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COMPETITION ALERT

IN THIS **ISSUE**

COMPETITION COMMISSION DOES NOT BEAT TO MANUFACTURERS' STEEL DRUM IN MERGER PROHIBITION

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A CUP OF TEA AT THE COMPETITION TRIBUNAL...

On 19 June 2017, the Competition Commission (Commission) announced that it has finalised its investigation and referred a case against Rooibos Limited (Rooibos), the largest processor of rooibos tea to the Competition Tribunal (Tribunal) for abusing its dominant position by allegedly inducing rooibos tea farmers not to deal with its rival rooibos tea processors in contravention of s8(d)(i) of the Competition Act, No 89 of 1998.

PROPOSED AMENDMENTS TO THE MERGER THRESHOLDS AND MERGER FILINGS

On 9 June 2017, Minister of Economic Development, Ebrahim Patel gazetted proposed amendments to the lower merger notification thresholds for compulsorily notifiable mergers.

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This is the second time the Commission has prohibited a transaction between Greif and Rheem, the first instance being in 2004.

On 21 June 2017, the Competition Commission (Commission) published its decision to prohibit an intermediate merger between two steel drum manufacturers, Greif International BV (Greif), a Dutch company, and Rheem South Africa Proprietary Limited (Rheem).

This is the second time the Commission has prohibited a transaction between Greif and Rheem, the first instance being in 2004.

In addition to manufacturing steel drums in South Africa, Greif manufactures industrial packaging products, including, inter alia, steel pails, blow moulded plastic drums and knock down drums. Rheem manufactures not only steel drums but cans and pails used predominantly for packaging industrial liquids and hazardous chemicals.

The Commission found that the merger would effectively result in the creation of a monopoly, regardless of the geographic market.

The Commission identified the market for the manufacture and supply of large steel drums as an area of overlap between the merging parties. In its assessment of this market, the Commission found that the merger would effectively result in the creation of a monopoly, regardless of the geographic market. Interestingly, in its 2004 prohibition of the merger, the Commission delineated only KwaZulu-Natal and Gauteng as the two geographical areas of overlap where the two companies were the only manufacturers of steel drums. The Commission concluded that post-merger, the merged entity would likely be in a position to unilaterally increase prices.

High barriers to entry were also cited by the Commission as a reason for its prohibition.

Public interest benefits – which were not expanded upon in the Commission's press release – were not found to outweigh the anti-competitive effects that the proposed merger would have given rise to.

Given that the Commission did not come to a markedly different conclusion than it had 13 years ago regarding the merger of Greif and Rheem, this indicates that the market dynamics for the manufacture of steel drums does not appear to have altered significantly over time to warrant a different outcome.

The parties to the transaction are able to take the Commission's decision to the Competition Tribunal to consider the prohibition of the merger.

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A CUP OF TEA AT THE COMPETITION TRIBUNAL...

The crux of the Commission's investigation focused on Rooibos' monopolisation of rooibos tea supply from commercial farmers in order to foreclose its competitors at the processing level of the value chain or prevent the expansion of its rivals in the market.

On 19 June 2017, the Competition Commission (Commission) announced that it has finalised its investigation and referred a case against Rooibos Limited (Rooibos), the largest processor of rooibos tea to the Competition Tribunal (Tribunal) for abusing its dominant position by allegedly inducing rooibos tea farmers not to deal with its rival rooibos tea processors in contravention of s8(d)(i) of the Competition Act, No 89 of 1998.

The Commission has undertaken to establish a more proactive approach to investigate abuse of dominance in key sectors in the South African economy as outlined in its Annual Performance Plan 2016/2017.

Rooibos tea is a unique caffeine-free product containing extremely high levels of anti-oxidants and is only grown in the Western and Northern Cape regions of South Africa. Accordingly, the source of supply is limited and it is imperative that tea processors have infinite access to rooibos tea from commercial farmers in order to remain competitive in the market. The value chain is structured such that the tea processors purchase rooibos tea from commercial farmers in bulk. In turn, the rooibos tea is dried and treated and then on-sold to the local packers as well as the export market as a bulk product for packaging into final products and other value-added products.

Rooibos inherited the assets and the monopoly position previously occupied by the Rooibos Tea Control Board to, among other things, regulate the marketing, pricing and research in the rooibos tea industry. The crux of the Commission's investigation focused on Rooibos' monopolisation of rooibos tea supply from commercial farmers in order to foreclose its competitors at the processing level of the value chain or prevent the expansion of its rivals in the market.

In 2014, Rooibos introduced two exclusionary tactics which had the alleged effect of locking-in the supply of rooibos tea from commercial farmers which left rival processors frustrated. Firstly, long-term supply agreements were concluded between Rooibos and commercial farmers, in terms of which the latter were required to supply prescribed volumes of tea to Rooibos for a period of four years. Secondly, commercial farmers were required to supply up to half of their production yield to Rooibos in exchange for access to production research output.

In the past, the Commission has faced endless challenges in successfully prosecuting and addressing abuse of dominance cases. In order to combat these challenges, the Commission has undertaken to establish a more proactive approach to investigate abuse of dominance in key sectors in the South African economy as outlined in its Annual Performance Plan 2016/2017. It remains to be seen exactly what measures the Commission has implemented in prosecuting this case before the Tribunal.

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PROPOSED AMENDMENTS TO THE MERGER THRESHOLDS AND MERGER FILINGS

It is proposed that the merger notification fee for intermediate mergers be increased from R100,000 to R150,000, and the merger notification fee for large mergers be increased from R350,000 to R500,000.

On 9 June 2017, Minister of Economic Development, Ebrahim Patel gazetted proposed amendments to the lower merger notification thresholds for compulsorily notifiable mergers, as well as the relevant merger filing fees, as follows:

- It is proposed that the threshold for an intermediate merger will be met where (i) the acquiring and target firms have combined annual turnover or gross assets of R600 million or more (currently the merger threshold amount is R560 million) and (ii) the target firm has turnover or assets of at least R100 million (currently the merger threshold amount is R80 million). The higher thresholds for large mergers remain unchanged.
- It is proposed that the merger notification fee for intermediate mergers be increased from R100,000 to R150,000, and the merger notification fee for large mergers be increased from R350,000 to R500,000.

These proposed amendments are subject to written comments by interested persons.

The higher thresholds for large mergers remain unchanged.

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