Competition News
The official newsletter of the competitioncommission
Edition 7 • March 2002
Towards a fair and efficient economy for all.

IN THIS EDITION

Ports and Competition

The efficiency of ports is crucial to SA, they are situated far from major markets: transport costs (including road haulage costs, shipping costs and port tariffs) are higher than in countries where ports are situated closer to their markets. These costs will add more to the final price of goods both exported from and imported into the country, so it is vital that our ports be as competitive and productive as possible. In lieu of this, the Competition Commission made a submission to the Portfolio Committee on Transport, concerning the Draft Ports White Paper.

Are ports a natural monopoly?

Ports are an integral part of transport networks. The high cost of port infrastructure investment means that port viability depends on large volumes passing through those ports to recoup the costs. There are significant economies of scale, and geographic advantages, which means that we should expect elements of a natural monopoly to be associated with ports. However, this natural monopoly status is confined to a few large geographical 'catchment areas' for traffic into and out of the associated hinterlands.

Competition within and between ports

It is possible for ports within SA to *compete* for traffic to certain destinations or from certain sources. For example, if sugar is exported then it would make sense to export it from Durban – the transport costs to get it to Port Elizabeth and export it from there would be prohibitive unless Durban's port charges were way above Port Elizabeth's. But for goods sourced from, say, Johannesburg, there is not as much of a transport cost differential as between Johannesburg to Durban versus Johannesburg to Port Elizabeth, so the level of

CONTINUED ON PAGE 2

FROM PAGE 1

port tariffs might be a more important consideration for Johannesburg-based exporters (and importers).

It is clear that competition can exist *between* SA ports (inter-port competition), and *within* each port, for providing certain port services (intra-port competition). Concern has been expressed about the competitiveness of SA ports in general, relative to their international counterparts. All three forms of competition should be present, although some stakeholders have noted the dangers of excessive or destructive competition. Each of these three forms of competition will be examined in the following sections.

Inter-port competition

To a degree, tariffs charged in adjacent ports should exert a disciplining effect on one another. *Marginal consumers* should be able to choose between, say, Port Elizabeth and East London, depending on which offers the best deal. In assessing market power, the role of marginal consumers is crucial, though they may represent only a small proportion of all consumers for a good or service. Some of the factors that might identify specific consumers of port services as marginal consumers (those able to switch between two or more alternative ports of entry/exit) are the following:

- Exporters/importers of high value, low-volume goods for which transport costs are not significant
- Exporters/importers of goods sourced from or destined for inland locations that are roughly equidistant from two or more alternative ports, e.g. Gauteng
- Exporters/importers of goods that are particularly sensitive (or particularly insensitive, for that matter) to port delays, caused for example by one port being at full capacity, or having poor productivity.

Therefore, in theory at least, and abstracting from differences in facilities offered at each, SA ports are potentially competitors to each other. As to the concern about destructive competition, doubts have been expressed about whether the Eastern Cape hinterland can really sustain the viability of three ports (East London, Port Elizabeth and Coega).

Another important implication of perceived destructive levels of competition is that investment in port infrastructure will be discouraged if investors see very small returns.

There should really only be one Port Authority for the country, for if there is to be one per port (as is being considered as an option) then the possibility of regulatory capture will be magnified. Local Port Authorities would be subject to investor lobbying and favours for, say, the proclamation of a development corridor or an export promotion zone. Furthermore, there are economies in having only one Port Authority for the nation.

Intra-port competition

Within each port, and in respect of certain services, the way to introduce vigorous competition might be to have competition in advance (*ex ante*) for the market, rather than competition in the market.

Unfortunately, the draft policy makes no mention of which port services might be amenable to the introduction of competition, how much competition would be feasible, or how such competition would be brought about.

The competitiveness of SA ports

In addition to the possibility of competition in and between SA ports, there is the matter of the overall level of competitiveness, efficiency and productivity of SA ports in comparison with world standards. Much has been made of selected statistics, such as comparing the dismal number of containers Durban can handle per hour with other ports such as those in Japan or Hong Kong. Such bald statistics ignore factors such as whether containers are being loaded from the wharf onto the ship, or whether they are being trans-shipped. Nor do such statistics reveal whether a port accepts all vessels or only those of a given specification, for which quayside equipment might be specially designed.

Nevertheless, there is a general feeling amongst stakeholders that SA ports are slow and expensive, and there have been calls for increased participation of the private sector, to revitalize investment and efficiency.

Competition concerns

The main competitive concern at present appears to be the existence of what might be called restrictive vertical practices, which come about because several competing service providers are vertically integrated to differing degrees.

Thus a service provider with market power over a specific service might be able to *leverage* (extend) that market power up or down to other services, in which it competes with other firms. That could allow an operator to monopolise a range of landside services by pricing them lower than its competitors are able to, and then cross-subsidising by raising charges for specific services that only itself may provide. Such a *vertical price squeeze* would be difficult to eliminate without vertically separating the provision of certain port services.

Conclusion

One should consider several forms of competition to be possible within and between ports in SA, but the Draft White Paper does not explicitly recognize these types of competition and the draft policy is inadequate to that extent.

Furthermore, the Draft White Paper says very little about which port services are to be concessioned, or for how long.

Competition *for* the market is needed, and the winners of the concession contracts should be granted those concessions for long enough periods and for a large enough range of services, to make it worthwhile for them to invest in new equipment and infrastructure.

