

COMPETITION NEWS

ISSUE NO 4 – September 2016

THE OFFICIAL NEWSLETTER OF

THE SWAZILAND COMPETITION COMMISSION



Page 3



Page 14



Page 12

SADC COMPETITION AUTHORITIES SIGN MOU



Page 15

COMPETITION NEWS

ISSUE NO 4 – September 2016

FROM THE CEO



To the reader

The Commission continues to carry out its mandate of stimulating a competitive economic environment in the country through controlling anti-competitive practices, mergers and acquisitions, as well as protecting the welfare of consumers.

As we mentioned in the previous publication, the Commission is working diligently and without fear or favour in regulating competition within the Swazi economy. As we carry out this important mandate, our values of integrity, transparency, accountability, teamwork and independence remain at the core of work.

Since the beginning of the current financial year, we have worked with our stakeholders on a number of projects, including the process of the review of Competition Act and Fair Trading Act. We sincerely thank our partners who are actively participating in this process and we hope that the outcome shall help us carry out our mandate more effectively.

The Commission's successes are only possible through the support that you continue to give us. We thank you for your continued support and we look forward to working with you to achieve economic growth through fair competition in the economy. We further encourage you to give us feedback that will enable us to improve our work and the service we give to our stakeholders. We all have an obligation to report anti-competitive conduct to the Commission. Therefore everyone is a key stakeholder of the Commission.

Once again, thank you and enjoy the read.

SCC CONDUCTS WORKSHOP FOR SENATORS

On 20 July 2016, the Commission conducted a workshop for Honourable members of the House of Senate at Sibane Hotel in Ezulwini. The workshop, which was aimed at consulting the parliamentarians on the review of the Fair Trading Act of 2001 and the development of the Regulations, was attended by Senators, the Principal Secretary (PS) in the Ministry of Commerce, Industry and Trade as well as the CEO of the Swaziland Competition Commission, among others.

The workshop was part of the activities under the Regional Integration Implementation Support Project (hereinafter referred to as "RIISP"). In this project, the European Union (EU) is funding Swaziland through the Common Market for Eastern and Southern Africa (COMESA) for purposes of regional integration. It is comprised of three components namely the -

- (i) domestication of the COMESA Competition Regulations of 2004;
- (ii) amendment of the Fair Trading Act of 2001 and the development of the Fair Trading Regulations; and

- (iii) amendment of the Competition Act of 2007 and the Competition Regulations of 2010.



Chairperson of Senate Portfolio Committee, Senator Lindiwe Ngwenya speaking during the workshop

Speaking during the workshop, the Principal Secretary in the Ministry of Commerce Industry and Trade, Mr Jinno Nkambule, mentioned that it was important to engage parliamentarians on Competition Law and Policy matters. He emphasised the

importance of consumer matters and the necessity for consumer protection law, in particular because all of the participants present were consumers and that in one way or the other all were affected by consumer issues.



Principal Secretary in the Ministry of Commerce, Industry and Trade, Mr Jinnu Nkambule making his remarks

The Chairperson of Senate Portfolio Committee, Senator Lindiwe Ngwenya, thanked the PS, the Ministry and the Commission for engaging with the Senators and further appreciated the initiative to amend the consumer law. She

further expressed the gratitude of the Senators in that the presentation was printed for them in both languages and that the presenter made his presentation in SiSwati language.

Making a presentation of the Draft Bill and Regulations, the Commission's Senior Legal Analyst, Mr Thobisa Simelane mentioned that the objectives of the consumer legislation are transparency and fair standing between the consumer and the seller. He explained that the legislation will be Principle based and Rule based; that the Act will contain principles while the Regulations will be rule based and an example was made with deceptive practices wherein a consumer is only told about the general fee, but other fees are hidden.

He also mentioned that where there is a consumer complaint or dispute, the Secretariat would mediate the dispute and if the mediation fails the Secretariat would refer the matter to the Board. The Board, upon receipt of the complaint, may require further information or call the parties to present their cases and finally the Board will make its decision. The Board can make any order it deems fit which may include ordering

COMPETITION NEWS

ISSUE NO 4 – September 2016

a return of the purchase amount or replacement of the goods or to remove contractual conditions. He further explained that the Board's decision can be appealed by either the consumer or the seller at the High Court or Magistrates Court depending on the amount involved.

