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DEPARTEMENT VAN HANDEL EN NYWERHEID

No. 2250 **4 Oktober 1985**

WET OP DIE HANDHAWING EN BEVORDERING VAN MEDEDINGING, 1979

Ek, Dawid Jacobus de Villiers, Minister van Handel en Nywerheid, gee hiermee ingevolge artikel 14 (5) van die Wet op die Handhawing en Bevordering van Mededinging, 1979 (Wet 96 van 1979), kennis dat ek van voorneme is om op 2 Mei 1986 die volgende kennisgewing in die *Staatskoerant* te publiseer:

1. Ek, Dawid Jacobus de Villiers, Minister van Handel en Nywerheid, handelende kragtens die bevoegdheid my verleen by artikel 14 (5) van die Wet op die Handhawing en Bevordering van Mededinging, 1979 (Wet 96 van 1979) (hierna "die Wet" genoem), met die instemming van die Minister van Finansies, en op grond van 'n algemene ondersoek kragtens artikel 10 (1) (c) van die Wet, verklaar hiermee enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode waarna in paragraaf 2 verwys word, onwettig.

Verbod

2. Behoudens die bepalings van paragrawe 8 en 9, mag geen persoon enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode aangaan, 'n party wees by of aanhou om 'n party te wees by, wat in hierdie kennisgewing—

(a) herverkooppryshandhawing;
(b) horisontale pryssamespanning;
(c) horisontale samespanning oor verskaffingsvoorwaardes;
(d) horisontale samespanning oor markverdeling; of
(e) samespanning in verband met tenders,

uitmaak nie.

Herverkooppryshandhawing

3. "Herverkooppryshandhawing" waarna in paragraaf 2 (a) verwys word—

(a) beteken enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode wat die uitwerking het, of waarskynlik die uitwerking sal hê, om 'n herverkoper van enige handelsartikel regstreeks of onregstreeks te verplig of te beweeg om 'n besondere,

DEPARTMENT OF TRADE AND INDUSTRY

No. 2250 **4 October 1985**

MAINTENANCE AND PROMOTION OF COMPETITION ACT, 1979

I, Dawid Jacobus de Villiers, Minister of Trade and Industry, in terms of section 14 (5) of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979), hereby give notice that I intend to publish on 2 May 1986 the following notice in the *Government Gazette:*

1. I, Dawid Jacobus de Villiers, Minister of Trade and Industry, acting by virtue of the powers vested in me by section 14 (5) of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979) (hereinafter referred to as "the Act"), with the concurrence of the Minister of Finance, and by virtue of a general investigation in terms of section 10 (1) (c) of the Act, hereby declare any agreement, arrangement, understanding, business practice or method of trading referred to in paragraph 2 to be unlawful.

Prohibition

2. Subject to the provisions of paragraphs 8 and 9, no person shall enter into, be a party to or continue to be a party to any agreement, arrangement, understanding, business practice or method of trading which in terms of this notice constitutes—

(a) resale price maintenance;
(v) horizontal price collusion;
(c) horizontal collusion on conditions of supply;
(d) horizontal collusion on market sharing; or
(e) collusive tendering.

Resale price maintenance

3. "Resale price maintenance" referred to in paragraph 2 (a)—

(a) means any agreement, arrangement, understanding, business practice or method of trading which has, or is likely to have, the effect of directly or indirectly compelling or inducing a reseller of any commodity to charge a particular, or a particular minimum, resale

of 'n besondere minimum, herverkoopprys te vra, of sodanige prys bepaal is of bepaal staan te word deur berekening of deur verwysing na enige diskonto al dan nie; en

(b) sluit uit die aanbeveling, deur 'n individuele verskaffer, van 'n herverkoopprys as 'n riglyn vir die gerief van die herverkoper wat sodanige prys na sy goeddunke mag verminder en wat nie regstreeks of onregstreeks deur middel van die weerhouding van voorrade, die ontsegging van distribusieregte of deur middel van enige diskriminerende verkoopvoorwaarde of 'n strafmaatreël of enige ander metode wat waarskynlik daardie uitwerking sal hê, afgedwing word nie: Met dien verstande dat waar 'n aanbevole herverkoopprys op of in verband met 'n handelsartikel verskyn, die woorde ''aanbevole prys'' by sodanige prys moet verskyn.

Horisontale pryssamespanning

4. ''Horisontale pryssamespanning'' waarna in paragraaf 2 (b) verwys word—

(a) beteken enige ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers van enige handelsartikel, of van wesenlik soortgelyke handelsartikels, om—

(i) 'n besondere, of 'n besondere minimum, prys te vra; of

(ii) op enige wyse gebruik te maak van enige prys as 'n aanbevole prys of as 'n riglyn,

hetsy sodanige prys deur berekening of met verwysing na enige diskonto bepaal is of bepaal staan te word, al dan nie;

(b) sluit in die gebruik van 'n vereniging of van 'n maatskappy, beslote korporasie of ander regspersoon waarby sodanige verskaffers 'n belang het, om die horisontale pryssamespanning op enige wyse teweeg te bring; en

(c) sluit uit, in verband met 'n professionele diens deur lede van 'n georganiseerde professie, die uitreiking van 'n tarief van aanbevole gelde as 'n riglyn vir die gerief van die lede van sodanige professie en wat nie regstreeks of onregstreeks afgedwing word nie of enige by wet gemagtigde struktuur van tariewe of gelde: Met dien verstande dat—

(i) sodanige professie of enige regsreël, as 'n voorwaarde vir lidmaatskap, vereis dat die lede 'n eksamen in studievelde wat toepaslik op die praktisering van daardie professie is, geslaag het; en

(ii) sodanige professie 'n professionele gedragskode het wat hom magtig om daardie persone wat skuldig bevind is aan onbehoorlike uitvoering van hul pligte of aan gedrag wat tot oneer van hul professie strek, van lidmaatskap uit te sluit, of 'n prosedure in werking te stel om hulle van lidmaatskap uit te sluit.

Horisontale samespanning oor verskaffingsvoorwaardes

5. ''Horisontale samespanning oor verskaffingsvoorwaardes'' waarna in paragraaf 2 (c) verwys word—

(a) beteken enige ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers van enige handelsartikel of van wesenlik soortgelyke handelsartikels, om sodanige handelsartikel of handelsartikels te verskaf, of om in reaksie op 'n uitnodiging of versoek om tenders te verskaf te tender—

(i) slegs op of met enige besondere voorwaarde of bepaling; of

(ii) deur die gebruikmaking van enige voorwaarde of bepaling as 'n aanbevole voorwaarde of bepaling of as 'n riglyn;

price, whether or not such price is determined or is to be determined by calculation or by reference to any discount; and

(b) excludes the recommendation, by an individual supplier, of a resale price as a guide for the convenience of the reseller who may reduce such price at his discretion and which is not directly or indirectly enforced by means of the withholding of supplies, the denial of distribution rights or by means of any discriminatory sales condition or a penalty or by any other method likely to have such effect: Provided that where a recommended resale price appears on or in relation to a commodity, the words ''recommended price'' shall appear with such price.

Horizontal price collusion

4. ''Horizontal price collusion'' referred to in paragraph 2 (b)—

(a) means any agreement, arrangement or understanding between or among two or more suppliers of any commodity, or of substantially similar commodities, to—

(i) charge a particular, or a particular minimum, price; or

(ii) use in any way, any price as a recommended price or as a guide,

whether or not such price is determined or is to be determined by calculation or by reference to any discount;

(b) includes the use of an association or of a company, close corporation or other juristic person in which such suppliers have an interest, to effect the horizontal price collusion in any way; and

(c) excludes, in respect of a professional service by members of an organised profession, the issue of a tariff of recommended fees as a guide for the convenience of the members of such profession and which is not directly or indirectly enforced or any structure of tariffs or fees authorised by law: Provided that—

(i) such profession or any rule of law, as a condition for membership, requires the members to have passed an examination in fields of study relevant to practising in that profession; and

(ii) such profession has a code of professional ethics empowering it to exclude from membership, or to set in motion a procedure to exclude from membership, those persons found guilty of improper performance of their duties or of conduct which is discreditable to their profession.

Horizontal collusion on conditions of supply

5. ''Horizontal collusion on conditions of supply'' referred to in paragraph 2 (c)—

(a) means any agreement, arrangement or understanding between or among two or more suppliers of any commodity, or of substantially similar commodities, to supply, or to tender to supply in response to a call or request for tenders, such commodity or commodities—

(i) only on any particular condition or term; or

(ii) using any condition or term as a recommended condition or term or as a guide;

(b) sluit in die gebruik van 'n vereniging of van 'n maatskappy, beslote korporasie of ander regspersoon waarby sodanige verskaffers 'n belang het, om die horisontale samespanning oor verskaffingsvoorwaardes op enige wyse teweeg te bring; en

(c) sluit uit, in verband met 'n professionele diens deur lede van 'n georganiseerde professie bedoel in paragraaf 4 (c), 'n aanbeveling wat nie regstreeks of onregstreeks afgedwing word nie dat sodanige diens teen 'n besondere voorwaarde of bepaling gelewer word.

Horisontale samespanning oor markverdeling

6. "Horisontale samespanning oor markverdeling" waarna in paragraaf 2 (d) verwys word—

(a) beteken enige ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers van enige handelsartikel of van wesenlik soortgelyke handelsartikels, wat die uitwerking het om die mark vir sodanige handelsartikel of handelsartikels in die geheel of gedeeltelik tussen hulle soos volg te verdeel—

(i) territoriaal;

(ii) ten opsigte van klante of groepe klante;

(iii) kwantitatief, deur verwysing na die hoeveelhede of aandele wat deur elke sodanige verskaffer geproduseer of verskaf staan te word of deur verwysing na enige beperking of produksiefasiliteite; of

(iv) ten opsigte van tegniese faktore in verband met die betrokke handelsartikel; en

(b) sluit in die gebruik van 'n vereniging of van 'n maatskappy, beslote korporasie of ander regspersoon waarby sodanige verskaffers 'n belang het, om die horisontale samespanning oor markverdeling op enige wyse teweeg te bring.

Samespanning in verband met tenders

7. "Samespanning in verband met tenders" waarna in paragraaf 2 (e) verwys word, beteken—

(a) enige ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers van enige handelsartikel dat een of sommige of al sodanige verskaffers nie 'n tender in reaksie op 'n uitnodiging of versoek om tenders sal indien nie; of

(b) die indiening deur 'n verskaffer van enige handelsartikel, van 'n tender in reaksie op 'n uitnodiging of versoek om tenders, wat in enige opsig bereik is deur ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers, insluitende die eersgenoemde verskaffer, van sodanige handelsartikel,

waar die ooreenkoms, reëling of verstandhouding nie bekendgemaak word nie aan die persoon wat die uitnodiging of versoek om tenders rig, op of voor die tydstip waarop enige tender gemaak word deur enige persoon wat 'n party is by die ooreenkoms, reëling of verstandhouding.

Beperking op toepassing

8. Die bepalings van hierdie kennisgewing word nie so uitgelê nie dat dit van toepassing is op enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode tussen—

(a) 'n houermaatskappy en sy volfiliaal of tussen maatskappye wat volfiliale van dieselfde houermaatskappy is;

(b) beslote korporasie wat slegs dieselfde persoon of persone as lede het;

(b) includes the use of an association or of a company, close corporation or other juristic person in which such suppliers have an interest, to effect the horizontal collusion on conditions of supply in any way; and

(c) excludes, in respect of a professional service by members of an organised profession contemplated in paragraph 4 (c), a recommendation which is not directly or indirectly enforced that such service be provided on a particular condition or term.

Horizontal collusion on market sharing

6. "Horizontal collusion on market sharing" referred to in paragraph 2 (d)—

(a) means any agreement, arrangement or understanding between or among two or more suppliers of any commodity, or of substantially similar commodities, having the effect of dividing wholly or partially the market for such commodity or commodities between or among them—

(i) territorially;

(ii) in respect of customers or classes of customers;

(iii) quantitatively, by reference to the quantities or shares to be produced or supplied by each such supplier or by reference to any limitation of production facilities; or

(iv) in respect of technical factors relating to the commodities concerned; and

(b) includes the use of an association or of a company, close corporation or other juristic person in which such suppliers have an interest, to effect the horizontal collusion on market sharing in any way.

Collusive tendering

7. "Collusive tendering" referred to in paragraph 2 (e) means—

(a) any agreement, arrangement or understanding between or among two or more suppliers of any commodity that one or some or all of such suppliers shall not submit a tender in response to a call or request for tenders; or

(b) the submission by a supplier of any commodity, in response to a call or request for tenders, of a tender that is in any respect arrived at by agreement, arrangement or understanding between or among two or more suppliers, including the first mentioned supplier, of such commodity,

where the agreement, arrangement or understanding is not made known to the person calling for or requesting tenders at or before the time when any tender is made by any person who is a party to the agreement, arrangement or understanding.

Restriction of application

8. The provisions of this notice shall not be so construed as to apply in respect of any agreement, arrangement, understanding, business practice or method of trading between or among—

(a) a holding company and its wholly-owned subsidiary, or between companies which are the wholly-owned subsidiaries of the same holding company;

(b) close corporations which have only the same person or persons as members;

(c) maatskappye waarvan al die aandele gehou word deur dieselfde persoon of beslote korporasie, of tussen sodanige beslote korporasie en sodanige maatskappye; of

(d) persone in verband met—

(i) goedere wat uitgevoer staan te word na enige ander land as Botswana, Lesotho, Swaziland, 'n staat waarvan die gebied voorheen deel van die Republiek van Suid-Afrika uitgemaak het en enige gebied binne die Republiek van Suid-Afrika waarvoor daar 'n Wetgewende Vergadering ingestel is kragtens die Grondwet van die Nasionale State, 1971 (Wet 21 van 1971); of

(ii) enige diens wat gelewer staan te word in enige ander land as die Republiek van Suid-Afrika of daardie lande, state of gebiede vermeld in (i) hierbo,

of op enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode wat deur die bepalings van die een of ander wet gemagtig word.

Uitsonderings

9. Tot die mate wat skriftelik deur my op aanbeveling van die Raad op Mededinging ten opsigte van 'n spesifieke geval bepaal word, is die bepalings van hierdie kennisgewing nie van toepassing nie met betrekking tot enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode wat—

(a) onder die besondere omstandighede klein en middelgroot ondernemings in staat stel om voort te bestaan en om teen groot ondernemings mee te ding ten spyte van hul strukturele nadele as gevolg van grootte;

(b) in die geval van 'n volgehoue afname in aanvraag wat nie tydelik of siklies is nie, na 'n handelsartikel, 'n aanpassing van produksiekapasiteite by die vraag teweegbring op 'n wyse wat met die openbare belang versoenbaar is;

(c) 'n beperking van mededinging teweegbring en wat, onder die omstandighede, in die openbare belang geregverdig is; of

(d) voor die inwerkingtreding van hierdie kennisgewing bestaan het en waarvan die beëindiging deur daardie inwerkingtreding, sonder 'n redelike geleentheid vir die partye daarby om hul sakebedrywighede te herorganiseer, waarskynlik ontwrigting in die betrokke bedryf sal veroorsaak.

Woordomskrywing

10. In hierdie kennisgewing—

(a) beteken "beslote korporasie" 'n beslote korporasie wat kragtens die Wet op Beslote Korporasies, 1984 (Wet 69 van 1984), geregistreer is;

(b) sluit "handelsartikel" in enige fabrikaat of merk van enige handelsartikel, enige boek, tydskrif, koerant of ander publikasie, enige gebou of bouwerk en enige diens, hetsy persoonlik, professioneel of andersins, met inbegrip van enige opbergings-, vervoer-, versekerings- of bankdiens;

(c) het "maatskappy", "houermaatskappy" en "volfiliaal" die betekenis wat aan hulle toegeskryf word in artikel 1 van die Maatskappywet, 1973 (Wet 61 van 1973);

(d) beteken "Raad op Mededinging" die Raad op Mededinging kragtens artikel 3 van die Wet ingestel;

(e) sluit "prys" in enige huur, enige gelde ten opsigte van 'n professionele of ander diens, die rentekoers ten opsigte van enige lening of skuld, die premie ten opsigte van enige versekering of enige ander teenprestasie ten opsigte van 'n handelsartikel; en

(c) companies of which all the shares are held by the same person or close corporation, or between such close corporation and such companies; or

(d) persons in relation to—

(i) goods which are to be exported to any country other than Botswana, Lesotho, Swaziland, a state the territory of which formerly formed part of the Republic of South Africa and any territory within the Republic of South Africa in respect of which a Legislative Assembly has been established in terms of the National States Constitution Act, 1971 (Act 21 of 1971); or

(ii) any service to be rendered in any country other than the Republic of South Africa or those countries, states or territories referred to in (i) above,

or in respect of any agreement, arrangement, understanding, business practice or method of trading authorised by the provisions of any law.

Exceptions

9. The provisions of this notice shall, to the extent specified by me in writing at the recommendation of the Competition Board in respect of a specific case, not apply in respect of any agreement, arrangement, understanding, business practice or method of trading which—

(a) in the particular circumstances enables small and medium-sized enterprises to be maintained and to compete against large enterprises despite their structural disadvantages owing to size;

(b) in the event of a lasting reduction in demand, which is not temporary or cyclical, for a commodity, brings about an adjustment of productive capacities to the demand in a manner reconcilable with the public interest;

(c) effects a restriction of competition and which, in the circumstances, is justified in the public interest; or

(d) has been in existence prior to the commencement of this notice and the termination of which by such commencement, without a reasonable opportunity for the parties thereto to rearrange their business affairs, is likely to cause disruption in the industry concerned.

Definitions

10. In this notice—

(a) "close corporation" means a close corporation registered in terms of the Close Corporations Act, 1984 (Act 69 of 1984);

(b) "commodity" includes any make or brand of any commodity, any book, periodical, newspaper or other publication, any building or structure and any service, whether personal, professional or otherwise, including any storage, transportation, insurance or banking service;

(c) "company", "holding company" and "wholly-owned subsidiary" shall have the meaning assigned to them in section 1 of the Companies Act, 1973 (Act 61 of 1973);

(d) "Competition Board" means the Competition Board established by section 3 of the Act;

(e) "price" includes any rental, any fee in respect of a professional or other service, the rate of interest in respect of any loan or debt, the premium in respect of any insurance or any other consideration in respect of a commodity; and

(f) sluit ''verskaffer'' in, tensy uit die samehang anders blyk, die vervaardiger, produsent, verkoper en herverkoper van goedere, enige verskaffer van goedere by wyse van huur of andersins en die verskaffer van enige professionele, finansiële of ander diens.

Intrekking van kennisgewing

11. Goewermentskennisgewing No. R. 1038 van 25 Junie 1969 word hierby ingetrek.

Staat is gebind

12. Kragtens die bepalings van artikel 2 (3) van die Wet, bind die bepalings van hierdie kennisgewing, behalwe vir sover kriminele aanspreeklikheid betrokke is, die Staat vir sover die Staat by die produksie en distribusie van handelsartikels betrokke is.

No. 2251 **4 Oktober 1985**

WET OP DIE HANDHAWING EN BEVORDERING VAN MEDEDINGING, 1979

ONDERSOEK NA SAMESPANNING OOR PRYSE EN VOORWAARDES, MARKVERDELING EN TENDERPRAKTYKE

Ek, Dawid Jacobus de Villiers, Minister van Handel en Nywerheid, publiseer hiermee kragtens artikel 12 (4) (b) van die Wet op die Handhawing en Bevordering van Mededinging, 1979 (Wet 96 van 1979), in die Bylae hierby, die Raad op Mededinging se Verslag No. 15, gedateer 9 Augustus 1985, ten opsigte van gemelde Raad se ondersoek na samespanning oor pryse en voorwaardes, markverdeling en tenderpraktyke.

D. J. DE VILLIERS,

Minister van Handel en Nywerheid

(f) ''supplier'' includes, unless the context otherwise indicates, the manufacturer, producer, seller, and reseller of goods, any supplier of goods by way of lease or hire or otherwise and the provider of any professional, financial or other service.

Withdrawal of notice

11. Government Notice No. R. 1038 of 25 June 1969 is hereby withdrawn.

State is bound

12. Pursuant to the provision of section 2 (3) of the Act, the provisions of this notice shall, except in so far as criminal liability is concerned, bind the State in so far as the State is concerned in the manufacture and distribution of commodities.

No. 2251 **4 October 1985**

MAINTENANCE AND PROMOTION OF COMPETITION ACT, 1979

INVESTIGATION INTO COLLUSION ON PRICES AND CONDITIONS, MARKET SHARING AND TENDER PRACTICES

I, Dawid Jacobus de Villiers, Minister of Trade and Industry, do hereby publish in terms of section 12 (4) (b) of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979), in the Schedule hereto, the Competition Board's Report No. 15 dated 9 August 1985, in respect of the said Board's investigation into collusion on prices and conditions, market sharing and tender practices.

D. J. DE VILLIERS,

Minister of Trade and Industry

BYLAE

REPUBLIEK VAN SUID-AFRIKA

RAAD OP MEDEDINGING

VERSLAG NO 15

ONDERSOEK NA SAMESPANNING OOR PRYSE EN VOORWAARDES, MARKVERDELING EN TENDERPRAKTYKE

ONDERSOEK NA SAMESPANNING OOR PRYSE EN VOORWAARDES, MARKVERDELING EN TENDERPRAKTYKE

I N H O U D S O P G A W E

REPUBLIEK VAN SUID-AFRIKA

RAAD OP MEDEDINGING

VERSLAG NO 15

ONDERSOEK NA SAMESPANNING OOR PRYSE EN VOORWAARDES, MARKVERDELING EN TENDERPRAKTYKE

HOOFSTUK I

OPDRAG, METODE EN OMVANG VAN ONDERSOEK EN AGTERGRONDINLIGTING

OPDRAG

1. Op sy vergadering van 14 November 1984 het die Raad besluit om kragtens die bepalings van artikel 10(1)(c) van die Wet op die Handhawing en Bevordering van Mededinging, 1979 (Wet 96 van 1979), ondersoek in te stel na sekere tipes besigheidsooreenkomste, reëlings, verstandhoudings, besigheidspraktyke of handelsmetodes in die algemeen wat volgens die oordeel van die Raad gewoonlik vir die doeleindes van of in verband met die skepping of handhawing van beperkende praktyke aangewend word. Besonderhede van die voorgenome ondersoek is in Kennisgewing 835 van die Staatskoerant (No 9512) van 30 November 1984 verstrek. Die volgende uittreksel daaruit word aangehaal:

> "Die onderwerp van die voorgenome ondersoek is enige besigheidsooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode -
>
> (a) in verband met -
>
> (i) die prys, gelde, rente, premie of ander teenprestasie waarteen; of
>
> samespanning oor pryse en voorwaardes
> (ii) enige ander bepaling of voorwaarde waarop, goedere verskaf, 'n diens gelewer of 'n lening, krediet of risikodekking verstrek sal word deur verskaffers van die goedere, diens, lening, krediet of risiko-dekking, of in verband met die afdwinging van daardie ooreenkoms, reëling, verstandhouding, praktyk of metode.
>
> In die besonder is hierby ingesluit vertikale en horisontale prysbinding, hetsy individueel of gesamentlik;
>
> mark-verdeling
> (b) in verband met enige vorm van markverdeling tussen verskaffers van goedere en dienste, insluitend grondstof-, produksie- en markkwotas; en
>
> tenders
> (c) in verband met tenders, insluitend die weerhouding daarvan om te tender of die inhoud van tenders wat ingedien word."

2. By die publikasie van die kennisgewing in die Staatskoerant het ongelukkig enkele tegniese foute ingesluip. Derhalwe is besluit om weer eens kennis van die ondersoek in die Staatskoerant te gee (Kennisgewing 203 van 1985, Staatskoerant No 9661 van 29 Maart 1985).

METODE EN OMVANG VAN ONDERSOEK

3. Soos vroeër vermeld, het die Raad kragtens die bepalings van artikel 10(4) van die Wet sy voorneme om die ondersoek in te stel vir algemene inligting in die Staatskoerant bekendgemaak. Aangesien die Raad finansiële instellings in die geval van sekere ondersoeke slegs met die toestemming van die Minister van Finansies kon insluit, is sodanige toestemming ingevolge artikel 16 van die Wet gevra en verkry.[1)]

4./...

1) Sedertdien is die Wysigingswet op die Handhawing en Bevordering van Mededinging, 1985 aanvaar en is sodanige toestemming nie meer nodig nie.

4. In die kennisgewing is vermeld dat enigiemand voor 29 Maart 1985 (in die tweede kennisgewing 29 April 1985) die skriftelike vertoë wat aangaande die ondersoek nodig geag word aan die Raad kan rig. Voorts is die ondersoek skriftelik onder die aandag van 'n groot aantal moontlike belanghebbende persone, ondernemings en beroepe gebring en die versoek gerig om in hul voorleggings onder meer kommentaar op sekere vrae en stellings te lewer. Ten einde 'n nog wyer dekking van die ondersoek te verkry, is die ondersoek ook onder die aandag van die georganiseerde handel en nywerheid gebring met die oog op hul kommentaar. Dié oragnisasies is ook versoek om kommentaar te lewer en die ondersoek onder die aandag van hul lede te bring.

5. 'n Doelbewuste poging is ook aangewend om met 'n persverklaring deur die Voorsitter van die Raad en onderhoude met die media die wydste dekking van die ondersoek te verseker ten einde die aandag van alle moontlike belanghebbendes daarop te vestig. Wye publisiteit is gevolglik aan die ondersoek gegee.

6. In die briewe waarin kommentaar versoek is, is uitdruklik vermeld dat finansiële en professionele dienste ingesluit is. Voorts is die volgende voorbeelde van elk van die besigheidsooreenkomste, reëlings, verstandhoudings, besigheidspraktyke of handelsmetodes genoem -

(a) samespanning oor pryse en voorwaardes

maksimum-, minimum-, vaste en aanbevole pryse, gelde of rente;

omvang van kontant- en hoeveelheidskortings;

ander verkoopvoorwaardes, soos die gesamentlike bepaling van afleweringsvoorwaardes, rentebetaling op agterstallige rekenings en krediettermyne (dit wil sê enige vorm van vertikale en horisontale, hetsy individuele of gesamentlike, ooreenkoms met betrekking tot pryse, rente, gelde ten opsigte van goedere en dienste; sowel by die bemarking van goedere as dienste; met inbegrip van professies);

(b) markverdeling:

alle vorme van verdeling of afbakening van markte tussen mededingers of toewysing van verbruikers, klante of kliënte aan sekere mededingers;

alle vorme van kwotas;

gesamentlike produksie (vervaardiging) en bemarking van grondstowwe, halfklaar- en klaarprodukte;

alle vorme van kwotas tussen mededingers met betrekking tot grondstowwe, enige inset, produksie of verkope;

(c) tenders:

gesamentlike tenders deur mededingers;

onderlinge besluite om te tender of nie te tender nie; en

onderlinge besluite of ooreenkomste oor die voorwaardes waarop getender sal word of enige ander aspek met betrekking tot 'n tender.

7. Beide horisontale en vertikale markverdeling word by die ondersoek ingesluit.

8. 'n Groot aantal voorleggings is dan ook ontvang. Die Raad wens veral sy dank te betuig aan die persone en instansies wat klaarblyklik moeite gedoen het om omvattende en insiggewende voorleggings te doen. Dit het 'n waardevolle bydrae tot die voltooiing van die ondersoek gelewer. Samesprekings is deur die lede en amptenare van die Raad met 'n groot aantal belanghebbendes oor die ondersoek gevoer en literatuur wat verband met die ondersoek hou, is bestudeer.

AGTERGRONDINLIGTING

1. Doel van die ondersoek

9. Die Wet op die Handhawing en Bevordering van Mededinging 1979, is in wese 'n magtigende wet. Gevolglik is geen praktyk wat in 'n spesifieke bedryf beoefen word, hoe beperkend en teen die openbare belang ook al, onwettig alvorens dit nie formeel deur die Raad ingevolge die Wet ondersoek, teen die openbare belang bevind en deur die Minsiter per kennisgewing verbied is nie. Die ondervinding het geleer dat hierdie prosedure 'n uitgerekte en tydrowende aangeleentheid kan wees met groot nadele vir partye wat as gevolg van sekere beperkende praktyke aan die kortste end mag trek. Voorts is die Raad meestal nie van die bestaan van baie van die praktyke bewus nie en kan eers met optrede begin wanneer klagtes ontvang word. Die benadering dat die Raad hoofsaaklik op klagtes reageer, is om verskeie redes onbevredigend. Afgesien daarvan dat verskeie partye onvoldoende kennis dra van die bestaande mededingingswetgewing, is daar andere wat vanweë vrees vir viktimisasie en die versteuring van verhoudinge met ander markpartye, huiwer om skadelike praktyke onder die Raad se aandag te bring.

10. Daarenteen lewer 'n algemene verbod van spesifieke praktyke wat teen die openbare belang bevind is, 'n wesenlike bydrae tot die uitskakeling van hierdie probleem, omdat dit algemene toepassing vind en nie slegs gerig is op die gedrag van enkele bepaalde partye nie.

11. Die ondersoek is onderneem aangesien die Raad van mening is dat die ooreenkomste, reëlings en verstandhoudings wat in die kennisgewing van die ondersoek vermeld word effektiewe mededinging beperk of kan beperk, dat hulle redelik algemeen in die Suid-Afrikaanse ekonomie voorkom en dat hulle gewoonlik vir die doeleindes van of in verband met die skepping of handhawing van beperkende praktyke aangewend word.[1)]

12. Gevolglik is die doel van die ondersoek om daardie ooreenkomste, reëlings en verstandhoudings en hul geregverdigheid in die openbare belang te ontleed en oorweeg, met die oog op die wenslikheid daarvan om 'n algemene onwettigverklaring deur die Minister ingevolge artikel 14(5) van die Wet, aan te beveel.

2. Praktyke beoefen kragtens statutêre bepalings

13. Van die praktyke waaroor hierdie ondersoek handel, word dikwels ingevolge 'n aansienlike verskeidenheid van wetgewing of statutêr-gemagtigde regulasies of reëls beoefen. Aangesien hierdie ondersoek hoogstens tot optrede kragtens 'n ministeriële kennisgewing kan lei wat geen invloed op statutêre voorskrifte kan hê nie, het dit geen nut om aandag aan daardie voorskrifte te gee nie. Met die oog op perspektief word vermeld dat beperkende statutêre voorskrifte in 'n ander verband wel aandag van die Raad ontvang, wat ingevolge artikel 6 van die Wet die funksie het om amptelike mededingingsbeleid te koördineer op 'n wyse wat met die amptelike ekonomiese doelstellings ooreenstem.

3. Vorige ondersoeke

14. Dit kan nuttig wees om van die vorige ondersoeke wat reeds tot 'n mindere of meerdere mate in dieselfde verband onderneem is, 'n kort oorsig te gee.

(a) Ondersoek na individuele en gesamentlike prysbinding in die Republiek van Suid-Afrika[2)]

15. Die doel van die ondersoek, waarvoor die opdrag op 22 Maart 1962 deur die destydse Minister van Ekonomiese Sake aan die Raad van Handel en Nywerheid[3)] gegee is, was om ondersoek

in/...

1) In die verslag word dikwels hierna verwys as "praktyke" of "bedryfspraktyke".

2) Raad van Handel en Nywerheid, Ondersoek na individuele en gesamentlike prysbinding in die Republiek van Suid-Afrika, Verslag 1220(M), 8 Desember 1967.

3) Tot aan die einde van 1979 was die Raad van Handel en Nywerheid verantwoordelik vir die toepassing van mededingingsbeleid ingevolge die Wet op Reëling van Monopolistiese Toestande, 1955, (Wet 24 van 1955).

in te stel na die handelspraktyke bekend as individuele en gesamentlike prysbinding en te bepaal of dit in die openbare belang geregverdig is. Die Raad van Handel en Nywerheid het gedurende die ondersoek ook die omvang van prysbinding ten opsigte van die volgende produkte ondersoek: voedsel, alkoholiese dranke, tabak en tabakprodukte, klerasie en skoeisel, was- en skoonmaakstowwe, meubels, elektriese en huishoudelike toerusting, nie-elektriese toerusting, mediese benodigdhede, benodigdhede vir persoonlike versorging, voertuie en vervoer, leesstof, skryfbehoeftes en ontspanningsprodukte.

16. In die ondersoek is tot die gevolgtrekking gekom dat 'n stelsel van gedwonge herverkooppryse teen die openbare belang is, terwyl 'n stelsel van aanbevole pryse nie noodwendig teen die openbare belang hoef te wees nie. Die Raad van Handel en Nywerheid het aanbeveel dat -

(i) die afdwinging van herverkooppryse verbied word;

(ii) geen verhelpende optrede teen die praktyk om herverkooppryse aan te dui, ingestel word nie, met dien verstande dat die pryse slegs gidspryse vir die gerief van herverkopers sal wees; en

(iii) verskaffers die reg verleen word om by die Minister aansoek om vrystelling van die verbod op afdwinging van herverkooppryse te doen.

17. Op 28 Junie 1968 het die Minister van Ekonomiese Sake vir algemene inligting bekend gemaak[1] dat hy van voorneme was om met die goedkeuring van beide Huise van die destydse Parlement by kennisgewing in die Staatskoerant die besigheidspraktyk bekend as herverkoopprys-handhawing onwettig te verklaar. Skriftelike aansoeke om vrystelling van die verbod sou vir insluiting daarvan by die kennisgewing oorweeg word.

18. Op 25 Junie 1969 het die Minister met die goekeuring van beide Huise van die Parlement by kennisgewing in die Staatskoerant[2] bekend gemaak dat hy enige ooreenkoms, verstandhouding, besigheidspraktyk of handelsmetode wat die uitwerking het, of daarop bereken is om 'n herverkoper regstreeks of onregstreeks te verplig of te beweeg om hom aan 'n aangeduide herverkoopprys te hou as onwettig verklaar en enige persoon verbied om so 'n ooreenkoms of verstandhouding aan te gaan of 'n party daarby te wees of te bly of om so 'n besigheidspraktyk of handelsmetode toe te pas.

19. Die verbod sou egter nie op aanbevole, aangeduide of gesuggereerde pryse in die vorm van 'n gidsprys van toepassing wees nie en op 'n voorlopige grondslag is vrystelling aan petrol; buite- en binnebande; en boeke en tydskrifte, insluitende nuusblaaie, verleen.

20. Die kennisgewing het op 1 Julie 1969 in werking getree.

21. Ten einde die verbod wat in Goewermentskennisgewing R.1038 van 25 Junie 1969 vervat is, uit te brei sodat dit ook van toepassing is met betrekking tot ander persone as verskaffers van handelsware en om aan die Minister die bevoegdheid te verleen om die verbod ook van toepassing te maak op handelsware wat van die verbod uitgesluit is, is die Wysigingswet op Reëling van Monopolistiese Toestande, 1978, aangeneem. Dié wysigingswet het ten doel gehad om die verbod in Goewermentskennisgewing R.1038 van 25 Junie 1969 vervat, uit te brei sodat dit ook van toepassing is met betrekking tot ander persone as die verskaffers van handelsware; en om die bevoegdheid aan die Minister te verleen om sodanige verbod ook van toepassing te maak ten opsigte van enige handelsware in daardie goewermentskennisgewing genoem en uitdruklik van bedoelde verbod uitgesluit.

22./...

1) Kennisgewing R.1150, Staatskoerant No 2109 van 28 Junie 1968.

2) Goewermentskennisgewing R.1038, Staatskoerant No 2442 van 25 Junie 1969.

22. Na ondersoeke en aanbevelings deur die Raad van Handel en Nywerheid is die voorlopige vrystelling van bande en binnebande[1] en boeke[2] onderskeidelik op 17 November 1978[3] en 15 Augustus 1980[4] teruggetrek. Gevolglik bestaan tans 'n uitsondering slegs ten aansien van petrol, tydskrifte en nuusblaaie.

23. In die huidige ondersoek sal weer aandag gegee word aan die aspekte wat in die ondersoek na die handhawing van herverkooppryse deur die Raad van Handel en Nywerheid behandel is, veral in die lig van vertolkingsprobleme van die 1978-wysigingswet. Individuele en gesamentlike handhawing van herverkooppryse sowel as individuele en gesamentlike aanbevole pryse sal onder die loep kom.

(b) Ondersoek na beperkende tenderpraktyke in die Republiek van Suid-Afrika[5]

24. Die destydse Minister van Ekonomiese Sake het op 8 Oktober 1969 die Raad van Handel en Nywerheid opdrag gegee om kragtens die Wet op Reëling van Monopolistiese Toestande, 1955, ondersoek in te stel na -

"(1) die besigheidspraktyke of handelsmetodes wat eenvormige tenderpryse vir handelsware tot gevolg het;

(2) regstreekse of onregstreekse samespanning of samewerking tussen tenderaars onderling of tussen tenderaars en ander persone of organisasies; en

(3) alle ander metodes ter manipulering of beïnvloeding van tenderpryse vir handelsware."[6]

25. Die Raad van Handel en Nywerheid het in sy ondersoek tot die gevolgtrekking gekom dat beperkende tenderpraktyke wat mededinging regstreeks of onregstreeks beperk, een of meer van die gevolge vermeld in die definisie van 'n monopolistiese toestand in artikel 1 van die Wet op Reëling van Monopolistiese Toestande, 1955, het of bereken is om te hê.[7] Die spesifieke gevolge wat beperkende tenderpraktyke het of bereken is om te hê, soos deur die Raad van Handel en Nywerheid bevind, is dat dit -

(i)/...

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1) Raad van Handel en Nywerheid, Ondersoek na die Vrystelling van die Verbod op die Handhawing van Herverkooppryse met betrekking tot Bande en Binnebande, Verslag 1860(M).

2) Raad van Handel en Nywerheid, Ondersoek na Monopolistiese Toestande by die Verskaffing en Distribusie van Boeke in die Republiek van Suid-Afrika, Verslag 1794(M), 22 Julie 1977.

3) Kennisgewing R.2292, Staatskoerant No 6217 van 17 November 1978. Beëindiging van die vrystelling het op 29 Desember 1978 in werking getree.

4) Kennisgewing R.1692, Staatskoerant No 7177 van 15 Augustus 1980, inwerkingtreding 31 Oktober 1980.

5) Raad van Handel en Nywerheid, Ondersoek na Beperkende Tenderpraktyke in die Republiek van Suid-Afrika, Verslag No 1475(M), 24 Mei 1973.

6) Verslag 1475(M) par. 1.

7) Dieselfde sewe gevolge word vermeld in die definisie van 'n "beperkende praktyke", in artikel 1 van Wet 96 van 1979. Dié term het die begrip "monopolistiese toestand" vervang.

(i) die handhawing of verhoging van pryse tot gevolg kan hê;

(ii) kan verhinder dat die produksie of verspreiding van sekere kommoditeite op die mees doeltreffende en ekonomiese wyse geskied;

(iii) toetrede van nuwe verspreiders of produsente tot die tendermark kan verhinder of beperk; en

(iv) die aanpassing van handels- of nywerheidstakke by veranderde toestande kan verhoed of beperk.

26. Die Raad van Handel en Nywerheid het tot die gevolgtrekking gekom dat beperkende tenderpraktyke nie in die openbare belang geregverdig kan word nie omdat dit nie -

(i) die optimale benutting van die land se ekonomiese middele bevorder of daarmee versoenbaar is nie;

(ii) ekonomiese groei en die bereiking van 'n hoër lewenstandaard bevorder nie;

(iii) lei tot groter stabiliteit met betrekking tot pryse, produksie en distribusie van kommoditeite of van indiensname van arbeid en kapitaal nie; en

(iv) hoër ekonomiese konsentrasie voorkom nie.

27. Derhalwe het die Raad van Handel en Nywerheid bevind dat beperkende tenderpraktyke per slot van sake nie in die openbare belang geregverdig kan word nie. Nogtans bestaan buitengewone omstandighede wat die praktyke in sekere gevalle in die openbare belang kan regverdig deurdat dit die doeltreffende gebruik van die land se middele, of progressiwiteit en innovasie in die ekonomie bevorder of daarmee versoenbaar is en terselfdertyd die belang van die tenderaars en kopers per tender bevorder of nie oormatig benadeel nie. Dié Raad het derhalwe aanbeveel dat die Minister geen stappe doen om die praktyk te beëindig nie, maar dat die Minister 'n ondersoek op 'n ad hoc-basis na elke beperkende tenderpraktyk moet gelas.[1)]

28. Voorts is aanbeveel dat die Minister 'n versoek rig aan die Ministers met regsbevoegdheid oor die toepaslike tenderkooptransaksies om beperkende tenderpraktyke daadwerklik teen te werk en om aan hom daaroor verslag te doen.

4. Ander toepaslike vorige ondersoeke

29. 'n Hele aantal ondersoeke, benewens dié na die handhawing van herverkooppryse en beperkende tenderpraktyke, wat deur die Raad van Handel en Nywerheid of die Raad op Mededinging onderneem is, het op 'n ad hoc-grondslag een of meer van die praktyke betrek wat by hierdie ondersoek ingesluit is. Sommige van die praktyke wat voor die verbod op die handhawing van herverkooppryse (Kennisgewing R.1038 van 25 Junie 1969) gekondoneer is, is deur hierdie verbod ook onwettig verklaar.

30./...

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1) Op 'n voorlopige basis het die Raad van Handel en Nywerheid sowel as die Raad op Mededinging na 'n hele aantal klagtes van die beweerde beperkende tenderpraktyke ondersoek ingestel. Slegs in een geval, naamlik in die Ondersoek na die verskaffing en distribusie van farmaseutiese produkte (Raad van Handel en Nywerheid, Verslag 1884(M), gedateer 14 November 1978), het beperkende tenderpraktyke in dié bedryfstak deel van die ondersoek gevorm en is aanbeveel dat dit verbied word. In Kennisgewing R.2844, Staatskoerant No 7974 van 31 Desember 1981, is "enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode of enige handeling of toestand waardeur -

(a) vervaardigers van farmaseutiese produkte op enige wyse, regstreeks of onregstreeks, saamwerk ten einde eenvormige pryse of voorwaardes vir die verskaffing van farmaseutiese produkte aan enige tenderkoper, vas te stel"

onwettig verklaar. (Klousule 2(a)).

30. Van die gevolgtrekkings, aanbevelings of optredes van die verlede wat derhalwe regstreeks of onregstreeks deur die huidige ondersoek geraak word, is -

(i) Kennisgewing 1839 van 5 Desember 1958 (gewysig deur Kennisgewing R.466 van 25 Maart 1966) van toepassing op kruideniersware. Praktyke wat verbied is, sluit die handhawing van herverkoopprys en kollektiewe onderhandeling met betrekking tot pryse of handelskortings in;

(ii) Kennisgewing 1840 van 5 Desember 1958 (gewysig deur Kennisgewing R.465 van 25 Maart 1966) van toepassing op beskuitjies. Die verbod behels onder meer minimum, maksimum of vaste pryse van beskuitjies, afleweringskoste, kortings en byvoeging van spoorvervoerkoste.[1]

(iii) Verskaffing en verspreiding van lugbande[2]: die pryskartel van die South African Tyre Manufacturers' Conference is gekondoneer alhoewel prysmededinging uitgeskakel word.

(iv) 'n Ondersoek na hardeware en sanitêre ware[3] het Kennisgewing R.763 van 1961 tot gevolg gehad, wat benewens ander verbiedinge die vasstelling van pryse en handelskortings op 'n eenvormige basis en die handhawing van herverkoopprys verbied het. Dié verbod is deur Kennisgewing R.556 van 13 Maart 1981 opgehef.

(v) Die Raad van Handel en Nywerheid het 'n ooreenkoms met die vervaardigers van sigarette en die Tobacco Manufacturers' Committee (Kennisgewings R.1013 en R.1014 van 5 Julie 1963 respektiewelik) aangegaan[4] wat ook op "groothandelterme" betrekking het.

(vi) In die ondersoek[5] na die bedrywighede van die Federasie van Bounywerhede (Suid-Afrika) (BIFSA) in die Republiek van Suid-Afrika was veral die tenderpraktyke van hierdie organisasie die onderwerp van die ondersoek. In 'n ooreenkoms[6] het BIFSA onderneem om etlike praktyke te staak, die bepalings omtrent ander te wysig, terwyl ander gekondoneer is.

(vii) Die gesamentlike handhawing van eenvormige winsgrense deur die National Wholesale Drug Association is as teen die openbare belang bevind en verbied (Kennisgewing R.2846 van 31 Desember 1981), terwyl samespanning tot eenvormige tenderpryse en -voorwaardes, soos vroeër genoem, ook verbied is (Kennisgewing R.2844 van 31 Desember 1981).[7]

(viii) Beperkende voorskrifte met betrekking tot sekere tenderpraktyke deur die Elektrotegniese Aannemersvereniging (Suid-Afrika) is ook na 'n ondersoek[8] verbied (Kennisgewing R.1697 van 6 Augustus 1982).[9]

(ix)/...