In the coming months, as part of the policy development process, the Competition Commission will continue to engage the Department of Transport and other stakeholders, in order to address some of the issues identified above.

Geoff Parr, Policy and Research

Risk Mitigation and Asset Securitisation

A view through the Competition Act's microscope

During December 2001 the Competition Commission released two updates[1] outlining the Commission's proposed approach to risk mitigation transactions and asset securitisation schemes, as undertaken by registered banks in South Africa. This article provides an outline of the rationale and the approach adopted by the Commission.

A Conceptual Background

The risk profile of banks is fundamentally different from that of other financial institutions. Banking is about the management of credit risks which inevitably form an integral part of banking. To manage the stream of advances or loans, banks require security or collateral to protect themselves in the event of default by a borrower.

Thus, in the ordinary course of their business, banks enter into, *inter alia*, the following transactions:

(i) Taking and exercising of security (pledge or cession agreement)
(ii) Government concessions in infra-structure development
(iii) Sale and Leaseback transactions
(iv) Securitisation Schemes

Section 12 Applications

The merger definition focuses on the 'change of control', which is defined in section 12(2) of the Competition Act, to provide guidance. Therefore, any transaction that meets the requirements set in the section would constitute a merger and would have to be notified to the Commission irrespective of its competitive or anti-competitive nature or effects. While this may seem unnecessary if one thinks of transactions that pose no threat to competition or consumer welfare, a particular regulatory approach was adopted in the Act. The regulatory principle is that the competition authorities should determine whether a transaction impacts on competition, rather than business.

Since risk mitigation financial transactions result in the acquisition of an interest in the assets or the business of another company at the time of sale and/or upon default by such firm, they would technically fall within the ambit of the merger control provisions. The acquiring party will, as a result of the said transaction, gain control of the business (or part of the business) or business assets wherein no control was exercised previously. Where the threshold requirements are met, notification of these transactions would be required.

In terms of securitisation schemes, the sale of the bank's assets to the Special Purpose Vehicle (as a going concern) appears to be a sale of income-generating assets, and therefore a sale of part of the business of the seller. This sale may therefore constitute a merger as contemplated in section 12 of the Act. The SPV will, as a result of the sale of the concerned assets, acquire control over a part of the seller's business, which it did not have prior to the transaction.

However, it could not have been the intention of the legislature to include transactions which occur in the ordinary course of banking within the ambit of the merger provisions.

Due to factors such as the temporary nature of the banks' exercise of control of the securitised interest, and the fact that the acquisitions resulting from any default do not fall within the bank's core business (and are realised in respect of purely financial transactions, with the intention to dispose of the acquisition as soon as possible) they currently do not pose competition concerns.

Furthermore, the purely financial nature of the transactions outlined above largely removes any potential and direct impact on public interest issues, which are usually vital in most merger analysis cases. In fact, it is widely accepted that these transactions have a positive economic impact.

The Commission reviewed the international best practice and considered various concerns - including the nature and increasing volume of these transactions and the current global economic environment - and adopted a prudent, yet flexible approach.

The Commission's approach

Where a bank acquires an asset or controlling interest in a firm in the ordinary course of its business in providing finance based on security or collateral, the Commission would not require notification of the transaction at that point. Similarly, if upon default by the firm the bank takes control of the asset or controlling interest in that firm with the intention of safeguarding its investment or on-sell to another firm or person to recover its finance, a notification would not be required. However, if the bank fails to dispose of the assets or the controlling interest within twelve months, notification would be required upon the expiry of that period. The twelve-month period commences only when the bank assumes control over the security interest. The expiry of this period in itself will trigger notification of that acquisition if thresholds are met. In seeking an extension, the

CONTINUED ON PAGE 4

FROM PAGE 3

institution concerned bears the onus of providing a substantial basis for non-disposal of the asset or control over the firm in question. The Commission would then exercise its discretion in granting such an extension on a case-by-case basis.

Failure to notify the transaction upon expiry of the twelve-month period, or the extended period, will be construed as an implementation of a merger and the penalties in terms of Section 59(1)(d) and (2) will be applicable.

In respect of securitisation schemes outlined above, the Commission would not require notification of the transaction where a bank sells, facilitates or sponsors the sale of a portfolio of assets to a SPV, provided that the scheme is executed in compliance with the stipulated conditions in the Schedule of the South African Reserve Bank's Securitisation Notice. Therefore, this approach would not apply to any further disposal of the same portfolio of assets.

It should be noted that the application of the Commission's approach to risk mitigation and securitisation schemes is, however, restricted to banks and their subsidiaries registered in terms of the Banks Act No. 94 of 1990.

[1] The detailed updates are available on the Commission's website: www.compcom.co.za

Shaazia Adam, Compliance

Industry Designation

for economic stability

A firm may apply, by virtue of Section 10 of the Competition Act, to be exempted from the application of the provisions of Chapter 2 of the Act, which prohibit certain practices and agreements normally regarded as being anti-competitive.

However, in terms of Section 10(3) and (4) of the Act, the Commission may grant such an exemption only if it is for the purpose of achieving certain given objectives, such as the maintenance and promotion of exports, or in relation to the exercise of intellectual property rights. Therefore, it is against a set of objectives that the Commission exercises a certain parental or discretionary function in granting an exemption.

One particular objective though, concerns the designation of an industry by the Minister of Trade and Industry for reasons of economic stability, after consulting with the Minister responsible for that sector. An industry can thus be designated for economic stability, which, prima facie appears to be a solid industrial policy objective, but in fact is of such a broad nature and so all encompassing that it can be incoherent as a result.

