

The Official Newsletter of the Competition Commission South Africa

Competition NEWS

Competition regulation for a growing and inclusive economy



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SIGNATURE of HISTORIC MOUs SIGNALS COMMISSION'S COMMITMENT to CROSS-BORDER ENFORCEMENT

By Alex Kuhn



Competition policy and enforcement which is limited to national jurisdictions is not optimal in a world where markets transcend national borders. The strategies of firms are increasingly global and national economies increasingly interdependent. Competition plays an important role in opening up markets for economic development, and ensuring that they are not captured by firms with market power. Cooperation agreements between national competition authorities provide one mechanism to deal with the limitations of national competition policy, law and enforcement.

In this context, three landmark memoranda of understanding (MOU) have been signed by the Competition Commission (the Commission) in the last seven months.

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Editorial Note

We are pleased to present this edition of Competition News. The edition covers mainly our work in the last half of the 2015/16 financial year (Oct 2015-Mar 2016). During this period, there were several important developments in the enforcement of competition law and merger regulation.

In November 2015, the Competition Commission (Commission) had the honour to host the 4th BRICS International Competition Conference (BRICS Conference). This conference attracted over 500 delegates from different parts of the world, with a strong representation from BRICS countries, renowned experts in competition law and economics, and heads of competition authorities on the continent and abroad. In line with the Commission's Vision 2030 which seeks to contribute to the eradication of poverty, inequality and unemployment in South Africa by 2030, we chose the theme "competition policy and enforcement in BRICS countries" for the conference.

The BRICS conference was held alongside two other important events, namely the 9th Annual Competition, Law, Economics and Policy Conference, and Lectures on Competition Policy which was hosted in partnership with the University of KwaZulu-Natal and Competition and Regulation European Summer School. Yongama Njisane discusses these events in detail.

Cooperation among competition authorities is an integral part of effective competition enforcement. It is for this reason that the Commission has had very close relations with

its counterparts on the continent and abroad since its establishment 16 years ago. Recently, the Commission has taken steps to formalise these relationships by signing two landmark multilateral memoranda of understanding (MOU) with the BRICS competition authorities and the SADC competition authorities, as well as a bilateral MOU with Namibia. These MOUs will certainly deepen cooperation among competition authorities and ensure effective cross-border enforcement. In our lead story, Alex Kuhn provides a summary of each of the three MOUs.

Nelly Sakata provides an overview of the Commission's guidelines on the assessment of public interest provisions in merger regulation. The Competition Act requires the Commission to assess both competition and public interest factors when evaluating mergers. Public interest was specifically included in the Act in order to ensure that socio-economic inequalities that exist in South Africa as a result of apartheid laws are addressed. The guidelines, which were issued on 2 June 2016, seek to provide certainty on approaches followed by the Commission when assessing public interest factors. Business and practitioners are encouraged to follow these guidelines when filing mergers with the Commission.

Still on mergers, the Commission prohibited the proposed merger between Jo Jo Tanks and Nel Tanks. The merged entity would have had the ability to increase prices post-merger and would not face any significant constraints. The proposed acquisition of CTP by Digital Disc was also prohibited on the basis that the merged entity would have had market power and would engage in potential anti-competitive conduct. Although the Commission had proposed conditions to address these concerns, the merging parties were not amenable to the conditions. The merger was subsequently approved with conditions by the Tribunal. The two cases are discussed by Gilberto Biacuana and Zanele Hadebe. The Commission also approved a number of mergers with conditions. A notable condition was a behavioural remedy imposed in the MTN/Smart Village merger relating to access of fibre to rival internet service providers. Grashum Mutizwa and Portia Mbele discuss this transaction.

Romeo Kariga summarises the Competition Tribunal's (Tribunal) judgment in the predatory pricing case involving Media 24 as a respondent. In this judgement, the Tribunal found that Media 24 used a multi-pronged strategy to prevent a competitor from expanding in

the community newspaper market in the Goldfields region in the Free State. Ngoako Moropene discusses another judgement issued by the Tribunal where it found that certain wholesalers and retailers in the cycling industry engaged in collusive conduct by reaching agreements on, among other things, price increases and discounts offered to customers. The Commission's successful prosecution of this case reaffirms its commitment to root out cartel behaviour in all sectors of the economy, whether big or small. Cartels are harmful because they result in high prices for consumers and reduce the incentive for firms to be innovative. In a related article, Katlego Monareng highlights the significance of dawn raids in cartel investigations.

The Commission has finally completed its investigation in the construction sector which was initiated in 2009. Through this investigation, a series of collusive arrangements involving major and small players in the sector was uncovered. The Commission adopted what it termed the "Fast Track Settlement Process" to incentivise the implicated construction firms to disclose their participation in cartel conduct and settle with the Commission. This approach proved to be a success as it sped up the investigation and saved costs for all parties, including the Commission. Khomotso Hlongoane and Mehluhi Nxumalo give a summary of the Fast Track Settlement Process.

In the previous edition, the Commission discussed the outcomes of its ex-post review on the Massmart Supplier Development Fund. In that review, it found that the Fund has addressed the public interest concerns raised by facilitating the entry and expansion of suppliers in the agricultural, agro-processing and manufacturing sectors into Massmart's supply chain. Thulani Mandiriza and Michelle Viljoen summarise the findings of a supplementary impact assessment, with specific reference to effect of Wal-Mart's entry on suppliers and competitors post-merger. Sunel, Khalirendwe and Kerschyl provide insights on market outcome post the Media 24/ Natal Witness merger. They also provide a summary of the impact of the Commission's prohibition of the merger between Pick n Pay Retailers and Fruit & Veg City, which was subsequently abandoned by the merging parties.

Happy reading!
Editorial Team

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MOU between South Africa and Namibia

In November 2015, the Commission signed the first MOU in its history with the Namibian Competition Commission. The signature of the MOU formalises a longstanding relationship of support and cooperation between the two authorities. It provides for “the fullest mutual assistance possible” in investigations and enforcement proceedings, including service of process of companies and individuals if requested.

“We thank the Namibian Competition Commission for their cooperation. I’m grateful we’re able to formalise our relations. Our laws tend to be similar which makes cooperation easier,” said South African Competition Commissioner Tembinkosi Bonakele at the time.

Namibian Competition Commission Chief Executive Officer, Mr Mihe Gaomab II said that the signing of the MOU was an historic moment for them, and would improve cooperation between the authorities, especially on multi-jurisdiction projects, such as mergers.

MOU between BRICS Competition Authorities

The heads of the BRICS competition authorities signed an MOU to formalise relations between the member countries on 19 May 2016 in St Petersburg, Russia. The MOU on Cooperation in the Field of Competition Law and Policy establishes a framework for collaboration between the BRICS competition authorities which were represented by seven competition authorities:

- For Brazil: the Administrative Council for Economic Defense of the Federative Republic of Brazil (CADE)
- For the Russian Federation: the Federal Antimonopoly Service (FAS)
- For India: the Competition Commission of India (CCI)
- For the People’s Republic of China: the National Development and Reform (NDRC), the Ministry of Commerce (MOFCOM) and the State Administration for Industry and Commerce (SAIC)
- For South Africa: the Competition Commission of South Africa (the Commission).

The MOU provides for exchanging information, joint studies on markets of mutual concern and cooperation and coordination in investigations or enforcement proceedings. It came into effect immediately for a period of four years, with the option to renew or extend it further.

“The MOU consolidates the already close cooperation between BRICS competition authorities. The Competition Commission of South Africa is committed to deepen these relations in the interest of all BRICS economies and people,” said Competition Commissioner, Tembinkosi Bonakele. Coordinated actions within the framework

of the MOU have already started, and joint research into the pharmaceutical and other markets relevant to BRICS members is anticipated before the end of 2016.

MOU between SADC competition authorities

A week later, on 26 May 2016, an MOU between nine SADC competition authorities was signed in Gaborone, Botswana. The Memorandum of Understanding on Inter-Agency Cooperation in Competition Policy, Law and Enforcement was signed by competition authorities of Botswana, Malawi, Mauritius, Namibia, Seychelles, South Africa, Swaziland, Tanzania and Zambia. Five of the remaining six member states (Angola, DRC, Lesotho, Madagascar and Mozambique) do not yet have functioning competition authorities and are in different stages of establishing them. The MOU remains in effect for three years with the option to renew or extend it by mutual consent.

The MOU commits competition authorities to cooperate by sharing information on cases, coordinating investigation of cases, harmonising the rules and procedures for handling cases, and undertaking joint capacity building and research activities. The signing of the MOU marks an important milestone in the implementation of the Declaration on Regional Cooperation in Competition and Consumer Policies adopted by SADC Heads of State and Government in 2009. Over the years, the Declaration facilitated provision of capacity building and technical assistance to member states in support of competition policy development and implementation.

The determination of the SADC competition authorities to address national and cross-border competition enforcement is evidenced both by the signature of the MOU as well as by the establishment in July 2015 of three SADC working groups on cartels, mergers and research. The SADC Mergers Working Group (chaired by Botswana) has drafted a cooperation framework, and the SADC Cartels Working Group (chaired by Zambia) will undergo training provided by the OECD on the detection and prosecution of cartels in July 2016. The SADC Research Working Group is participating in cross-country sector research being undertaken by the African Competition Forum into the construction, pharmaceutical and private healthcare, cement, fertiliser, LPG and telecommunications markets due to be finalised by April 2017. In the past such research has led to reform of legislation as well as prosecution of anti-competitive conduct in the region.

“The Competition Commission of South Africa is committed to fulfilling the MoU through exchanging information and views on significant developments in competition policy, laws and enforcement between the SADC competition authorities,” said Competition Commissioner Tembinkosi Bonakele.



Commissioner Tembinkosi Bonakele and Mr Mihe Gaomab II, CEO of the Namibian Competition Commission sign the MOU



BRICS heads of competition authorities sign a joint declaration on future cooperation among them

The Commission issues guidelines on the assessment of public interest provisions in merger regulation

By Nelly Sakata

On 2 June 2016 the Competition Commission (“Commission”) published its Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998, as amended (“the Competition Act”) (“the Guidelines”).¹ The Guidelines were published in government gazette number 40039, as well as on the Commission’s website. The Guidelines were issued in terms of section 79(1) of the Competition Act, which allows the Commission to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction.

In terms of section 12A of the Competition Act No. 89 of 1998, as amended (“the Competition Act”), Competition authorities are required to assess the impact of the proposed merger notified to the Commission, both on Competition in a relevant market and on public interest grounds. In relation to its analysis on public interest effects, the Competition Act requires the Competition authorities to consider the effect that the merger may have on a particular industrial sector or region, employment, the ability of small businesses (SMEs) or firms controlled or owned by historically disadvantaged persons (HDIs) to become competitive, and the ability of national industries to compete in international markets. These are commonly known as the public interest grounds under merger regulation.

Public interest grounds under merger control were included in the Competition Act mainly to address the socio-economic inequalities arising from the past and also for purpose of aligning competition policy with broader development and economy objectives. It was recognised that mergers could create further concentration and social disparities, if not properly considered. Accordingly, in order to prevent further economic distortions and achieve the objectives of the Competition Act of opening up the economy for the benefit of all South Africans, it became important to consider public interest grounds in merger analysis.

In practice, there has, however, been uncertainty around the way in which competition authorities assess public interest grounds in a merger analysis. This necessitated the publication of guidelines that can provide guidance on the approach the Commission is likely to follow and the type of information it may require in assessing public interest grounds in a merger analysis. In developing the Guidelines, the Commission considered previous decisions of the Competition (Tribunal) and the Competition Appeal Court (“CAC”) on how public interest issues should be dealt with in merger analysis.

As a general approach, the Commission will determine the following when assessing each of the public interest provisions listed in section 12A(3) of the Competition Act:

1. The likely effect of the merger on the public interest ground;
2. Whether such effect, if any, is merger specific;
3. Whether such effect, if any, is substantial;
4. Whether the merger is justified or not; and
5. Possible remedies to address any substantial negative public interest effect.

The issue of merger specificity has been the subject of debate, in particular the effect of the merger on employment. In this regard, the Commission took heed from the Tribunal’s interpretation of “merger specific” and has clarified in its Guidelines that “a merger specific public interest effect is essentially an effect that is causally related to, or results from or arises from the merger”.

In its Guidelines, the Commission recognises that an assessment of public interest grounds can only be considered through the prism of the enquiry on competition, namely whether the merger is likely to substantially prevent or lessen competition or not. Accordingly, in determining whether the merger can or cannot be justified on substantial public interest grounds, the Guidelines present two lines of enquiry. If the merger is likely to be anti-competitive, the Commission will determine whether there are any substantial positive public interest effects that could justify the approval of the anti-competitive merger. Accordingly, it will allow the merging parties an opportunity to substantiate any likely positive effects to justify the approval of the merger. If the merger is unlikely to be anti-competitive, the Commission will determine whether the merger raises any substantial negative public interest effects which may lead to a prohibition of the merger or the imposition of conditions. The merging parties will, however, be allowed to justify the negative public interest effect, which may result in the approval of the merger, with or without conditions. However, this will be assessed on a case by case basis.

In considering each public interest ground, the Commission will follow a sequential approach. The approach of each step is highlighted below.

A particular industrial sector or region

The Commission may consider, amongst others, the impact of the merger on local production or manufacturing. In this regard, the Commission will look at the possible closure of existing local production facilities or opening of new production facilities and/or substitution of locally produced goods with imports. In determining whether the effect is substantial, the Commission will consider, amongst others, the importance and strategic nature of the relevant products to the sector or region, and of the sector or region to the broader economy.

Employment

The Commission will request the merging parties to declare all potential retrenchments that are being considered, irrespective of whether they are claimed to be merger specific, i.e. resulting from the merger, or operational. This touches on the right to “proper consultation”. In the *BB Investment/Adcock merger*, the Tribunal recognised that both the Commission and the employees are entitled to receive proper information about the proposed retrenchments. This is in order to enable the Commission to make an informed recommendation or take an informed decision, or for the employees to make meaningful representations. This is also to establish whether the retrenchments are merger specific and justified. In determining whether the effect is substantial, the Commission will consider factors such as the number of employees likely to be affected, the affected employees’ skill levels, the likelihood of alternative employment in the short term, etc. In case of significant negative effects on employment, such as significant job losses, the Commission will essentially consider two aspects in the merging parties’ justification. These are whether there is a rational link between the proposed job losses and the reasons for the job losses, and whether there is an equally weighty public interest justifying the job losses. Remedies that the Commission may consider include capping the number of job losses, placing a moratorium on job losses for a period of time.

The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive

The Commission will consider, amongst others, the entry conditions or expansion opportunities within a market including whether the merger raises or lowers barriers to entry or expansion. The remedies that the Commission may regard as appropriate to address any negative effect on this public interest ground include, amongst others, establishing a supplier development fund for technical and financial support and assistance of SMEs and historically disadvantaged individuals.

The ability of national industries to compete in international markets

The Commission will consider, amongst others, the nature or structure of the industry and the market dynamics within the industry, the nature of competition and the market position of the firm in the domestic economy, whether a change in productive capacity is required in order for the merged firm to compete globally against other firms, as well as the policy considerations that are relevant to the sector. The possible remedies that the Commission may consider to address any substantial negative effect on the ability to compete in international markets include obligation on merging parties to invest within a specified time period, to create jobs, to introduce new products and technology or training, re-skilling or skills-upliftment programs.

In preparing these guidelines, the Commission followed a consultative process which entailed obtaining input from various stakeholders including legal practitioners, business, civil society, and also holding workshops in order to discuss comments received and to get more input from stakeholders. The Commission has since revised the guidelines to incorporate input from stakeholders.

“These guidelines mark an important milestone in merger regulation in South Africa since the establishment of the Competition Commission 16 years ago. With the increased focus on public interest considerations in merger regulation, the guidelines provide the much needed clarity on how the Competition Commission will consider public interest grounds in assessing mergers. We encourage business and practitioners to follow these guidelines when filing mergers in South Africa,” said acting Deputy Commissioner, Hardin Ratshisusu.

¹ The Guidelines were published in government gazette number 40039, as well as on the Commission’s website.

M&A QUARTERLY Performance Report – QUARTER 4 (JAN 2016 -MARCH 2016)



OVERVIEW

The number of cases notified to the Commission has markedly decline as was anticipated in the previous Q3 (October 2015 -December 2015) report. This could be a culmination of a number of macro-economic factors, but the ongoing economic downturn's contribution to the experienced trends cannot be ignored.

The Commission received 49 merger notifications during Q4 but finalized 89 mergers in the same period. A number of investigations were carried over from the previous Q3. Out of the 89 finalised merger reviews in Q4, 75 of these transactions were approved without conditions, 10 were approved with conditions and 2 were prohibitions.

There was a significant (58%) decline in the number of notifications in Q4 from the 118 notified in the previous Q3. The trend experienced in Q4 in relation to number of notifications is somewhat consistent with prior years, although the decline in Q4 notifications is more pronounced than in prior years. The decline could be testament to the general economic downturn experienced in South Africa, particularly driven from a weak exchange rate in the second half of 2015 and early 2016.

The total value of transactions in Q4 was R504 billion. This only includes transactions where the purchase consideration was listed.¹ There have not been much reported anticipated large M&A transactions; save for the media reports that Broadband Infraco supports the government's plan to merge it with Telkom to prevent further erosion of value.²

There was a trend towards consolidation in various sectors of the economy, as reflected in the mergers notified in Q4. The consolidation in Q4 was most notable in mergers falling within the manufacturing, property and wholesale sectors. The sectors which grew the most (on a quarter-on-quarter annualised rate) include Construction (300%), Transport (150%), Mining (50%), Information & Communication (25%) and Wholesale (21%).

The data on acquisition does not however show a consistent trend on the ultimate acquiring firm/s. The data indicates that acquisitions are being made by different ultimate acquiring firms across all sectors of the economy. The trend of acquiring firms making acquisitions in various sectors however suggests diversification strategies for most firms.

