12 OCTOBER 2016

COMPETITION ALERT

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FIRMS CAN HAVE THEIR (ICE CREAM) CAKE AND EAT IT TOO: NON-COMPETE CLAUSES ARE NOT NECESSARILY ANTI-COMPETITIVE

Since there was no geographic overlap as Nestlé did not operate an ice cream business in South Africa, the Tribunal agreed with the Commission's finding that the proposed transaction was unlikely to substantially prevent or lessen competition.

The Competition Tribunal (Tribunal) recently unconditionally approved a large merger between two firms active in the ice cream industry, namely Nestlé S.A (Nestlé), as the primary acquiring firm, and R&R Ice Cream Public Limited Company (R&R), as the primary target firm. In its reasons issued on 12 August 2016, the Tribunal re-affirmed some of the basic principles surrounding non-compete clauses.

The Tribunal therefore concluded that the non-compete obligation did not give rise to any concerns from a competition law perspective.

Prior to the proposed transaction, R&R, which is controlled by PAI Europe V (Fund V), had recently entered the ice cream market through its acquisition of the whole of Nestlé's South African ice cream business.

The Tribunal noted that the proposed transaction would form part of a global transaction in terms of which Nestlé and Fund V would incorporate a joint venture (JVCo), to which both Nestlé and Fund V would contribute certain rights and assets. Nestlé and Fund V would enjoy joint control of JVCo. Effectively, this would result in Nestlé re-acquiring control of the ice cream business which R&R had recently acquired.

The Tribunal agreed with the Competition Commission's (Commission) finding that the proposed transaction gave rise to a product overlap in the market for the manufacture and supply of ice cream. However, since there was no geographic overlap as Nestlé did not operate an ice cream business in South Africa, the Tribunal agreed with the Commission's finding that the proposed transaction was unlikely to substantially prevent or lessen competition.

The Tribunal then considered whether a non-compete obligation, which was agreed to by Nestlé and Fund V in respect of the JVCo, was anti-competitive. The non-compete obligation was such that Nestlé and Fund V would not engage in any activities which would compete with the business of the JVCo. The test applied in this regard is whether the non-compete obligation is reasonable and commercially justifiable.

The Tribunal firstly considered the duration of the restraint. Without mentioning the precise duration of the restraint, the Tribunal held that the restraint was reasonable and commercially justifiable in light of the fact that the restraint was "only limited to a certain period." The Tribunal proceeded to consider the nature of the restraint and held that since it only concerned the activities that would compete with the JVCo, it was able to pass muster. The Tribunal therefore concluded that the non-compete obligation did not give rise to any concerns from a competition law perspective.

This decision confirms that non-compete obligations are not necessarily anti-competitive, provided that the extent of the activities they seek to limit are not overbroad and the period of time for which they apply is limited.

Andries La Grange and Roxanne Bain

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KENYA STRENGTHENS TIES WITH SOUTH AFRICA AS THE TWO NATIONS STEP UP EFFORTS IN COMPETITION ENFORCEMENT

The CAK concluded a cooperation agreement with the COMESA Competition Commission (CCC) as a means to coordinate with the CCC in enforcing their Competition Act.

On 6 October 2016 the CAK's plan to step up enforcement of anti-competitive practices was bolstered when it signed a Memoranda of Understanding (MOU) with the South African Competition Commission.

Enforcement of competition law on the African continent has continued to intensify over the past year with many countries joining regional competition authorities; taking steps to implement competition legislation; or actively enforcing their existing legislation.

The Competition Authority of Kenya (CAK) has become a particularly proactive authority. As reported by Cliffe Dekker Hofmeyr earlier this year, the CAK concluded a cooperation agreement with the COMESA Competition Commission (CCC) as a means to coordinate with the CCC in enforcing their Competition Act. On the enforcement front, the CAK then conducted its first dawn raid in March 2016 by raiding fertiliser companies Mea Limited and Yara East Africa. The dawn raids of March 2016 demonstrate how the CAK's capacity building over recent years has been successful and has facilitated its reputation as an active competition authority.

On 6 October 2016 the CAK's plan to step up enforcement of anti-competitive practices was bolstered when it signed a Memoranda of Understanding (MOU) with the South African Competition Commission at the Annual Competition Law Economics and Policy Conference.

The MOU will enable the agencies to share information relating to cross-border mergers and conduct joint investigations and enforcement activities subject to their respective national laws and regulations. The MOU also reflects the authorities' aims to increase the efficiency of investigations; increase the overall transparency of the merger review process; and increase institutional capacity by providing expert exchange programmes between the CAK and the South African Competition Commission (Commission).

Notably, the MOU provides for the exchange of non-confidential information and documents, which will allow the CAK and the Commission to conduct joint market enquiries and engage in research which will ultimately inform government policy. Co-ordinated investigations will occur in cases where similar or the same anti-competitive practices are being investigated or prosecuted by both countries.

The MOU concluded between the Commission and the CAK is ultimately part of the broader process in which the South African Competition Commission is establishing more formal relationships with other competition authorities around the world. Over the last year, the South African Competition Commission signed similar MOUs with the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China as well as with the Directorate-General Competition of the European Commission. On 6 June 2016 the Southern African Development Community ("SADC") competition authorities from Malawi, Mozambique, Namibia, Botswana,

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KENYA STRENGTHENS TIES WITH SOUTH AFRICA AS THE TWO NATIONS STEP UP EFFORTS IN COMPETITION ENFORCEMENT

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International companies with footprints in Africa therefore need to be aware that information will be shared with the South African Competition Commission, and the Commission in turn will engage with other African authorities in pursuing anti-competitive conduct and sharing information relating to mergers.

