DLA CLIFFE DEKKER HOFMEYR

COMPETITION

ALERT

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IN THIS ISSUE

NEW APPOINTMENTS AT THE COMPETITION COMMISSION

Cliffe Dekker Hofmeyr congratulates Mr Makgale Mohlala on his appointment as Divisional Manager of the Cartels Division of the Competition Commission and Mr Mava Scott on his appointment as Spokesperson of the Competition Commission. Cliffe Dekker Hofmeyr wishes them a prosperous career in their new positions.

ARE MERGER RELATED EMPLOYMENT CONDITIONS STIFLING THE REALISATION OF EFFICIENCIES?

In the merger transaction between Bucket Full Proprietary Ltd (part of the Caxton group) as the acquirer and the Cartons & Labels Business of Nampak Products as the target, the Competition Tribunal has once again attached a condition relating to employment as part of its consideration of public interest issues.

The two year moratorium imposed by the Tribunal essentially prevents the merged entity from retrenching any employee as a result of the merger. The irony is that the very reason for the merger is the general decline in the carton and label industry with the resultant operational and pricing pressures having already forced a number of industry players to either consolidate their operations or undertake radical rationalisation. The merger will enable the acquiring group to leverage its expertise and experience in the paper and board market to achieve economies of scale and thus realise efficiencies within the Cartons & Labels Business, but any job losses as a result of the merger may not be permitted for a two year period. Absent the merger, both parties would be entitled to reduce employment numbers for operational reasons in terms of the Labour Relations Act.

There is no doubt that the competition authorities are often faced with the difficulty of attempting to harmonise the promotion of consumer welfare through cost saving against job losses

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occasioned by retrenchments, however one has to deliberate whether this protective stance of the competition authorities insofar as employment is concerned is not dampening the realisation of efficiencies and synergies which should naturally arise from a merger.

What seems to be a clearly emerging trend is that every merger transaction which has any negative effect on employment will be extremely closely scrutinised by the competition authorities and may result in conditions being imposed. These transactions are also likely to take significantly longer to investigate and be decided.

Natalie von Ey and Kitso Tlhabanelo

HIGH COURT DECIDES ON NETCARE'S CONCERNS REGARDING HEALTHCARE INQUIRY

The High Court, on Friday, released its judgement in respect of the on-going conflict of interest dispute between Netcare Hospital Proprietary Limited, KPMG Services Proprietary Limited and the Competition Commission. Netcare claimed that KPMG cannot act as a service provider to the Commission in respect of the Commission's inquiry into the private healthcare market. Netcare claimed that KPMG would, in acting for the Commission, breach its fiduciary duty of loyalty towards Netcare (an erstwhile client of KPMG) and that this would constitute a conflict of interest.

In essence, Netcare's concern was that the Commission, through KPMG would (if it has not already) obtain access to confidential information of Netcare, including cost, pricing and margin information, which would be relied on by the Commission during the course of its market inquiry to the detriment of Netcare.

Netcare, in October 2013, brought an urgent application to interdict KPMG from disclosing its information to the Commission, which was settled between the parties. In terms of this settlement KMPG's systems were to be purged of Netcare's information. A dispute arose in respect of whether the order was in fact complied with and Netcare brought an application for amended relief including interdicting KMPG and, alternatively, certain KPMG employees from assisting the Commission.

The Court found that the relationship between KPMG and Netcare ended prior to KPMG being officially appointed by the Commission to assist with the healthcare inquiry. Accordingly, once the relationship between KPMG and Netcare ceased, KPMG no longer had a fiduciary duty towards Netcare, save for retaining confidentiality over Netcare's information. The Court found that Netcare was not able to establish that it had a *prima facie* right which was intruded on through KPMG's engagement with the Commission.

