Towards a free and fair economy for all

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Towards a free and fair economy for all

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Putting the Brakes on Toyota

Commission Investigates Automobile Industry and Fines Toyota R12 Million

The public outcry over the high prices of new motor vehicles, despite the strengthening rand, led to the Commission initiating a formal investigation into car prices. This extended to a number of sales practices, which if established, would be violations of the Competition Act. The primary aim of this investigation is to establish if there are any anti-competitive practices in the industry that may be contributing to the escalating car prices.

The Commission's preliminary investigation in dealerships, major motor vehicle manufacturers and importers of new motor vehicles throughout

Putting the brakes on Toyota continued…

the country suggests that that the practice of minimum resale price maintenance is widespread within the car industry. There is also indication that this may be a standard practice amongst most manufacturers and importers of new motor vehicles.

Minimum resale price maintenance occurs when a manufacturer imposes a minimum resale price on a dealer, thereby limiting or even excluding a dealer's ability to offer discounts. If this practice truly exists, it really is a grave concern to the Commission that a practice so anti-competitive and detrimental to consumers can be a norm in an industry. This would be particularly so in light of the fact that such a practice is outrightly prohibited by section 5(2) of the Competition Act.

Various statements made by the National Association of Automobile Manufacturers of South Africa (NAAMSA), as well as a pattern found to be generally used in conducting motor vehicle sales by most manufacturers/importers, created the impression that a practice calculated at maintaining motor vehicle prices at certain proportions or levels, has apparently been agreed upon, thus going against the provisions of the Competition Act.

Furthermore, the Commission's investigation indicates possible collusion amongst most dealers, as well as price co-ordination by a number of manufacturers. The Commission is determined to uncover these practices and eradicate them if they do indeed exist. Also, connected to this is the issue of manufacturers/importers of new motor vehicles, possibly charging excessive prices. If enough evidence surfaces on this issue, the Commission will move to nail the alleged perpetrators. The investigation could ultimately cover the entire motor vehicle market in South Africa.

The Commission's seriousness in eradicating anti-competitive practices in this industry is evident in the amount of administrative penalty imposed on Toyota South Africa Motors (Pty) Ltd (TSAM). The Commission was alerted by a member of the public who discovered while in the process of negotiating the purchase of a new Toyota Corolla, that a number of Toyota dealerships offer the same discounts on the new Toyota Corolla range. In addition, he reported that salespersons advised him that failure to implement these discount structures, would expose them to a stipulated fine.

This complaint came at the opportune time when the Commission was still considering the public outcry on high car prices and an investigation was immediately launched. Various dealerships were contacted during the investigation and in the process the Commission obtained a copy of TSAM's pricing and discount structure document. This document was circulated to all Toyota dealerships and was possible proof of Resale Price Maintenance.

The Commission decided to summons five Toyota dealer principals to appear before the Commission to be interviewed and to submit copies of the abovementioned document, including all possible documentation relating to the determination of resale prices. TSAM then submitted all the information that was requested from the dealerships in the summonses to the Commission. The evidence found indicated that a contravention of the Act had and was taking place, meaning that the matter must be referred to the Tribunal for Toyota SA to be prosecuted.

The Toyota case would not have been the first case the Commission has referred to the Tribunal on minimum resale price maintenance. A similar case against Federal Mogal Aftermath in respect of spare parts was referred to the Tribunal and a fine of R3 million, was subsequently imposed.

However, before the case against Toyota could be referred to the Tribunal, the parties entered into negotiations with the Commission to settle the case without referring. A consent agreement was therefore concluded with Toyota, in terms of which Toyota agreed to discontinue the practice and pay an administrative penalty of R12 million. The consent agreement has been referred to the Tribunal for confirmation as a consent order in terms of section 58(1)(b) of the Competition Act. This means that the Commission will not refer the complaint against Toyota to the Competition Tribunal for adjudication.

The Commission is of the view that the penalty against Toyota, and other firm(s) such as International Healthcare Distributors (R20 million) Federal Mogul (R3 million) South African Medical Association (R900 000) and the Hospital Association of SA (R4.5 million), sends a loud and clear message that the Commission is determined to aggressively and fearlessly pursue any violations of the Competition Act.

The information in the Commission's possession relating to various industries, suggests that firms that have been brought to book thus far are not the only ones that have violated the Competition laws of South Africa. It seems that industry players have made it a norm to disregard the laws of the country, but they will surely be dealt with, sooner or later. Therefore the Commission is set to conduct a thorough investigation for the benefit of consumers. The Commission thus appeals to the public to assist by alerting them to these harmful activities by industry players.

The Commission also urges industry players who find themselves in anti-competitive arrangements with their competitors to take advantage of the Corporate Leniency Policy, issued by the Commission in February this year. This Policy offers full immunity from prosecution to a firm that has participated in price fixing, market allocation or collusive tendering if such a firm is 'first to the door' in blowing the whistle on other members of the 'cartel' and co-operates with Commission in a manner outlined in the Policy. The policy is available on the Commission's website and at the Government Printers.

The Commission is not witch-hunting, but it is considering various other sectors for possible investigation. Relevant evidence on alleged anti-competitive conduct will be gathered and once uncovered, the Commission will have no mercy and will deal with the perpetrators severely. Industry players have a choice, they either come out themselves and change their ways or face the penalties if the Commission uncovers them first.

The International Competition Network (ICN) Conference

The Commissioner, Adv. Menzi Simelane, recently attended the Seoul Competition Forum and the 3rd ICN Annual Conference in Korea, held from 20 to 22 April 2004. The ICN is the international network of competition authorities. It provides anti-trust agencies from developed and developing countries with a focus network for addressing practical anti-trust enforcement and policy issues of common concern. At this conference Adv. Simelane presented a speech entitled: "Benefits of technical assistance, the South African experience". The following are highlights of the speech.

Adv. Simelane's address reflected on South Africa's experience over the last five years and the critical role that technical assistance has played in the creation of what, the Commission believes, is an efficient competition law enforcement regime in South Africa.

Since inception in September 1999, the South African competition authorities have received a lot of technical assistance from various agencies, on both a bilateral and multi-lateral level. Adv. Simelane in particular acknowledged the following agencies for their work with the Commission over the years: the ACCC, US DOJ and FTC; the Italian Competition Authority, Norwegian Competition Authority, European Union, Office of Fair Trading, NMA and Swedish Competition Authority. Between these authorities ideas have been exchanged, including strategies and tactics on how to improve the quality of competition law enforcement in South Africa and how the Commission can become more focussed and efficient. Views on how those authorities can contribute to the development of a competition culture in South Africa and sub-Saharan region have also been exchanged.

ADV. MENZI SIMELANE
Commissioner Competition Commission

Exchange Programmes

The Commission has consistently benefited from exchange of staff programmes with the FTC, DOJ, ACCC and the Norwegian Competition Authority. Consultants from these authorities stayed with the Commission for up to six months, working on cases with case teams, advising on strategies for case investigation, strategic management of the institution and the development of technical expertise. The biggest benefit for the Commission from this exercise was that the Consultants became part and parcel of the broader staff component as they were based at the Commission's offices. The Commission staff had immediate access to some of the best expertise available within the anti-trust community. With this approach, the Commission has been able to build technical capacity not only at a junior staff level, but also at senior management level.

