
COMPETITION

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COMPETITION COMMISSION APPOINTS NEW EXECUTIVES

Cliffe Dekker Hofmeyr congratulates Mr Liberty Mncube, Mr Junior Khumalo and Mr Thomas Kgokolo on their appointments to the executive of the Competition Commission and wishes them a prosperous career in their new positions.

CONSTITUTIONAL COURT RULES ON COSTS AWARDED AGAINST THE COMPETITION COMMISSION

The Competition Act, No 89 of 1998 (Act) provides that each party to proceedings before the Competition Tribunal must bear its own costs and the Tribunal is only permitted to award costs in instances where private complainants refer the matter to the Tribunal and not against the Commission (as statutory body tasked with prosecuting conduct in contravention of the Act).

The Competition Appeal Court (CAC), in the intermediate merger between *Pioneer Hi-Bred International Inc and Pannar Seed Proprietary Limited*, awarded costs against the Commission for the proceedings in the CAC and the Tribunal, in favour of the merging parties. The Commission was granted leave to appeal the cost order in the Constitutional Court.

The CAC is legislatively permitted to award costs in respect of proceedings before it, but this appeal was concerned with the ability of the CAC to impose costs against the Commission in respect of the Tribunal proceedings.

The Constitutional Court noted that in the ordinary course the costs will follow the results, but is of the view that the Commission is not an ordinary litigant and in instances

of defendants playing institutional roles this rule does not ordinarily apply as such a party should not be inhibited in fulfilling its duties due to the threat of an adverse cost order. The Court did note that the CAC would not be prohibited from ordering costs against the Commission where it acts unreasonably, frivolously or vexatiously (depending on the facts of each case).

The Court held that it would be contrary to the provisions of the Act for the CAC to have the power to award costs against the Commission in respect of the Tribunal proceedings, where the Tribunal does not have the power to do so itself.

The Court, accordingly, set aside the CAC's order in respect of costs in respect of the proceedings before the Tribunal and, furthermore, set aside the CAC's cost

order in respect of the appeal proceedings before the CAC as the order was unsubstantiated and no particular circumstances existed that would warrant a cost order against the Commission.

In future, it can be anticipated that the courts will be reluctant to award costs against the Commission unless it can be shown that the Commission pursued the matter in a manner that objectively considered, would be unreasonable

PUBLICATION OF HEALTHCARE INQUIRY TERMS OF REFERENCE AND APPOINTMENT OF HEALTHCARE INQUIRY PANEL

Section 6 of the Competition Amendment Act, No 1 of 2009 (Amendment), which came into effect on 1 April 2013, formalised the powers of the Competition Commission (Commission) to conduct market inquiries. The Amendment Act empowers the Commission to conduct market inquiries in respect of "the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm". As its name suggests, a market inquiry is a broad investigation into the state of competition in a market, as opposed to a narrow investigation into the conduct of specific market participants.

Against this background, the first market inquiry under the Amendment Act has been formally announced by the Commission. The inquiry is one into the private healthcare sector, which comprises the portion of healthcare services that are funded by private patients themselves (either through medical aid schemes, insurance or 'out-of-pocket' payments). In embarking upon this inquiry, the Commission has indicated that it seeks to investigate the factors that have a distortive impact on competition in the market. In investigating the competitive dynamics that characterise the private healthcare market, the Commission will also consider a range of inter-related markets, including healthcare financing and healthcare goods (medical devices and pharmaceutical products).

The rationale for the initiation of the private healthcare market inquiry appears to be alleged prohibitive pricing and above-inflation increases in prices and expenditure. The inquiry seeks to investigate the factors that drive price formulation, seeking to not only identify competition concerns that impact on price, but also regulatory failures. The end goal is to furnish recommendations as to:

- ways in which pro-competitive outcomes in the market can be achieved; and
- policy and regulatory mechanisms that can be implemented to bolster the accessibility, affordability and quality of private healthcare services.

As required under the Amendment Act, the Commission has published its terms of reference for the intended market inquiry. The Commission intends to commence the inquiry on 6 January 2014 with the scheduled completion date being 30 November 2015. Details regarding the administrative phases of the inquiry and guidelines for participation will be published by the Commission in due course.

The healthcare inquiry will be led by a panel consisting of retired Chief Justice Sandile Ngcobo (Chairperson); Professor Sharon Fonn; Dr Ntuthuko Bhengu; Dr Lungiswa Nkonki and Mr Cornelis van Gent.

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10TH IBA COMPETITION MID-YEAR CONFERENCE

From 7 – 8 March 2014 the International Bar Association Antitrust Committee will host its mid-year conference in Cape Town.

The conference will focus on African antitrust law developments, including the new Common Market for Eastern and Southern Africa (COMESA) supranational antitrust regime for the 19 COMESA member states, and comparative international trends. The event will also include a regulators round table with representatives from various African and other authorities as well as panels dealing with merger control, cartels, dominance, enforcement and other issues. Speakers will include experienced international and African practitioners, economists, academics and regulators. Chris Charter, a Director in our Competition and Regulatory Department will be a participating speaker in a session on current issues arising out of the regulation of dominance and market power.

For more details on this Conference please visit www.ibanet.org or contact us directly.

THE INSTITUTE FOR INTERNATIONAL RESEARCH: COMPETITION LAW FORUM

On 12 and 13 March 2014 the Institute for International Research will be hosting a Competition Law Forum on the latest developments and the possible impact of competition law. The key focus of this forum includes:

Leana Engelbrecht, a Senior Associate in our Competition and Regulatory Department will be presenting a session on unintended collusion and information sharing.

- an update on the activities of the Common Market for Eastern and Southern Africa (COMESA) Competition Commission;
- a need to know on market enquiries; and
- an overview on cartelism, abuses of dominance and damages claims and class actions following a competition law breach.

For more information on the IIRSA Competition Law Forum, visit www.iir.co.za/competitionlaw or contact us directly.

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