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Towards a fair and efficient economy for all.

In this Edition

The High Cost of Convenience:

The Case of Computicket's Exclusive Contracts

By: Liberty Mncube

Introduction

The Competition Commission recently referred a case of exclusionary conduct on the part of Computicket to the Tribunal for adjudication. This followed from the Commission receiving five separate complaints from Strictly Tickets CC, Soundalite CC (trading as Artslink), KZN Entertainment News and Reviews CC (trading as Going Places), L Square Technologies CC (trading as TicketSpace), and Ezimidlalo Technologies CC.

The Complainants alleged that Computicket has long term exclusive contracts with most inventory providers which lessen or prevent competition. The Commission found that the exclusive contracts result in Computicket maintaining its dominance and prevent new entrants from entering and expanding within the market for outsourced ticket distribution services for entertainment events.

The South African Competition Act prohibits a dominant firm from engaging in an exclusionary act, if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain. The key to the evaluation is thus the way in which the conduct of a dominant firm may negatively impact on competition, and on consumers. To this end, the Commission applies an effects-based framework to allegations of exclusionary abuse of dominance. While a company such as Computicket may have attained its strong position through good products and service, it should not be able to unduly protect itself from the challenges of rivals. The premise of competition law is that actual and potential competitive rivalry is important to keep such a dominant firm on its toes.

The industry

The ticketing industry consists of the ticket agents, being firms that sell tickets on behalf of the inventory providers (promoters, theatres, producers, etc). This is an efficient way of distributing tickets, increasing the overall sales of tickets including those sold by the inventory provider themselves.

The ticket agents further offer consumers easy access to tickets as opposed to having to stand in long queues at entertainment venues. The inventory provider may outsource this service completely to the ticket agents or they may outsource only part of the services and handle part of the ticketing themselves.

Ticket agents distribute tickets through call centres, over the internet and through a network of retail outlets. The price paid by the consumer for tickets

Editorial Note

The wide variety of articles in this edition of Competition News reflects the ongoing growth in the Commission's work across a wide scope of issues. The lead article by Liberty Mncube relates to the area of exclusionary abuse of dominance, which has been receiving less public attention recently as cartels have hogged the limelight. A dominant firm which keeps out actual and potential rivals is potentially just as damaging as collusion as it means that the firm can unilaterally exert its market power without having to come to a collusive agreement with anyone. The Commission found that Computicket has engaged in such conduct over a period of years to the detriment of those buying tickets for events and those holding events and needing to sell tickets, who are not able to choose from other effective competing service providers.

Cartels, however, continue to take up a large part of the Commission's work. This is reflected in the summary of recent settlements by Molebogeng Taunyane. Possible collusion is also the subject of Neo Chabane's article on the airline industry, where the Commission has been active in response to public outcry about exhorbitant prices around the Fifa World Cup.

In matters related to competitors reaching agreements, but where firms have sought exemptions from the provisions of the Act in order to collaborate with their competitors, the Commission dealt with an exemption application. Shadrack Rambau reports on an exemption that was granted to the petroleum industry for the period of World Cup to ensure security of supply in this abnormal time. However, as explained by Bukhosibakhe Majenge, collective bargaining agreements by organized labour are exempt by law in South Africa, as they are in other countries.

Industry cooperation, including under the auspices of government, was a key focus of the Commission's recent Public Sector Consultative Forum. As reported by Mulalo Shandukani, this Forum is a critical means by which the Commission engages with government departments on competition issues that across areas of policy and regulation.

And, lastly on arrangements between competitors, Andile Mangisa explores the realm of business ethics given the apparently widespread nature of collusive practices in South Africa, as well as explaining why it makes business sense to condemn such practices.

The review of mergers illustrates the decline in activity due to the economic recession. The Mergers division has made the most of this period to review Service Standards of the Commission in merger analysis. These emphasise that if parties timeously provide all necessary information the Commission undertakes to expedite the analysis of non-complex case, in particular. The article by Thabelo Ravhugoni situates two recent mergers in the supply of farming requisites within the context of wider restructuring, and explores some of the issues that arose.

The Commission continues to actively build links with other competition authorities around the world. Nerice Barnabas reviews the main issue covered at this year's International Competition Network Annual Conference, and Oupa Bodibe and Liberty Mncube highlight the recent Joint Food Project with the authorities of Zambia and Egypt. The recession has posed similar challenges to competition authorities around the world, as described by Mziwodumo Rubushe.

We close this issue with a fascinating interview with Nandi Mokoena, who rose from graduate trainee to head the Strategy and Stakeholder Relations Division, before leaving early this year. We will all miss her!

Dr. Simon Roberts

is typically determined by the inventory provider, with the compensation that flows between the inventory provider and the appointed ticket agent in most cases borne by the inventory provider. In essence this is a cost paid by the party putting on the event and wishing to have its tickets sold, set pursuant to the terms of the particular distribution contract in question (percentage, or fixed amount).

A consumer purchases tickets for an event at the venue box office before the event or from an outsourced offsite ticket distributor which removes the need to go to the venue beforehand. What may be a convenient alternative channel becomes the only alternative if the inventory provider decides to sell tickets exclusively through its outsourced ticket distributor.

When is exclusivity a problem?

Exclusive contracts exist when a firm agrees to purchase all the goods or services it requires exclusively from one seller. There may be good reasons for this because of the investments that either or both sides are making in the relationship. The buyer is choosing to forego the value of alternatives and so presumably sees some benefit in doing so. However, where the power of the seller is substantial, the anti-competitive effect may outweigh the benefits to be had.

The potentially anticompetitive effect of exclusive contracts relates to the limitation placed by the contract on inventory providers' ability to have rival ticket distributors selling their tickets to final consumers. However, whenever inventory providers go out to contract they can assess rival offers for their business and benefit from competition at this stage. The possibility of anticompetitive exclusion arising out of these types of contracts arises only if a ticket distributor is able to foreclose rival ticket distributors from a large enough fraction of the market to deprive rivals

of the opportunity to achieve the scale necessary to be effective competitors.

Put differently, if there are many buyers and scale economies then entry will occur only if a sufficient number of buyers have not signed exclusive contracts (over some period) enabling a rival firm to come in and offer its services to a reasonable portion of the market. This implies that as individual buyers are induced to sign exclusive contracts with the dominant firm, this negatively impacts on the likelihood of entry and thus on the bargaining power of remaining buyers who are then also more likely to enter exclusive contracts.

Moreover, when a monopolist can discriminate and offer better deals to some inventory providers and not others, exclusion can be achieved without relying upon coordination failures amongst the buyers. A monopolist can offer a very good deal to some inventory providers, inducing them into exclusive contracts, whereupon the others will have little alternative but to accept such arrangements also.

Foreclosure effects

While the economic theory of harm outlined above is useful in shaping analysis of exclusive contracts, case specific factual enquiries are essential in order to reach findings in terms of the Act.

With a market share exceeding 95%, the Commission identified that Computicket is dominant in the market for outsourced ticketing services for entertainment events. The Commission then found that Computicket has, by way of its exclusive contracts, foreclosed well over 90% of the relevant market to (actual and potential) competitors in the market, including the complainants.

The exclusionary effect of Computicket's exclusive contracts is exacerbated by a number of their features, including: the long-term nature thereof (typically three or more years); the fact that they are not terminable on short notice by the inventory providers; and the staggered nature of the contract periods.

All of these factors materially limit the ability of actual and potential competitors in the relevant market to attain the minimum scale to compete effectively in the market. This consequence is of particular significance in the market for outsourced ticket distribution services for entertainment events because of important economies of scale.

