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COMPETITION ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

COMPETITION BY NUMBERS: STATISTICS FROM THE COMPETITION COMMISSION'S 2015/2016 ANNUAL REPORT

The recently published 2015/2016 Report reveals telling statistics relating to the performance of the Commission's core functions.

For a bird's eye view of the status of South African competition law enforcement in the last year, one need look no further than the Competition Commission's (Commission) Annual Report (Report). The recently published 2015/2016 Report reveals telling statistics relating to the performance of the Commission's core functions.

There was not a substantial growth in mergers notified in the 2015/2016 period. The Commission received 391 merger notifications (only slightly less than in the 2014/2015 period, in which 395 notifications were received), most of which were intermediate mergers. The Commission finalised 413 merger cases, 364 of which were unconditionally approved (up from 321 previous year). The Commission conditionally approved 37 mergers in the 2015/2016 period, compared to 43 in the 2014/2015 period, while the number of prohibited mergers in the 2015/2016 period increased from five to seven.

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The Report sets out the Commission's strategic goals, which place "balancing the efficiency objectives of the Competition Act" with public interest aspirations at the forefront of the Commission's objectives. According to the Report, the Commission's goal is, among other ambitions, to "contribute to a growing and inclusive economy" which it aims to achieve by "creating an enabling environment for small, medium and micro enterprises; promoting job creation and preventing job losses; preventing further market concentration; and supporting competition in industries that have the potential to drive economic growth in South Africa.".

These objectives are evident from several of the statistics provided in the Report. For instance, 28 of the 37 conditionally approved mergers were subject to conditions aimed at addressing negative public interest concerns and of these 28 mergers, 25 were subject to employment-related conditions such as restrictions on post-merger retrenchments. Six of the conditionally approved mergers were subject to BEE related conditions such as, among others, the imposition of an obligation to maintain or increase BEE status or to continue with a particular BEE procurement policy. Other public interest conditions include the imposition of obligations to invest in small businesses, to assist historically disadvantaged retailers and to refrain from relocating manufacturing plants or facilities outside of South Africa.

The Commission's enforcement activity in relation to prohibited practices also continues apace. The Commission conducted five dawn raids during the 2015/2016 period, an increase from four in the 2014/2015 period. These dawn raids were conducted at advertisement placement agencies; furniture removal companies; liquefied petroleum gas suppliers; automotive glass fitment and repair services firms; and suppliers of wood-based products. (Several more dawn raids were conducted by the Commission in 2016 after the end of its financial year, showing a sharp increase in the use of dawn raids as an enforcement tool).

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The Commission received 160 complaints relating to abuse of dominance and restrictive vertical practices from the public but initiated only four complaints during the period, suggesting that the Commission is relying more on complaints from the public than initiating its own.

The Commission received 160 complaints relating to abuse of dominance and restrictive vertical practices from the public (up from 144 in the 2014/2015 period) but initiated only four complaints during the period, suggesting that the Commission is relying more on complaints from the public than initiating its own. Of the 160 complaints 113 complaints resulted in non-referrals, 33 are being fully investigated and 9 were withdrawn by the complainants. Complaints received from the public relate to conduct in various sectors including the food/beverage/agriculture, retail, construction and building, transport/logistics, healthcare, telecoms and IT sectors.

The Commission initiated a staggering 133 cartel investigations in the 2015/2016 period, the bulk of which related to the automotive components sector (so we may see a string of consent orders in the automotive components sector over the next few years, just as we saw settlements in the construction sector over the last few). Thirty-eight investigations were completed, of which 22 were referred to the Tribunal for prosecution. Ten Corporate Leniency Policy applications were received, of which four were granted and six are still being considered.

The Report is indicative of the Commission's growth in experience and capacity and can be used as a source for numerous other insights, including the Commission's progress; the growth in the public's participation in the competition process; and the Commission's view on key cases and developments.

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SA EMPLOYERS TAKE HEED: US ENFORCERS SOUND A WARNING TO HR PROFESSIONALS

Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment.

The United States Department of Justice (USDOJ) and the Federal Trade Commission (FTC) have recently issued a warning to human resource (HR) professionals involved in employment and compensation decisions that they will look to prosecute any who seek to coordinate with other companies on the terms of employment for potential new hires.

In a guidance document issued in October 2016, the USDOJ and FTC (jointly responsible for enforcing US competition laws) point out that:

> "Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment. Consumers can also gain from competition among employers because a more competitive workforce may create more or better goods and services."

The guidance in general cautions companies against communicating its employment policies to other companies competing to hire the same types of employees, as this could lead to an agreement not to compete for employees on terms of employment.

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More specifically, an agreement between employers to limit or fix the terms of employment for potential hires may violate antitrust laws if the agreement constrains an individual firm's decision making with regard to wages, salaries, benefits, terms and conditions of employment, or even job opportunities. Thus, so-called "wage fixing" agreements or "no poaching" agreements are outlawed.

Some of the antitrust "red flags" raised by the USDOJ include:

- where there is an agreement or refusal to hire or solicit employees;
- expressing a desire to avoid competing aggressively for employees;
- participating in meetings where any of the aforementioned topics are raised or even discussing these socially; and
- receiving documents that contain another company's internal data about employee compensation.

In principle, South African competition law is no different. Although there is a specific carve-out for collective bargaining and collective agreements as contemplated in the Labour Relations Act, significant risks apply to companies that seek to coordinate employment policy with other employers outside of the formal processes allowed under labour law.

Given the clear policy objective of the Competition Commission to protect the South African workforce, one can readily expect our authorities to take the US guidance on board in its enforcement objectives. Should this occur, there would be a reinvigorated need for South African HR professionals to consider employees as a competitively significant input, and employment related practices as an activity which may not be coordinated.

Chris Charter and Riad Daniels

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Competition
NEWS BULLETIN

East African Community Competition Authority (EACCA) swears in five newly appointed Commissioners

The Commissioners, approved since February 2016, were sworn in at the beginning of November 2016, at the East African Commission's Headquarters in Arusha, Tanzania. The Commissioners comprise one from each partner state (Burundi, Kenya, Tanzania, Rwanda and Uganda).

These are the very first Commissioners to serve the EAC Competition Authority. This is a further important step in bringing this new regional regulator online.

Best Lawyers 2017 Edition

- Named "Law Firm of the Year" in the practice area of Real Estate Law.
- Listed 36 of our lawyers across Cape Town and Johannesburg.
- Emil Brincker listed as Lawyer of the Year for Tax Law.
- Pieter Conradie listed as Lawyer of the Year for Arbitration and Mediation.
- Francis Newham listed as Lawyer of the Year for M&A Law.

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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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