Competition News

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Towards a free and fair economy for all

IN THIS EDITION

ICN Comes to Cape Town in 2006

The International Competition Network (ICN), an organization of national competition authorities worldwide will hold its Annual Conference in the beautiful city of Cape Town, South Africa on 3-5 May 2006 at the Cape Town International Convention Centre (CTICC). The Competition Commission and the Competition Tribunal of South Africa are sponsoring and hosting the event.

The ICN is an international organisation consisting of about 82 competition authorities from 77 countries. ICN has become the premier international discussion forum on competition issues, with opportunities for non-competition agencies with interests on competition matters to also participate and make input. It has distilled, through the activities of its working groups, a number of best practices that have rapidly become a standard for the efficient functioning of national competition regulation.

ICN is a 'virtual organization' in that its activities are predominantly conducted by email, with occasional teleconferences being held, to keep the extensive work plans ticking over. A conference is held each year at which the preceding year's work output is presented and discussed by the conference delegates. Dr Ulf Boge from the German Bundeskartellamt chairs the Steering Group that currently leads the ICN. The organization is structured into several working groups, which are discussed below:

Cartels

Globally, the identification and prosecution of cartels is the highest enforcement priority of competition authorities. Due to their secretive nature, cartels are difficult to identify or crack. The Cartels Working Group has already produced an Anti-Cartel Enforcement manual, which include chapters on searches/raids/inspections, Implementing an Effective Leniency Programme, as well as an Anti-Cartel Enforcement Template, containing information about ICN members' anti-cartel enforcement regimes. This year's work plan includes a project on the obstruction of cartel investigations; international co-operation/exchange of information; and the interaction of public and private enforcement. The Working Group is scheduled to hold a Cartels Workshop in Seoul in early November, when electronic evidence gathering, international co-operation and the calculation of penalties will come under scrutiny.

Mergers

The Mergers Working Group is split between two subgroups with the one dealing with investigative techniques and analytical framework, and another that examines notification and procedures. Even more so than cartels, there is a drive within the Mergers Working Group towards international convergence on merger consideration and procedures.

The Notifications and Procedures subgroup has already produced eight Guiding Principles and 11 Recommended Practices; a Model Waiver of Confidentiality; and Comparative Filing Fees, whereas the Investigative Techniques and Analytical Framework subgroup has produced the Analysis of Merger Guidelines; the document on Merger Remedies Review Project; a draft Merger Guidelines Workbook, and a Handbook on Investigative Techniques for Merger Review. Between June 2005 and May 2006, the Mergers Working Group is planning to hold Regional Workshops on Investigative Techniques, as well as a Mergers Workshop in early 2006 in Washington DC, perhaps on remedies or economic evidence.

Competition Implementation

The Competition Policy Implementation (CPI) Working Group has subgroups dealing with Technical Assistance, Enhancing the Stature of Competition Authorities with Stakeholders, and Advocacy. First, the Technical Assistance Working Group will be fine-tuning its report on assessing the foundations of successful assistance. This year, the second Working Group will focus on enhancing the stature of competition authorities with business and canvassing the experiences of young competition authorities. The Advocacy subgroup is likely to examine the interaction between competition authorities and the judiciary, both in countries with young and established competition authorities.

Telecommunications

This Working Group will first be conducting a stock taking exercise on existing work on competition policy in telecom (especially by the ICN and OECD), as well as covering selected anti-trust cases in telecom. Then the state of telecom sector competition will be examined for SA, Turkey, Jamaica and China.

It is hoped that this work will be used to identify valuable lessons and possibly optimal approaches to assist countries liberalizing or deregulating their telecom sectors. There may also be time left to analyse new challenges arising from technological progress in the sector. This Working Group will dissolve after the conference in Cape Town.

Unilateral Conduct Working Group

This Working Group was formed after a proposal at the Bonn Conference in May this year. There will probably be two or more subgroups, and although the work plan has not yet been decided on, there have been suggestions that the focus should first be on basic principles, such as market power and market definition, and then proceed to find common elements in the different approaches to unilateral conduct that are adopted by ICN member countries.

Contributed by: Geoff Parr,
Policy and Research Division

Cell Phone Handset Subsidies: To regulate or not to regulate

The Independent Communications Authority of South Africa (Icasa) is concerned that the practice of subsidising handsets and the subsequent need to lock customers into long-term contracts may have adverse competition and consumer welfare effects. Consequently, on the 4th and 5th of August 2005, Icasa held public hearings on the subject in terms of section 27 of the Telecommunications Act, No 103 of 1996. The Competition Commission participated in these hearings. This article summarises the Commission's oral and written submissions to Icasa on the issue.