Furthermore, inventory providers do not have any significant countervailing buyer power in their dealings with Computicket. Not only are inventory providers highly fragmented, but the alternatives available to them are limited (if they exist at all) given the near-monopoly of Computicket in the relevant market. And, the costs of switching to self-supply are high.

This has to be balanced against the possible efficiencies which may outweigh the anti-competitive effects. The efficiencies must not merely be present, but must also require the specific conduct for them to be realised. It may be that the efficiencies can be realised without having the same anti-competitive effects. In this case the Commission did not find the efficiencies justified the exclusionary conduct.

Harm to consumers

The harm to consumers as a result of Computicket's exclusive contracts flows naturally from the substantial effect they have had in foreclosing the relevant market to competitors, and is also reflected in actual harm to consumer welfare.

The foreclosure of rivals has resulted in a reduction of the choice (and associated convenience) that consumers would otherwise have enjoyed for the provision of outsourced ticket distribution services to them. Moreover, Computicket's commissions and fees for its ticket distribution services are higher than they would otherwise be.

Prohibiting or limiting Computicket's exclusive contracts will mean its position can be effectively challenged, and inventory providers will be able to use more than one ticketing service to distribute their tickets. Competition between outsourced ticketing service distributors will increase improving choice and service quality at more competitive rates. Consumer will be able to determine for themselves what is the true cost of 'convenience'.

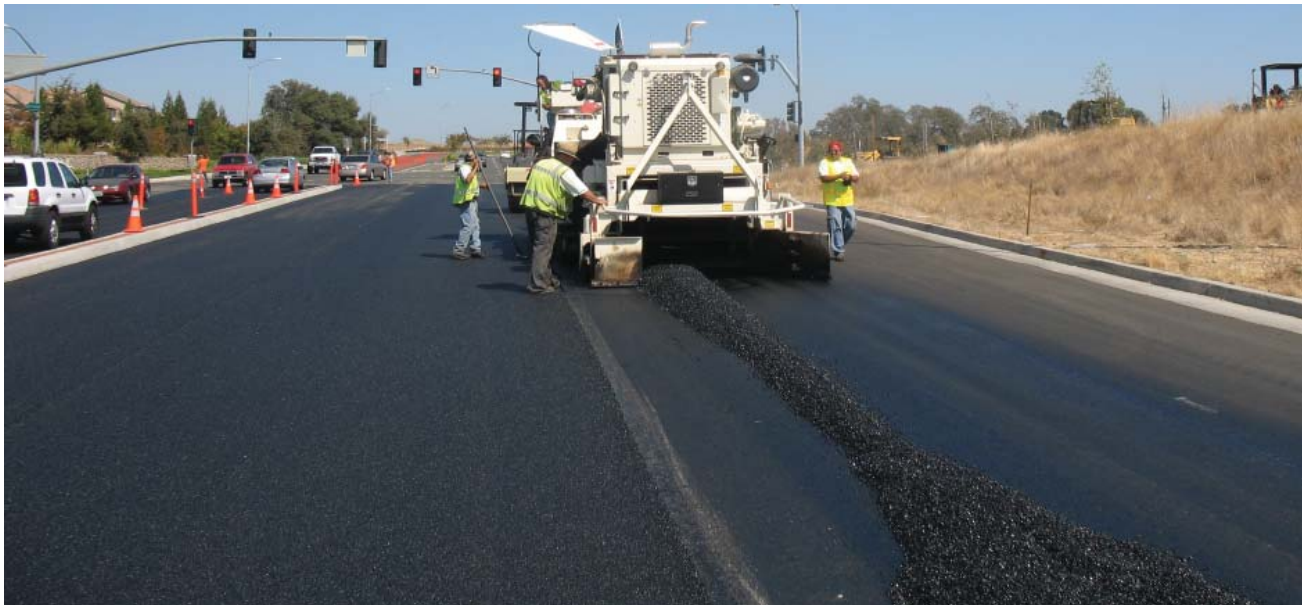
The Commission has asked the tribunal to levy an administrative penalty of 10 percent on Computicket's 2009 turnover and to declare the exclusivity clauses in its contracts with inventory providers as void and of no force or effect.

Unravelling Cartels

By: Molebogeng Taunyane

As the Commission continues to uncover and prosecute cartels across the economy and particularly in its priority sectors of food, construction and intermediate industrial products, more firms are also opting to settle. Typically this involves admitting to the conduct, co-operating with the Commission in the prosecution of remaining cartel members and instituting internal compliance programmes.

In recent months, the Commission has concluded five consent agreements relating to cartel conduct. Four of these were with participants in different construction product cartels.



Marley Pipes Systems (MPS) admitted to its role in a cartel involving the manufacture and supply of Polyvinylchloride (PVC) and High Density Polyethylene (HDPE) pipe products, and agreed to pay a penalty of R31.1mn. This cartel was exposed in October 2007 when DPI Plastics wanted to merge with Incledon Cape. During the merger analysis the Commission found signals of price-fixing, allocation of customers and bid-rigging. DPI Plastics applied for leniency, providing evidence which exposed the cartel. Other respondents in the case include Petzetakis Africa (Pty) Ltd, Swan Plastics CC, Amitech (Pty) Ltd, Flotek Pipes and Irrigation, Andrag (Pty) Ltd, Gazelle Plastics (Pty) Ltd and MacNeil Agencies.

Two consent agreements confirmed involve the cartel in the precast concrete market which fixed the selling prices of pipes, culverts and manholes, rigged tenders and divided the markets. Cobro Concrete and Concrete Units have agreed to penalties of R4mn and R5.8mn respectively. Prior to this, in December 2007, Rocla applied for leniency regarding its involvement in this cartel. Thereafter, Aveng entered into a consent agreement for its subsidiary, Infraset and agreed to a penalty of R46mn. All four of these companies are now assisting the Commission to prosecute the remaining cartel members.

The third construction related product is bitumen, used in road construction. Masana Petroleum Solution (Pty) Ltd has agreed to pay a R13mn penalty for its part in the collusion regarding bitumen. This follows a leniency application by Sasol and its subsidiary Tosas in January 2009, providing evidence of collusion in the supply of bitumen. Masana, Sasol and Tosas are now co-operating with the Commission in its prosecution of the remaining respondents which include Chevron SA (Pty) Ltd, Engen Limited, Shell SA (Pty) Ltd, Total SA (Pty) Ltd and the Southern African Bitumen Association (SABITA).

Lastly, Keystone Milling became one of first respondents in the white maize milling cartel to settle with the Commission following Premier Foods and Tiger Brands disclosures during the bread cartel investigation. According to the agreement Keystone will pay a penalty of R6.7mn for its involvement in fixing the price of maize meal. It provided substantial further information relating to other respondents, assisting the Commission in their prosecution. There are many other parties involved in this cartel case and the Commission will continue to encourage firms to 'come clean' and settle.

Competition Commission Investigates Collusion Amongst Airlines

By: Neo Chabane

The Competition Commission initiated an investigation against major airlines BA/Comair, South African Airways, 1Time, SA Airlink, Mango and SA Express in December last year. The investigation centres around allegations that the airlines are colluding on prices and pricing strategies to be adopted during the FIFA 2010 World Cup tournament. This came against the backdrop of wide-ranging investigations in South Africa and many other countries in recent years into collusion amongst airlines such as in imposing fuel price 'surcharges'.

