DLA CLIFFE DEKKER HOFMEYR

COMPETITION

ALERT

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IN THIS ISSUE

COMMISSION NON-REFERS COMPLAINT BY DOCTORS WITHOUT BORDERS

In September 2012, Doctors Without Borders (DWB) lodged a complaint of alleged anticompetitive conduct against Aspen Pharmacare Holdings Limited (Aspen), Mylan Laboratories Limited (Mylan Laboratories), Mylan South Africa Incorporated (Mylan SA) and Mylan Incorporated (Mylan). DWB complained that the exclusive supply agreement concluded by these parties in respect of the introduction of fixed dose combination anti-retroviral products (used in the treatment of Aids and HIV) in the South African public health sector was possibly anti-competitive.

Mylan appointed Aspen as its exclusive distributor of the active pharmaceutical ingredient used to produce finished dose anti-retroviral products and its exclusive distributor of the finished dose anti-retroviral products in South Africa. Mylan also agreed that neither it nor its affiliated firms would directly or indirectly sell these products to any other company registered or incorporated in South Africa. The exclusive distribution agreement was concluded for a period of eight years.

DWB complained that the exclusive distribution agreement caused a substantial lessening or prevention of competition in the market and that on-going pricing negotiations between Aspen and Mylan possibly constituted price fixing. The latter was dismissed by the Competition Commission (Commission) based on a lack of supporting evidence.

The Commission further investigated whether the conduct by Mylan, Mylan Laboratories and Mylan SA constituted market allocation between competitors.

The Commission found that the non-compete provisions and as such were considered together. The Commission found that the non-compete provisions were not sufficient to be categorised as market allocation as envisaged in the Competition Act, No 89 of 1998. Furthermore, it is accepted that the pharmaceutical industry, as owners of intellectual property, may licence the use of their intellectual property on an exclusive or non-exclusive basis. Where an exclusive agreement is concluded the Commission will scrutinise the agreement closely and will consider any claimed efficiencies. The Commission found that, in this case, Aspen's competitors could reasonably access alternative sources of supply and the exclusivity was warranted based on certain efficiencies. Accordingly, the Commission did not believe that the exclusivity agreement led to a substantial lessening or prevention of competition that could not be justified based on certain efficiencies.

The Commission did indicate its concern about the duration of the exclusivity agreement, however, the exclusivity agreement had been mutually terminated in 2013 and it was not necessary for the Commission to consider it further.

Leana Engelbrecht

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EXCLUSIVITY CONCERNS MUST BE MERGER-SPECIFIC

In two separate merger decisions, issued by the Competition Tribunal (Tribunal) days apart, the Tribunal deviated from the Competition Commission's (Commission) recommendations that the transactions concerned be conditionally approved. In both cases, the Commission had recommended that the mergers in question be approved subject to the removal of exclusivity provisions in contracts. Instead, the Tribunal unconditionally approved both transactions.

In the case of *Resilient Properties (Proprietary) Limited/ NAD Property Income Fund (Proprietary) Limited*, the Commission's concerns arose from lease exclusivity provisions in favour of anchor tenants in shopping malls. However, these exclusivity provisions were negotiated and in force prior to the negotiation of the transaction. As such, the Tribunal found that the recommended condition regarding removal of these provisions sought to remedy a concern that was not merger-specific. The Tribunal found that "the clauses in the lease exist pre-merger and the implementation of the merger does not alter that situation." As a parting remark, the Tribunal noted that, in seeking to remedy the impact of such clauses on competition, "enforcement through the prohibited practice regime is the more effective tool."

Similarly, in the case of *ABSA Bank Limited and Bytes Technology Group South Africa (Proprietary) Limited*, the Commission expressed its concerns with exclusivity provisions in the relevant franchise agreements, indicating that such clauses would have a foreclosing effect, thereby resulting in a restriction of competition. The Commission accordingly recommended that the exclusivity provisions in the franchise agreements be removed. The Tribunal disagreed with the proposed condition on the basis that the exclusivity clauses were contained in pre-existing agreements and as such, the concerns raised were not merger specific. The Tribunal further noted that "[i]t is further inappropriate for antitrust issues to be implemented through the back door by means of merger control. Other avenues are available to the Commission to investigate any concerns arising from the exclusivity clauses in question…"

From these decisions, two points are deserving of emphasis. The first is an observation that the Commission appears to be more vociferously interrogating exclusivity provisions in contracts due to their potentially restrictive impact on competition. The second is that such concerns (raised in the merger regulation context) are better suited to being investigated under the prohibited practice sections of the Competition Act, No 89 of 1998 - while they may arise within the context of the consideration of a merger, regard must be had to whether the concerns are merger-specific.

