Competition News
The official newsletter of the competitioncommission
Edition 33 • December 2009
Towards a fair and efficient economy for all.

In this Edition

Celebrating 10 years

By: Molebogeng Taunyane

The first of September marked the 10th anniversary of the coming into effect of the Competition Act and the Competition Commission and Competition Tribunal 'opening their doors'. Over the past decade the Competition Commission moved from being a relatively unknown entity – as there was a lack of awareness of the Competition Act - to a prominent feature in dinner table conversations. The high profile attained by the Commission is associated with taking on major competition cases and addressing concerns close to consumers' hearts.

However, this was not an easy feat in a country which lacks a competition culture.

In celebrating 10 years of competition enforcement the Competition Commission, Competition Tribunal and Mandela Institute co-hosted a larger than normal t. A book reviewing the decade of work of the competition authorities was also compiled by the Competition Commission and Tribunal, and launched at the conference.

Over 300 people including international speakers, representatives of competition authorities, lawyers and economists, academics and regulators attended the two-day event. The Conference was opened by the Minister of Economic Development, Ebrahim Patel.

The conference had important keynote addresses on selected major questions facing competition authorities. The heads and senior managers of the South African authorities reflected on the major challenges faced, and those anticipated in coming years.

Invited speakers included representatives from authorities who have provided assistance to the Commission and Tribunal over the years, such as current and former heads of competition authorities of the USA, UK and France. There were also presentations by heads of the competition authorities of Zambia, Kenya, Comesa, Tanzania, Malawi and Zimbabwe, and a special session on the development of competition law across the African continent.

On the first day of the conference, papers addressed the themes of competition policy in developing countries and the challenges of abuse of dominance. The second day covered developments in cartel enforcement, merger review, market enquiries and assessing the impact of competition enforcement. Leading academics and experts, including Professors Massimo Motta, Richard Whish and Joseph Harrington, gave presentations on the current state of research and thinking internationally. These provided a context for the wide range of papers presented that critically assessed the South African experience and cases.

The review undertaken by the Competition Commission and Competition Tribunal was launched at a cocktail on the first evening of the conference. In setting out the record of the past ten years it lays a basis for the critical assessments that we hope will be made by observers from various perspectives, continuing the vigorous debates on the role of competition policy in the country's economic development.

Editorial Note

This quarter saw the 10th anniversary of the Competition Commission and Competition Tribunal opening their doors and starting to enforce the Competition Act, on 1 September 1999. The authorities marked the occasion with an event described in the lead article by Molebogeng Taunyane. As the Chairperson of the Competition Tribunal over the decade, David Lewis has been hugely influential in the development of competition law. He has shared some of his reflections with us, as recorded also by Molebogeng.

In addition to marking the 10 year anniversary, the quarter has been busy with investigations and projects. In terms of enforcement, Lebogang Madiba describes an important search and seizure operation conducted on the premises of the cement producers. Tamara Paremoer sets out the main areas covered in the investigation initiated into possible anti-competitive practices regarding supermarkets. In the area of food, Mulalo Shandukani explains how the Commission has also joined with the Egyptian Competition Authority and the Zambian Competition Commission in a project to compare experience and build capabilities in assessing anti-competitive conduct in major food products.

As described in the merger review, merger activity has declined sharply over the year, due to the economic crisis. However, the complexity of the deals reviewed by the Commission has not diminished. Thabelo Ravhungoni outlines the main grounds on which the Commission opposed the acquisition of Finro Cash & Carry by Massmart, which was subsequently approved by the Tribunal. Grashum Mutizwa sets out the main considerations reviewed by the Commission in recommending approval of the acquisition of Bond Exchange of South Africa by the Johannesburg Securities Exchange.

Last, but certainly not least, during August President Zuma signed the Competition Amendment Act into law. The amendments have been widely reported on, and include criminalisation of cartel conduct and individual liability, along with provisions for market enquiries, and investigations into complex monopolies. At the time of writing, the President has still to proclaim the date on which the provisions of the Amendment Act will come into effect.

Simon Roberts
Editior-in-Chief

Bidding Farewell

By: Molebogeng Taunyane

After 10 years at the helm of the Competition Tribunal it doesn't seem as if we have seen the last of former chairperson David Lewis. His future plans revolve around competition issues. These include a book telling the story of the past ten years and working with new agencies in the developing world.

At the moment he is lecturing on issues of regulation and the developmental state offered on the MBA and executive courses at the Gordon Institute of Business Science.

His exit marks the end of an era for the competition authorities as he was instrumental in the establishment of the institutions. Lewis retired from the Tribunal on July 31 after two five-year terms. However, this is also a start of a new era – with the signing into law of the new Competition Amendment Bill.

In his interview with Competition News he had lots to say about his experiences of the past ten years.

What has the past ten years been like for you as the chairperson of the Tribunal?

I have enjoyed every minute of it (except driving to Pretoria). I've learnt an enormous amount. I also really enjoyed the adrenalin and excitement of some our big trials and loved working with the people, both in the Tribunal and the Commission, with whom I have shared these 10 years. I suppose I have enjoyed being part of a really successful set of institutions that have made an enormous impression, not only on the culture of business, but on the expectations and hopes of ordinary people. We have been at the forefront of demonstrating that government can set up successful regulatory bodies.

What are you going to miss about your role as Tribunal chairperson?

All of the above - the people, the unified sense of purpose, the adrenalin, the intellectual challenges, the public service, the satisfaction of belonging to a successful set of institutions that believe in themselves and in their mission.

What did you regard as the most challenging thing in your position? Or, any other challenges?

