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Towards a fair and efficient economy for all.

In this Edition

The Unraveling of a Fertiliser Cartel as Sasol Settles with the Commission on a Record Fine

By: Tembinkosi Bonakele

On 20 May 2009 the Competition Tribunal ('the Tribunal') confirmed the settlement agreement between the Competition Commission ('the Commission') and Sasol Chemical Industries ('Sasol'). The settlement covers the Nutri-Flo (collusion) complaint against Sasol, Omnia Fertiliser and Yara South Africa and the Commission initiated investigation against Sasol for collusion with Foskor. It does not cover any abuse of dominance issues or what is sometimes referred to as unilateral conduct. In terms of the settlement agreement Sasol admitted to contravening Section 4(1)(b) (covering collusion) of the Competition Act ('the Act') and agreed to pay a penalty of just over R250 million, representing 8% of its Sasol Nitro division's turnover. Below we briefly discuss the cases as well as the Commission's approach to this settlement.

The Nutri-Flo Complaint

In November 2003, Nutri-Flo, a small fertiliser blender and distributor (a customer of Sasol), lodged a complaint with the Commission alleging that three large fertiliser suppliers in South Africa, Sasol, Kynoch and Omnia, were engaged in collusion by dividing the markets for various fertiliser products such as Limestone Ammonium Nitrate (LAN) and by fixing prices of LAN and other fertiliser products. Further, Nutri-Flo alleged that Sasol had abused its dominance by engaging in excessive pricing in respect of LAN and Ammonium Nitrate Solution (ANS) and in exclusionary conduct through an effective margin squeeze.

During its investigation of the complaint the Commission noted that concerns of anti-competitive behaviour, and collusion in particular, in the fertiliser industry had long been highlighted by the Competition Board (a predecessor to the existing competition authorities) in its 1998 decision in the then proposed merger between Sasol and African Explosives and Chemical Industries Limited (AECI).

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Editorial Note

The past three months have seen much activity in the food sector for the competition authorities and this is reflected in the cases covered in the June edition of the newsletter. Food became a priority sector for the Competition Commission ("Commission") following our observation of the impact food price hikes were having on the poor and the uncovering of the bread and milk cartels. It became clear that a holistic assessment of the entire food value chain was needed with the aim of understanding the competition and other factors at play and initiating investigations where this was warranted. The result was the establishment of an inter-divisional food team in early 2008 which has since been studying and making interventions in the food value chain from an enforcement, merger and advocacy perspective. Within the food sector, the main focus areas of the food team are the grain milling & baking, dairy, vegetable fats and oils, poultry, and pelagic fish industries.

The leading case in this month's newsletter however was, for the most part, completed before even the bread and milk cartels were uncovered. The case against Sasol Chemical Industries Limited ("Sasol"), Omnia Fertilizer Limited ("Omnia") and Yara South Africa (Pty) Ltd ("Yara") began in 2003 after complaints from two companies operating in the fertiliser industries. The Commission completed this investigation and referred it to the Competition Tribunal ("Tribunal") for adjudication in 2005. In this matter the Commission alleged that Sasol, Omnia and Yara had colluded to fix prices and divide markets while Sasol had also abused its dominance in the fertiliser industry.

During 2007 the Commission initiated another complaint, this time against Sasol and Foskor (Pty) Ltd, following a merger which pointed to a collusive agreement between the two companies in the phosphoric acid industry. This matter was referred to the Tribunal as a consent order together with the settlement reached in the above fertiliser case, for the Tribunal's confirmation.

Both of the above matters have implications for food prices as fertliser is a major input in the food value chain while phosphoric acid is a major input in the production of fertiliser. In this newsletter we set out the details of both cases and the long road which finally lead to the settlement of both matters. This settlement was historic in that Sasol's penalty was the highest amount ever agreed between the Commission and a respondent.

The Senwes matter, which is also covered in this edition, also has implications for the price of grain in South Africa. Here we summarise the main findings of the Tribunal following the Commission's referral of this case. The Tribunal found that Senwes had contravened the Competition Act 89 of 1998, as amended, by denying grain traders the benefit of an annual storage discount which they had previously enjoyed.

Staying with the food theme, we also cover the merger between Business Venture Investments No. 1311 ("Newco") and Sea Harvest Corporation ("Sea Harvest") in which Newco, a subsidiary of Brimstone intended to acquire the entire issued share capital of Sea Harvest. The Commission recommended that the Tribunal approve this merger without conditions. This edition gives a brief report on the analysis in the case and the motivation for the Commission's recommendation and the Tribunal's final decision. This matter again illustrated the need for a holistic approach to the food sector involving both enforcement and merger assessments.

Outside the food sector we have covered several notable mergers and the much publicised alleged bicycle cartel. We also continue to learn much from our international relations. In this regard, the past few months have been very active with conferences taking place within the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD). Here we detail some of those learnings as well as a report of how we influence the current thinking in the development of competition law around the world.

There is much more to gain from this edition of the newsletter, for example our article on lessons for professional associations. We hope you enjoy this newsletter as you have previous editions. Please contact us on the details set out if you need any more information.

Nandi Mokoena
Editor-in-Chief

Subsequent to its investigation, the Commission found that Sasol and its competitors had contravened section 4(1)(b) of the Act in that they had entered into a framework of agreements, arrangements and understandings which had the effect of constructing and dividing the market such that Sasol became the exclusive supplier of LAN. The Commission's investigation revealed that collusion was, amongst other things, facilitated through a network of committees and clubs, namely the Import Planning Committee, the Nitrogen Balance Committee and the Export Club. These committees were used by the respondents to exchange commercially sensitive information and to reach agreements on prices, export volumes and market division by allocating customers, suppliers and territories for a range of fertiliser products including ammonia, potash, urea, phosphate-based fertilisers and LAN. In addition, the Commission found that the cartel enhanced Sasol's ability to exert market power – unchallenged by the big players who were then part of the cartel. In this regard the Commission found that Sasol had engaged in excessive pricing and exclusionary conduct. The case was referred to the Tribunal in 2006, but at the time of publication the settlement had not been heard by the Tribunal on merit, owing in large part to the pre-trial legal battles and procedural challenges confronted by the Commission in attempting to combine various fertiliser cases against Sasol - with each having its own complexities.

The Phosphoric Acid Investigation

In April 2005, Sasol and Foskor filed a large merger notification with the Commission in terms of which Foskor would acquire the production and storage assets utilised by Sasol in the manufacturing and sale of phosphoric acid, an input into fertiliser products such as mono-ammonium phosphate and di-ammonium phosphate. During the investigation of this merger the Commission discovered that Sasol and Foskor had already entered into a toll manufacturing agreement ('the TMA') in terms of which Sasol agreed to exclusively manufacture phosphoric acid for Foskor. This effectively meant that Sasol 'agreed' not to compete with Foskor in the phosphoric acid market. The Commission recommended that the merger be prohibited because it was likely to lead to substantial lessening or prevention of competition in the phosphoric acid market, as these were the only two firms which supplied the South African market with almost all its phosphoric acid requirements. The parties then decided to withdraw the merger, but continued with the TMA.

The Commission noted that the effect of the TMA would be what it sought to prevent by blocking the merger, elimination of competition in the supply of phosphoric acid. Accordingly, the Commission initiated an investigation into the TMA. During its investigation the Commission received a further complaint from animal feeds producers in which similar issues were raised. The animal feeds producers further alleged that Foskor charged excessive prices in the phosphoric acid market.

