7 MARCH 2018

COMPETITION ALERT

IN THIS **ISSUE**

PENALTIES FOR JUMPING THE MERGER GUN

In terms of the Competition Act, No 89 of 1998 (Act), the Competition Tribunal (Tribunal) may, among other things, impose an administrative penalty on firms that either fail to give notice of a merger or proceed to implement the merger without the approval of the Competition Commission (Commission) or the Tribunal as the case may be (also known as "gun jumping"). Such an administrative penalty may not exceed 10% of the firm's annual turnover in South Africa during the previous financial year.

A TALE OF TWO CINEMAS

The Tribunal recently dismissed a market division complaint against Ster-Kinekor and Nu Metro arising from an agreement prescribing the genre of film which each could exhibit at the Victoria & Alfred Waterfront (V&A Waterfront) in Cape Town.

CDH
CLIFFE DEKKER HOFMEYR

PENALTIES FOR JUMPING THE MERGER GUN

The Competition Tribunal may impose an administrative penalty on firms that either fail to give notice of a merger or proceed to implement the merger without the approval of the Commission or the Tribunal.

In terms of the Competition Act, No 89 of 1998 (Act), the Competition Tribunal (Tribunal) may, among other things, impose an administrative penalty on firms that either fail to give notice of a merger or proceed to implement the merger without the approval of the Competition Commission (Commission) or the Tribunal as the case may be (also known as "gun jumping"). Such an administrative penalty may not exceed 10% of the firm's annual turnover in South Africa during the previous financial year.

The minimum penalty will be double the filing fee payable subject to a maximum penalty of R5 million for intermediate and R20 million for large mergers.

There are a number of different triggers to filing a merger, not just the acquisition of more than 50% of the shares in an entity (so called "bright line" control). Acquiring the ability to materially influence the policy of a firm in a manner comparable to the other forms of commercial control is sufficient to trigger an obligation to file a merger (for example, the right to veto the budget, forecast or business plan of a firm or the appointment of key executives – such as CEO, CFO or Managing Director). This means that some deals may unwittingly lead to an obligation to file a merger.

In 2017, the Commission published the Draft Guidelines for the Determination of Administrative Penalties for Failure to Notify a Merger and Implementation of Mergers Contrary to the Competition Act (Guidelines). In terms of the Guidelines, the Commission states that the minimum penalty will be double the filing fee payable (ie R300,000 or R1 million for intermediate and large mergers respectively) subject to a maximum penalty of R5 million for intermediate and R20 million for large mergers. In arriving at an appropriate penalty in terms of the Guidelines the Commission also proposes that the following steps are taken:

- Step 1: Determination of the nature or type of contravention;
- Step 2: Determining the range of the administrative penalty;
- Step 3: Considering factors that might mitigate and/or aggravate the amount reached in step 2; and
- Step 4: Rounding off this amount if it exceeds the statutory cap of 10% of turnover provided for in the Act.

Recently in the *Macsteel* matter, the Commission sought to make a consent agreement an order of the Tribunal in a case which we discussed in our last alert. The prior implementation of that transaction attracted a R1 million penalty. The administrative penalty imposed was based on the merger filing fee (being R100,000 at the time the merger ought to have been filed) multiplied by five (for reasons that are not clear) and then multiplied by two (given the number of respondents) to arrive at the penalty payable.

While the Tribunal confirmed the consent agreement, it sought to interrogate the basis for using the filing fee as the starting point for the calculation of the administrative penalty. At the hearing the Tribunal voiced its concern that this approach could lead to the penalties being an insufficient deterrent to parties who failed to notify mergers.

CDH
CLIFFE DEKKER HOFMEYR

PENALTIES FOR JUMPING THE MERGER GUN

CONTINUED

Parties concluding commercial transactions must be aware that the penalties for failing to notify transactions or gun jumping are at least twice the merger filing fee.

In defending its approach, the Commission relied on the Guidelines and on previous Tribunal case law, specifically the *Caxton and Natal Witness Printing and Nine Others* (FTN190Dec15) dated 21 July 2017. In the *Caxton* case, the Commission relied on other decisions, mentioned below, which used the merger filing fee as the proxy for 'affected turnover' and to serve as the basis upon which to calculate the appropriate administrative penalty. For example, in *Competition Commission v Deican Investments (Pty) Ltd and New Seasons Investments Holding (Pty) Ltd* (FTN151Aug15) and *Competition Commission v Dickerson Investments (Pty) Ltd and Nodus Equity (Pty) Ltd* (FTN127Aug15) , the Tribunal stated that the filing fee provides a rational base or a minimum floor from which to compute an appropriate penalty. This was reiterated in the *Competition Commission v Standard Bank of South Africa Ltd* (FTN228Feb16) case, where the penalty imposed was equivalent to the filing fee at the time.

The Tribunal sitting at the hearing of the *Macsteel* matter seemed unconvinced by this approach and asked whether the Commission had given consideration to the approach in other jurisdictions. The Commission said it had not but rather sought to rely on the Guidelines and the case law.

