Competition News
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Towards a fair and efficient economy for all

In this Edition

The Commission's approach to prioritisation

By: Shan Ramburuth
Commissioner

The Commission faces an ongoing challenge to maximise its effectiveness, given its limited resources. As part of the Commission's strategic planning process we have thus engaged in identifying criteria for prioritisation. The approach to prioritisation has involved both identifying priority sectors and the basis on which specific cases will be prioritised.

The three main criteria, which underpin the prioritisation approach flow directly from the Commission's core mandate as reflected in the Competition Act. The criteria are: a) the impact on poor consumers; b) the importance for accelerated and shared growth; and c) the likelihood of substantial competition concerns based on information the Commission gathers from complaints and merger notifications.

As the most egregious breaches of the Competition Act, cartels are unsurprisingly a crosscutting priority. In addition, with the introduction of the corporate leniency policy (CLP) and improved investigative capacity, the Commission is making important progress in the detection and prosecution of collusive arrangements between competitors.

The Commission has further employed the criteria together with consultation with stakeholders and background research to identify four priority sectors for particular attention over this and coming years. In these sectors, the Commission of course, will investigate complaints and will take a more proactive stance in general to implementing its mandate. The approach taken differs by sector, to take into account specific concerns and characteristics. However, it will include a review of available data and evidence on potential anti-competitive conduct. This may then lead to investigations that are more specific and the initiation of formal complaints in what will generally be a multi-year programme of work. The sectors identified for 2008/09 are as follows.

Food and agro-processing

Agricultural markets were amongst the most regulated by the apartheid government. In 1996, two years after the first democratic elections, the government swept aside the 'Control Boards' which had governed the marketing and price determination of

Editorial Note

This issue of Competition News appears after a small gap as we have been rethinking the content to make it more useful and accessible to our readers. It also covers a period of high levels of activity and public attention on the activities of the competition authorities.

The Commission has been developing a process of prioritisation, both to identify criteria, which are applied and key sectors on which to focus, as described by the Commissioner Shan Ramburuth on page 1.

One of the reasons for the Commission's recent success in addressing cartels is the Corporate Leniency Programme (CLP). Recent changes to the CLP are reviewed by Thulani Kunene (page 3).

Two areas of the Commission's work, which have attracted significant media coverage, are food products and infrastructure inputs. Recent work on these issues in the form of the bread cartel and infrastructure is described in the articles on page 4 and 7. The cartel uncovered in the scrap metal sector after considerable work by the Commission is also covered (page 10).

As always, alongside enforcement actions are the many mergers, which the Commission evaluates. The main mergers, and the issues they posed, are summarised in the final piece to give readers an insight into this very important ongoing area of the Commission's work.

I hope you find this issue of Competition News to be interesting and thought provoking.

Should you have any comments or suggestions you can send them to keitumetsel@compcom.co.za

Simon Roberts
Editor-in-Chief.

most agricultural products. Farmers had also been supported by tariffs and quotas on imports and subsidised finance, while co-operatives played an important role to play in the provision of inputs and the storage, processing and packaging of products. The alleged cartel behaviour uncovered in recent years in areas such as dairy products, bread and maize meal, suggests that the private concerns in agro-processing and food have engaged in far-reaching anti-competitive behaviour to the disadvantage of both consumers and farmers. The importance of food to poor consumers and the high levels of poverty in South Africa mean that this has had a particularly negative impact on welfare. Moreover, the impact on the returns from farming clashes with the government's objectives to support entry of black farmers into commercial agriculture and of rural development more broadly.

Infrastructure and construction

An important component of the government's plan to achieve more rapid growth is a far-reaching programme of investment in infrastructure. After sustained economic growth over the past decade, infrastructure is now a major bottleneck, which is being urgently addressed, led by investments in transport and energy by the major parastatals in these areas. Anti-competitive behaviour increases the costs of this state-led investment, as well as raising the costs of investment by private firms more broadly. Internationally, there have been high profile investigations into construction and infrastructure projects, such as by the Netherlands' NMa and the UK's Office of Fair Trading, which have uncovered extensive bid rigging. The close-knit nature of the South African business community as well as the apartheid legacy of regulation by government and industry groups suggests that it may well be a problem in South Africa.

Banking

Following mounting concern about the level of bank charges and the arrangements governing the payments system the Competition Commission launched an inquiry into these issues with an independent panel of experts. Although participation is voluntary, all the major banks have participated in the inquiry. The inquiry report is due in June 2008, at which point the Commission will determine what further steps to take.

Intermediate industrial products

The South African economy is unusual in having a strong base in heavy industry but relatively weak capacity

in more diversified manufacturing. The comparative advantage in capital-intensive intermediate industrial products is despite the high levels of unemployment, especially amongst those with low skill levels. The skewed industrial base is due to South Africa's resource endowment, the cheapest electricity in the world, and extensive support by the apartheid government. However, while this has created entrenched dominant industries with a low cost base in important product groupings, in many cases it appears that the low production costs are not reflected in relatively low prices for local customers who may be engaged in labour-absorbing manufacturing activities.

It is important to note that the Commission does not have powers to require information from companies in the absence of a formal investigation. The focus on the above sectors involves a research process based on publicly available information and existing analyses. Where anti-competitive outcomes are identified, the Commission can then address these using the powers given to it under the Competition Act. Where the outcomes may not be due to breaches of the Competition Act the Commission will endeavour to engage with other institutions, as may be appropriate and to share its understanding of the issues negatively impacting on shared economic growth and development.

Review of Corporate Leniency Policy

By: Thulani Kunene
Enforcement and
Exemptions Division

The Competition Commission has, in line with most competition authorities internationally, prioritised the eradication of cartels, as one of the most serious contraventions of the Competition Act. Naturally, cartels are highly secretive and difficult to detect, hence the identification of an effective leniency program internationally as one of the most potent tools in the fight against cartel behaviour.

The program offers total or partial immunity to cartel members that assist the authorities in identifying and prosecuting cartels.

In the pursuit of cartels, the interests of consumers in ensuring that cartels are detected and broken up, are paramount. Therefore, authorities are prepared to forsake a sanction against a member of cartel who has applied for immunity in return for their assistance in prosecuting other members of the cartel.