The Commission found that the TMA resulted in phosphoric acid buyers, such as animal feed producers who used to be Sasol customers, being forced to stop sourcing from Sasol and to purchase from Foskor. Further, Sasol refused to sell its surplus phosphoric acid to these customers and referred them to Foskor. The Commission found this conduct amounted to collusion on the part of Sasol and Foskor.

Corporate Leniency and Settlement

In May 2008 Foskor applied for leniency in terms of the Commission's Corporate Leniency Policy ('the CLP') in respect of the TMA and related conduct, admitting to the contravention of section 4(1)(b) of the Act and proposing to settle the abuse of dominance conduct (this cannot be covered by the CLP). Foskor was granted leniency and negotiations over abuse of dominance conduct are the subject of ongoing settlement discussions.

Towards the end of 2008 Sasol filed a marker application for fixing prices of various fertiliser products. (Note that because leniency is granted to the first person to approach the Commission, the CLP permits a person who wants to apply for leniency but is still collecting the required information to apply for a marker to reserving a space as the first applicant for leniency). At the same time Sasol informed the Commission that it was conducting a competition law compliance review of its activities and it would approach the Commission and fully cooperate if it finds any wrongdoing on its part. The marker application was rejected on the basis that the marker was too wide in its scope and was in respect of matters that were pending before the Tribunal. Shortly thereafter Sasol also applied for a marker in relation to the division of markets by allocating suppliers, territories or specific types

of goods in export markets in respect of phosphoric acid. This marker was also rejected by the Commission on the basis that leniency had been granted on the first company to approach the Commission, namely Foskor. Subsequently Sasol provided more specific information to the Commission which revealed that Sasol, Omnia and Kynoch had engaged in fixing prices, dividing markets by allocating customers and goods, and collusive tendering for certain fertiliser products between 1996 and 2004.

Sasol entered into discussions with the Commission with the view of settling the Nutri-Flo complaint and the phosphoric acid investigations. Given the similarities in the nature of the conduct in the Nutri-Flo and phosphoric acid cases, both in which Sasol and its competitors acted to undermine competition in the respective product markets, the Commission agreed that the settlement agreement would encompass both matters in so far as they involve collusion.

A culmination of these discussions was a settlement agreement that was filed with the Tribunal on 6 May 2009, where Sasol admitted to contravening section 4(1)(b) of the Act, although it fell short of expressly admitting that the committees were in fact used for price fixing - Sasol denied throughout that the committees such as the Nitrogen Balance Committee were used for price fixing. Sasol settled on a penalty of 6% of Sasol Nitro's turnover (amounting to around R188 million). On the eve of the confirmation of the settlement agreement Sasol approached the Commission with evidence showing that the committees were in fact a vehicle for price fixing and market allocation (and monitoring adherence to the agreements), which it now fully admitted. Consequently, the Commission revised the fine to 8% of Sasol Nitro's turnover (amounting to just over R250 million).

In revising the penalty upwards, the Commission had to balance a number of important issues. The Commission noted that Sasol has cooperated, provided it with the relevant information and was willing to enter into a settlement. However, and crucially for the Commission, Sasol's cooperation came late. Sasol had many opportunities to uncover the conduct. Firstly, Sasol management should have been alerted to possible collusion in its fertiliser business as early as 1998, when the Competition Board raised concerns of anti-competitive behaviour in the fertiliser markets. It did not do nearly enough, if anything, to uncover what later proved to be a modus operandi of its fertiliser business. Secondly, when the complaint was lodged to the Commission and investigated, Sasol management had an opportunity to ask their fertiliser division managers some tough questions. Again, it did not do nearly enough to uncover what was later shown to be a systematic conduct by successive generations of managers. For cooperation to be meaningful, it has to be timely, and must provide information to the competition authorities, saving them the time and resources in investigating the cases.

The conclusion of the settlement agreement, whilst representing a breakthrough in dealing with problems in this very important market, is not the end. The Commission must still bring its case against the remaining respondents, Omnia and Kynoch. The Commission must also continue with pursuing the abuse of dominance cases, and an appropriate remedy addressing the pricing problems, whether through settlements or the Tribunal, must be found for the pricing of fertiliser. Regardless, the cartel has unravelled.

ICN Merger and Unilateral Conduct Workshops

By: Grace Mohamed and Simon Roberts

South Africa is a leading participant in the International Competition Network (ICN), an organization which brings together competition authorities from around the world. In the main areas of work, mergers, cartels, unilateral conduct, and advocacy, there are Working Groups which examine different approaches, share experiences, and identified recommended practices where appropriate. The learning from these groups includes specific areas such as corporate leniency.

In the first quarter of 2009 workshops were held by the Unilateral Conduct Working Group (UCWG) and the Mergers Working Group (MWG), in Washington and Taipei respectively. Both were attended by representatives from a large number of agencies, as well as practitioners.

The mergers work of the ICN is relatively advanced in terms of examining the legal and economic standards applied in different jurisdictions. A substantive part of the Taipei Workshop focused on the analysis of competitive effects in merger investigations through a merger hypothetical case which encouraged the exchange of practical experiences among participants. The during merger investigations and the principles of determining appropriate remedies were also key plenary topics. Grace Mohamed from the Commission gave a presentation on how South Africa implements its merger control provisions.

In the area of unilateral conduct, the main work in recent years has been in assessing the laws and interpretations across jurisdictions of different categories of conduct. This area of competition law is one with a relatively high degree of diversity and hence the work of the working group to date has largely focused on assessing and understanding this. The annual workshop is particularly important in providing a forum where practitioners can grapple with the questions through often robust debate.

The main topics of the workshop held on 23 and 24 March were: assessing dominance and/or substantial market power; criteria for assessing the durability of market power; assessing anti-competitive effects and foreclosure; and, predatory pricing. In each of these areas papers have already been adopted by the ICN in the Annual Conference in 2008 and hence the focus was more on the application in cases. This was furthered in breakout sessions using hypothetical case scenarios.

Simon Roberts from Commission presented in a plenary on 'Dominance, Durability and State-created monopolies', highlighting the importance of taking into account how firms had come to be dominant and the many factors which could mean dominance endured and effective entry was hindered. These concerns are especially notable in smaller economies with high levels of concentration and a legacy of state support for major firms.

Pracitioners Meeting

By: Maarten van Hoven

The legal profession has been involved in development of the Competition law jurisprudence from the inception of the Competition Act in 1998. The Commission recognizes the profession as an important stakeholder in the enforcement of the Competition Act in that it acts as an intermediary advisor to firms exposed to the provisions of the Competition Act.

The Commission is of the view that frequent (non case specific) interaction with practitioners assist the Commission in better understanding the challenges firms face in interacting with the Commission and equally it provides an opportunity for the Commission to explain certain of its procedural and policy positions in applying the Competition Act. From both perspectives these meetings are welcomed.

On 12 March 2009 the Mergers & Acquisitions Division and members of the Strategy and Stakeholders Division of the Commission met with various representatives of the legal fraternity in Pretoria. Various issues were discussed including aspects relating to merger filings and documents that are required in support of these notifications. Other issues that were discussed were the imminent increase of the lower and higher merger notification thresholds and the Commission's approach to the transition which became effective 1 April 2009.

