COMPETITION

IN THIS ISSUE

COMPETITION COMMISSION INITIATES MARKET INQUIRY INTO THE RETAIL GROCERY SECTOR

On 12 May 2015, Economic Development Minister Ebrahim Patel announced that the Competition Commission will conduct a market inquiry into the retail grocery sector in terms of s43B of the Competition Act, No 89 of 1998 (Act).

The market inquiry shall involve all shops that predominantly sell fast moving consumer goods. It encompasses all types of retail offerings from small informal businesses and independent grocery stores to supermarket and wholesale groups. The Commission has indicated that it believes that this market has features that may prevent, distort or restrict competition.

On 12 June 2015, the Commission published its draft terms of reference in the Government Gazette for public comment. The scope of the market inquiry will, at this stage, include the following six issues:

- the impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers in townships, peri-urban and rural areas and the informal economy;
- the impact of long term exclusive leases entered into between financiers, property developers and national supermarket chains on competition in the grocery retail sector;
- the dynamics of competition between local and foreign owned small and independent retailers in townships, peri-urban areas, rural areas and the informal economy;
- the impact of regulations, including, among other things, municipal town planning and by-laws on small and independent retailers in townships, peri-urban areas, rural areas and the informal economy;
- the impact of buyer groups on small and independent retailers in townships, peri-urban areas, rural areas and the informal economy; and
- the impact of certain identified value chains on the operations of small and independent retailers in townships, peri-urban areas, rural areas and the informal economy.

In addition to these six broad issues, the Commission indicated that it may consider the competitive dynamics in the grocery retail sector, including pricing practices, extent of consumer choice and innovation, the impact of franchise retailers, and the causes and impact of the decline in small and independent retailers in townships, peri-urban areas, rural areas and the informal economy.

All public comments on the draft terms of reference must be submitted to the Commission by 6 July 2015.

Naasha Loopoo

COMPETITION APPEAL COURT RULES ON SASOL EXCESSIVE PRICING CASE

In May 2014, the Competition Tribunal imposed a staggering R500 million administrative penalty on Sasol Chemical Industries Limited (SCI), as a dominant firm in the supply of purified propylene and polypropylene, for charging excessive prices in contravention of s8(a) of the Competition Act, No 89 of 1998 (Act). The Tribunal further imposed behavioural remedies requiring SCI to submit a proposed pricing remedy based on a price formulation linked to prices charged in regions in the world with the lowest prices for purified polypropylene.

SCI appealed the decision of the Tribunal to the Competition Appeal Court (CAC). The CAC released its judgment in this matter on 17 June 2015 and overturned the decision of the Tribunal.

In terms of s8(a) excessive pricing by a dominant firm is prohibited. Excessive pricing is defined as charging a price for a good or service which bears no reasonable relation to the economic value of that good or service and is higher than that economic value.

In determining whether excessive pricing in contravention of s8(a) of the Act has, in fact, taken place the actual price of the goods must be weighed up against the economic value of the goods and the difference between the two must be analysed, on a value judgment, to determine whether, firstly, the excessive price is unreasonable and, secondly, whether the charging of the excessive price is to the detriment of consumers.

The CAC considered what the appropriate interpretation of s8(a) is in respect of determining the economic value of the goods in question. The primary question was whether a cost advantage must be taken into account in determining the economic value of the goods and the CAC stated that "if the cost of an essential component of product/s, whose prices are under scrutiny, can be justified on rational grounds, that should be the yardstick employed in the primary inquiry with which the Court is engaged. The complexity of price assessment dictates that some deference is required". The CAC concluded that the economic value must be determined with reference to the price at which SCI's supplier of propylene feedstock (Synfuels – a company in the Sasol group) supplied propylene feedstock to SCI and that there is no need to adopt a hypothetical price as conceded by SCI.

The CAC further considered whether the price charged was unreasonable so as to render it excessive. The CAC concluded that the price charged by SCI was between 12% and 14% higher than the economic value of the product and determined that this higher price was not unreasonable so as to render the price excessive and in contravention of s8(a) of the Act. It was, accordingly, not necessary for the CAC to consider whether the price led to consumer harm and SCI's appeal was upheld.

