COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 62/CR/Nov01

In the matter between:

Sappi Fine Papers (Pty) Limited	**Applicant**
and	
The Competition Commission	**Respondent**

Reasons

BACKGROUND

1. This matter concerns an exception taken by Sappi to a complaint referral by the Commission. The relevant factual background to the case, which is common cause, is that Papercor CC (Papercor) lodged a complaint with the Commission on 18 May 2000 alleging various prohibited practices on the part of Sappi Fine Papers (Pty) Ltd (Sappi). According to the complaint referral, the complaint included allegations that Sappi refused to sell paper supplies to Papercor or refused to do so on the same terms as it sells to so-called designated merchants, who are competitors of Papercor. Similar allegations were made by Papercor against Sappi in an interim relief application filed with the Tribunal. At the request of Papercor, the hearing of the interim relief application was postponed *sine die* to allow the parties

an opportunity to negotiate. Agreement has not been reached between the parties because Sappi insists that, as a pre-condition to any supply agreement, Papercor pays on a party and party basis, the legal costs incurred by Sappi in defence of the interim relief application referred to above.

2. In the complaint referral, the Commission alleges that Sappi's insistence that Papercor pays its legal costs prior to concluding a supply agreement is conduct prohibited by section 8(d)(iii) of the Act. Instead of filing an answer Sappi took exception to the complaint referral. There are two grounds to the exception: firstly, it is argued that the complaint referral is void and of no effect because the Commission failed to refer it within the time period prescribed by the Act and consequently the Tribunal lacks the jurisdiction to pronounce upon it. Secondly, it is argued that the complaint referral lacks averments necessary to sustain a contravention of section 8(d)(iii) - the factual allegations in the complaint referral, even if they were proved, do not disclose a cause of action.

3. We deal with these two points of exception below.

JURISDICTION

4. As its first point of exception, the respondent argues that the complaint referral is void and of no effect as it was made at a time when the Commission no longer had jurisdiction to refer the complaint.

5. The common cause facts are that the complaint was submitted on the 18 May 2000 and was then accepted by the Commission on the 8 June 2000. The Commission referred the complaint to the Tribunal on the 26 November 2001.

6. In the complaint referral the Commission alleges that it has jurisdiction to hear the complaint in terms of section 50 of the Act.

7. That section of the Act, which came into operation on 1 February

2001 pursuant to the passing of the Competition Second Amendment Act 39 of 2000, provides that a complaint must be referred to the Tribunal within one-year of submission to the Commission. This period may be extended with the consent of the complainant. If the period is not extended then the Commission is deemed to have issued the complainant with a notice of non-referral.[1]

8. Extensions of the Commission's time period to investigate operated differently prior to this amendment. We will for convenience refer to the 'old' and 'new' systems. Under the old system the Commission was first required to screen a complaint after it had been submitted.[2] If the complaint met the prerequisites of the screening process, it was then accepted as a complaint. After it had been accepted, the Commission then had a period of one year from date of acceptance – (note, not the date of submission, which would always be a prior date) – to investigate the complaint and refer it to the Tribunal.[3]

9. Under the new system there is no longer provision for the prior acceptance of a complaint. A complaint simply has to be lodged in order to be investigated. Apart from this important distinction the two systems are similar. Accordingly section 50(2) of the Act provides, as did its analogue in the old system, that the Commission has one year to investigate a complaint, except under the new system the year runs from date of submission not the date of acceptance.[4] As with the old system the year may be extended with the consent of the complainant.

10. Subsequent to the exception being taken the Commission introduced correspondence to show that the complainant had agreed to extend the period for the complaint to be investigated in a series of separate consents.[5] The first consent was granted for the period commencing May 2001 until the end of June 2001 and was granted on the 30 May 2001.

1 A notice of non-referral entitles a complainant to refer its complaint to the Tribunal. Absent such a notice it is not entitled to do so. (See section 51(1))
2 See Rule 17(2) of the previous Commission rules.
3 See Rule 19(2) of the previous Commission rules.
4 We set out the section below.
5 There were in fact eight separate extensions that ran from 1 May 2001 to 30 November 2001.See Annexure to the Commission's answering affidavit to the respondents notice of exception, Record pages 39 – 46.

11. It is common cause that the consents for the extension were all made at a time when the new system had come into force. The legal question that arises is whether the new system, which came into operation on 1 February 2001, is prospective or retrospective in its operation.