The Commission has had a Corporate Leniency Policy ("CLP") since February 2004. In January 2007, the Commission decided that it was appropriate that a review of the policy be undertaken. The purpose of the review was to make the CLP a more effective tool in the fight against cartels.

Amongst other objectives, the Commission sought to create certainty regarding the criteria that will qualify an applicant for leniency and remove criteria, which discourage firms from applying for leniency.

The Commission conducted research on international best practice in the fight against cartels. In addition, the Commission also took into account the specific experiences of the European Commission and a number of jurisdictions such as Canada and Australia who in the past embarked on a similar process of reviewing their respective leniency policies. Furthermore, the Commission took into account feedback that it had received from various local stakeholders regarding their experiences with the CLP.

Based on these interactions, the following key changes are being made to the policy:

Key Changes

Amendments to the Competition Act to specifically make provision for CLP. The Commission identified the lack of clear statutory backing for the policy as contributing to companies' reluctance to approach it for leniency.

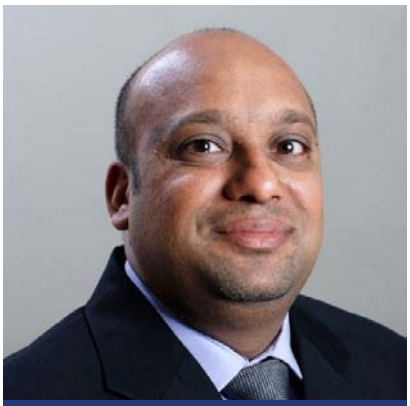
The removal of certain clauses interpreted by firms considering applying for immunity and some stakeholders as granting the Commission unfettered discretion in the granting of immunity.

To provide for oral or paperless applications. This is to reduce the fear of potential leniency applicants that their submissions to the Commission may be used against them in subsequent civil or criminal proceedings.

Introduction of a marker system into the CLP, whereby a firm can establish beforehand whether leniency would be available to it and reserve its place in the line.

Bread and milling cartel

By: Mapato Rakhudu, Policy and Research Division



By: Avish Kalicharan, Enforcement and Exemptions Division

The existence of anti-competitive behaviour in the food value chain has long been suspected, although no evidence was forthcoming until recently. High increases of food prices, supra-competitive processing margins, and possible profiteering have been cited as major cause for concern. Nevertheless, the Food Price Monitoring Committee (FPMC), established by government to probe the dramatic food price hikes during 2002 and 2003, noted such concerns but concluded, "No profiteering on basic foodstuffs has occurred".

It has nonetheless recently become evident that there has been widespread anti-competitive conduct in the pricing of some food products, certainly in the wheat and maize value chain.[1] Most notably the major firms dominating the milling of wheat and maize and the production of bread and maize meal have been colluding to set prices through regular meetings and contact from at least 1994 up to 2007.

Maize and Wheat Industry

Maize and wheat constitute the most important field crops in South Africa and are of primary economic importance as they contribute significantly towards the total gross value of agricultural production. In addition, maize and wheat are key inputs into the main staple foodstuff for poor South Africans, that is, maize meal and bread.

The apartheid government instituted extensive controls on the production and marketing of food products including wheat and maize, with state sanctioned 'Control Boards' under the 1937 Marketing Act, re-promulgated in 1968. This was largely done to the benefit of white farmers and was coupled with support for farmers (including protection, subsidised finance and export subsidies). Farmer co-operatives also played an important role in providing inputs and services such as storage, packaging, and processing.[2]

Under the first democratic government, the far-reaching liberalisation initiated in the 1980s continued (the one exception being sugar), with the closure of the control boards under the 1996 Marketing of Agricultural Products Act, conversion of quantitative trade restrictions to tariffs and gradual reductions in the tariffs themselves. Alongside this, the large farmer cooperatives, such as OTK in the old Eastern Transvaal, converted themselves into private companies. These co-operatives, have rapidly acquired other operations extending their reach both geographically and vertically through the value chain.

Maize and wheat are primarily traded on the South African Futures Exchange (SAFEX), with prices appearing to be set in competitive markets. However, there are high levels of concentration throughout the food value change, from the supply of seed and inputs such as fertilizer, to the storage and processing of commodities and sale of end consumer products. There is also extensive vertical integration from the storage and trading of the agricultural products, dominated by the now privately owned co-ops, to the processing and sale of products.

With regard to the milling and baking level, the industry is highly concentrated, with only four firms controlling approximately 90% of the milling output, namely Pioneer, Premier Foods, Tiger Brands, and Ruto/Foodcorp. Small-scale millers account for the remaining 10%. The big four companies are further vertically integrated in baking and production of other foodstuffs such as maize meal, bread, cereals and pasta, while most of the smaller millers are not vertically integrated.

The Bread and Milling Cases

The investigation into the bread and milling companies was initiated after the Commission received information, through an informant, of possible price fixing in the bread industry in the Western Cape. The informant alleged that the three mainbakeries, i.e. Sasko (Pioneer), Blue Ribbon (Premier) and Albany (Tiger Brands), had met to discuss increasing bread price simultaneously and decreasing the commission payable to the independent distributors/agents.

The Commission's investigation established that the three bakeries had given written notices to its distributors

[1] There is also a case pending against milk processors who have allegedly colluded to fix the price of milk.
[2] This was underpinned by various legislation that included the 1913 Land Act, the Land Bank Act of 1912, the Land Settlement Act of 1912, and the Co-operative Societies Acts of 1922 and 1939.

that there was going to be a 35 cents increase in the price of bread. The increase was to be implemented around 18 December 2006 by two of the bakeries and a few days later by the third bakery. All three bakeries also notified the distributors of their intention to reduce agents' commission to a maximum of 75 cent per loaf of bread. Prior to this announcement, the agents were receiving between 60 cents and R1,10 per loaf of bread. When some of the agents attempted to change suppliers, they were told that the bakery would not supply them, as there was an agreement between the bakeries not to supply the customers of another bakery.

The Bakeries fixed their prices in a manner, which was intended to mislead their customers into believing that they were independently set. There were usually slight differences in pricing and the increases were implemented either on the same date or within a few days of each other.