It can be said that 'stability is indicative of pro-activity aimed at the moderation or elimination of fluctuations in economic activity'. 'Economic' implies the fulfillment of society's demands for goods and services through the most efficient means. Hence, the objective lends itself to the attainment of society's needs in an environment of scarcity, through the smooth allocation and employment of available resources. Moreover, it could be effectively argued that the state is the most able institution to intervene in the market to ensure stability and the fulfillment of society's needs, particularly in instances of market failure. Industry designation, therefore, could be a justifiable intervention and viewed simply as an indirect mode of state aid as the sector would be exempt from competition law and principles.

But, public authorities should be aware of the issues surrounding the coherence of their policies. Inconsistencies can lead to inefficiency, credibility problems and an atmosphere of uncertainty in both the private and public spheres.

This is contingent on the act designation since, if badly designed, the implications are that there will be a weakening of the competitive position of the industry and the survival of less competitive firms at the expense of more efficient ones. In particular, governments are susceptible to distorting the rules of competition by discriminating in favour of public enterprises or by lending assistance to certain private sector firms, which are often regarded as national flag carrying entities. Markets, though, should be flexible and resources should be allocated to where they are most efficiently utilised. Effective competition ensures this optimal outcome and intervention is justifiable only in limited circumstances.

Therefore, if competition distortions are to be allowed through designation and subsequent exemption, it should be justifiable only to the extent that a governmental objective is achieved, or contributes significantly towards that objective. Similarly, the objective itself must be carefully considered and the designation should be part of an informed decision-making process. Perhaps, this could be achieved through a cost benefit analysis approach, the basic principles of which are posited as follows:

- Adequate information needs to be obtained for understanding the need for, and the consequences of, the proposed designation
- The potential benefits to society need to justify the potential costs, recognising that not all benefits and costs can be described in monetary or quantitative terms
- The proposed designation will maximise net benefits to society
- The designation is the most cost-effective means of achieving the intended social benefit, in comparison to other instruments.

The cost benefit analysis could be contained within a Competition Impact Statement (CIS). The Commission, in conjunction with the Department of Trade and Industry, could compile and oversee the preparation of the CIS. In this manner, the Minister can make an informed decision and avoid the possible negative impact of designation.

Daryl Dingley, Policy and Research

Defending the Consumer

A coherent system of legislation long overdue

Although consumer laws have been in existence in South Africa for more than four decades, consumer protection has been virtually non-existent. While the term ‘consumer’ appeared in various statutes and laws, in most instances it referred to the rights, duties and obligations of those involved in business with respect to their roles as buyers and sellers. This perception failed to recognise consumers as an integral part of the market economy and to see consumer protection as a tool to address issues of market failure.

There are many statutes pertaining to consumer protection, but they are often vastly different from each other in content. For instance consumer and competition policies have a common goal, i.e. consumer welfare, but there are differences in the ways in which both policies seek to achieve this goal. Consumer policy appears to be based on the principle of minimum government intervention, allowing the market generally to regulate itself, and intervening only in those areas where problems arise.

The Consumer Affairs Act states that ‘when the committee has decided to undertake a preliminary investigation - it may negotiate with any person, or body, corporate or unicorporate with a view to <u>making an arrangement</u>, which in the opinion of the committee will ensure a discontinuance of an unfair business practice.’ The biggest handicap in this instance is that the Consumer Affairs Act fails to prohibit conduct harmful to consumers outright, and therefore such conduct does not immediately become a statutory violation. As a result, it has become almost impossible for the committee to enforce such legislation.

Whilst negotiations may be necessary to avoid legal difficulties, there are dangers that come with a cozy relationship between consumer protection agencies and business. If big corporations are allowed to use their dominance unimpeded, the resulting social costs can be very high. There is no doubt that consumer laws need to be flexible to enable an investor friendly environment, but they also need to have clear policy directives and tough legal sanctions for unacceptable behaviour.

There are four specific provisions of the Competition Act which relate directly to consumer protection:

CONTINUED ON PAGE 6

FROM PAGE 5

(i) Section 8(a) prohibits a dominant firm from charging an excessive price to the detriment of consumers
(ii) Section 8(d)(iii) prohibits a dominant firm from selling goods and services on condition that the buyer purchases separate goods or services unrelated to the object of the first transaction
(iii) Section 4(1)(b) prohibits firms in a horizontal relationship from directly or indirectly fixing a purchase or selling price
(iv) Section 5(3)(b) prohibits firms in a vertical relationship from setting minimum resale prices.

In contrast to the Consumer Affairs Act, competition policy, whilst offering an indirect approach to improving consumer welfare, concentrates more on direct and punitive redress mechanisms with no room for negotiations. The Competition Act offers two types of penalties for breach of its provisions: (i) a firm may pay an administrative fine of up 10% of the annual turnover and (ii) a firm may be ordered to divest part of its business.

The different legislative approaches offer an incoherent system, thereby posing one of the biggest problems consumers and consumer protection agencies currently face. These include lack of transparency, information, and proper complaints and redress mechanisms and jurisdiction issues. It is also imperative that laws dealing with consumer protection issues set standards of service delivery in order to allow for a system of regulation that is capable of defending the interests of consumers.

Most importantly, consumer protection includes the efforts of public interest organisations and of consumers themselves. Consumer organisations can play a useful role advocating for consumer interests, by examining the effects of laws and by giving objective guidance to government on the measures to be followed.