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1) Kennisgewing 1839 en 1840 het gevolg op 'n ondersoek deur die Raad van Handel en Nywerheid, Monopolistiese Toestande in die Kruideniershandel, Verslag 437(M), 26 April 1958.

2) Raad van Handel en Nywerheid, Monopolistiese Toestande by die Verskaffing en Verspreiding van Lugbande in die Republiek van Suid-Afrika, Verslag 489(M), 11 Februarie 1959.

3) Raad van Handel en Nywerheid, Monopolistiese Toestande by die Verskaffing en Verspreiding van Hardeware en Sanitêre Ware vir die Boubedryf in die Republiek van Suid-Afrika, Verslag 606(M), 7 April 1960.

4) Raad van Handel en Nywerheid, Monopolistiese Toestande by die Verskaffing en Distribusie van Sigarette en Verwerkte Tabak in die Republiek van Suid-Afrika, Verslag 940(M), 28 Julie 1962.

5) Raad van Handel en Nywerheid, Ondersoek na die bedrywighede van die Federasie van Bounywerhede (Suid-Afrika) in die Republiek van Suid-Afrika, Verslag 1273(M), 30 Januarie 1969.

6) Kennisgewing R.1802 van 23 Oktober 1970.

7) Ondersoek gedoen deur die Raad van Handel en Nywerheid, op cit, Verslag 1884(M).

8) Raad op Mededinging, Die Bedrywighede van die Elektrotegniese Aannemersvereniging Suid-Afrika), Verslag 6, 28 Julie 1981.

9) Hierdie kennisgewing is teruggetrek deur Kennisgewing R.989 van 3 Mei 1985 en vervang deur Kennisgewing R.1194 van 30 Mei 1985.

(ix) Gesamentlike praktyke met betrekking tot pryse, markafbakening en tenders het in die ondersoek na die steenkoolbedryf aan die orde gekom.[1]

31. Oor die jare is baie van die praktyke in die geval van sekere partye ondersoek en selfs verbied. Waar sekere pratkyke in die verlede wel gekondoneer is, is die vraag nou of sodanige praktyke steeds in die openbare belang geregverdig is en of dit nie verbied moet word nie, veral in die lig van veränderde ekonomiese omstandighede.

5. Ondersoeke ingevolge artikel 10(1)(c) van die Wet

32. Soos vroeër genoem, geskied die huidige ondersoek ingevolge artikel 10(1)(c) van Wet 96 van 1979 wat onder meer bepaal dat die Raad die ondersoek instel wat hy nodig ag "na enige besondere tipe besigheidsooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode, in die algemeen of met betrekking tot 'n bepaalde handelsartikel of 'n klas of soort handelsartikel of 'n bepaalde besigheid of onderneming of 'n klas of tipe besigheid of 'n onderneming of 'n bepaalde gebied wat volgens die oordeel van die Raad of die Minister, na gelang van die geval, gewoonlik vir die doeleindes van of in verband met die skepping of handhawing van beperkende praktyke aangewend word". Indien die Raad ná die ondersoek van mening is dat die betrokke ooreenkoms, reëling, verstandhouding, ens. wat aldus aangewend word en nie in die openbare belang geregverdig is nie, moet die Raad by die Minister aanbeveel dat kragtens artikel 14(5) opgetree word soos die Raad onder die omstandighede nodig ag.

33. Die Minister kan by kennisgewing in die Staatskoerant enige besondere tipe ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode wat die onderwerp van die ondersoek was, onwettig verklaar. Enigiemand kan verbied word om so 'n ooreenkoms, reëling of verstandhouding aan te gaan of 'n party daarby te wees of te bly of om so 'n besigheidspraktyk of handelsmetode toe te pas. Die verbod kan wees geheel en al of in die mate of onderworpe aan die uitsonderings in die kennisgewing vermeld. Die Minister moet egter minstens een maand voor die datum van publikasie van die kennisgewing die teks van die voorgenome kennisgewing, tesame met 'n verklaring van sy voorneme vir so 'n kennisgewing, in die Staatskoerant publiseer.

34. Omdat dit in wese hier gaan oor die verbod van een of meer praktyke, en nie oor optrede teen spesifieke persone wat mededinging beperk deur 'n beperking of verkryging nie, is van 'n appèl na 'n spesiale hof, soos in die geval van 'n ondersoek ingevolge artikel 10(1)(a) of 10(1)(b), geen sprake nie.

6. Indeling van die verslag

35. Die res van die verslag word soos volg ingedeel:

Hoofstuk II : Oorsig van die besondere praktyke, naamlik die samespanning oor pryse en voorwaardes, markverdeling en tenderpraktyke.

Hoofstuk III : Oorsig van maatreëls met betrekking tot die praktyke in 'n aantal oorsese lande. Die lande waarop gelet sal word, is die Verenigde State van Amerika, Kanada, Australië, Frankryk, die Bondsrepubliek Duitsland en die Verenigde Koninkryk. Aandag sal ook aan die beleid van die Europese Ekonomiese Gemeenskap (EEG) gegee word.

Hoofstuk IV : Algemene redes vir die bestaan van die praktyke en die voorkoms daarvan in die Republiek van Suid-Afrika.

Hoofstuk V : Die vraag of die betrokke praktyke "beperkende praktyke" uitmaak.

Hoofstuk VI : Die beperkende praktyke en die openbare belang.

Hoofstuk VII : Gevolgtrekkings en aanbevelings.

Hoofstuk II/...

1) Raad op Mededinging, Ondersoek na die bestaan van Beperkende Praktyke by die Verskaffing en Distribusie van Steenkool in die Republiek van Suid-Afrika, Verslag 12, 10 Augustus 1983.

HOOFSTUK II

OORSIG VAN DIE BESONDERE PRAKTYKE

INLEIDING

36. In hierdie hoofstuk word 'n oorsig gegee van die betekenis van samespanning oor pryse en voorwaardes, markverdeling en beperkende tenders. Telkens sal slegs op dié aspekte en vorme van die praktyke gelet word wat volgens die Raad se ondervinding, op grond van die voorleggings wat ontvang is en die literatuur die meeste voorkom. Dit is egter nodig om vooraf enkele begrippe te omskryf.

BEGRIPPE

37. In die algemeen word onderskei tussen praktyke wat op 'n individuele of gesamentlike grondslag, op 'n horisontale of vertikale basis en op 'n vrywillige of gedwonge wyse beoefen word.

38. 'n Praktyk is op 'n individuele grondslag indien die ondernemer of verskaffer[1)] alleen en onafhanklik optree. Hy besluit volgens sy eie oordeel watter beleid hy sal volg. Onder 'n stelsel wat op 'n gesamentlike grondslag berus, tree die verskaffer nie onafhanklik op nie, maar wel saam met ander partye. Wanneer 'n verskaffer homself regstreeks of onregstreeks verbind om in samewerking met ander op te tree, word hierdie aksie as gesamentlike optrede of samespanning beskou. Ook kan die praktyke van 'n horisontale of vertikale aard wees. Die praktyk geskied horisontaal indien die samespanning met ander verskaffers op dieselfde vlak in die produksie- of distribusieketting geskied (regstreeks of onregstreeks, onder meer ook deur middel van 'n handels- of professionele vereniging, en gesamentlik); vertikaal wanneer die praktyk plaasvind tussen verskillende opeenvolgende vlakke in die produksie- of distribusieketting (byvoorbeeld tussen verskaffers en afnemers van handelsartikels) en dit kan op 'n individuele sowel as op 'n gesamentlike basis geskied.

39. Die praktyk hoef ook nie noodwendig 'n vrywillige daad te wees nie. Waar ondernemings vrywilliglik tot 'n ooreenkoms ten opsigte van 'n bepaalde praktyk kom, kan dit ook gebeur dat op 'n regstreekse of onregstreekse wyse druk op 'n onderneming geplaas word om 'n party by 'n ooreenkoms, reëling of verstandhouding te word of te bly. 'n Baie effektiewe manier om druk uit te oefen is waar die gesamentlike optrede as 'n voorwaarde van lidmaatskap van 'n organisasie gestel word en sodanige lidmaatskap besliste voordele vir 'n ondernemer inhou.

SAMESPANNING/...

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1) 'n Verskaffer van 'n handelsartikel, soos omskryf in artikel 1 van Wet 96 van 1979, sluit 'n ondernemer, 'n vervaardiger, 'n verspreider, 'n kontrakteur, 'n professionele persoon en 'n finansiële instelling in.

SAMESPANNING MET BETREKKING TOT PRYSE EN VOORWAARDES

40. In die vakliteratuur word samespanning oor pryse en voorwaardes vry algemeen "prysbepalingspraktyke" ("pricing practices") genoem en in hierdie afdeling word in besonder daardie praktyke geïdentifiseer en omskryf wat toegepas word om die pryse[1] waarteen en die voorwaardes waarop handelsartikels gelewer word, te bepaal.

41. Vervolgens word die belangrikste vorme beskryf waarin hierdie praktyke aangetref word.

1. Horisontale pryssamespanning (-binding)

42. Horisontale pryssamespanning of prysbinding ("price collusion" of "price conspiracy") word gedefinieer as enige ooreenkoms, verstandhouding of reëling met betrekking tot pryse en voorwaardes waar die gemeenskaplike doelwit normaalweg is om prysmededinging tussen partye wat daarby betrokke is uit te skakel, te verminder of te beheer. Die verskaffer tree nie onafhanklik op nie maar saam met ander partye. Derhalwe word die individuele onderneming se vryheid om self na goeddunke op te tree, uitgeskakel of beperk.

43. Hierdie tipe ooreenkoms, reëling of verstandhouding omvat gewoonlik meer as slegs pryse en voorwaardes. Dikwels word ook saamgespan met betrekking tot winsmarges wat toegelaat sal word, die bepaling van voorwaardes waaronder herverkopers in handelsartikels mag sake doen en gesamentlike maatreëls om 'n ooreenkoms of reëling af te dwing. Soms gaan sulke samespannings ook gepaard met die regstreekse of onregstreekse regulering van die partye se handelsaktiwiteite. Veral is dit die geval waar onderhandelinge en die aangaan van ooreenkomste deur die bestaan van goed georganiseerde handelsverenigings vergemaklik word. Ander praktyke, soos beperkende tenders, eksklusiewe ooreenkomste, die vasstel van produksiekwotas en markverdeling, kan ook voorkom (kyk later vir beperkende tenders en markverdeling).

44. Die belangrikste vorme van horisontale pryssamespanning wat vir die doeleindes van hierdie ondersoek van belang is, word vervolgens toegelig.

Samespanning/...

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1) By die interpretasie van die opdrag word prys as 'n algemene begrip gebruik om pryse, gelde, rente, tariewe, premies of enige teenprestasie in te sluit en sluit ook die voorwaardes verbonde aan die transaksie in. Onder meer kan die volgende voorwaardes met die "prys" saamgaan -

(i) notering van pryse met of sonder belasting of prysverhogings;

(ii) diskonto's (kortings);

(iii) ooreenkomste om nie diskonto's beskikbaar te stel nie, of nie bokant 'n sekere peil nie;

(iv) ooreenkomste om nie sekere kostevoordele aan verbruikers en klante/kliënte deur te voer nie;

(v) eenvormige vervoerkoste-skedules;

(vi) brekasietoelaes;

(vii) betalingsvoorwaardes;

(viii) krediettermyne; en

(ix) gebruik van gemeenskaplike klantelyste om diskonto's te bepaal, met ander woorde die opdeling van klante in kategorieë.

Samespanning oor pryse en voorwaardes

45. Die volgende algemene vorme van samespanning oor pryse en voorwaardes word aangetref:

Partye kom ooreen om bepaalde pryse en voorwaardes vir hul handelsartikels vas te stel, byvoorbeeld deur -

vaste fabriekspryse neer te lê, veral wanneer die artikels homogeen van aard is;

in gevalle waar 'n handelsartikel uit 'n verskillende aantal grade bestaan, word 'n basis- of rigprys vir die mees algemene graad vasgestel met 'n plus of minus-faktor vir die ander grade;

die vasstelling van eenvormige pryse na lewering (prysegalisasie), met ander woorde dat die afstand van 'n vervaardiger vanaf 'n bepaalde mark nie verskille in vervoerkoste gaan meebring nie;

die neerlegging van vaste pryse vir sekere kopers of groepe kopers; en

die neerlegging van vaste, minimum- of maksimumpryse en voorwaardes.

46. Waar die genoemde soorte van samespanning 'n eenvormige prys tot gevolg het bestaan 'n reeks ander metodes wat gebruik kan word om 'n mate van eenvormigheid in pryse te bewerkstellig sonder dat vaste pryse as sodanig neergelê word soos die volgende -

(i) die verhaling van sekere koste-elemente, waardeur pryspeile kan verskil alhoewel die kosteberekeningsmetodes ooreenstem;

(ii) die bepaling van eenvormige bruto pryse, maar die partye is vry om hul eie netto pryse te bepaal;

(iii) die bepaling van minimum- of maksimumpryse;

(iv) die nie-gebruik van sekere prysvasstellingsmetodes;

(v) samespanning oor prysverwantskap tussen bepaalde handelsartikels onderling; dit wil sê dat ooreengekom word dat 'n vaste verhouding tussen die pryse van verskillende handelsartikels sal bestaan; en

(vi) die gelyktydige verhoging, en met dieselfde persentasie, van pryse.

47. By sommige ooreenkomste, reëlings of verstandhoudings staan dit die partye vry om hul eie pryse en voorwaardes te bepaal, maar die partye span saam oor eenvormige stelsels van kosteberekening en prysvasstelling. Voorbeelde hiervan is -

(i) die gebruik van dieselfde/gesamentlike pryslyste;

(ii) instelling van gesamentlike vertikale herverkooppryshandhawing;

(iii) samespanning om nie benede 'n sekere prys te verkoop nie;

(iv) samespanning om nie prysdiskriminasie toe te pas of van individuele of gesamentlike pryslyste af te wyk nie;

(v) die gebruik van prysverhogingsformules waar nie van intermediêre instellings in die distribusiekanaal gebruik gemaak word nie;

(vi) 'n gesamentlike strewe na die hoogs moontlike prys;

(vii) ondernemings om buitengewone prysafwykings te voorkom; en

(viii) ooreenkomste om pryse markgeoriënteerd te hou.

2./...

2. Prysinligtingstelsels

48. By hierdie praktyke kom die partye ooreen om op 'n gereelde grondslag inligting ten opsigte van pryse en voorwaardes met betrekking tot pryse uit te ruil. Gewoonlik word die pryse na 'n sentrale punt, byvoorbeeld 'n handelsvereniging of 'n firma van rekenmeesters of prokureurs, gestuur wat weer die betrokke inligting aan al die partye tot die ooreenkoms besorg. Benewens hierdie metodes kan elke markparty egter, sonder om met die ander saam te span, regstreeks 'n afskrif van sy pryse en voorwaardes aan sy mededingers stuur.

49. Ofskoon dit nie noodwendig die geval is nie, kan die partye ooreenkom of reël oor hoe die inligting gebruik sal word.

3. Vertikale pryssamespanning (handhawing van herverkoopprys)[1)]

50. Vertikale pryssamespanning is 'n praktyk wat normaalweg daarop gerig is om prysmededinging tussen herverkopers van dieselfde of soortgelyke handelsartikels uit te skakel. Meestal is dit die primêre leweransier van die handelsartikel (vervaardiger of invoerder) wat voorskryf teen welke prys of voorwaarde 'n handelsartikel op groot- of kleinhandelvlak verkoop moet word, alhoewel dit ook 'n tussenpersoon in die produksie- of distribusieketting of lede van 'n betrokke bedryfstak kan wees. Druk word uitgeoefen om toe te sien dat die herverkoper hom by die neergelegde prys hou, sodat die ondernemer aan wie so voorgeskryf word, aan bande gelê word. Vertikale prysbinding moet egter nie met die praktyk van voorgestelde of aanbevole pryse, wat later bespreek word, verwar word nie. 'n Onderskeidende kenmerk van die praktyk is dat dit slegs kan bestaan indien die betrokke handelsartikel herverkoop word. Sou die vervaardigers byvoorbeeld besluit om teen 'n vaste prys aan die eindverbruikers te verkoop en geen herverkoop plaasvind nie, kan daar nie sprake van vertikale prysbinding wees nie.

51. Soos reeds gemeld, is die mees algemene vorm van vertikale prysbinding dié waar 'n vervaardiger aan 'n groothandelaar of kleinhandelaar voorskryf teen welke pryse sy handelsartikels herverkoop moet word. In die proses word gewoonlik van die tussenpersoon of "herverkoper" van 'n handelsartikel verwag om die verpligting wat deur die vervaardiger of verskaffer op hom geplaas is, deur te voer totdat die handelsartikel die verbruiker bereik.

52. Dit is egter nie noodsaaklik dat die vervaardiger die prys inisieer nie; dit kan in enige stadium in die produksie- en distribusiekanaal voorkom, byvoorbeeld by die groothandelaar na kleinhandelaar op 'n individuele basis of in enige fase van die produksie- of distribusieketting gesamentlik deur markpartye.

53. Vertikale pryssamespanning wat algemeen as herverkooppryshandhawing ("resale price maintenance") bekend staan, kan òf op die prys van die handelsartikel òf op die voorwaardes by die verkoop van die handelsartikel òf op beide elemente van toepassing wees. Die praktyk kan verskeie vorme aanneem, soos die -

(i) vasstelling van minimum-, maksimum- of vaste pryse;

(ii) neerlegging van die maksimum potensiële afwyking van rigpryse;

(iii) beperking op winsmarges;

(iv) beperking op inruilpryse; en

(v) neerlegging van kosteberekeningsmetodes, byvoorbeeld om nie teen laer as die aankoopprys te verkoop nie of teen 'n prys wat alle koste, vas en veranderlik, insluit.

4. Aanbevole pryse

54. 'n Aanbevole prys (insluitende voorwaardes) is 'n aanduiding deur een "persoon" (verskaffer, leweransier) dat 'n bepaalde metode van prysvasstelling vir 'n ander persoon tot voordeel strek en waarin advies gelewer, of 'n aanbeveling in dié verband gedoen word. Meestal word die werklike pryse waarteen die handelsartikels na die aanduider se mening herverkoop behoort te word, op artikels self of op pryslyste aangedui. Die herverkoper word egter nie verplig om teen sodanige aanbevole prys te verkoop nie.

55./...

1) Kyk ook Verslag 1220(M) van die Raad van Handel en Nywerheid in hierdie verband.

55. Aanbevelings oor pryse kan òf horisontaal òf vertikaal geskied en kan gedoen word deur verkopers, gebonde derde persone (soos professionele verenigings en handelsverenigings) of ongebonde derde persone, byvoorbeeld onafhanklike raadgewers. Die partye wat die aanbeveling doen, kan ook op enige vlak van die produksie- of distribusieketting, of van die ekonomiese stelsel in die breë, optree.

56. Die volgende belangrike vorme van aanbevole pryse word onderskei:

(a) Horisontale (gesamentlike) aanbevole pryse

57. Horisontale aanbevole pryse en voorwaardes word hoofsaaklik deur handelsverenigings, professionele verenigings of ander organisasies wat 'n besondere groep ondernemings verteenwoordig, uitgereik.

58. Hierdie aanbevelings kan die volgende insluit:

(i) vaste pryse;

(ii) minimumpryse;

(iii) maksimumpryse;

(iv) die oplegging van sekere spesifieke bykomende heffings; en

(v) die vasstelling van pryse volgens sekere spesifieke formules.

(b) Vertikale aanbevole pryse

59. Aanbevole pryse en voorwaardes deur vervaardigers van handelsartikels op 'n vertikale grondslag kom redelik algemeen voor en dit is geensins vreemd dat groothandelaars sulke aanbevelings doen nie. Die vertikale aanbevole pryse kan individueel of gesamentlik geskied.

60. Die volgende vorme van vertikale aanbevole pryse kom die meeste voor, naamlik om -

(i) sekere vaste pryse te hef;

(ii) sekere minimumpryse te hef;

(iii) nie bokant 'n sekere maksimumprys te vra nie; en

(iv) so na as moontlik aan 'n sekere prys te hou.

61. Voorts kom dit redelik algemeen voor dat vervaardigers of verskaffers in hul reklameveldtogte aanduidings gee van aanbevole pryse of diskonto's op aanbevole pryse.

(c) Prysaanbeveling deur derde persone

62. 'n Laaste metode van aanbevole pryse is die een waar derde "onverbonde" persone wat nie regstreeks aan die besondere bedryf of vervaardiging verbonde is nie inligting ten opsigte van aanbevole pryse of bloot prysinligting oor pryse en voorwaardes wat in die bedryf geld of heersend is, publiseer. 'n Voorbeeld hiervan is wanneer 'n onafhanklike raadgewer of instelling met 'n spesiale kennis van die bedryf so 'n prysaanbeveling doen.

MARKVERDELING

1. Algemeen

63. Markverdeling kan omskryf word as 'n praktyk wat daarop gemik is om mededinging tussen markpartye te beperk of te reël met die oog op voordele wat vir die deelnemers daaruit voortspruit, onder meer deur die werking van die markmeganisme by prysvorming uit te skakel of te beperk, ander sogenaamde ontwrigtende optrede deur individuele markpartye te verhoed en produksie- en bemarkingskoste te verminder.

64./...

64. Markverdeling kan verskillende vorme aanneem en kan op verskillende vlakke van die produksie- en distribusieketting voorkom, horisontaal of vertikaal wees en eensydig (gewoonlik by vertikale markverdeling) of deur middel van samespanning tussen markpartye geskied.

2. Horisontale markverdeling

65. Horisontale markverdeling geskied veral by wyse van ooreenkomste, reëlings of ander vorme van samespanning tussen markpartye op dieselfde vlak van die produksie- en distribusieketting. Die praktyk kom in verskillende vorme voor en die indeling wat hier gevolg word, is (a) die onderlinge verdeling of toekenning van markte deur verskaffers, (b) beperkinge op produksie of aanbod en (c) gesamentlike ondernemings.

(a) Die onderlinge verdeling of toekenning van markte deur verskaffers

66. Hierdie vorm van markverdeling word normaalweg toegepas deur verskaffers van 'n handelsartikel op dieselfde vlak van die produksie- en distribusieketting of deur die verskaffers van 'n bepaalde diens. Dit geskied tipies by ooreenkoms of 'n ander vorm van bewustelike samespanning maar kan ook deur blote bewustelike parallelle optrede plaasvind. Verskillende vorme kan geïdentifiseer word, onder meer 'n verdeling van verbruikers of afnemers (klante of kliënte), die verdeling van gebiede en kwantitatiewe beperkinge.

67. Die verdeling of toekenning van markte volgens verbruikers geskied wanneer mededingers individuele of kategorieë van verbruikers onder mekaar verdeel, en elkeen sy bemarkingspoging slegs tot die verbruikers of kategorieë van verbruikers wat vir hom afgesonder is, toespits.

68. Die verdeling van individuele verbruikers/klante/kliënte kom gewoonlik voor in gevalle waar slegs 'n beperkte aantal groot verskaffers aan die aanbodkant van die mark is. Die verdeling van klasse verbruikers kan, onder meer, volgens grootte van firmas aan die vraagkant, staats- en private kopers en herverkopers of eindverbruikers geskied.

69. Hierdie vorm van markverdeling kan ook in 'n terugwaartse rigting in die produksie- en distribusieketting toegepas word, byvoorbeeld waar kopers van grondstowwe 'n toedeling van grondstofvoorsieners doen of waar enkele kleinhandelaars wat gesamentlik 'n dominante posisie in die mark beklee, 'n toedeling van voorsieners van produkte doen.

70. Die verdeling van markte volgens geografiese gebiede, ook bekend as territoriale of gebiedsverdeling, verskil van dié volgens verbruikers slegs in die opsig dat 'n regstreekse toewysing van verbruikers of klasse verbruikers nie plaasvind nie, maar dat by ooreenkoms die mark in onderskeibare (geografiese) gebiede afgebaken word en aan elkeen van die partye wat by die ooreenkoms of reëlings betrokke is een of meer van daardie gebiede toegeken word. So 'n party spits sy bemarkingspoging net op daardie gebied toe. Hierdie vorm van verdeling kom gewoonlik slegs voor waar 'n groot aantal partye aan die vraagkant van die mark is en veral waar hulle redelik eweredig oor die totale geografiese markgebied versprei is.

71. 'n Variasie van die verdeling van markte volgens geografiese gebiede kom voor waar verskaffers binnenslands in dieselfde gebiede meeding maar oorsese gebiede (lande) onderling met betrekking tot die uitvoer van produkte verdeel.

72. 'n Ander vorm van die verdeling van markte tussen voorsieners geskied in die vorm van kwantitatiewe beperkinge, gewoonlik kwotas. Die verskaffers bepaal die totale mark in kwantitatiewe terme en verdeel dan die totaal op 'n ooreengekome grondslag tussen hulle. Hierdie vorm gaan dikwels gepaard met boetes, in die een of ander vorm, teen dié wat hulle kwotas oorskry ten gunste van daardie verskaffers wat daardeur verhoed word om hulle volle kwotas te bereik.

73. Die verdeling van markte tussen verskaffers veronderstel teoreties dat al die verskaffers van 'n bepaalde produk aan 'n sekere mark, partye by die ooreenkoms, reëling of verstandhouding moet wees, alhoewel dit nie noodwendig die geval hoef te wees nie. In die praktyk kan die verdeling van markte relatief doeltreffend wees waar van die verskaffers wat gesamentlik 'n oorheersende posisie in die totale mark beklee, of waar ander bestaande verskaffers deur gesamentlike markaksies uit die mark gedwing word, of potensiële toetreders daardeur verhoed word om in 'n mark te vestig.

(b)/... 25

(b) Beperkinge op produksie of aanbod

74. Beperkinge op die produksie van goedere of die lewering van dienste is 'n onregstreekse vorm van markverdeling. In die geval van goedere is die verskaffers gewoonlik vervaardigers, verwerkers van halfklaarprodukte of herverpakkers van produkte. Die verskaffers van dienste kan ook die aanbod van hulle dienste beperk deur byvoorbeeld beperkinge op toetrede tot professionele groepe, beperkinge op dienste gelewer of nie gelewer nie, beperkinge op die afsetpunte vir dienste en ooreenkomste tussen gevestigde firmas om vennote of werknemers te beperk.

75. In plaas daarvan dat die verskaffers van goedere en dienste markte verdeel, word die produksie of die aanbod beperk tot 'n vlak wat gelyk aan of minder as die totale mark of vraag is. Die deelnemende partye word gevolglik in die posisie gestel om elkeen sy (beperkte) produksie van goedere of aanbod van dienste te verkoop sonder die aanwending van bemarkingsaksies wat in die afwesigheid van die ooreenkoms nodig sou wees om sy markaandeel te behou. Terselfdertyd word verhoed dat sommige van die verskaffers probeer om hulle markaandeel uit te brei.

76. Beperkinge op die produksie of die aanbod kan verskillende vorme aanneem. 'n Algemene vorm is produksiekwotas waar elkeen van die voorsieners aan kwantitatiewe beperkinge op fisiese produksie onderhewig gestel word, gewoonlik op die grondslag van historiese produksierekords. Dikwels gaan dit gepaard met boetebepalings. 'n Ander, minder eksakte en meer buigsame, vorm is 'n ooreengekome beperking op produksiefasiliteite, fasiliteite vir die aanbieding van 'n diens, of op 'n toename (groei) in fasiliteite. Dit ontstaan dikwels in 'n marksegment wat deur 'n surpluskapasiteit gekenmerk word. Die betrokke verskaffers kom ooreen om kapasiteit ooreenkomstig 'n bepaalde formule te verminder, om ouer en miskien minder winsgewende fasiliteite of produksieprosesse te sluit of te staak, of om ander bestaande vervaardigers se fasiliteite oor te neem en te sluit. Die doel is veral om die kapasiteit wat benut word in verhouding tot die mark te bring sodat sogenaamde "ontwrigtende" bemarkingsaksies, om markaandeel te behou of uit te brei, onnodig gemaak word.

77. 'n Ander vorm van beperking op die produksie of die aanbod is daardie waar tegnologie, patentregte, outeursregte of handelsmerke as instrument gebruik word. Verskaffers kom ooreen om tegnologie of regte te poel of te kruislisensieer ten einde hul markposisie ten koste van ander verskaffers te beskerm of te versterk.

78. Verskaffers kan ook ooreenkom oor beperkinge op die verskeidenheid produkte of dienste wat elkeen vervaardig (of bemark) of beperkinge op produkdifferensiasie plaas. Hoewel die produkte wat onderling toegeken word van mekaar mag verskil, ding hulle nogtans mee omdat hulle vir dieselfde doel aangewend word of identiese prosesse of fasiliteite vir die voortbringing daarvan gebruik word. In marksegmente waar 'n relatief klein aantal verskaffers bestaan, kan die voortbringingsproses ook in opeenvolgende stadia opgedeel en onder die deelnemers verdeel word.

(c) Gesamentlike ondernemings

79. Gesamentlike ondernemings kom voor wanneer twee of meer partye 'n onderneming tot stand bring waarvan die winste (of ander voordele) en verliese in een of ander verhouding verdeel word. Dit kan verskillende vorme aanneem en om uiteenlopende redes tot stand gebring word. 'n Onderskeid kan getref word tussen gesamentlike ondernemings waar die stigters horisontaal verwant is en dié wat in 'n vertikale verhouding tot mekaar staan. Gesamentlike ondernemings verskil van die gewone vorme van samespanning in dié opsig dat waar by samespanning gewoonlik 'n ooreenkoms, reëling of verstandhouding bestaan om op 'n bepaalde wyse individueel of gesamentlik op te tree, by gesamentlike ondernemings 'n bepaalde onderneming tot stand kom of aksie slegs gesamentlik uitgevoer word.

80. Die vorme wat gesamentlike ondernemings kan aanneem, sluit in die stigting van 'n nuwe onderneming deur twee of meer partye om 'n nuwe mark te betree of om bepaalde funksies namens die stigters te behartig ('n beperkende omskrywing wat dikwels gebruik word), die gesamentlike uitvoering van 'n bepaalde aksie, of die gesamentlike gebruik van bepaalde fasiliteite. Die samesmelting van twee ondernemings of die gesamentlike oorname deur twee of meer partye van 'n (ander) bestaande onderneming word soms ook as 'n gesamentlike onderneming beskou, maar dit word meer algemeen onder mededingingswetgewing as 'n verkryging (soos gedefinieer in Wet 96 van 1979) hanteer.

81./...

81. Gesamentlike ondernemings is gewoonlik gegrond op die besondere bydrae wat elkeen van die stigters kan lewer of die gesamentlike voordeel wat vir die stigters daaruit voortspruit. Die meer algemene doeleindes van hierdie tipe onderneming sluit in die gesamentlike ontginning of verwerking van grondstowwe of vervaardiging of distribusie van goedere of aanbod van dienste om kapasiteitsbesparings teweeg te bring; die samevoeging van besondere kundighede of van produksiemiddele soos tegniese kundigheid en kapitaal, patente en produksiefasiliteite, produksiekundigheid- en fasiliteite en bemarkingskundigheid; die samevoeging van kundighede of van kundigheid en fasiliteite of kundigheid en kapitaal vir navorsing en ontwikkeling; die samevoeging van bates of sekuriteite om kapitaal aan te trek, risiko te versprei, markmag te vergroot vir aankope of verkope op gunstiger voorwaardes of om die koste van navorsing en ontwikkeling te verdeel; en die gesamentlike benutting van fasiliteite of uitvoering van sekere bedryfsfunksies om die koste daarvan te deel of die uitvoering van funksies vir die gemeenskaplike voordeel te reël.

82. Net soos in die geval van beperkinge op produksie of produksiefasiliteite kan gesamentlike ondernemings, of minstens sekere vorme daarvan, ook as 'n onregstreekse vorm van markverdeling beskou word. In plaas daarvan dat twee of meer verskaffers in 'n bepaalde mark optree, of potensieel kan optree, tree 'n enkele onderneming namens hulle op. Voorts bestaan die "poeltipe" van gesamentlike ondernemings waar sekere bedryfsfunksies deur 'n gesamentlike onderneming namens die stigters behartig word of waar fasiliteite gesamentlik aangeskaf of bestaande fasiliteite gesamentlik gebruik word.

83. Die mees algemene vorm van "poeltipe" gesamentlike ondernemings is dié vir aankope of verkope op 'n gesamentlike grondslag. Dit kom tot stand in die vorm van spesifieke ondernemings, ingelyf as regspersoon, met of sonder winsbejag, of 'n informele poelorganisasie. Die koste van aankope of die inkomste uit verkope word, in die geval van ondernemings sonder winsbejag, gewoonlik deur middel van poelrekenings regstreeks aan die deelnemers toegedeel, of die produkte word teen 'n bepaalde prys aan die gesamentlike onderneming verkoop en winste in verhouding van verkope aan die deelnemers oorbetaal. Gemeenskaplike fasiliteite kan op dieselfde grondslag aan die deelnemers beskikbaar gestel of verhuur word.

84. By laasgenoemde vorm van gesamentlike onderneming is dikwels al die verskaffers van 'n produk of diens betrokke. Dit word ook dikwels aangewend om die uitvoer van handelsartikels te bevorder of uitvoerverdienste te verhoog.

85. Gesamentlike ondernemings bied 'n voordeel bo blote samespanning deurdat dissipline of beheer veel makliker is en doeltreffender toegepas kan word, omdat die stigters gewoonlik gesamentlik beheer oor die bedryfsvoering van die enkele onderneming uitoefen.

3. Vertikale markverdeling

86. Vertikale markverdeling behels gewoonlik die toekenning, deur 'n verskaffer, van markte in die vorm van geografiese gebiede, verbruikers of klasse van verbruikers aan die herverkopers van sy produkte. Dit kan geskied by wyse van ooreenkoms tussen die verskaffer en sy distribueerders of kan as 'n eensydige aksie deur die verskaffer toegepas word.

87. Dié praktyk kom slegs voor waar die voorsiener 'n beperkte aantal of geselekteerde herverkopers aanwys en deur die diskresie wat hy uitoefen, in die posisie is om herverkopers aan bepaalde voorwaardes onderhewig te stel soos in die geval van eksklusiewe distribusieregte, agentskappe en ander vorme van beperkende distribusie.

88. In die praktyk word distribueerders verplig om hulle verkope tot sekere geografiese gebiede of sekere verbruikers of klasse van verbruikers te beperk, of hulle word verplig om net vanaf 'n bepaalde plek die produksie te verkoop. Laasgenoemde variasie is minder beperkend, omdat dit nie die herverkoper verhinder om buite sy toegekende gebied te verkoop nie. Veral in die geval waar nabyheid van die afsetgebied 'n belangrike rol speel, soos waar afleweringskoste 'n belangrike faktor is, kan dit egter as gevolg van die kostevoordeel wat elke herverkoper in sy eie gebied geniet, 'n effektiewe beperking wees.

89. Die gewone vorme van vertikale markverdeling deur verskaffers is gewoonlik 'n bepaalde bemarkingsbeleid wat toegepas word in gevalle waar 'n mate van beskerming nodig is om herverkopers te oorreed om investerings in verwerkings-, verpakkings- of distribusiefasiliteite te doen, hul lojaliteit te verkry, aggressiewe bemarkingsoptrede te verseker of kopers met gevorderde tegniese advies te dien. Dit word veral toegepas in gevalle waar die produk van so 'n aard is dat handelsmerkidentifikasie en -voorkeur of distribusiekoste 'n belangrike rol speel.

BEPERKENDE TENDERS

1. Die betekenis van tenders

90. Ten einde tenderpraktyke in die regte perspektief te plaas, word eers die begrip "tender" in die ekonomiese bestel kortliks bespreek en daarna die verskynsel van beperkende tenderpraktyke.

91. Tenders kom algemeen in die hedendaagse ekonomiese bestel voor en is een van die aanvaarde metodes van aankope van handelsartikels, veral by staatsaankope, in die bou- en mynboubedryf en selfs by die verkryging van sommige professionele dienste.

92. 'n Tender kan gedefinieer word as die aanbod van een of meer handelsartikel teen gespesifiseerde voorwaardes aan 'n koper in reaksie op 'n uitnodiging van die koper om te tender.[1)]

93. Die primêre doelwit by die aanvra van tenders is om mededinging tussen tenderaars betreffende dié handelsartikels wat deur die aanvraer gespesifiseer is, te bewerkstellig. Die doel is dat die aanvraer in die posisie gestel moet word om die gunstigste kontrakvoorwaardes te bekom en om hierdeur ook 'n markgeoriënteerde ekonomie te bevorder.

94. Benewens die primêre doelwit bestaan onder meer die volgende sekondêre oogmerke -

die blootlegging van verskaffingsbronne wat andersins onbekend sou gebly het;

die teenwerking van begunstiging en korrupsie; en

die bevordering van objektiewe en eenvormige waarde-oordele oor die handelsartikels van verskillende ondernemings.

95. Soms wend owerheidsinstansies die toekenning van tenders as ekonomiese beleidsinstrument aan soos vir die aanmoediging van plaaslike nywerheide deur die toekenning van tenders op 'n streeksgrondslag.

2. Tenderpraktyke

(a) Algemeen

96. In die ekonomiese bestel kom verskeie vorme van beperkinge op mededinging voor, waarvan beperkende tenders deel uitmaak. Beperkende tenders as 'n beperking op mededinging kan die gevolg wees van 'n beperkende ooreenkoms, reëling of verstandhouding waardeur onderlinge mededinging verminder of uitgeskakel word. Uiteraard moet 'n element van samespanning by die toepassing van beperkende tenders teenwoordig wees. Dit is inderdaad hierdie element wat tot beperkinge op mededinging lei. Samespanning met betrekking tot tenders kan in die ope of in die geheim plaasvind voordat tenders ingedien word.

97. In verband met tenderpraktyke moet egter tussen samespanning met betrekking tot tenders en gesamentlike tenders onderskei word. Laasgenoemde praktyk het veral betrekking op projekte wat van 'n omvang is dat dit nie deur een tenderaar alleen hanteer kan word nie en dit gevolglik 'n geval van "noodsaak" is dat op 'n gesamentlike basis getender word. Gewoonlik word 'n konsortium of 'n gesamentlike onderneming deur voornemende tenderaars gestig om vir sodanige projekte te tender.

98. Gesamentlike tenders moet ook nie met subtenders verwar word nie. Soms moet die hooftenderaar subtenders aanvra vir dié handelsartikels wat hy nie self kan verskaf nie om die hooftender saam te stel. Samespanning tussen subtenderaars onderling en tussen hooftenderaars en subtenderaars is wel moontlik.

99. Samespanning met betrekking tot tenders kan dus op horisontale sowel as vertikale vlak plaasvind.

100./...

1) 'n Tender verskil van 'n notering. Laasgenoemde is die verstrekking van 'n prys waarteen 'n handelsartikel aan 'n voornemende koper in antwoord op sy spesifieke navraag, aan hom verskaf sal word.

100. Die omvang van samespanning met betrekking tot tenders kan strek vanaf deurdringende sistematiese samewerking tussen tenderaars binne die belangrikste segmente van 'n bedryf tot informele samespanning tussen twee mededingers. 'n Bedryfsvereniging kan die instrument wees waardeur samespanning bedryf word en die strengste geheimhouding kan daaraan verbonde wees of dit kan ook op 'n openlike en formele basis gedoen word. Samespanning met betrekking tot tenders kan verlerlei vorme aanneem waarvan die vernaamstes vervolgens in oënskou geneem word.

(b) Identiese tenders

101. Een van die vorme van identiese tenders kom voor waar 'n vereniging binne 'n bedryfstak in so 'n sterk posisie teenoor die aanvraer van 'n tender verkeer dat hy laasgenoemde kan dwing om standaardtenderdokumente te aanvaar van die vereniging wat die voorwaardes uiteensit waarop getender word. Sou die tenderaanvraer nie dié voorwaardes aanvaar nie, word aan die vereniging se lede opdrag gegee om hul tenders te weerhou. Gewoonlik gee die vereniging se lede gehoor aan die opdrag, dog streng beheer word uitgeoefen om te verseker dat aan die opdrag voldoen word. Sou van die lede die opdrag ignoreer, is hulle onderhewig aan skorsing of die betaling van boetes.

102. 'n Ander vorm van identiese tenders bestaan in die geval waar vooraf deur voornemende individuele tenderaars oor eenvormige tenderpryse en -voorwaardes ooreengekom word[1)], wat 'n vorm van horisontale pryssamespanning is. Vertikale eenvormige prysvorming kan ook ontstaan indien voornemende tenderaars insette verkry van een verskaffer of van verskaffers wat onderling op een of ander wyse pryse op 'n horisontale vlak handhaaf.

103. Dit is egter moontlik dat voornemende tenderaars die prysleier in 'n bedryfstak volg of dat die pryse op pryslyste gebruik word om te tender, en derhalwe kan tenderpryse neig om identies te wees.

(c) Pre-seleksie van tenderaars

104. Hierdie praktyk bestaan basies uit twee metodes, naamlik die voorafbepaling van die gunstigste voorwaardes waarop getender word en, tweedens, die sogenaamde vrywillig "opgeblaasde" tenders. In die eerste geval word vooraf deur die tenderaars ooreengekom dat 'n spesifieke tenderaar die gunstigste voorwaardes op 'n tender sal aanbied sodat die tender aan hom toegeken kan word. Die ander tenderaars kan dan selfs een of ander vorm van vergoeding van die "suksesvolle" tenderaar ontvang. Hierdie metode van manipulasie wek die skyn dat onder mededingende omstandighede getender is. Die prys en voorwaardes is egter nie altyd die vernaamste oorweging by die toekenning van tenders nie en kan gevolglik 'n mate van risiko vir die samespanners inhou.

105. Die tweede vorm, naamlik vrywillig f"opgeblaasde" tenders, is 'n variasie van die vorige en raak hoofsaaklik die prys. Voornemende tenderaars kom vrywilliglik ooreen om hul tenderpryse kunsmatig te verhoog om sodoende 'n spesifieke tenderaar in staat te stel om teen heersende pryse te tender waardeur die moontlikheid van die toekenning van die tender aan hom, vergroot word.

(d) Voorkoming van mededingende tenders

106. Somtyds kom voornemende of 'n groep voornemende tenderaars ooreen om nie in mededinging met mekaar te tender nie. 'n Variasie hiervan is dat 'n vereniging sy lede verbied om in mededinging met nie-lede te tender. Verskeie metodes,waarvan die merk van tenderkoeverte een van die bekendste is, kan gevolg word om dit te bereik. Deur tenderkoeverte van die lede van 'n vereniging duidelik te merk word lede se tenders onderskei van dié van nie-lede. Die aanvraer van 'n tender word dan voor die keuse gestel om òf slegs lede se tenders oop te maak en een te aanvaar òf dié van nie-lede oop te maak en een te aanvaar, maar nie om beide lede en nie-lede se tenders oop te maak nie.

(e) Markverdeling

107. Markverdeling ten opsigte van tenders geskied gewoonlik in die geval waar tenderaars vooraf besluit aan wie 'n tender toegeken moet word. Die besluit kan by elke uitnodiging om te tender geneem word of dit kan eenmalig besluit word om die toekenning op 'n rotasie-basis te laat geskied.

108./...

1) Kyk vroeër in die verslag in verband met samespanning met betrekking tot pryse.

108. Markverdeling kan ook plaasvind deur sorg te dra dat die toekenning van tenders op 'n geografiese basis of op 'n basis van verbruiker-toewysing geskied.

109. Ofskoon onderskeid tussen samespanning met betrekking tot tenders en gesamentlike tenders getref word, kan laasgenoemde 'n element van samespanning bevat indien gesamentlik getender word met die doel om die mark te verdeel en nie weens die omvang van die tenderprojek nie.

(f) Weerhouding om te tender

110. Hierdie vorm van tenderpraktyk is een van die magtigste instrumente in die handel van voornemende tenderaars. Deur vooraf ooreen te kom om tenders te weerhou, kan al die ander vorme van tenderpraktyke versterk en die aanvraer van tenders onwillekeurig gemanipuleer word om aan die wil van tenderaars te voldoen.

(g) Kombinasie van beperkende tenderpraktyke

111. In die voorafgaande is slegs 'n paar metodes waarvolgens tenders deur middel van samespanning beperkend kan wees, in oënskou geneem. Verskillende variasies of kombinasies van hierdie metodes bestaan egter. In die praktyk word dikwels 'n kombinasie van twee of meer metodes toegepas om tenders ten gunste van tenderaars te beïnvloed en in die proses mededinging te verminder of uit te skakel.

HOOFSTUK III/...

HOOFSTUK III

OORSIG VAN MAATREëLS MET BETREKKING TOT DIE PRAKTYKE IN 'n AANTAL OORSESE LANDE

112. Die praktyke van samespanning oor pryse en verskaffingsvoorwaardes, markverdeling en tenders het in die meeste Westerse lande aandag geniet. Die Raad is nie voornemens om 'n deurtastende oorsig van die maatreëls wat met betrekking tot hierdie praktyke in oorsese lande geneem is, te gee nie. Dit is voldoende om die belangrikste aspekte van die meer beduidende stelsels, naamlik dié van die Verenigde State van Amerika, die Verenigde Koninkryk, Australië, die Bondsrepubliek Duitsland, Kanada, Frankryk en die Europese Ekonomiese Gemeenskap, uit te lig. Aangesien mededingingsbeleide in hierdie lande in reaksie op die behoeftes en opvattings van elke land ontwikkel het, toon die verskeie stelsels aansienlike verskille in benadering en erns waarmee dit aangewend word.

