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Towards a fair and efficient economy for all

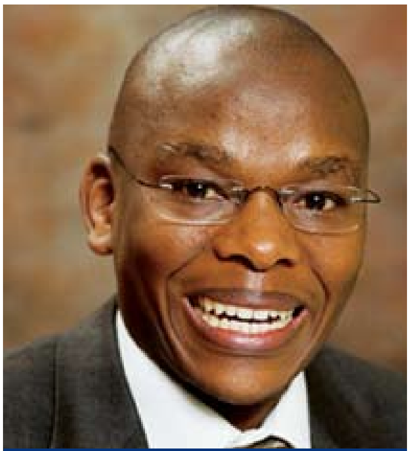
In this Edition

Amendments to the Competition Commission Act: A new age beckons

Introduction

The year 2008 marks ten years since the promulgation of the Competition Act (Act no 89 of 1998). It was therefore befitting that policy makers undertook a review of the legislation that has had so much impact on the South African business landscape. The stated objective of reviewing the Competition Act was to strengthen the competition authorities.

The debate regarding the strengthening of the competition authorities seems to have been given impetus by two things: one being the desire to have competition law respond more decisively to anti-competitive conduct of dominant firms in sectors that are regarded as important for growth, such as the steel industry; and second, the uncovering of widespread cartels by the competition authorities in sectors such as the bread and milk, which, understandably, led to a general public outrage and a general call for the directors and executives to take personal responsibility for these. Against this background the Department of Trade and Industry started the process of reviewing the Act, a process that saw a very robust engagement – with all key stakeholders ranging from business to labour, regulatory authorities to civil society making submissions – confirming the recognition of the pivotal role that competition law has come to play in our country.



By: Tembinkosi Bonakele
Deputy Commissioner

Accordingly, the review did not just come because 10 years after the promulgation seem like a logical time for a review, but came at a time where enforcement has reached a critical point, and a question had to be asked about the impact of the enforcement work, and the next level to take it to. In this article we cover the key amendments, primarily for purposes of explaining the provisions and, to a limited extent to point out some of the implementation challenges.

Criminal Liability for Cartel Conduct

By way of a background, the current Competition Act (prior to the coming into effect of the amendments) prohibits firms who are in the same line of business from fixing prices, allocating markets and rigging bids through collusive tendering in

Editorial Note

This issue of *Competition News* leads with a discussion by Tembinkosi Bonakele on the Amendments to the Competition Act recently passed by Parliament. The Amendments include major changes to the competition law regime, which are highlighted together with the context which motivated their introduction. In addition, the article highlights the demands that they will place on the Commission's capacities, which the Commission is currently actively planning for.

Enforcement actions continued to have a high profile in the past quarter, led by the Commission's ongoing investigation into the steel industry. Nompucuko Nontombana and Itumeleng Lesofe provide an insight into the Commission's concerns and the process of the investigation which has revealed that the suspicions of collusive conduct were justified and, indeed, further reaching than thought at first.

At the same time, the Commission has been investigating several steel industry mergers, as described in the review of major merger cases. Concerns that the mergers would increase the likelihood of co-ordination led the Commission to recommend prohibition in the cases addressed here.

One of the longest running collusion cases drew to a close in the period, with a proposed settlement still to be confirmed by the Tribunal. The case relates to price fixing by buyers of glass cullet (recycled glass). The article by Khotso Modise explores the issues that arise for the Commission when the complainant later appears to be implicated in the practices and ultimately reaches a settlement separately from the Commission, as in this case.

Another major investigation which includes alleged collusive conduct on both the buying and the selling side is the case referred by the Commission against dairy processors. Lulama Potwana sets out the main elements in the Commission's case, which indicate that conduct by the main processors of raw milk both suppressed the prices paid to farmers and increased prices charged for pasteurised milk and other dairy products.

Two articles deal with topics in competition law and the experience of other jurisdictions. Roshika Pillay reviews the issue of legal privilege, which has come to the fore in the Commission's use of search and seizure powers. The last article by Simon Roberts briefly comments on the competition regime in South Korea, which has a strong and well-resourced authority that has evolved in the context of meeting the challenges of a newly industrialised country.

Simon Roberts
Editor-in-Chief

contravention of section 4(1)(b), that is, engaging in cartel activity. These contraventions are widely regarded as the most egregious violations of competition law. Cartels are often equated with theft, and sometimes even 'day light robbery'. Like many of the other contraventions of the Act, firms found to have been engaged in cartel activity can be liable for a fine of up to 10% of their turn over for the year preceding the finding.

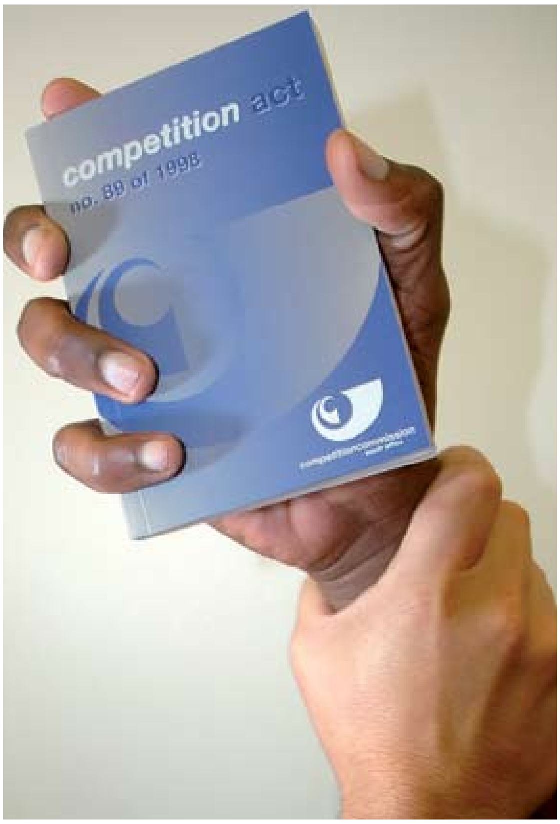
The amendments increase the penalties by introducing a criminal offence against a director or an executive (a person in management) of a firm who causes the firm to engage, or knowingly acquiesce in a firm engaging in cartel conduct in contravention of section 4(1)(b) of the Act. The director or executive can only be prosecuted for this offence if his or her firm has been found guilty of engaging in a cartel. A person found guilty of this offence may be liable for a fine not exceeding R500 000, or for an imprisonment term for a period not exceeding 10 years, or both.

No doubt this provision is primarily aimed at deterring cartel conduct. It sends a powerful signal that it is now time for directors and executives of firms to ensure that there are adequate systems to ensure that there is compliance with the provisions of the Competition Act. And, for firms who have been engaging in cartel activity, it is time to come clean and take advantage of the Competition Commission's Corporate Leniency Policy (CLP), as any delay may be costly.

It would, however, be naïve to think that because of these provisions, there will be no more cartels in South Africa. But, now that the stakes of participating in a cartel are higher, it can be expected that firms will go to greater lengths to avoid detection, such as by destroying evidence and seeking to mislead the Commission, as well by engaging in protracted litigation. This means that the authorities must increase the capacity to investigate and prosecute these cases, and to take on the many technical points that are likely to be raised by the respondent firms.