A topic that was discussed at some length was the Commission's approach to "double transactions", these are transactions that occur back to back and the question was asked whether or not it is required of parties to notify two transactions to the authorities instead of one transaction. Examples, of these types of transactions are where financial institutions acquire a controlling interest in a firm with the intent of disposing of it either entirely or partially, or where firms acquire control and thereafter enter into subsequent transactions for purpose of empowerment or financial reasons. The Commission advised practitioners that various factors ought to be considered in the decision to file one or two to transactions with the Commission. These factors included whether the transactions are divisible from each other and whether or not there is a time delay between the various stages of the transaction. The Commission advised practitioners that they should approach the Commission in advance in discussing these transactions and in particular in the manner in which the filling should be made.

Another topic discussed related to confidential information supplied to the Commission and claimed by firms. Although confidential information must be respected and is very important to the Commission in fulfilling its mandate in that the Commission is able to ensure that the information it is provided would remain confidential to the Commission, it often also impacts on the manner in which the Commission can interact with third parties. Parties often claim information or documents as confidential for the sake of protecting the information, whereas the information is often not confidential as defined in the Act. The Commission cautioned practitioners not to apply a blanket approach to confidentiality to documents when only a paragraph or two of the documents is indeed confidential. Confidential information is defined in the Act as trade, business or industrial information that belongs to a firm, has a particular economic value and is not generally available to or known by others.

Another important topic discussed includes the Commission approach to ailing or failing firms in particular in the current economic climate. The Commission was requested to provide an indication whether or not it could facilitate fast tracking transactions which involve firms that are in financial difficulty and urgently needs assistance. In response thereto the Commission explained that it will assist where it can within the provisions of the Act and in the event that no obvious competition issues arise the Commission will do everything possible to expedite the approval of the transaction. Once again the Commission informed practitioners of the benefits of interacting in advance with the Commission with these types of transactions.

In summary the meeting with practitioners was practical and informative. The Commission undertook to issue guidelines or notes on the Commission's approach to certain aspects discussed in order to facilitate compliance. It was agreed that these meetings be held on a quarterly basis and that every alternative meeting be held in Johannesburg. The next meeting is likely to be held in July 2009. Should you wish to form part of the mailing list please forward your e-mail address to francinay@compcom.co.za.

By: Mfundo Ngobese

Merger between Much Asphalt (Pty) Ltd, Gauteng Asphalt (Pty) Ltd, Road Seal (Pty) Ltd and Road Seal Properties (Pty) Ltd

Gauteng is the industrial heartland of South Africa. Increasing demand on our road infrastructure due to economic growth of recent times induced the custodians of our highways and byways such as the South African National Roads Agency (SANRAL) and municipalities to spend more on maintaining and building new roads in Gauteng and other regions of the country. High levels of concentration throughout the road construction value chain and its concomitant effects on prices and quality is one of the factors inimical to efficient allocation of government resources and ultimately consumer welfare.

The acquisition by Much Asphalt (Pty) Ltd (Much Asphalt) of Gauteng Asphalt (Pty) Ltd (Gauteng Asphalt), Road Seal (Pty) Ltd (Road Seal) and Road Seal Properties (Pty) Ltd (RS Properties) presented the Commission with an opportunity to assess the concentration levels in Gauteng in the markets for the production and supply of asphalt, and provision of asphalt laying/paving services. The merger presented horizontal overlaps in the production and supply of both cold and hot mix asphalt products. In addition, it was going to result in vertical integration since Much Asphalt's asphalt manufacturing activities are upstream of Road Seal's asphalt paving / laying services.

In connection with the overlapping production and supply of cold mix asphalt the Commission found that cold mix asphalt constitutes a small proportion of the entire asphalt production market and constitutes a small proportion of most asphalt suppliers' businesses. The parties have a relatively small presence in this market.

The parties sought to differentiate the asphalt market into high-end and low-end. They submitted that the high-end market refers to more technologically advanced asphalt used on freeways, runways, race tracks etc. They note that low end asphalt is the basic product used primarily by the private sector on driveways and sidewalks.

Even though the Commission concurred with the parties that there are distinct product markets for high-end and lower-end asphalt products, it found that the lower-end asphalt market is not restricted to driveways and sidewalks but includes municipal and secondary roads. In addition, high end producers like Much Asphalt

and Raubex are already supplying the lower-end of the market.

However, since Gauteng Asphalt is not involved in the high-end market the main consideration was whether Much Asphalt and other suppliers involved in the high-end market should be considered as part of the lower-end market as well. Manufacturers that operate in the high-end market can easily switch to or increase their production of lower-end products market since no additional investments or technical expertise is required and as such should be considered as competitors in the lower end of the market.

The parties submitted that chemical, rheological and physical properties of hot mix asphalt require that it is applied on the road at a specific elevated temperature. This generally translates into a time frame of approximately 4 hours from the time of manufacture to the time of application or a maximum distance of about 200km from the plant to the paving site. In addition, the parties noted that high transport costs limited the area in which a plant can competitively supply. The parties submitted that Gauteng Asphalt's products are available in areas North of Johannesburg and into the Pretoria metropolitan and Tshwane area ("the Tshwane region").

The Commission did not dispute that there is an overlap in the Tshwane region, however, even if the 50 km radius from a plant is regarded as the economic area of supply, there is still substantial overlaps between Gauteng Asphalt's and Much Asphalt's plants, other than Witbank, for a significant part of the Gauteng region.

Further the Commission found that even if the geographic market were to be defined as more local than Gauteng, in the region(s) in which the parties have recognised an overlap in their activities there is only one independent supplier, i.e. Raubex, that they could face. Accordingly, even in such region(s) the merger leaves only two suppliers as it is in the entire Gauteng market.

In the overlapping geographic market the Commission found that the merging parties will have an estimated combined market share of between 65% and 80% in the market for the production and supply of hot mix asphalt to the open market. The Commission found that there are fairly significant barriers to entry in the market for the production and supply of asphalt primarily arising from access inputs such as aggregates and also environmental impact assessment that need to be undertaken.

In addition, the Commission found that the acquisition of Gauteng Asphalt removes the only remaining non-vertically integrated supplier of asphalt in the lower-end of the market and a potential supplier in the high-end market.

Strategic documents obtained from the parties seemed to indicate that there is a general cooperative commercial behaviour between competitors in the affected market. The Commission was of the view that there could be a strong likelihood that the proposed transaction will facilitate or make future coordination easier to sustain. Removal of Gauteng Asphalt as one of the three manufacturers of asphalt in Gauteng that sell to the open market, would have resulted in a clear increase in concentration, and was likely to make a collusive outcome easier to achieve and/or sustain.

Regarding the vertically related markets, the Commission found that the transaction is unlikely to result in either customer or input foreclosure. In connection with the former the Commission found that if Road Seal uses its maximum paving capacity, this will amount to 18% of Much Asphalt's supply of asphalt in the Gauteng. Regarding input foreclosure the Commission found that the merged entity is unlikely to have the incentive to foreclose 87% of its business that is accounted for by third party pavers.

On the whole, the Commission concluded that the transaction, if consummated, was likely to substantially prevent or lessen competition in the Gauteng market for production and supply hot-mix asphalt in both the lower and higher ends of the asphalt supply market.