The Commission's decision to initiate this investigation specifically into price hikes around the World Cup came in the wake of public outcry over the perceived extraordinary escalation in domestic air ticket prices as evidenced in a Sunday Times article in November 2009. In addition to this, the Presidency had also formally requested the Commission to look into the matter. Subsequent to the letter from The Presidency the Commission received a Corporate Leniency Policy (CLP) application from South African Airways (SAA) regarding its alleged cartel activities in the domestic airline market.

In its application SAA gave the Commission e-mail correspondence between the airlines which indicated that the airlines might adjust air fares ahead of the World Cup. In particular, the e-mail suggests that since there is no indication as to which flights will represent peak demand flights, airlines have the option to either not provide any inventory for sale until such time, or price all inventory at peak time rates until such time as they have greater certainty. This e-mail also suggests that air fares will have to be raised in order to cover various anticipated additional costs.

As part of the ongoing investigation, the Commission has issued summons to the airlines which they have all responded to. The Commission also carried out a successful search and seizure operation at the offices of South African Airways (SAA), Mango Airlines and the Airlines Association of Southern Africa (AASA) on 31 March 2010.

Given the once-in-a-lifetime opportunity the World Cup presents for South Africa to attract foreign visitors to our country, the airlines investigation is significant and will be concluded soon.

The Petroleum and Refinery Industry Exemption During the 2010 FIFA Soccer World Cup

By: Shadrack Rambau

On 17 March 2010, the Commission granted the South African Petroleum Industry Association and its members (SAPIA) unconditional exemption for purposes of the 2010 FIFA Soccer World Cup. The exemption commenced immediately, to end on 31 August 2010.

The Commission granted the exemption in response to an application made by SAPIA on 07 December 2009, in terms of Section 10(1)(b) of the Competition Act. SAPIA is the representative association of the petroleum industry and represents common interests of the petroleum refining and marketing industry in South Africa.

The exemption covers a wide range of agreements and practices which, according to SAPIA, are required to ensure the continuity and stability of liquid fuels supply to various sectors and geographic locations of the South African economy. SAPIA initially requested the Commission to exempt it for a period of six (6) years, commencing immediately and ending on 31 December, 2015 (long-term exemption). In the alternative, SAPIA requested to be granted a short-term exemption, which would lapse within a reasonable period after the completion of the World Cup.

SAPIA relied on the objective set out in Section 10(3)(b)(iv) of the Act and asserted that the agreements and practices concerned will contribute towards maintaining the economic stability of the petroleum and refinery industry in South Africa. The petroleum industry was designated by the Minister of Trade and Industry for purposes of Section 10(b)(iv) of the Act on 05 June 2009.

The Commission's evaluation of the exemption application found that it was extremely broad and it is for this reason that the assessment was limited to short-term for purposes of the World Cup.

The Commission concluded, after the analysis of the facts, that certain agreements and/or practices proposed by SAPIA would contravene sections 4(1)(a) and (b) of the Act and that they warranted an exemption for the purposes required. These included SAPIA's system of information exchange on sensitive areas such as costs, volumes and distribution impairing competition by reducing uncertainty regarding competitors' strategies and diminishing each company's commercial independence.

The system was also found to have the effects of limiting expansion in the petroleum industry. The exchange of information regarding deliveries and product volumes allows competitors to keep market shares in check and to undertake retaliatory measures against those undertakings which tried to increase their share of the market, therefore eliminating incentives to effective competition.

Further it should be noted that certain agreements and/or practices by SAPIA are the subject of ongoing investigation initiated by the Competition Commission.

Notwithstanding the evidence above, the Commission is satisfied that these agreements and/or practices by SAPIA in the petroleum industry are required to obtain the objective set out under Section 10(3)(b)(iv) of the Act. Oil reserves in South Africa are limited and the petroleum industry has to import its oil requirements from the troubled Middle Eastern region. The industry is

therefore susceptible to supply instability due to the geopolitical tension in the Middle East and other oil-producing regions. To cope with increasing demand for liquid fuels for the period prior to and during the World Cup, the Commission is of the view that coordination of activities between SAPIA is necessary in order to optimize the existing infrastructure.

The Commission also found that various government departments were required by FIFA to make delivery guarantees for the period during the World Cup. This is a pre-condition for any country that wishes to host the Soccer World Cup. The Department of Transport (DOT) made a guarantee that South Africa will have in place the transport infrastructure that can accommodate the travel demand that will be created by the World Cup. In order for the DOT to deliver on this guarantee, the Commission found it necessary for SAPIA to share information regarding deliveries, stock levels and fuel tanks usage at various airports, depots and terminals across the country. Without this interaction, our transport infrastructure is unlikely to meet the travel demand due to supply interruptions which might occur at certain depots or terminals during the World Cup.

The short-term exemption was therefore granted to ensure that the petroleum and refinery industry meets the expected increase in market demand for liquid fuels during the World Cup.

Last, and very importantly, it should be noted that the exemption does not extend to the wholesale, commercial and retail trade of the liquid fuels supply chain but is limited to arrangements to ensure logistics and bulk supply.

The Exemption of Collective Bargaining and Collective Agreements from Competition Law

By: Bukhosibakhe Majenge

Any intersection between competition policy and labour policy is bound to produce an interesting outcome. The goal of competition policy is to ensure that markets are competitive , whilst labour policy is geared at, inter alia, the protection of the rights of workers. The two delicately co-exist in an uneasy truce. According to Sutherland and Kemp "almost all countries have made the policy decision that competition law should yield before the protections which labour law provides for workers."

The lessons from other jurisdictions are instructive. In an important case in Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie ("Albany") the European Court of Justice set out the approach in the European Union: "it is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) (now Article 81(1)) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1)"

In an illuminating decision in Brown v. Pro Football, Inc ("Brown") the US Supreme Court articulated the context and the evolution of the "non-statutory labour exemption from antitrust laws" in the US. The Court explained that it has implied this exemption from federal labour statutes, which set forth a national labour policy favouring free and private collective bargaining. The Court reasoned that this implicit exemption reflects both history and logic.

It asserted that "the implicit ('non-statutory') exemption interprets the labour statutes in accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice. It thereby substitutes legislative and administrative labour related determinations for judicial antirust related determinations as to the appropriate legal limits of industrial conflict. As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus the implicit

exemption recognises that, to give effect to federal labour laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.

Section 3(1)(a) and (b) of the South African Competition Act ("the Act") contains an in-built express statutory exemption of collective bargaining and collective agreements in terms of the Labour Relations Act No.66 of 1995, as amended ("the LRA") from the application of competition law. Collective bargaining and collective agreements occupy a prominent position in labour jurisprudence. In the first certification judgment the Constitutional Court asserted that "collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power that individual workers and workers exercise collective power primarily through the mechanism of strike action, and in theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of terms and conditions of employment, and the exclusion of workers from the workplace (lockout)." The right to strike is an integral part of collective bargaining. In National Police Services Union and Others v National Negotiating Forum & Others the Labour Court emphasized that "… courts have no right to intervene and influence collectively bargained outcomes. These outcomes must depend on the relative power of each party to the bargaining process."

The competition authorities have not yet had an opportunity to fashion and weave an approach to the interpretation of the exemption encased in section 3(1)(a) and (b) of the Act and to determine its precise legal contours. In the large merger between Daun et Cie AG and Kolosus Holdings Limited , within the context of considering employment issues in a merger, the Tribunal signaled that at most, its role is "ancillary to these other statutes and institutions (LRA and its institutions); it is supportive of their general thrust and should, by and large, not be employed as a substitute for, and in order to second-guess, these other interventions." Undoubtedly, existing labour law jurisprudence will play a critical role in moulding an appropriate approach to the interpretation of the important exemption engraved in section 3(1)((a) and (b) of the Act.