Nozipho Buthelezi, Compliance

Consent Orders

negotiated between December 2001 and January 2002

Tourvest to pay R 200 000 fine

The Competition Commission undertook an investigation into alleged non-notification and implementation of a merger between Tourvest Holdings (Pty) Ltd and Kraalkraft (Pty) Ltd.

In terms of Section 13(1) of the Act, prior to the amended act (Second Competition Amendment Act 39 of 2000) effective 1 February 2001, notification of a merger must be made to the Competition Commission not more than seven days after whichever is the earlier of:

- The conclusion of the merger agreement
- The public announcement of the proposed merger bid, or
- The acquisition by any one of the parties to that merger, of a controlling interest in another.

Therefore, in terms of Section 13(3) of the Act, prior to the amendments, the parties to an intermediate or large merger must not implement that merger until they have received approval from either the Competition Commission or the Tribunal.

Tourvest Holdings (Pty) Ltd and Kraalkraft (Pty) Ltd consequently reached an agreement with the Competition Commission, admitting to contravening the merger notification requirements as stipulated in the Competition Act.

The Competition Tribunal confirmed the consent order whereby Tourvest and Kraalkraft are liable to fines totalling R 200 000. The fine was paid to the Competition Commission on 20 February 2002.

SAFCOL's contracts anti-competitive?

The Competition Commission investigated a complaint by Mondi against SAFCOL, a supplier of saw logs in the saw milling industry, for contravening Section 5(1) of the Act.

The Commission investigated the complaint and concluded that SAFCOL had contravened the Act, as it had entered into restrictive vertical contracts for the sale of softwood saw logs from its plantations to private sawmills, York Timbers Limited and CJ Rance (Pty) Limited, and supplied its customers on terms that were different to each other. This constituted price discrimination in terms of the Competition Act.

SAFCOL has reached an agreement with the Competition Commission, admitting to committing practices prohibited in terms of the Competition Act Section 5(1). SAFCOL consented that the content of certain clauses in some of their contracts with customers were anti-competitive. Section 5(1) states: 'An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.'

These contraventions entailed entering into long-term softwood saw log supply agreements with both York and Rance, which contained provisions relating to the indefinite duration of the tenure of the contract and ineffectual price revision procedures.

Note: A Consent Order is an agreement between the Competition Commission and Parties on Prohibited Practices and Remedies.

Overview of E&E Activity

As at the end of January 2002 the Enforcement and Exemptions Division had 52 cases under investigation. Data available for 49 of these cases revealed the following when analysed:

- 71.4% of all cases under investigation relate to an abuse of dominance
- 30.6% of all cases under investigation involve horizontal restrictive practices
- 38.8% of all cases under investigation involve vertical restrictive practices. (see Table 1)

32.7% of all cases are being investigated under more than one section of the Act.

22.4% of cases have both a vertical and abuse of dominance prohibited dimension, supporting the theory that for vertical practices to have a significant effect on the level of competition, market power should be present in at least one of the relevant markets. (see Table 2)

The Enforcement and Exemption division is currently investigating an application for exemption in the financial services industry under section 10(4) of the Act. Section 10(4) allows for exemption from the Act for agreements or practices that relate to the exercise of intellectual property rights.

Ten of the Enforcement and Exemption cases are currently at the tribunal stage awaiting hearings. Six of these cases have an abuse of dominance prohibited dimension, four relate to restrictive horizontal practices prohibited, and four vertical restrictive practices prohibited.

TABLE 1. CASES PER APPLICABLE SECTION OF THE ACT

Applicable section(s) of the Act	**Number of cases**	**Percentage of total**
Section 4 – Restrictive horizontal practices prohibited	15	30.6
Section 5 – Restrictive vertical practices prohibited	19	38.8
Sections 8 and 9 – Abuse of dominance and price discrimination by a dominant firm prohibited	35	71.4

TABLE 2. MULTI-DIMENSIONAL CASES

Applicable section(s) of the Act	**Number of cases**	**Percentage of total**
Sections 4 and 5 – Restrictive horizontal and vertical practices prohibited	5	10.2
Sections 4 and 8 and/or 9 – Restrictive horizontal practices prohibited; abuse of dominance and price discrimination by a dominant firm prohibited	5	10.2
Sections 5 and 8 and/or 9 – Restrictive vertical practices prohibited; abuse of dominance and price discrimination by a dominant firm prohibited	11	22.4

Overview of M&A Activity

Forty-seven mergers were notified and finalised over the period April to June 2001 (second quarter). Most of the mergers were intermediate (68%), with large mergers making up 27% and small mergers constituting 5%. As to the type of mergers taking place over this period, 56% were horizontal, 15% purely vertical, 27% conglomerate and the remaining 2% consisted of a management buy-out and a horizontal/vertical mix. The financial services sector dominated this period, with manufacturing following in second place.

The third quarter (July to September 2001) witnessed significantly more notifications than the first or second quarters. In July there were 30 notifications and in August 26. However, September saw only 13 notifications.

At least 5 large mergers were notified over this period, the rest being intermediate.

CONTINUED ON PAGE 8

FROM PAGE 7

There were three large, high-profile mergers notified during this period:

- DaimlerChrysler/Sandown Motors
- Bidvest/Paragon
- Unilever/Robertsons Foods

The Competition Commission's decision to approve the DaimlerChrysler merger was upheld by the Tribunal. However, in a controversial ruling, the Tribunal overruled the Commission's decision to prohibit the Bidvest/Paragon merger. The Unilever merger is currently being debated in the Tribunal. Most of the mergers were horizontal. The trend for mergers in services such as financial intermediation and real estate continued.