Table 3: Firms which made at least two acquisitions in the fourth quarter

Acquiring Group	Sectors
Sibanye	Mining (2)
Socintra SA	Information & Communication (1), Finance (1)
Stellar Capital	Information & Communication (1), Finance (1)

Source: Commission compilation

There are no discernible patterns on the acquiring firm, nor can any patterns or trends be interpreted from the data available. The trend may however be indicative of diversification strategies for most firms or expansion strategies such as the case of Sibanye in mining.

There were two mergers prohibited in the period. The first was a small merger whereby Jo Jo Tanks Proprietary Limited (Jo Jo Tanks) intended to acquire the operating assets and liabilities of the Nel Tanks business. The merged entity would have had the ability to increase prices post-merger because it would have market power and would not face significant competitive constraints post-merger. There were no workable remedies identified to address the structural change in the relevant market.

The other merger prohibited was the proposed acquisition of CDT by CTP. The Commission found that the merged entity would have had the ability to increase prices, that the merged entity

¹ There were 7 transactions in which the purchase consideration was not clear.

² See Business Day 4 April 2016.

would likely raise the minimum order sizes for the replication of CDs and DVDs and potentially engage in anti-competitive bundling strategies. The Commission proposed remedies to the merging parties to deal with these concerns however the merging parties were not amenable to merger conditions. The merging parties successfully appealed the Commission's decision, and the merger was subsequently approved with conditions by the Tribunal.

As noted in Q3, there has been an upward trend in mergers involving companies under business rescue or under distress. In Q4, the number of such mergers increased, with notable business rescue cases including mergers such as B Braun/ Dismed and Wasteman/Solid Waste. In addition there were also transactions for companies under financial distress such as Totalgaz/Kaya Gas and the prohibited CDT/CTP merger. This trend may continue particularly if the economic outlook does not improve in the short to medium term.

STATISTICS

As indicated above the Commission received 49 merger notifications during Q4 but finalized 89 mergers in the same period. A number of investigations were carried over from the previous Q3 and finalized in Q4. See Table 1 below. There was a significant (58%) decline in the number of notifications in Q4 from the 118 notified in the previous Q3. There was also a decline in the number of finalized cases from 103 to 89.

Table 1: Q4 Mergers of 2015/16

	Q1	Q2	Q3	Q4	Total for the year
Notified	115	109	118	49	391
Large	33	32	36	15	116
Intermediate	77	71	81	33	262
Small	5	6	1	1	13
Finalised	113	108	103	89	413
Large	38	30	33	28	129
Intermediate	73	71	67	59	270
Small	2	7	3	2	14

Source: Competition Commission

Table 1 also provides an overview of the cases notified and finalized by the Commission by category. The number of intermediate mergers notified to the Commission represents the highest proportion of all cases notified but significantly decreased together with all other categories of mergers, declining from 81 in Q3 to 33 in Q4.

The trend experienced in Q4 in relation to number of notifications is somewhat consistent with prior years, although the decline in Q4 notifications is more pronounced than in prior years. Q4 routinely experiences the lowest number of notifications.

KEY CASES IN QUARTER 4

The following key cases were decided in quarter 4.

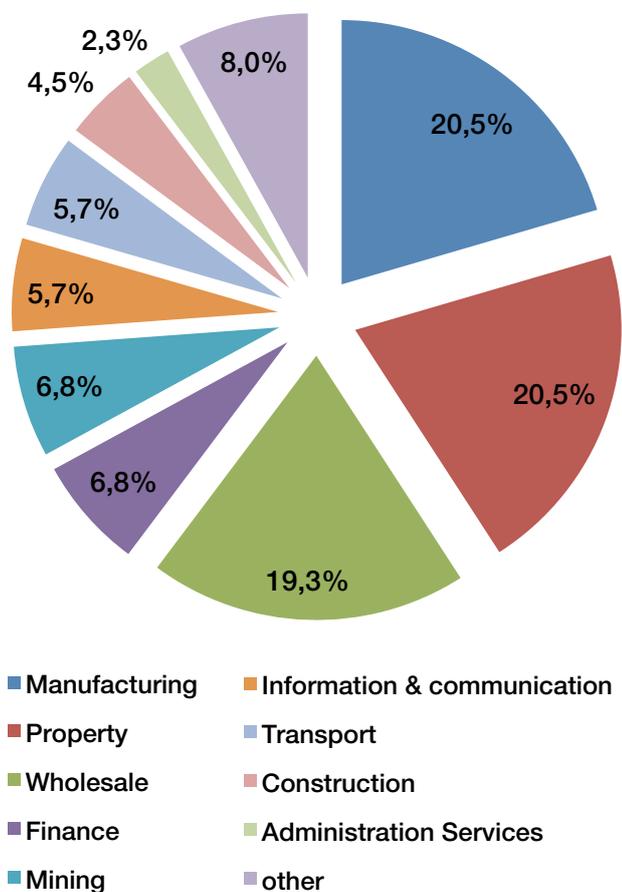
- MTN Smart Village approved subject to fibre access conditions;
- Commission prohibits CTP/CDT merger, Tribunal approve with conditions;
- Commission conditionally approves Totalgaz/Kaya Gas Merger;
- Afrimat/Cape Lime merger approved with conditions; and
- Jo Jo Tanks Proprietary Limited and Nel Tanks Close Corporation



M&A ACTIVITY AND SECTOR INSIGHTS IN Q4

As pointed out earlier, a total of 89 mergers were finalised by the Commission in Q4. Figure 1 shows that finalised mergers in Q4 were dominated by Manufacturing (20.5%), Property (20.5%), Wholesale (19.3%), Finance (6.8%), Mining (6.8%), Information & Communication (5.7%), Transport (5.7%), Construction (4.5%) and Administration Services (2.3%). Other sectors which experienced some merger activity during the same period include Accommodation, Agriculture, Healthcare, Professional Services, Public Administration, Scientific Services and Waste Management.

Figure1: Finalised by sector, fourth quarter 2015/16 financial year

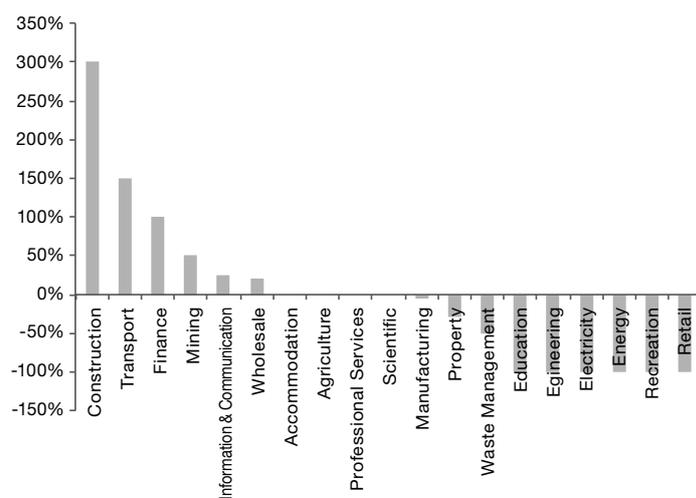


*Other includes sectors such as Accommodation, Agriculture, Healthcare, Professional Services, Public Administration, Scientific Services and Waste Management, each sector accounting for 1.1% of finalised cases in the fourth quarter.

Figure 1 shows that in Q4, the sectors which grew (at quarter-on-quarter annualised rate) include Construction (300%), Transport (150%), Mining (50%), Information & Communication (25%) and Wholesale (21%). Some sectors grew from a low base in the Q3 financial year and recorded some finalised mergers. These include Administration Services (2), Healthcare (1) and Public Administration (1). Sectors that recorded no quarter-on-quarter annualised change include Accommodation, Agriculture, Professional Services and Scientific Services.

The sectors which decelerated in the fourth quarter of 2015/16 financial year include Education (-100%), Engineering (-100%), Electricity (-100%), Energy (-100%), Finance (-100%), Recreation (-100%), Retail (-100%), Waste Management (-50%), Property (-28%) and Manufacturing (-5%)

Figure 2: Quarter-on- quarter growth rate in finalised mergers (y/y), fourth quarter 2015/2016 financial year



Source: Commission construction

COMPLIANCE AND IMPACT OF REMEDIES IMPOSED IN QUARTER 4

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.

(a) Monitoring Pending Conditions

At the commencement of Q4, the Unit was monitoring 118 cases with conditions. At the end of the Q4, 8 cases were closed and 17 new cases were added to the monitoring list. Of the 17 new conditions added to the monitoring list, 7 were imposed by the Tribunal following either a decision to prohibit the merger by

the Commission or a decision to approve the merger without conditions. At the end of Q4, the Unit is therefore monitoring 127 cases. The number of conditional approvals has remained high in Q4. These statistics are presented under the section dealing with conditions imposed in Q4.

During the quarter, 10 cases were approved with conditions by the Commission. These are presented in the Table below.

Table 3: List of cases approved with conditions by the Commission in Q4

Three of the cases had behavioural conditions, 7 public interest conditions and 1 was a structural condition. Of the 7 cases with public interest conditions, 3 cases had conditions aimed to address a negative impact on employment, 2 case had

Case Number	Primary Acquiring Firm	Primary Target Firm	Market	Condition
2015Nov0629	Totalgaz Southern Africa (Pty) Ltd	The Liquid Petroleum Gas storage, supply and distribution business carried on by Kaya Gas (Pty) Ltd and certain assets associated therewith	Distribution and supply: Liquefied Petroleum Gas	Public Interest – Obligation to assist HD retailers continuation of supply implement BEE
2015Nov0616	DSV A/S	Uti Worldwide Inc.	Logistics: freight forwarding	Public Interest – Employment: Restriction on job losses for 2 years
2015Dec0687	Tegeta Exploration ("Tegeta") and Resources (Pty) Ltd	Optimum Coal Mine (Pty) Ltd (in business rescue) and 6 Other Target Firms (Mining: Coal	Public Interest – Employment: No merger-specific job losses
2015Dec0754	Konecranes Acquisition Company LLC	Terex Corporation	Industrial lifting equipment	Public Interest – Employment: Limit merger-specific job losses and provision of training for affected employees
2015Dec0715	Afrimat Limited	Cape Lime (Pty) Ltd	Mining: aggregates	Structural: Divestiture
2015Dec0687	Super Group Trading Proprietary Limited	Corsair Logistics Proprietary Limited	Road logistics	Behavioural – continue using third party contractors
2015Dec0694	Coty Inc.	Haircare, colour cosmetics and fragrance businesses of the Procter and Gamble Company	Cosmetics	Public Interest – merging parties required to continue using third party distributors
2015Nov0608	Mobile Telephone Networks (Pty) Ltd	Smart Village (Pty) Ltd	Telecommunications	Behavioural: the merged entity is required to grant wholesale access to third party service providers on non-discriminatory bases.
2015Nov0627	Sibanye Platinum Bermuda Limited	Acquarius Platinum Limited	Mining	Public Interest – Employment: Restriction on merger-specific retrenchments BEE: The parties are required to continue with their BEE procurement policy in terms of the Mining Charter
2015Nov0625	Sibanye Platinum Bermuda Limited	The Rustenburg Mines (a division of Rustenburg Platinum Mines Limited)	Mining	Public Interest – Employment: Restriction on merger-specific retrenchments BEE: The parties are required to continue with their BEE procurement policy in terms of the Mining Charter

conditions imposed to address the negative impact on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons in becoming competitive, and 2 case had conditions aimed at addressing several public interest concerns including employment.

The Commission prohibited 3 of the cases set out below and recommended 4 without conditions. This table indicates the decision of the Tribunal to impose conditions in all 7 cases.



JOBS REPORT FOR Q4

Table 5 below provides an overview of the impact on jobs in Quarter 4. 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.

In the Q4, 8 cases had an impact on employment. This was largely in the mining sector. This is slightly lower than in Q3, where 13 cases had an impact on employment. The figures in Table 5 suggest that fewer jobs were lost while more jobs were saved in Q4 when compared to Q3. This suggests a positive impact on jobs in Q4.

Table 5: Summary of the impact on jobs in 2015/16

Month	No. of cases	Jobs lost	Jobs saved	Jobs created	Net effect
Q1	7	60	1912	0	1852
Q2	11	125	1070	100	945
Q3	13	1199	1021	3139	-178
Q4	8	15	4271	0	4256
Total	39	1399	8274	3239	6875

OUTLOOK FOR 2016

Given the current economic downturn experienced in the country, the decline in the number of cases which have been notified in Q4 is unsurprising. Although Q4 generally experiences a low number of notifications in all other years, the trend has likely been exacerbated by the economic downturn.

If this downturn persists, the Commission may also receive more cases of firms under business rescue or distress, such as the business rescue merger between Samancor and International Ferro Metals which is currently under investigation.

The COMMISSION BLOCKS CTP's ACQUISITION of DIGITAL DISC

By Gilberto Biacuana & Ratshidaho Maphwanya

Background

On 5 November 2015, the Competition Commission of South Africa (the Commission) received notice of an intermediate merger whereby CTP Limited (CTP), a company incorporated in accordance with the company laws of South Africa, intended to acquire the Digital Disc Manufacturing and Replicating Business of CDT (CDT), a division of Times Media (Pty) Ltd (Times Media). Times Media is ultimately controlled by Tiso Blackstar Group SE (Tiso Blackstar). CDT is also a company incorporated in accordance with the company laws of South Africa. Post-merger, CTP would control CDT.

CTP is a wholly owned subsidiary of Caxton Publishers and Printers Limited (Caxton). Caxton is a public company incorporated in accordance with the company laws of South Africa. CTP is in turn a wholly owned subsidiary of Caxton and CTP Publishers and Printers Limited (CAT), a public company listed on the Johannesburg Stock Exchange (JSE).

CAT is the ultimate holding company of a group of controlled subsidiary companies through which the business of the Caxton Group is conducted. CAT and CTP are ultimately controlled by an individual.

Areas of overlap

The Commission considered the activities of the merging parties and found that there was a horizontal overlap with respect to the manufacture and replication of optical discs i.e. CDs and DVDs.

The theory of harm pursued by the Commission was unilateral effects. The Commission assessed the following:

- Whether the merged entity would have the ability and incentive to unilaterally increase prices post-merger in the market for the manufacturing and replication of CDs and DVDs;

- Whether the merged entity would have the ability and incentive to increase minimum order sizes for CDs and DVDs thus raising customers' costs; and
- Whether the merged entity would have the ability and incentive to bundle the manufacturing and replication of CDs and DVDs with the distribution services of CDs and DVDs.

Competition analysis

The Commission assessed the competition effects of the proposed transaction in the following markets:

- The national market for the manufacturing and replication of music CDs with some imports; and
- The national market for the manufacture and replication of DVDs with some imports.

The Commission found that the merged entity would control almost 100% of both markets post-merger. The Commission further found that the only other replicator in the market was not a specialist music replicator with the capacity to service large recording firms. The Commission further found that imports were not substantial and were mainly limited to old music titles and niche products. The Commission further found that the merged entity was unlikely to face substantial competition post-merger. Therefore, the Commission concluded that the merger was likely to substantially lessen competition in both markets.

The Commission further found that the merged entity would have the ability and incentive to raise prices and increase the minimum order quantities for CDs and DVDs which would increase customers' costs post-merger. The Commission further found that the merged entity would have the ability and incentive to bundle replication and distribution services which may harm other music distributors post-merger.

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Efficiencies

The merging parties claimed certain efficiencies as a result of the merger. The claimed production and operational efficiencies emanated, for the most part, from fixed cost savings arising from the consolidation of the businesses into one site. The cost savings claimed by the merging parties were however not verifiable and were best estimates as no due diligence was conducted. The Commission found that the claimed efficiencies were not real and were unlikely to be passed onto consumers given that the merged entity was unlikely to face any substantial competition post-merger.

The merging parties further claimed that cost savings would arise due to economies of scale. The Commission questioned the costs used by the merging parties to calculate unit costs of production. The Commission found that the claimed cost savings were likely overestimated. The cost structure submitted by the merging parties showed that the target firm was relatively inefficient compared to the acquiring firm. Given that the transaction would result in a two to one merger with limited competitive constraints, the Commission concluded that the cost savings resulting from the economies of scale were unlikely to be passed onto consumers.

Failing firm

The Commission found that globally and in South Africa the CD and DVD industries were declining. However, the Commission also found that these industries were likely to exist in the future. The Commission analysed the target firm's business viability and found that CDT was not a viable business. However, the Commission concluded that the parties did not meet the failing firm test as the merging parties did not look for alternative buyers for CDT except CTP.

Conclusion on competition effects

The Commission found that the merged entity would have the ability to increase prices post-merger because it was likely have substantial market power and would not face any competitive constraint. The Commission further found that the merged entity was likely to raise the minimum order sizes for the replication of CDs and DVDs which would likely increase customers' costs post-merger. The Commission further found that the merged entity would likely engage in a bundling strategy post-merger which would likely to increase the costs of customers and would also likely drive other music distributors out of the music distribution market.

Therefore, the Commission concluded that the merger would likely substantially prevent or lessen competition in the market for the manufacture and replication of CDs and DVDs. To remedy the negative competitive effects arising from the proposed transaction, the Commission proposed certain conditions to the merging parties. The conditions were meant to ensure that the merged entity does not increase

the prices charged to content holders for the manufacture and replication of CDs and DVDs. The conditions would also ensure that the merged entity does not increase the minimum order size for the manufacture and replication of CDs and DVDs and would also ensure that the merged entity does not bundle the replication and distribution services.

The merging parties rejected the Commission's proposed conditions and indicated that the conditions were equivalent to a prohibition of the merger. The merging parties also stated that the condition on bundling is the only condition that would not have resulted in the merged entity's business being unviable. The merging parties did not submit alternative conditions.

Public interest considerations

The merging parties submitted that the merger would result in job losses spread across the operations of both merging parties due to duplications. The Commission found that a rational process was not followed to arrive at the number of job losses contemplated by the merging parties.

The Commission also found that in terms of the Sale of Business Agreement entered into between the merging parties, CTP would acquire CDT as a going concern. In terms of section 197 of the Labour Relations Act (LRA), if a company is acquired as a going concern, the acquiring firm takes over the employees of the target firm.

