109**	**125**
Large	33	33
Intermediate	74	91
Small	2	1
Finalised	**105**	**135**
Large	27	38
Intermediate	76	94
Small	2	3
Approved without conditions	**2**	**124**
Large	24	33
Intermediate	66	88
Small	2	3
Approved with conditions	**9**	**10**
Large	3	4
Intermediate	6	6
Small	0	0
Prohibited	**2**	**1**
Large	0	1
Intermediate	2	0
Small	0	0
Withdrawn/no jurisdiction	**2**	**0**
Large	0	0
Intermediate	2	0
Small	0	0

Table 1 also provides an overview of the cases notified and finalized by the Commission by category. As in all other quarters, the number of intermediate mergers notified to the Commission represents the highest proportion of all cases notified.

Table 1 also sets out the number of mergers by decision and shows that out of the finalised 130 merger reviews in Q3, 119 of these transactions (92%) were approved without conditions, 10 were approved with conditions (8%) and one was prohibited.

Table 2 highlights the turnaround times for the different cases finalised in Q2.

Table 2: Summary of turnaround times for Q1, Q2 and Q3

Category	Service Standard	Q2		Q3	
		No. of Cases	Ave. Turnaround Time	No. of Cases	Ave. Turnaround Time
Phase 1	20	54	18	85	18
Phase 2	45	39	**50**	45	44
Phase 3	60	9	57	2	56
Phase 3 Large	120	1	85	3	118

Source: M&A

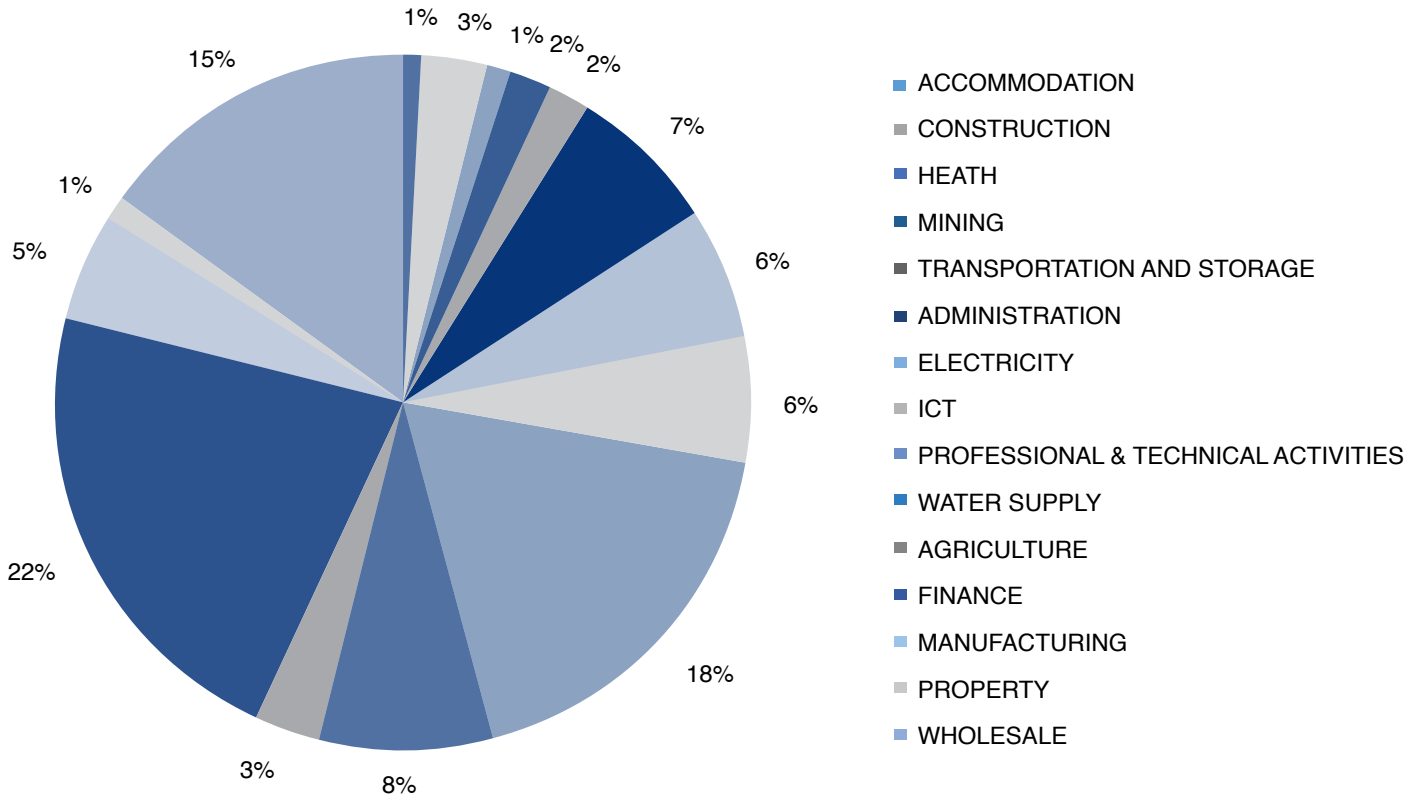
The M&A Division has met all the turnaround times as prescribed in the service standards. There were staff movements in the period, with two Analysts and one junior being transferred to the Cartels Division in Q3. There are also vacant positions at the Senior Analyst level where 3 positions are currently vacant.

The improvement in Phase 2 cases is partly attributable to the revision in procedures for Phase 2 cases which require shorter reports.

SECTOR INSIGHTS IN Q3

Figure 1 below shows that the finalised mergers in Q3 were dominated by Property (22%), Manufacturing (18%) and Wholesale (15%). Other sectors which experienced some merger activity during the same period include Mining, Transportation, Finance, Health and ICT as reflected in the figure below.

Figure 1: Mergers finalised by sector Q3



Source: Commission construction

There is no discernible pattern emerging from about the sectors that are growing on a quarter to quarter basis. The leading sectors in terms notified transactions are routinely property, manufacturing and wholesale. This pattern is consistent in this quarter as well.

