

COMPETITION

Informal complaint initiation – complaints initiated on a ‘wink and a nod’

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INTRODUCTION

A recent decision by the Supreme Court of Appeal (“SCA”) has given the Competition Commission (the “Commission”) some latitude to initiate a complaint against a firm, without having to follow the procedural formalities required of private complainants.

It would now appear possible for the Commission to investigate the activities of a firm without first initiating a formal complaint against that firm and, more importantly, it is no longer necessary for the Commission to pigeon-hole its investigation by focusing only on conduct referred to in a complaint. Provided the complaint initiated against a firm triggers an investigation, the scope of that investigation will not be limited by the parameters of the complaint, should the matter subsequently be referred to the Competition Tribunal (the “Tribunal”). This will have significant implications for a firm which is subsequently required to set up a defence to any allegations of anti-competitive conduct levelled by the Commission.

RELIANCE ON ABUSE OF DOMINANCE COMPLAINT

In the matter between the *Competition Commission v Yara (South Africa) (Pty) Ltd, Omnia Fertilizer Ltd and Sasol Chemical Industries Ltd* (the “*Omnia Decision*”), the SCA considered whether it was competent for the Commission to rely on an abuse of dominance complaint lodged against Sasol Chemical Industries Ltd (“Sasol”), when it subsequently referred allegations of cartel conduct involving Sasol, Yara (South Africa (Pty) Ltd (“Yara”) and Omnia Fertilizer Ltd (“Omnia”) to the Tribunal.

The SCA found that, notwithstanding the fact that the complainant, Nutri-Flo CC and Nutri-Fertilizer CC (collectively referred to as “Nutri-Flo”) had aimed its complaint exclusively at Sasol, because the complaint also contained allegations of collusion between Yara, Omnia and Sasol, the initiation of an investigation into the activities of Yara and Omnia, which subsequently culminated in the referral of a complaint to the Tribunal, was competent and within the contemplation of the Competition Act No. 89 of 1998 (the “Act”).

In reaching this conclusion, the SCA has all but rejected the so-called ‘referral rule’, carefully developed by the Competition Appeal Court (“CAC”) in recent years.^[1] What the rule traditionally requires is that a referral to the Tribunal must correspond with, and not be wider than, the ambit of the complaint as submitted (or amended) by a complainant or the Commission. If it does, the referral falls to be set aside.

It was on the basis of this rule that Omnia appealed against a decision by the Tribunal to preside over a referral containing allegations of collusion between Yara, Omnia and Sasol, based on an abuse of dominance complaint initiated against Sasol alone.

THE CAC'S FINDINGS

The Commission subsequently brought an application to amend its referral, but the application was opposed by Omnia. On appeal, the CAC in applying the rule found that the original complaint was aimed exclusively at Sasol, and extended the rule to have regard to the intention of the complainant. On the facts of the case, the CAC held that the complaint was never intended to implicate Yara and Omnia, refused the amendment and deprived the Tribunal of jurisdiction to hear the matter.

The SCA, on appeal, agreed with the factual findings of the CAC:

“... I agree with the factual finding of the CAC that, on a proper interpretation of the complaint submitted by Nutri-Flo, it was aimed exclusively at Sasol. It was never aimed at Omnia. In other words, Nutri-Flo never intended to complain against any prohibited practice by Omnia”.[2]

However, rather than following a strict interpretation of the referral rule, which would dictate that the referral be set aside, the SCA distinguished between the application of rule to private complainants and the Commission, stating that in terms of section 49B(1), no formalities are prescribed by the Act for the initiation of a complaint by the Commission.

For this reason, the Commission can start its investigative process without completing a Form CC1 and may do so on the basis of information submitted by an informant; alternatively, information gathered from media reports or documents filed or uncovered during the course of an unrelated investigation. All that is required is a decision by an investigator to open a case, and that this decision be based on a reasonable suspicion. A respondent to proceedings initiated before the Tribunal need only be made aware of an investigation into its activities *after* the Commission has completed its investigation and referred the matter to the Tribunal for adjudication.

CONCLUSION

In light of the *Omnia Decision*, it seems that it is only after the referral of a complaint to the Tribunal that the principles of administrative justice will apply, in so far as knowledge of the case one has to meet is concerned. Nothing prevents the Commission from initiating a fresh complaint in respect of conduct uncovered during the course of its initial investigation or proceedings before the Tribunal, which may later be consolidated with the original referral, without first notifying a firm of this decision.

Depending on the information already at the Commission's disposal, an investigation into this behaviour may be quite cursory. Provided the Commission's decision to investigate any information brought to its attention is objective and based on a reasonable suspicion, the subsequent referral of a complaint to the Tribunal based on that the results of that investigation will be competent.

[1] See *Clover Industries Ltd v The Competition Commission*, Case No. 78/CAC/1 Jul 08 (12 November 2008).

[2] *Competition Commission v Yara (South Africa) (Pty) Ltd, Omnia Fertilizer Ltd and Sasol Chemical Industries Ltd*, Case No. 784/12, par 16.



Paul Coetser

Head of Competition

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