Annual Public Sector Consultative Forum

By: Mulalo Shandukani

The Commission's annual public sector consultative forum (PSCF) on the 26th of March 2010 addressed the difficult question of collective engagements by industry with government, to meet common challenges, when this means competitors getting together. The PSCF is also a mechanism for the Commission to provide feedback on its work and to obtain input from public sector role players on the Commission's main focus areas.

Update on focus areas

Competition Commissioner Shan Ramburuth opened this year's PSCF by informing the delegates that the Commission will fall under the Ministry of Economic Development as from the 1st of April 2010. This coincides with the Commission's 2010-2013 strategy which emphasises ensuring that Commission's work has demonstrable outcomes insofar as contributing to increasing the competitive environment for economic activity. In this regard, the Commissioner acknowledged the importance of constantly improving the efficiency of the organisation through:

- better knowledge management, better management and decision-making; and
- increased dialogue and engagement with government departments and other key stakeholders in the economy.

Deputy Commissioner Tembinkosi Bonakele reflected on the major cases being investigated under the prioritized sectors. In summary, the Commission's investigations continue to uncover widespread collusion and reflect the high levels of market concentration levels in these sectors, and specifically in substantial areas of food products, infrastructure and intermediate industrial products. In pursuit of eradicating anti-competitive, the Deputy Commissioner pointed out that it must be a collective effort between government departments and the Commission. For example, the Commission is already interacting with the Department of Agriculture to holistically address competition concerns in the food sector. Maximum impact of the Commission's work is sure to be realized through constructive interaction between the Commission and its stakeholders.

Supplier collaborations, competition law compliance, and Competition law limitations on information exchange between competitors

In the past year the Commission and government departments has been grappling with the possible implica-

tions of firms collaborating together to address common challenges, often with the support of government. For example, at times some government departments have deemed it necessary to call competitors in one room in order to discuss market developmental issues. However, market participants have been refusing to attend these meetings for fear of potentially falling foul of the Competition Act.

The Commissioner assured government departments that it is not a breach of the Competition Act to facilitate industry meetings to address development challenges as long as issues like prices do not form part of the meeting agenda. And, the Commission is available to advise stakeholders in instances where external parties are unsure on whether or not certain practices may fall foul of the Competition Act. The Commissioner concluded by noting that government departments have a responsibility to ensure that markets work effectively through the development of pro-competitive public policy objectives.

Muzi Mkhize, Hydrocarbons Chief Director at the Department of Energy (DoE), detailed the mission, vision and strategic objectives of the DoE and endorsed the idea of intergovernmental cooperation. He commented that the DoE is gradually getting to grips with the exact nature of the Commission's work and that the two institutions had interacted with regard to the approved exemption application aimed at ensuring that there is sufficient fuel supply during the 2010 soccer World Cup.

Public Sector Forum Attendants

The Commission's Simon Roberts and Andre Jooste from the National Agricultural Marketing Council both presented on the role of government departments and the limits of information exchange in markets. There was consensus between the two speakers that the main criteria in assessing where information exchange between competitors has a greater effect of dampening competition include markets with a small number of competitors, barriers to entry, homogeneous products, the extent of disaggregation of the information, how readily can conduct of others be identified, and the timeous nature of information exchange.

It was noted that South African mar

kets are highly concentrated and as such information exchange may not be desirable. However, Andree Jooste also warned that a blanket ban on information exchange may be counterproductive as it can result in the improper functioning of the market. As such, he said that there must be a balance between the need for information exchange in a market and that of complying with competition law.

Impact of Cartel Activities on Business: an Ethical Perspective

By: Andile Mangisa

The bread cartel matter that was exposed by a whistleblower from the Western Cape has raised wide-ranging questions about the ethics of business, and the relationship with competition law compliance.

Cartels are often equated with theft by firms from consumers. However, the Competition Act does not use the word cartel. Rather, the Act prohibits an agreement between competitors in a horizontal relationship from: directly or indirectly fixing a purchase or selling price or any other tradition condition; dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or engage in collusive tendering. Cartels denote groups of business people who engage in outright anti-competitive fixing of markets in this way, to the detriment of consumers. It further reflects the fact that this activity is particularly likely to happen in mature industries with well established networks in trade associations and similar organizations.[1]

Defining Business Ethics, and Ethics in Business

Ethics are defined as "relating to morals", "a set of principles of morals", and

as "rules of conduct".[2] Charles Powers and Davis Vogel (in Chryssides and Kaler, 1992:53) define ethics as "concerned with clarifying what constitutes human welfare and the kind of conduct necessary to promote it".[3] Most ethics literature in considering ethics as a philosophical enquiry, uses the terms "ethics" and "morals" interchangeably. Most writers in this field refer to ethics as it reflects beliefs about right and wrong conduct or questions of moral right, wrong, duty and obligation and moral responsibility.

Business ethics applies these ideas in concentrating on moral standards as they apply to systems and organisations through which modern societies produce and distribute goods and services, and to people who work within these organisations.[5] Weiss (1987:7) cites Laura Nash (1990:5) as pointing out that business ethics "…is not a separate moral standard, but the study of how the business context poses its unique problems for the moral person who acts as an agent of this system".[6] It considers the implications of economic activity on the interests of all who are affected by such activity and seek to ensure that business does not detrimentally impact on the interests of its stakeholders. As such, business ethics attempts to address the ethical impact of economic activity and the economic impact of being ethical.

Some believe that ethical behaviour hinders one's success. However, that is not the case. In his book 'Business Ethics', Deon Roussouw argues that business should make ethical sense, but ethics can also make business sense.[7] Roussouw further asserts that the greatest challenge faced by Africa is that the current neglect of ethical values in business turns into beliefs about the ways business should be done. Such beliefs, which function as myths that legitimize and sustain unethical business practice, can play a powerful role in reinforcing an unethical behaviour. This is directly relevant to understanding cartel behaviour, where such conduct appears to have become a norm, a belief about how business should be done. This is now explored in the case of the bread cartel.

Ethical ramifications of the bread cartel activity to the bakery industry

Rossouw argues that the myth articulating that 'Nice guys come second', proclaims that it is impossible to be ethical and successful in business, where ethics and business are seen as opposites. Another myth, which could be a slogan for cartels, is 'if you can't beat them, join them'.

Almost all the big bakeries in the bread cartel joined hands to avoid coming off second best in active competitive rivalry. It became a fact that bread cartel members were driven by unethical business interests, of maximising 'the bottom line' ostensibly for shareholders, at the expense of firms other stakeholders.

From the perspective of a legal person, a judicial body and a regulator in the business sector, this raises some questions. Is the bottom line ethical, legal and in compliance with the Competition Act? It is not the profit seeking itself, but the processes followed in this pursuit which is at issue. Profits earned through effort and hard work contribute to the greater good and accord with the principles of business ethics. Increasing the bottom line by subverting this is properly condemned under the Competition Act.

The awareness of the Act thus does lead to companies such as those in the bread cartel risking their reputation and investor confidence. It is therefore the responsibility of the Competition Commission to sensitize stakeholders about the consequences of unethical business practices (cartel activities), to regulate and enforce compliance with competition law to ensure an ethical, fair and efficient economy in South Africa.