There is no consistent pattern recurring acquiring firms as acquisitions are being made by different companies. However, it is noteworthy that a number of transactions notified.

KEY CASES IN Q3

A number of key cases were decided in the quarter under review. Some of the key cases are discussed below.

a.Prohibition of the Hollard Holdings (Pty) Ltd and MotoVantage Holdings (Pty) Ltd and Regent Insurance Company Limited, Regent Life Assurance Company Limited, SA Warranties (Pty) Ltd, Motor Compliance Solutions (Pty) Ltd, Paintech Maintenance (Pty) Ltd and Anvil Premium Finance (Pty) Ltd. The Commission recommended to the Competition Tribunal (Tribunal) a prohibition of a large merger involving firms that offer short-term and long-term insurance policies and insurance and non-insurance value-added products (VAPs). The Commission found that the proposed transaction is likely to substantially prevent or lessen competition in the markets for credit life and shortfall cover and that the transaction also raises public interest concerns.

The proposed transaction involved two steps. The first step entails the acquisition by Hollard Holdings (Pty) Ltd (Hollard) of Regent Insurance Company Limited (Regent Insurance) and Regent Life Assurance Company Limited (Regent Life Assurance) from Imperial Holdings Limited (Imperial). Hollard provides short-term and long-term insurance policies to a broad range of customers. Its offerings include motor insurance, transportation and property insurance and individual life policies. The Regent Group offers short-term and long-term insurance policies and insurance and non-insurance value-added products. The second step of the proposed transaction entails the acquisition by MotoVantage Holdings (Pty) Ltd (MotoVantage) of SA Warranties (Pty) Ltd (SAW), Motor Compliance Solutions (Pty) Ltd (MCS), Paintech Maintenance (Pty) Ltd (Paintech), and Anvil Premium Finance (Pty) Ltd (Anvil) from Imperial. MotoVantage markets, distributes and administers insurance policies underwritten by licensed insurers. SAW, MSC and Paintech fall within the Regent Group.

The Commission found that the proposed transaction will result in increased levels of concentration in the affected markets which are characterized by high barriers to entry. In particular, the merging parties will hold the largest market share in the market for the provision of short-term motor insurance credit life cover and short-fall cover if the merger is allowed.

The Commission also found that the merging parties are likely to have the ability to increase prices (i.e. premiums) on new policies for these products that will be underwritten post-merger. This is likely to harm consumer welfare.

In addition, the Commission found that the post-merger control structure of the merged entity may present a platform for the exchange of competitively sensitive non-public information. Value-added products currently underwritten by Hollard and Regent will be administered under the common ownership of Hollard Holdings and FirstRand, the ultimate controlling firms of MotoVantage. This will enable firms controlled by Hollard and FirstRand, including Wesbank, to have access to each other's competitively sensitive information, including information of external firms that compete with Wesbank in the market for vehicle finance and the finance of VAPs. It is thus likely that there could be incentives for information exchange by virtue of the platform created by MotoVantage and the integration of the target firms.

With regard to public interest concerns, the Commission found that the proposed merger is likely to lead to substantial job losses within Hollard, Regent Insurance and Regent Life Assurance.

The Commission considered potential remedies that would address the harm arising from the proposed transaction and engaged with the merging parties but did not find workable remedies. It is for this reason that the Commission recommended to the Tribunal that the proposed merger be prohibited.

(b) Conditional approval for the Clicks and Netcare Pharmacies merger.

(c) Conditional approval of Country Bird Holdings (Pty) Ltd and Sovereign Food Investments Limited merger.

These cases will be discussed in the next page.

COMPLIANCE AND IMPACT OF REMEDIES IMPOSED IN Q3

The Monitoring Unit (the 'Unit') is responsible for monitoring active conditions that are pending, closing lapsed conditions and commenting and reviewing new conditions to be imposed. In addition, the Unit also investigates allegations of apparent breach of conditions. In this 2016-17 financial year, the unit has identified 23 conditions that are due for closing. At the end of Q3, the Unit had closed 1 condition. The Unit did not deal with any investigations or breaches in Q3. This report will highlight the number of conditions closed at the end of Q3 as well as the new conditional approvals in Q3.

(a) Monitoring Pending Conditions

At the commencement of Q3, the Unit was monitoring 128 cases where conditions have been imposed. At the end of the Q3, 1 case was closed and 11[1] new cases were added to the monitoring list. At the end of Q3, the Unit is therefore monitoring 138 cases.

The number of conditional approvals in Q3 relatively increased when compared to the 9 conditional approvals in Q3. These statistics will be presented later below under the section dealing with conditions imposed in Q3.

(b) Closing of lapsed conditions

In the Ferro South Africa (Pty) Ltd ("Ferro") and Revertex South Africa (Pty) Ltd merger, the Conditions imposed required Ferro to either acquire Akzo Nobel's 50% shareholding in a joint venture the target firm has with Akzo Nobel or dispose of the target firm's 50% shareholding in the joint venture within 12 months of the approval date.

The merging parties provided the Commission with a signed sale of Shares of Agreement confirming Ferro's acquisition of Akzo Nobel's 50% shareholding in the joint venture. The Commission was thus satisfied that the merging parties complied with the conditions given that the divestiture of the shareholding was concluded within the 12 month period.

(c) Conditions imposed on cases in Q3 .During Q3, 10 cases were approved with conditions by the Commission.

[1] Please note that the Commission approved 10 cases subject to conditions, however, the Tribunal rejected the Commission's recommendation to approve the Safripol merger with conditions. In addition, the Tribunal approved the Parentco and Stellar Capital mergers subject to conditions, where the Commission had recommended an unconditional approval. The details are provided in Tables 1 and 2 below.

These cases are reflected in the table below.

