DLA CLIFFE DEKKER HOFMEYR

25 APRIL 2012

COMPETITION ALERT

CONSTITUTIONAL COURT UPHOLDS COMPETITION TRIBUNAL DECISION

In the first of a series of expected decisions from the Constitutional Court (Court) relating to various competition law procedural matters, the Court has ruled that the Competition Tribunal's (Tribunal) decision that certain of Senwes' pricing practices amounted to an abuse of dominance should stand, despite the Supreme Court of Appeal having previously found that the Competition Commission's (Commission) failure to plead the specific theory of harm relied on by the Tribunal in its finding meant that the hearing had been unfair.

The Court's decision finds that the Tribunal has express inquisitorial powers and appears to afford the Tribunal considerable leeway in conducting its own hearings. According to the Court, this is in keeping with provisions of the Competition Act and the social justice imperatives that it contains.

While the majority of the Court sided with the Commission in finding that the Tribunal hearing had been fair, a minority judgment suggests that justice would have been best served by having the Tribunal expressly rule on the ambit of the referral so that both parties are afforded the opportunity to lead further evidence on the disputed aspects of the case.

While this decision dealt with the conduct of a Tribunal hearing, a number of pending decisions are still expected to deal with the conduct of the Commission when investigating and referring complaints to the Tribunal. It remains to be seen whether the Court is inclined to give the Commission as much leeway as the Tribunal. Certainly, it seems that to balance a more permissive approach to Tribunal hearings with stricter requirements of "due process" for investigations leading to a trial would be a reasonable outcome.

continued

IN THIS ISSUE

SPOTLIGHT STILL ON STEEL

The Commission has referred a collusion case against ArcelorMittal (Mittal) and its smaller competitor, Evraz Highveld Steel and Vanadium (Highveld), to the Tribunal for alleged price fixing and market allocation in respect of flat steel products.

The Commission's investigation was partly predicated on a complaint that Mittal and Highveld were increasing steel product prices by similar increments at around the same time, which the Commission concluded was evidence of an understanding that Highveld would follow Mittal's price changes, including the variation of discounts and transport tariffs. This may prove controversial, as it seems to elevate the phenomenon of "conscious parallel conduct" (whereby smaller players tend to follow price increases by larger "price leaders" in a transparent market) from merely being evidence of structurally uncompetitive market, to anti-competitive conduct. This must be of concern to any players in a transparent market who behave rationally in following pricing of competitors with pricing power.

LENIENCY APPLICATIONS OPEN TO DISCLOSURE

In a related matter, litigation around the Commission's 2009 referral against producers of long steel products continues its protracted course in light of the Competition Appeal Court (CAC) ruling this month regarding whether a copy of the leniency application on which the referral is partly based should be made available to the respondents. The Tribunal had previously denied access based on a finding that litigation privilege attached to the application. The CAC found that a leniency application did not attract privilege, but nevertheless did not grant access based on the fact that the leniency applicant had claimed its application as confidential. As a confidentiality claim can only be set aside by the Tribunal, the CAC referred the matter back to the Tribunal to determine whether the information submitted is indeed confidential and if so, to consider an order concerning how access to the information might be made (in this regard, a convention has developed whereby access is initially granted to legal advisors only).

The decision is key as it now means that leniency applications cannot remain completely shrouded while forming the basis of a complaint referral. It remains to be seen how the Tribunal will deal with the question of whether a leniency application can in principle be confidential, despite the fact that it contains evidence that will in due course be used in the prosecution of a case in public.

COMMISSION REIGNS IN THE HORSERACING INDUSTRY

In the latest in a spate of prohibitions, the Commission has blocked a proposed restructure of the horseracing industry on the basis that it would lead to a concentration of market power in the related markets of horseracing administration, betting and media rights.

