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I. INTRODUCTION

The new year is likely to see several interesting developments in South African competition law, following a very busy 2012 in which the Competition Commission made its maiden voyage to the Constitutional Court, Government intervened in several large merger transactions, and the Tribunal handed down three important judgments in cartel cases.

II. HEALTHCARE INQUIRY

The Commission intends to embark on a wide-ranging inquiry into the level and nature of competition in the South African private healthcare sector in 2013. The Act does not provide for the Commission to conduct formal market inquiries in the same manner as EU regulation does, but the Commission can ask industry players to voluntarily participate in a sector study. The Commission's only previous foray into inquiries of this kind was the 2008 banking inquiry, in which banks participated voluntarily and the Commission made several non-binding recommendations to the banking regulator.

The terms of reference setting out the nature and scope of this healthcare study have not yet been published, but it seems that the Commission's main concern is the rising cost of private healthcare. There have been consistently sharp increases in medical scheme expenditure on private hospitals over the last ten years, well in excess of the consumer price index. The Commission is apparently concerned that increasing consolidation in the private South African hospital sector, a lack of adequate regulation, and muted competition have given rise to these price hikes.

Much as it did with the banking inquiry, the Commission is likely to send detailed questionnaires to industry players regarding their strategy, pricing, and cost drives. The Commission may request participants in the study to produce detailed data to enable it to analyze the relevant product markets and identify potential problems. Formal public hearings may be held in due course.

The results of this study may be used to craft further regulation of the healthcare sector in due course or, if the Commission uncovers evidence of cartels or abuses of dominance in the sector, it may initiate formal complaint proceedings in order to prosecute companies contravening the Competition Act.

III. RISE IN MERGER ACTIVITY

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South Africa is slowly recovering from the global recession and local and cross-border merger activity is likely to rise.

Fairly uniquely, the Competition Act requires the South African authorities to consider not only whether a proposed merger will result in a lessening of competition in South Africa, but also whether it will impact on a range of specified public interest factors. Specifically, this refers to the impact that a merger will have on a particular industry sector or region, employment, the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive, and the ability of national industries to compete in international markets.

In a recent decision on the nature and scope of this public interest review, regarding the acquisition of South African retailer Massmart by global giant Walmart, the Competition Appeal Court emphasized that the competition authorities must consider not only whether any workers employed by the merging companies will lose their jobs, but also whether their working conditions will deteriorate. In addition, job losses in the broader South African supply chain also need to be assessed and, if these effects are substantial, they must be addressed by imposing appropriate conditions.

This aspect of the Commission's jurisdiction is likely to continue to be an area of focus in 2013, although it is not clear to what extent the Government will participate in large mergers to the extent it did in this transaction. Firms who are party to notifiable transactions in South Africa should consider the wider public interest implications of their transaction, not only whether the merger may lead to job losses in the merging firms. It is clear that in the world after the Walmart case, companies who need a quick clearance for their transaction must find solutions to potential public interest problems.

IV. CLARITY ON THE COMMISSION'S POWERS TO BROADEN ITS COMPLAINT REFERRALS

2013 will hopefully bring some clarity to the vexed question of how wide the Commission's power is to add new grounds of complaint, or additional respondents, to an existing complaint after it has already been referred to the Tribunal for hearing.

A string of cases about this issue were heard by the Constitutional Court in 2012. The Commission's view is that it can amend its complaint referral at any time before the Tribunal hearing starts if it wishes to add respondents to existing complaints (for example, to prosecute additional conspirators in a cartel) or to add charges to an existing complaint referral (for example to also charge a dominant company accused of participating in a cartel with abuse of dominance). The Commission maintains that it should be entitled to amend its complaint referrals at any time, even if the new complaint it seeks to add was not investigated prior to the referral.

The Commission applied directly to the Constitutional Court for clarity on this issue, but the Court declined to hear these cases. As a result, the Commission pursued applications for leave to appeal in the Competition Appeal Court. In the *Omnia* case, the Commission was granted leave to appeal to the Supreme Court of Appeal ("SCA") and that case will be heard during the first half of 2013. However the Appeal Court denied leave to appeal in the *Loungefoam* case. It is unclear whether the Commission will now petition the SCA to hear its appeal.