The merging parties stated that they did not have any arrangement between them with respect to CDT's employees post-merger. The Commission found that in a declining market these retrenchments would have been inevitable. However, to limit any further job losses the Commission proposed a condition that placed a cap on job losses to 23 employees for a period of 3 years. This Condition was also rejected by the merging parties.

Application for reconsideration by the parties

The merging parties later filed an application for reconsideration with the Competition Tribunal which was heard on 15 March 2016. Following the hearing, the Tribunal approved the merger subject to several conditions. The conditions were that the merged entity would not increase the minimum orders beyond 100 units, that the merging parties would not bundle the replication of CDs/DVDs with their distribution, that the merging parties would not require customers to sign exclusive contracts and that the merger would not result in more than the identified 23 merger-specific retrenchments. The merging parties have not appealed the Tribunal's decision.

The Commission **PROHIBITS** the **MERGER** between **JO JO Tanks Proprietary Limited (Jo Jo)** and **NEL Tanks Close Corporation (Nel Tanks)**

By Zanele Hadebe & Thabelo Masithulela

On 15 March 2016, the Commission prohibited a small merger whereby Jo Jo intended to acquire the operating assets and liabilities of the Nel Tanks business as a going concern. Nel Tanks is a family owned business controlled by the Nel Family Trust and is based in Blackheath in the Western Cape. Jo Jo is currently the largest manufacturer of polyethylene tanks in South Africa. Jo Jo has 7 manufacturing plants in most parts of the country. In addition, Jo Jo has 3 distribution depots in South Africa, situated in Cape Town, Mthatha and Port Elizabeth, respectively.

Jo Jo and Nel Tanks manufacture and supply a range of polyethylene tanks (vertical, horizontal, underground and septic) to their respective customers, e.g. agricultural co-ops/businesses and retail groups. The various types of polyethylene tanks produced by Jo Jo and Nel Tanks vary in shape, colour, size and are used for storing water for domestic use and other purposes. Polyethylene tanks are also used in numerous industries such as agricultural, oil/gas, chemicals and waste treatment for different purposes.

The Commission's investigation of the proposed transaction found that there was a horizontal overlap between Jo Jo and Nel Tanks in relation to the manufacture and supply of polyethylene tanks. Jo Jo and Nel Tanks are both manufacturers and suppliers of polyethylene tanks locally, i.e., Western Cape. The Commission noted that although Jo Jo and Nel Tanks sell other rotational moulded and/or custom moulding products, the polyethylene tanks (particularly, vertical water and horizontal transport tanks) were the main focus of their businesses. Jo Jo and Nel Tanks also compete on septic and underground tanks, but this is not their primary focus. Nel Tanks and Jo Jo sell their tanks to the Western Cape and other surrounding provinces such as Eastern Cape and Northern Cape. Given this, the Commission assessed the competition effects of the proposed transaction in the markets for the manufacture and supply of vertical water tanks and horizontal transport tanks in the Western Cape, or within a 300km-400km radius from the merging parties' operation in the Western Cape.

The Commission prohibited the merger based on a number of reasons. In particular, the Commission found the following:

- The merged entity will have the ability to increase prices post-merger because it will have market power and will not face significant competitive constraints post-merger in both markets.
- There are high barriers to entry in the polyethylene tanks market, in particular the Western Cape. The Commission's investigation revealed that Jo Jo is a well-known brand and it will be difficult for new and small players to penetrate the tank market and expand as they have to compete with a well-established brand. Further, Jo Jo has long standing relationships with its customers which include major retailers and agricultural co-ops. In addition, a new entrant will have to incur significant marketing costs to sell its products in the Western Cape.
- The bargaining power of some of the customers that came with playing off the two brands against each other will be lost as a result of the proposed merger. Therefore, the proposed merger weakens the ability of customers to bargain against the two largest players who are now merging.



- The merger removes an effective competitor and by so doing raises the level of concentration in an already fairly transparent market.
- The market appears to be structured in such a way that the merging parties focus largely on particular segments of the market whilst other players focus on other market segments.
- Further, the Commission is concerned that the proposed merger is likely to enhance the ability for firms to coordinate their activities in the broader Western Cape polyethylene tanks market. In addition, high entry barriers as well as the expected growth in demand in the market, given South Africa's current water shortage, is likely to further strengthen the likelihood of coordination not only in the Western Cape but also nationally.
- Lastly, the efficiencies the merging parties have claimed are in the Commission's view insufficient to outweigh any competition concerns that may arise as result of the proposed transaction. The Commission found that the efficiencies contemplated could be achieved through sourcing additional financial capital either through the financial sector or through agreements with other interested investors or buyers who present less harmful competitive outcomes.

The Commission also found that remedies proposed by the merging parties were insufficient to address the competition harm arising from the proposed transaction. As a result, the Commission prohibited the merger as it was likely to lead to a substantial prevention or lessening of competition in the markets for the manufacture and supply of vertical water tanks and horizontal transport tanks in the Western Cape, or within a 300km-400km radius of the merging parties' operations in the Western Cape.



THE COMMISSION APPROVES LIQUEFIED PETROLEUM GAS MERGER WITH CONDITIONS

By Ratshidaho Maphwanya

The Commission approved with conditions the acquisition by Totalgaz Southern Africa Proprietary Limited (Totalgaz) intended to acquire the Liquefied Petroleum Gas (LPG) storage, supply and distribution business carried on by Kaya Gas Proprietary Limited and certain assets associated therewith (Kaya Gas).

Totalgaz, is controlled by Total SA ("Total"), a public company incorporated in France and listed on the Paris, Brussels, London, and New York Stock Exchanges. Post-merger, the business of Kaya Gas would be wholly owned by Totalgaz.

Total is involved in many sectors of the oil industry, both upstream (hydrocarbon exploration, development and production) and downstream (refining, petrochemicals, specialty chemicals, trading and shipping of crude oil and petroleum products and marketing). In South Africa, Totalgaz is predominantly a single-product business which is concerned with the wholesale and re-sale of LPG, as well as services connected to this in South Africa, Botswana and Lesotho. Totalgaz distributes LPG in bulk and in cylinders, with cylinder sizes including 5 kg, 9 kg, 12 kg, 14 kg, 19 kg and 48 kg.

The Kaya Gas Business is a wholesaler, distributor and reseller of LPG products primarily in the Western Cape, but also to a lesser extent in Gauteng, the Eastern Cape and KwaZulu-Natal. Kaya Gas resells LPG in bulk and in cylinders, with cylinder sizes including 5 kg, 9 kg, 15 kg, 19 kg and 48 kg.

The Commission found that there was a horizontal overlap between the merging parties in the wholesale and resale of LPG in both bulk and cylinders. The activities of the merging parties overlap in the Western Cape with regards to the supply of LPG in both cylinders and bulk, in the Eastern Cape with regards to the supply of LPG in bulk, in Gauteng with regards to the supply of LPG in bulk and in KwaZulu-Natal with regards to the supply of LPG in bulk.

With regards to the geographic market, the Commission found that the market is likely to be largely provincial although there appeared to be cross province trade for bulk LPG between Western Cape and Eastern Cape. The Commission therefore settled on the following relevant markets:

- A market for the supply of LPG broadly in the Western Cape;
- A market for the supply of bulk LPG in the Western Cape and the Eastern Cape – the Southern region;
- A provincial market for the supply of cylinder LPG in the Western Cape;
- A provincial market for the supply of bulk LPG in the Gauteng Province;
- A provincial market for the supply of bulk LPG in KwaZulu-Natal; and
- A provincial market for the supply of cylinder LPG in the Western Cape.

The Commission found that Kaya Gas is a relatively small market player in each of the following markets: the supply of bulk LPG in the Southern region, the broad LPG market in the Western Cape, the supply of bulk LPG in Gauteng and the supply of bulk LPG in KwaZulu-Natal. Kaya Gas was a more significant player in the supply of cylinder LPG in the Western Cape. Although all the markets in question were fairly concentrated pre-merger, the cylinder LPG market in the Western Cape also exhibited a high change in HHI. Therefore, the Commission focused its analysis on this market.

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Although it appears that the merged entity would be the largest player in the cylinder LPG market in the Western Cape, the merged entity will continue to face competition from firms such as African Oxygen Limited (“Afrox”), Easigas (Pty) Ltd (“Easigas”) (and Reatile Gaz (Pty) Ltd (“Reatile”)) and Oryx Oil SA (“Oryx”). The Commission found it unlikely that the merged entity would be able to unilaterally increase prices in the cylinder market in the Western Cape. The fact that the retail price for cylinders is regulated would also serve to protect final consumers to a certain extent.

With regards to barriers to entry, the Commission found that these are influenced by the capital expenditure required to satisfy the scale of entry by an entrant. Successful entry is possible and the market has seen entry and expansion by players such as Wasaa Gasses (Pty) Ltd (“Wasaa”) and Kaya Gas in recent years. Therefore, the merger was unlikely to raise barriers to entry. The Commission found that cylinder customers also have some countervailing power as they would be able to more readily switch between suppliers in response to price increases especially since they are typically not bound by contracts.

Although the Commission did not define a separate market for 5kg cylinders, it considered this cylinder size because of the prominence of Kaya Gas in this cylinder size. The 5kg cylinder size introduces a certain level of differentiation between the wholesalers. For Kaya Gas specifically, this is made even more so by its unique and very broad distribution network. Ultimately, the Commission considered whether the merger would result in unilateral effects in the 5kg cylinders.

The Commission found that Totalgaz was Kaya Gas’ most prominent rival in the supply of LPG in 5kg cylinders in low income areas. The removal of Kaya Gas would allow Totalgaz to increase prices for the 5kg cylinders as it was unlikely to face substantial competition from the other wholesalers that do not have the same presence in this cylinder size.

With regards to coordinated effects, the Commission found that the cylinder LPG market in the Western Cape exhibits several characteristics that may facilitate coordination. It is a homogenous product market and is highly concentrated. The merger would increase the level of concentration while also introducing a certain degree of market share and business approach symmetry (by removing the most differentiated firm). The increased concentration and symmetry would likely facilitate tacit coordination.

The Commission also considered the public interest effect of Totalgaz not maintaining the Kaya Gas 5kg distribution network in the low-income areas in the Western Cape. The Commission found that a large number of the Kaya Gas 5 kg cylinder customers rely on Kaya Gas as their sole supplier as the other wholesalers are either unwilling or unable to supply into their locations. The smaller spaza shops were also found to rely a great deal on the LPG business with more than half of the spaza shops consulted by the Commission indicating that LPG constituted more than half of their revenue. If Totalgaz does not continue to supply these shops, they would likely exit the market which would be inconsistent with section 12A (3) (c) of the Act. The Commission found that the customers of the spaza shops were heavily reliant on the 5kg cylinders and hence would lose out on an important energy source if supply was not maintained at the same level. The Commission therefore found this to be against the public interest.

The Commission also considered the impact of the proposed transaction on the shareholding held by historically-disadvantaged individuals in the South African LPG industry. The merger would result in the dilution of ownership by historically disadvantaged South Africans in the LPG market. This represents a dilution of ownership by historically-disadvantaged South Africans in the South African LPG market which is against the purpose of the Act.

The Commission and the merging parties were able to reach agreement resulting in the merger being approved subject to conditions that addressed the concerns identified during the investigation.



MERGER between MTN AND Smart Village GETS conditional approval

By Grashum Mutizwa & Portia Bele

On 29 January 2016, the Commission approved with conditions a merger whereby Mobile Telephone Networks (Pty) Ltd (“MTN”) acquired Smart Village (Pty) Ltd (“Smart Village”). MTN is a global communications partner and cellular network operator. Smart Village is mainly active in providing fixed line fibre broadband access to the residential market.

The merger presented a horizontal overlap in relation to the provision of fixed-line broadband fibre optic access network as both parties deploy fibre in gated residential estates. Both parties also operate as Internet Service Providers and offer internet connectivity services to residential estates where fibre is deployed. The Commission found that each gated residential estate constitutes a distinct separate geographic market as gated residential estates generally do not permit the duplication of fibre infrastructure in the respective gated estates. In that regard, there was no geographic overlap arising in the assessed markets. Smart Village holds 100% of the market in each of the gated residential estates wherein it has laid the fibre, thus the merged entity would have monopoly power over each of the gated residential estates.

The Commission found that the vertical relationships arising from the merger would result in a substantial lessening and prevention of competition. The merged entity would acquire a position that would allow it the ability to exercise market power. This could be exercised through foreclosure strategies over its fibre infrastructure in the gated residential estates. In addition, the Commission found that the merged entity would have the incentives to do so as MTN is also able and intends to expand its downstream services offerings in the gated residential estates. Such foreclosure conduct would ultimately harm consumers in those estates where such conduct would be perpetuated and prices are unlikely to decline when there are no viable competitive choices. MTN would also be in a prime position to leverage market power on its fibre into downstream services such as internet connectivity, TV on demand services and security services through bundling strategies.

The Commission found that the input foreclosure strategy could be remedied through the imposition of conditions relating to open access model to the fibre infrastructure on fair, reasonable and non-discriminatory terms and having transparent and market related pricing. With an open access model, customers in gated residential estates would be afforded choice in terms of product and price offerings. The Commission was further of the view that as long as MTN’s ability to leverage its market power over fibre is curtailed by the adoption of an open access model on a non-discriminatory basis, other potential exclusionary strategies such as bundling are also unlikely to be achieved.

The Commission **IMPOSES** a **DIVESTITURE CONDITION** in the **MERGER** between **Afrimat and Cape Lime**

By Mogau Aphane & Lindiwe Khumalo

On 15 March 2016 the Commission approved with conditions an intermediate merger whereby Afrimat Limited (“Afrimat”) intended to acquire the entire issued share capital of Cape Lime (Pty) Ltd (“Cape Lime”). Post- merger, Cape Lime would become a wholly-owned subsidiary of Afrimat.

The Commission found that the proposed transaction raised a horizontal overlap between the activities of the merging parties in the supply of lime and lime products, aggregates for various applications and concrete ready-mix. Although the proposed transaction raised a horizontal overlap between the activities of the merging parties in respect of the production and supply of limestone, the Commission did not consider this market further as there was no geographic overlap between the activities of the merging parties. On the market for the supply of ready mix concrete the Commission found that it was unlikely that the merger would raise competition concerns.

In the market for the supply of aggregates within a 50 km radius which encompasses areas around Robertson, Western Cape, the Commission found that only the merging parties’ quarries were in operation being Kleurfloof and Langvlei. The investigation showed that there were no other suppliers of aggregates in the area. The Commission found that the proposed merger would result in a merger to monopoly within a 50 km radius of Robertson which raised competition concerns as there were no alternatives available to customers.

The Commission engaged the merging parties to find a way to ameliorate the concerns raised by the proposed transaction. To address the harm the Commission required Afrimat to divest its Kleurkloof’s quarry in Robertson to a new entrant. The Commission found that by divesting this business, the pre-merger scenario would be restored, post-merger. The divestiture was thus made a condition of the approval of the proposed transaction.

There were no public interest concerns likely to arise from the proposed transaction. The Commission therefore approved the proposed transaction subject to divestiture condition.

THE FINALISATION OF THE CONSTRUCTION FAST TRACK SETTLEMENT PROCESS

By Khomotso Hlongoane and Mehluli Nxumalo

BACKGROUND TO THE CONSTRUCTION SECTOR INVESTIGATION

The Commission initiated investigations into the construction sector in 2009 after receiving information that collusive tendering was pervasive in the sector. A large number of instances of collusive tendering were disclosed and in response the Commission developed the Construction Fast Track Settlement Process ("Fast Track Settlement"). In February 2011 the Commission issued the Invitation to firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act ("Invitation to Settle").

The Invitation to Settle required construction firms to disclose all conduct they had been involved in that contravened section 4 (1) (b) of the Competition Act 89 of 1998 ("the Act"). In accordance with the Commission's Corporate Leniency Policy, the first firm to come forward would be granted immunity. In accordance with the Commission's Corporate Leniency Policy, the first firm to come forward would be granted immunity and other firms that were willing to disclose their participation in cartel conduct were invited to settle in terms of the Fast Track Settlement.

In 2013, the Commission settled with 15 out of 21 firms that participated and were found liable under the Fast Track Settlement. The settlement agreements with these 15 firms were confirmed by the Tribunal in July 2013 and a combined administrative penalty of R 1.4 billion was levied against these firms. The confirmation by the Tribunal of the consent agreements with 15 construction firms completed the Fast Track Settlement.

PHASE TWO CONSTRUCTION SECTOR INVESTIGATION

The second phase of the construction sector investigation entailed the following:

- The investigation against 24 firms that did not participate at all in the Fast Track Settlement but were implicated in collusive tendering by other firms that participated;
- The investigation against 4 firms that participated under the Fast Track Settlement and settled for their contraventions pertaining to certain projects but declined to settle regarding certain projects wherein they were implicated; and
- The investigation against 2 firms that participated in the Fast Track Settlement but refused to settle for projects they themselves disclosed in their Fast Track Settlement applications.

Phase Two Construction Settlements

There were more settlements following this further investigative work in Phase Two of the construction investigation. The Commission settled with 9 firms, for a combined settlement penalty of R78 571 397.85.

Phase Two Construction Non Referrals

Non-referral notices¹ had to be issued against 14 firms for 21 projects. This includes 13 projects where further investigation did not yield sufficient evidence for referral. The Commission also found 7 projects where the firms whose conduct was in question had been liquidated and were no longer in business. In one case, evidence showed that the conduct had prescribed in terms of section 67(1) of the Act.