The Competition Act and Professional Associations

By: Mulalo Shandukani

Various professional associations exist in the different South African industries. The common mandate of such associations is to determine, promote and maintain professional standards and or business ethics amongst professionals. In executing this mandate, professional associations should encourage their members to adhere to good corporate governance which would, amongst other things, necessitate compliance with competition legislation of the Republic.

As a creature of statute, the Competition Commission ("the Commission") is mandated to act against practices that have the effect of substantially lessening or preventing competition in contravention of the provisions of the Competition Act 89 of 1998, as amended ("the Act"). The Act is not sector-specific and applies to all economic activity within, or having an effect within the Republic[1]. Accordingly, it is important for all professional associations whose members are engaged in economic activity to understand how some of their trade practices may fall foul of the Act.

At the outset, it must be noted that the mere existence of a professional association or affiliation to a particular professional association is not in itself a competition concern. In fact, the Commission recognises that professional associations may be beneficial vehicles which firms may use to, inter alia, address common industry issues, share non-proprietary industry information and coordinate their submissions to policy makers for the general betterment of the industry.

However, the Commission is also aware that professional associations could be, and sometimes are, used as *fora*[2] to exchange and discuss commercially sensitive information resulting in competitors agreeing to fix prices, output and trading conditions, divide markets and engage in collusive tendering. Given that the operational nature of a professional association is to bring competitors together, professional associations must take heed of the provisions of section 4 of the Act which prohibits various forms of cartel conduct.

Competition risks for professional associations

A professional association is usually comprised of individual members who are in the same line of business and are, therefore, regarded as competitors[3]. As such they must adhere to the provisions of section 4(1)(b) of the Act which states that:

"An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers territories, or specific types of goods or services; or

(iii) collusive tendering

Professional fees

Professional associations often put in place rules[4] that their members must abide by. Not all rules will raise competition concerns. However, some rules are inherently problematic as they promote anti-competitive behavior. The most common one of these is the publication of guideline tariffs of fees for use by association members. The Competition Tribunal Commission has previously found that the publication of a "Tariff Fee Guideline" by an association constitutes a "decision by an association of firms" which involves direct or indirect price fixing in contravention of section 4(1)(b)(i) of the Act. Recommended prices, like fixed prices, may have a significant negative impact on competition[5]. First, recommended prices may facilitate the coordination of prices between service providers. Secondly, they can mislead

1 Section 3(1)

2 See Richard Whish, Competition Law 5th Ed, at page 488.

3 Competition Commission and two others v United South African Pharmacies and others 04/CR/Jan02 at page 8; See also section 1(xiii) of the Act

4 The Act defines rules to include public regulations, codes of practice and statement of principle

5 Competition in Professions- OFT March 2001

6 See for example the Competition Commission v the Association of Pretoria Attorneys 2002AUG157, at para 5.1. of the Consent Order which was endorsed by the Competition tribunal , prohibiting the publication of the "Guideline for Attorneys and Own client Fees"

consumers about reasonable prices. Also, it is accepted in international antitrust law that even if recommended prices are meant to serve as a guide, they have the effect of becoming the ruling price as they encourage competitors to align prices[6]. In the end, price competition is eliminated completely, leaving consumers with limited or no choice at all.

Besides professional fee guidelines being a competition concern for competition authorities, professional associations must also be aware that agreements or arrangements involving price fixing, market allocation and/or collusive tendering amongst competitors are per se prohibitions in terms of section 4(1)(b) of the Act and as such do not allow room for transgressors to raise a defense. Alternatively, an arrangement or agreement between competitors not caught under section 4(1)(b) may be subject to a rule of reason analysis under the Section 4(1)(a) general prohibition if it substantially lessens or prevents competition in a market. A rule of reason analysis allows parties to an anti-competitive agreement or arrangement to show the presence of any technological, pro-competitive or efficiency gains that outweighs the accompanying anti-competitive effect.

Information Sharing

Depending on the type of information shared and also the market structure of a particular industry where members of an association are active, it is generally permissible to exchange aggregated industrial information relating to less commercially sensitive variables[7]. However, it is advisable for professional associations to avoid sharing information or meeting discussions relating to or leading to commercially sensitive topics such as pricing, costs, market allocation, production, market shares, discount or payment terms to customers, business strategy, bidding tactics, and allocation of markets[8].

Recourse for Professional Associations

Item 1 and 2 of Schedule 1 of the Act make provision for a professional association whose rules contain a restriction that has the effect of substantially preventing or lessening competition in market to apply to be exempted from the provisions of Part A of Chapter 2 of the Act. The Act defines rules to include public regulations, codes of practice and statement of principle. The Commission may either grant or refuse to exempt all or part of the rules of a professional association for a specified period if, having regard to international applied norms, any restriction contained in the rules is reasonably required to maintain professional standards or the ordinary function of the profession. Unless professional rules containing competition restrictions have been duly exempted by the Commission, they leave the professional association open to investigation and consequently the possibility of the imposition of a hefty administrative penalty.

7 The Antitrust Guidelines for Collaborations Among Competitors dated April 2000

8 Competition Law and Trade Associations, Speech by John Pecman, Acting Senior Deputy Commissioner of the Canadian Competition Bureau, 2008 Property & Casualty Industry Insurance Forum

The Organisation for Economic Co-operation and Development and the Global Forum on Competition, 2009

By: Nandi Mokoena

This year, from 16 to 18 February 2009, the Organisation for Economic Co-operation and Development (''OECD") focused on the competition response to the global economic crisis. Consequently the round table discussions of the OECD centered mainly on financial sectors and each competition authority's response to the changing financial and economic climate. The discussion was, as usual, vibrant and informative. The OECD's summary of deliberations highlighted 22 points which emerged from the 2 day meeting of country representatives, the most notable of which were the following:

- The financial sector is at the heart of every well-functioning market economy but it is also vulnerable to systemic loss of trust;
- The current crisis resulted from failures in financial market regulation, not failure of the market itself or of competition;
- Competition and stability can co-exist in the financial sector;
- Competition helps make the financial sector efficient and ensure that rescue and stimulus packages benefit final consumers;
- Stability in the financial sector should not be achieved through protectionism and reduced competition law enforcement;
- Competition law and policy is flexible enough to deal with the financial crisis;
- A good relationship between competition authorities and sector regulators is essential.
- The temporary crisis framework must avoid harm to competitors, consumers and the competitive process;
- Competition authorities will need to adapt to the new environment without changing their standards; and
- Regulation is going to expand and competition authorities have a role in ensuring that regulation, whether new or existing, is consistent with competition principles.

Following the OECD meeting on the financial crisis, the Global Forum on Competition ("GFC") took place on 19 and 20 February. The agenda of the GFC included discussions concerning the role of the competition authorities in the management of economic crises, with a particular focus on the food industry; competition policy and the informal economy; and challenges faced by young competition authorities. South Africa participated in the discussions and was specifically asked to share its experience with responding to the food price crisis which impacted on South Africa. Mr Dave Lewis of the Competition Tribunal of South Africa contributed as a panelist in this latter session. The representatives from the South African competition authorities presented on how the Competition Commission of South Africa ("Commission") came to prioritise the food industry and what matters had already been finalised as part of the food study.