The meeting was a great success as the Senators provided valid contributions on some important issues which were to be included in the Draft Bill and Regulations.



Honourable senators paying attention during the workshop



The Commission's Senior Legal Analyst Thobisa Simelane stressing a point

MERGERS AND ACQUISITIONS

Section 35 of the Competition Act, 2007 empowers the Commission to authorize mergers and acquisitions with the purpose of monitoring, regulating, controlling and preventing acts or behaviours which may substantially lessen competition to an appreciable extent in our jurisdiction. If a merger or acquisition is carried out without the authorization of the Commission, such a transaction shall not be legally enforceable. Companies are required by the Competition Act to notify if they merge or acquire a controlling interest in another entity. In response thereof, companies have notified transactions and the Commission was able to conclude the following five mergers and acquisitions.

I. MA/03/2016 - Acquisition of the entire shareholding of B&H Sugar (Pty) Ltd by the Sunshine Sugar specialists (Pty) Ltd

The acquiring firm in this transaction was Sunshine Sugar Specialists (Pty) Ltd, a company registered in accordance with the laws of South Africa. Sunshine Sugar Specialists (Pty) Ltd is a dealer, supplier and wholesaler of sugar in South Africa and it did not have any operations in Swaziland nor did any of its shareholders.

The target firm, B&H Sugar (Pty) limited is a Swazi registered company. Its business operations are based in Nhlanguano. The company is categorised as a pre-packer of sugar by the Swaziland Sugar Association and has a sugar quota allocation in refined sugar and brown sugar.

There were no overlaps in the products of the merging parties. The transaction constituted the replacement of an industry participant by a new entrant and there was no market share accretion. The relevant market was identified as the pre-

packing and distribution of refined sugar and brown sugar in Swaziland. Post-merger, the structure of the market and the other factors considered in the counterfactual were not altered. As such the conclusion was that this transaction is not likely to result in a substantial lessening or prevention of competition in the market. Therefore, the transaction was recommended for approval without conditions. The transaction was approved without conditions.

II. MA/04/2016 - Acquisition of the entire shareholding of Foodcom Sugar (Pty) Ltd by Sunshine Sugar specialists (Pty) Ltd.

The acquiring firm in this transaction was Sunshine Sugar Specialists (Pty) Ltd, a company registered in accordance with the laws of South Africa. Sunshine Sugar Specialists (Pty) Ltd was in the process of acquiring B&H Sugar (Pty) Ltd which was awaiting approval from the Swaziland Competition Commission, under (Case No. MA/03/2016). The transaction would establish the company's economic presence in

Swaziland. Since the B&H transaction was approved, Sunshine Sugar Specialists (Pty) Ltd already have a sugar allocation as a pre-packer from the SSA.

The target firm, Foodcom Sugar (Pty) Ltd is a Swazi registered company. The company has a mill site and packaging plant in Matsapha where the sugar is pre-packed, milled and turned into icing sugar. The sugar is then exported to Foodcom CC in South Africa. Foodcom sells to certain customers who go directly to the mill to purchase sugar.

There were overlaps between the products of the parties within the relevant market. The relevant market was defined as the pre-packing and distribution of refined and brown sugar in Swaziland.

Post-merger, the structure of the market and the other factors considered in the counterfactual were slightly altered. As such it was concluded that the transaction was not likely to result in a substantial lessening or prevention of competition in

the market. Therefore, the proposed transaction was recommended for approval without conditions. The transaction was approved without conditions.

III. MA/05/2016 - Acquisition of Swazi Syra (Pty) Limited by Henno Louis Delpont, Ludick Cornelius Delpont and Christiaan Wege

The acquiring parties were Mr Henno Louis Delpont, Mr Ludick Cornelius Delpont and Mr Christiaan Wege who are all South African citizens. Mr Christiaan Wege has an economic presence in Swaziland as a shareholder in a clothing retail outlet. The other two parties have no economic interests in the country.