The CLP currently in operation encourages firms engaged in cartels to come forward. The firm that comes out first and provides the Competition Commission (Commission) with information to prosecute the other cartel members gets immunity from prosecution. This tool, widely recommended by many successful competition authorities around the world, has in the recent past yielded very positive outcomes in cartel investigations in South Africa. For the CLP to work, companies seeking to come out and *spill the beans* need to be reasonably certain of the outcome of the process, that is, if they meet the requirements in the CLP, they will get immunity.

One of the challenges for implementing these amendments is to ensure that there is certainty for potential leniency applicant not just in relation to the administrative fine against the company, but also about the position of directors or staff members who might face the prospect of a criminal prosecution. The amendment address this issue by providing that the Commission may grant any person (presumably a person who cooperated in the investigation of a cartel) a certificate that such a person is *deserving of leniency*. The consequences of this certificate are that, *inter alia*, the Commission may not seek or request a prosecution of such a person for the offence for which he has been granted the certificate, and may make submissions to the National Prosecuting Authority in support of leniency for such a person.



Much as the scheme in the amendments provides a framework on how to address this issue, the agencies involved in the implementation of these provisions, namely the Competition Commission and the National Prosecuting Authority have to work out details of implementation in a memorandum of understanding (MoU). It is going to be important for the two institutions to engage stakeholders in developing the MoU, to ensure that the MoU has public support and the process of applying for leniency is well understood, and provides certainty. The authorities will also need to quickly establish a reputation for consistency in cooperation – talking in one voice – on corporate leniency.

Market Inquiries

The current provisions of the Competition Act do not expressly provide for market inquiries or any remedies that may be imposed following a market inquiry. Nevertheless, the Commission conducts market inquiries on the basis of general provisions in the Act which allow the Commission to take measures to increase market transparency.

The amendment provides the Commission with powers to conduct an inquiry into the state of competition in a market without necessarily referring to the conduct of any particular named firm. The effect of the amendment is to give the Commission powers to summons persons to appear before it and to provide documents, as it would during any formal investigation. The inquiry may be initiated by the Commission, acting on its own or upon the request of the Minister of Trade and Industry. The Commission must announce the commencement of the inquiry by publishing the terms of reference in the Government Gazette. Upon completion of the market inquiry the Commission must also publish its finding in the Government Gazette and provide the Minister with the report of the inquiry. Subsequent to a market inquiry, the Commission may take any action within its powers, including initiating a complaint and referring the matter to the Competition Tribunal (Tribunal).

The market inquiry provisions are a significant addition in the toolkit of the Commission. The Commission has a responsibility to increase its capacity to be able to perform this important function.

Complex Monopolies

The amendments introduce provisions aimed at addressing anti-competitive conduct that are not captured by any of the prohibited practices in the current Competition Act. The amendments provide that a complex monopoly obtains in a market where at least 75% of the goods or services are supplied by five or fewer firms and any of those two or more firms conduct their businesses in a conscious parallel manner, without an agreement to do so. The Commission may investigate and refer to the Tribunal any firms found to have participated in a complex monopoly. The Tribunal may issue an order prohibiting the conduct, or setting conditions necessary to ameliorate the effects of the conduct. Before the Commission may refer this type of conduct to the Tribunal the following conditions must have been met:

- One of the firms involved must have at least 20% of the market.
- The conduct must have resulted in high entry barriers, exclusion of other firms, excessive pricing, refusal to supply other firms, or other market characteristics that indicate co-ordinated conduct.

These provisions are quite complex, and will present challenges of interpretation. It is instructive that the test for a complex monopoly would be quite difficult to meet, and even after it has been met, the worst order one may get against participants is what amounts to a declarator that the conduct is prohibited, and must therefore be stopped.

Concurrent Jurisdiction

The concurrent jurisdiction amendments clarify a long standing confusion on the jurisdiction of competition authorities in the telecommunications sector. Section 3 of the Act provides for concurrent jurisdiction in respect of competition matters in regulated sectors. Such concurrency has to be managed through agreements between the Commission and the regulatory authority of the relevant industry. The Electronic Communications Act, (Act 36 of 2005), provides that the Competition Act is subject to the Electronic Communications Act, and effectively ousts the jurisdiction of the competition authorities in the telecommunications sector with respect to restrictive practices.

While the amendments retain concurrent jurisdiction with respect to the regulated sectors, it asserts the ‘primary’ jurisdiction of the competition authorities to deal with restrictive practices and mergers in all sectors. The provisions are clear and unambiguous, but the implications of the provisions are less so. One implication is that the competition authorities have the power to investigate any conduct that violates the Competition Act, regardless of its origins. Arguably, this may mean even conduct that arises out of a regulation or legislation in a regulated sector. Whist it is widely accepted that what this means is that the competition authorities are responsible for *ex post* regulation and the sector regulators retain *ex ante* regulation, some sector statues retain some *ex post* regulatory powers for sector regulators. This requires the Commission and the sector regulators to clarify these matters soon by agreements, and to amend sector legislation where necessary.

Gun Jumping Investigations

The current legislation did not provide for the investigation of implementation of mergers prior to approval by the competition authorities, so called gun jumping. Whilst this offence was informally investigated by the Commission, investigations were often frustrated because no enforcement powers, such as the power to issue a summons, could be exercised during the investigations. Consequently, the authorities were at the mercy of the suspected company’s cooperation. The amendments now provide for the formal investigation of gun jumping, with a power to use the full investigative powers, such as the power to summons people to appear before the Commission and to bring documents.

Conclusion

After almost a decade of competition enforcement, the amendments will bring some changes in the competition law landscape. It require us to all roll-up our sleeves, and prepare for the implementation of the new provisions, while continuing with what has been working in the past. Like any new legislation, the amendments to the Competition Act will have implementation challenges. The authorities must be ready for implementation, and business to comply.

The Commission’s investigation into alleged collusion in the steel industry

By: Nompucuko Nontombana
Enforcement &
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By: Itumeleng Lesofe
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The steel industry is among the sectors prioritised by the Commission in order to make a meaningful impact in the promotion of competition in the South African economy. The sector is identified for prioritisation because it is characterised by high concentration levels and high barriers to entry and therefore very limited competition or potential for entry. The recent increases in the price of steel have also meant that the sector has a huge impact on the competitiveness of downstream industries and, importantly, in driving up costs for

a number government projects or infrastructure investments which use steel as an input. Internationally, the industry has also been found to have collusive tendencies, particularly bid rigging in relation to construction projects.

South Africa's steel industry

South Africa is the largest steel producing country in Africa and stands at number 21 in the world rankings of crude steel producing countries, according to the International Iron and Steel Institute. It is also a large net exporter of steel, due to low input costs, such as iron ore, scrap metal, coal and electricity.

It is important to distinguish between carbon steel and stainless steel. Carbon steel refers to steel mainly consisting of iron from iron ore and which has carbon as the main alloying element. Stainless steel differs from carbon steel by the amount of chromium present and the fact that it does not rust when exposed to air and moisture.

