DLA CLIFFE DEKKER HOFMEYR

COMPETITION ALERT

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COMPLAINT LODGED IN THE POULTRY SECTOR

The poultry industry has been receiving a lot of attention in respect of what has been dubbed the 'chicken war' between local chicken producers and importers of frozen chicken products into South Africa, resulting in an application brought by the South African Poultry Association (SAPA) for tariff hikes on frozen chicken imports from Brazil and Argentina, which is facing opposition from the Association of Meat Importers and Exporters (AMIE).

One of the forums in which this war is being waged is before the South African competition authorities. The AMIE previously raised the desirability of a market inquiry into the poultry sector (similar to the market inquiry currently being undertaken by the Competition Commission (Commission) in the private healthcare market) and has since lodged a complaint against SAPA and local frozen chicken producers with the Commission. This complaint relates to, among other things, the use of the International Trade Administration Commission of South Africa and customs duties to remove import competition from the market and other alleged anti-competitive practices.

Broadly speaking, the poultry industry could probably benefit from a market inquiry to establish what it is that renders local producers unable to compete effectively, and to consider the effect of imports (with or without tariff barriers) on local businesses and consumers. However, it is also clear that the issues at play go beyond pure competition issues and stray significantly into broader issues of industrial and trade policy, as well as the public interest (in particular local businesses and jobs). These issues really fall outside the scope of a market inquiry or complaint investigation as contemplated in the Competition Act (Act).

In fact, there may be a tension between the strict competition law considerations and the broader policy questions, and it may not be fair to expect the Commission to come up with the solution as that is not really within its mandate as arbiter of competition rather than industrial policy. It is arguably a strength of the regulator in comparison to some other jurisdictions (such as the EU) that it is allowed to focus on competition issues rather than to develop other industrial policy; it has also been of concern to certain commentators where policy makers have perhaps leaned too heavily on the competition regulator to drive industrial policy.

While there is merit in better understanding the economic drivers in an industry insofar as that assists with policy development as well as competition law enforcement, the competition authorities have limited ability to drive prices down through price regulation. Instead, they can only look to ensure that companies conduct themselves in a competitive manner.

In certain cases a market may have structural or systemic reasons for higher pricing that cannot be put down to anti-competitive behaviour by any of the players in that market. The economics of any industry is based on a complex set of variables and effective competition is but one of those. Ultimately and whatever the outcome of the Commission's investigation, the poultry debate highlights how other factors such as import tariffs or subsidies abroad can serve to distort a market, regardless of whether players are acting in accordance with the Act.

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LENIENCY AND CRIMINAL PROSECUTION – USEFUL GUIDANCE FROM THE UK

A hot topic has been the conclusion of fast-track settlements between the Commission and various firms in the construction industry for their involvement in collusive conduct.

In particular, there is rampant speculation as to whether the individuals involved in the collusive conduct may be prosecuted criminally under the common law as the provisions of the Competition Amendment Act, No 1 of 2009 (Amendment Act) that introduce criminal sanctions for cartel conduct are not yet in force. This is a particularly difficult question to answer in light of the nature of the fast-track settlement procedure offered by the Commission in this matter, but also in other circumstances where leniency is obtained in terms of the Commission's Corporate Leniency Policy (CLP) as a result of a successful leniency applicant's cooperation with the Commission in exchange for not having an administrative penalty imposed against the firm for its involvement in collusive conduct.

This question is not unique to South Africa and most countries with competition law regimes that have policies to induce cartel members to come forward, similar to the CLP, have had to carefully consider this. This is especially true in those jurisdictions that have specific criminal sanctions for cartel conduct, such as the United Kingdom.

In July, the United Kingdom's Office of Fair Trading (OFT) introduced its policy dealing with, among other important issues surrounding the leniency process, criminal prosecution by individuals for cartel conduct where leniency was granted – "Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process, OFT1495" (guidelines). These guidelines inform the OFT's approach to leniency applications and so-called 'no-action letters' in terms of which immunity from criminal prosecution is granted to individuals that took part in collusive conduct, which includes comfort letters that criminal prosecution will not be undertaken.

