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When there is no thread of evidence: Inferential reasoning in cartel cases clarified by the Competition Appeal Court in alleged blanket cartel

On 17 December 2021, the Competition Appeal Court (CAC) handed down its judgment in *Aranda Textile Mills (Pty) Ltd & Mzansi Blanket Supplies (Pty) Ltd v the Competition Commission of South Africa* [2021] CAC Case No: 190/CAC/DEC20 where it clarified what must be proved to establish a cartel case based on circumstantial evidence and inferential reasoning.

Pre-closing merger notifications to the Egyptian Competition Authority are now mandatory

Transactions constituting "*economic concentrations*" now require pre-closing clearance in Egypt. Egypt has substantially altered its merger control regime by amending the Protection of Competition and Prohibition of Monopolistic Practices Law 3 of 2005 (Competition Law) on 30 December 2022.

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Aranda Textile Mills (Pty) Ltd (Aranda) and Mzansi Blanket Supplies (Pty) Ltd (Mzansi) were respondents in a referral brought by the Competition Commission (Commission) where it alleged that Aranda and Mzansi, through submitting simultaneous but separate bids for the same tender in their capacity as competitors, contravened section 4(1)(b) of the Competition Act 89 of 1998 (Act) by reaching an agreement to fix prices and engage in collusive tendering. Both price fixing and collusive tendering (i.e. bid-rigging) are regarded as per se contraventions under the Act due to the perceived egregious nature of these offences. This means that once an agreement of this nature has been proven, respondents cannot rely on any pro-competitive benefits that such an agreement may have on the market as a defence.

The blanket tender and tribunal decision

This case concerned a government tender for six contracts for the supply of blankets. At the time, Aranda was the only local producer of blankets that met the tender specifications, meaning that all of the bidders would need to get their supply through Aranda. Both Aranda and Mzansi submitted separate bids for the tender. The tender was ultimately awarded to Mzansi as a result of its superior broad-based black economic empowerment credentials.

A disgruntled unsuccessful bidder then submitted a complaint to the Treasury Department alleging that there was collusion between Aranda and Mzansi because of the difference in the price of the Aranda blankets that it was quoted on compared to the prices contained in Mzansi's bid. Upon investigating the matter, the

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Treasury Department referred the matter to the Commission, which then brought a complaint to the Competition Tribunal (Tribunal). The Tribunal ultimately held that both Aranda and Mzansi contravened the Act. It came to this finding based on no direct evidence of collusion but on inferential reasoning gathered from various pieces of circumstantial evidence. Inferential reasoning can be understood as the process of reaching a particular conclusion based on the cumulative weight of various pieces of circumstantial evidence which, when considered in isolation, do not prove the conduct.

Aranda and Mzansi then appealed the Tribunal's decision to the CAC, which had to consider whether the Commission had proved a contravention of section 4 of the Act on a balance of probabilities based on inferential reasoning and whether the conduct of Aranda and Mzansi could be characterised as being conduct between competitors (parties in a horizontal relationship), and thus a per se prohibition, or whether it was conduct between a supplier and customer (parties in a vertical relationship).

Inferential reasoning in cartel cases

In considering the Tribunal's inferential reasoning, the CAC noted that while it may be difficult for the Commission to secure direct evidence in cartel cases, due to the secretive nature of the conduct, judicially accepted rules relating to inferential reasoning must apply. The CAC confirmed that the approach to inferential reasoning in competition law is the same as in other areas of the law.

The CAC recognised that it is possible to prove such a cartel case on the basis of relying wholly on circumstantial evidence and inferential reasoning. It nevertheless warned that such cases should be analysed with a *"cautious and fact-sensitive approach"*. It held that in order to reach such a conclusion, evidence must be assessed holistically and that not one piece of circumstantial evidence would be sufficient, on its own, to prove collusion. The inference sought to be drawn must be consistent with all the proven facts. If it is not, then such an inference can either not be drawn or such an inference must, when measured against the probabilities, be the more natural or plausible conclusion amongst other conceivable ones. In instances where there are no proven objective facts, no proper inferences can be drawn as such conclusions would then be regarded as mere speculation or conjecture.

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The CAC found that the fact that a manufacturer and a supplier bid for the same tender, without more, does not contravene the Act. In these cases, an agreement or concerted practice would still need to be established. The CAC held that the Commission failed to provide proof of primary facts that would justify a collusive inference to be drawn. The CAC held that the Tribunal failed to give weight to Aranda and Mzansi's witnesses' evidence which contextualised and provided legitimate explanations surrounding the circumstantial evidence in which the conclusions were drawn.

Characterisation

The CAC then considered whether the Tribunal was supposed to engage with a characterisation assessment in making its determination. In short, characterisation entails an assessment of whether the alleged conduct falls within the legislative ambit of the per se prohibition in section 4(1)(b) of the Act (including whether the parties are in a horizontal relationship with one another) and whether such conduct would by object contravene the Act. Previously, conduct which appeared to meet the per se criteria was characterised as falling outside the Act because the object of the conduct was found to not contravene the Act. Examples of these instances include dual distribution networks and commercially motivated restraints in sale of business/share agreements.

The CAC found that the Tribunal's failure to properly characterise the conduct, more particularly the relationship between Aranda and Mzansi as either a horizontal or vertical one, was also fatal to its finding of a contravention. Although the CAC did not make a finding on whether the relationship in this case was horizontal or vertical, it did note that a characterisation enquiry should be done for any alleged section 4 cartel prohibition as this makes for a constitutionally compliant approach.

