DLA CLIFFE DEKKER HOFMEYR

COMPETITION

ALERT

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DUNLOP GETS FINED FOR PRIOR IMPLEMENTATION OF MERGER

In September 2010, Dunlop Industrial Products Proprietary Limited and Rema Tip Top Holdings South Africa Proprietary Limited notified the Competition Commission of a transaction, as required in terms of the Competition Act, No 89 of 1998.

During its investigation, the Commission established that the merging parties had engaged in activities that constituted the implementation of a compulsorily notifiable transaction without the requisite approval having been obtained, this being in contravention of the Act. In particular, the Commission found that, amongst other things, a senior executive of the acquiring firm had been engaging in the day-to-day operations of the target firm and the merging parties were already marketing themselves as a single entity. Against this background, the parties conceded to the allegations of prior implementation levelled by the Commission and agreed to pay an administrative penalty of R500 000.

Typically, administrative fines have been levied by the authorities in respect of failures to notify transactions to the Commission at all. However, this case demonstrates that, even after notification, the risk of exposure to an administrative penalty still exists if a transaction is implemented prior to approval being obtained. Merging parties should therefore take care to ensure that its conduct is not construed as a form of prior implementation during the course of the Commission's investigation into the notified transaction.

Lerisha Naidu and Kitso Tlhabanelo

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COMPETITION COMMISSION RAIDS AUTO BODY FIRMS

On 4 July 2014, the Competition Commission raided the offices of three auto body firms as part of its investigation into collusive conduct in the market for auto body repairs.

The Commission may conduct dawn raids on firms where it has reasonable grounds to believe that a prohibited practice is taking place or that information or documents relevant to an on-going investigation is at the premises being raided and subject to obtaining (in most instances) a warrant to conduct the search and seizure operations.

The Commission confirmed that these dawn raids were conducted lawfully and the requisite warrants approving the search and seizure operations were obtained.

This dawn raid marks the second dawn raid publicly conducted by the Commission this year, the first being dawn raids on Unilever and Sime Darby Hudson & Knight in respect of the Commission's investigation into the market for the manufacture and supply of edible oils and margarine, which took place in April 2014. This raid adds to the small yet growing list of the hand full of dawn raids conducted by the Commission since its inception.

Leana Engelbrecht

SIXTEENTH CONSTRUCTION FIRM SETTLES WITH THE COMPETITION COMMISSION

As part of the Competition Commission's fast-track settlement procedure in the construction industry the Commission invited construction firms that were involved in collusive conduct to apply to engage with the Commission on settlement terms.

In response to its invitation, the Commission received settlement applications from twenty one firms. The settlement applications implicated a further twenty five firms that had not responded to the invitation. Harding Allison Close Corporation (Harding Allison) was one of the twenty five firms that was implicated by the settlement applications.

On 18 June 2014, a date which is more than three years following the Commission's invitation and almost a year after the Competition Tribunal (Tribunal) confirmed fifteen consecutive settlement agreements between the Commission and fifteen firms in the construction industry, the Tribunal confirmed its sixteenth settlement agreement in this matter. As part of the settlement agreement, Harding Allison admitted to collusive tendering with Group Five by agreeing on a cover price in respect of a project for the building of premises for Renault Motor Company in Umhlanga.

Harding Allison agreed to pay an administrative penalty of R78,821.94, which represents 2% of its annual turnover for 2009.

Kayley Keylock

EXCEPTION APPLICATION BY CAPE GATE (PROPRIETARY) LIMITED

On 25 July 2014, the Competition Tribunal issued its reasons for dismissing the exception application brought by Cape Gate (Proprietary) Limited (Cape Gate) against a complaint referral lodged by the Competition Commission in August 2013.

In the referral, the Commission alleged that Cape Gate (together with other respondents) contravened s4 of the Competition Act, No 89 of 1998 (Act) by entering into an agreement or engaging in a concerted practice to fix the purchase price of scrap metal in South Africa. In particular, the Commission contended that the parties operate as a buyer's cartel in the market for the purchase of scrap metal. The Commission's referral papers indicate that the respondents adopted interrelated mechanisms to coordinate the purchase of scrap metal, including engagements and related agreements with scrap merchants.

