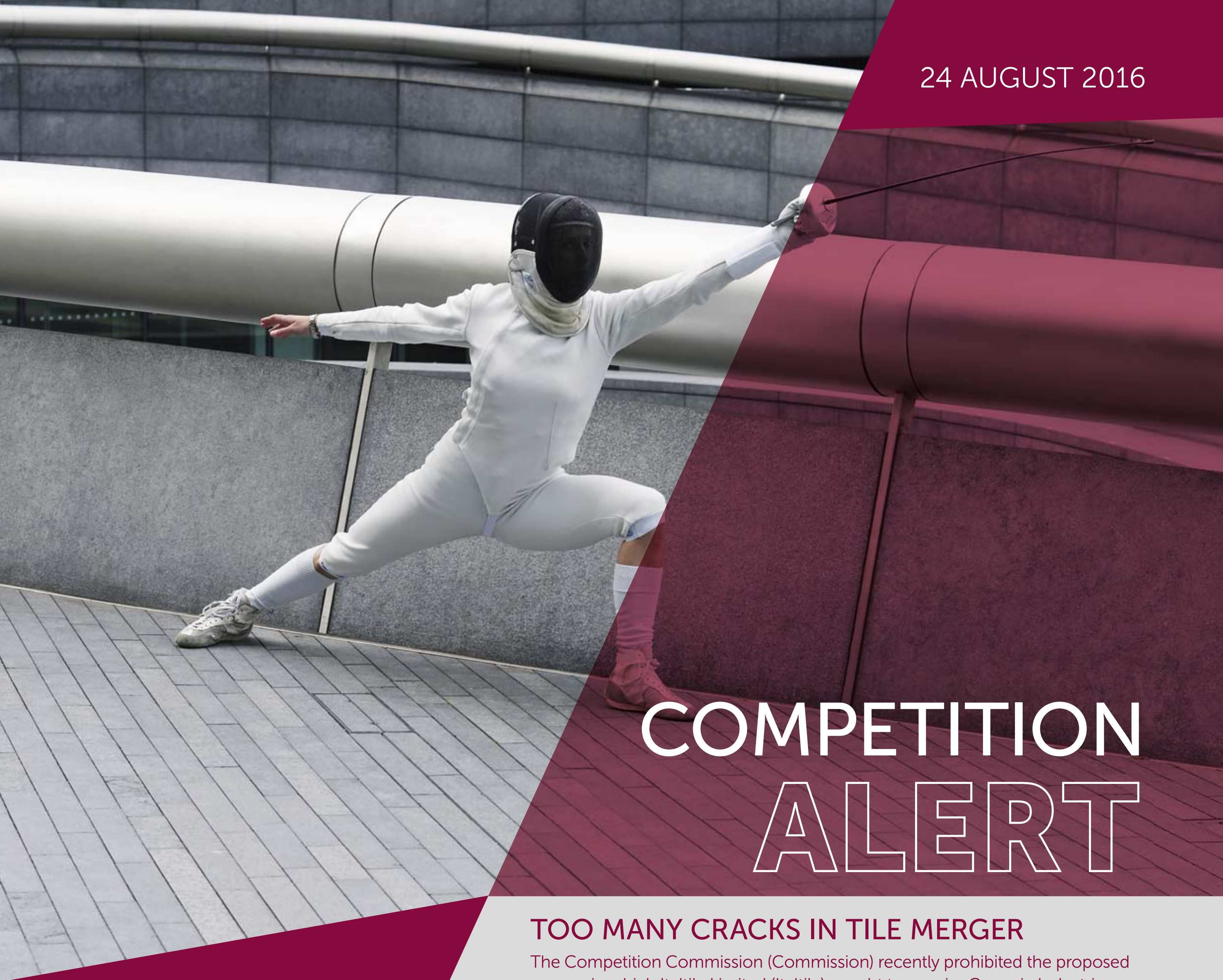

24 AUGUST 2016

COMPETITION ALERT

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In September 2014, the Competition Commission (Commission) approved the intermediate merger between Foster Wheeler M&M Limited and MDM Engineering Group Limited and accordingly imposed a condition on Amec Foster Wheeler South Africa Proprietary Limited (Amec FW), such that the merged entity shall not, as a result, of the merger, retrench any employees in South Africa for a period of 3 years from the approval date.

CLIFFE DEKKER HOFMEYR

TOO MANY CRACKS IN TILE MERGER

The Commission identified that the target firms, CIL and Ezee Tile, were active in the upstream market for the manufacture and supply of tiles, sanitary ware, baths, and related products, whereas the acquirer, Italtile, was active in the downstream market for the retail sale of these products.

