

# COMPETITION MATTERS

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## Competition Appeal Court rules on ArcelorMittal excessive pricing case

The Competition Appeal Court (CAC) recently handed down its judgement in the appeals lodged by ArcelorMittal (Mittal) and MacSteel International against the landmark 2007 ruling of the Competition Tribunal in which the Tribunal found that Mittal had been charging excessive prices in the local flat steel market, through its infamous international parity pricing system.

The CAC declined to bring finality to the matter and instead referred the matter back to the Tribunal for redetermination (a reconsideration of the evidence already before the Tribunal, but applying the CAC's statement of the law of excessive pricing). In so doing, the CAC has made an authoritative pronouncement on the law of excessive pricing, as a form of abuse of dominance.

The CAC found the Tribunal's exposition of excessive pricing to be "fundamentally flawed". The Tribunal had adopted an approach based upon the premise that where a price charged by a dominant firm could not be justified by any factor other than the pure exercise of market power, the price would be excessive within the meaning of the Act. Because such prices would not be the result of any "*cognizable competitive constraints*" only a super-dominant firm

would have the ability to charge an excessive price and, on the Tribunal's reasoning, excessive pricing would be a form of misconduct that very few firms would have the ability to engage in. Indeed, only those that trade in "uncontested and incontestable markets" could engage in behaviour designed to take advantage of that structural circumstance.

The CAC has stated that the prohibition against excessive pricing actually invites a four part enquiry based more on the assessment of actual figures than in the abstract, conceptual enquiry favoured by the Tribunal. To determine whether a dominant firm (which need not be super-dominant) has engaged in excessive pricing, the following enquiry must be made: (i) what is the actual price charged by the dominant firm, (ii) what is the economic value of the good or service being sold (expressed as a monetary value), (iii) is there a reasonable relationship between the actual price charged and the economic value (which means that the two must be compared and then an assessment should be made of whether the difference is comprised of 'pure profits', and (iv) if not, is the excessive price charged to the detriment of consumers (which can be assumed, but requires a value judgement)?

*Continued on next page*

The CAC admits that determining 'economic value' is not an easy exercise, but indicated this might be determined by calculating the notional price that would have been charged under assumed conditions of long-run competitive equilibrium (ie competition that in the long run could eliminate 'pure profit' taking). In other words, the enquiry would be to determine the price that the firm would have had to charge to sustain itself in the long run, in the face of competition. To achieve this, a "*fairly robust*" approach may have to be taken, which could involve a detailed consideration of actual costs and assessment of comparator figures.

All dominant firms are now placed on warning that their pricing strategies should not be aimed at extracting 'pure profit' from consumers (which can be actual customers or end users of the product being sold, or its derivatives) and that consideration should be given to the degrees of difference, if any, in the prices actually being charged and those that would more closely reflect the economic value of the good or service concerned.

[Nick Altini](#)

## A single meeting may be one too many

A recent decision of the European Court of Justice (ECJ) in *T-Mobile NL v Nma (C-8/08)* has held that a single meeting between competitors is enough to constitute a "*concerted practice*" in contravention of competition law.

On a single occasion in 2001, representatives of five Dutch mobile network operators met and informed each other of, *inter alia*, the reduction of standard dealer remunerations for postpaid subscriptions, which was to take effect on a specified date. The Netherlands Competition Authority (NCA) found that the operators had thereby engaged in a "*concerted practice*" in contravention of Dutch competition legislation. Having made this finding, the NCA imposed fines on the operators for cartel behaviour.

The NCA's decision was appealed to the Dutch Administrative Court for Trade and Industry, which considered the provision in Dutch competition law to be similar to Article 81(1) of the EC Treaty (European law) and opted to stay the proceedings to request a preliminary ruling from the ECJ on specific points central to the determination of the case.

In its decision, the ECJ upheld its previous finding that firms are guilty of engaging in a "*concerted practice*" when there is a form of coordination between these firms, which the coordinating firms knowingly substitute for the risks of competition without having reached the stage of a properly concluded agreement. In South Africa, concerted practice is defined as "*co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replace their independent action, but which does not amount to an agreement*". Arguably, our definition of concerted practice is not too dissimilar to the European position.

In its ruling, the ECJ confirms the position that firms involved in a concerted practice are presumed to have taken account of the sensitive information exchanged with their competitors in determining their conduct in that market, unless the firms in question can show evidence to the contrary. Following on from this, the ECJ was asked to determine whether this presumption of a causal connection applies even if the concerted practice relates to an isolated event or whether it applies only to those circumstances where the concerted practice has taken place regularly over a period.

