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EXCESSIVE PRICING IN THE GLOBAL PHARMACEUTICAL INDUSTRY

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In the developing world, disease and poverty are interdependent making access to essential medicines at affordable prices even more critical. 80% of the two billion people worldwide without access to essential medicines live in low income countries. As such, competitive rivalry in the pharmaceutical industry can improve access to medicines by reducing prices and through motivating brand companies to challenge existing patent drugs and create new and improved medicines. Furthermore, upon expiration of patent drugs, competition encourages generic companies to provide less expensive alternatives of medicines.

SA Commission investigates three major pharmaceutical companies

In June 2017, the Competition Commission of South Africa launched an investigation against three major pharmaceutical manufacturing companies for alleged excessive pricing of cancer drugs – Roche, Pfizer and Aspen Pharmacare. Roche, a Swiss company and Pfizer, an American company, are two of the largest pharmaceutical companies in the world. Aspen Pharmacare, a South African company, although not in the global top twenty pharmaceutical companies, is the sole manufacturer and supplier of off-patent cancer drugs for blood, bone marrow and ovarian cancers. Aspen acquired the license and marketing rights from the originator GlaxoSmithKline after the patents expired in 2009.

All three companies have sole rights to distribute different cancer drugs in South Africa. Roche and Pfizer are sole suppliers of the breast and lung cancer medicines, respectively, while Aspen Pharmacare is the only supplier of three generic cancer medicines. The investigation follows a number of similar investigations against the same companies by other competition authorities internationally, including the European Commission (EC), the

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Italian Competition Authority and the UK Competition and Markets Authority (CMA).

The Competition Commission of South Africa dropped charges against Aspen Pharmacare in October 2017 citing that an excessive pricing case could not be sustained against the company. The Commission noted that the revenues generated by the drugs in question (Myleran, Alkeran and Leukeran) were very low due to few patients using the drug. Furthermore, the drugs presented limited prospects in the market as they were approaching their lifespan. Nonetheless, the fact that Aspen is the sole manufacturer of the medicines raises competition concerns.

International competition cases against pharmaceutical companies

In May 2017, the EC launched an investigation against Aspen Pharmacare for alleged excessive pricing of five off-patent cancer drugs for blood, bone marrow and ovarian cancers. Aspen Pharmacare is alleged to have imposed price increases up to 4000% in a number of European countries at specific points in time between 2012 and 2016. The price increases were not gradual annual increases over a four year period but significant price increases made at specific points observed during the period under review. For example, in England and Wales, Aspen Pharmacare increased the price of Busulfan used by leukaemia patients by 1100% from £5.20 to £65.22 a pack during 2013 while the price of Chlorambucil also used to treat blood cancer increased by 385% from £8.36 to £40.51 a pack during the same year. In Spain, Aspen Pharmacare is being investigated for increasing the price of a cancer drug by 4000% and causing a deliberate drug shortage in order to charge excessive prices between 2012 and 2016.

In September 2016, the Italian Competition Authority imposed a fine of €5 million on Aspen Pharmacare for increasing prices of cancer drugs by 300% to 1500% higher than the original price since the approval of the drug in Italy in 2013. Prior to this conduct, Aspen Pharmacare had threatened to withdraw the drugs from the Italian market.

Similarly, in December 2016 the UK's CMA imposed a record fine of £84.2 million on pharmaceutical manufacturer, Pfizer, and a fine of £5.2 million on distributor Flynn Pharma, for charging excessive prices for a generic anti-epilepsy drug, Phenytoin Sodium. These companies increased prices by up to 2600% between 2012 and 2013 after de-branding of the drug to become a generic drug. The CMA cited that it could not find any justification for the significant price increases as these were old drugs without recent innovation or investment costs to be recouped.

The above excessive pricing cases involving Pfizer in the UK; and Aspen Pharmacare in the EU and Italy; all relate to generic drugs. Generic drugs are expected to be generally cheaper than patent or branded drugs because generic drugs can be manufactured by any company not just the developer of the original drug. Price competition between multiple manufacturers is expected to lower prices of generic drugs and therefore they are not subject to price regulation. On the other hand, pricing of original or patent medicines is heavily regulated and generally expensive as a way to provide incentives for future innovation. Pricing of new drugs is designed in such a way as to cover past and future R&D expenditures.

Lack of price regulation and limited entry in generic drugs can lead to excessive pricing of generic drugs especially in cases where a single company has sole rights to manufacture and distribute the generic drug within a particular geographic market. This raises the issue of parallel imports as a way to promote price competition between local manufacturers and imports. Parallel imports refer to importation of legitimately produced drugs for resale into a country, without the authorisation of the patent holder or owner of intellectual property rights of the specific drug. Parallel imports of pharmaceutical drugs involve taking advantage of a price difference between two countries. Increased competition with parallel imports results in lower prices of the drug, other things equal. However, the price benefits of parallel imports are inconclusive in countries in the European Union where parallel imports are permitted.

It goes without saying that

competition requires the presence of effective rivals and market conditions free from agreements which may limit the ability of competitors to contest the market. The nature of arrangements in the pharmaceutical industry as described above suggests a need for more stringent competition rules, although this needs to be balanced with the characteristics of the industry including patents and intellectual property rights which make it prone to competition prosecutions. Importantly, the incentive of companies to invest in R&D and earn profits from protection of rights to intellectual property is a critical dimension of competition in the industry, although these rights can also be abused.

The global pharmaceutical industry

Given the widespread and global nature of the above cases, it is important to reflect on global trends to determine the extent of market power exerted by the individual firms.