During the early stages of the investigation, Premier Foods Limited, t/a Blue Ribbon Bakeries, filed an application for immunity from prosecution in terms of the Commission's Corporate Leniency Policy ("CLP"), where it offered to co-operate fully with the Commission.

Premier furnished information to the effect that during or about the period 1995 to 2006 Premier, Tiger, Pioneer and Foodcorp acting through their respective representatives, telephonically and in meetings:- directly or indirectly agreed to fix the selling price of bread to their customers; agreed on the timing and implementation dates of such price increases; and agreed to close down certain of its bakeries in certain areas in favour of competitors.

Further information supplied by Premier, indicated that the cartel operated not only in the Western Cape, but also in Gauteng, Mpumalanga and other parts of South Africa. Premier also indicated that the companies were involved in a milling cartel.

The previously mentioned conduct described above contravened section 4 (1) (b) (i) and (ii) of the Act which, incidentally, is considered by competition authorities to be the most egregious infringement of competition law. On 14 February 2007, the Commission referred the Western Cape bread case to the Competition Tribunal.

Premier was given immunity and the referral was made against Pioneer and Tiger Brands.

After the referral of the Western Cape case Tiger Brands also approached the Commission with the view of co-operating with the Commission. Tiger Brands conducted their own internal investigation and furnished the Commission with a report, which confirmed the information provided by Premier, as well as shedding more light on the milling cartel.

Information submitted indicated that the milling companies had colluded by agreement or engaged in a concerted practice to fix, not only the amount or margins by which the prices were to be increased, but even the date on which the said increases were to become effective. The said collusion is in contravention of section 4 (1) (b) (i) of the Act. The milling companies, by agreeing not to poach each other's customers, were also dividing markets by allocating customers in contravention of Section 4(1) (b) (ii) of the Act.

Tiger Brands entered into a consent order agreement with the Commission for the part that they played in the bread cartel. They were awarded immunity in terms of the Commission's CLP for their role in the milling cartel as they provided the Commission with vital information, which the Commission did not have. The Competition Tribunal approved the consent order on 12th December 2007. In terms of the order, Tiger Brands had agreed to a fine of R98 million and undertook to refrain from colluding with its competitors, as well as undertook to develop a competition compliance programme. The administrative penalty imposed on Tiger amounts to 5.7% of its national turnover for bread operations for the 2006 financial year. Tiger Brands only qualified for immunity in relation to its role in the milling cartel.

Bread Price Increases

Soon after the Commission uncovered the long-running cartel and imposing a fine against Tiger

Brands, the bread companies publicly announced bread price increases, which led to widespread protest across the economy from a wide range of stakeholders. Most stakeholders felt that consumers were the ultimate bearers of the R98 million fine.

The firms, and Tiger Brands in particular, justified the increases as necessary due to cost increases led by the sharply higher wheat prices. This however raises a range of questions about the size of the margins achieved over the years because of collusion, and what a more competitive market could be expected to look like. It can be assumed that the collusive price setting had maintained and grown margins of the millers and bakers over the years.

Further, while it is accurate that wheat prices have increased considerably over the past year, wheat prices generally fluctuate due to the internationally traded nature of the commodity. However, bread prices have constantly been on a steady upward trajectory, despite the wheat price fluctuations. This is reflective of the asymmetries in price transmission in food marketing chains, where increased input prices are largely transferred to the consumer prices, but decreases in input prices are not reflected in decreases to end consumers. Given that the earlier margins were already those set under cartel conditions, it suggests that there is substantial scope for greater competitive rivalry to exert downward pressure on prices.

The cartel investigation illustrates that, effectively, despite the deregulation of the maize and wheat value chains, the sectors are now privately regulated by the major processing firms (in their own interests), and this regulation has replaced the apartheid state's regulation.

In the face of such market concentrations of the industry, anticompetitive behaviour may ultimately hinder any desirable response to whatever incentives the government puts forth. This has serious consequences for the welfare of the poorest households given the importance of maize meal and bread as the key staple foodstuffs in South Africa. Low-income households typically have to spend a very high share of their income on food, meaning that the pricing of basic foodstuff is crucial for the welfare of a large proportion of the population, especially those below the poverty line.

The bread and milling cartels also point to potential problems in many value chains within agricultural industry. These anti-competitive outcomes are also suggested in other agricultural sectors (e.g., as milk, tea, poultry). It is therefore against this background and the soaring food prices that the Commission has commissioned an investigation on the entire food value chain, which focuses mainly on staple foods for the poor.

Competition Commission investigation against pharmaceutical companies

By: Nandi Mokoena
Commissioner's Office

During 2005 the Competition Commission ("Commission") received allegations of collusive tendering (also referred to as bid rigging) and the division of markets against firms in the pharmaceutical industry. Following upon these allegations, the Commissioner initiated a complaint against Adcock Ingram Critical Care (Pty) Ltd ("AICC"), Tiger Brands Limited and Fresenius Kabi South Africa (Pty) Ltd ("FKSA") alleging that the respondents had:

- engaged in collusive tendering in respect of Contract RT299, which was the State Tender for Large Volume Parenterals destined for State hospitals across South Africa, in contravention of section 4(1)(b)(iii) of the Competition Act 89 of 1998, as amended, ("the Act"); and
- divided the private hospital market amongst themselves in contravention of section 4(1)(b)(ii) of the Act.

As part of its investigation, the Commission interviewed or summonsed several individuals who were believed to have information or evidence concerning the Commission's allegations. During this process FKSA was first to confess to the collusion. FKSA:-

- confirmed that it had knowledge of and was involved in collusive tendering and the division of markets as alleged by the Commission;
- provided information about meetings and discussions between the parties;
- indicated that Dismed Criticare (Pty) Ltd ("Dismed") and Thusanong Health Care (Pty) Ltd ("Thusanong") were also party to the collusive tendering;
- applied for leniency in terms of the Commission's Corporate Leniency Policy.

[1] Intravenous solutions for patients requiring such treatment in hospital

Accordingly, the Commissioner initiated a complaint against Dismed and Thusanong and granted FKSA conditional leniency.

The information gathered from parties interviewed by the Commission and the leniency application by FKSA revealed that some respondents were involved in collusive tendering and the division of markets in contravention of the provisions of section 4(1)(b) of the Act from as far back as 1993 to 2007.