Role of Multi-lateral Institutions

The second element of technical assistance has been the role of multi-lateral institutions. Over time, the OECD and UNCTAD have also sent experts to South Africa to hold workshops and seminars on various key topics identified by the Commission. The OECD in particular has one of the best programmes in the world. The case study seminars are the single most important form of technical assistance that can be offered, whether as a matured or young authority. General seminars on policy issues have also proved to be extremely popular. Together with the OECD and UNCTAD, the Commission holds at least three of these seminars in Pretoria every year.

Interaction with Other Authorities

The Commission has also benefited from general high-level interaction between its staff and senior staff of other authorities, whether it be through conferences, workshops or official visits to those agencies. Whilst official visits may appear to be a costly exercise, one-on-one meetings with very senior officials and heads of other authorities have been very beneficial. The Commission has not only done this with all of the previously mentioned agencies, but also with competition authorities from Kenya, Tanzania, Zambia, Zimbabwe and Algeria.

The ICN Conference continued…

Conclusion

The Commission has followed almost all the ICN recommendations. Statistically, the Commission has in each year trained at least 20 of its staff and 25 staff members of regional authorities or government departments from each OECD Seminar. This means that at least 100 officials in the developing countries of the SADC region (±14 countries), have received direct technical assistance from members of the ICN and organisations linked to it. Therefore, it is important for the ICN to encourage these activities and for its members to make available their senior staff as facilitators in those programmes. He also added that the role of the ICN should be to facilitate, monitor and constructively contribute to the exercise of technical assistance. He further said that the ICN should be cautious not to over emphasise its role in this area by undermining and duplicating existing arrangements. South Africa will always measure the ICN by the strategic value of its initiatives, its importance to South Africa's development processes and its overall ability to effectively enforce South African competition laws.

In conclusion, Adv. Simelane thanked the ICN on behalf of the competition authorities and the South African government for the role that they have played, individually and collectively, in the development, maintenance and sustainability of an effective competition regime in South Africa and in the region.

The Birth of Low-cost Carriers:

Implications for Competition in Aviation

Introduction

Aviation suffered a major blow from the September 11 terrorist attacks. In the aftermath, airline corporations have had to adapt and find new strategies of survival. Some have found refuge in the low-cost carrier (LCC) model. Although low-cost carriers have been in operation for the past three decades or so, the last four years have seen an unprecedented surge in the number of new LCCs worldwide. For instance, 17 of the 24 LCCs operating in the UK were birthed after 2001. LCCs currently account for about 20% of the domestic market in the US and 15 % in Europe, although in the UK alone, they account for about 40% of the domestic market.

The South African Market

South Africa has not been left untouched by these winds of change. Kulula.com became the first LCC to take to the South African skies, whilst newcomer 1Time took off in February 2004. Although bigger airlines, SAA and Nationwide, had shrugged off the imminent impact of a new LCC in local skies[1], competition for passengers in South Africa may never be the same. For instance, the announcement of the pending entry of 1Time late last year sparked a price war that has been raging ever since. Kulula.com acted first by announcing that it intended cutting prices by up to 30%, charging, for example, R299 for a one-way ticket on the hotly contested Johannesburg-Cape Town route[2]. Other routes enjoyed similar offers as well. Nationwide followed by putting a limited number of tickets on the market, with the Johannesburg-Cape Town route passengers enjoying a low fare of R290[3]. SAA soon joined in offering major discounts as well. 1Time responded by offering an unconditional maximum of R581 for a one-way ticket between Johannesburg and Cape Town on every seat, every flight, every day, irrespective of when the reservation was made.

Whilst consumers benefit from low prices during a prolonged price war, the warring parties, especially those with shallow pockets, would prefer a short-lived battle. According to Chalmers[4], aviation "remains a high risk

1 Phasiwe, K. New no-frills no competition says SAA. Business Day, 11 November 2003
2 Makings, R. Kulula lays down gauntlet - R299 to Cape Town. Sunday Times, 18 January 2004
3 Fraser, J. Nationwide shrugs off newcomer. Business Day, 28 January 2004
4 Chalmers, R. Passengers smile, airlines lose. Business Day, 26 January 2004

business and however great they may be for consumers, lengthy price wars are, ultimately, simply no good for airlines." When it comes to price wars, competition authorities have a difficult task of distinguishing exclusionary acts from competitive ones. For example, it is hard to separate a price cut designed to save consumers money, from one designed to freeze out a newcomer. Put another way, a price reduction that has a predatory intent may not be easily distinguishable from one aimed merely at meeting competition.

General Characteristics of LCCs

LCCs offer a slightly differentiated product to that offered by bigger airliners. They capitalise on cutting costs by using least-cost systems, including non-allocated seating, to provide an efficient service, without compromising on safety. For example, they use a homogenous, smaller-size aircraft that utilises a high-density seating arrangement. This allows for maximum capacity utilisation and low maintenance costs. Most LCCs do not offer an in-flight service; rarely are free meals, drinks or snacks offered. Although the service offered by LCCs is targeted primarily at the non-business leisure traveller, price-sensitive business passengers also form part of this market. LCCs, as the name suggests, produce at low cost and aim to compete on price.

Strategic Responses to LCC Entry

The low cost business model adopted by LCCs enables them to profitably offer substantially lower regular fare categories than those offered by bigger airliners. Thus, to beat them at their own game, bigger airliners often respond to LCC entry by lowering prices in the affected routes. However good for consumers, if the prices drop too far, the cuts may have an anti-competitive intent - predation. However, there is no general agreement as to the logic, let alone the sustainability of using predation as a strategy. Instead, the incumbent firm may rely on a 'reputation effect' to protect its turf. That is, once potential entrants fear that the incumbent 'may' undercut them, perhaps based on past experience, this 'reputation' effect may serve as a strong deterrent to potential entry.

Another possibility is for incumbent airliners to cross-subsidise between the affected and non-affected routes to sustain themselves in a prolonged cut-price competition. In other words, passengers in a non-affected route would pay higher fares to subsidise the low fares in the contested route. Again, this strategy may run in the face of competition laws.

Another common strategic response to entry by an LCC is a sudden increase in capacity by incumbent operators. It has been observed that incumbent carriers would often respond to a new entry by increasing flight frequencies

The birth of low-cost carriers continued…

or using larger size aircrafts on the routes concerned[5]. Although there might be a justification for a capacity increase, such a strategy may be viewed with suspicion by the competition regulators.

Besides the above common responses, network airliners may copycat by setting up a low-cost subsidiary of their own. Whilst this tactic has borne mixed results globally, the South African air travel market may not be large enough to permit such a response. In fact, SAA ruled out the possibility of turning one of its subsidiaries, SA Express, into a low cost operator[6]. However, if copying the LCC strategy is not a viable business model, another tactic might involve a takeover of the new entrant by the incumbent, although such a result would be subject to the scrutiny of the competition authorities.