Lerisha Naidu and Nazeera Mia

INVENSYS EXCEPTION APPLICATION FAILS

On 3 September the Competition Tribunal (Tribunal) heard the exception application between Invensys Plc (Invensys), Invensys Systems (UK) Limited and Eurotherm Limited to the complaint referral brought by Protea Automation Solutions (Proprietary) Ltd (Protea) re the complaint referral between Protea, Invensys, the Invensys Group, EOH Holdings Limited and EOH Mthombo (Proprietary) Limited (fifth respondent).

Protea brought a complaint against Invensys on the basis that their exclusivity agreement with the fifth respondent had the ongoing effect of substantially preventing or lessening competition in contravention of various sections of the Competition Act, No 89 of 1998 (Act). In Invensys' answering affidavit they submitted to the Tribunal that Protea's complaint referral should be dismissed and they should not be granted the opportunity to amend their referral on the following grounds:

- Protea's reliance upon s4 of the Act is misplaced as the fifth respondent and Invensys are not in a horizontal relationship;
- Protea has failed to provide sufficient material facts and details to support their allegation that Invensys is dominant in the market. Furthermore Protea have failed to define the relevant market or markets with sufficient particularity;
- Protea have failed to provide facts on how the new distribution arrangement substantially prevents or lessens competition; and
- There is a misjoinder of the Invensys holding company which was not trading at the time.

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The Tribunal noted that its approach to exception applications differs from that of the High Court in that each case must be decided on its own merits without an overly technical evaluation. Central to the Tribunals approach were the following three considerations:

- The complaint proceedings in the Tribunal are *sui generis* and consist of elements of both motion and trial proceedings in the High Court. A complainant is required to provide "a concise statement of the grounds of the complaint and the material facts or the points of law relevant to the complaint and relied upon by the complainant";

- The subject matter of the proceedings involves the intersection of law and economics and often requires complex economic analyses of the facts to advance a theory of harm. It is often the case that a particular set of facts could be seen through the lens of more than one section of the Act; and

- The Tribunal enjoys inquisitorial powers and is required to exercise these in its truth seeking functions and thus always enjoys a wide discretion to conduct its proceedings.

The approach followed by the Tribunal in this case confirmed the earlier sentiments expressed by the Tribunal in which they stated "notwithstanding an absence of express provision for them in our rules, we would be willing to consider hearing an exception when appropriate. We have also indicated that the approach to exceptions in our proceedings needed to take into account the *sui generis* nature of our proceedings; we are neither a civil court approaching pleadings in trial proceedings nor a criminal court. Our proceedings are adversarial but we also as an institution enjoy inquisitorial powers. We are guided by the need to conduct proceedings fairly and to the extent permissible, informally."

The Tribunal further went on to discuss the remedies available under an exception application. They held in the case of exception applications brought on the basis of vague and embarrassing allegations or a failure to disclose the court usually grants the offending party an opportunity to amend its pleadings. On the other hand, in circumstances where the exception concerns a pure point of law dismissal of the case is often the appropriate remedy. The Tribunal held that the present case was distinguishable from the above as the application consisted of a mix of law and facts.

The Tribunal held that it would rarely dismiss a matter on the merits of a case without first satisfying itself that the prospects of success for a complainant are low and without first providing a party with an opportunity to clarify its case. It emphasised however that each case must be decided on its own facts and in this case dismissal was not the appropriate remedy.

The Tribunal held that fairness dictates that a party ought to be placed in a position to know the case it has to answer thus the Tribunal allowed Protea to file a supplementary founding affidavit to provide clarity and certainty to the proceedings.

Petra Krusche and Alexia Tomazos

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