The fourth quarter (October to December 2001) saw fewer notifications as compared to the previous quarter. In October there were 22 notifications, only 12 in November, and 28 in December. More than 35% of the cases notified in the fourth quarter are currently under investigation.

As these cases have not been finalised, no report is available and therefore the information contained in Table 1 is based on a sample of finalised cases. These figures will change.

TABLE 1. FINALISED CASES FOR THE LAST THREE QUARTERS OF 2001: A COMPARISON

	Quarter II	Quarter III*	Quarter IV *(Provisional)*
Classification			
• Large	27%	30%	23%
• Intermediate	68%	70%	77%
• Small	5%	0%	0%
Type			
• Horizontal	56%	64%	36%
• Vertical	15%	6%	15%
• Horizontal/Vertical	1%	2%	7%
• Conglomerate	27%	25%	35%
• Management buy-out	1%	3%	7%
Sectors			
• Manufacturing	22%	20%	31%
• Wholesale and retail trade	14%	17%	7%
• Financial intermediation, insurance, real estate	54%	44%	24%
• Transport, storage and communication	10%	8.5%	0%
• Mining and quarrying	0%	4.5%	0%
• Agriculture, hunting and related services	0%	3.5%	16%
• Community, social and personal services	0%	2.5%	7%
• Post and telecommunications	0%	0%	15%

*Figures based on a sample study

Commission Cases

Commission recommends that the Saldanha-Iscor deal go ahead

The Competition Commission has recommended the unconditional approval of the large merger between Iscor Limited and Saldanha Steel (Pty) Ltd.

This transaction, valued at approximately R181 million, forms part of the restructuring of Iscor, which will result in Iscor holding mainly iron and steel manufacturing operations after the restructuring process.

Iscor, a public company listed on the JSE, is a metals and minerals resources company producing and marketing flat and long steel products, iron ore, coal, base metals and industrial minerals. Saldanha Steel, a private company owned by Iscor (49,95 %), the Industrial Development Corporation of SA Limited and Pybus Fifty Seven (Pty) Ltd (0,05 %), is a state-of-the-art steel mill, which focuses solely on export, producing only two types of flat steel: hot rolled coil and ultra-thin hot rolled coil.

The proposed transaction will result in Saldanha Steel becoming a wholly owned subsidiary of Iscor.

Although a product overlap occurs in the manufacturing of hot rolled coil steel, and although these parties are only one of three national participants who manufacture this product, the Competition Commission decided that it is unlikely the proposed merger will substantially prevent or lessen competition. The reason for this is that at present Saldanha Steel does not serve the national market. Accordingly, no geographic market overlap occurs which would raise any competition concerns.

Shell/Tepco merger approved on public interest grounds

The Competition Commission has recommended to the Competition Tribunal that the large merger between Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd, be conditionally approved.

Shell, involved in the manufacturing and sale of petroleum and petroleum products directly and indirectly through subsidiaries and franchise outlets, is to purchase Tepco and absorb Tepco into its operations.

Tepco, owned by Thebe Investment Corporation, is an independent empowerment firm that markets and distributes petroleum and petroleum products.

In terms of the proposed merger, Shell is to purchase and absorb Tepco into its operations. In return, Thebe will acquire a 17.5% share in Shell Marketing, a holding company that retains Shell downstream petroleum activities including the marketing, wholesale and retail of petroleum products.

With the elevation of any merger, the Competition Commission considers possible competition concerns and efficiencies that may arise, as well as public interest concern issues.

It was the Commission's view that this proposed transaction will not raise competition concerns. However, the Commission found that the wholesale acquisition of Tepco by Shell would result in the removal of an independent firm owned and controlled by historically disadvantaged individuals. Furthermore, the proposed merger would not advance the ability of a firm (Thebe) owned by historically disadvantaged individuals to become competitive.

For this reason, the Competition Commission recommended approval of the transaction to the Competition Tribunal, on condition that Tepco remain an independent company that may be jointly controlled by Thebe and Shell, and that the Tepco brand be maintained to assure independence.

This recommendation was significant, as, for the first time in its two years of operation, the Commission considered "substantial public interest" grounds for recommending conditional approval.

Consequently, both Shell and Tepco appealed to the Competition Tribunal regarding the Commission's conditional merger approval. Although new evidence pertaining to the application for this merger has come to light, the Commission reaffirmed its original recommendation to the Competition Tribunal. The Tribunal however, approved the merger unconditionally.

Commission recommends conditional approval of Unilever and Robertson merger

In October 2000, Unilever acquired the business of Bestfoods worldwide. The only presence Bestfoods had in South Africa was through a joint venture with Robertsons Holdings, which is part of the Remgro group of companies. The joint venture company in turn has, amongst other subsidiary companies in the world, two wholly owned South African subsidiaries, namely Robertsons Foods (Pty) Ltd ("Robertsons Foods") and Robertsons Food Service (Pty) Ltd ("Robertsons Foodservice"). In terms of the merger, Bestfoods licenses its products to Robertsons Foods which manufactures products on behalf of the joint venture and which is responsible for the distribution, marketing and sale of the products within South Africa. Bestfoods does not import products into South Africa, but simply licenses the know-how and technology to the joint venture.