All this, coupled with the Commission's finding that a merger condition or structural remedy would not mitigate the adverse competition effects, in the context of a market that is a key input to the construction sector (recently riddled with competition problems), led the Commission to prohibit the merger.

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The Commission found that CIL, with high market shares, and Ezee Tile, made significant, ongoing sales to Italtile. This created the potential that the merged entity could exclusively self-supply, thereby reducing supply to Italtile's rival firms, neatly fitting the so-called "foreclosure" theory of harm. If Italtile had sufficient competitors this concern would likely have been mitigated, but the merged entity would allegedly face little constraint should it seek to raise prices or reduce (or even refuse) to supply Italtile's competitors.

The Commission further found that there are high barriers to entry into the upstream market.

During a merger investigation, the Commission is empowered to contact market participants, such as customers and competitors. In this case, the Commission apparently received concerns regarding the anti-competitive effects of the proposed transaction, particularly, the foreclosure that would arise.

All this, coupled with the Commission's finding that a merger condition or structural remedy would not mitigate the adverse competition effects, in the context of a market that is a key input to the construction sector (recently riddled with competition problems), led the Commission to prohibit the merger. Italtile has already indicated its intention to tackle the Commission's finding before the Competition Tribunal.

Susan Meyer and Kitso Tlhabanelo

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CREATIVE REMEDIES FOR COMPETITION LAW CONTRAVENTIONS

The Commission, in its aim to penalise respondents for anti-competitive behaviour and deter future contraventions, typically imposes discretionary financial penalties.

Respondents to investigations involving anti-competitive conduct, who enter into consent agreements with the Competition Commission (Commission), must agree to appropriate sanctions with the Commission, with a view to reaching settlement. The Commission, in its aim to penalise respondents for anti-competitive behaviour and deter future contraventions, typically imposes discretionary financial penalties (of up to 10% of the respondent's turnover), and secures commitments in respect of ongoing compliance efforts. However, the bespoke remedies can extend beyond the bland, as is evident from a recent consent agreement entered into between the Commission and Sime Darby Hudson & Knight (Pty) Ltd (Sime), in terms of which Sime admitted to concluding an anti-competitive agreement with Unilever South Africa (Pty) Ltd (Unilever).

Bespoke remedies can extend beyond the bland, as is evident from a recent consent agreement entered into between the Commission and Sime Darby Hudson & Knight (Pty) Ltd (Sime).

The alleged anti-competitive agreement precluded Sime from supplying customers with margarine packs that were less than 15 kilograms in size, such that Sime would have no presence in the retail sector of the market, where Unilever is active. Sime also admitted to agreeing to only produce packs of edible oils equal to or greater than 25 litres in size, which only industrial customers would be interested in purchasing, meaning it would again not compete directly with Unilever. The Commission alleged that this illegal allocation of customers persisted between 2004 and 2013.

In terms of the consent agreement, Sime agreed to pay an administrative penalty of some R35 million, and also made certain undertakings to the Commission in respect of its future conduct. In what are unique settlement terms, Sime agreed, among other things, to:

- invest R135 million to build and commission a new packaging and warehouse facility for its edible fats and oils and ensure that it has the ability to package retail sizes of these products, such that Sime would now be able to enter the retail market that it was previously precluded from supplying;
- utilise the services of a Black Economic Empowerment (BEE) distributor to undertake some of Sime's distribution requirements so that, according to the Commission, Sime's reliance on its potential competitors for distribution of its products would come to an end; and
- provide assistance to the BEE distributor so as to facilitate it becoming a viable business, possibly even including financial assistance to procure, for example, a fleet of vehicles, loan guarantees and other forms of investment to enable the BEE distributor to render transportation services on a sustainable basis.

In terms of the Competition Act, No 89 of 1998 (Act) during or after the investigation of a complaint, the Commission and

CREATIVE REMEDIES FOR COMPETITION LAW CONTRAVENTIONS

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It seems that, provided the Commission and the respondent agrees on the negotiated remedies, and the Tribunal is willing to sanction them, settlement for competition law infringements are an open canvass.

respondent can agree to settlement of the matter and enter into a consent agreement and apply to the Competition Tribunal (Tribunal) to make it an order. The agreement will only be binding to the extent that it is made an order by the Tribunal. If the Tribunal refuses to make the order, there is no legally enforceable agreement between the Commission and the respondent.