The GFC heard that the Commission had a three pronged strategy on the food price crisis. The first prong was a proactive strategy in which the Commission conducted several studies to identify competition concerns and launch investigations. The second part of the strategy was case work in both enforcement and merger regulations. Information derived from these cases was fed into the proactive approach of the Commission. The third leg, still to be developed further, was to monitor conduct after discovery of cartels and other anti-competitive conduct, and to engage with other regulatory bodies and institutions.

Food as a priority sector

The Competition Commission of South Africa selected, amongst other sectors, the food sector as one of its priorities. The underlying logic for selecting priority sectors was so that the Commission could be proactive and direct its resources so that it could have the most impact.

Prioritisation was also prompted by the rapid increase in food prices.

The aim was to disentangle the anti-competitive conduct from the other causes of food price increases. In this regard, the Commission selected five sub-sectors that had the greatest bearing on food security for the poor while exhibiting concerns about possible anti-competitive conduct, namely grain milling & baking, dairy, vegetable fats and oils, poultry, and fish. In addition, the Commission had investigations under way in recent years into fertilizer prices, with two cases being referred to the Tribunal.

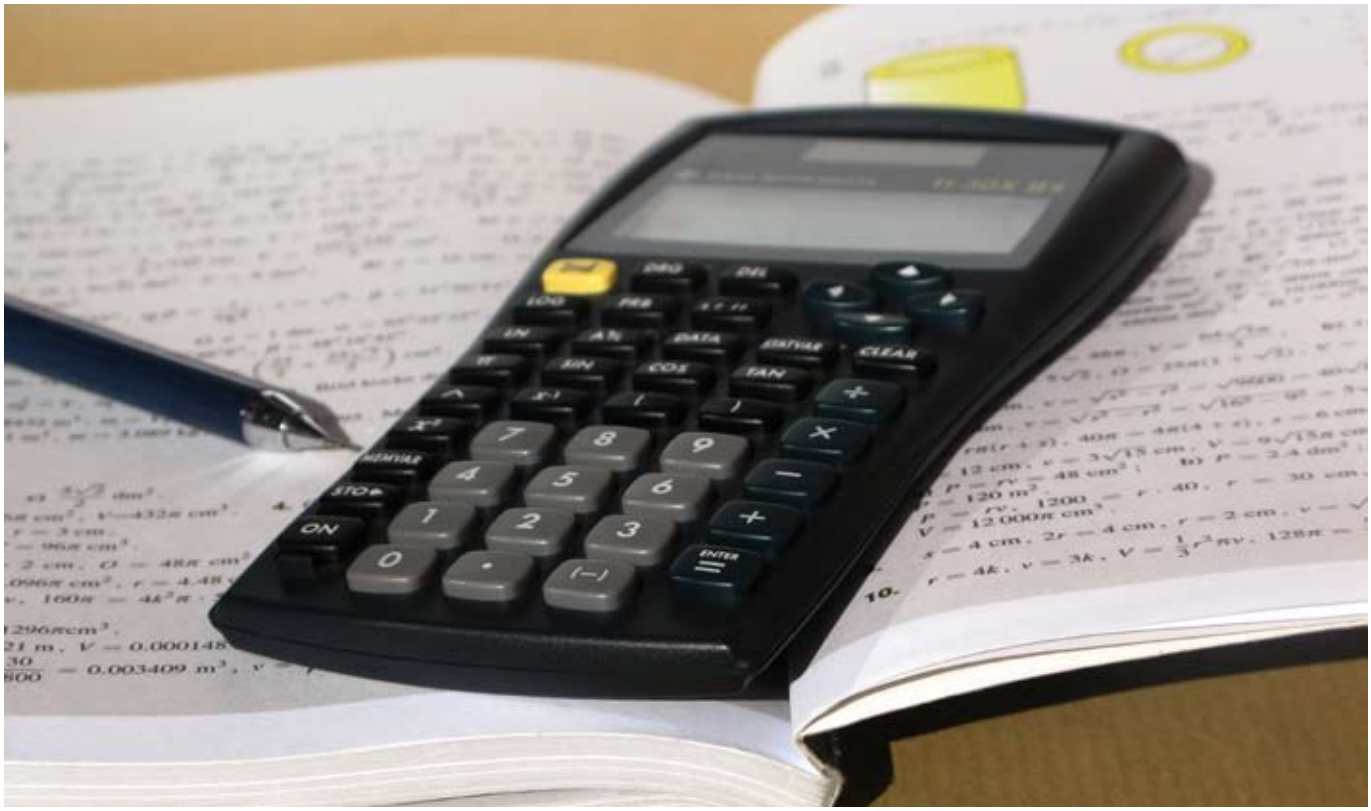
The Commission established a multi-divisional Food Team in early 2008 with members drawn from all of the main divisions such as enforcement, mergers, compliance (now strategy and stakeholder relations), and policy & research. The cross-cutting Team was responsible for driving the Commission's strategy on the food sector, including but not limited to refining the Commission's broad strategy into attainable goals, overseeing investigations, undertaking research studies, and ensuring a coherent and coordinated response across all divisions.

Initial work included a scoping exercise analysing price and other trends in food had been completed focusing on the identified subsectors. The purpose of the scoping exercise was to identify the nature of competition concerns in each sector and evaluate the need for more in depth studies. Changes in structure including previous mergers and acquisitions in the various sub-sectors were also evaluated.

More in-depth studies had also been undertaken into some of the products leading to recommendations for formal investigations in some areas, while cases were already underway following complaints received in others. Issues related to retail were also being considered.

The South African competition authority representatives concluded by stating that the Commission of South Africa had adopted a proactive strategy to confront the food crisis. The report presented to the GFC reflected on the key activities of the Commission in this area in light of the dimensions, nature and causes of the food price crisis in South Africa. Ultimately, the Commission aimed to contribute towards competitive agricultural markets in South Africa working with other arms of government and other stakeholders.

While the Commission had engaged in a broad range of activities to mitigate the food crisis, the key question remained as to the extent to which the work undertaken by the Commission had improved competition in sectors in which cartels were discovered and prosecuted. This question could be answered in the abstract but required a more in-depth study of the sub-sectors to determine the impact of the work undertaken by the Commission. In addition, competition policy was but one instrument in government's arsenal to improve the competitiveness of agriculture. For this reason, competition policy depended on other policy interventions to change the structure and conduct of the agriculture value chain. For instance, high levels of concentration in the input, processing, manufacturing and retail levels required more active policies to encourage entry of new players.



Competition Commission of South Africa against Senwes Limited

By: Ngoako Moropene

On 20 December 2006 a complaint against the respondent, Senwes Limited ("Senwes") was referred by the Competition Commission to the Competition Tribunal for adjudication, following the complaint lodged by CTH Trading (Pty) Ltd ("CTH") on 2 December 2004. The Tribunal ruled on the case on 3 February 2009, although the hearing on remedies has been postponed until the two appeals lodged against the findings have been determined.

The complaint against Senwes was in essence about abuse of a dominant position to exclude competitors in two main forms, through inducement of customers/suppliers and through a 'margin squeeze'.

Senwes is engaged both in grain storage and trading. The Commission alleged that Senwes induced farmers not to trade with other trader rivals by making representations concerning storage costs. The inducement itself took different forms. In the first place it was alleged that an annual cap on storage fees (at 100 days) was only available to farmers if they sold to Senwes. If the grain had been stored for more than a 100 days, and the farmer sold to a third party, then storage at the daily tariff for the full period would be incurred. If the farmer sold to Senwes then only 100 days would be charged.

