DLA CLIFFE DEKKER HOFMEYR

COMPETITION

ALERT

10 MARCH 2014

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CROSS DIRECTORSHIPS: DISTINGUISHING THE BENIGN FROM THE CONCERNING

A recent Competition Tribunal (Tribunal) decision, *Standard Chartered Private Equity (Mauritius)* III Limited with two others and ETC Group (Mauritius), indicated that, whilst cross directorships between competing firms may theoretically create a platform for collusion, any risk is likely to be too remote where there is no direct link between the competing firms and where there are several layers of holding companies interspersed between the relevant directors.

During the Tribunal's assessment it emerged that two of the acquiring firms were, indirectly and through their respective investments, active in the manufacturing and marketing of wines - specifically, Remgro Limited (Remgro) through its interests in Distell Group Limited (Distell) and Standard Chartered Plc (SC Group) through its interests in the Airfresh Group (Airfresh). The merger itself did not implicate the wine market, nor were Distell or Airfresh the transacting parties.

Post implementation of the merger, both Remgro and the SC Group would be entitled to appoint directors to the board of the target firm. Concerns were raised as to whether the cross directorships between any of the competing acquiring firms, especially Distell or Airfresh, could lead to an exchange of confidential information. Ultimately, the Tribunal dismissed this concern on the basis that there was no direct link between the target firm and Distell such that it would be very unlikely that commercially sensitive information could be disseminated to Distell through the target firm. There were also found to be several layers of holding

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companies between the target firm and Remgro, and hence the risk of the flow of information from the target firm to Remgro, and then from Remgro to Distell, was found to be too remote.

The assessment of cross directorship is necessary as, in terms of the Competition Act, No 89 of 1998 (Competition Act) an agreement to engage in price-fixing, market division or collusive tendering is presumed to exist between two or more competitors if one has a significant interest in the other, or the firms have at least one director or substantial shareholder in common (s4(2)).

The term 'director' is widely defined in the Competition Act as a director of a company as defined in the Companies Act, No 71 of 2008, a member of a close corporation as defined in the Close Corporations Act, No 69 of 1984, a trustee of a trust, or a person holding an equivalent position in any other firm. Reference must also be had to the common law, which provides that a *de facto* director who is involved in the management of the company in the way that a director normally would be, will be covered by the presumption in s4(2), even if they have not been formally appointed.

Where cross directorships result in a firm providing a competitor with information relating to its future prices, changes to confidential trading terms, the allocation of markets, or the rigging of tenders, this is likely to amount to an obvious form of collusive behaviour. More commonly however, information exchanges may subtly increase transparency and reduce uncertainty regarding future competitive market strategies, without the firms directly intending to collude.

Susan Meyer and Nazeera Mia

COMPETITION (COMMISSION) DECISION NOT TO REFER SUPERMARKETS INVESTIGATION

On 24 January 2014, the Competition Commission decided not to refer a complaint based on allegations of exclusionary behaviour in the property and supermarket retail markets to the Competition Tribunal. The decision followed the conclusion of the Commission's investigation into the potential deleterious effects that exclusivity provisions in lease agreements with anchor tenants in shopping centres have on competition in the retail grocery market.

The Commission was initially concerned that exclusivity provisions in anchor tenant leases increased the barriers to entry faced by smaller independent grocery retailers and single line shops such as bakeries and butcheries, by denying them access to retail space in shopping centres.

That the matter has not been referred is to be commended. Exclusive lease agreements with anchor tenants play an important role in ensuring the commercial viability of new retail property developments. Exclusivity acts as an incentive to anchor tenants to accept the risk of being the first tenant in a new development. In turn, the presence of a strong anchor tenant in a new development gives smaller stores comfort that the centre will draw the feet required for them to trade profitably and this allows developers to sign up the suite of lessees required to obtain funding for new developments, in advance.

However, there is an important lesson to learn from the Commission's decision. During the period that the Commission was investigating the effects of the impugned exclusivity provisions, it also used its powers to impose conditions on parties to mergers to extract undertakings from landlords that they would attempt to negotiate exclusivity provisions out of leases with anchor tenants. Although these conditions are similar in effect to the behavioural remedies that would ultimately be competent after a finding of a contravention by the Tribunal in complaint proceedings, in certain instances the conditions were requested by the Commission in merger investigations only at a late stage of the Commission's investigation of the transaction and without a proper assessment of the actual effects of the exclusivity provisions in the context of the merger being undertaken.

That the Commission has now come to the conclusion that "the anti-competitive effects of the conduct could not be demonstrated conclusively" in its complaint investigation, casts serious doubts over the appropriateness of the conditions which the Commission sought to impose on merging parties during the currency of the complaint investigation into exclusivity in retail leases.

The Commission also seems to still want to have its cake and eat it when it comes to its investigation of the conduct in question. Although it makes a decision not to refer the matter to the Tribunal for lack of evidence, it still cautions that "notwithstanding this, the Commission remains concerned about … the potential dampening effects of exclusive leases on competition…".

