# *Towards a free and fair economy for all*

Competition News

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*Towards a free and fair economy for all*

IN THIS EDITION



# Healthcare Industry

## Goes Under the Microscope

The Commission has completed the investigation it initiated into price fixing in the healthcare industry and referred its findings to the Competition Tribunal. It has determined that the South African Medical Association (SAMA), the Hospital Association of South Africa (HASA) and the Board of Health Care Funders (BHF) (the Respondents) have all contravened Section 4(1)(b)(i) of the Competition Act of 1998 by directly or indirectly fixing prices.

Within SAMA, there are practitioners that are competitors, for example Urologists competing with other Urologists or General Practitioners competing with other General Practitioners. The recommendation of tariffs for such practitioners to use, therefore constitutes price fixing. In the case of HASA, the association recommends tariffs in terms of which charges can be levied for certain services provided by the Private Hospital groups, who are competitors and are members of HASA. Likewise, the BHF recommends a scale of benefits to its members. The tariffs are intended to be guidelines for the purchasing of healthcare services.

It came to the Commission's attention that the Respondents recommend and publish tariffs annually. Precedent by international competition authorities views this conduct as price fixing under competition law. The Commission agrees and has determined that it constitutes a prohibited practice regardless of whether the tariffs are adhered to or not.

Section 4(1)(b)(i) prohibits agreement between firms or an association of firms in a horizontal relationship (i.e. competitors) to directly or indirectly fix a purchase or selling price or any other trading condition. This conduct is, per se, prohibited, which means there can be no defense considered for engaging in such conduct. Indeed, the Tribunal ruled in an earlier case against soda ash companies that it is not necessary to establish any deleterious impact on competition. All that has to be established is the existence of an agreement embodying the features detailed in Section 4(1)(b).

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The Commission will seek an order prohibiting the Respondents from fixing prices through the publication of tariffs. It will also recommend that administrative penalties be imposed on all parties. The amount of the penalties will be determined by the Tribunal. In respect of the medical aid schemes, this application is applicable only to open medical schemes which are members of BHF and who therefore, as opposed to closed schemes, compete with each other.

Should the Tribunal confirm the Commission's findings, it is envisaged that it will result in the emergence of truly competitive pricing in the healthcare sector, which the Commission believes will translate into better prices and greater choice for consumers.

A decision in the Commission's favour would mean that other associations, which similarly recommend tariffs, would need to cease doing so. The Commission emphasised that the parties have been co-operative throughout the lengthy investigation. In the view of the Commission, the door is still open for settlements between itself and the Respondents and/or the consideration of exemption applications.

## Implications for consumers

It is becoming clear that the only reason for price fixing is to keep prices high and, unfortunately, to the detriment of both consumers and the private healthcare industry. The private healthcare industry cannot grow and become a market leader if it is not competing for consumers, through better treatment options, value-for-money prices, innovative products and adherence to service standards. Therefore, in the long run, the private healthcare industry fails to meet the needs of the growing South African consumer population. It is essential that consumer interests are carefully protected.

It would be a futile exercise for consumers to shop around for a better healthcare service provider, offering better prices, if industry players are colluding on these prices. New players would also find it difficult to access the consumers.

It is recommended that the industry should provide consumers with information regularly which will enable them to make informed choices on prices options, treatment available and the quality of service.

In addition, the industry must improve on their monitoring and enforcement of professional standards. This should be complemented by a comprehensive complaints procedure.

# Pretoria Attorneys Guilty of Price Fixing

Following an investigation initiated by the Commission last year, the Commission determined that the Pretoria Association of Attorneys (the Association) was in contravention of the Competition Act of 1998. The investigation showed that the Association issues guidelines for recommended fees, which has the effect of indirectly fixing prices.

Subsequent to this, a Consent Order[1] was negotiated by the Commission with the Association in respect of its issuing of recommended fees. The order has now been confirmed by the Competition Tribunal. Price fixing is prohibited under Section 4(1)(b)(i) of the Act. It constitutes a per se contravention, which means that it is prohibited outright.

In the Consent Order, the Association conceded that it was in contravention of the Act even though it had never intended the recommended fees to be binding on its members. The Association agreed to withdraw the offending guidelines and undertook not to re-issue them or any like guidelines. An administrative penalty was imposed on the Association.

The publication of "Guideline for Attorneys and Own Client Fees" issued by the Association had no statutory support and contravened the Act, whether the tariffs were enforced or not. The confirmation of this order sets a precedent regarding the publishing of guidelines by voluntary associations. If the publication of such guidelines is not as a result of a statutory mandate, then such publication of tariffs by an association of competitors falls foul of the Competition Act.

Recommended fees may work against the public interest. Consumers must be allowed to choose between goods and services in a competitive economy and one important element of choice is price. Competition between suppliers charging the same fee is necessarily diminished. If suppliers of the same goods or services charge the same fee, there is no competition. Due to fixed tariffs, prices remain high and consumers do not benefit from shopping around.

1 A Consent Order is an agreement between the Competition Commission and Parties on Prohibited Practices and Remedies. The basis of the Consent Order is that the respondent must admit to contravening the Act and agree to the settlement negotiated between themselves and the Commission. The Consent Order may contain remedies that the respondents will employ to stop the prohibited behaviour.

# Small Farmers to Benefit

## from Competition Decision

In May 2000, two farmers from Patensie, a small farming town situated in Gamtoos River Valley (GRV) near Port Elizabeth, lodged a complaint with the Commission against Patensie Sitrus Beherend Beperk (Patensie). Patensie offers packing and marketing services to citrus producers in the GRV. The complaint was referred by the Commission to the Tribunal.

On 8 April 2002, the Competition Tribunal delivered its judgment, finding that Patensie had abused its dominant position. Patensie appealed this finding to the Competition Appeal Court. The Appeal Court upheld the decision of the Tribunal. It found that by obliging its farmers to deliver their entire output or such portion to it, Patensie was in clear violation of Section 8 (d)(i) of the Competition Act. It held that Patensie's Articles of Association awarded Patensie the exclusive right to pack and market the citrus crop of its members (the farmers). It further held that exclusivity agreements amount to an abuse because they distort competition between producers, by depriving customers of the dominant firm (Patensie) of the opportunity to choose their pack-house or export agent.

During its investigation, the Commission found that the old co-operatives had been converted into companies. The farmers who were members of these co-operatives became shareholders. As shareholders they are bound into these companies by terms that not only distort competition, but also have serious repercussions on these farmers' businesses.

It is hoped that this judgment will ensure that farmers are able to deal with any of the independent packhouses and will now be able to shop around for the best prices for the packing and export of their produce and therefore be in a better position to support their operations. The judgment makes it mandatory for the packhouses to devise different mechanisms in ensuring that farmers fulfil their financial obligations to them.