DIE VERENIGDE STATE VAN AMERIKA

1. Agtergrond

113. Die Verenigde State se opvatting en ondervinding is dat "unrestrained interaction of competitive forces" normaalweg lei tot "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions".[1)]

114. Ten spyte van betekenisvolle ontwikkelings elders, is dit steeds waar dat so 'n uitgebreide en omvattende stelsel van wette oor mededinging soos wat in die Verenigde State ontwikkel het gedurende die vyf-en-negentig jaar sedert die "Sherman Act" aangeneem is, in geen ander land bestaan nie.

115. Daar is ander ondergeskikte wette, maar die grondtrekke van Amerikaanse "anti-trust"-wetgewing verskyn in drie Wette.

116. Die Sherman Act van 1890 bevat twee hoofverbiedinge -

(a) Artikel 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared illegal ..."

(b) Artikel 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor ..."

117. Die Clayton Act van 1914 verklaar vier gespesifiseerde tipes van beperkende of monopolistiese praktyk onwettig waar hulle mededinging aansienlik verminder of neig om 'n monopolie te skep:

(a) Prysdiskriminasie (artikel 2)

(b) Eksklusiewe handeling ("exclusive dealing") en bindingskontrakte ("tying contracts") (artikel 3)

(c) Verkrygings van mededingende maatskappye (artikel 7)

(d) Ineengeskakelde direksies (artikel 8)

118. Die Federal Trade Commission Act van 1914 raak hoofsaaklik die oprigting van die Kommissie en die administrasie daarvan. Artikel 5 van die Wet bevat egter een belangrike materiële bepaling wat, in sy gewysigde vorm, soos volg lees: "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared illegal."

119./...

1) Northern Pacific Railway Co v United States 356 US 1,4 (1968).

119. Die toepassing van die "anti-trust"-wette berus nie uitsluitlik by die Departement van Justisie en die "Federal Trade Commission" nie. Die Sherman en Clayton Wette bepaal dat enige private persoon wat skade as gevolg van oortredings ly oortreders kan dagvaar en "threefold the damage by him sustained" te herwin.

120. Slegs daardie aspekte van "anti-trust"-reg wat vir die huidige ondersoek betekenisvol is, sal kortliks hieronder uiteengesit word.

2. Die "Rule of Reason" en per se-oortredings

121. Die breë taalgebruik van artikel 1 van die Sherman Wet het dit vroeg in die Wet se geskiedenis vir die Hooggeregshof nodig gemaak om daardie beperkinge op handel wat deur die artikel onwettig verklaar word, verder te identifiseer. Die Hof het uiteindelik 'n "rule of reason" neergelê om die geldigheid van beperkinge op handel onder hierdie Wet te bepaal. Aangesien die gemene reg "undue or unreasonable restraints" op handel onwettig verklaar het, was die gevolgtrekking dat artikel 1 van die Sherman Wet kontrakte of kombinasies verbied wat "undue limitation on competitive conditions" veroorsaak het.

122. Die "rule of reason" bly belangrik by die toepassing van artikel 1 van die Wet op nuwe beperkinge.

123. Die howe het egter ook die leerstelling dat sekere tipes gedrag onweerlegbaar as onredelik veronderstel moet word, ontwikkel. Sekere tipes van samespanning is beskou as so beperkend van mededinging te wees dat bewys van 'n ooreenkoms om hulle te gebruik, op sigself 'n onredelike beperking en derhalwe onwettig is. Hierdie anti-mededingingspraktyke staan as "per se"-oortredings bekend en hulle sluit al die praktyke wat by hierdie ondersoek ter sake is, in.

3. Horisontale beperkinge

(a) Pryssamespanning en samespanning met betrekking tot tenders

124. Dit staan nou vas dat artikels van die Sherman Wet 'n primêre belang het by uitdruklike ooreenkomste deur mededingende firmas om pryse vas te stel. Pryssamespanning is per se onwettig, en geen getuienis oor die redelikheid van die pryse hoef deur die howe aangehoor te word nie. Regter Stone se klassieke verklaring is die volgende:

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition ... Agreements which create such potential power may well be held in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable."[1]

125. In sy ewe beroemde opsomming van die posisie het Regter Stone in United States v Socony-Vacuum Oil Company (1940) gesê:

> "Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition ... Any combination which tampers with price structures is engaged in an unlawful activity."

126. Latere sake het hierdie reël op die vasstelling van maksimumpryse en reëlings wat pryse onregstreeks beïnvloed, toegepas. Gevolglik is ooreenkomste om standaard heffings vir tjekwisseling of kredietverlening te bepaal, om pryse op dieselfde tydstip te verander of om pryse nie te adverteer nie, per se onwettig. Dit is ook beslis dat dit onwettig is vir mededingende handelaars in nuwe motorkarre om oor 'n "lysprys" ooreen te kom selfs al het klante gereeld oor pryse beding en die verweerders amper nooit karre teen daardie pryse verkoop nie.

127./...

1) In United States v Treton Potteries Co. (1927).

127. Die reg slaan ag op die wese, nie die vorm nie. Daarom is dit pryssamespanning om oor minimumpryse of 'n formule om pryse te bereken, ooreen te kom.

128. Ooreenkomste in verband met tenders wat vir spesifieke kontrakte ingedien staan te word, word natuurlik gedek, en nie slegs wanneer prysaanbiedinge identies is nie, maar ook wanneer gereël word dat 'n spesifieke firma die wenbod sal indien terwyl ander fiktiewe botte teen hoër pryse indien.

129. Ooreenkomste tussen kopers word gelyk aan ooreenkomste tussen verkopers geag.

130. Die eenvormigheid van pryse moet in al hierdie gevalle uit samespanning voortspruit. In hierdie verband beteken samespanning 'n werklike "meeting of the minds" in 'n gemeenskaplike poging om prysmededinging te onderdruk of te beperk; dit word voorts geïmpliseer dat daar met redelike vertroue deur die deelnemers op die plan of verstandhouding staat gemaak kan word. Blote uitruiling van inligting of prysleierskap oortree derhalwe nie artikel 1 van die Sherman Wet nie.

(b) Ander ooreenkomste as prysooreenkomste; markverdeling

131. Markmag is vanselfsprekend 'n noodsaaklike vereiste vir doeltreffende optrede selfs vir diegene wie se doel met beperking van mededinging defensiewe optrede is en die stabilisering van 'n situasie waarin mededinging as oormatig beskou word beoog. Hetsy die bedoeling defensief of uitbuitend is, is die klassieke voorskrif vir die verbetering van 'n bedingingsposisie om mededingers van 'n mark uit te sluit en die beskikbare handel sover as moontlik tot 'n beheerbare aantal deelnemers te beperk.

132. Van regstreekse belang by hierdie ondersoek is die vermindering van mededinging deur ooreenkomste tussen mededingers om deur markverdeling uit mekaar se pad te bly. Tensy dit onbeduidend in omvang en uitwerking is, is so 'n ooreenkoms ook per se onwettig kragtens artikel 1 van die Sherman Wet.

133. Ooreenkomste om markte te verdeel kan vele vorme aanneem. Firmas kan ooreenkom om markte geografies te verdeel; of hulle mag ooreenkom om klante funksioneel klasgewys (een bedien die groothandelaars en die ander die kleinhandelaars) of tegnies deur tipe van produk, toe te deel.

134. Sodanige ooreenkomste word gewoonlik geregverdig op die gronde dat hulle meer doeltreffende produksie en bemarking moontlik maak. Produksiekapasiteit kan gekonsentreer en skaalbesparings ondersteun word; distribusiekoste kan verminder en vervoer beperk word. Die leemte in die argument vir "meer rasionele" organisasie van produksie is dat indien dit deur markdoeltreffendhede ondersteun sou word, firmas sodanige voordele sal nastreef sonder om hulle na marktoekenningsooreenkomste te wend. Spesialisasie sal deur addisionele winste geregverdig word, wat ooreenkomste met mededingers onnodig maak.

135. Markverdelingsooreenkomste kan in sommige opsigte nog 'n groter uitwerking op mededinging as pryssamespanning hê. Deur die uitskakeling van mededingers verkry die enkele oorblywende markparty - hoewel in 'n beperkte gebied - 'n monopolie en is hy nie net met betrekking tot pryse nie, maar ook wat betref diens, kwaliteit, innovasie, ens, van mededinging gevrywaar.

4. Vertikale beperkinge: herverkooppryshandhawing

136. Vir huidige doeleindes is herverkooppryshandhawing die enigste vertikale beperking wat 'n kort bespreking vereis.

137. Dit blyk betreklik algemeen geglo te word dat herverkooppryshandhawingsooreenkomste tussen 'n vervaardiger en sy handelaars verskeie funksies kan dien en dat hul "anti-trust" wettigheid deur die "rule of reason" op 'n saak-vir-saak grondslag bepaal moet word.

138./...

138. Herverkooppryshandhawing is egter in 1911 deur die Hooggeregshof op 'n per se grondslag veroordeel. Sodanige prysbepaling was in verskeie state wat "fair trade" wette ingevolge 'n uitsondering deur die Kongres gemagtig het, toegelaat. Die Kongres het hierdie voorsiening later herroep. Dit word algemeen as waarskynlik aanvaar dat die "rule of reason" in die toekoms op herverkooppryshandhawing toegepas sal word.

VERENIGDE KONINKRYK

139. Kragtens die "Restrictive Trade Practices Act", 1976, is alle ooreenkomste in verband met die verskaffing en verkryging van goedere en handelsdienste, en wat beperkings bevat wat deur twee of meer partye aanvaar is, aan registrasie en daaropvolgende geregtelike ondersoek onderhewig. Die betrokke partye mag egter die "Restrictive Practices Court" oortuig dat hulle nie teen die openbare belang is nie.

140. Die Verenigde Koninkryk laat 'n verskaffer van goedere of dienste aansienlike vryheid aangaande die prys waarteen hy hulle sal lewer, toe. Tog is pryse aan beperkings of beheer kragtens 'n aansienlike aantal wette en die gewoontereg onderhewig.

141. Kragtens die gemene reg kan pryssamespanning, dit is 'n ooreenkoms tussen verskaffers aangaande die pryse wat gehef staan te word, 'n beperking van handel en as sodanig onafdwingbaar tussen partye wees, tensy dit as redelik geregverdig kan word. Daar sal egter geen saak wees teen 'n handelaar wat nie in kombinasie met ander ten opsigte van sy prysbeleid optree nie, selfs al word dit gevolg met die doel om 'n ander skade te berokken - met dien verstande dat geen onwettige middele gebruik word nie.

142. Kragtens die "Restrictive Trade Practices Act" van 1976 mag 'n gemeenskaplike prysbeleid wat ingevolge 'n ooreenkoms of reëling wat registreerbaar en kragtens hierdie wet geregistreer is (behoudens die gemeenregtelike regte van enige party of derde party), gevolg word mits dit nie na die "Restrictive Practices Court" verwys en veroordeel is nie.

143. Indien 'n registreerbare ooreenkoms egter nie geregistreer is nie, is dit onwettig om dit af te dwing of daarby te hou en enige persoon wat as 'n gevolg van pryssamespanning kragtens 'n registreerbare maar ongeregistreerde ooreenkoms benadeel is, het 'n eis vir skadevergoeding teen die betrokke partye.

144. Die "Resale Price Act", 1976, bepaal dat 'n verskaffer van goedere nie voorwaardes aangaande hulle minimum herverkoopprys mag oplê nie tensy hulle deur die "Restrictive Practices Court" as "vrygestelde" goedere kragtens die "Resale Act" verklaar is. 'n Verskaffer van goedere mag aanbevole pryse vir die herverkoop van sy goedere publiseer; maar indien die aanbeveling die gevolg van 'n ooreenkoms tussen verskaffers is, moet die ooreenkoms kragtens die "Restrictive Trade Practices Act" geregistreer word, aannemende dat die ander toepaslike maatstawe bevredig is.

145. Wat pryse betref, bepaal die "Fair Trading Act", 1973, dat waar 'n monopoliesituasie in verband met spesifieke goedere of dienste bestaan, die pryse wat deur die betrokke onderneming gehef word aan ondersoek deur die "Monopoly and Mergers Commission" onderhewig kan wees. Indien die Kommissie bevind dat enige sodanige prysbepalingspraktyk 'n uitwerking teen die openbare belang het, het die Regering verreikende magte om die beëindiging van sodanige praktyk af te dwing.

146. Horisontale ooreenkomste tussen mededingers wat markte beperk deur die toewysing van geografiese areas, beperkings op die soorte of hoeveelhede goedere of dienste verskaf, verkry of verwerk staan te word, of die tipe of klas van klante of verskaffers bedien staan te word, behels die aanvaarding van toepaslike beperkings in artikel 6 of 11 van die "Restrictive Trade Practices Act". Sodanige horisontale ooreenkomste tussen maatskappye wat in die Verenigde Koninkryk sake doen sal registreerbaar wees behalwe waar hulle in verband met uitvoere vanaf die Verenigde Koninkryk of die verskaffing van dienste buite die Verenigde Koninkryk, staan. Horisontale ooreenkomste wat markte beperk mag ook kragtens die gewoontereg tot inkorting van handelsreg wees en, as sodanig, onafdwingbaar tussen partye tensy hulle geregverdig kan word op die gronde dat die inkorting redelik is.

147./...

147. In die meeste gevalle sal eksklusiewe ooreenkomste, indien behoorlik opgestel, wettig wees. Nietemin bejeën die "Monopolies Commission" sodanige ooreenkomste met agterdog indien dit blyk dat hulle die markoorheersing van 'n monopolis, soos omskryf in die Wet, beskerm.

148. Die bepalings van die "Restrictive Trade Practices Act" wat in die eerste paragraaf van hierdie afdeling uiteengesit word, is van toepassing op samespanning met betrekking tot tenders. Die bepalings teen mededingingspraktyke van die "Competition Act", 1980, vul die ander mededingingsbeleidfunksies en magte van die "Director-General of Fair Trading" aan, en is die jongste van 'n aantal stappe wat sedert 1948 ingestel is om mededinging in Britse nywerheid en handel aan te moedig.

149. Die bepalings van die "Competition Act", 1980, wat anti-mededingingspraktyke behandel, kan as aanvullend tot dié van die "Fair Trading Act", 1973, beskou word, en laat ondersoek van praktyke van individuele firmas wat mededinging beperk, verwring of voorkom, toe.

150. Spesifieke anti-mededingingspraktyke word nie verbied nie, en die Wet poog ook nie om daardie wat onwenslik is te spesifiseer nie. Dit beoordeel praktyke, nie op hulle vorm (soos in die beperkende praktyke-wetgewing) nie, maar op hulle uitwerking op mededinging. 'n Anti-mededingingspraktyk word in die Wet omskryf as 'n gedragswyse wat deur 'n persoon in die loop van besigheid gevolg word wat -

"of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it."

AUSTRALIë

151. In Australië is aangeleenthede in verband met mededinging, die uitwerking op mededinging en openbare belang vervat in die Australiese "Trade Practices Act", 1974, wat deur die "Trade Practices Commission" geadministreer word.

152. Wat die bevordering van mededinging betref verbied die Wet in die algemeen bepalings in ooreenkomste wat mededinging wesenlik verminder, misbruik van monopolistiese mag, herverkooppryshandhawing, eksklusiewe handelinge ("exclusive dealing") en prysdiskriminasie, sowel as primêre en sekondêre boikotte insluitende sommige deur werknemers.

153. Sekere besondere aangeleenthede wat deur die Wet gedek word, verdien spesiale vermelding. Dit is 'n oortreding van die Wet om 'n bepaling van 'n kontrak, ooreenkoms of verstandhouding wat die bedoeling of uitwerking van wesenlike vermindering van mededinging het, neer te lê of gevolg aan te gee in 'n mark waarin 'n maatskappy goedere lewer of verkry. Voorbeelde van sodanige bepalings is markverdelingsooreenkomste, en beperkings op opbrengs of kwaliteit van goedere geproduseer, verskaf of verkry staan te word.

154. Die bepalings in kontrakte, reëlings of verstandhoudings wat verbied word, of hulle die bedoeling of uitwerking het om mededinging wesenlik te verminder of nie, is -

(a) bepalings wat die bedoeling het om transaksies met besondere verskaffers of klante uit te sluit of te beperk;

(b) bepalings wat die bedoeling of uitwerking het om pryse van goedere of dienste vas te stel (behalwe waar hulle aangegaan is vir die doel van sekere soorte gesamentlike ondernemings of deur sommige gesamentlike kopersgroepe); en

(c) bepalings wat as prysaanbevelings beskryf word maar wat die bedoeling of uitwerking het om die pryse van goedere of dienste wat gehef of betaal staan te word,vas te stel.

155. Herverkooppryshandhawing word verbied aangesien geglo word dat 'n herverkoper die reg het om oor die prys van die goedere wat hy te koop aanbied, te besluit en dat hy sy onafhanklikheid moet behou. Gevolglik is dit onwettig vir 'n verskaffer om 'n minimumprys vir die herverkoop van goedere deur hom verskaf, neer te lê. Hy mag egter 'n maksimumprys waarbo die goedere nie herverkoop mag word nie, bepaal.

156./...

156. 'n Verskaffer mag ook 'n herverkoopprys aanbeveel, maar mag nie vereis dat herverkopers nie teen pryse laer as die aanbevole herverkoopprys verkoop nie (dit moet duidelik in alle lyste, instruksies of ander dokumente deur die verskaffer uitgegee, gemaak word). Dit moet duidelik wees dat daar geen verpligting op die herverkoper rus om die aanbevole prys te hef nie. Dit is ook onwettig vir 'n verskaffer om 'n prys waaronder 'n herverkoper nie die goedere te koop mag adverteer nie, te bepaal.

157. Dit is nie onwettig vir 'n onafhanklike liggaam om 'n handelsgidspublikasie wat aanbevole of voorgestelde kleinhandelpryse bevat, uit te gee nie. Dit is egter onwettig vir individuele besighede wat sodanige publikasies ontvang om onderling ooreen te kom om die aanbevole pryse te aanvaar as die werklike pryse wat hulle sal hef. Die verskaffing van aanbevole pryse deur handelsverenigings kan onwettig wees as dit mededinging wesenlik skade berokken.

158. Kragtens die Wet is enige reëls van handelsverenigings wat daarop gemik is om pryse te bind, diskonto's te staak en persone met wie lede mag of nie mag sake doen nie, te benoem, onwettig. Dit is onwaarskynlik dat reëls wat daarop gemik is om standaarde te handhaaf, mits hulle nie ten koste van mededinging is nie, die Wet sal oortree.

159. Oor die algemeen sal 'n etiese kode wat die handhawing van diens deur lede van 'n vereniging nastreef, nie die Wet oortree nie. Standaard vorms of eenvormige voorwaardes mag egter nie pryse of diskonto's, prysaanpassings, marges of ander aangeleenthede wat by die bedingingsproses tussen gebruikers van die vorm belangrik is, spesifiseer nie.

160. In sommige nywerhede kan daar gronde wees vir die aanduiding van aangeleenthede in spesifieke eerder as algemene vorms of voorwaardes. Waar sodanige aangeleenthede dien om die posisie van verbruikers te verstewig of om die posisie van klein besighede teenoor firmas met groter ekonomiese mag te versterk, kan hulle deur die "Trade Practices Commission" "gemagtig" word . Magtiging beskerm die applikant teen geregtelike stappe vir oortreding van die Wet.

161. Gesamentlike aankope, gesamentlike reklame en markinligtingreëlings, aktiwiteite waarby handelsverenigings dikwels betrokke is om besparings vir lede te behaal en om hulle te help meeding met groter teenstanders, sal nie noodwendig die Wet oortree nie. Dit sal die geval wees waar sodanige aktiwiteit nie meer doen nie as om klein besighede toe te laat om aan mededingende gedrag wat nie andersins aan hulle beskikbaar is nie, deel te neem. Indien sodanige aktiwiteit egter ook gebruik word om pryse vas te stel (in die besonder) of om verkoopsvoorwaardes op te lê, sal dit waarskynlik die Wet oortree.

BONDSREPUBLIEK DUITSLAND

162. Die belangrikste regsbepalings vir die handhawing en bevordering van mededinging in die Bondsrepubliek Duitsland word bevat in die Wet teen Beperkings van Mededinging wat deur die Federale Kartelamp geadministreer word. Die Wet maak onder meer voorsiening vir 'n verbod op kartelle en die verbieding van ander ooreenkomste wat mededinging beperk. 'n Kartel word oor die algemeen omskryf as 'n situasie waar verskeie mededingende ondernemings hulle optrede koördineer (meestal deur middel van 'n ooreenkoms) met die doel om mededinging uit te skakel of te beperk. Voorbeelde is pryskartelle, kwotakartelle, kartelle in verband met die toewysing van klante en streke sowel as die toewysing van produksie en kapasiteite. Die wetgewing op beperkende handelspraktyke is daarop gemik om mededinging as 'n hoeksteen van die markekonomie te beskerm. Die basiese oogmerk daarvan is om mededingende markstrukture in stand te hou.

163. Die verbod op kartelle is nie ontwerp om slegs sodanige ooreenkomste te verhoed nie. Kragtens die Wet is alle kontraktuele reëlings (ooreenkomste en besluite) deur ondernemings of verenigings van ondernemings ongeldig in soverre hulle produksie of marktoestande waarskynlik sal beïnvloed deur mededinging te beperk.

164. Alhoewel die Wet kartelvorming in beginsel verbied, is die gevolge van hierdie verbod soortgelyk aan die "rule of reason"-benadering. 'n Aantal beperkende praktyke is by die verbod uitgesluit. Voorts, indien die partye tot 'n ooreenkoms 'n relatiewe klein aandeel van die mark het en die goedere of dienste maklik van bronne buite die ooreenkoms verkrygbaar is, word die ooreenkoms nie geag as een wat die marktoestande beïnvloed nie. Dit word ook algemeen aanvaar dat daar baie ander oorwegings is wat kartelle regverdig, byvoorbeeld veiligheids- en gesondheidsredes. Karteloореenkomste in verband met die bevordering van die doeltreffendheid en ekonomiese sterkte van ondernemings, kan gemagtig (van die verbod uitgesluit) word vir sover -

(a)/...

(a) hulle met die eenvormige toepassing van algemene besigheids-, aflewerings- en betalingsvoorwaardes handel (voorwaardekartelle);

(b) hulle verband hou met rabatte op goedere verskaf wat 'n werklike vergoeding vir dienste gelewer weergee en nie tot diskriminerende behandeling van individuele kopers lei nie (rabatkartelle);

(c) in die geval van 'n afname in verkope as gevolg van 'n permanente verandering in vraag, hulle produksiekapasiteite by die vraag aanpas, met inagneming van die globale ekonomie en die openbare belang (struktuurkrisiskartelle);

(d) hulle eenvormige standaarde en tipes skep (standaardisasiekartelle), ekonomiese aktiwiteite rasionaliseer (rasionalisasiekartelle), of spesialisasie teweegbring (spesialisasiekartelle), terwyl wesenlike mededinging in die mark bly bestaan;

(e) hulle dien om uitvoer te beskerm en te bevorder, in sover slegs buitelandse markte geraak word (uitvoerkartelle);

(f) hulle met invoer te make het en die Duitse kopers aan geen mededinging nie, of slegs aan geringe mededinging, van buitelandse verskaffers blootgestel word (invoerkartelle); en

(g) hulle beperkinge op mededinging meebring wat vir die ekonomie as geheel en die openbare belang noodsaaklik is.

Met inagneming van die ingewikkeldheid van ekonomiese ontwikkelings, kan spesiale magtiging vir kartelle gegee word, selfs waar nie aan die bepalings van die Wet voldoen word nie, dit is spesiale kartelle wat deur die Bondsminister van Ekonomiese Sake gemagtig kan word.

165. Ooreenkomste en besluite wat eenvormige metodes vir spesifikasie van dienste of vir prysontleding in sekere ekonomiese sektore tot stand bring, word van die bepalings van die Wet uitgesluit as hulle nie pryse of pryselemente vasstel nie. Hierdie ekonomiese sektore is dié waarin op 'n uitnodiging om te tender, slegs op die grondslag van beskrywings wat 'n kwalitatiewe ondersoek op die tydstip wanneer die kontrak gesluit word, getender kan word.

166. Om klein en middel-grootte ondernemings te help om vir die strukturele nadele (as gevolg van grootte) in mededinging met magtige ondernemings te vergoed, maak die Wet, bykomend tot die bestaande uitsondering van die verbod op kartelle, voorsiening vir verdere samewerkingsfasiliteite (byvoorbeeld samewerking deur klein sake-ondernemings).

167. Haas alle vorme van samewerking tussen ondernemings is toelaatbaar, vir sover hulle dien om die doeltreffendheid van klein en middel-groot ondernemings te bevorder en mededinging nie wesenlik benadeel word nie. Dit sluit samewerking op die gebied van produksie, navorsing en ontwikkeling, finansiering, administrasie, reklame, aankope en distribusie in. Intermaatskappy-samewerking kan die vorm van koördinasie sowel as die afstigting van een of verskeie funksies van die betrokke ondernemings aanneem. Sodanige samewerking word van die trefwydte van die Wet uitgesluit indien dit hoofsaaklik op die bevordering van doeltreffendheid gerig is en nie op die uitskakeling of beperking van mededinging gemik is nie.

168. Dit word voorts aangevoer dat inter-maatskappy samewerking waarskynlik die doeltreffendheid van deelnemende ondernemings sal verbeter indien dit, byvoorbeeld, ontwerp is om opbrengs of kwaliteit te verhoog, om die reeks van produkte uit te brei, om afleweringsroetes of -periodes te verkort, om die aankoop- en verkoopreëlings te rasionaliseer, om bestellings te reël op 'n wyse wat vragkoste verminder, of om voorsiening vir die gemeenskaplike gebruik van duur publisiteitsmedia te maak.

169. Blote prysreëlings is in elk geval nie toelaatbaar nie. Slegs waar sodanige reëlings onafskeidbaar verbonde is aan samewerking wat in die geheel gemik is op verhoging van doeltreffendheid, kan ooreenkomste ten opsigte van pryse of pryselemente toegelaat word, mits dit die doel van rasionalisasie dien. Dit mag in die besonder die geval wees waar klein en middelgroot firmas by gemeenskaplike reklame of distribusie betrokke is. Die verpligting om uitsluitlik deur 'n gemeenskaplike verkoopsagentskap te verkoop kan ook die onderwerp van 'n ooreenkoms kragtens die Wet wees.

170. Terwyl artikel 1 van die Wet 'n wye reeks beperkende praktyke en artikels 2 tot 8 'n aantal uitsonderings dek, is artikels 15 tot 21 op sekere tipes beperking van mededinging van toepassing. Van spesiale belang by hierdie ondersoek is dat ooreenkomste waarby een besigheid die vryheid van 'n ander beperk om pryse of verkoopsvoorwaardes te bepaal, verbied word. Dit

is/...

is veral van toepassing op herverkooppryshandhawing. Beperkings deur 'n koper op verkopers, soos 'n mees begunstigde koper klousule, is ook verbode. In 'n ander artikel van die Wet word 'n lisensieverlener toegelaat om 'n lisensiehouer se herverkoopprys van die goedere wat kragtens die gelisensieerde patent, model of handelsgeheim vervaardig is, te bepaal.

KANADA

171. Kragtens artikel 32 van die "Combines Investigation Act" is "sameswering" ("conspiracy") 'n swaar strafbare oortreding. Dit word gepleeg wanneer 'n persoon met 'n ander persoon saamsweer, saamwerk, ooreenkom of reël -

(a) om fasiliteite vir vervoer, produksie, vervaardiging, verskaffing, opberging of handeldrywing met enige produk onredelik te beperk;

(b) om die vervaardiging of produksie van 'n produk onredelik te voorkom, beperk of verminder, of om die prys daarvan onredelik te verhoog;

(c) om mededinging in die produksie, vervaardiging, aankoop, ruil, verkoop, opberging, verhuring, vervoer of verskaffing van 'n produk, of in die prys van versekering op persone of eiendom, onredelik te voorkom of verminder; of

(d) om mededinging op 'n ander wyse onredelik te beperk of beskadig.

172. Ten spyte van sekere uitsonderings is die omvang van die statutêre bepalings opvallend breed.

173. Kragtens artikel 32.1 van die Wet is "bid-rigging" (samespanning met betrekking tot tenders) verbode. Almal wat 'n party by "bid-rigging" is, is aan 'n misdryf skuldig en dit is nie nodig om te bewys dat die beperking op mededinging onredelik is nie. "Bid-rigging" sal egter nie 'n oortreding van die Wet wees as die ooreenkoms of reëling bekend gemaak word aan die persoon wat die botte of tenders aanvra op of voor die tydstip waarop die tender gemaak word nie. Hierdie uitsondering is ingesluit om partye in staat te stel om as deel van 'n gesamentlike onderneming op te tree, 'n praktyk wat dikwels ekonomies wenslik is.

174. Artikel 38 van die "Combines Investigations Act" verbied herverkooppryshandhawing. Die voorstel van pryse deur 'n produsent of verkoper is aanvaarbaar. Die herverkoper is egter onder geen verpligting om enige voorstel met betrekking tot pryse te aanvaar nie.

FRANKRYK

175. Die praktyk van vasgestelde minimumpryse word in Frankryk deur artikel 37(4) van Ordonnansie No 45 1438 van 30 Junie 1945 verbied. Vasgestelde herverkoppryse mag egter by wyse van uitsondering gemagtig word. Sodanige uitsonderings word slegs vir 'n voorgeskrewe tydperk verleen.

176. Die Ordonnansie van 28 September 1967 verbied 'n produsent, invoerder of groothandelaar om op enige manier prysaanbevelings vir die verkoop van sekere produkte aan die Republiek, aan 'n kleinhandelaar oor te dra.

177. Die volgende praktyke is per se onwettig:

(a) Alle pryssamespanningsooreenkomste wat met vergoedingskemas gepaard gaan is onwettig wat ook al hul verklaarde oogmerk is.

(b) Vertoonde pryslyste en eenvormige diskonto's is onwettig indien hulle met 'n stelsel van boetes vir firmas wat pryse onderbie gekoppel word, of as hulle inderdaad gevolg word.

(c) Stelselmatige soortgelyke pryse, selfs sonder 'n vertoonde pryslys, is ook onwettig.

178. Dit kan inderdaad erken word dat publikasies deur 'n handelsvereniging tot beter inlingting van klante kan bydra en firmas ook kan help om hul koste te evalueer, veral wat betref 'n aantal klein firmas sonder 'n verfynde rekeningkundige stelsel. Om hierdie redes is die publikasie van pryslyste deur handelsverenigings nie op sigself onwettig nie.

179./.

179. Markverdeling en produksiekwotas is onwettige praktyke, selfs as word hulle inderdaad nie eerbiedig nie, omdat hulle geag word ontwerp te wees om minder doeltreffende firmas, wat sou verdwyn het of aansienlike markaandeel sou verloor het indien mededinging geheers het, te beskerm. Indien 'n ooreenkoms buigsame kwotas of markaandele vereis, maar hierdie buigsaamheid vind nie plaas nie, is die ooreenkoms ook onwettig.

180. Samespanning met betrekking tot tenders word spesiaal deur artikel 412 van die strafwetboek verbied. Die wet op kartelle is van toepassing op gesamentlike optrede wat bepaal aan watter onderneming 'n kontrak toegeken moet word en te reël dat, wanneer tenders geopen word, daardie onderneming se bod as die laagste aanvaar sal word.

EUROPESE EKONOMIESE GEMEENSKAP

181. Die Europese Ekonomiese Gemeenskap se grondwetlike dokument, die Verdrag van Rome van 1957, bevat bepalings, vernaamlik artikels 85 en 86, wat met mededingingsbeleid te doen het.

182. Die een gebied van konsensus agter artikels 85 en 86 van die Verdrag van Rome, was dat die oprigting van die Gemeenskapsmark deur die aftakeling van tariewe en ander handelsbelemmerings nie verydel moet word deur private karteelooreenkomste of dominante firmas toe te laat om nuwe of vervangingshindernisse vir handel tussen lidlande op te rig nie. Dus word die verbiedings in hierdie artikels in die Verdrag nie as teen die behoeftes van vrye mededinging of ekonomiese doeltreffendheid beskou nie, maar as "onversoenbaar met die Gemeenskapsmark". Alhoewel die Europese Kommissie heelwat sterk voorstanders van 'n kragtige mededingingsbeleid bevat, weerspieël die werklike ontwikkeling van die gemeenskapstelsel onvermydelik verskille in agtergrond en oortuiging.

183. Laasgenoemde is verantwoordelik vir die feit dat die verbieding van beperkende ooreenkomste in artikel 85(1) van die Verdrag uitdruklik in artikel 85(3) ongedaan gemaak word wat betref ooreenkomste wat ekonomiese vooruitgang bevorder, onderworpe aan verdere voorwaardes oor onredelike uitwerking op mededinging.

184. Die betekenis hiervan is nie slegs dat dit die Europese Hof meedoënloos verwikkel in die opweeg van ekonomiese argumente nie, maar dat dit die toepassingsproses ook grootliks beïnvloed omdat geen ooreenkomste streng gesproke as per se onwettig beskou kan word nie. Sekere tipes van beperkende reëlings mag in die praktyk na aan hierdie posisie kom namate die presedente in die gewysdes opeenhoop, maar in beginsel kan 'n moontlike eis vir uitsondering ingevolge artikel 85(3) altyd in die vooruitsig gestel word.

185. Hoe die Kommissie derhalwe ook al beklemtoon dat sy regulasies vereis dat alle beperkende ooreenkomste aangemeld moet word (met die aansporing dat geen boetes ten opsigte van onwettige ooreenkomste wat aangemeld is, agterna gehef sal word nie), sal baie besigheidslui in Europa die risiko om dit nie te doen nie aanvaar en is die omvang van vrywillige nakoming beperk.

186. Die verbod van beperkende reëlings wat teen hierdie doelwit oortree, het amper die krag van 'n per se-reël, maar die Gemeenskap se beleid rus andersins basies op 'n veronderstelling dat beperkende reëlings waarskynlik verbruikers sal benadeel, maar dit kan weerlê word deur aan te toon dat die ooreenkomste noodsaaklik vir tegnologiese vordering of verhoogde produktiwiteit is. Daar steek gevaar in om beginsels wat algemeen van toepassing is op besluite kragtens artikel 85(3) neer te lê. Uitsondering ten opsigte van sekere tipes ooreenkomste is egter konsekwent geweier. Hierdie is, in die besonder, markverdelingsooreenkomste en ooreenkomste in verband met pryssamespanning en kwotas.

187. Die 1951 Verdrag waardeur die "European Coal and Steel Community" (ECSC) tot stand gekom het, voorsien met betrekking tot die gemeenskapsmark wat deur hom opgerig is, reëls wat mededinging beheer wat regstreeks op ondernemings in die steenkool- en staalnywerheid van toepassing is. Die wesenlike bepalings is soos volg:

ooreenkomste wat neig om mededinging te beperk, behalwe waar anders bepaal, is verbode (artikel 65 ECSC);

optrede tot konsentrasie in die steenkool- en staalsektore is aan voorafgaande keuring onderhewig (artikel 66 ECSC); en

ondernemings in 'n dominante posisie is aan misbruik-beheer onderhewig.

188. Artikel 65 ECSC verbied alle ooreenkomste tussen ondernemings, alle besluite van verenigings van ondernemings en alle gesamentlike praktyke wat regstreeks of onregstreeks neig om die normale werking van mededinging binne die gemeenskapsmark te voorkom, beperk of verwring, en in die besonder daardie wat neig:

om pryse vas te stel of te bepaal;

om produksie, tegniese ontwikkeling of beleggings te beperk of te beheer; en

om markte, produkte, klante of bronne van verskaffing toe te deel.

189. Ooreenkomste kan gemagtig word vir firmas om in die produksie van of in die gesamentlike aankoop of verkoop van spesifieke produkte, te spesialiseer of mee te doen indien dit gevind word dat -

sodanige spesialisasie of gesamentlike aankoop of verkoop tot 'n wesenlike verbetering in die produksie of distribusie van die betrokke produkte sal bydra;

die onderhawige ooreenkoms noodsaaklik is om hierdie resultate te behaal, en nie meer beperkend is as wat vir daardie doel nodig is nie; en

dit nie in staat is om aan die belanghebbende ondernemings die mag om pryse te bepaal, te gee nie, of om die produksie of verkoop van 'n wesenlike gedeelte van die onderhawige produkte in die gemeenskapsmark te beheer of beperk nie, of om hulle van effektiewe mededinging deur ander ondernemings in die gemeenskapsmark te beskerm nie.

HOOFSTUK IV/...

HOOFSTUK IV

ALGEMENE REDES VIR DIE BESTAAN VAN DIE PRAKTYKE EN DIE VOORKOMS DAARVAN IN DIE REPUBLIEK VAN SUID-AFRIKA

190. In hierdie hoofstuk word eerstens die tipiese redes vir die voorkoms van samespanning oor pryse en voorwaardes, markverdeling en beperkende tenders gegee soos dit veral in die literatuur aangetref word. Daarna word gelet op die algemene voorkoms van die praktyke in die Republiek van Suid-Afrika.

ALGEMENE REDES VIR DIE PRAKTYKE

191. Die betrokkenheid van markpartye by die samespanning in die geval van die betrokke praktyke kan op verskillende wyses en om verskillende redes geskied.

192. So kan die samespanning wissel van 'n formele, uitdruklike ooreenkoms tot 'n losse, informele en ongeorganiseerde reëling tussen deelnemers in dieselfde bedryfstak. Betrokkenheid by die samespanning kan vrywillig wees of 'n lid kan op 'n regstreekse of onregstreekse wyse verplig word om deel te neem. Die nakoming van die ooreenkoms of reëling kan berus op 'n ooreengekome afdwinging daarvan; maar dit kan ook 'n ereverstandhouding ("gentleman's agreement") wees waarin geen sanksies beding is nie.

193. Die mees algemene vorm van samespanning is dié oor die prys van handelsartikels wat dan aangevul word met ooreenkomste of reëlings in verband met verkoopsvoorwaardes, produkte en verskeidenheid, verpakking, tenderpraktyke en verdeling van die mark.

194. Normaalweg bestaan meer as een rede vir die totstandkoming van die praktyke. Die vernaamste redes vir samespanning word vervolgens onder verskillende hoofde saamgevat.

1. Struktuur van die bedryfstak

195. Die basiese voorvereiste vir 'n suiwer mededingende markstelsel is dat die aantal partye aan beide kante van die mark so groot moet wees dat geen enkele aanbieder of afnemer in staat moet wees om enige invloed te kan uitoefen op die onpersoonlike markfaktore, wat pryse bepaal, nie. Dit is vanselfsprekend dat hierdie ideale toestand nêrens in die praktyk en allermins in Suid-Afrika bestaan. Dit kan dus aanvaar word dat struktuurgebreke in die Suid-Afrikaanse mark tot beperkende optrede sal lei.

196. Dit is veral in 'n duopolistiese en oligopolistiese markstruktuur waar die waarskynlikheid groot is dat die markpartye op een of ander wyse sal saamspan, veral met die doel om hul winsgewendheid te verhoog. Die doelwit kan ook wees om die mark te reguleer of om nuwe toetreders uit te hou.

197. Samespanning in die geval van 'n duopolistiese of oligopolistiese markstruktuur word ook aangehelp indien 'n nie-gedifferensieerde en homogene produk deur die markpartye bemark word. In so 'n marksituasie is die markpartye in 'n groot mate van mekaar afhanklik en oefen die een se gedrag 'n regstreekse invloed op die ander uit. Derhalwe bestaan 'n interafhanklikheid tussen aanbieders. Die omstandighede vir samespanning is gunstig indien die aantal deelnemers in die mark min is, die lede se vraag- en aanbodkrommes min of meer dieselfde is, die geleentheid vir "kullery" gering is en die aankooppatroon van kopers redelik konstant is. Alhoewel die totale vraag na die betrokke produk redelik onelasties kan wees, het elke mededinger gewoonlik 'n geknikte vraagkromme ("kinked demand curve") wat veroorsaak dat 'n prysverlaging deur een 'n regstreekse invloed op die omset van sy mededingers uitoefen. Om hierdie rede, so word beweer, is prysmededinging nie so algemeen by oligopoliste nie. Oor die algemeen het oligopoliste met betreklik homogene produkte 'n langtermynneiging tot dieselfde voorwaardes. Samespanning wat veral die gevolg van die aard van die markstruktuur is, trag meestal om sogenaamde "ordelike" bemarking te verseker deur moordende mededinging in die bedryfstak te voorkom.

2./...

2. Intensiteit van mededinging

198. Die intensiteit van die mededinging wat in 'n bepaalde bedryfstak bestaan, oefen dikwels 'n belangrike invloed uit op partye se geneigdheid en vermoë om saam te span. In die geval van uiters strawwe mededinging ("cut throat competition") word dikwels van een of ander vorm van samespanning gebruik gemaak om "dissipline" in die bedryfstak te verkry of te handhaaf.

3. Winsgewendheid

199. Die primêre doel van enige vorm van samespanning ten aansien van die betrokke praktyke is die verhoging en stabilisering van die partye se winsgewendheid. Die mening word gehuldig dat langtermynbeplanning beter gedoen kan word indien dit nie met die onsekerheid spruitende uit oormatige mededinging rekening hoef te hou nie. Samespanning tussen markpartye op een of meer gebiede kan dan ook na bewering, meewerk om ekonomiese neigings te stabiliseer.

4. Kostestruktuur

200. Dit is algemeen die sienswyse dat omstandighede by kapitaalintensiewe bedryfstakke met 'n hoë vaste koste bevorderlik is vir pryssamespanning ten einde mededinging uit te skakel en 'n sekere rendement op investering te verseker. As rede hiervoor word aangevoer dat veral gedurende 'n fase van 'n dalende vraag en 'n neiging tot oortollige of ledige kapasiteitsbesetting markpartye hulle tot prysoorloë sal wend ten einde die omset te verhoog en sodoende 'n groter bydrae tot die verhaling van vaste koste te verkry.

201. Veral in bedryfstakke waar die vaste koste betreklik groot is, word samewerking tussen die betrokkenes as 'n metode gesien om te verseker dat oorkapasiteit nie geskep word nie of dat dit selfs verminder word. So kan dan na bewering beter vir die toekoms beplan en risiko's beperk word.

5. Struktuur van die kopersmark

202. 'n Kopersmark wat nie in 'n hoë mate gekonsentreerd is nie, dien dikwels as aanmoediging vir verkopers om saam te span. Indien sekere kopers groot bestellings plaas, ontstaan die versoeking om af te wyk van die voorwaardes waarop ooreengekom is ten einde sake van mededingers weg te neem. Algemeen word aanvaar dat die sukses van samespanning groter in die geval van klein kopers is, aangesien groot kopers teenkrag ("countervailing power") kan uitoefen. Dit kan ook gebeur waar voldoende samespanning tussen klein kopers plaasvind.

6. Bestaan van handelsverenigings

203. 'n Handelsvereniging dien dikwels as 'n nuttige middel vir die toepassing van beperkende praktyke en samespanning. So 'n vereniging kan ook die sosiale milieu skep wat vir samespanning bevorderlik is.

7. Ander redes

204. Ander redes wat vir die bestaan van die praktyke aangevoer word, is die uitskakeling van prysmededinging tussen vervaardigers of herverkopers, die bevordering van stabiliteit veral ten opsigte van pryse en verkope, verlaging van bemarkingskoste, die handhawing van 'n bevredigende peil of kwaliteit van diens, die "etiese" aard van die produk of diens, leidinggewing aan herverkopers, voorkoming van "chaos" en "onbillike" mededinging, handhawing van winsmarges, vermindering van risiko's, beskerming van die klein onderneming, beskerming van verbruikers, die beskerming van die beeld van 'n produk, en samespanning as teenkrag teen monopsoniemag.

VOORKOMS VAN DIE PRAKTYKE

205. Aan die hand van die redes wat in die voorafgaande gedeelte vir die bestaan van die praktyk gegee is, is die geleenthede vir die bestaan en voorkoms daarvan in verband met samespanning oor pryse en voorwaardes, markverdeling en beperkende tenders in die Suid-Afrikaanse ekonomie baie gunstig. Volgens die voorleggings wat ontvang is en op grond van die Raad se ervaring van die verlede kom dié praktyke by 'n groot aantal bedryfstakke en 'n wye reeks handelsartikels voor. Bewerings[1] in verband met die voorkoms van die praktyke wat deur die ondersoek

omvat/...