The four largest pharmaceutical companies account for 21% of global prescription drug sales in 2016 (Table 1). As the concentration ratio measure of the largest four companies (CR_4) is less than 40 percent, the pharmaceutical industry is generally not regarded as a concentrated industry on this basis. However, while the individual companies may not be dominant in terms of the firm shares of global sales, the exclusive rights that come with supplying specific drugs create dominant positions in particular drug (product) markets.

To determine the extent of market power in the cancer drugs market as per the above cases, Table 2 shows global sales of cancer drugs in 2016, noting that there may be further sub-markets relating to the treatment of specific types of cancer which could be even more concentrated. The largest four companies account for 50% (CR_4) of global cancer drug sales, which clearly shows concentration at a product level.

Despite concentration in individual product markets which raises competition concerns, the global firms have an important role to play in the industry in terms of investments in research and development (R&D). The pharmaceutical industry as a high-technology and knowledge-intensive industry is driven by large investments in R&D. On average, R&D costs equate to 19% of global prescription drug sales. Given the costly and cumbersome administrative regulatory processes associated with the development of a drug, only the largest firms are financially equipped to conduct the majority of the R&D investments in the industry and also hold the majority of patents as the originators.

Table 1: Top ten global pharmaceutical companies

Rank	Company	Global prescription drug sales ($bn), 2016
1.	Novartis (Switzerland)	41.6
2.	Pfizer (USA)	45.9
3.	Roche (Switzerland)	39.6
4.	Sanofi (France)	34.2
5.	Johnson & Johnson (USA)	31.7
6.	Merck & Co. (United States)	35.7
7.	AbbVie (United States)	25.3
8.	GlaxoSmithKline (UK of Great Britain and Northern Ireland)	27.8
9.	AstraZeneca (UK)	21.0
10.	Celgene (United States)	11.1
	Other companies	454.1
	Total industry sales	768

The implication is that barriers to entry are high. These patents have a lifetime of 20 years from filing with an extension of five years in most OECD countries. The smaller pharmaceutical companies mainly manufacture off-patent products or manufacture drugs under license to a patent-holder. This raises a key issue regarding the appropriate duration of patents as they are required to allow sufficient time for recoupment of the costs of R&D investments and for companies to earn profit from their investments as noted above. The challenges associated with quantifying the actual costs of R&D across different drugs makes it difficult to determine the appropriate duration of patents. Furthermore, although a pharmaceutical company may file for a patent application soon after a drug discovery, clinical trials necessary for drug approval may take several years before the drug is commercialised, the effect being to shorten the effective life of the patents.

Although patents stimulate innovation and reward firms for R&D investments, global pharmaceutical companies may use patents to reinforce market power in specific product markets. The monopoly and exclusive rights provided by patents prohibit rival manufacturers from producing or selling the same product resulting in high prices and limited access to medicines. Although generic drugs are regarded as the most effective and sustainable way to reduce the price of drugs due to competition, the above cases show that lack of competition even in markets for off-patent drugs leads to high prices. Furthermore, in the context of the South African investigation, it is likely that concentration in specific product markets or to supply the domestic market may mean high prices relative to competitive benchmarks.

Abuse of patent rights to charge unjustifiably high prices raises issues about the need for compulsory licensing whereby companies can apply for the license to produce a patented medicine without the consent of the patent owner. This can be done be done through arrangements that ensure licensing on fair, reasonable and non-discriminatory (FRAND) terms. However, this approach needs to take into consideration the incentives of firms to engage in R&D and future innovations noting that under license patents holders may also benefit financially from licensing their technology to other companies. While it is important to reward firms for R&D investments, the rights they enjoy should not be used to reinforce dominant positions in the market, increase prices unjustifiably, and limit entry of new players particularly as greater competition can lead to further innovation as companies fight to gain and maintain market share.

Table 2: Top ten global oncology sales

Rank	Company	Global oncology sales ($mn) 2016
1.	Roche	26 411
2.	Celgene	10 097
3.	Johnson & Johnson	4 963
4.	Pfizer	4 924
5.	Bristol-Meyers Squibb	6 907
6.	Norvatis	9 330
7.	AstraZeneca	3 383
8.	Merck & Co	1 716
9.	AbbVie	2 409
10.	Eli Lily	3 616
	Other companies	19 991
	Total industry sales	93 747

THE IMPORTANCE OF ACCESS CONDITIONS IN VERTICAL MERGERS: VEHICLE ASSEMBLY IN KENYA

Grace Nsomba

On 29 August 2017, the Competition Authority of Kenya (CAK) approved with conditions the proposed acquisition of Associated Vehicle Assemblers Limited (AVA) by Simba Corporation Limited (Simba Corp). The approved merger sees the acquisition of an additional 50% of the shares in AVA which were previously controlled by Marshalls East Africa Limited (Marshalls).

The case appears to be fairly straight forward. However, the issues raised by the merger pertaining to vertical foreclosure and the setting of access conditions are relevant for similar cases being considered by authorities, particularly in a developing country context where there is likely to be high concentration at the downstream or upstream level. Simba Corp, an integrated multi-sector business group with diversified interests in automotive and generator distribution, real estate and hospitality; set out to acquire full control of a company it already had business interests in on a going concern basis. The entity expressed that the key driver of the transaction was Marshalls' lack of capacity and its unwillingness, as a partner, to make investments within the AVA business. However, there were foreclosure concerns as the AVA business serves as an assembly plant for third party vehicle assemblers other than Simba Corp.

Simba Corp distributes, services and sells parts of vehicles, while AVA engages in the assembly of commercial motor vehicles including trucks, buses and pickups. There is an existing vertical relationship between Simba Corp and AVA, particularly because AVA assembles two brands of vehicles for Simba Corp. The AVA assembly plant prior to the acquisition was open to third party vehicle assemblers such as Tata and Scania. The acquisition therefore raised concerns over third party market foreclosure over the use of the plant and barriers to entry following the approved acquisition.

