



COMPETITION ALERT

COMMISSION REFERS CYCLING INDUSTRY CARTEL TO THE TRIBUNAL

Although the Commission as a matter of policy focuses on big businesses affecting a broad spectrum of consumers, the prohibitions in the Competition Act affect small and big business alike and where evidence is brought to its attention of alleged prohibited practice, it is statutorily bound to take action.

In an investigation dating from March 2009, the Commission has now referred its complaint against the cycling industry cartel involving 12 bicycle retailers and 16 bicycle wholesalers. In addition to an anonymous tip-off and complaint lodged by an independent retailer that kick-started the investigation, the complaint has apparently been bolstered by admissions by some of the respondents during the investigation process. The bicycle retailers are alleged to have excluded competitors such as internet retailers from the market by requesting the bicycle wholesalers to sell to these independent retailers at a higher price.

It is also alleged that the respondents held various meetings in 2008 to discuss and agree on the wholesale and recommended retail prices of cycles and accessories.

The Commission has requested the Tribunal to impose an administrative penalty of 10% on the annual turnover of each of the firms involved.

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WARNING: COMMISSION USED IN BANK DETAILS SCAM

Firms that have entered into public consent orders with the Commission are being targeted in an apparent scam aimed at diverting to fraudsters payment of agreed penalties. The scam apparently involves firms receiving a fax, ostensibly from the Competition Commission, advising that the Commission's banking account details have changed, and that all future payments due in terms of its consent agreement with the Commission, be paid into this account. The "new" banking account details are set out (an account in the name of "*Competition Commission of SA*"), and a copy of the consent order (a public document) is attached to the fax. Commission has confirmed that such faxes are fraudulent. Any firm making payment to the Commission directly should accordingly be sure to liaise directly with the Commission, or through attorneys, to ensure that payment is correctly remitted.

TRIBUNAL CONSIDERS LEGITIMACY OF SHAREHOLDERS AGREEMENT - AND PROVIDES FOOD FOR THOUGHT

The interim relief application brought by Gogga Tracking Solutions (Pty) Ltd (GTS) against Vodacom Service Provider (Pty) Ltd (VSP) has been struck from the Tribunal's roll on the technical basis that GTS was not authorised to bring the application. In upholding the terms of a shareholders' agreement between the shareholders of GTS, which prevented it from engaging in litigation without the consent of all the shareholders, the Tribunal had cause to consider under which circumstances it would have the power to declare provisions of an agreement void.

GTS had lodged a complaint with the Commission that VSP, being both a wholesale supplier and retailer of data bundles, had engaged in a margin squeeze against GTS (a customer for data bundles and also a competitor in the downstream retail market), by increasing the price at which GTS could obtain data.

GTS then applied for interim relief in an attempt to fast-forward its remedy pending outcome of the complaint investigation. VSP opposed the application on the "short point" that GTS required the consent of both shareholders, which had not been obtained. It is significant to note that VSP was indirectly a substantial shareholder in GTS, via a subsidiary.

GTS argued that the right to curtail legal proceedings as contained in the shareholders' agreement was inapplicable in circumstances where the interests of one shareholder in bringing the application conflicted with that of another's in having the application dismissed. In this instance, it was clearly not in VSP's interest to have the interim relief application brought, an interest which its subsidiary, with shares in GTS, apparently shared.

In a carefully-worded judgment, the Tribunal confirmed that it is only able to declare an agreement or part thereof to be void if it forms an integral element of a prohibited practice. The Tribunal suggested that an "*agreement which seeks to extinguish a firm's rights of access to the fora in which competition disputes are resolved*" would be sufficiently related to the broader scheme of prohibited practices to merit censure.

In the present instance, GTS alleged only a "*conflict of interest*" and had failed to allege that the provision was furthermore "*designed and implemented... as a mechanism to frustrate GTS's rights of access to ... organs of the competition system.*" Absent such an averment, the Tribunal was bound to apply the provisions of the agreement as drafted.

Despite upholding the "short point" raised by VSP, the Tribunal was at pains to issue the following important caution: "*shareholders should not perceive this decision as a source of encouragement to draft and implement shareholders' agreements in such a manner that their effect is to impede or prevent access by firms with co-shareholders to competition authorities if disputes arise about competition issues. These provisions would be ill-fated and the consequences to the relevant shareholders, if they are unmasked, would be highly unwelcome to them.*"

The Tribunal also sent a message that such technical arguments, whilst sound, have the effect of potentially delaying a remedy that affected not only the commercial interests of the parties, but also the interests and welfare of all consumers. Accordingly, the Tribunal declined to award any costs to VSP.

As the Tribunal expressly stated that neither the laying of a complaint nor the referral of the complaint (if any) would amount to the institution of legal proceedings by GTS (and would not therefore require shareholder authorisation) the merits of the allegations may well be ventilated in the future.

TRIBUNAL CONFIRMS ITS PERMISSIVE APPROACH TO COMPLAINT INITIATION

In a recent judgment (*Commission v Loungefoam (Pty) Ltd, Vitafoam SA (Pty) Ltd and others*) the Tribunal has again confirmed an important procedural issue in relation to the process for initiating complaint investigations.

In this instance, the Commission sought to amend the particulars of its complaint referral, *inter alia* to cite additional respondents and broaden the scope of its referral to include further and alternative charges. The respondents objected to the amendments on the basis that the respondents and conduct referred to were not expressly included in the complaint initiation.

In ruling in the Commission's favour, the Tribunal clarified that the initiation of an investigation is quite distinct from the complaint referral, and eventual prosecution thereof. The initiation of a complaint is, of necessity, preliminary and need not contain all averments required to make a referral.

For policy reasons rooted in the public interest, the Tribunal clearly does not wish to fetter the Commission's ability to extend

the scope of its investigation at any stage to include additional conduct or alleged participants. All that is required for a valid complaint initiation is to set out (in the broadest of terms) the prohibited practice being investigated - no mention of specific facts or participants need to be specified. Provided that a "rational link" can be established between the initiation and subsequent referral (a low threshold test), then the referral is valid and the Tribunal was unequivocal in stating that "*the Commission is not required to initiate a complaint against each and every respondent that it may, after its investigation wish to prosecute.*"

The implication of this approach for players in an industry being investigated is stark. Once an investigation has been duly initiated into the conduct of certain players in an industry, those players not at first implicated, are not secure in the knowledge that they are off the hook. As such, players might have no inkling of the investigation until much later in the process. They are at a distinct disadvantage when it comes to negotiating a settlement or even applying for leniency.

At the same time, where an investigation is drawn out, players implicated late in the game will not be able to avail themselves of the statutory prescription period, even where conduct has ceased more than three years prior to being cited as a respondent.

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