The Act allows the Tribunal to impose a fine of up to 10% of the firm's annual turnover. Even though the contravention concerned was of a serious enough nature to warrant a fine, the Tribunal took a view that a fine is not appropriate in the particular circumstances of the Patensie case. It, however, cautioned that others in the agricultural sector or elsewhere, who utilise similar anti-competitive mechanisms and who, in the wake of this decision, persist with these practices, may well render themselves liable to a fine.

The Commission is very pleased with the final outcome of this case and that the Appeal Court concurred with its position. The case took longer than expected, but this is characteristic of litigious matters.

The effect of the Appeal Court judgment is that it is now established law, that farmers should not be forced to deliver their produce to a dominant firm on an exclusive basis. Such a provision constitutes a violation in respect of which a fine can be imposed under the Competition Act. Parties who nevertheless wish to enter into such arrangements must consider applying for exemption in terms of Section 10 of the Competition Act.

# Commission Supports BEE Bill in Parliament

In March this year, the Department of Trade and Industry published the broad-based strategy on Black Economic Empowerment. Subsequently, the dti drafted the Broad-Based Black Economic Empowerment Bill, which seeks to operationalise the implementation of the strategy. The BEE Bill was published for comments and the Commission expressed its support for it during its submission to the Trade and Industry Parliamentary Portfolio Committee hearings in Cape Town.

The Commission felt that the Bill, together with the strategy for broad-based BEE, would assist the Commission when addressing Black Economic Empowerment issues in the analysis of merger transactions, or when considering exemption applications in terms of the Competition Act.

When considering whether a merger can or cannot be justified on public interest grounds, the Commission is required to consider, among other things, the effect the merger will have on the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive. Similarly, the Commission may grant exemptions to parties involved in agreements or practices that would otherwise fall foul of the Competition Act, on the same grounds.

The codes of practice contemplated in Section 7 of the proposed BEE Bill will be of great use to the Commission and their analysis, since they are expected to set out empowerment targets.

The Commission recommended that Appendix C of the Strategy Document (which specifies details regarding the number of appointees to the proposed Advisory Council as well as terms of office) be incorporated into the Bill so as to be consistent with other pieces of legislation in South Africa.

The Bill sets the framework for implementing Black Economic Empowerment. The Commission also believes it will promote the spread of ownership and assist new business entrants to participate in the economy.

# Petroleum Pipelines Bill Raises Many Questions

In 1998, the Department of Mineral and Energy Affairs published a White Paper on Energy Policy, in terms of which energy supply policy in South Africa was to be overhauled. One of the areas to be focused on was the petroleum sector and the use of its pipelines. Consequently the Department of Mineral and Energy Affairs published the Petroleum Pipelines Bill, in terms of which the use of pipelines will be regulated.

The Commission commented on the Bill and made the following observations:

1. The Bill establishes a Petroleum Pipeline Regulatory Authority (PPRA) and outlines the process, requirements and conditions for licensing of the construction and operation of (and the provision of prescribed commercial services in relation to) a crude oil pipeline, petroleum product pipeline or an off-loading facility.

2. While the Commission applauds the Bill's broad objectives, closer examination of its content raises many questions for the Commission, particularly in the area of reducing barriers to entry for competitors. In order to stimulate competition, new firms must enter into the industry. In turn, for firms to want to enter the market, they must be confident that their activities will not be over-regulated, or at least that any regulations they face are clear and unambiguous.

3. The Commission is of the opinion that too much detail was left for the regulations to clarify, whereas the methodology for vetting or approving pipeline tariffs was crucial in determining whether competition would result.

4. The Bill makes provision for private sector construction, ownership, and operation of pipeline, but it outlaws cross subsidisation and states that vertically integrated firms may be required to keep separate accounts and run their businesses separately. This is welcome to the extent that it will lead to a proper allocation of costs, so that access charges can be assessed.

5. However, the Bill provides that as a condition of the license, a petroleum pipeline may be licensed for either crude oil or petroleum products, but not both, with the exception of emergency cases. This removes the ability of firms to configure product lines to handle a wide variety of petroleum products, thereby limiting the economies of scope that could contribute to the minimisation of costs.

6. Furthermore, the Commission is concerned with whether new pipelines will be built by the private sector or government, considering that until now Government, through Petronet, has managed and operated the country's pipelines. The Bill is silent on this aspect. It is also not clear how the proposed pipelines regulator would fit into the range of other energy regulators.

During the parliamentary hearings, the Portfolio Committee on Minerals and Energy requested the Commission to research further and provide the Committee with an independent opinion on some of the issues raised during the hearings. These issues related to the technical and economic feasibility, as well as the environmental impact of switching a pipeline between crude oil and petroleum products transportation, specifically:

(a) how long it would take to switch between products

(b) how the frequency of switches would impact the feasibility of switching

(c) how the fluctuations in spare capacity would affect the feasibility of switching

(d) what additional environmental and safety considerations would arise when such switching of products in pipelines occurs

(e) would there be any spillage or effluent arising from reconnecting and disconnecting pipes

(f) would the process result in product contamination and if so, what would be the impact on product quality and the cost of reprocessing?

Further, the Commission was requested to do a pipelines capacity forecast to determine the need for investment in pipelines in the short to medium term. In addition to its own research, the Commission sourced the services of an experienced pipelines consultant to provide answers to some of the above questions. A consolidated report will be sent to the Committee.

# Anti-competitive Mergers

## The case for structural remedies

The examination and the evaluation of mergers and acquisitions in terms of Section 12 A of the Competition Act provide the Commission with three options: approve the transaction, prohibit the transaction, or approve the transaction with conditions attached. Merger transactions that raise no substantial competition concerns are easy to deal with. However, in merger cases that may substantially lessen or prevent competition, one of the challenges facing Competition Authorities is that of deciding whether to impose remedies as a condition for allowing the merger to go through in order to eliminate the competition problem ex ante, or to approve the merger and rely on the ex post control of anti-competitive behaviour through agreed-to conditions. This is a question of structural (ex ante) versus behavioural (ex post) remedies.

Remedies are an alternative to prohibitions. Instead of an outright prohibition, some merger transactions may be approved with conditions attached so as to remove or minimise their anti-competitive effects. Thus, remedies, whether structural or behavioural, are intended to prevent the anti-competitive effects of mergers and to restore competition where it would have been lessened or eliminated. Consumers should benefit from the same degree of competition after a merger as before a merger. The duty of a competition authority should be to decide on which remedy will effectively and fully restore or preserve competition.

The following criteria have been identified as critical in the effective implementation of remedies:

**Effectiveness**
The goal of remedies is the restoration of pre-merger competition. The remedy adopted should provide a permanent solution to the competition problem raised by the envisaged anti-competitive effect[1]. Moreover, the remedy should be implemented speedily and effectively.