Table 3: List of cases approved with conditions by the Commission in Q3

Case Number	Primary Acquiring Firm	Primary Target Firm	Market	Condition
2016Jul0359	IFFCO Africa Holdings Pte	FR Waring Holdings (Pty) Ltd	Bulk trading of soft oils, hard oils and oilmeals	Behavioural – Additional Acquisitions: Obligation to exercise the Call Option within 18 months of the approval date. Public Interest – Industrial sector: Obligation to not relocate the manufacturing facilities for a period of 3 years.
2016Aug0389	Abbott Laboratories	St. Jude Medical, Inc	Supply of medical devices	Structural: Obligation to divest Divestment Business to a third party.
2016Aug0410	Country Bird Holdings (Pty) Ltd	Sovereign Foods Investments Limited	Poultry	Public Interest – Employment: Moratorium on retrenchments. Public Interest – BEE: Obligation on merged entity to sell a percentage of its shares to a BEE entity within a period of 2 years.
2016Jun0297	Clicks Retailers (Pty) Ltd	The retail pharmacy business carried on by Netcare Pharmacies 2 (Pty) Ltd within Medicross Clinics	Retail Pharmacy	Behavioural – cross shareholding/information exchange: Obligation not to exchange competitively sensitive information. Behavioural – Right of first refusal: merged entity requiredz to amend the current lease agreements to limit Clicks Retailers' right of first refusal. Public Interest – Employment: Moratorium on retrenchments for a period of 5 years. Obligation on Clicks Retailers to employ additional employees. Public Interest – Investment: The Clicks Group is required to make investments in training in the pharmacy industry by providing internships, learnerships.
2016Sep0440	Imperial Holdings Limited	Itumele Bus Line (Pty) Ltd	Transport	Public Interest – industrial sector (Restraint): Obligation to reduce a restraint of trade period.
2016Sep0492	SMG Tygervalley (Pty) Ltd and	McCarthy Limited in respect of a BMW and MINI Dealership and Related approved repair centre, McCarthy Forsdicks Tygervalley	Vehicle Dealership	Public Interest – Employment: Obligation to invite affected employees to apply for vacant positions in merged entity.
2016Jul0371	Vukile Property Fund Limited and Diecel Trade & Invest (Pty) Ltd	Synergy Income Fund Limited	Property	Behavioural – cross shareholding/information exchange: Obligation not to exchange competitively sensitive information.
2016Sep0472	Konecranes PLC	The Terex Handling and Port Solutions Business	Supply Lifting Equipment	Public Interest – Employment: Obligation to restrict the number of retrenchments. Obligation to provide a re-skilling allowance for unskilled retrenched employees.
2016Oct0520	Allcool Investments Proprietary Limited	Fast Gear Trading Proprietary Limited	Property	Behavioural – cross shareholding/information exchange: Obligation not to exchange competitively sensitive information.
2016Aug0430	KAP Diversified Industrial (Pty) Ltd	Safripol Holdings (Pty) Ltd	Chemicals	Behavioural – Supply: Obligation to supply customers on fair terms.

Source: Competition Commission

In addition to the above, the Tribunal also imposed conditions on two cases that were unconditionally approved by the Commission.

These cases are reflected in the table below.

Table 4: List of cases approved with conditions by the Tribunal in Q3

Case Number	Primary Acquiring Firm	Primary Target Firm	Market	Condition
2016Sep0477	Parentco (Pty) Ltd	Edcon Limited	Retail Clothing	Public Interest – Employment: Edcon plans to employ and train 2,000 new staff. Public Interest – Industrial sector: Edcon commits to expanding its local procurement program and reduce the number of exports
2016Oct0542	Stellar Capital Limited	Prescient Holdings (Pty) Ltd	Supply of medical devices	Additional acquisitions: Obligation to implement the second leg of the transaction by 31 January 2017.

Source: Competition Commission

JOBS REPORT FOR Q3

The table below provides an overview of the impact on jobs in Q3. The Table considers the number of jobs lost, the number of jobs saved and the number of jobs likely to be created through mergers and acquisitions that were finalised in Q3.

Table 5: Summary of the impact on jobs in Q3

Month	Jobs lost	Jobs saved	Intended job creation	No. of cases	Net effect
October	0	0	0	0	0
November	119	41 151	3 932	6	44 964
December	0	0	0	0	0
Total	**119**	**41 151**	**3 932**	**6**	**44 964**

In the Q3, six cases had an impact on employment. These cases related to the wholesale, mining, manufacturing and health sectors. This is slightly higher than in Q2 where five cases had an impact on employment. Of these six cases, four were approved with employment conditions by the Commission as illustrated in Table 4 below. The figures in Table 3 above suggest that less jobs were lost while more jobs were saved in Q3. This suggests a positive net impact on jobs in Q3.

The large positive net effect was largely influenced by the Edcon case alone which resulted in about 40 000 job savings, which job savings occurred because Edcon would have failed if the transaction was not approved resulting in job losses.

Table 6: List of cases approved with employment conditions by the Commission in Q3

Case Number	Primary Acquiring Firm	Primary Target Firm	Market	Condition
2016Aug0410	Country Bird Holdings (Pty) Ltd	Sovereign Foods Investments Limited	Poultry	Public Interest – Employment: Moratorium on retrenchments.
2016Jun0297	Clicks Retailers (Pty) Ltd	The retail pharmacy business carried on by Netcare Pharmacies 2 (Pty) Ltd within Medicross Clinics	Retail Pharmacy	Public Interest – Employment: Moratorium on retrenchments for a period of 5 years. Obligation on Clicks Retailers to employ additional employees. Public Interest – Investment: The Clicks Group is required to make investments in training in the pharmacy industry by providing internships, learnerships.
2016Sep0492	SMG Tygervalley (Pty) Ltd and	McCarthy Limited in respect of a BMW and MINI Dealership and Related approved repair centre, McCarthy Forsdicks Tygervalley	Vehicle Dealership	Public Interest – Employment: Obligation to invite affected employees to apply for vacant positions in merged entity
2016Sep0472	Konecranes PLC	The Terex Handling and Port Solutions Business	Supply Lifting Equipment	Public Interest – Employment: Obligation to restrict the number of retrenchments. Obligation to provide a re-skilling allowance for unskilled retrenched employees.