12. If it is only prospective, then the old system applies, and at the very least the first extension was valid and effective, as the extension was granted within the one-year period from the date of acceptance, namely the 8th June 2000.

13. If the new system applies, retrospectively, then the consent for the extension should have been granted within a year after the date of the submission of the complaint (18 May), and hence it would have been made out of time.

14. When the Competition Second Amendment Act came into force it contained a transitional measure in terms of section 23(5) which provided that –

"Any proceedings that were pending before the Competition Commission, Competition Tribunal or Competition Appeal Court before the date of commencement of this Act must be proceeded with in terms of the principal Act as amended, except to the extent that a regulation under section 21(4) or 27(2) of the principal Act as amended, or a rule of the Competition Appeal Court, provides otherwise."

15. In a previous decision of the Tribunal in the Novartis case[6] we decided that notwithstanding section 23(5) of the Amendment Act, section 50 does not operate retrospectively. This is because the right to bring a complaint referral within a time period creates a substantive right. An amending statute that affects substantive rights should not be interpreted to apply retrospectively unless the amendment expressly provides for retrospective application.

6 22/CR/B/Jun01

16. In its oral submissions to us, the respondent indicated that they would not challenge the correctness of this decision, but confined themselves to arguing that the Commission had not made out a case for jurisdiction in its complaint referral and secondly that even if it could validly extend the period for investigating the complaint it could do so only once, as the legislation did not contemplate multiple extensions.

17. Thus we must decide two questions: Firstly, whether it is fatal for the Commission not to have alleged that it had jurisdiction by virtue of the extended periods it had obtained from the complainant and, secondly, whether multiple consent extensions are competent under the Act.

18. There is nothing in the rules to suggest that the Commission is bound to plead its grounds for jurisdiction in its complaint referral. In the complaint referral the Commission sets out both the date on which the complaint was submitted (Paragraph 5.1) and the date on which the complaint was accepted (paragraph 8.3).[7] Since the date of the referral appears *ex facie* that document the respondent had sufficient information to question its jurisdiction. What the referral was missing were the allegations that the period for investigating the complaint had been extended. Whilst it would be good practice to plead these facts, so that a respondent knows whether it can bring a challenge, their omission is not fatal.[8] To hold otherwise would mean non-suiting a complainant's referral that de facto was competent. It is quite clear that the Commission may not bring a complaint referral which it does not have the jurisdiction to bring, but it does not follow that it loses the jurisdiction it has, by want of allegations in the complaint referral. If its jurisdiction is challenged and it cannot prove it, it will lose. In

7 The respondent made much of a rather pedantic point that because the Commission had referred to section 50 as the basis on which it referred the complaint it had therefore not referred it in terms of the old system. The inference is not an obvious one as the reference to section 50 does not suggest an obvious election to adopt the new system as opposed to the old as section 50 contains a variety of provsions. The fact that the Commission mentions the date of acceptance of the complaint specifically seems to contradict this inference as otherwise this would be an irrelevant allegation. Secondly the question of retrospective effect is in any event an issue of law.

8 In this case until the respondent brought the exception it would not have known of the existence of the multiple extensions. It is for this reason that we did not restrict the respondent from arguing this issue at the hearing even though the point was not taken in its notice of exception or its heads of argument.

this case we find that the Commission validly extended the time period, which it had to investigate the complaint and the only issue remains whether it was permissible for it to do so by means of multiple consents to extend.

19. This was the issue on which the respondent placed most of its reliance in its argument before us. The language of sub-sections 50(2), 50(4) – (5) is important here -

"50. Outcome of complaint

1. …

2. Within one year after a complaint was submitted to it, the Commissioner must -

(a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or

(b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.

3. …

4. In a particular case –

(a) the Competition Commission and the complainant may agree to extend the period allowed in subsection (2); or

(b) on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period.

5. If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2), or the extended period contemplated in subsection (4), the Commission must be regarded *as having issued a notice of non-referral on the expiry of the relevant period."*

20. The respondent argues firstly on a textual approach that the use of the words *"the period"* presupposes a single period of extension. This it argues is reinforced by the fact that the power to extend in section 50(4) is to *'extend the period allowed in subsection (2)"*. Since this period is a period of one year the legislature only contemplated an extension to the period of one year and not an extension to the one year plus any previous periods of extension.