**Least cost**
The remedy chosen for this purpose should achieve the goal at least cost, that is, the administrative costs of the remedy should not outweigh the benefits of restored competition.

**Minimising the loss in efficiency**
Some mergers are supposed to increase efficiencies through the exploitation of economies of scale and scope. In order to maximise these efficiencies, the scope of remedies should be minimised by, for instance, delineating divestitures beyond the business overlap. In this regard, remedies should preserve the efficiency-enhancing potential of a merger. Moreover, the proposed solution should not create a new competition problem in the affected market or in any other market.

**Efficient re-allocation of assets**
Where divestiture is chosen, the divested assets should go to the buyer who values them the most, unless that buyer would also become too large in terms of market share.

**Certainty**
The chosen remedy should preserve competition with as much certainty as possible. Competition authorities should avoid the risk of inadequate relief, or the burden of untimely relief, as these would reduce consumer welfare[2].

Structural remedies are measures taken to deal with the characteristics or structure of the markets. At the horizontal level, this can be achieved by, for instance, ordering a divestiture where a firm has a substantial share of the market and barriers to entry are very high. Such divestitures can either be in full (divestiture of an entire ongoing business and related assets) or partial (incorporating various aspects of a business). Divestitures are chosen because of their potential to facilitate the entry or expansion of a replacement competitor. Similarly vertical market power can be reduced through unbundling a vertically integrated firm.

The South African Competition Commission has, in its dealings, preferred structural remedies to behavioural ones, in accordance with international best practice. This is evidenced by the success that the Commission has had in the implementation and monitoring of structural remedies. Some of the successful structural remedies include: Unilever/Robertsons; Nampak/Malbak and Pharmacare/Triomed[3].

The major advantage of structural remedies lies in their simplicity. Structural remedies, once affected, do not require additional resources in terms of monitoring. As Justice Brennan stated "divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should be in the forefront of a court's mind…."[4]. Furthermore, the EU Court of First Instance adds to this by saying that structural remedies are, “as a rule, preferable”.

Behavioural remedies on the other hand attempt to influence the conduct of firms that have market power. Generally, behavioural remedies consist of commitments aimed at guaranteeing a level playing field among competitors. Examples include, undertakings by parties to a merger not to use a trademark for a certain period of time; to make part of the production capacity of the merged entity available to third parties; and to grant access to essential facilities on non-discriminatory terms.

The major drawback of behavioural remedies, in the Commission’s experience, is that they do not deal with the root of the problem – market power. They attempt to cure the symptoms rather than the actual ailment. These methods do not remove the incentive or opportunity to engage in an anti-competitive act.

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**1** Wilmer,Cutler & Pickering. 2001. European Commission Notice on merger remedies.
**2** Parker, RG & Balto, DA. 2000. The evolving approach to merger remedies. *Antitrust Report.*
**3** Unilever Plc/ Robertsons Case No. 2001Sep19; Nampak Ltd/ Malbak Ltd Case No. 2002Feb26; Pharmacare Ltd/Triomed (Pty) Ltd Case No. 2002Oct24.
**4** US Supreme Court in the DuPont/ICI merger case

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Secondly, behavioural remedies require long term monitoring of compliance, which can be very costly in terms of time and resources. What's more, discriminatory behaviour can occur in a very subtle manner e.g. price increases, quality reduction, delayed supplies, artificial shortages etc. According to Motta et al (2002)[5], a remedy that calls for an obligation to supply is tantamount to an empty promise.

Behavioural remedies are best suited to sector specific regulators who have the knowledge and expertise of the industry concerned and thus can carefully monitor any evasive behaviour. Competition authorities, on the other hand, are generalists with limited industry knowledge and thus are in a difficult position when it comes to the close-range monitoring of firm behaviour.

Structural remedies appear to be the most effective treatment of anti-competitive mergers.

In February 2002, the Commission established a divestiture unit, within the M&A Division. The divestiture unit has been tasked to advise on the acceptability and implementation of remedies in merger cases. It is also responsible for the monitoring of the compliance of said remedies.

To date the unit has ensured the compliance of seven structural remedies or divestitures, as they are commonly known, and two behavioural remedies. It is currently monitoring a further two structural remedies and five behavioural remedies.

The unit has made increased use of Trustees in recent structural remedies. The Trustee acts on behalf of the Commission to ensure the merged entity's compliance in terms of the remedy.

The key objective of the Trustee's work is to ensure that the divested products are maintained as a competitive force pending the sale, and that they are sold in good condition and to the proposed purchaser who meets the Commission's criteria, to enable continued competition in the relevant markets.

5 Motta. M, Polo. M and Vasconcelos. H, 2002. Merger remedies in the EU: An overview. Paper presented at the symposium on "Guidelines for merger remedies – prospects and principles" , Paris. Jan 17-18 2002.

# Fast-Tracking Procedures

One of the key issues that the Commission is faced with, is the speedy resolution of cases filed with it. After thorough consultations and deliberations within the Commission, where the Mergers and Acquisitions Division and all supporting divisions discussed the processes, procedures and interactions, the Commission noted that it is feasible and in fact desirable to implement fast-tracking procedures as vigorously as possible. This may address one of the most enduring concerns about the Commission's turn-around time.

In March 2002 the Commission adopted fast-tracking procedures. The Commission's experience with fast-tracking has, however, been that:

- Less than a third of phase one investigations qualify for fast-tracking.
- Practitioners insist on fast-tracking, whilst merger notifications do not meet the criteria.
- The Commission is often pressurised into dealing with cases as a matter of urgency due to the late filing by parties.
- Practitioners tend to overlook/ ignore vertical integration.

To qualify for fast-tracking, all the components of fast-track cases must be present for a transaction. These components are:

- The merger must be classified as an intermediate, phase one investigation (non-complex);
- The filing must be complete;
- The merger gives rise to no public interest issues and the filing is accompanied by comfort letters from all the relevant trade unions and (or) employee representatives; and
- No jurisdictional issues arise from the merger.

The Commission categorises merger cases as phase one in the following instances:

- Property transactions[1].
- Transactions where one of the parties is a new entrant into the market. Justification for this proposal lies in the fact that the transaction would normally represent the replacement of one participant by another.
- Management buy-out transactions are similar to new entrant cases and should therefore be treated in accordance with the above suggestion.
- Where there is no product overlap in respect of the product market and no vertical concerns.
- Where the parties to the merger are not in the same geographic market.
- Where the parties are in the same relevant market both in terms of the product and geographic markets, but the combined market share post merger is less than 15%, excluding highly concentrated markets.
- Where the parties are in the same relevant market and their combined market shares are above 15%, but:
- The post-acquisition HHI is below 1000 points.
- Where the post-merger HHI is between 1000 – 1800 but the increase in HHI is below 100 points.
- Where the post-merger HHI is above 1800 but the increase thereof is less than 50 points.