The target firm, Swazi Syra is a Swazi registered company which was dormant for several years. Its only assets are farms in the Shiselweni region. The relevant market was identified as commercial land for farming of macademia nuts in

Swaziland. The acquiring parties were new entrants into the market.

The relevant market was found to be concentrated and that import competition was significant in the market.

Post-merger, the structure of the market and the other factors considered in the counterfactual were not altered; as such the determination was that this transaction was not likely to result in the substantial lessening or prevention of competition. Therefore, the proposed transaction was recommended for approval without conditions. The transaction was approved without conditions.

IV. MA/01/2016- Acquisition of Interneuron (Pty) Ltd shares in Swaziland Industrial Development Company by Swaziland National Provident Fund.

The acquiring firm in this transaction was SNPF a company established in 1974 as a retirement fund savings scheme. The

main business of SNPF is to provide benefits for employed persons when they retire from regular employment in old age or in the event of becoming incapacitated. All employed persons in Swaziland are required by law to become contributing members of the fund, and employers must pay a contribution for every eligible staff member.

The target firm is SIDC a company which was formed in 1987 as a joint venture between the Government of the Kingdom of Swaziland and major International finance institutions (the DEG of Germany, CDC of UK, FMO of Holland, Proparco of France and IFC (World Bank). SIDC is a private development company committed to supporting its customers with quality services in the financing of projects through equity, loans, finance leasing and factory buildings for lease.

The relevant market was identified as the letting of commercial property comprising of industrial, office, retail, leisure, hospitality and residential property in Manzini, Matsapha, Ezulwini, Nhlanguano, Piggs Peak and Mbabane.

This transaction only resulted in the increase of SNPF's shareholding in SIDC and will not result in the acquiring firm holding market power which will allow it to act unilaterally in the market. As such the conclusion was that this transaction was not likely to result in the substantial lessening or prevention of competition. Therefore, the proposed transaction was recommended for approval without conditions. The transaction was approved without conditions.

V. MA/ 06/2016 - Acquisition by Kadent Limited of 100% of the issued share capital in Pattihis Holdings Limited and in Ramedica Holdings Limited

The acquiring firm in this transaction was Kadent; a company incorporated in accordance with the laws of the Republic of Cyprus, and is a wholly owned subsidiary of Pernbrook Limited which is also incorporated in accordance with the laws of the Republic of Cyprus. Kadent is involved in the supply of animal nutrition and care products, original brand pharmaceutical prescription, generic pharmaceutical products and over the counter pharmaceutical products. Kadent supplies through

COMPETITION NEWS

ISSUE NO 4 – September 2016

Pharmachem and Ascendis Health Limited in Swaziland. These companies market and supply only generic prescription pharmaceutical products into Swaziland. Kadent only has an economic presence in that they supply in the country but they have no physical presence in the country.

There were two target firms in this transaction. The target firms were Ramedica and Pattihis, both firms are registered in accordance with the laws of the Republic of Cyprus. Ramedica is involved in the development, manufacture and supply of generic prescription pharmaceutical products.

Remedica sells generic prescription pharmaceutical products directly from Cyprus into Swaziland.

The relevant market was identified as the supply of generic prescription pharmaceutical products in Swaziland. As a result of the transaction, the structure of the market would not be altered. The determination was that the transaction would not result in the substantial lessening or prevention of competition in the market. Therefore, the transaction was recommended for approval without conditions. The transaction was approved without conditions.

Companies are required by the Competition Act to notify if they merge or acquire a controlling interest in another entity.

COMMISSION CONDUCTS STAKEHOLDERS' VALIDATION WORKSHOPS

On 5 – 8 July 2016 the Commission conducted validation workshops with relevant stakeholders regarding the amendment of the Fair Trading Act and development of Fair Trading Regulations. The main objective of the workshops was to get stakeholders input on the draft Bill and Regulations. Professor Prentiss Cox, the Consultant working on this project, made a presentation to various stakeholders of the Commission.

In the stakeholders' workshop, the Consultant explained how consumers will be covered in the Draft Bill. He went on to advise the workshop on the goals of consumer protection which he said were transparency in market transactions and fair treatment of all consumers.

