DLA CLIFFE DEKKER HOFMEYR

COMPETITION ALERT

1 July 2013

CONSENT ORDER BETWEEN SENWES LTD AND THE COMPETITION COMMISSION, APPROVED BY THE COMPETITION TRIBUNAL

A complaint referred to the Competition Tribunal in 2006, which dealt with allegations of anticompetitive business practices on the part of Senwes Ltd (Senwes) relating to grain storage tariffs, resulted in a drawn out legal process which passed through the Competition Appeal Court, the Supreme Court of Appeal and eventually, the Constitutional Court.

The Tribunal subsequently found that Senwes had placed the margins of competitors in the grain trading markets under pressure and, in the words of the Tribunal, had engaged in a so-called 'margin squeeze' in terms of s8(c) of the Competition Act, No 89 of 1998. However, a dispute arose regarding the Tribunal's ability to consider evidence relating to a possible margin squeeze, as the initial complaint referral to the Tribunal did not make use of this term.

After various appeals and contradictory judgments over numerous years, the Constitutional Court ruled in favour of the Competition Authorities and merely deleted the Tribunal's reference to 'margin squeeze', thus cementing the ruling that Senwes' conduct had contravened s8(c) of the Act. No fine was imposed on Senwes as a first-time contravention of s8(c) of the Act does not attract a penalty. However, the Competition Commission and Senwes subsequently chose to settle the remedies in terms of a settlement agreement. The Tribunal has now confirmed the consent order as agreed to by the parties.

The bulk of the provisions of the settlement agreement envisage a complete separation of the grain trading and grain storage businesses of Senwes. The settlement agreement specifically requires Senwes to transfer its grain trading business to a separate legal entity which is wholly owned by Senwes (Newco). To ensure complete separation despite Senwes' 100% interest in Newco, Newco is required to have independent directors on its board and no information, other than statutory reports required by the Companies Act, No 71 of 2008, may pass between the two businesses.

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Further provisions of the settlement agreement, amongst others, require Senwes to offer all parties who store grain with it equal access to storage options and on identical terms, save for any difference which is considered to be legitimate under the Competition Act.

The purpose of the separation provisions is pre-emptive, in that they attempt to ensure that the business decisions of the grain storage business of Senwes are not influenced by the grain trading business of Senwes. Consequently, there shouldn't be any incentive to engage in anticompetitive conduct.

HEIGHTENED COMPETITION LAW AWARENESS WHEN ISSUING TENDERS

The Competition Commission referred a complaint to the Competition Tribunal relating to collusive tendering for a tender issued by the National Treasury.

The tender was initially issued on behalf of the Department of Health for the supply and distribution of rapid HIV test kits to numerous government health departments.

Collusive tendering or 'bid rigging' is a per se prohibition under s4(b)(iii) of the Competition Act, which cannot be justified by the perpetrator on any grounds and may attract a penalty of up to 10% of the entity's turnover.

The respondents in this instance are Shekina Medical and Disposables CC (Shekinah) and Hosanna Medical and Disposables CC (Hosanna). According to the complaint referral, both bids were identical in format and signed on the same date, certain annexures to both tender applications had been printed from the same computer and the compact disks containing electronic versions of the applications had identical labels. During the course of the Commission's investigation, multiple meetings between Shekina and Hosanna, where the tender was discussed, were uncovered.

Interestingly, the complaint was originally brought to the Commission in 2011 by the National Treasury itself who, despite having had at least 70 bidders, noticed the similarities between Shekina and Hosanna's bids and consequently suspected potential collusive tendering on their part.

As the bulk of investigations into bid rigging allegations have, in the past, been prompted by leniency applications, the fact that the complaint came from the actual entity who issued the tender may potentially indicate a heightened awareness of competition law when dealing with tender bids. In this regard, it is possible that tender issuers may now be scrutinising tender bids with competition law in mind, in an effort to reduce the threat of collusive tendering and ensure that bids remain competitive.

CONSENT ORDERS CONCLUDED IN THE BICYCLE CARTEL MATTER

The Competition Commission has concluded consent orders with five respondents in the bicycle cartel matter.