A common ethical sense is that businesses would like to be perceived as ethical, as part of a good corporate reputation and good corporate governance. Ethical conduct represents an investment in the company's reputation whilst unethical conduct represents a reputational risk to the company. In this context, cartel conduct is properly condemned, and firms ought to remember that a good reputation is built over years but can be destroyed overnight.

Merger Review

By: Maarten van Hoven

Introduction

Just as we thought merger activity was increasing in line with the budding economic recovery and somewhat higher merger filings during the last quarter of 2009, the first quarter of 2010 showed a dramatic drop in notifications once again (Figure 1 below).

The vast majority of mergers decided on by the Commission during the last few months raised relatively few competition concerns (classified by the Commission as phase 1 or phase 2).

We highlight two which had interesting dimensions.

Clicks & APG

The continued growth ambitions of Clicks Retailers (Pty) Ltd ("Clicks") saw its acquisition of 35 pharmacy stores of Amalgamated Pharmacy Group (Pty) Ltd ("APG"). Clicks is a household brand in South Africa and have over the years steadily increased its footprint of owning pharmaceutical dispensaries in South Africa. Clicks was one of the first corporate retailers to grow into owning dispensaries since the ban on corporate ownership of pharmacies was lifted in the earlier part of this decade.

During 2003 Clicks acquired Purchase Milton & Associates a group of pharmacy retailers trading primarily under the Link brand another well known brand to South African families. This transaction resulted in Clicks acquiring approximately 80 pharmacies across South Africa. Over time Clicks incorporated these pharmacies into the traditional Clicks stores in order to provide both a wide range of health, beauty and lifestyle products and a dispensary for over the counter prescription products.

The APG transaction considered by the Commission earlier this year was the same as the previous acquisition, just on a smaller scale. The strategy of Clicks apparently remains the same, to roll out more and more dispensaries within their Clicks stores countrywide. Clicks own approximately 354 Clicks retail stores, and has approximately 222 in-store pharmacies. The majority of pharmacies acquired by Clicks in this transaction was located in areas in which Clicks does not have a dispensary presence and could therefore relocate the APG pharmacies to become an in-store Clicks pharmacies.

Over the last eight years the retail pharmaceutical market has changed significantly with the introduction of corporate ownership of pharmacies and the planned legislative changes to dispensing fees. These changes have naturally placed a lot of financial pressure on independently owned pharmacies as they started to compete with larger corporate groups that extract much more efficiencies from owning multiple stores and independent stores not having the ability make a margin on the product as a result of the introduction of dispensing fees. It therefore does appear that the retail pharmaceutical landscape is gradually changing with more and more corporately owned dispensaries appearing in our suburbs and towns and less independently owned and managed pharmacies. Other corporate retailers that have also joined Clicks in diversifying into owning dispensaries are Shoprite (through Medirite), Pick n Pay and Dischem.

Having found that the acquisition were unlikely to substantially prevent or lessen competition in the markets in which the parties compete the Commission approved the transaction without conditions.

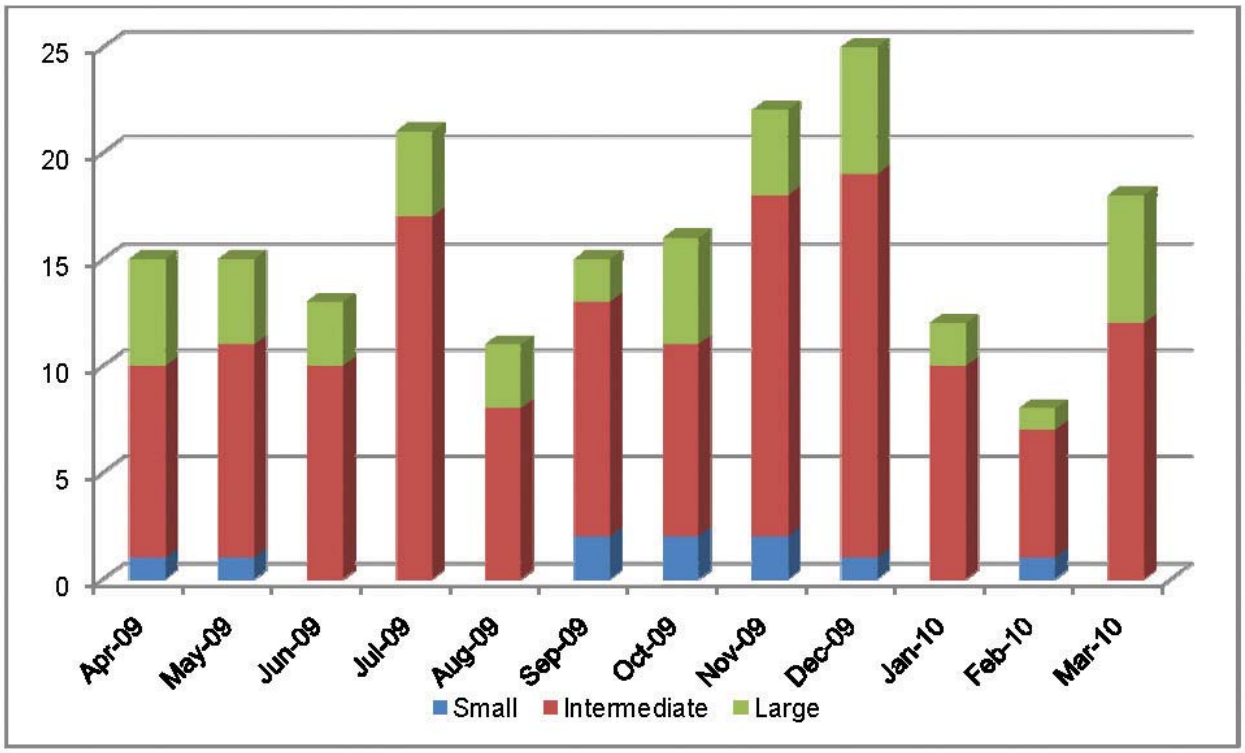
Masscash & Emsengeni

Another noteworthy transaction approved by the Commission was the acquisition by Masscash (a subsidiary of Massmart) of a retail / wholesale grocery business located in Willowvale in the Eastern Cape trading as Emsengeni. Willowvale is located approximately 110km south of Mthata towards the coast. The closest town to Willowvale is Idutya located on the N2. Masscash trades in Idutya and various other surrounding towns along the N2 as "Weirs". Weirs is a combination between a wholesalers and a retailer selling a wide range of grocery products to both small retailers and end consumers. Emsengeni does exactly the same.

The focus of the Commissions analysis revolved around the ability of small retailers to travel and make use of alternative suppliers other than Weirs and Emsengeni. A clear trend that the Commission observed in analysing this transaction (and various other Massmart transactions filed during the course of the last year) is that the traditional wholesale grocery business is becoming something of dying specie. With the enormous growth of retail chain stores during the last decade independent retail stores have dwindled, naturally placing pressure on traditional wholesalers from whom they have bought supplies. This has forced traditional wholesalers to rethink their strategy in order to attract more sales and start tapping into the more lucrative retail market by also selling to end consumers as opposed to only selling to retailers. What has emerged from this is that various traditional grocery wholesalers have converted their product offering to attract both end consumers and traditional retailers by bulk breaking and allowing single item purchases. This new trading format has become known as "hybrid stores".

The majority of the competitors of Masscash and Emsengeni in and around Willowvale and Idutya are hybrid stores serving both end consumers and retailers. Competitors have become innovative in that they have introduced value-added offerings such as free or subsidised delivery and attractive discounts in order to attract customers from further afield. In conclusion the Commission has found that, although the merging parties were major market participants in and around the narrower Willowvale and Idutya towns, there were effective rivals and that enough customers were willing to travel further afield in the event of an increase in pricing to discipline the merging parties. The Commission therefore approved the transaction without conditions.