21. The respondent argues that the reason that the statute does not permit multiple extensions is that otherwise a respondent would be prejudiced by a never-ending series of extensions which would mean that the case against it would never reach finality.

22. The Commission argues that the statute is silent on this point and that indeed if there is nothing in the statute to prevent them from making use of more than one extension, we should not read such a stricture in. The Commission argues that where the legislature had intended a single extension period it has expressly done so in section 14, the section dealing with merger control. In section 14(1)(a) it states that the Competition Commission –

"may extend the period in which it has to consider the proposed merger by a *<u>single period</u> not exceeding <u>40 business days</u> and, in that case, it must issue an extension certificate to any party who notified it of the merger;..."*

23. We are persuaded by the Commission's argument. There is nothing in the express wording of the text of section 50 to preclude multiple extensions. In order to be valid, however, the extensions must be granted before the expiry of the previous period otherwise the chain will be broken. There is no suggestion that the chain of extensions in this case has been interrupted by a period for which a prior consent had not been granted.

24. The difference in the text in sections 14 and 50 is significant to serve

as interpretative guide. Both were introduced as part of the same amendment and therefore we can assume that when the legislature applied its mind to the issues of extensions of both merger considerations and complaint referrals it was mindful of requiring a single extension period with the former, but not with the latter. What is also significantly different about section 14 is that the requirement of a single period is coupled with a stipulation that the extension may not exceed 40 days. Section 50(2) is silent on how long the period of extension may run.

25. The absence of these features in section 50 suggests that the legislature had not intended to provide for only a single period of extension for the reasons suggested by the respondent. If it had considered it necessary, the logic would not be merely to restrict the Commission to a single extension but also to impose a time cap on that extension. If the legislature was concerned about the danger of the abuse of multiple extensions it would surely have provided for this expressly, coupled with a cap on the period for extension. Without a cap the period of extension is academic. A single period of several years is surely more prejudicial to the respondent than a multiple series of extensions that does not extend beyond three months. The only distinction between the two is that under the former the respondent knows when the end of the period is whilst under the latter the endpoint remains uncertain. The distinction would make little practical distinction as if the Commission had only a single period of extension it would always bargain for the longest period, *ex abundante cautela,* even if it only needed a much shorter period. A respondent's uncertainty is hardly alleviated by this.

26. The real explanation for the time cap on the Commission imposed by section 50 is not to protect a respondent but a complainant. The complainant has no right to proceed with its own complaint referral unless it has a certificate of non- referral from the Commission. If the Commission is dilatory in its investigative function a complainant might wish to bring the case itself, but it cannot do so without a certificate of non-referral. Furthermore without a decision from the Tribunal declaring the conduct in question a restrictive practice it

cannot bring a case for damages in a civil court.[9] What the legislature intended was to impose some restriction on the Commission's prerogative to bring a complaint referral in its own good time – it was thus meant to balance the Commission's public right to be the preferred prosecutor, with the private right of a complainant to get its dispute heard. For this reason the complainant can refuse to agree to the extension and then the Commission has to apply to the Tribunal for an extension.

27. If the legislature had intended to protect the respondent by this mechanism it would surely have done so expressly.

28. We conclude that there is nothing in the Act to preclude the Commission obtaining multiple extensions for referring a complaint in terms of section 50. The exception based on jurisdiction is dismissed.

NO CAUSE OF ACTION DISCLOSED

29. The excipient – the respondent in the main matter – excepts to the complainant's referral on the grounds that it fails to disclose a cause of action, which has been defined by Appellate Division as

'…every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'[10]

30. In other words, the respondent argues that even if all the allegations made in the Commission's pleading are true, it still falls short of disclosing a cause of action.

31. The complainant alleges that the respondent is in contravention of Section 8(d)(iii) of the Competition Act, which provides:

"It is prohibited for a dominant firm to –

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9 Section 65.

10 **McKenzie v Farmers' Cooperative Meat Industries Ltd 1922 AD 16** at 22

…

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the competitive effects of its act–

…

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract."

32. We have previously held that although our rules make no express provision for the taking of exceptions we would exercise our discretion to hear exceptions in the appropriate circumstances.[11] An exception that a complaint referral discloses no cause of action is one of those.

