COMPETITION

IN THIS ISSUE

NEW APPOINTMENTS AT THE COMPETITION COMMISSION

Cliffe Dekker Hofmeyr congratulates Mr Bukhosibakhe Majenge on his appointment as Divisional Manager of the Legal Services Division of the Competition Commission and Ms Wendy Ndlovu on her appointment as Manager in the Office of the Commissioner. Cliffe Dekker Hofmeyr wishes them a prosperous career in their new positions.

CHANGES TO THE COMESA COMPETITION REGIME

Noting the various criticisms levelled against its competition regime, the Common Market of Eastern and Southern Africa (COMESA) Competition Commission (Commission) recently adopted several amendments to its Competition Rules and Regulations.

Significantly, the thresholds for merger notification have been raised and the merger filing fee payable has now been lowered.

While the amendments do not address all concerns raised by business communities, the changes go a long way in winning investor confidence and improving the existing regime.

Revised thresholds for merger notification

Previously, a merger was notifiable to the Commission where the monetary thresholds for merger notification were met (Monetary Thresholds), and where both or either of the parties to the merger operated in two or more COMESA member states (Regional Dimension).

A firm was considered to 'operate' in a member state if it had an annual turnover or value of assets exceeding $5 million in that member state and it was not the case that more than two-thirds of the annual turnover or value of assets were achieved or held within the same Member State. Given that the Monetary Thresholds were set at nil, once a transaction had Regional Dimension, merger notification was required.

The amendments raise the thresholds for notification. A merger is now notifiable where, during the most recent financial year:

- the combined annual turnover or combined gross asset value, whichever is higher, of the merger parties in the COMESA market, equals or exceeds $50 million; and
- the annual turnover or gross asset value, whichever is the higher, in the common market of each of at least two of the parties to a merger, equals or exceeds $10 million. However, in circumstances where each party achieves at least two-thirds of its aggregate turnover or assets in the common market within one member state, a filing will not be required. Nevertheless, a merger filing with the national competition authority, in the implicated member state, may still be necessary.

The revised thresholds are an important amendment to the COMESA competition law. The previously wide ambit for merger notifiability has now been narrowed and there is more certainty as to when a merger is notifiable. In addition, the Commission will no longer need to expend its time and resources assessing transactions of little value, having a negligible effect in the COMESA market.

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Reduced merger filing fee

The merger filing fee previously payable to the Commission was 0.5% of the parties' combined turnover or assets, in the COMESA market, whichever was the higher, capped at $500,000. The capped fee was equivalent to more than R5 million and was considerably higher than the maximum South African filing fee of R350,000.

The introduction of the new amendments sees the filing fee reduced to a capped amount of $200,000 or 0.1% of the parties' combined turnover or assets, whichever is the higher.

While the reduced filing fee offers some relief to investors, it is still difficult to justify the filing fee when you consider that certain national authorities dispute that the Commission ousts their jurisdiction over transactions in member states. Of course, this only applies when such transactions also qualify as COMESA mergers. One of the objectives of the Commission was to become a one-stop shop for all mergers within the COMESA market. The competition regime contemplated a single merger filing to the Commission, substituting filings required by any national authorities. Given that certain national authorities, who impose their own merger filing fees, expressly require that separate notifications be lodged with them, the business community often find themselves having to lodge dual notifications, in order to avoid the statutory risks of failing to notify an otherwise notifiable merger. Until national authorities align their domestic legislation with that of COMESA competition law, businesses have no alternative but to pay merger filing fees to both the Commission and the relevant national authority.

Despite this impracticality, the amendments are welcomed and the COMESA competition regime has moved a step closer to international best practice.

Nazeera Mia and Nonhlanhla Ndlovu

FINAL GUIDELINES FOR DETERMINATION OF ADMINISTRATIVE PENALTIES PUBLISHED

The Competition Commission has published the final Guidelines for Determination of Administrative Penalties for Prohibited Practices (Guidelines). The Guidelines took effect on 1 May 2015. Draft Guidelines were published by the Commission in 2014 and a process of public engagement followed.

Section 79(1) of the Competition Act, No 89 of 1998 (Act) empowers the Competition Commission to prepare guidelines to support its policy approach to matters within its jurisdiction. In this light, the Commission published the Guidelines to provide some clarity on the somewhat contentious matter of penalty calculations for purposes of settlement or referral of prohibited practice matters.

In setting out the Guidelines, the Commission stated that the primary objective was to provide transparency and objectivity when dealing with penalty calculations, however, the Commission also emphasised that the process of penalty calculation is not a precise science and that the Commission may still exercise discretion in arriving at calculations. In addition, the Commission acknowledged that it does not have the final say on penalty calculations as its decisions are subject to approval of the Competition Tribunal and the scrutiny of the Competition Appeal Court and other courts in appeals and reviews.

The Commission's methodology is based on a six-stage test developed in the case of *Competition Commission v Aveng (Africa) Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd (Case No: 84/CR/Dec09)* which was later confirmed by the Competition Appeal Court.
In essence, the six-stage test comprises of the following steps:

(i) the determination of the affected turnover (being the annual turnover derived by the relevant firm in South Africa and exports from South Africa in relation to the market in which the collusive conduct took place) in the most recent financial year in which there is evidence that the relevant firm participated in the contravention;

(ii) the calculation of the base amount by multiplying the affected turnover with a percentage of up to 30% determined with reference to the nature and extent of the contravention, and loss and damage suffered as a result of the contravention and market circumstances;

(iii) multiplying the base amount by the duration of the contravention;

(iv) reducing the amount obtained at step (iii) if it exceeds the statutory limit for an administrative penalty of 10% of total turnover;

(v) a consideration of aggravating and mitigating factors (reflected in a percentage reduction or increase in the administrative penalty); and

(vi) reducing the amount obtained at step (v) if it exceeds the statutory limit.

Some notable features of the Guidelines include:

- where the contravention took place within the auspices of an association of firms, the association will be liable for the payment of an administrative penalty separately from the members of the association. The administrative penalty imposed may not exceed 10% of the association's own turnover or income in the preceding financial year;

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- the affected turnover may include turnover in a market that was protected as a result of the contravening conduct (by virtue of, for example, a market division agreement in terms of which the relevant firm agreed not to participate in a particular market and, in turn, the other participating firms agreed not to participate in a market in which the relevant firm is active in);

- in once-off bid-rigging cases, a successful firm's affected turnover will be considered to be the greater of (i) the value of the bid submitted by the successful bidder; (ii) the value of the contract concluded or to be concluded; or (iii) the amount ultimately paid to the successful bidder pursuant to the tender. The affected turnover of an unsuccessful firm that participated in the collusion will be considered to be the greater of (i) the value of the bid submitted by the unsuccessful bidder; (ii) the value of the contract concluded or to be concluded; or (iii) the amount ultimately paid to the successful bidder pursuant to the tender;

- if a contravention existed prior to the commencement date of the Act, the duration of the conduct will be calculated from 1 September 1999;

- the Commission will assess the degree of co-operation by a relevant firm with reference to (i) the extent to which the firm may have delayed, obstructed or assisted the investigation and litigation process; and (ii) whether the firm co-operated through tangible action to facilitate the speedy resolution of the case;

- the Commission may offer a discount of up to 50% of the administrative penalty calculated based on the six-step methodology when settling with a firm, subject to factors such as the expeditious conclusion of settlement during the early stages of the investigation, providing assistance in the prosecution of other firms by providing timeous, complete and accurate information that corroborates evidence the Commission already has in its possession, and being pro-active in providing assistance to the Commission;

- under exceptional circumstances, the Commission will take into consideration the respondent firm's ability to pay the administrative penalty. The Commission shall be guided by the production of objective evidence such as audited financial statements which can attest to the veracity of the firm's financial position. If the Commission is satisfied that the administrative penalty shall put the respondent firm at risk, then it may consider the use of payment terms amenable to both parties; and