In terms of UK law, where leniency is granted to a firm, the current or former employees, directors and other officers of that firm may be awarded blanket immunity from criminal prosecution wherever they are in the world, irrespective of their role in the cartel activity. The approach taken by the OFT in this regard is informative:

- An individual hoping to obtain a no-action letter will be required to comply with the conditions for leniency (as required of the relevant firm) being:
  - admitting that he participated in the cartel conduct;
  - providing all relevant information to the OFT;
  - complete and honest cooperation with the OFT;
  - refraining from engaging in any further cartel conduct; and
  - that individual must not, on behalf of the firm he was acting for, have been the ring leader of the cartel.
- Leniency applicants may apply for leniency on a no-name basis should it be concerned of the likelihood of criminal investigation. Once the OFT is able to give an assurance that criminal enforcement will not be contemplated in the circumstances, the identity of the firm will have to be disclosed.
- Where a no-action letter is issued in respect of an individual, such an individual will be interviewed by the OFT and the information provided in such an interview cannot be used against him in criminal proceedings, unless, the individual knowingly provided false or misleading information and in some instances where a no-letter issue is revoked due to non-cooperation.
- The no-action or comfort letters will only be issued closer to the conclusion of the criminal investigation and, most probably, after at least one interview with the relevant individual. Interim comfort letters may be issued provided that the individual continues to give his full cooperation.

Although there can be no better deterrent to individuals engaging in cartel conduct than the prospect of criminal liability, this can impact negatively on the ability of the Commission (and even firms themselves) to investigate and prosecute cartels, which invariably relies on whistle-blowers who may be less inclined to come forward if they are unable to manage the risk of criminal prosecution. An integral function of the competition authorities is to prosecute collusive and anti-competitive conduct – it is, accordingly, important to manage the tension between, on the one hand, incentivising firms and individuals to disclose collusive conduct, to the benefit of the economy as a whole, through an effective and efficient leniency regime and, on the other hand, dis-incentivising firms and individuals from disclosing collusive conduct due to the risk of criminal prosecution. The possibility of criminal prosecution outside of the competition law enforcement regime creates uncertainty and as a matter of policy it is probably far better to have the regulation of this drastic deterrent measure fall within the ambit of the competition authorities under the Amendment Act rather than on an ad hoc basis under the common law.

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UNITED ARAB EMIRATES COMPETITION LAW IMMINENT

The United Arab Emirates (UAE) has created a competition regulation regime that will come into force on 23 August 2013, following a six month grace period for entities to become compliant, which began in February 2013.

The UAE Federal Law, No 4 of 2012 (UAE Act) regulates competition in three broad and familiar categories, namely by:

- prohibiting restrictive agreements, which limit or prevent competition;
- prohibiting a firm from abusing a dominant position; and
- regulating merger control.

The merger control provisions in the UAE Act are based on market share thresholds which are yet to be published, so it is not clear at this stage how these provisions will be triggered in practice. Similarly, it is also unclear what constitutes a "dominant position" for purposes of the abuse of dominance provisions.

Interestingly, there are a number of broad sectors that are explicitly excluded from regulation by the UAE Act. These include the financial sector, the telecommunications sector, the gas and petrol sector, pharmaceutical production and distribution, postal services, electricity and water and activities of drainage, garbage disposal and sanitation. The excluded sectors will certainly cover a significant portion of firms operating within the UAE market. Notably, in contrast, the South African Competition Act contains provisions which allow for applications for exemptions, but does not provide a specific list of exempted sectors.

LANDBANK CREEPS UP ON THE AGRICULTURAL INDUSTRY

On 26 June 2013, the Competition Tribunal (Tribunal) approved the merger between the Land and Agricultural Bank of South Africa (LandBank) and the Performing Financial Products of the Lending Book of GWK Limited (GWK) on one hand, and the merger between LandBank and Statusfin Financial Services (Pty) Ltd (Statusfin) on the other hand.

The Commission considered the mergers simultaneously and found that although LandBank's post-merger market share would be 27%, the accumulation in market share in both transactions was slight, only 1.05% in respect of the GWK transaction and 1.8% in respect of the Statusfin transaction. Furthermore, the merged entity would still be competing with large established firms such as: ABSA, Standard Bank, Nedbank and Senwes post-merger.

However, due to various similar transactions that have been notified to the Commission by LandBank, the Commission queried LandBank's rationale for the sudden acquisitions of various cooperatives in the Agricultural Industry. The Commission's enquiry is likely predicated on notion of 'merger creep', which refers to a situation where a firm acquires a number of smaller businesses and this, over time, results in the acquiring firm possessing a high market share in the relevant market. This can lead to anti-competitive effects.

