COMPETITION

IN THIS ISSUE

COMPETITION COMMISSION INVESTIGATES AUTOMOTIVE INDUSTRY

The Competition Commission (Commission) recently announced that it is investigating various instances of collusive conduct in the market for the manufacture and supply of automotive components used to manufacture motor vehicles.

The Commission is investigating alleged price fixing, market division and collusive tendering by the manufacturers of various vehicle parts, including electric power steering and motors, glow plugs, pressure regulators, accelerator pedal modules and spark plugs.

The Commission indicated that it has information in its possession of collusive conduct taking place from 2000 up to date, with 82 vehicle part manufacturers being implicated in such conduct in respect of the supply of over 121 different parts to motor vehicle manufacturers such as Toyota, Daihatsu, Nissan, Isuzu, General Motors, Hyundai, Yamaha, Volvo, Mazda, Mitsubishi and Ford.

The Commission is currently only investigating this conduct and there is no indication of whether the Commission will proceed to refer this collusive conduct to the Competition Tribunal for adjudication in the near future or at all.

The Commission has extensive powers at its disposal during an investigation to assist it in determining whether collusive conduct has in fact taken place and to formulate its case against parties that have transgressed the Competition Act, No 89 of 1998.

This includes summonsing parties to be interrogated by the Commission and to provide the Commission with relevant information and documentation and conducting search and seizure operations (referred to as dawn raids) to obtain information that may be relevant to its investigation.

Leana Engelbrecht

CROSS-SHAREHOLDINGS IN THE CEMENT INDUSTRY

Although the Competition Act, No 89 of 1998 (Act) contains no express prohibition on cross-shareholding, the Competition Commission (Commission) is intent on ensuring that the possible anti-competitive consequences of cross-shareholding are given express attention through the case law.

Earlier this month, the Commission conditionally approved a merger involving two cement producers, Holcim Limited (Holcim) and Lafarge SA (Lafarge). Holcim, previously active in the South African cement market had exited a few years ago, save for an interest held in local cement producer, Afrisam Proprietary Limited (Afrisam). In order for Holcim to acquire Lafarge, the Commission required that Holcim divest of its interest in Afrisam within a period of three years after approval of the merger.

The Commission's investigation revealed that, as a result of its interest in Afrisam, Holcim was in possession of competitively sensitive information and information that a firm would not ordinarily have about its competitor's business. If the merger were to be approved unconditionally, Holcim would be in possession of sensitive information for both Afrisam and Lafarge, its competitor firms.

The Commission's concern was that post-merger, the cross-shareholding would create a platform for tacit collusion in the cement industry, which was previously riddled with collusion, and this potential anti-competitive conduct would be compounded by the high concentration level and high barriers to entry in the industry. Accordingly, the Commission approved the merger on condition that Holcim divest of its shareholding in Afrisam.

Cross-shareholdings in competitor firms can create an element of transparency and shareholder meetings could provide a forum for active coordination. Where cross-shareholdings result in a firm providing a competitor with information relating to its future pricing, allocation of markets,

continued

DLA CLIFFE DEKKER HOFMEYR

or, tender price, this conduct could amount to collusion. However, firms subject to cross-shareholding may also exchange competitively sensitive information more subtly, increasing transparency and reducing market uncertainties in relation to future competitive conduct.

Similarly, cross-directorships may be perceived by competition authorities to also be concerning. In the merger involving Momentum Group Limited and African Life Health Proprietary Limited (ALH Merger), the Competition Tribunal expressed its distaste for interlocking directorships between rival firms and emphasised that the question will always justify proper scrutiny as a result of the opportunity or temptation that exists to violate the competition legislation as a result thereof. Nonetheless, the Competition Appeal Court in the ALH Merger found that cross-directorships at a holding company level are far less likely to attract competition law scrutiny than would be the case at operating company level. This is because the kind of information generally considered at holding company level encompasses issues of financial and investment policy, corporate governance and so forth. In contrast, where decisions relate to the day-to-day control/ operations of the businessess, the risk of collusion is far greater.

Nazeera Mia

SETTLEMENTS WITH FURNITURE REMOVAL SERVICE PROVIDERS

Cover pricing is a practice in terms of which a firm, in response to an invitation to tender, submits a fictitious, higher bid by agreement with its competitor to deliberately lose a tender, thereby ensuring that the competitor with whom the agreement is struck is the successful bidder.

These arrangements were found to be a widespread form of anti-competitive conduct that characterised tendering for projects in the construction industry. This form of collusive tendering has formed the basis of a number of recently concluded consent agreements between construction firms and the Competition Commission (Commission), in terms of which firms furnished admissions of their involvement in such arrangements.

