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COMPETITION **ALERT**

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An absolute or flexible restriction: Can prohibited practices be prosecuted three years after the practice ceased?

The Constitutional Court (Court) recently delivered a unanimous seminal judgment in *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14. The decision primarily engaged with whether section 67(1) of the Competition Act 89 of 1998 (as amended) (Act) constitutes a rigid prescription provision or a procedural time-bar which can be condoned in the event of non-compliance.

Merger control and failing firms (Part 2)

In a recent article (accessible here), we discussed an anticipated increase in reliance on the failing firm doctrine in the context of merger assessments. We surmised that the competition authorities were unlikely to relax the strict failing firm doctrine requirements solely to cater for COVID-19. This article continues the discussion by engaging more substantially with the doctrine's requirements.

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The matter concerned a complaint referral by the Competition Commission (Commission) in which the respondent, Pickfords Removals SA (Pty) Limited (Pickfords) was accused of engaging in 37 instances of collusive tendering in contravention of the Act.

Section 67(1) of the Act, as it was at the time, provided that *"a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased"*.

The key outcomes of the decision appear to be:

- Firstly, that a complaint initiation need not necessarily cite all alleged respondents at the outset and, depending on the facts, may be amended upon further investigation by adding new firms, without triggering a separate and new complaint initiation.
- Secondly, the prosecution of prohibited practice complaints initiated more than three years after the alleged illegal conduct ceased are met by a procedural time-bar in terms of section 67(1) of the Act, and not a wholly inflexible prescription defence. Nonetheless, the hurdle of showing good cause for condonation of non-compliance with section 67(1) of the Act must still be overcome.

Facts

In November 2010, the Commission initiated a complaint (2010 initiation) in respect of the broader furniture removal industry, but did not specifically cite Pickfords as a respondent to the investigation. In June 2011, Pickfords and other furniture removal firms were specifically cited in a further complaint initiation by the Commission concerning the same practices (2011 initiation). The 2011 initiation was in turn amended in June 2013, alleging the total of 37 instances of collusive tendering by Pickfords. In September 2015, the Commission referred a prohibited practice complaint to the Competition Tribunal (Tribunal), alluding to both the 2010 initiation and 2011 initiation. Pickfords excepted to the complaint referral, alleging (inter alia) that 14 of the 37 counts of the alleged collusive conduct were time-barred in terms of section 67(1) of the Act.

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A determination of the correct 'trigger event' for the commencement of the running of the three-year period is crucial.

Trigger event

A determination of the correct 'trigger event' for the commencement of the running of the three-year period is crucial. On the facts, several counts of the alleged collusive conduct would only be timely if the 2010 initiation, as opposed to the 2011 initiation, was used as the trigger event.

In this regard, the Tribunal as the court of first instance, had found that the 2011 initiation was not an amendment of the 2010 initiation, but was a self-standing initiation. The Competition Appeal Court (CAC) overruled the Tribunal, finding the converse. Importantly, the particular facts of the case appear to have been highly relevant in leading the Court to side with the CAC on this score. For example, the Court noted that the 2010 initiation pertinently stated that the collusion was 'ongoing', foreshadowing the possible addition of further firms and, in the Court's view, the 2011 initiation made it clear that it was intended to be an extension of the 2010 initiation.

The CAC nonetheless held that Pickfords only became a named party when the 2011 initiation occurred; "*before that, the alleged prohibited practice did not involve it*" such that, on the CAC's analysis, the trigger event would have still been in 2011. It is in this regard that the Court departed from the CAC.

Having held that the Commission is required to be in possession of some information regarding an alleged practice "*which objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice*", the Court ultimately found that the Commission need only have in mind some of the firms potentially involved in a prohibited practice to initiate a valid complaint, and the names of all the firms need not be included when the complaint is first initiated.

In disagreeing with the CAC that the trigger event was the 2011 initiation, the Court held "*...that approach misconceives the purpose and objects of the Competition Act, particularly the provisions relating to the initiation of a complaint. As stated, the emphasis in those provisions is on the prohibited practice concerned, not the names of firms or parties implicated in it.*" The Court also emphasised the informal procedure used by the Commission.

Ultimately, in the Court's view, the trigger event from which the three year period for purposes of section 67(1) of the Act was to be calculated was with reference to the 2010 initiation.

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An absolute or flexible restriction: Can prohibited practices be prosecuted three years after the practice ceased?*...continued*

The CAC agreed with this finding, having viewed the prescription provision as serving a legitimate purpose of barring investigations into cartel behaviour that ceased an appreciable time ago, and no longer endangered the public.

Does section 67(1) constitute an absolute time-bar?

The central issue was whether section 67(1) of the Act constitutes a substantive time-bar which places an absolute prohibition on the initiation of a complaint in respect of a prohibited practice more than three years after the cessation of that practice; or is merely a procedural time-bar, which can be condoned by the Tribunal in terms of its powers under the Act.