The Commission had in the past also categorised companies in liquidation (failing firms) as phase one cases, but has since reviewed its position, as companies in liquidation often require complex analysis.

The Commission also added that mergers where the parties are in the same relevant market, but the combined market share post merger is less than 15%, would be excluded from fast-tracking where the relevant markets are highly concentrated.

The majority of phase one investigations that do not qualify for fast-tracking are because the parties do not supply the Commission with comfort letters from the trade unions.

## Public interest issues

- The filing must deal with a worst-case scenario in respect of the impact of the merger on employment.
- If the parties state that there will be no job losses as a result of the merger, reasons should be put forward.
- A comfort letter from the trade unions must accompany the filing. This letter would convey that the trade unions were notified of the transaction and that they support the merger or would not oppose the merger. Parties are advised to engage trade unions early in the process.
- A transaction can only be fast-tracked where it does not raise any other public interest issues.
- Another factor that disqualifies phase one investigations from being fast-tracked is the completion of filings. The Commission gives the following guidelines for completion.

## Guidelines for complete filings:

### Forms and annexures

This means the business plans, annual reports and/or financial statements, board minutes relevant to the transaction and complete lists of all the products and services of all the companies in the acquiring family and target firm must be included. If these are not available, an affidavit to this effect must be submitted. (Technically the Commission can issue a form CC13(2) in most cases.)

### Schedule 3

- The relevant information on the activities of firms in the acquiring family must be supplied, not only those for the acquiring firm.
- For the purposes of the target, only the transferred firm and any other firm, business or asset controlled by it, is relevant.
- Consolidated turnover and asset figures must be provided.

### Schedules 4 & 5

- The description of the transaction should be clear and thorough.
- This must include the rationale for the transaction and purchase consideration.
- The relevant information on the activities of firms in the acquiring family must be supplied, not only those for the acquiring firm. Similarly the information is required for the target.

### Market definition

- When a market definition is proposed, it is suggested that the parties put forward a narrow and a broad definition. If there are no concerns with market shares on either definition, the case can be dealt with speedily.
- Parties should not just provide their "conclusions" on the relevant market, but also the information these conclusions are based upon. The availability of the data used for the analysis would speed the Commission's investigation.
- All the relevant information for market share calculation must be included in the filing.
- Vertical mergers should have information regarding two relevant markets. Two lists of customers and competitors must accompany the market definitions.

### Jurisdictional issues

A case can only be fast-tracked when there are no jurisdictional disputes. A matter that raises jurisdictional problems will not ordinarily be regarded as a fast-track case. However, to eliminate this problem, parties may be well advised to seek an advisory opinion prior to the notification when there is uncertainty on jurisdiction. Parties should then be transparent about the opinion upon filing.

### Other issues

*Confidentiality claims:*

Onerous confidentiality claims frustrate the Commission's ability to expedite cases and draft reasons for decisions in the case of large mergers. The Commission has found that confidentiality is sometimes claimed for information that is freely available to the public, i.e. in annual reports and websites.

*User-friendly filings:*

Cross-referencing affects the readability of a document.

*Property transactions:*

Decisions on property transactions are expedited when the parties follow the SAPOA (South African Property Owner's Association) market delineations.

Should the filing not be complete, correct and timeous, the target of a decision within 20 or less days cannot be reached. In all other cases the complexity of the analysis required would dictate the length of the investigation.

Where cases do not fall within the ambit of fast-tracking, parties can expect to be informed of the possible complexity of the case within 15 days of filing. Discussion and information exchanges should then take place as proposed above.

1 Under Review

# Lumpy Markets in Merger Analysis

Lumpy markets have significant implications for the assessment of any merger. The Commission recently investigated the intermediate merger between General Electric and Instrumentarium. Three market overlaps were prevalent, i.e. the markets for patient monitors, mammography equipment and c-arms. The latter two markets seemed problematic on the basis of very high postmerger market shares. However, in both markets a "lumpy demand" prevailed, i.e., nationally only a few transactions occurred during the course of a year.

## Emphasise competitive conditions

Market shares frequently provide an indication of the competitive activity in an industry. However, market shares are calculated on the basis of annual sales or production, which, in lumpy markets, are so small that concentration figures distort the firms' relative competitive significance[1]. Market shares could simply become "volatile", "shifting" and "easily skewed"[2]. In *Baker Hughes*, only 38 hardrock hydraulic underground drilling rigs (HHUDRs) were sold in the calendar year prior to the merger's announcement. The district court had found that obtaining a single contract to provide HHUDRs could move a competitor from last to first place in the market[3]. As a result, because market shares could easily reflect short-run, transient factors in a market, competition authorities place an important emphasis on the competitive analysis in these cases.

## How is structural data treated?

Lumpy markets may lend themselves to be measured according to firms' capabilities to bid on new consumer demand, particularly those in which long-term contracts are typical. On this basis, competition authorities would assign equal shares to all qualified bidders.

In the process, evidence of historical performance, either in terms of units of production or sales revenue, would not be considered[4]. The 1992 US Merger Guide-lines recognised this methodology in appropriate circumstances[5].

## Evaluating oligopolistic coordination

Successful oligopolistic coordination is less likely, everything else being equal, in markets where customers purchase infrequently and in large volumes[6]. First, in lumpy markets, deviation (cheating) from coordinated price and output levels is more attractive[7] (long-term contracts are scarce and highly valued). Secondly, fluctuating and unpredictable demand complicates the pegging of coordinated levels, as well as the monitoring of adherence to it[8].

In Rhône-Poulenc/SNIA (II),[9] the European Commission claimed that the absence of longterm, exclusive contracts reduced the likelihood of successful collusion. The Commission indicated that long-term contracts would be a barrier to entry, as the ability of customers to switch would be restricted.

## Buyer power

In a lumpy market the influence of a buyer's decision increases dramatically[10]. A single contract means long-term business to suppliers, causing them to frequently compromise on aspects of a deal to secure a transaction.

This relates to another indication of buyer power: the discipline that customers are able to force upon suppliers. In lumpy markets, customers could occasionally use the prices of lower bidders to "manipulate" the higher bidders to reduce their margins even further. Evidence of manipulation is highly regarded by the European Commission[11].

## Conclusion

Although high post-merger concentration might normally lead competition authorities to be rightfully sceptical about a proposed merger, industries where erratic demand prevails should be viewed with caution. The presence of significant competitors and low entry barriers in lumpy markets could alleviate concerns about the post-merger market power of participant firms.

