MATTERS

2 DECEMBER 2015

COMPETITION

IN THIS **ISSUE**

CDH

CLIFFE DEKKER HOFMEYR

COMMISSION SETTLES WITH TWO RESPONDENTS IN SHIPPING CARTEL

The Competition Commission in 2012 initiated an investigation into several international shipping companies in respect of alleged collusion relating to the maritime shipment of motor vehicles, equipment and machinery to and from various countries, including South Africa.

The Commission is one of many competition authorities across the world investigating various firms alleged to have engaged in price fixing, market allocation and collusive tendering in this market.

The Commission developed a specific methodology to be applied for purposes of reaching settlement with the respondents in this matter. In terms of this methodology respondents are required to settle on an amount calculated with reference to the number of instances of collusion engaged in by it. The Commission accordingly imposes an administrative penalty for each instance of collusion separately (ie each of these instances of collusion could, in the view of the Commission, be prosecuted individually and carry an administrative penalty of up to 10% of turnover), although the cumulative administrative penalty does not exceed 10% of the respondents' annual turnover.

Through the application of this methodology the Commission settled with Wallenius Wilhelmsen Logistics AS for its involvement of 11 collusive instances on the basis of an admission of engagement in collusive conduct and the payment of a cumulative administrative penalty of R95,695,529. Nipon Yusen Kabushiki Kaisha Ltd settled with the Commission for its engagement in 14 instances of collusive conduct on the basis of an admission of engagement in the collusive conduct and the payment of a cumulative administrative penalty of R103,977,927.

Leana Engelbrecht

The Commission developed a specific methodology to be applied for purposes of reaching settlement with the respondents in this matter.

COMPETITION TRIBUNAL IMPOSES EMPLOYMENT CONDITIONS IN AGRI-MARKET

On 8 July 2015, the Competition Tribunal approved the acquisition by Louis Dreyfus Commodities Africa Proprietary Limited (LDCA) and VKB Agriculture Proprietary Limited (VKB) of the business of Best Milling Proprietary Limited, Ixia Trading 177 Proprietary Limited and Moliblox Proprietary Limited (Kromdraai Group) on condition that the merging parties shall not retrench any employees as a result of the merger, save for 61 affected employees.

Following the conclusion of and implementation of the proposed transaction, LDCA and VKB shall jointly control the Kromdraai Group.

The Competition Commission found that the proposed transaction is unlikely to substantially prevent or lessen competition in any market.

The Commission accepted that the merging parties applied a rational process in arriving at the number of 61 employees.

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COMPETITION TRIBUNAL IMPOSES EMPLOYMENT CONDITIONS IN AGRI-MARKET

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On the subject of employment, the merging parties submitted that approximately 80.51% of jobs will be unaffected as a result of the proposed transaction and the remaining 19.48% of jobs were at risk, translating into a loss of 61 jobs. The merging parties argued that if these affected employees were not retrenched, the Kromdraai Group will be forced to close down, in which case, all of the existing employees will lose their jobs. Therefore, the merging parties submitted that 61 semi-skilled and unskilled employees be retrenched post-merger. The Commission accepted that the merging parties applied a rational process in arriving at the number of 61 employees. However, the Commission argued that the affected employee complement comprised unskilled individuals with little or no formal education and in order to address the shortcoming, it recommended that the merger be conditionally approved.

The Tribunal agreed with the Commission's reasoning and approved the proposed transaction on condition that the merging parties shall not retrench any employees as a result of the merger, save for 61 affected employees. In addition, the Tribunal imposed an internal mechanism into the merger conditions whereby VKB is obliged to give a right of first preference to the affected employees should positions arise at VKB for a period of 12 months after the approval date of the merger.

Naasha Loopoo

The merging parties argued that if these affected employees were not retrenched, the Kromdraai Group will be forced to close down, in which case, all of the existing employees will lose their jobs.

COMMISSION PROHIBITS SMALL MERGER FOLLOWING A VOLUNTARY MERGER SUBMISSION

Following a voluntary merger submission to the Competition Commission by the merging parties, the Commission, on 28 July 2015, prohibited the merger in which Raumix Aggregates Proprietary Limited (Raumix) sought to acquire OMV Kimberley Proprietary Limited and OMV Kimberley Mining (Proprietary) Limited (OMV Group).

Raumix is a subsidiary of Raubex Group Limited (Raubex Group) which comprises a number of companies involved in road construction, the production and supply of value added bitumen products, the production and supply of aggregates from quarries, contract crushing of aggregates and other raw materials, the production and supply of asphalt materials handling and benefaction for the mining industry.

OMV produces aggregates used as road stone by road contractors and in asphalt production and high quality concrete applications. The products it supplies meet the specifications of the Committee of Land Transport Officials which the South African National Roads Agency needs.