Source: Competition Commission

M&A CONTIRBUTION TO COMMISSION OBJECTIVES IN Q3

During the quarter, M&A continued to participate in a number of Commission initiatives with the aim of contributing to the overall Commission objectives. For instance, Grashum, Kholiswa, Dineo, Portia and Rakgole participated as resource persons in the edible oils dawn raids which were conducted from 7-9 December 2016. In addition, information used to initiate the cartel case was largely obtained from a merger investigation of the Wilmar Continental and Sealake merger.

OUTLOOK FOR Q4

In line with prior years, it is anticipated that there will be a dip in the number of cases notified in Q4. The likely lower case load will allow the Division time to align its constrained human resources. It is anticipated a number of vacant positions will be filled in the Q4 period.

There is also an upcoming Investigative Skills workshop which is routinely scheduled for the Q4 period aimed at sharpening investigative skills and keeping up with developing standards in competition policy. The workshop will be conducted by internal resources including the Deputy Commissioner.

There are also Business Plan projects which are scheduled for completion in Q4. These include the Trade Union Practice Note, Prior Implementation Guidelines, increase in filing fees deliberations and updating merger forms.

Key cases for finalisation include the Corruseal mergers, Dow/DuPont, Wilmar/Sealake, Corobrik and Mediclinic. In terms of upcoming key mergers in Q4, there is the widely publicised acquisition of Monsanto by Bayer which has been on the cards for a while but not yet notified to the Commission. There is also the reported Shoprite and Steinhoff merger and the 45% stake acquisition by the Blue Telecoms in Cell C, which has also generated interest in the ICT sector but has not yet been notified

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CONDITIONAL APPROVAL FOR THE **CLICKS** AND **NETCARE** PHARMACIES MERGER

BY PORTIA BELE

THABELO MASITHULELA

The Competition Commission (the Commission) recommended to the Tribunal a conditional approval for the merger wherein Clicks Retailers (Pty) Ltd (Clicks) acquired Netcare Pharmacies 2 (Pty) Ltd (Netcare Pharmacies 2) and Netcare Pharmacies (Pty) Ltd (Netcare Pharmacies), the target businesses.

Clicks is ultimately owned and controlled by Clicks Group Limited (Clicks Group) which, in turn, owns United Pharmaceutical Distributors (UPD) and Unicorn Pharmaceuticals (Pty) Ltd. The target businesses are both ultimately controlled by Netcare Limited (Netcare).

Netcare Pharmacies 2 operates the pharmacies trading as the Medicross Pharmacies. In addition, Clicks has entered into an Outsourcing and Master Sub-Lease Agreement with the Netcare Hospital Group in terms of which it will sub-lease the front shop areas within the Netcare in-hospital pharmacies currently operated by Netcare Pharmacies. Following the implementation of the proposed transaction, Clicks will own, manage and control the Medicross Pharmacies. Clicks will also control and manage the operations of the Netcare in-hospital front shops.

The merger gave rise to both horizontal and vertical overlaps. The horizontal overlaps arose in that both Clicks and the Medicross Pharmacies are retailers of pharmaceutical products while Clicks, Medicross Pharmacies and the Netcare in-hospital front shops sell front shop products. In relation to the vertical overlap, Clicks owns UPD that acts as a wholesale distributor of pharmaceutical products for Clicks and for competing third parties in the downstream retail market for pharmaceutical products.

The Commission concluded that the merger is unlikely to raise unilateral effects in any of the markets considered, as the merged entity would continue to face competition from other retail pharmacy groups and independents in the market. The Commission also found that the merger is unlikely to result in any input or customer foreclosure concerns, as there are alternative suppliers of pharmaceutical products in the market.

In relation to the coordinated effects, given that there will be an outsourcing and leasing arrangement for the in-hospital front shop activities, the Commission considered whether there will be any exchange of competitively sensitive information between the Netcare Group and the Clicks Group. The Commission imposed conditions that the agreements should be amended to reflect that Netcare will not be provided with disaggregated information relating to the specific dispensing fees charged by Clicks, the specific products stocked or sold by Clicks or the prices at which specific products are sold. The auditors employed by Netcare for this purpose will also be independent auditors.

The Commission also identified exclusivity clauses in which Medicross grants Clicks the right of first refusal to own and operate a pharmacy business and Netcare grants Clicks the right of first refusal to operate the Netcare in-hospital front shops in any future premises to the exclusion of any other interested party. The Commission was of the view that the exclusivity, that guarantees Clicks will have exclusive rights of first refusal to operate a pharmacy in future Medicross Centres and front-shops in future Netcare Hospitals, has the potential to dampen competition. The Commission considered the rationale and the existing roll-out plans of the Medicross Pharmacies in the coming years and imposed a condition that the restriction clause be limited to a period of 3 years.

The Commission also investigated various concerns raised by third parties relating to customer foreclosure, the bargaining power of UPD, the geographic footprint of Clicks, the ability of Clicks to exert bargaining power on the dispensing fees charged and the ability of Clicks to lower prices to the detriment of independent pharmacies.