At the beginning the challenge was establishing respect for the institution. We had to show that we would be both tough and fair. I believe firmly that even though we are an adjudicative body we are creatures of the Competition Act and responsible for ensuring that its objectives are realised. But this had to be done by proving to everyone that they would be treated with scrupulous fairness. I think that we have succeeded in doing this - I have also said that

while we were not always loved by all those who came into contact with us, we were respected, and that was much more important. After that every difficult case - and there were many - was a challenge. There are very few absolutely clear cut answers in competition law and economics. We were dealing with high stakes issues that were important for the society, for ordinary consumers and for the businesses that were directly affected by our decisions. And so we wanted to get them right. I have spent many sleepless nights worrying about whether we were taking the right approach in a particular case. I guess the challenge is the responsibility for taking decisions rather than simply giving advice.

Reflecting on the ten years, what according to you are some of the things that the Competition Authorities in South Africa have managed to accomplish?

I think that we have accomplished a great deal. As I have said we have earned the respect of business, of government and, most important, of the public. We have won the respect of the legal profession and the economics profession here and internationally. We have instilled a culture of respect for competition in South Africa, something that very few competition authorities have been able to achieve. We have also made our mark internationally. The Tribunal and its decisions are being cited in judgments and scholarly work elsewhere. The Commission and its investigatory skills, strategic planning and prioritisation are widely cited as examples of effective institution building. Mostly, I think that we have achieved the building of institutions in which the staff has pride in performing a public service.

What are some of your most memorable and interesting cases over the years?

Too many to name - JD/Ellerines, the Distell merger, the attempt by Mediclinic to take over Afrox Health, the Goldfields/Harmony merger, Sasol/Engen, Ansac - Botash, the early pharmaceutical interim relief cases, the SAA case, Federal Mogul, the Sasol - Nationwide Poles case, the Mittal excessive pricing case, the cartel cases even though our role was mostly in the confirmation of consent orders. These are just the ones that immediately spring to mind but there are many more.

As you leave the Tribunal do you have any concerns about the state of competition in the economy? If so, what?

Of course - I will always have concerns about the state of competition in South Africa and so must everyone who works at the Tribunal and Commission. Competition has powerful enemies and while it has many friends they are not as well organised or as well resourced as the enemies of competition. We have seen with the recent spate of cartel cases just what the state of competition in South Africa is. Furthermore, the economic crisis will be used as a convenient excuse to evade and avoid competition scrutiny.

I am also not confident that we have sufficiently communicated the importance of competition across the various tiers of government who have the ability to either promote competition or undermine it. So, while I think that we have achieved much, there is still much to be done and we must be on our guard constantly to ensure that our gains are not reversed.

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

I think generally healthy where the practice and enforcement of competition law is concerned. But, I think less healthy where competition policy is concerned. This we can see in the parlous state of many of our sectoral regulators and in the very poor performance of vital state owned enterprises who have taken advantage of the absence of competition combined with poor regulation to get away with providing inefficient and costly services. Many private sector institutions - for example in telecommunications - have also taken advantage of this.

How do you foresee the development of competition policy in the country?

I think that we are yet to see many cartel prosecutions. Also there are many areas of the law that, thanks largely to very confusing judgments by the Competition Appeal Court, remain unresolved and uncertain. I think particularly of the excessive pricing and price discrimination sections of the Act. We also desperately need to clarify the question of competition jurisdiction in the regulated sectors. I expect all of these to feature in the evolution of competition law. For the rest I think that we are going to

have to engage with government more effectively around policies and regulations and statutes that, often inadvertently, generate anti-competitive outcomes. I don't expect this to be antagonistic - in fact I made a proposal in my recent talk at the 10 Year conference for a comprehensive review and overhaul of regulation so as to better harness the positive force of competition. This doesn't of course mean that competition is always a productive motor force. We have in the recent past seen great market failure that requires more effective regulation rather than unrestrained markets in order to produce socially positive outcomes. These are the directions in which I think the practice of competition law and policy will emerge.

Are there areas that need to be improved?

As regards the Tribunal in particular, I would like to see it focus on preventing the sorts of abuse of our processes that characterised the Ansac cases and the Harmony/Goldfields merger in particular, but also many other cases. We have bent over backwards to be fair and it has, on occasion, been grossly abused by parties interested in using our procedures, usually by invoking high minded constitutional principles, to achieve narrow selfish ends and to undermine the objectives of the Act and our inability to do our work. The Tribunal must do all in its considerable powers to prevent this.

What is your opinion on the new Competition Act?

I am a little concerned about it. While I believe firmly that imprisonment fits the crime of price fixing, I am worried about the constitutionality of the Act and, particularly, about the impact it will have on the corporate leniency programme. I fear that while we may see a few people going to jail, we may see many more cartels escape detection because of the impact that criminalisation will have on the operation of the Corporate Leniency Policy. However, Parliament has, in its wisdom, decided to follow this route and the Commission and the Tribunal as well as the criminal justice system must set up the processes necessary to give effect to it.

Are the any other problems that you anticipate with the implementation of the new Act?

In addition to the criminalisation provisions, I am worried about the complex monopoly provisions. What may happen here is that the vagueness and poor drafting of these clauses will make prosecution of the new offence of belonging to a complex monopoly very difficult to enforce but it will chill competition on the part of those firms who may fear prosecution in the face of this uncertainty. It may even discourage new entry into a market - like banking for example - which may be construed as complex monopolies, when new entry is exactly what is required to introduce competition. I think many of the problems caused by complex monopolies can be addressed by the new market enquiry provisions which are very exciting and are going to be a big part of the Commission's work in the coming years.