Predation or Competition

In terms of the Competition Act, a dominant firm is prohibited from "selling goods or services below their marginal or average variable cost". The conventional definition of predatory pricing is that of a dominant firm with market power, engaging in below-cost pricing with the intent of driving a competitor out of the market and recouping costs thereafter, through future price increases. Predatory pricing is often difficult to prove for a number of reasons, chief of which is that it exhibits all the signs and symptoms of competition; bitter rivalry amongst firms, falling prices (which is good for consumers), firms exiting the market and survivors expanding their market shares.

Again, the challenge for competition authorities is in separating favourable non-predatory deals from behaviour aimed at eliminating competition. Thus, over the years, competition authorities have adopted two key tests for establishing predatory pricing: the 'cost/price test' and the 'recoupment test'. The 'cost/price test' is used to determine whether a firm has priced below a certain measure of cost, usually marginal cost or its nearest proxy, average variable cost. The 'recoupment test' determines whether an airline has been able to raise prices after an episode of pricing at predatory levels, in order to recoup its losses. However, it must be noted that certain responses, such as a price reduction as a result of entry or an increase in prices as a result of exit, occur naturally due to increased/decreased competition in any competitive market. Therefore, such price changes do not, in themselves, point to predatory behaviour. Furthermore, since predation harms the firm's competitors, intervention by competition regulators raises questions as to what/whom is being protected: competition or competitors.

International Experience

In July 2003, the U.S. Court of Appeals 10th Circuit, upheld summary judgment in favour of American Airlines in a case of predation involving low cost rivals Vanguard, Western Pacific and SunJet, on the basis that the government failed to establish that American Airlines "priced below an appropriate measure of cost" [7]. In Canada, the Tribunal ruled in its Phase 1 decision, that during the period in question, Air Canada operated increased capacity on fares that did not cover the avoidable costs of providing a service on the affected routes, in response to the eastward expansion of WestJet and the entry of CanJet, both LCCs[8].

In Australia an allegation of predatory pricing by Qantas Airways against budget carrier Virgin Blue Airlines was discontinued on the grounds that "like all section 46 [misuse of market power] cases, final resolution in the courts on this matter would have been extremely difficult, lengthy and expensive"[9]. The German competition authority, the Bundeskartellamt, on the other hand, succeeded in issuing a pricing injunction against Deutsche Lufthansa AG (DLH) whom it had charged with predatory pricing aimed at squeezing the new entrant and low cost operator Germania Fluggesellschaft mbH out of the market[10].

Conclusion

The underlying issue, which is also a great challenge to competition regulators, is the limit to which dominant incumbents can respond to entry by LCCs and whether competition authorities should be concerned. The cost advantages of budget carriers which have ensured them growth and profitability at a time when most of the network operators face financial difficulties, means that the competitive confrontation between incumbents and LCCs is far from over, and, therefore, the debate about price wars and predation remains unsettled. In the meantime, competition authorities have to watch vigilantly.

5 Harumi, I & Darin, L. 2003. Incumbent responses to lower cost entry: Evidence from the US airline industry. Department of Economics, Brown University, Rhode Island, US
6 Phasiwe, K. New no-frills no competition says SAA. Business Day, 11 November 2003
7 Edlin, A & Farrell, J. 2003. The American Airlines Case: A chance to clarify predation policy. Paper prepared for the Antitrust Revolution
8 Competition Tribunal File No. CT2001002, para.1
9 Qantas airlines matter discontinued. Press release No. MR 245/03. 21 November 2003 http://www.accc.gov.au
10 Bundeskartellamt prohibits Lufthansa from hindering its rival Germania. Bundeskartellamt press release Feb 19 2002. http://www.bundeskartellamt.de

Mergers and Acquisitions Activity (M&A):

The Financial Year 2003/04

Introduction

In their pursuit of efficiency and market effectiveness, firms often merge. The majority of mergers benefit competition and consumers by allowing firms to operate more efficiently, but some are likely to lessen competition. That, in turn, can lead to higher prices, less choice for consumers, lower product quality and less innovation.

According to Chapter 3 of the Competition Act (no 89, 1998), "a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm".

During the year ending 31 March 2004, the Commission received 283 merger notifications. Of these 65 were large mergers, 212 were intermediate mergers and 6 were small mergers. The number of notifications represents a 34 percent increase in the total received the previous year, although the number of large mergers declined from 68 to 65 in the previous year and the number of intermediate mergers increased by approximately 53.6 percent from 138 the previous year, to 212 in the year 2003/04. About 277 investigations were finalised. Of these, 261 were approved unconditionally and seven were approved subject to conditions. Only one merger was prohibited.

The different structural forms of acquisitions can be classified as follows: horizontal[1](H), vertical[2](V), conglomerate[3](C), management-buy-out (B) and the vertical/horizontal-mix (M). Of the 277 mergers finalised by the Commission, 50% were horizontal, 25% conglomerate, 9% vertical, 9% management-buy-out and 7% horizontal/vertical mix.

M&A Activity and Special Purpose Vehicles

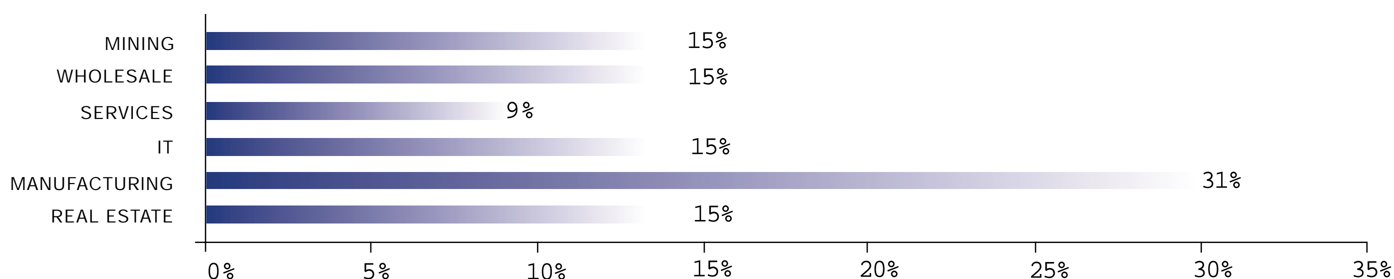
Special Purpose Vehicles (SPVs), also known as Special Purpose Entities (SPEs), are typically single-purpose, separate legal structures created by corporations. They subsist to give an external and beneficial source of funding for the company creating the vehicle. Nowadays, SPVs have often served a company's need to launch a new venture or unrelated line of business, thus transferring the risk (and liabilities) of the new venture from the sponsor to the SPV. Accordingly, the SPV's assets and liabilities are kept separate from the sponsoring corporation. But frequently, multiple SPVs are created, and assets are sold back and forth among them and/or the sponsor that gave life to these entities.[4]

Mergers using Special Purpose Vehicle entities have increased from 21 in 2002/03 to 33 in 2003/04. This, as was the case in the previous year, is thought to be linked to the desire by large companies to unbundle and create new firms with which to venture into new markets, or for sale when representing non-core assets.

