



## COMPETITION

### IN THIS ISSUE

CONDITIONAL APPROVAL  
OF TELKOM AND BUSINESS  
CONNECTION MERGER, FOLLOWING  
DIMENSION DATA INTERVENTION

COMPETITION COMMISSION  
REVISES MERGERS & ACQUISITIONS  
DIVISION SERVICE STANDARDS

COMMISSION EMBARKS ON DAWN  
RAIDS IN SEPTEMBER AND OCTOBER

TRIBUNAL RULES ON  
INTERLOCUTORY APPLICATION  
IN PIONEER FISHING CASE

UPDATE ON HEALTHCARE INQUIRY

CO-OPERATION AGREEMENT  
ENTERED INTO BETWEEN THE  
COMPETITION COMMISSION  
AND THE INTERNATIONAL TRADE  
ADMINISTRATION COMMISSION

NAMIBIAN AND SOUTH AFRICAN  
COMPETITION AUTHORITIES  
FORMALISE TERMS OF  
COOPERATION

# CONDITIONAL APPROVAL OF TELKOM AND BUSINESS CONNECTION MERGER, FOLLOWING DIMENSION DATA INTERVENTION

*On 4 August 2015, the Competition Tribunal approved the large merger between Telkom SA SOC Limited (Telkom) and Business Connection Group Limited (BCX) on a number of conditions.*

The merger entails Telkom, a telecommunications service provider, acquiring BCX, an information and communications technology (ICT) service provider with six operating divisions which operates six business divisions offering services ranging from cloud infrastructure, communications, security and network services, workspace services, professional services, application services and service integration and management.

The Commission found that the transaction would give rise to vertical anti-competitive effects in that Telkom, with its extensive fibre network it uses to provide wholesale fixed lease lines, had market power in the upstream market for the supply of wholesale fixed-leased lines. The merger would enable Telkom to engage in an input foreclosure strategy. Furthermore, Telkom would be the only service provider capable of offering wholesale connectivity and a full suite of downstream services (including the supply of managed network services (MNS), value-added network service (VANS), hosting, Information Technology Services (ITS) and the retail supply of mobile services) without having to

procure additional components from a third party, therefore allowing it to potentially exclude competitors which do not have the benefit of being vertically integrated.

To ameliorate the competition concerns raised by the Commission, with which Dimension Data Proprietary Limited, an intervening party in the matter concurred, certain merger conditions were imposed.

These include the implementation of a pricing programme to ensure non-discriminatory pricing of its network and bundled services and a behavioural remedy to ensure that the quality of fixed network products are provided by Telkom's wholesale division to other licenced operators, electronic communications network service and electronic communications service licensees is equivalent to those provided to Telkom's retail division.

Merger specific job losses were also considered and limited to 20 employees per year for 3 years in respect of the identified employees affected by the merger in terms of a merger condition.

*Kitso Tlhabanelo*

*The Commission found that the transaction would give rise to vertical anti-competitive effects in that Telkom, with its extensive fibre network it uses to provide wholesale fixed lease lines, had market power in the upstream market for the supply of wholesale fixed-leased lines.*

# COMPETITION COMMISSION REVISES MERGERS & ACQUISITIONS DIVISION SERVICE STANDARDS

*Since they were first issued in March 2002 and revised in 2010, legal practitioners have relied on the service standards issued by the Competition Commission to serve as a guidance to its clients as to the anticipated turnaround time to receive a merger decision.*

The Commission has again revised its service standards, with effect from 1 April 2015, such that large mergers are now anticipated to require at least 120 business days to investigate where the merger is a phase 3 (complex) merger.

Previously, the Commission's service standards indicated that all phase 3 (complex) mergers – intermediate or large – would be investigated and finalised within 60 business days.

Having considered its actual average turnaround times for complex large mergers in particular, the Commission saw fit to revise its service standards to align them with realistic expectations of parties to mergers of this nature.

Phase 3 intermediate mergers are still expected to take 60 business days to complete and the remaining service standards have also remained the same. Particularly, 20 business days should be allowed for the Commission to complete a phase 1 (non-complex) merger investigation and 45 business days for a phase 2 (complex) investigation.

These service standards have been formulated assuming the full co-operation of the merging parties with the Commission during the merger investigation.