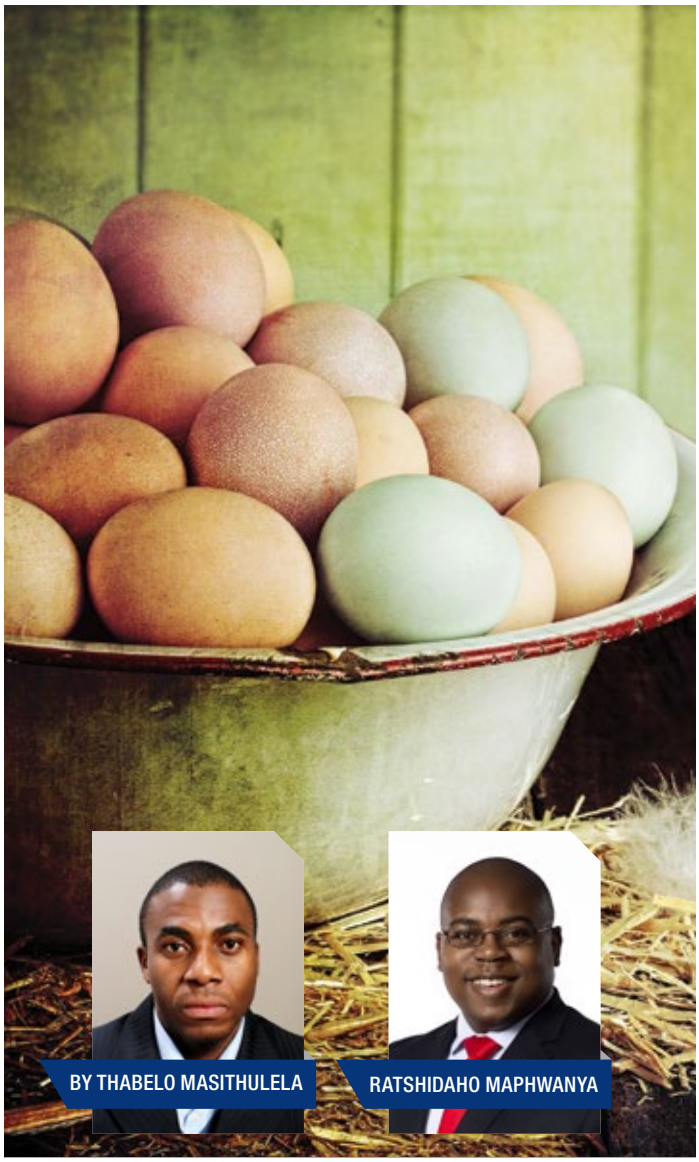
However, the Commission found that there are numerous customers in the market that purchase pharmaceutical products and that, with the market share of the target businesses (at less than 10% in any of the markets considered), the proposed transaction is unlikely to confer an increase in the bargaining power of UPD. While the Commission notes that the existing geographic footprint of Clicks may make it attractive to medical aid schemes, the Commission found that the acquisition of only 36 Medicross pharmacies is unlikely to have an impact on designated service provider negotiations between Clicks and medical aid schemes in relation to dispensing fees.

The Commission found that a decline in the presence of independent pharmacies may be attributed to independents not being able to match the prices and product offerings of corporate pharmacies. However, in the Commission's view, this position is not substantially enlarged by the proposed transaction.

To guard against any possible future loss of employment as a result of the merger, the Commission recommended that the merging parties not retrench employees as a result of the merger for a period of five years from the implementation date.

SUMMARY OF MERGER BETWEEN

COUNTRY BIRD HOLDINGS (PTY) LTD AND SOVEREIGN FOOD INVESTMENTS LIMITED



The Competition Commission (the Commission) conditionally approved an intermediate merger whereby Country Bird Holdings Proprietary Limited (CBH) intended to acquire Sovereign Food Investments Limited (Sovereign Foods). Following the merger, Sovereign Foods will be controlled by CBH.

CBH is a private company incorporated according to the company laws of South Africa and is controlled by Synapp International Limited (Synapp) which is ultimately controlled by Mr. Kevin James. Synapp controls one other firm in South Africa: Arbor Acres South Africa (Pty) Ltd (Arbor Acres). Sovereign Foods is a public company listed on the Johannesburg Stock Exchange.

The proposed merger was a hostile takeover in that CBH made an unsolicited offer directly to the shareholders of Sovereign Foods without the endorsement of Sovereign Foods' management and board. The executive management of Sovereign Foods was actively opposed to the proposed merger. In this regard, the two parties to the merger had not signed a merger agreement and it was not clear what exact percentage CBH would own in Sovereign Foods when the merger is concluded.

CBH is a fully integrated chicken producer which produces chicken products from three production sites in Bloemfontein, Klerksdorp and Mahikeng. Each site has a parent breeding operation, hatchery, feed mill, abattoir, and plant based factory shop. Sovereign Foods is a fully integrated poultry business in South Africa with business units comprising, inter alia, breeding, hatchery, broiler operation, feed mill, processing plant and a sales and marketing unit. Its production facilities are based in Uitenhage and Hartbeespoort.

Both parties are integrated poultry producers, which raises horizontal overlaps in several levels of the market as well as some potential sub-markets. The Commission focused on the following relevant markets (i) the broad market for chicken meat production in South Africa; and (ii) the market for the production and supply of frozen chicken products in South Africa.

The Commission found that Astral Operations Limited (Astral) and RCL Foods Consumer (Pty) Ltd (RCL) are the two largest players based on market. The Commission also found that the merged entity has a post-merger market share not exceeding 20%. The low market share that will be attributable to the merged entity post-merger suggests that the merger is not likely to substantially prevent or lessen competition. The Commission also found that customers are likely to have some countervailing power and that imports play a prominent role in the domestic market and that this is likely to continue to grow.

Sovereign Foods and its employees submitted that the merger will result in job losses as CBH uses a different business model that relies on substantially less employees. In order to address this concern, CBH agreed to a merger remedy which would ensure that there will be no merger specific retrenchments in perpetuity. The Commission was of the view that the proposed remedy will be sufficient to address the concerns regarding possible job losses.

The Commission also considered the impact of the merger on an empowerment deal that was previously proposed by Sovereign Foods pre-merger. In order to address this concern, CBH agreed to a condition that CBH will propose and support an empowerment deal which will result in a certain percentage of Sovereign Foods's shares being handed over to historically disadvantaged shareholders if Sovereign Foods achieves the required shareholding to be able to implement such condition.

As such, the Commission approved the merger subject to the employment and empowerment conditions set out above.

COMPETITION COMMISSION VS MUCH ASPHALT AND OTHERS

BY FHATUWANI MUDIMELI

On 10 February 2009, the Commission initiated a complaint against asphalt suppliers and paving contractors, including Much Asphalt, Roadmac and Roadspan for allegedly fixing prices, dividing markets and tendering collusively in the supply of hot and cold mix asphalt products in contravention of section 4(1)(b)(i), (ii) and (iii) of the Competition Act, 89 of 1998.

