DLA CLIFFE DEKKER HOFMEYR

COMPETITION ALERT

25 September 2013

COMMISSION VS YARA AND OMNIA: DID THE SUPREME COURT OF APPEAL GET IT RIGHT? OR NOT?

On 13 September 2013, the Supreme Court of Appeal (SCA) upheld the Commission's appeal against a decision by the Competition Appeal Court (CAC) in respect of the Commission's referral of a complaint against Omnia and Yara.

The decision is the latest in a long line of cases dealing with process and procedure in getting a case from complaint, through investigation and to referral. Like those before it, this decision will no doubt garner controversy for a long time to come.

The nub of the dispute was whether the Commission was entitled to make a referral that ostensibly went beyond the intended scope of the original complaint. In this case, Nutriflo submitted a broadly worded complaint alleging that Sasol had abused its dominance and requesting the Commission to investigate that. Its complaint also included allegations of collusion between Sasol, Omnia and Yara but Nutriflo did not ask the Commission to prosecute that.

In addressing the complaint, the Commission also investigated the collusion, and on the strength of information uncovered, referred that aspect along with the abuse charges. Omnia and Yara objected to this on the basis that the Commission was bound to stick within the four corners of the original complaint.

The CAC found that the referral was invalid as Nutriflo had not intended for the complaint to be laid against Yara and Omnia and that the referred conduct went beyond that disclosed in the complaint as submitted to the Commission. Although it is open to the Commission to initiate its own, broader complaint and to validly refer that, the Commission did not purport to have done that and this rendered the point justiciable.

So while the debate initially turned on whether the Commission's referral off the back of Nutriflo's complaint was valid, the SCA side stepped the entire issue by simply noting that as the Act provides for no formalities for a Commission initiated complaint, this could be done informally and tacitly, so that "All the Commission has to do is decide to initiate a new complaint". In the present case, the SCA inferred that "By deciding to investigate the additional complaints and by subsequently referring them to the Tribunal, the Commission in effect tacitly initiated the complaints not covered in the original Nutriflo complaint."

With respect, the SCA may not be altogether correct in its interpretation of the Act. While correctly noting that no formalities are required to initiate a complaint, the SCA failed to observe that the 'Commissioner' is the one who initiates complaints, not the 'Commission'. The Commissioner must also direct an inspector to investigate the complaint. Accordingly, it should not be sufficient for the decision to initiate to be inferred from the mere fact of investigation – rather there should be evidence that the Commissioner applied his mind to available information,

continued

IN THIS ISSUE

indicated a decision to initiate, and then directed an inspector to investigate the specific complaint (and the inspector knew she was investigating pursuant to that directive). This sequence of events is a far cry from the conveniently open-ended procedure contended for by the SCA.

Although the SCA has neatly taken the debate away from vexed task of assessing the scope of original complaint, in doing so it may have inadvertently introduced greater cause for debate in the future. A complaint initiation and its timing is the *fons et origio* for many of the consequences of enforcement – having this hinge on proof of a tacit decision is unsatisfactory and may introduce a considerable burden of proof on the Commission if the evidence of that is not incontrovertible. A respondent will put the Commission to the proof thereof and unless the Commission has in place a paper-trail of some sort, it may be difficult to show that this has happened.

Ultimately, despite the apparent *carte blanche* granted by the SCA, the Commission should take care to make sure it has clear, documented evidence of the Commissioner's decision to initiate an investigation, lest reliance on tacit initiation create grounds for even more argument than to date.

Chris Charter

CIVIL PROSECUTION FOR CARTEL CONDUCT, THE SECTION 65(6) CERTIFICATE AND PREMIER FOODS' CHALLENGE

Premier Foods Proprietary Limited recently brought the latest procedural challenge to flow from the on-going class action proceedings against the members of the so-called 'bread cartel'. It challenged the Competition Tribunal's powers under s65(6) of the Competition Act, No 89 of 1998.

This provision provides that a certificate must be obtained from the Chairperson of the Tribunal or the Judge President of the Competition Appeal Court when a civil claimant wishes to claim damages from cartel members. Premier Foods was the leniency applicant, cooperated with the Competition Commission in its investigation and prosecution of the cartel and actively participated in the hearing of the matter. Premier Foods was, however, not cited as a respondent in the matter but the Competition Tribunal found that Premier, with the other participants of the cartel, contravened s4(1)(b)(i) and (ii) of the Act.