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COMMISSION PROHIBITS SMALL MERGER FOLLOWING A VOLUNTARY MERGER SUBMISSION

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Given that the OMV Group is the only supplier of road stones required for surfacing national roads in Kimberley, the Commission found that Raumix would be incentivised to raise costs to its competitors who required products OMV Group supplies in the downstream market. This would result in a substantial lessening or prevention of competition.

This decision is exemplary of the importance of the voluntary small merger notification and investigation process.

The process enables the Commission to detect and investigate the potential anti-competitive effects of mergers that would not ordinarily be notified due to them not meeting the monetary thresholds required to compel the parties to notify the mergers.

Kitso Tlhabanelo

This decision is exemplary of the importance of the voluntary small merger notification and investigation process.

GUARDING AGAINST INFORMATION EXCHANGE IN SITUATIONS OF CROSS DIRECTORSHIPS

A recent Competition Tribunal decision provides some guidance on policies to be adopted in guarding against information exchange. This, in particular where pre-merger, firms related to an acquiring group have representation on the boards of firms that compete in the same or similar markets as a target firm.

The exchange of information between competitors or potential competitors may amount to, or facilitate, conduct which is outright prohibited by the Competition Act, No 89 of 1998, as amended (Competition Act) by constituting price fixing, market division, or collusive tendering. Information exchange could also lead to anti-competitive effects which effects may not outweigh any pro-competitive benefits of the arrangement concerned.

In particular, information exchange which makes a market more transparent can be problematic as this could result in increased co-ordination between competitors and may ultimately lead to a substantial prevention or lessening of competition.

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GUARDING AGAINST INFORMATION EXCHANGE IN SITUATIONS OF CROSS DIRECTORSHIPS

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In the merger involving RTT Group (Pty) Ltd (RTT), Courierit SA (Pty) Ltd and one other (Target Firms), the Competition Commission considered whether the merger would result in cross-directorships and potentially facilitate co-ordination between competing firms. This was based on the facts that:

(i) the Government Employees Pension Fund represented by the Public Investment Corporation SOC Limited (GEPF/PIC), an indirect shareholder of RTT, had board representation in various non-controlling portfolio companies (Portfolio Firms). These Portfolio Firms are involved in the broader logistics market; and

(ii) pursuant to the merger, the GEPF would be entitled to appoint directors to the boards of the Target Firms, which firms are involved in the market for the provision of courier services and warehousing services.

The Commission was therefore of the view that the Target Firms compete with the Portfolio Firms in the broader logistics market and this would give rise to a potential for information exchange. In light of the Commission's concerns, the merger was conditionally approved.

The parties did not raise any objections to the imposition of conditions and specifically agreed as follows:

- members appointed by the PIC to the board of the Target Firms cannot also serve on the board of Portfolio Firms;
- members who previously served on the board of Portfolio Firms cannot be appointed to the board of the Target Firms, until at least a year has lapsed following that board member having ceased to be a board member of the Portfolio Firms;
- the PIC will ensure that its investments in the Target Firms are housed in a division distinct from the division(s) in which its investments in the Portfolio Firms are held, with adequate security and confidentiality safeguards guarding against information exchange;
- to the extent that the PIC representatives on the board of the Target Firms have access to competition sensitive information of the Target Firms, the PIC representatives should ensure that such information is only reported on to the investment committee of the PIC in confidence and on an aggregated basis;
- the PIC board representatives should sign confidentiality undertakings confirming that the sensitive information will be protected and submit same to the Commission; and
- the PIC will notify the Commission of any change in the identity of the PIC representatives serving on the board of the Target Firms.

Nazeera Mia

Members appointed by the PIC to the board of the Target Firms cannot also serve on the board of Portfolio Firms.

The PIC board representatives should sign confidentiality undertakings confirming that the sensitive information will be protected and submit same to the Commission.

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COMMISSION CONDITIONALLY APPROVES LARGE MERGER BETWEEN BLACK-OWNED INVESTMENT FIRMS

The Competition Tribunal's conditional approval of the merger between Pembani Group Proprietary Limited (Pembani) and various firms controlled by Shanduka Group Proprietary Limited (Shanduka) has created one of the largest black-controlled investment groups in South Africa.

Pembani is jointly controlled by Old Mutual Life Assurance Company South Africa and Mr Phutuma Nthleko, MTN's former CEO. Its primary investment focus is oil, gas and resources. Shanduka's portfolio included investments in listed and unlisted firms in the following industries: resources, financial services, energy, telecommunications, beverages and food.

Notwithstanding the complexity and scope of the transaction, the only overlap identified by the Commission was in the coal industry, where Pembani, in addition to acquiring Shanduka's interests, already held a minority interest in one of Shanduka's competitors, BHP Billiton Energy Coal South Africa (BECSA). Given the low market shares of the parties, the competition authorities found that the small increase in market concentration did not raise competition concerns.