Conclusion and remarks

In conclusion, the CAC in this case made two significant findings which affect the way that cartel cases will be tried in the future.

The CAC emphasised that there is no lower standard for relying on circumstantial evidence and inferential reasoning to prove a cartel case than the equivalent standards applied in other areas of the law. The CAC found this despite the inherent difficulty for the Commission to obtain evidence for secretive cartel behaviour. In these instances, the Commission is under an obligation to prove objective facts and draw inferences from these facts by discrediting possibilities that would explain the conduct away as being anything other than collusion.

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In relation to characterisation, it has traditionally been used as a shield by respondents as a defence against any alleged cartel conduct. The CAC in this case suggests that the Tribunal, and seemingly the Commission while investigating, must characterise all alleged cartel conduct before reaching its finding. This means that characterisation should be analysed by the Commission from the outset when considering whether to institute a referral against a firm and by the Tribunal in making its finding.

This case is illustrative of the need for the Commission, in instances where there are threads of evidence, to make a concerted effort to make sure that all of the loose ends tie up to show a case of cartel contravention.

Albert Aukema and Reece May

Pre-closing merger notifications to the Egyptian Competition Authority are now mandatory

Transactions constituting *"economic concentrations"* now require pre-closing clearance in Egypt. Egypt has substantially altered its merger control regime by amending the Protection of Competition and Prohibition of Monopolistic Practices Law 3 of 2005 (Competition Law) on 30 December 2022.

Old post-closing regime

Under the old regime, transactions that met the turnover threshold had to be notified to the Egyptian Competition Authority (ECA) within 30 days after closing. The old post-closing regime continues to apply to all transactions signed up until 29 December 2022. However, going forward, all transactions that meet the turnover thresholds (which have been substantially increased when compared to the old regime) **and** result in a **change of control or material influence** over another entity will require pre-closing approval from the ECA.

Under the old regime, no definition of a *"merger"* or *"control"* was contained in the Competition Law. As such, in principle, any transaction that met the financial threshold had to be notified to the ECA within 30 days of closing, regardless of whether the transaction led to a change of control.

New pre-closing regime

The new regime introduces a change of control element for the first time in the Egyptian merger control system. An *"economic concentration"* is defined as any change of control or material influence that results from a merger, acquisition, or the establishment of a full-function joint venture. Control and material influence are defined as the ability to influence the economic and strategic decisions, as well as the business objectives, of the target entity. Excluded from the definition of an economic concentration are transactions that do not result in a change of control or material influence, such as those between subsidiaries of the same parent company.

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The thresholds that trigger the pre-closing approval requirement are a combined turnover or assets of EGP 900 million (approximately USD 30 million) in Egypt, with at least two parties having a turnover of EGP 200 million (approximately USD 6,5 million) each in Egypt, or a combined worldwide turnover or assets of EGP 7,5 billion (approximately USD 250 million), with at least one party having a turnover of EGP 200 million (approximately USD 6,5 million) in Egypt. This, of course, raises the question of whether the ECA will apply a local nexus test when it comes to the latter 'international leg' of the turnover thresholds. This is an aspect we will be keeping a close eye on as merger regimes without local nexus tests are not considered to be best practice and introduce significant difficulties from a compliance and legal certainty perspective.

In terms of timing, upon a complete filing being submitted, the ECA will conduct an initial review. This initial review shall be concluded in 30 working days, with the option to extend the review period by an additional 15 working days. If the ECA finds that the transaction raises competition concerns, a second phase will follow. The review period for this second phase is 60 working days and may also be extended by an additional 15 working days. It is still not entirely clear as to what will constitute a complete filing as the ECA appears to be somewhat formalistic when it comes to supporting documents.

The amendments to the Competition Law have also significantly lowered the merger filing fees. The ECA's fees for reviewing a notified transaction shall not exceed EGP 100,000 (approximately USD 3,500).

Firms failing to submit the pre-closing notification will be subject to a fine ranging between 1% and 10% of the value of the annual turnover or assets of the involved parties or the value of the transaction (whichever is highest), or a fixed amount ranging between EGP 30 million (approximately USD 1 million) to EGP 500 million (approximately USD 16,5 million) if the value of turnover or assets cannot be ascertained.

COMESA and the ECA

Egypt is one of the 21 COMESA Member States. Generally, the COMESA Competition Commission serves as a one-stop shop for mergers

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requiring clearance in more than one Member State. The introduction of the new pre-closing regime creates a legal obligation to notify **both the COMESA Competition Commission and the ECA** (to the extent a transaction is notifiable in both jurisdictions). Under the old post-closing regime, this dual notification requirement only applied informally.

Conclusion

In conclusion, it is crucial for businesses operating in Egypt to be aware of this material change to its merger control paradigm.

The ECA will start to enforce the new regime after the executive regulations are issued. Certain aspects of the new regime appear to be positive steps in that they increase certainty and reduce costs. The changes also align Egypt with most other jurisdictions that also require pre-closing notifications. However, the separate notification requirement (in addition to the COMESA filing) does create a degree of additional complexity because COMESA is a non-suspensory regime (i.e. parties may, on risk, implement their transaction prior to receiving approval) whereas the new Egyptian regime suspends closing until approval is received.

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BBBEE STATUS: LEVEL ONE 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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