1 Schlossberg, R.S. and Clifford, H.A. (2000) Mergers and Acquisitions: Understanding the Antitrust Issues. American Bar Association: Chicago.
2 United States v Baker Hughes, 908 F.2d981, 986 (DC Cir. 1990).
3 Id.
4 Schlossberg, R.S. and Clifford, H.A. (2000) Mergers and Acquisitions: Understanding the Antitrust Issues. American Bar Association: Chicago.
5 "Where all firms have, on a forward-looking basis, an equal likelihood of securing sales, the Agency will assign firms equal shares." 1992 Merger Guidelines, part B.2 of Chapter 3.
6 Hawk, B.E. and Huser, H.L. (1996) European Community Merger Control: A Practitioner's Guide. Kluwer Law International: The Hague.
7 See e.g., Hospital Corp. of Am. V FTC, 807 F.2d at 1391.
8 Compare the 1992 US Merger Guidelines at par 2.12.
9 Case no IV/M.368 (Jan. 17, 1994) at par 26-31 and 37.
10 See, e.g., United States v Syufy Enters., 903 F.2d 659, 670 (9th Cir. 1990).
11 See p 200 in Hawk, B.E. and Huser, H.L. (1996) European Community Merger Control: A Practitioner's Guide. Kluwer Law International: The Hague[11]

# Case Reviews

## Commission retracts revocation of Swartland and Boskor merger

On 6 February 2003, the Commission granted an unconditional approval of the proposed intermediate merger between Orono Trading 51 (Pty) Ltd and Boskor Timber Processors. The transaction entailed the acquisition of the Boskor sawmill by Orono Trading, a shelf company wholly owned by the Swartland Group. The recommendation for an unconditional approval from the Commission's Mergers & Acquisitions Division was inter alia based on the fact that the filing parties stated in the merger notification documents that no job losses would take place as a result of the merger.

Notwithstanding the abovementioned submission, on 17 February 2003 the Swartland Group held a meeting with the Boskor employees informing them that 300 – 350 employees would possibly have to be retrenched due to "operational requirements". The Commission initially had no knowledge of the abovementioned meeting or the anticipated retrenchments.

On 20 March 2003, the relevant Trade Union representing the Boskor employees, CEPPWAWU, informed the Commission of the anticipated retrenchments and provided the Commission with copies of all correspondence exchanged between CEPPWAWU and the Swartland Group.

In copies of the correspondence provided by CEPPWAWU, Swartland claimed that "operational requirements" necessitated the retrenchment of 300 – 350 employees. The Commission did not accept that within only eight business days of taking over the sawmill, "operational requirements" can necessitate the retrenchment of such a large number of employees.

The Commission was of the opinion that Swartland anticipated the retrenchments before the filing of the merger, or at least knew of the possibility of these retrenchments. Swartland nevertheless failed to disclose the possibility of retrenchments and stated, as a fact, that the transaction would not interrupt the employees' continuity of employment. Due to the false and/or misleading information contained in the notification documents, the relevant Trade Union did not find it necessary to participate in the merger evaluation process. The merger, however, did have a potentially negative effect on CEPPWAWU's members but the Union was deprived of an opportunity to participate.

Due to the fact that the unconditional approval was based on false and/or misleading information, the Commission is entitled to revoke the approval in terms of section 15 (1) (a) & (b). The result of the revocation will be that the Boskor sawmill will be returned to the original owners, SAPPI Limited.

Sawmilling, however, does not represent a core business of SAPPI. SAPPI has apparently been trying to sell the Boskor sawmill for a number of years. Should the Boskor sawmill be returned to SAPPI, SAPPI might decide to close down the sawmill completely or retrench the employees themselves.

It was the intention of the Commission to protect the employees as far as possible by encouraging the parties to reach an acceptable settlement between themselves, before the Commission takes a final decision on the revocation of the merger.

Initial efforts by the Commission to persuade the parties to reach a settlement between themselves were unsuccessful. On 17 June 2003, the Commission took a decision to proceed with steps to revoke the merger in terms of Section 15(1)(a) of the Act.

On 18 June 2003 the Commission received a copy of a document, dated 11 June 2003, that was apparently served by the Swartland Group on all Boskor employees. The particular document contained a confirmation that Swartland has withdrawn its Notice in terms of Section 189(3) of the Labour Relations Act, which was served on Boskor employees on 11 March 2003. The serving of a Notice in terms of Section 189(3) is compulsory and is a prerequisite for retrenchments to be legally binding and properly implemented.

In light of the withdrawal the Commissioner requested a meeting between all parties concerned to gather, first hand, parties' views and opinions pertaining to the pending revocation. The meeting was held on 30 June at the Commission's premises and was attended by both parties and their representatives. It was decided at the meeting that the parties would report back to the Commission on or before Wednesday 9 July 2003 about their views and efforts in reaching a settlement between themselves. The deadline was extended to Friday 11 July 2003 at the request of both parties.

On Friday 11 July 2003, the Commission received letters from both parties confirming that they had reached a settlement between themselves.

The Commission was also given a copy of the signed settlement agreement concluded between the parties. The agreement inter alia provides that:

- No compulsory retrenchments of any employees will take place for a period of 12 months from the date of signature of the agreement (The agreement was signed on 11 July 2003)
- The parties will revert to the SAPPI Disciplinary Code until such time as the parties have negotiated the content and introduction of a new code
- No employees will be forcibly removed from their hostels nor will the supply of electricity to the hostels be interrupted
- Swartland will arrange a mobile facility to supply food to staff
- Swartland will supply transport to employ-ees in order to consult with a doctor
- The clinic at the sawmill will continue to be manned by a nurse and an ambulance service remains available for injuries on duty
- The parties will meet within 12 weeks to discuss the sale of a stake in the Boskor sawmill to a BEE partner.

The terms of the settlement puts no obligation on the Commission to monitor adherence thereto. Should Swartland breach any of its obligations contained in the settlement agreement, the Trade Union will inform their attorneys who, on their part, will institute proceedings on behalf of the employees in the relevant forum.

# Commission recommends approval of New Clicks acquisition of pharmacy outlets

The Commission recommended to the Competition Tribunal that it approves, without conditions, the acquisition by the Clicks Organisation (Pty) Ltd (TCO) of four firms, which own and control 83 pharmacies nationwide. TCO is a private company, wholly owned by listed entity, New Clicks Holdings Ltd. The four firms are: Purchase Milton & Associates (Pty) Ltd, Milton & Associates (Pty) Ltd, J&G Purchase (Pty) Ltd, and Leon Katz Ltd. Together they control, *inter alia*, the following pharmacy brands: Hyperpharm, Guardian, Galleria, Pharmarama, Remedys and Medirama.