We focus on carbon steel, which may further be classified into flat products and long products that differ by the production process and the uses to which the products are put. Flat steel is widely used in shipbuilding, automotive, transmission of gas and oil industries. Long steel is mostly used in the civil construction industry, for railway lines, transmission towers and other engineering services.

There are only two flat steel producers in the country, Arcelor Mittal ("Mittal") South Africa and Highveld Steel and Vanadium. Flat steel products manufactured locally include hot-rolled and cold-rolled sheets and coils, hot-dipped galvanized sheets and tinplate. Mittal is the largest producer of flat steel, and supplies more that 80% of the domestic market. Mittal also supplies the largest range of flat steel products than its competitor, Highveld.

In long steel there are five producers, Mittal, Highveld Steel and Vanadium, Scaw, Cape Town Iron and Steel Works ("Cisco") and Cape Gate. In long steel, Mittal is also the largest supplier, responsible for more than 50% of local production.[1] Long steel products include billets, booms, reinforcing bar (commonly referred to as "rebar"), wire rod, rounds and sections.

Columbus Steel is the only producer stainless steel in South Africa. It manufactures slabs, plates, hot-rolled sheet and coil, and cold-rolled sheet and coil. These are stainless steel flat products.

There are a number of players who compete to a limited extent with the primary steel producers as steel merchants or steel traders. The role of these merchants/traders is to add value by processing, distributing and trading in the carbon steel produced by the steel mills. Some of the merchants are also linked to the steel mills.

The Commission's investigation

Concerns have long been raised about possible anti-competitive behaviour in the steel industry, by stakeholders in the industry and in previous investigations within the Commission. These concerns range from the high concentration levels in the industry, the high barriers to entry, the setting of local prices at Import Parity Pricing levels while South Africa is a net exporting country and suspicions of collusion among the primary steel producers and the steel merchants. For example, in relation to pricing,

1 It is also the world's largest steel producing company following a merger between Arcelor and Mittal.

South Africa is a low cost producer due to its access to relatively cheap iron ore, electricity and scrap metal. However, due to high barriers to entry and other considerations, these cost advantages are not sufficient to attract new entrants.

Previously, the Commission also investigated the steel industry in the Harmony Gold vs Iscor/Mittal Steel case. This investigation was in relation to allegations of abuse of dominance in the sale of flat steel products. The Commission non-referred the complaint but allegations of excessive pricing and inducement were taken directly to the Tribunal by the complainant. The Tribunal found Mittal Steel to have abused its 'super' dominance by charging excessive prices in the local market for flat steel, but dismissed the inducement allegation. The Tribunal's decision in this matter is on appeal.[2]

The Commission's current investigation is looking across the entire value chain in the steel industry. The basis for this recent investigation is a request the Commission received from the Department of Trade and Industry ("the dti") to conduct a research on the role of steel merchants in the steel value chain. The dti's request in this regard was informed by its concerns regarding the lack of transparency in pricing and the complex nature of relationships among the players in the local steel industry.

The Commission's preliminary research revealed that various steel merchants earned significantly high margins on various steel products.[3] It further showed that South African producers of long and flat steel products have been charging prices to local customers at import parity levels ("IPP levels") since 2002 despite the fact that South Africa is a net exporter of steel. A look at the trend of prices of various steel products, notably reinforcing steel, also confirmed that over time prices increased at rates that are higher than Statistics South Africa's Production Price Index which reflects average increases in prices at the factory gate.

During early 2008, various commentators[4] also noted that Mittal Steel announced consecutive double-digit increases in its steel prices citing upward movement of steel prices in world markets, higher input costs, particularly iron-ore and coking coal, and an inability to meet increased demand due to the electricity crisis. In most instances, these price increases were followed by similar announcements by other industry players.

Internationally, competition authorities have also uncovered instances of collusion in the construction industry broadly. In the UK, the cartel investigation in the construction industry uncovered evidence of bid-rigging in public sector tenders and private contracts. Similar conduct had been found to occur in construction projects in Japan, the Netherlands, France and Hungary.[5] Through the assistance of leniency applicants and dawn raids, some of these investigations revealed that the construction industry is characterised by anti-competitive tendencies due to the generally high degree of transparency and co-operation among players.

On the basis of these findings and developments, the Competition Commissioner initiated a complaint against several players in the domestic steel industry for *inter alia* their possible involvement in the conduct of fixing prices and/or trading conditions for various steel products. As part of the investigation, on 19 June 2008 the Commission conducted a search and seizure operation in the premises of Highveld Steel and Vanadium, Cisco and SAISI.[6]

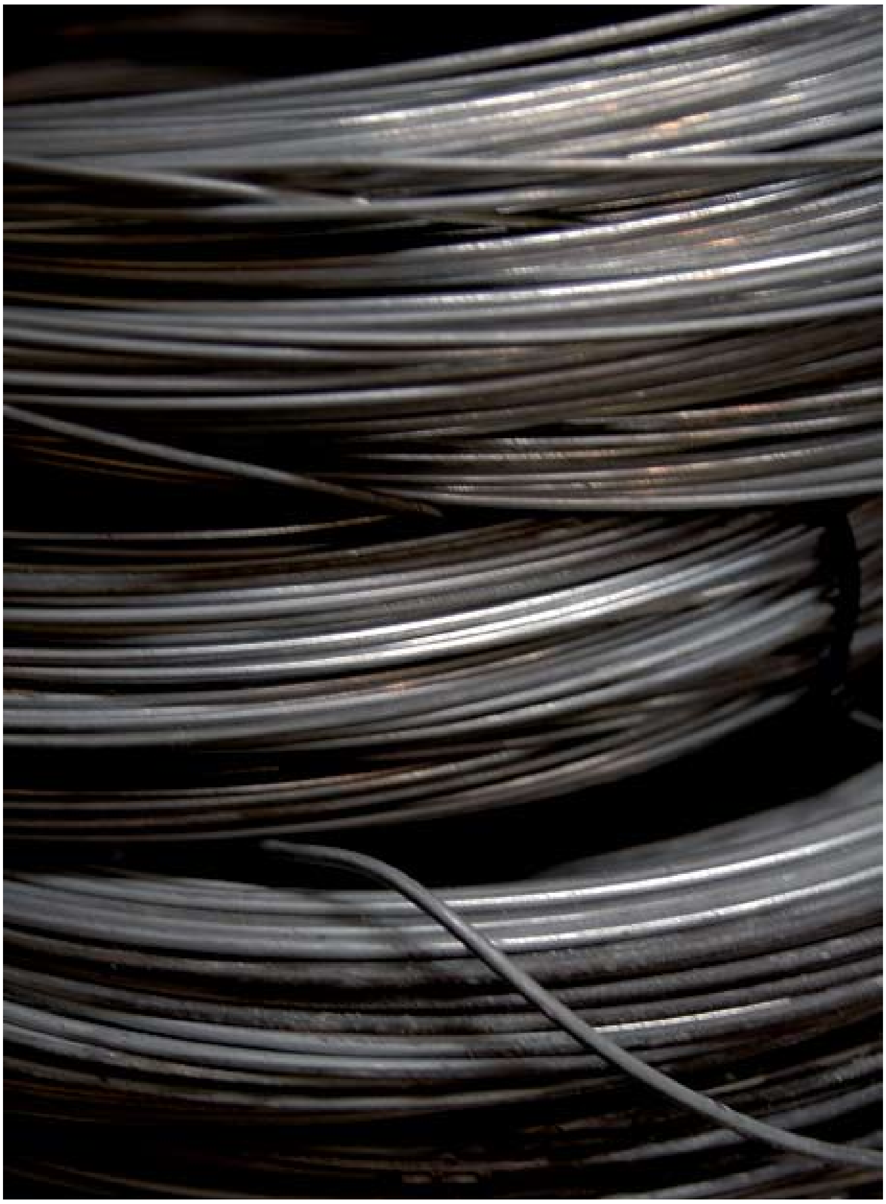
Since conducting the search and seizure, the Commission has received more than five marker and leniency applications in relation to various products and cartel activities in the steel industry. The leniency applications implicate parties at different levels of the steel value chain, and confirm the reality of collusive conduct in the industry. Scaw has publicly announced that it is one of the leniency applicants and is co-operating with the Commission in this regard. The investigation is ongoing.