What advice would you like to give to your successor, Norman Manoim at the Tribunal?

Be fair and be tough as you've always been. And be sure to retain your great sense of humour.

Raiding cement producers

By: Lebogang Madiba

On the 24th of June 2008, the Commission conducted a highly successfully search and seizure operation (commonly known as 'raids') on the premises of Pretoria Portland Cement Company Ltd (PPC), Lafarge Industries South Africa (Pty) Ltd, Afrisam South Africa (Pty) Ltd and NPC-Cimpor (Pty) Ltd. This was against the backdrop of a complaint pro-actively initiated by Commissioner, on the 2nd June 2008 against all four cement producers active in South Africa and a cement extender company known as Slagment (Pty) Ltd, which was previously jointly owned by all cement companies.

The complaint initiation which triggered the raids was largely based on findings of the Commission's economic research report into inputs used in the government and State Owned Enterprises' (SOE) infrastructure programme. The research was conducted, inter alia, with a view of identifying possible anti-competitive behavior in the construction industry. The research focused on key products which form inputs to the infrastructure programme such as cement, aggregates, bricks and steel. The review concluded that anti-competitive behaviour in some of these products and markets could be substantially increasing not only the costs of the infrastructure programme but also other projects that rely on these key inputs and as such raising costs in the economy more widely.

With respect to cement, the economic analysis essentially concluded that even though the legally sanctioned cement cartel was disbanded in 1996, the four cement producers still operated in same historic locations, with low levels of competition between them. Cement prices had doubled since 2001, with pricing movements

in 'steps' every six months, giving rise to a genuine concern that the high cement prices could be attributable to collusion. The cement producers tend to increase cement prices around the same time (January and July each year) and the magnitude of such price increases appeared to be similar overall, thus giving rise to concerns that the price increases could be a result of collusion/coordinated behavior by the cement producers.

In addition, information gathered from the market indicated that independent downstream market participants are struggling to procure sufficient quantities of cement extenders such as blast furnace slag, whilst the cement producers enjoy abundant supplies of cement extenders. This therefore gave rise to a concern that the cement producers in cahoots with cement extender companies could be limiting the amount of cement extenders available in the market in order inhibit competition from independents.

It also appeared that PPC, being a leading cement producer in the South African market with estimated market share of over 35%, could have abused its position of dominance in the market by treating its customers differently in terms of price. The Commissioner accordingly based the investigation on possible contraventions of section 4(1)(b), 5(1) and 8(c) of the Competition Act.

Following information gathering and consultations with industry informants and experts, and other competition authorities, it was resolved to make use of the Commission's search and seizure powers to obtain information that we may not otherwise have obtained given the cement cartel's modus operandi. The interactions with other competition authorities such as the Brazilian Secretariat of Economic Law, the Bundeskartellamt and the European Commission proved invaluable in providing an indication of the most probable modus operandi to be employed by the cement cartel in South Africa. In essence, in cement cartels uncovered in other countries (in which several of the multinational producers in South Africa had been implicated) it appeared that there were only irregular meetings, physical records were not kept of cartel arrangements, or were destroyed, and where information is stored electronically, codes and fictitious names are used to conceal its true nature.

Whilst provided for in the Competition Act, a search and seizure operation is by no means a simple exercise, as the Commission's previous unsuccessful raid on PPC and Slagment proved in August of 2000. In fact the Commission has to date only conducted a few raids given the complex process involved in planning and executing them.

Altogether five locations were searched by teams from the Commission. These teams involved a substantial number of Commission staff, together with IT specialists and police officers to assist with the execution of the search warrants and access to the buildings. The raids went smoothly, with the teams working long into the night at most locations, identifying and seizing relevant documents. Above all, and in contrast with the previous cement raid, no party has challenged the raids in court.

The widespread use of cement in construction and infrastructure means that uncovering cartel conduct in this product will have far reaching implications for the public, government, State Owned Enterprises and businesses who may have been harmed by such conduct.

Please note that PPC has since been granted conditional leniency after confirming the existence of a cartel to divide the markets among the four cement producers.

The Supermarket Industry Investigation

By: Tamara Paremoer

The Competition Commission established a Food Sector Study team ("the Food Team") as part of its strategic prioritisation process in January 2008. The Food Team identified various priority food items for review. During interviews conducted as part of the food team's value chain studies, industry participants raised concerns regarding the concentration of buyer power in food retail through major channels. In particular, producers raised concerns regarding large farm-to-retail price spreads whilst manufacturers raised concerns regarding the inaccessibility of retail shelf space. Further, public concern about high and rising food prices has been vociferous in the light of difficult economic conditions.

These factors, together with the fact that the Commission has made several other positive interventions at various levels of the food value chain, prompted the Commission to include the retail trade of food in its broader food study. After a preliminary review of the sector, the Commission initiated an investigation into the conduct of major food retailers in June 2009; colloquially referred to as "the Supermarket Investigation". The investigation is focusing on retail practices related to priority food items identified by the Food Team. However, it is believed that the conduct identified will be reflective of practices in the broader groceries market. The respondents cited in this matter are the large retailers Pick 'n Pay Limited, Shoprite Holdings Limited and the Spar Group Ltd; the major wholesaler/ retailers Metcash Trading (Pty) Ltd and Massmart Ltd, as well as niche retailer Woolworths Ltd.

Investigations in other jurisdictions

The issue of retailer buyer power has come under the spotlight in various jurisdictions including the United Kingdom and Australia. The UK Competition Commission raised specific concerns regarding local market concentration and the ability of retailers to transfer business risk and uncertainty to suppliers: to the ultimate detriment of consumer welfare. Other areas of concern related to long-term exclusive lease agreements and the possible facilitation of tacit collusion through information exchange. The Australian Competition and Consumer Commission highlighted exclusive long term lease agreements and limited price competition as areas of concern.

