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COMPETITION ALERT

TRIBUNAL SETS OUT APPROACH TO CARTEL PENALTIES

In its recent decision to impose an administrative penalty against two firms for their role in a wire mesh cartel, the Tribunal has set out a new approach to penalty calculations. Borrowing heavily from the policy in Europe, the Tribunal's approach involves six steps:

Step 1: Determination of the affected turnover in the relevant year of assessment (affected turnover is based on sales of products or services that can be said to have been affected by the contravention).

Step 2: Calculation of the 'base amount', being that proportion of the relevant turnover relied on (based on the EU precedent, this may be as much as 30% of the affected turnover, depending on the nature of the contravention).

Step 3: Where the contravention exceeds one year, multiplying the amount obtained in step 2 by the duration of the contravention.

Step 4: Rounding off the figure obtained in step 3, if it exceeds the cap provided for by s59(2) (this cap is statutorily set at 10% of a firm's entire South African turnover).

Step 5: Considering factors that might mitigate or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it (this is not typically applied in the EU, but allows the Tribunal to consider factors that are specific to a respondent, such as it being an unwilling participant, or in the interests of proportionality).

Step 6: Rounding off this amount if it exceeds the cap provided for in s59(2). If it does, it must be adjusted downwards so that it does not exceed the cap (this is likely only if there are aggravating circumstances that push the level of fine up).

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The new paradigm provides some clarity, but does open the door for significant argument as to the effect of the contravention as well as the circumstances applicable to each firm involved. Of considerable concern to firms that have significant turnover beyond that affected by the cartel, is the prospect of paying a fine well in excess of 10% of affected turnover. It is also worth noting that the calculation process envisages higher fines for cartels of long duration as a matter of course.

SCA FINDS IN FAVOUR OF THREE LEADING PLAYERS IN THE VEHICLE TRACKING INDUSTRY

The Supreme Court of Appeal (SCA) has dismissed the appeals brought by vehicle tracking company, Tracetec, and the Competition Commission (Commission) against the February 2011 decision of the Competition Appeal Court (CAC).

In 2005, Tracetec lodged a complaint with the Commission against Netstar, Matrix Vehicle Tracking and Tracker, alleging that the three companies, which together enjoy over 90% of the market, were forcing competitors out of the market. Tracetec alleged that the three companies, through the Vehicle Security Association of SA (VESA), contravened the Competition Act by setting standards for VESA membership and accreditation that created barriers to entry as newcomers to the industry could not satisfy the set standards. Tracetec argued it had not been able to become VESA accredited, which meant it could not grow its business because of the fundamental importance insurers attached to such accreditation.

The Competition Tribunal (Tribunal) found that the three companies were preventing competition in the industry and denying consumers lower prices. The CAC disagreed, setting aside the Tribunal's decision and dismissing both the Commission and Tracetec's complaints against the three companies.

The CAC's decision was taken on appeal by the Commission and Tracetec. The SCA dismissed the applications and awarded costs to Netstar, Matrix Vehicle Tracking and Tracker, which are likely to run into several million rands in legal fees.

TRANSNET PURCHASES THE FORMER DURBAN INTERNATIONAL AIRPORT FOR R1.8 BILLION

On 11 April 2012, the Tribunal unconditionally approved a merger involving Transnet's acquisition of certain immoveable property on which the former Durban International Airport was located. Prior to approval, the property was owned by Airports Company South Africa (ACSA).

ACSA's rationale for the transaction was that the airport on the property had been closed and replaced by King Shaka International Airport, which opened in May 2010, 35km north of Durban.

According to Transnet, the transaction is of strategic importance to both Transnet and the South African Government, given a planned phased development of a dug-out port on the property. The port will provide the required capacity to meet the expectant demand created by the Gauteng-Durban corridor.

The Tribunal noted that while the proposed transaction results in an overlap in the market for rentable industrial property within the Durban node, the post-merger market share of Transnet in this market will be less than 10%. In addition, Transnet's plan to use the property for a planned dig out diminishes any horizontal concerns. The Tribunal therefore found that the proposed transaction was unlikely to result in a substantial prevention or lessening of competition in any relevant market.