The Commission, therefore, referred the complaint against AICC, Dismed and Thusanong to the Competition Tribunal for adjudication on 11 February 2008. The case is ongoing.

The Commission's research into infrastructure inputs

By: Junior Khumalo,
Policy and Research Division

1. Introduction

The Accelerated and Shared Growth Initiative for South Africa (AsgiSA) programme introduced by government in February 2006 has investment in infrastructure as a major driver of higher growth rates. In light of this, the government embarked on a bold infrastructure investment initiative, with a budget of R415.8 billion over three years spread across electricity generation and distribution, transport and logistics, as well as water supply. Overall, it should improve the efficiency of the South African economy and reduce the costs of doing business. One externality from the AsgiSA initiative that is hoped for is its potential to stimulate and grow the production of capital goods and other manufactured inputs.

However, one of the key constraints to achieve envisaged growth levels, as identified by AsgiSA, is the lack of competition in a number of sectors in South Africa. According to the Deputy President's presentation launching AsgiSA, "public and private monopolies have used their market dominance to charge high prices, especially infrastructure services and intermediate products for downstream industries". Furthermore, it stated that "a number of large firms, particularly those which provide basic input materials or services into more labour intensive sectors, benefit from a range of barriers to entry including economies of scale, high transport costs and regulatory barriers".

Given this background, early last year the Competition Commission began a research study of infrastructure input materials, such as bricks, cement, reinforcing steel, as well as construction services. The research project was split into three stages, the first stage provided an overview of government and State-owned Enterprises' (SOE) spending on infrastructure, the second stage focused on identifying important products and services and an initial review of competition levels in these markets, and in the third stage deeper research into selected priority markets was conducted. This article briefly touches on international experience of cartel investigations in the infrastructure and construction industries in section 2, and then reviews some of the basic pricing data on highlighted products in section 3.

2. Recent international cartel cases related to construction and infrastructure

There are worrying signs from other countries about the possible extent of anti-competitive behaviour in construction. For example, in 2001 the Dutch competition authority (the NMa) began investigating a cartel involved in bid-rigging in connection with 15 major infrastructure projects such as the building of the fifth runway at Schiphol Airport. In December 2003, the NMa fined the companies €94.6mn. In 2004, the NMa further intensified its investigations into the construction sector using its leniency policy as incentive for companies involved in bid rigging to come clean in exchange for reduced or cancelled fines. This strategy culminated in 481 companies across civil engineering and infrastructure related activities applying for leniency. Over a seven-year period up to 2007, the construction industry investigation led to 1374 cases, with total fines of €301mn.

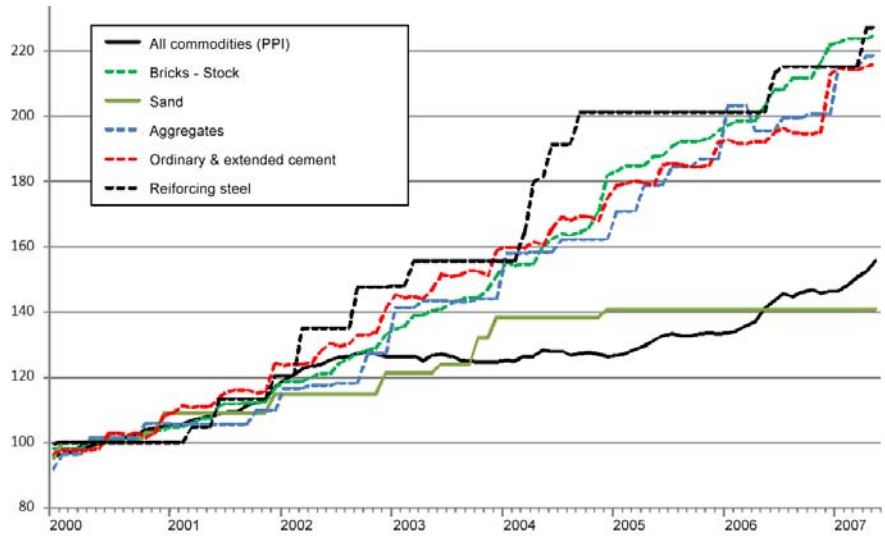
In April 2008 a four year investigation by the UK's Office of Fair Trading (OFT) into bid rigging in the construction industry culminated in 112 construction firms being charged, of which 37 have applied for leniency and a further 40 have admitted to at least some degree of price fixing. The investigation included raids on 57 companies in 2006 and, by March 2007, the OFT had introduced a 'fast-track' programme whereby the implicated companies that had not applied for leniency were offered a reduction in fines in exchange for their willingness to cooperate with the OFT in certain specific ways.

3. Priority markets

An initial review of the Producer Price Index (PPI) data reveals that over recent years, prices of many of the input products to the infrastructure programme have been increasing at rates substantially in excess of average producer and consumer inflation (Figure 1). Indeed, to the extent to which producer prices feed through to consumer prices, these patterns have contributed to the breach of the Reserve Bank's inflation target.

A closer look at several of the major product groupings within the materials used for building and construction reveals that prices for bricks, aggregates and cement have all been increasing very rapidly (Figure 2) and with consistent increases year-on-year in excess of 10% per annum, far above the overall PPI reflected in Figure 1 above. In other words, while overall producer prices in 2007 were around 50% higher than in 2000, the prices of these products are now in most cases double what they were seven years previously. Steel products show a much greater degree of variation, with prices of reinforcing steel used in construction increasing in steps. Of these materials, only sand prices stabilised after early increases such that their overall increase for the period was in line with the average PPI.