Vertical mergers are generally less likely to significantly impede effective competition than horizontal mergers. This is because there is no change in concentration in the markets involved in the merger, whereas horizontal mergers involve a direct loss in competition as a result of the change in the level of concentration in the relevant market. However, there are circumstances in which vertical mergers can affect healthy competition, particularly in instances where a dominant position is created or strengthened in at least one level of the market.

In the current transaction, the vertically integrated entity will have sole control of the only assembly plant in Mombasa. The CAK did impose conditions on the merged entity so as to 'cushion' third party brands and any other competing brand from foreclosure. The conditions imposed were that the merged entity:

- Shall keep the plant open to existing third party brands and any other competing brands that may wish to use the AVA plant for assembly, for as long as there exists excess capacity at the plant; and,
- Honour all existing assembly contracts with third party brand assemblers at the AVA plant.

As highlighted above, a merging entity can foreclose rivals not only through refusing access, but also by affecting the price, quality, timeliness and terms of access. Although the CAK imposed conditions on the merged entity so as to allow third party assemblers access to the plant, the conditions do not directly address these other strategies that can be used to foreclose existing and future third party assemblers. In this case, this includes the ability of the merged entity to claim that plants are operating at full capacity or that the plant is committed for future projects even if this is not the case. It may, of course, be a challenge to explicitly address these issues as they are not straightforward to monitor.

However, it is important that consideration be given to other possible foreclosure strategies and that the conditions at least specify explicitly that access will be granted on fair and reasonable terms that are not less favourable than those granted to the integrated entity, and/or those currently available. This consideration may be implicitly accounted for in the requirement that existing contracts be honoured, although this does not appear to relate to future contracts as well.

In light of Kenya being a potential hub for automotive assembly and production in the East African region, coupled with the strong geographic advantage Mombasa port holds in terms of access to international and regional markets, a vertical merger such as this can work to the detriment of market participants and competition. The automotive assembly market in Kenya is still in its infancy, but holds great prospects with vehicle assembly figures expected to double by the year 2019. Access conditions to facilities such as the AVA assembly plant are important to the extent that rivals require access to compete effectively in the market; especially in the developing country context where markets are particularly concentrated in key industries.

Conditions that are imposed in mergers are an important way in which competition law links with industrial policy objectives. By ensuring access for rivals, they are better positioned to compete and grow their businesses. Vertical foreclosure can raise rivals' costs rendering them less efficient and effective as rivals which in turn can have negative effects on the economy or sector as a whole.

In 2016 the Comesa Competition Commission (CCC) also dealt with a vertical merger case involving input foreclosure in the copper industry, in which access conditions were imposed. Reunert Limited, a downstream producer of copper products proposed to acquire Zamefa, a Zambia based upstream supplier of copper rods with a significant share of the market. The CCC raised concerns over potential input foreclosure. With the acquisition of Zamefa's copper rod supply and existing business in the downstream cables market, the merged entity had an incentive to limit the supply of copper rods to Reunert's competitors in the Common Market. The conditions imposed in this case were that:

- The merged entity should continue to supply copper rods on the same conditions to customers in the Common Market;
- The above condition shall cease to apply should there be presence of new competitors with the ability to supply copper rods of sufficient quality and quantity to satisfy the requirements and demand in the Common Market; and
- The merging parties should submit to the CCC an affidavit of complying with imposed conditions.

The CCC addresses the terms on which copper rods should be supplied. However, the conditions do not cover new contracts that may arise post-merger, in the absence of new competing suppliers. The merged entity is therefore free to assign new contracts that may have significantly less favourable terms to those enjoyed by Zamefa, such as to undermine competition. This leaves room for foreclosure strategies involving manipulation of price, quality and access in future contracts.

The copper industry is one of the cornerstones of the Zambian economy. Kenya, Malawi and Uganda are also heavily reliant on the supply of copper from Zambia, with Zambia having an estimated copper rod supply market share of at least 50% in these markets. In this particular case there needs to be evidence that customers could not access alternative sources or available alternatives such as imports were imperfect substitutes perhaps due to prohibitive transport costs. There also needs to be consideration of whether the vertically integrated firm has the ability and incentive to foreclose – this includes considering whether it would be profitable.

HEINEKEN DEVELOPING A TASTE FOR LOCAL CRAFT BREWERS

Jason Bell

One of the world's largest brewing houses, Heineken, has taken a step towards a larger share of the South African beer market with the acquisition of the local black owned craft brewer, Soweto Gold, in October 2017. This development comes just months after Heineken bought out the Stellenbosch-based brewery, Stellenbrau. The mergers mean that the brands can now be marketed to a global customer base. While this may be good for the respective owners of the acquired firms, the transactions reflect the challenges faced by Soweto Gold and other small brewers in accessing routes to market on their own.

Soweto Gold has stated that the merger presented an opportunity to benefit in terms of marketing, distribution and sales. This is consistent with challenges identified in previous CCRED research on barriers to entry in the beer industry, which included interviews with Soweto Gold as a black industrialist with capabilities in beer brewing that experienced difficulty in accessing the mass market due to challenges in obtaining finance and competing with the dominant firm, SABMiller. The study found, amongst other things, that there were significant barriers to entry in the industry including SABMiller's control and influence over access to bar space, fridges, and branding at popular mass market outlets such as taverns and bars, and its control and influence over distributors through various incentive contracts which include terms restricting the ability of distributors to service rival producers.