From 2008, the Commission has been involved in an investigation into the cycling industry following the publication of a minuted industry meeting where cycling retailers and wholesalers present at the meeting, in the Commission's view, colluded. The Commission referred the matter to the Competition Tribunal for adjudication and subsequently withdrew its referral due to procedural irregularities. However, in 2012, the matter was once again referred to the Tribunal against those retailers and wholesalers who were present at the meeting.

The Commission considered the conduct of the parties at the meeting to be collusive based on discussions surrounding:

- increasing gross margins by increasing the mark-ups on cycling accessories from 50% to 75% and increasing the mark-ups for bicycles from 35% to 50%;
- the date of the implementation for such mark-up increases;
- ceasing the practice of discounting; and
- getting wholesalers to provide higher recommended retail prices to the retailers and then advertise these prices to the public.

Interestingly, in terms of the consent orders, although the five respondents admitted to contravening s4(1)(b) of the Competition Act, the respondents were not required to pay an administrative penalty. It is not clear why no administrative penalty was payable in settlement of the matter. This has sparked considerable interest as the Commission has only in three other cases where s4(1)(b) of the Act was allegedly transgressed, settled on the basis that despite an admission of guilt, no administrative penalty was payable.

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TELKOM SA SOC LIMITED AND COMPETITION COMMISSION SETTLEMENT AGREEMENT

The settlement agreement entered into between the Competition Commission and Telkom addresses various complaints lodged against Telkom from 2005 to 2007 by the Internet Service Providers Association and others.

The content of the complaints were that Telkom had abused its dominance and engaged in 'margin squeeze' conduct. Specifically, it was found that Telkom was guilty of charging excessive prices for certain bandwidth transmission lines and undersea cable lines and that Telkom set prices for certain wholesale services at levels which were not competitive with Telkom's own retail internet access services. It was also found that Telkom bundled certain internet access services to other unrelated access services in contravention of the Competition Act. This bundled package was priced far lower than similar services which end customers would purchase.

In the settlement agreement, Telkom has agreed that the pricing of its wholesale services resulted in a 'margin squeeze' and that the bundling of certain access services with unrelated access services resulted in anti-competitive conduct. Consequently, Telkom has agreed to pay a penalty of R200 million over a three year period.

Furthermore, Telkom is to introduce a separation between its retail and wholesale operations as well as a transfer pricing programme to regulate transactions in its provision of network services between its wholesale and retail divisions. Measures also include a code of conduct that would guard against discrimination against other internet service providers as well as keeping confidential service information in the wholesale division from the competing retail division. Telkom is also to reduce the price of wholesale services between 2014 and 2016.

It is clear form this finding, that a higher standard of conduct is expected of dominant firms who must be cautious in their business activities and not engage in conduct that permits these firms to abuse their dominant positions or engage in exclusionary conduct that falls foul of the Competition Act.

R1.46 BILLION SETTLEMENT IN CONSTRUCTION FAST-TRACK

On Monday 24 June, the Competition Commission announced its settlement with 15 firms in the construction industry for conduct amounting to collusive tendering, with the cumulative administrative penalties totalling R1.46 billion.

Following an initial complaint in February 2009, the Commission initiated an investigation into possible collusion in respect of the World Cup soccer stadia. In September 2009, following the Commission's receipt of various disclosures that revealed that collusive conduct was historically endemic in the industry and required further investigation, the Commission initiated an investigation into the construction industry as a whole. In February 2011, the Commission invited firms in the construction sector to participate in a fast-track settlement process, in terms of which firms could settle past contraventions of the Competition Act on financially advantageous settlement terms, in return for full disclosure and cooperation to persecute other offenders.

The Commission's investigation uncovered 140 prosecutable instances of collusive conduct. The administrative penalties forming the basis of settlement range from R155,850 to R311,288,311 depending on the number and extent of the contraventions. Not all implicated firms elected to settle the uncovered conduct and in this regard, the Commission has indicated that it intends to pursue individual prosecutions in respect of those firms.

A formal hearing before the Competition Tribunal will take place, on a date to be determined, at which the terms of settlement agreements will be need be confirmed as an order of the Tribunal.

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