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An Overview of the WTO's 6th Ministerial Meeting in Hong Kong

Introduction

The Ministerial Conference is the highest authority and decision-making body in the WTO, meeting biennially to negotiate all matters under multilateral trade agreements. The Hong Kong Ministerial Conference, which was held in December 2005, is the 6th ministerial conference of the WTO. It follows the 2003 ministerial conference in Cancun, where it was expected that all members would reach consensus on how to complete the remaining agreements of the Doha Development Agenda. The Cancun meeting, however, failed to achieve any progress in the negotiations, mainly because of discord created by agricultural issues. It also ended in deadlock on the Singapore issues. The original 2005 deadline set for the completion of the agreements was missed and ever since, the Doha talks have largely been stalled. This paper seeks to present an overview of the ministerial conference held in Hong Kong.

The Road to Hong Kong

The negotiations of the ministerial conferences of the WTO are divided into "rounds". The present round of negotiations is called the Doha Development Agenda ("DDA"), which includes negotiations that aim to lower barriers to trade around the world, with the main focus on development and making trade fairer for developing countries. The core issues of the DDA negotiations

generally cover agricultural issues, non-agricultural products and services, with agriculture being the most significant issue upon which agreement has been the hardest to negotiate.

The outcome of the Cancun ministerial was probably one of the biggest failures of the WTO. The ministerial was characterised by conflict, particularly between the developed and developing nations, and eventually the ministerial broke down mainly because of the disputes on the agricultural issues and deadlock over the Singapore issues. The divergence on agriculture included the same issues i.e. subsidies, domestic support and market access. With regard to the Singapore issues, the Doha mandate called for WTO members to consider negotiations on four issues i.e. investment, competition, trade facilitation and transparency in government procurement in Cancun.

Of interest to the Competition Commission with regard to the Singapore issues were the developments of the Competition Policy in the Doha Round. Competition Policy was introduced in the Doha agenda after the 1996 Singapore Ministerial Declaration called for the establishment of a working group to formally examine the relationship between trade and competition policies. Although most members had acknowledged the strong relationship between trade and competition, there was a great deal of controversy on whether or not measures should be taken to create a multilateral set of rules governing competition regulation.

The developed countries pressed for international standards of competition policy, arguing that unfair competition distorts trade, whilst developing countries were divided on the issue, with some countries favouring such a policy, while others were less enthusiastic. As mentioned earlier no progress emerged on Competition Policy and other Singapore issues.

Nevertheless, subsequent to the Cancun disasters, it took several months for the negotiators to get back to the negotiating table and resume the dialogue. The resumed negotiations ultimately produced the so-called "July Framework" in July 2004, wherein the WTO members agreed to put the Doha negotiations back on track and also outlined the negotiating road to be followed towards Hong Kong. Of significance, the July Framework revived efforts to eliminate agricultural subsidies, and as there was still no consensus on the Singapore issues, the members settled to proceed the negotiations in only one subject; trade facilitation. The other three were dropped from the Doha agenda.

Unfortunately, the enthusiasm created by the July Framework proved short-lived, and progress on the Doha round was once again stalled. Deep divergences among developed and developing members on key negotiating issues continued. The complexities were also evident from the fact that the WTO July General Council meeting concluded without issuing the draft ministerial text. Some progress emerged when the newly elected Director-General of the WTO Pascal Lamy came out with a draft ministerial text for discussion at the Hong Kong ministerial at the eleventh-hour, introduced on 26 November 2005 in Geneva. However, the release of the much-anticipated text did not mean that the deadlock over agriculture and other issues had been resolved, as generally, members were still at loggerheads over the issues.

The Hong Kong Ministerial

The main task before members in the Hong Kong ministerial was therefore mainly to settle a range of pending issues that will shape the final agreement of the DDA, which is hoped to be completed at the end of 2006. It was critically important that it put into action the developmental undertakings of the DDA to make the multilateral trading system work for the poorest countries.

The ministerial opened for talks on 13 December 2005, amid violent demonstrations by thousands of protesters denouncing the WTO. The ministerial also began on a pessimistic note. Before its commencement, there was enormous scepticism as to whether it would achieve anything at all, and expectations were low with regard to the core areas of the Doha. However, unlike other ministerials, which have failed, the outcome of the Hong Kong ministerial proved a modest success. The biggest achievement is that the talks did not collapse and at least certain agreements were reached. The main issues for discussion before the ministerial included agriculture, non-agricultural market access and services. These are discussed below.

Agricultural Issues

Agriculture remains the thorniest issue of the Doha negotiations and has been for the most part the cause of discord between members, and the failure of the WTO ministerials. The main points of contention on agriculture are three issues, which generally form part of the agricultural policies of the developed nations. Firstly there is the issue of market access, which concerns tariffs and quotas that countries maintain on agricultural imports. Secondly, it is believed that the domestic support in the form of subsidies given to agricultural farmers have the potential to distort trade flows by reducing imports below levels that would normally occur. Third are the export subsidies that affect export competition in that they affect the pricing of goods in the international market.

The developing countries have since the beginning of the negotiations been opposed to the agricultural polices held by the developed nations as explained above. The main argument raised by the developing countries, is that excessive subsidies lead to massive over production, which is then dumped on world markets, leading to big distortions in the world prices of agricultural products and damaging developing country agriculture. Despite this contention, well developed nations continue to maintain their agricultural policies.

Although members had generally agreed on eliminating agricultural subsidies, they

continued to be divided on the approach to achieve this. For instance, members were divided on how deeply to cut farm tariffs, how many products to exempt from reductions, and whether and how to set tariff ceilings on agricultural products. Similarly there were disagreements as regards the deadline for elimination of agricultural export subsidies.

Nonetheless, the Hong Kong ministerial saw modest progress being reached as regards agricultural subsidies. A major step forward has been the agreement for the end of all farm export subsidies by 2013. An elimination of subsidies to cotton exporters by 2006 was also agreed upon. Very little progress was made in the area of domestic support, although it is hoped that attention will switch to this area in the next few months, if an agreement on market access can be reached.

Although the elimination of subsidies was hailed as a step forward, some regard it as imbalanced, as generally the export subsidies are insignificant when measured against the domestic subsidies offered by the developed nations. For example, the domestic support in the EU amounts to 55 billion euros, while export subsidies amount to 3 billion euros. Third World Network argued that the ending of direct export subsidies does not necessarily mean the end of these, as a large part of domestic subsidies enter into exported products. Ultimately, unless domestic subsidies are cut, export subsidization will continue even after the elimination of export subsidies in 2013. It would have been more meaningful if there had been an agreement leading to substantial cuts in total domestic subsidies.