Little has changed at the manufacturing level in the industry with the largest mass producer, SABMiller, still holding a virtual monopoly because of its ability to exploit economies of scale in production, distribution, and advertising. These advantages have allowed it to effectively control access to the mass beer market. As beer is a differentiated product, craft brands can compete with established brewers in terms of consumer tastes, although there are important differences in terms of the ability to achieve scale and market products. Smaller brands may look to compete directly with SABMiller in terms of accessing space on the counter in bars, for example, but SABMiller has the capacity and scale to offer attractive incentives to bar owners to secure the most visible space. Rivals find it difficult to compete in this regard as they have to incur similar costs to ensure that their products are positioned at the customer's eye level. Soweto Gold was forced to target middle-class consumers in the craft market due to difficulties in building brand awareness, achieving scale including in distribution, requirements to invest in bottling, as well as strategic behaviour by SABMiller. As noted above, part of the rationale for the merger with Heineken relates to enhancing capacity in distribution and marketing.

The acquisition of Soweto Gold is testament to the barriers facing entrants in terms of establishing independent, black owned companies to compete with incumbent firms not only in beer but other consumer goods markets as well. This case shows that despite the fact that Soweto Gold has clearly developed a good product, brand and company established by a black industrialist, barriers to entry and expansion are high such that there may have been no other option to grow the company but to merge with a large multinational company in order to achieve the brand awareness and economies of scale to expand its share in the market.

CARTELS INVESTIGATED IN SOUTH AFRICA: POSSIBLE IMPACT IN THE REGION?

Teboho Bosiu

Most countries in Southern Africa are net importers of products from South Africa and are therefore likely to be subject to South African cartels. Imports from South Africa cut across sectors including food, capital equipment, construction materials, energy, plastics and chemical products. Moreover regional markets are closely linked through the presence of South African companies in the rest of the region. This article expands on an earlier article in this Review on the possible impacts of some of the South African cartels on the region, as part of CCRED's monitoring of competition case developments and the evolution of enforcement in the region.

In settling cartel cases with the Competition Commission ("Commission"), few companies disclose the list of other countries that may be affected by the conduct, probably fearing possible litigation in the affected countries. This article looks at the available information relating to recent cartels cases, with investigations initiated in the past two years, to provide regional competition authorities with early warning mechanisms and motivation for regional collaboration on investigations.

In the past two years up to September 2017, the Commission has either referred, settled or conducted raids (in which case there may be no evidence of a cartel as yet, or some firms may not be subject to subsequent referral or settlement) in relation to at least 17 cases with possible regional impact (Table 1). We note that these are cases where information is available publicly either due to settlements agreed, raids conducted (and reported in the media) or a referral by the Commission (there may be other investigations conducted that have not been made public). Some of the parties in the cartel cases have admitted to conduct in South Africa but these admissions do not cover impacts on other countries as the mandate of the Competition Commission relates to conduct with an effect in South Africa. We have examined the countries where the companies involved in the South African cartels are also operating and/or exporting to, based on a review of their websites or in other public information. Those denoted 'Africa' are cases where the company does not specify on its website or other documents which countries it exports to or operates in, but simply states that it has a presence in 'Africa'.

"A cartel in South Africa is a cartel in the region?"

The presence of these companies in the rest of the continent indicates the likelihood that the cartel conduct extended beyond the borders of South Africa. That is, companies involved in cartel conduct in South Africa are likely to exhibit similar practices through their subsidiaries and/or branches elsewhere in the region, especially since key business decisions such as pricing and market strategies of companies are typically taken at headquarters in South Africa. Additionally, it is likely that a company that is benefiting from cartel conduct in one jurisdiction faces powerful incentives to engage in a similar arrangement in other jurisdictions where it has physical presence and operations. This is especially so if those jurisdictions have a poor track record of successful investigation and prosecution of cartel cases, as is the case with many SADC competition authorities.

Furthermore, many of the countries listed in Table 1 import the majority of the cartelised products from South Africa. For example, Botswana, Zimbabwe, Zambia, Namibia and others are all net importers of rail maintenance equipment and related services, mainly from South Africa. The companies involved in supplying these products and services were the subject of the rail and maintenance cartel case in South Africa, which was referred to the Tribunal in 2016. The firms allegedly colluded in bidding for tenders to supply Transnet, including allocating various tenders amongst each other. Over 90% of Botswana's imports of rail maintenance equipment and related services in 2016 were from South Africa, while the figures are just over 51%, 31% and 25% for Namibia, Zimbabwe and Zambia, respectively.

On the other hand, South Africa is also a strategic hub for the trade of goods in and out of the Southern Africa region. The cargo freight cartel which is alleged to have fixed the rates of general cargo shipment from Asia to South Africa involved companies that also have offices in South Africa. The potential impact on countries in the region is different in this instance as it may not involve collusion of firms operating in or exporting to the neighbouring countries. In this case, as prices may have been higher for cargo to South Africa, this would have also increased the costs for cargo passing through South Africa to other countries such as Botswana for instance. As such, initiating a follow on investigation or assessing effects may be more difficult in this case notwithstanding the fact that Botswana customers may have been subject to high cartel prices. Notably, Asia is an important trade partner to the southern Africa region, with over 38% of SADC's total imports in 2016 coming from Asia.

While many of these cases have not been concluded in South Africa as yet, the investigations alone should alert regional competition authorities and thus serve as the basis for initiating investigations into the sectors and companies identified. Internationally, countries like South Korea, Mexico and Brazil have taken direct action against companies involved in export cartels that had impact in their economies. Although the regional authorities may not have jurisdiction over other companies, they may have strong cases against those companies that have operations and physical presence in their markets and where some proportion of revenues is earned domestically. Moreover, even though many regional authorities do not specifically outline procedures to deal with the impact of regional cartels on local markets, some specify that their legislation applies to "*all economic activity within, or having effect within*" their jurisdictions. This provides the scope for follow-on investigations.

