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Compliance in South Africa

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The South African Competition Commission intensified its efforts to combat cartel activity in 2007, and a number of cases involving price-fixing and market division in key sectors of the South African economy were referred to the Competition Tribunal for adjudication.

Various factors have contributed to successful prosecutions. First, the Competition Commission is increasingly in a position to initiate its own investigations, rather than simply wait for complaints from South African customers or competitors. The latest Annual Report published by the Commission indicates a significant increase in the number of complaints initiated by the Commission. While only three complaints were initiated by the Commission during the 2005-06 term, six such complaints were initiated during the 2006-07 term.

Second, the Commission utilized search and seizure operations (or “dawn raids”) in the course of a number of investigations in 2007. These included a raid on various freight forwarding companies in conjunction with the EC and U.S. competition authorities and a simultaneous raid on the Durban, Port Elizabeth, and Johannesburg premises of the Reclamation Group (Pty) Ltd. for alleged collusive tendering and fixing

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of prices and trading conditions in the recycling industry. (The Reclamation raid was also the largest such operation conducted by the Commission since its inception.)

Third, it seems that the Competition Commission's Corporate Leniency Policy is starting to yield results. For example, the investigation into the fixing of prices and trading conditions by South African dairy producers Parmalat, Ladismith Cheese, Woodlands Dairy, Lancewood, Nestle, and Milkwood Dairy was bolstered by information supplied by Clover about the coordinated removal of surplus milk from the market by Clover, Woodlands, and Parmalat (a form of indirect price-fixing). As a result, the Commission granted Clover immunity from prosecution for this charge in terms of the leniency policy. The Milk Producers' Organisation of South Africa has since lodged a complaint against several major South African supermarket chains, alleging the fixing of milk prices and the use of discounts and promotion fees paid by retailers. This complaint is currently being investigated by the Commission.

In an investigation relating to the bread and milling industries, the Commission was assisted by Premier Foods (trading as Blue Ribbon Bakery) after it was granted conditional immunity from prosecution. The information supplied resulted in the Commission extending its investigation nationwide and also initiating a separate investigation into various practices in the milling industry. In November of 2007, the Tribunal confirmed a settlement agreement in which one of the cartel members, Tiger Brands, agreed to pay an administrative penalty of nearly ZAR 99 million (or approximately 5.7 percent of its national turnover for bread operations for the 2006 financial year) and to implement a compliance program. Tiger Brands was also granted

immunity for its participation in the milling cartel.

Although the South African leniency policy has been in effect since 2004, only about 14 applications have been received by the Competition Commission to date. As a result, in 2007, the Commission released a discussion paper setting out proposed amendments to the policy intended to make it more user-friendly and effective. They include incorporating the policy into the Competition Act (it is currently only a guideline) and introducing a “marker system” to allow leniency applicants to secure a place in the queue on the basis of limited information (provided that they submit complete information later). The discussion document also proposes allowing firms that have instigated cartel conduct to qualify for leniency and permitting oral leniency applications (to avoid information used in leniency applications being subject to discovery in subsequent civil legal proceedings such as damages actions by customers or competitors).

In addition to the changes to leniency policy, other significant amendments to the South African Competition Act are expected in the near future. In August of 2007, the South African Minister of Trade and Industry indicated at a briefing for the Economic, Investment and Employment Cluster's Programme of Action that amendments to the Competition Act would be presented for consideration by the Cabinet in 2008. As of the publication date of this article, no draft proposals have been circulated, but it is expected that these amendments will strengthen the Commission's powers to address sectors of the economy where there are “inherited” or “complex monopolies”.

There has been speculation that criminal liability for directors of companies that participate in cartel conduct will also be introduced. Sanctions of this nature, including

lengthy jail terms, were recently imposed on executives involved in cartel activities in the United Kingdom and United States and amendments to introduce liability of this kind were proposed late last year by the newly elected Australian government. It seems that this approach might also find favor with the Chair of the South African Competition Tribunal, David Lewis, who commented during the recent Tiger Brands consent order hearing that although the South African legislature had cogent reasons for not criminalizing individual participation in cartel conduct at the time when the Act was introduced, it is now “increasingly held in competition law that the only penalty sufficient to deter cartel conduct is prison time ... and [that] is a view, quite honestly, that we share.”

The South African antitrust authorities’ efforts to expose and penalize firms involved in anticompetitive practices in South Africa are likely to intensify in 2008. In particular, the Commission has said that it will prioritize investigations into the construction sector ahead of the Soccer World Cup in South Africa in 2010, after a preliminary investigation into this sector last year indicated possible bid-rigging and the fixing of input prices. The Commission will also focus on key industries that impact the daily lives of South African consumers such as basic foodstuffs, telecommunications, and the intermediate goods used in manufacturing like polymers, steel, chemicals, and fertilizers. The Commission is also expected to release its report on the banking industry later this year, which may trigger further investigations in the financial services sector.

These developments highlight the need for local and international companies operating in South Africa to implement and maintain a competition law compliance

program. An effective program should educate employees about the importance of competition law compliance and the basic principles embodied in the Competition Act. Staff should also be prepared to handle interactions with the competition authorities, including dawn raids. A competition law audit of legal agreements, policies, marketing materials, and the firm's practices may also be necessary, particularly if the company interacts with competitors that are members of industry associations. Reporting procedures should be established in order to detect possible contraventions and bring them to the attention of in-house legal counsel as soon as possible. This not only mitigates competition law risk, but also places the company in the best possible position to consider applying for leniency should the need arise. With the prospect of prison time looming in South Africa, it is never too soon to begin.