Key Unilever brands within the processed food industry include Royco (soups, sauces, mixes, etc.) and Oxo (black spreads). Robertsons, also in the processed foods market, has amongst its key brands Knorr (soups, sauces, etc.), Marmite and Bovril (black spreads)

The competition analysis identified serious competition concerns in a number of product markets: packet soup, soya mince, Sishebo mixes, salad dressing, recipe mixes, dry marinades, pour-over sauces, dry pasta sauces, instant soups and black spreads. It revealed that there is a very high level of concentration within these product markets, as in all markets one of the two brands, Royco and Knorr, is dominant, with the exception of black spreads which are branded differently.

The high levels of concentration will not be offset by any pro-competitive factors, including significant countervailing power. Furthermore, significant barriers to entry exist, in the form of access to retailers; distribution and merchandising; branding and the portfolio of products.

CONTINUED ON PAGE 10

FROM PAGE 9

Although countervailing power exists to a limited extent in the retail food market, the Commission is of the opinion that it is not sufficient to promote competitive outcomes and curb the exercise of market power that the merged entity will have.

Furthermore, the merged entity will gain control and ownership over the two most dominant brands in the market, Knorr and Royco. These two brands are known to be intense competitors in the market. From its marketing campaigns and interviews with competitors and customers at the wholesale and retail level, it is clear that Robertsons is an aggressive player. The merger is, therefore, likely to have a significant effect on competition.

As required by the Act, the Commission further reviewed efficiency claims and pro-competitive benefits. In addition, the Commission considered whether the merger can or cannot be justified on public interest grounds. No substantial public interest issues were identified, which could justify the merger.

The Commission has concluded therefore, that, given the high combined market shares and dominance of the parties in the nine relevant markets identified by the Commission, together with the fact that barriers to entry are high and countervailing power is not sufficient to promote competitive outcomes, the merger, as currently proposed, would lead to a substantial lessening or preventing of competition in the market.

The Commission further considered whether any remedies could be imposed that would alleviate the competition concerns. The parties made certain proposals to the Commission with a view to lessening the anti-competitive effects of the transaction. The Commission, after receiving the proposals, was not satisfied that the anti-competitive effects or concerns would be resolved. Unifoods would retain dominance in all of the nine markets identified.

As a result, agreement on the remedies was not reached between the parties and the Commission. The Commission therefore recommended that:

- Unifoods divest of the whole product portfolio currently marketed under the Royco and Oxo brands, including the sub-brands
- The divestiture be to a viable third party, approved by the Commission
- The divestiture take place within six months of the Tribunal's decision if the merger is approved.

Hearing regarding the Confidentiality Claims

During the Tribunal hearing, parties wanted access to information from the Competition Commission. The Commission refused to provide access without proper application in terms of Section 45 of the Competition Act. In addition, the Competition Commission could not give access to such information, because the Commission is bound by the Confidentiality Claim in terms of Section 44(2).

Both the Competition Commission and the respondents agreed to a pre-hearing at which the argument would be presented to the Tribunal to adjudicate on this matter.

On 18 January 2002, the matter was argued before the Tribunal and the Tribunal ordered that the Competition Commission give the parties access to the confidential information.

The Competition Commission appealed this decision to the Competition Appeal Court.

The Competition Appeal Court made the following Order:

The Order of the Competition Tribunal dated 18 January 2002* was set aside and the Competition Commission should provide the entire record of proceedings in the Unilever-Robertson merger to the parties. "Only the legal representatives of the parties will have access to the confidential information", so claimed. Such access is limited to the said representatives attending the offices of the Commission, no copies are to be provided and no reproduction of such documents is allowed. The access is to enable the legal representatives to decide whether or not they wish to make an application in terms of Section 45 to have such access to the confidential information.

In addition, the legal representatives are to make undertakings to the Commission in respect of keeping the information confidential. If the parties wish to make an application to the Tribunal to have access to the confidential information in terms of Section 45 of the Act, a copy of such an application must be served on the parties who make the confidentiality claims. The Application in terms of Act 45 was made as quoted.

*The content of the Order of the Competition Tribunal dated 18 January 2002 was as follows:
1. The Competition Commission must give the parties' legal advisors access to the full record that has been supplied to the Tribunal in connection with the merger, including all information claimed as confidential, by Monday 21 January 2002 at 12:00.
2. The legal advisors must give confidentiality undertakings to the Commission prior to being granted access.
3. If the merging parties wish to expand the class of persons to whom access to confidential information should be afforded, or if they wish to contest confidentiality claims, they must do so at the next pre-hearing.
4. The Commission will furnish the confidential version only of its recommendations to FAWU.

Commission prosecutes Sappi for abuse of dominance

The Competition Commission filed a complaint referral with the Competition Tribunal against Sappi Fine Papers (PTY) Ltd (Sappi). Sappi, manufacturers and providers of coated and uncoated paper products, has at least 45% of the market share and is therefore dominant in this sphere.

The referral pertains to the fact that Sappi is in contravention of section 8(d)(iii) of the Competition Act 89 of 1998. Sappi is refusing to supply Papercor with paper unless Papercor pays all costs in respect of the Interim Relief application to the Tribunal by Papercor against Sappi. In terms of the Act it is prohibited for a dominant firm to engage in exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act. In this instance, Sappi contravened section 8(d)(iii) of the Act, which states:

"…selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of that contract..."

Sappi has insisted that Papercor pay its costs in respect of the Interim Relief application and it is the view of the Commission that this conduct amounts to nothing less than forcing a buyer to accept a condition unrelated to the object of the contract.