In addition, the Commission alleged that even before the 100 day period, farmers were told that if they sold their grain to Senwes they would receive a reduced storage charge and hence Senwes could make them a more competitive offer for their grain even pre-cap.

The Commission alleged that the inducement abuse constituted a contravention of section 8(d) (i) of the Act, alternatively 8(d) (iii), alternatively 8(c). The Commission also alleged that by charging farmers and traders a different price for the same service, namely long term storage, Senwes was guilty of price discrimination in terms of section 9(1) of the Act. In the course of the case the Commission also alleged that the differential tariff constituted a 'margin squeeze' by an integrated firm dominant in the upstream market for grain storage, so as to exclude non-integrated rivals in the downstream market for trading in contravention of section 8(d), alternatively 8(c).

In all these allegations where dominance is an essential element, the Commission alleged that Senwes is dominant in the storage market and leveraged this dominance into the downstream market for trading, a market where it conceded that Senwes whilst a significant player is not dominant player.

Tribunal Judgment

The Tribunal found that the complaint in respect of the inducement has not been established because, although the Commission has proved that representations made by officers of Senwes amounted to inducement to customers not to deal with rivals of Senwes' trading arm, the anti-competitive effect had not been established on a balance of probabilities.

The Tribunal found that the complaint in respect of margin squeeze had been established and that this amounted to a contravention of section 8(c) of the Act, but not sections 8(d) or 9(1).

In the final paragraph of its decision, the Tribunal requested that the Commission report Mr Jacobus Albertus Pretorius to the relevant authorities to be prosecuted for committing perjury during the Tribunal proceedings.

The Tribunal also indicated it will in due course hold a separate hearing in respect of remedies. This has subsequently been delayed by Senwes filing an application for leave to appeal the whole Tribunal judgment, except for the order made against Mr Pretorius for committing perjury, and requesting a stay of the remedies hearing. Subsequently, the Commission filed an application for leave to cross-appeal.

As per the Tribunal's decision, the Commission has approached the Director of Public Prosecution ("the DPP") in Pretoria and laid charges for perjury against Mr Pretorius, in view of reinforcing the message to the South African public at large that proceedings before the competition authorities are of grave importance and are not to be treated lightly. The DPP allocated this matter to one of the prosecutors who referred the case to SAPS Commercial Crimes Unit in Pretoria. She has directed registration of case and allocation of an investigating officer, and will personally prosecute the case by securing attendance of the accused through J175 summons.

Competition Commission Initiates Investigation into Cycle Cartel

By: Sipho Mtombeni

The Competition Commission has uncovered a possible cartel operating amongst local cycle retailers after being alerted to information in the form of minutes of a meeting allegedly held in Midrand in September 2008. This meeting appears to have been between firms in the cycling industry including retailers and wholesalers.

The minutes were posted on 'The Hub' website, which is a forum for various parties involved in the sport of cycling. The minutes indicated that the meeting was held to discuss the state of the cycle retailers, specifically concerns that the industry was not performing well economically, as well as possible solutions to deal with the problems. These included getting the cycle shops to agree on the prices and margins to be made on cycling equipment and accessories as a solution to reviving the industry. Extracts from the minutes of the meetings, indicate that the following were inter alia agreed upon:

- There are too many retailers and "shops should not under-cut each other".
- Gross margins for cycling accessories were to be increased from 50% to 75%.
- Margins on bikes to increase from 35% to 50%.
- Timing of the price increases.

Based on this information, the Commission was concerned that the abovementioned conduct could amount to a contravention of section 4(1)(b)(i) of the Competition Act and thus initiated an investigation in March 2009. Summonses were subsequently issued against two of the major cycle retailers who appeared to have been behind the conduct. However, it later emerged that more entities were involved and the Commission has expanded its investigation to include these firms.

The Retailers

The Commission's investigation started with the cycle retailers, i.e. retailers of bicycles, and cycling accessories such as clothing, helmets and nutritional supplements. Retailers in South Africa obtain their stock from the wholesalers, who import the products from various international sources, as there appear to be no significant manufacturers of bicycles and cycling accessories in the country.

The investigation revealed that there had been discussions and meetings between cycle retailers. Furthermore, wholesalers appear to indicate recommended retail prices (RRPs) at which the retailer is to on-sell the product to the end consumer. The RRPs are worked out to yield approximate markups of 35% for bicycles and 50% for accessories from the wholesale price. Of concern is that, although the prices are ostensibly only recommended, the retailers were under the impression that to divert from that price would mean cuts in supply.

At the meeting of September 2008 retailers met along with some wholesalers in order to discuss proposals to change the "industry norms" to increase the mark-ups as described above. There were several means discussed in order to achieve this goal. For example, one of the suggestions was to collectively

increase the retail prices to the end consumers, as well as to have wholesalers advertise their products with higher RRPs. Discussions had gone further to suggest a date for such price increase being 1 October 2008.

Another major concern discussed in the meeting was the role of the "Discount Stores", which are the low cost retailers who offer products to the public at significant discounts. Some of the retailers (and wholesalers) were concerned about the number of the Discount Stores in the market and that these stores were offering significantly low prices, thus impacting negatively on the margins in the whole industry. Some solutions suggested to this problem included influencing some of the major wholesalers to stop supplying these discount stores, or limiting the numbers and areas in which the discount stores could operate.

The Wholesalers

During the course of the investigation greater clarity emerged on the role of the cycling wholesalers. As mentioned above, the wholesalers had for years been providing RRPs to retailers through price lists. Even though this may not necessarily fall foul of the Act, as the RRP appeared not to be binding, the combination of this and the fact that the RRPs were advertised to the public, made it difficult for retailers to go against the recommended prices. As such it appears as though the RRPs were adhered to, and some retailers even alleged that they had no freedom to price outside the RRPs provided by the wholesalers. The Commission is investigating this aspect to examine if the wholesalers could be involved in the practice of retail price maintenance in contravention of Section 5(2).

The Commission also established that the wholesalers had been in discussions with each other in an attempt to form an association, to deal with industry problems such as import duties, wholesalers' relationships with cycle dealers, participation in cycling expos, etc. These discussions were however fruitless, as no consensus could be reached on some of the issues and such association was ultimately not formed. However, the Commission remains concerned about the discussions.

The Commission continues its investigation

With the information received since the original initiation implicating more cycle retailers and even some wholesalers, the Commission has widened the scope of its investigation.

Ultimately this case points to the fact that cartel activity is quite a common feature in the South African economy and does not only extend to major industries in the economy, but to smaller industries as well. With the Commission's continued focus on cartels as priority, this matter sends a resounding message to all firms in any industry that the Commission will continue to carry out its mandate to ensure an effective and efficient economy for all.

Merger thresholds

By: Maarten van Hoven

In terms of Section 11(1) of the Competition Act 89 of 1998 ("the Act") the Minister of Trade and Industry in consultation with the Competition Commission must determine a lower and higher threshold for purpose of determining small, intermediate or large categories of mergers.