Figure 2: Producer price indices for selected building materials (bricks cement and aggregates)

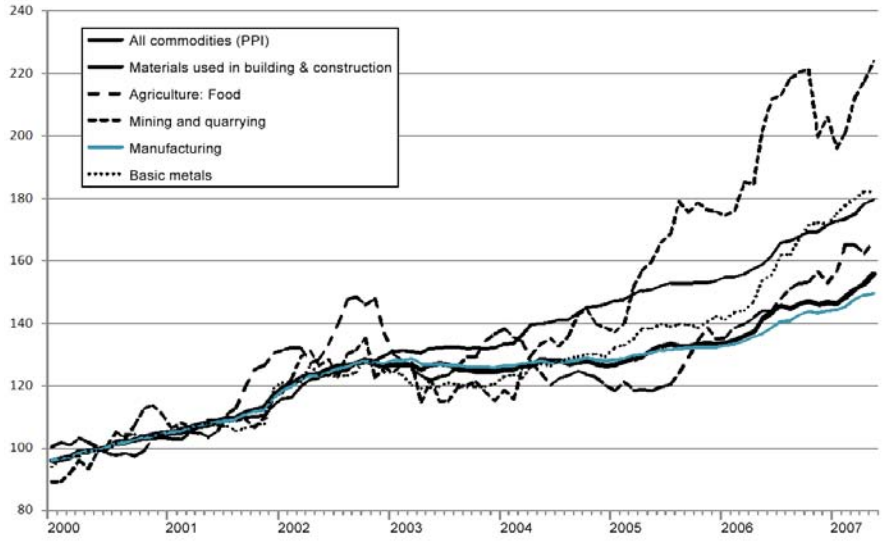


Source: Statistics South Africa

The market structure and competition conditions differ substantially across the various products highlighted here. The bricks industry appears relatively un-concentrated, with a large number of players. It is a relatively easy process to make cement blocks with low barriers to entry, given access to competitively priced inputs, while clay bricks requires much greater investment in a kiln. In the clay bricks industry there are a large number of small to medium players and a few larger ones, with Corobrik the clear leader. The Clay Brick Association reports that it has 81 members who represent an estimated 70% of the total market. The total estimated annual clay brick production capacity for 2007 is estimated to be 4.5 billion bricks. However, the relatively high transport costs of bricks means that the geographic market, especially for clay stock bricks, is localised within an estimated 120km radius from the production site, while face bricks are transported over longer distances. Other potential barriers to entry include access to raw materials and the time required to meet the necessary regulatory requirements to set up a factory.

In contrast to the bricks industry, the South African cement industry has been dominated by three big producers, namely PPC, AfriSam and Lafarge. In 1990, these three accounted for approximately 95% of the market, led by PPC with a share in excess of 40%. The big three players were effectively a collective monopoly under a government sanctioned cartel, ended in 1996. The cement industry remains highly concentrated and is capital-intensive with large-scale production plants. Similar to the bricks industry, high transport costs (due to the weight of input materials and the

Figure 1: Producer Price Index: All commodities and selected sub-indices



Source: Statistics South Africa

final cement product) meaning that proximity to the source of raw materials and to the market is important. The incumbent players in the cement industry have extensive distribution networks; therefore a potential entrant without its own transport infrastructure may struggle to surmount such a hurdle.

The reinforcing steel used in the construction industry is part of the broader grouping of long steel products. Unlike the flat steel products market (which is dominated by Mittal), the long steel market has a number of competitors against Mittal. However, Mittal is still the dominant producer with over 50 per cent of the market, followed by Highveld, Scaw, Cape Gate, and Cisco. In previous rulings, the Tribunal has strongly suggested that the practice of setting local prices at import parity levels in a market such as for long steel products can only be maintained because of collusion between the players, given that there is no price regulation. The long steel market has also been characterised by net exports (that is, a surplus of production over domestic consumption).

4. Concluding remarks

The review undertaken by the Commission to date thus raises concerns about possible anti-competitive behaviour in several markets for infrastructure inputs, which is inflating prices and, in turn, increasing the costs of the infrastructure programme. In addition, such behaviour could also be increasing the costs of other projects and products that use these inputs and raising costs in the economy more widely. Our analysis of the markets for these three key infrastructure inputs (bricks, cement, and steel) has identified a number of reasons to be concerned about the nature of competition in these markets. The concerns are especially pertinent given that the level of infrastructure spending by government is likely to remain high in the medium term.

The possible implications of South African Competition Act on the 2010 Soccer World Cup

In 2010, South Africa will host the momentous and anticipated FIFA World Cup. Necessary steps have been taken to protect the 2010 FIFA World Cup from, among other things, ambush marketing. On 7 September 2006, South Africa enacted the 2010 FIFA World Cup South Africa Special Measures Act No. 11 of 2006 to deal with certain aspects of the tournament such as the declaration of venues, national anthems and flags, visas and permits, designated areas, access control measures, traffic free zones and other matters.

By: Bukhosibakhe Majenge
Compliance Division

By: Elphus Mudimeli
Compliance Division

On 25 May 2006, Notice 683 of 2006 was published designating the 2010 FIFA World Cup as a "protected event" in terms of section 15A of the Merchandise Marks Act No.17 of 1941 from the date of publication to six calendar months after the date of commencement of the World Cup. In terms of section 15A (2) of the Merchandise Marks Act "for the period during which an event is protected, no person may use a trade mark in relation to such event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organizer of such event". Contravention of section 15A (2) constitutes a criminal offence.

In a similar vein, on 14 December 2007, Notice 1791 of 2007 was gazetted prohibiting the use of certain words, letters, emblems, devised and numerals in terms of section 15 of the Merchandise Marks Act in connection with the 2010 FIFA World Cup. The prohibition will also lapse six month after the tournament and does not apply to the media, provided the reportage is "fair and not imbued with unscrupulous business enterprising." The effect of the said notices is to deal with, among others, the problem of ambush marketing in terms of which a company attempts to ambush or undermine the sponsorship activities of a rival that owns the legal rights to sponsor the event.

The said notices also bring into sharp relief the implications of the South African anti-trust legislation, the Competition Act No. 89 of 1998, on the tournament. The South African competition legislation does not deal with contests or prize competitions, but it is designed to militate against practices that constrain or impede competition in the economy and monopolistic tendencies. At this point one may ask the question, what does the Competition Act have to do with the 2010 FIFA World Cup? The answer is clear - the Competition Act applies to all economic activity within, or having an effect within, South Africa.

The Act, provided its requirements are met, will also apply to any anti-competitive conduct that occurs in the hurly-burly of staging and hosting the tournament. It must be borne in mind that certain anti-competitive business practices are prohibited in terms of the Competition Act. These will include, for instance, agreements or concerted practices, which may have the effect of substantially preventing or lessening competition in a market, price-fixing or fixing any other trading condition, market-allocation, bid rigging, minimum resale price maintenance.