M&A Activity and Foreign Direct Investment (FDI)

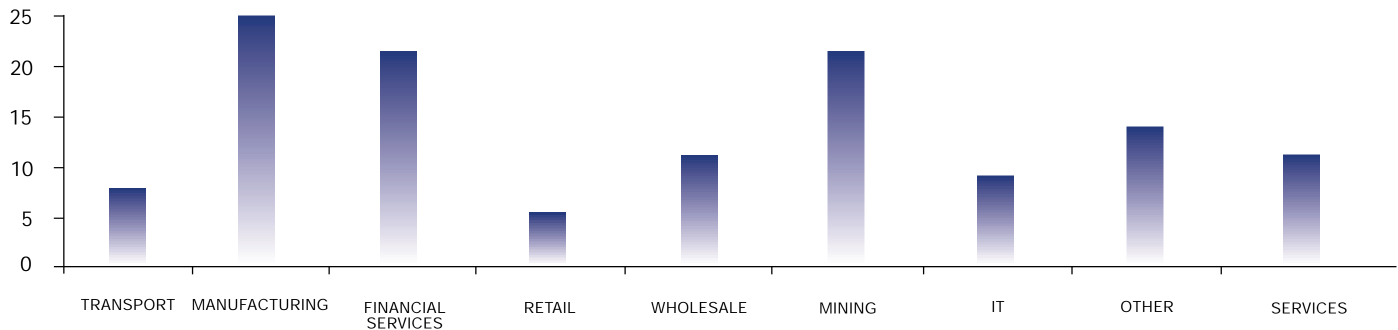
The government sees the flow of FDI as a way of bringing foreign currency into the country, ultimately contributing to the development of the economy as a whole. The Commission through the Act considers foreign direct investment to be one of the important aspects in its analysis of cases. The commission received a total of 13 cases with an FDI component. The diagram below shows the percentage share of the different sectors:

DIAGRAM 1: Foreign Direct Investment: April 2003 - March 2004



1 Merger between firms that produce and sell the same products, i.e., between competing firms
2 Merger between firms operating at different stages of production, e.g., from raw materials to finished products to distribution
3 Merger between firms in unrelated business
4 The Financial Journalist, Issue No 15, November 2003. A Case Study: Special Purpose Vehicles (SPVs) can be Lethal, by Lori Pizzani

DIAGRAM 2: Black Economic Empowerment/SME's: April 2003 - March 2004



From the diagram above it is apparent that the manufacturing sector dominates, accounting for 31% of cases with an FDI component. Other sectors accounted for 15% of FDI cases each, except for the services sector with a 9% share.

M&A Activity and Black Economic Empowerment (BEE)/SMEs

The year 2003 is regarded as the year in which BEE entered a new phase as a generator of M&A transaction flows in South Africa. According to Ernest and Young's review of M&A activity, BEE is set to continue being the main driver of M&A activity in 2004. During 2003/04, the Commission received approximately 37 notifications with a BEE component. Of the 37 transactions, the manufacturing sector accounted for 22%, whilst the financial services and mining sectors accounted for 19% each. The Information Technology sector accounted for 4% of the total BEE transactions and is expected to pickup in 2004/05 as companies gear themselves for the Information Technology charter, which is underway. The 2003/04 figures are presented in diagram 2 below:

Mergers with a BEE component seem to have increased when government legislation was introduced, signaling some positive response from the South African business sector. In 2002/03, about twenty-one mergers with a BEE component were lodged. The financial services and the mining sectors accounted for five percent and 29 percent respectively. Comparing these two periods (2002/03 and 2003/04), the Commission found that the mining sector peaked in 2002, possibly due to the introduction of the mining charter in the previous year (2001). In 2003/04, merger activity in the mining sector (with a BEE component) subsided, with a share of only 19%. The opposite can be said of the financial services sector, which seem to have increased from 5% in 2002/03 to 19% in 2003/04[5].

M&A Activity and Employment

In South Africa, unemployment remains at high levels and is seen as one of the most critical socio-political problems facing the government[6]. The Commission continues to track the effect that M&A transactions has on this structural problem. The effect of competition policy on employment is evident from the table below; and these figures are further interpreted in the next paragraph.

The impact of merger activity on employment (all sectors) 1999 - March 2004

MANUFACTURING	LOSSES	GAINS / SAVED	NET LOSS / GAINS
1999	187	200	13
2000	1177	2760	1583
2001	5704	50	-5654
2002/3	577	0	-577
2003/4	177	0	-177
OTHER SECTORS	LOSSES	GAINS	NET LOSS / GAINS
1999	124	0	-124
2000	1342	5089	3747
2001	1673	15	-1658
2002/3	1334	16806	15472
2003/4	1157	1150	-7
TOTAL	13452	26070	12618

5 The Financial service BEE charter was introduced in 2003
6 Unemployment in South Africa: A microeconomic approach by Geeta Kingdon and John Knight

From September 1999 to March 2004 a total of 13452 jobs were lost and about 26070 were either saved or created, resulting in a net gain of 12618 jobs. About 55% (7377) of total losses occurred in 2001/02 and 64% (16806) of the gains in 2002/03. It is also apparent from the table above that the financial year under review (2003/04) accounts for 9% (1157) of the total losses and 4% (1150) of the total gains. The data depicted on the table above does not reflect the high unemployment rate (estimated at 40%) reported by Statistics South Africa[7]. However, this information is based on only those mergers filed with the Commission.

Summary

From the discussion above, it is evident that the number of mergers notified during the 2003/04 increased by 34% (283), compared to the 211 cases notified in 2002/03. The data analysed above also shows that the number of transactions with BEE and SPV components increased dramatically. In general, the majority of M&A transactions (97%) did not raise any competition concerns and were unconditionally approved.

It is noted though that despite an increase in mergers with BEE components, there is little use of law firms and advisors from historically disadvantaged communities.

7 This could be due to that a) companies affected by employment losses had retrenched people or exited the market rather than having been absorbed through the merger process. In other words, disinvestments by firms, which lead to employment losses, would not be covered by the Commission's database; b) mergers might take place only once job losses have already occurred; so that those job losses are not merger related.

Potential Anti-Competitive Effects Of Mergers:

A New Zealand and United States Perspective

Introduction

An analysis of a merger requires (to some extent) that a prediction be made on the possible future behaviour of firms in a particular market, a task with obvious challenges. Accordingly different jurisdictions use differing methods to establish whether a transaction would raise any concerns of a unilateral or coordinated nature on competition. In New Zealand, the Commerce Commission uses "safe-harbours" as guidelines to screen for transactions that might lead to substantial lessening of competition[1]. For example, a transaction is considered unlikely to substantially lessen competition in a market where, post-merger, the three-firm concentration ratio is below 70% and the merged entity enjoys a market share that is less than 40%.

1 See the New Zealand Commerce Commission's Practice Note no. 4.

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This article discusses the conditions and factors that should be present (in addition to relevant concentration levels) for a transaction to raise concerns of potential unilateral or coordinated effect on competition. There is a vigorous debate on these conditions and factors that is currently taking place in industrial economics literature.

Co-ordinated Interaction[2]

Coordinated interaction may be defined as "actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others"[3]. This practice may either be express or tacit, and the accommodating actions do not necessarily have to be anti-competitive (for example, standardisation of products).

For coordination to be successful, firms in the particular industry need to be able to reach "consensus" on the terms of coordination, and be able to swiftly detect and punish deviations from those terms.