*Kitso Tlhabanelo*

*The Commission saw fit to revise its service standards to align them with realistic expectations of parties to mergers of this nature.*

# COMMISSION EMBARKS ON DAWN RAIDS IN SEPTEMBER AND OCTOBER

*The Competition Commission (Commission) has been embarking on dawn raids with increasing frequency. September saw two dawn raids being conducted in the space of one week, one involving recruitment agencies and the other furniture removal companies. Only two weeks later the Commission raided the offices of various liquefied petroleum gas suppliers (in respect of an investigation into deposits charged for gas cylinders – an investigation unrelated to the current inquiry being conducted by the Commission into this market).*

Dawn raids entail the Commission searching for and seizing, documents and information which will advance its investigation into whether the firm being raided has contravened the Competition Act, 1998 (the Act). Of course, this occurs whilst being observant of the firms' rights and within the bounds of s48 of the Act.

The Commission's dawn raid at the Bloemfontein and Port Elizabeth premises of Stuttafords Van Lines Proprietary Limited (Stuttafords), Pickfords Removals SA Proprietary Limited (Pickford), the Bloemfontein premises Afriworld 142 Proprietary Limited (Afriworld) and Cape Express Removals Proprietary Limited (Cape Express Removals) in Cape Town relates to on-going investigation, dating back to 2010, into the market for the provision of furniture removal services.

Interestingly, the above named furniture removal companies have been investigated before by the Commission. Despite previously settling with the Commission, this dawn raid is the second for Cape Express since the launch of the Commission's investigation into this market.

As far as Pickford and Afriworld is concerned, this dawn raid comes at a time when the referral of its collusion charge arising from the Commission's initial investigation has yet to be heard by the Tribunal. The Commission has concluded its initial investigation into Stuttafords and the matter is also set to appear before the Tribunal once the Commission refers the matter.

The furniture removal companies' alleged continued involvement in transgressing conduct is surprising, especially since these companies are by now fully au fait with the consequences of contravening the Act. The Commission is likely to request strict penalties be imposed on these repeat offenders and this is a specific consideration in terms of the Act when determining administrative penalties.

*Kitso Thlabanelo*

*As far as Pickford and Afriworld is concerned, this dawn raid comes at a time when the referral of its collusion charge arising from the Commission's initial investigation has yet to be heard by the Tribunal.*

The Commission is likely to request strict penalties be imposed on these repeat offenders and this is a specific consideration in terms of the Act when determining administrative penalties.

# TRIBUNAL RULES ON INTERLOCUTORY APPLICATION IN PIONEER FISHING CASE

*On 31 August 2015, the Competition Tribunal heard an interlocutory application by Pioneer Fishing Proprietary Limited (Pioneer Fishing) seeking two orders. The orders sought are first, that the Competition Commission must provide proper responses in respect of Pioneer Fishing’s request for further particulars (Application for Further Particulars), and secondly, an application to strike out from the Commission’s response any reliance on any agreement to allocate territories or markets in contravention of s4(1)(b)(ii) of the Competition Act (Application to Strike Out). The Application for Further Particulars was partially granted and dismissed by the Tribunal, while the Application to Strike Out was dismissed by the Tribunal in its entirety.*

By way of background, the Commission initiated a complaint against Pioneer Fishing in March 2011. After investigating the complaint, the matter was referred to the Tribunal for adjudication in March 2014. In order to respond to the Commission’s Referral, Pioneer Fishing requested further particulars from the Commission in August 2014. The Commission duly responded in November 2014.

## Application for Further Particulars

- Pioneer Fishing argues that the Commission’s Referral and its responses for Further Particulars are vague, evasive and contradictory that it prejudices Pioneer Fishing in its ability to know the case that it must meet. Pioneer Fishing raised two main concerns in this regard: first, the relationship between the market and the conduct and secondly the nature of the oral agreement.
- In the first instance, Pioneer Fishing argued that there is confusion about the multitude of likely markets referred to by the Commission in its Referral. The Tribunal found Pioneer Fishing’s arguments to be unconvincing and took the view that the only conduct referred to by the Commission is that of market division of one product being that of horse mackerel. Moreover, all

Pioneer Fishing needs to know in order to plead to the Commission’s allegations is a clear description of how the market for the supply of horse mackerel is geographically divided in South Africa. The Commission provided a clear and adequate description of the market likely to be affected by the conduct. Therefore, there was no need for a request for further particulars from the Commission.