Albert Aukema

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GLENCORE ACQUIRES COAL PURCHASE RIGHTS FROM BHP BILLITON

The Competition Tribunal (Tribunal) has unconditionally approved a merger in terms of which Glencore International AG (Glencore) will acquire the rights and obligations held by BHP Billiton Energy Coal South Africa Proprietary Limited (BHP Billiton) under an agreement for the supply of export coal from Optimum Colliery. As Optimum Colliery is owned by Glencore, the transaction allows Glencore to market the coal produced at this mine.

The competition authorities defined the relevant market as the international market for the production and export of thermal coal and found there to be a horizontal overlap given that Glencore produces and supplies thermal coal and that the rights being purchased are in respect of the production and supply of export coal from the Optimum mine. The competition authorities found that the overlap did not raise any competition concerns as the market share of the merged entity in the international market would be less than 14%, with a negligible accretion in market share (less than 1%).

During the Tribunal hearing, similar concerns around the merger were raised by both Eskom and South African Breweries. The concern was that Glencore would divert coal away from domestic customers to the export market, where the price charged for coal is higher. The competition authorities dismissed this concern on the basis that coal from the Optimum Colliery is currently already exported and as such, the only change post-merger is that the coal will be exported by Glencore, instead of BHP. Both Glencore and BHP confirmed that for as long as the export price of coal exceeds the domestic coal price, the coal mined at the Optimum Colliery would be exported, irrespective of the merger.

What is worth noting is that in the 2013 merger between Glencore and Xstrata Plc, the Tribunal specifically mentioned concerns around how the export market appeared to be distorting the market for domestic coal consumption. Although it is clear that, on its own, this latest merger does not result in distortion, what the competition authorities do not seem to have taken into consideration is the notion of merger creep, ie where a number of small acquisitions over time may ultimately lead to some level of distortion in a market.

Kayley Keylock

COMPETITION COMMISSION MAKES RECOMMENDATION IN RESPECT OF AFGRI-MERGER

South African merger regulation is, in the context of comparative anti-trust approaches to the assessment of mergers, quite unique. In the consideration of mergers, the competition authorities are mandated to consider a transaction in a dual sense – by firstly assessing its likely impact on competition in the relevant markets and secondly, though no less importantly, analysing the transaction-specific effects on the public interest. Viewed in this context, a merger brought before the competition authorities may conceivably raise no competition concerns, but may nevertheless be susceptible to prohibition (or conditional approval) on public interest grounds.

In this context and in the merger between Afgri and the AgriGroupe, the Commission's investigation revealed that the proposed transaction would not likely substantially prevent or lessen competition in the market for agricultural commodities, storage, trading and other related services. Notwithstanding the unlikely impact on competition that would flow from the merger, the Commission was nevertheless mandated to conduct an analysis, following concerns from various stakeholders, into certain public interest concerns. In particular, government raised concerns that, post-merger, the AgriGroupe would increase the storage costs for grain in certain regions, which is an indispensable cost in the realisation of food security in South Africa. Moreover, the apprehension was raised that the merged entity would export grain to other counties and increase prices in South Africa. Employment concerns were also raised as well as the impact that the proposed transaction would have on farmers, specifically black farmers.

The Commission's investigation revealed that none of the public interest concerns raised were supported by evidence. The Commission found that diverting grain to other countries would not be economically feasible; the merged entity was unlikely to exclude access to silos (particularly in view of excess capacity in the silos); and the transaction was more likely to result in job opportunities in the long term.

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The Commission also noted that other concerns were raised, which fell beyond the purview of the Commission's statutorily entrenched public interest mandate – as a result, the Commission refrained from expressing a view on matters it considered itself not empowered to investigate.

This reminds us that not all concerns that do not speak to transaction-specific impacts on competition can be shoe-horned into a public interest analysis that the Commission is mandated to investigate. The Commission is empowered to consider certain merger-specific public interest factors and any stakeholder concerns that fall outside of the ambit of the Commission's investigatory powers must be pursued in other appropriate fora and with other relevant institutions.

Lerisha Naidu

TRIBUNAL APPROVES LARGE MINING MERGER SUBJECT TO TWO-YEAR NO RETRENCHMENT CONDITION

The Competition Tribunal of South Africa has recently approved a large merger in the mining industry between Sibanye Gold and Newshelf 1114 (which is controlled by Gold One International, a publicly listed Australian company) subject to a condition that for the first two years after the implementation of the merger, no merger-related retrenchments may occur. This once again highlights the interplay between the Labour Relations Act, No 66 of 1995 (LRA) and the Competition Act, No 89 of 1998 (Competition Act).

Typically, the LRA regulates what happens to employees in the event of a commercial transaction, for instance to protect employees' continuity of employment in the event of a transfer of a business as a going concern. However, not all merger transactions will be considered as a going concern transfer as was the case in this merger which was a share acquisition. One of the purposes of the Competition Act is to promote and maintain competition in South Africa in order to promote employment and advance the social and economic welfare of South Africans. The competition authorities are consequently enjoined to consider public interest issues including the effect that the merger will have on employment.