Figure 1. Monthly notifications to the Commission for the period April 2009 – March 2010.



M&A Service Standards 2010

By: Maarten van Hoven

During March 2010 the Commission published new service standard commitments to mergers and acquisitions notified. The Commission aims at being a high performance regulatory agency with realistic, predictable and achievable service standards in finalising merger cases.

The 2010 Service standards replace the service standards published during 2002. In an attempt to provide predictable outcomes the Commission has categorised cases according to complexity and has defined three types of cases non complex (phase 1), complex (phase 2) and very complex (phase 3). Crucial to these are, of course, proper merger filings with the necessary information provided on the part of merging parties. The matrix below provides a guide to differentiating between the three categories:

DIFFERENTIATING FACTORS			
Characteristics	**Phase 1**	**Phase 2**	**Phase 3**
Combined market shares	< 15%	< 30%	>30%
Multiple markets	No	Yes	Yes
Deregulated markets	No	Yes	Yes
Control structure complexity	No	No	Yes
Complex market definition	No	No	Yes
Significant documentation and information requests	No	No	Yes
Likely or potential extent of anti competitive harm	**No**	**No**	**Yes**
Complexity of investigation	**Non complex**	**Complex**	**Very complex**

According to the Commission non complex cases are readily identifiable by the absence of competition issues in that either the firms do not compete in the same markets or their combined market share is below 15%. Complex (phase 2) cases involve transactions between direct or potential competitors (horizontal mergers) or between customers and suppliers (vertical mergers) where the parties hold market share in excess of 15% in their respective markets. Very complex (phase 3) cases involve those which are likely to create or result in a substantial prevention or lessening of competition. Mergers between leading market participants in any one of the markets in which the parties compete falls within this category.

The proposed new service standards need to be realistic and in all instances measurable and achievable. Having considered our resources and anticipated volumes of notifications and changed complexity of transactions the Commission has adopted the following new service standards. The service standard refers to the number of business days the Commission anticipates to review the transaction calculated from the business day following the date on which a complete merger notification was filed.

Category	2010 service standard
Phase 1 (non complex)	20
Phase 2 (complex)	45
Phase 3 (very complex)	60

With the introduction of the new service standards the Commission has effectively incorporated previous commitments for the fast-tracking of merger approvals into the new phase 1 non-complex category.

As part of committing to the new service standards the Commission has issued a practice notice on the minimum filing requirements required by the Commission for merger notifications in order to facilitate efficient investigation in having complete and accurate information and documents to conduct a thorough analysis.

For more detailed information about the service standards and practice note on the minimum filing requirement visit the Commission website at the following links.

http://www.compcom.co.za/service-standards/
http://www.compcom.co.za/practice-notes/

Disposals of Afgri Retail Outlets

By: Thabelo Ravhugoni

During December 2009 the Commission was notified of two separate but related transactions, the transactions involved different acquiring firms MGK Operating Company (Pty) Ltd t/a Obaro and TWK Agriculture Limited as acquiring firms but the same seller namely Afgri Operations Limited. The targets were various farming requisites retail stores owned by Afgri.

In the first transaction between MGK and Afgri, MGK proposed to acquire from ten farming requisites retail outlets across Limpopo and Mpumalanga. In the second transaction between TWK and Afgri, TWK proposed to acquire 13 retail outlets of Afgri, mainly in KZN.

Afgri, TWK and MGK have their roots as agricultural co-operatives, whose activities revolve around the supply of farming inputs. Farming inputs have been mainly supplied by co-ops since 1900s. Of particular importance to the supply of farming inputs is the deregulation of the agricultural sector in 1996, which dismantled a single marketing channel system which allowed, among others, a co-op to enjoy a geographic monopoly position. As a result

there has been entry and extensive restructuring within this area, while most co-operatives converted into private companies.

Afgri's disposals in these two mergers are part of a restructuring to focus on 'core business' after around ten years of extensive expansion in its reach. While the Commission appreciates firms' business rationalisation to be more competitive, it believes that rationalisations that result in market dominance would reverse the benefits that deregulation attempts to present to consumers in the sector. Therefore the Commission looks at these particular mergers very closely.

The retail outlets which formed the subject matters of the two transactions provide a basket of products targeted at farmers in the following categories Agricultural Chemicals; Animal Feed; Animal Health; Building and Construction; Fertilizer; Fuel & Lubricants; Hardware; and Seed. The merging parties argued that when supplying the above products, they face competition from specialist retailers and direct suppliers.

There are three channels through which farmers source their farming requisites, namely direct supply, warehouse supply, and retail supply. A key question was the extent to which competition extends across these channels.

The Commission found that a significant portion of farmers' requirements of their inputs ("high-volume seasonal requirements") are supplied directly by upstream suppliers and manufacturers. When purchasing directly from suppliers and manufacturers the parties role is usually limited to administering financial settlement of these purchases through their respective finance divisions. In respect of the pricing and delivery issues, suppliers or manufacturers will be responsible, as the parties never take ownership of or handle the physical products.

While in some cases the retail outlets may have the physical capacity to meet these high-volume seasonal requirements (in terms of the storage and delivery capacities of the retail outlets), in practice, customers do not seek to fulfil their bulk requirements via the retail or warehouse channels (i.e. the merging parties' outlets). This is because the additional costs incurred in transporting bulk volumes to and from the outlet, and in storing them at the outlet, render these channels less efficient, and hence more expensive, than direct supply from the manufacturer. In addition, the parties do not actively pursue these sales as they perceive the comparative advantage of direct suppliers in this regard to be large. Moreover, the parties' retail operations and logistics are not particularly well equipped to engage in the storage and distribution of such large volumes.

In the light of the above, we concluded that the parties cannot be regarded as alternatives in the supply of high-volume seasonal requirements to farmers. Their role in this channel is limited to offering long-term finance to farmers for sourcing of similar inputs.

The parties compete in the supply of farmers' inputs directly off the retail floor to satisfy farmers' requirements during the planting phase. These requirements are smaller, unplanned volumes of farming requisites. The Commission found that specialist retailers and the downstream agents of manufacturers are more attractive alternatives to direct supply in these cases as they are more convenient and can supply small volumes at short notice than suppliers and manufacturers.

In the light of the above, the Commission concluded that the mergers affected the retailing of farming requisites. While the Commission took note of the Competition Tribunal's ruling in the Afgri/Natal merger that it would be better to assess these types of mergers on the basis of competitors selling a 'package' of products to consumers, we did not find evidence suggesting that farmers would not shop around for better prices at part-line stores of farming requisites. The farmers' ability to shop around for lower prices to part-line stores is also confirmed by the parties. The Commission therefore concluded that the merging parties face competition from retail specialists and suppliers' agents.

The Commission concurred with the merging parties that markets are local for such purchases (typically around 50km radius). Based on this, while there are overlaps between the merging parties in some areas, the Commission found that there is unlikely to be a substantial prevention or lessening of competition given the other retail stores that farmers can switch to for farming inputs.

Lastly, during the merger investigations concerns were raised of price fixing and resale price maintenance, which are being separately pursued.