33. The Commission argues, based on its interpretation of High Court practice, that a pleading is only excipiable if no possible evidence led on the pleadings can disclose a cause of action. They argue that they will be able to lead evidence that will disclose a cause of action. The respondent disagrees and is of the view that no amount of evidence will remedy the faulty premise on which the Commission has sought to erect its case because the Commission has misconceived the requirements of the section under which it has proceeded. The Commission or any other complainant may not simply refer a complaint on the basis of a bald allegation – it must at least allege that the elements of the transgression that it seeks to prove are, *in fact,* present.[12] The complainant does not, at this stage, have to *prove* the

11See our decisions in **The Competition Commission of SA v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others (case number 08/CR/B/May01) and National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome (Pty) Limited and Others** (case number 45/CR/Jul01).

12 This is, in any event, clearly required by Rule 15(2) of the Tribunal rules which explicitly states that the affidavit that must support a complaint referral must set out 'the material facts or the

facts alleged. However, in order for the respondent to know the case that it is required to meet, the complainant must at least reveal the factual allegations upon which its claim is based.

34. Section 8(d)(iii) can be broken down into a number of distinct elements. Firstly, all section 8 claims require that the alleged transgressor is dominant as defined in Section 7 of the Act. Secondly, for a claim to succeed under Section 8(d)(iii) the Commission is required to establish either that the respondent has made the sale of its goods and services conditional upon the buyer purchasing goods and services unrelated to the purposes of the contract or that the respondent has forced the buyer to accept a condition unrelated to the object of the contract. In order then to 'disclose' a cause of action under Section 8(d)(iii) the Commission must 'disclose' the facts upon which it will rely in seeking to prove the existence of these elements. Note that the respondent argues that the Commission is also required to establish that the act complained of generates anti-competitive effects and that, accordingly, it must also disclose the factual basis for this claim. However, as we shall elaborate on below, we are not persuaded by this latter argument.

35. The Commission has clearly alleged that the respondent is a dominant firm in the market for the manufacturing and provision of coated and uncoated paper. The respondent's share of this market, avers the Commission, exceeds 45%, sufficient, in terms of Section 7 of the Act, to sustain a presumption of dominance. When, in the hearing on the merits, the Commission is put to proof of this allegation and the respondent is given the opportunity to contest it, we may conclude that the Commission's allegation of dominance cannot be sustained - the market share may be exaggerated; the relevant market may be incorrectly identified. However, at this stage, this is not our concern and it does not have to be the concern of the Commission. For the purposes of contesting this exception, it is sufficient that the Commission discloses the relevant market that it has identified and the factual basis for the allegation that the respondent is dominant in this market. This the Commission has done.

points of law relevant to the complaint and relied upon by the Commission...'

36. However, unfortunately for the Commission, this is not the only factual averment that it is obliged to make – that is dominance is not the only element of the alleged transgression. It must also allege the factual basis of its claim that the respondent is *'selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract'* or is *'forcing a buyer to accept a condition unrelated to the object of a contract'*.

37. The Commission concedes that it is not in possession of facts that would support an allegation that the respondent is tying the sale of its products to purchases by the respondent of other goods or services in unrelated markets. Accordingly, the facts that must be alleged relate to a claim that the respondent is, as a condition of sale, forcing the complainant to accept a condition unrelated to the object of the contract of sale. This condition is the respondent's insistence that the complainant, Papercor, pay the legal costs sustained by the respondent as a result of the claim for interim relief initiated by Papercor.

38. The Commission does not disclose the factual basis of its claim that the sale of the respondent's product is unrelated to the legal costs that it claims. On the contrary, there is a strong *prima facie* basis for arguing that these are intimately related. The disputed legal costs arose out of an action mounted by Papercor that had, as its express purpose, the procurement of product from the respondent. The interim relief proceedings were postponed *sine die* to enable the respondent and Papercor to negotiate a mutually acceptable supply arrangement. The Commission's complaint referral arises directly out of these negotiations. The Commission may, in the hearing on the merits, prove that these are indeed unrelated, however, at present it must simply disclose the facts that it will allege in order to sustain its claim.

39. Nowhere are these crucial facts alleged and on this basis alone the exception is upheld.

40. The respondent argues that the Commission would also have to allege that the imposition of this allegedly unrelated condition is anti-competitive in its effect. However, we reject this argument. The acts

described in 8(d)(i)-(v) are characterised in Section 8(d) as 'the following exclusionary acts' which in turn are defined as 'act(s) that impede(s) or prevent(s) a firm entering into, or expanding within, a market'. Thus these acts, in contrast with the general category of 'exclusionary acts' referred to in Section 8(c), are presumptively anti-competitive – a complainant is not required to allege or prove facts to this effect.