The Court further found that Netcare did not establish a well-grounded apprehension of irreparable harm as the risk of disclosure of its confidential information was not imminent as

(i) any information still held by KPMG is protected by contractual undertakings of non-disclosure in the favour of Netcare;

(ii) the Commission provided undertakings that it would not request KPMG to divulge confidential information; and

(iii) the Commission has statutory powers that would enable it to obtain the information through legitimate means should it wish to have access to it (either through Netcare's voluntary participation in the healthcare inquiry or by virtue of a subpoena).

The Court determined that the balance of convenience was in the Commission's favour as granting the interdict would result in delays that may result in the Commission not meeting the deadline for the conclusion of the healthcare inquiry by virtue of the Commission having to find an alternative service provider with comparable resources to assist it.

Ultimately, the court found Netcare would be able to claim for breach of contract in the event that KPMG disclosed its information and that the relief sought by it was not appropriate in the circumstances.

Leana Engelbrecht

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FINAL STATEMENT OF ISSUES AND GUIDELINES FOR PARTICIPATION IN HEALTHCARE INQUIRY PUBLISHED

The Competition Commission published the final Statement of Issues and Guidelines for Participation in the Market Inquiry into the Private Healthcare Sector.

The Commission in November 2013 announced that it would conduct a market inquiry into the private healthcare sector. This announcement was made soon after the Commission was granted increased powers in respect of conducting market inquiries by virtue of the Competition Amendment Act, 2009 coming into force. The Commission's inquiry is limited to that portion of the healthcare services market that is funded by private patients through direct payments, medical schemes, insurance or out-of-pocket payments. The Commission, in its Statement of Issues, identified the financing of healthcare, providers of healthcare services and healthcare consumables as the three broad categories of this market which it will focus on for purposes of this market inquiry.

The Statement of Issues sets out the initial views of the Commission of the appropriate framework for conducting the marketing inquiry as topics for consideration, although this can change during the course of the market inquiry. In its Statement of Issues the Commission identifies certain theories of harm of conduct in these markets that may result in a lessening or prevention of competition and in assessing these theories focus on consumers, healthcare financers and healthcare service and product providers. This assessment includes probable concerns relating to access to information om respect of healthcare services by consumers, the price, quality and availability of healthcare services and also the relationship between consumers, healthcare providers, healthcare insurance providers, brokers and medical schemes. The Commission will also focus on existing regulatory frameworks in the healthcare market relating to the financing of healthcare and the structures in which healthcare providers themselves operate. Although the private healthcare market is the primary focus of the inquiry, the Commission also intends to inspect the relationship between the private and public healthcare markets.

The purpose of the Guidelines is to assist the Inquiry Panel and stakeholders in respect of the conduct of the market inquiry and provide the rules for engagement in the market inquiry. In terms of the Guidelines, stakeholders are invited to participate in the market inquiry through written and oral submissions and, in some instances, requests for information from the Commission. Oral submissions will take place in an open forum during public hearings and written submissions will be publically available although stakeholders may claim information as confidential to prevent its disclosure to third parties

The most notable change to the Guidelines is that the Commission will no longer periodically produce progress reports in the course of the inquiry in order to inform the public of the progress and direction of the inquiry. In the initial draft of the Guidelines provision was made for these progress reports, which were proposed to be provided in addition to the provisional report to be published on the findings of the inquiry. Nevertheless, the Commission stresses its commitment to transparency and openness and the Guidelines still provide for preliminary observations and relevant information to be published by the inquiry panel during the course of the inquiry as and when the panel considers it appropriate to facilitate public participation and constructive comment.

The Commission has further called for submissions from stakeholders that wish to participate in the healthcare inquiry and participants have until 31 October 2014 to make submissions to the Commission.

Leana Engelbrecht

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THE COMPETITION COMMISSION RETRACTS AND CORRECTS TERMS OF REFERENCE FOR LPG MARKET INQUIRY

The Competition Commission, on 15 August 2014, retracted the terms of reference it published in June this year announcing that it intended undertaking a market inquiry into the LPG market. It simultaneously published corrected terms of reference for the inquiry, on the basis that *"The Commission noted a few errors in the background sections which provided an overview of the LPG sector"* (according to a media release issued by the Commission).