International inquiries have provided useful background. However, the Commission remains sensitive to the particularities of the South African retail landscape and cautions against pre-empting the outcomes of this investigation based on international experience.

Major Competition Concerns

The Commission has identified four main areas of concern. The first concern relates to buyer power and manifests in the imposition of considerable costs on suppliers that may have the effect of limiting upstream competition in contravention of section 5(1) or section 8 of the Act. Examples of these costs include the imposition of merchandising requirements, onerous payments and returns policies that are unfavourable to manufacturers, steep listing fees required to gain access to retailers' shelves and a range of demands for promotional discounts and contributions to advertising spend. These conditions have a considerable effect on manufacturers' costs and may also raise barriers to entry for smaller retailers who are not afforded similar services by larger manufacturers.

Secondly, the Commission will investigate the potential anti-competitive effect of restrictive clauses and exclusive long-term leases for supermarkets as "anchor tenants" in shopping complexes. The term "anchor tenant" refers to a large retailer that drives traffic to shopping complexes, as such proving crucial for the success of the development. The major supermarket chains are the preferred anchor tenants of property developers, financiers and potential store owners. Anchor tenants commonly enter into exclusive leases of considerable duration. These agreements may function as a barrier to entry. The Commission sees value in evaluating the basis for the duration of particularly the exclusive leases. Long-term exclusive arrangements could pose a contravention of sections 5(1) and/or section 8(c) of the Act.

The third concern relates to a practice known as "category management". A "category" refers to a discrete group of similar or related products, each managed as a distinct business unit. Decisions about product placement, promotion and pricing are made on a category-wide basis. It is an accepted industry practice to appoint a "category captain" for each category. In South Africa, the category captain is generally an employee of the largest manufacturer in a particular category. Category Captains are involved in all aspects of the product management program of the category, including allocation of shelf space, recommending shelf layouts and developing promotion schedules for all products in the category, both their own and those of competitors. In order to perform this role, the category captain must have access to sales volume data of all brands.

Particular concerns with category management include the possibility of minimum resale price maintenance in the face of a concentration at both the retailer and manufacturing level; information sharing that could facilitate collusion; competitive exclusion at the manufacturer level and possible lessening of competition at the retailer level as smaller retailers cannot access the skill and industry knowledge of category captains. Category management introduces a significant level of transparency with respect to sales, promotion plans and market shares across competing manufacturers and retailers. Retailers may also be able to use the fact that there is a single point of contact across a category to gather market information about their competitors and to ensure that trade deals are appreciably similar across the retail landscape. These concerns will be evaluated as possible contraventions of section 4 (1) (a), section 5(1) and section 8 of the Act.

The final concern relates to information exchange. The Commission has received information that suggests that retailers may have access to pricing and market share information through market research firms. The level of aggregation of this information will need to be evaluated. Sufficiently disaggregated information may lead to anti-competitive effects in contravention of section 4(1) (a) of the Act.

The investigation is still in its early stages. We envisage that this investigation will allow both the Commission and the public at large to gain a better understanding of the competitive dynamics in this complex sector. Given the impact of the retail sector on consumers, the Commission encourages all stakeholders with relevant information to make submissions to the Commission.

Joint Food Project being undertaken by the Zambian Competition Commission, the Competition Commission of South Africa and the Egyptian Competition Authority

By: Mulalo Shandukani

The Competition Commission of South Africa (CCSA) in July hosted delegations from the Egyptian Competition Authority (ECA) and the Zambian Competition Commission (ZCC) to kick start the first phase of the Joint Food Project (JFP). The JFP, which is being funded by the International Development Research Centre, aims to share knowledge and approaches with regard to assessing possible anti-competitive conduct in food markets.

Competition investigations into various aspects of the food supply and pricing in several jurisdictions indicate that anti-competitive market structures and conduct may be contributing to high food prices. Accordingly, the objective of the JFP is to provide a platform for the three competition agencies to facilitate learning through sharing of work experiences and assisting each other in building capacity to develop better ways of rooting out anti-competitive behavior in the food sector of their respective countries. In pursuit of this objective, the scope of the JFP has been organized into the following three phases:

- initiating the project and building the team in each competition agency;
- drawing together the available information and analysis related to food prices in each country leading to the compilation of an overview report; and
- engaging in a closer examination of the selected set of issues raising or having a potential to raise competition concerns

This article covers the initial phase, including the three day workshop held by the agencies in July.

Competition regimes

The first day of the workshop was all about familiarizing the JFP members with the legislative framework of the three competition agencies and their interventions in the food sector so far.

Differences in the legal regimes include in the threshold for firm dominance. While in South Africa is 45% market share or less than 35% market share but with market power, a firm is considered dominant in the Egyptian competition regime if it has 25% market share, market power and there is no competing firm in a position to counter the conduct of such a dominant firm. The ZCC has a collective dominance provision.

On merger control, the ZCC requires that all merger transactions affecting the Zambian economy be reported regardless of size. In South Africa, there is compulsory notification of all merger transactions reaching or exceeding R560 million of combined turnover/asset values of the merging parties. The ECA does not evaluate merger transactions but only requires a mere post merger notification for record purposes.