Asphalt can be categorised into two types, namely, hot mix and cold mix asphalt. Hot mix asphalt is used for larger or new road construction such as urban streets, freeways, runways, bus lanes and public sidewalks. Cold mix asphalt, on the other hand, is a temporary application usually used for small road maintenance work, for example, pothole repairs.

The respondents are competitors in the market for the production and supply of asphalt. In addition to supplying asphalt, Roadmac and Roadspan are also active in the paving market and thus are vertically integrated. The alleged collusive conduct relates to the level of the asphalt supply chain where respondents compete as suppliers of asphalt to paving contractors.

The cartel conduct concerns a bilateral arrangement... between Much Asphalt and Roadmac as well as Much Asphalt and Roadspan.

The complaint referral is based on the Commission's investigation which revealed that from 2008 to date, Much Asphalt and Roadspan being firms in a horizontal relationship bilaterally agreed, alternatively engaged in a concerted practice, to divide markets by allocating territories in respect of the provision of hot and cold mix asphalt products in contravention of section 4(1)(b) (ii) of the Act.

In 2008, representatives of Much Asphalt and Roadspan met and agreed that Roadspan will not enter and supply asphalt in Gauteng where Much Asphalt is active and will remain a customer of Much Asphalt in Gauteng. The net result of this agreement is discernible in that, up to this point, Roadspan has not entered the asphalt supply market in Gauteng despite its capability to do so.

Similarly, the Commission's investigation revealed that from 2005 to at least 2007, Much Asphalt and Roadmac being firms in a horizontal relationship bilaterally agreed, alternatively engaged in a concerted practice, to divide markets by allocating territories in respect of the supply of asphalt products in contravention of section 4(1)(b) (ii) of the Act.

In 2005, representatives of Roadmac and Much Asphalt met and agreed that Roadmac will not enter into the commercial asphalt market and compete with Much Asphalt. Much Asphalt and Roadmac further agreed that Roadmac will continue sourcing asphalt from Much Asphalt in provinces where Roadmac had no presence. Roadmac only entered into the asphalt commercial market in 2007.

The Commission referred the matter to the Competition Tribunal for adjudication on 16 November 2016.

SCREENING TRENDS

FOR QUARTER 1 TO QUARTER 3 OF 2016/2017 FINANCIAL YEAR

BY SHADRACK RAMBAU

The Screening Unit completed a total number of 49 cases in Quarter 3. Of the cases completed, 37 were non-referred, 8 were transferred to Cartels, 3 were referred for full investigation and 1 was withdrawn. Most of the complaints received in Quarter 3 were from the retail and trading sector with a total of 8 cases. This was followed by the energy sector and agricultural and forestry sector with 3 and 2 cases, respectively.

Since the start of the current financial year, (from Quarters 1 - 3), the agricultural and forestry sector has been in the top three sectors in which the Commission has received most of its complaints. Most of the complaints received in this sector relate to exclusive agreements both at processing and growing levels of the supply chain.

The retail and trading sector also featured in the top three sectors in Quarters 1 and 3. Most of the complaints received in this sector relate to stall owners who were prevented from erecting temporary stalls by landlords in shopping centres. This is due to the fact that there are already tenants in the shopping centres who are selling similar products. Other complaints received by the Commission in this sector relate to exclusive distribution agreements between manufacturers or suppliers and appointed or designated distributors.

The Commission has also received complaints of excessive pricing against long distance bus companies as well as airlines which are flying shorter routes.

SCIENCE, EDUCATION AND PRACTICE

IN A NEW ERA OF COMPETITION REGULATION

BY TEMOSHO SEKGOBELA

On 6 and 7 December 2016, the FAS held its second International Conference, themed "Antimonopoly policy: science, education, practice" and "Competition policy under new economic challenges" at the Skolkovo Innovation Centre in Moscow, Russia. The theme may be a mouthful, however it proved relevant to the work and challenges being undertaken by competition authorities, especially within the BRICS nations in terms of thinking and discussing whether the competition policy toolbox and approach should adapt, if at all, to new challenges such as global competition transgressions, big data, global mergers and the increased interface between intellectual property law and competition law enforcement.

Mr. Igor Artemiev, head of the FAS, began by commenting on the impact of globalisation and how cooperation tools between competition authorities have not changed to address the need to share information in the face of complex and global cartels in new and challenging markets. Mr. Valles of the United Nations Conference on Trade and Development noted that although there are a vast number of cooperation tools available, ranging from voluntary confidentiality waivers to bilateral agreements between countries/competition authorities, there are still structural, legal and behavioural barriers to international cooperation in the enforcement of global cartels primarily due to the issue of confidentiality. Mr. Valles noted that in times of global economic downturn, such as we are facing at the moment, anticompetitive conduct increases which means competition authorities need to have the necessary tools to detect, investigate and prosecute international cartels.

Other themes that arose included pharmaceuticals and intellectual property rights. Section 27 of the Constitution states that, "Everyone has the right to have access to health care services…[and]The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of…[these] right(s)." Therefore, government needs to ensure that access to medication is not prohibitively expensive so as to deny people the right to healthcare. Although our government regulates the pricing of pharmaceutical products through public bidding (public healthcare system) and the application of the single exit price (private healthcare system), the conference discussion identified other means that anticompetitive conduct can occur within the pharmaceuticals market outside direct excessive pricing, such as the limitation of the entry of competitors and "gaming" the intellectual property regulatory system. The United States America (USA), Brazil and European Union have faced the rise of litigation by originators especially against generic suppliers including:

- the use of settlements between an originator and generics supplier to delay the entry of generics following the expiration of a patent, which essentially maintains the status quo in terms of choice and pricing;
- frivolous litigation in trying to assert an intellectual property right with the sole aim of achieving an anticompetitive end;
- abuse of the intellectual property regulatory system through misinformation, fraud or misrepresentation in order to gain intellectual property protection where none should have been awarded, an important consideration in South Africa which has an administrative depository system of patent registration rather than a substantive search; and examination system which may mitigate such abuses;
- product hopping through, for example, the extension of the life of a patent by raising technical and legal barriers to entry for generic suppliers such as switching a pharmaceutical product from a capsule to liquid.