Overview

The South African mobile market has grown tremendously since the licensing of the first mobile operators in 1994, reaching an estimated 23 million by the end of April 2005. Of the total subscribers, about 85% are on prepaid services and 15% are contract customers[1]. It is accepted that handset subsidies have assisted in driving penetration levels in South Africa and other countries. In South Africa cell phones are a status symbol – the more fancier and expensive the handset, the more attractive it is. Few people would afford paying cash for these devices and so offering them for free is a creative way of reaching as many subscribers as possible.

The question to be answered, however, is whether handset subsidies are still needed in the South African market and what purpose other than market penetration are they serving now since the main purpose of driving market penetration has surpassed all expectations.

To regulate or not to regulate

To the extent that handset subsidies are problematic, specific regulations should be developed. However, there is a danger that regulation may result in far worse outcomes than the identified problem. In other words, the impact of regulatory failure may surpass that of the supposed market failure.

Nevertheless, issues such as transparency and contract term flexibility, may need closer scrutiny.

Operators and service providers tend to provide numerous tariff plans and product/service packages that confuse consumers and render informed choice impossible. Usually there is no break down of costs by item so that the consumer knows exactly how much goes to paying for the handset, call charges and other services.

Therefore, ICASA should consider introducing measures to increase transparency and comparability of various options.

Long-term contracts tend to lock-in customers such that it becomes difficult or costly for disgruntled customers to switch networks before the expiry of the contract. The shorter the contract period, the easier it is to switch networks and the more service providers would compete on quality of service. With regard to the tying of services and equipment accompanying subsidies, consumers should have the choice of a service contract independent of equipment and vice versa. In other words, consumers who choose not to opt for equipment should be given an equivalent and explicit discount on tariffs.

Competition effects of handset subsidies

Despite the fact that handset subsidies lower the cost of entry for new customers, they may adversely affect competition and consumer welfare. It is not clear however, whether the pro-competitive gains of subsidies outweigh the potential adverse effects thereof. The following are some of the competition and consumer welfare effects of handset subsidies.

Operating costs - Research[2] shows that the most significant operational costs are the costs of customer acquisition, advertising, interconnection and the cost of purchasing equipment and accessories for resale. These costs are often passed on to consumers in the form of higher tariffs. Operators in subsidy free environments, where the cost of acquisition is relatively low, perform best in minimising operations costs as a proportion of revenues. It is however not certain that a reduction in customer acquisition costs and operating expenses will be passed on to consumers in the form of lower tariffs.

Limited consumer choice – mobile phone operators purchase handsets from a limited number of manufacturers, thus limiting consumer choice. This also limits competition at the level of handset vendors. In India, with more than 20 handset manufacturers competition at the handset vendor level has pressurised prices downwards.

1 www.cellular.co.za/stats/statistics_south_africa.htm
2 Cost Structures of Mobile Operators. www.gii.co.jp/press

Switching costs – Long-term contracts mean that consumers cannot switch service providers easily. Early termination of a contract is subject to prohibitively high penalty fees. Where SIM-locks are used, switching to another network is impossible unless one discards the handset or again pays a fee to have the handset unlocked.

Entry costs/barriers to entry for new competitors – Acquiring customers in the mobile phone market is costly and the cost of handset subsidies to a new network operator could be a barrier to entry because it means that the firm must first have funds set aside for handsets even before it starts operations. For a small, less experienced firm, this could be a deciding factor for success.

Bundling/tying-in – Selling a handset on condition that a customer must subscribe with the particular network could be viewed as a form of tying or bundling. Bundling can be used as an anticompetitive strategy to gain an edge over one's competitors. It prevents consumer choice and may lead to higher prices. However, there are certain pro-competitive gains that must be weighed against the anticompetitive effects thereof. For instance, operators save more by marketing and advertising a bundle than individual products and services.

Number portability - The single most crucial aspect of the debate around handset subsidies is the effect they have on number portability. Number portability is thought to be the essence of competition in the telecommunications sector. It reduces switching costs tremendously and allows network operators to keep close tabs on their quality of service and tariff levels lest they lose customers to more competitive networks. With heavy subsidies, long-term contracts and SIM-lock features it may be difficult to implement number portability.

Conclusion

Icasa should consider allowing handset subsidies to continue but ensure that aspects such as transparency and flexibility are enhanced. Those customers who do not like contracts have the choice of going prepaid. Those who prefer to be on postpaid plans should have the choice of contracts of different lengths. Most importantly, Icasa should compel the three mobile network operators to offer – in addition to their present offerings – contracts without "free" handsets, at reduced call charges. This would have the effect of stimulating direct competition on call charges.

Contributed by: Fungai Sibanda,
Policy and Research Division

The Nebulous Nature of Tourism

In evaluating the competitive landscape in any market, it is generally advisable to start by defining the relevant product market. An interesting anomaly is that practitioners tend to define the market as broadly as possible and the authorities aim to define the market as narrowly as possible. In the case of tourism the question that needs to be asked is: what products or services are relevant when referring to a market in the tourism industry?