1) Die Raad vereenselwig hom nie noodwendig met dié bewerings nie.

omvat word, is onder meer in die geval van die volgende bedryfstakke of handelsartikels gedoen.[1]

LYS VAN PRAKTYKE EN BEWEERDE PRAKTYKE[2]

Handelsartikel[3]	Praktyke en Beweerde Praktyke
Aandelemakelaarsdienste	Horisontale prysaanbeveling
Aartappelskyfies	Horisontale pryssamespanning
Argitekdienste	Horisontale pryssamespanning
Alkoholiese drank	Horisontale pryssamespanning; Horisontale prysaanbeveling
Bakkersprodukte	Markverdeling
Bitumen en padboumateriaal	Horisontale pryssamespanning; Tendersamespanning
Bouersaktiwiteite	Horisontale samespanning oor tendervoorwaardes
Boeke	Horisontale prysaanbeveling
Boeke (skool)	Tendersamespanning
Bourekenaarsdienste	Horisontale prysaanbeveling
Brandblusinstallasie	Tendersamespanning
Brandkluise	Horisontale pryssamespanning; Markverdeling
Brandstof	Markverdeling
Brillense	Horisontale pryssamespanning
Brood	Markverdeling
Chemikalieë - rubber	Markverdeling
Chloor - vloeibaar	Tendersamespanning
Eiendomsagentskapdienste	Horisontale pryssamespanning
Ertjies en lensies	Horisontale pryssamespanning; Markverdeling

Fynpapier/...

1) Waar die praktyke deur wette of regulasies gereël word, is dit meestal uitgelaat.

2) (a) Praktyke in terme van ander wetgewing uitgesluit.

(b) Pryse sluit voorwaardes in.

(c) Die voorkoms van individuele aanbevole pryse kom so algemeen voor dat dié praktyk uit die lys gelaat word.

(d) Bewerings oor die handhawing van herverkooppryse is weggelaat.

3) Soos gedefinieer in Wet 96 van 1979.

Handelsartikel	Praktyke en Beweerde Praktyke
Fynpapier	Horisontale samespanning; Tendersamespanning
Groente - bevrore	Horisontale pryssamespanning
Hawermout	Horisontale pryssamespanning
Hout	Horisontale pryssamespanning
Huishoudelike elektriese toerusting	Horisontale pryssamespanning
Hysbakke	Tendersamespanning
Ingenieursdienste	Horisontale pryssamespanning; Tenderprosedure-aanbeveling
Kalk (gebluste)	Horisontale pryssamespanning; Markverdeling
Klip en gruis	Tendersamespanning; Horisontale pryssamespanning; Markverdeling
Koeldrank	Horisontale pryssamespanning
Kookolie	Horisontale pryssamespanning
Koerante	Markverdeling; Horisontale pryssamespanning
Kratte - plastiese	Horisontale pryssamespanning
Kunsmis	Horisontale pryssamespanning; Markverdeling
Margarien	Horisontale pryssamespanning
Medisyne - voorskrif	Horisontale pryssamespanning
Meel	Markverdeling
Melk - vars	Horisontale pryssamespanning; Markverdeling
- gekondenseer	Horisontale prysaanbeveling
Metaalskroefaansluitings	Horisontale pryssamespanning
Mieliegruis	Tendersamespanning
Motorbande	Horisontale pryssamespanning
Motors - elektries	Tendersamespanning
Nywerheidsgas	Markverdeling
Oplosmiddels	Horisontale pryssamespanning
Ouditdienste	Horisontale prysaanbeveling ten opsigte van sekere sekretariële dienste
Plate	Horisontale pryssamespanning

Pype/...

Handelsartikel	Praktyke en Beweerde Praktyke
Pype - beton - stormwater- en toebehore - versinkte staal en toebehore - ander toebehore	Horisontale pryssamespanning Tendersamespanning
Regsdienste	Horisontale pryssamespanning
Reisagentskapsdienste	Horisontale pryssamespanning
Reklamedienste	Horisontale pryssamespanning
Rolprente	Horisontale pryssamespanning
Sement	Horisontale pryssamespanning; Markverdeling; Tendersamespanning
Sigarette	Horisontale pryssamespanning; Tendersamespanning
Sop - verpakte sop	Horisontale pryssamespanning
Spoelbakke, plasties	Horisontale pryssamespanning; Markverdeling
Steenkool	Markverdeling; Tendersamespanning; Pryssamespanning
Suurdeeg	Horisontale pryssamespanning
Televisiestelle	Horisontale pryssamespanning
Verf	Horisontale pryssamespanning
Versekeringsdienste (Korttermyn)	Horisontale pryssamespanning; Markverdeling
Versekeringsdienste	Horisontale prysaanbeveling
Vervoerbande	Samespanning op tenders
Vismeel	Markverdeling (gesamentlike bemarking); Horisontale pryssamespanning
Voedsel - bevrore	Horisontale pryssamespanning
Vragversendingsdienste	Horisontale prysaanbeveling
Waspoeier	Horisontale pryssamespanning

206. Die omstandighede in Suid-Afrika is beslis ook gunstig en bevorderlik vir die voorkoms van die praktyke. In hierdie verband help die uiters hoë graad van konsentrasie van ekonomiese mag in die Suid-Afrikaanse ekonomie die praktyke aan. Die struktuur van baie van die bedryfstakke wat as duopolisties of oligopolisties beskryf kan word, is klaarblyklik ook meewerkende faktore. Hierbenewens is die aard van die handelsartikel en die vervaardigingsproses dikwels ook sodanig dat die verkopers van die handelsartikels probeer om hulle teen mededinging te verskans. In hierdie verband is die homogene aard van baie van die handelsartikels, die groot investering en die relatief hoë aandeel van die vaste koste in die produksieproses na alle waarskynlikheid ter sake.

207./...

207. Die eienskap van die mark, wat veral klein van omvang is en uit 'n groot aantal, dikwels klein, kopers bestaan, dra ook by tot die bestaan van die praktyke. Tot welke mate die praktyke as teenkrag aangewend word, is nie duidelik nie. Nogtans kan dit nie betwyfel word nie dat ander praktyke, voortspruitend uit magte wat uit wette en regulasies verkry word, wel as 'n rede gesien kan word om teenkrag uit te oefen.

208. Op grond van die Raad se ervaring en uit die voorleggings is dit duidelik dat die praktyke van samespanning oor pryse en voorwaardes, markverdeling en beperkende tenders in 'n groot verskeidenheid van vorme kan voorkom. Dit wissel van regstreekse tot onregstreekse praktyke; informele praktyke tussen twee of meer partye tot formele praktyke tussen markpartye; en van praktyke wat nie afdwingbaar is nie tot dié wat afdwingbaar is deur verskillende vorme van strafsanksies. In sekere gevalle word die betrokke praktyke deur handelsverenigings geadministreer.

209. Aangesien die Republiek se mededingingswetgewing nie voorsiening maak vir die verpligte registrasie van beperkende praktyke soos in sekere ander lande nie, is dit 'n bykans onmoontlike taak om die volle omvang van die praktyke in die Suid-Afrikaanse ekonomie deur 'n ondersoek van hierdie aard presies vas te stel, veral vanweë die groot verskeidenheid van vorme waarin die praktyke kan voorkom en die dikwelse "geheime" aard daarvan. Wat wel waar is, is dat die omvang of voorkoms van die praktyke groter is as wat aanvanklik deur die Raad vermoed is. Etlike bedryfstakke het praktyke aangemeld na aanleiding van die ondersoek waarvan die Raad tot hiertoe geen vermoede gehad het dat dit wel bestaan nie.

HOOFSTUK V/...

HOOFSTUK V

DIE VRAAG OF DIE BETROKKE PRAKTYKE "BEPERKENDE PRAKTYKE" UITMAAK

INLEIDING

210. In hierdie hoofstuk word vasgestel of die praktyke in Hoofstuk II beskryf vir beperkende praktyke ingevolge die Wet op die Handhawing en Bevordering van Mededinging, 1979, verantwoordelik is of kan wees.

211. Artikel 1 van die Wet omskryf 'n "beperkende praktyk" as -

"(a) enige ooreenkoms, reëling of verstandhouding, hetsy regtens afdwingbaar of nie, tussen twee of meer persone; of

(b) enige besigheidspraktyk of handelsmetode, met inbegrip van enige metode om pryse vas te stel, hetsy deur die verskaffer van enige handelsartikel of andersins; of

(c) enige handeling of versuim deur enigiemand, hetsy hy onafhanklik of tesame met iemand anders optree; of

(d) enige toestand wat uit bedrywighede van enige persoon of klas of groepe persone ontstaan,

wat, deurdat dit mededinging regstreeks of onregstreeks beperk, die uitwerking het of waarskynlik sal hê om -

(i) die produksie of distribusie van enige handelsartikel te beperk; of

(ii) die fasiliteite beskikbaar vir die produksie of distribusie van enige handelsartikel in te kort; of

(iii) die prys van enige handelsartikel te verhoog of te handhaaf; of

(iv) die produksie of distribusie van enige handelsartikel op die mees doeltreffende en ekonomiese manier te verhoed; of

(v) die ontwikkeling of invoering van tegniese verbeterings of die uitbreiding van bestaande of die skepping van nuwe markte te verhoed of te vertraag; of

(vi) die toetrede van nuwe produsente of distribueerders tot enige tak van die handel of nywerheid te verhoed of te beperk; of

(vii) die aanpassing van enige beroep of tak van die handel of nywerheid by veranderde toestande te verhoed of te vertraag."

212. Gevolglik bestaan 'n "beperkende praktyk" wanneer die volgende drie elemente gelyktydig teenwoordig is -

(a) 'n beperking op mededinging, hetsy regstreeks of onregstreeks;

(b) die beperking op mededinging een of meer van die resultate genommer (i) tot (vii) hierbo ten gevolge het of dit waarskynlik sal hê; en

(c) die beperking op mededinging die gevolg is van een of meer van die toestande genommer (a) tot (d) hierbo.

213. Geen twyfel kan bestaan dat die betrokke praktyke aan (c) hierbo voldoen nie.

214. By 'n beoordeling van die vraag of die betrokke praktyke vir 'n beperking op mededinging verantwoordelik is (die eerste element, (a) hierbo), is dit uit getuienis ontvang en volgens sy ondervinding vir die Raad duidelik dat al die betrokke praktyke mededinging regstreeks of onregstreeks in verskillende opsigte beperk of kan beperk. Uit die getuienis blyk dat mededingers vanweë die praktyke nie tot die beste van hul vermoë kan meeding of in staat gestel

word/...

word om mee te ding nie. Hierdeur ontken die Raad nie dat strawwe mededinging wel op ander gebiede moontlik is en inderdaad wel plaasvind ten spyte van die uitskakeling van mededinging op een terrein nie. Die vraag is egter of effektiewe mededinging bestaan of nie.

215. In hierdie verband stem die Raad saam met die Verslag van die Studiegroep oor Strategie vir Nywerheidsontwikkeling se beskouing dat effektiewe mededinging, wat 'n noodsaaklike voorwaarde vir die doeltreffende funksionering van die markekonomie is, 'n marksituasie verteenwoordig wat -

(i) nie noodwendig volledige mededinging is nie, maar voorsiening maak vir toetrede, 'n keuse vir kopers laat en geen verskaffer in 'n posisie plaas om sy voorwaardes (onder meer pryse) op kopers af te dwing nie;

(ii) prakties doenlik is; en

(iii) met die openbare belang versoenbaar is.

216. Dit is duidelik dat by enige praktyk wat hier ondersoek word, oneffektiewe mededinging, in die lig van die genoemde kriteria, ten spyte van strawwe mededinging in sekere opsigte wel moontlik is. Ook is dit moontlik dat die betrokke praktyke geen noemenswaardige uitwerking op mededinging het nie. Dan ontstaan die vraag waarom die betrokke praktyke dan beoefen word.

217. Die Raad twyfel nie daaraan dat al die besigheidsooreenkomste, reëlings, verstandhoudings, besigheidspraktyke of handelsmetodes in verband met samespanning oor pryse en voorwaardes, markverdeling en beperkende tenders wat in Hoofstuk II geïdentifiseer is mededinging regstreeks of onregstreeks beperk.

218. Vervolgens word die vraag oorweeg of aan die tweede element van 'n beperkende praktyk, in (b) hierbo vermeld, voldoen word.

SAMESPANNING OOR PRYSE EN VOORWAARDES[1)]

1. Horisontale pryssamespanning

(a) Pryse en voorwaardes

219. Soos in Hoofstuk II uiteengesit, word horisontale pryssamespanning omskryf as enige ooreenkoms, verstandhouding of reëling wat vir 'n gemeenskaplike doel prysmededinging regstreeks of onregstreeks tussen die betrokke partye kan uitskakel, verminder of beheer. Gevolglik tree die individuele verskaffer nie onafhanklik op nie, maar saam met ander partye en derhalwe word die individuele onderneming se vryheid om self na goeddunke op te tree, beperk.

220. Die praktyk het betrekking op 'n toestand waar twee of meer ondernemings saamspan om op 'n gesamentlike grondslag pryse vir hul handelsartikels vas te stel. Die partye elimineer dus bewustelik een element wat in 'n mededingende toestand ondernemings van mekaar onderskei, te wete prys. Dit is duidelik dat ondernemings onder mededingende toestande op 'n aantal vlakke met mekaar sal meeding, onder meer op grond van die produk, kwaliteit, prys, verkoopsvoorwaardes en lewering. Hierdie elemente kan as 'n onafskeidbare stel voorwaardes beskou word. Indien een of meer elemente uit die stel gelaat word, het dit 'n negatiewe of beperkende invloed op mededinging.

221. 'n Regstreekse gevolg van effektiewe mededinging is dat dit marges onder druk plaas en hoër produktiwiteit vereis ten einde realistiese marges te behou of te bereik. Pryssamespanning verminder die afwaartse druk op pryse sodat pryse sal neig om hoër te wees as wat andersins die geval sou wees.

222. Voorts sal die voordele van hoër produktiwiteit of tegniese vernuwing en verbetering nie by wyse van 'n prysvermindering na die afnemer deurgevoer word nie maar sal dit neig om hoofsaaklik die verskaffer se marges te verhoog. Aangesien samespanning ten opsigte van pryse ook daarop gemik kan wees om mededinging buite die groep teen te werk, kan dit beperkend op toetrede tot 'n bedryfstak inwerk; die blote bestaan van so 'n ooreenkoms kan toetrede inhibeer.

223./...

1) Soos vroeër genoem, word ook in hierdie hoofstuk die begrip prys of pryse gebruik om pryse sowel as voorwaardes in te sluit.

223. 'n Uiters nadelige ekonomiese gevolg van horisontale samespanning oor pryse is dat dit neig om ondoeltreffendheid te bevorder. Onder mededingende toestande sal die ondoeltreffende verskaffer neig om mettertyd van die mark te verdwyn. Die aard van pryssamespanning is juis dat dit elke deelnemer se omstandighede in berekening bring. Die prys wat uit die samespanning voortvloei, sal gevolglik neig om die bestaan van die relatief ondoeltreffende deelnemer te verseker of minstens te verbeter. Deurdat die prys waarop gesamentlik ooreengekom word die mees ondoeltreffende onderneming ook moet pas, word die opwaartse druk op pryse verstewig tot voordeel van die relatief doeltreffende ondernemings en ten koste van die afnemers.

224. Ten slotte is dit uit die getuienis aan die Raad duidelik dat 'n groep dikwels veel stadiger by veranderde omstandighede aanpas as 'n individuele onderneming. By 'n samespannende situasie moet die groep in sy geheel in 'n bepaalde rigting beweeg, en dan slegs wanneer almal of die meerderheid van die lede daartoe instem.

225. Uit die getuienis blyk dit ook dat die praktyk van horisontale prysbinding mededinging resgstreeks of onregstreeks kan beperk. Geen twyfel kan bestaan nie dat hierdie beperking die uitwerking het of waarskynlik sal hê om pryse te verhoog of te handhaaf, die produksie of distribusie op die mees doeltreffende en ekonomiese manier te verhoed en om die toetrede van nuwe produsente of distribueerders te verhoed of te beperk. Dit is derhalwe 'n beperkende praktyk ingevolge die Wet.

(b) Prysinligtingstelsels

226. Hierdie praktyk behels die uitruil van prysinligting tussen verskaffers wat op dieselfde vlak van die produksie- en distribusieketting sake doen.

227. Die Raad is daarvan oortuig dat die uitruil van prysinligting die effek kan hê, of dit so beplan is al dan nie, om pryse op verskaffersvlak op soortgelyke peile te bring en te hou. So is dit vir 'n verskaffer onnodig om deur marknavorsing vas te stel teen welke pryse sy mededingers hul handelsartikels in die mark plaas. Die egalisering van pryse het weer 'n duidelike effek om verskille tussen soortgelyke handelsartikels na elemente anders as pryse te verskuif terwyl die verskille tussen verskaffers ook op die agtergrond geskuif word.

228. Die uitruil van prysinligting kan dus in die praktyk dieselfde uitwerking hê as wat by horisontale pryssamespanning die geval is, dit wil sê, starheid in pryse, die behoud van die status quo tussen verskaffers en die ontmoediging van doeltreffendheid.

229. Derhalwe het die Raad geen twyfel dat hierdie praktyk, wat wel beperkend op mededinging kan inwerk, 'n beperkende praktyk ingevolge die Wet is nie. Indien dit nie die bedoeling van die verskillende partye sou wees om die pryse op die een of ander wyse aan die prysinligtingstelsels te koppel nie sou daar immers geen sin in die uitruiling wees nie. Nietemin is daar nie noodwendig samespanning om die pryse op 'n spesifieke vlak vas te stel nie.

2. Vertikale pryssamespanning (handhawing van herverkooppryse)

230. Die praktyk van vertikale pryssamespanning wat alom bekend staan as herverkoopprysh andhawing, verwys na die handelspraktyk waar 'n verskaffer aan 'n afnemer of groep afnemers voorskryf teen welke vaste of minimumpryse die afnemer die handelsartikel mag verkoop. Terselfdertyd word druk uitgeoefen om toe te sien dat die afnemers (herverkopers) by die neergelegde pryse hou.

231. Die Raad van Handel en Nywerheid het in sy ondersoek na individuele en gesamentlike prysbinding in die Republiek van Suid-Afrika[1] bevind dat die praktyk van herverkoopprysh andhawing wel beperkend op mededinging inwerk. Gemeet aan die definisie van 'n beperkende praktyk is bevind dat die handhawing van herverkooppryse -

in/...

1) Raad van Handel en Nywerheid, Ondersoek na individuele en gesamentlike prysbinding in die Republiek van Suid-Afrika, Verslag No 1220(M), Desember 1967.

in sy wese die distribusie van die teiken-handelsartikels tot 'n bepaalde groep (herverkopers) sal beperk, naamlik tot dié wat bereid is om die voorgeskrewe pryse te handhaaf. Grootskaalse laekoste-ondernemings sal byvoorbeeld neig om daardie handelsartikels wat pryssensitief is en waar skaalbesparings na die finale afnemer deurgevoer word bo die handelsartikels wat aan prysbinding onderhewig is, te verkies, veral omdat hulle normaalweg nie daarmee gediend is dat die verskaffers hul vryheid van optrede aan bande lê nie;

uiteraard daarop gemik is om prysmededinging tussen herverkopers uit te skakel. Dit beteken dat pryse nie alleen gehandhaaf word nie, maar dat dit voorts op peile vasgestel kan word wat hoër is as wat in 'n mededingende situasie die geval sou wees;

tot gevolg het dat die verkoopprys van 'n handelsartikel min verband hou met die kostestruktuur van elke individuele herverkoper; die moontlikheid om byvoorbeeld distribusiekostebesparings na die afnemer deur te voer word geheel en al beperk. Die druk op herverkopers om hul doeltreffendheid te verhoog ten einde redelike marges te bereik, word deur gewaarborgde minimummarges verlaag, en sodoende kan doeltreffendheid inderdaad teengewerk word. Die gevolg is ernstige diskriminasie tussen die finale kopers wat deur die praktyk gedwing word om dieselfde vir 'n handelsartikel te betaal afgesien van die aard en gehalte van die dienste wat daarmee gepaard gaan; en

toetrede van 'n mededingende produk kan bemoeilik aangesien die verstarring van marges en skepping van "gebonde" of "simpatieke" of "getroue" herverkopers beteken dat daardie groep herverkopers in alle waarskynlikheid nie vir nuwe toetreders beskikbaar sal wees nie.

232. Die Raad op Mededinging is van mening dat die oorwegings wat destyds gegeld het, steeds van toepassing is en dat die praktyk 'n beperkende praktyk is.

3. Aanbevole pryse

233. 'n Aanbevole prys is 'n verklaring waarin een instansie aandui dat 'n bepaalde prysvastellingsmetode of prys vir 'n ander instansie tot voordeel kan strek en derhalwe 'n aanbeveling doen dat die prys gevolg behoort te word. Aanbevole pryse kan in drie groepe verdeel word, naamlik horisontale aanbevole pryse, gesamentlike vertikale aanbevole pryse en individuele vertikale aanbevole pryse. Hierdie groepe word vervolgens van nader beskou.

(a) Horisontale aanbevole pryse

234. Horisontale aanbevole pryse word gewoonlik deur 'n organisasie wat verskaffers (vervaardigers, groothandelaars, kleinhandelaars, professionele groepe of verskaffers van dienste) in 'n bepaalde bedryfstak verteenwoordig, uitgereik en behels 'n aanbeveling van die pryse waarteen die betrokke verskaffers hul handelsartikels aan hul afnemers moet voorsien. Verskaffers kan ook op minder formele wyses byeenkom om gesamentlik hul pryse te bepaal.

235. Die antwoord op die vraag of hierdie praktyk beperkend op mededinging kan inwerk, word gevind in die invloed wat dit in die mark self uitoefen. In die eerste plek is dit so dat aanbevole pryse in die algemeen neig om die geldende pryse te wees; waar 'n hele groep verskaffers dus by die aanbeveling betrokke is, kan die prys dus vir die hele groep die geldende prys wees. In die praktyk word die aanbevole prys dus dikwels die geldende prys en aangesien al die verskaffers wat daarby betrokke is die aanbeveling stilswyend kan aanvaar of as leidraad gebruik, word prysmededinging in 'n mindere of meerdere mate uitgeskakel of verminder.

236. 'n Vermindering in prysmededinging kan tot gevolg hê dat pryse op 'n hoër peil vasgestel word as wat andersins die geval sou gewees het. Ook kan die praktyk tot gevolg hê dat die uitskakeling van prysmededinging daartoe aanleiding kan gee dat die relatiewe posisie van verskaffers in die mark verstar. Soos in die geval van horisontale pryssamespanning kan hierdie praktyk dus tot die behoud van die status quo tussen verskaffers lei en neig om ondoeltreffendheid te bevorder.

237. Min twyfel kan derhalwe bestaan dat die praktyk wel as 'n beperkende praktyk ingevolge die Wet beskou kan word.

(b)/...

(b) Gesamentlike vertikale aanbevole pryse

238. 'n Metode vir gesamentlike vertikaal aanbevole pryse, alhoewel dit nie algemeen voorkom nie, is waar 'n verteenwoordigende handelsvereniging namens die verskaffers (nie herverkopers nie) aanbevelings doen oor herverkoopprys. Praktiese ondervinding het geleer dat aanbevole pryse tot 'n baie hoë mate die geldende prys by transaksies is[1] en vroeër is reeds bevind[2] dat 'n stelsel van aanbevole pryse wel die ontwikkeling van effektiewe mededinging kan vertraag. Dit is duidelik dat die neerlegging van aanbevole pryse 'n gesamentlike aksie is waardeur die verskaffer sy onafhanklikheid by prysvasstelling vrywilliglik opsê.

239. Deur deel te wees van die gesamentlike aksie verbind die verskaffer homself tot die gevolge daarvan in die mark wat in wese neerkom op eenvormigheid in pryse en marges. Uit die getuienis blyk duidelik dat die herverkoper in hierdie situasie tot 'n hoë mate gelei word in die rigting wat die prysvoorskrywers (-aanbevelers) gerade ag terwyl gesamentlike aanbevole pryse sal neig om die verskille tussen soortgelyke handelsartikels op die agtergrond te skuif. Dit kan inderdaad onomwonde gestel word dat so 'n praktyk aanleiding kan gee tot prysstarheid en die effektiewe uitskakeling van prysmededinging. Getuienis wat onder die Raad se aandag gebring is, dui daarop dat dit juis die subtiele metodes is wat toegepas word om verskille tussen handelsartikels op 'n herverkoopvlak uit te skakel, wat in wese daartoe lei dat dieselfde pryse vir soortgelyke handelsartikels betaal word ongeag die koste om die artikels te produseer. 'n Ernstiger aspek van hierdie gevolg is dat eenvormige pryse dikwels by herverkopers geld hoewel die praktyk van herverkoopprysbandhawing onwettig is. Sodoende word die bestaande verbod omseil.

240. Gemeet aan die definisie van 'n beperkende praktyk bestaan by die Raad in die lig van die gevolge of moontlike gevolge daarvan geen twyfel dat hierdie praktyk mededinging wel beperk of kan beperk, nie alleen op 'n horisontale grondslag nie, maar ook op 'n herverkopersvlak. Dit volg derhalwe onvermydelik dat die uitwerking van vertikaal-gesamentlike aanbevelings in die praktyk dieselfde as dié vir herverkoopprysbandhawing is.

(c) Individuele vertikale aanbevole pryse

241. 'n Aanbeveling oor herverkoopprys in hierdie groep kom baie algemeen voor en behels 'n aanbeveling van die verkoopprys deur 'n enkele verskaffer aan die afnemers van sy handelsartikel.

242. Soos in die vorige gevalle waar pryse vertikaal aanbeveel word, word in die praktyk ondervind dat die aanbevole prys sal neig om die geldende prys te wees. Of dit die bedoeling is of nie, 'n aanbeveling deur 'n verskaffer kan neig om in baie gevalle pryse te verhoog of te handhaaf, veral aangesien die herverkoper se aankoopprys dikwels op aanbevole herverkoopprys gebaseer is. Dit is vir die Raad duidelik dat in baie gevalle waar wel van aanbevole pryse afgewyk word, dit plaasvind omdat aanbevole pryse doelbewus hoog vasgestel word sodat herverkopers groot kortings kan toestaan ten einde op dié wyse klante te lok. Dit kan die gevolg hê dat die finale koper daarna strewe om die grootste korting op 'n gegewe aanbevole prys te bekom en dat die werklike koopprys van die handelsartikel van ondergeskikte belang word. Sodoende word die deursigtigheid van die mark vertroebel en prysvergelykings bemoeilik.

243. Die Raad is in die geval van individuele vertikale aanbevole pryse daarvan oortuig dat die praktyk, deurdat dit mededinging regstreeks of onregstreeks beperk, en die uitwerking het of waarskynlik sal hê om pryse te verhoog of te handhaaf, 'n beperkende praktyk ingevolge die Wet is.

MARKVERDELING

1. Horisontale markverdeling

244. Horisontale markverdeling geskied tussen verskaffers, en soms tussen verbruikers, op dieselfde vlak van die produksie- en distribusieketting en van dieselfde of min of meer dieselfde handelsartikels (met dieselfde of verskillende handelsmerke) wat dieselfde behoeftes kan bevredig. Elk van die versakffers sal in 'n markgeoriënteerde ekonomiese stelsel normaalweg met mekaar meeding met die doel om winste te maksimeer of om bevredigende wins te behaal. Dit

impliseer/...

1) Kyk Verslag No 1220(M), van die Raad van Handel en Nywerheid, Ondersoek na individuele en gesamentlike prysbinding in die Republiek van Suid-Afrika, par. 291.

2) Verslag No 1220(M), par. 394.

impliseer dat die onderskeie verskaffers met mekaar sal meeding, onder meer deur middel van produkbeleid, prysbeleid, distribusiebeleid en verkoopsbevorderingsbeleid (die beleidsinstrumente van bemarking) met die doel om elkeen sy eie markaandeel uit te brei of minstens te beskerm. Horisontale markverdeling verhoed, beperk of reguleer gewoonlik hierdie mededinging wat in 'n markgeoriënteerde ekonomiese stelsel verwag kan word.

245. Die aard en moontlike gevolge van sodanige beperkinge word vervolgens vir die onderskeie vorme van horisontale markverdeling bespreek.

(a) Die onderlinge verdeling of toekenning van markte deur verskaffers

246. Die onderlinge verdeling of toekenning van markte deur verskaffers in die vorm van, onder meer, die toekenning van verbruikers of verskillende kategorieë verbruikers, volgens geografiese gebiede of kwantitatiewe beperkinge, het die uitwerking om òf vir elke verskaffer sy eie afgebakende mark te skep sodat verskaffers nie in dieselfde mark meeding nie, òf die hoeveelheid van 'n produk of diens wat gesamentlik deur al die verskaffers voorsien word tot die vraag of die omvang van die mark te beperk. In laasgenoemde geval word mededinging om markaandeel te vergroot, uitgeskakel sodat elkeen se proporsionele markaandeel beskerm word. 'n Verskaffer sal sy volle kwota vir 'n bepaalde tydperk kan verkoop mits sy produk fisies en prysgewys vir die mark aanvaarbaar is.

247. Soos vroeër gemeld, is dit duidelik dat hierdie vorme van markverdeling mededinging regstreeks of onregstreeks beperk. Die gevolge of waarskynlike gevolge van so 'n beperking van mededinging sluit die verhoging of handhawing van pryse in deurdat verskaffers nie onderling op 'n prysbasis hoef mee te ding nie, en deurdat dit die distribusie van 'n produk op die mees doeltreffende en ekonomiese manier kan verhoed aangesien toekennings op 'n arbitrêre grondslag sonder inagneming van enige bedryfsekonomiese oorwegings kan geskied. Die uitbreiding van bestaande of die skepping van nuwe markte kan verhoed of vertraag word, veral in die geval van kwantitatiewe beperkings. Dit kan ook die toetrede van nuwe produsente of distribueerders verhoed of beperk omdat die bestaande verskaffers nie onderling meeding nie en individueel of gesamentlik doeltreffender teen nuwe toetreders kan optree.

248. Min twyfel kan dus bestaan dat hierdie vorm van markverdeling 'n beperkende praktyk ingevolge die Wet is.

(b) Beperkinge op produksie of aanbod

249. Onderlinge beperkinge op die produksie van goedere of die aanbod van dienste in die vorme van, onder meer, kwantitatiewe beperkinge (kwotas) en beperkinge op fasiliteite het gewoonlik die uitwerking dat verskaffers die aanbod beperk tot die beskikbare mark of vraag en dat dit gevolglik nie vir verskaffers nodig of moontlik is om deur middel van veral prysbeleid, distribusiebeleid en verkoopsbevorderingsbeleid met mekaar mee te ding om hul markaandeel te beskerm of uit te brei nie. Aangesien die prys in 'n markgeoriënteerde ekonomiese stelsel deur die vraag en die aanbod bepaal word, kan sulke beperkinge op die produksie, en gevolglik op die aanbod, bydra tot die handhawing of verhoging van pryse en kan dit trouens in die plek van pryssamespanning gebruik word, of om daardie praktyk te ondersteun.

250. Beperkinge op die produksie of aanbod en fasiliteite vir produksie of distribusie is op sigself gevolge wat in die omskrywing van beperkende praktyke ingesluit is. Dit is voorts duidelik dat sodanige beperkinge, deurdat dit mededinging regstreeks of onregstreeks beperk, ook sekere van die ander omskrewe gevolge sal hê of waarskynlik sal hê, onder meer om pryse te verhoog of te handhaaf; die produksie of distribusie van enige handelsartikel op die mees doeltreffende en ekonomiese manier te verhoed; en die aanpassing van enige beroep of tak van die handel of nywerheid by veranderde toestande te verhoed of te vertraag.

251. Onregstreekse beperkinge op produksie deur die gebruik van tegnologie, modelle, patentregte, outeursregte en handelsmerke kan ook tot gevolg hê dat mededinging beperk word deurdat verskaffers saamspan om nuwe tegnologieë en regte nie te gebruik nie tot tyd en wyl kapitaal wat in bestaande fasiliteite geïnvesteer is, verhaal is, of om tegnologie of regte tussen die samespannende partye te poel of kruislisensiëring tot die verskaffers wat saamspan, te beperk en sodoende ander verskaffers of potensiële verskaffers uit die mark te hou. Dit kan ook gebruik word om markverdeling te ondersteun of doeltreffender te maak deur partye wat nie ook die tegnologie of reg beskik nie, daarmee te dwing om hulle aan markverdeling of ander samespanningspraktyke te onderwerp, of hulle daarmee te dwing om beperkende voorwaardes te aanvaar.

Hierdie/...

Hierdie vorme van beperkinge op produksie sal dus mededinging regstreeks of onregstreeks beperk en verskeie van die omskrewe gevolge hê, of waarskynlik hê, veral in dié opsig dat dit produksie en distribusie kan beperk; gebruik kan word om pryse te verhoog of te handhaaf; die invoering van tegniese verbeterings kan verhoed of vertraag; en die toetrede van nuwe verskaffers kan verhoed of beperk.

252. Beperkinge op die verskeidenheid produkte of dienste wat deur elkeen van 'n groep verskaffers vervaardig of aangebied word, of die opdeling van die produksieproses in opeenvolgende stadia en die onderlinge toekenning van daardie stadia, bring 'n vermindering van die aantal verskaffers van 'n spesifieke produk of diens mee en kom gevolglik ook neer op die toekenning van 'n bepaalde marksegment aan enkele verskaffers. Dit het gewoonlik ten doel, en ook tot gevolg, dat mededinging tussen die verminderde aantal verskaffers beperk word deurdat elkeen se bemarkingspoging ten aansien van die spesifieke produk of diens nie tot volle uiting kom nie. Sodanige optrede kan, deurdat dit mededinging regstreeks of onregstreeks beperk, een of meer van die omskrewe gevolge van 'n beperkende praktyk hê, of waarskynlik hê, onder meer om die fasiliteite beskikbaar vir produksie en distribusie te beperk en die toetrede van nuwe verskaffers van 'n produk of diens te verhoed of te beperk.

253. Dit is dus duidelik dat beperkinge op produksie beperkende praktyke ingevolge die Wet uitmaak.

(c) Gesamentlike ondernemings

254. Gesamentlike ondernemings kan 'n verskeidenheid van vorme aanneem en met uiteenlopende oogmerke aangewend word. Die aspek hier ter sprake, is of die skepping van gesamentlike ondernemings as 'n beperkende praktyk ingevolge die Wet beskou kan word.

255. Samespanning in die geval van gesamentlike ondernemings kom nie voor by die bedryf van die (enkele) onderneming as sodanig nie maar 'n ooreenkoms, reëling of verstandhouding bestaan wel by die stigting van die gesamentlike onderneming, hetsy in die vorm (meestal) van 'n kontrak, deelname aan die stigting of die storting van kapitaal, of deur die bestuur van die onderneming op een of ander regstreekse of onregstreekse wyse.

256. Die moontlike beperkinge op mededinging wat uit gesamentlike ondernemings voortspruit, kan regstreeks of voortspruitend wees. Regstreekse beperkinge ontstaan in gevalle waar die stigting van gesamentlike ondernemings die effek het om bestaande mededinging tussen die stigters uit te skakel, ongeag of dit die doel van die gesamentlike onderneming is. Dit kan horisontaal geskied, waar so 'n onderneming die bestaande aktiwiteite van die twee of meer stigters in dieselfde mark oorneem (dit kan gewoonlik ook as 'n samesmelting of oorname beskou word), of vertikaal, waar die gesamentlike onderneming sekere vertikale funksies van die stigters behartig, soos by poeltipe-ondernemings vir die verskaffing van grondstowwe of die bemarking van eindprodukte. In hierdie gevalle word die aantal mededingers verminder wat, in die geval van twee stigters met relatief groot markaandele, 'n ernstige uitwerking op mededinging kan hê of in 'n duopolistiese of oligopolistiese markstruktuur mededinging totaal kan uitskakel. Die gesamentlike onderneming kan ook 'n mededingende voordeel bo sy mededingers verkry deur onder meer die verkryging van gunstiger aankoop- en verkoopvoorwaardes as gevolg van groter hoeveelhede, en sodoende toetrede verhoed of beperk.

257. Voortspruitende beperkinge op mededinging sluit in beperkinge op mededinging tussen die stigters in ander markte, wat voortspruit uit die band of samewerking wat deur middel van die gesamentlike onderneming tussen hulle geskep word, die beperking op potensiële mededinging deur die toetrede van 'n enkele gesamentlike onderneming tot 'n nuwe mark in die plek van die moontlike toetrede deur elkeen van die twee of meer stigters, asook die uitsluiting van bestaande of potensiële nuwe verskaffers of afnemers deur gesamentlike ondernemings tussen stigters wat in 'n vertikale verhouding tot mekaar staan. Selfs in die geval van 'n gesamentlike onderneming met die oog op navorsing en ontwikkeling kan mededinging beperk word as die deelnemers deur die verbeterde produk wat hulle ontwikkel het 'n mededingende voordeel bo hulle mededingers verkry of die toetrede van nuwe produsente tot die betrokke tak van die handel of nywerheid daardeur verhoed of beperk word.

258. Dit is duidelik dat gesamentlike ondernemings, deurdat dit mededinging regstreeks of onregstreeks kan beperk, een of meer van die omskrewe gevolge van 'n beperkende praktyk het, of waarskynlik sal hê, onder meer deurdat dit die produksie of distribusie van enige handelsartikel beperk; die fasiliteite beskikbaar vir die produksie of distribusie van enige handelsartikel inkort; pryse verhoog of handhaaf; of toetrede deur nuwe produsente of distribueerders/...

eerders verhoed of beperk. Gevolglik kan hierdie praktyk as 'n beperkende praktyk ingevolge die Wet geag word.

2. Vertikale markverdeling

259. Vertikale markverdeling in die vorm van die toekenning, deur 'n verskaffer, van markte aan die herverkopers van sy handelsartikels in die vorm van geografiese gebiede of van verbruikers of klasse verbruikers bring mee dat die mededinging wat normaalweg tussen die herverkopers van dieselfde produk sal voorkom, uitgeskakel of verminder word. Mededinging tussen die distribueerders van die verskaffers se produkte sal normaalweg dan beperk word tot die mededingende produkte van ander verskaffers wat òf dieselfde produkte met ander handelsmerke òf substituutprodukte kan wees. Mits die prys en gehalte van die betrokke produk gunstig met dié van mededingende produkte vergelyk, sal daar geen, of minstens minder, druk op die herverkopers van die bepaalde produk wees om pryse te verminder of hulle fasiliteite of diens te verbeter nie. Terselfdertyd word toetrede tot die bepaalde mark beperk, of indien al die verskaffers in 'n oligopolistiese markstruktuur vertikale markverdeling sou toepas, heeltemal verhoed.

260. In die geval van tweeledige distribusie, dit wil sê waar 'n verskaffer sy eie afsetpunte of -organisasie het maar ook van geselekteerde herverkopers gebruik maak, kan vertikale markverdeling daarop gemik wees om die verskaffer se eie afsetpunte of -organisasie teen mededinging te beskerm.

261. Vertikale markverdeling beperk dus mededinging regstreeks of onregstreeks en dit is duidelik dat uit sodanige beperking een of meer van die omskrewe gevolge van 'n beperkende praktyk sal ontstaan of waarskynlik sal ontstaan, naamlik die verhoging of handhawing van pryse; om toetrede te verhoog of te beperk; om die produksie of distribusie van handelsartikels te beperk; om die fasiliteite beskikbaar vir die produksie of distribusie van handelsartikels in te kort; om die produksie of distribusie van 'n handelsartikel op die mees doeltreffende en ekonomiese manier te verhoed; om die uitbreiding van bestaande of die skepping van nuwe markte te verhoed of te vertraag; en om die toetrede van nuwe produsente of distribueerders tot enige tak van die handel of nywerheid te verhoed of te beperk. Dit voldoen gevolglik aan die vereistes vir 'n beperkende praktyk.

BEPERKENDE TENDERPRAKTYKE

1. Identiese tenders

(a) Standaardtenderdokumente en -voorwaardes

262. Identiese tenders behels onder meer die bestaan van standaardtenderdokumente waarop die vooraf vasgestelde voorwaardes waarop tenderaars moet tender, aangedui is. Die individuele tenderaar word gevolglik nie toegelaat om self gunstiger voorwaardes op sy tender aan te dui nie. Dit het tot gevolg dat die een nie in 'n beter mededingende posisie vis-à-vis die ander met betrekking tot die tendervoorwaardes kan verkeer nie. Trouens, die eintlike doel van standaardtenderdokumente (tendervoorwaardes) is om tenderaars in staat te stel om op gelyke voet ten opsigte van tendervoorwaardes te tender. Die aanbieders verkeer gevolglik in 'n veel sterker posisie as die aanvraers en deur die aanwending van ander manipulasiemetodes kan 'n toestand ontstaan waarin tenderkopers geen ander keuse het as om die eenvormige voorwaardes wat in die tenderdokumente gestel is, te aanvaar nie.

263. By die Raad bestaan geen twyfel nie dat hierdie vorm van tenderpraktyk mededinging regstreeks of onregstreeks beperk, en die uitwerking het of waarskynlik sal hê om die fasiliteite beskikbaar vir die distribusie van die gevraagde handelsartikel vir die aanvraer in te kort. Dit kan ook die distribusie van 'n handelsartikel op die mees doeltreffende en ekonomiese manier verhoed of die invoering van tegniese verbeterings en die aanpassing by veranderde omstandighede verhoed of vertraag. Derhalwe is die gebruik van standaardtenderdokumente en -voorwaardes 'n beperkende praktyk ingevolge die Wet.

(b) Tenderpryse

264. Samespanning met die doel om identiese tenderpryse teweeg te bring, het gewoonlik as onderliggende oogmerk die uitskakeling van prysmededinging. Selfs al is dit nie die uitdruklike oogmerk nie, word prysmededinging by implikasie uitgeskakel. Identiese tenderpryse wat ontstaan as gevolg van die gebruikmaking van gemeenskaplike pryslyste of 'n eenvormige diskontoskaal skakel eweneens prysmededinging uit. Dat identiese tenderpryse mededinging regstreeks uitskakel, staan dus bo alle redelike twyfel.

265./...

265. Die handhawing van pryse, minstens met betrekking tot 'n spesifieke tender, is die klaarblyklike gevolg van identiese tenderpryse. Gewoonlik kring dit wyer uit sodat pryse oor die algemeen gehandhaaf word. Dit kan selfs 'n prysverhogende uitwerking hê. Indien die ooreengekome tenderprys laer as die heersende prys is, is dit wel prysverlagend ten opsigte van daardie spesifieke tender, maar omdat vir "verliese" aldus gely gewoonlik vergoed word deur hoër pryse elders, kan identiese tenderpryse neig om pryse oor die algemeen te verhoog. Identiese tenderpryse het dus of sal waarskynlik die uitwerking hê om pryse te handhaaf of te verhoog.

266. Identiese tenderpryse verskans ook die ondoeltreffende onderneming wat as gevolg van eenderse tenderpryse moeilik van die doeltreffende een onderskei kan word. Dit kan gebeur dat 'n tender aan 'n ondoeltreffende onderneming toegeken word, in welke geval identiese tenderpryse die uitwerking het of waarskynlik sal hê om die produksie of distribusie van die gevraagde handelsartikel op die mees doeltreffende en ekonomiese manier te verhoed.

267. Die praktyk waarvolgens identiese tenderpryse toegepas word, is gevolglik 'n beperkende praktyk ingevolge die Wet.

2. Pre-seleksie van tenderaars

268. Pre-seleksie van tenderaars word bewerkstellig deurdat tenderaars bepaal wie die suksesvolle tenderaar sal wees deur vooraf te reël dat die een die gunstigste tendervoorwaardes sal aanbied, of ingevolge 'n ooreenkoms of reëling tussen tenderaars, die heersende prys sal aanbied terwyl die ander hul pryse kunsmatig verhoog. By die aanvraer van die tenders word sodoende die indruk geskep dat op 'n mededingende grondslag getender word.

269. Deur die toepassing van hierdie praktyk word die doel om die beste mededingende pryse te bekom nie verwesenlik nie. Gevolglik het die praktyk die uitwerking of sal dit waarskynlik hê om pryse te handhaaf of te verhoog. Omdat die tenderaanvraer onder die indruk verkeer dat die gemanipuleerde tender die gunstigste is, word die ander beskikbare fasiliteite vir die distribusie van die gevraagde handelsartikel op 'n onregstreekse manier van hom weerhou. Dit kort dus hierdie fasiliteite in. Dit kan ook tot gevolg hê dat die distribusie van die gevraagde handelsartikel aan die tenderaanvraer op die mees ekonomiese en doeltreffende manier verhoed word.

270. Daar kan dus geen twyfel bestaan nie dat hierdie praktyk 'n beperkende praktyk ingevolge die Wet uitmaak.

3. Voorkoming van mededingende tenders

271. Die praktyk bestaan veral daaruit dat voornemende tenderaars onderling op een of ander wyse ooreenkom om nie in mededinging met mekaar te tender nie.