The ECA started operating in 2006 and it consists of a board of directors, chairperson and an executive director who is responsible for decision-making on the work activities of the agency. The ECA has jurisdiction over firms and individuals. All violations of the Egyptian competition law are of a criminal nature and, as such, cases are referred to the Prosecuting Authority which can impose criminal sanctions through fines but not a jail term. Public utilities owned by the state are completely immune from competition regulation. However, public utilities managed by the private sector and agreements concluded by the government relating to price regulation of essential products may be exempted if certain conditions are met. A highlight of ECA's three year existence was busting a major cartel in the Egyptian cement industry.

Zambian economy has been subject to competition regulation since 1995. The Competition Act is a blend of competition and consumer protection provisions. The ZCC functions through a secretariat as an investigative wing and the board of commissioners responsible for adjudication. The board of commissioners only meets quarterly to take decisions but firms may pay a fee if they want the board to sit at any given time. The decisions of the ZCC are appealable to the Zambian High Courts. Zambian legislators are contemplating introducing a competition tribunal.

In general, the three competition agencies share some similarities in that they are all mandated to regulate horizontal and vertical restrictive practices as well as abuse of dominance. Also, cartel conduct (such as price fixing, output restrictions and market allocation) is per se prohibited in all three competition regimes.

Competition interventions in the food sector

There are similarities regarding the authorities' initiatives in the food sector which creates a suitable environment for the agencies to share their experiences on market conduct. The ZCC is concerned about possible collusive practices and abuse of dominance (excessive pricing) in the milling and fertilizer industries. The ZCC suspects that the public announcement of the recommended prices by the Milling Association of Zambia may be facilitating price collusion amongst millers. In South Africa, the CSSA has investigated cartel cases (mostly relating to price fixing and market allocation) relating to bread, milk, fertiliser and milling.

From left to right: Liberty Mncube; Wilfred Steenkamp; Hardin Ratshisusu; Avish Kalicharan; Ayman Shafei; Nandi Mokoena; William Mwemba; Mulalo Shandukani; Dr. Khaled Attia; Dr. Simon Roberts; Wesley Kalapula; Oupa Bodibe; Fatma Saadallah; Beene Shanduka Njovu; Donya Hassan; Nerice Barnabas; Lameez Vania

Sasol and Omnia, the two largest exporters of fertilizer to Zambia, have been identified in cartel conduct in South Africa. Also, the ZCC is concerned about tying and abuse of dominance practices in the poultry industry. In South Africa, there are ongoing cases in the poultry industry. Egypt and South Africa share similar competition concerns on edible oils.

Obstacles facing the competition agencies

The JFP also aims to share experiences and build capacity regarding enforcement. In this regard, Keith Weeks presented in the workshop on the lessons learned from the South African banking inquiry. The main message was that a successful market inquiry is dependent on, amongst others, sufficient consultation of stakeholders, a good communication strategy, thorough consideration of resource constraints and regard to treatment of confidential information.

The agencies also discussed obstacles hindering them from fully executing their mandates. Lack of public awareness of the role of a competition agency in the economy and insufficient human resources were identified as common obstacles. Furthermore, other obstacles facing the ECA are lack of cooperation by businesses due their mistrust of Egyptian government institutions in handling confidential information, price regulation in some sectors as well as the unavailability of reliable market data attributable to the informal sectors and many unlicensed firms characterizing the larger part of the Egyptian economy. The ZCC often finds available market data to be very outdated and therefore useless for market analysis purposes.

Way forward

On the last day of the workshop each agency presented on their intended food sector focus areas for purposes of the JFP. The agencies also discussed common methodological approaches to be adopted when addressing competition concerns in the focus areas. Plans are being made for a mini-conference to be held in Zambia where each agency shall present a report reviewing factors driving prices of staple foods and the extent to which there are competition concerns at different levels in the food supply chain. The agencies are planning to submit a joint paper to the International Development Research Centre by early next year.

Merger Review

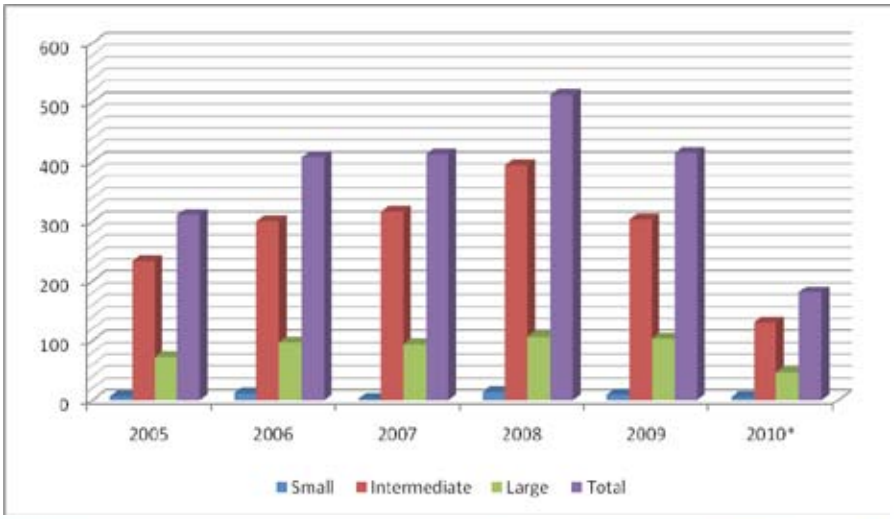
By: Maarten van Hoven

During the last few months the Commission has experienced a sharp decline in merger notifications as compared to previous years. The decline can be attributed to two factors, firstly the changed economic conditions and secondly the increased merger notification thresholds as reported on in our previous edition which became effective 1 April 2009. The Commission is not able to accurately determine to which extent the two factors contribute to the drop in merger notifications. The diagram presented below summarizes the actual merger notifications to the Commission for the last five years and the projected annualized notifications for 2010 (based on notifications to the Commission for the past 5 months since 1 April 2009).