Non-Agricultural Market Access

Non-Agricultural Market Access ("NAMA") refers to the negotiations, which focus on market access for non-agricultural products; basically all products that are not covered by the agriculture negotiations or the services negotiations. The aims of the negotiations in this area are the reduction or elimination of tariffs, including the reduction or elimination of tariff peaks, high tariffs, tariff escalation, as well as non-tariff barriers.

A structure of the NAMA was adopted in the July Framework, which largely included a compilation of proposals, providing the modalities to reduce industrial tariffs in both developed and developing countries. The several proposals by members included linear formulae wherein tariffs would be cut by a certain rate, and non-linear formulae, which would reduce higher tariffs by greater rates, and therefore bring harmonisation both across countries and tariff lines.

However, members continued to be divided over the kind of formulae to apply to tariff reductions, and the sort of flexibility to be provided to developing countries. On the one hand, were the proposals by developed countries for extensive tariff liberalisation from developing countries, whilst on the other hand the developing countries contested that the demand by developed countries for extensive opening to imports would destroy domestic businesses and jobs, without bringing compensating economic gains.

Well, the Hong Kong ministerial saw a huge compromise on the part of developing countries, when members agreed to the adoption of the Swiss formula, to be used to cut industrial tariffs. At the heart of this compromise, is that the formula would cut higher tariffs proportionally more than lower tariffs, penalizing mainly developing countries since to build up their industrial sectors, they generally maintain higher industrial and manufacturing tariffs than developed countries.

Most of these countries may be forced to more extreme forms of liberalisation as drastic cuts in their industrial tariffs may lead to the collapse of local industries, de-industrialisation and massive job losses, contrary to the development intent of the DDA. Many attribute this concession by the developing countries to the developed nations' (in particular the EU) aggressive efforts to get them to agree to their service and NAMA proposals, in return for agricultural subsidies.

Services

Services negotiations of the WTO fall under the General Agreement on Trade in Services ("GATS"). GATS places over 160 services sectors on the table for liberalisation, and proposes that countries adapt national laws to permit foreign service-providers' access to local markets as domestic service-providers. In previous negotiations, safeguards were put in place in the GATS to protect members' interests. Countries could table fewer sectors for liberalisation in line with their policies and their stage of development. This was in light of the main concern that countries could be pressurized into commitments that will impact on the ability of their governments to regulate and ensure affordable and equitable access to essential services.

The main issue of contention with regard to services negotiations is that there have been proposals by the developed countries to shift the original approach of the GATS, wherein the one with a mandatory element would replace the initial flexible "request-offer" approach. With the request offer approach a government was free to request another to open up several service sectors, but the requested government was also free to offer only those it is willing to open up or even not to make any offers at all.

The new proposals outlined in the services annex to the initial draft ministerial text, called on countries to expand the request-offer process through the introduction of mandatory plurilateral negotiations and commitments such as enhancing foreign ownership rights. The deal was pursued most aggressively by developed countries, which sought to remove this flexibility by demanding benchmarks to evaluate the quality of the offers on the table, and to ensure that all countries make commitments. This clearly threatened the flexibilities in the GATS.

The above developments in services highlighted an unsettling abuse of the WTO process, as despite vocal resistance from a majority of developing countries, the final text released for discussion at the ministerial meeting contained the Annex

that contained the plurilateral proposals. This enraged a number of governments who opposed these measures. Their attempts to offer substantial alternative proposals with more emphasis on development concerns in general, and also deleting the possibility of plurilateral negotiations, were largely ignored.

In the end, the developing countries that had originally been opposed to such prescriptive and mandatory language in Annex, eventually gave in to a firm position held by the developed nations. While they might have succeeded in weakening the mandatory and prescriptive language of the text, and preserving the request-offer approach, the final Ministerial Declaration provides for the process to be pursued on a plurilateral basis. With the plurilateral approach, which will incorporate sectoral and modal approaches, developing countries face increased pressure to take part in plurilateral negotiations. The text also aims for new qualitative benchmark such as enhancing levels of foreign equity participation, designed to encourage countries to open up new service sectors. The text also contains some firm deadlines: the plurilateral requests must be submitted within two months (28 February 2006 or as soon as possible thereafter), to which countries are obliged to respond by 31 July 2006. The final draft schedules of commitments are to be submitted by 31 October 2006. This unfortunately means that the developing countries face increased pressure to liberalize their services faster with little attention to development concerns.

Conclusion

Undoubtedly, the outcome of the Hong Kong ministerial was a modest success compared to the preceding ministerials. The biggest achievement is that the ministerial did not collapse, as another collapse after Cancun and Seattle would have been disastrous for the multilateral trading system. What was at stake in Hong Kong was the institutional survival of the WTO. At the very least, that has been salvaged.

Generally, the ministerial yielded some constructive progress in the core areas of the DDA, though the final effect of the negotiations is still in question. The developmental intent of the WTO still remains questioned by a large number of people, as there is widespread criticism on the final draft ministerial as it currently stands. Whether or not the conclusions reached at the Hong Kong ministerial were vague promises of development, remains to be seen. Ultimately, it is imperative for the WTO members to make substantial progress by the first half of 2006 so that a final agreement can be concluded by the end of that year. It is hoped the final agreement will pave the way for a global free trade; and eventually the commencement of the new round of talks, which would hopefully revive some of the dropped Singapore issues such as Competition Policy.

Contributed by: Mapato Rakhudu, Policy & Research Division

What is Meant by "Creeping Mergers"?

Introduction

A merger that increases the level of concentration in a market may reduce competition by increasing the market power of the merged firm and/or increasing the scope for coordinated conduct among the remaining competitors. In many situations, acquisition of a small market player, resulting in a small increase in concentration, will have little effect on competition. However, in some instances, a small acquisition may form part of a pattern of creeping mergers, which have a significant cumulative effect on competition.

The term 'creeping mergers/acquisitions' is generally used to describe the acquisition of a number of individual assets of another business or several smaller businesses over time that may have a cumulative effect upon the acquiring firm's market share and industry concentration. In layman's terms, the issue is similar to the impact that the loss of an individual hair has on baldness. Clearly no single hair can be sufficient to make the difference between being bald and not being bald; but if so, and if hairs can be removed individually, then baldness is impossible![1] The challenge here is that no single acquisition would result in a substantial lessening of competition, thereby ducking imminent competition scrutiny, particularly as the acquisitions are spread out in time and space.