Mergers and Acquisitions – quarterly review of major cases

Mergers in the Steel Industry

During the same period as the Commission's investigation into competition concerns in the steel industry the Commission also received a number of merger notifications involving firms in these industries. Although fully cognisant of the widespread collusion concerns in the broad steel and scrap industries, the Commission assessed each merger filing on its merits, paying particular attention to how the merger could enhance or facilitate existing collusion in each of the relevant markets defined. We review two of the mergers and highlight some of the key issues that arose.

2 At the time of writing this article the decision was still pending as the matter was due to be heard during October 2008.
3 Reference period is 1 July 2007 to 31 September 2007.
4 See Engineering News article of 28 March 2008 by Olivia S Spadavecchia titled *Arcelor Mittal announces new price increase for May as global prices rise, rand weakens*. Also see media release no 121/2008 by the City of Cape Town issued on 8 April 2008 titled *City's Delft Rescue Plan Suffers Setback*.
5 The Commission's Review of Infrastructure Inputs and Possible Competition Concerns, 31 August 2007.
6 An institution that represents the interests of all the primary steel producers. SAISI was raided based on suspicions that it was being used by steel producers as a platform to share commercially sensitive information such as prices.



Cape Gate Holdings (Pty) Ltd / Cape Africa Wire and Fence (Pty) Ltd

On 13 June 2008 the Competition Commission was notified by Cape Gate (Pty) Ltd of its intention to acquire Transvaal Gate together with its subsidiaries, Cape Africa and Fence & Tube. Pre-merger, Cape Gate held 51% of Cape Africa with the remainder held by Transvaal Gate. Post-merger, Cape Gate would own 100% of the entire issued share capital of Cape Africa, Transvaal Gate and Fence & Tube.

Cape Gate is involved in various levels of the steel industry value chain, including fencing applications where Transvaal Gate is also active. Cape Africa is a distribution joint venture established by Cape Gate and Transvaal Gate for the distribution and on-sale of steel, wire and wire products supplied to it by Cape Gate, Transvaal Gate and Fence and Tube in the Limpopo province only.

The transaction gave rise to both horizontal and vertical effects. The horizontal overlaps were in the market for the manufacturing of commercial chain link fencing and the distribution of standards & droppers (fencing accessories). Vertical integration occurred in that Cape Gate produces galvanized wire which is the primary input in Transvaal Gate's production of commercial chain link fencing.

Although there were horizontal and vertical effects arising from the merger, the Commission's main concerns were as a result of collusion in the various markets for wire and wire products, including fencing products. The upstream market for galvanised wire is highly concentrated with only two players holding more than 70% of the market. Furthermore, manufacturers of galvanized wire are also vertically integrated with manufacturers of the wire rod input, and downstream to the manufacturers of commercial chain link fencing.

The nature and price setting practices of the Cape Africa JV led the Commission to suspect that Cape Gate and Transvaal Gate were already collectively setting prices in the Limpopo region and that this behaviour may have been extended throughout the country. This concern, compounded by information received in the CLP application implicating certain products relevant to this transaction, necessitated further investigation into the conduct of firms in the identified markets. The Commission therefore held interviews under oath with a number of industry participants who admitted to price fixing in both the upstream galvanised wire and the downstream commercial chain link fencing markets. The Commission also took the view that absent collusion in the upstream market for galvanised wire, Transvaal Gate would be an effective competitor in the downstream market for commercial chain link fencing as it would have fair access to alternative sources to Cape Gate for its supply of input material to make commercial chain link fencing in which it competes with Cape Gate.

The Commission concluded that this merger would result in an increase in concentration in the commercial chain link fencing market, allowing for the strengthening of existing collusion in this market. It would also enhance the ease of monitoring cartel members' adherence to an agreed price in the upstream galvanised wire market.

Aveng (Africa) Ltd/ Silverton Reinforcing and Wire Products (Pty) Ltd, Koedoespoort Reinforcing Steel (Pty) Ltd, Witbank Reinforcing & Wire Products (Pty) Ltd and Nelspruit Reinforcing Supplies (Pty) Ltd

In April 2008, the Commission received a merger notification from Aveng (Africa) Ltd of its intention to acquire four steel reinforcing firms namely Silverton Reinforcing and Wire Products (Pty) Ltd; Koedoespoort Reinforcing Steel (Pty) Ltd; Witbank Reinforcing and Wire Products (Pty) Ltd and Nelspruit Reinforcing Supplies (Pty) Ltd. The Commission combined the assessment of these mergers in order to assess their cumulative effects on the market.

The proposed transactions would result in a horizontal overlap in the activities of the merging parties with respect to the cutting, bending, supplying and installation of rebar and supplying of hard drawn wire and mesh in both the Gauteng (including Witbank) and Nelspruit markets.

In addition, the merger presented two vertical dimensions. First, the primary target firms source some of their mesh and hard drawn wire requirements from reinforcing steel producers including Steeledale, a division of Aveng Africa in the instant transaction. Second, the primary target firms' reinforcing steel businesses are upstream to the acquiring firm's construction services business, which it conducts through Grinaker-LTA.

The Commission found that the merging firms would have relatively high market shares for the supply of rebar in the Gauteng (including Witbank) and Nelspruit markets. The presence of high market shares may not necessarily lead to anti-competitive conduct if new firms can enter the market in a relatively short period (usually within 1 to 2 years). The Commission's investigation however found barriers to enter the supply, cut and bend of reinforcing steel products to be high. Investigations also revealed that there were few independent reinforcing steel companies that have direct access to raw materials from steel mills. It is apparent that due to the construction boom, access to input material is the main obstacle to entry, particularly for small reinforcing steel suppliers or new entrants. Steel mills prefer to supply long standing customers rather than new entrants at these times.