The challenge for competition authorities in the enforcement of competition law within the context of the above conduct includes whether a pay for delay settlement between an originator and a

generics supplier can ever amount to an exclusionary abuse of dominance given the test of "substantiality" or whether this can only be a case of collusive conduct. In other words, whether or not this type of agreement has to be with multiple generics suppliers and not only a single generics supplier in order to lead to foreclosure concerns. The South African competition authorities have not necessarily seen analogous litigation or intervention and it may be that it occurs within the intellectual property judicial processes instead. However, it would be interesting to consider whether such litigation, occurring in other jurisdictions, can and has had any competitive effect within the South African pharmaceutical market.

Recent global mergers and acquisitions within agro-processing, such as the transactions between Dow/DuPont, ChemChina/ Syngenta and Bayer/Monsanto, have raised multiple issues including food security, the role of intellectual property, innovation and competition, impact on emerging markets and the role of both commercial and small-scale farmers within emerging markets and access to agro-processing products.

The conference considered whether the continuing phase of mergers and acquisitions transactions, which is giving rise to further global consolidation and concentration within agro-processing, will likely lead to the stifling of innovation and productivity. This is so, given that most of the global transactions are among firms which have complementary product lines therefore potentially reducing the incentive on merged entities to aggressively pursue innovative product lines in competition as was pre-merger. Concentration within the seed market is significant given that as of 2014, the top three global seed firms (Monsanto, DuPont/Pioneer and Syngenta) accounted for approximately 47% of global seed sales, with the top five firms accounting for 54% and the top ten firms, 66% of global seed sales. This is happening within the context of already existing extensive collaboration through research and development, cross-licencing agreements and joint ventures between global agro-processing firms.

However, global consolidation is not happening just within the seed market but across the entire food value chain including feed, fertilizer and plant protection agents, bringing about vertical integration and likely conglomerate effects. From a competition enforcement perspective, competition authorities need to think not only of the global impact of these transactions but of the local impact of the transaction which may give rise to different competition concerns and in some jurisdictions no local competition concerns. The conference highlighted that the need for cross-border cooperation, especially within the BRICS nations, is necessary not only in identifying competition concerns but also in the formulation of remedies such as the localisation of research and development and opening up of patents to allow for more inclusive innovation.

The rise of disruptive technologies, big data, digital platforms and algorithms are terms that are on all agendas of competition fora. Not only do they pose a competition policy challenge in terms of even determining when competition law intervention is necessary or appropriate, but they also challenge the enforcement toolbox in terms of what is the "firm", market definition, the scope and characterisation of "meeting of minds" in the context of colluding algorithms, liability, remedies and the link between all of this and consumer protection including issues of privacy. All of this is still relatively new not only within jurisdictions such as the USA and European Union, but also certainly within South Africa. Nevertheless, these issues raise interesting competition questions including challenging the traditional means of competition regulatory enforcement and how markets are defined, remedial approaches including compelling access to data as an essential facility, the evidentiary burden requirements in cartel litigation within the context of algorithms and big data firms' acquisitions of small start-ups and the impact of this on innovation and the development of small business.

COMMISSION PARTICIPATES IN THE 2016 ICN ADVOCACY WORKSHOP IN MEXICO CITY

BY MZIWODUMO RUBUSHE

The Competition Commission South Africa (the Commission) participated in the 2016 ICN Advocacy Workshop held in Mexico City, Mexico from 3-4 November 2016. The theme of the Workshop was "Designing Effective Advocacy Strategies".

The ICN (International Competition Network) is a specialised yet informal network of established and new agencies, enriched by the participation of non-governmental advisors (representatives from business, consumer groups, academics and the legal and economic professions) with the common aim of addressing practical anti-trust enforcement and policy issues. By enhancing convergence and co-operation, the ICN promotes more efficient and effective anti-trust enforcement worldwide to the benefit of consumers and business. The Commission is a member of the ICN and participates in its working groups.

Competition Advocacy refers to activities that promote a competitive environment through non-enforcement mechanisms such as building relationships with government entities and increasing public awareness around the benefits of competition.

The Commission was represented by Mr Mziwodumo Rubushe, Head of Stakeholder Relations and Mr Ricky Mann, Economist: Policy and Research. Mr Rubushe presented and participated in a panel discussion at plenary on "Competition Advocacy Strategies in Public Procurement". Other panel members in the discussion included Mr Dan Sjoblom, Director General Swedish Competition Authority; Mr Nuno Rocha de Carvalho of Portugal and Mr Benjamin Contreras, member of the Board of the Federal Economic Commission of Mexico. The Plenary Session was moderated by Mr Artem Grinenko, Deputy Head of Department of Control over Public Procurement: Federal Antimonopoly Service of Russia.

The Commission's presentation covered Procurement Policy in South Africa; the Commission's Advocacy Strategy in Public Procurement, including its three pillars of awareness raising amongst procurement officials; institutionalising bid rigging detection through policy intervention; and sustainability of the intervention. It was clear from the panel discussion that the Commission's strategy onpublic procurement is on par with its international counterparts.

Interesting Breakout Sessions included: "Planning and effective advocacy strategy in a changing market place"; "Planning effective advocacy strategies using advocacy and enforcement as complements"; "Designing and assessing effective advocacy strategies" etc. The South African representatives attended the Breakout Session on "Planning an effective advocacy strategy

in a changing market place". In this session Canada's Catherine Hariton, Senior Competition Law Officer, presented an interesting paper on "Balancing Regulation and Competition". She outlined Canada's approach as that of advocating that governments and decision makers should consider the effects that regulations have on competition. Their approach is that regulation should be used only where market forces will not achieve policy objectives - and even then, only to the extent necessary in order to address those objectives.