However, the Act makes provision for exemptions of the offending agreements or practices, provided certain requirements are met. The exemptions provisions of the Competition Act include the exemption of intellectual property rights. In our opinion, in view of the fact that Notice 1791 of 2007 creates an absolute prohibition in terms of the Merchandise Marks Act, this dispenses with the need to make an application to the Commission for exemption in respect of the words, letters, emblems etc. contained in the notice.

The Reclam investigation - unravelling a cartel

The Commission recently concluded a settlement agreement with the New Reclamation Group ("Reclam") following almost two years of an investigation into the scrap metal industry. The Competition Commission found that Reclam and its competitors had been involved in a cartel to fix prices, allocate markets, and rig tenders in the ferrous and non-ferrous scrap metal markets. In terms of the consent agreement, Reclam agreed to pay an administrative penalty of R145 972 065, which amounts to 6% of Reclam's annual turnover in the affected markets. The settlement has been referred to the Competition Tribunal ("Tribunal") for confirmation. A brief overview of the scrap metal industry and the process followed in investigating the matter follow below.

By: Nompucuko Nontombana
Enforcement and Exemptions Division

The scrap metal industry - background

The scrap metal industry involves the recycling of scrap metal for sale to industries, which use it to produce new products. It is therefore a key input to primary and secondary metal conversion industries.[1] Scrap metal can be either ferrous (of iron and steel) or non-ferrous (of other metals such as aluminium). The scrap metal industry covers the collection and processing of scrap metal in order to sell to end users. It is collected from various sources, which generally include regular industrial companies that generate scrap metal, households, and individual gatherers of scrap. . In South Africa, scrap is also sourced from neighbouring countries. Processing of the collected scrap involves sorting, cleaning and grading the metal before selling to end users or customers. The users include local steel producers and foundries, as well as export markets.

The structure of the industry is such that many of the collectors are generally small dealers, who would not normally have the capacity to process the scrap collected. The major recyclers are mostly involved in both collection and processing. For instance, Reclam has a number of collection facilities situated around the country for collecting scrap, which is then processed. In addition, most of the major recyclers are able to do any form of processing of metal, ferrous or non-ferrous. The major recyclers include Reclam, SA Metal ("SAM"), Eurotrade, and Universal Recycling.

The investigation

The investigation into the scrap metal industry was pursued after the Commission recommended a prohibition of a large merger application by Reclam and SAM in February 2006. The merger documents submitted to the Commission implicated Reclam, SA Metal and Machinery, National Scrap Metal, and Cape Town Iron and Steel Works in activities related to market allocation, price fixing and fixing of trading conditions, and restrictive vertical practices in contravention of the Competition Act. The documents included an exclusive supply agreement concluded by the parties in 2000, which had the effect of lessening competition in the Western Cape and Northern Cape regions. The alleged conduct affected the collection and supply of ferrous and non-ferrous scrap. Based on this information, the Commission initiated a complaint against all the parties on 11 August 2006.

As part of the investigation into these allegations, further documents were summoned from the parties. Among the documents submitted in response to the summons, the Commission found evidence that implicated Reclam and other parties in collusive tendering. The new evidence related to a scheme to rig Spoornet's auctions of wagons, coaches, and tankers in 2007. The new evidence also implicated parties who were not included in the initial complaint. The Commission therefore extended its investigation to include collusive tendering in contravention of section 4(1) (b) (iii) and to include the new respondents, LO Rall, Universal and Fine Trading.

Based on the new evidence, the Commission conducted simultaneous search and seizure operations on 20 July 2007 at the premises of Reclam in Johannesburg, Port Elizabeth, and Durban. Documents, including electronic documents, were seized from the premises. Due to disputes about which documents were privileged, as well as about the basis for the warrants, the Commission agreed to keep all the documents that were seized at the Tribunal until these issues were resolved.

Subsequent to the Commission's actions, a number of informants contacted it with information related to the investigation of Reclam. In early

[1] Who Owns Whom, 2006. Recycling of Waste and Scrap (T Duligal, March 2006)

August 2007, an anonymous source provided the Commission with new information, which implicated Reclam and its competitors, Abeddac Metals, Amalgamated Metals Recycling, Ben Jacobs Metals, Power Metal Recyclers, SAM, and Universal Recycling, in price fixing and collusive tendering for non-ferrous scrap metal. The further new respondents were added to the existing investigation. It is worth noting that Reclam had submitted more than 60 files in response to the summons but could not explain how this piece of new information was not submitted among the files submitted to the Commission.

While the Commission was in the process of opposing Reclam's application to set aside the warrants, Reclam approached the Commission with a view to settling the matter. One of the Commission's persuasive arguments was that Reclam had concealed information or had submitted incomplete information to the Commission in its response to the summonses, based on the information received by the Commission from third parties. It was agreed by the Commission and Reclam that Reclam would conduct its own internal investigation and review the documents seized by the Commission in order to establish the nature and extent of contraventions among its employees. The outcome of Reclam's investigations confirmed the Commission's suspicions of prohibited practices in the metal scrap industry. On 3 April 2008, Reclam admitted guilt for the following contraventions of the

Act:
- Reclam and its competitors agreed to fix prices for the supply of ferrous and non-ferrous scrap metal in contravention of section 4(1)(b)(i) of the Act;
- Reclam and its competitors entered into exclusive agreements and other arrangements to divide markets by allocating territories and customers for the supply of ferrous and non-ferrous scrap metal in contravention of section 4(1)(b)(ii) of the Act.

As part of the settlement, Reclam agreed that it will no longer be a party to any arrangements in the ferrous and non-ferrous scrap metal markets, which constitute a prohibited practice in terms of the Act, and that it will implement a compliance programme for its employees, management and directors not to engage in any further anti-competitive conduct. Reclam also undertook to offer its full co-operation in the Commission's ongoing investigation in the scrap metal industry.

The Commission will soon be concluding its investigation into the scrap metal industry. This will entail pursuing the matter with Reclam's competitors who were part of the cartel and were implicated in the course of the investigation.