At the merger hearing, when asked by the Tribunal to explain its approach on a variety of incremental mergers by a particular firm, the Commission noted that it takes a holistic approach by being cognisant of similar previous mergers that have been notified.

Most notably, the Commission undertook, in cases where the creeping effect is relevant, to revisit customers it had spoken to when the initial merger was notified to assess whether the latest transaction would result in any pro-competitive gains in the market. This is certainly something for firms to consider in the future where the firm has previously made a number of small acquisitions, notwithstanding the seemingly inconsequential accretion in the firm's post-merger market share.

MINORITY PROTECTIONS AND CONTROL

The Industrial Development Corporation (IDC) and a consortium of foreign investors recently notified a transaction to the competition authorities in terms of which the IDC and the consortium intend acquiring all the shares in Rio Tinto South Africa Limited (Rio Tinto SA).

Although the Tribunal has not issued the reasons for its decision in the matter yet, the Commission's report analysing the transaction is available. The report contains valuable insights into the factors considered by the Commission when assessing questions of control by minority shareholders.

In terms of the transaction, the IDC will ultimately acquire a 20% stake in Rio Tinto SA and as part of its investigation of the transaction, the Commission undertook an analysis of the nature of the rights attaching to the IDC's minority interest in order to determine whether it would result in the IDC exercising control over Rio Tinto SA (the enquiry into the IDC's control of Rio Tinto SA was relevant as, had it been found that the IDC did not control Rio Tinto SA, there would have been less cause for concern regarding the existence of overlaps between the activities of other businesses controlled by the IDC and that of Rio Tinto SA and its subsidiaries).

Ultimately, the Commission submitted that the IDC would control Rio Tinto SA and certain subsidiaries, as the IDC would have material influence over the activities of Rio Tinto SA as a result of its ability to veto certain key decisions of the board of Rio Tinto SA.

What is interesting about the Commission's approach is that it identifies certain decisions which the IDC will be able to veto that may not at first blush appear to confer control on minority shareholders. For example, the Commission identifies as relevant the ability to veto decisions over the establishment or implementation of financial or accounting policies of Rio Tinto SA. This is not a decision which, seen in isolation, is commonly identified as conferring control on a shareholder.

Although one cannot rely on the Commission's report as conclusive of its approach to issues of minority stakes conferring control, it is interesting to note that in coming to a conclusion on control, the Commission does not expressly rely on a single veto right or factor as decisive in determining whether the IDC will control Rio Tinto SA. Rather, the Commission appears to have taken a broader approach whereby a number of veto rights combined, certain of which are not trite examples of rights conferring control, are taken into account in finding that the IDC as a minority shareholder will have sufficient influence over the business of Rio Tinto SA to control it.

It is important that investment companies acquiring even relatively small minority stakes in other companies carefully consider the rights and entitlements attaching to such stakes in a holistic manner to ensure that there will be no ability to exercise material influence post transaction, which may trigger the requirement to notify a merger.

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Competition practice and services, please contact:

Nick Altini
National Practice Head
Director
T +27 (0)11 562 1079
E nick.altini@dlacdh.com

Chris Charter
Director
T +27 (0)11 562 1053
E chris.charter@dlacdh.com

Pia Harvey
Director
T +27 (0)11 562 1207
E pia.harvey@dlacdh.com

Petra Krusche
Director
T +27 (0)21 481 6350
E petra.krusche@dlacdh.com

Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@dlacdh.com

Natalie von Ey
Director
T +27 (0)11 562 1333
E natalie.von_ey@dlacdh.com

Albert Aukema
Senior Associate
T +27 (0)11 562 1205
E albert.aukema@dlacdh.com

Susan Meyer
Senior Associate
T +27(0)21 481 6469
E susan.meyer@dlacdh.com

Lerisha Naidu
Senior Associate
T +27 (0)11 562 1206
E lerisha.naidu@dlacdh.com

Leana Engelbrecht
Associate
T +27 (0)11 562 1239
E leana.engelbrecht@dlacdh.com

Kayley Keylock
Associate
T +27 (0)11 562 1217
E kayley.keylock@dlacdh.com

Nazeera Ramroop
Associate
T +27 (0)21 481 6337
E nazeera.ramroop@dlacdh.com

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com

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