- In the second instance, the Commission in its Referral alleges that an oral agreement was concluded at a meeting between certain identified individuals. However, Pioneer Fishing raises that the Referral does not state when and where this meeting allegedly took place. Furthermore, Pioneer Fishing enquired whether the terms of the oral agreement constituted express, tacit or implied terms.
- The Tribunal held that the Commission provided Pioneer Fishing with adequate information to be able to investigate this information for its own account. However, the Commission was ordered to provide further particulars as to whether the oral agreement was reached at a single meeting or whether the agreement was reached as a result of a process and secondly should the Commission become aware of the place where the oral agreement was concluded, it was ordered to

*The Application for Further Particulars was partially granted and dismissed by the Tribunal, while the Application to Strike Out was dismissed by the Tribunal in its entirety.*

The Commission initiated a complaint against Pioneer Fishing in March 2011. After investigating the complaint, the matter was referred to the Tribunal for adjudication in March 2014.

# TRIBUNAL RULES ON INTERLOCUTORY APPLICATION IN PIONEER FISHING CASE

*continued >*

provide this information to Pioneer Fishing. On the issue of terms of the oral agreement, the Tribunal relying on previous case law held that it is unnecessary for the Commission to provide the precise details of an alleged agreement as the Commission is not trying to enforce the oral agreement, but contends that the parties engaged in prohibited conduct, in contravention of the Competition Act.

## Application to Strike Out

- Pioneer Fishing argues that the Commission in its response for further particulars alleged that it was charging Pioneer Fishing with two sets of agreements, namely an oral agreement as well as a written restraint contained in a sale agreement. The oral agreement was expressly referred to in the Commission's Initiation Statement, whereas the written restraint was a new complaint that was not previously contemplated in the Initiation Statement and Referral to the Tribunal. To this end, Pioneer Fishing argued that the Commission is not entitled to rely on the restraint in the sale agreement because it was not initially included as part of the Initiation Statement. Moreover, the Commission's reliance on the restraint in the written agreement has prescribed in terms of s67(1) of the Competition Act, even if it was tacitly initiated by the Commission at the time of responding to Pioneer Fishing's request for further particulars.

- The Tribunal considered whether or not a fair reading of the Commission's Initiation Statement and Referral lead to the conclusion that the written restraint is being relied on as a prohibited conduct in these documents.
- Based on previous cases, the Tribunal held that the Initiation Statement is at the very start of the Commission's investigation, at which stage it does not have all the particularities of the conduct in question. During the course of the Commission's investigation, further information will come to light and this is revealed in the Referral. The Tribunal urged that one must not confuse the Initiation Statement with the Referral. Moreover, the Tribunal noted that Pioneer Fishing is not entitled to respond to the Initiation Statement, but will in time be called on to answer the charge in the Referral after the Commission's investigation comes to a close.
- After a detailed consideration of the wording in the Initiation Statement and Referral, the Tribunal concluded that from a fair reading of the two documents, an inference can be drawn that the complaint was initiated and referred, not only in respect of the alleged oral agreement relating to the market division of specified territories within South Africa, but also in respect of the restraint relating to the 20% of the quota purchased from the respondent, Blue Continent Products Proprietary Limited. Therefore, the restraint is not a new complaint about a different prohibited practice not raised in the complaint. The Application to Strike Out was therefore dismissed.

Naasha Loopoo

*Pioneer Fishing raised two main concerns in this regard: first, the relationship between the market and the conduct and secondly the nature of the oral agreement.*

The Tribunal noted that Pioneer Fishing is not entitled to respond to the Initiation Statement, but will in time be called on to answer the charge in the Referral after the Commission's investigation comes to a close.

# UPDATE ON HEALTHCARE INQUIRY

The Commission has extended its time period for the completion of the Market Inquiry in the Private Healthcare Sector (Inquiry). The Inquiry is now earmarked for completion by 15 December 2015. The Inquiry Panel earlier this year stressed that it is constrained in terms of timing and intimated that it may extend its initial November 2015 deadline for the completion of the Inquiry.

The extension of the deadline resulted in changes to the planned timeline for certain milestones in the Inquiry process:

- public hearings are now scheduled to take place from February to May 2016;
- the Inquiry will publish its provisional report by August 2016 followed by further stakeholder engagement; and
- the final report will be published by 15 December 2016.