It seems that the Tribunal, while reluctant in this specific instance to accept the merger filing fee as the starting point for the penalty, has in fact accepted this approach in previous cases.

Parties concluding commercial transactions must be aware that in terms of the Guidelines (which are still in draft format) the penalties for failing to notify transactions or gun jumping are at least twice the merger filing fee. When concluding a commercial transaction, care must be taken to interrogate whether a change in or acquisition of control has occurred and accordingly, whether the transaction ought to be notified to the Commission for approval prior to implementation.

Craig Thomas and Susan Meyer

A TALE OF TWO CINEMAS

Nu Metro agreed to withdraw its objection to Ster-Kinekor entering the V&A Waterfront on condition that Ster-Kinekor's operations would be limited to "art films" while Nu Metro would only exhibit "commercial films".

The Competition Tribunal recently dismissed a market division complaint against Ster-Kinekor and Nu Metro arising from an agreement prescribing the genre of film which each could exhibit at the Victoria & Alfred Waterfront (V&A Waterfront) in Cape Town.

The alleged market allocation agreement arose in the context of a civil dispute between Nu Metro and the landlord of the V&A Waterfront when Ster-Kinekor sought to operate an "art cinema complex". Nu Metro contended that it enjoyed a right of first refusal should any further theatres be developed at the V&A Waterfront. When its objection was disregarded, it instituted action in the High Court. The matter was resolved by way of a settlement agreement in terms of which Nu Metro agreed to withdraw its objection to Ster-Kinekor entering the V&A Waterfront on condition that Ster-Kinekor's operations would be limited to "art films" while Nu Metro would only exhibit "commercial films". This agreement was subsequently made an order of the High Court (Settlement Agreement). All of this took place before the prohibition against market division in the Competition Act, No 89 of 1998 (Act) came into effect.

Nu Metro accordingly sought legal advice and on this basis decided against implementing the Settlement Agreement, and applied for leniency.

It later appeared that Ster-Kinekor intended to exhibit certain commercial films at the V&A Waterfront which would amount to a breach of the Settlement Agreement. Nu Metro accordingly sought legal advice and on this basis decided against implementing the Settlement Agreement, and applied for leniency. The Commission granted Nu Metro leniency and referred the complaint against Ster-Kinekor to the Tribunal. Ster-Kinekor raised the following key arguments before the Tribunal:

- Firstly, the Commission improperly characterised the Settlement Agreement as an agreement between competitors (a prerequisite for a market division contravention) when in fact it comprised two vertical relationships: the one between Nu Metro and the landlord of the V&A Waterfront, and the other between Ster-Kinekor and the landlord.
- Secondly, Ster-Kinekor, having changed hands, argued that the Tribunal could not grant relief against its new owner because it had not contravened the Act even if its predecessor had.
- Thirdly, Ster-Kinekor contended that the Settlement Agreement was concluded before the commencement date of the Act's market division prohibition and thus the parties could not be deemed to have contravened the Act.

A TALE OF TWO CINEMAS

CONTINUED

The Tribunal ultimately dismissed the complaint against Ster-Kinekor and held that the Settlement Agreement was concluded before the relevant provision in the Act came into force.

Ultimately, the case turned on the third issue. The Commission contended that notwithstanding the fact that the parties concluded the Settlement Agreement before the relevant section of the Act came into force, both parties had implemented the agreement after the commencement of the relevant section.

The Tribunal held, however, that the evidence revealed that Ster-Kinekor's exhibition of art films could have plausibly been more attributable to the implementation of Ster-Kinekor's business model rather than the Settlement Agreement. Counsel for Ster-Kinekor pointed out, the fallacy of such an argument by a story our courts have retold about the Parisian cripple suspected of being a German spy in disguise:

> That he [ie the Parisian cripple] habitually speaks French and limps on two sticks matters not all: that he was once heard speaking fluent German and was seen to run may well be conclusive.

Secondly, post the enforcement of the Act, Nu Metro had only tried to invoke the Settlement Agreement once in circumstances where there was uncontested evidence indicating that the Ster-Kinekor employees had no knowledge of the Settlement Agreement which Nu Metro sought to invoke. Without knowledge of a Settlement Agreement, it follows that there could be no implementation of it.

The Tribunal ultimately dismissed the complaint against Ster-Kinekor and held that the Settlement Agreement was concluded before the relevant provision in the Act came into force and that the Commission could not prove that there was continuing conduct regarding the implementation of the Settlement Agreement after the section's commencement.

Had there been evidence of actions or discussions aimed at implementing the Settlement Agreement, the historic nature thereof would unlikely have been a sound defence to the market division allegations. Any risky arrangements concluded prior to the enforcement of the Act's market division section will be deemed to be on-going, unless clearly discarded.

Ammara Cachalia 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

Lara Granville
Director
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com

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

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

Veronica Cadman
Executive Consultant
Competition
T +27 (0)11 562 1131
E veronica.cadman@cdhlegal.com

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

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

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

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.

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