With respect to the vertical dimension, the Commission found that most of the competitors of the primary acquiring firm are vertically integrated. Against this backdrop, the Commission was concerned that the merger would result in the primary target firms (which are presently independent players and not affiliated with an input supplier and a construction company) being part of a large construction group. This could lead to the small construction companies that are not vertically integrated and that compete with the merging parties' construction arm, being refused access to reinforcing steel products for construction projects.

In addition, the Commission was concerned that the removal of four independent companies from the relevant markets resulted in a clear increase in concentration and was likely to make a collusive outcome easier to achieve and/or sustain. This led to further investigation which found that there is widespread collusion, specifically in the market for reinforcing steel products. The Commission's enquiry revealed that extensive and regular communication took place between competitors, sharing sensitive information with the explicit intention of agreeing to dampen the intensity of competition and to establish pricing levels. Given that the merging parties and their competitors have been engaging in such apparently coordinated behaviour, the Commission believed that the proposed acquisition of the primary target firms would increase the likelihood and effectiveness of such efforts in future.

As such, the Commission found that the mergers are likely to lead to a substantial prevention and lessening of competition in the steel reinforcing markets, both from a unilateral and coordinated effects perspective. The Commission prohibited the three mergers in which Aveng (Africa) Ltd (acquiring firm) intended to purchase Koedoespoort Reinforcing Steel (Pty) Ltd, Witbank Reinforcing & Wire Products (Pty) Ltd and Nelspruit Reinforcing Supplies (Pty) Ltd (target firms). The Commission also recommended to the Competition Tribunal the prohibition of the large merger involving the acquisition of Silverton Reinforcing and Wire Products (Pty) Ltd by Aveng Africa. The parties subsequently withdrew all four of the merger filings.

Crest Chemicals and Bergen Trading

The Commission approved, without conditions, the intermediate merger between Bergen Trading CC ("Bergen Trading") and Crest Chemicals (Pty) Ltd ("Crest"). Crest is a wholly owned subsidiary of Chemical Services Limited ("Chemserve") which in turn is controlled by AECI Limited, a public company listed on the Johannesburg Securities Exchange. Crest is one of the largest distributors of commodity and specialty chemicals in South Africa. Through this transaction, Crest intended to add to its portfolio the surfactants distribution business of Bergen Trading. Crest and Bergen Trading distribute these surfactants for use in virtually all surface active cleaning agents such as detergents.

The transaction had a horizontal as well as a vertical dimension. The horizontal overlap arose in that both parties distribute surfactants (particularly Nonyl Phenol Ethoxylates (NPEs) and Alcohol Ethoxylates (AEs), the commonest types of surfactants) under exclusive supply arrangements with manufacturers. The merged entity would house two supply agreements from two of the major manufacturers of surfactants, namely Sasol Olefins & Surfactants and Shell Chemicals. The surfactants distribution market is highly concentrated, especially at the level at which the merging parties operate, with the merged entity having combined market shares of approximately 21% and 32% for NPEs and AEs, respectively.

The Commission found that there are other credible players such as CH Chemicals and Protea Chemicals and a few other smaller distributors who can import surfactants. However, these distributors are constrained to import these surfactants in bulk as there is a severe shortage of such bulk storage facilities in South Africa. Nevertheless the Commission found that the proposed merger did not exacerbate this situation.

In respect of the vertical overlap, certain Chemserve's subsidiaries purchase surfactants from Bergen Trading for onward distribution or value addition. As such, there was potential for input foreclosure especially in the downstream industries in which the Chemserve subsidiaries compete. However, the Commission concluded that the merged entity would be in no stronger position nor incentivised to foreclose its downstream rivals.

Competition Commission against CONSOL (PTY) LTD and NAMPAK (PTY) LTD

By: Khotso Modise
Compliance Division

One of the longest running Commission cases at the Tribunal is about to end. Settlement between the Commission and the parties has been reached in the complaint against Consol (Pty) Ltd and Nampak (Pty) Ltd ("the respondents") laid by Enviroglass & Waste Services, a division of the Reclamation Group (Proprietary) Limited ("Enviroglass / the complainant") with the Commission on 10 October 2003. At the time of writing, the Consent Agreements in this matter are still to be confirmed by the Tribunal.

Enviroglass carried on the business of collecting, purchasing and processing raw cullet and sold this to the Consol and Nampak. Cullet is an industry term given to glass that is destined for recycling. The respondents carried on, *inter alia*, the business of manufacturing glass containers for the beverage, food and pharmaceutical industries by using a combination of virgin raw materials such as silica sand, soda ash and limestone as well as processed furnace-ready cullet. Both Consol and Nampak bought cullet from collectors and processors of cullet such as the complainant. The collection, processing and supply of unprocessed and processed cullet for purposes of glass container manufacturing happens throughout the whole of Republic of South Africa.

Consol and Nampak were members of the Glass Recycling Association ("the GRA"), in which Enviroglass was also a member. The Commission contended that the GRA was used by the respondents as a platform to fix prices and allocate markets between Consol and Nampak. Accordingly, the Commission charged that the respondents for contravening sections 4(1) (b) (i) and (ii) of the Competition Act ("the Act"). The specific allegations by the Commission were that the respondents entered into agreements in terms of which they agreed that they would not compete in certain geographic markets and fixed the price of cullet (re-cycled glass) to the detriment of collectors and competitors.

This case highlighted particular issues when the Commission and the complainant may be at cross purposes as to the rationale for the investigation. Enviroglass was at all material times a member of the GRA and was party to the decisions under investigation which influenced its behaviour in the case. In other cases, the complainant may lodge a complainant with the Commission simply because it has lost its influence within an existing cartel and hopes the Commission's intervention may assist it to avoid punishment by other powerful members of the cartel. Other complainants are just looking to secure damages. The Commission therefore needs to be alive to the fact that complainants do not always necessarily approach the Commission with clean hands.

A complainant who is of the view that the Commission in referring his complaint to the Tribunal has not covered all aspects of the complaint filed may make an application for an order to intervene thereby become a party to the proceedings at the Tribunal. Ordinarily there is not a problem with the complainant intending to intervene and become a party to Tribunal proceedings. The complainants usually have a more intimate knowledge of the facts of their complaints and are involved in running the case from the factual point of view meaning that that the Commission's case is often intertwined with that of the complainant.

The Enviroglass case was no different. However, when Consol and Nampak were going to raise the issue of Enviroglass' involvement in the GRA, there was an obvious reluctance by Enviroglass to start trial. At one point, just days before the commencement of the Trial, Enviroglass filed an application to rebut some aspects contained in the expert witness statement filed by Consol. This entailed the postponement of the trial and the adoption of a whole new timetable to enable all parties to react to their anticipated filing. The application then came to nothing when it later transpired that Enviroglass had since decided to abandon its application to file a further statement. In the process a trial set down for the week starting 25 October 2007 had to be postponed for almost a year to 1 September 2008.