According to Mieczkowski[1] '… tourism constitutes a complex of diverse and fragemented components and phenomena that relate, in some way, to practically every visible and invisible aspect of life. No other economic sector involves such a critical interplay of diverse economic, political and environmental factors.'

1 Mieczkowski, Z. (1995). Environmental issues of tourism and recreation, Lanham:University press of America.

The same product or service may, or may not, be a tourism-related economic activity, based on certain characteristics of the consumer. By its very nature tourism is multi-sectoral and consists of various tangible and intangible activities. It is 'statistically invisible' with only the most obvious sectors, or those exclusively devoted to tourists being enumerated in the macro tourism data. These would include tour guides, travel agents, hotels and airlines.

The definition of tourism when evaluating a merger on public interest grounds could make for interesting challenges if parties were to use section 12 (3)(a) of the Competition Act and claim the positive effect of a merger on a particular industrial sector or region if the industrial sector were to be defined as the tourism sector.

Instead of merely referring to the tourism industry, the exact nature of the product catering to tourists' needs would be more relevant from a competition perspective, since the enterprise may cater to tourist as well as non-tourist needs with the emphasis on tourism being exaggerated. For instance, in a case of a restaurant specializing in the provision of authentic South African meals, the location of the restaurant can determine whether the restaurant falls within the tourism sector or not. If it is located in the Victoria and Alfred Waterfront in Cape Town, it can reasonably be assumed that the restaurant will cater mostly for tourists and thus fall within the tourism sector. However, if it is situated in a Pretoria suburb, it is more likely that it will be catering for the local market and would hence fall outside the tourism sector. The customer base is thus very crucial in this regard.

In determining the product market, competition practitioners would need to determine that the enterprise falls within the broader restaurant market, rather than referring to the tourism industry per se (the same would apply for other markets within the tourism industry: airlines would be defined in terms of the service they offered and hotels would be defined within the hospitality industry).

One other practical difficulty in defining the tourism industry relates to International Standard Industry Classification (ISIC), a system used to classify and standardize industries across countries by referring to sic codes. There is no sic code for the tourism industry. Enterprises catering to tourists needs are generally defined in terms of their product or service offering.
From a macro perspective, industries that cater to tourists' needs generally fall within the service industry category. Service industries are industries in which production and consumption occur simultaneously. They are highly dependent on the quality of service being offered and are usually of a repeat or maintenance nature. In the case of tourism they are of a repeat nature. In addition, much of the service is intangible and many of the goods that attract tourists are free goods, such as the sun, sea and unspoilt landscapes, which increase the opportunities for free riding.

In conclusion, although tourism has been touted as an industry with enormous growth potential and one that is able to achieve a number of stated objectives in the Act, such as promoting the development of the economy and the advancement of the social and economic welfare of South Africans; attempting to define industries engaged in tourism-related activities broadly would prove fruitless from a competition perspective. Instead, it would make more sense for competition practitioners to define the market more narrowly by explicitly stating the activities of firms, rather than referring to the nebulous concept called tourism.

Contributed by: Liza Niedermeier,
Policy and Research Division

Balancing the Scale in Analysing Employment Issues

In addition to competition analysis of a merger notified with the Commission, section 12A of the Competition Act (Act No 89 of 1998, as amended), requires the Commission to also determine whether a merger can or cannot be justified on public interest grounds before a decision can be made. Though public interest inquiries are not uncommon, the specific reference to employment found in our Act is one of a kind.

While merging parties have become acquainted with informational demands relating to competition analysis, they seldom elaborate on employment issues like they would do with competition issues. This is despite the fact that they are required to do so on the forms that are completed for purposes of filing. This makes it difficult for the Commission to perform its analysis with limited or no information at all on public interests. Moreover, it delays finalisation of matters as the Commission's time is consumed by the process of requesting further information from the parties, or contacting the union representative for clarity on employment issues.

The question of what information the parties must submit has been discussed several times, and perhaps the confusion in some instances is created by lack of articulation in the form itself. Unlike the information required on competition where the form requires specific information on the customers, competitors, market shares, etc., the same articulation is not made in respect of employment.

As a point of discussion, the Commission has come up with guidance on information that they will require to make an independent assessment of the employment issues. This proposal is based on practical experience in merger evaluation thus far and is discussed below. Where a merger is likely to result in retrenchments, or is likely to change the conditions of employment of workers, the parties must disclose that to the Commission for independent analysis. In particular, the Commission will request the merging firms to provide:

- The number of employees employed by each merging firm (pre-merger) and a breakdown thereof in terms of unskilled, semiskilled, skilled and highly skilled workers;
- Per the above categories, the number of employees to be retrenched; and
- Per the above categories, how the proposed merger will impact on the terms and conditions on which workers are employed.