272. 'n Interessante variasie van hierdie praktyk kom voor waar 'n vereniging sy lede verbied om in mededinging met nie-lede te tender, ofskoon lede toegelaat word om onderling mee te ding om die toekenning van 'n tender. Gewoonlik is 'n vereniging waardeur hierdie praktyk toegepas word so prominent in die mark dat hy dikwels tendervoorwaardes aan 'n tenderaanvraer kan dikteer. Ofskoon onderlinge mededinging tussen lede toelaatbaar is, word die tenderaanvraer die geleentheid ontneem om beide lede sowel as nie-lede se tenders te oorweeg en dié tender wat die beste aan sy behoefte voldoen, hetsy van lede of nie-lede, te aanvaar. Voorts word 'n gedeelte van die aanbieders van 'n mark vir die tenderaanvraer uitgesluit. Boonop ontneem dit 'n gedeelte van die aanbieders in 'n mark die geleentheid om 'n tendertoekenning te verkry. Die Raad is gevolglik oortuig dat hierdie praktyk wel mededinging beperk.

273. Dit is ook duidelik dat hierdie tenderpraktyke een of meer van die gevolge van 'n beperkende praktyk, soos vervat in die laaste element wat vir 'n beperkende praktyk vereis word, kan hê en derhalwe 'n beperkende praktyk ingevolge die Wet is.

4. Markverdeling met betrekking tot tenders

274. Samespanning om die mark te verdeel, kan om verskeie redes toegepas word. Een van die vernaamste oogmerke is om tenders in een of ander verhouding aan tenderaars toe te wys sodat geeneen 'n voordeel bo 'n ander behaal nie. Soms word gesamentlik deur tenderaars getender

sodat/...

sodat elkeen 'n gedeelte van die tender kan behartig ofskoon die omvang van die tenderprojek nie werklik 'n gesamentlike tender regverdig nie. Die doel in hierdie geval is duidelik om die tenderaars betrokke by 'n gesamentlike tender te laat deel in die tender en word onderlinge mededinging tussen die tenderaars regstreeks of onregstreeks uitgeskakel.

275. 'n Ander metode waardeur tenders op 'n gelyke grondslag toegewys kan word, is om by herhalende tenders, toewysings op 'n rotasiebasis te doen. Dit verseker dat elke tenderaar om die beurt in die geleentheid gestel word om die tendertoekenning te verkry. Hierdeur word die tenderaanvraer onder die indruk geplaas dat binne 'n mededingingsmilieu getender is, terwyl die gunstigste tender wat ingedien is moontlik meer gunstig vir die tenderaanvraer sou gewees het in die afwesigheid van hierdie vorm van markverdeling. Dit kan ook prysverhogend wees omdat die "onsuksesvolle" tenderaars mag poog om hul verlies aan omset tydens 'n tendersiklus te verhaal deur hul pryse elders te verhoog.

276. Markverdeling op 'n geografiese basis verhoed dat voornemende tenderaars tenders indien in die gebiede wat deur bestaande tenderaars bedien word. Sodoende word onderlinge mededinging uitgeskakel.

277. By markverdeling op 'n klantetoewysingsbasis word gewoonlik vooraf tussen tenderaars ooreengekom dat 'n spesifieke tenderaar 'n spesifieke tenderaankoper sal bedien. Waar 'n tenderaanvraer ook 'n bestaande klant van die tenderaar is, word die tenderaanvraer gewoonlik aan die betrokke tenderaar toegewys.

278. Mededinging word onteenseglik deur al hierdie metodes van markverdeling ten opsigte van tenders beperk, en hulle het die uitwerking, of sal dit waarskynlik hê, om die fasiliteite beskikbaar vir die produksie of distribusie van die gevraagde handelsartikels vir die tenderaanvraer in te kort. Hierbenewens kan pryse verhoog of gehandhaaf word en die produksie of distribusie van die gevraagde handelsartikels op die mees doeltreffende en ekonomiese manier verhoed word.

279. Markverdeling met betrekking tot tenders voldoen gevolglik aan die vereistes wat in die Wet gestel word vir die bestaan van 'n beperkende praktyk.

5. Weerhouding van tenders

280. Deur saam te span om tenders te weerhou, word potensiële tenderaars verhoed om te tender of beïnvloed om nie te tender nie. Die tenderaanvraer kry gevolglik nie die geleentheid om alle moontlike tenders, wat in afwesigheid van sodanige samespanning ontvang sou word, te oorweeg nie. Sodoende word die fundamentele doel van aankope deur middel van tenders, naamlik om deur ope mededinging die beste pryse en voorwaardes te verkry, verydel en die volle potensiaal van die mark nie geopenbaar nie. Bowendien is die weerhouding van tenders 'n magtige instrument waarmee die reeds geïdentifiseerde beperkende praktyke toegepas kan word.

281. Die Raad is oortuig dat samespanning om tenders te weerhou, mededinging beperk wat een of meer van die gevolge soos reeds vroeër genoem, het of waarskynlik sal hê. Dit kan byvoorbeeld die fasiliteite beskikbaar vir die produksie of distribusie van die gevraagde handelsartikels vir die tenderaanvraer inkort, pryse verhoog of handhaaf en die produksie of distribusie van die gevraagde handelsartikels op die mees doeltreffende en ekonomiese manier verhoed. Die praktyk is gevolglik 'n beperkende praktyk ingevolge die Wet.

ALGEMEEN

282. Uit bogenoemde blyk dat al die genoemde tenderpraktyke as beperkende praktyke beskou kan word. Trouens, die Raad van Handel en Nywerheid het in sy Verslag 1475(M)[1] tot dieselfde gevolgtrekking gekom.

SAMEVATTING/...

1) Raad van Handel en Nywerheid, Ondersoek na beperkende tenderpraktyke in die Republiek van Suid-Afrika, Verslag 1475(M).

SAMEVATTING

283. In hierdie hoofstuk is die volgende praktyke as beperkende praktyke ingevolge die Wet bevind:

Horisontale prysbinding

Prysinligtingstelsels

Vertikale pryssamespanning

Aanbevole pryse

Horisontale markverdeling

Vertikale markverdeling

Identiese tenders

Pre-seleksie van tenderaars

Voorkoming van mededingende tenders

Markverdeling met betrekking tot tenders

Weerhouding van tenders.

284. In die volgende hoofstuk sal die Raad oorweeg of dié beperkende praktyke in die openbare belang geag kan word of nie.

HOOFSTUK VI/...

HOOFSTUK VI

DIE BEPERKENDE PRAKTYKE EN DIE OPENBARE BELANG

285. In hierdie hoofstuk oorweeg die Raad met inagneming van die vertoë wat ontvang is of omstandighede bestaan wat die beperkende praktyke, soos in die vorige hoofstuk geïdentifiseer, in die openbare belang regverdig.

286. Gedurende die ondersoek het die Raad weer eens ondervind dat van die belanghebbendes hul eie belang verkeerdelik as sinoniem met die openbare belang beskou. Die begrip openbare belang strek egter veel wyer en sluit onder meer die breë nasionale belang, die belange van die betrokke bedryfstakke en van die algemene publiek (spesifiek as verbruikers) in.

SAMESPANNING OOR PRYSE EN VOORWAARDES

1. Horisontale pryssamespanning

(a) Pryse en voorwaardes

287. Volgens voorleggings wat ontvang is, is die belangrikste voordeel wat aan horisontale pryssamespanning toegeskryf kan word dat dit stabiliteit in die mark tot gevolg het wat vir verskaffers en afnemers tot voordeel kan strek, veral in die geval van redelik homogene produkte en waar min markpartye betrokke is.

288. Voorstanders van die praktyk is ook daarvan oortuig dat pryssamespanning die moontlikhede van rasionalisasie en ander produksie- en distribusiebesparings versterk (kyk ook die gedeeltes in verband met markverdeling en tenderpraktyke). In sy voorlegging aan die Raad het 'n handelsvereniging wat 'n baie sterk kartel in die Republiek verteenwoordig die redes vir hierdie praktyk soos volg opgesom:

> "... demand for [product] is highly elastic and ... prices ... will always tend to be uniform. Where no co-operation between suppliers is possible ... other methods for attaining market equilibrium will develop with more or less the same results as open co-operation but with far more uncertainty for both suppliers and buyers of the products concerned. The fact is that an oligopolistic market structure for products which are either homogeneous or completely interchangeable is not conducive to price competition at the manufacturing level."

289. 'n Ander voordeel wat vir die samespanning toegeëien word, is dat dit indiensname beveilig, veral wanneer sekere sosiaal-ekonomiese faktore in 'n ekonomie aanwesig is waar hoë of stabiele werkverskaffing 'n prioriteit is. Horisontale samespanning verseker die voortbestaan van die status quo vir die voorsieners, veral indien investering van groot omvang is. Dit word geredeneer dat die beveiliging van investering veral in relatief klein ekonomieë van die uiterste belang is, aangesien sulke ekonomiese stelsels nie kan bekostig dat kapitaal en werkverskaffing verlore gaan nie. Die beskerming of beveiliging van investering het voorts tot gevolg dat aandeelhouers met 'n groter mate van vertroue nie alleen in die bedryf sal bly nie, maar ook meer geneig sal wees om nuwe beleggings te maak. 'n Ander organisasie stel dit weer soos volg: "Industry stability [wat slegs deur samespanning gewaarborg word] is essential in order to ensure a reasonable return on capital already invested and for attracting funds that may be required in future. This is even more important in the light of the present international situation where South Africa is continuously subjected to threat of boycots and calls for disinvestment." Die punt word inderdaad deur sekere voorstanders van die praktyk gemaak dat dit slegs met die bestaan van pryssamespanning moontlik mag wees om in veral kapitaalintensiewe bedrywe met vertroue te herinvesteer of dat 'n nuwe ondernemer slegs sal toetree indien hy deel van die kartel kan wees. Onsekerheid oor die markgedrag van mededingers kan belegging in die bepaalde bedryf andersins te riskant maak.

290. 'n Punt wat na vore gebring is, is dat dit verkieslik is dat, waar beheer nodig geag word, dit eerder in die hande van die privaatsektor moet wees, en dat samespanning oor pryse 'n beter alternatief as prysbeheer is.

291./...

291. Voorstanders van horisontale pryssamespanning wys daarop dat die uitskakeling van prysmededinging nie beteken dat mededinging nie meer tussen die partye plaasvind nie. Dit laat die deelnemers tot die samespanning toe om eerder op ander elemente, soos diens en kwaliteit, van handelsartikels te konsentreer en langs daardie weg met mekaar mee te ding.

292. Horisontale pryssamespanning kan ook volgens sekere respondente as 'n instrument gebruik word om die invoer van handelsartikels die hoof te bied. Die voordele hieraan verbonde sluit onder meer die volgende in: werkgeleentheid word binnenslands beskerm, valuta word bespaar tot voordeel van die land en beleggings van die pryssamespanners word beskerm.

293. In baie gevalle, so word beweer "... a cartel is justified because demand is monopsonistic or oligopsonistic" van aard. In 'n ander voorlegging word gesê dat "the manufacturers were being held to ransom by large merchants who would manoeuvre between manufacturers with huge orders and obtain prices at such cut-throat rates that the manufacturers were forced into such a position whereby they had to enter into this agreement". 'n Interessante argument ten gunste van eenvormige krediettermyne is die volgende: "Indien groothandelaars gunstige krediettermyne gebruik [kan] dit tot nadeel [van die] kleinhandelaar strek wat homself dalk te diep in die skuld dompel." 'n Ander groep sien dit soos volg: "...[conditions of sale] are aimed at the most effective distribution system, effective credit control to minimize the risk of bad debts, to maintaining quality and safety standards and providing a fair system of dealing with claims".

294. Ernstige besware en kritiek is egter teen horisontale pryssamespanning geopper en dit is aangevoer dat die praktyk die mededingende verhouding tussen verskaffers en afnemers versteur en belet dat die afnemer die ekonomiese voordele van 'n markgeoriënteerde ekonomiese stelsel kan benut. Prysmededinging tussen verskillende verskaffers van basies identiese handelsartikels word uitgeskakel. Basies beskik die partye wat by samespanning betrokke is oor monopoliemag ten aansien van die vasstelling van pryse. 'n Baie pertinente vraag word in hierdie verband gevra "...how can the producers expect the transporters, wholesalers, and retailers to introduce a competitive element to their product whilst refraining from doing so themselves?".

295. 'n Ander beswaar wat algemeen teen hierdie praktyk geopper word, is dat dit innovasie inhibeer, aangesien mededinging die doeltreffendste aansporing vir innovasie is. By die gebrek aan mededinging sal die druk om te innoveer gevolglik afneem. Selfs waar verskaffers vernuwing tot stand bring, sal die voordele, veral waar dit kosteverlagend is, nie na die afnemer of verbruiker deurgevoer word nie.

296. Die bestaan van horisontale pryssamespanning in 'n bepaalde sektor van die mark word deur sommige teenstanders daarvan as 'n sterk ontmoediging van toetrede beskou, aangesien dit dieselfde uitwerking kan hê asof die toetreder tot 'n monopolistiese mark sou wou toetree. Die samespannende verskaffers kan, byvoorbeeld deur 'n roofsugtige prysbeleid, nuwe toetreders uit die mark hou. 'n Respondent het die punt soos volg opgesom: "... in order to finance their campaign against imported (products) they have increased their prices excessively elsewhere ... it shows the lengths the industry will go to protect its monopoly".

297. Aangesien die prys in baie gevalle op so 'n peil vasgestel word dat selfs die ondoeltreffendste deelnemer se voortbestaan verseker word, beteken dat pryse in die algemeen hoër moet wees as wat onder mededingende toestande die geval sou wees. By implikasie beteken dit dat -

die skaars hulpbronne van die ekonomie nie op die mees doeltreffende wyse benut word nie;

die vlak van winsgewendheid van die markpartye anders is as wat dit onder mededingende omstandighede sou gewees het; en

in enkele gevalle monopoliewinste gemaak kan word.

298. Nog 'n beswaar wat teen horisontale pryssamespanning geopper word, is dat dit die kwaliteit van handelsartikels kan verlaag of ten minste verbeterings inhibeer. Die verhoging in kwaliteit sal noodgedwonge bykomende koste meebring wat nie sonder meer verhaal kan word nie[1].

299./...

1) Dit is belangrik om weer te beklemtoon dat "prys" slegs een element van 'n horisontale ooreenkoms verteenwoordig, en dat die behoud van die status quo soos uitgedruk in die markaandeel in baie gevalle òf pertinent òf stilswyend in die ooreenkoms opgeneem word.

299. Van afnemerskant word die beswaar geopper dat 'n afnemer se vryheid om met 'n verskaffer te onderhandel tot 'n groot mate aan bande gelê en die individualiteit van die verskaffer en die afnemer beperk word. Dit volg dat die pryse van die afnemers weer op hul beurt as verskaffers in die distribusiekanaal 'n mate van eenvormigheid kan toon. 'n Baie belangrike afnemer van kruideniersware stel dit pertinent dat "these practices ... restrict competition and may result in higher prices and variety, quality, and other factors may be adversely affected to the detriment of the public".

300. Die argument wat die voorstanders van die praktyk aanvoer dat mededinging bloot van prysna nie-pryselemente verskuif word, word om 'n aantal redes deur die kritici verwerp. Spesifiek word geredeneer dat die prys een element in 'n ondeelbare stel van verkoopvoorwaardes is en dat die verwydering van een element desnoods die doeltreffendheid van die stel nadelig sal beïnvloed. Voorts kan afnemers ook verplig word om vir dienste te betaal waarsonder hulle sou kon klaarkom. 'n Afnemer van 'n produk waar 'n kartel optree, stel dit soos volg: "... because they are part of a cartel they remain unnegotiable on any condition".

301. By 'n beoordeling deur die Raad van die argumente wat in die vorige paragrawe weergegee is, wil dit voorkom of die onderliggende redes waarom verskaffers saamspan hoofsaaklik om die eie belang van die partye tot die samespanning gaan. Om dit meer pertinent te stel: samespanning sal die volgende voordele vir die deelnemers inhou:

(i) voortbestaan van die partye daarby met ander woorde die behoud van die status quo;

(ii) besparing van gedupliseerde koste wat nie noodwendig na die afnemers deurgevoer word nie;

(iii) voorkoming van verliese;

(iv) winste vir alle deelnemers op 'n peil wat hoër is as wat onder mededingende toestande die geval sou wees; en

(v) uitskakeling, of ten minste vermindering, van risiko.

302. Dit is interessant om hier die kommentaar van 'n belangrike groep in die kruideniershandel aan te haal: "Cartels claim that they are able to give cheaper unit pricing through rationalised production and distribution operation. They also claim to stabilise the market. The reverse is true. They become less efficient, prices go up, service goes down and 'stabilisation' means protection of the inefficient. Their whole raison d'etre is to behave like a monopoly and benefit accordingly. Consequently they are inflationary and harmful."

303. Aan die ander kant kan die kommentaar van 'n vooraanstaande beleggingsmaatskappy in die Republiek nie uit die oog verloor word nie. Die besondere respondent verklaar dat "... buyers should be in a position to determine themselves the terms and conditions under which they buy without blanket restrictions by the Board". Hierdie is met ander woorde 'n betoog vir die vrye werking van die markmeganisme sonder enige owerheidsregulering, wat andersins "... would serve to distort the normal inter-play of market forces".

304. Die voordeel van stabiliteit wat vir die behoud van horisontale pryssamespanning aangevoer word, is nie vir die Raad aanvaarbaar nie. Stabiliteit geld nie net dié bedryfstakke en handelsartikels waar dit toegepas word nie, maar vir alle ondernemers. Insgelyks is die Raad ook nie daarvan oortuig dat die praktyk in gevalle van homogene produkte, gekonsentreerde markstrukture en hoë investerings geregverdig is nie. Die Raad gee toe dat mededinging nie slegs tot die prys beperk is of dat dit die belangrikste is nie, maar meen dat mededinging meestal in 'n groot mate onderdruk word.

305. Uit die aard van die saak gaan die voordele van die prysmeganisme verlore. Die Raad is voorts oortuig dat die blote bestaan van horisontale pryssamespanning nuwe toetrede kan inhibeer terwyl die meganisme wat deur samespanning geskep word, aktief nuwe toetreders kan uithou.

306. Dit is belangrik om daarop te let dat die voordele van die handhawing van ooreenkomste wat daarop gemik is om mededingende magte te inhibeer, insluitend die gemak van toetrede tot die mark, op maniere anders as hoër pryse en by implikasie hoër opbrengste op kapitaal, gerealiseer kan word. Voordele vir ondernemings en hulle aandeelhouers wat deel is van ooreenkomste/...

komste wat mededinging beperk, kan ook gerealiseer word in die vorm van laer risiko van die besigheid. Die doelwitte van enige besigheidsonderneming is die een of ander optimale kombinasie van opbrengs op kapitaal vir risiko. 'n Opoffering van opbrengs op kapitaal vir laer risiko kan gewis as in die belang van die ondernemings en hul aandeelhouers beskou word. As 'n algemene reël word hierdie optimale kombinasie die beste deur mededingende markmagte bepaal, insluitend prysmededinging, maar sonder kunsmatige hoë koste van toetrede tot die bedryfstak. By die afwesigheid van mededinging en potensiële mededinging en die moontlikhede vir nuwe toetreders tot die mark kan die aanname nie gemaak word dat die verbruiker in teenstelling met die verskaffer ooit die voordeel uit laer risiko trek nie.

307. Die Raad het geen twyfel dat die praktyk van horisontale pryssamespanning per saldo nie in die openbare belang geregverdig is nie. Samespanning van hierdie aard negeer die voordele wat uit effektiewe mededinging voortspruit. Dit -

(i) verseker nie dat die land se skaars hulpbronne op die mees doeltreffende wyse benut word nie;

(ii) kan ondoeltreffende bedrywe beskerm;

(iii) kan neig om die peil van progressiwiteit soos gemeet aan innovasie, navorsing en produkontwikkeling benede dit wat onder mededingende toestande sou geld, vas te pen. Samespanning van hierdie aard dra ook by om die status quo van die partye tot 'n hoë mate te verseker; en

(iv) kan meebring dat die pryse vir die afnemer op 'n hoër peil as wat onder mededingende toestande die geval sou wees, gehandhaaf word.

(b) Prysinligtingstelsels

308. Soos alreeds verduidelik, kan markpartye regstreeks of onregstreeks onderling ooreenkom om op 'n gereelde grondslag inligting ten opsigte van pryse en voorwaardes uit te ruil.

309. Respondente het aangetoon dat die uitruil van prysinligting hoofsaaklik geskied om verskaffers van 'n bepaalde handelsartikel in staat te stel om te bepaal watter omstandighede in die mark geld. Hierdeur kan bevestig word wat die betrokke verskaffer reeds deur sy eie marknavorsing vasgestel het, of leiding by besluitneming verkry word. Kleiner verskaffers vind die praktyk veral nuttig aangesien dit hulle die koste en moeite bespaar om self die inligting te bekom.

310. Volgens sekere voorstanders van die praktyk werk dit 'n hoë mate van stabiliteit in prysvasstelling in die mark in die hand. Ander weer het aangevoer dat selfs indien die inligting nie regstreeks aan mededingers gestuur word nie, die inligting steeds bekom word, byvoorbeeld vanaf afnemers of vorige werknemers. Om dié rede dan word die inligting ook aan die ander markpartye gepos sonder om enige voordeel van die praktyk te verwag.

311. Die grootste beswaar deur teenstanders van die praktyk is dat dit prysstarheid van die betrokke handelsartikels sal bevorder. Dit is selfs moontlik dat pryse op 'n hoër vlak vasgestel kan word. Dit is nuttig om 'n stelling wat deur 'n respondent gemaak is, te herhaal: "Since it is poor publicity for any company to publish an official price list which may show basic price levels higher than those of competitors, identical price lists are therefore published."

312. Teenstanders van die praktyk beweer ook dat die argumente wat teen horisontale pryssamespanning in sy breëre geld ook hier van toepassing is.

313. Dit is vir die Raad duidelik dat die uitruil van prysinligtingstelsels moontlik 'n verhogende invloed op pryse kan hê. Elke deelnemer behou egter die reg om steeds sy eie pryse vas te stel en sal in elk geval hul pryse vasstel na gelang van wat toestande in die mark is. Ook bestaan vele ander metodes om dieselfde inligting te bekom. Derhalwe is die Raad van mening dat die uitruil van prysinligting per saldo in die openbare belang geregverdig kan word.

2./...

2. Vertikale pryssamespanning (handhawing van herverkooppryse)

314. Soos in Hoofstuk I gemeld, is die praktyk van vertikale pryssamespanning (herverkoopprys-handhawing) vroeër reeds deur die Raad van Handel en Nywerheid ondersoek[1] en is die praktyk mettertyd verbied.[2]

315. Die Raad van Handel en Nywerheid het die praktyk deeglik ondersoek en na oorweging van al die voor- en nadele daarvan tot die slotsom geraak dat die praktyk beperkend op mededinging inwerk en per saldo nie in die openbare belang geregverdig is nie. Die Raad op Mededinging is daarvan oortuig dat die oorwegings wat tydens die vorige ondersoek gegeld het vandag nog bestaan en stem saam dat die praktyk van vertikale pryssamespanning of die handhawing van herverkooppryse, of dit individueel of gesamentlik toegepas word, nie in die openbare belang geregverdig kan word nie.

316. Interessantheidshalwe kan daarop gewys word dat in die voorleggings wat die Raad met betrekking tot hierdie ondersoek ontvang het, op enkele uitsonderings na, respondente geen kommentaar oor hierdie praktyk gelewer het nie. Derhalwe kan ook aanvaar word dat die respondente nie van mening is dat die verbod op die praktyk nadelig op hul sake-aktiwiteite inwerk nie en dat hulle die huidige status quo daaromtrent aanvaar.

3. Aanbevole pryse

317. Vroeër is drie vorme van aanbevole pryse onderskei en as beperkende praktyke bevind, naamlik horisontale aanbevole pryse, gesamentlike vertikale aanbevole pryse en individuele vertikale aanbevole pryse. Vervolgens word oorweeg of dié beperkende praktyke in die openbare belang geregverdig is.

(a) Horisontale aanbevole pryse

318. Die argumente wat ten gunste van horisontale aanbevole pryse na vore gebring word, kom basies ooreen met dié wat onder horisontale pryssamespanning aangevoer is. Spesifiek redeneer voorstanders van die praktyk dat horisontale aanbevole pryse 'n stabiliserende invloed op die pryspeil het, aangesien die oorgrote meerderheid van die verskaffers in die bedryf by die aanbevole pryse sal hou en dat hierdie stabiliserende invloed weer die voordele wat by horisontale prysbinding te vinde is, tot gevolg sal hê. 'n Vervaardiger in die drukkersbedryf beweer dat aanbevole pryse en kortingskedules lei tot "'n soort van orde in die bedryf ... [en verhoed] dat as gevolg van die laer bruto wins op [sekere handelsartikels] die algemene publiek uitgebuit word maar ... tog verseker dat die [herverkoper] 'n bestaansminimum verdien".

319. Voorts, so word geredeneer, word die prys wat aanbeveel word gewoonlik deur 'n verantwoordelike organisasie wat die belange van al die, of ten minste die meerderheid, van verskaffers in 'n bedryfstak verteenwoordig, vasgestel. Hierdie verantwoordelike organisasie word as meer bevoeg as sy lede beskou om pryse aan te beveel en sulke pryse sal objektief en realisties wees, aldus voorstanders van die praktyk. Inderdaad word die punt gestel dat "members are not sufficiently sophisticated [in die besondere geval] to do complicated calculations of arriving at the true costs of all (products) sold by them". Die praktyk word ook as kostebesparend beskou, aangesien een enkele organisasie die koste dra in plaas daarvan dat elke verskaffer individueel pryse moet vasstel en aanbeveel. Andere weer voer aan dat die horisontale aanbevole pryse slegs rigpryse is waarvan lede kan afwyk, en inderdaad afwyk. Die aanbevole pryse vorm slegs die basis of wegspringplek vir die individuele verskaffers se prys. "The list prices", so word beweer, "eventually established by producers have essentially become the basis for quoting competitive discounts". Ook word deur sommige organisasies aangevoer dat die pryse van die individuele verskaffers omtrent dieselfde sou gewees het sonder die gesamentlike bepaling van aanbevole pryse. "In the practical situation", word aangevoer, "members would meticulously abide by these prices, whether as the result of pressure or otherwise cannot be categorically stated."

320. Die kritiek wat teen hierdie praktyk uitgespreek word, kom ook ooreen met dié wat teen horisontale pryssamespanning uitgespreek is en word ook in wese gemeet aan die gevolge wat dit in die mark sal hê. Dit kan, na bewering, onder meer, 'n hoë mate van eenvormigheid in pryse bokant normale mededingende peile tot gevolg hê. Die vertroue wat 'n verskaffer het dat sy

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1) Raad van Handel en Nywerheid, Verslag 1220(M).

2) Goewermentskennisgewing R.1038 van 25 Junie 1969.

eweknie nie maklik onderkant aanbevole pryse sal handel dryf nie, versterk sy eie verset teen kortings wat regstreeks sy winsgewendheid sal beïnvloed. Dit word inderdaad gestel dat hierdie praktyk op die oog af vryheid van prysonderhandeling toelaat maar dat dit in wese 'n verbloeming van 'n horisontale prysvasstellingsooreenkoms is. Ook word beweer dat die praktyk inflasionisties en diskriminerend van aard kan wees, aangesien buitensporige kortings aan sommige toegestaan word en ander weer die "volle" prys moet betaal. 'n Belangrike vervaardiger van verbruikersartikels beklemtoon die volgende punte: "On balance the recommended mark-up on the cost prices of the various products are generally high[and we have] experienced refusal ... that discounts being offered to the trade be passed on to the customers." Indien die gewenste vlak van winsgewendheid nie behaal word nie word die aanbevole prys verhoog en nie dié prys wat gemiddeld behaal is nie.

321. Die Raad is ook hier nie oortuig deur die argument van stabiliteit wat ter regverdiging van die praktyk aangevoer word nie. Die Raad is van mening dat dit die taak van die individuele verskaffer is om individueel sy prys te bepaal. Waar die voorstanders van die praktyk aanvoer dat omtrent dieselfde pryse sou geheers het sonder die gesamentlike aanbeveling, word die nie-noodsaaklikheid van die praktyk verder beklemtoon.

322. Dit is die Raad se siening dat die praktyk tot gevolg het of kan hê dat pryse onvermydelik hoër as onder mededingende toestande sal wees. Die voordele van effektiewe mededinging word grotendeels negeer en 'n starheid in pryse sal dikwels aangetref word. Na oorweging van al die beweerde voor- en nadele van die praktyk, is die Raad van mening dat die beperkende praktyke per saldo nie in die openbare belang geregverdig is nie.

(b) Gesamentlike vertikale aanbevole pryse

323. 'n Argument wat algemeen ten gunste van hierdie praktyk aangevoer is, is dat dit die finale afnemer teen uitbuiting sal beskerm en wel om twee redes. In die eerste plek word die finale herverkoper bygestaan in sy prysvasstellingsfunksie en word hierdie bystand veral belangrik gereken vir 'n klein herverkoper wat nie die personeel of die kundigheid het om self sy herverkooppryse te bereken nie. Die praktyk is dus vir hom gerieflik en arbeidsbesparend. 'n Belangrike handelsvereniging stel dit soos volg: "... small businessmen often rely on ... [the association] to set price guidelines". Tweedens sal die finale afnemer oënskynlik nie bereid wees om 'n prys hoër as die aanbevole prys te betaal nie. Dieselfde vereniging skryf voorts dat "in practice pricing guidelines have set a ceiling rather than the norm for the industry". Derhalwe word die verbruiker deur die praktyk beskerm.

324. Voorstanders van die praktyk beklemtoon die feit dat die pryse slegs aanbeveel en nie afgedwing word nie en dat dit enige herverkoper vrystaan om sy eie pryse te bepaal. So beklemtoon 'n ander handelsvereniging die feit dat "recommended prices have been developed purely as a tool to assist its members in calculating the selling prices (for its products)". Die punt word ook gestel dat aanbevole pryse 'n baie handige reklame-instrument is, veral wanneer reklame byvoorbeeld landswyd onderneem en kortings aangebied word.

325. Uit die argumente wat teen die praktyk gevoer is, blyk dat die teenstanders daarvan veral gekant is teen die starheid in marges en pryse wat sulke aanbevelings tot gevolg het en dat dit vererger word deur die feit dat 'n groepaanbeveling gedoen word.

326. 'n Klagte wat ook teen die praktyk geopper word, is dat die kortings wat van die aanbevole prys gegee word in baie gevalle belangriker word as die prys van die produk self. Dit beteken, so word geredeneer, dat aanbevole pryse in baie gevalle onrealisties hoog vasgestel word ten einde die herverkopers toe te laat om aantreklike kortings op die aanbevole prys aan te bied. Op sy beurt het hierdie "trading in discounts" die uitwerking om die finale afnemer se aandag van die prys van die produk na die korting toe af te wend en dit beteken dat so 'n afnemer meer belangstel in die afslag wat hy kan beding as die prys wat hy betaal.

327. Nog 'n beswaar is dat baie gevalle voorkom waar verskaffers op subtiele wyse poog om toe te sien dat herverkopers beïnvloed word om by die aanbevole pryse te hou. Afwykings deur herverkopers lei, so word beweer, tot diskriminasie in een of ander vorm waardeur so 'n herverkoper beïnvloed word om by die aanbevole pryse te hou. Die praktyk is dan in wese net 'n alternatief vir herverkooppryshandhawing, wat reeds onwettig is.

328. Die Raad het ernstige bedenkinge oor die praktyk van gesamentlike vertikaal aanbevole pryse. Dit is die Raad se ondervinding dat sulke pryse dikwels neig om

die/...

die geldende pryse te wees. Die feit dat dieselfde of soortgelyke aanbevelings deur 'n hele groep verskaffers gedoen word, gekoppel aan die punt wat hierbo genoem is, sal beteken dat die herverkooppryse van 'n groep handelsartikels òf eenvormig òf baie na aan mekaar sal wees. Die Raad ondersteun die mening dat prysaanbevelings van hierdie aard sal neig om nie alleen pryse op peile hoër as wat onder mededingende omstandighede die geval sou wees, vas te pen nie, maar ook om enige horisontale reëling ten opsigte van byvoorbeeld verkooppryse of markaandele te versterk.

329. Die Raad is terdeë daarvan bewus dat hier bloot van aanbevelings sprake is en dat vryheid van individuele optrede steeds bestaan. Dit is egter 'n gesamentlike aksie wat normaalweg 'n groot mate van beïnvloeding bevat en dus neig om tot soortgelyke pryse te lei. Indien in ag geneem word dat dit in baie gevalle voorkom dat intermediêre afnemers se pryse gebaseer is op die aanbevole herverkoopprys, veral waar sulke afnemers ooreenkomste vir die lewering van goedere en dienste oor 'n termyn aangaan, dan is dit duidelik dat hierdie pryse tot 'n mate op horisontale aanbevole pryse kan neerkom, waarteen die Raad hom reeds uitgespreek het.

330. Dit is nie ongewoon dat aanbevole pryse op die een of ander subtiele wyse afgedwing word nie. Onder suiwer mededingende omstandighede sou dit 'n afnemer vrystaan om 'n ander verskaffer te nader. Die feit dat al die verskaffers egter saamspan ten opsigte van die besondere aanbevole pryse versterk die bedingingsmag van die leweransiers en verminder die moontlikheid dat van pryse afgewyk sal word. Veral is dit die geval waar die verskaffers in 'n sterk en goed georganiseerde handelsvereniging saamgesnoer is.

331. Die Raad is, na oorweging van alle argumente, nie daarvan oortuig dat gesamentlike vertikaal aanbevole pryse in die openbare belang geregverdig is nie.

(c) Individuele vertikale aanbevole pryse

332. Voorstanders van die praktyk van aanbevole pryse deur individuele verskaffers wys veral op die voordele wat die praktyk inhou ter beskerming van die finale afnemer. Selfs die mees oningeligte afnemer, so word beweer, sal onmiddellik bewus wees van 'n prys bokant dié wat aanbeveel word en sal so 'n prys bevraagteken.

333. Die voordeel wat die praktyk vir 'n verskaffer inhou, is dat die prys van 'n handelsartikel in die meeste gevalle só vasgestel word dat dit op 'n bepaalde marksegment betrekking het. Die segment is vir die verskaffer duidelik omlyn, byvoorbeeld op grond van kwaliteit, en die herverkoper is in staat om sy eie aktiwiteite op 'n wyse te reël dat hy wat dié handelsartikel betref nie in 'n verkeerde subsegment van 'n mark meeding nie. Dit sal verseker, aldus voorstanders van die praktyk, dat die handelsartikel die regte groep finale afnemers bereik.

334. Herverkopers is ook oor die algemeen ten gunste van die praktyk aangesien dit aan die een kant die baie klein herverkoper die moeite en koste spaar om sy verkooppryse vas te stel terwyl die groot herverkoper weer die aanbevole prys as 'n bemarkings- en reklame-instrument kan gebruik om sy kortings of "spesiale pryse" te promoveer.

335. Uit die voorleggings wat ontvang is, blyk dat die praktyk vry algemeen deur verskaffers as 'n instrument by reklameveldtogte gebruik word, byvoorbeeld wanneer geadverteer word dat spesiale pryse aan herverkopers hulle daartoe in staat stel om hul pryse met 'n sekere bedrag te verminder. In die proses kan positiewe verkoopsresultate bekom word en is die voorstanders van die praktyk van mening dat dit 'n baie belangrike instrument in 'n mededingende mark is.

336. Die argument word telkemale na vore gebring dat die pryse bloot aanbeveel word en dat dit die herverkoper vrystaan om na goeddunke sy prys by sy eie omstandighede aan te pas. Die meerderheid dui voorts aan dat geen druk op herverkopers uitgeoefen word om by die aanbevole pryse te hou nie.

337. Argumente wat teen die praktyk aan die Raad voorgelê is, kom hoofsaaklik op die volgende neer: in die eerste plek word daarop gewys dat aanbevole pryse meestal die verkoopprys word. Dit word toegegee dat afwykings hiervan wel plaasvind, maar op grond van studies in hierdie verband word sulke afwykings as beperk bestempel.

338./...

338. 'n Tweede beswaar is dat in sommige gevalle wel druk op herverkopers uitgeoefen word om by die aanbevole pryse te hou. Hierdie punt word veral beklemtoon in gevalle waar die behoud van die reg om in 'n sekere handelsmerkartikel sake te doen die voortbestaan van die herverkoper regstreeks kan beïnvloed.

339. 'n Derde belangrike beswaar teen die praktyk is dat, soos by ander vorme van aanbevole pryse, die korting belangriker raak as die prys en as't ware die aandag van die prys afwend.

340. 'n Punt wat ook deur die teenstanders van die praktyk aangevoer is, is dat die herverkopers se aankooppryse in die meerderheid van gevalle op die aanbevole herverkooppryse baseer word, wat tot 'n hoë mate nie slegs die herverkooppryse nie maar ook die marges standaardiseer.

341. By die evaluasie van die argumente oor individuele aanbevole pryse het die Raad van Handel en Nywerheid[1] reeds in 1967 tot die gevolgtrekking gekom dat "... die moontlikheid van effektiewe mededinging en die bevordering van die openbare belang [nie] geheel-en-al uit [gesluit word] nie. Dit volg dat 'n stelsel van aanbevole herverkooppryse deeglik dopgehou moet word ten einde te verseker dat dit nie dieselfde ekonomiese uitwerking as gedwonge herverkooppryse het nie". Die Raad op Mededinging het tydens die huidige ondersoek tot die gevolgtrekking gekom dat dit nodig is om te onderskei tussen gesamentlike en individuele aanbevole pryse. Soos uit vorige paragrawe blyk, is die Raad van mening dat enige vorm van gesamentlike aanbevelings per saldo nie in die openbare belang geregverdig is nie.

342. Wat individuele aanbevole pryse betref, is die Raad nie oortuig dat die praktyk mededinging tussen herverkopers of tussen primêre verskaffers in dieselfde mate aan bande lê nie en dat daar omstandighede bestaan wat dit in die openbare belang regverdig. 'n Aantal faktore is hier vir die Raad baie belangrik.

343. In die eerste plek is dit duidelik dat 'n herverkoper wel in staat is om sy eie pryse vas te stel. Sou daar enige gevalle voorkom waar druk van enige aard ook al uitgeoefen word kan die Raad sulke gevalle kragtens die Wet op die Handhawing en Bevordering van Mededinging, 1979, ondersoek.

344. 'n Tweede belangrike punt is dat herverkopers sowel as finale afnemers steeds keuses kan uitoefen. Die bestaan van mededingende produkte wat onafhanklik bemark en waarvoor pryse onafhanklik vasgestel word beteken dat die voordele van effektiewe mededinging wel hier tot uiting kan kom.

345. 'n Verdere oorweging is die besef dat aanbevole herverkooppryse wel 'n instrument ter beskerming van die finale afnemer kan wees, veral indien die bestaan van 'n groot, oningeligte koperspubliek in gedagte gehou word. Terselfdertyd kan dit ook die voordeel van gerief vir die klein herverkoper van 'n groot verskeidenheid produkte inhou, sonder die nadele van gesamentlike en vertikale aanbevole pryse.

346. Die Raad is derhalwe daarvan oortuig dat ofskoon die praktyk 'n beperkende praktyk ingevolge die Wet is, en sekere nadele kan inhou, dit nie per saldo geregverdig sou wees om die praktyk as sodanig summier te verbied nie.

MARKVERDELING

1. Horisontale markverdeling

347. Horisontale markverdeling impliseer dat verskaffers op dieselfde vlak van die produksie- en distribusieketting regstreeks of onregstreeks markte verdeel. Uiteenlopende redes vir asook argumente ten gunste van en teen hierdie praktyk word aangevoer. Sommige argumente is van toepassing op alle vorme van horisontale markverdeling terwyl ander net vir spesifieke vorme geld. Veral ten opsigte van die toekenning van markte en beperkinge op produksie, waarvan die uitwerking en gewoonlik ook die doel is om die verskaffing van handelsartikels regstreeks of onregstreeks te beheer of te reguleer, is die argumente dikwels dieselfde en daarom sal hierdie vorme saam behandel word met vermelding van gevalle waar 'n argument spesifiek op 'n bepaalde vorm betrekking het. Afsonderlike ooreenkomste, wat nie noodwendig op die regulering van verskaffing gemik is nie, sal afsonderlik behandel word.

(a)/...

1) Kyk Verslag 1220(M).

(a) Toekenning van markte en beperkinge op produksie

348. Die argumente van diegene wat ten gunste van hierdie regstreekse en onregstreekse vorme van markverdeling is, berus hoofsaaklik op rasionalisasie met gepaardgaande kostevoordele as gevolg daarvan, op stabiliteit, langtermynbeplanning, winsgewendheid met die oog op investering en op voordele vir die verbruiker. Sekere defensiewe argumente oor die beperkte uitwerking van die praktyk word ook aangeroer.

349. Rasionalisasie met gepaardgaande besparings ten opsigte van die koste en kapitaal is 'n argument wat feitlik deurgaans gebruik word. Dit word aangevoer dat in die geval van veral die toekenning van markte in die onderskeie vorme, besparings ten opsigte van distribusiekoste voorkom deurdat, byvoorbeeld, distribusiefasiliteite nie onnodig gedupliseer word nie, vervoerkoste en promosie-uitgawes verminder kan word. Ten opsigte van beperkinge op produksie word aangevoer dat produksiekoste in toom gehou of verlaag word deur die beter verhaling van vaste koste deurdat kapasiteitsbesetting verhoog of die onnodige duplikasie van produksiefasiliteite vermy word. Die vaste koste-element van die eenheidskoste van produkte of dienste word gevolglik tot 'n minimum beperk. Voorts word aangevoer dat ondoeltreffendhede makliker uitgeskakel kan word deurdat 'n verskaffer relatief ondoeltreffende eenhede kan sluit of onttrek, aangesien hy nie 'n uitbreiding van sy markaandeel nastreef of vir die behoud daarvan hoef te veg nie. Markverdeling kan ook spesialisasie en standaardisasie bevorder, wat weer 'n vermindering in koste kan meebring. Dit geld na bewering veral by beperkinge op die verskeidenheid produkte of dienste en die opdeling van produksieprosesse.

350. 'n Argument wat verder op die kostevoordele uitbrei, is dat markverdeling langtermynbeplanning, veral ten opsigte van investering, vergemaklik en verhoed dat surpluskapasiteit tot stand kom. Dit is veral belangrik waar relatief groot bedrae kapitaal geïnvesteer moet word, soos by kapitaalintensiewe sektore waar 'n hoë (minimum) produksie of omset nodig is om 'n eenheid lewensvatbaar te maak. In die relatief klein Suid-Afrikaanse mark kan 'n verhoging van die aanbod in sodanige gevalle ook nie geleidelik geskied nie maar slegs in spronge (trapsgewyse). Die argument is dat surpluskapasiteit 'n vermorsing van skaars kapitaal en 'n swak verhaling van vaste koste meebring en dat markverdeling dit kan verhoed. 'n Tweede reeks argumente ten gunste van markverdeling handel oor sogenaamde stabiliteit in 'n bedryfstak, die beskerming van bestaande ondernemings teen ondergang en die noodsaaklikheid van bevredigende winste met die oog op nuwe investering. Daar word aangevoer dat "oormatige" mededinging onstabiliteit en gevolglik onsekerheid skep wat verhoed dat voldoende investering gedoen word om die aanbod by 'n toenemende vraag aan te pas. Voorts word aangevoer dat bestaande ondernemings, veral die betreklik klein onderneming, daardeur uit die mark gedruk word, wat 'n verlies aan werkgeleentheid meebring en uiteindelik tot 'n kleiner aantal verskaffers en gevolglik minder mededinging aanleiding gee.

351. 'n Verdere reeks argumente ter regverdiging van markverdeling behels die aanwending van die praktyk om die beeld van die onderneming of die bedryfstak te bevorder en die verbruiker te beskerm of te bevoordeel ten opsigte van die eienskappe van die handelsartikel. Die voorstanders van die praktyk voer aan dat verskaffers deur saam te werk en nie onderling mee te ding nie, beter daarin slaag om die beeld van hul produkte of dienste, of dié van die betrokke sektor, te bevorder. 'n Ander argument is dat die verbruiker beskerm word deur te verhoed dat prysmededinging aanleiding gee tot 'n verlaging van gehalte om winste te handhaaf, en dat 'n goeie naverkoopdiens en die voortbestaan van verskaffers met die oog op naverkoopdiens, verseker word. Kwaliteit en waarde word ook tot voordeel van die verbruiker verhoog of verseker deur spesialisasie en standaardisasie of deur die verpoeling of kruislisensiëring van patent- en ander regte. Dikwels word die verbruiker ook deur die gesamentlike toepassing van etiese reëls of kodes of van waarborgskemas beskerm.