The ECJ unequivocally states that a meeting on a single occasion between competitors may be sufficient for participating firms to align their market conduct. The Court adds that the number of meetings held is not as important as whether the meeting/s afford competitors the opportunity to take account of the information exchanged in order to determine their conduct in the relevant market and knowingly substitute practical cooperation between them for the risks of competition.

Although European law differs in certain respects to SA law, this decision is likely to have some impact on the approach adopted by our competition authorities when considering the consequences and impact of an exchange of confidential information by competitors. Competitors who meet, even once, perhaps at a trade association meeting, must be extremely careful to avoid discussing competitively sensitive information to prevent a possible contravention of the law.

[Pia Harvey](#)

## When big is not necessarily bad: cigarette giant remains at large

The Competition Tribunal recently dismissed complaint proceedings brought by the Competition Commission and Japan Tobacco International Limited (JTI) against British American Tobacco South Africa Limited (BATSA).

The Complainants alleged that BATSA's agreements with retailers and other gatekeepers of the point of sale (POS) effectively prevented rivals from promoting their products in competition with BATSA.

Through its arrangements with retailers, BATSA effectively purchased the right to determine the position and space allocation for its own brands and those of competitors in cigarette dispensing units at the POS.

Space allocation and product positioning of competing brands in a retail setting are aspects of what is referred to as "*category management*", which retailers typically delegate to a major supplier in return for substantial payment. JTI, while supporting the notion of category management by one supplier on behalf of the category, objected to BATSA having appropriated any private benefit, arguing that BATSA was bound to manage the category objectively, purely with reference to the rate of sale of each cigarette brand. The Tribunal determined that it would be irrational for BATSA, having paid handsomely for the right to manage the category, to exercise that right on a purely altruistic basis, but suggested that suppliers, retailers and even consumers may nevertheless benefit.

Despite BATSA's category captaincy, the Tribunal found that rivals could influence BATSA's decisions, provided that they were willing to pay the retailers' asking price for the privilege. Here, the lower market share of rival brands belied the brand strength, resources and experience of the multinational tobacco companies that stood behind them. The Tribunal reasoned that JTI had the wherewithal to compete against BATSA in regard to promotional opportunities but had chosen not to do so. Instead, JTI sought to "*fight its battles in the in the Competition Tribunal rather than on the more testing terrain of the market.*"

The Tribunal emphasised that in abuse of dominance cases, as well as those based on vertical restrictive practices, competitive harm must be illustrated by evidence of significant foreclosure. In addition, there should be a clear causal link between any foreclosure and the conduct concerned. In this case, after an exhaustive interrogation of the facts, the Tribunal concluded that neither legal test was satisfied. In the first instance, BATSA's rights were a "*limited exclusive*" so that it did not in fact have the ability to exclude rivals altogether. Exclusivity was in particular limited by the countervailing power of retailers, who would always insist that all cigarette brands were stocked in sufficient quantities to avoid stock-outs. Moreover, there was evidence that where rivals had sought to curtail BATSA's hold over the POS this was possible and that access to more vital promotional channels, such as entertainment venues, had been highly contested by all players. BATSA's conduct could therefore be distinguished from incentive schemes that resulted in rivals being excluded altogether from sales opportunities (such as those that South African Airways had implemented in regard to travel agents).

Additionally, the difficulty experienced by rivals in challenging BATSA's dominance appeared most likely to be as a result of strict regulation, which precluded above-the-line advertising and severely limited the opportunities for promotion.

The decision signals that the Tribunal intends to apply an effects-based approach to competition enforcement. It is both a dig at over-regulation as well as confirmation that dominant firms need not apologise for taking strong competitive measures to protect their position, and that where rivals prefer to take a knife to a gun-fight, competition law is not necessarily available to even the odds.

*Chris Charter*

## Summonses should not amount to "fishing expeditions"

About five years ago, the Supreme Court of Appeal in *The Pretoria Portland Cement Co Limited and Another vs Competition Commission and Others 2003 (2) SA 385 (SCA) (Portland Cement)* stated that it would - '*... not allow persons or businesses to be subjected to an abuse of power and must also make it clear to the Commission that it also is subject to the Constitution and the law and must accordingly mend its ways in certain respects.*'

In an interlocutory application brought by Woodlands and Milkwood (collectively referred to as Woodlands) against the Competition Commission in the notorious milk case, Woodlands challenged the lawfulness of the Commission's summonses, pursuant to which the Commission had interrogated employees of Woodlands and obtained certain documents, before initiating the milk complaint referral against, amongst others, Woodlands. Woodlands, amongst other relief, required the complaint against it to be declared invalid.