Importantly, the terms of reference now follow the prescripts of the Competition Act by giving the required 20 business days' notice before the commencement of the inquiry (this was not done in the previous terms of reference). The inquiry will now commence on 15 September 2014 and the Commission anticipates that it will be concluded by March 2016.

Although the ultimate scope of the inquiry remains largely the same as before, the new document also now refers to autogas (where LPG is used in motor vehicles as an alternative to conventional fuel) and gas reticulation to residential developments, as industries which form part of the LPG sector under consideration.

Albert Aukema

COMPETITION COMMISSION CONCLUDED CONSENT AGREEMENT WITH BRITISH AIRWAYS PLC

The Competition Commission has fined British Airways Plc (BA Plc) R21,7 million for colluding with Virgin Atlantic Airways Limited (Virgin Atlantic) to fix a component of ticket prices on passenger flights between United Kingdom and South Africa.

The Commission initiated an investigation against BA Plc and Virgin Atlantic in 2008 in respect of alleged price fixing of fuel surcharges. Pursuant to its investigation, the Commission found that during August 2004 to January 2006, BA Plc and Virgin Atlantic coordinated their pricing in relation to their respective fuel surcharge rates in the international market for passenger airline services. This conduct was facilitated through the exchange of pricing and other commercially sensitive information. The Commission found that this conduct was in contravention of section 4(1)(b)(i) of the Competition Act and referred the matter to the Competition Tribunal for adjudication.

BA Plc subsequently entered into a settlement agreement with the Commission. As part of the settlement agreement reached, BA Plc admitted to participating in the prohibited practice, agreed that in future it will refrain from engaging in the same conduct and initiated a compliance programme designed to ensure that all relevant employees and directors comply with the obligations under the Competition Act.

In 2012, BA Plc reached a similar settlement agreement with the Commission after British Airways World Cargo (BAWC), a division of BA Plc, exchanged commercially sensitive information with various other air cargo carriers. The exchange of information resulted in fixing the price of fuel surcharges in the international market for air freight and/or cargo services. This conduct attracted an administrative penalty of GBP871,116.50.

Nazeera Mia

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B&E AND CYCAD PIPELINE SETTLEMENTS

Further to the receipt of settlement applications made in the context of the fast-track invitation to the construction industry to settle collusive conduct on favourable terms, 21 firms disclosed conduct to the Commission. In consequence, 15 of the 21 responding firms entered into (within the context of the fast-track invitation) settlement agreements with the Commission, which were confirmed as orders of the Tribunal in July 2013.

The 21 responding firms that disclosed conduct pursuant to the fast-track process implicated an additional 25 firms that had not responded to the Commission's invitation at all. Accordingly and since July 2013, the Commission has been engaging with those remaining implicated firms in a "Phase 2" process, with some of these firms electing to enter into settlements outside the fast-track process. For example, B&E International Proprietary Limited (in July 2014) and Cycad Pipelines Proprietary Limited (in August 2014) concluded settlements with the Commission on ostensibly less advantageous terms than would have been agreed if the conduct concerned formed the subject matter of settlements reached during the fast-track process. There are some firms that are in continuing discussions with the Commission over "Phase 2" settlements. For example, Group Five is reported to be engaging with the Commission in respect of four outstanding matters that did not form the subject of settlement under the fast-track invitation.

Where settlement is not reached with such firms, the Commission is likely to refer the matters for adjudication before the Tribunal.

Lerisha Naidu

NEW CLARITY IN MERGER CONTROL

In the recent merger involving Tiger Equity and Murray & Roberts (Tiger Equity), the Competition Tribunal held that a SPV owned by six minority shareholders, none of which owned a stake exceeding 28% (the equity spread was 9%, 6%, 5%, 26%, 26% and 28%) is not jointly controlled as was contended by the Competition Commission.

Under the merger control provisions of the Competition Act, the identity of the controllers of a business is relevant for two purposes: (1) to determine the classification of the merger as small, intermediate or large; and (2) to identify and define the scope of the competition impact of the merger.