Collaboration and coordination amongst regional competition agencies is critical for successful prosecution of regional cartels, and it is encouraging that the COMESA Competition Authority is also looking to increase its focus on cartel cases. Collaboration is necessary despite the possibility that some authorities may be reluctant to assist foreign counterparts for various reasons including political economy and legal considerations.

Table 1: Cartels assessed in South Africa with possible regional dimensions, 2015-2017

Industry	Firms involved in SA cartel	Possible countries affected	Raid/referral/ settlement	Year
Wet peels and citrus peel pulp	Beefcor (Pty) Ltd	Botswana, Mozambique	referral	2017
	Cape Fruit Processors (Pty) Ltd		referral	2017
Bricks	Corobrik	Africa	referral	2017
	Era Bricks (Pty) Ltd		referral	2017
	Eston Brick and Tile (Pty) Ltd		referral	2017
	De Hoop Brickfields (Pty) Ltd		referral	2017
	Clay Industry CC		referral	2017
	Kopano Brickworks Ltd		referral	2017

Industry	Firms involved in SA cartel	Possible countries affected	Raid/referral/ settlement	Year
Fire Protection Services	Afrion Property Services CC	Africa	settlement	2017
	Belfa Fire (Pty) Ltd		referral	2017
	Cross Fire Management (Pty) Ltd		referral	2017
	Fireco Gauteng (Pty) Ltd		settlement	2017
	Fireco (Pty) Ltd		referral	2017
	Fire Protection Systems (Pty) Ltd		referral	2017
	Tshwane Fire Sprinklers CC		referral	2017
	ANS Fire Protection Services CC		raid	2017
	Arksun Fire Equipment CC		raid	2017
	BH Fire Protection Services CC		raid	2017
	Belfa Coastal Cape		raid	2017
	Belfa Coastal Natal		raid	2017
	Bhubesi Fire Projects (Pty) Ltd		raid	2017
	Chubb Fire and Security (Pty) Ltd		raid	2017
	Country Contracts CC		raid	2017
	Eagle Fire Control CC		raid	2017
	Fire and General CC		raid	2017
	Fire Check CC		raid	2017
	Fire Control Systems KwaZulu-Natal CC		raid	2017
	Fire Design CC		raid	2017
	Fire Sprinkler Installations CC		raid	2017
	FireCo (Pty) Ltd (FireCo Cape)		raid	2017
	FireCo (Pty) Ltd (FireCo KZN)		raid	2017
	Jasco Fire Solutions (Pty) Ltd (Jasco Cape)		raid	2017
	OVG Fire Management (Pty) Ltd (OVG Cape)		raid	2017
	QD Fire Cape CC		raid	2017
	Specifire (Pty) Ltd		raid	2017
	Whip Fire Projects (Pty) Ltd		raid	2017
	Ramsin Industrial Supplies CC		raid	2017
Chemicals	Investchem (Pty) Ltd	Africa (incl. Botswana, Zimbabwe, etc)	settlement	2017
	Akulu Marchon (Pty) Ltd		settlement	2017
Meat	Karan Beef (Pty) Ltd	Africa	raid	2017
	Sparta Foods (Pty) Ltd		raid	2017
	Chalmar Beef (Pty) Ltd		raid	2017
	Beefmaster Kimberley (Pty) Ltd		raid	2017
	Morgan Beef (Pty) Ltd		raid	2017
	Beefcor (Pty) Ltd		raid	2017
	Midland Meat (Fabvleis)		raid	2017

Industry	Firms involved in SA cartel	Possible countries affected	Raid/referral/ settlement	Year
Edible oils1	Wilmar Continental Edible Oils and Fats (Pty) Ltd	Mozambique, Zimbabwe, Malawi, Zambia, BLNS countries	raid	2016
	Willowton Oil and Cake Mills		raid	2016
	FR Waring Holdings (Pty) Ltd		raid	2016
	Africa Sun Oil Refineries (Pty) Ltd		raid	2016
	Epic Foods (Pty) Ltd		raid	2016
Edible oils2	Unilever	Africa	referral	2017
	Sime Darby Hudson Knight (Pty) Ltd		settlement	2016
Cargo freight	Hamburg Sud South Africa (Pty) Ltd	Southern Africa	raid	2016
	Maersk South Africa (Pty) Ltd		raid	2016
	Safmarine (Pty) Ltd		raid	2016
	Mediterranean Shipping Company (Pty) Ltd		raid	2016
	Pacific International Line South Africa (Pty) Ltd		raid	2016
	CMA CGM Shipping Agencies South Africa (Pty) Ltd		raid	2016
Rail maintenance	Plasser Railway Company	Southern Africa	referral	2016
	Railway Mechanised Maintenance Company		referral	2016
	Lennings DEC Rail Services		referral	2016
Gear pumps	Hudaco Trading	Southern Africa, Botswana, Zambia, Zimbabwe	referral	2016
	Fermel		referral	2016
Security services	Raite Security Services and Consulting	Africa	settlement	2016
	Today's Destiny Trading and Projects		settlement	2016
Packaging paper	Mpact Limited	Sub-Saharan Africa	raid	2016
	New Era Packaging (Pty) Ltd		raid	2016
Telecoms equipment	ZTE SA	Angola	referral	2016
	ZTE Mzanzi		referral	2016

