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COMPETITION ALERT

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TRIBUNAL LOWERS THE CEILING IN ROOF BOLT CARTEL

The two remaining respondents in the Roof Bolt cartel (the other two respondents having respectively settled with the Commission and qualified for corporate leniency) appear to have gotten off rather lightly in the final analysis, contributing to the current flux in terms of what level of penalties might be expected in cartel cases.

In the course of its decision, the Tribunal reduced the number of alleged contraventions facing the respondents from six to one. As a result, the penalty imposed was far less than the Commission had hoped.

The decision touches on a number of technical issues relating to the prosecution of cartels. In respect of a number of alleged contraventions, the Tribunal found that where collusive conduct (eg a rigged bid) took place more than three years before the start of the investigation, there is no jurisdiction to prosecute the conduct *unless the effects of the conduct endured into the three year period*. Where the collusive tender is not awarded, or is replaced with a different tender that is not colluded on, then the 'chain of causation' between the collusion and actual prices paid is broken, so that there is no conduct to prosecute within the prescription period. On evidence presented, it was only in respect of one tender that subsequent purchases made subject to the collusive pricing occurred within the relevant period.

In this year's seminal Constitutional Court judgment in *Senwes*, the Court confirmed the Tribunal's very wide powers of discretion to entertain allegations and evidence not specifically pleaded, as part of its inquisitorial function. Many lawyers feared that this would lead to a 'free for all' in Tribunal hearings where respondents would be hostages to the wind. However, to its great credit the Tribunal was careful to exercise its power with due regard for fairness to respondents. Unlike in *Senwes*, where common cause evidence was not framed in a particular way, in this case it was not merely a question of whether the case was fully pleaded in the referral, but whether the case was precisely pleaded at all. In other words, while *Senwes* means the Commission is not limited to what it pleads in its referral, there is nevertheless an obligation to ensure that a respondent does understand what is being pleaded, and has time to respond. This was not the case with certain of the allegations that the Commission sought to allege at the last minute – allegations not supported by evidence before the Tribunal.

The Tribunal also noted that reliance on so-called 's49A' proceedings (in terms of which the Commission interrogates respondents under oath during the investigation but prior to referral) to support a case is dangerous. These records do not automatically form part of the pleaded record and do not necessarily amount to useful evidence on a standalone basis. The oral evidence reflected in transcripts is often

IN THIS ISSUE

continued

vague and contradictory as a result of poor interview techniques, but also the fact that at the time of interrogation, the Commission might not yet be sure of the case it is going to plead. The Commission sought to rely on these transcripts as best evidence of a contravention, without corroborating documentary evidence, which ultimately proved fatal, particularly following effective cross-examination by the defence. A lesson the Commission should take from this case is that prosecuting remaining respondents after some have settled or applied for leniency is not a mere 'mopping up' exercise, and a proper case needs to be built rather than merely relying on what the Commission has been told by those no longer contesting the proceedings (who of course have an incentive to tell the Commission what it wants to hear).

The Tribunal's decision may well reduce parties' incentive to settle complex cases, as the Commission's inability to convert confessions into convictions gives the perception that the Tribunal is imposing fines that are far less than what the Commission typically seeks in settlement. While the Commission currently looks to settle at a percentage of total turnover in an affected market, if not total turnover, in this case the Tribunal based the penalty on turnover attributable to the particular collusive project, rather than the turnover of the respondents in the relevant business activity. Although the percentage was quite high (18%) and the fine subject to a 10% hike based on aggregating circumstances, the penalties of R1.8 million and R4.7 million respectively must seem low to the Commission.

TRIBUNAL IMPOSES CONDITION ON COMMISSION IN SHIPPING MERGER

The Tribunal recently approved the merger between DCD-Dorbyl (DCD) and the Elgin Brown and Hamer group (EBH) subject to a number of conditions, and in an unprecedented move placed one of the merger conditions on the Commission.

DCD is a mechanical engineering business operating in the rail, mining and energy, marine and defence sectors. Of relevance to this transaction are DCD's operations in the marine sector, where it provides a broad range of ship repair and conversion/modification services. The EBH group provides ship repair and associated services to local and foreign owners of shipping vessels.

The Commission found that the merger gives rise to an overlap in the market for general ship repair activities (including oil and gas rigs repairs) at a regional level, and in particular at the port in Cape Town where both the merging parties are active. In this market, the Commission found that the merged entity will control significant leases and have a dominant position post-merger.