Amendments to the Pharmacy Act 88 of 1997 now allow for a non-pharmacist, in this case a retail group, to own a dispensing pharmacy subject to obtaining approval from the Director-General of the Department of Health. One of the conditions is that the pharmacy is under the continuous supervision of a registered pharmacist. The Commission said that TCO's rationale is that this provision, and consequently this transaction, creates a huge potential for the effective distribution of dispensing drugs, particularly in rural areas. Based on the Commission's analysis of all relevant factors, the Commission has concluded that it is unlikely that this large merger could substantially prevent or lessen competition and have therefore recommended that it be approved unconditionally. The Tribunal has approved the acquisition.

# Astral Foods acquisition of Bulkop approved

The Commission has approved the intermediate merger between Astral Operations Ltd, which trades as Meadow Feeds Cape (MFC), and Bulkop Feeds. Astral Operations is wholly owned by JSE-listed Astral Foods.

Both the parties produce animal feed. The parties intend to move their operations to Port Elizabeth with a view to the provision of animal feed for Alexandria and Tsitsikamma (both 150 km from Port Elizabeth).

The Commission is of the opinion that the post merger market shares of the parties are significant in the Tsitsikamma/Alexandria dairy feed market. However, customers of the merging parties expressed no concerns regarding the transaction. Most of the customers felt that in the event of anti-competitive pricing by the merged entity, they could source their feed requirements from other competitors in Tsitsikamma /Alexandria.

The Commission concluded that the transaction does not substantially prevent or lessen competition in any market, and that the transaction does not raise public interest issues significant enough to lead to a different conclusion on the outcome of the merger.

# Commission approves merger of Strate with bond clearing and settlement houses

The Commission received a voluntary small merger notification of the acquisition of Universal Exchange Corporation Ltd (Unexcor) and the Central Depository Ltd (CD Ltd) by STRATE Ltd (Strate).

Strate is the authorised Central Securities Depository for the electronic settlement of equities and warrants listed on the JSE Securities Exchange (JSE), as well as all transactions concluded "off-exchange" in securities listed on the JSE. Unexcor is the recognised clearing house of the Bond Exchange of South Africa, and CD Ltd performs settlement services for bonds.

The Commission's analysis revealed that there was no overlap in the activities of the merging firms.

The Commission is of the view that the unification of the South African financial markets' settlement and clearance services will lead to efficiencies in those markets. It will have a positive effect on the industry as a whole and will position South Africa to compete effectively on an international basis. Furthermore, there is a worldwide tendency to merge clearing and settlement systems into ever-larger entities, both as a result of economies of scale and the desire for more effective public regulatory oversight.

Concerned parties have, however, raised the issue of the vertical integration between the JSE and Strate.

The JSE is, pre-merger, a 50% shareholder in Strate. The Commission found that these issues will not be exacerbated by the merger. On the contrary, the vertical issues are diluted by the proposed transactions. Due to the structure of the transaction and purchase consideration, the JSE's shareholding in Strate will decrease from 50% to 40,8%, thereby further diluting the influence of the JSE as a shareholder.

Pre-merger, the shareholding the JSE had in Strate did not raise competition concerns since the owners of the JSE are its and Strate's users (customers). They therefore have no incentive to increase costs to users. However, should the JSE demutualise and become a for-profit institution, this incentive will change.

A for-profit JSE might be able to exclude a new, competing exchange from access to the clearing and settlement services under its control.

The Commission therefore approved the transaction without conditions, but will take an advocacy position on the preferred market structure should the JSE demutualise and become a for-profit institution.

# Adcock Ingram and Parke-Med merger approved

The Commission was notified of the sale of Parke-Med, a generic pharmaceutical firm, to Adcock Ingram, wholly owned by Pfizer Laboratories (Pty) Ltd. Both parties compete within the broader human pharmaceutical market. The Commission has approved the transaction without conditions.

The Commission's analysis of the transaction revealed no competition concerns. However, the Commission is also tasked with examining public interest issues in considering a merger.

During the course of the merger investigation, the Commission received a complaint from a firm, primarily premised on the fact that Black Economic Empowerment (BEE) firms and historically disadvantaged individuals are unable to enter the pharmaceutical manufacturing sector. This firm had made an offer to acquire Parke Med, which had not been accepted.

The Commission's role is to promote and protect competition. Its task is to evaluate a merger as it is submitted to the Commission. While the Commission has sympathy with the complaining firm and with BEE as a goal, it cannot pick and choose the parties to the transaction.

The Commission did consider all the submissions made by the complaint, but concluded that it was unlikely that the merger raised the barriers to entry for BEE firms or historically disadvantaged firms to the pharmaceutical industry.

# Commission approves National Brands and House of Coffees merger

The Commission has approved the intermediate merger between National Brands Ltd and House of Coffees (Pty)Ltd (HOC) with no conditions.

National Brands is a manufacturer, marketer and distributor of FMCG to both the retail and Out of Home (OOH) sectors, including tea, coffee creamers, biscuits, and snacks. HOC manufactures and distributes coffee and tea to both the retail and the OOH sector.

Post merger, the merged entity's market shares in both the retail and OOH markets give rise to competition concerns. However, the Commission's investigation revealed that there are a number of alternative suppliers that customers can turn to if the merged entity unilaterally increases prices, both from a retail and OOH perspective. Barriers to entry are low and this has resulted in a number of new entrants. Imports play a significant role and should exercise a constraint on the ability of the merged entity to exercise market power post merger. The Commission is furthermore of the view that countervailing power in, especially, the retail market will have a similar effect.

The Commission felt it was unlikely that the proposed transaction would lead to a substantial lessening or prevention of competition. It also believes the transaction does not raise substantial public interest concerns, although the parties did indicate there may be limited retrenchments. Therefore, based on all these factors, the Commission has approved the transaction without conditions.

# How Competitive is South Africa's Car Dealership Industry?

There are approximately 1150 franchised motor vehicle dealerships in South Africa. Most of these dealerships distribute and sell new motor vehicles on the basis of franchise agreements with car manufacturers. This article only deals with the sale of new (as opposed to used) vehicles. The fact is that there seems to be sufficient competition in the used car market, as dealerships are able to buy from and resell vehicles to customers without any agreements with manufacturers. The used car market is gaining in importance as escalating new car prices are putting new car ownership beyond the reach of most consumers.

This is reflected in the declining volumes of new car sales. According to the National Association of Automobile Manufacturers of South Africa (NAAMSA), new vehicle sales declined by 4,8 percent in 2002. Some experts estimate that the decline will be as high as seven percent in 2003. However, it is possible that monetary easing by the South African Reserve Bank will rejuvenate the demand for new cars in the coming months.

## Size and structure of the industry

Dealerships in the South African vehicle retail industry fall into two categories:

- Multi-franchise dealerships – distribute and market multiple brands of vehicles.
- Exclusive dealerships – distribute and market only one brand of vehicles.