The Competition World Convenes at the 9th Annual ICN Conference

By: Nerice Barnabas

The Turkish Competition Authority hosted the 9th Annual International Competition Network (ICN) Conference, which was held on 27-29 April 2010 in the historical city of Istanbul, Turkey. Approximately 500 participants attended the meeting, representing more than 80 competition agencies from around the world, together with over 100 Non Governmental Advisors (NGAs) from the legal, business, consumer, and academic communities.
The Annual Conference addressed the successes that the ICN has achieved during its first nine years, as well as challenges it needs to address in its second decade. The Annual Conference highlighted the recent work of the ICN working groups on cartels, competition agency effectiveness, competition advocacy, mergers, and unilateral conduct. It also showcased the work of the ICN Vice Chairs responsible for Advocacy and Implementation, and International Coordination and Outreach.

This year's accomplishments include:

- Updated Chapters of the Anti-Cartel Enforcement Manual on Digital Evidence Gathering, and Cartel Case Initiation;
- Chapter on "Strategic Planning and Prioritisation" of the Competition Agency Practice Manual;
- Draft Market Studies Good Practice Handbook;
- New Recommended Practices for Merger Analysis on market definition and failing firm/exiting assets;
- Report on Refusal to Deal;
- Promotion of the Advocacy and Implementation Network's Support Program;
- Information about technical assistance and competition related studies planned for 2010; and
- Outreach Toolkit and Study, ICN Blog and "Virtual University".

Five themes were highlighted for the future work of the ICN:

- The huge importance which member's have placed on relationships built through the network
- Convergence should continue to be the ICN's main goal over the long term
- The needs of younger agencies and agencies in developing countries are a key focus
- The ICN should focus on implementation and cooperation with other international organizations
- There is a need to engage with a more diverse range of non-governmental advisers

South Africa has long been an active supporter of the work of the ICN with David Lewis (former Chairman of the Competition Tribunal) being the former Chair of the ICN Steering Committee and Shan Ramburuth (Commissioner of the Competition Commission) being a member of the organisation's Steering Committee which oversees the implementation of the organization's mission and vision.

South Africa was well represented at this year's Conference with delegates from the Competition Tribunal, Competition Commission and NGA's from Wits University, the Gordon Institute of Business Science and Bowman Gilfillan Attorneys.

The South African delegation actively participated. Tembinkosi Bonakele (Deputy Commissioner) was on the Unilateral Conduct Panel which addressed margin squeeze and refusal to supply and was also one of the resource persons on the Cartel Working Group breakout session on 'Trends in Cartels'. Shan Ramburuth (Commissioner) was a panel member on the Agency Effectiveness Working Group breakout session on 'Effective Project Delivery'. Tribunal Chairman, Norman Manoim, was a panel member on the Agency Effectiveness Working Group breakout session on 'Participation of Stakeholders in Agency's Strategic Planning'. David Lewis (Gordon Institute of Business Science) moderated the Agency Effectiveness Working Group breakout session on 'Prioritisation'.

Apart from participating in the breakout session, the Commission's delegation actively engaged with their counterparts from Competition agencies from other jurisdictions on areas of cooperation and capacity building – some of the fruits of which are already being

seeing. In addition, a meeting of the stakeholders of the proposed African Competition Forum (ACF) was held on the sidelines of the Conference and discussions were held on how to chart the way forward in setting up the new organization.

The 9th Annual Conference concluded with Mr. John Fingleton, the Chair of the ICN Steering Group, saying that the ICN remained as vital as ever:

"This network makes a real and vibrant contribution to the consumers of the world. The relationships it builds and sustains between competition agencies from a diverse range of countries help deliver stronger competition and better outcomes for consumers across all our economies"

The Tenth ICN Annual Conference will be held in the Netherlands at the Hague on 17-20 May, 2011.

ICN at a Glance

The ICN is a specialized yet informal network of established and newer agencies, enriched by the participation of non-governmental advisors (representatives from business, consumer groups, academics, and the legal and economic professions), with the common aim of addressing practical antitrust enforcement and policy issues. By enhancing convergence and cooperation, the ICN promotes more efficient and effective antitrust enforcement worldwide to the benefit of consumers and businesses.

The ICN is a results-based, project-oriented organization, which has grown from 16 to 104 competition agencies (from 92 jurisdictions) in 9 years. The ICN is exclusively concerned with competition law – "It is all competition, all the time". The ICN operates by consensus and its work takes place in working groups, with members and nongovernmental advisors (NGAs) conducting discussions, typically via teleconference or e-mail. In addition, members and experts convene annually to discuss working group projects and their implications for enforcement. The next annual conference will be hosted by the NMa on 17-20 May 2011 in The Hague, Netherlands.

With an increasing number of investigations that involve cross-border effects and concurrent reviews by multiple agencies, competition agencies need to collaborate with each other to reduce the risk of: (i) sub-optimal enforcement, and (ii) inconsistent outcomes. The ICN helps to facilitate cooperation and convergence, where appropriate.

The ICN has produced a series of practical recommendations and other tools on best practices, investigative techniques and analytical frameworks, which have significantly contributed to cooperation efforts among competition agencies. Notable achievements have been made in the areas of merger review, anti-cartel enforcement, unilateral conduct, competition advocacy, and competition policy implementation, through a variety of practical outputs. These include recommended practices, case-handling and enforcement manuals, reports, templates on legislation and rules in different jurisdictions, databases and toolkits, and workshops. Implementation of these work products, in so far as this leads to optimal enforcement and consistent outcomes, is good for competition agencies, governments, business and ultimately consumers. Importantly, the ICN has also helped to foster closer relations among agency leaders and staff, leading to improved cooperation on cases and a better understanding of each other's laws and policies.

For more information, please visit the ICN Web site at www.internationalcompetitionnetwork.org.

The Joint Food Project

By: Oupa Bodibe and Liberty Mncube

The rise of food prices in recent years increased the widespread concerns about the implications of anti-competitive conduct in these markets on the poor. Against this backdrop, the Joint Food Project between the Zambia Competition Commission, the Competition Commission of South Africa and the Egypt Competition Authority aimed at sharing experiences on competition issues in food markets. The completed studies were recently presented at a mini-conference in Zambia on 13 and 14 April, attended by representatives from competition authorities across Africa.

The project identified areas of common concern, on each of which country case studies were undertaken. The project also enabled comparative learning into methodologies for assessing possible anti-competitive conduct in food markets. South Africa and Egypt examined issues in vegetable oils, South Africa and Zambia focused on milling, especially maize milling, as well as on fertilizer. Egypt also interrogated the role of the informal sector as a competitive constraint to the formal sector. It is worth noting that South Africa is quite peculiar in the African con-

Participants at the Joint Food Project Conference in Zambia

tinent for having such a small informal sector relative to the formal sector.

The studies highlighted the importance of a careful understanding of market dynamics, and the ways in which products are produced and sold. For example, the different levels in the crushing and refining of oil was highlighted, together with understanding the vertical relationships between firms at both levels. Differentiation between different types of edible oil was also identified as a crucial issue, together with the need to assess the impact of government intervention as is the case in Egypt. Geographic markets was a common issue addressed in the maize milling studies of both Zambia and South Africa, given the often long transport costs and regional orientation of some of the main firms.

The comparison of the country experiences also emphasised the international integration of food markets, especially in commodities such as grains and vegetable crude oils. Common factors impacting on global prices had affected all the countries. A further issue discussed was the regional integration of markets and the possibility of regional cartels. Recent South African cases, including in fertilizer have raised these concerns. This poses challenges for competition authorities whose writ is largely national. It demands increased cooperation and coordination between competition authorities around cross-border cartels.