352. 'n Bekende kartel in die Republiek gee die voordele van markverdeling soos volg: "... lowest possible price ... rationalised distribution ... eliminate cross haulage ... better utilised sales representation ... equitable spread of availability where unexpected breakdowns occur ... improved SA Transport Services liaison and truck utilisation ... facilitate economies of scale ... (and) improve industry's credit management". 'n Respondent uit die chemiese nywerheid stel dit weer so: "[Die] algemene mening (is) dat die beperking van verspreidingskoste deur gebiedsafbakening bydra tot die nywerheid se kostedoeltreffendheid. In afwesigheid van gebiedsafbakening kan bemarkings- en verspreidingskanale tot stand kom wat nie kostedoeltreffend is nie en kan bestaande lede van die nywerheid uit die mark gedruk word, wat oor die langtermyn die verbruiker tot nadeel sal strek."

353. Soos reeds gemeld, bestaan ook sekere defensiewe argumente oor die beperkte doeltreffendheid en die oogmerke van ooreenkomste, reëlings en verstandhoudings ten opsigte van markverdeling. So word aangevoer dat verskaffers in 'n oligopolistiese marksituasie mekaar in elk geval sal dophou en parallel sal optree, veral waar die handelsartikels wat hulle verskaf homogeen of relatief/...

relatief homogeen is, en dat sulke ooreenkomste, reëlings en verstandhoudings nie doeltreffend is nie en vryelik verbreed word, veral tydens die laagkonjunktuur. Voorts word aangevoer dat met markverdeling nie oormatige winste nagestreef word nie maar slegs "redelike" winste met die oog op die handhawing van bestaande produksiekapasiteite en die noodsaaklike uitbreiding daarvan. Verskaffers kan ook nie verbruikers uitbuit nie omdat laasgenoemde hulle tot substitute en ingevoerde produkte kan wend. 'n Ander argument is dat in die geval waar verskaffers steeds in dieselfde mark meeding, soos by markverdeling by wyse van beperkinge op produksie, mededinging nie heeltemal uitgeskakel word nie maar net tot ander terreine beperk word. Ook word die kostevoordele wat voortspruit na die verbruikers deurgevoer sodat die praktyk uiteindelik tot hulle voordeel is.

354. Die teenstanders van die praktyk gee toe dat die toekenning van markte en beperkinge op produksie wat mededingers deur onderlinge ooreenkomste, reëlings en verstandhoudings op mekaar plaas sekere regstreekse of bewysbare koste-voordele kan hê. Dié groep is egter van mening dat die praktyk ernstige gevolge op mededinging het of waarskynlik sal hê. Dit word aangevoer dat effektiewe mededinging veel beter daarin slaag om ondoeltreffendhede uit te skakel. In 'n markgeoriënteerde ekonomie behoort die winsmotief die motiverende faktor vir die eienaars en bestuur te wees en in 'n mededingende marksituasie kan die winste van 'n bepaalde verskaffer net verhoog word as hy daarin kan slaag om òf 'n beter produk of diens as sy mededingers aan te bied òf sy koste in toom te hou of te verminder deur die doeltreffender aanwending van sy fasiliteite, die verbetering van produksiemetodes, beter interne beheer oor koste en die verhoging van die koste-doeltreffendheid van sekere bestedings. Voorts is die Raad meegedeel dat dit die ondervinding is dat versakffers deur mededinging gedwing word om ondoeltreffende fasiliteite te onttrek of te vervang ten einde hul eenheidskoste te verlaag terwyl sodanige druk onder 'n stelsel van markverdeling afwesig kan wees.

355. Die koste-voordele van spesialisasie en standaardisasie bestaan dikwels ook net in teorie en vergoed nie altyd vir ander nadele wat later vermeld sal word nie. Trouens, waar spesialisasie en standaardisasie aan markverdeling gekoppel word (in teenstelling met waar dit in 'n mededingende marksituasie geskied) is 'n verwysingsraamwerk vir die evaluering van koste-doeltreffendheid dikwels afwesig. Voorts is dit ongetwyfeld so dat effektiewe mededinging verskaffers dwing om hul tegniese kennis en vaardighede te verhoog, wat ook 'n kosteverlagende uitwerking het. 'n Kruideniersgroep het soos volg oor rasionalisasie uitgewei:" ... judged by the extent to which protection has been granted to existing units and the extent to which the competitive climate has consequently deteriorated, it is more likely that the replacement of unnecessary units has been delayed ... [there has been] little proof of a stabilising effect".

356. Dit kan nie betwyfel word dat markverdeling langtermynbeplanning, veral ten opsigte van investering, bevorder nie. Daarteenoor kan aangevoer word dat verskaffers normaalweg rasioneel optree by die neem van investeringsbesluite. Verskaffers hou mekaar dop en is meestal bewus van mekaar se beplande kapasiteitsuitbreidinge. Een verhoog ook nie kapasiteit as hy nie 'n redelike mate van sekerheid het dat hy dit winsgewend kan benut nie en in 'n mededingende marksituasie sal 'n verskaffer met surpluskapasiteit nie in staat wees om pryse te verhoog om so vir 'n lae kapasiteitsbesetting te vergoed nie. Voorts het surpluskapasiteit in 'n uitbreidende mark hoofsaaklik korttermynnadele en kan dit oor die lang termyn 'n gunstige uitwerking op die koste hê in toestande van vinnig stygende koste van toerusting. Markverdeling, wat 'n gereguleerde situasie skep, verhoed ook dat winste sy belangrike rol van die allokasie van produksiemiddele doeltreffend vervul en gevolglik dat die aanbod hom vinnig by veranderings in die vraag aanpas.

357. Wat die argument van die bevordering van stabiliteit in 'n bedryfstak betref, voer die teenstanders van die praktyk aan dat dit juis 'n funksie van mededinging is om doeltreffendheid te bevorder en te sorg dat verskaffers wat nie daarin kan slaag om doeltreffend op te tree nie, uit die mark verdwyn. Werkgeleentheid gaan nie daardeur verlore nie maar word net na die doeltreffender verskaffers oorgeplaas.

358. In 'n volkshuishouding wat deur doeltreffendheid gekenmerk word of waar dit aktief nagestreef word, sal verskaffers ook beter met buitelandse konkurrente kan meeding sodat groter geleenthede vir bykomende werkskepping sal bestaan.

359. Na bewering kan markverdeling deur die toekenning van markte en beperkinge op produksie die prosesse van innovasie en nabootsing, wat belangrike kenmerke van 'n markgeoriënteerde ekonomiese stelsel is, vertraag of beperk. Slegs deur die ontwikkeling en verskaffing van nuwe, verbeterde produkte en die differensiasie van handelsartikels word verseker dat die verbruiker voortdurend nuwe en tegnologies verbeterde goedere en 'n wyer keuse gebied word.

360./...

360. Die teenstanders van die praktyke om markte te verdeel of om beperkinge op produksie deur onderlinge ooreenkomste, reëlings of verstandhoudings te plaas, is van mening dat as aangevoer word dat oligopoliste in elk geval parallel optree, of sal optree selfs by 'n verbod daarteen, of dat ooreenkomste, reëlings en verstandhoudings vryelik verbreek word, ontstaan by die groep onmiddellik die vraag wat dan die noodsaaklikheid van samespanning, reëlings of verstandhoudings is. Die agterdog wat daardeur geskep word, strek die betrokke sektor tog net tot nadeel.

361. Voorts word as argumente teen die praktyk aangevoer dat die verbruiker uitgebuit kan word sonder dat dit die oorspronklike bedoeling van die samespannende partye is, dat die "redelike" winste wat beoog word ondoeltreffende verskaffers kan beskerm, dat soms doeltreffend teen verskaffers wat nie wil saamwerk nie opgetree kan word, dat Suid-Afrikaanse vervaardigers in baie gevalle doeltreffend teen die invoer van produkte beskerm word, hetsy deur kwantitatiewe beperkings, tariefbeskerming of 'n dalende waarde van die geldeenheid, dat geskikte substitute nie altyd beskikbaar is nie, en dat dit moeilik is om te glo dat markverdeling toegepas sal word as die verskaffers wat saamspan in die eerste plek nie daaruit voordeel trek nie. Daarby word beweer dat markverdeling dikwels gebruik word om ander beperkende praktyke moontlik te maak of doeltreffender toe te pas.

362. By die beoordeling van die argumente ten gunste van en teen die toekenning van markte en beperkinge op produksie wil die Raad dit geensins betwyfel dat markverdeling onder bepaalde gevalle wesentlike voordele kan inhou nie. Die Raad is egter daarvan oortuig dat markverdeling effektiewe mededinging in 'n groot mate inhibeer en dat effektiewe mededinging in die meeste gevalle die belangrikste faktor is om die koste in toom te hou of te verlaag.

363. Die verbruikers word die geleentheid ontneem om 'n keuse tussen die aanbiedinge van verskillende verkopers te doen. Aanbieders is ook beter in staat om hul verkoopsvoorwaardes op verbruikers af te dwing. In hierdie verband is dit interessant om die volgende aan te haal uit die brief van 'n afnemer van 'n kartel wat nie alleen oor pryse ooreenkom nie maar ook markverdeling toepas: "We do not wish the industry to know that we are one of the complainants for fear of reprisals being taken by them against our company." Die Raad is daarvan bewus dat in toestande waar effektiewe mededinging ontbreek, kostebesparings meestal nie na die verbruiker deurgegee word nie. Die Raad is van mening dat slegs effektiewe mededinging die dissipline sal verseker wat verskaffers verplig om doeltreffendheid na te streef en die winsgewendheid van nuwe investerings na behore te evalueer.

364. Die Raad is ook nie oortuig deur die argumente van stabiliteit, en die voordele wat daaruit voortspruit, wat markverdeling na bewering tot gevolg sou hê nie. Stabiliteit is van betekenis vir elke bedryfstak, onderneming en produk en nie slegs vir dié waar markverdeling van toepassing is nie. Die gevaar bestaan ook dat pryse op die koste van die marginale of relatief ondoeltreffende verskaffer gebaseer mag word. Dit kan onnodige hoë pryse meebring, wat weer 'n regstreekse invloed op die skepping van werkgeleenthede kan hê. Dit is die Raad se standpunt dat onsekerheid 'n onvermydelike deel van 'n markgeoriënteerde ekonomiese stelsel is en die doeltreffende verskaffer steeds toestande van tydelike onsekerheid sal oorleef en, nadat die ondoeltreffendes uitgeforseer is, bevredigende winste met die oog op die nodige kapasiteitskepping behaal sal word. As sodanige verskaffers beperkende praktyke sou gebruik om mededingers op ander gronde as groter doeltreffendheid uit die mark te dwing, of as konsentrasie in 'n bepaalde sektor deur die oorname van onwinsgewende verskaffers oormatig sou toeneem, kan sulke praktyke en verkrygings ingevolge die Wet op die Handhawing en Bevordering van Mededinging, 1979, ondersoek word. Voorts moet in gedagte gehou word dat verskaffers wat op grond van groter doeltreffendheid groei, steeds deur die moontlikheid van toetrede gedwing sal word om pryse in toom te hou en doeltreffendheid te handhaaf.

365. Wat betref die argument dat markverdeling help om die beeld van die handelsartikel en die bedryfstak te bevorder, om die verbruiker te beskerm en om 'n bevredigende diens te verseker, stem die Raad nie saam dat die argumente bydra om die praktyk in die openbare belang te regverdig nie. Die Raad stem met die teenstanders van die praktyk saam dat die bevordering van 'n markgeoriënteerde ekonomiese stelsel op die duur wel die gewenste voordele ten opsigte van innovasie en nabootsing sal verseker. Innovasie en nabootsing bring ook regstreeks ekonomiese groei mee deurdat dit aanleiding gee tot 'n kringloop van skepping van vraag, nuwe investering, bykomende werkgeleentheid, hoër totale inkomste van verbruikers, 'n toename in die totale vraag, en nuwe geleentheid vir investering.

366. Ofskoon standaardisasie ongetwyfeld kostesparings en voordele vir die verbruiker kan meebring, beperk dit dikwels die verbruiker se keuse, en ook die koste om sy behoeftes te bevredig kan toeneem deurdat hy nie voldoende opsies ten opsigte van die kombinasie van koste en gehalte/...

gehalte van 'n handelsartikel gebied word nie. Waar standaardisasie in 'n mededingende marksituasie voorkom, is dit gewoonlik op gesonde ekonomiese beginsels gegrond, wat nie in 'n gereguleerde marksituasie noodwendig die geval is nie.

367. Die Raad meen nie dat markverdeling die beste metode is om verbruikers te beskerm nie. In 'n mededingende mark wat bevorderlik vir innovasie en produkdifferensiasie is, sal hulle 'n voldoende keuse gebied word en sal pryse realisties wees. In wese werk markverdeling die werking van die markkragte teen.

368. Indien die argument lui dat markpartye, veral in oligopolistiese marksituasies parallel sal optree en dat afgewyk sal word van die ooreenkomste, reëlings of verstandhoudings, sonder enige strafsanksie, is die Raad te meer daarvan oortuig dat sodanige ooreenkomste, reëlings en verstandhoudings nie in die openbare belang is nie. Die partye kan sonder enige noemenswaardige benadeling net so goed daarsonder funksioneer. Die agterdog wat deur die samespanning geskep word, kan die betrokke partye net tot nadeel strek. Die Raad is verder ook daarvan oortuig dat die primêre doel van enige vorm van samespanning is om die betrokke partye te bevoordeel.

369. Samevattend kan gesê word dat in die lig van die werklike of potensiële ekonomiese gevolge van markverdeling in die vorm van die toekenning van markte en beperkinge op produksie dit die Raad se standpunt is dat die praktyk teen die openbare belang is en verbied moet word.

(b) Gesamentlike ondernemings

370. Gesamentlike ondernemings kan vir 'n baie wye verskeidenheid oogmerke tot stand kom. Die ekonomiese regverdiging wat vir hierdie tipe van samewerking aangevoer word, kan soos volg groepeer word:

(i) Gesamentlike ondernemings stel verskaffers in staat om die risiko van nuwe nywerheidsontwikkeling of van investering in kapitaalintensiewe sektore te versprei of te verdeel;

(ii) dit stel verskaffers in staat om projekte aan te pak waarvan die koste vir individuele verskaffers te hoog is;

(iii) dit help verskaffers om groot bedrae vir kapitaalinvestering te akkumuleer of aan te trek;

(iv) verskaffers word in staat gestel om gesamentlike of gekombineerde fasiliteite op te rig met die oog op kapasiteitsbesparings; en

(v) gesamentlike ondernemings maak die samevoeging van verskillende vaardighede of kundighede of van produksiemiddele en tegniese vaardighede moontlik.

371. Die voorstanders van die praktyk is van mening dat gesamentlike ondernemings mededinging kan bevorder deurdat dit nuwe toetrede tot 'n bepaalde mark moontlik maak in gevalle waar toetrede vir die stigters individueel nie moontlik is nie, hetsy as gevolg van 'n gebrek aan fondse, onvermoë om voldoende kapitaal aan te trek, te hoë eenheidskoste as gevolg van 'n klein volume, 'n gebrek aan vaardighede of produksiemiddele of die risiko wat te hoog is. Deur middel van 'n gesamentlike onderneming word die aantal verskaffers in 'n bepaalde mark dan verhoog wat veral in 'n markstruktuur wat monopolisties of selfs oligopolisties van aard is, 'n sterk positiewe uitwerking op mededinging kan hê. Gesamentlike ondernemings kan ook kleiner verskaffers in staat stel om beter teen die groteres mee te ding. Hoewel die aantal markpartye daardeur verminder kan word, kan mededinging as sodanig bevorder word. Volgens die voorstanders kan gesamentlike ondernemings ook ander ekonomiese voordele inhou, soos die beter benutting van beskikbare vaardighede, die bevordering van innovasie en gevolglik ekonomiese groei deur gesamentlike navorsing en ontwikkeling wat vir 'n enkele verskaffer te duur mag wees, en die uitvoer van handelsartikels op 'n gesamentlike grondslag waardeur toetrede tot 'n buitelandse mark moontlik gemaak kan word of meer winsgewend vir 'n land mag wees deurdat die betrokke verskaffers nie onderling meeding nie. Veral in die relatief klein Suid-Afrikaanse mark kan gesamentlike ondernemings die enigste moontlikheid bied om kapitaalintensiewe vervaardigingsprojekte lewensvatbaar te maak of die risiko daarvan binne aanvaarbare perke te bring. Gesamentlike ondernemings kan ook sekere regstreekse kostebesparings meebring, soos wanneer die stigters sekere terugwaartse of voorwaartse funksies gesamentlik uitvoer.

372./...

372. 'n Bekende organisasie wat 'n gesamentlike bemarkingsorganisasie in die Republiek het, het die voordele daarvan soos volg saamgevat: "[Product] as a diminishing and strategic resource requires, particularly in the South African context, this type of marketing and distribution to maximize and ensure full utilisation of the national resource." Dit inkorporeer "... co-operative risk sharing ... reliable supply ... availability to strategic and politically sensitive areas ... flexibility ... rigid quality control ... technical backup".

373. Aan die ander kant word die siening gehuldig dat die moontlike nadelige uitwerking van gesamentlike ondernemings op mededinging op sowel die markstruktuur as markgedrag betrekking kan hê. Struktuurveranderings kan ontstaan waar die stigters van 'n gesamentlike onderneming reeds verskaffers in 'n bepaalde mark is en hulle aan die mark onttrek sodat 'n enkele verskaffer, die gesamentlike onderneming, twee of meer bestaande verskaffers, die stigters, in 'n mark vervang. Die stigting van 'n gesamentlike onderneming om as verskaffer in 'n ander mark, waar die stigters nie reeds betrokke is nie, op te tree, kan ook die uitwerking hê van 'n beperking op potensiële mededinging deurdat daardeur verhoed word dat die stigters elkeen self toetree. Een nuwe verskaffer tree dus toe in die plek van twee of meer potensiële toetreders.

374. Dit word aangevoer dat die vernaamste gedragsbeperking op mededinging die moontlikheid, en selfs waarskynlikheid, is dat die stigters van 'n gesamentlike onderneming ook op ander terreine sal saamwerk of saamspan. Die samewerking of kontak wat deur middel van die gesamentlike onderneming tot stand gebring word, bied die geleentheid om samewerking ten opsigte van ander handelsartikels te bespreek en te bevorder wat nadelige gevolge vir mededinging kan hê, byvoorbeeld wederkerige transaksies of eksklusiewe voorsiening waardeur ander verskaffers uitgesluit word. Laasgenoemde praktyk kom blykbaar al hoe meer in Suid-Afrika voor. Sodanige kontak kan ook samespanning tussen die stigters ten opsigte van ander handelsartikels bevorder.

375. 'n Ander beweerde nadelige effek op mededinging wat struktuur- sowel as gedragskenmerke het, is die uitsluiting van bestaande of potensiële nuwe verskaffers deur die totstandkoming van gesamentlike ondernemings waar die stigters in 'n vertikale verhouding tot mekaar staan. 'n Gesamentlike onderneming tussen 'n grondstofverskaffer en 'n grondstofverwerker kan ander grondstofverskaffers uitsluit, dus 'n gedeelte van hul mark ontneem, of 'n potensiële nuwe grondstofverskaffer se mark beperk.

376. 'n Soort gesamentlike onderneming waarna teenstanders spesifiek verwys, is dié waar verskaffers op dieselfde vlak van die produksie- en distribusieketting 'n gesamentlike onderneming stig om terugwaartse of voorwaartse funksies namens die stigters te onderneem, byvoorbeeld die voorsiening van grondstowwe of die bemarkingsfunksie. Sulke gesamentlike ondernemings wat dikwels 'n "poeltipe"-onderneming is, kan dan in 'n duopolistiese of oligopolistiese markstruktuur onderlinge mededinging ten opsigte van die bepaalde funksie totaal uitskakel en gevolglik die verbruiker 'n keuse tussen verskaffers ontneem en verhoed dat die ekonomiese voordele van effektiewe mededinging realiseer. Die nadelige gevolge van dié tipe gesamentlike onderneming kan vererger as die betrokke handelsartikel relatief homogeen is en geskikte substitute nie beskikbaar is nie, of as die elastisiteit of die kruiselastisiteit van die vraag laag is.

377. By die beoordeling van die argumente wat ten gunste van en teen gesamentlike ondernemings geopper word, is dit vir die Raad duidelik dat baie goeie ekonomiese regverdiging vir gesamentlike ondernemings wel kan bestaan. Gesamentlike ondernemings kan die mededinging in bepaalde omstandighede verhoog of bevorder. Mededinging kan egter ook op grond van die markstruktuur en -gedrag beperk word. Volgens die Raad se mening sal die werklike uitwerking op mededinging afhang van die oogmerke van die gesamentlike onderneming, die vorm daarvan, die aard van die produk en die markstruktuur wat in elke geval in die betrokke bedryfstak heers.

378. In die lig van die uiteenlopende oogmerke en vorme wat gesamentlike ondernemings kan hê en die soms baie duidelike ekonomiese voordele daarvan, is 'n gevolgtrekking oor die regverdiging in die openbare belang van gesamentlike ondernemings in die algemeen, onmoontlik. In die meeste gevalle sal slegs in die lig van die vorm van 'n gesamentlike onderneming, die markstruktuur en die produkte betrokke bepaal kan word of 'n gesamentlike onderneming in die openbare belang geregverdig is of nie. Veral van belang is die mate van markmag waaroor die gesamentlike onderneming beskik of waarskynlik sal beskik, die markmag waaroor die stigters individueel of gesamentlik beskik, of die stigters mededingers is en of die handelsartikel wat deur die gesamentlike onderneming verskaf word horisontaal of vertikaal nou verwant is aan die goedere wat deur die stigters verskaf word.

379. Slegs in die geval van gesamentlike ondernemings wat die bemarkingsfunksie van mededingende verskaffers binnenslands oorneem of behartig, is die Raad van oordeel dat sodanige gesamentlike ondernemings as teen die openbare belang kan wees. Die Raad meen egter dat waar sulke optrede/...

trede tot die ontstaan van beperkende praktyke aanleiding gee, die probleem ingevolge artikel 10(1)(a) van dié Wet ondersoek en verhelp kan word.

2. Vertikale markverdeling

380. Vertikale markverdeling behels gewoonlik dat 'n verskaffer aan herverkopers van sy produkte 'n beperkte mark toeken in die vorm van geografiese gebiede, van liggingbeperkings, of van verbruikers of klasse verbruikers. Die verskaffer stel of wys 'n beperkte aantal herverkopers van sy produkte aan en beperk gewoonlik by wyse van 'n kontrakbepaling elkeen tot 'n bepaalde mark. Mededinging wat normaalweg tussen herverkopers van die bepaalde produk sal bestaan, word gevolglik tot 'n meerdere of mindere mate uitgeskakel, afhangende van die aard van die beperkings. Sodanige herverkoper sal hoofsaaklik met verskaffers van soortgelyke produkte van ander handelsmerke en van substituutprodukte meeding. Mits die prys en die gehalte van die produk gunstig is in vergelyking met dié van mededingende produkte sal die betrokke herverkoper sy markaandeel kan handhaaf sonder om sy prys te verlaag of sy diens te verbeter.

381. Argumente wat ten gunste van vertikale markverdeling aangevoer word, sentreer veral rondom die voordele wat die praktyk vir sowel die verskaffer as die herverkoper inhou. Vir die verskaffer hou vertikale markverdeling na bewering die voordele in dat dit die beskikbaarheid van geskikte afsetpunte vir sy produkte verseker en dat herverkopers deur die mate van beskerming wat hulle geniet lojaal sal wees en aggresief verkope in hulle onderskeie gebiede sal bevorder. Deurdat verskaffers slegs aan 'n beperkte aantal uitgesoekte herverkopers voorsien, word hulle dan in staat gestel om bemarkingskoste te verminder of te beperk en om hulle kredietrisiko's tot 'n minimum te beperk. Die beeld van die produk kan ook bevorder word deur net te voorsien aan herverkopers wat 'n "goeie naam" in 'n gebied opgebou het en die nodige tegniese advies aan verbruikers en 'n goeie naverkoopdiens kan verskaf.

382. Volgens die voorstanders is die voordele vir herverkopers onder meer dat sy investering in 'n mate beskerm word en hy met groter sekerheid sy fasiliteite en diens kan verbeter en kan sorg dat hy altyd voldoende voorrade het. Veral by duur en tegnies ingewikkelde produkte is sodanige sekerheid van groot belang. Vertikale markverdeling kan gevolglik, deurdat dit mededinging tussen herverkopers van dieselfde produk beperk, mededinging met ander soortgelyke produkte en substitute bevorder.

383. Hierteenoor is die vernaamste argument teen vertikale markverdeling dat dit mededinging tussen herverkopers van dieselfde produk beperk of uitskakel en gevolglik ondoeltreffendheid en hoë pryse kan meebring. Voorts word aangevoer dat toetrede beperk word en dat indien al die verskaffers in 'n oligopolistiese markstruktuur vertikale markverdeling toepas, toetrede tot die distribusie van die betrokke soort produkte heeltemal uitgeskakel word. Die gevaar bestaan ook dat verskaffers wat 'n dubbele distribusiestelsel het en gevolglik regstreeks meeding met herverkopers aan wie hy lewer, vertikale markverdeling kan gebruik met die uitsluitlike doel om sy eie verkooporganisasie te beskerm. 'n Groot koper van 'n besondere groep duursame verbruiksartikels rapporteer dat bevind is dat "nie slegs pryse vanaf verskillende handelaars in dieselfde area nie, maar ook afslagte, identies is ... Dit dui daarop dat die vervaardiger die maksimumafslag aan die agentskappe voorskryf ... [en] dat verspreidingsregte ook effektief deur die vervaardiger tot 'n spesifieke geografiese area beperk word, ten einde enige wyer geografiese mededinging uit te skakel".

384. Die Raad meen dat vertikale markverdeling in teenstelling met horisontale markverdeling, wat gewoonlik die uitwerking het om mededinging tussen verskaffers te beperk, belangrike en gesonde besigheidsoogmerke kan hê deurdat dit die doeltreffende distribusie van produkte kan verseker en mededinging tussen produkte van verskillende handelsmerke kan bevorder. Dit moet voorts aanvaar word dat 'n verskaffer daarop ingestel is om sy markaandeel te verhoog en sy winste te verhoog en dat vertikale markverdeling deel van sy bemarkingsbeleid is om dit te bereik. Mits daar nie horisontale samespanning tussen verskaffers bestaan nie, sal verskaffers en hulle aangestelde distribueerders steeds deur mededinging van soortgelyke produkte en substitute gedwing word om doeltreffend te wees en pryse op realistiese vlakke te hou.

385. Die Raad is gevolglik oortuig dat waar vertikale markverdeling bestaan daar dikwels voldoende regverdiging vir die praktyk is en dat die praktyk gevolglik nie sonder meer as teen die openbare belang beskou kan word nie.

BEPERKENDE/...

BEPERKENDE TENDERPRAKTYKE

1. Identiese tenders

386. In hierdie kategorie bestaan hoofsaaklik twee vorme van beperkende praktyke, naamlik standaardtenderdokumente en -voorwaardes en identiese tenderpryse, wat die gevolg is van samespanning tussen tenderaars.

(a) Standaardtenderdokumente en -voorwaardes

387. Gewoonlik word standaardtenderdokumente en -voorwaardes aangetref waar die opstel van die tendervoorlegging en die verskaffing van die betrokke handelsartikels redelik ingewikkeld van aard is.

388. Die argumente wat vir die behoud van standaardtenderdokumente en -voorwaardes aangevoer word, is veral tweërlei van aard, naamlik dat -

dit tenderaars op gelyke voet plaas wanneer getender word en die een gevolglik nie 'n "onregverdige" mededingende voorsprong ten opsigte van voorwaardes bo 'n ander verkry nie; en

billike en redelike tenderprosedures bevorder word. Aan die een kant verseker dit dan dat die tenderaanvraer maklik vergelykbare tenderpryse ontvang en aan die ander kant dat tenders opgestel kan word op voorwaardes waarmee tenderaars vertroud is.

389. Ook word deur sekere groepe aangevoer dat standaardtenderdokumente en -voorwaardes slegs as riglyn vir die tenderaars dien en geensins afgedwing word nie. In hierdie verband word die volgende uittreksel uit 'n voorlegging van 'n respondent aangehaal: "... (S)tandard documentation is an endeavour to ensure that at tendering stage competition is fair and equitable and, that prices,because tenders are submitted on known, tried and tested contract conditions, are accordingly much keener." Die respondent gaan voort deur te meld dat sy "... insistence on tendering on standard conditions ... is not designed to enforce standard conditions of contract as such. What is enforced is a tendering procedure whereby the basis is provided for the uniform compilation of tender prices and for an accurate evaluation and adjudication of tenders. The essential aim is to promote fair and equitable tendering procedures. In this way the (person who calls for tenders) is assured of receiving readily comparable tender prices while (tenderers) are able to compile and submit their tenders on conditions of contract with which they are familiar".

390. Die teenstanders van die praktyk voer egter aan dat standaardtenderdokumente en -voorwaardes eensydig van aard is en die belange van die tenderaanvraer nie behoorlik verteenwoordig of in aanmerking geneem word nie; dat die tenderdokumente of voorwaardes redelik staties is en nie rekening hou met die wysigings wat nodig is om by nuwe ontwikkelings of spesifieke omstandighede aan te pas nie; en dat die vryheid om te kontrakteer belemmer word omdat die betrokke partye meestal verplig is om by die voorgeskrewe bepalings te hou. Voorts word geargumenteer dat die starheid van standaardtenderdokumente en -voorwaardes die inisiatief om gunstiger voorwaardes op 'n tender aan te bied van die individuele tenderaar ontneem. Dat billike en redelike tenderprosedures deur hierdie praktyk bevorder word, word ook bevraagteken as gevolg van die eensydige en arbitrêre aard daarvan. Die stelling is gemaak dat dit nie die funksie van die besondere bedryfstak is om die tenderaanvraer te beskerm of aan hom die voorwaardes waaronder getender moet word, voor te skryf nie. Ten opsigte van die argument dat die standaarddokumente en -voorwaardes slegs as riglyne geld, word as teenargument aangevoer dat die ondervinding geleer het dat sodanige riglyne alte dikwels ontwikkel in 'n instrument waardeur die praktyk afgedwing word. 'n Respondent betoog in hierdie verband dat "... due to ... insistence in using (standard) contract documentation, the compilation of these documents were carried out under the secretariat of [an association] and the various clauses were, therefore, very heavily weighed in favour of the [tenderers]". 'n Ander respondent betoog dat "... in the end each tenderer should be free to tender upon conditions which are acceptable to him".

391. Die Raad is van mening dat 'n vereniging wat die praktyk normaalweg administreer gewoonlik in so 'n dominante posisie verkeer dat hy die gebruik van die tenderdokumente en -voorwaardes nie net op sy lede kan afdwing nie (selfs waar dit slegs as 'n handleiding ingestel is), maar ook die tenderaanvraer kan dwing om dit te aanvaar. Inderdaad betoog 'n respondent in dié verband"... any [tenderer] has the simple free alternative of declining to tender. Employers have no such alternative, ... they will toe the line, or they will get no tenders from [the members of an association], who constitute the major portion of [an industry]". Ook stem die Raad saam dat die tenderdokumente en -voorwaardes redelik eensydig kan wees en tot gevolg kan hê/...

hê dat die tenderaanvraer nie altyd die beste tenders kry nie. So kan die ontwikkeling of invoering van verbeterings of innovasies verhoed of vertraag word. In die algemeen kom effektiewe mededinging meer tot sy reg sonder die bestaan van die praktyke. Die Raad is in die algemeen nie daarvan oortuig dat die beperkende praktyk nodig en in die openbare belang geregverdig is nie.

392. Die Raad glo derhalwe dat die beëindiging van hierdie praktyke in die bedryfstakke waar dit wel bestaan of beoog word, tot groter mededinging in die betrokke bedryfstakke kan lei.

(b) Identiese tenderpryse

393. Een van die argumente wat vir die behoud van identiese tenderpryse aangevoer word, hang ten nouste saam met die elastisiteit van die vraag waarmee tenderaars te kampe het. Dit word beweer dat 'n groot volume aankope en 'n klein aantal aankopers (soms net een aankoper) dikwels by tenderaankope betrokke is. Indien geen goeie substitute vir die betrokke handelsartikel bestaan nie, is die vraag daarna redelik prysonelasties. Tenderpryse wat laer is as die algemeen heersende prys kan gevolglik 'n verlies aan totale wins vir die bedryfstak veroorsaak. Om 'n verliessituasie te vermy en te verhoed dat marginale ondernemings die mark verlaat, word identiese tenderpryse derhalwe deur die voorstanders van die praktyk as noodsaaklik beskou.

394. Voorts word aangevoer dat sekere markstrukture identiese tenderpryse regverdig. In die bedryfstakke waar 'n relatief groot aantal mediumgroot ondernemings aanwesig is, is in die afwesigheid van die identiese tenderpryse byvoorbeeld strawwe mededinging aan die orde van die dag. Prysmededinging sal dan na bewering in hierdie omstandighede as gevolg van prysoorloë tot destabilisasie van die mark lei. Dit kan uiteindelik uitloop op 'n vermindering van die aantal ondernemings in 'n bedryfstak, met die gepaardgaande nadele vir die ekonomie daaraan verbonde. Ook word beweer dat identiese tenderpryse stabiliserend op die mark kan inwerk.

395. Die siening van die voorstanders van die praktyk is ook dat in 'n oligopolistiese marksituasie en by redelik homogene produkte 'n verlaging in die prys deur een tenderaar tot 'n verlaging van die algemene pryspeil, eintlik "chaotiese" pryse, in die betrokke bedryfstak sal lei. Eenvormige tenderpryse is derhalwe noodsaaklik om stabiliteit in die bedryfstak te bewerkstellig. Ook is genoem dat veral in die geval van homogene produkte met 'n relatief hoë persentasie vaste koste, die kostestruktuur van al die aanbieders min of meer dieselfde is sodat eenvormige tenderpryse 'n vanselfsprekende gevolg is. Samespanning in sodanige omstandighede, en veral gedurende 'n dalende konjunktuur, is derhalwe noodsaaklik om genadelose mededinging en die uitskakeling van sommige van die markpartye te verhoed.

396. Die teenstanders voer aan dat die praktyk om saam te span met die doel om identiese tenderpryse te bewerkstellig, die primêre doelwit vir die aanvra van tenders, naamlik om mededinging tussen tenderaars te bevorder en daardeur die gunstigste kontrakvoorwaardes te bekom, aantas. Die doel is om mededingende tenders ten opsigte van alle aspekte, byvoorbeeld prys, kwaliteit en diens, te verkry. Die prysmeganisme kan nie effektief met identiese tenderpryse funksioneer nie.

397. Dat identiese tenderpryse wel voorkom, blyk uit 'n voorlegging waarin gestel word dat: "Dit ook seker nie blote toeval is dat die ... vervaardigers se tenderpryse jaar na jaar feitlik, indien nie presies, dieselfde is vir 'n bepaalde tender nie. Dit skep beslis die indruk dat vooraf besluit word wat die prys vir die betrokke jaar sal wees." 'n Ander een betoog: "Die pryse van ... tenderaars vir emulsie-produkte is so presies eenders dat daar moet geglo word dat daar samespanning tussen die mededingers is."

398. Volgens getuienis is die Raad van mening dat die uitskakeling van onderlinge mededinging die primêre oogmerk van identiese tenderpryse is. Die resultaat is dan dikwels 'n prys wat hoog genoeg moet wees om die relatief ondoeltreffende tenderaar se prestasie in te sluit en aan hom minstens 'n normale wins te verseker. Identiese tenderpryse moedig gevolglik die voortbestaan van ondoeltreffende ondernemings op 'n kunsmatige wyse aan en verskaf nouliks aanmoediging om doeltreffendheid in die betrokke bedryfstak te verbeter.

399. Die bewering dat die kostestrukture van verskillende ondernemings vir homogene produkte vir almal dieselfde is en dat dit vir identiese tenderpryse verantwoordelik is, is nie vir die Raad aanvaarbaar nie. Selfs al verteenwordig die vaste koste 'n groot gedeelte van die totale koste, kom verskille in die veranderlike koste immers voor en kan die individuele ondernemer nog steeds bekostig om laer pryse as sommige van sy mededingers aan te bied, veral in die gevalle

waar/...

waar die eenheidskoste van produksie vir veranderinge in die produksiegrootte gevoelig is.

400. Die Raad is van mening dat die vrye werking van die markmeganisme ten opsigte van tenderpryse tot almal se voordeel strek. In hierdie verband dien daarop gelet te word dat die Staat en plaaslike owerhede van die grootste tenderaankopers is en dat die manipulasie tot eenvormigheid in tenderpryse nie net skadelik vir die tenderaanvraer is nie, maar oor 'n veel wyer vlak nadelig is omdat die belastingbetaler ook onregstreeks daardeur geraak word. Alles in ag genome is die Raad nie oortuig dat die omstandighede bestaan wat die praktyk van identiese tenderpryse in die openbare belang regverdig nie.

2. Pre-seleksie van tenderaars

401. Soos reeds in die omskrywing van tenderpraktyke aangedui, is die oogmerk van hierdie praktyk om tenders so te manipuleer dat die toewysing of toekenning daarvan aan 'n spesifieke tenderaar gemaak word. Dikwels word die toewysing deur 'n kartel behartig.

402. Dit word aangevoer dat hierdie praktyk nie teen die openbare belang geag kan word nie omdat een tenderaar in elk geval teen die laagste prys of gunstigste voorwaardes tender en dit te betwyfel is of by die afwesigheid van vooraf toewysing daarop verbeter kan word. Dit is derhalwe slegs 'n metode om te verhoed dat ander tenderaars op mekaar se markgebied inbreuk maak of klante van mekaar lok. Bowendien, so word geredeneer, is karteloореenkomste inherent onstabiel sodat so 'n ooreenkoms kort van lewensduur is.

403. Die voorstanders van vooraf toewysing argumenteer dat tenders soms op uitnodiging vanaf 'n voorkeurlys aangevra word. Indien van die tenderaars nie in staat is om die betrokke tenderprojek te behartig nie, word pre-seleksie toegepas eerder as om die risiko te loop dat hul name van die voorkeurlys verwyder word.

404. Volgens die teenstanders van hierdie praktyk skep dit die vermoede by die tenderaanvraer dat onder mededingende toestande getender is. Voorts word aangevoer dat die tenderaanvraer sonder dat hy dit besef, daarvan weerhou word om die doelmatigheid van tenders in terme van pryse, kwaliteit, dienslewering en werkverrigting na behore te oorweeg.

405. Die Raad is ook nie oortuig dat die "gunstigste" tender wat onder hierdie stelsel voorgelê word inderwaarheid dié gunstigste is nie. In die afwesigheid van hierdie praktyk is die moontlikheid groot dat 'n nog gunstiger tender ingedien kan word. Uit die redenasie van die voorstanders vir die behoud van hierdie praktyk is dit vir die Raad duidelik dat die eiebelang van die markpartye voorop gestel word. Die deursigtigheid van die mark, wat 'n vereiste vir effektiewe mededinging is, word belemmer omdat die volle spektrum van voorwaardes en pryse aan die tenderaanvraer verbloem word.

406. Met inagneming van al die argumente is die Raad daarvan oortuig dat die vooraftoekenning of -toewysing van tenders per saldo nie in die openbare belang geregverdig is nie.

3. Voorkoming van mededingende tenders

(a) Ooreenkoms om nie in mededinging met mekaar te tender nie

407. Waar tenderaars of 'n groep tenderaars ooreenkom om nie in mededinging met mekaar te tender nie, kan identiese tenders een van die resultate wees. Dieselfde argumente soos by identiese tenders bespreek, word hier ter regverdiging van die praktyk aangevoer. Dié praktyk kan egter ook tot gevolg hê dat slegs een tender of een tender van 'n groep tenderaars ingedien word.

408. Voorstanders van die praktyk voer aan dat ofskoon die groep slegs een tender of identiese tenders indien, diegene wat van die groep uitgesluit is in elk geval met die groep kan meeding. Voorts word geargumenteer dat die tenderaanvraer dikwels die enigste aanvraer op die tendermark is en gevolglik oor monopsonistiese mag kan beskik. Om teenkrag ("countervailing power") hierteen te skep, word dié praktyk dan gevolg. Soms is tenderaankope vir die grootste gedeelte van 'n bedryfstak se omset verantwoordelik en word dié monopsonistiese mag verder versterk. Indien geen teenkrag in hierdie geval bestaan nie, kan tenderaars gedwing word om teen sulke lae pryse te tender dat verliese gely word. Die teenstanders van hierdie praktyk redeneer dat die praktyk die basis van 'n markgeoriënteerde ekonomiese stelsel aantas omdat dit klaarblyklik mededinging beperk. Die tenderaanvraer is ook nie daartoe in staat om die volle potensiaal van die mark ten opsigte van pryse en voorwaardes te peil nie.

409./...

409. Reeds is daarop gewys dat identiese tenders wat die gevolg van die voorkoming van mededingende tenders is nie vir die Raad in die openbare belang aanvaarbaar is nie. Dit is voorts vir die Raad duidelik dat die bevordering van die eie of groepsbelang ten koste van die tenderaanvraer, die onderliggende motief vir die behoud van die praktyk is. Die argument dat mededinging in elk geval nog bestaan via diegene wat van die groep uitgesluit is, is nie vir die Raad aanvaarbaar nie. Dit is meer dikwels die geval dat al die markpartye lede van die groep is. Die omvang van mededingende tenders is kleiner en gevolglik is die tenderaanvraer nie daartoe in staat om die volle potensiaal van die mark te peil nie. In 'n markgeoriënteerde ekonomie is dit noodsaaklik dat die deursigtigheid van die mark so ver moontlik bevorder word, en dit is nie die geval waar dié praktyk toegepas word nie. Voorts ontstaan die vraag of die individuele onderneming in 'n groep slegter daaran toe sal wees in die afwesigheid van die praktyk. Indien 'n tender nie aan een van die groep toegeken word nie, was die praktyk bowendien nie van veel waarde vir die groep nie.

410. Die Raad is daarvan oortuig dat hierdie praktyk meer skade kan aanrig as wat dit tot voordeel is en dat dit nie vir die voortbestaan van die doelmatige onderneming noodsaaklik is nie. Die Raad kan nie aanvaar dat in die afwesigheid van samespanning om nie in mededinging met mekaar te tender nie, die monopsonistiese mag van die tenderaanvraer nie geneutraliseer sal word nie. Die Raad is gevolglik nie deur die voorstanders van die praktyk oortuig dat hierdie beperkende praktyk per saldo in die openbare belang geregverdig is nie.

(b) Verbod van 'n vereniging se lede om in mededinging met nie-lede te tender

411. Hierdie praktyk verskil van die vorige daarin dat lede van 'n groep (gewoonlik 'n vereniging) wel deur die vereniging toegelaat word om onderling in mededinging met mekaar te tender, maar nie in mededinging met nie-lede van die groep of vereniging nie. Gewoonlik vind hierdie praktyk inslag by tenderprojekte wat redelik ingewikkeld van aard is.

412. Dit word deur die voorstanders van die praktyk betoog dat in die genoemde omstandighede die kwaliteit van die betrokke groep self of sy handelsartikels (of werk) veral 'n belangrike rol speel. Om kwaliteit te verseker, is dit volgens die voorstanders van hierdie praktyk noodsaaklik dat 'n vereniging beheer oor sy lede uitoefen, wat uiteraard nie oor nie-lede gedoen kan word nie. Voorts skep hierdie praktyk vertroue by die tenderaanvraer dat hoë kwaliteitsvereistes by die tenderprojek gehandhaaf sal word. Dit vergemaklik ook organisatoriese probleme en het die bykomende voordeel van standaardisasie omdat by laasgenoemde gewoonlik van standaardtenderdokumente gebruik gemaak word, wat vir die lidtenderaar die versekering inhou dat hy op gelyke voet met ander lede tender en sy prys met dié van sy mededingers vergelykbaar is. Soms bevat 'n vereniging se regulasies ook 'n bepaling dat nie-lede, met die toestemming van die vereniging, in mededinging met lede mag tender. 'n Bepaalde prosedure wat in so 'n geval gevolg moet word, word deur die vereniging voorgeskryf en gewoonlik kan na 'n hoër gesag geappelleer word, sou die nodige toestemming nie verkry word nie. Dit word beweer dat hierdie prosedure en bepaling die moontlike inbreuk op die openbare belang uitskakel.

413. Die argumente teen hierdie praktyk sentreer hoofsaaklik om die feit dat mededinging tussen lede en nie-lede van 'n vereniging nie moontlik is nie. Ook word geargumenteer dat sodanige vereniging gewoonlik 'n dominante posisie in die mark het en daardeur tenderaanvraers kan beïnvloed om tenders aan lede toe te ken. Dit het ook tot gevolg dat nie-lede, selfs teen hul sin, gedwing is om by die vereniging aan te sluit, wat die mag van die vereniging verder versterk. Dit is ook nie altyd prakties doenlik dat nie-lede om verlof aansoek doen om saam met lede te tender nie. Dié prosedure, en ook om te appelleer, is te omslagtig en tenders het dikwels reeds gesluit voordat die neergelegde prosedure gevolg is.