The Sime case demonstrates that the Commission is not only concerned with retributive and deterrent justice, but is also open to adopting other means, in line with the broader purpose of the Act (for example, remedies aimed at furthering BEE initiatives), towards redressing competitive harm. It seems that, provided the Commission and the respondent agrees on the negotiated remedies, and the Tribunal is willing to sanction them, settlement for competition law infringements are an open canvass.

Susan Meyer and Nazeera Mia

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THE COMMISSION RESERVES THE RIGHT TO AMEND CONDITIONS UNDER SMALL AND INTERMEDIATE MERGERS

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In September 2014, the Competition Commission (Commission) approved the intermediate merger between Foster Wheeler M&M Limited and MDM Engineering Group Limited and accordingly imposed a condition on Amec Foster Wheeler South Africa Proprietary Limited (Amec FW), such that the merged entity shall not, as a result, of the merger, retrench any employees in South Africa for a period of 3 years from the approval date. Amec FW accepted the conditional approval and did not seek a consideration application in terms of s16 of the Competition Act, No 89 of 1998 (Act) read together with Tribunal Rule 32.

In June 2016, the merged entity was questioned as to why the matter was before the Tribunal and not the Commission, in light of the express wording in clause 4.9 of the merger conditions.

In December 2015, Amec FW advised the Commission that it intended to approach the Tribunal to have the employment condition varied on the basis that there was a change in economic circumstances following the conditional approval and that the business was experiencing a reduction in revenue and profitability that threatened its ability to remain sustainable in the market. Amec FW also relied on clause 4.9 of the merger conditions, which provide that the merged entity may approach the Commission to have the conditions revised on the basis that changes in the market, economic and regulatory conditions justify such a revision. In response, the Commission advised the merged entity to file an application in terms of Tribunal Rule 42 for a variation of the employment condition. In doing so, the Commission's obligation to investigate the basis for the variation was therefore triggered. Accordingly, the merged entity filed an application with the Tribunal in March 2016.

After conducting a thorough investigation, the Commission was satisfied that the amendment was justified in the circumstances. In May 2016, the Commission filed a notice with the Tribunal indicating that it did not intend to oppose the variation of the employment condition for two reasons: first, the competitors of the merged entity advised the Commission that the engineering, procurement, construction and project management services industry was under pressure due to a decline in mining projects coupled with the low prices for oil and gas and secondly, the merged entity demonstrated that the envisaged retrenchments were in fact merger- specific.

At the hearing in June 2016, the merged entity was questioned as to why the matter was before the Tribunal and not the Commission, in light of the express wording in clause 4.9 of the merger conditions. Amec FW conceded that the power to amend the merger conditions did in fact lie with the Commission and only filed the current application before the Tribunal on the Commission's behest. The Tribunal disagreed with the Commission's advice to Amec FW and clarified that the Act is quite clear in that it gives the Commission the power to approve, prohibit or conditionally approve intermediate and small mergers, but did acknowledge that the Act was silent on whether the Commission would also have the power to amend merger conditions it had imposed. The Tribunal argued that it was common cause that if the

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THE COMMISSION RESERVES THE RIGHT TO AMEND CONDITIONS UNDER SMALL AND INTERMEDIATE MERGERS

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Where a dispute arises between the Commission and the merging parties relating to an amendment to the merger conditions, the Tribunal will naturally enjoy jurisdiction in terms of the general powers set out in Tribunal Rule 42 to amend the conditions.

Commission had the power to impose a condition on the merged entity, it would also have the power to amend that condition, absent any statutory provision to the contrary. Moreover, the Commission also reserved its rights to amend the conditions under clause 4.9 of the merger conditions. Therefore, the Commission was directed to issue amended conditions to the merged entity.

On a last note, the Tribunal considered it useful to set out the following key points on the question of its jurisdiction:

- in circumstances, where an application is filed by way of consideration under s16 read with Tribunal Rule 32 to amend the conditions under the intermediate or reverse a prohibition decision by the Commission, as the case may be, the Tribunal will naturally enjoy jurisdiction over the matter;
- in circumstances, where the Commission imposes conditions in an intermediate merger, in which it reserves the right to amend its own conditions, and where no consideration application is filed, then the Tribunal will not have the required jurisdiction over the matter; and
- where a dispute arises between the Commission and the merging parties relating to an amendment to the merger conditions, the Tribunal will naturally enjoy jurisdiction in terms of the general powers set out in Tribunal Rule 42 to amend the conditions.

This case provides certainty to parties to small and intermediate mergers wishing to amend the conditions especially in those instances where the Commission reserves a right to amend the conditions and is welcomed.

Albert Aukema and Naasha Loopoo

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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