On 2 October 2013, Cape Gate filed an exception application on the grounds that the Commission's referral was contradictory, vague and embarrassing and lacked essential averments necessary to sustain a complaint.

In respect of the allegation that the referral lacked the averments necessary to sustain a complaint, it was argued by Cape Gate that, for a complaint to be sustained under s4(1)(b) of the Act, it must be

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alleged that the relevant parties are in a horizontal relationship (ie that a competitive relationship exists between the parties). Cape Gate argued that the allegations of the Commission were unsustainable on this basis as the implicated parties (being scrap customers and scrap merchants) operate at different levels of the supply chain and, as such, could not properly be categorised as competitors. On this issue, the Tribunal refrained from determining whether the Commission's case was unsustainable for want of establishing the presence of a competitive relationship between the parties. The Tribunal found that to express a view on the presence or otherwise of a horizontal relationship, evidence would need to be led to understand the relationship between the respondents and scrap merchants. The Tribunal therefore dismissed the application for this reason (among others).

This case is a reminder that, while exception applications are procedural in nature and are designed to ensure that respondents are apprised of the case against them, the success of such applications often turns on a substantive assessment of the merits of the matter (and a concomitant consideration of all available evidence). In such case, the Tribunal appears to be disinclined to find in favour of applicants where a full ventilation and consideration of the facts and evidence has not occurred.

Lerisha Naidu

EXEMPTION APPLICATION SOUGHT FOR PROFESSIONAL RULES

The Council for Built Environment (CBE) acting on behalf of the Engineering Council of South Africa (ECSA) has applied to the Competition Commission to be exempted from certain provisions of the Competition Act, No 89 of 1998 (Act) that outlaw prohibited practices.

The exemption application relates to certain professional rules of ECSA in term of which work that may be undertaken by engineers are identified and regulated. The CBE asserts that this exemption is necessary to maintain professional standards or the ordinary function of the profession and, in addition, certain legislative provisions of the Council for Built Environment Act, No 43 of 2000 (CBE Act) requiring cooperation between CBE and the Commission.

Schedule 1 of the Act allows for the exemption of the rules of professional associations by the Commission, where such rules have the effect of substantially preventing or lessening competition but are reasonably required to maintain professional standards, or the ordinary function of the profession.

In June 2014, the ECSA (amongst other firms), applied for the exemption of the fee guidelines published by it (which effectively constitute price fixing) and the Commission's decision in respect of this exemption remains pending.

Previously, various professional bodies have relied on this provision of the Act to apply for the exemption of their professional rules, which usually are perceived to have the effect of lessening or preventing competition in a market. Most notably, the Health Professions Council of South Africa has unsuccessfully applied for exemption from the application of the Act in respect of certain of their professional rules. Subsequently, a private complainant has taken a complaint against the Health Professions Council of South Africa and Professional Board of Optometry to the Tribunal alleging that their professional rules, specifically those rules that prohibit lay ownership and investment in the business of a health professional, are anti-competitive. The Tribunal has not, yet, released its decision in respect of this complaint.

It is clear that the professional rules are recognised as being capable of having an anti-competitive effect in the markets that are subject to these rules. Nevertheless, the competition authorities' approach is in no way clear, with the Commission being overall reluctant to grant exemptions under Schedule 1 of the Act and professional bodies, as a result, experiencing great uncertainty as to the permissibility of their professional rules.

Leana Engelbrecht

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SQUID EXPORTERS RECEIVE COMPETITION LAW EXEMPTION

The Competition Commission recently granted an association of squid export firms exemption to share information on the export of Loligo Reynaudi, locally known as Chokka squid. The exemption is positive news for squid exporters and the local fishing industry which has fallen on hard times.

South African squid is not intended for local consumption and is exported mainly to Europe. Even though year-on-year, the entire catch of squid is exported, South African squid still makes up a negligible portion of this global resource.

In recent years, squid catches in South Africa have been at an all-time low. In an already depressed environment, exporters were faced with challenging market circumstances where, amongst others, customers would challenge exporters on their quoted price based on claimed market information. Due to an absence of credible and current market information, exporters were unable to make informed business decisions.