Seychelles, Mauritius, South Africa, the Kingdom of Swaziland, United Republic of Tanzania, and the Republic of Zambia also concluded an MOU which will ensure cooperation between the SADC competition authorities and strengthen effective enforcement of competition law in each SADC member state.

International companies with footprints in Africa therefore need to be aware that information will be shared with the South African Competition Commission, and the Commission in turn will engage with other African authorities in pursuing anti-competitive conduct and sharing information relating to mergers. The most recent MOU between the CAK and the Commission means that for firms transacting in both Kenya and South Africa, there is a renewed need to ensure that they are competition law compliant and that transactions are notified in all African authorities where such notification is required.

Lara Granville and Riad Daniels

TOP RANKED GLOBAL CHAMBERS AND PARTNERS 2016
Cliffe Dekker Hofmeyr
BAND 2
Competition/Antitrust

The LEGAL 500
2014-2016
Ranked Cliffe Dekker Hofmeyr
TIER 2
FOR COMPETITION

2015 RANKED #1 BY DEALMAKERS FOR M&A DEAL FLOW 7 YEARS IN A ROW
1st by General Corporate Finance Deal Flow

2014 1st by M&A Deal Flow
1st by M&A Deal Value
1st by General Corporate Finance Deal Flow

2013 1st by M&A Deal Flow
1st by M&A Deal Value
1st by Unlisted Deals - Deal Flow

2012 1st by M&A Deal Flow
1st by General Corporate Finance Deal Flow
1st by General Corporate Finance Deal Value
1st by Unlisted Deals - Deal Flow

DealMakers

2015
1ST
South African law firm and 12th internationally for Africa & Middle East by deal value

2ND
South African law firm and 2nd internationally for Africa & Middle East by deal count

1ST
South African law firm and 15th internationally for Europe buyouts by deal value

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RED LIGHT REMAINS FOR THE ANDALUSITE MERGER

In January 2015, the merging parties notified the Competition Commission (Commission) of the intermediate merger.

After a lengthy period of litigation before the competition authorities, the Competition Tribunal (Tribunal) has prohibited the proposed acquisition by Imerys South Africa Proprietary Limited (Imerys) of Andalusite Resources Proprietary Limited (AR).

Producers and end-users expressed concern that they would be deprived of a competitive choice between Imerys and AR and that there was a high probability that the merged entity would increase the price of andalusite or divert andalusite sales from South Africa to export markets.

In January 2015, the merging parties notified the Competition Commission (Commission) of the intermediate merger in terms of which Imerys intended to acquire the entire issued share capital in AR. Imerys and AR are involved in the mining, processing and sale of andalusite and are the only two parties that mine and supply andalusite in South Africa. Andalusite forms part of the alumina-silicate group of compounds. Alumina-silicates possess heat-resistant properties and are widely used in the production of refractories for high-temperature industrial processes. Refractories are particularly important to the local steel production industry.

During the course of the merger investigation, interested third parties provided submissions to the Commission. In particular, producers and end-users expressed concern that they would be deprived of a competitive choice between Imerys and AR and that there was a high probability that the merged entity would increase the price of andalusite or divert andalusite sales from South Africa to export markets. As a result of such concerns, in April 2015, the Commission decided to prohibit the proposed merger.

In May 2015, the merging parties referred the matter to the Competition Tribunal (Tribunal), requesting that the merger be considered afresh. The hearings took place over several months from May 2015 into August 2016. The theory of harm raised by the Commission was that the transaction would be a "merger to monopoly". The Tribunal agreed, noting that the "two to one merger" would lead to a monopoly in the mining, processing and sale of andalusite in South Africa, and also a near-monopoly in the global sale of andalusite. Since barriers to entry in the mining, processing and sale of andalusite in South Africa are high, there is no realistic prospect of new entry in the foreseeable future, even if the merged entity did increase prices.

The Tribunal determined therefore that the proposed transaction would involve a permanent structural shift in the andalusite market reducing the number of participants in South Africa from two to one, and would result in a substantial prevention or lessening of competition. Moreover, the proposed transaction raised significant public interest concerns, specifically from a small business and an industrial sector perspective. The

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This prohibition by the Tribunal follows one of several prohibition decisions made by the Commission in the last financial year.

proposed transaction had the potential to remove an effective competitor leaving the market without an alternative supplier of andalusite. In turn, this would have a direct impact on producers of refractories, as the iron and steel industries consume the vast majority of alumina-silicate-based refractories. It is also difficult to envisage how the proposed transaction would enable the merging parties to become more competitive globally given that they are currently the main players in the global market for andalusite.

Although the merging parties proposed certain behavioural conditions in an attempt to address these concerns, the Tribunal took the view that the proposed conditions were inadequate and did not address the structural market change resulting from the proposed transaction. The Tribunal also considered the proposed behavioural conditions impractical from a monitoring and compliance perspective as such conditions would be unduly onerous on the Commission to effectively monitor.

This prohibition by the Tribunal follows one of several prohibition decisions made by the Commission in the last financial year. In the Commission's financial year ending 2015/2016, the Commission finalised 413 merger cases, of which 37 were approved with conditions and 7 were prohibited.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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.

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