The studies in this joint project stimulated a keen interest for further collaboration between different countries which is being followed up. For that reason the outcomes and synthesis report of the joint food project will be discussed at a workshop to be convened by the IDRC later this year.

The Challenges of Competition Advocacy in a Recession

By: Mziwodumo Rubushe

Introduction

South Africa is not immune to the global economic crisis. The effects of the crisis saw a sharp reversal in the economy's longest period of growth in recent times, with as the quarterly GDP growth rate declining from 5.1% to -1.8% from the third to the fourth quarter of 2008. The economy contracted by a further annualized rate of 6.4% in the first quarter of 2009, the sharpest fall in 25 years, marking the onset of a clear recession.

While the crisis first became apparent in the financial sector of the developed world, it developed into a deep real economy and jobs crisis that threatens to severely damage economies in both the developing and developed world. In South Africa, the crisis is manifesting itself in a decline in economic growth with manufacturing and mining disproportionately affected. We have also seen a decline in export earnings, weakening business confidence, significant jobs shedding and reduced government revenue collection.

The overriding risk the economy faces

is that this crisis leads to de-industrialisation, with the consequential destruction of capacity to sustain and increase decent work. The impact on mining and manufacturing sectors has been particularly severe, in terms of both the extent of decline in activities and employment. Manufacturing production declined by 21.6% in April 2009 compared to the corresponding month in 2008, while mining production decreased by 12.8% in March 2009. The unemployment rate, on the strict definition, increased from 21.9% in the fourth quarter of 2008 to 23.5% in the first quarter of 2009.

Competition advocacy in South Africa

The Competition Commission is the independent investigative and prosecutorial body of the competition authorities with the mandate to promote and protect competition in the economy. A very important part of this is advocacy, which entails influencing policies and legislation and promoting market transparency.

Sector regulators are also advocates of competition. In carrying out their statutory duties they frequently have to consider what is the appropriate balance to strike between regulation and competition.

There are also other advocates involved in the public debate on competition issues. These include government departments; state owned enterprises; law firms; academics; journalists; consumer organizations and trade unions. Through public discussions at conferences, articles, studies and reports they have an important role to play in contributing to the development of the competition agenda and arguing the benefits of competition.

Challenges imposed by the economic crisis

When firms are under financial pressure due to the crisis there are a number of ways in which robust competition enforcement may be questioned or challenged.

In the arena of mergers, there is a greater likelihood of anti-competitive mergers being proposed on a failing firm basis. There is also the likelihood of competing firms wishing to get together to jointly agree how to respond, with the implicit or explicit intention to collude.

Where firms have been found to have contravened the Competition Act, there is pressure to 'go easy' on the penalties which waters down their deterrence purpose. On the other side, consumers under financial pressure expect the Commission to act to get prices down.

Credibility of competition enforcement must be maintained in the face of the economic downturn. This is best achieved by a combination of soundly reasoned, evidence based decisions and fair process. The competition authorities must stand firm in the face of uncertainty. However the competition authorities should ensure that they are pragmatic and flexible when appropriate and that their powers are applied in a way that fully recognizes the economic reality and context of South Africa.

Under the current crisis there might be a temptation to trade off competition benefits in the longer term (low prices and innovation) against what may be appealing in the short term (keeping jobs at home and enabling big players to survive the recession).
This should be resisted.

How advocacy can help

Competition authorities will have to communicate their role in the current crisis. What the crisis has exposed is the danger of leaving everything to the markets to self correct. There will always be a role for the state to intervene. However, it must be emphasized that competition is important during the crisis as well.

Competition advocacy plays an important role in sending a clear message about the benefits and importance of competition. The questioning of competition policy will continue; it may be described as a luxury or as of theoretical interest against the greater need of meeting the short term recessionary impact. Recognition of the recessionary reality is needed, but the long term benefits of competition must not be lost.

Nandi Mokoena Takes a Bow

By: Molebogeng Taunyane

Former Strategy and Stakeholder Relations (SSR) Manager Nandi Mokoena had one of the most blossoming careers at the Competition Commission, but despite her success she has decided to leave it all behind.

Mokoena started her career at the Competition Commission as a graduate trainee ten years ago. Within a year she was appointed to a junior analyst position in the Enforcement and Exemptions Division (E&E), and was subsequently promoted to analyst. In 2005 she left her analyst position to join Routledge Modise Moss Morris law firm, now known as Eversheds.

A year later, she became a senior analyst in E&E and moved up the ranks to the Commissioner's Office as a

coordinator in charge of international relations prior to her taking charge of SSR division.

As she takes a final bow Competition News chats to her about her time here and her views on the future of competition law.

What do you regard as your highlights or memorable cases over the years?

There are so many. In terms of the cases, the Hazel Tau case stood out for me as one in which we brought about a tangible, immediate and positive difference to many lives. With the different roles I fulfilled in the Commission, I'd have to say that I enjoyed the international relations job the most, though the travelling was a strain at times. Overall, it was always good to work for an organisation whose purpose was aligned to my own and on whose behalf I could always just tell the truth.

What are your thoughts on the current status of competition law and policy in South Africa?

I think from the start competition law could have gone in many different directions. It could have been a non-starter, like some of the competition laws that came before the current Act. It could have become an exclusive and complex area of law, benefiting large corporate companies and out of reach of the common man. At some point in its history competition law and the Commission were in danger of falling into both of these scenarios. Thankfully, due to the concerted efforts of the Commission and the Tribunal's leadership it has become a law that ordinary people/consumers know about and look to for relief.

The legislatures' recent efforts to strengthen the law are largely positive, but, I feel they require careful co-ordination. So, I think the future of competition law is a bright one, though it is difficult to imagine the Commission in a better place than it is right now.

Nandi Mokoena

Are there areas that need to be improved?

Although I've mentioned the 'down-to-earth' nature of South Africa's competition regime as a positive development, I think there is still work to be done in translating the results of the Commission's work into tangible benefits for consumers. The damages area of law is still under utilised, possibly because of its complexity and cost. Perhaps there are ways to make this area of law more accessible to those who really need it to work for them. In the meantime, however, there may be other avenues of realising benefits to consumers built into penalties faces by companies. In addition, economic emancipation in South Africa is still a distant goal for many and the robust application of competition law is firmly at the centre of the development agenda.

Seeing that your position at SSR was different from all your other roles – what did you regard as your challenge in this job?

Trying to balance its different roles and to carry each of them out effectively was a challenge. The position entails overseeing communications and advocacy, coordinating strategy and international relations and managing a team. I wanted to "do" less and just "be" more, especially for the SSR team. I struggled to achieve the balance and constantly found myself doing more and being less.

What advice would you give to your successor?

I would suggest that he/she prioritise certain roles over others and bring in as much help as he/she can where necessary. I'd also say he/she should enjoy every moment as it is great work.

What do you miss about the Commission?

I miss the people. There was seldom a dull day at work. I felt like the people I worked with genuinely enjoyed what they were doing and were at the Commission not only because they needed a job. The passion everyone displayed certainly made for lively debate but also ensures that we all moved forward in one direction.

What are you currently doing?

I've taken a gap year and I'm doing a bit of everything that was difficult to find time for when I was working. This includes volunteer work, light reading (no case files), getting back into my hobbies and some R&R. So, 'focus' is the one thing I am trying not to do this year!

Please visit our revamped website at **www.compcom.co.za** for the latest news, guidelines on merger filings, information on priority sectors, filing complaints, exemption application and general information on the Commission. You can also subscribe to receive our media releases and newsletters.

Towards a fair and efficient economy for all

Where to get hold of us

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