Role of consumer organizations and the Competition Commission's support for them

The importance of having a strong consumer movement

The Competition Commission is the investigative and prosecutorial body established in terms of section 19 of the Competition Act. A key objective of the Act is to provide consumers with competitive prices and product choices. While consumer interests are explicit in the objectives of the Act, it was government drafters rather than actively organized interest groups who inserted them. One of the Competition Commission's biggest concerns is the state of organisation of the consumer constituency in the country.

During the liberation struggle against apartheid, consumer boycotts were powerful weapons, however, the establishment of an independent consumer organisation never happened.

In most societies, there is support for consumer activism, which addresses consumer concerns ranging from the price of steel to school uniforms, motorcars, medicines, bank charges, and mobile phone tariffs.

However, in South Africa, for the most part, consumer leadership is unable to bring together these grievances into an eloquent, focused expression that would engage consumers in the activities of the competition authorities, among others, to the investigations of the Competition Commission and hearings before the Competition Tribunal.

By: Mziwodumo Rubushe
Compliance Division

The competition authorities aim to approach their work in a manner that would generate support from consumer organisations. Thus, I deal briefly with three issues, namely, prioritising consumers in case selection, engaging with consumers in the investigative process, and transparency in the decision-making process.

Prioritising consumers in case selection.

The competition enforcement experience suggests that, in its first, critical years, the competition authorities did not initiate investigations, as most were complaint driven.

In the absence of a strategically sophisticated consumer activism, there is nothing inherently wrong with this, as the complainants tend to be well-resourced consumers of intermediate products.

For example, while the price of soda ash, may affect the prices of basic consumer products like glass and detergent, a battle over soda ash is unlikely to generate much consumer interest.

Usually large complainants would not engage in an intense public agitation in support of their case that would stir up consumer activism. However, the impact of public agitation is considerably more dramatic and immediate on complaints driven by well resourced, sophisticated, and mass based consumer organisations.

When the Treatment Action Campaign (TAC), an organisation that campaigns for HIV treatment and prevention, filed a competition complaint against several pharmaceutical multinationals, alleging excessive pricing of antiretroviral drugs and the refusal to supply an essential facility, it surrounded the investigation with all its finely honed protest skills. At the same time, it engaged the services of its own lawyers and experts to assist in preparing submissions to the Competition Commission, which referred the case to the Tribunal for adjudication after conducting its own investigation.

What would have been a complex and difficult competition case was won by the complainants because, the pharmaceutical companies, feared a protracted legal battle mixed with negative publicity. An agreement reached with the pharmaceutical companies to issue licenses to local producers, thus, relinquishing the monopoly achieved through their possession of patent protection settled the case.

This enhanced the pharmaceutical companies' standing in the eyes of all consumers, TAC and the competition authorities and helped to establish the essential connection between consumer interests and competition enforcement.

The competition authorities need to be busy with a case that responds to spontaneous consumer dissatisfaction on prices of a basic commodity at any point in time.

The price of school uniforms is a case in point. At the beginning of each year - there are complaints about the price of school uniforms. These grow louder and louder every year in response to what consumers believe are excessive price increases. The complaints inevitably subside during the year, only to resurface when the school year starts again the following year.

The competition commission has a year in which to investigate these complaints thus keeping the issue alive during the year as well as preparing for a sophisticated engagement with the suppliers of school uniforms when, at the beginning of the next school year this issue rears its head again.

This is not an argument for pursuing unwinnable cases by responding to every popular complaint about pricing – but on the basis that there is seldom smoke without fire, or, more specifically, that there is usually a link between unusual price movements and competition, the competition enforcers should examine complaints which have their basis in popular perceptions.

Secondly, the enforcement agency should make a point to engage with consumers in the investigative process.

This not only helps intensify the interface between competition authorities and consumer organizations, it also, without doubt, improves the quality and raises the credibility of the evidence that the competition authorities have to place before the decision makers, be they the courts or, as in the Competition Commission case, specialist tribunals. Hence, in all cases regarding consumer products, surveys, preferably involving consumer focus groups should be used.

These are neither technically demanding nor do they consume massive resources – but they will significantly improve the quality and credibility of the evidence garnered by the authority in support of its cases.

In the aids drugs case – the complainants close relationship with their base of aids sufferers would have not only improved the quantity and quality of the Competition Commission's evidence, but, it also introduced a powerful human dimension into a case that, had it been prosecuted, would otherwise have been dominated by arcane and complex legal and economic issues.

The use of consumer intelligence is not restricted to complaints of anti-competitive conduct but may also be effectively deployed in merger investigations.

To show that the Commission is committed to engaging civil society, for example, it invited civil society organizations to the Tiger Brands hearings on the 28 November 2007. Organizations present at the hearings included the Black Sash, the National Consumer Forum (NCF), the Congress of South African Trade Unions (COSATU), and the South African Human Rights Commission (SAHRC). This gave the case a human

dimension and a voice to the victims of cartel behaviour - as their participation sent a powerful message that the contravention of the Competition Act constituted a violation of human rights.

Thirdly, there is the issue of transparency in the decision-making process.

Our competition law provides for a very strict separation between the investigative and prosecutorial process, on the one hand, and, the adjudicative or decision-making process, on the other.

Once the Commission has decided to investigate a particular instance of conduct or once it has concluded its investigation of a large notified merger, it refers the results of its investigations to the decision-maker, the Competition Tribunal. Then the Tribunal holds public hearings, which, although similar to the format of a court hearing, are more informal and accessible. The rights of intervention accorded to interested parties – and these would certainly include consumer representatives –are very permissive. The media attends these hearings, which it widely reports on.

Written reasons provided in respect of every decision reached are published on the Tribunal's website. A transparent hearing and decision-making process should be sufficient to galvanise consumer organisations, and we have no doubt that these processes would be an effective weapon in the hands of any consumer activist, even in the hands of a fledgling consumer organisation. It amounts to a readymade, organised public platform.