- the Commission may in certain instances impute liability on a holding company where its subsidiary company has been found to have contravened the Act. In doing so, the Commission will consider whether (i) the subsidiary company is wholly owned by the holding company; (ii) the holding company exercises decisive or material influence over the commercial policy of the subsidiary; (iii) the holding company had knowledge of the subsidiary's participation in the contravention; or (iv) the holding company derived substantial benefit from the activities of the subsidiary. Notably, the statutory cap (ie the 10% maximum penalty) for purposes of determining an administrative penalty in instances of imputed liability will be calculated at step four based on the turnover of the subsidiary involved in the conduct, however, at step six (the final and most definitive step in the calculation) the statutory cap will be calculated based on the holding company's consolidated turnover in the preceding financial year.

As mentioned above, the Guidelines are not binding policy determinations and the competition authorities may still exercise their discretion in applying these Guidelines. It remains to be seen whether certain provisions of the Guidelines, such as the imputed liability on holding companies, will pass muster once legally challenged as the Act does not make provision for the such imputed liability (as is the case in other jurisdictions).

Leana Engelbrecht

COMPETITION COMMISSION AMENDS PRACTITIONER UPDATE ON RISK MITIGATION FINANCIAL TRANSACTION

On 10 April 2015, the Competition Commission published a practitioner update relating to the application of the merger provisions of the Competition Act, No 89 of 1998 (Act) to risk mitigation transactions (Update).

Though the Update is non-binding on the Commission and other competition authorities, it gives insight and clarity into the Commission's likely approach on policy issues.

The Update provides that state-owned finance institutions authorised to provide finance in the ordinary course of business may now qualify for exemption from merger notification requirements. Previously only registered banks qualified for exemption.

The Commission recognises that banks (and now also state-owned finance institutions) play an important role in the economy and that they may make use of risk mitigation techniques which are aimed principally at protecting their interests in the event of default (by implication they are not aimed at the acquisition of control over a business for the long term).

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The Commission's Update states that it does not wish to burden itself or the parties involved in bona fide risk mitigation transactions and by way of the Update expands the exemption of specific forms of these transactions from the Act's merger provisions. In recognising that these transactions are intended to be temporary in nature, the Update provides that where a bank or state-owned finance institution fails to dispose of the assets or controlling interest, which would otherwise have given rise to a requirement to notify, within a period of 24 months, a merger notification will be required. As stated above - in addition to widening the exemption to include state-owned financial institutions - the Update also extended the leniency period for disposing the assets from the previous 12 months to 24 months.

Albert Aukema and Louis Botha

COMPETITION COMMISSION AMENDS PRACTITIONER UPDATE ON ASSET SECURITISATION SCHEMES

On 10 April 2015, the Competition Commission extended the exemption in Practitioner Update 5 to asset securitisation schemes (Schemes) entered into by non-banking institutions provided the Schemes are in accordance with the regulations issued by the South African Reserve Bank (SARB).

The purpose of the amendment is to align the Commission's policy approach to the current regulatory framework governing the Schemes with the aim of reducing transaction costs.

Section 79 of the Competition Act, No 89 of 1998 (Act) empowers the Commission to prepare updates that inform its approach on matters falling within its jurisdiction. While the updates are not binding on the competition authorities, the updates outline the approach the Commission is likely to adopt to certain transactions.

An asset securitisation scheme involves the pooling of a portfolio of assets by registered banking institutions followed by the subsequent sale of the assets to a special purpose institution (SPI). The newly established SPI will then issue marketable securities against the portfolio of assets to the market. Under an asset securitisation scheme, the transfer of assets from registered banking institutions to the SPI may trigger a change of control as contemplated in s12(1)(a) of the Act. In other words, the SPI is said to acquire or establish direct or indirect control over the whole or part of the business of another firm. If the financial thresholds are met, notification to and approval from the competition authorities is required.

The Commission concedes that it could not have been the intention of the legislature to include the Schemes which are frequently entered into by registered banking institutions to fall within the ambit of the merger provisions – that is s12(1)(a) of the Act. These transactions are purely financial in nature in that the SPIs are created solely for the purpose of executing the Schemes, having no assets and the limitations placed on the SPIs ensure that the Schemes do not enjoy a competitive position. Therefore, the Commission does not require the notification of transactions where registered banking institutions to sell, facilitate or sponsor the sale of the portfolio of assets to a SPIs, provided the Schemes are in accordance with the regulations issued by the SARB.

Naasha Loopoo

COMPETITION TRIBUNAL CLARIFIES POSITION ON EMPLOYEE NOTIFICATION IN MERGER PROCEEDINGS

On 15 April 2015, the Competition Tribunal approved the acquisition by Deltrade 83 Proprietary Limited (Deltrade), soon to be renamed JHI Retail Proprietary Limited (JHI Retail), to acquire the property management business of Liberty Holdings Limited (LP Manco) and the retail property management business of JHI Properties (JHI Retail Division) on condition that there is a two year moratorium on merger related retrenchments post approval and a limited notification to employees within three months of the approval date.

JHI Retail (originally Deltrade) purchased the businesses of LP Manco and JHI Retail Division as a going concern. Post-merger, both businesses will be transferred to JHI Retail which will manage the retail property businesses of the transferred firms. The Competition Commission found that the proposed transaction is unlikely to substantially prevent or lessen competition in any conceivable market.

On the issue of public interest considerations, the Commission identified a right of first refusal clause in a copy of the Property Management Service Level Agreement (Agreement) permitting LP Manco to refuse to lease any premises to any of its competitors that wish to lease such premises. The Commission and the merging parties engaged in negotiations and the merging parties have since removed the right of first refusal from the Agreement.

On the issue of employment, the Commission found that the proposed transaction will result in potential redundancies, as the merging parties employ a substantial number of employees, many in overlapping jobs. The merging parties were unable to give the necessary comfort to the Commission that the

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merger will not result in any retrenchments as the due diligence exercise was not completed. The merging parties considered such an exercise to amount to a pre-implementation of the merger which is clearly frowned upon by the competition authorities. Such an exercise will be performed once the merger has been implemented. However, the merging parties were willing to give an undertaking that there will be no merger related retrenchments for a period of two years, post approval of the merger. The Commission recommended that the merger be approved subject to a two year moratorium from the 'effective date' and not the 'approval date'.

There was some uncertainty around the meaning given to 'effective date' and 'approval date' and the implications that each meaning held. According to the Commission, the 'effective date' was a date 12 months after the approval of the merger when the merging parties had finalised the implementation of the transaction. In effect, the Commission was seeking a three year moratorium on merger related retrenchments. According to the merging parties, they were willing to agree to a two year moratorium on retrenchments from the approval date, but not for three years, as there was no basis for the moratorium to run for an additional 12 months. The additional year would be a burden to the merging parties and would result in costs increasing, disproportionately compromising JHI Retail's overall competitiveness. The Tribunal held that the concept of the 'effective date' was confusing and the appropriate date was the 'approval date' which would run from the date that the Tribunal approved the merger.

The remaining issue was whether the period should be for two or three years. According to the Commission, the reason for the departure from the Commission's standard two years recommendation was that the merging parties misrepresented themselves during the Commission's investigation. Through its investigation, the Commission discovered that the merging parties' due diligence report contained evidence that merger related retrenchments had been contemplated but not disclosed. The merging parties denied the allegation, as the due diligence report that the Commission was referring to had been subsequently amended. The Tribunal was satisfied with the explanation and concluded that the merging parties did not misrepresent themselves. Therefore, there was no basis to justify an extended period beyond the two years offered by the merging parties.