The merging parties should provide a job description and the job grading required for each of the above categories. This would

include full elaboration on the average skill-set and qualifications needed to perform each identified function.

Further to the analysis, the parties should indicate the affected geographic region(s) – directly and indirectly – from an employment perspective. In this respect, the parties should show how mobile the relevant employees are, and in which areas the employees are likely find alternative job opportunities. It is important to state the expected average time period within which each affected category of employees could realistically expect to find alternative employment.

Lastly, parties should indicate their intension to mitigate the effect of job losses per each affected job category (for example, skills training or retraining at the cost of the merged entity). Other information would include measures like retrenchment packages offered, short listing of retrenched persons for future positions, relocation of employees and counseling offered at company cost.

Since natural attrition could, in many instances, compensate for jobs lost due to the merger, parties should provide statistics on the natural attrition rate at each of the parties for the last three years; and describe how natural attrition or current vacancies at the merging parties' firms is likely to impact on the potential number of job losses as a result of the proposed transaction.

If the merger is unlikely to result in any retrenchments, or affect the conditions of employment, the parties should not merely state that, but must elaborate on it so that an independent person analyzing the merger can be able to make that conclusion without taking the parties' word for it. In addition, it would be useful if the parties were to make undertakings not to retrench people (this can be in terms of percentages) in instances where they had not done due diligence and are not aware of how employment will be affected.

With the information articulated in this article, the Commission is likely to analyse the employment effect of mergers faster than it currently does. This aspects, and similar others will be discussed and work-shopped with practitioners. The Commission is planning a workshop in October/November for purposes of discussing this with practitioners. Invitations will be sent to practitioners in due course.

Contributed by: Odie Strydom, Mergers and Acquisitions Division

Taking stock of Merger Evaluations: Financial year 2004/05

The Commission is tasked with regulation of mergers which meet specified thresholds. This means that parties wishing to merge must notify the Commission in order to get approval before such mergers could be implemented. Since its inception in 1999, the Commission has received a total of 1764 merger notifications. Of all mergers finalized since 1999, only 16 transactions were prohibited.[1]

2004/05 financial year: (April 2004 to March 2005)

During the year 2004/05, the Commission received 311 merger notifications. Of these, 72 were large, 233 intermediate and 6 small mergers. The number of notifications represents a 9.5% increase compared to the total number of mergers received in the previous year. The number of large mergers increased by 10.8% from 65 to 72, whilst the number of intermediate mergers increased by 9.4%, from 213 to 233.

Of the 311 cases notified with the Commission, 3 were withdrawn. Of those finalised, 9 were approved with conditions; only 4 were prohibited which represents 1.3% of the total finalised cases. A sectoral overview of merger activity during the 2004/05 financial year is portrayed in figure 1.

In figure 1 it is clear that most merger activity occurred in the manufacturing sector. This is indicative of a continuing trend identified in previous years. The majority of mergers were filed within the food and beverage sub-sectors, followed by chemical products, paper and packaging, metal, building materials and transport equipment. It is worth noting that the number of mergers in most of the sub-sectors identified decreased compared to the previous years. Slight increases were,

1 See Competition Commission Annual Reports.

however, experienced in the metal, printing and publishing and paper and packaging sub-sectors.

Further increases were noted in the services, wholesale and other sectors. The number of merger notifications in the real estate, transport and financial services sectors were stable. There have been slight decreases in activity in the information and technology (IT), mining, and retail sectors.

Of the total number of mergers finalised, 49 were considered favourably on public interest grounds. This represents an increase of 32.4% compared to the 37 cases received in the previous year. These transactions facilitated the entry and ability of BEE firms to become competitive in the sectors in which these mergers took place.

The greatest impact on the public interest was in manufacturing, which represented 23% of all BEE related transactions, followed by services, other and mining sectors with 15%, 14% and 10% respectively. The remaining sectors accounted for less than 10% each in this regard, with real estate, information technology and finance commanding 8% each. Wholesale and transport accounted for 6% each and, the retail sector was at the bottom with 2% of all BEE transactions accounted for in this sector. Figure 2 reflects the rising trend of BEE transactions notified with the Commission in the past 3 years.

It is apparent from Figure 2 that merger activity with a BEE component increased by 113% from 23 in 2002/03 to 49 in the 2004/05 financial year. The commission also found that there is a positive relationship between the number of BEE transactions lodged with it and the timing within which BEE sector specific charters were introduced. For example, the number of merger notifications in the financial service sector reached a peak during the 2002/03 financial year, possibly assisted by the promulgation of the BEE industry charter.

