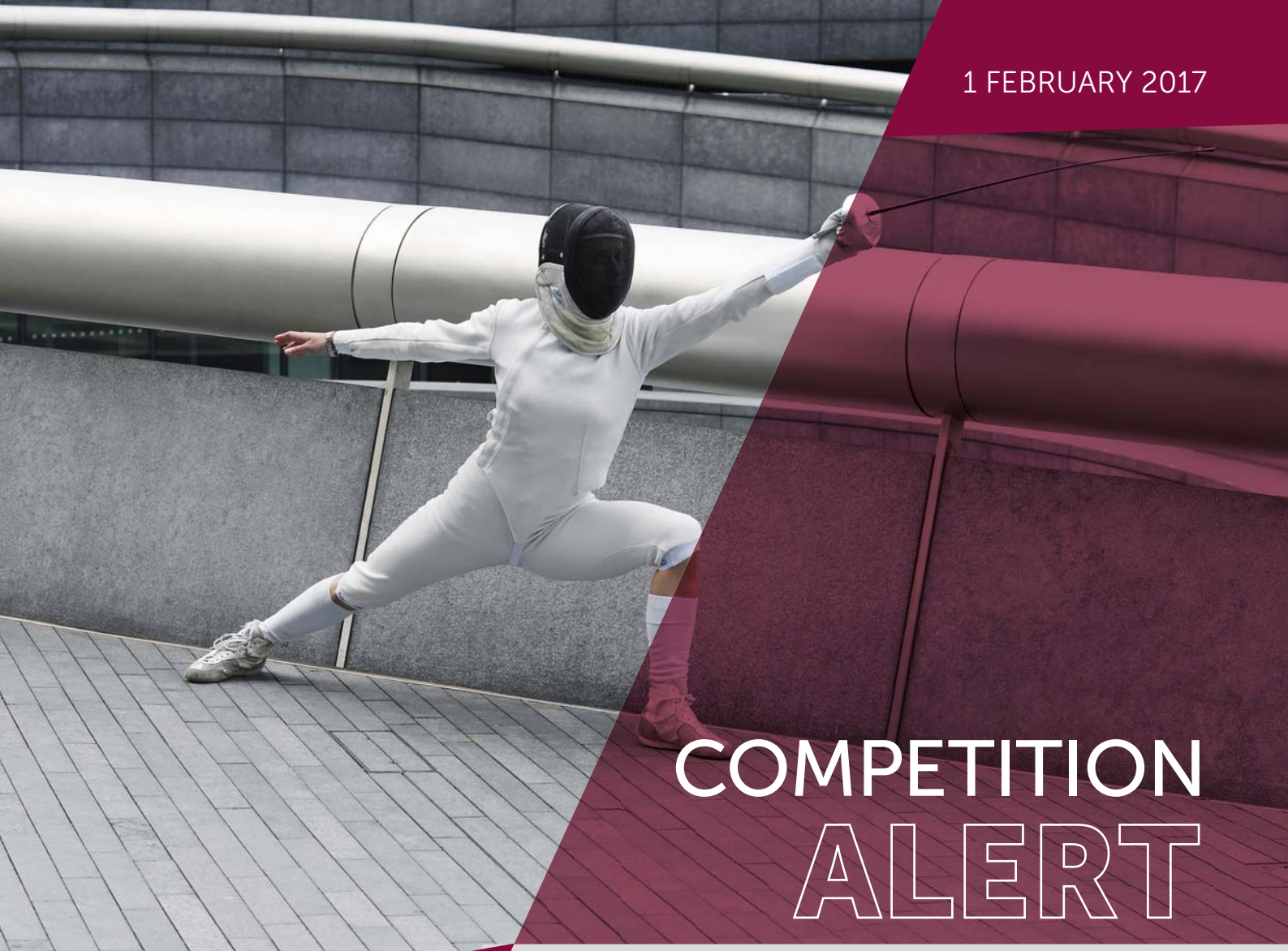

1 FEBRUARY 2017

COMPETITION ALERT

IN THIS **ISSUE**

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CYCLING ON THIN ICE

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CDH
CLIFFE DEKKER HOFMEYR

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The Commission launched an investigation into collusion in the furniture removal industry in November 2010. The Commission investigated a total of 69 firms, which revealed, according to the Commission, "entrenched and ubiquitous co-operation and endemic practices of collusive conduct" in the furniture removal industry. Most contraventions discovered were in the form of cover pricing, which occurs where bidders co-ordinate their tenders so that one pre-determined firm wins the bid.

The Commission issued an invitation to the firms investigated to settle with the Commission for a relatively light penalty (4% of their 2013 turnover). Some firms took up the offer and settled with the Commission, including Joel Transport (R150,582) for 12 offences; Reliable Removals CC (R90,563) for six offences; Del Transport (R210,415); and H&M Removals (R196,364). JH Retief Transport paid the highest fine to date (R4,273,060) for 3,487 instances of cover pricing.

Stanley's attempted to settle, but could not reach an agreement with the Commission on the quantum of the fine. The matter therefore went to the Tribunal, with Stanley's admitting to its involvement in eight instances of collusion, but challenging the Commission's proposed fine.