As indicated by the Competition Commissioner, cover pricing provides "a false impression of a fair competitive bidding process" and is collusive in nature.

In a recent settlement with the Commission, which was made an order of the Competition Tribunal on 8 October 2014, certain furniture removal companies admitted to engaging in cover pricing arrangements in contravention of the Competition Act, No 89 of 1998 (Act). In terms of the arrangement, a furniture removal company that was first contacted to provide a quotation would offer to source additional quotations on behalf of the customer and would thereafter request its competitors to submit quotes as cover prices. Put differently, the firms would agree on the intended outcome of the tender and would seek to manipulate the outcome accordingly (by way of the submission of fictitious cover bids). The Commission's investigation revealed that this constituted collusive tendering, in contravention of the Competition Act, specifically, s4(1)(b)(iii). The firms concerned agreed to pay a penalty of 10% of its annual turnover for the relevant financial year.

This case (as with previous settlement agreements concluded with construction firms) suggests that cover pricing (which requires broad co-operation among market participants to succeed) may often be a pervasive practice that characterises industry-wide commercial dealings in certain markets. This case serves to emphasise that cover pricing ought to be steadfastly guarded against as the competition authorities regard the conduct to be egregious.

Lerisha Naidu and Kitso Tlhabanelo

COMPETITION COMMISSION APPROVES SANITARY AND PLUMBING WARE MERGER LIKELY TO BRING SUBSTANTIAL FOREIGN DIRECT INVESTMENT

The Competition Commission (Commission) recently announced its unconditional approval of Grohe Luxembourg Four S.A (Grohe) acquisition of joint control over South African based Apex Valves South Africa (Pty) Ltd, Cobra Watertech (Pty) Ltd, Isca (Pty) Ltd, Libra Bathrooms (Pty) Ltd, Vaal Sanitaryware (Pty) Ltd and Expiro Manufacturing (Pty) Ltd (Watertech Companies).

Grohe forms part of an international group of companies, incorporated in Luxembourg. As is customary with transactions involving international firms gaining entry into the South African market (via greenfield entry or acquiring control over locally incorporated firms), concerns arise on whether the entry can give rise to public interest concerns. Given that the Commission is mandated to consider the competitive effects of a potential merger, as well as its impact on public interest, the Commission considered whether the merger may result in the Watertech Companies shifting production from South Africa to factories owned by the Grohe group of companies in other parts of the world, most notably China, as this could have the potential of reducing the Watertech Companies' local manufacturing and affect firms that provided inputs into the Watertech Companies' production activities, thus leading to concomitant job losses across the value chain.

In response to these concerns, the merger parties provided the Commission with strategy documents confirming its intention to grow the manufacturing base in South Africa for exports and indicating its commitment to maintaining and increasing current manufacturing levels and continuance of arrangements to procure inputs from local suppliers.

The acting Deputy Commissioner, Hardin Ratshisusu, commented that the merger *"is a significant transaction as it translates into substantial foreign direct investment intended to grow exports into the rest of the African continent and globally. The undertaking provided by the merging parties to increase production of sanitary and plumbing ware products in South Africa addresses any potential public interest concerns that would have arisen as a result of the merger".*

Nazeera Mia

COMMISSION GRANTS CONDITIONAL EXEMPTION TO THE NATIONAL HOSPITAL NETWORK

The National Hospital Network (NHN), a network of independently owned private hospitals earlier this year 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).

The NHN sought an exemption in respect of tariff negotiations between it and medical schemes and medical scheme administrators and collective bargaining agreements which would constitute price fixing, which is *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 businesses and firms controlled by historically disadvantage persons to become competitive in the context of a market that is notoriously difficult to function in.

The Commission has granted the exemption for a period of four years commencing on 1 January 2014 (as opposed the 5 year exemption sought by the NHN), subject to the NHN annually submitting relevant information to the Commission to enable the Commission to monitor the impact of the measures taken to meet the objective of the exempted conduct (ie whether the conduct, in fact, promoted the ability of small business and firms controlled by historically disadvantaged persons to become competitive).

The Commission has on two previous occasions granted similar exemptions to the NHN and, in this instance, indicated that it found that the exemption of this conduct has assisted the members of the NHN to effectively negotiate prices and compete with the three large incumbent hospitals in the market, resulting in the members of the NHN gaining market share in the last five years.

The Commission further acknowledges that the inquiry into the private healthcare market is likely to provide them with additional information to be able to assess the market in more detail, although, it is not clear to what extent the healthcare inquiry, in fact, informed the Commission decision in this instance.

Leana Engelbrecht

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

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

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

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

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

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

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

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

cliffedekkerhofmeyr.com

DLA CLIFFE DEKKER HOFMEYR