Terms of co-ordination

For firms in a particular market to reach common ground on the terms of collusion, certain conditions that may be conducive to such an agreement need to be present in that market. These conditions include (but are not limited to) the following:

- Highly concentrated market: A smaller number of players in the market make it easier to coordinate behaviour.
- Homogeneous products: Undifferentiated products make it easy to reach consensus on price. Problems associated with variations in quality can also be easily avoided.
- Homogeneous competitors: Similar firms (whether through similar capacity, similar cost structures, similar market shares or a combination of these) are likely to coordinate their activities.
- Inelastic demand: When demand is not that price sensitive, customers may not switch to other sources of supply when prices increase. This may lead to a very stable market demand, making it easier to allocate customers through entrenched sales positions.
- High barriers to entry: The high profits enjoyed by the coordinating firms may not be eroded by new entry, making it worthwhile to collude. If there are any new entrants, it may take them a long time to enter the market.
- History of collusion: A history of collusion may indicate that conditions in the industry are conducive to coordination.

Detection and punishment of deviation

Once the terms of coordination have been laid, its effectiveness will depend on whether players in that particular industry are able to swiftly detect and punish any deviations. An industry that is transparent, with readily available information and stable demand, is conducive to coordination, as players in that industry will be able to monitor and detect any cheating. Although monitoring may be possible, cheating might still take place, especially in cases where punishment is ineffective, untimely and lacks credibility.

For detection and punishment to be effective, the following conditions should prevail in that industry:

- Sufficient excess capacity: The non-deviating players should have enough excess capacity to enable them to retaliate through, for example, price cuts. On the other hand, if that industry is characterised by high fixed costs, excess capacity may actually promote competition, rather than be used to punish cheating.
- Similar cost structures: In the same way that similar cost structures could be used to reach terms of coordination, they could also be used to monitor deviations. Deviations may be easier to detect when firms cannot conceal price cuts by claiming reduced costs.
- Steady growth in demand: It is easier to monitor collusion when there is a steady growth in demand. Any sudden gain in market share by the "cheating" firm is at the expense of the coordinating firms and is therefore easily detectable.
- Access to key information: Where key information about specific transactions and individual prices and output are openly available to competitors, deviation will be detectable.
- Type of transactions: Large transactions that involve long-term contracting present a higher incentive to cheat. However, small and frequent transactions have a lower profit incentive for deviation. This is because a large number of such transactions should be processed for them to be profitable, thereby increasing the risk of detection.

A merger may also make it easier for the merged entity, post-merger, to exercise market power unilaterally. The conditions that may be conducive for such an exercise in market power are discussed in the next section.

Unilateral Effects[4]

As already stated, in some instances a merger may make it easier for the merged entity to raise prices and restrict its output unilaterally, without any accommodating reactions from its competitors. Unlike in coordinated interaction (where there is collective dominance), the transaction creates or enhances market power for the merged firm. Unilateral effects are also known as non-coordinated effects.

Substantial lessening of competition through the exercise of unilateral market power may occur in two market situations. The first one is where the product is largely undifferentiated, with buyers basing their purchasing decisions merely on the price.

2 This section is based on the papers by David T. Scheffman and Mary Coleman: "Quantitative Analyses of Potential Competitive Effects from A Merger" and James F. Rill et al: "Coordinated Effects Analysis under International Merger Regimes".

3 See revised 1992 FTC/DOJ Horizontal Merger Guidelines

4 This section is based on the paper by Alistair Lindsay: "The EC Merger Regulation: Substantive Issues", the revised 1992 FTC/DOJ Horizontal Merger Guidelines and the New Zealand Commerce Commission's Practice Note no. 4.

Potential anti-competitive effects of mergers…

It is also important to note that the competitors of the merged firm should have production capacity restrictions. The second scenario is where the products are differentiated and the buyers look at their different characteristics when making purchasing decisions. Put another way, the buyers consider the different products to be imperfect substitutes for each other.

Undifferentiated product markets with production capacity constraints

In the case where the products are relatively undifferentiated, the merged firm may be able to restrict its output and raise its price. However, this is possible only because the merged entity enjoys a larger share of the market and a larger number of its customers may be unable to turn to alternative suppliers. The competitors of the merged firm may be unable to increase their supply of the product because of the fact that they have severe capacity constraints and are unable to expand capacity within a reasonable period. It also could be the case that there is extra capacity, except that such excess capacity could be significantly more costly to operate than the capacity currently used.

In transactions where these market conditions exist, for example, New Zealand's Commerce Commission may pay special attention to the following:

- the type of product;
- the market shares;
- production capacity in the market; and
- the scope for expansion of firms in the market.

Differentiated product markets

In a differentiated product market, the firms in the market sell products that are not perfect substitutes for each other. When looked at from the 'chain of substitution' perspective, products may be closer substitutes to other products that are adjacent to them, and not as closely substitutable with products that are farther from them in the chain. This means, therefore, that competition between products is localised. In such a situation, a merger of firms producing immediately adjacent products may lead to price increases that are localised, rather than price increases across the market.

Differentiated product markets may be tricky to define structurally. Information on market shares and market definition may be misleading. As Lindsay (2003) puts it: ".... market definition may become a somewhat arbitrary exercise: any market may exclude products which are "close" substitutes or include products which are more "distant" substitutes". It is therefore important to look at the relative positioning of products in the chain of substitutes, their cross-elasticities of demand and whether there could be new entry or product repositioning in the market.

The loss of localised competition that results from the merger of firms that produce closely substitutable products, may not be restored when consumers of the products, of one of the merging parties consider the other merging party's product as the only substitute. In other words, if the merged firm were to raise the price of one of the products post-merger, it would not lose any of its sales because consumers would simply substitute the now more expensive product for the other product from the same entity[5]. However, if the competitors of the merged firm are able to reposition their products or new entrants offer products to compete with those of the merged entity, the lost localised competition can be restored and therefore make the price increase unprofitable.

Conclusion

In this article we discussed the conditions that may be conducive to firms lessening competition through either coordinating their actions or acting individually post-merger. However, when analysing any horizontal merger, it is important that a case-by-case approach is followed, as not all the conditions will exist in any given transaction. In some cases all the conditions may exist, but may be contradictory. Some analysts have criticised the use of "checklists" to determine the competition effects of a merger. They argue that such an approach leads to a "rather mechanistic" application of the checklist.

In reality, the characteristics that may lead to coordinated or unilateral effects may not all be there, but the parties may still be able to substantially lessen competition by exercising their market power. In the United States, for example, the U.S. Merger guidelines state that competitors need not perfect the act of coordination or market dominance for them to harm competition.

5 There are techniques that can be used to test for the "Critical Loss" The question is: What amount of sales would have to be lost to make a hypothetical price increase unprofitable? See "Critical Loss" Analyses by David Scheffman, 2003, Federal Trade Commission.

Economists Debate Policy Issues[1]

The South African Competition Economics Forum (SACEF) had its first meeting of the year on Thursday the 22nd of March 2004. The forum was well attended and this impacted on the quality and level of discussion and debate. On the agenda was 1) the question of access to finance and competition in the banking sector, 2) the department of health regulations concerning the proposed single exit pricing system; the issue of practitioners' certificates of need and 3) the dti's beneficiation policy. The third item on the agenda was deferred to the next meeting when a specialist in the area will be addressing the forum.