During the latter part of 2008 the Minister invited comments from interested parties to the proposed changed thresholds. Although various submissions were received the business community welcomed the proposed changes as it would reduce the burden on firms to notify the Commission of transactions. Although according to the Commission there is no direct correlation between the size of a merger and its complexity, or the likely effect it would have on competition the Commission accepts that target firms that have a small turnover or asset base are likely to have no significant impact on the economy, considering factors such as barriers to entry and countervailing powers.

The current merger thresholds (listed in the following table) came into effect as from 1 April 2009.

In addition to the change of thresholds the Minister also announced that the filling fee payable for intermediate and large mergers would increase. The new filling fees for these two categories of mergers are:

- Intermediate merger: R 100 000
- Large merger: R 350 000

No changes were affected to the manner in which merger thresholds have to be calculated. Parties still required to use the most recent audited financial statements for the immediate previous financial year. The Commission has also created a threshold calculator which could be used by business in determining whether or not their proposed mergers are notifiable.

In terms of Section 13 and 13A of the Competition Act there is an obligation on parties to intermediate or large mergers to notify the Competition Commission of those mergers and not implement those mergers prior to obtaining the approval or conditional approval from either the Commission or Tribunal respectively.

With regards to small mergers (transactions that fall below the lower threshold) no obligation rests on parties to notify these transactions to the Commission and they may also implement these transactions without first obtaining approval from the Commission.

Section 13 (3) of the Act does, however, provide the Commission with the right to call upon parties to a small merger to notify the Commission of those mergers which according to the Commission may significantly affect competition. In this regard the Commission has issued guidelines advising the business community in which instances they should voluntary inform the Commission of small mergers they enter into. In brief, the Commission requests to be informed of small mergers entered into by firms that are subject to chapter 2 investigation and/or a respondent before the Competition Tribunal in terms of chapter 2 of the Competition Act. Upon receiving the information of the transaction the Commission will advise the parties to that small merger whether or not the Commission requests them to notify the transaction. The Commission believes that by issuing the small merger guidelines, the Commission can proactively (with the co-operation of the parties) possibly prevent anti competitive effects resulting from small mergers.

The merger thresholds have not been amended since 2001. The changes were necessitated due to the significant economic growth the country has experienced over the last few years. The structure of the Commission has remained relatively unchanged and merger notifications have increased approximately three fold from 2001 to 2008. The amended thresholds would have a significant impact on the workload in the Commission as it is anticipated that notifications should drop by between 30 to 40 percent from 2008 to 2009.

The reduced workload would likely enable the Commission to investigate more vigorously and produce higher quality work.

Threshold	Combined turnover / asset value	Target firm turnover / asset value
Lower threshold	R 560 000 000	R 80 000 000
Higher threshold	R 6 600 000 000	R 190 000 000

Brimstone and Sea Harvest Merger

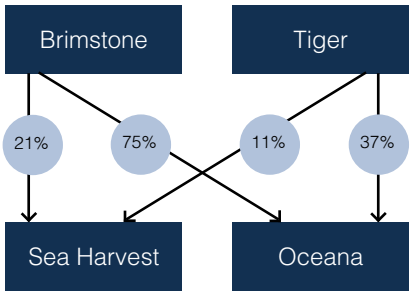
By: Thabelo Ravhugoni

On 23 December 2008, Business Venture Corporation (Pty) Ltd ("Business Venture") notified the Competition Commission ("Commission") of its intention to acquire Sea Harvest Limited ("Sea Harvest"). Business Venture is jointly controlled by Brimco (Pty) Ltd ("Brimco") and Kagiso Strategic Investments III (Pty) Ltd ("KSI"). Brimco and KSI are controlled by Brimstone Investment Corporation Limited ("Brimstone") and Kagiso Trust Investments (Pty) Ltd ("Kagiso") respectively.

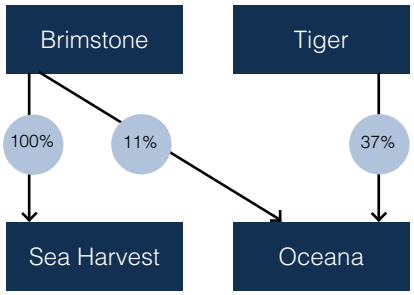
Prior to implementing the transaction Sea Harvest was controlled by Tiger Brands Limited ("Tiger") in that it held 73,16% of the entire issued share capital of Sea Harvest. The balance of 21,52% was indirectly held by Brimstone and The Sea Harvest Employee Trust with 5,32% shareholding.

Brimstone is an investment holding company holding a diverse portfolio of interests in a number of firms. Of particular relevance to this transaction is Brimstone's interest in Oceana Group Limited ("Oceana"). Oceana and Sea Harvest operate in the fishing industry. Uniquely Tiger also has an equity interest in Oceana and according to the Commission this interest enables them to exercise control over Oceana together with Brimstone.

A diagrammatical illustration of the pre merger shareholding appears below:



Post merger the structure would look as follows:



Oceana and Sea Harvest compete in the harvesting, supply and marketing for hake, as well as in the market for the harvesting, supply and marketing of small pelagic fish (pilchards and anchovy). Pilchards and anchovy are considered to be the most important species within the pelagic fish category, as anchovy is mainly used for fishmeal and pilchards for canning purposes to be sold as a protein alternative to consumers in the retail market.

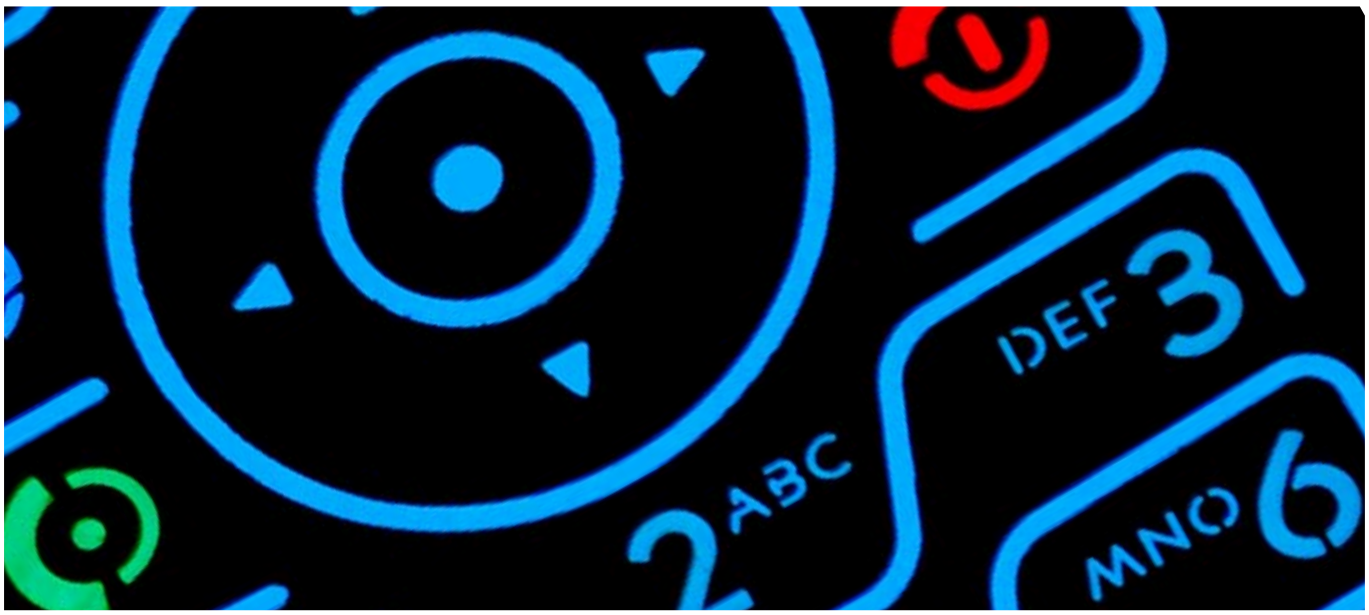
Whilst Oceana has established its presence in small pelagic fish market, Sea Harvest mainly focuses on hake. Oceana has insignificant presence in hake. Similarly, Sea Harvest has negligible presence in pelagic fish respectively.