Table 1 below lists the firms that were issued with non-referral notices and also identifies the respective projects to which the notices relate

Table 1: firms issued with non-referral notices

No.	Firm	Projects
1.	Basil Read	<ul style="list-style-type: none">• Tati Nickle DMS Project• N17 between New Canada and Soccer (contractual conditions)• Sanral N17 Leandra/Leaven
2.	WBHO	<ul style="list-style-type: none">• Milkwood Development Marina Martinique PE• Lebone College
3.	Ludick Construction	<ul style="list-style-type: none">• Mooi River Mall Potchefstroom
4.	Adamson Nielson	<ul style="list-style-type: none">• Commercial Building in Mafikeng
5.	Wascon	<ul style="list-style-type: none">• N1 Parys
6.	Trencon	<ul style="list-style-type: none">• New Board Factory at Ugie
7.	Meyker	<ul style="list-style-type: none">• N1 Parys
8.	Rainbow Construction	<ul style="list-style-type: none">• Benmore Shopping Centre• New Distribution Depot(BATSA)• Nike House of Football
9.	GD Irons	<ul style="list-style-type: none">• Villa Mall
10.	Raubex	<ul style="list-style-type: none">• Sanral N17 Leandra/Leaven• Colesburg Springfontein
11.	Futura	<ul style="list-style-type: none">• Nike House of Football
12.	Granbuild	<ul style="list-style-type: none">• Bokomo
13.	Group Five	<ul style="list-style-type: none">• New Sendzimir• Tamboti
14.	Edilcon	<ul style="list-style-type: none">• Sunninghill project

¹ The Fast Track Settlement invited firms that were willing to disclose their participation in cartel conduct to settle.

Phase Two Construction Referrals

The Commission's further investigative work in Phase 2 also presented cases in which there was sufficient evidence for referral to the Tribunal. The firms concerned declined to settle with the Commission. In total, 12 firms were the subjects of referrals for collusive tendering in respect of 18 construction projects. These matters are at various stages of on-going litigation. The table below lists these firms and the respective projects

Table 2: Firms facing prosecution

No.	Firm	Projects
1.	Edilcon Construction (Pty) Ltd	<ul style="list-style-type: none"> BATSA New Warehouse Elvira Rota Mercedes Benz Centurion Mall VW
2.	GD Irons (Pty) Ltd	<ul style="list-style-type: none"> BATSA
3.	Isipani	<ul style="list-style-type: none"> Tienie Louw Stellenbosch University
4.	Delatoy Investment (Pty) Ltd (Shearwater)	<ul style="list-style-type: none"> Thabazimbi Pipeline
5.	Power Construction	<ul style="list-style-type: none"> N1 Touws River to Laingsburg
6.	Afristruct Project (Pty) Ltd	<ul style="list-style-type: none"> New Tapping Fume
7.	Giuricich Coastal projects (Pty) Ltd	<ul style="list-style-type: none"> Mondi Reel
8.	Group Five	<ul style="list-style-type: none"> Senekal to Vaalpenspruit
9.	GVK	<ul style="list-style-type: none"> Cape Gate Tygervalley Construction Akila Trading
10.	Group Five WBHO Stefanutti Basil Read	<ul style="list-style-type: none"> World Cup Stadia
11.	WBHO	<ul style="list-style-type: none"> N17 between New Canada and Soccer City (contractual conditions)

CONSENT AGREEMENTS

Arising out of the Fast Track Settlement, certain affected parties requested information for the purposes, amongst others, of instituting civil actions for damages against the construction firms and independent investigations for contravention of other legislation.

The requested information could be availed in respect of matters where the firms disclosing prohibited conduct entered into Conditional Immunity Agreements ("CIA") with the Commission and all implicated parties had settled with the Commission. Based on these CIAs the Commission has entered into seven consent agreements which have been confirmed by the Tribunal. Three consent agreements have not been executed. Referrals have been filed seeking declarators of the prohibited conduct in respect of two firms.

CONCLUSION

The course of the Fast Track Settlement Process required the forging of new paths where none had existed before. This is in regard to processes, where an invitation of the kind employed was the first of its kind in South African competition law enforcement. The scope of the investigation was also of an unprecedented size. The construction projects subject to the investigation were estimated to be valued at R47 billion of which an approximate R27 billion was comprised by projects paid for out of the public purse.

The litigation arising out of the Fast Track Settlement is also raising questions whose deliberation will lead to greater clarity and consistency in the body of South Africa's competition law. The biggest outcome of the Fast Track Settlement must however be the actual impact of the entire project on the economy of South Africa. The construction sector is large and of strategic importance in the South African economy.

Where market participants have, previously, tendered collusively with impunity in the construction sector, we are encouraged that this is no longer the case. The success of the Fast Track Settlement in bringing the financial consequences of cartel conduct to bear on shareholders is responsible for this. There is confidence moreover, that the recent criminalisation of cartel conduct will cause firms and their officers to walk even closer to the right side of the law in the future.





Significance of DAWN RAIDS- A sharp INVESTIGATION TOOL often used these days

By Katlego Monareng

Introduction

An investigation into an alleged prohibited practice (collusion in this context) starts when the Competition Commissioner initiates a complaint or a third party submits a complaint in terms of section 49B of the Competition Act, 89 of 1998 as amended (the Act). After a complaint is initiated or submitted, the Competition Commission (Commission) may use any of the investigative tools provided for in the Act in order to secure evidence of collusion, such as summoning of information, interrogation of individuals and, of course, dawn raids.

Entry and search provisions in the Act empower the Commission to apply for a search warrant to enter and search any premises where there are reasonable grounds to believe that a prohibited practice has taken place, is taking place, or is likely to place;¹ or anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.²

Dawn raid as an investigative tool

The Commission until recently relied on other investigative tools to gather evidence of collusion. Summons and information request letters were preferred over dawn raids because the invasive nature of dawn raids meant that the Commission needed to develop processes for handling of evidence and for safeguarding business and individual rights in order to preserve the integrity of this tool. The Commission has begun to utilise dawn raids as one of its most effective tools to secure evidence of collusion. Dawn raids provide the Commission with a rare once-off opportunity to secure all relevant evidence of collusion without relying on what is provided, on request, by the party being investigated. Dawn raids are therefore important because they deny the firms under investigation an opportunity to manage the kind of information they wish to disclose to the Commission. It is therefore of utmost importance that investigators who are part of a dawn raid use the opportunity to search diligently and seize only relevant documents that would ensure a successful referral.

Post 1 May 2016, now that cartel conduct is criminalised, dawn raids have become even more important as a tool to secure evidence of collusion. Summons and information request approach will become less effective because directors or

people who, either by their actions or acquiescence, involved their firms in collusive conduct will be reluctant to provide information about the cartel conduct that exposes them to a criminal investigation.

The Commission's experience with dawn raids is that they are effective in curtailing what would otherwise be a long and costly investigation and prosecution process. In the fats and oil investigation, certain firms decided not to submit information to the Commission when summonses and information requests were issued. However, when the Commission decided to conduct a search and seizure operation at the premises of Unilever South Africa (Pty) Ltd and Sime Darby Hudson Knight (Pty) Ltd (Sime Darby) in 2014 evidence of collusion was uncovered. This resulted in a settlement agreement concluded between Sime Darby and the Commission.³ This underscores the importance and successes of dawn raids in cutting to the chase.

Dawn raid as a compliance tool

The more dawn raids the Commission conducts, the more it instils vigilance and a culture of compliance in the minds of some corporates. Vigilance is beneficial if it leads to compliance due to the effects of the fear of being caught, discouraging some of the firms from engaging in cartel activities. However, the fear of being caught may also incentivise the firms to become cleverer in the manner in which they collude and keep documents because of the benefits accruing from a cartelised market. Dawn raids are also an important tool that aids the corporate leniency policy in catching and dismantling cartels.

Five dawn raids conducted in the previous financial year

Last year, the Commission conducted five dawn raids. All these raids were conducted successfully at the premises of the respondents without any legal challenges. The first raid was in the market for the provision of job placement advertisement. This raid was conducted at the premises of Human Communications (Pty) Ltd (Human Communications), Kone Staffing Solutions (Pty) Ltd (Kone Staffing) and Jobvest (Pty) Ltd. These firms are located at the same premises. One director at Human Communications is also a director at Kone Staffing. The firms are alleged to have been involved in price

¹ Section 46(1)(a) of the Act.

² Section 46 (1)(b) of the Act.

³ The consent agreement was made an order of the Tribunal in 2014.

fixing, market division and collusive tendering by agreeing on tender prices, allocating and rotating customers among themselves. In light of the relationship between the three firms, the Commission considered a dawn raid as the only means by which it could secure evidence from the three firms. It would not have made sense, from an investigation point of view, to proceed in any other way than by search and seizure. Most of these firms' clients are government departments, municipalities and state owned enterprises. This investigation is still ongoing.

The second raid was conducted on 30 September 2015 in the market for the provision of furniture removal services, at the premises of Stuttaford Van Lines (Pty) Ltd (Stuttaford), Pickfords Removals (Pty) Ltd (Pickfords), Cape Express Removals (Pty) Ltd (Cape Express) and Afriworld 142 (Pty) Ltd (Afriworld). Stuttaford and Pickfords are part of Laser Group Transport (Pty) Ltd, which is by far the largest firm in the furniture removal sector. In respect of Stuttaford and Pickfords, the Commission raided their offices in Port Elizabeth and Bloemfontein respectively. This raid was a second raid in the furniture removal sector, especially for Cape Express because the Commission raided them in November 2010. This is an indication of how entrenched collusion is in certain sectors of our economy.

The Commission became aware that the conduct of cover pricing⁴ is widespread in the furniture removal sector and that most of the removal firms continued to collude despite having settled with the Commission or being aware that they are being investigated. Like with the Job advertisement case, this cartel conduct mainly affected the public purse because most of their client are government organisations including South African National Defence Force, Department of International Relations, South African Police Services and Department of Health, causing government to pay more for these services than would have been the case in a competitive market. This investigation is still ongoing.

The third dawn raid was successfully conducted on 14 October 2015 at the premises of African Oxygen Limited, Oryx Oil South Africa (Pty) Ltd, KayaGas (Pty) Ltd, EasiGas (Pty) Ltd, Totalgaz Southern Africa and Liquefied Petroleum Safety Gas Association of Southern Africa (LPG Association). Save for the LPG Association, these firms are active in the market for the supply of Liquefied Petroleum Gas (LPG). The conduct relates to fixing of a deposit fee for LPG cylinders in that the firms are alleged to have agreed to increase a cylinder deposit fee from R150 to R300.

Whilst at the premises of one of the firms, the Commission became aware that these firms may be using the South African Petroleum Industry Association (SAPIA) as a platform for collusion. In light of this information, the Commission executed a warrantless search at the premises of SAPIA.

The Commission sought permission in terms of section 47(2) (a) of the Act to enter and search SAPIA premises. Permission was duly granted. However, even if permission was not granted, the Commission would have still executed a warrantless search in terms of section 47(2)(b) of the Act. This warrantless search underscores the importance of dawn raids. This investigation is still ongoing.

The fourth raid was conducted on 23 March 2016 at the premises of automotive glass suppliers and their connected companies, namely: PG Glass, Glasfit, Shatterprufe and Digicall. PG Glass and Glasfit are automotive glass fitment and repair providers. Shatterprufe, which is part of PG Glass Group, supplies PG Glass and Glasfit with automotive glass. Digicall, which is owned by Glasfit processes and administers automotive glass related insurance claims on behalf of PG Glass and Glasfit. The investigation relates to possible collusion and price fixing in the automotive glass market. The Commission suspects that Digicall is being used as a platform for collusion and as a monitoring system of the alleged collusion. Further, that the supplier/customer relationship between PG Glass group and Glasfit may also be exploited for collusion. The investigation into this matter is still ongoing.

The Commission closed the 2015/2016 financial year with a dawn raid at the premises of PG Bison Ltd and Sonae Novobord (Pty) Ltd. These respondents are active in the market for the production and supply of particleboard and Medium Density Fireboard (MDF). Particleboard and MDF are wooden products that are used in a variety of applications which include the manufacture of home and office furniture, kitchens, built in cupboards, coffins, shop fittings, case goods, doors, picture framing, shelving, DIY applications, packaging, cladding, flooring and ceilings. The respondents were investigated for collusion in the past and the case was non-referred. The Commission decided to employ search and seizure operation this time as the best method to secure evidence of collusion.

Conclusion

All the five raids conducted in the previous financial year were in markets that are a priority to the Commission and the developmental agenda of the state. These complex cases would not be easily resolved through summons and interrogations. The Commission needed to use its search and seizure powers as a best suited tool in the circumstances to secure evidence that will lead to successful referrals and ultimately opening up markets for new entrants, providing consumers with competitive prices and product choices. Dawn raids remain a sharp tool for the Commission in its mission to make a contribution towards a growing and inclusive economy.

⁴ A cover price means generally, a price that is provided by a firm that wishes to win a tender to a firm that does not wish to do so, in order that the firm that does not wish to win the tender may submit a higher price; or alternatively a price that is provided by a firm that does not wish to win a tender to a firm that does wish to win that tender in order that the firm that wishes to win the tender may submit a lower price.

The Salient Findings of the **TRIBUNAL** on the Production of Documents

By Mfundo Ngobese and Mehluli Nxumalo



The Competition Tribunal offered a well-defined position on the question that arises regarding the production of documents, in its reasons for the *Competition Commission v Group Five and Two Others* decision (CR229Mar15/DSC124Sep15). An important legal issue is raised in this matter, relating to the process that must be followed in all referral proceedings and whether certain tactical positions shall be available defences for respondents.

This was an interlocutory application to compel the production of documents, brought by a respondent, namely Group Five, who had not filed an answering affidavit to a referral by the Commission. Group Five relied on High Court Rules 35 (12) and (14) as well as on Commission Rule 15 as basis for seeking production of documents.

The Supreme Court of Appeal found in *Competition Commission v Arcelormittal* (SA 538 (SCA)) that a respondent could request production of documents before close of pleadings if the requirements of High Court Rule 35(12) are met. In this regard there should be a reference to the identified document in the complaint referral finding affidavit in respect of which an answering affidavit is to be filed.

In the Group Five matter, the Tribunal found, that the Commission did not make sufficient mention of the requested documents in its referral. In the result, no recourse to High Court Rule 35 (12) existed. Little was made of the High Court Rule 35(14) argument by either the parties or the Tribunal.

On Commission Rule 15, the Tribunal found that while the SCA held in *Arcelormittal* case that a respondent is entitled to the production of documents, it left open the question of when this entitlement arose especially when the matter is being litigated.

This is the crux of the matter on which the Tribunal had to rule on in the Group Five matter. The parties did not dispute that the entitlement claimed by the Respondents to documents would arise when the Commission refers a complaint to the Tribunal. However, they disagreed on when documents should be produced if the matter is being litigated. The Commission maintained that the production may only occur after the close of pleadings, on discovery in the ordinary course. Group Five, however, contended that the production should occur arises upon application by a respondent or any other person, whether or not the pleadings have closed.

The language of premature discovery was used in this circumstance by counsel for the Commission. This strips the matter to its bare essentials and hints at a broader challenge that is sometimes faced by the Competition Authorities when respondents seek the selective application of ordinary court procedures to suit their specific needs in a given matter.

In this regard, respondents may seek to use the discretion that is vested with the Tribunal on how to organise its process in order to selectively introduce or employ procedure which are beneficial to their course.

In pursuit of their course, and presumably on the advice their legal representatives, of these firms choose to ignore possible consequences that may be visited upon them if their interpretation is found to have been spurious. This places a respondent firm in the invidious position where, if it declines or delays filing its answering affidavit to a referral, it may face default judgment proceedings. This is the course of events that unfolded in the Group Five matter.

After hearing arguments from both sides, the Tribunal reasoned that Group Five is not entitled to the production of documents outside of the normal procedure of discovery. There is a known procedure that must be followed for discovery and the attempt to subvert this procedure by putting up subjective interpretations of the rules could not be permitted.

In particular, the Tribunal stated that the entitlement to documents that arises by operation of Commission Rule 15 is “a right of access to a record held by a public body” which should not be conflated with “a right of access by a litigant to use to compel early discovery from another litigant in this case the Commission”.

The absence of a time guideline for the production of documents under Commission Rule 15 provides further support for making the timing of production of documents in terms of this Rule subject to the process of litigation. When litigation has commenced time periods are normally provided for the exchange of legal processes, yet there is no time period that attaches to Commission Rule 15. This leaves open the interpretation of the time period contemplated for this rule and, as the Tribunal reasoned, it would be the typical understanding that a “reasonable” time must be read into the Commission rule.

This led the Tribunal to the conclusion that the timelines already set out for discovery, in litigation before the Tribunal, constitute the reasonable time that is required for production of documents when litigation has commenced. Therefore, this rule in question will be applied correctly if the obligation to produce documents is understood to coincide with the already existing process of discovery.

It is, in the end, the function of adjudicatory bodies such as the Competition Tribunal to adjudicate on disputes, even where such disputes are contrivances necessitated by skilful defensive legal practice. However, one can only appeal to the professional conscience of the legal representatives of firms that they should not pursue far-fetched interpretations in the name of protection of their clients’ rights. Bringing spurious challenges may ultimately not advance the interests of their clients both in terms of costs and the risks of findings being made against them.

It is by well-founded challenges that the law develops as contentious issues shall be ventilated and the rulings on them shall provide authoritative directions on what course shall be followed in future matters.

SCREENING TRENDS -

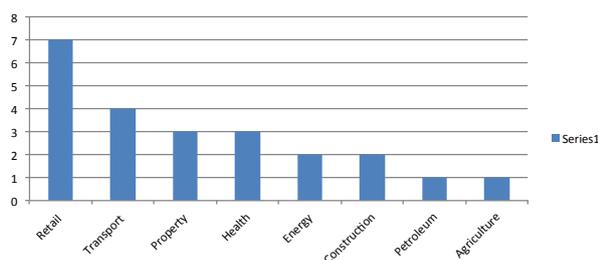
for the last half of the 2015/16 financial year

By Shadrack Rambau



The Commission received about 79 complaints in the second half of the 2015/16 financial year. The number of complaints received during this period is 2% less than complaints received in the first half of the year (the Commission received about 81 complaints). Figure 1 below set out a list of top eight (8) sectors where most of the complaints received the Commission in the second half of the year originated. The vertical axis indicates the number of complaints received while the horizontal axis indicates the sectors

Figure 1: Top eight (8) sectors where the Commission received most of its complaints between 01 October 2015 and 31 March 2016



Whilst the number of complaints received by the Commission in the second half of the 2015/16 financial year originates from various sectors; the retail sector continues to lead the pack. The Commission received a total of seven (7) complaints from the retail sector in the second half of the financial year. This represents 28% increase as compared to five (5) complaints which were filed in the first half of the year. Most of the complaints filed in the retail sector were in relation to long-term exclusive lease agreements (“the exclusive agreements”) concluded between landlords of various shopping centers and malls; and what is referred to in the retail sector as “anchor tenants”. The exclusive agreements prevent new tenants from occupying rental spaces in competition with the incumbents in a number of shopping centers and malls across the country.