The transaction involved the acquisition by Kenilworth Racing (Kenilworth) of Gold Circle in the Western Cape, followed by a takeover of Kenilworth by the Thoroughbred Horseracing Trust (Trust). What gave rise to competitive concerns was the fact that Phumelela, a front runner in the horseracing industry, manages Kenilworth and thus post-merger, also Gold Circle in the Western Cape. At the same time, the Trust is the largest shareholder in Phumelela.

This apparently incestuous outcome led the Commission to conclude that the interests of Phumelela, the Trust and Kenilworth would be aligned so that only Gold Circle KZN (left out of the merger) would be an independent competitor. Perhaps interesting to note, is that while Phumelela is already the strongest player, the Commission found a move from 60% to 70% market share would substantially lessen competition. This was based on the fact that the only remaining competitor (Gold Circle KZN) would not have the critical mass to defend itself against Phumelela's market power, thus upsetting any balance in the market.

Arguments as to pro-competitive efficiencies and Gold Circle's financial problems did not stand up to strategy documents indicating Phumelela's "keen interest in single-handedly controlling the entire horseracing industry in South Africa", leading the Commission to conclude that the transactions "are not intended to introduce more players in the horseracing industry as envisaged, but to further the interests of the leading firm in the industry...". As is often the case, aggressive-sounding internal documents can be volatile evidence when assessing mergers.

COMMISSION COLLECTS R200 MILLION IN FINES

The Commission has settled with Lafarge Industries South Africa (Lafarge) for its participation in the cement cartel involving price fixing and market division by the four main cement producers: Lafarge, Pretoria Portland Cement Company (PPC), AfriSam (South Africa) (AfriSam) and Natal Portland Cement Cimpor (NPC-Cimpor). The agreement follows the Commission's settlement with AfriSam, where AfriSam agreed to pay R125 million for its participation in the cartel.

In terms of Lafarge's settlement agreement, Lafarge has agreed to pay a penalty of R148,724,400, which is 6% of Lafarge's annual turnover for 2010 in South Africa, Botswana, Lesotho, Swaziland and Namibia.

In the interim, the Commission will continue to pursue its case against NPC-Cimpor and reports that it is likely to refer its case to the Tribunal for adjudication before the end of April. The matter dates back to 2008 when the Commission raided the premises of the four cement producers. The raid was followed by an application for corporate leniency by PPC.

An investigation initiated by the Commission on 16 January 2008, following Cathay Pacific's application for leniency for price fixing conduct in respect of flights between Johannesburg and Hong Kong, has resulted in the Commission concluding settlement agreements with South African Airways (SAA) and Singapore Airlines. In terms of the settlement agreements, SAA and Singapore Airlines have agreed to pay penalties of R18,799,292 and R25,106,692 respectively.

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Competition practice and services, please contact:

Nick Altini
Director
National Practice Head
T + 27 (0)11 562 1079
E nick.altini@dlacdh.com

Chris Charter
Director
T + 27 (0)11 562 1053
E chris.charter@dlacdh.com

Albert Aukema
Senior Associate
T + 27 (0)11 562 1205
E albert.aukema@dlacdh.com

Pia Harvey
Director
T + 27 (0)11 562 1207
E pia.harvey@dlacdh.com

Susan Meyer
Senior Associate
T + 27 (0)21 481 6469
E susan.meyer@dlacdh.com

Petra Krusche
Director
T + 27 (0)21 481 6350
E petra.krusche@dlacdh.com

Lerisha Naidu
Senior Associate
T + 27 (0)11 562 1206
E lerisha.naidu@dlacdh.com

Andries le Grange
Director
T + 27 (0)11 562 1092
E andries.legrange@dlacdh.com

Kayley de Oliveira
Associate
T + 27 (0)11 562 1217
E kayley.deoliveira@dlacdh.com

Natalie von Ey
Director
T + 27 (0)11 562 1333
E natalie.von_ey@dlacdh.com

Leana Engelbrecht
Associate
T + 27 (0)11 562 1239
E leana.engelbrecht@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T + 27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.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@dlacdh.com

www.cliffedekkerhofmeyr.com

EVERYTHING MATTERS