Leana Engelbrecht

COMPETITION COMMISSION APPROVES STEEL MERGER WITH CONDITIONS

On 11 June 2015, the Competition Commission conditionally approved an intermediate merger between Hebei Iron and Steel Group Co. Limited (Hebei) and Duferno International Trading Holding SA (Duferno). To address and allay its concerns on public interest considerations, the Commission imposed employment conditions and investment conditions.

Hebei manufactures iron and steel through its subsidiaries. Duferno trades and distributes steel globally. In South Africa, Duferno's activities are undertaken by Duferno Steel Processing Proprietary Limited (DSP) and Duferno Distribution Services Proprietary Limited (DDS). Following the implementation of the proposed transaction, Hebei will acquire a majority stake in Duferno.

The Commission found that the merger is likely to raise public interest concerns in the steel sector. These concerns stem from Hebei's intention to sell its product beyond China which could increase the tendency for DSP and DDS to import the product. The Commission found that it would be easier for Hebei to import the finished product directly from China, given that it has the ability and capacity to manufacture the products that both DSP and DDS currently manufacture and distribute respectively in South Africa.

From an employment perspective, the Commission imposed an indefinite condition on merger-related retrenchments for DPS and DDS employees. Furthermore, the merged entity is prohibited from changing the terms and conditions of employment for these employees as a result of the merger.

From an investment perspective, the Commission imposed an indefinite condition on the merging parties to ensure that the businesses of DPS and DDS continue to operate post-merger. Moreover, Hebei may not change its plans

continued

of developing a steel plant in South Africa and Hebei must invest in DSP's steel processing plant in Saldanha in order for the plant to continue operating efficiently. Furthermore, Hebei undertook to continue sourcing from local suppliers of DSP and DDS provided it is economically feasible to do so.

Deputy Commissioner Hardin Ratshisusu noted that these conditions address the public interest concerns arising from the merger and will ensure that DSP remains a viable entity that contributes to the development of the domestic steel market. This decision comes after Economic Development Minister Ebrahim Patel's announcement on 12 May 2015 to establish an independent panel of steel industry experts to provide advice towards a more competitive steel price for downstream users and stimulate local demand for steel.

Naasha Loopoo

SACTWU CHALLENGES CONDITIONAL APPROVAL OF INTERMEDIATE MERGER

The Competition Commission's decision to conditionally approve the intermediate merger between Newcomer One (Newco One), Bagshaw Footwear Proprietary Limited (Bagshaw) and the four divisions of Kap Manufacturing Proprietary Limited (Kap), being United Fram, Wayne Plastics, Mossop Western Leathers and Jordan Shoes, was challenged by the Southern African Clothing and Textile Workers Union (SACTWU) in an application for consideration filed on 11 December 2014.

The merger entailed Newco and Bagshaw acquiring the divisions of Kap and was approved on condition that the merging parties not retrench any employees for a period of one year from the date of implementation of the transaction.

According to SACTWU, the merger conditions imposed by the Commission contradicted an agreement preceding the merger in terms of which the merging parties undertook to refrain from retrenching employees at a number of firms for a period of three years (Prior Agreement).

The Tribunal was thus faced with weighing the enforceability of the Prior Agreement against merger conditions imposed by the Commission.

While an administrative penalty could be levied against the merging parties for failure to fulfil a merger condition, no measure within the ambit of competition law could be taken against the merging parties for reneging on their undertaking in terms of the Prior Agreement.

In its decision, the Tribunal took into account the fact that the merging parties had not opposed the application before it and had undertaken to honour the Prior Agreement notwithstanding the less onerous merger condition imposed.

On 28 May 2025, the Tribunal ordered a moratorium on retrenchments for a period of three years from the implementation of the merger.

