13 APRIL 2016

COMPETITION ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

COMPETITION COMMISSION REJECTS EXEMPTION APPLICATIONS

New Alitalia and Etihad alleged that the market for passenger airline services between Italy and South Africa was in decline and motivated for the exemption on the basis that it would stimulate significant volumes of new traffic to South Africa.

The Competition Act, No 89 of 1998 (Act) empowers the Competition Commission (Commission) to exempt certain agreements and practices of firms from the application of the Act's prohibited practice provisions.

Alitalia Societa Aerea Italiana S.p.A (New Alitalia) and Etihad Airways PJSC (Etihad) both sought an exemption to allow them to jointly price, schedule and market their flights to enable them to compete more effectively against the larger global airlines.

In their application for an exemption, New Alitalia and Etihad alleged that the market for passenger airline services between Italy and South Africa was in decline and motivated for the exemption on the basis that it would stimulate significant volumes of new traffic to South Africa.

The inability to convince the Commission, as per s10 of the Act that the exemption would lead to the maintenance or promotion of exports or that a change in productive capacity was necessary to stop a decline in an industry, resulted in the Commission declining to grant the exemption.

The inability to convince the Commission, as per s10 of the Act that the exemption would lead to the maintenance or promotion of exports or that a change in productive capacity was necessary to stop a decline in an industry, resulted in the Commission declining to grant the exemption.

Other criteria set out in s10 of the Act that may be relied on in applying for an exemption are the promotion of the competitiveness of small businesses or firms controlled or owned by historically disadvantaged persons and/or advancing the economic stability of a designated industry.

Where existing measures are sufficient to achieve the aims of the exemption sought, the Commission is not likely to grant the exemption. This was the case in the instance of the exemption applications filed by the Council for the Built Environment (CBE). Five of the six exemption applications by the CBE were rejected by the Commission in January this year for that reason among others.

Kitso Tlhabanelo and Natalie von Ey

CDH
CLIFFE DEKKER HOFMEYR

LITTLE PIG, LITTLE PIG, LET ME IN...

During the month of March 2016, the Commission conducted a search and seizure operation at the Gauteng premises of PG Glass, Glassfit, Shatterprufe and Digicall as part of its investigation into alleged price fixing and market division in the provision of automotive glass fitment and repair services.

The Competition Commission (Commission) is, in terms of s48 of the Competition Act, No 89 of 1998, authorized to enter and search, with or without a warrant, premises and seize documents and electronic data, including laptops and servers, if it has reasonable grounds to suspect that a business has been engaging in anti-competitive practices. Consequently, all businesses, irrespective of size are not entitled to respond "*no, not by the hair on my chinny chin chin*" to unannounced inspections by the Commission.

These recent dawn raids by the Commission are again a reminder to business to ensure that one's house is in order so to speak as the way in which a raid is handled can have very significant consequences, both for a business' reputation and also for its market value.

During the month of March 2016, the Commission conducted a search and seizure operation at the Gauteng premises of PG Glass, Glassfit, Shatterprufe and Digicall as part of its investigation into alleged price fixing and market division in the provision of automotive glass fitment and repair services. The reason given by the Commission for the raids was that it had grounds to believe that information relevant to its collusion investigation existed on the premises of the firms.

A week later, the Commission's officials swooped into the premises of PG Bison and Sonae Novoboard as part of its investigation into alleged collusion between these firms as the only two manufacturers of medium density fibreboard in South Africa.

These recent dawn raids by the Commission are again a reminder to business to ensure that one's house is in order so to speak as the way in which a raid is handled can have very significant consequences, both for a business' reputation and also for its market value. Understanding what will happen, and knowing what your obligations, and indeed your rights are will help ensure that the business cooperates fully, but while minimising disruption and protecting your legal position.

Suggested positive actions to be taken include:

(1) implementing a response strategy before being confronted by a dawn raid;

(2) ensuring appropriate training for all employees so that they know and understand what they should do in the event of a dawn raid;

(3) checking the warrants or authorisation documents (should they exist) produced by the Commission inspectors and raising any concerns with in-house or external lawyers;

(4) immediately contacting in-house and/or external lawyers and requesting the inspectors wait until lawyers arrive before commencing the inspection (but not insisting on this);

(5) trying to delay answering any questions (other than straightforward administrative queries) until a lawyer is present; and

(6) seeking external legal advice if at any stage you are uncertain as to your rights and responsibilities.