Stanley's noted that the total value of the tenders obtained through its involvement in cover pricing amounted to R129,425 of which the firm received R80,000 in turnover and approximately R8,000 profit. The Commission's penalty guidelines provide that, in the case of once-off bid rigging, the affected turnover for the calculation of a penalty is the value of the tender, the contract value or the actual amount paid for the tender. On the basis of these guidelines, together with the penalty guidance provided in the case of Aveng, Stanley's submitted that it should be liable to pay R62,641.88. Since this appeared to be a low figure, it offered to pay R350,000.

The Commission rejected this offer and stated that its own penalty guidelines did not apply in this situation. Following the six-step *Aveng* approach, it asserted a fine of R1,575,715 should be imposed for each of the eight instances of bid-rigging, totalling R12,605,721.60. Recognising that such an amount would be unsustainable for the furniture removal company, it proposed a fine of R1,700,000.

The Tribunal found that the Commission's penalty guidelines and the *Aveng* six-step approach were not appropriate methods of calculating an appropriate penalty in this case, because the Aveng method applies to firms that have on-going and extended agreements and the Commission's guidelines deal with once-off bid rigging. Therefore, Stanley's conduct did not fall into either of these categories.

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COMMISSION SEEKS HIGHER FINE FOR FURNITURE REMOVAL COMPANY

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The Tribunal finally issued a penalty of R450,000, approximately 3.5% of Stanley's turnover. It stated in its reasons that the fine should be in line with the settlement agreements of other furniture companies, such as Stanley's co-accused Cape Express, which was fined R645,710 for 1,744 incidents. The Tribunal made it clear that even though the settlements by way of consent orders do not create binding precedent in opposed matters, they can be used as a yardstick for setting an appropriate penalty.

The Commission is now appealing this fine, arguing that it is too low. The Commission is clearly committed to using the level of penalties to act as a deterrent to cartel conduct, and considers that, in circumstances where the relevant firms have not settled directly with it prior to a Tribunal hearing, such firms are not deserving of any leniency in relation to the quantum of the fine.

Lara Granville

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CYCLING ON THIN ICE

The Omnico case or "bicycle case" brought before the CAC in 2016 concerned a number of wholesalers and suppliers of bicycles and bicycle accessories which were alleged to have discussed and agreed upon unanimous mark ups on their retail prices.

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A cartel, as defined in *The South African Cartel Handbook*, is an "an unlawful arrangement, agreement or understanding, in terms of which competitors agree to:

(i) fix prices (whether directly or indirectly);

(ii) restrict supply by limiting sales or production;

(iii) divide markets by allocating customers, suppliers ,territories or specific types of goods or services; and/or

(iv) engage in collusive tendering."

Section 4(1)(b)(i) of the Act prohibits "an agreement between, or concerted practice by, firms or a decision by an association of firms...if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect".

The *Omnico* case or "bicycle case" brought before the CAC in 2016 concerned a number of wholesalers and suppliers of bicycles and bicycle accessories which were alleged to have discussed and agreed upon unanimous mark ups on their retail prices, effective 1 October 2008, pursuant to a series of correspondence exchanged and meetings held during September 2008.

After investigating the matter, the Competition Commission (Commission) presented evidence to the Competition Tribunal showing an exchange of communication between the competing wholesalers regarding consensus for the proposed price increases. The Commission concluded that, on the basis of the meetings leading up to the eventual price increase on 1 October 2008, the firms that were at least present at the meeting, or who knew about the agenda, had engaged in cartel conduct.

One of the implicated firms argued that, despite having been approached to increase its own prices along with the other wholesalers, it did not agree to the unanimous increase, nor did it participate in the meetings, and was therefore not part of the cartel. The CAC dismissed this defence, stating that "silence within a specialised context can never equal non-participation... the cumulative effect of conduct whether active or passive when assessed within a particular context is equally compelling".

The CAC has adopted the European position in this regard, imposing "a duty to speak or to report to authorities or publicly distance oneself from any uncompetitive behaviour". It is therefore sufficient to show that the undertakings concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove the requisite standard that the undertaking participated in the cartel.

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CYCLING ON THIN ICE

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In a case of cartel conduct, the Commission has to prove that "the conduct in question would have the effect of undermining competition", and thus it is sufficient to prove that an agreement to create a cartel is a contravention of s4(1)(b) of the Act.

In a case of cartel conduct, the Commission has to prove that "the conduct in question would have the effect of undermining competition", and thus it is sufficient to prove that an agreement to create a cartel is a contravention of s4(1)(b) of the Act. The onus then lies with the firms concerned to disprove the alleged cartel conduct. Silence or being passive will not be regarded as a sustainable defence.

Accordingly, the CAC found that the appellants, Ominco and Coolheat, had engaged in conduct directly and indirectly in contravention of s4(1)(b)(i) of the Act. Penalties of R1,925,366 and R4,250,612 were imposed upon Omnico and Coolheat respectively, after a consideration of the aggravating and mitigating factors.

Karabo Ndhlovu and Natalie von Ey

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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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