During the merger investigation, the Commission found that Tiger and Brimstone entered into various agreements, some of which, particularly those in relation with Sea Harvest, contained "non- competition" clauses. In terms of these clauses Brimstone or any of its subsidiaries were precluded from acquiring an interest in businesses similar to or in competition with Sea Harvest.

These types of structures and relationships between shareholders could often lead to firms indirectly allocating markets. Although the merger did not raise any significant competition concerns, in that the transaction disentangled Brimstone and Tiger in respect of their shareholding in Sea Harvest, the Commission was concerned that the pre merger relationships governed by shareholding and agreements between the parties could have possibly prevented Brimstone to propose any expansion that could encroach into Sea Harvest's market which is possibly in contravention of Section 4(1)(b) of the Competition Act. Notwithstanding the above the Commission has been investigating the markets in which Oceana and Sea Harvest compete and the findings from the merger investigation would be used in support of these investigations. According to the Commission the fishing industry is experiencing dwindling supply, of pelagic fish as a result of reduced quotas. With no reduction in demand for pelagic fish the reduced quotas results in higher prices and coupled with possible anti-competitive behavour in the industry will exacerbate the harm on consumers. The Commission has therefore decided to conduct thorough investigations in the fishing industry.

The Competition Tribunal upheld the Commission's recommendation and approved the merger without conditions.

Merger and Acquisition Summaries



During the last quarter the Commission considered various high profile transactions and transactions which raised significant competition concerns.

Vodafone & Vodacom

The Vodafone & Vodacom transaction was considered and approved by the Competition Tribunal on 25 February 2009. Prior to the merger, Vodafone through certain subsidiary companies, held 50% of the issued share capital of Vodacom. The remaining shares were held by Telkom SA (Pty) Ltd ("Telkom"). In terms of the proposed transaction, Vodafone will acquire a further 15% of the issued share capital in Vodacom from Telkom. Telkom will then unbundle the remaining 35% shares which it retains in Vodacom to its own shareholders, who are members of the public. Post-merger, Vodafone will hold 65% of the issued share capital of Vodacom and the remaining shares of Vodacom will be publicly held. Vodafone will exercise sole control over Vodacom post-merger. In its analysis the Commission considered all possible competition and public interest aspects and found that it unlikely that the merger would substantially prevent or lessen competition in any of the markets in which Vodacom or Vodafone competes. The Commission further found that merger would have no significant effects on the various public interest aspects listed in the act.

Sanlam, Liberty and Metropolitan & Masthead.

During February 2009 Sanlam, Liberty and Metropolitan notified a transaction in terms of which they indented to acquire joint control with Old Mutual, (which is currently a controlling shareholder) of Masthead Distribution Services. Masthead is a brokerage support services firm that provides brokerage support services including but not limited to compliance and business management services to independent insurance brokers. Masthead also provides distribution services to insurance and other financial services providers including the Sanlam, Liberty, Metropolitan

and Old Mutual for their long-term and short-term insurance, savings and investment products. During the Commission's in-depth investigation the Commission identified the potential foreclosure in the downstream distribution and compliance services markets to small independent brokers due to the joint control of Masthead by the four major insurance firms in South Africa. Furthermore according to the Commission the transaction was likely to facilitate information exchange and possible collusion that may occur through the presence of the three primary acquiring firms and Old Mutual on Mastheads' Board post merger. These concerns were communicated to the merging parties and the merger was subsequently abandoned during April 2009 before Commission could rule on the matter. Based on the information gathered by the Commission, possible further enforcement investigations may be initiated.

Senmin International (Proprietary) Limited ("Senmin") & Cellulose Derivatives (Pty) Ltd ("Cellulose Derivatives").

During February 2009 the Commission prohibited the proposed merger between Senmin International (Proprietary) Limited ("Senmin") & Cellulose Derivatives (Pty) Ltd ("Cellulose Derivatives"). Senmin is a wholly owned subsidiary of Chemical Services Limited ("Chemserve"), which in turn is controlled by AECI Limited. Cellulose Derivatives is the only manufacturer of a product called technical grade carboxymethylcellulose ("CMC") in South Africa. The technical grade CMC is a depressant used in mines, particularly platinum mines for mineral extraction. In South Africa, the technical grade CMC is distributed by two companies, namely GM Associates and Senmin. In essence the approval of the transaction would have granted one entity, Senmin, control over a critical input that is required by the only other competitor in the market; and this raised potential competition concerns. The Commission found that the transaction presents substantial foreclosure concerns as Senmin would have been able to exercise market power in the manufacturing of CMC. Consequently, it would have been in a strong position to foreclose its rivals in the supply of technical grade CMC to the mines. The transaction however did present some efficiency gains through Senmin's introduction of better research and manufacturing methods of CMC. However, these are not brought about by the merger and the anti-competitiveness of the transaction remained overwhelming. Although the imposition of conditions were considered to alleviate the anti-competitive concerns raised by Commission, the Commission concluded that such conditions would not allay the foreclosure concerns brought to bear by the acquisition. The main among the reasons was that the pricing conditions would not preclude the exclusion of downstream rivals. It was the Commission's view that Senmin could still achieve a foreclosure strategy even in the presence of the supply conditions. As such, the Commission prohibited the transaction.

DCD Dorbyl and Globe Engineering Works (Pty) Ltd

During February and March 2009 the DCD Dorbyl and Globe Engineering Works (Pty) Ltd merger was analyzed by the Commission and considered by the Competition Tribunal DCD Dorbyl is controlled by Investec Bank Limited ("Investec"), Reyapele Investments (Pty) Ltd and Management. DCD Dorbyl is active in ship repair industry and is in particular active in the Cape Town harbour. Globe is active in ship repair industry in the Cape Town harbour. In terms of the Sale of Shares Agreement, DCD Dorbyl intended to acquire 100% of the issued share capital in Globe Engineering. The ship repair market could be split into various segments, which relate to different types of vessels to be serviced. The segments stretch from small and medium sized local fishing vessels to large container vessels and oil and gas rigs. In addition to the different types of vessels different types of repairs have to be performed on these vessels. These factors impact on the market analysis as certain market participants are not positioned to undertake certain projects whereas others have the ability to perform the services. The primary issue considered by the Competition Tribunal related to the A Berth facility to be controlled by the parties which is used for the repair of oil rigs in Cape Town harbour. According to the Commission if the parties controlled this facility the parties could foreclose competitors from access to this facility and thereby substantially prevent or lessen competition in this market. The Tribunal accordingly approved the transaction subject to certain conditions which would remedy the potential concerns.

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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