In the course of the long postponement Enviroglass without knowledge of the Commission engaged Consol and Nampak in negotiations for a settlement. This may have been born out of the realization that the financial compensation it expected by way of civil damages would be hard to come by especially in the light of their role in the GRA and general collection of raw glass. To the surprise of the Commission, Nampak and Consol then approached the Commission with a view to settle the matter pursuant to their agreement with Enviroglass. The lengthy delays had also impeded the Commission in, for example, securing witnesses who had long closed shop, while others had relocated.

While a curtain will soon come down on five years of work, there are important lessons for the Commission going forwards. We will be sure to pay more attention to the conduct of complainants themselves, and their motives, as well as being alive to the fact that intervention applications may frustrate litigation by the Commission.

The Commission's investigation into Dairy Processors

By: Lulama Potwana
Legal Services Division

During February 2005 the Commissioner initiated a complaint against several processors in the milk industry for alleged prohibited practices in contravention of the Competition Act. This investigation was prompted in 2004 by a letter from a 'small' milk producer referring to possible anti-competitive practises affecting milk producers in the industry. Subsequently, the Commission initiated a complaint and commenced an investigation into the milk industry of alleged restrictive vertical practices, alleged restrictive horizontal practices including collusion, price fixing, market division, and alleged abuse of a dominant position by some of the major milk processors.

As part of the investigation, the Commission summonsed the respondents to provide it with relevant documentation and for certain employees of the respondents to appear in person. The respondents provided the Commission with information and/or documentation sought and the Commission's investigation team interrogated various people in terms of section 49A(1)(a) of the Act and in one instance also exercised its powers to enter and search premises in terms of section 46 of the Act. As the investigation progressed, the investigation team ("the team") established that there are more players involved in the possible contraventions of the Act and that there are more possible contraventions of the Act than previously identified at the initiation stage. Subsequently, further initiations followed which were consolidated with the initial complaint initiation. The respondents are Clover Industries Limited and Clover SA Ltd ("Clover"), Parmalat (Pty) Ltd ("Parmalat"), Ladismith Cheese (Pty) Ltd ("Ladismith Cheese"),The fourth respondent is Woodlands Dairy (Pty) Ltd ("Woodlands"), is Lancewood (Pty) Ltd ("Lancewood"), Nestlé SA (Pty) Ltd ("Nestlé") and Milkwood Dairy (Pty) Ltd.

Technically, the dairy chain starts at raw milk production and ends when processors and consumers utilize products that were created at different stages of the value chain. For purposes of defining the market the dairy industry can broadly be divided into: (a) The raw milk (fresh milk) segment and (b) the dairy products or ingredients segment. Dairy products or ingredients which consist of products such as pasteurised milk, cheese, butter, UHT milk and milk powders, are sold through both retail and non-retail channels. The non-retail channels involve the sale of bulk products as commodities to food service customers and ingredients customers. However, a few of these milk producers also engage in the business of re-selling ingredients, or dairy products, in bulk or as commodities.

Raw milk relates to milk in its simplest form, in that it has not yet been processed, pasteurised or packaged. Given the nature of this product, the relevant geographic markets are regions in which the procurement occurs, which are characterised by very high market share so the side of the procurer.

The Complaints

The grounds for the first complaint referral are that, during at least the period from 1 January 2002 to 30 March 2006, Clover, Parmalat, Lancewood, Woodlands, Ladismith Cheese and Nestle committed a prohibited practice in contravention of the provisions of Section 4 of the Act in that they directly or indirectly fixed the procurement prices of milk paid to producers through one or more means of information exchange. The Commission also uncovered evidence that the respondents agreed to increase prices by the same amount on the same dates. The Commission alleges that the respondents in this matter shared disaggregated pricing data, which set out all the components making up an end price.

The grounds of the second complaint are that, during at least the period from 1 January 2002 to 30 March 2006, Parmalat, Clover, Woodlands and Nestlé committed a prohibited practice in contravention of the provisions of Chapter 2 of the Act, in that, being firms in a horizontal relationship as contemplated in terms of Section 4 of the Act in the relevant market, indirectly fixed the purchase price of milk and/or a trading condition in contravention of section 4(1)(b)(i) of the Act through long term milk supply or milk exchange agreements between them. As a result of this arrangement, the milk price is artificially maintained and the benefits of surplus milk are not passed on to the consumer.

In the third complaint, the Commission alleges that through their exclusive supply agreements with producers, Parmalat & Clover abused their dominant position in contravention of section 8(d)(i) by inducing suppliers not deal with competitors. Alternatively, that the agreements between them and the producers and specifically the prohibition on the off-selling of milk, has the effect of substantially preventing or lessening competition.

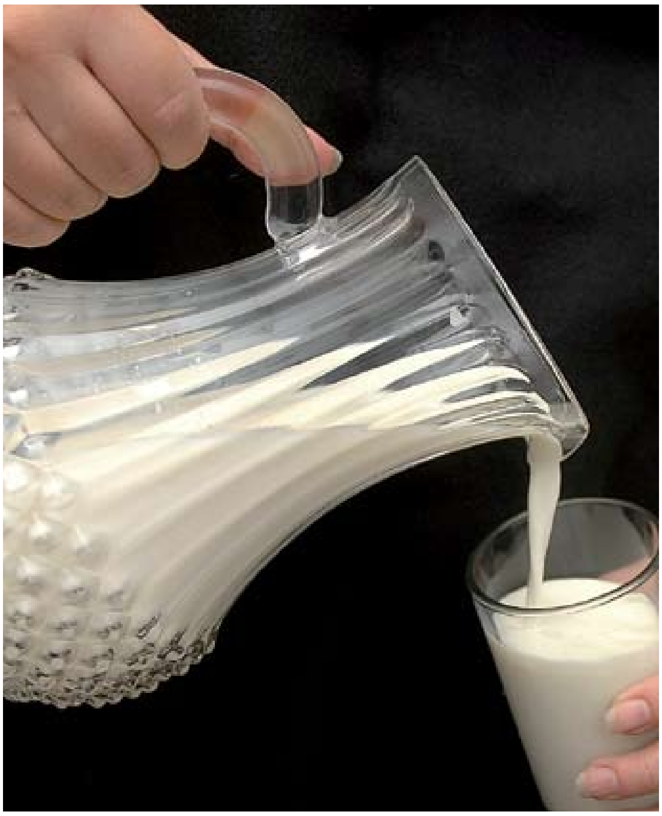
The grounds for the fourth complaint are that, during at least the period from 1 January 2002 to 30 March 2006, Woodlands, and Milkwood committed a prohibited practice in contravention of the provisions of Chapter 2 of the Act, in that, being firms in a horizontal relationship as contemplated in terms of Section 4 of the Act in the relevant market, they directly or indirectly fixed the retail prices of UHT Milk between them. The Commission also alleges that Woodlands and Milkwood agreed not to compete in certain areas, thereby allocating markets in contravention of section 4(1)(b)(ii)).

In the fifth complaint the Commission alleges that Clover and Woodlands fixed the prices of processed milk ("UHT – Long Life") to the retail market in contravention of section 4(1)(b)(i) of the Act. It is alleged that Woodlands and Clover agreed on trading conditions by artificially manipulating the market through arrangements regarding price signals and volumes in the market for raw milk in contravention of section 4(1)(b)(i) of the Act.