Of greater concern was the potential for the exchange of information between competitors resulting from Pembani's minority interest in BECSA, which gives it the right to appoint a director to BECSA's board, and its acquisition of Shanduka's coal firms.

To address this concern, the parties agreed that a person elected to sit on the board of BECSA would not at the same time, or during the year preceding his election, be:

- a director on the board of any of the Shanduka coal firms;
- an employee of Pembani working in a coal marketing position; or
- an employee of the Shanduka coal firms occupying a coal marketing position.

Moreover, the parties agreed that a former BECSA director elected by Pembani may not serve as a director of the Shanduka coal firms, or be employed in a coal marketing position, within a year after serving as a BECSA director.

George Miller

Pembani is jointly controlled by Old Mutual Life Assurance Company South Africa and Mr Phutuma Nthleko, MTN's former CEO.

Given the low market shares of the parties, the competition authorities found that the small increase in market concentration did not raise competition concerns.

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TRIBUNAL 'RELAXES' ADMINISTRATIVE PENALTY ON THE BACK OF MARKET DIVISION

In the complaint proceedings between the Competition Commission and Sam Louw N.O, Anita Louw N.O and Welkom Key Centre CC (collectively, the Respondents) the Competition Tribunal found on 18 December 2014 that the Respondents contravened s4(1)(b)(ii) of the Competition Act of 1998 by entering into an agreement to divide the market for the supply and distribution of security cylinders, matching keys, padlocks, electronic and multipoint locks in the Free State and Northern Cape provinces.
On 23 July 2015, the Tribunal imposed a unique set of remedies on the Respondents, which is likely to set an interesting precedent in future.

The Tribunal acknowledged its six-step test for the assessment and calculation of administrative penalties as formulated in Competition Commission and Aveng Africa Limited t/a Steeledale and Others, as follows:

- Step 1: Determination of the affected turnover in the relevant year of assessment;
- Step 2: Calculation of the base amount, being the proportion of the relevant turnover ranged between 0 to 30%;
- Step 3: The base amount is multiplied by the duration of the contravention;
- Step 4: The amount in Step 3 is rounded off, if it exceeds the statutory cap of 10% of total turnover;
- Step 5: Consideration of mitigating and aggravating factors; and
- Step 6: The amount in Step 5 is rounded off, if it exceeds the statutory cap.

The Commission submitted that a 10% administrative penalty be imposed on the Respondents as market division is a per se prohibition, deemed to be unlawful. On the other hand, Welkom Centre argued that the base amount be set at 5% and submits that a 90% discount be applied to the administrative penalty and relied on the following mitigating factors:

(i) the market division was an attempt by Louw's Key Centre to assist a new entrant (Welkom Centre) in the market, both of which did not know that the conduct was unlawful;

(ii) over time, the significance of the agreement diminished as Welkom Centre serviced customers that was allocated to Louw's Key Centre;

(iii) the market is characterised by trust as it pertains to security of person and property;

(iv) Welkom Centre did not derive any profit from the agreement;

(v) Welkom Centre co-operated with the Commission in that it was frank and honest; and

(vi) Welkom Centre was not found to have previously contravened the Competition Act.

On 23 July 2015, the Tribunal imposed a unique set of remedies on the Respondents, which is likely to set an interesting precedent in future.

The Commission submitted that a 10% administrative penalty be imposed on the Respondents as market division is a per se prohibition, deemed to be unlawful.

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TRIBUNAL 'RELAXES' ADMINISTRATIVE PENALTY ON THE BACK OF MARKET DIVISION

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Moreover, the Respondents also proffered alternative remedies which required that their respective customers be informed of the unlawful conduct that the Respondents engaged in as well as weekly advertisements in a newspaper that circulates in both territories.

The Tribunal held that the maximum administrative penalty contended for by the Commission is not warranted in this case and held that a remedy that seeks to deter the Respondents from the censured conduct coupled with the alternative remedies is more apposite. The alternative remedies are more likely to redress any harm that may have been caused by the market division, than an administrative penalty alone. In order to address the wrongs of the Respondents, the Tribunal imposed a two-fold remedy comprising an administrative penalty and conditions aimed at correcting the effects of the market division.

In the case of Welkom Centre, the administrative penalty was set at R41,127.40 and in the case of Louw's Centre, the administrative penalty was set at R123,868.75. The Tribunal applied a rather novel approach to the imposition of administrative penalties by structuring the order in such a way that if the Respondents complied with its respective obligations flowing from the alternative remedies, 50% of their administrative penalties will be obliterated and reduced accordingly. However, if they fail to comply, the full administrative penalty becomes due and payable.

Naasha Loopoo

The alternative remedies are more likely to redress any harm that may have been caused by the market division, than an administrative penalty alone.

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