Access to Finance and Competition in the Banking Sector

The Commission participated in the National Treasury Task Team on competition in banking. The draft report drew on experience in the UK, where it was found that customers need more transparent information on bank charges to aid them in comparing charges between banks, and that switching costs should be reduced, by requiring banks to simplify procedures and to share client information and history with other banks. The report found that penalty fees, charges for essential services or charges for services not open to competition should be on a cost-plus basis and open to regulatory oversight. These findings sprang from a general concern over the high level of bank charges in South Africa.

The report also recommended enabling legislation to involve 2nd and 3rd tier banks, and the conversion of the Postbank, to roll out access to financial services to previously unserviced customers. At the upper end of the market, Government should enable foreign banks to enter the market. The establishment of a deposit insurance scheme was also recommended.

The report warned against the Banking Council's proposed National Bank Account, a basic account for low-income consumers that would however depend on Government subsidy and on the banks being able to collude on charges and on infrastructure. It was felt that such a proposal might forestall other less costly initiatives that don't depend on the restriction of competition for their success, for example, supermarket banking and the application to banking of cell phone technologies.

Finally, the report recommended that the Commission reconsider the regulatory options in respect of the payments system, as it constitutes an essential facility and can only be accessed by contracting with a shareholder bank. The Commission was also advised to consider the UK concept of a 'complex monopoly' and whether it could be applied to the SA banking sector or, if not, whether a legislative amendment could be made to the Competition Act which would facilitate the treatment of the sector as a complex monopoly.

The Department of Health Regulations

The pharmaceutical industry has been affected by regulations issued in the recent past, in terms of the Medicines and Related Substances Amendment Act. These regulations are of concern not only from an industry point of view but from a competition economics perspective as well. For instance, with regard to the single exit price system, the forum noted that even though a number of studies on the health industry have surely been done, the forum is not aware any study commissioned by the department of health justifying the proposal for a 50% across-the-board reduction in the pharmaceutical blue book prices.

Whilst the need for transparency within the distribution chain and low prices for consumers is recognised, the forum is critical of the use of direct price control as a means of achieving this. Instead, since current legislation allows for such measures as the parallel importation of drugs, compulsory licensing and generic substitution, which should increase competition and therefore help reduce prices, these should be explored and exploited more extensively than has been the case so far. The recommendation is therefore for the department of health to effectively use existing legislation and other possibilities before resorting to the drastic measure of price regulation.

Shortly after the meeting the revised regulations had done away with the 50% cut in favour of a requirement that incentives, discounts, etc be removed from pharmaceuticals prices on a product-by-product basis. Nevertheless, manufacturers will henceforth not be able to implement price rises at will, instead they will have to justify these to the Department of Health, which would amount to a form of price control.

The regulations also put an exact value on the services of wholesale, distribution and retail, regardless of the size of delivery, the remoteness of the buyer, and the value of the medicines (above a fairly low rand value). These stipulations also amount to a form of price control and will affect the viability of the various players in the supply chain of

1 The views expressed in this article are not necessarily those of the Competition Commission, its individual members or the individual members of the SA Competition Economics Forum.

pharmaceuticals in possibly unintended ways. There have also been concerns expressed about the wisdom of preventing doctors from dispensing medicines unless there is no pharmacy nearby.

The regulation concerning the doctors' certificate of need, although supposedly serving the public interest by forcing doctors to locate their practices in rural and other under-served areas, is a form of market allocation and, therefore, also against the principles of competition. Doctors should be able to practice wherever they so desire based on their own assessment of demand and supply conditions. Government should therefore consider offering certain incentives to lure doctors to practise in the under-serviced areas instead of using heavy-handed regulation to prevent them practising in areas of their own choice.

Executive Appointments at the Commission

The Commission Recently Appointed Two New Executives

Zodwa Ntuli was promoted to Divisional Manager for Compliance.
She was previously the Head of Department: Corporate Compliance at the Commission.

Lizel Blignaut is now the new Divisional Manager for Mergers and Acquisitions.
Her previous position at the Commission was Senior Investigator: Mergers and Acquisitions.

Case Reviews

Ubuntu and Harmony Merger gets the Green Light

The Commission has recommended to the Tribunal the unconditional approval of the large merger between Ubuntu-Ubuntu Commercial Enterprises (Pty) Ltd (Ubuntu) and Anglovaal Mining Ltd (Avmin), Avgold Ltd (Avgold) and Harmony Gold Mining Company Ltd (Harmony).

The proposed transaction is unlikely to give rise to a substantial lessening or prevention of competition in the gold and PGM markets. The parties submitted that the proposed transaction will result in the establishment of the largest black owned diversified mining company in South Africa. Harmony and Avgold are two of many players in the international gold market, where prices are fixed internationally. Post merger Harmony's market share will increase by less than 1% in the international gold market.

The Tribunal has in several cases found that the market for production and supply of gold is a global market. Price is influenced by the sale of new production, the sale of reserves by financial institutions such as central banks, the World Bank and the IMF. A single producer of gold cannot influence the prices in the international market and South African producers are essentially price takers.

Avmin's interest in Two Rivers, being a joint venture with Implats and Avmin and its interest in Modikwa, where the other partner is Anglo Platinum, is unlikely to have a negative effect on the competitive landscape for Platinum Group Metals as a result of the proposed transaction. Avmin is already contractually committed to send the concentrate from these joint ventures to Implats and Anglo Platinum respectively, for refinement. The proposed transaction is likely to facilitate new entry for the mining of PGMs in the future, should the parties decide to develop Kalplats. It also does not raise substantial public interest concerns.

Healthcare Industry Merger Approval Recommended

The Commission has recommended to the Tribunal a conditional approval of the acquisition of Afrox Healthcare Limited (Ahealth) by Business Venture Investments No.790 (Proprietary) Limited (Bidco), a special purpose vehicle.

Bidco comprises a BEE consortium and Medi-Clinic Corporation Limited (Medi-Clinic). The BEE consortium comprises Mvelaphanda Strategic Investments (Proprietary) Limited (Mvelaphanda) and Brimstone Investment Corporation Limited (Brimstone), and a consortium of doctors in BEE groupings. The BEE consortium members respectively hold 40%, 40% and 20% shares in the consortium. Bidco will acquire the 69.6% shareholding currently held by African Oxygen Limited in Afrox Healthcare Limited (Ahealth). The BEE consortium will hold 75% of Bidco while Medi-Clinic will hold the balance of 25%. Medi-Clinic will be able to appoint one of the seven Bidco directors.

Ahealth and Medi-Clinic are competitors in the market for the provision of private hospital services. They are two of three major market participants, the third being the Netcare Group. The proposed merger results in Medi-Clinic having an indirect interest of 25% in one of its only two competitors, Ahealth. It is this aspect of the transaction that has raised competition concerns. Had the transaction been a 'full' merger between Ahealth and Medi-Clinic, it is likely that the Commission would have prohibited the transaction. Although this transaction is short of a 'full' merger, and Medi-Clinic is not gaining 'control' of Ahealth as that term is defined in the Competition Act, the Commission was nonetheless concerned about Medi-Clinic's acquisition of a significant minority stake in an important competitor.