Creeping mergers: Dominance v. SLC test

In the scenario of creeping mergers there might be a difference between the ultimate

1 Allan Fels, Chairman, ACCC, 2003, "A Small Business Friendly Trade Practices Act", Speech to the Council of Small Business Organisations of Australia

outcome of applying the substantial lessening of competition (SLC) test or the dominance test.

In certain circumstances, a series of small mergers or creeping mergers can be difficult to address under the SLC test. This is because creeping mergers are only ever likely to increase the market power on an incremental basis and therefore it becomes difficult to observe and quantify which incremental acquisition resulted in the substantial lessening of competition.[2] A gap in coverage between the two tests could emerge if the mergers gradually increased the weight of a firm that initially was not dominant. At some point, one of the mergers would presumably be sufficient to create a dominant position and so be blocked under a dominance test.[3]

That said, in such a hypothetical situation, the specific market structure and conditions and the freedom of interpretation of the antitrust authority may be more influential than the question of which test is applied.[4]

International treatment of Creeping Mergers

The treatment of Creeping Mergers in the European Union

The European Commission Merger Regulations (ECMR) recently underwent a comprehensive review process. In January 2004, the EC Commission published it's revised text for the EC Merger Regulation, and an associated set of enforcement guidelines on the analysis of horizontal mergers.[5]

The ECMR apply to mergers, acquisitions, and other forms of concentration that bring about a lasting structural change in control. However, the new ECMR clarify the types of transactions that fall within its scope. In addition to (de)mergers, acquisitions and full-function joint-ventures, the regulations now capture interrelated transactions such as creeping mergers, conditional or staggered transactions. The Commission will treat those transactions that take the form of a series of transactions taking place within a two-year period as a single concentration. Various types of transactions can be identified as falling within this category:[6]

- acquisition of control through a public bid;
- acquisition of control of an undertaking through the gradual acquisition of shares;
- acquisition of control from various sellers through a series of transactions in securities;
- exchange of assets between two or more undertakings, regardless of whether these constitute legal entities; and
- acquisition of joint control of one part of an undertaking and sole control of another part.

The treatment of Creeping Mergers in Australia

The Australian Competition and Consumer Commission (ACCC) considers all merger factors, and where a proposed acquisition is likely to contravene section 50 of the Australian Trade Practices Act 1974, the ACCC will act to intervene even if the target's market share is small, or the commercial value of the proposed transaction is low. Section 50 generally prohibits mergers or acquisitions that would substantially lessen competition.[7]

The Australian Merger Guidelines of 1999 stipulate that:

"The initial acquisition may not raise substantial competition concerns, and each incremental acquisition may not give rise to a substantial lessening of competition in its own right. However, collectively the acquisitions may give rise to competition concerns and may eventually deliver control of the target company. The Commission considers that the Act may apply to such creeping acquisitions".

To ensure dependability and fairness in this process, the Commission's approach is to examine closely the circumstances of each case.[8]

A Charter under which major retail chains Metcash, Woolworths and Coles will not be able to limit the ability of independent supermarket retailers to seek alternative purchasers for their stores, commenced in July 2005. ACCC Chairman, Mr Graeme Samuel envisages that the charter will benefit consumers by promoting competition in the supermarket sector, particularly by helping to address concerns about creeping mergers. "It will ensure that independent supermarket owners are able to achieve the highest possible price for their stores via an open bidding process. It will also ensure that each of the major supermarket players has a fair opportunity to acquire independent supermarkets as they come up for sale".[9]

Whilst attempts have been made to address creeping mergers in the supermarkets industry, the general issue of creeping acquisition still raises a problem for the ACCC. It is not clear at which point the ACCC can or should view such a small and often insignificant event in its wider context.[10]

2 OECD, 2003, "Substantive criteria used for the assessment of mergers", DAFFE/COMP(2003)5
3 Ibid
4 OECD, 2003, "Substantive criteria used for the assessment of mergers", DAFFE/COMP(2003)5
5 DG COMP, 2004, Commission Notice – Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings
6 Maudhuit and Soames (1, 2), 2005, "Changes in EU Merger Control: Part 3", European Competition Law Review,
7 Greame Samuel, Chairman, ACCC, 2003, "Competition and the nation's supermarket trolley: A perspective of the Australian Competition and Consumer Commission", Speech to the Food and Grocery Council of Australia Canberra
8 Greame Samuel, Chairman, ACCC, 2003, "Competition and the nation's supermarket trolley: A perspective of the Australian Competition and Consumer Commission", Speech to the Food and Grocery Council of Australia Canberra
9 ACCC News Releases, 2005, "ACCC announces charter to promote competitive sales of independent supermarkets", http://www.accc.gov.au/content/index.phtml/itemId/694509
10 Allan Fels, Chairman, ACCC, 2003, "A Small Business Friendly Trade Practices Act", Speech to the Council of Small Business Organisations of Australia

The Review of the Competition Provisions of the Trade Practices Act[11] (the Dawson Review) considered the issue of creeping mergers in detail and concluded that the Act, in its present form, is adequate to consider creeping acquisitions insofar as they raise questions of competition[12]. Subsequent to the Dawson Review, the Senate passed a motion requiring the Economics References Committee to inquire into and report on 'whether the Trade Practices Act 1974 adequately protects small businesses from anti-competitive or unfair conduct'. The Senate Committee's report was tabled on 1 March 2004.[13]

Some submissions to the Senate Committee raised concerns that the prohibition on anti-competitive mergers in section 50 of the Act may not be capable of addressing the cumulative effect of creeping mergers on competition in the relevant market.[14] In particular, the Committee considered that provisions should be introduced into the Act to ensure that the ACCC has powers to prevent creeping mergers, which substantially lessen competition in a market.[15] However, Government expressed disagreement with these recommendations, arguing that the existing provisions of the Act, especially section 50, were adequate to deal with the problem.[16]

In light of the above, it is clear that the treatment of creeping mergers continues to evolve in the Australian merger analysis.