It should however be noted that although the retail sector is not one of the priority sectors of the Commission, the issue of exclusive agreements remains a significant concern for the Commission. It is on this basis that the Commission has in the past year decided to establish the Retail Market Inquiry to specifically deal with issues arising from these exclusive agreements. Most of the complaints received by the Commission remain open pending the finalization of the market enquiry.

In the same period, the Commission received complaints from other sectors of the economy, including transport, property, health, energy, construction and petroleum. In the transport sector for instance, most of the complaints received by the Commission were in relation to excessive pricing and inducement of travel agents in the airline industry. The Commission also received a complaint from meter taxis against Uber for unfair competition in the market. In the property sector, the Commission received a number of complaints by estate agents against home owner associations. In particular, the complaints relate to the use of sole mandate thereby not allowing homeowners the opportunity to have the sale of their properties managed by an agent of their choice. Further most of the concerns that were raised in the health sector are being deal with by the Healthcare Market Inquiry.

Lastly, a noticeable change in the second half of the 2015/16 financial year is a significant drop in the number of complaints received by the Commission in the construction sector. The number of complaints received by the Commission in the second half of the year in the construction sector has plunged by about 83%, from a total of twelve (12) complaints in the first half of the year to just about two (2) complaints in the second half. This could be attributed to the fact that the Commission has committed a lot of resources in the past few years in dismantling cartels in this sector in order to ensure competitive prices for input materials such as cement, steel, bricks, aggregates and other services related to the sector.

THE COMMISSION takes a TOUGH STANCE AGAINST THE CBE EXEMPTION APPLICATIONS

Mbongiseni Ndlovu, Ronald Rateiwa and Shadrack Rambau



Introduction

The construction sector is one of the priority sectors for the Competition Commission (“the Commission”) because of its potential for employment creation and impact on the economy. In this regard, the Commission has committed a lot of resources in the past few years in dismantling cartels in the sector in order to ensure competitive prices for input materials such as cement, steel, bricks, aggregates and other services related to the sector. It is along this breath that, over the period between December 2015 and February 2016, the Commission has rejected two categories of exemption applications filed by professional councils under the Council for the Built Environment (“the CBE”).

The first category of the exemption applications relates to the Identification of Work (“the IDOW rules”). The second category of the exemption applications relates to the publication of the fee guidelines by each respective professional council. The professional councils concerned are the following: the Engineering Council of South Africa (“ECSA”), the South African Council for the Project and Construction Management Professions (“SACPCMP”), the South African Council for the Landscape Architectural Profession (“SACLAP”), the South African Council for Property Valuers Profession (“SACPVP”), the South African Council for the Architectural Profession (“SACAP”) and the Council for the Quantity Surveying Profession (“SACQSP”).

¹ However, it has to be noted that SACAP’s IDOW rules exemption application is yet to be decided upon by the Commission.

In filing their exemption applications, the professional councils argued that the IDOW rules and publication of the fee guidelines are (1) necessary to maintain professional standards or the ordinary function of the professions; and (2) are provided for in the legislation of each of the aforementioned professional councils. In addition, they also submitted that granting the exemption applications will protect the general public against financial, health and safety risks.

We briefly review some of the Commission's reasons for rejecting the two categories of exemption applications below.

1. IDOW rules

The investigation by the Commission found that the IDOW rules proposed by the CBE and its professional councils, in their current form, are likely to harm competition by restricting competition between registered and unregistered persons. Once the IDOW rules are implemented, unregistered persons will not be allowed to undertake work reserved in terms of the IDOW rules. Further the IDOW rules create categories of registration and allocate work to these categories. Once implemented, the IDOW rules will also not allow persons registered in a specific category to undertake work outside their category of registration. The above restrictions are regardless of the academic qualifications, practical experience and skills acquired by the persons.

It is the view of the Commission that the restrictions imposed by the IDOW rules will reduce the number of persons operating in the relevant market, and thus push prices up. By controlling the quantity supplied, the CBE councils will become a virtual monopoly in the provision of professional services in the built environment. The implication of such a conduct is that consumer surplus is transferred to producers, which will likely result in the reduction in social welfare.

Furthermore, the Commission found that there are already existing regulations in the built environment designed to cater for public health, safety and financial risks. Such regulations include for example, The Occupational Health and Safety Act 85 of 1993, The National Building Regulations and Building Standards Act 103 of 1977, the Mine Health and Safety Act 29 of 1996 in the Mining Engineering sector and the OHS - Electrical Installation Regulations 2920 of 2005 in the Electrical Engineering sector. Investigation also revealed that there are other municipal approval and monitoring systems in place. In this regard, the CBE and its professional councils were not able to adequately explain to the Commission the deficiencies of these regulations and the need for a new

body of regulations in the form of IDOW rules. Lastly, the Commission could not comprehend why the South African built environment would require such a stringent form of regulation compared to other countries to deal with risks emanating from incompetency or underperformance by persons operating in the built environment.

Thus, on the basis of the above, the Commission decided to reject the IDOW rules exemption application.

2. Fee Guidelines

In arriving at its decision to reject the fee guidelines exemption application, the Commission relied primarily on the following three key findings:

Firstly, the Commission's analysis of the published fee guidelines revealed that professional fees of different professional councils have increased on average by more than 10% per annum. For example, between 2006 and 2012, the professional fees charged by some of the CBE councils increased by between 16% and 20%. This appears not to be reflective of market forces, particularly during the period of economic slow-down.

Secondly, the structure of the professional fee guidelines is retrogressive, in the sense that fees charged by the persons operating in the built environment are higher for smaller projects and much lower for bigger projects. Such a structure of fee guidelines appears to be detrimental to consumers who are doing smaller projects. Thus, the conduct defies the logic of regulatory economics which endeavors to correct market failures such as the exploitation of smaller consumers who do not have much bargaining power.

Lastly, a review of international best practices in respect of the provision of the fee guidelines for the various professions that fall under the building industry revealed that most jurisdictions are doing away with the publication of fee guidelines. One of the major reasons cited for not using fee guidelines in these jurisdictions is the need for price competition to improve efficiencies in the built environment professions.

Conclusion

Thus, the Commission rejected both the IDOW rules and fee guidelines exemption applications because their implementation would increase the cost of providing the built environment services, which are an important input in the sector.

CIVIL CLAIMS BY THIRD PARTIES BASED ON CARTEL CONDUCT

By Layne Quilliam



On 4 November 2015, the Supreme Court of Appeal (“**SCA**”) delivered its decision on whether third parties could sue Premier Foods (Pty) Ltd (“**Premier**”) for damages that they had allegedly suffered as a result of Premier’s collusive conduct.

Premier had previously informed the Commission of its collusive conduct with other bread producers, which included the fixing of prices in contravention of section 4(1)(b)(i) of the Competition Act 89 of 1998 (“**Act**”). For reporting its collusive conduct, Premier received immunity from a fine in terms of the Commission’s Corporate Leniency Policy (“**CLP**”).

The Commission investigated the matter and ultimately referred its findings of collusive conduct by bread producers to the Competition Tribunal (“**Tribunal**”) for adjudication. Although Premier was called as a witness, it was not cited in the referral and no relief was sought against it because of the Commission’s policy at the time. When the Tribunal gave its decision, it declared Premier’s conduct to be a prohibited practice in terms of the Act.

In terms of section 65(6) of the Act, third parties require a certificate from the Tribunal confirming that a specific firm had performed a prohibited practice in terms of the Act. This certificate allows the party to institute a claim for damages in the High Court based on the Tribunal’s finding.

The SCA found that the Tribunal was not able to make a finding that Premier had contravened the Act as it was not cited as a respondent and that such relief was not sought against it. As a result, the Tribunal was not able to certify a finding of collusive conduct against Premier. In effect, this prevented third parties from claiming damages against Premier.

Notwithstanding this finding, the SCA did mention that it saw

no impediment against a leniency applicant being found to have contravened the Act, even where no penalty is sought against it.

The Commission filed an appeal with the Constitutional Court but subsequently withdrew its appeal as the matter had been settled by the representatives of the claimants and Premier.

During the Construction Industry Fast-Track Settlement Process, there were a number of firms that had received immunity in terms of the Construction Industry Fast-Track Process. In certain cases the Commission had finalised its case against all other respondents. This meant that the leniency applicant was the only remaining firm that had not had its collusive conduct confirmed by the Tribunal.

With this in mind, the Commission decided to confirm the collusive conduct of such leniency applicants through consent agreements in order to safeguard and preserve the rights of third parties to claim civil damages against leniency applicants. Once confirmed by the Tribunal, third parties are able to seek damages in the High Court against these firms that had received immunity in terms of the CLP.

The purpose of the CLP is to incentivise participants in a cartel to break ranks in exchange for the Commission not seeking an administrative penalty against them, but not to take away the rights of third parties to institute claims for civil damages against the leniency applicants.

A number of such consent agreements have now been confirmed by the Tribunal, such as CC / Basil Read Holdings Limited (CO165Oct15) and CC / Stefanutti Stocks Holdings Limited (017038), CC/Vlaming (Pty) Ltd (020313), CC/JT Ross (Pty) Ltd (020289), CC/Giurich Bros Construction (Pty) Ltd (020271), CC/G Liviero and Sons Building (Pty) Ltd (020263).

THE COMMISSION FINALISES THE PROSECUTION OF THE CYCLING CARTEL

Ngoako Moropene

This matter concerns the Complaint that was referred by the Competition Commission (“the Commission”) in terms of section 50(1) of the Competition Act no. 89 of 1998, as amended (“the Act), against 20 respondents who are either wholesalers or retailers of bicycles and/or bicycle accessories.¹

According to the complaint, Coolheat Cycles Agencies (Pty) Ltd (“Coolheat”), Omnico (Pty) Ltd (“Omnico”) and 18 Other respondents are alleged to have contravened section 4(1)(b)(i) of the Act, in that whilst being competitors in the market for the supply and delivery of bicycles and bicycles accessories, they agreed, alternatively engaged in a concerted practice to directly or indirectly fix prices or other trading conditions by utilizing a Recommended Retail Price (“RRP”) as the mechanism by which downstream prices and margins of bicycles and bicycles accessories could be increased from 1 October 2008 onwards. The respondents’ conduct resulted from the meeting which was held on 10 September 2008 (“the September meeting”) between the bicycles wholesalers and bicycles retailers in the cycling industry.

According to the minutes of the September meeting, the following key issues were discussed;

- Increasing gross margins by increasing mark-ups for cycling accessories from 50% to 75%, and for bicycles from 35% to 50%;
- A proposed time for the price increase (as from the 1st October 2008);
- Getting rid of discounting and of shops undercutting each other; and
- Getting wholesalers to provide higher recommended retail prices (“RRPs”) to the retailers and advertise these prices to the public.

Based on this information, the Commission initiated a complaint in terms of section 49B (1) of the Act against 20 respondents which comprised of bicycles wholesalers and bicycles retailers.² Prior to the hearing of this matter, the Commission concluded settlement agreements with six (6) respondent wholesalers and eleven (11) respondent retailers. These respondents agreed to settle the matter based on the following terms:



- They admitted to have contravened section 4(1)(b)(i) of the Act;
- Agreed to conclude settlement agreement without payment of an administrative penalty;
- Undertook to cooperate fully with the Commission in relation to the prosecution of any other respondents who are the subject of the Complaint Referral;
- Undertook to desist from engaging in the conduct complained of;
- Agreed that they will in future refrain from participating in meeting(s) aimed at engaging in a cartel conduct which may lead to a possible contravention of section 4(1)(b) of the Act;
- Agreed to testify before the Tribunal to such conduct forming the factual basis of the Commission’s Complaint Referral; and
- Agreed that their employees, management, directors and agents will attend competition law compliance training programme incorporating corporate governance provided by the Commission.

The settlement agreements were concluded and confirmed as the order of the Tribunal. In addition thereto, the Commission withdrew the complaint against Fritz Pienaar Cycles (Pty) Ltd (“FPC”) due to the fact that the firm was liquidated. However, Mr Fritz Pienaar (“Mr Pienaar”) who was the Managing Director of FPC tendered an undertaking to testify as the Commission’s witness during the Tribunal proceedings.

Both Omnico and Coolheat are the remaining respondents who have pursued the matter before the Tribunal and are the subject of the Tribunal’s Order. This matter was heard before the Tribunal from 18 to 21 May 2015, and closing arguments were heard on 17 July 2015 whereas closing arguments in relation to the administrative penalty were heard on 9 September 2015.

¹ The complaint was referred against 20 respondents which involves a number of bicycle wholesalers and bicycles retailers.

² The initial complaint was initiated on 5 March 2009 and amended to include other respondents on 12 May 2009, and was ultimately withdrawn on 10 June 2011. Subsequent thereto, a new complaint was initiated afresh on 18 July 2011 and this is the complaint that was heard before the Tribunal on merits and decided on 30 May 2016.

Exception Applications

Prior to the matter being heard before the Tribunal, the Commission was embroiled with a number of exception applications which sought to dismiss the Commission's Complaint Referral. In the first instance, the Commission received exception applications from Omnico, Bowman Cycles (Pty) Ltd ("Bowman"), Coolheat, Cytek Cycles Distributors CC ("Cytek"), and Pedaling Dynamics CC ("Pedaling Dynamics"). Both Bowman and Pedaling Dynamics opted not to proceed with their exception application before the Tribunal, as they were optimistic that they will ultimately settle the matter with the Commission. As a result, Omnico, Coolheat and Cytek proceeded with their exception applications before the Tribunal. The Tribunal partly granted exception applications and ordered the Commission to file a supplementary affidavit setting out further particularities explaining what facts the Commission relied on to assert that the wholesalers (which includes amongst others, the excipients) have contravened section 4(1)(b)(i) of the Act. In addition, the Tribunal ordered the Commission that, to the extent that it alleges that there was an agreement or concerted practice between wholesalers, the Commission must give further particulars to that effect.

On 14 May 2013, the Commission filed its supplementary affidavit in order to address the issues raised in the Tribunal's Order. Subsequent, Coolheat filed a second exception application against the Commission's supplementary affidavit seeking to dismiss the Commission's supplementary affidavit and the Commission's Complaint Referral. In February 2014, the Tribunal dismissed Coolheat's second exception application.

Tribunal's Decision

As already indicated above, Omnico and Coolheat are the remaining respondents to this matter and are the subjects of the Tribunal Order. On 30 May 2015, the Tribunal issued out an order and reasons in terms of which it was found that both Omnico and Coolheat had engaged in a conduct to directly or indirectly fix prices and/or trading conditions of bicycles and bicycle accessories in contravention of section 4(1)(b)(i) of the Act.

The Tribunal found that, both Omnico and Coolheat had together with other bicycles wholesalers participated in the September meeting in terms of which they discussed and agreed to increase their mark-ups on wholesale prices for bicycles and bicycle accessories. The increases were to be achieved by increasing the RRP's to allow more margin for retailers off the higher RRP and that was to be implemented on 1 October 2008. It also found that Omnico and Coolheat have contravened the Act simply because they have not distanced themselves from what was discussed and agreed during the September meeting.

The Tribunal imposed an administrative penalty in the amount of R 4 627 412 against Omnico. It further ordered Omnico to pay 50% of the administrative penalty within 60 days of the date of the order and the remaining balance within 60 days of the first payment. In addition, the Tribunal imposed an administrative penalty in the amount of R4 250 612 (Four Million Two Hundred and Fifty Thousand Six Hundred and Twelve Rand) against Coolheat. It further ordered Coolheat to pay 50% of the administrative penalty within 60 days of the date of the order and the remaining balance within 60 days from the first payment.

In determining the penalties, the Tribunal took into account some mitigating factors raised by Omnico, and no mitigating factors were raised and taken into account with respect to Coolheat as it elected not to present evidence during the Tribunal's proceedings relating to administrative penalty arguments.

Implications and lessons from the Tribunal's decision

The lessons drawn from this matter is that, where the wholesalers meet amongst themselves whether in the presence of the retailers or not, in terms of which they discuss how they will increase their RRP prices to be applied to the retailers, that conduct will amount to a cartel conduct in the upstream level between wholesalers and ultimately contravene section 4(1)(b) of the Act.

The implications of this decision are that, when faced with the situation where the wholesalers meet or discuss how to increase their prices or RRP's whether in the presence of retailers or not, the Commission will have to determine whether or not the wholesalers met as competitors to discuss how to increase RRP's. If the findings are in the affirmative, then the Commission can prosecute the wholesalers under section 4(1)(b) of the Act. In a nutshell, the decision would discourage wholesalers who may think that because of being in a vertical relationship with the retailers, they can simply avail themselves to the meetings requested by retailers and discuss how to increase their RRP prices and when to implement such increases without facing any reprisal for engaging in a cartel conduct.

According to this decision, whether the prices increased are the wholesalers' RRP's or not, the fact that the bicycle wholesalers have met as the competitors to discuss how to increase their RRP's in the meeting will not exonerate the wholesalers from being prosecuted for contravening section 4(1)(b) of the Act.

The Tribunal also opined that were the competitors meet to engage in a cartel conduct, the party which does not want to be implicated has the duty to distance himself from the conduct rather than to be passive and expect that his passive participation will be harmless.

