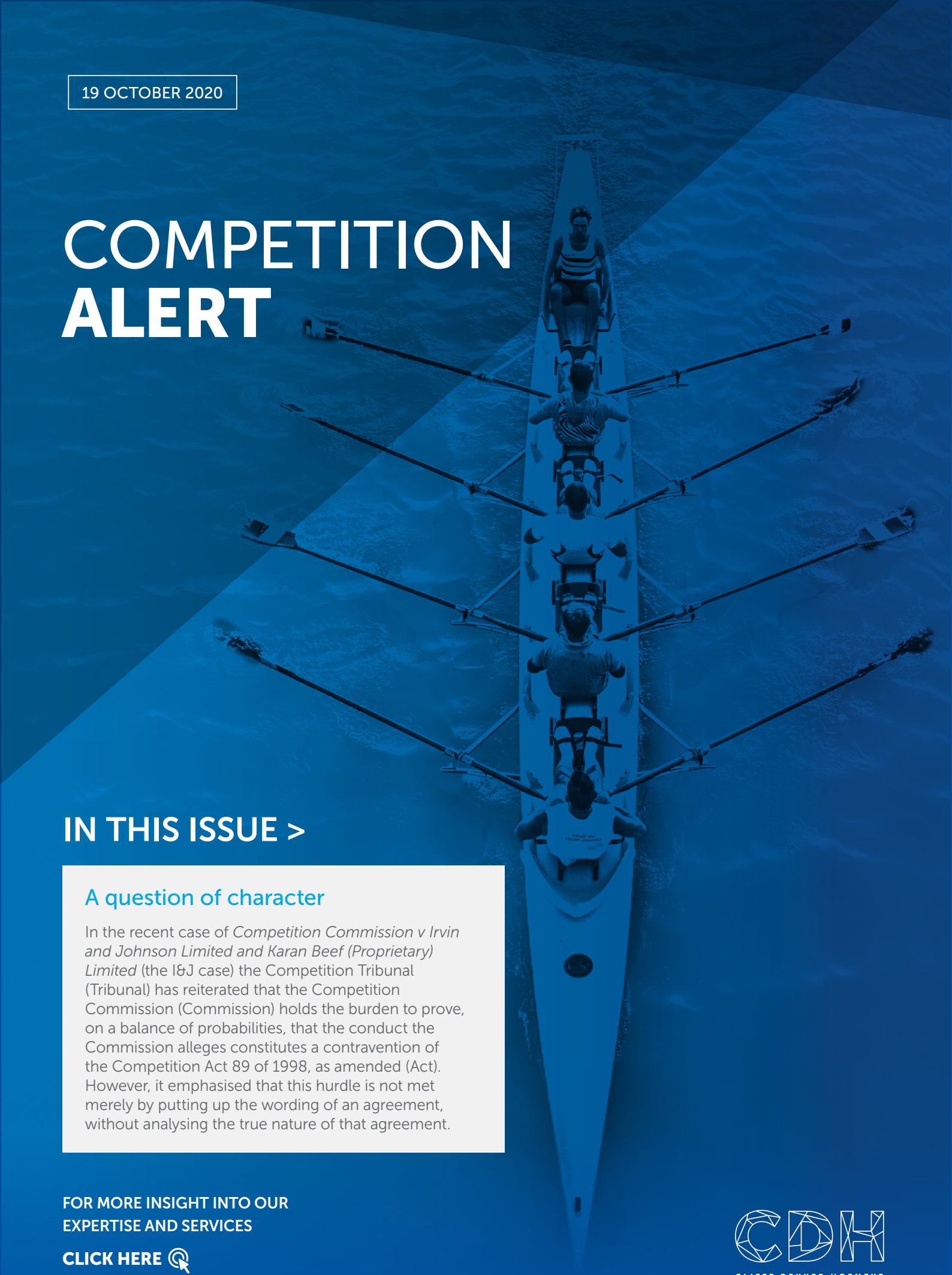
19 OCTOBER 2020

COMPETITION **ALERT**



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A question of character

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A question of character

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In the I&J case, the Commission had alleged that Irvin and Johnson Limited (I&J) entered a collusive agreement with Karan Beef (Proprietary) Limited (Karan Beef). In the past, I&J had manufactured processed meat, and also marketed and sold it to customers, such as retailers or the food industry. I&J then sold its manufacturing plant, while, according to the evidence of Karan Beef, Karan Beef was considering exiting the market for the sale of processed meat. At that point I&J entered into an agreement with Karan Beef in terms of which Karan Beef would manufacture, and I&J would market and sell the processed meat. A restriction was also placed on Karan Beef not to conduct marketing and sale activities, and accordingly it ceded its existing contracts in this regard to I&J.

Thus, the consequence of this agreement was that Karan Beef would manufacture for and sell to I&J and accordingly, they entered a vertical (customer and supplier) relationship. However, since they had also been (or possibly continued to be) in a horizontal relationship (as competitors), the Tribunal had to grapple with the question of whether the agreement constituted a section 4(1)(b) contravention of the Act (i.e: whether the agreement amounted to collusion for the purposes of the Act).

In this regard, the Commission bears the onus of proving the existence of such an agreement or concerted practice, on a balance of probabilities (which is practically achieved by leading sufficient evidence). To this end, the Commission merely put up the agreement between Karan Beef and I&J as evidence and asserted that the arrangement was collusive. While the Tribunal in the I&J case acknowledged the concern that may arise with vertical agreements between parties who have been and/or continue to be competitors in a horizontal relationship, it also re-affirmed that "*an agreement on the face of it cannot, without more, propel mere suspicion into a finding of collusion*".

Rather, the Tribunal reiterated that the Commission has to prove, based on clear and cogent evidence, (i) the true nature of the agreement or concerted practices; and (ii) whether such agreement or concerted practice has the character of the conduct sought to be prohibited in terms of section 4(1)(b) of the Act. The Tribunal noted that, "*the fact that two competitors or potential competitors conclude an agreement does not necessarily lead to the conclusion that such an agreement, on the face of it, without more, violates section 4(1)(b) [of the Act]*". In other words, the Tribunal held that the mere presence of an agreement or concerted practice does not spell the end of the enquiry.