The treatment of Creeping Mergers in the US

The U.S. agencies typically evaluate each individual transaction independently on its own merits, asking whether the transaction at issue, in and of itself, will lead directly to anticompetitive effects (e.g. price increases or output reductions). Generally, concentration trends alone "are irrelevant except insofar as they might suggest that somewhat more severe antimerger rules be applied when an industry reaches or approaches a particular level or concentration, or once a number of sellers has reached a critical point. In that event it is the present market structure that is critical, and not the history of its getting there."[17]

Conclusion and Recommendations

While one of the objectives of the South African Competition Act of 1998 is to promote a greater spread of ownership, the Act does not sufficiently make provision for creeping acquisitions. A large proportion of mergers or acquisitions examined by the Commission involved the acquisition of a large part or portion of another business. The issue of creeping acquisitions arises when bit by bit a business acquires small units of another business or several smaller businesses. A problem arises when no single acquisition will result in a substantial lessening of competition, particularly as the acquisitions are spread out in time and space.

The issue of creeping mergers/ acquisitions raises a problem for most competition authorities. At what point can or should the Commission view such a small and often insignificant event in its wider context? It is a difficult and complex problem, which we do need to properly weigh up.

Contributed by:
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Competition vs Vertical Integration

There is a perception amongst business, particularly small businesses, that suppliers or manufacturers should not operate in different levels of the market. The argument is that this conduct is anti-competitive; it limits participation in the market and that it might lead to smaller businesses being 'squeezed' out of the market. Whilst others see the benefit of buying directly from the supplier, they think this should only be limited to businesses but not be open to members of the public. Basically, they argue that suppliers or manufacturers should not be allowed to sell goods or services to consumers, but only to retailers.

11 The Dawson review was released in April 2003. It is the most thorough review of the Trade Practices Act since the Hilmer committee Review of 1993.
12 www.treasurer.gov.au
13 Ibid
14 Ibid
15 ibid
16 www.treasurer.gov.au
17 Areeda, Solow & Hovenkamp, 1998, IV Antitrust Law 916a, 1998

What is meant by vertical integration?

This refers to a situation where a manufacturer or supplier of goods/services takes a decision to carry out the production and distribution of its goods or services itself, thereby eliminating the so-called middleman and/or retailer. The supplier may set up subsidiaries or retail outlets to distribute its products. Most often than not this is done to ensure better co-ordination, efficiency, quality, better pricing and good service to customers.

Firms have been known to acquire or merge with firms on the downstream level that have a good distribution network, or infrastructure to ensure proper handling of their products, proper marketing and availability of products to customers.

What would raise competition concerns?

It is not unlawful for a firm to operate at different levels of the market. On the contrary, that could improve access to products by consumers, and hopefully result in competitive prices. It has also been proven in most cases that consumers benefit from lowered pricing and efficiency. Where the supplier sells or delivers directly to public there is assurance about higher levels of service and the product or service retaining its quality.

The practice could raise concerns if the manufacturer or supplier concerned was dominant in that sector, and favours its subsidiaries above other competitors at the downstream level, as retailers or competitors would have no other source of the product. It would also raise concerns if the dominant firm was charging retailers excessively compared to what they sell to the public, or if it engaged in a practice that excluded other players.

Therefore, there would not be concerns in instances where there is a significant pool of suppliers and/or distributors that businesses can make use of, and where there is stiff competition amongst suppliers/distributors in terms of price, discounts and distribution channels.

Act Relevancy

Section 8 of the Act prohibits a dominant firm abusing its market position by engaging in any form of exclusionary act that would have an effect of discriminating against buyers; or creating barriers to entry, resulting in market foreclosure for competitors, and/or new entrants into the market. To establish abuse, the complainant must prove that the respondent is the only supplier or firm with adequate supply; that there are no other reasonable alternatives or substitutes for the product or service.

Further, section 9(1) of the Act prohibits a dominant firm from engaging in price discrimination or charging different prices between purchasers of goods or services of like grade, quality and quantity by a dominant firm, e.g. changing trading conditions, deed done in good faith or difference in supply quantities, cost of manufacture, distribution, etc.

Conclusion

The Commission has no mandate to dictate to firms or businesses on how to conduct their businesses or who they should deal with, but it would intervene in instances where there is perceived harm to competition and/or consumers.

Therefore, it is imperative for businesses to determine whether they are being discriminated against, excluded from the market deliberately, or whether they are just against vertical integration before lodging a formal complaint with the Commission. When in doubt it is best to contact the Compliance division for clarity.

Contributed by: Busi Ngwenya, Compliance Division

Commission takes part in the ICN's Consultation Programme

The Commission has become very involved in the proceedings and activities of the International Competition Network (ICN) in the last two years. As noted in previous Competition News articles, the ICN is a worldwide, virtual network of Government competition authorities. It is structured into several Working Groups: Cartels, Merger, Unilateral Conduct, Telecommunications and Competition Policy Implementation.

The Competition Policy Implementation Working Group (or CPI for short) is itself further divided into three Subgroups, as follows, focusing on:

- **Subgroup 1:** The effectiveness of technical assistance
- **Subgroup 2:** enhancing the standing of competition authorities with businesses and the experiences of young agencies
- **Subgroup 3:** Competition and the judiciary.

In turn, the participants in Subgroup 1 on technical assistance (or "TA") decided in October 2005 to initiate a consultation and partnership programme, as part of the work plan for 2005/06. The ultimate objective of the programme is to make the experiences of developed competition agencies more readily available to newer competition agencies through an informal dialogue among ICN members. The immediate goal however, is to conduct a short-term trial run, or pilot test, in order to determine how the programme should best be structured. Accordingly, the pilot programme was developed before December of 2005 so that the pilot could be run from January to March of 2006, and so that the results thereof can be collected and assessed in time for the Annual Conference of the ICN, which is to be held in Cape Town on 3-5 May 2006.

The Subgroup contemplated two basic models of sharing experience with newer agencies and concluded that both had sufficient merit to warrant testing in the pilot programme. In both cases, the programme will seek to facilitate informal individual-to-individual contact, using agency-to-agency mechanisms to facilitate this contact.

- First is the partnership model, which will pair more experienced agencies with less experienced ones. The two agencies will work together to establish lines of communication, and it is understood that participation in the partnership will not preclude an agency from seeking or receiving advice from another agency. An example of the partnership model is the pairing of Japan and Indonesia.

- Secondly, the consultation model, according to which more experienced agencies will make it known that they are willing and able, within any limits they choose to set, to consult with less experienced agencies. Any number of less experienced agencies could consult with any participating agency. Availability to consult would be posted on the ICN Website and publicized to all ICN members by email. Each agency offering to consult with other agencies would designate a single individual as a point of contact, who would then route the request to an appropriate expert within the agency and establish a direct contact between the staff of the two agencies. All consultation would be on a confidential basis consistent with the jurisdiction's confidentiality rules. Examples of the consultation model are the USA's Department of Justice and Federal Trade Commission, the Hungarian Competition Authority, and the SA Competition Commission.