About eight companies own most of these dealerships, McCarthy Limited being the leader with a turnover of around R10 billion. It is followed by Imperial Holdings with a turnover of nearly R8 billion. There are four other significant players in the industry: Barloworld Motor (Pty) Ltd, Unitrans Limited, CMH Group and Super Group Limited and two smaller ones (Forza Group Limited and Vaal Auto Limited). There are also about 400 quality independent dealerships offering customers a wide selection of new vehicles.

## Competition analysis

There are indications that manufacturers monitor dealers' prices carefully and impose fines on them if they sell below agreed prices, or (what amounts to the same thing) grant higher discounts than allowed. In the large merger case between Unitrans Motors (Pty) Ltd and the motor division of Senwes Ltd, it emerged that manufacturers dictate the margins made on their products, the number of cars sold and even how the cars are sold. However, dealers seem to be able to circumvent such minimum resale price maintenance by means of offering more generous trade-ins to buyers, or by putting some mileage on a new car and selling it for less as a 'demo' unit.

### Barriers to entry

Franchise contracts are affecting entry into the new vehicle market as vehicles are distributed under these agreements. This is in stark contrast to the used vehicle market, where second-hand vehicles can be bought and resold by dealerships without any franchise agreements with the manufacturers.

## Motor vehicle prices

The cost of purchasing a new vehicle is now beyond the reach of many motorists in South Africa. According to the National Union of Metalworkers in South Africa (Numsa), about 33 percent of new vehicles being sold in the country now cost more than R200 000. It is estimated that in the USA it takes a household 20 working weeks to cover the price of a new car (including finance costs), compared to the 70 working weeks that a high income South African family needs to purchase and finance a similar car.

For example, between 1984 and 2003 the price of the entry-level Volkswagen Citi Golf shot up from R7 995 to R64 720, an increase of a staggering 709,5 percent. Similarly the price of its entry-level rival, the Toyota Conquest Tazz, increased from R12 060 in 1985 to R63 276 in 2003, a gain of 424,5 percent.[1] It should be noted that no significant improvements on these cars took place during the periods concerned.

In 2002, average car price increases varied between 18 and 22 percent, adversely affecting the volume of cars sold. The four interest rate hikes that were affected during the year exacerbated the situation. According to Brand Pretorius – Chief Executive of McCarthy Motor

1 Sunday Times Business Times May 11 2003.

Holdings, this led to monthly repayments on a new family car increasing by 28 percent.

**Factors affecting motor vehicle prices**

The South African motor vehicle industry is the largest in Africa, accounting for 81,6 percent of the continent's total car production[2]. Prior to 1994, the industry was mainly concerned with import substitution. It was an inefficient industry protected by high tariffs.

Since 1994, South African motor vehicle exports have increased from 20 000 units in 1997, to 108 000 in 2001. The low growth potential of domestic demand has forced manufacturers to be more export-oriented. Government's Motor Industry Development Programme (MIDP) and the American Africa Growth Opportunities Act (AGOA) are credited with much of the industry's recent export success, although there is another more fundamental reason why SA motor vehicle exports have performed so well: the rapid depreciation of the Rand.

The reduction in import tariffs has improved the competitiveness of the industry. In 2002, Japanese experts evaluating the industry rated it as 'advanced' (on a scale ranging from 'poor', through 'average', to 'above average', to 'advanced', to 'world leader')[3]. However, these improvements have not trickled down the supply chain to the other suppliers in the industry. The same experts rated first-tier component suppliers as 'above average', with the picture becoming gloomier as second-tier companies were rated 'average' and third-tier companies were generally 'poor'. These inefficiencies are adversely affecting the costs of producing cars in South Africa.

Vast improvements in the component manufacturing level are needed. This is especially important since about 80 percent of these components are imported mostly from Japan and Europe. To improve its competitiveness the industry needs to increase the content of locally produced components. In Japan, for example, the local content target is between 60 and 70 percent.

The recent strengthening of the rand/dollar exchange rate has not helped that much. At least it has kept the car price hikes, so far this year, at around two to four percent. However, because the bulk of component imports are priced in either yen or euros (and the rand did not perform as well against these currencies), vehicle prices will still be affected.

Because high prices are affecting the demand for motor vehicles in South Africa, the dealers are feeling the pinch. Some of the dealerships have recently started to advocate for legislative changes to enable individual car buyers to lease cars instead of buying them. It is not clear whether this will really lead to an increased affordability of cars, as the dealers would have to adapt their strategies accordingly, to provide for the reappearance of cars on the second-hand market after the lease periods expire. That might lead dealers to demand fewer new cars for outright sales purposes, and contract the supply of sales so that, in total, the number of new cars being supplied to customers might not increase. The position of the dealers is worsened by the fact that they have been losing sales to manufacturers. The percentage of new vehicle sales that pass through dealers fell from 81.9 percent of the market in 1999, to about 79.2 percent in 2002, while there were increases in direct sales by manufacturers to government and rental firms. Manufacturers are also increasingly opting to integrate vertically by distributing their own cars directly.

## Conclusion

Efficiency improvements are needed in the manufacture of motor vehicles, especially in the lower tiers. Increasing the percentage of the local content in car production has been a long-term priority of the Department of Trade and Industry (dti) and some progress has been made in this regard. As for the distribution sector, franchised dealers have repeatedly called on the dti to designate the industry and also lobby for the franchise laws to be made more favourable to franchisees.The Commission has not supported these calls. The industry appears to be functioning well, contributing to exports and a wider variety of cars. An amendment of franchise laws or action against the manufacturers, designed to prevent them imposing restraints on their dealers, does not appear to be warranted at this stage. This might simply cause manufacturers to opt for increased vertical integration rather than face more onerous provisions in how they interact with their dealers.

2 Engineering News 14/02/03
3 Engineering News 14/02/03

# Weighing Efficiencies

## Against Anti-competitive Effects

The importance of economic efficiency in the South African economy is highlighted in Section 2 of the Competition Act of 1996, which states:

"The purpose of this Act is to promote and maintain competition in the Republic in order to promote the efficiency, adaptability and development of the economy. It has also an

# Weighing efficiencies continued…

aim to provide consumers with competitive prices and product choices, and to promote employment, advance the social and economic welfare of South Africans".

The challenge for the Commission is to find the right balance between protecting consumers from anti-competitive practices and allowing those practices that will benefit broader economic efficiency. The Competition Act does provide some guidance on how to do this evaluation, but leaves a great deal of discretion to the Commission in making its final determination.

## What does the Competition Act say about efficiencies?

The Competition Act requires a consideration of efficiencies on merger and non-merger matters. In merger cases, Section 12A (1)(a)(i) of the Act expressly indicates that efficiencies 'must be greater than, and offset anti-competitive effects that arise as a result of the merger'.