On the issue of employee notification, the Commission was of the view that the merging parties failed to properly consult with the employees. LP Manco had informed the employees of the merger but it did not include specific information around the imminent retrenchments. While the merging parties conceded that a thorough consultation process had not been followed, they argued that a more detailed exercise might be construed as pre-implementation of the merger. In support of the Commission's arguments, an employee representative of LP Manco was invited to provide testimony at the merger hearing. The employee representative confirmed that consultations with employees did take place, however, the employees were concerned with the type of employment being guaranteed for a certain period of time and the kind of benefits they would receive from JHI Retail. The Tribunal was of the view that a condition should be imposed on the merging parties to notify the affected employees of the imminent retrenchments post-merger. The merging parties agreed to notify the affected employees within a period of three months from the approval date. The notification would include details as to which divisions are likely to be affected by retrenchments as well as the proposed numbers.

As the merging parties did not consult with the employees pre-merger on the imminent retrenchments because they felt that this might be construed as a pre-implementation of the merger, the Tribunal asked the Commission to clarify its position on this matter. On this point, the Head of Mergers and Acquisitions Division, Mr Hardin Ratshisusu noted that, "we encourage merging parties to consult with the employees to provide the files of these mergers and inform employees on what is going to happen to them after the merger". As a concluding remark, the Tribunal held that "this advice is worth noting for other merging parties".

Naasha Loopoo

COMPETITION COMMISSION CONDUCTS FURTHER DAWN RAIDS

On 20 March 2015, the Competition Commission conducted a dawn raid at the premises of six Gauteng based suppliers of fire control and protection systems (whose services include the installation and maintenance of automatic sprinkler systems, hydrants, hose reels, and extinguishers).

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 stated that, in this instance, the dawn raids formed part of its ongoing investigation into this market, where the Commission believes the implicated firms colluded when bidding for tenders for the provision of fire control and protection systems and that the Commission had reasonable grounds to believe that information relevant to its investigation was at the firms' premises.

The Commission confirmed that the dawn raids were conducted after obtaining the requisite warrants approving the search and seizure operations.

In the past year, the Commission has actively engaged in a string of dawn raids, affirming its intention to bring an end to anti-competitive collusive behaviour. During April 2014, dawn

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raids were carried out at the premises of two firms in respect of the Commission's investigation into the market for the manufacture and supply of edible oils and margarine. During July 2014, the Commission conducted dawn raids at business premises of three auto body firms as part of its investigation into collusive conduct in the market for auto body repairs. (This investigation has now been referred to the Competition Tribunal).

Dawn raids are, by their nature, invasive processes and firms are encouraged to have comprehensive plans in place to react in a controlled and efficiently manner in order to minimise the impact and safeguard their rights.

Leana Engelbrecht

SIBANYE GOLD SUCCESSFULLY CHALLENGES APPARENT BREACH OF MERGER CONDITIONS

Towards the end of 2014, the Competition Commission issued a notice of apparent breach of a condition imposed on a merger (Notice of Apparent Breach) to Sibanye Gold Limited (Sibanye Gold).

According to the Commission, Sibanye Gold had undertaken a retrenchment process in breach of a condition imposed by the Competition Tribunal to the effect that there may be no merger related retrenchments arising from Sibanye's acquisition of the Cooke mining operations from Gold One International in early 2014 (Retrenchment Condition). The Competition Tribunal's condition prohibited the parties from undertaking merger related retrenchments for a period of two years. Operational retrenchments, voluntary separation agreements and voluntary early retirement packages were not subject to the moratorium on retrenchments.

Sibanye Gold brought an application to review and set aside the Notice of Apparent Breach. Alternatively, Sibanye Gold sought an order confirming that it had substantially complied with its obligations in terms of the Retrenchment Condition.

The Notice of Apparent Breach was issued by the Commission following various happenings. During September 2014, Sibanye Gold informed the Commission that it had issued a retrenchment notice in terms of s189 of the Labour Relations Act, No 66 of 1995 (LRA), due to significant losses at the Cooke mining operations that could not be curtailed. In this correspondence, Sibanye Gold offered to meet with the Commission to provide it with further information of the anticipated retrenchment procedures. The Commission did not respond to the letter or take up the offer to meet. Subsequently, on 5 November 2014, the Commission received a complaint from the National Union of Mineworkers (NUM) in respect of the anticipated retrenchments. NUM complained that the retrenchment process was in contravention of the Retrenchment Condition. NUM urged the Commission to attend to the matter as after 12 November 2014 the retrenchments would take place and the process would apparently become irreversible. On 11 November 2014, the Commission served the Notice of Apparent Breach on Sibanye Gold.

