Cross-shareholdings can create an element of transparency

By Nazeera Mia

4 Nov 2014

Although the Competition Act, No 89 of 1998, contains no express prohibition on cross-shareholding, the Competition Commission is intent on ensuring that the possible anti-competitive consequences of cross-shareholding are given express attention through the case law.

© Sasin Tipchai – 123RF.com

Recently the Commission conditionally approved a merger involving two cement producers, Holcim Limited and Lafarge SA. Holcim, previously active in the South African cement market, had exited a few years ago, save for an interest held in local cement producer, Afrisam Proprietary Limited. In order for Holcim to acquire Lafarge, the Commission required that Holcim divest of its interest in Afrisam within a period of three years after approval of the merger.

The Commission's investigation revealed that, as a result of its interest in Afrisam, Holcim was in possession of competition sensitive information, which the Commission described as information that a firm would not ordinarily have about its competitor's business. If the merger were to be approved unconditionally, Holcim would be in possession of sensitive information for both Afrisam and Lafarge, competitor firms.

The Commission's concern was that post-merger, the cross-shareholding would create a platform for tacit collusion in the cement industry, which was previously riddled with collusion, and this potential anti-competitive conduct would be compounded by the high concentration level and high barriers to entry in the industry. Accordingly, the Commission approved the merger on condition that Holcim divest of its shareholding in Afrisam.

Active coordination

Cross-shareholdings in competitor firms can create an element of transparency and shareholder meetings could provide a forum for active coordination. Where cross-shareholdings result in a firm providing a competitor with information relating to its future pricing, allocation of markets, or, tender price, this conduct could amount to collusion. However, firms subject to cross-shareholding may also exchange competitively sensitive information more subtly, increasing transparency and reducing market uncertainties in relation to future competitive conduct.

Similarly, cross-directorships may be perceived by competition authorities to also be concerning. In the merger involving Momentum Group Limited and African Life Health Proprietary Limited (ALH Merger), the Competition Tribunal expressed its distaste for interlocking directorships between rival firms and emphasised that the question will always justify proper scrutiny as a result of the opportunity or temptation that exists to violate the competition legislation as a result thereof.

Nonetheless, the Competition Appeal Court in the ALH Merger found that cross-directorships at a holding company level are far less likely to attract competition law scrutiny than would be the case at operating company level. This is because the kind of information generally considered at holding company level encompasses issues of financial and investment policy, corporate governance and so forth. In contrast, where decisions relate to the day-to-day control/operations of the businesses, the risk of collusion is far greater.

ABOUT NAZEERA MIA

Nazeera Mia is an associate in the Competition practice at Cliffe Dekker Hofmeyr.
- Competition Commission approves Grohe acquisition - 4 Nov 2014
- Cross-shareholdings can create an element of transparency - 4 Nov 2014

View my profile and articles...