In the six complaint, the Commission alleges that the respondents indirectly fixed the selling price and / or trading conditions of milk and processed products at an artificially high level by agreeing on a co-ordinated control of volumes in the market in contravention of section 4(1)(b)(i) of the Act. Surplus removal of milk gave rise to indirect price fixing in that the volumes removed from the market resulted in the decrease of supply, which by necessary implication either prevented any decline in the prices of milk and milk by-products or alternatively increasing the prices of milk and milk by-products at an artificially high level by basing a lower producer price on a surplus in the market, but after removing the surplus in concert, base a higher retail price on a " shortage" in the market.

The Corporate Leniency

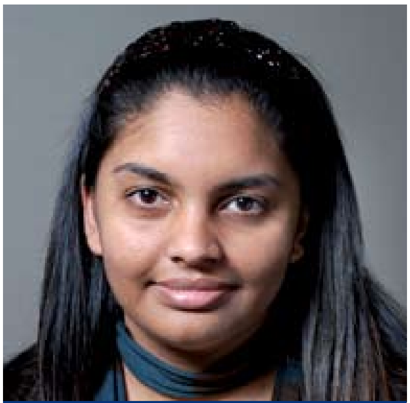
During or about September 2005, Clover applied for leniency under the Commission's Corporate Leniency Programme ("CLP"). More specifically, leniency was sought for Clover's role in co-designing and participating in a milk-balancing scheme over the past few years (count 6). The Commission granted Clover conditional immunity on 20 December 2005. Clover also sought immunity in respect of count three but was not granted same.



After the matter was referred to the Competition Tribunal, Clover raised three points *in limine*. In the first point *in limine*, Clover claims that the Commission referred the complaint after the expiry of one year from the date of the receipt of the complaint and that the entire referral should be dismissed. The Commission's argument is that the one year period as stated in section 50(2) of the Act does not apply as the complaint was initiated pursuant to the terms of section 49B(1) and 49B(2)(a) and not in terms of section 49 B(2) (b) as Clover contends. Clover's second and third points *in limine* relate to the conditional immunity granted to Clover. Clover contends that it will be unfair to have to assist the Commission in its case and yet be a respondent in relation to counts three and five. Clover argued that the conduct in count three is an integral part of the conduct alleged in count six and that the Tribunal should dismiss the third complaint against Clover. In the third point *in limine*, Clover argues that there is a significant factual difference between the third and fifth complaints on the one hand, and the sixth complaint on the other. Ladismith also argued the first point.

All three points have been dismissed by the Tribunal and on 19 September 2008 the Competition Appeal Court dismissed the appeal and review applications brought by Clover and Ladismith against the decision of the Tribunal. Clover is now appealing to the Supreme Court of Appeal ("SCA"). The hearing was initially scheduled to commence on 29 September 2008 but due to the appeal and review applications it was re-scheduled to commence on 24 November 2008. As a result of the current appeal to the SCA, the hearing might not commence as scheduled.

Legal Professional Privilege



By: Roshika Samdhan Pillay
Enforcement and Exemptions Division

Legal professional privilege ("privilege") is an issue that has come to the fore with the emergence of the Competition Commission's ("the Commission") use of its search and seizure powers as granted by the Competition Act 89 of 1998 ("the Act"). The issue revolves around which documents may be seized by the Commission during such procedures, as documents that reflect information that is exchanged between a legal advisor and his or her clients may be protected from the view of the Commission under a claim of privilege.

Privilege may be defined as "the fundamental right to give and take legal advice with complete confidence that communications between legal practitioner and client are protected".[1] The rationale behind the protection of this information exchange is that the legal advisor must be able to communicate freely with his or her client in order to render effective service and the client, in order to do so must be assured that this exchange will be protected.

In conducting investigations, investigators should not just accept claims of privilege at face value. At the time when privilege is claimed it is prudent to question why such is being claimed and whether it is a claim that is in accordance with the criteria below.

The criteria that must be met for a claim of privilege to succeed are:

a) The information in question must have been communicated by the legal advisor whilst he or she was acting in his or her professional capacity. There is no distinction drawn here between the salaried legal advisor and the attorney engaged in private practice.[2]

b) The advice communicated must be made in confidence. Where it is clear that such advice is intended to be communicated to other parties, a claim of privilege will not stand, for example, where terms of a settlement are communicated to an attorney by a client with the express intention that such be communicated to other relevant parties.[3]

   Where the protected information was exchanged in the presence of employees of a law firm, other than the legal advisor, such employees are also bound by the rules of legal privilege and may not reveal the privileged information.[4]

   Privilege may also be claimed in respect of information exchanged between the legal advisor and/or client and third parties where the information was communicated for submission to the legal advisor and such communication was made after the contemplation of litigation.[5]

c.1) The information exchange must have taken place for the purposes of obtaining legal advice. For alleged offences or acts in relation to which advice is sought, such must have already taken place. Advice obtained prior to the commission of the alleged offence or act is not protected[6]; or

c.2) The advice rendered must have been exchanged in contemplation of litigation, meaning that the party seeking the advice must be thinking about instituting legal proceedings. It is not necessary that there be actual or pending legal proceedings for the information exchanged between the legal advisor and client to be protected by privilege.[7]

d) Only the client may claim privilege over information and such may be waived at any time.[8]

While privilege is viewed by our courts as being fundamental "for the proper functioning of the legal system"[9] , Section 32 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") grants the right of access to information[10] and such section may be used to challenge a claim of privilege.

In the case of *Jeeva and Others v receiver of Revenue, Port Elizabeth, and Others*[11], the court was of the view that courts "should be inclined to uphold a bona fide claim to legal professional privilege in answer to a claim for access to information, although there may be cases in which the facts and circumstances are such as to induce a court to conclude that the privilege should not take precedence over the constitutional right of access".[12]

1 LSSA L.E.A.D. Professional Conduct 2006, 34.
2 South African Law of Evidence, page 579, and Schwikkard & Van Der Merwe *Principles of Evidence* 2nd Edition (2003) 135.
3 DT Zeffert AP Paizes A St Q Skeen, *The South African Law of Evidence*, 2003, 580; Schiwikkard & Van Der Merwe, *Principles of Evidence* 2nd Edition (2003), 136-137.
4 DT Zeffert AP Paizes A St Q Skeen, *The South African Law of Evidence*, 2003, 580; Schiwikkard & Van Der Merwe, *Principles of Evidence* 2nd Edition (2003), 136-137.
5 Schwikkard & Van Der Merwe, *Principles of Evidence* 2nd Edition (2003), 137.
6 Schwikkard & Van Der Merwe, *Principles of Evidence* 2nd Edition (2003) 1360-137; DT Zeffert AP Paizes A St Q Skeen, The South African Law of Evidence , 2003, 580 - 581.
7 Shcwikkard & Van Der Merwe, *Principles of Evidence* 2nd Edition (2003), 137.
8 DT Zeffert AP Paizes A St Q Skeen , *The South African Law of Evidence*, 2003, 584; Schwikkard & Van Der Merwe, Principles of Evidence 2nd Edition (2003) 137.
9 Schwikkard & Van Der Merwe, *Principles of Evidence* 2nd Edition (2003) 135.
10 Section 32 of Chapter 2 of the Bill of rights as contained in the Constitution of the Republic of South Africa, Act 108 of 1996.
11 1995 (2) SA 433 SE.
12 DT Zeffert AP Paizes A St Q Skeen, *The South African Law of Evidence*, 2003, 577.