In the case of South Africa, the Commission decided that although it is a fairly young competition agency itself, nevertheless it offers help to several under-resourced, new and incipient competition agencies in Sub-Saharan Africa. Therefore, on the ICN Website, it is noted that the Competition Commission welcomes requests from any agencies but particularly those from Sub-Saharan African agencies.

The advice and assistance offered is via email and telephone calls, in the English language, and covers the whole range of activities: mergers, enforcement and advocacy. It is hoped that the Commission can help its counterparts in Sub-Saharan Africa to tackle anti-competitive practices and to deal with merger notifications with confidence and by so doing, to build relationships across the continent.

Contributed by: Geoff Parr,
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Cases

An Overview of the Commission's Prohibition with Regard to the Massmart – Moresport Merger

The parties to the transaction are retailers of a wide range of sporting and outdoor goods. The parties operate the following relevant branded outlets: Makro, Game and Dion from the Massmarts side, and Sportsman's Warehouse, Outdoor Warehouse and Sport Shoe World from the Moresports side. The Commission recommended that the proposed merger between Massmart and Moresport be prohibited. The markets that raised particular concerns were the general sports equipment and outdoor equipment markets.

Market players & market trends

The market players can be viewed as follows:

- The chain stores that predominantly sell general sporting goods such as Game, Dion, Makro, Sportsmans Warehouse and Totalsports.
- The independent stores selling general sporting goods such as Kloppers in Bloemfontein and Somerset Sport in Somerset West in Cape Town.
- The specialist chain stores or independents such as The Pro Shop, The Golfers Club and the cycling shops.

Since the 1990's, the independent stores have been rapidly diminishing. In fact, most of the independents had exited the market prior to the merging parties' emergence in the general sporting goods retailing industry. These structural changes impacted on the degree of competition in this industry.

According to data supplied "Sports Trader" the number of independent retailers grew by 6,7% and the chain stores grew at 21,2% between the years 1999 and 2002[1]. Further data supplied shows that between 1999 and 2005, independent stores declined by 20%[2]. The significant reduction of independent retailers from a market cannot help but to damage the level of competition and that, in turn, usually leads to higher prices.

The big retailers, such as Sportsmans Warehouse and Game, continue to get bigger. This can be attributed to the fact that these companies employ market share growth strategies and communicate value propositions that are designed to either dominate a product category or customer segment. Increased size and scale leads to increased efficiencies that in turn fuel additional growth. Given their large scale, these companies might eventually compete against each other because that's the only playing field where significant market share can be gained.

Market segmentation & pricing policies

During the Commission's investigation the vital aspects were the issues of market segments and pricing policies. Any sporting discipline has participants who start out as beginners, have amateur

1 Du Toit, T. 3rd Quarter 2002. Independents retailers- Qua Vadis? Sports Trader.
2 Mailing lists-figures

enthusiasts who compete on a regular basis and possibly have professional sports men and women, who pursue the sport as a profession. The key points of difference between these retailers are the type of product that they carry, their target markets, and the service offered to customers, distribution mode and location.

The Commission's investigation revealed that the market is segmented into the general and niche markets as the retailers in each segment target a totally different customer from the other retailers. The general retailers offer entry-level to mid-level goods and target the ordinary sporting enthusiast. On the other hand the specialist retailers offer more specialist equipment, which is targeted at a specific sport or sports.

The merging parties are general mass retailers targeting entry and mid level sporting enthusiasts. Sportsmans Warehouse, has in the last few years, lost its focus as a specialist retailer and now offers the type of product that is found in the Game and Dion stores, for example inflatable swimming products. Hence, the Commission is of the view that Moresport now competes head on with the Massmart Group.

In the specialist segment are the specialist retailers who include some retail chains such as Totalsports and the Pro Shop, and independents, for example fishing retailers (i.e. Mias) and Cycling retailers (i.e. Cycle Lab, Bruce Reyneck Cycles etc.). According to the Commission, the specialist segments are distinct from general mass retailers for customers services such as product training and advice at point of sale, wide range of quality product choice, repairs and maintenance of equipment and trial periods on the products sold.

In terms of product(s), the independents and the specialist chains stock branded goods that the manufacturers are not prepared to supply to the mass discounters as part of brand protection strategy. Whilst the merging parties carry a few non technical non branded items, the specialist retailers carry the high end, technical premium brands across the spectrum of brands as opposed to the mass discounters who more often than not carry a single brand. This product differentiation further evidences the segmentation of the market detailed above.

The Commission is also of the view that Game and Dion actively monitor their entry-level ranges and compete by offering products with similar features for a lower price. Whilst Sportsmans Warehouse prices are either close to or higher than those of the Massmart group and less than or similar to, those of, for example, The Pro Shop. This is an indication that the Moresport group pay greater attention to the prices of the chains e.g. Game, and less or little attention to the independents. Hence, mid level products and entry level products are much closer together, provide a constraint to each other on a price, quality and service, and accordingly are better substitutes for each other.

That said, the Commission is of the view that entry-level segment and mid segment fall within the same relevant product market, namely general retailing of sports goods, and the prime segment falls within a separate market, namely the specialised retailing of sports goods.

The Commission's investigation further revealed that the merging parties employ a national pricing policy. The store managers would only have limited discretion to alter the price of goods. In general, the Pick and Pay, Hyperama, and Independents do not constrain the pricing of the merging parties because of the differences in their product ranges, and also because the prices in one independent store in one location can not offer meaningful competition to the either of the merging parties with its national footprint.

Competitive effect

Considering the above, the Commission is of the view that the merging parties are the only significant market participants in this market. Both Massmart and Moresport operate national chains which sell a wide range of general sports equipment, footwear and apparel. In terms of the market for the retail of general sports equipment, it is evident that the parties are extremely large players to the extent that they collectively hold in excess of 80% of the market. The Commission has also found the parties to be significant players in the market for outdoor equipment. This confirms that the buying power, within the equipment market, is only in the hands of these two players.

In addition, the merger will be of concern to local suppliers because of the concentrated buying power of the merged entity which will be able to put pressure on their margins through increased demands for discounts, rebates and advertising allowances. Moreover, a concern is on the access to supply due to the exclusivity of supply within the big chains.

Other than the direct competition that the parties provide to each other on certain product ranges, the parties also compete on a less direct way against each other. According to the Commission's investigation, Moresport do place a competitive constraint on the pricing of Massmart and vice versa on certain product ranges.