From the diagram it's clear that the Commission will receive less than half of the number of notifications received during its previous financial year. The drop in notifications from 2008 to 2009 could likely be attributed to the slowdown in the economic conditions.

Considering that both the lower and higher thresholds (for intermediate and large mergers) have been changed it has resulted not only in a reduction in the total number of merger notifications but also in the drop of number of large mergers. A great deal of "previously large mergers" has now become intermediate mergers which the Commission has having to decide upon as opposed to the Competition Tribunal.

Coupled with the economic downturn the Commission has also



received an increased number of transactions which relate to depressed financial performance. Uniquely, the Commission has also experienced that the complexity (from an analytical point of view) of matters have increased which results in the Commission having to spend more time on matters as in the past.

Interestingly, the workload within the Commission's Enforcement Division has significantly increased during the last year which naturally requires the Commission equitably allocate resources in addressing the core outputs of the Commission.

As a natural trend mergers and acquisition activity usually pick up to the latter part of the year and the Commission naturally anticipates an upswing in notifications during November and December.

Since the thresholds have been increased the Commission has increased its efforts in tracking mergers that fall below the thresholds in order to ensure that the Commission scrutinizes those mergers that are likely to substantially prevent or lessen competition notwithstanding the fact there is no compulsory notification requirement to them.

The Commission recommends prohibition of wholesale merger

By: Thabelo Rhavhugoni

On 21 May 2009, the Competition Commission ("Commission") referred the proposed merger between Masscash Holdings (Pty) Ltd ("Masscash"), a wholly owned subsidiary of Massmart Holdings Limited ("Massmart") and Finro Enterprises (Pty) Ltd trading as Finro Cash&Carry("Finro")totheCompetition Tribunal ("Tribunal"). In terms of this merger transaction Massmart, through Masscash, proposed to acquire 75% interest in the business of Finro. In its referral to the Tribunal, the Commission recommended that the proposed merger be prohibited on the grounds that the merger would result in higher prices for grocery products to the detriment of consumers.

Massmart, through Weirs Cash & Carry and Makro, competes with Finro in the wholesaling of grocery products[1] in the Port Elizabeth region and surrounding areas ("PE") to independent retailers.

During the investigation the following issues were identified:

- First, third parties informed the Commission that the merging parties are the closest competitors in the market;
- Second, the Commission was also informed that barriers to enter the grocery wholesale market in PE are high; and
- Third, third parties alleged that the merged entity will have significant buyer power, which will weaken their ability to compete in the market.

Closeness of Finro and Massmart in the PE area

In determining the validity of the claims made by third parties with regards to the closeness of the merging parties, the Commission conducted a telephonic customer survey, in which it interviewed about 400 customers of the merging parties. In the survey, customers were asked, among others, to provide the Commission with the name of their next best alternative store they would switch to if their current wholesale supplier was no longer available.

The survey revealed that a very high percentage of customers would choose either of the merging parties' stores as their next best alternative store. This reflected a very high diversion ratio percentage between the merging parties. From competition perspective, the higher the rate of diversion between the merging parties, the more intense is the pre-merger competition between them and therefore the greater the risk that the merger would result in a substantial prevention or lessening of competition. In its analysis, the Commission used the diversion ratio between the merging parties to determine the extent to which the merged entity would profitably raise prices and found that the higher diversion ratio between Massmart and Finro translates to the merged entity's ability to raise prices.[2]

1 Grocery products include food, cigarettes, health and beauty products and non-edible consumables such as detergents and house care products.

The merging parties however, argued that they will not have any incentive to raise prices, as they will lose their customers to their competitors. The main argument that the merging parties raised was that they will be unable to raise prices as their customers [smaller independent retailers (such as convenience stores and petrol station forecourts) and informal traders (such as hawkers and spaza shops)] face intensive competition from larger retail stores such as Shoprite, Spar, Pick n Pay that are aggressively moving into areas where independent retailers typically operate.

In essence, the merging parties submitted that if they were to raise prices, they would lose their customers as the customers of their customers would begin to buy from larger retail stores. In evaluating whether this indirect competitive constraint is credible to weaken the merged entity's ability to raise prices, the Commission investigated the extent of competition between independent retailers and larger retailers and found that although larger retailers have been trying to enter into the typical areas of independent retailers that did not have competitive impact as independent retailers continued offering better prices and services in the market for the retailing of grocery products to consumers in the lower living standard categories.

BARRIERS TO ENTRY

During the process of investigation, two issues that make entry into the wholesale grocery market in the Port Elizabeth region and surrounding areas were established. These issues are proper location and economies of scale.

Proper location

The Commission found that the role that suitable location play in constraining new entrants from becoming effective competitors in the wholesale grocery market in the Port Elizabeth region is credible. Proper location is one of the main barriers that entrants face when wishing to enter the wholesale grocery market in the Port Elizabeth region. The Commission's investigation also revealed the scarcity of proper location in the PE region.

Economies of scale

One other main constraint that is faced by new entrants in the wholesale market for grocery products in the Port Elizabeth area is the ability to offer competitive prices, since larger buyers are given volume discounts by suppliers. This was confirmed during the Commission's meeting with Finro when it was indicated that one of the main challenges that small independents face is that they cannot offer competitive prices and as a result they end up exiting the market.