On 17 November 2014, a meeting was held between representatives of Sibanye Gold and the Commission where Sibanye Gold complained that the Notice of Apparent Breach was issued by the Commission without affording Sibanye Gold the opportunity to engage with the Commission. The Commission then requested Sibanye Gold to provide submissions on the retrenchment process. Sibanye Gold made these submissions on 25 November 2014, denying that it had breached the Retrenchment Condition. Sibanye Gold also requested the Commission to confirm whether the submission satisfied the requirements of a remedial plan as contemplated in Commission Rule 39(2)(a). The Commission responded on 9 December 2014 stating that it would only be able to provide feedback on whether the remedial plan was adequate in January 2015. Sibanye Gold, however, launched an application to review the decision to issue the Notice of Apparent Breach on 10 December 2014.

The Tribunal aptly stated that the issuing of a Notice of Apparent Breach may have serious consequences (such as revoking the merger approval, ordering divestiture of an asset or the imposition of administrative penalties) and, accordingly, consultation between the merged entity and the Commission must take place prior to such serious consequences being imposed. In addition, the review provided for in Commission Rule 39(2)(b) is coupled with an implied declaration that the merged entity has substantially complied with its obligations with respect to the approval or conditional approval of the merger. In other words, if a merged entity is found to have substantially complied with its obligations, the Notice of Apparent Breach should be set aside.

Commission Rule 39(1) further states that a notice of apparent breach can only be issued if the merged entity has already breached an obligation of the merger approval and not if the breach will take place in the future. The Tribunal concluded that the Commission was thus not entitled to issue the Notice of Apparent Breach. The Commission would only be entitled to issue a notice of apparent breach once the retrenchments took place, irrespective of whether the retrenchment would be irreversible at that stage.

The Tribunal clarified that the Commission does not have the power to prevent or pre-empt a breach through the issuing of a notice of apparent breach and, during the time preceding the actual retrenchments, the employees could find recourse through employment laws to interdict the retrenchments.

The Tribunal commended the Commission for taking its responsibilities to safeguard the public interest seriously, but confirmed that the competition authorities are creatures of statute and the confines of the empowering legislation cannot be exceeded.

Leana Engelbrecht

COMPETITION TRIBUNAL UNCONDITIONALLY APPROVES MERGER BETWEEN ETHOS AND NAMPAK

The Competition Tribunal, on 1 April 2015, approved a merger in which Ethos Private Equity Fund VI (Ethos) acquired control over the Nampak Corrugated and Nampak Tissue business divisions of Nampak Limited (Nampak).

Despite concerns being advanced by trade unions regarding a perceived likely impact on employment of the target businesses' employees, the Tribunal could not impose any employment related conditions on the merger without any evidence to substantiate that the merger would negatively affect employment. The Commission's hands were further tied by the various submissions made by the merging parties confirming that the transaction would not result in any unskilled or semi-skilled employees being retrenched.

The Tribunal did, however, hold the merging parties to an undertaking to refrain from any merger specific retrenchments for two years after the merger, save for two executive employees who would not transfer to the acquiring firm.

The Tribunal has, in this case, demonstrated that it will not impose a merger specific moratorium on retrenchments solely on the basis of unsubstantiated concerns of trade unions. Where the Competition Commission has no reason to discredit the merging parties' submission that a merger will not give rise to employment related public interest effects, the Tribunal has no reason to impose employment conditions where there is no justification for discrediting the merging parties' submission that a merger will not give rise to employment related public interest effects.