A question of character...*continued*

The Tribunal confirmed that *"what needs to be demonstrated is whether the agreements between the parties can be characterised as having as their object or purpose participation in a cartel..."*

As to the second leg, whether the agreement or concerted practice espouses the character of the conduct that is prohibited under section 4(1)(b) of the Act, the Tribunal confirmed that *"what needs to be demonstrated is whether the agreements between the parties can be characterised as having as their object or purpose participation in a cartel..."*. To this end, the Commission has to lead sufficient evidence for the Tribunal *"to conclude that firms have crossed the line between legitimate commercial arrangements and cartel conduct"*.

In the end, the Tribunal found that there was a legitimate commercial agreement in place between I&J and Karan Beef and it was not of the character of a market division relationship – largely because Karan Beef had been intending on exiting the downstream market for the sale of processed beef in any event.

That said, the Tribunal noted that the Commission did not plead an alternative case based on sections 4(1)(a) or 5(1) of the Act. Although pleading an alternative case will not dispense with the Commission being required to lead sufficient evidence to prove the contravention it alleges, it may be that a contravention of section 4(1)(a) or 5(1) of the Act would be considered in future cases where the factual scenario echoes that of the I&J case.

Cartel conduct is harmful to competition and consumers alike and must face the appropriate attention and sanction. This must, however, be balanced against the principles of procedural fairness and the burden of proof contemplated in section 4(1)(b) of the Act, which serve as fundamental prerequisites to a cartel conduct finding. However, firms contemplating agreements with restrictions resulting in one or both contracting parties agreeing not to participate in a market or part of a market, should seek advice to analyse whether the agreement may be construed as achieving legitimate commercial ends, or whether it is likely to be collusive. We await to see whether the Commission will take the Tribunal's decision on appeal to the Competition Appeal Court.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
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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