In the words of the Commission, the purpose of the summonses was to gather information regarding a complaint initiated by it '*to establish whether there is any anti-competitive behaviour in 'any level' of the industry. Through this we allowed ourselves the opportunity to evaluate the entire industry.*'

Woodlands argued that the summonses were vague and overbroad, thus invalid. Another gripe was that the process of interrogation had been unfair as the Commission had apparently led Woodlands to believe that it was providing information regarding an investigation in which Woodlands was not implicated. This was clearly wrong as Woodlands found itself to be a respondent in the subsequent milk complaint referral.

The Tribunal agreed that the summonses were void by vagueness. The Competition Act in its present form empowers the Commission to investigate prohibited practices and mergers in relevant markets only. And not, as the Commission wished to do, the entire milk industry and all practices, some of which are not prohibited.

The minimum requirement of a valid summons under the Competition Act is the identification of the prohibited practice in a summons with sufficient particularity. It is unfair and an infringement of constitutional rights, to expect of an addressee of a summons to cobble together the ambit of the summons from the nature of the information requested or type of document demanded. In Woodlands' case, the Commission's summonses fell short of the minimum standards.

The Tribunal was not prepared to go as far as Portland Cement by nullifying the complaint against Woodlands due to the Commission's unlawful acts. Instead, it ordered that a copy of the evidence collected unlawfully from Woodlands be preserved in the offices of its Registrar, with proper consideration to be given to its admission as evidence at the hearing of the milk case, if it is shown to be just and equitable in the circumstances.

The Commission now has the opportunity to vindicate its unlawful actions if it can show on application that the evidence obtained pursuant to the unlawful summonses and that its manner of interrogation, did not violate Woodlands' right to fair administrative process.

In future, it can be expected that the Commission will be more careful in the execution of its functions. Nevertheless, it is important that summonses of the Commission are always assessed properly before complying as it may be difficult to manage the consequences of complying with an unlawful summons.

*Petra Krusche*

## Interventions by competitors in merger proceedings - a call for balance

While some competition agencies tend to be skeptical of competitor intervention with a rival's merger project, our competition authorities have in many instances adopted an open door policy giving the competitor every chance to be heard because this is considered to be an effective way of ventilating all relevant issues.

However, the Tribunal has increasingly indicated that interventions should be exercised within the bounds of good faith and public interest. In *AC Whitcher (Proprietary) Limited and the Competition Commission and Others*, the applicant, who had been a rival bidder to acquire the assets of the target firms, brought a review application to the Tribunal 75 days after the Commission's order. It became apparent that the motive was to frustrate the implementation process that was already underway. In dismissing the application, the Tribunal held that the conduct of AC Whitcher was nothing more than a ploy to extract some form of commercial advantage rather than the pursuit of the public interest, thus the application was dismissed with costs.

The award of costs to an unsuccessful intervener is becoming less unusual. An intervener has to offer input which is of added value to the investigation and not use the competition authorities to further its own commercial agendas. Filing vexatious applications is an abuse of the process and competitors need to be aware that it may result in censure.

The attitude of the competition authorities towards competitor interventions is to give the competitor a platform to raise legitimate competitive concerns; however, its motive will be closely examined.

Just like AC Whitcher, some competitors intervene in order to further their own agenda, for instance in order to acquire what their rivals have to divest in order to obtain clearance for their merger. Sometimes

interventions are mere attempts by a competitor to protect its profits. For example a competitor may object to a merger if it expects the merger to lead to a decrease in sales prices, but not if it expects prices to rise after the merger, since that might be beneficial for the competitor itself.

The Tribunal is therefore aware that its role requires an equilibrium to be struck between giving a fair hearing to competitors and protecting the legitimate commercial interests of merging parties as well as consumers. An intervention may sometimes keep an otherwise pro-competitive merger at limbo for months thus delaying benefits flowing down to the consumer. The Tribunal wants to avoid cumbersome and chaotic hearings<sup>1</sup> and has found that it is unfair on merger parties to allow complainants to adopt a laissez-faire approach to their intervention<sup>2</sup>, hence the Tribunal will not hesitate in making cost orders in instances where intervention is in bad faith.

In the most recent illustration of this principle, Altech withdrew its intervention in the merger between MTN and Verizon the day before the hearing. As a result Altech was ordered to pay the costs incurred as a result of its intervention. The Tribunal expressed regret that the Act does not permit it to award punitive costs.

It is thus important for competitors to note that in as much as the Tribunal is still keen to give them a fair chance to be heard, they must act reasonably, in good faith and in the public interest.

*Chris Charter and Scarlate Nkiwane*

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1. Caxton and CTP Publishers v Naspers Limited 72/CAC/Aug07

2. Barnes Fencing Industries (Proprietary) Limited v Iscor Limited (Mittal SA) 08/CR/Jan07

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