In order to reduce the merged entity's concentration of ship repair facilities in Cape Town, the Commission and the merging parties proposed a set of conditions to the Tribunal that prevented the merged entity, for a period of time, from tendering for the renewal of the ship repair facility in Cape Town currently leased by EBH (Cape Town Facility). The Tribunal raised the concern that this condition could have unintended consequences for competition depending on the market position of the third party which ultimately won the tender for operating this facility and acquired the market share related to ship repairs at this facility. To address this concern the Tribunal directed that the Commission engage with the Transnet National Ports Authority (TNPA) in an advocacy role to highlight the competition and public interest related issues which may arise in relation to ship repair facilities in general, and more specifically in relation to tenders involving access by small and medium sized enterprises to ship repair facilities. Although the Tribunal has on previous occasions entreated the Commission to look into an industry following merger proceedings, this is the first time that this has been made a condition of the merger. Although this makes the Commission answerable to the Tribunal if it does not follow through, it's not clear what the impact on the merging parties will be if the Commission breaches the condition. In terms of the Competition Act, the Tribunal may impose an administrative penalty for a contravention of, or failure to comply with, an order of the Tribunal and may also order a merging party to sell any shares, interests or other assets it has acquired pursuant to the merger or declare void any provision of an agreement to which the merger was subject. The merging parties will have to trust that a breach by the Commission will not impugn their merger.

Further conditions to the merger included that:

- The merging parties undertake not to acquire control over the Cape Town Facility within a period of 10 years after the expiry of the lease agreement between EBH and the TNPA on 28 February 2013.
- The merging parties undertake to notify the Commission of any acquisition of control over the Cape Town Facility after the expiry of the 10 year period.
- The merging parties cooperate in the investigation process instituted by the TNPA to review current ship repair conditions and tariffs.

The Tribunal's decision to impose conditions of up to 10 years' duration is indicative of an increasing willingness to impose conditions with wide-reaching and long term consequences for a market. Many would argue that it is dangerous to meddle with free market dynamics beyond the short to medium term. A further trend that seems to be emerging is to use merger conditions to address broader competitive concerns that might not be entirely merger-specific. In another recent decision, the Tribunal approved a merger subject to the condition that the merging parties negotiate in 'good faith' with the Spar Group (not a party to the merger) to have exclusivity clauses in lease agreements removed. This highlights the on-going tension between competition policy and competition law, where the regulator is naturally keen on the former and lawyers more comfortable with the latter. Whether it is permissible within the Act to leverage merger proceedings to further broader policy aims is a question that has yet to be answered.

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BREWERIES MERGER TO ENHANCE COMPETITION IN THE BEER MARKET

The merger between DHN Drinks (DHN) and Sedibeng Breweries (Sedibeng) is set to allow DHN Drinks (DHN) shareholders - Diageo Highlands (Diageo), Heineken International (Heineken) and Namibian Breweries (NB) - to compete more effectively with breweries giant, South African Breweries (SAB).

The merger between DHN and Sedibeng has been unconditionally approved by the Tribunal. DHN is a company formed by Diageo, Heineken and NB, following the 2003 consolidation of these three firms' sales, marketing and distribution functions into the well-known joint venture, Brandhouse Beverages (Brandhouse). The target firm, Sedibeng, operates as a brewery in Johannesburg and is currently owned 75% by Heineken and 25% by Diageo. Heineken and Diageo established Sedibeng for the purpose of brewing their own products in South Africa in order to effectively compete with the dominant SAB.

The transaction is essentially a restructuring in line with the joint venture partners' agreements, as a result of which Diageo, Heineken and NB will have an indirect shareholding in Sedibeng in direct proportion to their DHN shareholding. The Tribunal found that the transaction will not change the structure and dynamics of the markets in which the merging parties operate.

The establishment of Sedibeng has helped the merging parties have a manufacturing presence in South Africa allowing them to compete more effectively with SAB. According to the merging parties, this merger will further enhance this competition in the beer market.

TRIBUNAL ORDERS COMMISSION TO APPOINT A TRUSTEE TO UNSCRAMBLE THE PRIMEDIA@HOME AND PAARL MEDIA MERGER

Earlier this year, we noted that the reversal of the merger approval between Primedia@Home and Paarl Media left the merging parties faced with the practical challenge of reversing a merger which had been unconditionally approved a year earlier.