41. In other words the acts described in Section 8(d)(1)-(v) are *per se* anti-competitive.[13] However, in contrast with the acts described in Section 4(1)(b)(i)-(iii) and those described in Sections 8(a) and (b) they are not *per se* contraventions of the Act.[14] This is because Section 8(d) offences permit of a pro-competitive defence, a showing that the *presumed* anti-competitive consequences of a Section 8(d) Act are outweighed by the 'technological, efficiency or other pro-competitive gains'. Section 4(1)(b) offences (as well as Section 8(a) and (b) offences), on the other hand, admit of no such defence.

42. The respondent makes much of the potential balancing of anti- and pro-competitive consequences – 'if my opponent is not required to establish the precise anti-competitive consequences of a section 8(d) act, how' the respondent effectively asks, 'will I establish that its pro-competitive gains outweigh those effects'? This difficulty, even if it were to be admitted, cannot change the clear statement in Section 8(d) that provides that all of these acts are defined as exclusionary and hence anti-competitive. It may well be that, for the purposes of balancing the pro- and anti-competitive consequences, one may have to delve more deeply into the *extent* of the anti-competitive consequences. However one does not have to do any further delving in order to establish the *existence* of anti-competitive effects, to establish whether or not a practice described in Section 8(d) is indeed anti-competitive – this the Act establishes for us.

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13 For a further elaboration of the nature of section 8(d) practices see **The Competition Commission v Patensie Sitrus Beherend Beperk and Jakobus Johannes Petrus Bezuidenhout v Patensie Sitrus Beherend Beperk** (case number 37/CR/Jun01)

14 For a further elaboration of section 4(1)(b) complaints see **American Natural Soda Ash Corporation and Others v Botswana Ash (Pty) Limited and Others** (case number 49/CR/A/Jul00).

43. It is, in any event, our view that the balancing is a less precise enquiry than that suggested by the respondent – it is, inevitably, a qualitative rather than quantitative balance that is sought. Hence, by way of example, if the firm imposing an alleged tie was, in addition to being dominant in terms of the Act, actually a monopoly supplier then we would inevitably conclude that it would have to show massive pro-competitive gains in order to outweigh the effect of its monopoly status – a would be purchaser of product produced by the dominant firm would have literally no choice but to use the monopolist's product and thus accept any condition imposed in a contract of sale. If, on the other hand, the firm, despite its formally dominant status, nevertheless faced significant competition, we might well conclude when doing the balancing that the anti-competitive consequences were relatively minor and the pro-competitive showing required, concomitantly less onerous. But, we repeat, it is not necessary to establish that the act is indeed exclusionary or anti-competitive – it is sufficient to establish that the respondent is dominant and that it perpetrated the act alleged.

44. We do however acknowledge that the second leg of Section 8(d)(iii) – the imposition of an unrelated condition on the sale of a product – is, on the face of it, peculiarly at odds with the other practices listed in Section 8(d)(i)-(v). Each of the other acts listed here are well-established anti-competitive acts. This is the reason why the Act distinguishes these acts from the general category of exclusive acts referred to in Section 8(c) and why, in particular, it does not require a showing of anti-competitive effect in relation to the acts described in Section 8(d). However while 'tying' – the practice of conditionally linking the purchase of a desired product to the purchase of an unrelated product, which is the act clearly described in the first leg of Section 8(d)(iii) – easily falls into this category of what the US courts have referred to as 'black letter' anti-competitive acts, the same could not be said of the imposition of an unrelated *condition*. It is quite conceivable that a condition, possibly even one that is onerous or 'unfair', may nevertheless have no impact upon competition whatsoever. On this literal reading of the Act, the respondent may well be justified in insisting that when dealing with the practice of imposing an unrelated condition there should be a showing of an anti-

competitive effect. On the face of it, the imposition of an unrelated condition indeed bears little similarity to a tying arrangement, the essential feature of which is the linking of two unrelated *markets*. It would appear then that this single practice is at odds with the other acts listed in Section 8(d) including the act of tying described in the first part of Section 8(d)(iii).