Broadly, what the order entails is that although ordinarily the recommended retail prices may fall squarely under section 5(2). Under different circumstances such as this case, competing firms or wholesalers can still be found to have contravened section 4(1)(b) of the Act, particularly in instances where the implicated firms or wholesalers meets as competitors and discuss or engage in communication which amounts to a collusive conduct.

Conclusion

The Commission believes that the administrative penalties imposed against Coolheat and Omnico by the Tribunal will send a strong message that the Commission is serious about busting cartel behavior in any market regardless of the size of the implicated firms (whether big or small). Additionally, the Commission believes that this administrative penalty will create awareness about the consequences of the firms' engagement in a cartel behavior. The Commission will continue to investigate any cartel conduct as this conduct is deemed to be the most egregious conduct which is detrimental to the development of the economy.

TRIBUNAL IMPOSES A RECORD FINE FOR FAILURE TO NOTIFY

By Korkoi Ayayee

In certain appropriate cases, depending on the facts of the case, it is possible that gun jumping or implementing a merger without prior approval of the competition authorities, if it involves firms that are actual or potential competitors, may have the same effect as a price fixing arrangement. It appears that the recent case of prior implementation involving Life Healthcare Group Proprietary Limited (“LHG”) and Joint Medical Holdings Limited (“JM”) may fall into this category of cases in view of the fact that it has attracted the highest administrative penalty for gun jumping in the sum of R10 million.

On 7 April 2016, the Competition Tribunal (“Tribunal”) confirmed the consent agreement entered into between the Competition Commission (“Commission”), LHG and JM in terms of which the two hospital groups admitted to having contravened section 13A(3) of the Competition Act, No 89, 1998, as amended (“the Act”) by failing to notify the Commission of their merger and implementing such merger before obtaining the required approval from the Commission.

The case began in October 2010 following the Commission’s receipt of a complaint from the National Hospital Network wherein it raised a concern, amongst other things, about LHG shareholding in JM and the latter’s use of the LHG tariffs. Following this initial complaint, the Competition Commissioner on 10 February 2012 initiated a separate complaint against LHG and JM for allegedly contravening section 4(1)(b)(i) of the Act in that, LHG and JM being parties in a horizontal relationship, agreed that LHG will negotiate on JM’s behalf the tariffs charged by JM to various medical schemes.

The Commission duly investigated both complaints and found that since 2004 LHG and JM agreed that all their prices would be set jointly and all price negotiations including designated service provider arrangements would be conducted by LHG on behalf of both hospital groups. The Commission also found that since at least 2006, although LHG only had a 49% shareholding in JM, its rights with regard to the business of JM went beyond the rights afforded to minority shareholders to protect their financial interest. The type of control which LHG exercised over the business of JM was akin to a “joint controller” and evidence of this could be seen in the fact that no major decision regarding the business of JM, including its budget,

the appointment of key employees and items of major capital expenditure, could be taken unless it carried LHG’s approval.

The Commission found that the changes in the quality of LHG’s control over JM constituted a merger in terms of section 12(1) of the Act, specifically a large merger as defined in section 11(5) (c) of the Act as read with section 11(1) which ought to have been notified to the Commission.

Section 13A(3) of the Act prohibits parties to a merger from implementing any merger until it has been approved, with or without conditions, by the competition authorities. Merging parties that contravene the requirement contained in section 13A(3) and proceed to implement a merger prior to obtaining the required approval, are, in terms of section 59(1)(d)(i) or (iv) of the Act, at risk of being ordered to pay an administrative penalty up to 10% of their turnover and an order to reverse the acquisition.

In the consent agreement, LHG and JM admit that they failed to give notice of the merger and proceeded to implement the merger without the approval of the Tribunal as required by the Act. Consequently, the Commission has agreed with the parties, in an addendum to the consent agreement, that it will not pursue the section 4 complaints.

The parties have further agreed to jointly pay an administrative penalty of R10 million, and in addition have undertaken to undergo competition law compliance training. Furthermore, LHG has agreed to disinvest its shareholding in JM.

The R10 million administrative penalty is the highest fine ever imposed to date for a failure to notify the competition authorities of a merger prior to implementing the merger. The Tribunal in the past has been mostly lenient on parties who have been found to have implemented a merger prior to approval, with the highest penalty for such a contravention being R1.1 million.

This new record penalty confirms that where gun jumping or prior implementation involves firms that are actual or potential competitors and exhibits the same features or has the same effect as a price fixing arrangement, competition authorities will not hesitate to impose a higher administrative penalty.





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THE COMMISSION WINS ITS FIRST PREDATORY PRICING CASE AGAINST MEDIA24

By Romeo Kariga

INTRODUCTION

Since the inception of the Competition Act 89 of 1998, as amended (“the Act”), the *Media24*¹ case was the first in which a firm has been found guilty of predatory pricing by the Tribunal after a complete hearing of the merits. The Competition Commission (“Commission”) won the case at the Competition Tribunal (“Tribunal”). The decision of the Tribunal was handed down on 8 September 2015.

According to the Tribunal, Media 24 engaged in predatory pricing by engaging in a multi-pronged strategy which included using a Media 24 title, Forum, as a “fighting brand” to prevent GNN from expanding in the market. This strategy entailed pricing its advertising rates below average total cost and operating Forum for a lengthy period even though it was making a loss. Having started successfully and winning a larger share of the Welkom market than Forum, particularly in its start-up years, GNN finally exited the market in 2009. Within 10 months of the exit of GNN, Media 24 closed down Forum. From then until today, Vista, owned by Media 24, is the dominant community newspaper operating in the Welkom community.

Background

The complaint came after Berkina Twintig (Pty) Ltd (“Berkina”) trading as Gold-Net News (“GNN”) filed a case against Media24 with the Commission in 2009. The case is about predatory pricing in the community newspaper market in the Goldfields region in the Free State. Media24 (Pty) Ltd (“Media24”) owned 2 community newspaper titles namely Forum (a low level community newspaper) and Vista (Media24’s premium and more profitable paper). Berkina owned GNN. The Commission alleged that between 2004 and 2009 Media24 deliberately drove a competing community newspaper,

Gold-Net News, out of the market in the Welkom area. According to the Commission Media24 did this by positioning a competing community newspaper, Forum, as a “fighting brand” against Gold-Net News and running the brand at a loss until Gold-Net News eventually closed down in 2009. The Commission alleged that having succeeded with this strategy, Media24 closed Goudveld Forum in January 2010. Media24 denied the Commissions allegations.

The Tribunal’s decision

The Tribunal’s decision is significant in that it clarifies some aspects of what cost measure to apply when determining predatory pricing.

Predation Under Section 8(d)(iv)

Section 8(d)(iv) states that it is prohibited for a dominant firm to sell goods or services “below their marginal or average variable cost”. One of the questions that the Tribunal had to determine was whether or not Average Avoidable Costs (“AAC”)² could fit into section 8(d)(iv) when the Act only makes reference to marginal or Average Variable Costs (“AVC”), terms which have been interpreted restrictively when applied to predatory pricing cases.

¹ The Competition Commission vs Media24 Limited, later changed to Media24 (Pty) Ltd, Tribunal Case Number 013938/CR154Oct11. The Media24 predatory pricing case was referred to the Tribunal on 31 October 2011 and final arguments were heard on 13 November 2014.

² ACC is a “but for” concept. It is the cost the firm could have avoided by not engaging in the predatory strategy. The difference between AVC and AAC is that AAC includes an element of fixed costs known as product specific fixed costs. Generally AAC does not include sunk costs but in some instances it may. The Commission argued that all of Forum’s costs were avoidable since the strategy used was a fighting brand strategy

The Tribunal stated that it did not have to decide whether AAC can be used under section 8(d)(iv) especially in instances where the AAC is similar to AVC since there was not enough evidence in this case for the Tribunal to make a determination. The Tribunal further stated that in certain cases AAC is a better tool to use than AVC or marginal cost because it better suits the theory of predation being considered. For instance AAC is more suitable where there is a fighting brand strategy as in the Media24 case, and where a dominant firm invests in sunk costs to increase capacity. That's better reflected in AAC.

The most controversial aspects of the case advanced by the Commission in calculating AAC was the aspect of exit and opportunity cost. The Commission argued that there is evidence that Media24 sacrificed profits, which it would have made in Vista by keeping Forum open. Although the Tribunal accepted that opportunity cost could be included as part of the cost benchmark, it noted that no predation case has been decided based on opportunity cost to date in other competition jurisdictions. The Tribunal refrained from accepting opportunity cost in this case because the calculation was too imprecise and far reaching. For instance the Commission argued for diversion ratios between 27-38.5%, while Media24 argued for a diversion ratio of 16%. In addition, the diversion ratios used in calculating the opportunity costs were based on disputed evidence. Media24's economist from Charles River Associates also argued that if one was to include the opportunity costs of lost sales in the calculation one must also calculate what the consequence of closing Forum was to Media24 in terms of opportunity cost. This was referred to as the "real option" value. Media24's economists did not calculate the real option value and the Commission's economists said that its Media24 which is best placed to calculate it.

The Tribunal stated that common costs ought not to be included in calculating AAC, since they are not economic costs but are a management tool for assessing how to cost infrastructure of the organisation across its income earning titles. The Tribunal stated that redeployment costs, printing and distribution costs could be included in the calculation of AAC, as long as there is acceptable evidence of the extent of the particular costs and the avoidability thereof. However, the Tribunal stated that the evidence regarding redeployment costs was not sufficient in this case.

The Tribunal concluded that the Commission had not established that Forum's revenues were below its AAC and thus the Commission failed to prove a case of predation under section 8(d)(iv) of the Act.

Predation Under Section 8(c)

The Tribunal held that the Average Total Costs ("ATC") standard, even where prices are above AVC, is appropriate, particularly in our economy, characterized as it is by high barriers to entry in many markets and the unwillingness of capital markets to sponsor the entry of competitors against dominant incumbent firms. The ATC test is a more reliable standard when dealing with the problems associated with the vertically integrated or multi-product firm, because here the more orthodox measures

of cost evaluation, whether marginal cost, AVC or AAC, can so easily be obfuscated or frustrated. The Tribunal stated that in such a context the informational asymmetries between the outsider seeking to indict the firm as a predator and the insiders defending the firm, are such that most instances the firm is better placed to win the cost classification debate because it has command over the accounting choices.

ATC is however often criticised because it includes more costs than do any of the other measures and thus makes a finding of predation more likely. However, it is the standard accepted by the European Court of Justice in the AKZO case. The Tribunal held that objections to the use of the ATC standard, on the basis of its susceptibility to false positives, can be overcome if the adjudicator relies on evidence from different sources to make its findings more robust. In this case the Tribunal relied on ATC standard plus evidence of intent and recoupment.

The Tribunal concluded that:

"In respect of section 8(c), the Commission has established that Media24 priced its publication Forum below its average total cost, and that together with other evidence of direct and indirect intent to predate its competitor GNN, and its subsequent ability to recoup what it lost during the predation period, has established this as constituting an exclusionary act. This act furthermore had an anticompetitive effect and there is no evidence of any procompetitive gain that outweighed this effect. Accordingly, we find that Media24 has contravened section 8(c) of the Act and that this contravention lasted, for, at a minimum, the duration of the complaint period, namely January 2004 to April 2009".

Remedies

The Media24 predatory pricing case is also significant because the Commission is seeking the establishment of a Community Newspapers Development Fund ("the fund") to sponsor entry into the Goldfields region to restore competition. In terms of section 58 the Tribunal is empowered to "make an appropriate order" where a firm has been found guilty of committing a prohibited practice, which includes a section 8(c) contravention. The Commission sought a fund to the amount of R15million ("Fifteen Million Rand") to be administered by the Media Diversity and Development Agency (MDDA).

Media24 opposed the fund arguing that it is akin to an administrative penalty under section 59 of the Act which should only be imposed for a section 8(c) case for a repeat offence. Media24 further disputed the necessity and suitability of the proposed fund.

The remedies hearing was on 4-8 April 2016 and the parties await the Tribunal decision.

³ Average Total Costs include fixed, variable and sunk costs.



CRACKING DOWN ON **FAILURE TO NOTIFY** A MERGER AND **PRIOR IMPLEMENTATION** WITHOUT **PRIOR APPROVAL** BY THE **COMPETITION COMMISSION, DEICAN AND DICKERSON** TRANSACTIONS

By Jabulani Ngobeni

The South African merger control regime has a compulsory notification system for specific mergers hence the Commission relies on merging parties to file specific proposed mergers for the Commission's consideration before implementation. Sections 13A (1) and 13A (3) of the Competition Act 89 of 1998, as amended ("the Act") provides that a party to an intermediate or large merger must notify the Commission of the merger prior to the implementation thereof. Furthermore, section 59 of the Act provides that parties who proceed to implement a notifiable merger without the requisite approvals by competition authorities will be liable for an administrative penalty in respect thereof.

On 31 August 2015, the Commission brought two referral applications against Deican Investments (Pty) Limited ("Deican")/ New Seasons Investments Holdings (Pty) Limited ("New Seasons") (FTN127Aug2015) and Dickerson Investments (Pty) Limited ("Dickerson")/ Nodus Equity (Pty) Limited ("Nodus") (FTN151Aug2015). The referral alleged that the respondents implemented mergers without the prior approval of the Commission in contravention of sections 13A (1) and 13A (3) of the Act.

The first transaction occurred in December 2012 when Deican, a newly formed company, whose shareholders are Nodus and Dickerson, acquired a 30% shareholding and joint control

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of New Seasons. In the second transaction, in April 2013 Dickerson increased its shareholding in Nodus from 22% to 28% giving it veto rights over certain strategic decisions and thereby conferred control over Nodus in terms of section 12(2) (g) of the Act. During July 2013 and in the course of an unrelated transaction Dickerson was informed that both the Deican and Dickerson transaction may have been notifiable. In May 2014 the respondents approached their attorneys who also advised that the transactions were notifiable and that they need to approach the Commission. The respondents however took pre-emptive steps and de-implemented the Dickerson transaction prior to their disclosure meeting with the Commission. Even after their disclosure meeting with the Commission the respondents proceeded and de-implemented the Deican transaction without consultation the Commission. Although the respondents laid all their cards on the table and informed the Commission about their failure, the respondents were unable to reach an agreement on the appropriate penalty hence the matter was heard as an opposed hearing.

During the hearing it was common cause that the two transactions were notifiable and the respondents had contravened sections 13A (1) and 13A (3) of the Act. Therefore, the only issue for determination by the Tribunal was the quantum of the administrative penalty sought by the Commission. The respondents argued that they should not be required to pay an administrative penalty, and accordingly argued that these two applications be dismissed. In summary the respondents argued that their failures to notify were based on a bona fide mistake of law. The respondents further argued that they were not aware at the time that as a result of Dickerson increased shareholding in Nodus; there had been a trigger of acquisition of control. The Commission disagreed with the respondents submissions and argued for the imposition of an administrative penalty.

On 3 June 2016, the Tribunal issued its combined reasons and order, where it found that the respondents have contravened section 13A (1) through non-notification and 13A (3) by implementing mergers without the necessary notification.

On the approach taken by the Commission and respondents in calculating the appropriate penalty, the Tribunal held that it is crucial that one considers the factors set out in section 59(3) of the Act before applying the six-step methodology set out by the Tribunal in *The Competition Commission vs Aveng (Africa) Limited t/a Steeledale and others (84/CR/DEC09)* decision. This is because the failure to do so *“might result in an inflexible and blunt instrument for sanctioning of different contraventions*

of the Act, bearing in mind that in some, such as a failure to notify, regulators may have available other remedies in addition to the mere imposition of an administrative penalty.”

The Tribunal in determining the appropriate penalty considered how other jurisdictions such as the EU, US and Australia calculated administrative penalties in cases of prior implementation and ensured that each penalty did not exceed 10% of the turnover of that firm. Although the Tribunal did not develop a specific methodology for calculating penalties in prior implementation cases, the approach it took in this case was to firstly have regard to the nature of the contravention and thereafter used the merger filing fee as the base amount for calculating the penalty.

The Tribunal also looked at the mitigating and aggravating factors in this case and found the following five aggravating factors against the respondents:

- a degree of negligence on the part of the respondents;
- an undue and unexplained delay in approaching the Commission once the notification requirements had been confirmed;
- undoing the merger and taking the law into their own hands without providing the Commission an opportunity to assess the effects thereof,
- implementing two transactions involving acquisitions of some degree of control and;
- the profit that was derived from the unlawful prior implementation of the transactions.

The Tribunal found in mitigation that the respondents had reported the failure to notify voluntarily, they had not been found to have contravened the Act previously and that the contravention was for a relatively short duration.

However, Dickerson was found to be more culpable than the other respondents because Dickerson’s acquisitions triggered the notification requirements and Dickerson’s decision to undo the transactions resulted in the Commission’s jurisdiction to investigate the mergers being excluded.

Each respondent was fined R100 000 for failing to notify their transaction, the Tribunal further fined Dickerson an additional R150 000 and New Seasons, Deican and Nodus were each fined an additional R50 000. The total administrative penalty was R700 000.

HOW HAS the entry of **WAL-MART** AFFECTED SOUTH AFRICAN SUPPLIERS AND COMPETITORS?

By Thulani Mandiriza
and Michelle Viljoen



Background to the merger

In early 2011, the Competition Commission (“Commission”) referred the merger between Wal-Mart and Massmart¹ to the Competition Tribunal (“Tribunal”) for adjudication. In its consideration of the merger, the Tribunal concurred with the Commission’s findings that the merger did not raise any competition concerns as Wal-Mart did not compete with Massmart in South Africa. Wal-Mart’s only presence in South Africa was through its procurement arm which purchased South African produce for the export market. The Tribunal did, however, find that the merger raised public interest concerns related to employment and the potential displacement of small business.