Contributed by: Charles Mabuza & Liza Niedermeir, Policy and Research Division

Figure 1: Sectoral overview of merger activity

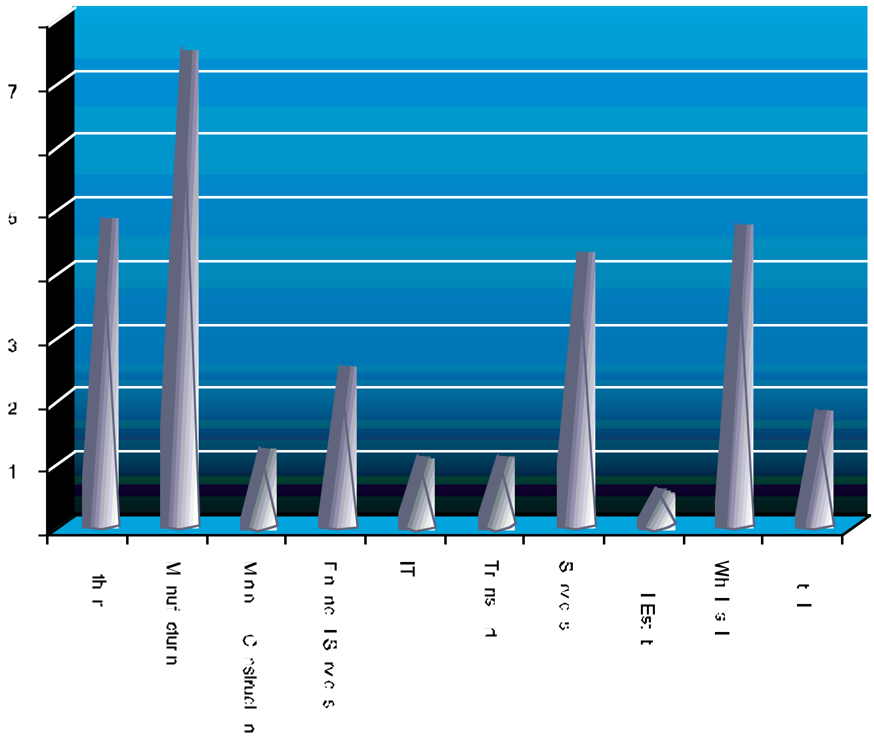
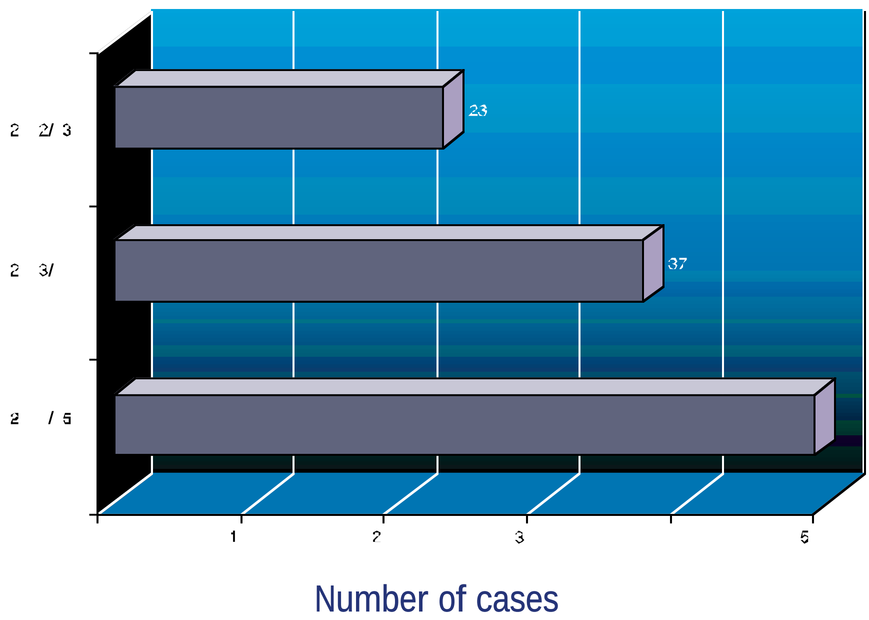


Figure 2: M&A transactions with a BEE component: 2002/03 to 2004/05



Cases

Medicross/Primecure merger prohibited

The Commission recommended to the Tribunal that a proposed merger involving Medicross Healthcare Group (Pty) Ltd ("Medicross") and Prime Cure Holdings (Pty) Ltd ("Prime Cure") be prohibited on the basis that it raises serious competition and public interest concerns.

Medicross is jointly owned by Network Healthcare Holdings Limited ("Netcare") and Netpartner Investments Limited ("Netpartner"). Both Medicross and Prime Cure are active in the area of managed health care services, which include the full spectrum of primary health care services, for example day-to-day GP services, dentistry, optometry, radiology and pathology. Both have medical centers throughout the country and have extended networks of healthcare service practitioners through which they provide their managed care products and services to members of medical schemes. Medicross and Prime Cure have, however, targeted different types of end consumers with Prime Cure focusing mainly on low-income consumers whereas Medicross focused on middle to high-income consumers.