The difficulty was clearly expressed by Paarl Media, quoted in the media as saying that "the Commission's decision is incapable of being implemented – you cannot unscramble an omelette."

In August, the Tribunal ordered that the Commission appoint a trustee to assist with the 'unscrambling' following Caxton's urgent application to the Tribunal to interdict Paarl Media from controlling or stripping Primedia@Home of its assets or retrenching its staff. Caxton's application included a request for an order that the Commission appoint a trustee to control and manage the Primedia@Home business, restore any assets that have been sold and dispose of the business.

While the Tribunal's decision is yet to be published, Nortons Inc (which represented Caxton in these proceedings) reports that the Tribunal ordered that Paarl Media

- must ensure that the Primedia@Home business is run independently of Media24's other knock and drop businesses;
- may not take steps to retrench staff;
- may not dispose of assets;
- will not cede, transfer or terminate contracts of customers;
- will not take steps to influence customers to transfer their businesses; and
- restore assets which have been disposed of to companies that are partially or wholly controlled by Naspers (Paarl Media is part of the Naspers group).

The Tribunal ordered further that the Commission appoint a trustee to monitor compliance with the obligations imposed on Paarl Media, make an inventory of assets and employees and investigate the feasibility of disposing of the business as a going concern. The trustee is required to report to the Commission within 20 business days of appointment on the identity of potential purchasers, which may not include any firm which is part of the Naspers group.

According to media reports, the Tribunal's order is welcomed by Paarl Media as it gives direction on how to proceed with the unbundling of the merger. At present, there is no legal precedent or guidelines to direct parties on unbundling a merger initially approved by the Commission.

COMMISSION TO PROBE THE "HEALTH" OF THE HEALTHCARE SECTOR

A key focus area at the recent 6th Annual Conference on Competition Law, Economics and Policy held at Wits University was the 'health' of the healthcare sector in South Africa.

Central to the discussion was the rising cost of healthcare, particularly within the private sector, with the keynote speaker, the Minister of Health, Dr Aaron Motsoaledi, attributing medical inflation to private-sector greed, a lack of effective competition and 'uncontrolled commercialism'.

During the conference it was tabled that part of the reason for the increase in the cost of private healthcare was the increased demand for private healthcare facilities. During his address, the Minister conceded that the public health sector has a problem of "deteriorating quality of healthcare". Concerns over the quality of public healthcare have resulted in individuals switching to private healthcare. The switch was clearly illustrated when conference delegates were asked for a show of hands of those who currently used public healthcare

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facilities – not a single hand was raised. Delegates were then asked to raise their hands if they had previously used public healthcare facilities – approximately half of the attendees' raised their hands. Certainly if public healthcare facilities were comparable to the private healthcare sector, the private healthcare sector would be forced to become more competitive, including in respect of pricing.

The structure of the private healthcare market was also blamed for the high costs of private healthcare. One of the papers presented at the conference proposed that the high degree of concentration in the market became particularly significant following the Commission's intervention in the market, with its prohibition of centralised bargaining by medical aids in 2003. Following the prohibition, large hospital groups are able to separately negotiate with each medical aid scheme the national prices for hospitals included in that hospital group. According to the paper, an increase in the number of competitors in the market, would afford the medical aid schemes greater countervailing power to negotiate prices with the hospital groups.

In a paper submitted by the Commission, concerns were raised over the use of a national reference price lists to influence practitioner pricing decisions; possible abuses of dominance by hospital groups in attracting specialists to their groups; as well as the possibility that specialists themselves were exploiting their market power.

In an effort to address the competition law concerns within the healthcare sector, the Commission has indicated that it will be conducting an investigation into the healthcare industry. A clear challenge will be getting all relevant stakeholders to the table, as the Competition Amendment Act, which empowers the Commission to compel participation in industry enquiries is not yet in force. Although the banking enquiry of 2006 to 2008 provides a precedent of sorts. It is already clear that the scope of an enquiry into healthcare is far broader and that the same levels of cooperation cannot be counted on. Four years on, it is not clear whether the banking enquiry has paid dividends.

As the parameters of the proposed investigation have not yet been set it remains to be seen whether the Commission will be providing a prescription to remedy the ills within the healthcare industry or whether the Commission will go as far as to perform surgery on the healthcare industry through regulatory intervention.

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