Conclusion

Considering all of the above, the Commission is of the view that the merger will lead to the removal of an effective competitor.

Furthermore, having considered various factors, the Commission is of the view that the transaction is likely to substantially prevent or lessen competition in particular in the market for the retailing of general sporting equipment through national chains.

Based on the discussions above, the Commission recommended that the proposed transaction be prohibited.

Contributed by: Liza Uekermann,
Policy & Research Division

Lessons from the Momentum and Africa Life Health merger

Introduction and Background

The Competition Appeal Court ("CAC") has in recent past overturned two or three of the Competition Tribunal's ("Tribunal") decisions. Some of these judgments have in the process facilitated the growth and development of our limited jurisprudence in Competition Law. The point would be illustrated by the judgment in the merger case of Momentum Group Limited ("Momentum") and Africa Life Health (Pty) Ltd ("ALH"), which is the focus of this discussion. The issues that are brought to the fore by this judgment relates to the powers of the Tribunal, the exercise of those powers in imposing conditions in merger cases and more importantly, cross directorship within the context of a single economic entity, which was the subject of the appeal and review.

The merging parties

The merging parties in the case were Momentum and ALH. The relationship between the merging parties is Momentum is a wholly-owned subsidiary of First Rand Limited ("FirstRand"). Momentum further controls Momentum Health (Pty) Ltd ("MH"), Momentum Interactive (Pty) Ltd ("MI") and Sovereign Health ("Pty") Ltd. FirstRand also controls Discovery Holdings Limited ("DHL") with about 65.6% of the issued shares. DHL controls Discovery Health (Pty) Ltd ("DH").

Rand Merchant Bank ("RMB") holds 10% minority interest in Life Healthcare ("Pty") Ltd ("Life"). The link here being that RMB is also a subsidiary of FirstRand. The primary target firm is ALH which company is controlled by its holding company, Africa Life Assurance Company Ltd ("African Life"). Interestingly, Momentum holds about 33.4% of African Life and with the transaction in question Momentum was to acquire the entire issued share capital of ALH from African Life. Post-merger, ALH would therefore become a wholly-owned subsidiary of Momentum.

Why is the analysis of the corporate and market structure of the parties relevant for

the purposes of the article? The point is to illustrate the common shareholding by FirstRand in various players within the health sector. Whilst these companies are competitors in the health sector, one group ultimately controls them, which is FirstRand. It is clear from the Tribunal records that Momentum and Discovery are fierce competitors hence the reason the Commission had no issues in recommending an unconditional approval of the merger. The Tribunal however approved the merger with conditions. It is these conditions that lead to the case being appealed to the CAC.

The Tribunal's conditions and reasoning

Simply put the condition of the merger was that cross-directorship between the firms both at the operating company and holding company level must be eliminated. Tribunal had its reason's for imposing such a condition. Whether or not those reason were sound in law is another question. One of the reasons put forward by the Tribunal for this condition was that there would be lessening or prevention of competition in the medical administration market. This concern came from the fact that ALH is a medical aid scheme administrator, which provides certain administration services to various medical aid schemes through various entities. The fact that Momentum would acquire ALH and therefore business of medical aid administration was viewed by the Tribunal as a potential competition concern. In its findings the Tribunal conceded and acknowledged that "…at present the medical administration businesses carried out by Discovery and Momentum compete in the market, irrespective of the fact that they are controlled by the same shareholder in the form of FirstRand".

However, despite this acknowledgement of the existence of competition between Momentum and Discovery the tribunal felt that the parties could stop competing with each other and co-operate instead. In this regard the Tribunal stated that "We find further that the FirstRand Group, if it was so inclined, is in a position to easily change its current strategy from a competitive to a co-operative one. Were this to occur, this would lead to lessening of an important rivalry in the health care market between the largest present competitor in the form of Discovery, and the firm that itself asserts it is in a position post merger, to be its most effective rival, Momentum". In order to prevent this concern from materializing the Tribunal attached the condition requiring that cross directorship at the level of Momentum Group and Discovery Holdings be eliminated. In particular, this affected two non-executive directors Mr Laurie Dippenaar and Mr Burger, respectively the chief executive and financial director of FirstRand. The existence of common directors provided ground for the possibility of exchanging sensitive information at board level. The Tribunal was further concerned that "…a market division strategy could easily be entertained between Discovery and Momentum".

It is also interesting to note that the Commission treated the Discovery and Momentum as a single economic entity

because of their common parent company, namely, FirstRand. The Tribunal seemed to acknowledge this fact in its findings but went to make a condition, which related to the management structure of the parties. The condition imposed by the Tribunal sought to prevent parties (in the form of cross directors) from sharing sensitive information. The question that needs to be asked is whether or not the Tribunal was justified in imposing such a condition? Did it have power to impose such a condition in the first place? How far can the Tribunal go?

The relationship between the parties is clearly one of a single economic entity. This is well evidenced in that FirstRand Group ultimately controls the parties. It is interesting that CAC sought to interfere with competition matters within a single economic entity. One then is left with the question whether or not competition authorities even have the powers in these kinds of transactions? If it is accepted in a transaction that parties form a single economic entity, it would always be prudent for the competition authorities not to concern themselves with competition within that entity. The Commission appears to have taken this route in its analysis of the merger. On the other hand the Tribunal took a different route, which consequently lead to the appeal and review to the CAC. However, this should not take away the powers of the competition authorities to analyse competition issues in a market simply because one or more of the parties are within a single economic entity. The market within which the parties in a single economic entity operates still need to be analysed fully to the extent that it does not violate the principle of single economic entity. In fact the Act do not apply to certain agreements or concerted practices by firms within a single economic activity in terms of section 4(5)(a) and (b) of the Act. That section of the Act is clear and would have found application in the case in question.

The Law

Judging by the decision of the CAC, one may be inclined to conclude that the Tribunal may have exceeded its powers by imposing this condition. But, what does the law state? Section 16(2) of the Competition Act No. 89 of 1998, as amended ("the Act") states

"Upon receiving a referral of a large merger and recommendation from the Competition Commission in terms of section 14A(1), or a request in terms of subsection (1), the Competition Tribunal must consider the merger in terms of section 12A, and the recommendation or request, as the case may be, and within the prescribed time-

(a) approve the merger;
(b) approve the merger subject to any conditions; or
(c) prohibit implementation of the merger.