The final outcome of these cases will have significant consequences for the Commission, which has stated that an outcome which is not in its favor will result in some 14 of its 34 pending referrals having to be set aside.

V. INCREASING AFRICAN COMPETITION LAW ENFORCEMENT

Kenya, Zimbabwe, Malawi, Tanzania, Namibia, Botswana, Swaziland, Mauritius, and Zambia now all have competition authorities. These authorities are proving to be increasingly activist and this trend is likely to continue into 2013.

Global foreign investment is increasingly adopting an African focus and so investors will increasingly need to assess whether their transactions require approval as mergers in a number of jurisdictions in Africa. These authorities are likely to experience heightened levels of merger review. Global firms should not forget to factor the time to get merger approval in these jurisdictions into their transaction plan.

2013 will also see the first mergers being notified to the COMESA (Common Market for Eastern and Southern Africa) Competition Commission. In respect of the regulations, a merger has to be notified to the COMESA Commission if either the acquiring or target firm has interests in two or more of the COMESA countries and may also have to be notified in each jurisdiction if required by that jurisdiction's laws.

Prosecution of cartels and abuses of dominance in Africa are also likely to rise. Firms should bear in mind that competition authorities across Africa interact on a regular basis. Cartel investigations often commence as a result of a "heads up" from a neighboring jurisdiction.

VI. CRIMINAL LIABILITY AT LAST

The Competition Law Amendment Act 2009 was passed more than two years ago but has not yet been signed into effect by the President.

There is increasing pressure from trade unions and consumer groups for Government to deal more harshly with cartels, and we may well see this Act coming into effect, or being repealed to make way for even harsher sanctions, in 2013.

The Amendment Act provides for the criminal prosecution of a director, or a person who holds a position with management authority who is responsible for causing a firm to engage in, or knowingly acquiescing to a firm's engagement in, cartel conduct. Such an individual could face up to ten years imprisonment or a fine of R500,000 or both.

The introduction of criminal liability is likely to impact negatively on applications for corporate leniency because management will fear personal liability if they came forward. A decrease in leniency applications may lead to a marked decrease in the Commission's prosecution rate.

VII. INCREASED PENALTIES FOR CARTEL CONDUCT

In 2012, the Competition Tribunal finally put to bed the long-debated method of calculating an appropriate penalty for firms found to have contravened the Competition Act. In a case involving suppliers of wire mesh, the Tribunal set out a methodology for calculating penalties.

The new methodology places a large emphasis on the duration of the cartel conduct and seems to make it more commonplace to reach the 10 percent of turnover maximum provided for in the Act. This, coupled with the fact that the Act has now been in force for over a decade, is likely to give rise to higher penalties in 2013. The Commission has made it clear that deterrence is an important factor in the level of a penalty.

The Commission has been relatively successful in cartel prosecution to date, bringing in penalties that amount to several billions of rands since the inception of the Act. It has also become more sophisticated in its cartel detection and, as result, 2013 is only going to add to that number by several hundred million rand.

VIII. POTENTIAL CLASS ACTION

2013 may also ring in the first ever class action case in South Africa. This raises the stakes for perpetrators of anti-competitive conduct dramatically, as not only will they face increasingly large fines from the Competition Tribunal, but they could also potentially have to defend a class action in civil court for damages caused by their conduct.

The Supreme Court of Appeal, in a ground-breaking decision, laid down the requirements to be met to in order to launch a class action. The matter related to the infamous bread cartel, which was successfully prosecuted by the Commission in 2010. A number of non-government organizations and five individuals have attempted to launch a class action against food giants Tiger Brands, Pioneer Foods, and Premier Foods. The SCA re-submitted the matter to the High Court, which had earlier refused to certify the applicants as a class—a prerequisite to bringing a class action.

In 2013 the High Court will decide on the issue with guidance set out by the Supreme Court of Appeal in its judgment. If successful, this will be the first claim of its kind in South African jurisprudence.

IX. CONCLUSION

With these issues to whet the appetite, it seems that exciting times await in the South African competition law fold and 2013 is unlikely to disappoint. In a jurisdiction with an infant competition law regime in comparison to its European and U.S. counterparts, it is exciting and encouraging to see our jurisprudence developing steadily.