DLA CLIFFE DEKKER HOFMEYR

COMPETITION

ALERT

26 MARCH 2014

IN THIS ISSUE

COMMISSION APPOINTS HEAD OF MERGERS AND ACQUISITIONS

Cliffe Dekker Hofmeyr congratulates Mr Hardin Ratshisusu on his appointment as the Divisional Manager of the Competition Commission's Mergers and Acquisitions Department and wishes him a prosperous career in his new position.

EVIDENCE OF ONGOING COLLUSIVE CONDUCT AND THE COMPETITION TRIBUNAL'S OBLIGATION TO DIRECT PROCEEDINGS BEFORE IT

On 14 March 2014 the Competition Appeal Court (CAC) handed down its judgment in the appeal involving Videx Wire Products (Pty) Ltd (Videx) and the Competition Commission (Commission).

Videx and its competitors, all of whom supplied roof bolts to the mining industry, had attempted to rig a reverse auction operated by a client. Their attempts to rig the auction were unsuccessful as the client did not accept the inflated prices that the auction gave rise to. As a result of the failed auction, the client had to negotiate with each firm independently. The Competition Tribunal (Tribunal) found that the collusive conduct had not ceased prior to the Competition Act's three year prescription period as it was of an ongoing nature and that it was therefore not time-barred from finding Videx to be in contravention of the Competition Act, No 89 of 1998 as a result. This finding was then taken on appeal to the CAC.

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In its decision, the CAC seeks *"to ensure that the approach to cartel matters and to the concept of continuing agreements [is] clarified"* and it makes important findings regarding the obligation on firms which have engaged in collusion to disclose this to contracting parties to ensure that the collusive conduct was seen not to be ongoing.

The CAC found the need for the client to negotiate with each firm independently to be an indirect result of the collusive conduct in respect of the reverse auction. Given that the negotiated contracts were still in place within the three year prescription period, the collusive conduct could be said to be ongoing. According to the CAC, *"Videx failed to show that the effects of the collusion were not still being felt after the cut-off date."*

The CAC acknowledges the difficulty in distinguishing between evidence of collusive conduct persisting and the reality that the effects of collusive conduct may be felt long after the collusive conduct has ceased (and possibly prescribed). According to the CAC, its decision does not mean *"that all ongoing effects of prohibited conduct qualify as factors justifying a conclusion that the prohibited conduct has not ceased"*. Rather, *"what is important is that one should have reached a point where market outcomes are being determined by independent competition. That is not the case for as long as contracts which are the outcome of collusion are being enforced."* In the CAC's opinion, firms who enter into agreements with customers tainted by collusion must disclose the fact of the collusion to customers to ensure that the effects of the collusion can be brought to an end.

In its decision, the CAC also makes important findings on the Tribunal's obligation to direct proceedings where it intends hearing a complaint not originally forming part of the complaint referral before it. The Constitutional Court has previously found that, as an inquisitorial forum, the Tribunal can determine a complaint brought to its attention during a hearing even if that complaint does not form part of the Commission's complaint referral.

The CAC found that the Tribunal, in exercising its inquisitorial powers, cannot simply sit back and allow the parties to adopt tactical positions in the proceedings before it. According to the CAC, once it became clear to the Tribunal that the Commission intended to pursue a case against Videx which was clearly not on the pleadings before it, the Tribunal *"should have required the Commission to articulate the case it wished to present"* by way of an amendment to the pleadings. It should also have cautioned Videx that if it considered evidence as inadmissible because it went beyond the pleadings, it was under a duty to formally object.

Albert Aukema

ICASA ANNOUNCES INQUIRY INTO THE STATE OF COMPETITION IN THE ICT SECTOR

On 13 March 2014, the Independent Communications Authority of South Africa (ICASA) announced that it will be instituting a high-level inquiry into competition in the Information and Communication Technology (ICT) sector.

ICASA stated in a press release that the ICT sector "*has been, and continues to undergo rapid technological changes with far reaching implications for the local and international industries. One area, in which these changes are more pronounced, is in the competitiveness of the electronic communications, broadcasting and postal sector and the assumption that greater competition will lead to reduction in the cost to communicate.*"

ICASA, by virtue of provisions 4B of the Independent Communications Authority of South Africa Act, No 13 of 2000 (the Act), has the authority to institute an inquiry into any matter relating to, amongst other things, the achievement of the objects of this Act. The Act does not specifically state that ICASA is the custodian of competition in the ICT sector but the Act, as its object,states that ICASA should regulate electronic communications in the public interest. One purpose stated in the Electronic Communications Act, No 26 of 2005 is, however, to promote competition within the ICT sector.

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ICASA published its notice of public inquiry on 20 March 2014, indicating the scope and extent of the inquiry. Notably the notice states that:

- despite an ostensible increase in competition in the ICT sector, there has not been a perceived decrease in the cost to communicate;
- ICASA has concerns relating to concentration in the ICT sector and that the market is controlled by few large players;
- Attempts by new market players to enter the broadcasting market seem to be unsuccessful;
- Based on its mandate to safe-guard the public interest, ICASA is compelled to guard against market failure and wishes to establish what corrective measures can be put in place to ensure a competitive market; and
- ICASA urges respondents to think 'outside the box' in providing comments during this inquiry process and to view the process as an exploration of the issues and how they may affect the regulation of competition in the ICT sector as a whole.