The court in the case of *Van Niekerk v Pretoria City Council*[13] stated that where privilege was claimed as an argument against the right of access to information, "the public interest benefit of upholding a claim made under section 23 (the section of the Interim Constitution of the Republic of South Africa that dealt with the right of access to information) should be considered in determining whether a proposed limitation of that right is reasonable".[14]

The most prolific cases in which the issue of privilege was analysed were that of *Thint (Pty) Ltd v National Director of Public Prosecutions and Jacob Zuma and Michael Hulley v National Director of Public Prosecutions*.[15] The two cases were dealt with together by the Constitutional Court and judgment was handed down on 31 July 2008.

The applicants in the above matters, being Thint, Mr Jacob Zuma and Mr Michael Hulley, alleged that the search warrants granted to the Directorate of Special Operations to conduct the search and seizure operations of 18 August 2005 and 08 September 2005, at the offices of Thint and Mr Hulley and at the residence of Mr Zuma, did not provide sufficient protection of their right to legal professional privilege.

One of the arguments put forward by the applicants in support of the above allegation was that the search warrants must have included provisions which specifically referred to Section 29 (11) of the National Prosecuting Authority Act 32 of 1998. This section deals with the procedure for the determination of claims of privilege. The court rejected this argument on the basis that there is no provision in South African Law which states that search warrants must contain provisions which deal with disputes over claims of privilege.

The other grounds on which the above allegation failed were:

a) the warrants were lawfully executed;

b) claims of privilege were not made during the searches, nor were such claims made subsequent to the searches despite the applicants having adequate time to make such claims; and

c) the applicants could not demonstrate to the court that they had suffered any actual prejudice as far as their right to privilege is concerned.

It is clear that privilege is not an absolute right and that a balancing test, where necessary, will have to be applied between the right of access to information and that of privilege.

In terms of Sections 49(5) and (6) of the Act, the right of privilege may be claimed over articles or documents on the ground that such contain "privileged information". When privilege is claimed, the individual conducting the search and seizure operation may request the sheriff or registrar of the relevant High Court to attach and remove the article and/or document for safe custody until the court decides whether or not the information is in fact privileged.

Competition Policy – some insights from South Korea

South African competition cases draw heavily on precedents and practices in jurisdictions with long established competition regimes, such as North America and Europe. Interesting insights can clearly also be drawn from the experiences of industrialising and newly industrialised countries which may share similar challenges of industrial development and high levels of concentration with South Africa.

South Korea is one such country, which has developed a strong competition regime and institutions that have evolved to meet particular concerns in that country while being founded on common core competition

13 1997 (3) SA 839 (T).
14 DT Zeffert AP Paizes A St Q Skeen, *The South African Law of Evidence*, 2003, 578.
15 Case numbers CCT 89/07 and CCT 91/07 respectively.

By: Simon Roberts
Policy & Research Division

principles. The KFTC has a high status amongst the country's economic policy institutions, being autonomous but with the head of the KFTC having a seat in cabinet. I briefly comment on some of the features of competition policy in South Korea, drawing on meetings with members of the authority and competition practitioners.

The Korea Fair Trade Commission (KFTC) was established in 1981 to enforce the Monopoly Regulation and Fair Trade Act of 1980. Its objectives are to encourage free and fair competition, prevent the concentration of economic power and thereby promote 'balanced development'.[1] Free and fair competition is defined broadly to include the control of potential abuses and imbalances in the bargaining power between parties, defined in terms of 'unreasonable' practices and 'unjustifiable' restrictions on competition. The KFTC also has a consumer protection mandate. In 2008 its staff totaled close to 500.

Prioritisation and cartel-busting

The KFTC has a very strong record of uncovering cartels, with between thirty and fifty cartel cases per year in recent years. The reasons for this success include the 2005 revisions to the leniency policy, a strong prioritisation on key sectors, and the capacity to undertake market studies drawing on the knowledge gained in case investigations, as well as wider research and analysis.

While the KFTC introduced a corporate leniency programme (CLP) in 1996, it only really began to bear fruit following changes in 2005 to increase certainty for the applicant regarding the terms under which immunity will be granted, as well as adding the provision that there will be a 30% reduction in fine for the second applicant. CLP applications increased substantially, to average around two per month from 2005 to early 2008.

The CLP programme is coupled with vigorous enforcement actions against cases of suspected collusion and bid-rigging. This includes a focus on tenders and procurement by public agencies to identify where suppliers are engaged in anti-competitive conduct to raise prices to public procurers.

The KFTC's prioritisation further sharpens the focus on two major areas in its fight against collusion, namely:

- household necessities, such as basic foods, as well as telecommunications
- industry necessities, such as intermediate inputs in the form of steel and coal

These two priorities ensure that the cartel-busting actions look at where the harm would be greatest on consumers and on industrial development. In these areas the KFTC is very active in studying markets and changing industry structures, as well as examining firm behaviour to identify signs of anti-competitive conduct.

Fair competition and concerns with controlling concentration

The establishment of the KFTC in 1981 came at a time when there were great concerns in Korea about the levels of concentration of economic power in the hands of the top conglomerates or *chaebols*, such as Samsung, LG and Hyundai. As a result the KFTC has developed an area of responsibility that is unusual when compared with most competition authorities. The legal regime was strengthened in the mid-1980s to enable the KFTC to monitor and regulate the largest *chaebol* groupings to restrain the concentration of economic power. These provisions are wide ranging and include powers to address cross-equity holdings and cross-debt guarantees among the affiliates of large business groups, undue subsidies within groups, and ceilings on shareholdings in other domestic companies.

A second set of powers addresses unfair contracting practices and unfair trading practices including the exercise of buyer power. These powers are also embodied in other specific legislation which the KFTC administers. Such powers are exercised to protect small and medium enterprises, for example, in subcontracting relationships to supply inputs to a large auto business. The KFTC is very active in this area, with 1947 cases of unfair subcontracting in 2006 alone.

While the levels of concentration have not necessarily declined in South Korea and the *chaebol* groupings remain at the heart of the economy, the KFTC believes that these provisions have an important impact on the behaviour of big businesses and their contribution to the economy. It also appears as if there is a high degree of dynamism amongst the *chaebols*, with their relative positions changing over time as some are more successful than others in making major investments and realising their growth strategies.

As would be expected, the role of the KFTC continues to evolve, and will be influenced by the new government which was elected on a more pro- big business platform.

1 Wise, M. (2000) 'The Role of Competition Policy in Regulatory Reform – Review of Competition Law and Policy in Korea', *OECD Journal of Competition Law and Policy*. Vol.3, No.2, pp.128-180.

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