In light of this, the Tribunal approved the merger subject to conditions which sought to address these concerns. In terms of employment, the Tribunal ordered the re-employment of 503 previously retrenched employees. To protect domestic suppliers, the Tribunal ordered that the merged entity establish a R100 million programme with the aim of developing local SMME suppliers.²

The Tribunal’s conditional approval was subjected to review at the Competition Appeal Court (“CAC”) by intervenors which included organised labour and government departments on the grounds that the effect of the merger on employment and local procurement had not been adequately addressed through the proposed remedies. The intervenors were particularly concerned that the merger entity would switch some of its procurement away from domestic suppliers to imports post-merger to the detriment of SMMEs and historically disadvantaged individuals. In March 2012, the CAC approved the merger subject to employment related

conditions and the establishment of the Massmart Supplier Development Fund.

Rationale for the impact assessment

The Commission previously conducted an ex-post review on the Massmart Supplier Development Fund (see Competition News Edition 52 May 2015). It found that the Fund has addressed the public interest concerns raised by facilitating the entry and expansion of suppliers in the agriculture, agro-processing and manufacturing sectors into Massmart’s supply chain. Overall, Wal-Mart abided by local procurement commitments and has positively contributed to job creation.

This impact assessment supplements the previous review by examining the effect of Wal-Mart’s entry on suppliers and competitors post-merger. The review considered international literature on the experience of suppliers and competitors following the entry of Wal-Mart. Based on information sourced from Massmart, the Commission examined whether there was evidence of import-substitution on the part of the merged entity post-merger. The impressions of Massmart’s larger suppliers and competitors were also examined.

International context: impact on suppliers, competitors and imports

The effect of Wal-Mart’s entry into countries has been the subject of much analysis and discussion internationally, particularly in light of the multinational’s drive for low prices. While the company’s relentless pursuit of delivering ‘Every-Day-Low-Prices’ benefits consumers³, its entry has been associated with low wages, the offshoring of jobs, products cheap in quality and price, as well as unwavering pressure on suppliers.⁴

¹ Competition Tribunal of South Africa, Wal-Mart/Massmart, 73/LM/Nov10, 29 June 2011.

² The merger conditions were informed by undertakings made by the merging parties which they agreed to have imposed as conditions for merger approval.

³ Fishman, Charles., 2006. The Wal-Mart Effect and a Decent Society: Who Knew Shopping Was So Important?

⁴ Fishman, Charles., 2006. The Wal-Mart Effect and a Decent Society: Who Knew Shopping Was So Important?

Literature on the experience of Wal-Mart's entry finds that suppliers realise various advantages, such as supply chain efficiencies and lower distribution costs, as a result of the multinational's presence. Furthermore, Wal-Mart suppliers stand to gain from access to the retailers' substantial consumer base, both within a country and internationally.⁵ However, Wal-Mart's entry does have adverse consequences.⁶ Amongst these is disintermediation through which products are sourced directly from manufacturers, bypassing wholesalers, distributors and suppliers. The company's global purchasing power enables it to import goods at lower prices that can be offered by local manufacturers.⁷ In addition, Wal-Mart requires suppliers to incur various additional costs through strict contract terms, such as more exacting product-specification demands, requiring suppliers to invest in innovation and improve quality and turnaround times.

With regard to competitors, Wal-Mart's entry is found to reduce the market shares and profit margins of incumbent supermarket chains and small retailers. While large retailers are able to respond by improving efficiencies similarly to Wal-Mart⁸, smaller retail stores that are unable to adjust are forced out of the market.⁹ The multinational does, however, bring direct savings to consumers through the fulfilment of its low price mandate. In addition, as Wal-Mart competitors typically respond to the increased competitive pressure by streamlining supply chain operations and reducing prices, customers benefit from lower prices in other supermarket chains. As such, consumers benefit from both direct and

indirect consumer-savings as a result of Wal-Mart's entry.¹⁰

When applied to the South African context, the effects of the entry of Wal-Mart identified in the literature resonate with those raised by the government departments during the Wal-Mart/Massmart merger proceedings; specifically, import-substitution and the subsequent decrease in demand for locally produced goods, as well as increased pressure on suppliers to reduce prices and accept more onerous supply terms which may compromise small suppliers' sustainability and ability to compete.¹¹

Impact of Wal-Mart's entry in South Africa

In examining the impact of Wal-Mart's entry, the Commission evaluated whether import-substitution had taken place post merger. In addition, the perspectives of Massmart's suppliers and competitors were also assessed in order to establish whether their experiences at all resemble those of their international counterparts.

As presented in Table 1 below it was found that post-merger, products purchased from domestic suppliers comprised the largest portion (in excess of 90%) of Massmart's total procurement. Importantly, however, Massmart only records and controls the value of products which are directly imported by the firm; it does not record and/or control which of its distributors supply imported goods to the firm.

Table 1: Local versus direct imports as a percentage of total value procured

Product category	2010		2011		2012		2013		2014	
	Domestic purchases	Direct imports								
Food	99,9%	0,1%	99,9%	0,1%	99,9%	0,1%	99,9%	0,1%	99,9%	0,1%
Liquor	99,7%	0,3%	99,6%	0,4%	99,5%	0,5%	99,3%	0,7%	99,7%	0,3%
General Merchandise	92,1%	7,9%	90,5%	9,5%	90,4%	9,6%	89,6%	10,4%	90,6%	9,4%
Cellular	100%	0,0%	100%	0,0%	100%	0,0%	100%	0,0%	100%	0,0%
ALL PRODUCTS	96,5%	3,5%	95,7%	4,3%	95,8%	4,2%	95,3%	4,7%	95,8%	4,2%

Source: Calculated by the Competition Commission from information sourced from Massmart

With respect to the impact on suppliers and competitors, it appears that Massmart's existing suppliers have not been adversely affected by the entry of Wal-Mart. Specifically, suppliers were not subjected to stricter contract terms and their continued supply to Massmart was not threatened by direct imports. In fact, suppliers mentioned several post-merger advantages, including potential exposure to regional and international markets, improved service levels, and continued store expansion by Massmart which has knock-on benefits for smaller independent traders.

Similarly, the Commission found no meaningful impact of the merger on competitors; specifically, competitors have

observed no significant changes in product prices, product quality or supplier relations as a result of Wal-Mart's entry, and as such, their ability to act as effective competitors to Massmart has not been significantly compromised.

From its analysis, the Commission concluded that the entry of Wal-Mart has not negatively impacted suppliers, consumers and to some extent competitors. The presence of strong retail brands in South Africa has managed to withstand the competition provided by Wal-Mart through Massmart.

⁵ Gereffi, G., and Christian, M., 2009. The Impacts of Wal-Mart: The Rise and Consequences of the World's Dominant Retailer. Journal Article: Annual Review of Sociology, Vol. 35 (2009), pp. 573 – 591.

⁶ Fishman, Charles., 2006. The Wal-Mart Effect and a Decent Society: Who Knew Shopping Was So Important?

⁷ UNI Global Union, 2012, Walmart's Global Track Record and the Implications for FDI in Multi-Brand Retail in India.

⁸ Fishman, Charles., 2006. The Wal-Mart Effect and a Decent Society: Who Knew Shopping Was So Important?

⁹ Basker, 2007, The Causes and Consequences of Wal-Mart's Growth.

¹⁰ Fishman, Charles., 2006. The Wal-Mart Effect and a Decent Society: Who Knew Shopping Was So Important?

¹¹ UNI Global Union, 2012, Walmart's Global Track Record and the Implications for FDI in Multi-Brand Retail in India.

AN **EX-POST** REVIEW OF THE **Media24/Natal** **Witness merger**

By Sunél Grimbeek, Katerina Barzeva & Qhawe Mahlalela



1. Introduction and background

On 14 May 2012, the Competition Tribunal (“Tribunal”) conditionally approved the large merger involving Media24 Limited (“Media24”) and Paarl Coldset (Pty) Ltd (“Paarl Coldset”) as the acquiring firms and The Natal Witness Printing and Publishing Company (Pty) Ltd (“Natal Witness”) as the target firm (“Media24/Natal Witness merger”). The transaction allowed Media24 to increase its direct shareholding in Africa Web Printers (“Africa Web”) from 50% to 80%. At the time of the merger investigation, Africa Web was the so called “coldset” printer of community newspapers in the KwaZulu-Natal and the northern Eastern Cape provinces.

The issues of contention between the various parties involved in this merger related to both competition and public interest aspects. The first contentious issue was whether the proposed merger would likely lead to exclusionary conduct by the merged entity, which post-merger would have been active both in the publishing and printing of community newspapers.

The second contention was whether or not the proposed merger would negatively affect public interest since the small community newspaper publishing businesses in KwaZulu-Natal and the northern Eastern Cape require coldset printing services, such as that provided by Africa Web. This concern mainly related to the fact that post-merger, Africa Web would no longer be an independent printer, but would form part of a vertically integrated business in the form of Media24. Small independent community newspapers would therefore have to rely on obtaining printing services from its main competitor in the downstream newspaper publishing market.

At the time of the transaction the Competition Commission (“the Commission”) concluded that the merger was likely to raise competition and public interest concerns in relation to the post-merger ability of small independent community newspaper publishers in the two relevant geographic regions to access printing services at competitive conditions of supply, including competitive prices.

In its recommendation to the Tribunal, the Commission proposed a post-merger divestiture of Africa Web to third parties such that the merging parties’ combined control of Africa Web would not exceed 50.1%. A competitor, Caxton, opposed the Commission’s proposed condition, rather suggesting a complete divestiture of Africa Web by the merging parties. After a full hearing, the Tribunal imposed a set of behavioural remedies, whereby the merged entity increased its share to 80% control of Africa Web. The Tribunal argued that the 80% control of Africa Web by Media24 was meant to ensure that there is adequate capital injection in Africa Web to keep Africa Web in the market and as a viable alternative printer for small independent community newspapers in the two affected regions.

In March 2016 we completed an ex-post review of the Tribunal’s decision in this matter. The primary objective of the study was to provide an assessment of the remedies that were imposed on the merging parties, and in particular: (i) to test the impact of the Tribunal’s decision on the dynamics of the coldset printing market within the relevant geographic regions; and (ii) to assess whether the market outcomes post-merger could have been improved should the Tribunal have approved the merger under the conditions recommended by either the Commission and/or Caxton.

2. Findings of the study

During the course of the study we engaged with several participants, including several small independent community newspaper publishers in the KwaZulu-Natal and northern Eastern Cape region. Through these engagements it became evident that the majority of these market participants still face similar competitive dynamics post-merger as at the time of the Tribunal’s hearing in 2012. The study found that the set of behavioural conditions that were imposed by the Tribunal on the merging parties did not have the intended effect in the market. Small independent newspaper publishers are facing increasingly high barriers to entry in the region, specifically with regards to high printing costs and an inability to attract sufficient advertising revenue from grocery retail chains and other national advertisers in competition with large vertically integrated media houses in the region.

It should also be noted that Media24 has subsequently sold its majority shareholding in Africa Web that it acquired as part of the transaction back to Mr Ouderajh who became the minority shareholder of Africa Web after the merger was conditionally approved by the Tribunal in 2012. In the Media24/Natal Witness merger, the Tribunal stated in its reasons that allowing Media24 to acquire the majority shareholding in Africa Web would enable Africa Web to receive capital investments to expand its printing operations in the KwaZulu-Natal region to the benefit of independent publishers in the region.

3. Conclusion

The intended outcome of the Tribunal’s decision in this matter has not been achieved due to the selling by Media24 of its majority shareholding in Africa Web approximately 14 months after the conclusion of the Tribunal hearing, seemingly without making any capital investments in Africa Web as was envisioned at the time of the hearing. Indeed, during the course of the study we discovered that Africa Web is no longer viewed as a viable printing option for independent newspaper publishers in the region.

From this development, it appears as though the Commission’s proposed conditions or alternatively the complete divestiture of Africa Web by Media24 as advocated for by Caxton during the Tribunal hearing may potentially have resulted in a better outcome for small publishers in the region.

¹ Tribunal case number: 15/LM/Jun11 (012179).

² Coldset printing is a printing mechanism used in the printing of newspapers; heatset printing is used for the printing of glossy titles such as magazines.



AN **EX-POST** REVIEW OF THE **ABANDONED** **MERGER** between **PICK 'N PAY** AND **FRUIT & VEG CITY**

Sunél Grimbeek, Khalirendwe Ranenyeni & Kerschyl Singh

1. Introduction and background

In March 2016 we completed an ex-post review of the abandoned merger between Pick n Pay Retailers (Pty) Ltd (“PnP”) and Fruit & Veg City Holdings (Pty) Ltd (“FVC”). In January 2007, the Competition Commission (“the Commission”) recommended to the Competition Tribunal (“Tribunal”) that the proposed large merger between PnP and FVC be prohibited.

The Commission’s recommendation to the Tribunal to prohibit the proposed merger was based on evidence obtained during its investigation that revealed that the proposed merger would result in the removal of an effective competitor and weaken future competition in the market for retailing of fresh produce. The evidence gathered at the time of the merger investigation revealed that at a national level, the combined market share of the merging parties in the market for retailing of fresh produce would be approximately 58% post-merger. Further evidence also revealed that post-merger, the merging parties would have had significant market share, exceeding 75% in various localised geographic markets. Subsequent to the Commission’s recommendation to prohibit the proposed merger, the merging parties abandoned the merger before the Tribunal hearing commenced.

The purpose of this ex-post review was to assess the impact of the Commission’s recommendation to prohibit the large merger between PnP and FVC in January 2007, specifically with regards to the impact that the recommended prohibition (which led to the parties abandoning the proposed merger) has had on competitors and consumers of PnP and FVC in the period since 2007 to present.

2. Findings of the study

Although there is no conclusive evidence on PnP’s intended strategies with regards to procurement policies and future expansion plans of the FVC brand post-merger, the information contained in the merger record shows that it is likely that PnP would have viewed FVC as complimentary to its existing operations post-merger and may not have pursued a strategy of expansion into the higher Living Standards Measure (“LSM”) income groups as FVC has subsequently done.

The information that was obtained through engagements with market participants during the course of this study indicates that the impact of the Commission’s recommendation to prohibit the proposed merger between PnP and FVC in January 2007 has largely been viewed as positive in the market for retailing of fresh produce and grocery in South Africa. Specifically, market

participants that were contacted during the course of the study were of the view that the Commission’s decision to recommend a prohibition of the proposed merger, had positive effects on competition in the retailing of fresh produce.

The study further found that FVC has experienced substantial growth and evolution over the past ten years. This is evident from the increase in the number of stores that FVC has rolled out since 2007, in particular the rebranding and rolling out of the Food Lover’s Market (“FLM”) brand from only two stores in 2007 to seventy-five stores by 2016 and the rolling out of 220 FreshStop stores during the same time period.

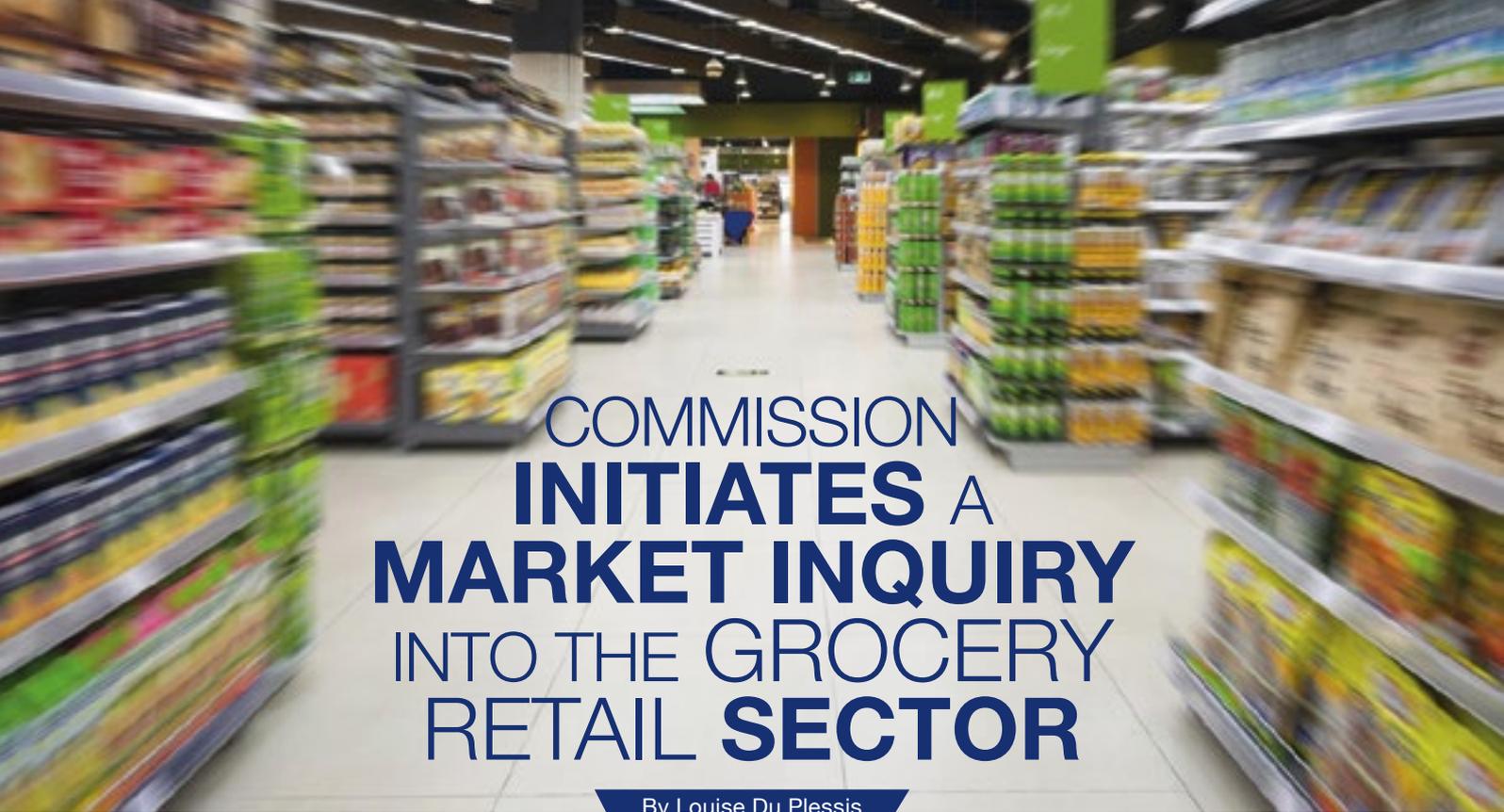
FVC’s growth is also evident through the increase in the number of product lines that they offer by increasing from just fresh produce to offering a range of product lines which also include dairy, bakery, deli, butchery, seafood, nuts and sweets, sushi bar and hot food.