In both presentations, the Consultant identified the difference between the principle and rule based approaches he used in the Draft Bill. It was stated that the principle based approach applies against a specific conduct after the act has occurred

while a rule based approach is relevant where a regulator tells an entity what it can/cannot do. The Consultant also



Professor Prentiss Cox making his presentation



Participants paying attention during the workshop

mentioned the difference between consumer protection law and competition law wherein he stated that consumer protection law is concerned with the conduct of the seller in relation to the consumer while competition law is concerned with the conduct within supply markets. He also stated that in drafting the Fair Trading and Consumer Protection Bill, he

considered the existing law (Fair Trading Act 2001 and Section 33 of the Competition Act 2007), the neighbouring national law, the USA, EU and Australian law and the existing COMESA Regulations on consumer protection.

The Consultant also met with the Judges of the Supreme Court, High Court and the Industrial Court and the Board of Commissioners for the Commission to get their input regarding the Draft Bill and Regulations.

All the workshops afforded the Consultant an opportunity to interact with the stakeholders. The meetings were successful as they provided a feedback on some important issues which were to be included in the Draft Bill. The validation workshops were a great success since stakeholders made important submissions and raised thought provoking questions that assisted in coming up with the amendments to the Draft Bill and Regulations.

ATTORNEYS' CONSULTATIVE MEETING ON AMENDMENT OF COMPETITION ACT AND COMPETITION REGULATIONS

On 02 August 2016, the Commission, with the help of Consultants, conducted a consultative meeting with attorneys regarding the amendment of the Competition Act and Competition Regulations at the Mountain Inn in Mbabane. This activity was part of the RIIS project and specifically on the Amendment of Competition Act and Competition Regulations. The Consultants, Mr Allen Grunes and Joan Marshal, were in the country for two weeks. During the first week they consulted various stakeholders to establish their views on the challenges of the current Competition Act and the areas that need amendment. The second week was dedicated to giving feedback to the stakeholders and proposing amendments based on the information received during the first week.

The consultants mentioned that the focus of competition law was economic development. They emphasised the difference between merger analysis as making assumptions

(proactive) or likelihoods and investigations of anti-competitive trade practices which looks at what has already occurred (reactive).

They further laid down other important aspects of competition law, which are: the detection, prevention and punishing of cartels and other anti-competitive trade practice including per se prohibitions as well as preventing abuse of a dominant position. It was stated that there is difficulty with assessing abuse of dominance because it can benefit or harm competition. Another objective is to prevent or restructure mergers that may harm competition. The focus is to limit dominance or factors that can lessen competition. The last objective identified by Grunes was advocacy.

The consultants then spoke about the domestication of the COMESA Regulations. They explained that the intention of the amendment is to ensure that the Act is in harmony with the COMESA Regulations. This will help the relationship between

COMPETITION NEWS

ISSUE NO 4 – September 2016

COMESA and the national authority in particular, which will speak to the cooperation agreement between the COMESA Competition Commission and Swaziland Competition Commission. This will further help in the ability to notify COMESA if there is a need for information exchange, consultation or coordination. Mr Grunes also stated that in their assessment of both the COMESA Regulations and the Competition Act there were differences but these were not so material. He explained that in reviewing the legislation they looked at the definition section and they suggest amending certain definitions including; a merger, dominant position and in defining dominance the Commission should think about adding a threshold of 50% which will establish a presumption of dominance.

The overall objective of the consultative meeting was achieved because attorneys' inputs were incorporated into the final drafts.



The Consultant Allen Grunes making a presentation during the meeting



Some of the participants during the meeting

COMPETITION AND CONSUMER LAW AND POLICY COMMITTEE WORKSHOP HELD IN BOTSWANA

The Commission, represented by the Chief Executive officer, Senior Analyst Louis Marx and Graduate trainee Njabulo Gamedze, participated in the Southern African Development Community (SADC) Competition and Consumer law and Policy committee workshop which was held in Gaborone, Botswana on 26-27 May 2016.

There were eleven countries that were represented in this meeting and include: South Africa, Mozambique, Mauritius, Namibia, Zambia, Swaziland, Malawi, Tanzania, Zimbabwe, Seychelles and Botswana.