The Commission has recommended that the Competition Tribunal imposes an administrative fine of up to 10% of the annual turnover of the Respondent, the maximum penalty allowable, for the period from 1 September 1999 until the date upon which the Tribunal makes a declaration order in terms of the prohibited practice conduct of Sappi.

Commission grants five-year exemption to Ring Pharmaceutical Distributors

The Competition Commission granted Ring Pharmaceutical Distributors (Ring) a five-year exemption in terms of section 10(2)(a) of the Competition Act (No. 89 of 1998).

Ring is essentially a buying group, that through its buying power, is able to negotiate the best prices on certain pharmaceutical products from pharmaceutical manufacturers. The Ring group currently comprises 33 pharmacies, all of which are operating in Pretoria's greater Tswane metropolitan area. They are individually owned small pharmacies that formed a buying group in order to compete with the other more established and larger pharmacies.

The applicant averred that in order for it to succeed as an SME it requires the benefit of not only buying the products in bulk but also marketing them through central advertisements, which amounts to fixing prices. The grounds for the application is section 10(3)(ii) of the Act, i.e. the practice is required to promote the ability of small business, or firms controlled or owned by historically disadvantaged persons, to become competitive.

In terms of the Act, section 10 (3)(b), exemptions may be granted after consideration of any one of the following four objectives of the Act:

- Maintenance or promotion of exports
- Promotion of the ability of small business, or firms controlled or owned by historically disadvantaged persons, to become competitive
- Change in productivity capacity

necessary to stop decline in an industry
- The economic stability of any industry designated by the Minister of Trade and Industry after consulting with the Minister responsible for the industry.

Ring was previously granted permanent exemption by the Minister of Trade and Industry on the recommendation of the erstwhile Competition Board from certain of the provisions of Government Notice 801 published in Gazette 10211 of 2 May 1986.

The basis for the exemption was that it permitted small retail pharmacies to compete effectively in the market, which was at that time dominated by large vertically connected groups.

However, in terms of the transitional arrangements contained in the Competition Act, No. 89 of 1998, this exemption lapsed on 31 August 2000. Also, in terms of the Competition Act, the exemption may only be granted for a specified period - in this instance for five years and in terms of the above objectives.

During the previous exemption, the number of Ring pharmacies has grown from 10 to 33, indicating the need for a further exemption, as this would provide an opportunity for more growth for small and medium enterprises.

The Commission's decision of granting the exemption for only five years is also in light of anticipated changes in this very dynamic sector of the economy.

International News

Mario Monti on the convergence of EU and US antitrust policy

In a speech at the General Council Roundtable of the American Bar Association in Washington DC in November 2001, Mario Monti, European Commissioner for Competition, analysed the convergence and divergence between European competition policy and United States antitrust policy. Mr Monti stated from the outset that US antitrust law had a profound influence on the early development of competition policy in Europe.

US and EU merger control laws are phrased differently. The tests could have widely differing outcomes. However, the economic rationale underpinning merger control by authorities and courts is very similar. The European Commission's body of precedent shows a coincidence of analysis with the US interpretive precedent. The seemingly different tests are used in similar ways.

On horizontal mergers, the EU and US converge on the analytical paths taken to

evaluate the effect on competition. Where different conclusions are reached in the different jurisdictions, it is generally because the merger would have different effects in different jurisdictions.

On the issue of competitive concerns due to collective or oligopolistic dominance and the likelihood of coordinated interaction, the EU and US are mainly in agreement. Another subject where the EU and US share a common approach is that of vertical mergers.

The divergent approach by the EU and US to the GE/Honeywell deal received a lot of attention, as being indicative of the differences in approach by the EU and US agencies. Mr Monti stated that he does not believe the rift between the EU and US agencies to be wide at all.

He states: 'Conglomerate mergers will raise concerns when they make it possible that the merged entity leverages its market power with the effect or object to foreclose or several markets from effective competition. These foreclosing practices, which are not based on normal business performance or 'competition on the merits', may substantially reduce consumers' choice and ultimately lead to higher prices and a loss of welfare.'

The existence of pre-merger market power or dominance in at least one of the products concerned is therefore a necessary condition for the likelihood and profitability of leveraging practices.

Remedies for merger transactions is another area where convergence is witnessed. The new EU approach to remedies has been strongly influenced by the Federal Trade Commission's study on the divestiture process. The European Commission is also moving closer to the US approach to failing firm defences.

On antitrust policy in general, both the EU and US agencies have adopted an economic approach and both have identified certain unacceptable practices. The EC hardcore list is, however, longer than the US *per se* list. This is mainly due to the specific market integration goal inherent in EC competition policy, one of the main areas of divergence between the EU and US legal systems. The EU and US also converge on the issues of cartels, leniency policies (where the EC is leaning more towards the US) and abuse of dominance or monopolisation.

The EU and US legal systems increasingly converge in substantive issues. However, substantial differences prevail with regard to the applicable procedures. These differences are mainly due to different institutional and legal frameworks.

A major difference between the two jurisdictions is on the issue of State Aid Control policy in Europe.

Mr Monti concluded that perfect convergence would never be achieved in a multi-polar world composed of sovereign jurisdictions, but that co-operation and dialogue are important in reducing the incidence of divergent and incoherent rulings.