The Tribunal held that it could not condone non-compliance with section 67(1). The CAC agreed with this finding, having viewed the prescription provision as serving a legitimate purpose of barring investigations into cartel behaviour that ceased an appreciable time ago, and no longer endangered the public.

In overruling the CAC, and finding in favour of the procedural time-bar interpretation of section 67(1), the Court noted that a rigid interpretation could potentially subvert the Commission's work as a public body by hindering it access to the Tribunal and could also possibly limit access to a civil court for potential claimants seeking damages arising from a prohibited practice. It was emphasized that "*prescription is aimed at penalising negligent inaction, not the inability to act...cartels are by their nature secretive, [thus] it would be inequitable to penalise the Commission, which would invariably have no knowledge of, for instance, surreptitious price fixing by cartels, for its failure to act within the three-year period...[which] would be tantamount to rewarding cartels for their covert unlawful conduct and would not be in the interests of justice*". Imposition of an absolute substantive time-bar was also found to hypothetically encourage cartels to remain silent for a period of three years, in order to gain immunity for known prohibited activities.

Condonation

Section 58(1)(c) of the Act grants the Tribunal the power to condone, on good cause shown, any non-compliance of (inter alia) a time limit set out in the Act. Overruling the CAC, the Court found that this "*expressly provides a general power of condonation, save for the [specific] exclusions*", and that condonation of non-compliance with the procedural time-bar of section 67(1) of the Act are within the Tribunal's powers, when good cause is shown.

The Court however cautioned that condonation for non-compliance with section 67(1) does not provide a blank cheque for slothful litigation, as 'good cause' must still be shown, which depends on the facts of each case, with the overriding consideration being the interests of justice. To this end, relevant factors that may be considered include: the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the issues to be raised in the matter; and the prospects of success.

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Merger control and failing firms (Part 2)

The CMA's provisional finding was recently revised due to the precarious financial position of Deliveroo having improved since its initial finding, and the CMA having found that the failing firm defence was no longer satisfied on the facts of the case.

In a recent article (accessible here), we discussed an anticipated increase in reliance on the failing firm doctrine in the context of merger assessments. We surmised that the competition authorities were unlikely to relax the strict failing firm doctrine requirements solely to cater for COVID-19. This article continues the discussion by engaging more substantially with the doctrine's requirements.

Inability to meet financial requirements

At the heart of this failing firm doctrine requirement is a firm's dire financial position which is leading the business into imminent failure, and which the proposed merger serves to remedy. If it is not made clear that the firm will actually fail, despite parlous circumstances, this requirement will not be met. Example can be drawn from the United Kingdom Competition and Market Authority's (CMA) provisional clearance of Amazon's investment in Deliveroo (*Amazon/Deliveroo*), initially based on a 'deterioration' in Deliveroo's financial position caused by the coronavirus outbreak. The CMA's provisional finding was recently revised due to the precarious financial position of Deliveroo having improved since its initial finding, and the CMA having found that the failing firm defence was no longer satisfied on the facts of the case.

In South Africa, for example, in *Iscor Ltd & Saldanha Steel (Pty) Ltd* (67/LM/Dec01), it was highlighted that the relevant firm must either be failing, or likely to fail in the imminent future. On the facts of that case, it was found that, without the financial restructuring of the acquirer, the target firm would have failed since "*no independent firm would have provided the finance necessary to bail it out of its debt obligations given its past [financial] performance and its less than certain future*".

In *Phodiclinics (Pty) Ltd and Others & Protector Group Medical Services (Pty) Ltd (in liquidation) & Others* (122/LM/Dec05), despite attempts of reorganisation, the failing firm had no cash flow or overdraft facilities to pay its staff salaries, debts or rent. In aggravation of this was the fact that management had left the company. The firm was eventually placed in liquidation which reinforced the conclusion that it was undoubtedly failing. A firm however need not have necessarily already crossed the Rubicon into liquidation to successfully invoke the failing firm doctrine. Rather, an analysis of a firm's financial position must evidence actual or imminent failure in the short to medium term without intervention.

Good-faith efforts to elicit reasonable alternative offers

Failing firms must elicit good faith alternative offers and interrogate whether any would raise less competition and public interest concerns, in comparison to the merger at hand.

For example, in *K2018239983 (South Africa) (Pty) Ltd & The Business of Hernic Ferrochrome (Pty) Ltd* (LM141Jul19), the business rescue practitioners conducted a bidding process for the sale of the target firm and identified five compliant bids. Regarding the losing four bids, two were competitors of the merging firms, already thought to have higher market shares than the combined post-merger market share

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Merger control and failing firms (Part 2)*...continued*

Although the fact that the failing firm's assets would exit the market, but for the merger, is not necessarily a prerequisite in South Africa; an ability to prove this may support the successful invocation of the failing firm doctrine.

of the merged entity, and the other two firms had no presence in South Africa and thus no BEE offering. The final bidders were evaluated on their stated intention and ability to ensure the sustainability of the target firm's business, including the retention of employees. On this basis, it was found that reasonable, good faith efforts were made to find an alternative purchaser, with the acquiring firm being the most suitable bidder.