The meeting started with member countries presenting updates on recent cases relating to consumer issues. The countries then reviewed the Draft Memorandum of Understanding (hereinafter referred to as “MOU”) in preparation of the signing ceremony which was to take place later on in the day. The MOU was signed by all Chief Executive Officers of each of the competition authorities

present excluding Mozambique who was still to consult with their country’s authorities.



The Swaziland Competition Commission CEO (centre) signing the MOU

There were group discussions during the meeting.

On mergers and acquisitions, the meeting felt that there was a need for close collaboration among the competition authorities. It was subsequently recommended that members should co-operate with each other and that common areas of interest should be shared. It was mentioned that merging parties should disclose other jurisdictions they have notified to or intend to notify.

The issue of franchises was discussed at length during the group discussions. It was said that most franchise owners have a tendency to limit the number of franchise shops in the respective countries. The issue of banks charging high interest rates on banking products was also highlighted. Some countries reported that they were already conducting inquiry in that regard.

On cartels and enforcements, it was discovered that there were similar cases detected in the various countries. Countries were advised to communicate with their counterparts to easily counter similar cartels discovered.

At the end of the meeting, member countries were encouraged to unite and promote a competitive environment in the SADC region.

SADC COMPETITION AUTHORITIES SIGN MOU

During the meeting, SADC Competition Authorities signed a Memorandum of Understanding (MOU) on Inter - Agency cooperation in competition policy, law and enforcement.



Botswana's Tebelelo Pule signs the MOU during the ceremony

WHAT ARE ANTI-COMPETITIVE AGREEMENTS?

BY: Modicai Donga – Chief Investigation & Litigation



The mandate of the Commission is enunciated in Sections 11, 12 and 13 of the Competition Act and includes, but not limited to, monitoring, controlling, regulating and preventing acts or behaviour that is anti-competitive. The Commission executes its mandate through carrying out investigations on any anti-competitive practices at its own initiative or at the request of a third party directly or indirectly affected by the conduct or trade practices of undertakings.

Section 30(1) of the Competition Act states that any category of agreements, decisions and or concerted practices are prohibited. In order to understand what this means, one needs to first understand what the goals of

competition law are and what the mandate of the Swaziland Competition Commission is.

GOALS OF COMPETITION LAW

The Preamble of the Act summarises the main goals of competition law as it provides that the Act is for the “...encouragement of competition in the economy by controlling anti-competitive trade practices... protecting consumer welfare...” The goals of competition law can therefore be said to be the integration of the internal market, the protection of consumers, freedom of competition, and economic efficiency.

ANTI-COMPETITIVE AGREEMENTS

Anti-competitive agreements can be horizontal and or vertical agreements. Horizontal agreements are those agreements between enterprises who are in the same supply chain (competitors), whereas vertical agreements are those agreements between undertakings who are in different levels of supply, a good example is an agreement between a product manufacturer and a supplier. For purpose of competition analysis, the following elements must be present -

- Agreement, decision or concerted practice
- Two or more enterprises

COMPETITION NEWS

ISSUE NO 4 - September 2016

- Object or effect the restriction, prevention or distortion of competition
- Substantial lessening or prevention of competition in the country or a substantial part of it.

An agreement can be formal, informal, written or even unwritten. Unwritten agreements include gentlemen's

agreements, concerted practices, emails and or any form of correspondences. Where an agreement is found to be anti-competitive by object, the conduct is taken to be injurious by its nature and to result in anti-competitive effects. In our next newsletter, we will look at the different types of horizontal and vertical agreements.

**CALL: 2404 0111/0421 AND REPORT ANY
ANTI-COMPETITIVE PRACTICE**

THE COMMISSION IS COMMITTED TO CONFIDENTIALITY, ALL WHISTLE BLOWERS ARE GUARANTEED CONFIDENTIALITY

CONTACTS

MA OFFICES, LOT 105

MANTSHOLO ROAD, MBABANE

GOLF COURSE

TEL: +268 2404 0111/0421

Fax: +268 2404 0342

EMAIL: info@compco.co.sz

compcomms@swazi.net

WEBSITE: www.compco.co.sz



Swaziland
Competition Commission

COMPETITION NEWS

ISSUE NO 4 – September 2016

COMPETITION NEWS

ISSUE NO 4 – September 2016