414. In dié verband voer 'n respondent aan dat die "stranglehold of the [association] is further reinforced by forbidding the consideration of tenders from non-members together with those from [members] ...[it] has resulted in tenders being accepted on less than optimal terms to both employer and (tenderer) and has increased the cost of [the tender project]". Ten opsigte van die bepaling in 'n vereniging se reëls dat toestemming deur nie-lede verkry kan word om in mededinging met lede te tender, beweer 'n respondent dat "[The association] is hardly a disinterested party in such matters and the overall procedure is so time-consuming as to have very little worth."

415. By die beoordeling van die praktyk het die Raad dit oorweeg of die handhawing daarvan hoegenaamd nodig is om die genoemde voordele te bereik. Dit is vir die Raad duidelik dat hierdie praktyk slegs die eiebelang van die tenderaars bevorder. Weer eens word die tenderaanvraer verhoed om die volle potensiaal van die mark te bepaal, wat vir die doeltreffendheid van die tenderstelsel noodsaaklik is. Dit is te betwyfel of in so 'n geslote tendermark noodwendig die beste/...

beste tender ingedien sal word. Dit is eerder waarskynlik dat in die afwesigheid van hierdie praktyk gunstiger tenders deur die lede van 'n vereniging ingedien kan word.

416. Die Raad aanvaar dat die tender en die hantering van die projek by ingewikkelde tenderprojekte van hoogstaande gehalte moet wees, maar dit kan nie as vanselfsprekend aanvaar word dat tenderaars buite die vereniging nie dieselfde kwaliteit van werk kan lewer nie. Trouens, in 'n wyer tendermark sal die markmeganisme elke tenderaar dwing om goeie kwaliteit te lewer. Die indruk word ook geskep dat die tenderaanvraer teen lae kwaliteit beskerm moet word en nie self daaroor 'n oordeel moet vel nie. Volgens die Raad se mening is dit in elk geval nie die tenderaar se funksie om die tenderaanvraer te beskerm of te besluit wat in die tenderaar se beste belang is nie. Ook behoort nie met die tenderaanvraer se keuse betreffende die toekenning van tenders ingemeng te word nie. Die tenderaanvraer behoort vertroud te wees met die hoedanighede en voordele verbonde aan die vereniging se lede. Net so moet hy ook vry wees om self te besluit of enige risiko's bestaan om met nie-lede sake te doen.

417. Ervaring het ook aan die Raad getoon dat die prosedure waarvolgens nie-lede toestemming kan verkry om in mededinging met lede te tender weens die tydsverloop verbonde aan dié prosedure en die omstandigheid daarvan, nie 'n prakties uitvoerbare reëling is nie.

418. Die Raad is derhalwe nie oortuig dat die voordele van die handhawing van dié praktyk die nadele daarvan oorskry nie. Die Raad is ook nie oortuig dat hierdie praktyk noodsaaklik is om die genoemde voordele aan tenderaanvraers te verseker nie. Die Raad is gevolglik van mening dat hierdie beperkende praktyk nie in die openbare belang geregverdig is nie.

4. Markverdeling met betrekking tot tenders

419. Markverdeling met betrekking tot tenders behels hoofsaaklik dat gesamentlik getender word of dat 'n tender op 'n rotasie-, geografiese- of klante-basis deur tenderaars aan 'n spesifieke tenderaar toegewys word.

(a) Gesamentlike tenders

420. Ten opsigte van gesamentlike tenders word gewoonlik aangevoer dat die tenderprojek van so 'n omvang is dat dit onmoontlik deur een tenderaar behartig kan word.

421. Ter verdediging van gesamentlike tenders met die doel om die mark te verdeel, word betoog dat dit die uitruilbaarheid van die betrokke handelsartikel vergroot of dat die tenderaankope so 'n groot gedeelte van die totale omset van die betrokke artikel in 'n bedryfstak verteenwoordig dat dit 'n verdeling regverdig om sodoende al die tenderaars in die tender te laat deel.

422. Teenstanders van die praktyk voer aan dat deur 'n gesamentlike tender met die doel om die mark te verdeel die tenderaars in staat gestel word om, sonder om afsonderlike tenders in te dien, teen identiese pryse en voorwaardes te tender. Die meeste van die argumente teen identiese tenders kan dus ook hier aangevoer word.

423. Die Raad is van mening dat die tenderaanvraer die beste toegerus is om te oordeel of 'n projek wel van so 'n omvang is dat dit 'n gesamentlike tender regverdig en behoort by die tenderuitnodiging aan te dui dat gesamentlike tenders aanvaarbaar is. Die tenderaar weer behoort op sy tender aan te dui dat gesamentlik getender word. Soos reeds aangetoon, is die argumente vir die behoud van identiese tenders nie vir die Raad aanvaarbaar nie en die Raad is ook nie oortuig dat gesamentlike tenders in die openbare belang geregverdig is nie.

(b) Toewysing van tenders op 'n rotasie-, geografiese of klante-basis

424. Gewoonlik word hierdie vorm van markverdeling met betrekking tot tenders deur pre-seleksie van tenderaars of weerhouding van tenders bewerkstellig. As voorbeeld van markverdeling met betrekking tot tenders, meld 'n respondent in sy voorlegging: "Dit is ... opvallend dat sommige groot ... somtyds nie tender vir die behoeftes van 'n ... nie, maar dan tog wel miskien weer die volgende jaar wanneer 'n ander een of meer weer onttrek. So het slegs een ... verlede jaar getender vir die ... behoeftes ...." Benewens die argumente vir die behoud van pre-seleksie soos reeds bespreek en vir die weerhouding van tenders wat later in oënskou geneem word, bestaan spesifieke argumente vir die behoud van hierdie vorm van markverdeling. Van die vernaamste argumente in dié verband word vervolgens in oënskou geneem.

425./...

425. Die voorstanders van die toewysing van tenders op 'n rotasiebasis voer aan dat hierdie praktyk langtermynbeplanning bevorder, veral omdat elke tenderaar lank voor die tyd weet wanneer 'n tender aan hom toegeken sal word en hy hom derhalwe daarby kan aanpas.

426. Met betrekking tot tendertoewysing op 'n geografiese basis word aangevoer dat dit kruisvervoer uitskakel en dus vervoerkoste verminder.

427. Die bewering is ook gemaak dat die tegniese aard van sommige tenderprojekte sodanig is dat hoë koste vir die voorbereiding van 'n tender aangegaan word. Dit vereis gewoonlik 'n hoë mate van deskundigheid, en tenderaars moet met die tenderaanvraers saamwerk om die nodige spesifikasies op te stel. Dit word derhalwe deur die betrokke tenderaars as billik beskou dat dié tenderaar wat die aanvoorwerk gedoen het, die tendertoekenning sal kry.

428. Dit is reeds aangetoon dat die argumente ten gunste van pre-seleksie nie vir die Raad aanvaarbaar is nie. Vir sover hierdie argumente ook ten opsigte van markverdeling ter sprake is, is dit ook nie vir die Raad in hierdie geval aanvaarbaar nie.

429. Die teenstanders van hierdie praktyk argumenteer dat veral met betrekking tot die toewysing van tenders op 'n rotasiebasis die vermoede gewek word dat in mededingende toestande getender word. Weer eens word die deursigtigheid van die mark belemmer en kan die "gunstigste" tender minder gunstig vergelyk in die afwesigheid van hierdie praktyk.

430. Dit is die Raad se mening dat die toewysing van herhalende tenders op 'n rotasiebasis tot gevolg kan hê dat die "onsuksesvolle" tenderaars mag poog om hul verlies aan omset tydens 'n tendersiklus te verhaal deur pryse te verhoog. In die afwesigheid van die praktyk behoort die markmeganisme daarvoor te sorg dat die onsuksesvolle tenderaars nie hul pryse willekeurig verhoog nie. Per saldo glo die Raad dat die voordele by die afwesigheid van hierdie praktyk swaarder weeg as die moontlike voordele verbonde aan die aanwesigheid daarvan.

431. Die argument dat vervoerkoste verminder word deur geografiese markverdeling verloor klaarblyklik uit die oog dat vervoerkoste slegs 'n gedeelte van die totale koste vorm. 'n Doelmatige onderneming in een gebied se totale koste, met inbegrip van vervoerkoste na 'n ander gebied, kan laer wees as die totale koste van 'n onderneming in daardie ander gebied. Deur hierdie vorm van markverdeling word verhoed dat kostevoordele in tenderpryse weerspieël word. Die Raad twyfel nie daaraan nie dat 'n geografiese markverdeling wat kan ontstaan as gevolg van die werking van die markmeganisme tot groter voordeel vir die openbare belang sal wees as 'n "gedwonge" markverdeling en dat die tenderaanvraer in hierdie verband sy eie besluit kan neem.

432. By tenders wat hoë tegniese kundigheid vereis, is tenderkoste vir alle tenderaars na alle waarskynlikheid hoog en kan 'n mededingende voorsprong ten opsigte van tegniek en innovasie verkry word wat die totale koste van 'n tenderprojek kan verlaag. Bowendien is die tenderaanvraer gewoonlik self ook tegnies deskundig of kan hy van tegniese raadgewers gebruik maak om hom met die opstel van tenderspesifikasies behulpsaam te wees. Geen rede bestaan dus waarom 'n tender aan 'n spesifieke tenderaar toegewys behoort te word nie. Trouens, die Raad glo dat sodanige toewysing slegs tot voordeel van die suksesvolle tenderaar en die ander samespanners strek. Dit inhibeer innovasie tot nadeel van die openbare belang en die belemmering van die markmeganisme in 'n markgeoriënteerde ekonomie. Derhalwe is die Raad nie oortuig dat hierdie beperkende praktyk in die openbare belang geregverdig is nie.

5. Weerhouding om te tender

433. Die besluit om nie te tender nie kan onafhanklik op 'n individuele basis deur 'n moontlike tenderaar geneem word, of 'n groep moontlike tenderaars kan gesamentlik besluit om nie te tender nie. In laasgenoemde geval is samespanning teenwoordig en dit is hierdie element wat die weerhouding van tenders as 'n beperkende praktyk identifiseer. In hierdie verband is soos volg betoog "our enquiry had been embargoed and tenders could not be submitted by [the members of an association and] several invited [tenderers] failed to tender".

434. Volgens diegene wat die praktyk verdedig, beskik 'n tenderaanvraer dikwels oor monopsonistiese mag, veral waar tenderaankope 'n relatief groot gedeelte van die totale omset van 'n bedryfstak uitmaak. Deur die weerhouding van tenders kan die tenderaanvraer beïnvloed word om die voorwaardes van 'n kartel of vereniging te aanvaar of om billiker tendervoorwaardes neer te lê. Sodoende kan die tenderaanvraer se mag geneutraliseer word.

435./...

435. Weerhouding om te tender is volgens die teenstanders van die praktyk een van die metodes waardeur verhoed kan word dat tenderaars in mededinging met mekaar tender. 'n Subtiele vorm van weerhouding om te tender bestaan waar 'n vereniging sy lede verbied om in mededinging met nie-lede te tender. Deur hierdie praktyk te volg, kan die reeds dominante posisie van 'n vereniging in 'n bedryfstak nog verder versterk word. Dit het ook tot gevolg dat 'n dominante vereniging onregstreeks nie-lede daarvan weerhou om te tender. Dit kan ook as 'n metode aangewend word om identiese tenders veral met betrekking tot standaardtenderdokumente op die tenderaanvraer af te dwing. Indien laasgenoemde nie dié dokumente of voorwaardes aanvaarbaar vind nie word lede deur hul vereniging opdrag gegee om hul tenders te weerhou. Weerhouding van tenders vergemaklik ook markverdeling met betrekking tot tenders. Deur tenders van ander tenderaars te weerhou, word verseker dat 'n tender aan 'n spesifieke tenderaar toegeken word.

436. Dit is vir die Raad duidelik dat samespanning om tenders te weerhou veral om die bevordering van die belange van 'n groep tenderaars of 'n vereniging sentreer. Dit vertroebel weer eens die deursigtigheid van die mark vir die tenderaanvraer en die primêre doelwit vir die aanvra van tenders, naamlik om mededinging tussen tenderaars te bewerkstellig, word daardeur verydel. Die Raad kan gevolglik geen regverdiging vir hierdie praktyk in die openbare belang vind nie.

6. Algemeen

437. Die verskillende beperkende tenderpraktyke is in isolasie teen die openbare belang geëvalueer. Die Raad is daarvan bewus dat hierdie praktyke dikwels gekombineerd toegepas word sodat hul negatiewe invloed op die openbare belang veel groter kan wees as wat uit die evaluasie blyk. Voorts is die evaluasie hoofsaaklik teen die agtergrond van die tendermark gedoen. Beperkende praktyke wat op die tendermark toegepas word, kan egter 'n oorspoelingseffek op die totale mark hê wat derhalwe die totale mark nadelig kan beïnvloed. Die Raad wil herhaal dat die argumente wat ten opsigte van gesamentlike pryse en markverdeling aangedui is, sowel dié ten gunste van en dié daarteen ook op beperkende tenders van toepassing is. Die omgekeerde geld eweneens. Die Raad kan ook nie nalaat nie om te vermeld dat hy daarvan oortuig is dat baie van die beperkende tenderpraktyke voorkom kan word indien die tenderaanvraers die nodige voorsorg by die spesifikasies van tendervereistes aan die dag lê.

HOOFSTUK VII/...

HOOFSTUK VII

SAMEVATTING, GEVOLGTREKKING EN AANBEVELINGS

INLEIDING

438. Effektiewe mededinging is noodsaaklik vir die doeltreffende werking van 'n markgeoriënteerde ekonomiese stelsel. Trouens, in die Grondwet van die Republiek van Suid-Afrika, 1983, word die bevordering van effektiewe mededinging as 'n nasionale doelwit gestel.

439. By 'n ondersoek van hierdie aard gaan dit om die wenslikheid daarvan om 'n algemene verbod in te stel ten aansien van 'n praktyk wat mededinging beperk. Dit gaan nie oor 'n verbod op die gedrag van spesifieke perone in 'n bepaalde situasie nie. Wat die openbare belang betref, kan so 'n praktyk se implikasies dus nie aan die hand van 'n spesifieke stel feite oorweeg word nie. Gevolglik moet die aanbevelings op grond van die beleid van bevordering van effektiewe mededinging,die Raad se ervaring en algemene argumente ten gunste van en teen die praktyke gemaak word, eerder as op grond van empiries bepaalde feite. In sy aanbeveling sal die Raad egter deeglik daarmee rekening moet hou dat 'n praktyk wat op hierdie wyse as onwenslik beskou word inderdaad in die lig van besondere omstandighede en die openbare belang geregverdig kan wees.

440. Dit impliseer dat partye betrokke by 'n spesifieke praktyk wat die onderwerp van 'n algemene verbod is, maar kan aantoon dat die toepassing van daardie praktyke in hul besondere omstandighede wel in die openbare belang geregverdig is, van so 'n verbod vrystelling moet kan verkry. Dit strook trouens met die beleid wat toepassing vind by enige ondersoek ingevolge artikel 10(1)(a) van die Wet na die gedrag van spesifieke persone wat 'n beperkende praktyk daarstel. Ook daar is die Raad verplig om voorkomende of remediërende optrede by die Minister aan te beveel tensy die betrokke partye die Raad tevrede kan stel dat hul optrede in die openbare belang geregverdig is.

SAMEVATTING

441. Bevindinge wat in die verslag vermeld word en wat van belang vir die uiteindelike aanbevelings van die ondersoek is, is kernagtig gestel die volgende -

1. Ongeregverdigde beperkende praktyke

442. Van wesenlike betekenis is die Raad se bevinding in Hoofstuk VI dat die volgende praktyke beperkende praktyke is wat nie in die openbare belang geregverdig is nie -

(a) Vertikale herverkooppryshandhawing

In hierdie verband het die Raad tot die verdere bevinding gekom dat dit nie geregverdig sou wees om individuele vertikale aanbevole pryse summier te verbied nie. Gesamentlike vertikale aanbevole pryse, daarenteen, word nie as geregverdig in die openbare belang beskou nie.

(b) Horisontale pryssamespanning

Voorts is tot die gevolgtrekking gekom dat horisontale aanbevole pryse, in teenstelling met prysinligtingstelsels, eweneens nie in die openbare belang geregverdig is nie.

(c) Horisontale samespanning oor voorwaardes waarop goedere verskaf of 'n diens gelewer mag word

(d) Horisontale markverdeling

'n Veralgemening oor die verskeidenheid van moontlike gesamentlike ondernemings is egter nie moontlik nie.

(e) Samespanning by tenders

2./...

2. Voorkoms van die betrokke praktyke

443. Soos uit Hoofstuk IV blyk, is in sommige van die voorleggings wat die Raad ontvang het bewerings gemaak oor die aanwesigheid van die vyf betrokke praktyke in 'n groot aantal bedryfstakke en ten aansien van 'n verskeidenheid handelsartikels. Vanweë die vertroulike aard van die praktyke is dit nie moontlik om die presiese omvang daarvan in die Suid-Afrikaanse ekonomie te bepaal nie. Dat hulle egter betreklik algemeen voorkom, trouens meer dikwels as wat aanvanklik vermoed is, lyk gewis. In sommige bedryfstakke speel hulle trouens 'n besonder belangrike rol.

3. Buitelandse stelsels

444. Die onderskeie buitelandse stelsels waarna in Hoofstuk III verwys is, toon verskille in benadering en in die doelgerigtheid waarmee teen die betrokke beperkende praktyke opgetree word. In verskeie van hulle word al of sommige van die betrokke beperkende praktyke egter deur òf 'n algemene òf spesifieke wetteregtelike verbod getref, die oortreding waarvan 'n strafgeregtelike sanksie en soms ook ander gevolge ontlok. Wat uit 'n beleidsoogpunt van belang is, is dat optrede teen die betrokke beperkende praktyke geensins vreemd aan ander mededingingsregstelsels is nie.

GEVOLGTREKKING

1. Die behoefte aan optrede

445. In die lig van die voorgaande is die Raad van mening dat 'n gepaste verbod teen die betrokke praktyke in 'n ministeriële kennisgewing vervat moet word. Hieroor laat die Raad hom verder uit wanneer hy by die formulering van sy aanbevelings kom.

446. Intussen sou die Raad sy plig versuim indien hy sou nalaat om met begrip te verwys na 'n standpunt wat in verskeie voorleggings sterk na vore gebring is. Dit is dat daar op hierdie wyse daadwerklik opgetree word om effektiewe mededinging te bevorder, terwyl die Staat self met wetgewing in 'n verskeidenheid opsigte verantwoordelik is vir 'n ernstige versteuring en beperking van mededinging - soms in opsigte wat aanleiding gee tot verdere beperkinge deur ondernemers in die betrokke gereguleerde bedryf. Gevolglik word die huidige bewustheid van die owerhede van die noodsaaklikheid om die mededingingsbeleid te koördineer, op prys gestel. Ten spyte van die wesenlike behoefte aan die so snel moontlike vermindering van mededingingsbeperkinge wat van owerheidsweë opgelê is, is die Raad daarvan oortuig dat dit nie die vertraging van optrede teen die praktyke wat hier ter sprake is kan regverdig nie.

2. Die noodsaaklikheid van 'n verbod

447. Die Raad is daarvan oortuig dat 'n noukeurig bewoorde verbod kragtens artikel 14(5) van die Wet 'n betekenisvolle uitwerking op die bevordering van effektiewe mededinging sal hê. 'n Verbod op herverkooppryshandhawing bestaan trouens reeds sedert 1969.

448. Die instel van ad hoc-ondersoeke ingevolge artikel 10(1)(a) van die Wet na beperkende praktyke in 'n spesifieke bedryf met die oog op optrede teen spesifieke partye, bly steeds van groot belang vir toekomstige beleid. So 'n optrede het egter geen uitwerking op die gedrag van persone wie se optrede nie in die bepaalde ondersoek onder die soeklig kom nie. Die oordeelkundige gebruik van artikel 10(1)(c)-ondersoeke wat gevolg word deur 'n algemene verbod kragtens artikel 14(5) van die Wet - dit wil sê 'n verbod op 'n spesifieke beperkende praktyk wat vir enige persoon geld wat nie van die werking daarvan uitgesonder is nie - is absoluut noodsaaklik vir die uitvoering van 'n beleid om effektiewe mededinging in die ekonomie as 'n geheel te bevorder. Dit is trouens waarom die Wet op die Handhawing en Bevordering van Mededinging, 1979, net soos sy voorganger, vir hierdie prosedure voorsiening maak.

3. Belangrikheid van uitsonderings

449. Artikel 14(5) van die Wet maak voorsiening daarvoor dat die kennisgewing met die ministeriële verbod uitsonderings kan bevat.

450. Wat hierdie ondersoek betref, is dit duidelik dat 'n verbod twee kategorieë uitsonderings sal moet hê.

(i)/...

(i) Daar sal sekere "konsepsuele" uitsonderings moet wees waar die verbod op beginsel- of beleidsgronde nie behoort te geld nie. Twee gevalle is hier van praktiese belang.

Die eerste is die gevolg van groepvorming waar samespanning kan plaasvind tussen afsonderlike regsentiteite wat in 'n ekonomiese sin 'n eenheid vorm. Pryssamespanning tussen byvoorbeeld twee volfiliale van 'n gemeenskaplike houermaatskappy is irrelevant uit die oogpunt van mededingingsbeleid.[1)]

Tweedens behoort 'n verbod op samespanning, soos in baie ander stelsels, ook nie te geld waar die samespanning uitsluitlik verband hou met goedere wat uitgevoer word of dienste wat in die buiteland gelewer sal word nie.

(ii) Hoe wenslik die verbod in beginsel ook mag wees, is dit besonder belangrik om ontwrigting van bedrywe deur die inwerkingstelling daarvan te vermy. Vier van die vyf betrokke beperkende praktyke was in die verlede nie verbode nie en word, soos vroeër aangetoon, betreklik algemeen in die ekonomie aangetref. In hierdie kategorie moet tussen drie gevalle onderskei word.

In die eerste plek is dit moontlik dat besondere omstandighede in 'n bepaalde bedryf die voortbestaan van 'n geformaliseerde reëling waarvan die praktyke wat hier ondersoek word 'n deel uitmaak, in die openbare belang kan regverdig.

In die tweede plek sou 'n gebrek aan soepelheid om vir besondere en veranderende omstandighede wat nie sonder die skepping van aansienlike onsekerheid skerp gedefinieer kan word nie, gevaarlik wees. Organisasies wat klein en middelgrootte ondernemings bystaan om vir die strukturele nadele as gevolg van grootte te kompenseer in die mededinging met kragtige ondernemings behoort nie deur so 'n verbod gekelder te word nie. 'n Beduidende blywende afname in die aanvraag na goedere kan 'n reëling om produksiekapasiteit by die aanvraag aan te pas, regverdig. 'n Beperking van mededinging met betekenisvolle implikasies vir die ekonomie kan inderdaad vir die openbare belang bevorderlik wees. Selfs in lande soos die Bondsrepubliek Duitsland en die Verenigde Koninkryk word met hierdie moontlikhede rekening gehou. Om hierdie noodsaaklike soepelheid te bekom sonder om te volstaan met onsekerheidskeppende definisies, sal die Minister 'n kwytskeldingsbevoegdheid moet kry in die vorm van 'n goedkeuring wat op aanbeveling van die Raad verleen word.

Derdens sal uitsonderings, maar dan net vir 'n redelike termyn, verleen moet word waar daar geformaliseerde reëlings bestaan wat nie in die omstandighede geregverdig is nie maar waar 'n onmiddellike beëindiging ontwrigting sal veroorsaak. Die doel van die tydsgebonde uitsondering is om die betrokkenes die geleentheid te gee om by die nuwe bedeling aan te pas.

AANBEVELINGS/...

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1) In hierdie verband is vertoë ontvang dat die uitsondering uitgebrei moet word tot alle maatskappye en 'n groep gebaseer op die houer/filiaalverhouding. Die probleem met so 'n benadering is dat die houer/filiaalverhouding ook tot stand kan kom waar daar 'n minimale aandeelhouding bestaan, en beheer ontstaan deur 'n kontraktuele bevoegdheid om die samestelling van die ander maatskappy se direksie te beheer. Daardie groepsverhouding impliseer dus nie noodwendig 'n substansiële aandeelhouding nie. Ofskoon 'n arbitrêre persentasie aandeelhouding gebruik sou kon word, is daar van 'n ekonomiese eenheid in werklikheid slegs sprake indien konsekwent by die bekende en omskrewe begrip van 'n "volfiliaal" gehou word.

AANBEVELINGS

451. Die Raad beveel hiermee by die Minister aan dat -

(a) die volgende praktyke ingevolge artikel 14(5) van die Wet op die Handhawing en Bevordering van Mededinging, 1979, met die instemming van die Minister van Finansies, onwettig verklaar word, en dat hy enigiemand verbied om so 'n ooreenkoms, reëling, verstandhouding of praktyk aan te gaan of 'n party daarby te wees -

herverkooppryshandhawing;

horisontale pryssamespanning;

horisontale vasstelling van voorwaardes waarop goedere of dienste verskaf of gelewer sal word;

horisontale markverdeling; en

beperkende tenderpraktyke.

Die laaste vier praktyke berus op samespanning ('n ooreenkoms, reëling of verstandhouding), terwyl herverkooppryshandhawing ook sonder samespanning afgedwing kan word;

(b) voorsiening vir die voortbestaan van individuele aanbevole herverkooppryse gemaak word;

(c) vanweë die funksie van professionele toesig en etiese kodes, voorsiening gemaak word vir nie-afdwingbare aanbevole gelde en vir aanbevole voorwaardes vir lewering van 'n professionele diens deur lede van 'n georganiseerde beroep;

(d) algemene uitsonderings op die verbod geskep word ten aansien van -

(i) maatskappygroepsverhoudinge (en mutatis mutandis waar 'n beslote korporasie gebruik word) waar afsonderlike regsentiteite by die samespanning betrokke is, maar dit vanweë ekonomiese gebondenheid irrelevant is vir mededingingsbeleid; en

(ii) samespanning met die oog op die uitvoer van goedere of die lewering van 'n diens in die buiteland;

(e) in die Kennisgewing voorsiening gemaak word vir gepaste uitsonderings in spesifieke gevalle wat skriftelik deur die Minister op aanbeveling van die Raad goedgekeur word. Soepelheid in die vorm van uitsonderings is noodsaaklik in die lig van die opmerkings wat in die inleiding van hierdie hoofstuk gemaak is. In vier gevalle is daar 'n klaarblyklike behoefte aan hierdie soepelheid. Eerstens moet rekening gehou word met die moontlikheid dat 'n verstandhouding wenslik kan wees waar dit klein en middelgrootte ondernemings in staat stel om mee te ding met grotes. Tweedens kan 'n reëling om produksiekapasiteit by 'n beduidende en blywende afname in die aanvraag aan te pas, geregverdig wees. Derdens moet daar voorsiening gemaak word vir omstandighede waar besondere omstandighede 'n beperking van mededinging inderdaad in die openbare belang regverdig. In die vierde plek is dit van groot belang dat dit moontlik moet wees om partye betrokke by bestaande praktyke by wyse van tydelike uitsonderings in staat te stel om by die veranderde omstandighede aan te pas en hul sakebedrywighede te herorganiseer. Dit is 'n belangrike beleidsoorweging om ontwrigting te vermy en die nuwe bedeling aldus op 'n verstandige en redelike wyse in te faseer ;

(f) Kennisgewing R.1038 van 25 Junie 1969 waarin die huidige verbod op herverkooppryshandhawing vervat is, deur die voorgestelde kennisgewing ingetrek word; en

(g) die voorgestelde kennisgewing ook uitdruklik op die Staat self van toepassing gemaak word. Dit strook trouens met die bepalings van artikel 2(3) van die Wet en sou net ten onregte weggelaat kon word.

452./...

452. 'n Voorgestelde kennisgewing wat só bewoord is dat aan al die aanbevelings hierbo gevolg gegee word, verskyn in Bylae A van die verslag.

S J NAUDÉ
VOORSITTER

R W BURTON
LID

J H DE LOOR
LID

J DE V GRAAFF
LID

B S KANTOR
LID

S J KLEU
LID

R P G KOTZE
LID

J A LAMBRECHTS
LID

A J MARAIS
LID

*D J MOUTON
LID

C L STALS
LID

S J J VAN RENSBURG
LID

F N VERMEULEN
DIREKTEUR

PRETORIA

9 Augustus 1985

* Hierdie lid het by die aanvang van die ondersoek sy belange verklaar ten aansien van sekere instansies wat eventueel vrystelling van 'n verbod mag verlang. Op versoek van die Voorsitter en met kennisname deur die Raad het die lid sy deelname aan besprekings van die algemene beginsels vervat in hierdie verslag voortgesit.

(R4/1/2/2/10)

B Y L A E

VOORGESTELDE KENNISGEWING

WET OP DIE HANDHAWING EN BEVORDERING VAN MEDEDINGING, 1979

1. Ek, Dawid Jacobus de Villiers, Minister van Handel en Nywerheid, handelende kragtens die bevoegdheid my verleen by artikel 14(5) van die Wet op die Handhawing en Bevordering van Mededinging, 1979 (Wet 96 van 1979) (hierna "die Wet" genoem), met die instemming van die Minister van Finansies, en op grond van 'n algemene ondersoek kragtens artikel 10(1)(c) van die Wet, verklaar hiermee enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode waarna in paragraaf 2 verwys word, onwettig.

Verbod

2. Behoudens die bepalings van paragrawe 8 en 9, mag geen persoon enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode aangaan, 'n party wees by of aanhou om 'n party te wees by, wat in hierdie kennisgewing -

(a) herverkooppryshandhawing;

(b) horisontale pryssamespanning;

(c) horisontale samespanning oor verskaffingsvoorwaardes;

(d) horisontale samespanning oor markverdeling; of

(e) samespanning in verband met tenders,

uitmaak nie.

Herverkooppryshandhawing

3. "Herverkooppryshandhawing" waarna in paragraaf 2(a) verwys word -

(a) beteken enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode wat die uitwerking het, of waarskynlik die uitwerking sal hê, om 'n herverkoper van enige handelsartikel regstreeks of onregstreeks te verplig of te beweeg om 'n besondere, of 'n besondere minimum, herverkoopprys te vra, of sodanige prys bepaal is of bepaal staan te word deur berekening of deur verwysing na enige diskonto al dan nie; en

(b) sluit uit die aanbeveling, deur 'n individuele verskaffer, van 'n herverkoopprys as 'n riglyn vir die gerief van die herverkoper wat sodanige prys na sy goeddunke mag verminder en wat nie regstreeks of onregstreeks deur middel van die weerhouding van voorrade, die ontsegging van distribusieregte of deur middel van enige diskriminerende verkoopvoorwaarde of 'n strafmaatreël of enige ander metode wat waarskynlik daardie uitwerking sal hê, afgedwing word nie: Met dien verstande dat waar 'n aanbevole herverkoopprys op of in verband met 'n handelsartikel verskyn, die woorde "aanbevole prys" by sodanige prys moet verskyn.

Horisontale pryssamespanning

4. "Horisontale pryssamespanning" waarna in paragraaf 2(b) verwys word -

(a) beteken enige ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers van enige handelsartikel, of van wesenlik soortgelyke handelsartikels, om -

(i) 'n besondere, of 'n besondere minimum, prys te vra; of

(ii) op enige wyse gebruik te maak van enige prys as 'n aanbevole prys of as 'n riglyn,

hetsy sodanige prys deur berekening of met verwysing na enige diskonto bepaal is of bepaal staan te word, al dan nie;

(b)/...

(b) sluit in die gebruik van 'n vereniging of van 'n maatskappy, beslote korporasie of ander regspersoon waarby sodanige verskaffers 'n belang het, om die horisontale prys-samespanning op enige wyse teweeg te bring; en

(c) sluit uit, in verband met 'n professionele diens deur lede van 'n georganiseerde professie, die uitreiking van 'n tarief van aanbevole gelde as 'n riglyn vir die gerief van die lede van sodanige professie en wat nie regstreeks of onregstreeks afgedwing word nie: Met dien verstande dat -

(i) sodanige professie of enige regsreël, as 'n voorwaarde vir lidmaatskap, vereis dat die lede 'n eksamen in studievelde wat toepaslik op die praktisering van daardie professie is, geslaag het; en

(ii) sodanige professie 'n professionele gedragskode het wat hom magtig om daardie persone wat skuldig bevind is aan onbehoorlike uitvoering van hul pligte of aan gedrag wat tot oneer van hul professie strek, van lidmaatskap uit te sluit, of 'n prosedure in werking te stel om hulle van lidmaatskap uit te sluit.

Horisontale samespanning oor verskaffingsvoorwaardes

5. "Horisontale samespanning oor verskaffingsvoorwaardes" waarna in paragraaf 2(c) verwys word -

(a) beteken enige ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers van enige handelsartikel of van wesenlik soortgelyke handelsartikels, om sodanige handelsartikel of handelsartikels te verskaf, of om in reaksie op 'n uitnodiging of versoek om tenders te verskaf te tender -

(i) slegs op of met enige besondere voorwaarde of bepaling; of

(ii) deur die gebruikmaking van enige voorwaarde of bepaling as 'n aanbevole voorwaarde of bepaling of as 'n riglyn;

(b) sluit in die gebruik van 'n vereniging of van 'n maatskappy, beslote korporasie of ander regspersoon, om die horisontale samespanning oor verskaffingsvoorwaardes op enige wyse teweeg te bring; en

(c) sluit uit, in verband met 'n professionele diens deur lede van 'n georganiseerde professie bedoel in paragraaf 4(c), 'n aanbeveling wat nie regsteeks of onregstreeks afgedwing word nie dat sodanige diens teen 'n besondere voorwaarde of bepaling gelewer word.

Horisontale samespanning oor markverdeling

6. "Horisontale samespanning oor markverdeling" waarna in paragraaf 2(d) verwys word -

(a) beteken enige ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers van enige handelsartikel of van wesenlik soortgelyke handelsartikels, wat die uitwerking het om die mark vir sodanige handelsartikel of handelsartikels in die geheel of gedeeltelik tussen hulle soos volg te verdeel -

(i) territoriaal;

(ii) ten opsigte van klante of groepe klante;

(iii) kwantitatief, deur verwysing na die hoeveelhede of aandele wat deur elke sodanige verskaffer geproduseer of verskaf staan te word of deur verwysing na enige beperking op produksiefasiliteite; of

(iv) ten opsigte van tegniese faktore in verband met die betrokke handelsartikel; en

(b) sluit in die gebruik van 'n vereniging of van 'n maatskappy, beslote korporasie of ander regspersoon waarby sodanige verskaffers 'n belang het, om die horisontale samespanning oor markverdeling op enige wyse teweeg te bring.

Samespanning/...

Samespanning in verband met tenders

7. "Samespanning in verband met tenders" waarna in paragraaf 2(e) verwys word, beteken -

(a) enige ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers van enige handelsartikel dat een of sommige of al sodanige verskaffers nie 'n tender in reaksie op 'n uitnodiging of versoek om tenders sal indien nie; of

(b) die indiening deur 'n verskaffer van enige handelsartikel, van 'n tender in reaksie op 'n uitnodiging of versoek om tenders, wat in enige opsig bereik is deur ooreenkoms, reëling of verstandhouding tussen twee of meer verskaffers, insluitende die eersgenoemde verskaffer, van sodanige handelsartikel,

waar die ooreenkoms, reëling of verstandhouding nie bekend gemaak word nie aan die persoon wat die uitnodiging of versoek om tenders rig, op of voor die tydstip waarop enige tender gemaak word deur enige persoon wat 'n party is by die ooreenkoms, reëling of verstandhouding.

Beperking op toepassing

8. (1) Die bepalings van hierdie kennisgewing word nie so uitgelê nie dat dit van toepassing is op enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode tussen -

(a) 'n houermaatskappy en sy volfiliaal of tussen maatskappye wat volfiliale van dieselfde houermaatskappy is;

(b) beslote korporasies wat slegs dieselfde persoon of persone as lede het;

(c) maatskappye waarvan al die aandele gehou word deur dieselfde persoon of beslote korporasie, of tussen sodanige beslote korporasie en sodanige maatskappye; of

(d) persone in verband met -

(i) goedere wat uitgevoer staan te word na enige ander land as Botswana, Lesotho, Swaziland, 'n staat waarvan die gebied voorheen deel van die Republiek van Suid-Afrika uitgemaak het en enige gebied binne die Republiek van Suid-Afrika waarvoor daar 'n Wetgewende Vergadering ingestel is kragtens die Grondwet van die Nasionale State, 1971 (Wet 21 van 1971), of

(ii) enige diens wat gelewer staan te word in enige ander land as die Republiek van Suid-Afrika of daardie lande, state of gebiede vermeld in (i) hierbo.

(2) Hierdie kennisgewing in nie van toepassing nie op enigiets kragtens enige ander wet gedoen.

Uitsonderings

9. Tot die mate wat skriftelik deur my op aanbeveling van die Raad op Mededinging ten opsigte van 'n spesifieke geval bepaal word, is die bepalings van hierdie kennisgewing nie van toepassing nie met betrekking tot enige ooreenkoms, reëling, verstandhouding, besigheidspraktyk of handelsmetode wat -

(a) onder die besondere omstandighede klein en middelgroot ondernemings in staat stel om voort te bestaan en om teen groot ondernemings mee te ding ten spyte van hul strukturele nadele as gevolg van grootte;

(b) in die geval van 'n volgehoue afname in vraag wat nie tydelik of siklies is nie, na 'n handelsartikel, 'n aanpassing van produksiekapasiteite by die vraag teweegbring op 'n wyse wat met die openbare belang versoenbaar is;

(c) 'n beperking van mededinging teweegbring en wat, onder die omstandighede, in die openbare belang geregverdig is; of

(d) voor die inwerkingtreding van hierdie kennisgewing bestaan het en waarvan die beëindiging deur daardie inwerkingtreding, sonder 'n redelike geleentheid vir die partye daarby om hul sakebedrywighede te herorganiseer, waarskynlik ontwrigting in die betrokke bedryf sal veroorsaak.

Woordomskrywing

10. In hierdie kennisgewing -

(a) beteken "beslote korporasie" 'n beslote korporasie wat kragtens die Wet op Beslote Korporasies, 1984 (Wet 69 van 1984), geregistreer is; (b)/

(b) sluit "handelsartikel" in enige fabrikaat of merk van enige handelsartikel, enige boek, tydskrif, koerant of ander publikasie, enige gebou of bouwerk en enige diens, hetsy persoonlik, professioneel of andersins, met inbegrip van enige opbergings-, vervoer-, versekerings- of bankdiens;

(c) het "maatskappy", "houermaatskappy" en "volfiliaal" die betekenis wat aan hulle toegeskryf word in artikel 1 van die Maatskappywet, 1973 (Wet 61 van 1973);

(d) beteken "Raad op Mededinging" die Raad op Mededinging kragtens artikel 3 van die Wet ingestel;

(e) sluit "prys" in enige huur, enige gelde ten opsigte van 'n professionele of ander diens, die rentekoers ten opsigte van enige lening of skuld, die premie ten opsigte van enige versekering of enige ander teenprestasie ten opsigte van 'n handelsartikel;

(f) sluit "verskaffer" in, tensy uit die samehang anders blyk, die vervaardiger, produsent, verkoper en herverkoper van goedere, enige verskaffer van goedere by wyse van huur of andersins en die verskaffer van enige professionele, finansiële of ander diens.

Intrekking van kennisgewing

11. Goewermentskennisgewing No R.1038 van 25 Junie 1969 word hierby ingetrek.

Staat is gebind

12. Kragtens die bepalings van artikel 2(3) van die Wet, bind die bepalings van hierdie kennisgewing, behalwe vir sover kriminele aanspreeklikheid betrokke is, die Staat vir sover die Staat by die produksie en distribusie van handelsartikels betrokke is.

SCHEDULE

REPUBLIC OF SOUTH AFRICA

COMPETITION BOARD

REPORT NO 15

INVESTIGATION INTO COLLUSION ON PRICES AND CONDITIONS, MARKET SHARING AND TENDER PRACTICES

INVESTIGATION INTO COLLUSION ON PRICES AND CONDITIONS, MARKET SHARING AND TENDER PRACTICES

I N D E X

REPUBLIC OF SOUTH AFRICA

COMPETITION BOARD

REPORT NO 15

CHAPTER I

TERMS OF REFERENCE, METHOD AND SCOPE OF INVESTIGATION AND BACKGROUND INFORMATION

TERMS OF REFERENCE

1. The Board decided, at a meeting held on 14 November 1984, to conduct an investigation in terms of section 10(1)(c) of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979), into certain types of business agreements, arrangements, undertakings, business practices or methods of trading in general which, in the opinion of the Board, is commonly adopted for the purpose of or in connection with the creation or maintenance of restrictive practices. Particulars of the proposed investigation were published in Notice 835 of the Government Gazette (No 9512) of 30 November 1984. The following is an extract from that Notice:

> "The subject of the proposed investigation is any business agreement, arrangement, understanding, business practice or method of trading -
>
> (a) in connection with -
>
> (i) the price, fee, interest, premium or other consideration at which; or
>
> collusion on prices and conditions — (ii) any other stipulation or condition on which, goods will be supplied, a service will be rendered or a loan, credit or risk coverage will be granted by suppliers of the goods, service, loan, credit or risk coverage, or in connection with the enforcement of such agreement, arrangement, understanding, practice or method.
>
> Specifically included are vertical and horizontal price fixing, whether individual or collective;
>
> market sharing — (b) in connection with any form of market sharing between suppliers of goods and services, including raw materials, production and market quotas; and
>
> tenders — (c) in connection with tenders, including refraining from tendering or the contents of tenders submitted."

2. Unfortunately a few technical errors crept in with the publication of the notice in the Government Gazette. Consequently it was decided to once again give notice of the investigation in the Government Gazette (Notice 203 of 1985, Government Gazette No 9661 of 29 March 1985).

METHOD AND SCOPE OF INVESTIGATION

3. As mentioned earlier, the Board's intention to conduct the investigation was announced for general information in terms of section 10(4) of the Act in the Government Gazette. As the Board can only include financial institutions in certain investigations with the permission of the Minister of Finance, such permission was applied for in terms of section 16 of the Act and was granted.[1]

4./...

1) Since then the Amendment Act on the Maintenance and Promotion of Competition, 1985 has been accepted and such permission is no longer required.

4. It was stated in the notice that anybody may address to the Board such written representations regarding the investigation as may be necessary, before 29 March 1985 (in the second notice 29 April 1985). Furthermore, the investigation was brought to the notice, in writing, of a large number of possibly interested persons, enterprises and professions with the request that they, in their submissions, comment inter alia, on certain questions and statements. In order to obtain a wider coverage of the investigation, it was also brought to the attention of the organised trade and industry for their comment. These organisations were also requested to comment on the investigation and to bring it to the attention of their members.

5. A purposeful attempt was also made by means of a press statement by the Chairman of the Board and interviews with the media, to ensure the widest coverage of the investigation by bringing it to the notice of all possible interested parties. Consequently wide publicity was given to the investigation.

6. It was expressly mentioned in the letters requesting comment that financial and professional services were included. Furthermore the following examples of each of the business agreements, arrangements, understandings, business practices or methods of trading were mentioned -

(a) collusion on prices and conditions:

maximum-, minimum-, fixed and recommended prices, fees or interest;

magnitude of cash, and quantity discounts;

other conditions of sale such as the collective determination of conditions of deliveries, payments of interest on overdue accounts and periods for which credit is granted (that is any form of vertical or horizontal agreement, whether individual or collective, concerning prices, interest, fees in respect of goods and services; the marketing of goods as well as services; including professions.);

(b) market sharing:

all forms of the division or demarcation of markets among competitors or allocation of consumers or customers to certain competitors;

all forms of quotas;

collective production (manufacturing) and marketing of raw materials, semi-finished and finished products;

all forms of quotas among competitors in respect of raw materials, any input, production or sales;

(c) tenders:

collective tendering by competitors;

mutual decisions to tender or not to tender; and

mutual decisions or agreements regarding the conditions on which will be tendered or any other aspect in respect of a tender.

7. Both horizontal and vertical market sharing are included in the investigation.

8. A large number of submissions was received. The Board especially wishes to express its gratitude to the persons and instances who evidently took trouble to make comprehensive and informative submissions. These submissions made a valuable contribution to the completion of the investigation. Members and officials of the Board also held discussions with a large number of interested parties regarding the investigation, and literature in connection with the investigation was studied.

BACKGROUND INFORMATION/...