Although the Tribunal stated that agreements between merging parties and trade unions would be evaluated on a case by case basis, this case is demonstrative of the fact that such agreements or prior engagements between trade unions and merging parties play a meaningful role in public interest considerations of a merger and should not be automatically dismissed as bearing less importance than a merger condition.

Kitso Tlhabanelo

COMPETITION COMMISSION REFERS PIPING CARTEL TO THE COMPETITION TRIBUNAL

On 25 May 2015, the Competition Commission referred a case of collusion against various pipe manufacturers to the Competition Tribunal for adjudication in terms of s50(1) of the Competition Act, No 89 of 1998 (Act).

The Commission alleges that in April 2007, Dawn Consolidated Holdings Proprietary Limited (Dawn) and Sangio Pipes Proprietary Limited (Sangio) concluded a shareholders agreement, in terms of which, Dawn and its subsidiaries, DPI Plastics Proprietary Limited and Ubuntu Plastics Proprietary Limited undertook not to manufacture any form of high density polyethylene (HDPE) piping, other than corrugated HDPE piping throughout South Africa. Moreover, Dawn and its subsidiaries were further obliged to purchase all of their HDPE piping requirements directly from Sangio. The shareholders agreement allegedly had the effect of dividing the market by allocating specific types of goods to Dawn (corrugated HDPE piping) and Sangio (regular HDPE piping), allegedly in contravention of s4(1)(b)(ii) of the Act.

Agreements of this nature are outright prohibited without the possibility of justifying them on pro-competitive, technological or efficiency grounds and attract an administrative penalty not exceeding 10% of the firm's annual turnover in South Africa.

Naasha Loopoo

COMMISSION REFERS CASE AGAINST FURNITURE REMOVAL COMPANIES

The Competition Commission has referred a case of price fixing, market division and collusive tendering against several furniture removal companies.

The Commission initiated its investigation against 69 furniture removal companies in 2010 and concluded that the firms engaged in extensive collusive conduct, with some firms being accused of being complicit in as many as 3487 instances of collusion.

The Commission is seeking an administrative penalty equal to 10% of the firms' turnover for each instance of collusive tendering.

The Commission has settled the matter with 15 respondents. The settlement agreements were concluded based on a formulaic approach developed by the Commission in terms of which a respondent firm would pay an administrative penalty of a percentage of turnover determined based on the number of instances of collusion the relevant firm was allegedly involved in.

For purposes of settlement in this matter, the Commission was willing to settle on an administrative penalty of 4% of turnover where the relevant firm engaged in 1 - 10 instances of collusion, 5% for 11 - 25 instances, 6% for 26 - 50 instances, 7% for 51 - 100 instances, 8% for 101 - 300 instances, 9% for 301 - 500 instances and the maximum 10% of the relevant firm's turnover where it engaged in upwards of 501 instances of collusion.

Leana Engelbrecht

COMMISSION REFERS CASE AGAINST AUTO BODY REPAIRERS

The Competition Commission has referred a case of price fixing, market division and collusive tendering against Eldan Auto Body CC (Eldan) and Precision & Sons Proprietary Limited (Precision). Eldan and Precision are both certified auto body repairers for Mercedes Benz and also do auto body repair to other makes of vehicles.

The referral follows an investigation by the Commission, which included a dawn raid at the offices of these firms (and one other) in July 2014. The Commission concluded that Eldan and Precision colluded from at least 2011 in respect of the provision of auto body repair services.

Leana Engelbrecht

CONTACT US

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

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

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

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

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

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

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

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

Nazeera Mia
Senior Associate
T +27 (0)21 481 6337
E nazeera.ramroop@dlacdh.com

Naasha Loopoo
Associate
T +27 (0)11 562 1010
E naasha.loopoo@dlacdh.com

Kitso Tlhabanelo
Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@dlacdh.com

BBBEE STATUS: LEVEL TWO 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

cliffedekkerhofmeyr.com
Cliffe Dekker Hofmeyr is a member of DLA Piper Group, an alliance of legal practices.

DLA CLIFFE DEKKER HOFMEYR