Premier argued that, as it was not a respondent, a certificate could not be legitimately issued against it as no formal decision was made as against it. The High Court found that the Tribunal could issue such an order irrespective of whether it was cited as a respondent or not. Furthermore, by virtue of its involvement in the matter and its admission of collusion made in obtaining leniency, it cannot be said that Premier was not granted the right to be heard.

It has since become common practice to refer a complaint against all parties involved in the allegedly collusive conduct (including the successful leniency applicant) and, accordingly, this issue may not be problematic in the future. This decision will, however, not only impact on possible civil liability for leniency applicants but will mean that parties implicated in collusive conduct and in respect of which the Tribunal makes a finding, even if such party was not a party to the referral to the Tribunal, may face claims for civil damages. It is, however, likely that this position would be challenged based on the fact that such a party would not have appeared before the Tribunal and its right to be heard would have been infringed.

Leana Engelbrecht

PUBLIC INTEREST CONCERNS LIMIT MERGER APPROVAL

The Competition Tribunal recently published its reasons for a decision to conditionally approve a merger in which the Industrial Development Corporation (IDC) and a consortium of foreign investors acquired shares in Rio Tinto South Africa Limited (Rio Tinto SA) (Rio Tinto Decision).

This decision is interesting because the Tribunal imposed conditions on the merging parties despite finding that the transaction would not result in substantial prevention or lessening in competition. Conditions were imposed solely because of a finding that the merger would have a negative impact on a particular industrial sector - energy supply.

When considering a merger notification, a decision-maker must follow prescribed steps in order to come to an outcome.[1] The primary necessary question is whether a merger will result in a substantial prevention or lessening of competition. However, a decision-maker is also required to ask a second question: Is the merger justified on substantial public interest grounds? The Competition Act gives specific public interest grounds which inform this decision. One of these is "the impact the merger will have on a particular industrial sector or region".

This is the factor which swayed the Tribunal in the Rio Tinto Decision.

The concern in the transaction related to overlap in the supply of Dense Medium Separation (DMS) magnetite iron ore. It is used for the washing of coal. An acquirer-controlled and a target-controlled entity were active in its production and sale. The Commission found these to be the only South African firms that could supply DMS magnetite to local coal mines.

As mentioned, a competitive analysis revealed that the transaction would not result in anticompetitive effects in respect of DMS, since the acquirer-controlled and the target-controlled entity did not compete for customers before the merger.

However, concern was raised that the transaction would result in locally-produced DMS iron ore being diverted overseas, to the detriment of local supply. DMS Iron ore plays a crucial role in the production of high-quality coal. A shortage of DMS iron ore would ultimately negatively affect Eskom's coal-related energy production, and compromise its ability to meet South Africa's electricity needs. The Tribunal found that a "post-merger incentive to self-supply" would result in short supply to domestic customers, which would in turn affect electricity supply in South Africa.

In order to remedy a concern, the parties inserted conditions which (amongst others):

- Ensured that there would be sufficient DMS iron ore made available to South African firms to satisfy annual demand; and
- Provided for monitoring of the fulfilment of the conditions

In this case, the Tribunal chose to restrict a merger, based on only public interest grounds in the Competition Act. It is worth remembering that the potential anti-competitive effects of a transaction are not the only things that should be considered when parties merge. The deal should also be evaluated more broadly, and considered in terms of its wider societal impacts.

Samantha Brener

[1] These are set out s12A of the Competition Act.

UPDATE ON THE PRIVATE HEALTHCARE PRICING INQUIRY

Earlier this year the Competition Commission (Commission) published its draft terms of reference. The Commission, at that stage, indicated that the market inquiry should take place by September 2013.

The Commission has now indicated that it envisages the inquiry to commence in November 2013. This delay is attributed to extensive consultation with relevant stakeholders.

The Commission has, furthermore, published on its website research into the private healthcare sector that was conducted prior to the decision to conduct the inquiry and has, furthermore, made available the submissions received by it in response to its call for submissions on its draft terms of reference.

The Commission indicated that it aims to complete its inquiry within 18 - 24 months, however, the inquiry may take longer to complete as it is an extensive exercise with serious consequences that should be undertaken comprehensively.

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