Whilst the Commission found that exemption is necessary to promote and maintain squid exports and that exemption would lead to pro-competitive outcomes, it set stringent conditions which need to be met before information can be shared. These conditions relate amongst others, to the types of information shared, time periods for sharing and the method of sharing. Information shared between competing exporters will thus be on a strict basis only and up-to-date records of any exchanges will need to be kept.

The granting of exemption under the Competition Act, No 89 of 1998 (Act) can be difficult to achieve, as it can only be considered on four public interest grounds, in line with the purpose of the Act. It is also one of the corner stones of the Act to guard against collusive conduct which essentially results in collusive outcomes. Agreements to collude are prohibited outright in terms of the Act and firms engaged in anti-competitive conduct may not offer any justification for their conduct, however well-intended it may be.

An agreement could facilitate express or tacit collusion through the sharing of competition sensitive information. These situations typically arise where information shared increases transparency and firms could become better acquainted with the market strategies of their competitors. A collusive environment could be fostered through the exchange of relevant information.

However, information sharing can also generate a number of pro-competitive results. It solves problems of information asymmetry from a supply and demand perspective, helps firms to manage inventories and is helpful in dealing with unstable markets. Information sharing of aggregated data is unlikely to be problematic from a competition perspective, as they have a limited coordinating effect, but can still be usefully employed to benchmark performance. Similarly exchanges of historical information or publicly available information and information dissemination on legal and regulatory requirements are generally not viewed as problematic.

In granting the exemption to squid firms, the Commission was cognisant that the exemption would generate pro-competitive effects for South Africa in a global market and demonstrates that competition policy in a complex area of information exchange needs to be considered carefully so as not to discourage pro-competitive information sharing.

Cliffe Dekker Hofmeyr represented the squid exporters in bringing the exemption application to the Commission.

Petra Krusche and Nazeera Mia

SOUTH AFRICA: RETRENCHMENT OF EMPLOYEES IN THE CONTEXT OF MERGERS AND ACQUISITIONS

One of the ways in which the Competition Act, No 89 of 1998 (Act) differs from similar legislation in other jurisdictions is the inclusion of, what has been termed, an unusually explicit public interest test for purposes of merger evaluation criteria.

The South African competition authorities' role should be understood in light of the purpose of the Competition Act, namely to encourage and maintain competition in South Africa to, amongst others, promote employment and advance the social and economic welfare of South Africans. The Competition Act specifically requires the competition authorities to

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consider, regardless of the outcome of the traditional competition enquiry, whether a merger can or cannot be justified on public interest grounds, including the effect that a merger will have on employment.

The Competition Commission recently conditionally approved a merger in the steel pipe industry. In its analysis of the possible effects of the merger on employment, the Commission found that the target firm had endured poor financial performance over the past three years and that, irrespective of the merger, approximately 285 jobs were going to be lost (retrenchment letters had already been served on these employees prior to the merger). The Commission engaged with both the trade unions representing the employees of the target firm and the merger parties on the employment effects of the transaction. The parties subsequently agreed to reduce the number of retrenchments to only 95 employees. Considering the counterfactual, the merger thus resulted in a saving of 190 jobs.

The conditions only applied for a period of two years from the effective date of the transaction and did not apply to voluntary retrenchments and/or separation agreements, voluntary early retirement packages and unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act, No 66 of 1995 (LRA).

Strangely, the conditions to the merger approval required the parties to ensure that the number of retrenchments "as a result of the merger" did not exceed 95, in line with the principle that the competition authorities may only interfere in employment issues within the scope of their statutory mandate encapsulated in the public interest test. However, the Commission's reasons specifically record that the job losses would not be the result of the duplication of roles but rather due to the financial predicament of the target firm, which appeared to exist regardless of the merger.

Typically, job losses in mergers occur as a result of restructuring, duplication of roles or a desire to downsize. In this merger however, job losses appeared to be due to the historical and on-going financial difficulty of the target firm. Thus, notwithstanding the fact that the retrenchments did not appear to be directly as a result of the merger, the Commission saw an opportunity to negotiate a condition with the parties which served to limit the total number of retrenchments for a period of two years from implementation of the merger.

In conclusion, whilst the LRA remains the primary source of protection for employees in South Africa, it is clear that the Commission is intent on vigorously confronting the challenge of employment issues through the merger analysis forum.

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