That subsection authorises the Tribunal to impose any condition. The wording of the subsection is so wide that it actually allows the Tribunal unlimited conditions it may impose. While the power to impose conditions appears to be unlimited, it must be understood in the context of reasonableness. That is to say the Tribunal can impose any reasonable condition based on the evidence presented before it. This is the CAC's point of departure with the Tribunal on the findings. The court stated that "It seems that the Tribunal's reservations in this regard were ill-founded and in the absence of full evidence, unjustified". Clearly the CAC was concerned that the Tribunal did not have sufficient evidence at its disposal to make the finding it did. In this regard the court referred to section 12A of the Act dealing with factors that must be considered when assessing a merger. It appeared that there was no initial determination of anti-competitive consequences by the Tribunal that must have lead to a conditional approval of the merger.

The CAC judgment does not in any way suggest that the Tribunal did not have the powers to impose the condition in question. All that the judgment does is to emphasise that the Tribunal should make such finding based on tangible evidence, which did not exist in this case. The provisions of section 12A and the effect in the market, being properly assessed would dictate the relevant evidence in a given case. Thus the Tribunal can impose any condition, as allowed by legislation, subject to clear evidence of anti-competitive effects in the market.

A remark may also be made that the CAC cautioned against the conditions that are too widely framed. This was more so according to the court's observation because the condition was imposed to prevent Momentum and Discovery sharing sensitive information in the first place, but it did not prevent them from doing so. The reading of the Tribunal's findings seems show that their apprehension could have been based on section 12A(2) in particular. There was fear on the part of the Tribunal that the merger could result in increased co-operation between these parties. It may be argued that the court intended that the Tribunal should narrow its conditions and they must be based on evidence.

On the question whether or not cross-directorship is an issue for competition is another question of law and fact. It would appear that there is nothing in the Act, which prohibits cross-directorship. Therefore the question would invariable turn into a factual enquiries which would look at the prevailing market conditions. That is to say given the market conditions prevailing at the time and relevant to the transaction would cross-directorship between the merging parties cause problems for competition in that market? In order to come to a conclusion one would have to have all the relevant market information and evidence that cross-directorship would lessen or prevent competition. This was the essence of the CAC judgment in dismissing the Tribunal's findings. It would appear that the principle that came out of the case is that cross-directorship is generally not a problem in the absence of evidence that it could result in the substantial prevention or lessening of competition in a market. In the end the CAC dismissed the conditions imposed by the Tribunal, meaning that the merger was approved without conditions.

Conclusion

The judgment was not only important for the directors and the firms concerned, but it is also an important milestone for the competition law jurisprudence. In the future there would be no confusion as to whether or not parties can merge when there are cross-director, especially within a single economic entity. On the other hand the Tribunal would have to satisfy itself based on the evidence before it that the existence of cross-directors in a given transaction could have the effect of substantially preventing or lessening competition in a market before it

could impose a condition similar to that in the present case.

It is without doubt that this case is still going to be a subject of debate and discussion. For now, it suffices to state that cross-directorship is permissible in merger cases in the absence of evidence proving that it could substantially lessen or prevent competition in a market.

Contributed by: Benedict Khumalo, Compliance Division

References:

1. *Competition Act No. 89 of 1998, as amended*
2. *Momentum Group Limited v African Life Health (Pty) Ltd 87/LM/Sep05*
3. *Momentum Group Limited & Others v The Chairperson, Competition Tribunal & Others 58/CAC/Dec05*

Commission Finalized Consent Orders Relating to the Motor Vehicle Prices Investigation

The Commission launched an industry-wide investigation into the new motor vehicle prices and sales practices in response to a public outcry in 2004. The investigation was initiated in terms of Section 49(B) of the Competition Act No 89 of 1998 ("the Act"), as amended, against the National Association of Automobile Manufacturers ("NAAMSA") and manufacturers and/or importers and distributors of new motor vehicles in South Africa, as well as their respective dealers and dealer associations.

The intention was to investigate the alleged anti-competitive practices by manufacturers, importers and/or dealers of new motor vehicles in South Africa, and also to determine whether or not high prices could be attributed to these alleged anti-competitive practices. In particular, the Commission looked at whether or not the respondents:

- Were fixing prices and/or trading conditions in contravention of section 4(1)(b) of the Act;
- Were maintaining minimum resale prices in contravention of section 5(2) of the Act;
- Had entered into agreements that imposes restrictions on their dealership network that have the effect of substantially preventing or lessening competition in the market, in contravention of section 5(1) of the Act;
- If dominant, had abuse their dominant positions by charging excessive prices to the detriment of consumers in contravention of section 8(a) of the Act.