LAW SOCIETY OF SOUTH AFRICA AND COMMISSION AGREE ON WAY FORWARD

In 2004, the Law Society of South Africa (LSSA) representing approximately 20,700 attorneys and 5 000 candidate attorneys, sought to exempt its rules governing the legal profession from the provisions of chapter 2 of the Competition Act. The exemption application concerned the LSSA's rules on professional fees, reserved work, organisational forms, multi-disciplinary practices, advertising, marketing and touting.

In 2011, the Commission rejected the LSSA's exemption application. Following the rejection, both parties committed to resolve all matters concerning the rules. Since then the parties have met to discuss the issues surrounding the Commission's refusal to grant the exemption.

The result of the consultation was that until the finalisation of the new Legal Practice Bill, the existing LSSA rules would continue to apply, subject to a liberalisation of the rule relating to advertising which will now be read to permit advertisements that don't offend the Advertising Standard's Authority Code in so far as it relates to truthfulness and non-misrepresentation, notwithstanding the

Commission's finding that certain rules restrict competition. The parties agreed that the rules cannot be excluded without being replaced by new rules, as this would create an untenable vacuum.

The Legal Practice Bill is set to go before Parliament shortly and is said to resolve the issues between the LSSA and Commission. Pending the implementation of this statute, the LSSA has agreed to apply the rules in a manner that is not offensive to competition law. Most notably, this includes a lift on the enforcement of prescribed minimum tariffs, which will allow attorneys to charge fees below the minimum tariffs prescribed in the rules.

COMMISSION TO TACKLE FISHING INDUSTRY TENDER

The Commission is investigating allegations against the R800 million tender won by Sekunjalo to combat illegal fishing along South Africa's coastline.

According to Corruption Watch, a non-profit organisation that gathers and reports information on corruption in South Africa, Sekunjalo is said to have had an unfair advantage as it submitted four separate bids under different company names. The non-profit organisation raised further concerns around a conflict of interest involving one of Sekunjalo's subsidiaries, Premier Fishing. Premier Fishing has rights to fish in South Africa, which effectively allows Sekunjalo to be both referee and player in the fishing industry.

Collusive tendering is per se prohibited under s4(1)(b)(iii) of the Competition Act. The competition authorities have previously found collusive tendering to include the rigging of bids, bid allocation and bid rotation, as well as the submission of cover bids and cover prices, agreements on tender prices and the allocation of bids to customers or territories.

SEED PRODUCER MERGER APPROVED BY THE COMPETITION APPEAL COURT

The CAC, approved the merger between DuPont subsidiary Pioneer Hi-Bred and local firm Pannar Seeds. The merger had previously been prohibited by both of the Commission and Tribunal.

The merging parties are two of only three players that compete in the local market for the production of (among others) maize seeds used in commercial and small scale farming of maize in South Africa. The market has high entry barriers as suitable maize germplasm has to be developed over many years, at great expense and with access to significant advanced technologies. Despite the fact that further entry into the market is unlikely, the CAC approved the merger on the basis that it found that Pannar, while not failing, is in decline and will ultimately exit the market if it does not partner with another firm that has access to advanced technology and considerable resources. The CAC found that Pioneer Hi-Bred was the only viable partner for Pannar, dismissing evidence given in the Tribunal that two other substantial multinationals could also partner with Pannar, thus preserving a market with at least three players, instead of reducing the market to two players, as the CAC has permitted. The CAC found that despite the fact that the merger substantially reduces the number of competitors in the market, the merged entity will be better able to compete with the market leader, Monsanto, than either of the merging parties could have on their own. The CAC found this to be a pro-competitive gain borne out of dynamic efficiencies to be achieved through the merger, which off-sets the lessening of competition that the merger also yields.

The CAC's unconventional approach has already attracted criticism and it is anticipated that the Commission may seek to challenge the decision before the SCA.

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