

Damages decision reminder for local authorities

ON JULY 11 this year the European Communities Court of First Instance (CFI) held that the European Commission was liable for damages incurred as a result of its unlawful prohibition of a notified merger.

This case concerned a merger that had been blocked by the European Commission on the grounds that the merged entity would have impeded competition in certain markets significantly.

The CFI overruled the European Commission's prohibition of the merger and its subsequent decision ordering a divestment of one aspect of the merged entity.

The CFI held that during the administrative phase of its investigation the European Commission had failed to set out the precise nature of the anticompetitive effects that it thought could be expected from the merger. Specifically, the European Commission did not identify clearly the true nature of its objections to the merger in its statement of objections, preventing the merging parties from identifying and offering suitable remedies that could have allayed the Commission's concerns. This, in the CFI's view, constituted a breach of the right to be heard.

In its decision, the CFI confirmed that the European Community's institutions can be held liable for the



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Ryan Goodman
& Justin Balkin

losses caused by them in the exercise of their powers (under article 288 of the EEC Treaty, which provides that in the case of noncontractual liability the community must make good any damage caused by its institutions or by its servants in the performance of their duties).

The CFI further confirmed that this rule extends to merger control when a notified transaction is blocked unlawfully.

According to the CFI, three conditions must be fulfilled for the European Commission to incur non-contractual liability.

Firstly, the European Commission must have committed a "sufficiently serious breach of a rule of law intended to confer rights on

individuals".

Secondly, the applicant must have suffered a certain, specific, proved and quantifiable harm.

Lastly, the applicant must establish the existence of a direct and immediate causal link between the damage allegedly sustained and the commission's unlawful action.

The CFI pointed out that its decision did not necessarily imply that if the European Commission had adopted the correct procedure the merger would have been approved.

However, it identified two categories of recoverable losses in the circumstances:

- Expenses incurred in relation to participation in merger review procedures undertaken after the CFI referred the merger back to the commission for further analysis; and

- The difference between the price actually obtained for the divested business and that which could have been obtained had a lawful decision been adopted by the commission in the first place.

It is noteworthy that South African competition law does not have an equivalent of article 228, which formed the basis of the CFI's decision. Conversely, the Competition Tribunal has analysed the public policy issues of costs for or against

the South African Competition Commission and has pointed out that "it is clear that the prevalent notion that we are barred from awarding costs in a matter involving the commission is responsible for a perverse set of incentives — in short it enables the commission to adopt a ... 'slapdash' approach to its role in litigation. On the other hand, it enables defendants to oppose matters, even matters already decided in the tribunal and the high court, for no apparent reason other than pique and the desire to prevent opponents from having their day in court".

Notwithstanding the Competition Tribunal's reluctance to award costs to or against the Competition Commission, the Promotion of Administrative Justice Act provides that a court or tribunal, in proceedings for judicial review, may grant any order that is just and equitable, including orders setting aside the administrative action and, in exceptional cases, directing the administrator or any other party to the proceedings to pay compensation.

It has been recognised that the CFI's decision may have practical implications for the European Commission's analysis of mergers in complex cases.

While merging parties may well have more scope for negotiating

remedies, there is a fear that the CFI's decision will result in an increase in the duration of merger proceedings. However, the most important aspect of the decision is procedural fairness by the European Commission. Provided that the European Commission has conducted its investigation in a fair, transparent and diligent manner, it will remain difficult for parties to claim damages against the commission.

This position must, with respect, apply equally in SA. Although the South African competition authorities are currently bound by the rules of procedural fairness and natural justice, care must be taken to ensure that this is given equal weight to the substantive analysis that the competition authorities carry out in each case. At the very least, even if the European position of now awarding damages in cases where a merger review is procedurally flawed is not imported into South African law, it will serve to remind the South African competition authorities of the importance of carrying out their functions in a fair, transparent and diligent manner.

■ *Justin Balkin is a director and Ryan Goodman a candidate attorney in Edward Nathan Sonnenbergs' competition law department.*