The language of the Act differs when it comes to efficiencies considered under Sections 4, 5 and 8, because it states that 'efficiencies must outweigh[1] the anti-competitive effects'. The question is whether the differences in language actually mean that the consideration of efficiencies in non-merger matters could be valued in an analysis such that it outweighed the competitive harm, even if it was not greater than the harm in the strictest sense. The parties should demonstrate efficiency claims because they are in possession of this information. This is expressly provided for in Sections 4(1)(a), 5(1) and 8(d), where the burden is placed on the respondent(s) to prove any efficiency gains. However, Section 8(c) is ambiguous in that it does not impose the burden to demonstrate efficiencies on the parties.

### What are efficiencies?

In economic terms, the concept of efficiency means maximisation of output from a given set of inputs. Efficiencies can be broadly grouped into three types: technical or production efficiencies, allocative efficiencies and dynamic efficiencies.

Technical or productive efficiencies are achieved when a firm produces the goods and services that they offer to customers at least cost. These efficiencies can be fostered by technological innovation (new machinery), new processes, or expanding the scale or scope of production. Competition can enhance technical efficiency by stimulating improvements in managerial performance, forcing a streamlining of work practices and enhancing the use of material inputs.

### What efficiencies are most crucial or should be considered by competition authorities?

The Act is not clear on which efficiencies should be given greatest value. It speaks of technological efficiency or other pro-competitive gains, but not of whom those gains are to benefit. Are they supposed to be the consumer or producer, or a combination of the two? Is there to be a way the consumer benefits are to be weighted against the producer benefits? There is also no reference in the Act to the time frame in which these efficiencies need to be evaluated. For example, dynamic efficiencies may occur several years after a practice is put in place, but how are those prospective benefits to be weighed against current period harm?

The views and experience of other competition authorities provide some insight into possible approaches to these questions. For example, the Canadian Competition Commission appears ready to deal directly with the problem of what to do about practices thought to be both anti-competitive and efficient. If it remains unclear as to whom the efficiency gains are to benefit, the Commission or the Tribunal might not challenge a contract or could allow a merger even if it results in a substantial harm to consumers.

The most recent US DOJ/FTC Horizontal Merger Guidelines provide some detail on the US approach to efficiencies. The Guidelines stress that efficiencies must be cognizable and specific to the merger transaction, stating:

"Certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the marginal cost of production, are more likely to be susceptible to verification, merger-specific, and substantial, and are less likely to result from anti-competitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anti-competitive output reductions. Yet others, such as those relating to procurement, management, or capital cost are less likely to be merger-specific or substantial, or may not be cognizable for other reasons".

In South Africa, the Competition Tribunal grappled with the difficult question of balancing competition and efficiencies in its decision regarding the merger of Trident Steel and Baldwins Steel[2]. The Tribunal noted the difficulties involved in verifying efficiencies. It noted that the greater the social value of an efficiency to society, the more difficult it would be to calculate. In addition, it was noted that there are no common units in terms of which a loss in competition could be compared with an increase in efficiency.

Whereas in some other jurisdictions the problem is resolved by way of a formula, the Tribunal has stated that a "flexible approach that recognises and weighs the evidence of a formulaic result has merit".

Regarding whether efficiency gains should be shown to benefit consumers primarily, or whether producer welfare should carry equal or more weight, the Tribunal indicated that a total welfare standard incorporating both would be preferable. It noted that efficiencies raised should be tangible and verifiable. In cases where efficiency gains are less clear, the benefit to consumers must be shown to be substantial.

## Conclusion

Clearly, the task of weighing efficiencies against anti-competitive effects is a difficult one. It is important that efficiencies raised not be merely incidental to the firm(s)'s operations, but must be shown to arise directly from the arrangement or conduct under scrutiny. The question as to which efficiencies should be given greater value is largely a judgment call, over which the Commission and Tribunal has some discretion. The Competition Authorities should consider all factors relevant to the case at hand, including whether efficiencies enhance welfare, the extent to which consumers and/or producers benefit from efficiencies and whether these efficiencies can be achieved within a reasonable time period.

1 Implies that efficiency gains must triumph over, be more important than, overcome, surmount or defeat the anti-competitive effects of the conduct
2 CT 89/LM/Oct00

# Consultative Forum

## for Competition Commission and Trade Unions

The Competition Act of 1998 accommodates participation by trade unions when evaluating mergers and acquisitions by corporate businesses in South Africa.

Registered trade unions, or their representatives, should receive from the parties to the merger, a merger notice containing details of the merging parties. The notice should also contain a summary of the effect the merger would have on employment.

Within five business days after receipt of the notice, a trade union may file a notice of its intention to participate in a merger analysis conducted by the Commission. The filing also entitles the union to participate in the Competition Tribunal pre-hearings as well as the hearings.

Through presentations, workshops and training sessions, the Commission continuously endeavours to educate trade unions on the application of the Act and to increase their ability to utilise the Act to their advantage.

One of the initiatives to promote trade union participation is the establishment of a Consultative Forum between the Commission and the General Secretaries of trade unions. The purpose of the Forum is to bring together senior trade union officials and senior Commission officials to discuss and debate issues of mutual concern, in order to facilitate broader policy-oriented discussions on the impact of competition on employment.

The initial targeted audience from the trade union side was the General Secretaries and their deputies. It was decided at the first meeting that the trade union officials who deal with competition/merger issues should also attend the Forum meetings.

To date, the Forum has held three successful meetings and has already paved a way to a greater understanding of the needs and administrative constraints of the Act, faced by both the trade unions and the Commission.

The focus is on issues vital to enhancing the unions' participation. This formed part of the agenda for the second Forum meeting. Issues included: proposals that business plans of the parties should form part of the merger notice documents when parties notify the union, taking into consideration pre-merger conditions e.g. restructuring, fast-tracking; union receipt of the Commission rulings or recommendations to the Competition Tribunal; and inclusion of unions in consent order negotiations proceedings.

Unions have shown a keen interest in other activities of the Commission and hope to be included when the Commission undertakes exercises such as investigations into food price increases and exemptions and enforcement (E&E) case investigations, which the Forum reviewed during the last meeting.

The last meeting examined trade union concerns about their internal capacity, in terms of staffing and financial resources, to adequately prepare and participate in the Commission's proceedings; the lack of information about transactions; the amount of time available for making submissions; feedback from the Commission on cases and clarity on the weight the Commission gives to public interest issues when analysing a merger transaction.

The Forum acknowledged that there has been an improvement with regard to labour participation in mergers and acquisitions proceedings. Prior to the establishment of the Forum, trade unions used to file their intention to participate without submitting their support for, or opposition to, the merger.

Enquiries about the Forum can be made to the Compliance division of the Commission for the attention of:
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