Mergers and acquisition cases

Steel: Mittal Steel Company N.V. and Duferco Steel Processing (Pty) Ltd

The proposed transaction involved the acquisition by Arcelor Mittal of Duferco Steel Processing ("DSP") from the Duferco Group and Industrial Development Corporation of South Africa Ltd. ("IDC"). The parties to the proposed merger were the only producers of hot-dipped galvanized steel (HDG) and cold rolled steel coil (CRC) in South Africa. DSP sourced its main input for its plant from Mittal. The merger represented a move to vertically integrate the DSP plant at Saldanha into Arcelor Mittal. DSP however, had only been active in the overseas export market due to earlier contractual restrictions. Even though the contractual restriction was lifted by the Tribunal in its ruling in the Iscor / Saldanha merger, DSP had not taken advantage of this despite better returns available in the local market and in the face of local customers willing to purchase from it. The Commission believed that the effective continued compliance by DSP with the previous restriction reflected the strong position of Mittal as sole local supplier of its main input. The Commission therefore found that DSP was a competitor of Arcelor Mittal in South Africa, even though it did not compete with it at the time for reasons stated above. The Commission concluded that the merger would lead to a substantial prevention or lessening of competition and accordingly recommended to the Tribunal that the merger be prohibited. Subsequently the merging parties withdrew the merger application before it was heard.

Powder coatings: Ferro Industrial Products (Pty) Ltd and Powder-Lak (Pty) Ltd

Through this transaction, Ferro intended to acquire the business of Powder-Lak. There was a horizontal overlap between the activities of the merging parties in the manufacture and supply of powder coating in South Africa. Powder coating finds use in the construction, white goods (i.e. fridges, microwaves, televisions, phones, and other appliances), and automotive, architectural, and general metal finishing sectors. The parties argued that powder coating could be substituted for solvent-based wet coating, galvanising and anodising. The Commission obtained evidence from customers of the merging parties that there are quality and technical limitations inhibiting a switch from

powder coating to other forms of coating.

In the powder coating market in South Africa, Ferro and Powder-Lak had high market shares. Apart from the merging parties, there was one other significant competitor in the market. Therefore, the implementation of the proposed transaction would have reduced the number of firms in the powder coating market in South Africa from three to two, in a highly concentrated market. The powder coating market is characterised by high entry barriers largely due to stringent quality requirements by customers as well as the lack of local technical expertise in the field.

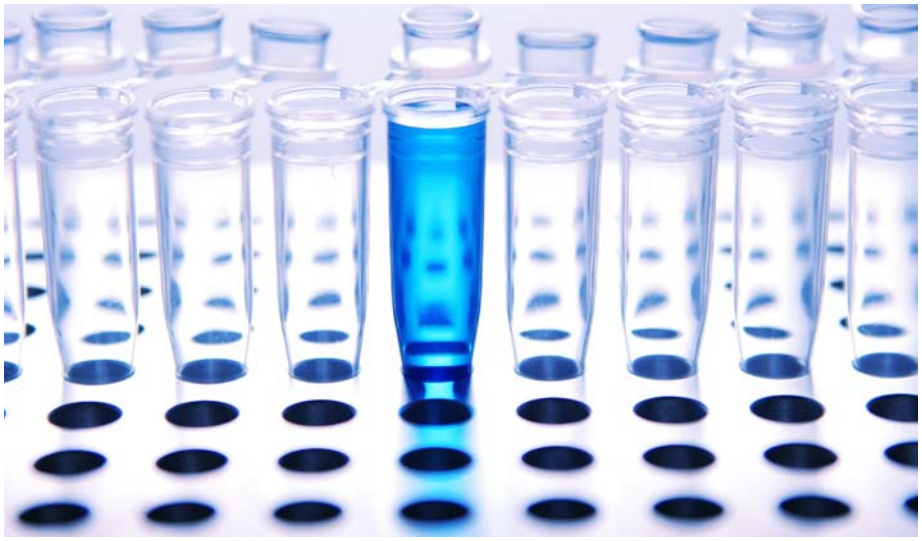
The Commission concluded that the proposed transaction was likely to lead to a substantial prevention or lessening of competition in the powder coating market to the extent that users of the product in the construction, white goods, automotive, architectural, and general metal finishing sectors would be adversely affected as prices were likely to increase.

Akzo Nobel N.V. and Imperial Chemical Industries PLC

The merger would result in the two market leaders in the decorative paints market having a joint venture in a separate market, the marine and powder coating market. Even though there was not history of collusion in the decorative paints market, the Commission found that the joint venture partners would have incentives to coordinate, and that the joint venture created the platform for coordination. The Commission impose a condition barring cross directorships.

Med-e-Mass (Pty) Ltd and Mastermed (Pty) Ltd

The overlap between the activities of the merging firms was in the market for the provision of Practice Management Applications ("PMA") to healthcare providers. The Commission was also of the view that the market is a technology driven market with many new players being able to enter the market. However, the Commission established that certain technological barriers exist relating to a practitioner's or other PMA provider's ability to convert data captured on the Med-e-Mass software to competing PMA software. Accordingly, the Commission was of the view that said technological barriers prevented or substantially hindered customers' ability to switch to other PMA software products. In light of the above, the Commission approved the transaction subject to the condition that, for a period of 3 (three) years from the date of approval of the merger, Med-e-Mass should, on request of any other PMA providers or practitioner utilizing the Med-e-Mass software, make available all codes and technological/electronic processes, which are required to enable the conversion/importation of data from Med-e-Mass products to any other PMA products.



Brandco (currently Heineken (Pty) Ltd) ("Brandco") and Diageo South Africa (Pty) Ltd ("Spiritsco")

The Commission recommended approval of the merger between Brandco (currently Heineken (Pty) Ltd) ("Brandco") and Diageo South Africa (Pty) Ltd ("Spiritsco") and Brandhouse Beverages (Pty) Ltd ("Brandhouse") and the Amstel Licence. Brandco is currently a wholly owned subsidiary of Heineken International B.V ("Heineken").

The establishment of the new profit sharing arrangement resulted in a combination of beer distribution

businesses of the merging firms. In turn, this would result in the merging firm having a combined post merger market share of about 10% in the market for the supply of beer in South Africa. The merged entity faces competition from the SABMiller, which commands about 90% of the national beer market.

The Commission was of the view that the transaction would enhance the merging parties' ability to compete with SAB Miller.

The Tribunal subsequently approved the merger.

Towards a fair and efficient economy for all

Where to get hold of us

Visit the Competition Commission online at www.compcom.co.za for more information about the Commission and the Act, as well as the rules and amendments to the Act. You may also forward enquiries, comments and letters to:

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