Kitso Tlhabanelo

TRIBUNAL RECONSIDERS ACQUISITION BY HOSKEN OF GALLAGHER CONVENTION CENTRE

On 22 December 2014, the Competition Commission prohibited the intermediate merger in terms of which Hosken Consolidated Investments Limited (HCI) intended to acquire Atterbell Proprietary Limited t/a Gallagher Convention Centre (GCC).

The Commission prohibited the merger on the basis that it would result in a substantial lessening or prevention of competition in the market for the provision of exhibition venues and exhibition facilities in Johannesburg. HCI holds an interest in Tsogo Sun Holdings Limited which operates various conferencing and exhibition facilities in, among other geographical areas, Johannesburg and, in particular, the Sandton Convention Centre (SCC). In addition, HCI owns the immovable property on which the Gallagher Convention Centre is situated. GCC, on the other hand controls the business of the Gallagher Convention Centre (the actual conferencing and exhibition facility). The acquisition would result in HCI also obtaining control over the business of the Gallagher Convention Centre. The Commission was not concerned that the transaction would lead to any lessening or prevention of competition in the national market for conferencing venues and facilities (for big conferences with more than 500 delegates).

The merging parties subsequently brought an application to the Tribunal to reconsider the Commission's decision to prohibit the proposed transaction. The merging parties argued that the proposed transaction would not lessen or prevent competition and, in addition, submitted that the merger was justified on public interest grounds as it would have a positive effect on employment.

The hearing of the application was, however, stood down to award the merging parties and the Commission an opportunity to discuss possible conditions to remedy the Commission's concerns with the transaction. The application was ultimately not heard as appropriate conditions were agreed upon by the parties and the Tribunal confirmed these conditions.

In summary, it was agreed that:

(i) the businesses of SCC and GCC will be kept separate and will not be integrated, which included implementation of measures to prevent the flow of competitively sensitive information between SCC and GCC;

(ii) GCC would not increase prices to exhibition customers by more than CPI per annum for a period of at least 4 years;

(iii) HCI ensures the continuance of the GCC business for at least 4 years; and

(iv) despite claims by the merging parties that the transaction would be beneficial to employment, HCI will maintain employment levels of the GCC business, preserving the employment of all permanent employees or, in the event of the business closing down, provide training or find alternative employment for permanent employees.

Leana Engelbrecht

COMPETITION COMMISSION PROHIBITS MERGER BETWEEN IMERYS AND ANDALUSITE RESOURCES

The Competition Commission prohibited a merger which proposed the acquisition of Andalusite Resources Proprietary Limited (Andalusite Resources) by Imerys South Africa Proprietary Limited (Imerys).

The merging parties are close competitors, and South Africa's only miners and suppliers of andalusite: which is a compound used in high temperature industrial processes (including the manufacture of steel and cement – highly input price sensitive industries). The proposed transaction would, accordingly, result in the removal of an effective competitor and the creation of a monopoly in the market for the manufacture and supply of andalusite.

The Commission concluded that the proposed merger would substantially lessen or prevent competition and found that:

(i) the market was characterised by relatively high barriers to entry;

(ii) customers would have relatively little countervailing power to discipline the merged entity as post-merger there would be no other source of supply of andulasite; and

(iii) based on Imerys' substantial presence in the downstream market for refractory products, the merged entity would have an incentive to limit the supply of andalusite to Imerys' competitors or to supply export markets to the detriment of Imerys' competitors.

The anticipated lessening or prevention of competition (and anticipated price increases) that would flow from the proposed transaction resulted in public interest concerns regarding other producers of refractories (which are generally highly price sensitive) and the consumers of refractories.

A further public interest concern arose as the merging parties envisaged that the proposed transaction was likely to lead to 3.6% of the employees of the merging parties being retrenched.

The Commission concluded that there were no pro-competitive effect or public interest benefits that could outweigh, and no remedies that could remedy, the anti-competitive effects of the proposed transaction and thus prohibited the merger.

The Commission's decision to prohibit the merger altogether illustrates that not all negative effects of a proposed merger, whether competition or public interest related, can be remedied by a merger condition.

Leana Engelbrecht and Kitso Tlhabanelo

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