Industry	Firms involved in SA cartel	Possible countries affected	Raid/referral/ settlement	Year
Wooden products	PG Bison	Zimbabwe, Zambia, Malawi, Tanzania, Mozambique, Kenya, Uganda, Angola, DRC, BLSN countries	raid	2016
	Sonae Novobord		raid	2016
Glass fitment and repair services	PG Glass	Angola, Malawi, DRC, Zambia, BLSN countries	raid	2016
	Glassfit		raid	2016
Liquefied Petroleum Gas (LPG) and gas cylinders	African Oxygen Limited	Angola, Kenya, Malawi, Mozambique, Nigeria, Seychelles, Zambia, Zimbabwe, Tanzania, Uganda, Senegal, BLSN countries	raid	2015
	Oryx Oil South Africa (Pty) Ltd		raid	2015
	EasiGas (Pty) Ltd		raid	2015
	Liquefied Petroleum Gas Safety Association of Southern Africa		raid	2015
	KayaGas (Pty) Ltd		raid	2015
	Totalgaz Southern Africa (Pty) Ltd		raid	2015
Plastic pipes	DPI Plastics	Sub-Saharan Africa	referral	2015
	Ubuntu Plastics (Pty) Ltd		referral	2015
	Sangio Pipes (Pty) Ltd		referral	2015
	Dawn Consolidated Holdings (Pty) Ltd		referral	2015

Source: Competition Commission, Competition Tribunal and company websites

Notes

[1] Settlement means the parties have reached an agreement to settle with the Commission, and in most cases there is an admission of guilt. Referral means the Commission has referred the case to the Tribunal for adjudication instead of settling the matter.

[2] Kaira, T. (2017). Cartel enforcement in the southern African neighbourhood. In Klaaren, J. et al. eds. Competition Law and Economic Regulation: Addressing Market Power in Southern Africa. Wits University Press. pp. 71-93.

[3] Based on Trademap data.

[4] Based on Trademap data.

[5] See Levenstein, M., Suslow, V., and Oswald, L. (2003). Contemporary International Cartels and Developing Countries: Economic Effects and Implications For Competition Policy. *International Agricultural Trade Research Consortium Working Paper.*

[6] See Botswana and Zambia competition acts.

[7] See Sokol, D. (2008). What Do We Really Know About Export Cartels and What is the Appropriate Solution? *Journal of Competition Law and Economics, 4(4), 967 - 982.*

EXCLUSIONARY ABUSE IN THE ROOIBOS LIMITED CASE

Farisai Chin'anga

The local rooibos market in South Africa comprises 8 large processing firms which account for approximately 90% of the market, with Rooibos Limited controlling 60% of the market. Similar to other processing firms, Rooibos Limited purchases large quantities of tea from commercial farmers and processes it into bulk tea which is subsequently sold to packaging firms to pack into finished products. A case against Rooibos Limited has recently been referred to the Competition Tribunal alleging exclusionary abuse of dominance in contravention of section 8(d)(i) of the Competition Act. The referral follows an investigation by the Competition Commission of South Africa in which Rooibos Limited was found to be using exclusionary contracting strategies in order to foreclose the supply of tea to other tea processors. The firm entered into 5-year contracts with the commercial farmers of rooibos tea, in which the farmers agreed to supply specified volumes of rooibos tea in 2014. Prior to 2014, Rooibos Limited had sourced rooibos tea from commercial farmers through 1-year contracts. Additionally, the firm offered its production research output to farmers on the condition that farmers would in turn supply it with up to 50% of their produce. These strategies allegedly impacted negatively on rival firms as Rooibos Limited secured a large proportion of the tea available in the rooibos tea processing market.

Overview of the case

Under section 8d(i) of the Competition Act, Rooibos Limited's conduct of entering into long-term supply contracts with commercial farmers is alleged to be exclusionary and anti-competitive as it could impede rival processing firms from expanding at the processor level of the rooibos tea value chain. This is consistent with a foreclosure theory of harm in which an incumbent firm deters effective competition through undermining the ability of rival firms to attract suppliers. Rooibos Tea is not in ubiquitous supply in South Africa such that securing sufficient volumes of tea for processing is important in the market in which scale economies are critical. Rooibos is primarily produced in a small geographical area in the Cederberg and Sandveld areas of the Western Cape and the Bokkeveld area of the Northern Cape. Although there are approximately 350 to 500 rooibos farmers in South Africa, only a limited number of farmers in the upstream market produce the majority of the total bulk tea supplied to processing firms.

Additionally, offering production research output in exchange for a stipulated supply of rooibos tea from commercial farmers was also alleged to be exclusionary and potentially detrimental to competing rooibos processing firms. The production research output presented a strong incentive for farmers to supply rooibos tea to Rooibos Limited as the research contributes to enhancing the overall quality, yields and farming methods. The research conducted includes a focus on issues such as soil health, optimal fertilizer usage, crop rotation and the use of chemicals. As such, there are efficiencies which need to be balanced against any anticompetitive effects of the alleged conduct.

The overall production of rooibos from commercial farmers decreased by 36% between the years 2009 and 2015. This may have contributed to the change in Rooibos Limited's strategy to a focus on tying up a large share of farmers' output for its own processing requirements. Figure 1 below illustrates that production gradually dropped from 18 000 tons in 2009 to 10 000 tons in 2012, the lowest volume recorded since 2006. In spite of the 25% increase recorded between 2012 and 2014, production declined once more by 8% between 2014 and 2015. Some rooibos commercial farmers have attributed the decline in yields to climate change, with erratic rainfall and droughts being experienced in the Western Cape province over the past years.