In Tiger Equity, the Memorandum of Incorporation and Shareholders Agreement entitled each shareholder to appoint a director to the board of the SPV, with a voting entitlement in proportion to the appointing shareholder's equity. The business of the SPV was determined by an ordinary majority, but certain governance issues required a voting majority of no less than 70%. The spread of the shares was such that: (1) no two shareholders could achieve the 70% vote; (2) any two of the three larger shareholders could determine the ordinary business of the SPV; and (3) no single shareholder could block an ordinary or special resolution. Nothing obliged the shareholders to work together in respect of the business of the SPV.

The Tribunal confirmed the possibility that all the shareholders of the SPV may vote together, but absent an agreement to do so, is not sufficient to constitute joint control. Joint control can also not be inferred merely because a special majority on the SPV's governance had been arranged. This is in line with the approach of the European Union (EU) that *"the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control"*.

Interestingly in Tiger Equity, the 28% shareholder of the SPV was a subsidiary of the financier of all of the shareholders' loans and the guarantor to the seller of the target firm. The 28% shareholder also held a significant minority stake in each of the holders of a 26% stake in the SPV. The question on whether this may constitute sufficient material influence over the SPV to constitute control as meant under section 12(2)(g) of the Competition Act was neither considered nor decided by the Tribunal. However, the Tribunal's mention of this set of facts, points to a keen awareness that such structural and financial linkages may have competition relevance.

A decade ago, in the merger involving Business Venture Investments and Afrox, the Tribunal cast a prospective minority shareholder as a controller of the target company, where the minority shareholder had the right to appoint legal and other advisors to transaction; was a grantor of the loan capital

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had the right to appoint legal and other advisors to transaction; was a grantor of the loan capital and had control over key competitive, financial and operational decisions.

The decision of the Tribunal in Tiger Equity is to be welcomed in that it focussed on the actual facts of the matter in determining the identity of the controller of a firm, as well as providing some insight on the importance for business and advisors being vigilant of changes in the governance structure of a firm, which may have relevance under the Competition Act.

Petra Krusche and Nazeera Mia

COMMISSION CONCLUDES COLLABORATION AGREEMENTS WITH REGULATORS

The Competition Commission concluded cooperation agreements with the Auditor General of South Africa (AGSA) and the North West Gambling Board (NWGB), respectively.

The Commission, as one of its statutory functions, may conclude agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within a relevant industry or sector and to ensure the consistent application of the principles of the Competition Act, 89 of 1998.

The NWGB, in terms of its empowering provincial and national legislation, must consider the competition when considering an application for a licence or an application for the transfer of a licence. Consequently, the NWGB and the Commission have concurrent jurisdiction over these matters of competition (as the Commission is generally tasked with assessing competition in markets in respect of which it is investigating a complaint of prohibited practices or an abuse of dominance, considering an exemption application, or considering whether to approve a proposed merger). It is specifically in respect of these issues which the NWGB and the Commission will cooperate and exchange information (subject to the processes and restrictions agreed upon in terms of the Memorandum of Agreement concluded between the parties. A similar agreement was concluded between the Commission and the National Gambling Board in 2011.

The Memorandum of Understanding between the Commission and AGSA also aims at enhancing cooperation between the parties, but is aimed at *"clarifying the specific mechanisms through which the oversight role of AGSA can find concrete expression in the fight against fraud and corruption."* To that extent the parties indicate that the agreement lays the basis for complementing each of their respective legal mandates and to share technical information and expertise. It appears that the Commission and AGSA aim to collaborate in respect of collusive tendering in public procurement to the extent that such conduct may constitute fraud and corruption. This marks a different slant to cooperation agreements with the Commission, which have previously predominantly been concluded with regulators that exercise concurrent jurisdiction in respect of assessing competition when making decisions in respect of its statutory functions (such as in the instance of the cooperation agreement concluded with the NWGB).

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