In *CTP Ltd and Another v Competition Commission* (IM232Feb16), the market characteristics were key considerations in justifying the acquirer's failure to attempt to find a suitable alternative purchaser. In this case, the relevant market for the manufacture and replication of CDs and DVDs was in fast decline and termed a potentially dying market, such that it was unlikely that there would be another willing buyer. In certain markets, hard-hit by COVID-19, this may be particularly relevant insofar as the pool of viable prospective acquirers practically able to sustainably save a failing firm may have shrunk.

Reasonable expectation that, but for the merger, the failing firm's assets would exit the market

Although the fact that the failing firm's assets would exit the market, but for the merger, is not necessarily a prerequisite in South Africa; an ability to prove this may support the successful invocation of the failing firm doctrine.

In *JD Group Ltd & Profurn Ltd* (60/LM/Aug02), the market in question comprised dominant players who would likely acquire the market share of Profurn if it failed. On this basis it was held that JD Group's acquisition of Profurn *"at worst shifts the calculus in favour of JD"*, which was less detrimental to competition than its acquisition by the dominant players in the market.

In *Schumann Sasol South Africa Pty Ltd & Price's Daelite Pty Ltd* (23/LM/May01), the parties alleged that, should the failing firm and its assets exit the candle market, competition would be diminished by exerting upward pressure on prices. However, it was ultimately found that the failing firm's exit would likely rather result in other competitors gaining access to the market and competition being better supported.

In conclusion, a firm's potential exit may be even more significant in the reconfigured COVID-19 landscape, with some markets having sustained more severe economic battering than others. COVID-19 is likely to have had a substantial impact on, for example, barriers to entry and levels of countervailing power.

While the failing firm doctrine may now be viewed through a pandemic-tinted lens, each requirement must still be satisfied, with appropriate regard to past precedent.

The notion that firms need not rely on the failing firm doctrine to justify approval of a complex merger was recently evidenced by the CMA's revised provisional approval of *Amazon/Deliveroo*, wherein despite the CMA abandoning reliance on the failing firm defence, it still recommended that the merger be approved.

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Merger control and failing firms (Part 2)*...continued*

In South Africa, the failing firm doctrine does not serve as an absolute defence and is but one factor in a merger assessment.

In South Africa, the failing firm doctrine does not serve as an absolute defence and is but one factor in a merger assessment. Even if the failing firm doctrine is properly invoked, the effect of the merger must still be considered in the light of other competition and public interest considerations. The public interest considerations which include, for example, the impact on small and medium size businesses or firms controlled or owned by historically disadvantaged persons (HDPs), the risk of job losses, and the ability of the merger to increase the levels of ownership by HDPs and workers, will bear equal importance as the competition factors in the analysis. It will be interesting to see how our competition authorities balance these potentially conflicting factors on the merger analysis scales.

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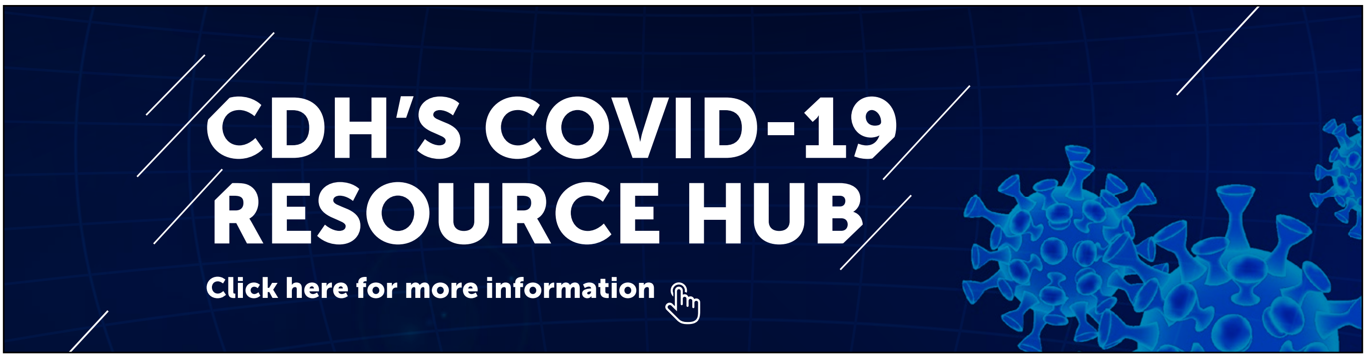

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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