Apart from Medicross and Prime Cure, there is only one other market participant of significant size active in this area, namely Carecross. Carecross, like Prime Cure, focuses on the low-income end consumers. The Commission is of the view that the market for managed care services provided on a national scale is highly concentrated. It is also of the view that the barriers to entry into this market are high, making future entry unlikely.

Future growth of the South African primary health care industry is expected to come from the millions of South Africans who currently are employed, but do not have any health insurance. Government and the industry face the challenge of creating affordable medical aid products for these citizens, generally referred to in the industry as the emerging market.

The Commission is of the view that Prime Cure is well positioned to service the bottom segment of the market, since it already targets the low-income end consumers; and that Medicross is a potential competitor to Prime Cure in servicing these low-income end consumers. Therefore, the proposed deal is likely to result in the removal of a potential competitor in the bottom segment of the managed care services market in South Africa and reduce the number of potential players in this industry to the detriment of consumers and competition in general.

From a public interest perspective, the proposed merger is likely to negatively affect the ability of small firms and firms controlled by historically disadvantaged persons to become competitive in this market. Furthermore, it is likely to have a negative impact on the broader healthcare industry in restricting the transfer of individuals from public healthcare facilities to private healthcare facilities. A further issue of concern relates to the already vertically integrated structure of Netcare that would be further strengthened by the proposed merger.

The Commission therefore concluded that the proposed merger is likely to substantially prevent or lessen competition and would have a negative impact on public interests and has recommended that the Tribunal should prohibit the merger.

Commission recommends large merger in the motor industry unconditionally

The Commission recommended that the proposed large merger between Imperial Group (Pty) Ltd ("Imperial Group") and Magic Merkel Motors (Pty) Ltd (Magic Merkel") be approved unconditionally.

Imperial Group is acquiring the Tzaneen based motor dealership business of Magic Merkel as a going concern. Both parties are involved in the retail sales of passenger and light commercial vehicles. Imperial Group, through its subsidiaries, conducts a variety of activities within the transportation, fleet management and mobility sectors. Imperial Group sells passenger and light commercial vehicles through its various dealerships.

Magic Merkel, the primary target firm, does not have any subsidiaries. Magic Merkel holds a franchise as a dealer of Daimler Chrysler vehicles and sells the entire range of its new and used vehicles and parts as well as providing workshop facilities.

Imperial Group has entered into a written sale of business agreement with Magic Merkel in terms of which Imperial Group acquires the motor dealership business of Magic Merkel as a going concern. The parties have submitted that the rationale for the proposed transaction is for commercial reasons. The Imperial Group would like to grow its business through the acquisition of dealerships in certain franchises, including the Daimler Chrysler franchise.

In passenger vehicles the parties' combined market share would be 12% and 6.1% in light commercial vehicles. The post-merger sub-market shares within passenger vehicles would be 52% for luxury cars, 24% for specialty cars, 30% for utility cars and 29% for minivans. The market for the sale of used cars does not raise any competition concerns, as there are many entrants, private sales, internet sales and auctions. The overlap is thus in the sale of passenger and light commercial vehicles. Since the Imperial Group has a national presence of 90 dealerships countrywide, the geographic market is assumed to be local and therefore there is no geographic overlap as Mercurius Motors is in Polokwane and Magic Merkel in Tzaneen.

The Commission therefore concluded that the transaction is unlikely to substantially prevent or lessen competition in the relevant market. The transaction also does not raise any significant public interest concerns.