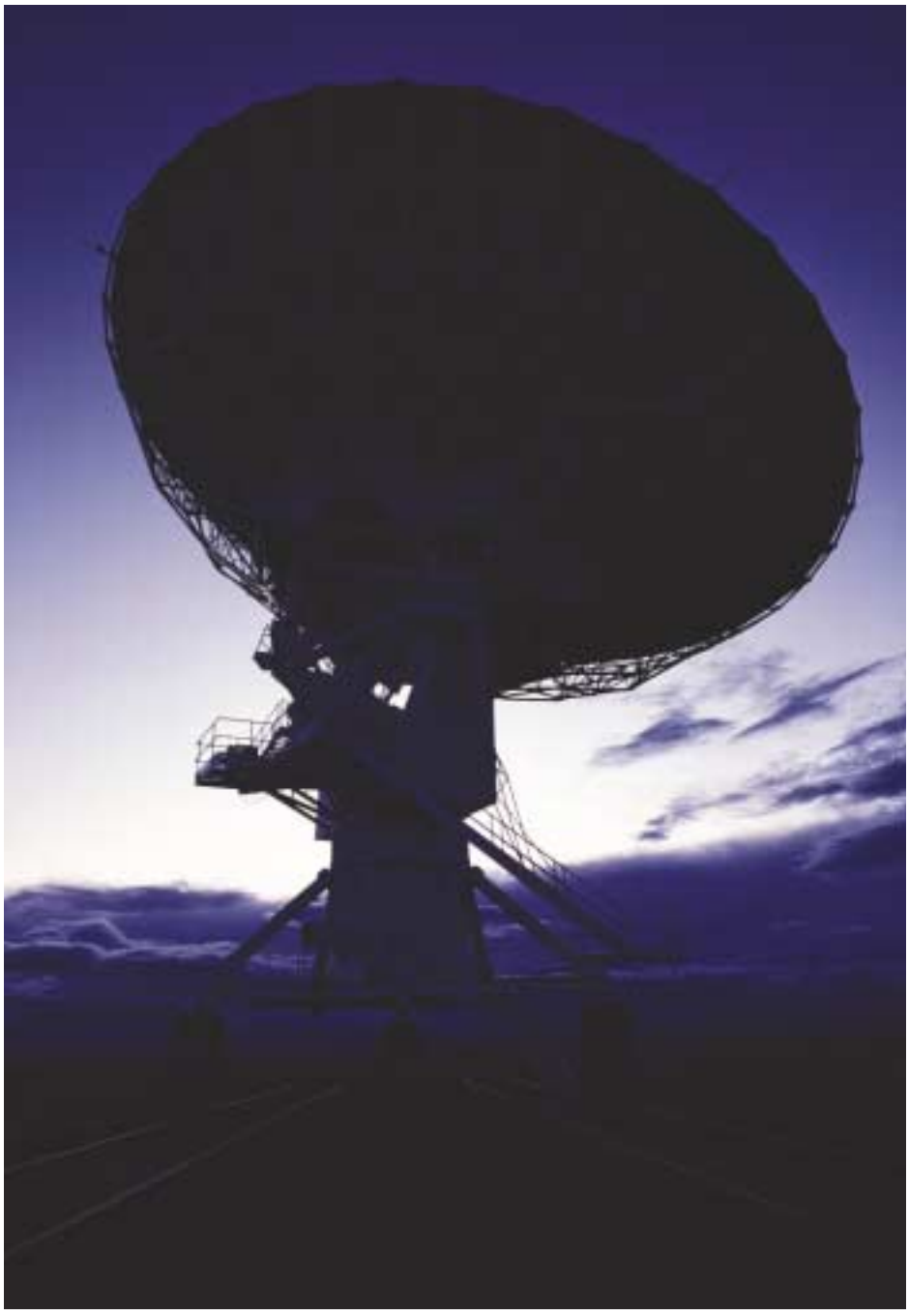
Having considered all the evidence gathered during the course of the investigation, the Commission decided, in May 2005, to refer cases against BMW dealers, Citroen, GMSA, Nissan, VWSA, Subaru dealers and DCSA to the Competition Tribunal ("the Tribunal") for allegedly contravening section 4(1)(b) and/or section 5(2) of the Act. Further evidence gathered also revealed that BMW, DCSA, VWSA, GMSA and Nissan had entered into agreements with their dealership network, which had the effect of substantially preventing or lessening competition in the market in contravention of section 5(1) of the Act.

Following this decision, the Commission then engaged into discussions with various respondents to ensure that the alleged anti-competitive practices ceased to exist and that consumers continue to benefit from product choice and competitive prices. During December 2005, the Commission finalised consent orders with the respondents, on condition, inter alia, that they all implement a compliance programme and pay the following administrative fine:

Toyota	-	R12 Million
General Motors	-	R12 Million
DaimlerChrysler	-	R 8 Million
BMW Dealers	-	R 8 Million
Nissan	-	R 6 Million
Volkswagen and its Gauteng Dealers	-	R 5 Million
Subaru Dealers	-	R 500 000
Citroën	-	R 150 000

In conclusion, the Commission's investigation into the motor vehicle industry has resulted in administrative penalties totalling R51,65 Million, including a R12 Million fine paid by Toyota, and that all respondents should implement compliance programmes, which will ensure that their businesses comply with the Act.

Commission approves satellite merger with conditions



The Commission has approved the intermediate merger transaction between international companies Intelsat Holding Limited ("Intelsat") and PanAmSat Holding Corporation ("PanAmSat") on condition that the merged entity does not increase prices to its South African customers for the next two years.

Both companies provide communications services via fixed satellites. Their customers include telecommunication, media and entertainment companies, corporations and governments. Intelsat operates 15 and PanAmSat 6 satellites transmitting to South Africa and parts of sub-Saharan Africa. Telkom is Intelsat's major customer while Multichoice is PanAmSat's major customer in South Africa. The merger will result in the merged entity having an estimated 65% of the market share for the sale of satellite transponder capacity in sub-Saharan Africa.

The merger is an international transaction and the parties to the merger have sought approval in various jurisdictions in which they operate including South Africa, USA, Brazil and Austria.

The Commission found that the transaction is likely to substantially prevent or lessen competition in an already concentrated market for the leasing of fixed satellite transponder capacity to sub-Saharan Africa. However the launching by other operators, such as New Skies, Rascom, SES Astra and MEASAT, of four satellites with significant capacity within the next two years, will constrain the market power of the merged entity.

The existing and new entrants will allow customers of transponder capacity to switch between satellite operators, and this will constrain the ability of the merged entity to unilaterally raise its prices.

The Commission therefore approved the merger subject to a condition that for a period of two years the customers of Intelsat or PanAmSat who are billed in South Africa will not be subject to a price increase except for an inflation related adjustment on 1 March 2007. The merging parties will notify all its customers who are billed in South Africa of this condition.

The Commission Deregistered for VAT

The Commission reminds its stakeholders that it had deregistered as a VAT vendor on 1st April 2005. The change was precipitated by the amendments to the VAT Act of 1991, which came in the Revenue Laws Amendment Acts Nos. 45 of 2003, and 32 & 34 of 2004 and took effect in April 2005. The Commission therefore reminds all stakeholders still going to file or pay monies over to the Commission to do so without the VAT portion. The Commission will therefore not be accepting incorrect filing fees.

The VAT treatment of government departments, which were generally not liable to register for VAT was extended with effect from 1st April 2005, to include National and Provincial Public Entities and Constitutional Institutions listed in schedules 1, 3A and 3C of the Public Finance Management Act, 1999 ("PFMA").

This was done by including the aforementioned entities in the amended definition of "public authority" in section 1 of the VAT Act.

With immediate effect, filing fees paid to the Commission are as follows:

1. Exemptions:

1.1 Single Exemption	R5 000
1.2 Plus, an annual fee equal to multiplied by the number of years for which the exemption is granted.	R500
1.3 Category Exemption	R100 000
1.4 Plus, an annual fee equal to multiplied by the number of years for which the exemption is granted.	R1000

2. For a Schedule 1 exemption	R100 000
3. Advisory Opinion	R2 500
4. Merger Notice:	
4.1 Intermediate merger	R75 000
4.2 Large merger	R250 000

These fee structures are contained in the Competition Act, and can be accessed through the website: www.compcom.co.za.

Stakeholders are urged to adhere to this request when filing notifications, and the Commission would like to thank all stakeholders for their continued compliance with the provisions of the Act.

Towards a free and fair economy for all

Where to get hold of us

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

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