45. However, in our view this anomaly is eliminated by a purposive reading of the Act. The clear purpose of this section is to describe a number of well-documented anti-competitive acts and to declare them *per se* anti-competitive. The drafters would have not intended to extend this category to cover a practice which, on its face, may have little to do with competition and which the case law has certainly not identified as a significant anti-competitive practice.

46. There is, however, a relatively straightforward explanation of this apparent anomaly. The first act described in section 8(d)(iii) is a classic tying arrangement – it is described as such in a number of authoritative US and EU judgments and in scholarly commentary. The essential features of a tying arrangement are the existence of two distinct products, that is, two distinct markets. In one of these markets, the 'tying market' or 'tying product', the alleged transgressor is dominant. It seeks to leverage advantage for itself or for an ally in the second market by requiring a would-be purchaser in the market in which it is dominant to favour itself or its ally in the second or tied market.[15] The element of leveraging is an essential feature of tying.

15 According to Areeda (**Antitrust Law** at 1700d) in the US *"The original, continuing, and most fundamental concern about tying is 'leverage'"*. He quotes the US Supreme Court's definition of leverage where it held that *"'Leverage' is loosely defined … as a supplier's power to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product."* **[Jefferson Parish Hosp. Dist. No 2 v Hyde, 466 U.S. 2 14 n.20 (1984)]**. In **"The Economics of EC Competition Law" at paragraph 5.13**, Walker and Bishop state: *"What may be referred to as the 'intuitive' antitrust concern with tying is that a firm that is a monopolist in one market might be able to 'leverage' this monopoly into another market and thus raise prices above the competitive level in this second market. The concern is that the monopolist uses his market power in the tying good market in order to improve anti-competitively his position in the tied good market."* **In Tetra Pak v Commission [1994] ECR II –755** the European Court of First Instance found that contractual clauses whereby Tetra Pak tied the sale of its carton packaging materials to the sale of its filling machines by requiring that purchasers of the filling machines use only their only their cartons infringed the provisions of article 82(d) (article 86(d) at the time). This was because these clauses eliminated

These elements are clearly described in the first leg of 8(d)(iii) – 'selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract'.

47. What then, are we expected to make of the second leg of section 8(d)(iii) - the imposition of an unrelated condition? This, on the face it, does not appear to require the existence of two markets or products. In the present case the condition is that Papercor, the would-be purchaser of the allegedly dominant firm's product, pay legal costs sustained by the respondent – in this instance it is clear that two products or markets are not linked by the tie, there is no leveraging of market power. In our view the inclusion of a prohibition on the imposition of 'unrelated conditions' simply reflects the cautious approach of the legislature, a caution appropriate in a field of law that potential transgressors have both the incentive and resources to evade. It is conceivable that a dominant firm may seek to impose a tie, may, in other works, seek to leverage its power into a second market, without explicitly specifying that the intended victim of the abuse purchase product in the second market. It may achieve this by imposing a condition in the sale agreement – for example, a technical standard or specification required when purchasing spare parts or some or other complementary input - that would lead its customer directly to the door of the intended beneficiary in the second market. Because the condition specified a standard rather than 'separate goods or services' the perpetrator of the tie may escape scrutiny under Section 8(d)(iii). It is this potential loophole that the second leg of Section 8(d)(iii) is intended to close.

48. The fact that the two legs are located in the same sub-paragraph suggests that they are both intended to address the same anti-competitive ill, namely tying. If they were not conceptually linked and the second link refers to some conduct that is distinct from tying, it would presumably have been set out in its own self-standing sub-paragraph. The architecture of paragraph (d), which sets out a different species of exclusionary act in each of its sub-paragraphs, tends to support this conclusion.

competition at the level of carton sales by tying making this market to the market for filling machines where Tetra Pak was dominant.

49. Our view is supported by the observation that Article 82(d) of the EU Treaty specifies as an abuse of dominance *"making the conclusions of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."* It is instructive that there is no single EU case in which the offending unconnected 'supplementary obligations' has not linked separate markets or products. And there are authoritative EU decisions in which this Article has been used to impeach conditions that have tied two markets, in which, in other words, a dominant firm has sought to leverage its market power into an unrelated market.[16]

50. Accordingly because the Commission has failed to disclose facts that will, if later proven, establish that the unrelated condition in question will link two markets – in our view, an essential element for a successful prosecution under Section 8(d)(iii) – we conclude that no cause of action has been disclosed and the exception is upheld.