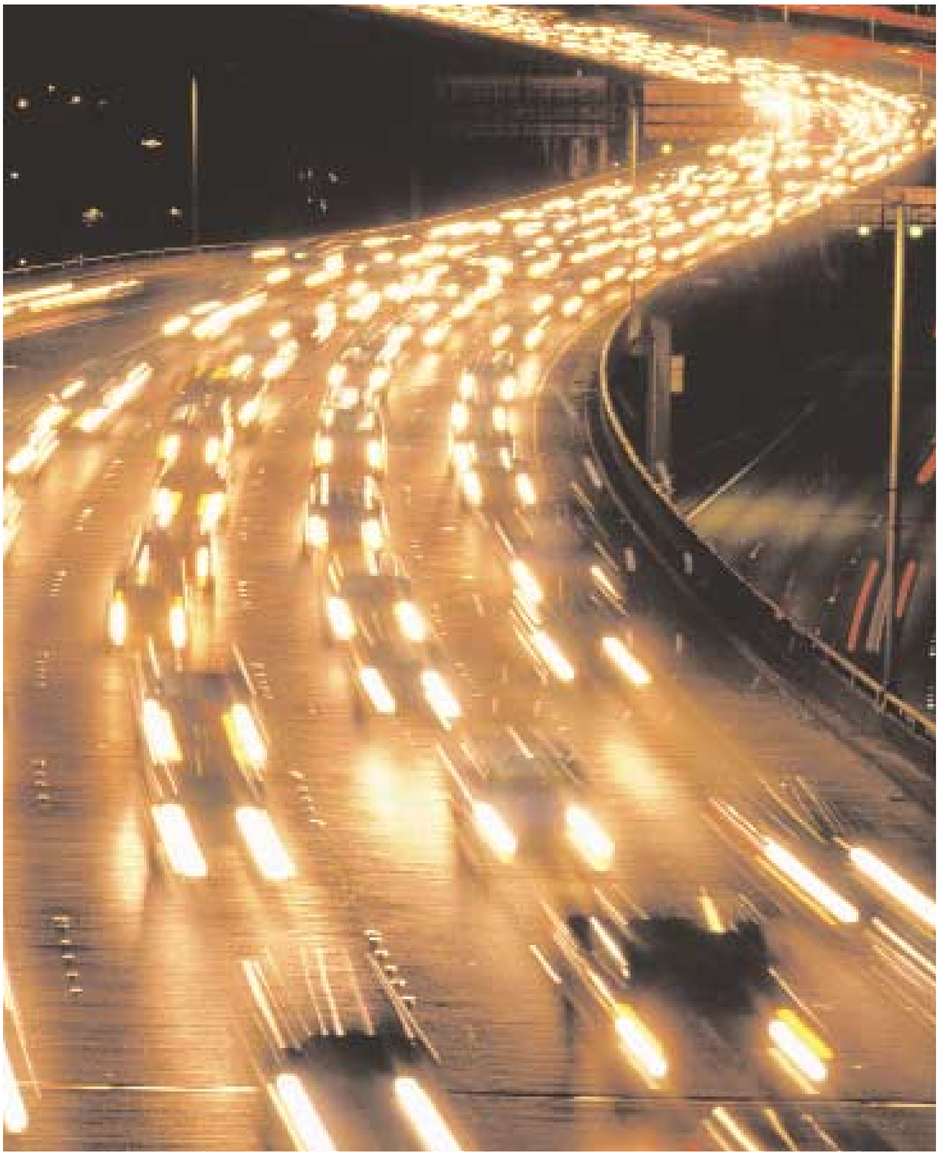
Eastern Cape Motor Holdings acquisition of Lippstreu Motors approved

The Commission gave the go-ahead to Eastern Cape Motor Holdings (Pty) Ltd ("ECM") to acquire Lippstreu Motors' (Pty) Ltd ("Lippstreu") exclusive rights in the Ford and Mazda franchise. This will give effect to Ford Motor Company South Africa's recommendation that there be one dealer in respect of its vehicles in the relevant geographic market.

The primary acquiring firm, ECM, based in Port Elizabeth, is one of the five firms controlled by Eastern Cape Motors Holdings (Pty) Ltd. ECM is active in the retail sale of passenger and light commercial vehicles. It has dealerships in respect of Ford, Mazda, Nissan, Volvo, Land Rover, Alfa Romeo and Fiat vehicle brands in Boksburg, Port Elizabeth, King Williams Town and East London. The primary target firm is Lippstreu. Lippstreu is in the retail sale of passenger cars in respect of Ford, Mazda, Volvo and Land Rover vehicle brands in Port Elizabeth. Both ECM and Lippstreu own dealerships in relation to Ford, Mazda, Volvo and Land Rover.

The merger is unlikely to substantially prevent or lessen competition in the relevant market. The merged entity will have a combined market share of 33% in the sale of passenger cars and 58% in the sale of light commercial vehicles. In the sub-markets of passenger cars their combined market share is 45% in entry-level cars, 23% in small cars and 64% in utility cars. There is inter-brand competition in the relevant market due to competition from dealerships supplying the vehicles of other manufacturers.

The Commission also considered whether the consolidation of Ford/Mazda dealerships could create a barrier to entry into the relevant market and concluded that although it is easier for a dealership that is owned by the manufacturer to be



established and expanded, individuals find it difficult to enter the market. However, there have been new dealerships that have been established such as Kia and TATA over the past five years.

It also appeared that most dealers compete on non-price basis through the provision of discounts, value added services, amongst other things. Thus if the merged entity increased prices customers would be able to switch to other brands that are available in the relevant market depending on their tastes and preferences, attitudes towards particular brands and prices of other vehicles that the other dealerships sell. There is also a possibility that customers would travel further from the geographic area to purchase vehicles, as it is a relatively large purchase and traveling costs may be offset by a small percentage discount in another market.