BUYER POWER

Third parties also raised concerns that the merger would enable the merged entity to negotiate better prices with suppliers relative to its competitors, which would weaken their ability to compete in the market. The issue of poor trading conditions that a merger transaction could create for the merged entity's rivals was investigated by the European Commission in the Carrefour/Promodes merger[3]. The European Commission argued that although the final consumers may benefit from lower prices that the merged entity could negotiate with suppliers, such a benefit will last shorter, as firms with better trading terms than competitors may dominate the market at the expense of smaller competitors, leaving final consumer with very limited choice."[4] On these grounds, the European Commission argued that the buyer power that the merger could create may lead to a substantial prevention or lessening of competition in the market.

Although the Commission did not find any evidence that the merger between Massmart and Finro would create buyer power that could prevent or lessen competition in the PE region, it takes note of the effect that buyer power could have on competition and will ensure that in evaluation of merger cases, particularly within the grocery sector, these effects are properly analysed as there have been complaints in the industry that buyer power of large retail stores is inhibiting the development of small and medium size retailers.

After public hearing held during the latter part of August 2009 in which various witnesses testified both on behalf of the Commission and the parties the Tribunal approved the transaction without conditions. The reason for the Tribunal's decision is pending.

2 In the merger between Somerfield plc and Wm Morrison Supermarkets plc, the UK Commission used diversion ratios to measure the degree to which Somerfield and Safeway/Morrisons had been rivals in local areas prior to the transaction. The UK Commission found that any merging stores which had diversion ratios above 14.3% generated a post-merger price rise in excess of 5%, and so the 14.3% diversion ratio was selected as the de facto threshold for a substantial prevention or lessening of competition finding. In our diversion ratio analysis, the Commission found a far higher diversion ratio percentage than a 14.3% UK Commission threshold.

3 Case no IV/M.1684.

4 Case no IV/M.1684, paragraph 45 and 46.

Acquisition of Bond Exchange of South Africa by JSE Limited

By: Grashum Mutizwa

The primary acquiring firm was JSE Limited ("JSE"), a public company listed on the JSE main board. The primary target firm was the Bond Exchange of South Africa Limited ("BESA"), a private owned company. Post the transaction, BESA became a wholly owned subsidiary of JSE.

Broadly, the JSE as a an exchange, operates in a number of markets that provide trading, clearing and settlement services across a number of asset classes such as equities, equity derivatives, commodity derivatives and interest rate derivatives. On the other hand, BESA's core business included services to the interest-rate market, listing debt instruments and derivatives, provision of electronic trade capture and matching facilities for authorised users. In South Africa, spot bond and interest rate derivatives trading occur 'over-the-counter' and not on exchanges, and therefore the merging parties offered mainly post trade related services for trading activities that occur off-exchange. In essence, the merging parties only offered post trading services, which primarily involves reporting and settlements.

Although the merging parties were both active in offering reporting and settlement services for the trading of spot bonds and interest rate derivatives, the merger did not pose any major competitive concerns in the markets. Chief among the reasons is that the JSE's Yield-X platform for spot bond trading has been unsuccessful and does not constrain BESA. Yield-X operates on a central counterparty model, an undesirable model since South Africa operates a primary dealer model for spot bonds. As such, virtually all spot bonds trades have been reported on BESA, with JSE's Yield-X generating insignificant revenues from its Yield X platform.

In relation to interest rate derivatives, both merging parties generated insignificant revenues for exchange services related to these products as trading occurs between the trading counterparties with little activities reported on-exchange. One of the rationales of the transaction was to pool resources of Yield-X and BESA in order to offer better products and services for the interest rate derivatives market. Again, there were no major competitive concerns arising on the interest rate derivatives space.

Notably, all participants engaged by the Commission in its market enquiry, particularly asset managers, primary dealers, inter-dealer brokers, the FSB and the National Treasury expressed a favourable view of the transaction, envisaging several benefits arising from the transaction than any potential harm. Therefore, taken as a whole, the Commission recommended the transaction be approved without conditions.

Commission and Tribunal attend the 8th Annual ICN Conference

By: Nandi Mokoena

From 3 - 5 June 2009 members of the International Competition Network (ICN) held their 8th Annual Conference in the beautiful city of Zurich, Switzerland. More than 450 participants coming from nearly 80 different countries took part in the conference and all the sessions, including evening events.

David Lewis, Norman Manoim, Shan Ramburuth, Simon Roberts and Nandi Mokoena represented the Commission and Tribunal at the June 2009 meeting while Lesley Morphet (Deneys Reitz) and Gomolemo Kekesi (Bowman Gilfillan) represented the Competition Committee of the Law Society. The conference covered all the major competition topics such as unilateral conduct, competition advocacy, market studies, mergers, cartels and competition policy implementation.

While all the sessions were informative and interactive, the two highlights of the conference for the South African delegation were South Africa's appointment to the steering committee of the ICN and Dave's birthday celebration. Shan, the Commissioner, represents South Africa on the steering committee and has already undertaken much work in this capacity.

The ICN was created in 2001 as a project-oriented and consensus-based organisation. Its membership includes nearly all of the world›s competition agencies. Non-governmental advisors with expertise and interest in competition matters work with ICN members to produce Recommended Practice proposals and substantive reports to promote convergence among the laws, processes and policies of different jurisdictions. The Recommended Practices are non-binding but, once adopted by the ICN, form a basis for sound antitrust enforcement throughout the world.

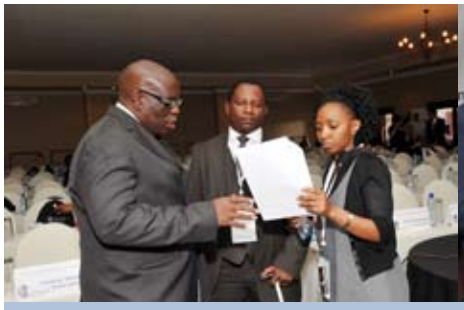
President J G Zuma signs the Competition Amendment Act No 1 of 2009 into law

During August 2009 the President signed the Competition Amendment Bill into law. The Competition Amendment Act, No 1 of 2009 was published in Government Gazette no 32533 of 28 August 2009 and will come into operation on a date to be proclaimed by the President.