51. We note that even if we have erred in our interpretation of the 'unrelated condition' component of Section 8(d)(iii) we would have still upheld the exception. This is because, as clarified earlier, the Commission has failed to disclose the facts upon which it shall rely in order to prove that the condition in question – the payment of the legal costs – is indeed unrelated to the object of the contract of sale. As we have noted, on the face of it, the condition and the object of the contract that the parties seek to conclude are intimately related and there are no facts disclosed that allege the contrary. Accordingly, even on this interpretation no cause of action is disclosed and the exception is upheld.

52. Note that we are not arguing that the imposition of a truly unrelated condition can never be anti-competitive. For example, a refusal to deal, a possible anti-competitive act although one clearly distinguished from tying, may conceivably be affected by imposition of a manifestly unacceptable unrelated condition on a sale – in other words an unrelated and unacceptable condition may be imposed as a

16 See footnote 15 *supra*.

device to force a would-be purchaser to walk away from a contract of sale. However, a refusal to deal would in all likelihood be prosecuted under Section 8(c) unless it met the onerous and unusual requirements contained in Section 8(d)(ii). The distinction between a Section 8(c) and a Section 8(d) prosecution is by no means academic. As already noted, because Section 8(d) describes acts whose anti-competitive consequences have been established by a century of anti-trust jurisprudence, a successful prosecution does not have to establish the anti-competitive or exclusionary consequences of the act in question – they are presumed to be present. However, for a prosecution in terms of Section 8(c) to succeed it is necessary to establish that the act complained of is indeed exclusionary, that it 'impedes or prevents a firm entering into, or expanding within a market'.[17]

REMEDY

53. The exception having been upheld, there are two potential remedies that we may impose. We could dismiss the complaint referral. In that eventuality, the Commission would be time barred from referring this matter to the Tribunal. Alternatively, we may grant the Commission leave to amend and cure the defect on its papers – we may, in other words, grant the Commission an opportunity to submit papers that do indeed disclose a cause of action.

54. We are, in principle, extremely reluctant to dismiss a complaint before it has been fully ventilated.[18] An injudicious compromise of this principle may sow the seeds of considerable abuse of our processes. However, as noted, having upheld the exception we are entitled to impose a remedy less powerful than outright dismissal of the

17 The imperative to establish the anti-competitive consequences of a 'refusal to deal' are, arguably, particularly clear insofar as forced dealing disturbs a broad principle of anti-trust, viz, that 'absent a purpose of creating or maintaining a monopoly merchants should be free to trade with whomever they choose and on such conditions as they choose' (Glen O. Robinson '**On Refusing to Deal with Rivals'**_University of Virginia School of Law, Law and Economics Research Paper Series, Working Paper No 01-3, May 2001). This principle is confirmed time and again by the courts with possibly its best-known formulation in **United States v. Colgate and Co 250 U.S. 300 (1919)**

18 See our decision in **Schering (Pty) Limited and Others v New United Pharmaceutical Distributors (Pty) Ltd and Others** (Case number 05/IR/A/Jul01).

complaint referral. We may grant the Commission leave to cure the defect on its papers so as to disclose more clearly its cause of action. Should it fail to do so we may, at that stage, dismiss the complaint referral - indeed if the Commission cannot disclose the factual basis of its complaint then it need proceed no further with this matter.

55. Erasmus describes the approach of the High Court in cases where it has upheld an exception:

"It is, in fact, the invariable practice of the courts, in cases where an exception has successfully been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. It has been held that it is doubtful whether this practice brooks of any departure; in the rare case in which a departure may be permissible, the court should give reasons for the departure."[19]

56. There is no reason for us not to *'observe the invariable practice'* in the present case, so we will allow the Commission the opportunity to amend its referral.

ORDER

Accordingly we make the following order:

1. the exception based on lack of jurisdiction is dismissed;
2. the exception based on the Commission's failure to disclose a cause of action in the complaint referral is upheld;
3. the Commission is granted leave to file amended pleadings;
4. if the Commission elects to file amended pleadings contemplated in 3 above, it must do so within 10 days of the handing down of this decision; and
5. there is no order as to costs.

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17 April 2002

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D.H. Lewis **Date**

Concurring: S. Zilwa; N.M. Manoim