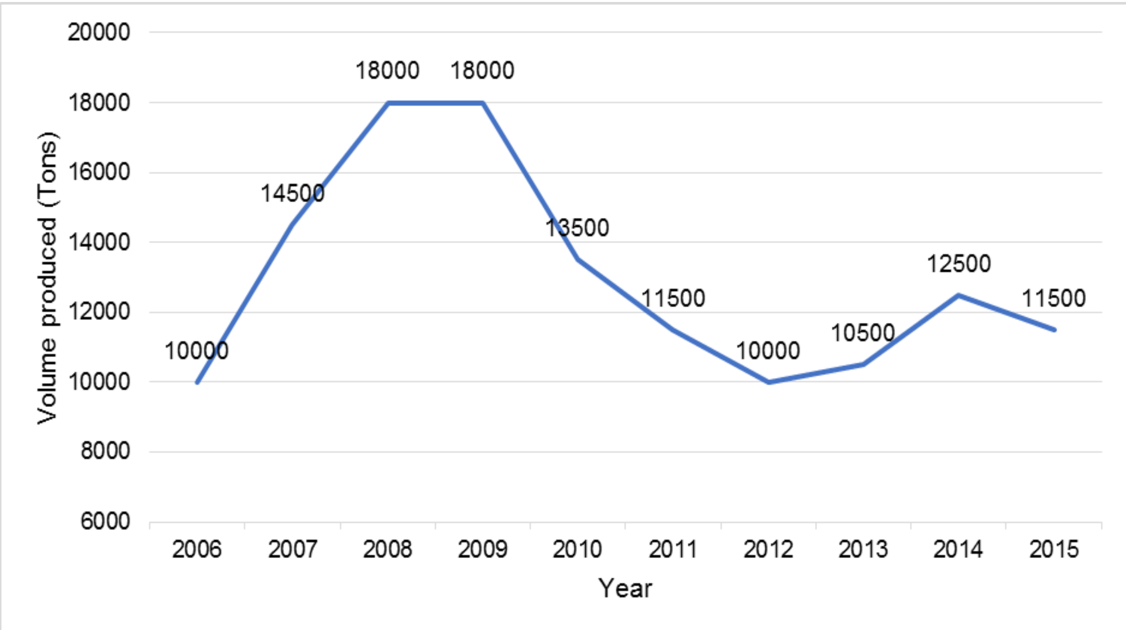
Given the above constraints, it seems likely that Rooibos Limited would find it beneficial to secure the supply of bulk tea for processing especially during periods of low yields and output. By extending the duration of contracts and tying up a large proportion of suppliers' output, rival firms are effectively foreclosed from accessing supply, raising their costs such that they cannot compete effectively in the market. Because of the fact that Rooibos Limited is a dominant firm, it is positioned as a critical customer for suppliers, which is reinforced by the benefits suppliers obtain from its various research initiatives. These efficiencies are required to be balanced against the likely harm to rivals. The use of strategic contracting locked in significant volumes of rooibos tea, whereas rival firm purchases remained stagnant or declined. Prior to that, volumes of rooibos purchased by Rooibos Limited were in severe decline.

Implications for rival processing firms

The use of exclusive long-term contracts and production research output by Rooibos Limited as an incentive induced commercial farmers not to deal with other processing firms. This had the effect of locking in key suppliers of unprocessed rooibos tea whilst securing significant volumes of the upstream input in the market. As a result, the price of the upstream input increased which in turn increased the costs of other rooibos processing firms, in line with theory in this regard. Of course, there are benefits to farmers from the research and the security of offtake guaranteed by the contracts which need to be considered.

There is potential for growth of rooibos exporters through supplying international markets. The rooibos market in the United Kingdom has increased significantly by 300% between 2006 and 2015, with rooibos accounting for 8.1% of the herbal tea total consumption in the United Kingdom valued at $US179 million. In the current economic climate in South Africa where there is an emphasis on addressing a history of concentrated markets and opening up markets for greater contestation, it is especially important that agreements such as those described herein are treated with a high level of scrutiny. If rival firms are limited through strategic conduct from contesting markets, their ability to expand and develop capabilities to compete in domestic and global markets is significantly undermined to the detriment in the long term of the economy as a whole.

Figure 1: Production of Rooibos tea in South Africa, 2006-2015



Source: South Africa Rooibos Council (2016)

Quarterly competition case update - Mergers and acquisitions			
Country	**Target**	**Acquirer**	**Status**
Botswana	Limane (Pty) Ltd	Capital Management Botswana Fund 1 (Pty) Ltd	Approved
	Kamoso Distribution (Pty) Ltd	Newshelf 1392 (Pty) Ltd	Approved with conditions
	Lobatse Clay Works (Pty) Ltd	Capital Management Botswana (Pty) Ltd	Approved
	Transport Holdings Ltd	Lacrose (Pty) Ltd	Approved
	Capevin Holdings (Pty) Ltd	Remgro International Holdings (Pty) Ltd	Approved with conditions
	Watershed Plaza Shopping Mall	New African Properties Ltd	Approved
Kenya	Coca Cola Beverages Africa Proprietary Ltd	Coca Cola Company	Approved
	Associated Vehicle Assemblers Ltd	Simba Corporation Limited	Approved with conditions
	Air Connection Limited	Panalpina Airflo Limited, Panalpina Airflo B.V. and Panalpina Kenya Limited	Approved with conditions
	Trillvane Limited	Kuehne + Nagel Limited	Approved with conditions
	Nairobi Java House Ltd	Star Foods Holding Limited	Approved
	Alldean Networks Limited, Simbanet Com Limited and Wananchi Telecom Limited	Synergy Communications	Approved
Malawi	New Finance Bank Limited	MyBucks	Approved
South Africa	The EOH Workplace Health and Wellness division of EOH Abantu (Pty) Ltd	Life Occupational Health (Pty) Ltd	Approved
	Khoisan Tea Import and Export (Pty) Ltd	Libstar Operations (Pty) Ltd	Ongoing
	GTA Travel Holding Ltd	Cinven Capital Management General Partner Ltd and Canada Pension Pan Investment Board	Approved
	Redefine Properties Ltd	Growthpoint (Pty) Ltd	Ongoing
	J Gilfillan Motors (Pty) Ltd	Unitrans Automotive (Pty) Ltd	Approved
	Prostaflo Promotions 28 (Pty) Ltd	Coricraft Group (Pty) Ltd	Approved
	Capensis Management (pty) Ltd	Lenmed Health (Pty) Ltd	Approved
	Old Mutual (Netherlands) BV	Old Mutual PLC	Ongoing
	Retail Capital (Pty) Ltd	Futuregrowth Asset Management (Pty) Ltd, acting as agent for Old Mutual Life Assurance Company (South Africa) Ltd	Approved