Merger in food industry conditionally approved

The Commission has conditionally recommended the approval of the large merger whereby Tiger Brands Limited ("Tiger") will acquire a majority shareholding in Newco and assume management control over Newco.

The primary acquiring firm is the holding company Tiger Brands Limited ("Tiger"), and the second acquiring firm is Ashton Canning Company (Pty) Ltd ("Ashton Canning"). The third acquiring firm is Newco, which will be established as a vehicle to house the merged entity. The target firms are Ashton Canning, LFI and Newco.

Ashton Canning and Tiger's Langeberg Foods International ("LFI") produce and sell canned deciduous fruit and fruit puree domestically and for export. The post-merger market share of the merged entity will be 68% in the canned deciduous fruit market and 50% in the production of fruit puree. Although the market shares are high, the customers of the merging parties will be able to source products in the relevant markets, either through other local players, or through imports. In addition, customers have a degree of countervailing power.

The parties have submitted that due to the fact that they export the majority of their produce, the proposed transaction is imperative for the long-term sustainable operation of their fruit canning businesses and is vital for the parties to be able to compete effectively in the international market. The parties have submitted that they rely on exports to derive profits and the strengthening of the Rand has had a detrimental effect on their turnover. According to the parties they are competing with international companies that have consolidated and whose canned fruit products are subsidised by their respective governments in an international market. The parties view the merger as vital to gain the critical mass necessary to compete effectively in the international market.

The deciduous fruit canning industry is faced with a number of challenges in the export market. It has been suggested that the consolidation of Ashton Canning and LFI will reduce the likelihood of Ashton Canning closing down.

There are approximately 45 permanent employees who will be retrenched as a result of the merger. According to the parties it is expected that the merged entity would, as a result of the merger, conclude contracts with approximately 1 000 less seasonal workers in the upcoming season than were contracted by the merging firms during the previous season.

The Commission found that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant markets, but recommended approval with conditions to address employment concerns with the parties committing to make available a fund to train the unemployed in the area on different skills.

Lufthansa/Swiss Air merger conditionally given the go-ahead

The Commission also conditionally approved a merger between Deutsche-Lufthansa AG ("Lufthansa") and Swiss International Airlines Ltd ("Swiss").

The merger takes place through a series of steps that are interlinked. Once all the steps have been fulfilled this will enable Lufthansa to acquire control over Swiss. There is an overlap in respect of activities of merging parties in the provision of scheduled air passenger services. Nine (9) overlaps were established and eight of these did not raise competition concerns.

The route between Johannesburg and Zurich was the one that raised concerns. It was found that no entrants showed any substantial interest to enter this route and that there was no countervailing power that existed to prevent excessive price increases on the route. On this basis, the Commission concluded that the proposed merger is likely to substantially prevent or lessen competition on the JHB-ZRH route, and recommended conditions that will make available slots on this route to prospective new entrants.

Commission concludes assessment of the TSB/Royal Swaziland Sugar merger

The Commission approved the proposed merger involving TSB Sugar International (Pty) Ltd ("TSB International") and Royal Swaziland Sugar Corporate Ltd ("RSSC") without conditions.

Though the merging parties have overlapping product offerings in respect of white sugar and molasses, the increase in concentration is not significant. On the vertical dimension, the Commission found that RSSC produces ethanol or alcohol using molasses as an input. It was found also that for both white sugar and molasses, there are alternative players such as Illovo Sugar Ltd ("Illovo") and Tongaat-Hullett Sugar Ltd ("T-HS") that could supply sugar at competitive rates in South Africa.

Therefore, the Commission concluded that the proposed merger is unlikely to lead to vertical foreclosure or significant public interest concerns, and decided to approve it without conditions.

Merger in the shipping industry conditionally approved

The Commission also recommended a conditional approval of a merger between AP Moller-Maersk ("Maersk") and Royal P&O Nedlloyd N.V. ("PONL"). Maersk and PONL are involved in containerized shipping services in the South Africa/Europe, South Africa/North America, South Africa/Middle East, South Africa/Far East and Intra-Africa routes.

The Commission found that there are barriers to entry due to the agreements on trading conditions in the industry and costs involved in entering the market. The route that particularly raised concern was the South Africa/ Europe one. From a public interest perspective, Maersk anticipates that the merger will result in 5% reduction of the workforce or 1500 jobs worldwide across the combined entity over five (5) years.

In view of the above concerns, the Commission recommended that the proposed merger be approved with conditions that require divestiture of PONL's rights, assets and obligations regarding its liner, shipping activities in the SA/EU and SA/North America Routes. Also, the parties are required to withdraw their membership from conferences on South African routes.

Towards a free and fair economy for all

Where to get hold of us

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