Further, FVC’s innovation and its increased ability to compete with major retailers is evident through its establishment of niche product offerings in the fresh produce market which is also in line with the Commission’s finding that FVC was a potential competitor at the time of the merger investigation in 2007. This study revealed that in the current market for retailing fresh produce and grocery, FVC through its FLM and Food Lover’s Eatery (“FLE”) brands have increasingly constrained major retailers, particularly where the retailers are targeting the higher LSM income groups.

Lastly, the study found that FVC has subsequently grown to a size approximately six times the size (in terms of revenue) it was at the time of the merger investigation in 2007, and that PnP has also grown in terms of the number of stores it operates in the same period. As such, the demand for fresh produce from farmers and National Fresh Produce Markets that would likely have been lost had the merger been approved by the competition authorities has been protected.

3. Conclusion

In conclusion, the study found that the Commission’s decision to recommend a prohibition of the merger between PnP and FVC in January 2007, which led to the subsequent abandonment of the merger by the merging parties, has had a positive effect in the South African retail market as well as the wider economy. The abandoning of the proposed merger resulted in the prevention of the creation of a dominant player in the relevant market and also resulted in the deterrence of increased buyer power that the merged entity would have obtained if the competition authorities had approved the merger.



COMMISSION INITIATES A MARKET INQUIRY INTO THE GROCERY RETAIL SECTOR

By Louise Du Plessis

On 30 October 2015, the Commission published the final Terms of Reference for the grocery retail sector market inquiry (“Inquiry”) in terms of section 43B of the Competition Act No 89 of 1998 as amended (“the Act”).¹

For the purposes of the Inquiry, the grocery retail sector includes all traders that predominantly sell fast-moving consumer goods (for example food, toiletries and/or liquor), whether as a wholesaler, retailer, or both. It encompasses all kinds of shops, from small informal businesses such as street traders and hawkers, spaza shops and small independent grocery stores to supermarket chains and wholesale groups and outlets. The scope of the Inquiry as set out in its ToR, covers the following six major areas:

- The impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers;
- The impact of long term exclusive leases on competition in the sector;
- The dynamics of competition between local and foreign owned small and independent retailers;
- The impact of regulations, including *inter alia* municipal town planning and by-laws on small and independent retailers;
- The impact of buyer groups on small and independent retailers; and
- The impact of certain identified value chains on the operations of small and independent retailers.

The Commission appointed Professor Halton Cheadle, Lulama Mtanga and Lumkile Mondli, as chairman and panellists respectively, to conduct the Inquiry on its behalf. The panel is supported by a team comprising of the Commission’s economists and lawyers.

The methods that will be used to gathering information for the Inquiry will include *inter alia* the following:

- Questionnaires and surveys to identified participants and/or to the general public;
- Information requests to particular market participants;
- Calls for submissions on issues relevant to the Inquiry;
- Targeted meetings with key industry stakeholders; and
- Public hearings.

The participants in the Inquiry process will include consumers, as well as firms directly or indirectly involved in the grocery retail sector, whether large or small, and those that have an impact on competition in the sector, such as firms in the property market, finance institutions and suppliers. The Inquiry will also include participation by business and trade associations, government departments, public entities, regulatory authorities, consumers and consumer groups, and any other stakeholder that may be able to provide information relevant to the Inquiry. Members of the public are encouraged to participate fully in the Inquiry process.

The Inquiry published its draft Statement of Issues, Guidelines for Stakeholder Participation and Administrative Timetable on the Commission’s website on 17 May 2016 for public comment. The documents set out the Inquiry’s intended timelines for gathering information and provide the initial framework for the Inquiry in order to assist participants in the Inquiry to focus on issues that are regarded to be the most relevant in answering questions arising from the ToR.

The Inquiry will be completed on 29 May 2017, and the Commission will publish a report at the conclusion of the Inquiry.

¹ The Commission published the final Terms of Reference (“ToR”) for the Grocery Retail Sector in the Government Gazette, Volume 604, on 30 October 2015, No. 39347 (p73-p82).



The ROAD TO PUBLIC HEARINGS in the HEALTH MARKET INQUIRY

By Neelofah Ally and Melissa Naidoo

The Competition Commission's Inquiry into the private healthcare sector (Health Market Inquiry (HMI)) has entered the final phase of its investigative process, which includes public hearings. We outline below the process that has led to these hearings.

A market inquiry is defined in the Act as "A formal 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 named firm". The Competition Commission may conduct a market inquiry in any manner, depending on the complexity of the market and the issues involved. Thus, it may include desktop research, interviews with market participants, information requests, and public hearings.

The private healthcare sector is a complex market involving a multitude of stakeholders and a number of pertinent issues. In this regard, the HMI is tasked with understanding issues such as but not limited to; the competitive dynamics that exists between the different market participants, reasons for high healthcare expenditure, whether there is market power and who holds it and the general lack of information available to patients across the industry. In order to satisfactorily conduct the inquiry the HMI's method has included, the receipt of written submissions; research studies including case studies, literature reviews, direct consultations, data reviews, surveys, focus groups and formal public hearings

The HMI received 68 initial submissions from stakeholders. The majority of submissions concur that private healthcare expenditure in South Africa is high and continues to increase at rates in excess of general inflation. Nevertheless, the submissions differ significantly on the possible explanations for this occurrence. Certain submissions attribute the cost increases to market power in the three stakeholder groups: the hospital groups, medical schemes and their respective administrators and specialist medical practitioners. Submissions also raised concerns about the regulatory environment. Some submitted that there is a lack of regulation or adequate enforcement of the applicable regulations due to ineffective oversight by the regulatory bodies. Others submitted that there is overregulation in certain areas, resulting in barriers to entry, expansion and innovation in the private healthcare sector. A number of submissions raise concerns about the lack of information available to patients, highlighting a general lack of transparency in accessing private healthcare information.

To date the HMI has held in excess of 100 separate stakeholder engagements, ranging from general discussions on the roles and responsibilities of certain stakeholders, to detailed engagements on submissions, matters of confidentiality, accessing important documents and information, data requests and dealing with various queries.

The HMI is currently in its investigative phase which is concerned with evidence gathering, analysing data and information, in order to formulate provisional conclusions on data and information collected and ultimately led to final recommendations.

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The Revised Statement of Issues

The HMI published its Revised Statement of Issues (RSOI) on 11 February 2016. It outlines the HMI's current thinking based on its reading of the submissions received, and the evidence gathered. It also highlights the HMI's priority focus areas going forward. The (RSOI) should be read in conjunction with the original Statement of Issues (SOI) that was published by the HMI on 1 August 2014.

Pre-hearing Consultations

Pre-hearing consultations for the first set of public hearings took place on 26 to 29 January 2016. The purpose of the pre-hearings was to establish procedures for protecting confidential information, establish who would represent the participants at the hearings, and determine the procedure to be followed at the hearings.

Participants worked with the HMI's Panel and Technical Team members to work out matters pertaining to public hearings, in general, such as clarifying issues, the dates for the publication of hearing notices; administrative arrangements pertaining to the public hearings and the conduct of the hearings as set out in the Guidelines for Participation.

Public hearings

The HMI held its first set of public hearings between 16 February 2016 and May 2016. This set of hearing consisted of 6 hearings and took place in Pretoria, Cape Town and Durban. These hearings were open to members of the public who could either attend the hearings or watch via live streaming. This provided an opportunity for members of the public to learn more about how the private healthcare sector operates. In this first set of public hearings the HMI invited all relevant stakeholders to make oral submissions, which included:

- (i) Consumers and consumer groups;
- (ii) Service providers comprising of hospital groups and practitioners;
- (iii) Funders and financiers, which included medical schemes, medical scheme administrators and managed care organisations, brokers and health insurers; and
- (iv) Regulators and policy makers.

The public hearings provided a platform for stakeholders to present their views on aspects of the market that impede competition, as well as matters that adversely affect the private healthcare market. It also provided an opportunity for the HMI Panel to probe further on issues of concern in the sector. General issues discussed during these hearing included:

- (i) Understanding the nature of the private healthcare market ;
- (ii) How stakeholders interact with each other;

- (iii) How consumers access, evaluate and use information about the sector;
- (iv) How healthcare services are provided and funded; and
- (v) The regulatory regime for the private healthcare market.

The Panel heard varying submissions including personal accounts from consumers about their experiences with stakeholders including medical schemes where they raised concerns related to the non-payment of their medical bills. Practitioners shared stories including those of their relationships with hospitals. Medical schemes and their administrators described how they interact with medical scheme members and healthcare providers and Hospitals expressed concerns regarding shortages of nurses and specialist in the country. Regulators also shared their experiences and challenges faced in fulfilling their duties.

The final stage

The public hearings are intended to be the final stage of the information gathering process, over and above that the HMI is using the public hearings for another vital purpose, which is to educate the public about how the private healthcare sector functions.

The first set of public hearings provided a good overall background on the issues pertinent to the private healthcare market. Furthermore, it got members of the public to come forward with information to the HMI. The remaining sets of public hearings will each focus on specific aspects and explore the competitive dynamics inherent in the private healthcare market. These sets of hearings will provide a better understanding of the factors that may prevent, restrict or distort competition in the private healthcare market.

Revised deadline for completion of the Market Inquiry

The timeframe for the completion of the HMI, beyond the date, initially gazetted was necessitated by the complexity of the issues, as well as the tasks involved in designing, collecting, presenting, cleaning, storing and analysing information and data. The deadline for completion of the HMI is now 15 December 2016, the implication of which has seen a revision of the Administrative Timetable. While the initial timetable envisaged that the public hearings will commence after the analytical work and research studies had been completed, the revised timetable indicated to stakeholders and members of the public that research and analytical work will run parallel to the public hearings.



PROGRESS ON THE LPG MARKET INQUIRY

LPG Team

The Commission's work in the market inquiry into Liquefied Petroleum Gas ("LPG") is progressing well with key milestones reached. The purpose of the inquiry is to determine whether there are anti-competitive features in the South African LPG market and how they can be remedied.

The Terms of Reference were published in the Government Gazette on 15 August 2014 with key themes focusing on high switching costs for bulk customers; regulatory impediments to effective competition; and limited growth of LPG usage by households amongst others.

The Inquiry commenced its investigative phase in September 2014 through call for submissions, targeted information requests, meetings with stakeholders and site visits. The Commission contacted market participants operating across the value chain and received more than 68 submissions from stakeholders as at 31 March 2016.

Some of the stakeholders that made submissions include regulators such as National Energy Regulator of South Africa (NERSA), Department of Labour, Department of Energy, municipalities, industry associations, quality assurance bodies, shopping mall owners, all major wholesalers including smaller players, retail outlets, and refineries among others. Specifically, the Commission used the following means to gather information:

- Introductory meetings were held with 30 market participants between 02 December 2014 and 11 December 2015;
- Site visits were conducted with 6 market participants between February 2015 and November 2015; and

- Teleconference calls were held with 11 market participants between February 2015 and September 2015

Arising from the submissions received, market participants indicated specific factors that were thought to have an impact on competition. On 27 August 2015, a call for further submissions was issued by the Commission. The purpose was to solicit additional views on narrow issues highlighted by the market participants. These issues related to: preferential supply allocation; bulk end-users limited ability to switch; potential for cylinder exchange programme to lead to coordination; limited LPG import facilities and the associated cost of importing and price regulatory framework.

In addition to the above, the Commission published its' preliminary findings and proposed recommendations on 10 May 2016 for public comment. The Commission's preliminary findings concluded that there are structural impediments to competition that may hinder the growth of the LPG industry. Further, the Commission found that there are significant bottlenecks in the regulatory environment which restrict the ability of potential competitors to enter and/or expand in the LPG industry.

On 23 March 2016, the LPG market inquiry timelines were extended to 30 September 2016 to allow for sufficient time for stakeholders to engage on the Commission's proposed recommendations. The Commission is currently reviewing all submissions made by market participants on the proposed recommendations.



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A YEAR IN DIALOGUE: a review of the 4th BRICS conference and the Commission's seminars in 2015

By Yongama Njisane

Strategic collaboration and advocacy is one of the Competition Commission's (Commission) strategic goals for the 2015 – 2020 period. A number of activities including, *inter alia*, hosting the annual competition conference, workshops and seminars on competition, trade and industrial policy as well as regulatory matters were identified as contributing towards the achievement of this strategic goal.

The year 2015 saw a number of significant collaborative and advocacy events taking place throughout the year. The Commission was granted the honor of hosting the 4th International BRICS International Competition Conference (BRICS Conference) which takes place biennially. Previous conferences were hosted by Russia in 2009, China in 2011 and India in 2013. The BRICS Conference was held at the Inkosi Albert Luthuli International Convention Centre in Durban. The annual competition conference, was also held as a precursor to the bi-ennial BRICS conference. A further opportunity to collaborate on a workshop focusing on developments in competition policy was identified and this was co-hosted by the Commission, the Competition and Regulation European Summer School and Conference and the University of Kwa-Zulu Natal, also as a precursor to the BRICS conference on 9 November 2015.

The theme of the BRICS Conference, “**Competition and Inclusive Growth**”, saw a number of conference papers and panel discussions explore the interrelationship between inclusive economic growth, development and competition. A total of 71 invited speakers participated in the three events. The joint workshop was anchored by 10 leading international scholars who taught on various aspects of competition economics and the role of economic evidence in competition regulation. 13 invited speakers, in addition to presenters of conference papers, participated in various panels at the annual conference. The BRICS Conference had about 48 invited speakers from the BRICS member countries, our international counterparts and international scholars participating in various panel discussions.

The main outcome of the BRICS conference was the generation of a new body of knowledge regarding developments in the enforcement of competition law in the BRICS member countries and the intersection of same with economic development imperatives. The key thrust of this body of literature focussed on the need to understand the role of competition policy in not just promoting growth, but to also on its distribution effect. As developing nations, the BRICS competition authorities are uniquely placed to promote and expand an appreciation of competition enforcement that recognises the specific needs and demands of emerging economies.

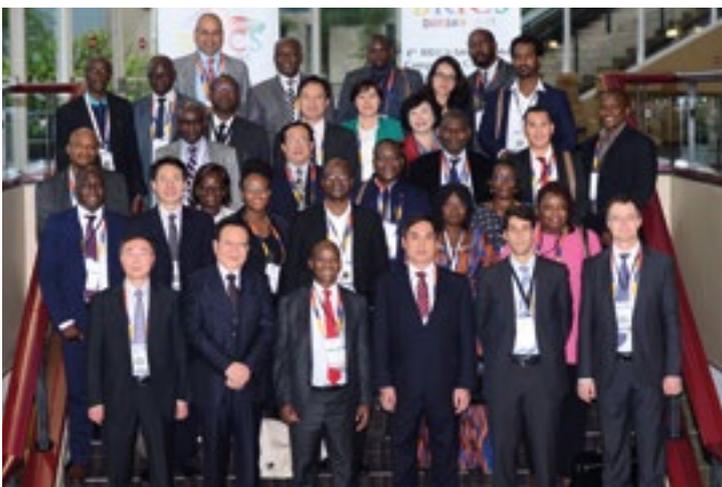
The quality of the discussions and engagements, due to the calibre of speakers, and as well as the arrangements for the social programme contributed to a successful conference. The BRICS conference was attended by the representatives of competition authorities of the BRICS member countries, African and international authorities, academics, lawyers, economists, representatives of business, consumer and labour groupings as well as ordinary citizens.

In addition to hosting a very successful BRICS conference, the Commission also hosted a number of workshops which sought to explore the relationship between competition, trade, and industrial policy in general. Some of the key highlights of these seminars are set out below:

- “*Competition Policy, Economic Development and Inclusive Growth in Developing Economies: Implications for Competition Enforcement*” by Professor Eleanor Fox, 28 July 2015. The primary focus of the workshop was to the intersection between competition policy and economic development as well as the competition implications of creating free trade areas, such as the African Free Trade Zone, proposed between SADC, EAC and COMESA. This topic was important in light of the developments towards the establishment of the African Free Trade Zone and how competition policies in the different African countries can be better aligned in anticipation of same.
- “*Promoting Faster Growth and Poverty Alleviation through Competition*” by the World Bank Group on 05 February 2016. This workshop was on the back of the publication of the “SA Economic Update - World Bank chapter on Competition, Growth and Poverty” by the World Bank Group. The aim of the workshop was to disseminate the findings of its study which covered cartel enforcement by the Commission and its contribution to economic growth and poverty reduction in South Africa.
- “*Presentation of Expert Economic Evidence in Competition Cases*” by Justice Dennis Davis, 09 December 2015. The workshop covered the scope of expert economic testimony and presentation of economic evidence during the litigation of competition cases. The workshop was important in the context of the contribution of economic evidence in the litigation of competition cases.
- “*The Competition Commission / OECD Workshops on Competition Assessment*” by Ania Thiemann, 16 to 18 November 2015. The aim of the workshop was to provide practical guidance to government bodies and regulators which are tasked with developing and drafting laws and regulations, to identify important competition issues during the legislative drafting process.
- “*Collusion - The Hidden Evil in the Marketplace. Are We Winning or Losing the Fight Against Cartels?*” by Prof Joseph Harrington, 10 to 11 September 2016. The workshop focused on the incentives, formation and modus operandi of cartels; the avenues available to competition authorities to detect and deter cartel conduct; and evidence of cartel detection and prosecution worldwide to gauge the gains made in enforcement.

4th BRICS Conference 2015 photographs







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