In advocating for competition assessment, Canada's Competition Bureau is guided by the following principles:

- Regulation should only address legitimate policy concerns;
- Regulations should be based on the best available evidence;
- Regulation should be proportionate to the associated harm; and
- Regulation should be reviewed regularly to reflect market conditions.

Canada provided examples where during the winter of 2013 – 2014, propane prices in some areas of Canada skyrocketed. The Minister of Natural Resources and Industry asked the Competition Bureau and the National Energy Board to investigate the causes of the exceptionally high prices. Some industry observers called for the government to regulate propane pricing to protect consumers from high heating prices. The Competition Bureau opposed such measures in a joint report to the National Energy Board, noting that short term price hikes can incentivise producers to bring additional supplies to the market. If regulators had imposed price controls, this market mechanism could not have functioned. Ultimately, prices dropped to normal levels and did not increase since then.

In Mexico, policy makers are provided with a Regulatory Impact Assessment Form to complete before drafting legislation. Thereafter they are required to request an Advisory Opinion from the Federal Economic Competition Commission of Mexico.

The Italian Competition Authority has powers to challenge legislation that infringes on competition. Regulators have 60 days to respond to their advisory opinion. If they fail, the Italian competition authority can challenge the legislation in Court.

Regarding procurement, it was interesting to note that in the Ukraine, the competition authority participates in tender adjudication. They have power to approve legislative drafts as well as powers to act as an Appeal Body for Public Procurement.

There were therefore very important lessons to be learnt from the interaction with our international counterparts. The European Union, for example, has done an ex-post evaluation on the training of Judges. This report could provide useful learnings for the Commission in view of the coming into effect of the criminal liability provision of the Competition Amendment Act of 2009.

On a lighter note, delegates were taken on a city tour of Mexico City. Highlights included a tour of the Mexico National Museum, a live band playing romantic latino music and, of course, a visit to Mexico would not be complete without a tot of tequila.

MEET Our EXECUTIVES

Chief Human Resource Officer
Nompumelelo Nkabinde

Effective leadership and management are essential for any organisation to be successful. The executive committee of the Commission is bestowed with the enormous yet exciting responsibility to lead an organisation of more than 230 employees who are largely lawyers and economists. **Lydia Molefe (LM)** chats to two of our executive members about their roles in the organisation.

LM: Tell me about yourself (a brief background e.g. where are you from? Which school did you go to (primary, high school and university)?

Nompumelelo Nkabinde (NN): I grew up in KwaMashu, township which is located in the north of Durban (not in Durban North). I did both my primary and high school education at the local schools. I then did my tertiary education at the then University of Durban-Westvile where I obtained my legal qualification. I then pursued and completed an MBA with Gibs. I am currently pursuing my PhD studies with the DaVinci Institute within HR.

LM: Who has influenced your decision to pursue a career in Human Resources?

NN: My late father had a big role to play in my career choice. After a completed my junior degree he was very adamant that the field of law was not "safe for women. At the time he was employed by Corobrik in Durban. My father then took me to their then HR manager to advise on options that a person with my qualification could pursue within an organisation. She felt that HR was the closest to law, and the rest is history.

LM: How did your journey begin at the Competition Commission? And tell me the different positions you've held at the Competition Commission?

NN: I joined the commission in January 2015 in a capacity as the Chief HR Officer and have been in that role since then.

LM: What does your current job entail?

NN: In a nutshell my role entails ensuring that the Commission attracts and retains the talent that it requires to achieve it mandate. Within that lies a need to ensure that the environment within which the work of the Commission is being done in an inclusive and conducive environment.

LM: What do you find most challenging about your job?

NN: As HR you are expected to create a balance between the broader organisational aspirations with day to day employee matters. This is an inherent part of the HR role that requires an ability to remain professional without compromising any of the two areas.

LM: What are your top priorities in Human Resources?

NN: Overall the key priority for HR is to support the Commission's strategic objective of "creating a high performing agency". To achieve that, we have prioritised two key projects; reviewing the Performance management system and implementing a retention programme for the commission's employees.

LM: How would your child describe you?

> **"My children would love an opportunity to describe me, especially in my absence. From what I hear they think I don't get it."**

Acting Divisional Manager, Mergers & Aquisition
Lebohang Mabidikane

LM: Tell me about yourself (a brief background e.g. where are you from? Which school did you go to (primary, high school and university)?

Lebohang Mabidikane (LM):I am from Daveyton in the Far East Rand.

LM: I attended Lerutle Primary School, Katlego Intermediary School as well as Wordsworth High School. I went to University of Johannesburg.

LM: Who has influenced your decision to pursue a career in Law or Economics?

LM: I am from a family of Lawyers, my one brother is an Advocate and the other 2 are Attorneys so Law is all I've always known. I was just fortunate that I happened to be good at it too.

LM: How did your journey begin at the Competition Commission? And tell me the different positions you've held at the Competition Commission?

LM: I began at the Commission in 2011 as a Junior Analyst in M&A. I then became a little restless thinking that as an Attorney I may have left practise too soon so I left to go back to practise. I came back to the Commission in 2014 after I managed to start a Competition Law practise at the black female owned law firm I worked for. I have also been a Senior Analyst in M&A and a Principal in Cartels and E&E.

LM: What does your current job entail?

LM: It entails leading the division in realising the strategic objectives of the Commission by amongst others This is done through implementing the division's business plan by overseeing investigations of mergers, presenting the findings of these investigations in reports, providing leadership to the division on how best to achieve certain outcomes in our case work, overseeing the Human Resources aspects of the division as well.

LM: What do you find most challenging about your job?

LM: I have not been in this position long enough to speak about challenges. All I can say is that I've enjoyed every minute of it since I started, I'm a hard core adrenaline junky so the fast pace and has been great!

LM: What are your top priorities in Mergers and Acquisitions?

LM: The People and the Quality of Work we produce. I believe that we need to ensure that we look after our people. When it comes to quality, I am obsessed with producing quality work, from the substance of the investigation to the presentation, that is, the writing of the reports.

LM: How would your child describe you?

> **"She tells me I'm the best mom in the world! She always adds that she's not saying this just to be nice, lol!"**

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