Healthcare industry merger continued…

In its investigation, the Commission considered the circumstances in which partial ownership by a competitor of another may result in anti-competitive effects, such as the ability that one firm will 'run down' its competitor. The Commission also considered the harm to competition that may arise when one competitor has a representative serving on the board of directors of another's holding company. However, for the reasons stated below, the Commission is satisfied that the transaction is not likely to lead to substantially preventing or lessening competition.

The Commission considered the structure of the transaction and the extent to which Medi-Clinic will be in a position to dictate or influence the business of Ahealth post merger. In terms of the structure of the shareholders' agreement between the BEE consortium and Medi-Clinic, the latter cannot, under any circumstances, hold more than a 25% shareholding in Bidco (and by extension in Ahealth). The balance of 75% of the shareholding in Bidco will be held by the BEE consortium. Furthermore, Medi-Clinic will be entitled, but not obliged, to appoint only one director to the board of Bidco, while the BEE consortium will be entitled to appoint six. The board cannot exceed seven members. In addition, the Medi-Clinic board nominee, if appointed, can neither be a director or employee of Medi-Clinic nor of Remgro Limited (the controller of Medi-Clinic). The Medi-Clinic nominee will be there to ensure that appropriate corporate governance and financial administration disciplined are observed by Bidco. The current management of Ahealth will also remain in place post-merger. It is the intention that the senior management will hold a maximum of 10% of Ahealth. Lastly, in terms of corporate governance, the board of Ahealth has a fiduciary duty to the shareholders of Ahealth, and not those of Medi-Clinic.

The Commission also considered whether the merger could result in co-ordinated conduct between Ahealth and Medi-Clinic. As stated above, Medi-Clinic will be entitled to appoint one director to the board of Bidco, while the BEE consortium will be entitled to appoint six. The Medi-Clinic non-executive director will not be on the board of Medi-Clinic, and not on the board of the operating company Ahealth, but on the board of the investment holding company Bidco. Thus, the risk of creating a platform for co-ordinated conduct is considerably reduced.

The Commission also considered the aspect of financial interest in a competitor. Economic incentives may be affected when one competitor has an interest in another. Medi-Clinic has a substantial financial interest in Bidco (and by extension, in Ahealth). However, it must contend with the much larger shareholding of the BEE Consortium. Also, in terms of the financing and the shareholders' agreement, the Commission found that they will not be in a position to control Bidco and therefore Ahealth. The agreement is structured so as to ensure that Medi-Clinic will not, under any circumstances, control Bidco, even as a creditor.

In the Commission's view, there was not sufficient evidence based on either corporate or financial interest to conclude that Medi-Clinic's indirect interest in Ahealth will lead to a substantial lessening of competition. The Commission was, however, concerned about Mvelaphanda's interest in Tshwane hospitals, which is the only area of competitive overlap between Mvelaphanda and Medi-Clinic as it could also be a platform for co-ordinated conduct between rivals. Mvelaphanda has a 32% shareholding interest in Tshwane hospitals, a private hospital in the Gauteng region (Pretoria), while Medi-Clinic holds 51% of the shares. The Commission is satisfied that the conditions recommended below will address the competition concern identified in this regard.

In addition to evaluating competition issues, the Commission also equally considered public interest issues. When considering these issues, the Commission is enjoined to have regard to the objects and purpose of the Act as well as its preamble. The Commission must consider the impact that the merger will have on the ability of firms owned or controlled by historically disadvantaged persons to become competitive. The dominant shareholders are all firms owned and controlled by historically disadvantaged persons. The transaction thus facilitates black economic empowerment in the healthcare industry.

In the light of the above, the Commission therefore recommended the approval of the merger subject to the following conditions:

1. The non-executive director appointed by Medi-Clinic shall be an independent director and shall not be a serving member of the boards of either Medi-Clinic or Rembrandt. Furthermore, Medi-Clinic shall not, directly or indirectly, receive from Ahealth, or disclose to Ahealth, any non-public commercially sensitive information, including but not limited to information relating to hospital costs, operations, pricing, marketing, purchasing, or future plans. In addition, any board representative appointed by Medi-Clinic shall not disclose, either directly or indirectly, any non-public commercially sensitive information about Ahealth to Medi-Clinic, or about Medi-Clinic to Ahealth.
2. Medi-Clinic must notify all of its future acquisitions of hospitals to the Commission regardless of the size of the merger.
3. Regarding Mvelaphanda's shareholding in Tshwane hospitals:
   - Mvelaphanda shall dispose of its 32% shareholding in Tshwane hospitals.
   - All directors of Mvelaphanda on the boards of Curamed and Tshwane hospitals must resign.
   - Dr Jackie Mphafudi, who is a director on the board of Medi-Clinic and also a director of Mvelaphanda, will also resign from the board of Medi-Clinic.

Case reviews continued…

Telkom Complaint Referred to Tribunal

The Commission has referred a complaint against Telkom on the allegations of abuse of dominance. This followed an investigation by the Commission into complaints lodged in 2002 against Telkom by the South African Value Added Network Services Association (SAVA), Omnilink and others. SAVA is a voluntary association established to represent the interests of VANS providers. Omnilink is a subsidiary of Internet Solutions (Pty) Ltd.

A VANS is essentially a telecommunication service provided to a customer over a telecommunication facility (includes any wire or cable that may be used for telecommunication) by a provider who is licensed to do so (by ICASA), during which value is added for the benefit of the customer. VANS include e-mail, electronic data interchange and internet service provision.

Telkom is the de facto monopoly provider of telecommunications facilities required by VANS providers to enable them to provide services to their customers. In addition, Telkom also competes with the VANS providers, who must obtain facilities from Telkom, in the market for value added services. This places Telkom at a unique advantage strategically vis-à-vis its competitors, as it is able to leverage its position as the monopoly provider of facilities in the competitive market for value added network services.

The Commission's investigation revealed that Telkom has abused its dominant position by engaging in a pattern of anti-competitive practices. These include Telkom imposing unreasonable conditions for it to provide telecommunication services to the VANS. Telkom refuses to provide these facilities unless the VANS providers conclude contracts which subject them to Telkom's dictates. As the VANS cannot operate without these facilities and must obtain them from Telkom, they have no choice but to subject themselves to Telkom's dictates.

The effect of these practices, including legal actions and threats of service termination, has been to chill competition in the VANS market. This anti-competitive conduct is likely to have a serious impact on both the ICT sector and broader economic development. The Commission's investigation revealed that as a result of its actions, Telkom has further entrenched its dominant position in the broader telecommunications sector, at the expense of competition for the provision of VANS, and consequently to the detriment of the development and growth of the ICT sector generally.

SAVA's allegations of anti-competitive conduct by Telkom are on the following grounds:

1. Telkom's refusal to provide telecommunications facilities to certain VANS providers to construct their networks;
2. Telkom's refusal to peer with certain VANS providers, as well as its refusal to provide facilities to certain VANS providers for use in peering (the interconnection of separate networks by internet service providers (ISP) to allow communication by customers of ISP providers for the provision of the internet);
3. Telkom's refusal to lease access facilities to VANS providers directly and insisting on VANS providers acting as agents of their customers in leasing access facilities from it; 4. Telkom's discriminatory pricing with regard to leased line services; and
5. Telkom's provision of bundled competitive services with monopoly services.