South Africa cont.	ADB Safegate Luxembourg SA	CEP IV Investment 16 SARL	Approved
	Wirtgen Group Holding GmbH	Deere & Company	Approved with conditions
	Lakeview Hospital	Netcare Hospitals (Pty) Ltd	Prohibited
	GRW Holdings (Pty) Ltd and GRW Sales (Pty) Ltd	Schmitz Cargobull AG	Approved with conditions
	Delta Property Fund Ltd	Educor Property Holdings (Pty) Ltd	Approved
	Linde and Wiemann RSA (Pty) Ltd	Vuwa Capital Partners (Pty) Ltd	Approved
	Clearwater Motors (Pty) Ltd	Unitrans Automotive (Pty) Ltd	Ongoing
	Hatfield Residences (Pty) Ltd, Varsity Stay (Pty) Ltd, Yellow Spiral Trading (Pty) Ltd, Vaxovert (Pty) Ltd and Edmacap (Pty) Ltd	Inkunzi Student Accommodation Fund (Pty) Ltd	Approved
	Interaction Market Services Holdings (Pty) Ltd	African Rainbow Capital (Pty) Ltd	Approved
	African Star Grain and Milling (Pty) Ltd	K2014202010 (Pty) Ltd	Prohibited
	Hatch Investments (Mauritius) Ltd	Dimension Data Protocol BV	Ongoing
	First World Trader (Pty) Ltd	Sanlam Investment Holdings (Pty) Ltd	Approved
	AM Alberts (Pty) Ltd	Louis Dreyfus Company Africa (Pty) Ltd	Ongoing
	The Akeso Group	Netcare Hospitals Group (Pty) Ltd	Ongoing
	Marnau Motors (Pty) Ltd	Legacy Auto (Pty) Ltd	Approved
	Holdspot Ltd	Long4Life Ltd	Approved
	Sovereign Foods Investment Ltd	Gallus Holdings Ltd	Ongoing
	Pacific Heights Investments (Pty) Ltd	Absa Bank Ltd	Ongoing
	Fixtrade 341 CC	Choppies Supermarkets South Africa (Pty) Ltd	Approved
	Sintex Integration Services (Pty) Ltd	DCT Holdings (Pty) Ltd	Approved
	PUV Trading (Pty) Ltd	SMG Ballito (Pty) Ltd	Approved
	General Motors (SA) (Pty) Ltd	Isuzu Motors (SA) (Pty) Ltd	Approved
	New Africa Investments Ltd and Kaya FM (Pty) Ltd	Thebe Investment Corporation (Pty) Ltd	Ongoing
	Loads of Living (Pty) Ltd	Truworths International Ltd	Approved with conditions
	New Just Fun Group (Pty)	Deneb Investments Ltd	Ongoing
	Shamwari Wildlife (Pty) Ltd and others	Shamwari Holdings (Pty) Ltd	Approved

Quarterly competition case update - Main enforcement cases	
Country	**Case summary**
South Africa	On 22 September 2017, the Competition Commission (CC) released a draft Automotive Code of Conduct for Competition. The purpose of the Code is to address anti-competitive concerns and enhance transformation in the industry. The Code seeks to address identified concerns in the automotive aftermarket industry and will bind various OEM's (car manufacturers), government bodies and industry associations who will be signatories to it.
	The Commission has referred the South African Football Intermediaries Association (SAFIA) and 36 of its members to the Competition Tribunal for prosecution in relation to fixing of various commission fees and trading conditions applicable for negotiating different contracts with players, coaches and football clubs.
	The Commission referred a case against fourteen fresh produce market agents and their association, the Institute for Market Agents of South Africa, in relation to charges of price fixing and/or fixing trading conditions in relation to commission fees charged to farmers.
	Autoliv Inc. (Autoliv) has concluded a settlement agreement with the Commission for its involvement in price fixing, market division and collusive tendering with its competitors, namely, TRW Inc, Takata Group, Toyoda Gosei Co Ltd and Tokai Rika Co Ltd in the market for airbags, seatbelts and steering wheels. The company has agreed to pay an administrative penalty of almost R150 million.
	Godrich Flour Mills concluded a settlement agreement with the Commission for price fixing and market division in the market for milled white maize products. Godrich will pay a penalty of R4.35 million.
	The Commission has recommended to the Competition Tribunal that Evraz Highveld Steel pay a R1 million administrative penalty for information exchange (sales volumes and prices) through the South African Iron and Steel Institute (SAISA) which facilitated price fixing and market allocation in the market for flat steel products.
Zambia	The Competition and Consumer Protection Commission (CCPC) fined Zambia Sugar K76,728,650 (US$ 13,000) for price discrimination and unfair pricing. It was established that household consumers paid 28% more than industrial sugar users. The investigation also revealed that Zambia Sugar was charging household users in Zambia 41% higher than what it charged export consumers in the Great Lakes region, despite costs being similar.

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