The Inquiry Panel has also re-opened registration to make oral submissions at the public hearings of the Inquiry following its initial invitation to do so in February 2015. Public hearings will now take place during six sets of public hearings each focused on a specific topic. Interested parties wishing to participate in the hearings are invited to register by 11 December 2015.

.....  
*Leana Engelbrecht*

*Interested parties wishing to participate in the hearings are invited to register by 11 December 2015.*

# CO-OPERATION AGREEMENT ENTERED INTO BETWEEN THE COMPETITION COMMISSION AND THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION

The Competition Commission recently entered into a Memorandum of Agreement (MOA) with the International Trade Administration Commission (ITAC) on the basis that these authorities share areas of common interest and function, necessitating co-operation between the two.

Although the Commission and ITAC are both focused on optimising the market place and achieving an effective economy, there can be fundamental disparities in the policies adopted by each authority, in pursuance of its shared objective.

For example, the Competition Act, No 89 of 1998 (Competition Act) is aimed at guarding against conduct that limits competition and harms consumers. The Commission's philosophy is that the presence of sufficient competitors in a market, increases competitiveness and drives down prices, which benefit

The Competition Act, No 89 of 1998 is aimed at guarding against conduct that limits competition and harms consumers.

# CO-OPERATION AGREEMENT ENTERED INTO BETWEEN THE COMPETITION COMMISSION AND THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION

*continued >*

consumers. In contrast, trade policies adopted by ITAC are often aimed at creating import tariff market barriers to protect domestically produced products, at the expense of foreign imports.

A practical dilemma of these differing policies was experienced in the poultry industry. In 2013, the South African Poultry Association (SAPA) acting on behalf of its members, local chicken producers, lodged an application with ITAC, to increase import tariffs on frozen chicken imported into South Africa. SAPA motivated amongst others, that local business was threatened by increases in imports and local chicken producers were not profitable. The Association of Meat Importers and Exporters (AMIE) opposed this application. AMIE also lodged a complaint with the Commission, arguing amongst others, that the increase in import tariffs will restrict import competition and thereby allow SAPA members to increase the price of their poultry products to the detriment of consumers.

The International Trade Administration Act, No 71 of 2002 allows a person to apply for an increase in import tariffs, whilst the Competition Act considers import tariffs as a factor that stifles competition. The above situation is therefore a common example of how tariffs can distort a market, where players in the market are abiding by legislation.

In the terms of the MOA, the Commission and ITAC have specifically agreed:

- to co-sponsor joint workshops on competition and international trade matters as and when necessary and to also conduct joint sector research or impact study assessments on topics of mutual interest;
- to refer complaints/applications to one another, advise and receive advice, and make representations to each other where necessary; and
- in analysing merger transactions and where the Commission is of the view that the merger presents international trade regulatory issues subject to the jurisdiction of ITAC, the Commission may consult with ITAC to obtain their input.

Although it remains to be seen how the Commission and ITAC will give effect to this arrangement, the idea behind the MOA is to be welcomed in that it ensures co-operation between the two authorities, at the very outset, on matters impacting competition law on the one hand, and international trade on the other.

.....  
*Nazeera Mia*

# NAMIBIAN AND SOUTH AFRICAN COMPETITION AUTHORITIES FORMALISE TERMS OF COOPERATION

*The Competition Commission of South Africa and the Namibian Competition Commission have concluded a memorandum of understanding to regulate the way in which these two regulators engage with each other in respect of matters that effect both jurisdictions in respect of the enforcement of competition law and policy.*

This memorandum of understanding will see increase engagement between the regulators, especially in respect of multi-jurisdictional matters and is most likely to be most relevant to multi-jurisdictional mergers.

.....  
*Leana Engelbrecht*



**OUR TEAM**

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@cdhlegal.com



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



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



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



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



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



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



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



**George Miller**  
Associate  
T +27 (0)21 481 6356  
E george.miller@cdhlegal.com



**Natalie von Ey**  
Director  
T +27 (0)11 562 1333  
E natalie.von\_ey@cdhlegal.com



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

**BBBEE STATUS:** LEVEL TWO CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**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@cdhlegal.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@cdhlegal.com

©2015 0833/DEC