Omnilink alleged Telkom provided VANS to Nampak (previously Omnilink's customer), at a price below the price Telkom would have charged Omnilink for the infrastructure and facilities required to offer the service, and which Telkom would also require in order to offer an equivalent service.

The Commission is of the view that Telkom has abused its dominance as alleged in 1 to 4 above and has referred the complaint to the Tribunal for determination. In respect of the bundling complaint, the Commission has decided not to refer it to the Tribunal, as the investigation did not reveal sufficient evidence of abuse of dominance by Telkom. Telkom has subsequently brought an applications in the High Court, alleging that the Commission and Tribunal has no jurisdicition over the matter.

NCP Chlorchem (Pty) Ltd and SASOL Chemical Industries Limited Transaction Conditionally Approved

The primary acquiring firm is NCP Chlorchem (Pty) Ltd (NCP). The primary target firm is Sasol Polymers, a division of Sasol Chemical Industries Limited.

NCP and Sasol Polymers are involved in the manufacture of bulk chlorine. In essence, they are the only two primary suppliers of chlorine in South Africa. The history of the transaction dates back to March 2001 when unforeseen circumstances resulted in the untimely closure of the Sasol Umbongintwini chlorine plant. In order to ensure that its contractual commitments in relation to the supply of packed chlorine to the water treatment industry were met, Sasol Polymers entered into a toll filling agreement with NCP (then Dow Sentachem) as an interim measure.

In terms of the present transaction, NCP will be acquiring Sasol Polymers' liquid chlorine packaging and distribution business and the associated caustic soda lye business. The toll filling agreement between Sasol and NCP will then be cancelled.

According to the merging parties, the packed chlorine market in South Africa has historically been segmented because of the geographical location of the chlor alkali plants. NCP, which owns a packed chlorine plant in Gauteng, supplied the customers in the inland regions. For economical and logistical reasons, this has meant that NCP primarily supplied customers in the inland regions while Sasol Polymers supplied and serviced customers in the coastal regions. This resulted in NCP being dominant in the inland regions and Sasol Polymers being dominant in the coastal regions.

In terms of the toll filling agreement mentioned above, NCP undertook the filling of Sasol Polymers' containers with chlorine for supply to Sasol Polymers, which it sells to its customers in the coastal regions. Sasol Polymers has therefore maintained its customer base, but no longer produces the product.

Accordingly, the parties did submit that the effect of the merger is not to strengthen NCP's market power in the geographic region in which it currently operates, but to extend its influence into another geographic region. The parties submit further that if the merger is approved, the effect on consumers subsequent thereto, will be identical to that prior to the merger in that there will still only be one supplier region.

The sale agreement contains a restraint of trade clause, which precludes Sasol Polymers from supplying third parties with bulk chlorine products, which are used to produce packaged chlorine products for the water treatment market.

In essence, therefore, the net effect of the transaction would be to foreclose any potential competitor in the market for packaged chlorine products. The Commission is, however, of the view that the aforementioned anti-competitive result can be ameliorated by the imposition of the following conditions:

(a) The restraint of trade provision that is contained in the sale agreement is removed.
(b) NCP shall supply any purchaser in terms of bulk chlorine supply agreement at market related prices.

The aforesaid conditions would not only ensure that the merger does not have a negative impact on the competitive structure of the market, but that the entry of a competitor to NCP is facilitated. Accordingly, the Commission approved the transaction with the aforesaid conditions.

Case reviews continued…

Merger in the Vehicle Industry

The Commission recommended the merger between Barloworld Motor (Pty) Limited (Barloworld Motor), the primary acquiring firm, and Avis Southern Africa Limited (Avis), the primary target firm, be approved without conditions. The merging parties provide overlapping services in the sale of used vehicles. The geographic market is local. The merging parties' post merger market shares in any local market are less than 15%, which does not raise competition concerns.

There are vertical relationships between Barloworld Motor and Avis. However, these relationships will not substantially prevent or lessen competition in the relevant markets.

Given that the post merger market share in the sale of used vehicles in any local market is less than 15% and no vertical integration concerns, the Commission finds that the transaction will not substantially prevent or lessen competition. In addition, the Commission finds that the transaction does not raise public interest concerns to justify a prohibition or conditional approval of the merger.

The Tribunal accepted the Commission's recommendations.

Banking Deal Prohibited

The Commission has prohibited the small merger between ABSA Bank Limited (ABSA), FirstRand Bank Limited (FirstRand), Nedbank Limited (Nedbank), The Standard Bank of South Africa Limited (SBSA) and Comcorp Online (Pty) Ltd (Comcorp).

The banks intended acquiring Comcorp for the establishment of an industry wide switch for the electronic submission of mortgage bond applications. All mortgage applications would have to be submitted via a single channel, being the switch. Furthermore, the banks intended to also acquire the BondTrak software used by mortgage originators (MOs) in managing their processes.

The four banks are involved in the broad financial services market, including the market for the provision of home loan financing. Comcorp is involved in the development and provision of software to the home loan origination market. The parties therefore participate in the broad mortgage industry.

The Commission found that the joint control of the four banks over Comcorp would create a platform for co-ordinated conduct that is likely to lessen interbank competition. The transaction would enable the banks to, through Compcorp, jointly fix a transaction fee, which would require each originator to pay for the electronic submission of mortgage applications. The Commission found that this would have the effect of limiting the multiple submission of mortgage applications to competing banks, wherein the MOs play one bank off against the other in an effort to obtain the best interest rate for the consumer. A restriction on this process would severely harm the consumer in that inter-bank competition would diminish.

Furthermore, should the banks do this without a merger approved by the Commission, it would amount to the fixing of a trading condition amongst competitors. This is prohibited in terms of Section 4 of the Competition Act. However, once the merger is approved it would not be seen as co-ordinated conduct, as the merged entity would constitute a single entity operating to the benefit of its shareholders. The imposition of such a fee would raise rival's costs as the MOs and banks compete in the market for mortgage applications.

In addition, the Commission found that the transaction would lead to a substantial prevention and lessening of competition in the software market. Service delivery is the key competitive variable in the origination and software vendor markets. If the banks, through Comcorp, were to dictate the use of only the BondTrak software, all MOs would be forced to change their software packages, accordingly making their systems redundant, as MOs compete in their respective markets by developing the most advanced and efficient technological systems.

The joint fixing of prices and trading conditions by the banks would prevent innovation and limit competition amongst originators and vendors. It would further foreclose software vendors from competing in the software market, as they would be forced to de-link their existing software packages and only use the BondTrak software owned by the banks. The Commission therefore found that the merger would substantially prevent and lessen competition in the home loan application, home loan software and the home loan finance markets.

Whereas the parties put forward certain efficiencies, the Commission found that these can be attained outside the merger and do not outweigh the anti-competitive effects arising from the merger. In addition, there are no public interest considerations that could justify approving this otherwise anti-competitive merger.

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