In the merger notification lodged with the Competition Commission, the merging parties indicated that no retrenchments were envisaged as a result of the proposed transaction. During the Commission's investigation however, the Commission became aware of possible retrenchments following from LRA s189 notices having been issued by the target firm, Gold One, regarding the possible retrenchment of 82 employees in its Cooke Mining operations. Section 189 deals with retrenchments based on operational requirements. The notice of possible retrenchments was given to the relevant trade unions prior to the merger notification being filed with the Commission.

The s189 process was subsequently withdrawn as there was a concern from Gold One that the retrenchment exercise would impact adversely on the proposed transaction.

The Commission made various enquiries regarding these employment effects and reviewed the information submitted by the merging parties, but was not able to conclusively determine whether the retrenchments were merger specific or not. In the circumstances, the Commission elected to recommend to the Tribunal that the merger be approved subject to the condition that the merged entity is prevented from retrenching any employee as a result of the merger for a two year period following the merger implementation date. The condition does not however cover retrenchments as a result of voluntary separation arrangements or voluntary early retirement packages. The merging parties elected not to contest the condition.

An entity looking to merge or expand into South Africa should keep the interplay between the competition and labour legislation in mind when considering any transaction, particularly when retrenchments for operational reasons may be contemplated prior to or during any proposed transaction.

Natalie von Ey

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NATIONAL HOSPITAL NETWORK APPLIES FOR FURTHER EXEMPTION FROM THE APPLICATION OF CHAPTER 2 OF THE COMPETITION ACT, 89 OF 1998

The National Hospital Network (NHN), a network of independently owned private hospitals, has again applied for an exemption in terms of s10 of the Competition Act, No 89 of 1998 (Act).

Section 10 of the Act provides for very limited instances in which a firm can apply for an exemption from Chapter 2 of the Act, relating to prohibited practices (horizontal, vertical and abuse of dominance). These instances are only where it can be shown that the agreement or practice or category of agreements or practices in respect of which the exemption is being sought contributes to:

- the maintenance or promotion of exports;
- the promotion of the ability of small businesses or firm controlled or owned by historically disadvantaged person (HDP) to become competitive;
- a change in the productive capacity necessary to stop decline in an industry; or
- the economic stability of the petroleum industry[1].

The NHN, in particular, seeks exemption in respect of tariff negotiations between it and medical schemes and medical scheme administrators and collective bargaining agreements which would constitute price fixing, this would be *per se* prohibited in terms of the Act. The NHN, in its exemption application, is of the view that this conduct promotes the ability of small and HDP owned companies to become competitive in the context of a market that is notoriously difficult to function in.

The NHN has on two previous occasions been granted an exemption on similar grounds and it is unlikely that the Commission should come to a different conclusion this time around. With the Healthcare Inquiry having commenced in early January 2014, it will be interesting to see whether the Commission may change its approach to this enduring exemption.

Leana Engelbrech

[1] *This is the only industry designated by the Minister of Economic Development up to date to be eligible for this exemption.*

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CARTEL ENFORCEMENT IN EUROPE

In 2013, the European Commission (EU Commission) finalised investigations in respect of four cartels, imposing aggregate fines amounting to €1.8 billion. The investigations were in respect of the automotive wire harnesses, shrimps, European interest rate derivatives (EIRD) and Yen interest rate derivatives (YIRD) markets.

- In Automotive wire harnesses, four firms were fined a total €141 million;
- In Shrimps four European North Sea traders were fined a total of €28 million;
- In EIRD four firms were fined a total of €1 billion; and
- USB was fined a colossal €2.5 billion in relation to its involvement in the YIRD cartel. This is the largest fine imposed in the history of the EU Commission imposing penalties. However, USB managed to avoid the fine in exchange for its co-operation in terms of the EU Commission's leniency policy.

The average fine per cartel was considerably higher than those in 2012 (€17million in 2013 as opposed to €8 million in 2012). However, the cartels prosecuted by the EU Commission in 2013 were, on average, smaller in size (in terms of the number of firms involved in the cartel) and shorter in duration than those prosecuted in 2012.

These figures demonstrate that the penalties levied by the EU Commission have increased year on year, notwithstanding the more limited nature of the prosecuted cartels in the most recent year. As all four cases were initiated under the EU Commission's leniency programme, it bears noting that leniency policies the world over continue to prove itself as a successful tool in the detection and prosecution of cartel conduct. The USB fine demonstrates the import of relying on such a policy and cooperating with the authorities to avoid crippling fines that the authority is empowered to impose.

It will be interesting to observe whether the European Commission continues with this trend of increased penalties and whether this approach has a bearing on the level of administrative penalties imposed or the subject of settlement.

Christelle Wood and Lerisha Naidu

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