Lizel Blignaut, Policy and Research

United Nations Conference on Trade and Development

In October 2001 the United Nations Conference on Trade and Development (UNCTAD) held an Expert Meeting on Consumer Interests, Competitiveness, Competition and Development in Geneva. The Expert Meeting gave rise to exchange of expertise and experiences concerning the relevance of competition and consumer policies for enhancing competitiveness in developing countries and economies in transition.

The discussions covered experiences relating to globalisation, competition, competitiveness and consumer protection; national competition law and policy; regulation and consumer welfare; and public policy and capacity building for rule making and enforcement.

One matter at issue that came to the fore was that market-oriented economic reforms should increase competition and serve consumer interests - which in many cases did not happen. Foreign firms often took advantage of liberalisation - by dumping substandard products in developing countries - and of weak governments, by monopolising markets. Competition rules and enforcement would ultimately benefit consumers and it was urged that appropriate legislation be adopted. It is, however, not sufficient to merely adopt legislation: countries have to be able to properly enforce it.

The consumers that suffered most from market failures and distorted information were the illiterate and poverty-stricken in developing countries.

Effective competition policy could benefit consumers indirectly, but consumer protection rules are necessary to take care of consumers' immediate concerns. Competition law and consumer protection share the same goals, namely the defence of consumer interests, and are compli-mentary policies, particularly in developing

CONTINUED ON PAGE 14

FROM PAGE 13

countries where large parts of the population could not automatically benefit from competition policy.

The Expert Meeting noted that properly implemented competition and consumer policies could make a key contribution to competitiveness and development.

Lizel Blignaut, Policy and Research

International Competition Network (ICN)

The belief that international antitrust co-operation and sound antitrust enforcement can be improved with the creation of a new vehicle for antitrust authorities to work together, has led to the creation of the International Competition Network (ICN). The ICN was launched at the Fordham Corporate Law Institute's annual international conference in October 2001. The ICN will provide antitrust agencies with a more focused network for addressing practical antitrust enforcement and policy issues of common concern. By enhancing convergence and co-operation, the ICN will promote more efficient antitrust enforcement worldwide.

The ICN was born from the recommendations of the International Competition Policy Advisory Committee (ICPAC). ICPAC focused on issues like multi-jurisdictional merger review, the interface between trade and competition, and future co-operation between antitrust agencies.

One of ICPAC's recommendations was the creation of a Global Competition Initiative where government officials, private firms and non-governmental organizations could consult on antitrust matters. In February 2001, 40 of the world's senior competition officials met in Ditchley Park, England, to discuss the way forward. The discussions gave support to the idea of establishing a new organization directed exclusively at international antitrust enforcement.

Membership to the ICN is open to any national or regional competition agency responsible for the enforcement of antitrust laws. The ICN will be flexibly organized around its projects. A steering committee, which will identify projects, will guide the work and devise work plans for approval of the ICN as a whole.

The ICN will initially work on the merger control process in the multi-jurisdictional context and the competition advocacy role of antitrust agencies.

The ICN will host one official conference per year, with the first conference to be hosted by the Italian Antitrust Authority in Italy in mid-2002. Thereafter annual conferences will be held in Mexico, Korea, Germany and South Africa.

Lizel Blignaut, Policy and Research

> *"The ICN will address complex issues and newly established competition authorities will no doubt benefit from the collective experience of other member agencies."*

David Lewis, member of the interim steering committee and Chairperson of the SA Competition Tribunal.

Analysis of Trade Union involvement in M&A cases

In terms of the Competition Act, Trade Unions may participate in transactions. Therefore, in cases where unions represent a substantial number of employees, it becomes compulsory for the merging companies to notify the union of the proposed transaction.

When Trade Unions file their 'intention to participate' notice, CC5(1), it entitles them to become a recognised participant in that particular merger/case with the Competition Commission.

To assist the Trade Unions understand the provisions of the Competition Act and their right to information, the Compliance Division has held a number of presentations and training workshops.

The focus for the next financial year will be on training Trade Union officials and their members to prepare submissions either in favour of, or against, proposed transactions. Relevant information can be obtained by contacting the Commission's Labour Liaison Officer, Ms Rhorho Cloete, at 012 482 9069.

The table below illustrates the level of participation by Trade Unions in merger cases thus far. During the period April - December 2001, the Commission was notified of 178 cases, of which 93 had Trade Union involvement.

Trade unions participated in approximately 60% of merger cases (56 notices in respect of 93 cases involving Trade Unions). The parties notified the 238 Trade Unions and the Competition Commission made follow-ups with all the unions that were affected.

Rhorho Cloete, Compliance

Month	Number of Cases	Number of Cases with TUs	Number of Cases without TUs	TU Participation	TU Participation Percentage
April 2001	14	8	6	4	50%
May 2001	23	10	13	7	70%
June 2001	10	7	3	3	42%
July 2001	30	10	20	4	40%
August 2001	26	12	14	5	41%
September 2001	13	8	5	6	75%
October 2001	22	16	6	9	56%
November 2001	12	8	4	5	62%
December 2001	28	14	14	13	92%
TOTAL	178	93	85	56	60%

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 rules and amendments to the Act. You may also forward enquiries, comments and letters to:

THE EDITOR
Compliance Division
Private Bag X23
Lynnwood Ridge
0040

Email: CCSA@compcom.co.za
Tel: (012) 482 9000
Fax: (012) 482 9003

Competition News is issued quarterly and if you would like to receive future copies, please forward your particulars to enable us to add your details to the distribution list.

Towards a free and fair economy for all

THE BRYAN SLINGERS PARTNERSHIP COM21852