ICASA will focus on:

i. the current state of competition in the market as a whole;

ii. the challenge of creating a level playing field across platforms;

iii. the impact of convergence, net neutrality and disruptive technologies on the competitive landscape;

iv. the role of access to fixed (fibre) and wireless (high demand spectrum) in enabling competition; and

v. the tension between consolidation and plurality in the ICT sector.

ICASA requests written submissions by 20 June 2014 and envisages oral presentations to follow written submissions (by parties that indicate that they would like to make such submissions).

The Competition Act, No 89 of 1998 (Competition Act), provides in s21(h) that the Competition Commission (Commission) and any other regulatory authority may negotiate agreement to co-ordinate and harmonise the exercise of jurisdiction over competition matters and to ensure a consistent approach to matters relating to competition. ICASA and the Commission concluded a Memorandum of Agreement in 2002 in accordance with s21(h) of the Competition Act, which Memorandum of Agreement relates to co-operation between the Commission and ICASA in respect of the investigation, evaluation and analysis of mergers and in respect of complaints involving telecommunication and broadcasting matters. The Memorandum of Agreement does not, however, extend to aspects relating to market inquiries into the state of competition in the ICT sector generally and it is unclear whether the Comission will be involved in this inquiry.

Leana Engelbrecht

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THE COMPETITION COMMISSION REFERS POWER CABLE INVESTIGATION

The Competition Commission (Commission) has referred a complaint investigation to the Competition Tribunal (Tribunal) regarding alleged cartel conduct by four cable companies, in relation to the supply of power cables, which are used to distribute electricity to residential and commercial users. For the consumer, this is likely to include the wires in home appliances and lighting. The respondents to the referral are Alvern Cables (Pty) Ltd, South Ocean Electric Wire Company (Pty) Ltd, Tulisa Cables (Pty) Ltd and Aberdare Cables (Pty) Ltd (Aberdare).

The Commission initiated an investigation against the respondents in March 2010 and in May 2010 it conducted a simultaneous raid of the offices of the respondents, seizing documents and electronic data that the Commission considered relevant to its investigation. The investigation has culminated in the present complaint referral.

The Commission is alleging that the respondents engaged in fixing the selling price of power cables to wholesalers, distributors and original equipment manufacturers and that two of the firms also divided markets by allocating customers. The Commission asked the Tribunal to impose an administrative penalty of up to 10% of each respondent's annual turnover, being the maximum penalty prescribed by the Competition Act, save for Aberdare, who was granted conditional immunity.

The current complaint occurs in the infrastructure industry, an industry that has recently been the subject of considerable focus by the Commission.

Susan Meyer and Nazeera Mia

TRIBUNAL APPROVES ACQUISITION OF DEVICES AND SERVICES BUSINESS OF NOKIA CORPORATION BY MICROSOFT CORPORATION

In September 2013, Microsoft announced its intention to acquire substantially all of Nokia's devices and services business in what is viewed as an attempt by Microsoft to increase its offering in the mobile phone market. The South African leg of this transaction was considered by the Competition Tribunal (Tribunal) on 19 February 2014 and was subsequently unconditionally approved.

The Competition Commission's recommendation and the Tribunal's decision is in line with the position taken in other jurisdictions that have concluded that this transaction is unlikely to raise competition law concerns (as there are many strong competitors active in the market, such as Apple and Samsung).

The Tribunal specifically noted that there is no horizontal overlap as Microsoft is primarily involved in the design, development and supply of computer software and hardware devices and related services, where Nokia is active in the development and supply of mobile handsets, telecom networks and location services. The vertical relationship between Microsoft and Nokia was considered in respect of the provision of operating systems, development of apps, consumer communication services, email services and smartphones and the Tribunal concluded that the transaction is unlikely to result in input or customer foreclosure in respect of these services and, in addition, based on an existing partnership agreement between Nokia and Microsoft, the transaction does not present a new incentive to the merging parties to foreclose rivals from using patent licenses.

This transaction has most notably also been approved by the US Department of Justice early in December 2013 and shortly thereafter by the European Commission.

Leana Engelbrecht

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COMMISSION REFERS FISHING COLLUSION INVESTIGATION

On 19 March 2014, the Competition Commission (Commission) referred the findings of its investigation into conduct by fishing companies that operate in the market for the supply of horse mackerel (both locally and for the export markets) to the Competition Tribunal (Tribunal).

The Commission alleges that the parties entered into a suite of agreements to allocate territories and/or customers. Notably, the investigation was initiated by the Commission in March 2011, taking a period of three years of investigation before referral. One of the firms involved in the conduct concerned has been granted corporate leniency for being first to confess involvement in the conduct. Whether the remaining respontent facing a potential administrative penalty of up to 10% of its annual turnover will elect to settle the matter before the Tribunal imposes a penalty remains to be seen.

In the context of this referral, the acting Commissioner, Tembinkosi Bonakele stated that "*this referral is yet another confirmation of the correctness of our focus on food and agro processing, a sector that has a direct impact on consumers.*"

Lerisha Naidu

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