The aim of the new Act is to amend the Competition Act, 1998, so as to provide certainty with regard to the concurrent jurisdiction between the Competition Commission and other regulatory authorities; to introduce provisions to address other practices that tend to prevent or distort competition in the market; to provide more guidance in relation to conducting market enquiries; to introduce provisions to hold personally accountable those individuals who cause firms to engage in cartel conduct; and to authorise the Competition Commission to excuse a respondent to a complaint if the respondent has assisted the competition authorities in the detection and investigation of cartel conduct; and to provide for matters connected therewith.

The Commission is working to ensure the smooth implementation of the new Act when it comes into operation. Some of the measures the Commission intends to introduce are internal procedures for carrying out market studies and guidance on the nature of the working relationship between the competition authority and the enforcement agencies.

Social Page:
Annual Competition Law, Economics and Policy Conference



(L-R) George Lepimile (UNCTAD), Thula Kaira (Competition Commission, Zambia) and Nandi Mokoena (Competition Commission, SA)

(L-R) Norman Manoim (Comeptition Tribunal, SA), Shan Ramburuth (Competition Commission, SA), Ebrahim Patel (Minister of Economic Development, SA) and Dave Lewis (former chairperson of the Competition Tribunal, SA)

Conference delegates

(L-R) Alex Kububa (Competition & Tariff Commission, Zimbabwe), George Lepimile , Paul Kwengwere (Competition Commission, Malawi) and Godfrey Mkocha (Fair Competition Commission, Tanzania)

(L-R) Sunel Grimbeek, San Sau Fung, Gilbert Muzata, Nompucuko Nontombana, Sbusiso Madonsela

(L-R) Dr Simon Roberts (Competition Commission, SA), Prof Bill Kovacic (US Federal Trade Commission), Prof Richard Whish (Kings College, London), Prof Massimo Motta (Pompeu Fabra & Barcelona GSE) and Wendy Mkwananzi (Competition Commission, SA)

Nandi Mokoena
(Competition Commission, SA)

(L-R) David Unterhalter, Kai-Uwe Kuhn (University of Michigan, USA), Nandi Mokoena, Joe Harrington (Johns Hopkins University, Baltimore, USA) and Tembinkosi Bonakele
(Competition Commission, SA)

Rietsie Badenhosrt
(Competition Tribunal, SA)

(L-R) Innocent Tau, Susan Kganyago, Cassandra Mongake, Vanessa Kruger, Tania Govender, Zibuyile Jafta, Sesule Mojapelo, Tebello Sello, Francina Yedwa

(L-R) Prof Frederic Jenny (Supreme Court, France), Judge Dennis Davis, Dr John Fingleton (UK Office of Fair Trading), Peter Freeman (Competition Commission, UK) , Yasmin Carrim (Competition Tribunal, SA) and Shan Ramburuth

(L-R) Prof Bill Kovacic, Kasturi Moodaliyar (Wits School of Law), Judge Dennis Davis (Competition Appeal Court, SA). Chantal Lavoie (Competition Commission, SA) and Patrick Smith (NERA Economic Consulting)

Gala dinner table setting

(L-R) Mahashane Shabangu, Haschendri Sooboo, Busisiwe Molefe

(L-R) Charlie Ndlovu, Mmboswobeni Nkhumeleni, Themba Mahlangu, Thabo Khumalo

(L-R) Londiwe Xaba, Ipeleng Selaledi, Edwina Ramohlola, Phumzile Ncube

10111 Pantsula Dancers

10111 Pantsula Dancers

MC Trevor Noah

(L-R) Shan Ramburuth handing a gift to Dave Lewis with Norman Manoim keeping watch.

(L-R) Reena das Nair, Neo Chabane, Grace Mohamed, Lira, Wendy Mkwananzi, Cassandra Mongake, Anisa Kessery and Josephilda Nhlapo-Hlope

(L-R) Molebogeng Taunyane, Keitumetse Letebele, Trevor Noah, Itebogeng Palare and Sesule Mojapelo

(L-R) Menzi Simelane and John Dreyer

Lira performing at the gala dinner.

Dancing to Lira

Welcoming drinks at the cocktail function launching the Ten Year Review Book.

(L-R) Thamsanqa Kekana and Hardin Ratshisusu

Book Launch: Mondo Ntlha, Doris Tshepe, Shan Ramburuth, Bongani Ngcobo, Kwena Mahlakoana, Simon Roberts

(L-R) Phumzile Ncube, Reena das Nair, and Catherine Cobertt

(L-R) San Sau Fung, Ryan Hawthorne, Junior Khumalo and Andrew Swann

Soweto String Quartet

The Competition Commission is committed to minimize the risk of and prevent any possible fraudulent and corrupt activities. Please call the **National Anti-Corruption Hotline** to report any act of corruption on **0800 701 701**, this is a toll-free number and is accessible 24 hours a day in any South African official language. Alternatively you can report via:

e-mail: pi@ethics-line.com

Fax: 0800 007788

Towards a fair and efficient economy for all

Where to get hold of us

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

THE EDITOR
Strategy and Stakeholder Relations Division
Private Bag X23
Lynnwood Ridge
0040

E-mail: CCSA@compcom.co.za
Tel: (012) 394 3200
Fax: (012) 394 0166

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