CDH
CLIFFE DEKKER HOFMEYR

LITTLE PIG, LITTLE PIG, LET ME IN...

CONTINUED

The fact that the Commission has undertaken six rounds of dawn raids over the past 12 months, together with the Commission's performance targets cited in the Commission's Strategic Plan for 2015 to 2020 is evidence that we can only expect a greater number of raids by the Commission in the future.

Some suggested actions to avoid include:

(1) obstructing the investigation by refusing to co-operate;

(2) insisting that the inspectors wait for the arrival of external lawyers before starting the investigation if they refuse to do so when asked;

(3) trying to destroy, delete or hide any paper or electronic documents or files; and

(4) telling anyone outside the business that the inspection is taking place or discussing any aspect of it.

The fact that the Commission has undertaken six rounds of dawn raids over the past 12 months, together with the Commission's performance targets cited in the Commission's Strategic Plan for 2015 to 2020 is evidence that we can only expect a greater number of raids by the Commission in the future. The key question which remains is *how prepared will you be, when the big bad wolf comes knocking on your door?*

Natalie von Ey

CDH
CLIFFE DEKKER HOFMEYR

COMPETITION AUTHORITIES SYMPATHISE WITH MERGING PARTIES' ECONOMIC WOES

In October 2015, Zimco and Atlantis applied to the Competition Tribunal (Tribunal) for an order, based primarily on changing market conditions, to remove the condition relating to the relocation of the Atlantis plant outside of South Africa and to confirm that certain proposed retrenchments were not merger specific. In January 2016, the Tribunal granted the application.

During 2014 the Competition Commission (Commission) conditionally approved Zimco Metals Proprietary Limited (Zimco) acquiring the lead manufacturing business and assets of Atlantis Metals Proprietary Limited (Atlantis), a firm under business rescue. Since Atlantis and Zimco were the only two producers of lead anodes in South Africa, which they both primarily exported, the Commission was concerned that the merger may create a monopoly or harm local supply and employment. Despite Atlantis being in a dire financial position at the time, the 2014 conditions barred the relocation of the Atlantis plant outside of South Africa and placed a moratorium on merger-related retrenchments for two years.

While a 'change in market circumstances' must be determined on a case by case basis, taking into account the unique characteristics of the market developments in question, this decision bodes well for merger parties seeking to, ex post facto, break the shackles of economically unworkable merger conditions.

In October 2015, Zimco and Atlantis applied to the Competition Tribunal (Tribunal) for an order, based primarily on changing market conditions, to remove the condition relating to the relocation of the Atlantis plant outside of South Africa and to confirm that certain proposed retrenchments were not merger specific. In January 2016, the Tribunal granted the application.

What qualified as 'changing market circumstances'?

- The parties could show that the price of commodities had weakened, linked with a decrease in the demand for commodity based products, including copper. Since lead anodes are used in copper products, the parties experienced a decline in demand for their products.
- The largest customer of Atlantis decided to suspend operations at some of its mines, with grave consequences for Atlantis whose viability largely depended on this customer.
- In order to sustain the economic viability of Atlantis, the plant needed to be relocated from Brakpan to Krugersdorp. The anticipated knock on effect was job losses for 13 employees who would not be able to relocate. The parties' view was that these retrenchments are not merger specific and are purely operational in nature.
- The parties are desirous of moving certain production capacity to locations outside of South Africa, closer to its export markets, to counter the high transport costs and weakening currency in South Africa.

After conducting a thorough investigation, the Commission was satisfied that the amendment was justified in the circumstances. While a 'change in market circumstances' must be determined on a case by case basis, taking into account the unique characteristics of the market developments in question, this decision bodes well for merger parties seeking to, *ex post facto*, break the shackles of economically unworkable merger conditions.

Naasha Loopoo and Susan Meyer

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Competition practice and services, please contact:

Chris Charter
National Practice Head
Director
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com

Albert Aukema
Director
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com

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

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

Naasha Loopoo
Associate
T +27 (0)11 562 1010
E naasha.loopoo@cdhlegal.com

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

George Miller
Associate
T +27 (0)21 481 6356
E george.miller@cdhlegal.com

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

Kitso Tlhabanelo
Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@cdhlegal.com

BBBEE STATUS: LEVEL TWO 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@cdhlegal.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@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR