



COMPETITION ALERT

AVENG TO PAY A R46 MILLION FINE FOR COLLUSION

The Commission has recently referred a complaint of alleged collusion by manufacturers of certain pre-cast concrete products including pipes, culverts and manholes, to the Tribunal. Infraset, a subsidiary of Aveng (Africa) Limited, has admitted its involvement in the alleged cartel. Aveng has acknowledged Infraset's involvement in price fixing, market allocation and collusive tendering in the markets for concrete pipes and culverts in Gauteng, KwaZulu-Natal and the Western Cape, and has agreed to pay an administrative penalty of approximately R46 million which constitutes 8% of Infraset's annual turnover in the preceding financial year.

This matter was precipitated by an application for corporate leniency by Rocla, which blew the whistle on Aveng and the other alleged cartel members. The Commission's investigation revealed that Rocla, together with Southern Pipeline Contractors, Concrete Units, Infraset, Grallio, Cobro, Cape Concrete, Concrete Walls, Craig Concrete and D&D had allegedly engaged in conduct in contravention of the anti-collusion provisions of the Competition Act.

Firms which are engaged in cartels are encouraged to apply to the Commission for immunity from prosecution in terms of the Corporate Leniency Policy, which may allow those firms to escape the imposition of an administrative penalty. Leniency is granted only to the firm "that is first to the door" in confessing its involvement in the cartel, in return for immunity from prosecution.

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A CARTEL IN PIPE PRODUCTS HAS BEEN EXPOSED BY THE COMMISSION

Manufactures of Polyvinylchloride (PVC) and High Density Polyethylene (HDPE) pipe products used in the building (plumbing), civil, mining and agricultural sectors are in the spot light as the Commission uncovers a cartel in this industry. DPI Plastics, one of the cartel members, has applied for and been granted conditional immunity from prosecution. An investigation into this industry was initiated as a result of information received during the course of a merger notification lodged with the Commission and from DPI's leniency application.

Following the Commission's findings of bid rigging, price fixing and the allocation of markets or customers by Swan Plastics, Marley Pipes Systems, Petzetakis, Amitech SA, MacNeil Agencies, Flo-Tek Pipes, Andrag and Gazelle Plastics, the Commission has referred the complaint of collusion against these companies to the Tribunal for adjudication. The Commission is currently in settlement negotiations with the named respondents. The Commission has indicated that it would seek to impose the maximum fine of 10% of each of the respondents' annual turnover, should negotiations be unsuccessful.

LANCEWOOD ADMITS TO PRICE FIXING AND NEGOTIATES A SETTLEMENT

The Tribunal has ratified a consent order entered into between Lancewood Cheese and the Commission, in terms of which Lancewood Cheese had admitted to price fixing and agreed to pay an administrative penalty of R100 000. In addition, Lancewood Cheese has agreed to co-operate with the Commission in its investigation into the milk industry, and more specifically, in the prosecution of various milk processors including, Parmalat, Ladismith Cheese, Woodlands Dairy, Milkwood Dairy and Nestle SA for allegedly engaging in anti-competitive practices in

contravention of the Competition Act. The Commission's investigation into the milk industry was preceded by Clover's application for leniency in terms of which Clover was granted conditional immunity for fixing the selling price of milk and other processed products. The Commission's investigation into the milk industry is ongoing.

SENWES

The Competition Tribunal has found Senwes guilty of a so called "margin squeeze" complaint in terms of Section 8(c) of the Competition Act. Senwes has noted an appeal to the Competition Appeal Court.

Senwes is a dominant silo owner and stores grain mainly on behalf of farmers and traders. Various alleged breaches of the Competition Act were referred by the Competition Commission to the Competition Tribunal, including an allegation that differentiated tariff structures for farmers and traders, respectively, constituted price discrimination under Section 9 of the Competition Act; alternatively, that Senwes had abused its dominance by inducing farmers to sell grain to it on condition that they received a lower storage tariff.

These charges were dismissed by the Competition Tribunal. However, the Tribunal found that Senwes had committed an abuse of dominance in the form of "margin squeeze", although the specific theory of harm in relation to the margin squeeze case had not been pleaded in the Commission's complaint referral. The margin squeeze allegation only surfaced for the first time in the Commission's witness statements.

A margin squeeze occurs where a dominant firm, which is vertically integrated in a downstream market, adopts pricing strategies which place the margins of its downstream competitors under pressure, either by pricing a necessary input required by its downstream

competitors too high or by selling goods or services in the downstream market at prices which are too low for its downstream competitors to make a sufficient margin to trade profitably.

The essence of the margin squeeze case brought against Senwes was that it had, during 2003, increased its storage tariff to traders which put them at a disadvantage vis-a-vis Senwes' internal trading division. The Competition Tribunal made important findings regarding the test to be employed in a margin squeeze case and, subject to the Competition Appeal Court reversing the decision of the Tribunal, this case sets an important precedent regarding the elements of an abuse of dominance in the form of a margin squeeze.

UPDATE ON COMPETITION AMENDMENT BILL

Despite President Kgalema Motlanthe's refusal to sign the Competition Amendment Bill into law on the basis, inter alia, that a reverse onus introduced by the Bill may not survive Constitutional muster, in an unprecedented decision, Parliament returned the Bill to the President, making no amendments to the questionable clause. The reverse onus arises from a provision in the Bill which obliges individuals criminally prosecuted for allowing their firms to engage in cartel behavior, to disprove the fact that the firm concerned was involved in a cartel,

which fact will be taken as automatically proved in the criminal trial if the Competition Tribunal has made that finding in civil proceedings against the firm concerned. In ordinary circumstances, the prosecuting authority bears the onus of proving all relevant facts and none are taken as proved at the start of the trial, unless admitted to by the accused.

In terms of the Constitution, the President may now either sign the unchanged Bill or refer it to the Constitutional Court for adjudication, the latter option being the more likely as the President has reportedly stated on more than one occasion that he is not inclined to enact the Bill in its current form. It is not known at this stage whether the Bill has in fact been referred to the Constitutional Court for decision.

DAVID LEWIS' NEW APPOINTMENT

David Lewis, the chairman of the Competition Tribunal has been appointed interim chairman of the steering group of the International Competition Network, more commonly known as the ICN. Authorities from 92 jurisdictions worldwide belong to the ICN whose main objective is to promote antitrust enforcement globally and consistency in policy issues of common concern.

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CONTACT US

Should any further information be required, or for competition law-related advice in general, please do not hesitate to contact one of our specialist practitioners.



Mondo Ntlha
Director
National Practice Head: Competition
T +27 (0)11 290 7128
E mondo.ntlha@dclacdh.com



Chris Charter
Director
T +27 (0)11 290 7112
E chris.charter@dclacdh.com



Andries le Grange
Director
T +27 (0)11 286 1150
E andries.legrange@dclacdh.com



Natalie von Ey
Director
T +27 (0)11 290 7113
E natalie.von_ey@dclacdh.com



Petra Krusche
Director
Regional Practice Head: Competition
T +27 (0)21 481 6350
E petra.krusche@dclacdh.com



Jay-Ann Jacobs
Director
T +27 (0)21 481 6325
E jayann.jacobs@dclacdh.com



Coreen Scholtz
Director
T +27 (0)21 481 6351
E coreen.scholtz@dclacdh.com



Johan Liebenberg
Competition Analyst
T +27 (0)11 286 1158
E johan.liebenberg@dclacdh.com



Nick Altini
Director
T +27 (0)11 290 7115
E nick.altini@dclacdh.com



Vishal Koovejee
Director
T +27 (0)11 286 1339
E vishal.koovejee@dclacdh.com



Janine Simpson
Director
T +27 (0)11 286 1452
E janine.simpson@dclacdh.com

Rookaya Ahmed-Kaprie
Senior Associate
T +27 (0)21 405 6117
E rookaya.ahmed@dclacdh.com

Pia Harvey
Senior Associate
T +27 (0)11 290 7091
E pia.harvey@dclacdh.com

JOHANNESBURG (Sandton)

6 Sandown Valley Crescent
Sandown
Sandton 2196
Private Bag X40
Benmore 2010
South Africa
Dx 154 Randburg
T +27 (0)11 286 1100
F +27 (0)11 286 1264
E jhb@dclacdh.com

1 Protea Place
Sandown
Sandton 2196
Private Bag X7
Benmore 2010
South Africa
Dx 42 Johannesburg
T +27 (0)11 290 7000
F +27 (0)11 290 7300
E jhb@dclacdh.com

CAPE TOWN

11 Buitengracht Street
Cape Town 8001
PO Box 695
Cape Town 8000
South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300
F +27 (0)21 481 6388
E ctn@dclacdh.com

CLAREMONT (Cape Town)

5th floor Protea Place
Protea Road
Claremont
PO Box 23110
Claremont 7735
South Africa
Dx 5 Cape Town
T +27 (0)21 683 2621
F +27 (0)21 671 9740
E ctn@dclacdh.com

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