BACKGROUND INFORMATION

1. Purpose of the investigation

9. The Maintenance and Promotion of Competition Act, 1979, is basically an enabling act. Consequently no practice applied in a specific trade, no matter how restrictive and against the public interest, is unlawful until it has been formally investigated by the Board in terms of the Act, found to be against the public interest and prohibited by notice by the Minister. Experience has taught that this procedure can be a drawn-out and time-consuming matter with considerable disadvantages for parties subjected to certain restrictive practices. Furthermore the Board is most of the time, not aware of the existence of many of the practices and can only start action once complaints are received. The approach that the Board mainly reacts to complaints, is unsatisfactory for various reasons. Apart from the fact that several parties have inadequate knowledge of the existing competition legislation, there are others who, for fear of victimisation and the possible disturbance of their relations with other market parties, hesitate to bring harmful practices to the attention of the Board.

10. On the other hand a general prohibition of specific practices which have been found against the public interest makes a substantial contribution to the elimination of this problem as it applies generally and is not directed at the conduct of certain parties only.

11. The investigation was undertaken because the Board is of the opinion that the agreements, arrangements and understandings mentioned in the notice of the investigation restrict or can restrict effective competition, that they occur fairly generally in the South African economy and that they are commonly adopted for the purpose of or in connection with the creation or maintenance of restrictive practices.[1)]

12. Consequently the object of the investigation is to evaluate and consider those agreements, arrangements and understandings and their justifiability in the public interest, with a view to the desirability thereof to recommend to the Minister to declare them illegal in terms of section 14(5) of the Act.

2. Practices applied in terms of statutory provisions

13. Some of the practices covered by this investigation are often practices in terms of a considerable variety of legislation or statutory regulations or rules. As this investigation can, at the utmost, lead to action in terms of a ministerial notice which can have no influence on statutory regulations, no useful purpose would be served by paying attention to those regulations. With the view to perspective it is mentioned that restrictive statutory regulations do receive the attention of the Board in another context. In terms of section 6 of the Act the Board has the function to co-ordinate official competition policy in a manner consistent with official economic objectives.

3. Previous investigations

14. It may be useful to give a short reveiw of previous investigations which have, to a certain extent, already been undertaken in the same connection.

(a) Investigation into individual and collective resale price maintenance in the Republic of South Africa[2)]

15. The object of the investigation of which the directive was given by the then Minister of Economic Affairs to the Board of Trade and Industries[3)] on 22 March 1962 was to investigate

trading/...

1) In the report it is often referred to as "practices" or "business practices".

2) Board of Trade and Industries, Investigation of individual and collective resale price maintenance in the Republic of South Africa, Report 1220(M), 8 December 1967.

3) Until the end of 1979 the Board of Trade and Industries was responsible for the implementation of competition policy in terms of the Regulation of Monopolistic Conditions Act, 1955, (Act 24 of 1955).

trading practices known as individual and collective resale price maintenance, and to determine whether it is justified in the public interest. During the investigation the Board of Trade and Industries also investigated the extent of resale price maintenance in respect of the following products: food, alcoholic beverages, tobacco and tobacco products, clothing and footwear, cleansing materials, furniture, electrical and domestic appliances, non-electrical appliances, medical requirements, requirements for personal care, vehicles and transportation, reading matter, stationery and recreational products.

16. In the investigation the conclusion was reached that a system of enforced resale prices is against the public interest, whereas a system of recommended prices is not necessarily against the public interest. The Board of Trade and Industries recommended that -

(i) the enforcement of resale prices be prohibited;

(ii) no remedial action be taken against the practice of indicating resale prices, provided that the prices are only guide prices for the convenience of resellers; and

(iii) suppliers be afforded the right to apply to the Minister for exemption from the prohibition on enforcement of resale prices.

17. On 28 June 1968 the Minister of Economic Affairs announced,[1] for general information, that he intended, with the approval of both Houses of Parliament of that time, by means of notice in the Government Gazette to outlaw the business practice known as resale price maintenance. Written applications for exemption from the prohibition would have been considered for inclusion in the notice.

18. On 25 June 1969 the Minister announced, with the approval of both Houses of Parliament by means of notice in the Govenrment Gazette[2] that he outlaws any agreement, arrangement, business practice or method of trading which has, or is calculated to have the effect of directly or indirectly compelling or inducing a reseller to observe a specified resale price and prohibits any person, to enter into such an arrangement or understanding or to be or continue to be a party thereto or to apply such business practice or method of trading.

19. The prohibition would, however, not be applicable to recommended, indicated or suggested prices in the form of a guide price and provisional exemption was granted to petrol; tyres and tubes; and books and magazines, including newspapers.

20. The notice came into operation on 1 July 1969.

21. In order to extend the prohibition contained in Government Notice R.1038 of 25 June 1969 to also apply to persons other than suppliers of merchandise and to vest powers in the Minister to also make the prohibition applicable to merchandise which was excluded from the prohibition, the Regulation of Monopolistic Conditions Amendment Act, 1978 was passed. This amendment act had the object of extending the prohibition contained in Government Notice R.1038 of 25 June 1969 to apply to persons other than suppliers of merchandise; and to vest powers in the Minister to make such prohibition also applicable to any merchandise mentioned in that government notice and expressly excluded from the intended prohibition.

22./...

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1) Notice R.1150, Government Gazette No 2109 of 28 June 1968.

2) Government Notice R.1038, Government Gazette No 2442 of 25 June 1969.

22. After investigations and recommendations by the Board of Trade and Industries the provisional exemption on tyres and tubes[1] and books[2] was withdrawn on 17 November 1978[3] and 15 August 1980[4] respectively. Consequently an exception presently exists only in regard to petrol, magazines and newspapers.

23. In the current investigation attention will once again be given to those aspects which were dealt with in the investigation into the maintenance of resale prices by the Board of Trade and Industries, especially in the light of interpretation difficulties of the 1978 amendment act. Individual and collective maintenance of resale prices as well as individual and collective recommended prices will be closely examined.

(b) Investigation into restrictive tender practices in the Republic of South Africa[5]

24. The then Minister of Economic Affairs instructed the Board of Trade and Industries on 8 October 1969, to investigate in terms of the Regulation of Monopolistic Conditions Act, 1955 -

"(1) the business practices or methods of trading which result in uniform tender prices for commodities;

(2) direct or indirect collusion or co-operation between tenderers themselves or between tenderers and other persons or organisations; and

(3) all other methods of manipulating or influencing tender prices of commodities."[6]

25. In its investigation the Board of Trade and Industries reached the conclusion that restrictive tender practices which restrict competition directly or indirectly, has, or is calculated to have one or more of the consequences mentioned in the definition of a monopolistic condition in section 1 of the Regulation of Monopolistic Conditions Act, 1955.[7] The specific consequences which restrictive tender practices have or is calculated to have, as found by the Board of Trade and Industries, are that they -

(i)/...

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1) Board of Trade and Industries, Investigation into the exemption from the prohibition on the maintenance of resale prices in the case of tyres and tubes, Report 1860(M).

2) Board of Trade and Industries, Investigation into Monopolistic Conditions in the Supply and Distribution of Books in the Republic of South Africa, Report 1794(M), 22 July 1977.

3) Notice R.2292, Government Gazette No 6217 of 17 November 1978. Termination of the exemption came into operation on 29 December 1978.

4) Notice R.1692, Government Gazette No 7177 of 15 August 1980, came into operation on 31 October 1980.

5) Board of Trade and Industries, Investigation into Restrictive Tender Practices in the Republic of South Africa, Report No 1475(M), 24 May 1973.

6) Report 1475(M), par. 1.

7) The same seven consequences are mentioned in the definition of a "restrictive practice" in section 1 of Act 96 of 1979.

(i) can result in the maintenance and enhancement of prices;

(ii) can prevent production or distribution of any commodity by the most efficient and economical means;

(iii) can prevent or restrict the entry of new distributors or producers into the tender market; and

(iv) can prevent or retard the adjustment of branches of trade or industry to changing circumstances.

26. The Board of Trade and Industries reached the conclusion that restrictive tender practices cannot be justified in the public interest as it does not -

(i) promote or is not compatible with the optimal utilisation of the country's economic resources;

(ii) promote economic growth and the attainment of a higher standard of living;

(iii) lead to greater stability of price, production and distribution of commodities or of employment of labour and capital; and

(iv) prevent increased economic concentration.

27. Consequently the Board of Trade and Industries concluded that restrictive tender practices cannot be justified in the public interest. Nevertheless there are exceptional circumstances in certain cases which may justify the practices in the public interest in that they promote, or are compatible with, the efficient use of the country's resources, or progressiveness and innovations in the economy, while they do at the same time promote, or do not unduly prejudice the interest of tenderers and purchasers by tender. Consequently the Board recommended that no steps should be taken by the Minister to end the practice, but that the Minister should instruct an investigation on an ad hoc basis into every restrictive tender practice.[1)]

28. Furthermore it was recommended that the Minister addresses the request to the Ministers with the jurisdiction over the applicable tender purchase transactions to actually counteract restrictive tender practices and to report to him on that.

4. Other relevant previous investigations

29. A large number of investigations, apart from those into the maintenance of resale prices and restrictive tender practices, which have been undertaken by the Board of Trade and Industries and the Competition Board on an ad hoc basis involved one or more of the practices which are included in this investigation. Some of the practices which were condoned before the prohibition on the maintenance of resale prices (Notice R.1038 of 25 June 1969) were also outlawed by this prohibition.

30./...

1) The Board of Trade and Industries as well as the Competition Board investigated quite a number of complaints of alleged restrictive tender practices on a preliminary basis. In only one case, namely the Investigation into the supply and distribution of pharmaceutical products (Board of Trade and Industries, Report 1884(M), dated 14 November 1978), restrictive tender practices in this branch of industry formed part of the investigation. It was recommended that it should be prohibited. In Notice R.2844, Government Gazette No 7974 of 31 December 1981, "any agreement, arrangement, understanding, business practice or method of trading or any act or situation whereby -

(a) manufacturers of pharmaceutical products, in any way, directly or indirectly, co-operate in order to submit uniform prices or conditions for the supply of pharmaceutical products to any tender buyer"

was prohibited. (Clause 2(a)).

30. Of the conclusions, recommendations or actions of the past which therefore are directly or indirectly affected by the current investigation, are -

(i) Notice 1839 of 5 December 1958 (amended by Notice R.466 of 25 March 1966) applicable to groceries. Practices which were prohibited, include the maintenance of resale prices and collective bargaining with regard to prices or trade discounts;

(ii) Notice 1840 of 5 December 1958 (amended by Notice R.465 of 25 March 1966) applicable to biscuits. The prohibition contains, inter alia, minimum, maximum or fixed prices of biscuits, delivery costs, discounts and addition of rail transport costs.[1]

(iii) Supply and distribution of pneumatic tyres[2]: the price cartel of the South African Tyre Manufacturers' Conference was condoned although price competition is eliminated.

(iv) An investigation into hardware and sanitary ware[3] resulted in Notice R.763 of 1961, which apart from other prohibitions prohibited the fixing of prices and trade discounts on a uniform basis and the maintenance of resale prices. This prohibition was lifted by Notice R.556 of 13 March 1981.

(v) The Board of Trade and Industries concluded an agreement with the manufacturers of cigarettes and the Tobacco Manufacturers' Committee (Notice R.1013 and R.1014 of 5 July 1963 respectively)[4] which also applies to "wholesale terms".

(vi) The subject of the investigation[5] into the activities of the Federation of Building Industries (South Africa) (BIFSA) in the Republic of South Africa was especially its tender practices. BIFSA undertook in an agreement[6] to cease several practices, to amend the conditions of others, whilst others were condoned.

(vii) The collective maintenance of uniform profit margins by the National Wholesale Drug Association was found contrary to the public interest and prohibited (Notice R.2846 of 31 December 1981), while collusion to uniform tender prices and conditions, as mentioned earlier, was also prohibited (Notice R.2844 of 31 December 1981).

(viii) Restrictive regulations in respect of certain tender practices by the Electrical Contractors' Association (South Africa) were also prohibited after an investigation[8] (Notice R.1696 of 6 August 1982).[9]

(ix)/...

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1) Notice 1839 and 1840 followed an investigation by the Board of Trade and Industries, Monopolistic Conditions in the Grocery Industry, Report 437(M), 26 April 1958.

2) Board of Trade and Industries, Monopolistic Conditions in the Supply and Distribution of Pneumatic Tyres in the Republic of South Africa, Report 489(M), 11 February 1959.

3) Board of Trade and Industries, Monopolistic Conditions in the Supply and Distribution of Hardware and Sanitary Ware for the Building Industry in the Republic of South Africa, Report 606(M), 7 April 1960.

4) Board of Trade and Industries, Monopolistic Conditions in the Supply and Distribution of Cigarettes and Processed Tobacco in the Reublic of South Africa, Report 940(M), 28 July 1962.

5) Board of Trade and Industries, Investigation into the activities of the Federation of Building Industries (South Africa) in the Republic of South Africa, Report 1273(M), 30 January 1969.

6) Notice R.1802 of 23 October 1970.

7) Investigation by the Board of Trade and Industries, op cit, Report 1884(M).

8) Competition Board, The Activities of the Electrical Contractors' Association (South Africa), Report 6, 28 July 1981.

9) This notice was withdrawn by Notice R.989 of 3 May 1985 and replaced by Notice R.1194 of 30 May 1985.

(ix) Collective practices in respect of prices, market demarcation and tenders were considered in the investigation into the coal industry.[1]

31. Many of the practices of certain parties were investigated and even prohibited over the years. Where certain practices have been condoned in the past, the question now arises whether such practices are still justified in the public interest or whether they should be prohibited, especially in the light of changing economic circumstances.

5. Investigations in terms of section 10(1)(c) of the Act

32. As mentioned earlier, the current investigation is conducted in terms of section 10(1)(c) of Act 96 of 1979 which stipulates, inter alia, that the Board undertakes such investigations, as it may consider necessary "into any particular type of business agreement, arrangement, understanding, business practice or method of trading in general or in relation to any particular commodity or any class or kind of commodity or any particular business or undertaking or any class or type of business or undertaking or any particular area which in the opinion of the Board or the Minister, as the case may be, is commonly adopted for the purpose of or in connection with the creation or maintenance of restrictive practices". Should the Board, after the investigation, be of the opinion that the particular agreement, arrangement, understanding, etc, which is thus being applied is not justified in the public interest, the Board has to recommend to the Minister that action be taken in terms of section 14(5) as the Board considers necessary in the circumstances.

33. The Minister may declare unlawful any particular type of agreement, arrangement, understanding, business practice or method of trading which was the subject of the investigation, by notice in the Government Gazette. Any person may be prohibited from entering into such an agreement, arrangement or understanding or being or continuing to be a party thereto or to apply such a business practice or method of trading. The prohibition may be total or to the extent or subject to the exceptions mentioned in the notice. The Minister, however, has to publish the text of the proposed notice, together with a statement of his intention to publish such a notice, at least one month prior to the date of publication of the proposed notice in the Government Gazette.

34. As this essentially deals with the prohibition of one or more practices, and not with action against specific persons who restrict competition by means of a restriction or an acquisition, appeal to a special court, as in the case of an investigation in terms of section 10(1)(a) or 10(1)(b), is not possible.

6. Classification of the report

35. The remainder of the report is classified as follows:

Chapter II	:	Review of the particular practices, namely collusion regarding prices and conditions, market sharing and tender practices.
Chapter III	:	Review of measures with regard to the practices in a number of overseas countries. Countries taken into consideration, are the United States of America, Canada, Australia, France, the Federal Republic of Germany and the United Kingdom. Attention will also be given to the policy of the European Economic Community (EEC).
Chapter IV	:	General reasons for the existence of the practices and their occurrence in the Republic of South Africa.
Chapter V	:	The question of whether the practices involved constitute "restrictive practices".
Chapter VI	:	The restrictive practices and the public interest.
Chapter VII	:	Conclusions and recommendations.

Chapter II/...

1) Competition Board, Investigation into the Existence of Restrictive Practices in the Supply and Distribution of Coal in the Republic of South Africa, Report 12, 10 August 1983.

CHAPTER II

REVIEW OF THE PARTICULAR PRACTICES

INTRODUCTION

36. In this Chapter the meaning of collusion on prices and conditions, market sharing and restrictive tenders is reviewed. Only the most frequently occurring aspects and forms of practices of which the Board has experience and found in the submissions and literature, will be considered. However, it is necessary to define certain concepts beforehand.

CONCEPTS

37. A distinction is generally made between individual or joint practices, horizontal or vertical practices and voluntary or compulsory practices.

38. A practice is conducted on an individual basis if the business undertaking or supplier[1)] acts solely and independently. He himself decides according to his own judgement, the policy he will apply. In a system based on a joint effort, the supplier does not act independently, but in conjunction with other parties. When a supplier binds himself directly or indirectly to act in collaboration with others this action is regarded as a joint action or collusion. The practices may be of a horizontal or vertical nature. It is horizontal if collusion is effected with other suppliers on the same level in the production or distribution chain (directly or indirectly, amongst others, also through a commercial or professional association and collectively); vertically when conducted between various subsequent levels in the production or distribution chain (for example between suppliers and consumers of commodities) and may be effected on an individual as well as on a collective basis.

39. The practice needs not necessarily be a voluntary one. Even when business undertakings agree voluntarily to a certain practice, direct or indirect pressure could be brought to bear on one of the parties either to become or remain a party to an agreement, understanding or arrangement. A very effective method of exerting pressure is where collective action is a precondition for membership of an organisation and such membership entails specific advantages for an entrepreneur.

COLLUSION/...

1) A supplier of a commodity, as defined in section 1 of Act 96 of 1979, includes a business undertaking, a manufacturer, a distributor, a contractor, a professional person and a financial institution.

COLLUSION REGARDING PRICES AND CONDITIONS

40. In trade literature collusion on prices and conditions are freely termed 'pricing practices' and in this section particularly these practices are identified and defined which determine the prices[1)] and conditions upon which the commodities are supplied.

41. The most important forms in which these practices are encountered are described below.

1. Horizontal price collusion

42. Horizontal price collusion or conspiracy is defined as any agreement, understanding or arrangement regarding prices and conditions when the joint aim is normally to eliminate price competition between the parties involved, or to reduce or control such competition. The supplier does not act independently but together with other parties. As a result, the freedom of an individual business undertaking to act according to own discretion is eliminated or limited.

43. This kind of agreement, arrangement or understanding usually involves more than prices and conditions. Often collusion also takes place in respect of profit margins, the determination of trade conditions for the resellers of commodities and joint measures with which to enforce an agreement or arrangement. Sometimes such collusion is accompanied by the direct or indirect regulation of the trade activities of the parties concerned. This is particularly the case where negotiations and agreements are facilitated by the existence of well-organised trade associations. Other practices, such as limiting tenders, exclusive agreements, the determining of production quotas and market sharing may also occur (see later: restrictive tenders and market sharing).

44. The most important forms of horizontal price collusion relevant for the purpose of this investigation are explained hereunder.

Collusion/...

1) In the interpretation of the directive, price is used as a general concept to include prices, moneys , interest, tariffs, premiums on any quid pro quo and also includes the conditions involved in a transaction. Amongst others, the following conditions may accompany the "price" –

(i) quoting prices with or without tax or price increases;

(ii) discounts;

(iii) agreements not to allow discounts or not above a certain level;

(iv) agreements not to convey certain cost advantages to consumers and customers/clients;

(v) uniform transportation cost schedules;

(vi) breakage allowances;

(vii) conditions of payment;

(viii) terms of credit; and

(ix) the use of joint customer lists to determine discounts in other words the division of customers into categories.

Collusion regarding prices and conditions

45. The following general forms of collusion regarding prices and conditions are encountered:

Parties agree to determine certain prices and conditions for their commodities, for example -

imposing fixed factory prices, especially when commodities are of a homogeneous nature;

when a commodity consists of a variety of gradings, a basic or guide price is fixed for the most common grade, with a plus or minus factor for the other grades;

the fixing of uniform delivered prices (price equalisation), in other words that the distance between a manufacturer and a certain market does not cause differences in transportation costs;

imposing fixed prices for certain buyers or groups of buyers; and

imposing fixed minimum or maximum prices and conditions.

46. Where the said kinds of collusion result in a uniform price, a series of other methods exists which may be used to achieve a measure of price uniformity without imposing fixed prices as such, for example the following -

(i) recovering certain cost elements, which may cause price levels to differ although the methods of calculating costs may agree;

(ii) determining uniform gross prices, but the parties remain free to determine their own nett prices;

(iii) determining minimum and maximum prices;

(iv) not to use certain price fixing methods;

(v) collusion in respect of price relationships between certain commodities; that is, agreeing that a fixed relationship will exist between the prices of various commodities; and

(vi) to increase prices simultaneously and by the same percentage.

47. In respect of some agreements, arrangements or understandings the parties are free to determine their own prices and conditions but the parties collude on uniform systems of cost calculation and price fixing. Examples are -

(i) the use of the same or collective price lists;

(ii) establishing collective vertical resale price maintenance;

(iii) collusion not to sell below a certain price;

(iv) collusion not to practice price discrimination or to deviate from individual or collective price lists;

(v) the use of price hike formulae, where intermediate institutions in the distribution channel are not used;

(vi) a collective striving towards the highest possible price;

(vii) agreements to prevent unusual price deviations; and

(viii) agreements to maintain market orientated prices.

2./...

2. Price information systems

48. In terms of this practice the parties agree to exchange information regarding prices and conditions in respect of prices on a regular basis. Prices are normally sent to a central point, for example a trade association or a firm of accountants or attorneys, from where the relevant information is supplied to all the parties to the agreement. Apart from these methods, each market party may send a copy of its prices and conditions to its competitors directly, without colluding with other parties.

49. Although it may not necessarily be the case, parties may agree or arrange as to how the information will be used.

3. Vertical price collusion (resale price maintenance)[1)]

50. Vertical price collusion is a practice usually directed at eliminating price competition between resellers of the same or similar commodities. Usually it is the primary supplier of the commodity (the manufacturer or the importer) who prescribes the price or condition at which a commodity may be sold at wholesale or retail level although it may also be prescribed by an intermediary in the production or distribution chain or members of the relevant branch of industry. Pressure is exerted to ensure that the reseller adheres to the imposed price, thus restricting the entrepreneur for whom such a prescription is made. Vertical price collusion should, however, not be confused with the practice of suggested or recommended prices, to be discussed later. A distinctive characteristic of this practice is that it can only arise if the relevant commodity is resold. For instance, where the manufacturers agree to sell to the ultimate consumers at a fixed price and no resale takes place, there can be no question of vertical price collusion or resale price maintenance.

51. As already mentioned, the most general form of vertical price restriction is that in which a manufacturer prescribes to a wholesaler or retailer the price at which his commodities are to be resold. In the process it is usually expected of the intermediary or 'reseller' to meet the obligation placed on him by the manufacturer or supplier until the commodity reaches the consumer.

52. It is, however, not essential that the price is initiated by the manufacturer; this may occur at any stage in the production and distribution channel, for example, from wholesaler to retailer on an individual basis or jointly by market parties during any phase of the production or distribution chain.

53. Vertical price collusion, generally known as resale price maintenance, may apply either to the price of the commodity or to the conditions of sale of the commodity or to both elements. This practice may assume various forms, such as -

(i) determining minimum, maximum or fixed prices;

(ii) laying down the maximum potential deviations from guide prices;

(iii) restricting profit margins;

(iv) restricting trade-in prices; and

(v) laying down cost accounting methods, for example not to sell at a price lower than the purchase price or at a price which includes all costs, fixed and variable.

4. Recommended prices

54. A recommended price (including conditions)is an indication by one 'person' (supplier, stockist) that a certain method of price fixing is advantageous to another and in which advice is given or a recommendation made in this regard. In most cases the actual prices for which commodities should be resold, in the indicator's opinion, are indicated on the commodities themselves or on price lists. The reseller is, however, not compelled to sell at such a recommended price.

55./...

1) See also Report 1220(M) of the Board of Trade and Industries in this regard.

55. Recommendations in respect of prices may be either horizontal or vertical and made by sellers, committed third persons (such as professional organisations and trade associations) or uncommitted third persons, for example independent advisers. The party making the recommendation may also act on any level of the production or distribution chain, or any level of the broader economic system.

56. The following important forms of recommended prices are distinguished:

(a) Horizontally (collectively) recommended prices

57. Horizontally recommended prices and conditions are issued mainly by trade associations, professional organisations or other organisations representing a certain group of business undertakings.

58. These recommendations may include the following:

(i) fixed prices;

(ii) minimum prices;

(iii) maximum prices;

(iv) imposing certain specific additional levies; and

(v) fixing prices according to certain specific formulae.

(b) Vertically recommended prices

59. Recommended prices and conditions by manufacturers of commodities on a vertical basis occur fairly generally. It is not unusual for wholesalers to make such recommendations. The vertically recommended prices may be made either individually or collectively.

60. The following forms of vertically recommended prices occur most frequently, namely -

(i) to charge certain fixed prices;

(ii) to charge certain minimum prices;

(iii) not to charge above a certain maximum price; and

(iv) to adhere as closely as possible to a certain price.

61. It furthermore generally happens that manufacturers or suppliers indicate recommended prices, or discounts on recommended prices, in their advertising campaigns.

(c) Price recommendation by third persons

62. A final method of recommended pricing is one in which third 'uncommitted' persons, who are not directly involved in the specific industry or manufacturing, publish information regarding recommended prices or mere price information regarding prices and conditions pertaining to or current in the industry. An example of this is when an independent adviser or institution with a specialised knowledge of the industry makes such a price recommendation.

MARKET SHARING

1. General

63. Market sharing may be defined as a practice aimed at restricting or regulating competition between market parties with a view to the benefits for participants resulting from such restriction, amongst others, by eliminating or restricting the operation of the market mechanism in price formation, to prevent other so-called disruptive actions by individual market parties and to reduce production and marketing costs.

64./...

64. Market sharing may assume various forms and may occur on various levels of the production and distribution chain, be horizontal or vertical and occur unilaterally (usually in the case of vertical market sharing) or by means of collusion between market parties.

2. Horizontal market sharing

65. Horizontal market sharing occurs especially by means of agreements, arrangements or other forms of collusion between market parties on the same level of the production and distribution chain. The practice occurs in various forms and the classification followed here is (a) the mutual division or market allocation by suppliers, (b) restrictions on production or demand and (c) joint ventures.

(a) The mutual division or allocation of markets by suppliers

66. This form of market sharing is usually applied by the suppliers of a commodity on the same level of the production and distribution chain or by the suppliers of a specific service. It occurs typically in the event of an agreement or some other form of conscious collusion, but may also occur by mere conscious parallel action. Various forms may be identified, amongst others, a sharing of consumers or buyers (customers or clients), the sharing of areas and quantitative restrictions.

67. The sharing or allocation of markets according to consumers occurs when competitors share individual or categories of consumers, and each one directs his marketing effort solely at the consumers or categories of consumers set aside for him.

68. The sharing of individual consumers/customers/clients usually occurs in cases where only a limited number of large-scale suppliers are present on the supply side of the market. Sharing classes of consumers may occur, amongst others, according to the size of firms on the demand side, State and private buyers and resellers or ultimate consumers.

69. This form of market sharing may also be applied backwards in the production and distribution chain, for example where buyers of raw materials make an allocation of raw material suppliers or when a few retailers, who jointly dominate the market, make an allocation of suppliers of products.

70. The sharing of markets according to geographical areas, also known as territorial or regional sharing, differs from those according to consumers only so far in that a direct allocation of consumers or consumer classes does not take place, but that by agreement the market is divided into distinctive (geographic) regions and one or more of those regions is allocated to each of the parties involved in the agreement or arrangement. Such a party directs its marketing effort solely at that region. This form of sharing usually occurs only when a large number of parties is present on the demand side of the market and especially when they are reasonably evenly distributed over the total geographic market area.

71. A variation of market sharing according to geographic regions occurs when inland suppliers compete within their country in the same regions, but divide overseas regions (countries) in respect of the exportation of products.

72. Another form of market sharing between suppliers is in the form of quantitative restrictions, usually by means of quotas. The suppliers determine the total market in quantitative terms, and between them then share the total on an agreed basis. This form is often accompanied by penalties, in some or other form, imposed upon those who exceed their quotas at the expense of those suppliers who are thereby prevented from achieving their full quotas.

73. Theoretically the assumption is that market sharing requires all the suppliers of a specific product for a specific market to be parties to the agreement, arrangement or understanding, although that need not necessarily be the case. In practice market sharing may be relatively effective when suppliers jointly hold a predominant position in the total market, or other existing suppliers are forced out of the market by joint market actions or potential entrants are prevented from establishing in a market.

(b)/...

(b) Restrictions on production or supply

74. Restrictions on the production of goods or the supply of services is an indirect form of market sharing. In the case of goods the suppliers are usually manufacturers, processors of half-finished products or repackers of products. Suppliers of services may also limit the supply of their services by, for instance, restricting entry to professional groups, restricting services rendered or not rendered, limiting service outlets and by agreements between established firms to limit partners or employees.

75. Instead of suppliers of goods and services sharing markets, the production of supply is restricted to a level equal to or less than the total market or demand. The participating parties are thus placed in the position where each is able to sell his (limited) production of goods or supply of services without implementing marketing actions which, in the absence of an agreement, would have been required to retain his market share. At the same time some suppliers are prevented from attempting to expand their market shares.

76. Restrictions on production or supply may assume various forms. Production quotas is a general form in which each of the suppliers is subjected to quantitative restrictions on physical products, usually on the basis of historical production records. These are often accompanied by penalty clauses. Another less exact and more flexible form is an agreed restriction on production facilities, facilities for supplying a service, or on an increase (growth) of facilities. This often originates in a segment of the market characterised by surplus capacity. The suppliers concerned agree to reduce capacity according to a specific formula, to discontinue or to close older and possibly less profitable facilities or production processes, or to take over and close other existing manufacturers' facilities. The aim is especially to bring the utilised capacity in relation to the market in order that the so-called disruptive marketing actions, implemented to maintain market shares or to extend them, are rendered unnecessary.

77. Another form of restriction on production or supply is that in which technology, patent rights, copy rights or trade marks are used as instruments. Suppliers agree to pool their technologies or to cross-license them in order to protect and strengthen their position in the market at the expense of other suppliers.

78. Suppliers may also agree to restrict the variety of products or services manufactured (or marketed) by each, or to restrict production differentiation. Although the products mutually allocated may differ, competition still takes place, since the products are utilised for the same purpose or because identical processes or facilities for the creation of these are used. In market segments which contain a small number of suppliers, the production process may also be divided into subsequent stages and shared amongst the participants.

(c) Joint ventures

79. Joint ventures are effected when two or more parties establish an undertaking in which the profits (or other benefits) and losses are divided proportionately in one way or another. This may assume various forms and may be established for various reasons. A distinction may be made between joint ventures in which the founders are horizontally related and those in which they stand in vertical relationship to one another. Joint ventures differ from the usual forms of collusion in this respect that, in the case of collusion, an agreement, arrangement or understanding usually exists so as to act individually or jointly in a specific way, whereas in the case of joint ventures a specific undertaking is created or action is only jointly executed.

80. The forms which joint ventures may assume, include establishing a new undertaking by two or more parties in order to enter a new market or to manage certain functions on behalf of the founders (a restrictive definition which is often used), the joint implementation of a specific action or the joint utilisation of certain facilities. When two undertakings merge or when two or more parties take over an existing undertaking, it is sometimes also regarded as a joint venture, but according to competition legislation it is treated as an acquisition (as defined in Act 96 of 1979).

81./...

81. Joint ventures are usually based upon the specific contribution which each of the founders is able to make or on the joint benefit which each of the founders obtains from it. The more general aims of this kind of undertaking includes the joint mining or processing of raw materials or the production or distribution of goods or the supply of services in order to effect capacity savings; the consolidation of specific skills or of production means, such as technical skills and capital, patents and production facilities, production skills and facilities and marketing skills; the consolidation of skills and facilities and capital for research and development; the consolidation of assets or securities with which to draw capital, the spreading of risks, increasing market control for buying or selling under improved conditions or to share the costs of research and development; and the joint utilisation of facilities or executing certain business functions in order to share the costs thereof or to arrange for the execution of functions to joint advantage.

82. As in the case of restrictions on production or production facilities joint ventures, or at least certain forms thereof, may also be regarded as an indirect form of market sharing. Instead of two or more suppliers operating within a certain market, or being potentially capable of operating, a single undertaking acts on their behalf. Consequently the 'pool type' of joint venture comes to exist in which certain management functions are handled by a joint venture on behalf of the founders or when facilities are jointly obtained or existing facilities are jointly utilised.

83. The most general form of the 'pool type' of joint ventures is that in which buying or selling is effected on a joint basis. This takes place in the form of specific undertakings, incorporated as a corporate body, with or without motives of gain or an informal pool organisation. Buying costs or sales income are, in the case of non-profit undertakings usually allocated directly to the participants by means of pool accounts, or the products are sold for a specific price to the joint venture and the profits paid to the participants in proportion to sales. On the same basis joint facilities may be made available or may be let to participants.

84. The latter form of joint undertakings often involves all the suppliers of a product or service. This is also often implemented to promote the export of commodities or to increase export earnings.

85. Joint ventures offer a greater advantage than pure collusion by virtue of the fact that discipline or control can be applied more easily and effectively, since the founders usually exercise joint control of the management of the single undertaking.

3. Vertical market sharing

86. Vertical market sharing usually comprises the allocation, by a supplier, of markets in the form of geographic regions, consumers or classes of consumers to the resellers of his products. This may occur by means of an agreement between the supplier and his distributors or may be implemented as a one-sided action by the supplier.

87. This practice only occurs when the supplier appoints a limited number of selected resellers, and by the discretion he exercises, is in a position to subject resellers to certain conditions, as in the case of exclusive distribution rights, agencies and other forms of limited distribution.

88. In practice distributors are compelled to limit their sales to certain geographic regions or certain consumers or classes of consumers or they are compelled to sell their products from a certain point only. The lastmentioned variation is less restrictive, since it does not prevent the reseller from selling outside his allocated region. Especially in cases where proximity to the outlet region is an important factor, as is also the case with delivery costs, it may, however, be an effective restriction as a result of the cost benefit enjoyed by each reseller in his own region.

89. The normal forms of vertical market sharing by suppliers is usually a certain marketing policy implemented in cases when a measure of protection is required to convince resellers to invest in processing, packaging or distribution facilities, to gain their loyalty, to ensure an aggressive marketing action or to provide buyers with advanced technical advice. This is especially implemented in cases when the nature of the product is such that the identification of trademarks and trademark preference or distribution costs plays an important role.

RESTRICTIVE/...

RESTRICTIVE TENDERS

1. The meaning of tenders

90. In order to place tender practices in the proper perspective, the concept 'tender' as it applies in the economic system is briefly discussed and thereafter the occurrence of restrictive tender practices.

91. Tenders are a general occurrence in the current economic system and one of the accepted purchasing methodsfor commodities, especially for state purchases, in the building and mining industries and even when obtaining certain professional services.

92. A tender may be defined as the supply of one or more commodities to a buyer on specified conditions in a reaction to the buyer's invitation to tender.[1)]

93. The primary aim when calling for tenders is to create competition between tenderers in respect of the commodities specified by the buyer. The purpose is to place the buyer in the position of obtaining the most favourable conditions of contract and thereby also promoting a market-orientated economy.

94. Besides the primary aim, the following secondary aims also exist -

the exposure of supply sources which would otherwise have remained unknown;

curbing favouritism and curruption; and

the promotion of objective and uniform value-judgements in respect of commodities of various undertakings.

95. Sometimes government institutions utilise the allocation of tenders as an instrument of economic policy, such as encouraging local industries by allocating tenders on a regional basis.

2. Tender practices

(a) General

96. In the economic system various forms of restrictions on competition are encountered, of which restrictive tenders form part. Restrictive tenders as a restriction on competition may result from a restrictive agreement, arrangement or understanding by which mutual competition is reduced or eliminated. Naturally an element of collusion is required for restrictive tenders to be present. It is indeed this element which results in restrictions on competition. Collusion in respect of tenders may occur overtly or covertly before tenders are submitted.

97. In respect of tender practices a distinction must be made between collusion regarding tenders and joint tenders. The latter practice is especially relevant to large projects which cannot be handled by one tenderer. It is thus a case of necessity for tendering to occur on a joint basis. Usually a consortium or a joint venture is established by respective tenderers in order to tender for such projects.

98. Joint tenders should not be confused with subtenders. Occassionally the main tenderer invites subtenders for those commodites he cannot supply himself in order to compile the main tender. Collusion among subtenderers and between main tenderers and subtenderers is possible.

99. Collusion in regard to tenders can thus occur on a horizontal as well as on a vertical level.

100./...

1) A tender differs from a quotation. The latter involves providing a price for which a commodity will be supplied to a prospective buyer in reply to his specific demand.

100. The scope of collusion regarding tenders may extend from intensive systematic co-operation between tenderers within the most important segments of an industry to informal collusion between two competitors. A business association may be instrumental in applying collusion and may take place in the strictest secrecy or may also be effected openly and on a formal basis. Collusion in respect of tenders may assume various forms of which the most important are considered hereafter.

(b) Identical tenders

101. One of the forms of identical tenders occurs when an association within an industry holds such a strong position in respect of the tender buyer that it is able to force the latter to accept standard tender forms from the association in which the conditions to be tendered under are stipulated. Should the buyer not accept the conditions, the members of the association are instructed to withhold their tenders. Members of such an association usually obey the instructions and strict control is exercised in order to ensure that they are being observed. Should some of the members ignore the instruction they are liable to be suspended or to pay a fine.

102. Another form of identical tenders exists when prospective individual tenderers enter into a prior agreement in respect of uniform tender prices and conditions,[1)] which is a form of horizontal price collusion. Vertical uniform price formation may also occur where prospective tenderers obtain inputs from one supplier or from suppliers who, in one way or another, mutually maintain prices on a horizontal level.

103. It is, however, also possible that prospective tenderers follow the price leader in a branch of industry, or the prices indicated on price lists. For these reasons tenders may incline to be identical.

(c) The pre-selection of tenderers

104. This practice basically consists of two methods, namely predetermining the most favourable conditions under which to tender and secondly, the so-called voluntary 'inflated' tenders. In the first case the tenderers agree in advance that a specific tenderer will offer the most favourable conditions so that the tender can be awarded to him. The other tenderers may then even receive some form of compensation from the 'successful' tenderer. This method of manipulation creates the impression that tendering has taken place under competitive conditions. However, the price and conditions are not always the most important consideration in the awarding of tenders and may consequently contain a degree of risk for the colluders.

105. The second form, namely voluntary 'inflated' tenders, is a variation of the former and affects mainly the price. Prospective tenderers voluntarily agree to raise their tender prices artificially in order to enable a specific tenderer to tender at the ruling prices, thus increasing the possibility of having the tender awarded to him.

(d) The prevention of competitive tenders

106. Occasionally prospective tenderers or a group of prospective tenderers agree not to compete with one another for a tender. A variation of this is that an association prohibits its members to tender competitively with non-members. Various methods, of which marking tender envelopes is the most well-known, may be implemented to achieve this. By clearly marking the envelopes of association members a distinction is made between the tenders of members and non-members. The caller of a tender then has to choose whether he wishes to open the envelopes of either the members and to accept one of them or to open the envelopes of non-members and to accept one of them. He may not open the envelopes of both members and non-members.

(e) Market sharing

107. Market sharing in respect of tenders usually occurs when tenderers decide in advance to whom a tender should be awarded. This decision can be made at each invitation to tender or an overall decision may be taken which allows tenders to be awarded on a rotation basis.

108./...

1) See earlier on in the report regarding collusion in respect of prices.

108. Market sharing may also take place by ensuring that tenders are awarded on a geographic basis or on a basis of consumer allocation.

109. Although there is a distinction between collusion regarding tenders and joint tenders, the latter may contain an element of collusion if tenders are submitted jointly with the aim of sharing the market, and not as a result of the scope of the tender project.

(f) Refraining from tendering

110. This form of tender practice is one of the most powerful instruments in the hands of prospective tenderers. An agreement in advance to withhold tenders, may strengthen all the other forms of tender practices and the tender caller is involuntarily manipulated to comply with the will of the tenderers.

(g) A combination of restrictive tender practices

111. In the aforegoing only a few methods by which tenders may be restrictive by means of collusion, have been discussed. Different variations or combinations of these methods do exist, however. In practice a combination of two or more methods are often employed to influence tenders in favour of tenderers, thus reducing or eliminating competition in the process.

CHAPTER III/...

CHAPTER III

REVIEW OF MEASURES WITH REGARD TO THE PRACTICES IN A NUMBER OF OVERSEAS COUNTRIES

112. The practices of collusion on prices and conditions of supply, market sharing and tenders have received attention in most Western countries. The Board does not intend to furnish an in-depth review of the measures taken in relation to these practices in overseas countries. It is sufficient to highlight the principal aspects of the more significant systems, viz those of the United States of America, the United Kingdom, Australia, the Federal Republic of Germany, Canada, France and the European Economic Community. Since competition policies in these countries have developed in response to the needs and beliefs of each country, the various systems show considerable differences in approach and in vigour of application.

THE UNITED STATES OF AMERICA

1. Background

113. The United States' belief and experience is that "unrestrained interaction of competitive forces" will usually result in "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions"[1].

114. Despite significant developments elsewhere, it is still true that in no other country is there such an elaborate and comprehensive body of law on competition as has developed in the United States in the ninety-five years since the Sherman Act was passed.

115. There are other minor laws, but the essentials of American "anti-trust" laws appear in three Acts.

116. The Sherman Act of 1890 contains two main prohibitions -

(a) Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal ...."

(b) Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor ..."

117. The Clayton Act of 1914 declares illegal four specified types of restrictive or monopolistic practice where they substantially lessen competition or tend to create a monopoly:

(a) Price discrimination (section 2)

(b) Exclusive dealing and tying contracts (section 3)

(c) Acquisitions of competing companies (section 7)

(d) Interlocking directorates (section 8)

118. The Federal Trade Commission Act of 1914 is concerned mainly with the establishment of the Commission and the mechanics of its operation. Section 5 of the Act, however, contains one important substantive provision which, in its amended form, reads as follows: "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared illegal."

119./...

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1) Northern Pacific Railway Co v United States 356 US 1,4 (1968).

119. Enforcement of the anti-trust laws does not depend exclusively on the Department of Justice and the Federal Trade Commission. The Sherman and Clayton Acts permit any private person who suffers damage as a result of violations to sue offenders and recover "threefold the damages by him sustained".

120. Only those aspects of anti-trust law which have significance for the present investigation will be briefly set out below.

2. The Rule of Reason and per se offences

121. The broad language of section 1 of the Sherman Act made it necessary early in that Act's history for the Supreme Court further to identify those restraints on commerce which the section declares unlawful. The Court eventually set forth a "rule of reason" to determine the lawfulness under this Act of restraints upon trade. Since the common law outlawed "undue or unreasonable restraints" upon commerce, it was concluded that section 1 of the Sherman Act prohibited contracts or combinations which caused "undue limitation on competitive conditions".

122. The rule of reason remains important in applying section 1 of the Act to novel restraints.

123. However, the courts have also developed the doctrine that certain types of conduct should be conclusively presumed to be unreasonable. Certain forms of collusion have been deemed to be so limiting of competition that proof of an agreement to use them is, by itself an unreasonable restraint and therefore illegal. These anti-competitive practices are known as "per se" violations, and they include all the practices relevant to this investigation.

3. Horizontal restraints

(a) Price fixing (collusion) and collusive tendering

124. It is now well-established that explicit agreements by competing firms to fix prices are a primary concern of section 1 of the Sherman Act. Price fixing is illegal per se, and no evidence of the reasonableness of the prices need be heard by the courts. Justice Stone's classic statement is the following:

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition ... Agreements which create such potential power may well be held in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable."[1]

125. In his equally famous summary of the position Mr Justice Stone in United States v Socony-Vacuum Oil Company (1940) said:

> "Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition ... Any combination which tampers with price structures is engaged in an unlawful activity."

126. Later cases have applied this rule to maximum price fixing and to arrangements where the effect of the agreement on price is indirect. Thus, agreements to establish standard charges for cheque cashing or credit servicing, to change prices at the same time or not to advertise prices are per se illegal. It was also held illegal for competing new car dealers to agree upon a "list price" even though customers invariably bargained over the price and the defendants almost never sold cars at that price.

127./...

1) In United States v Trenton Potteries Co. (1927).

127. The law deals with substance, not form. Hence it is price fixing to agree on minimum prices or a formula to calculate prices.

128. Agreements as to tenders to be submitted for particular contracts are, of course, covered, and not only when bids are identical, but also when it is arranged that a particular firm shall put in the winning bid while others put in fictitious bids at higher prices.

129. Agreements among buyers count equally with agreements among sellers.

130. In all these cases the uniformity of prices must result from collusion. In this context collusion means a real "meeting of the minds" in a common endeavour to suppress or limit price competition; moreover, it is implied that the plan or understanding can be relied on with reasonable confidence by the participants. Mere exchanges of information or price leadership therefore do not contravene section 1 of the Sherman Act.

(b) Agreements other than price agreements; market sharing

131. Power in the market is, of course, a necessary condition of effective action even for those whose purpose in limiting competition is defensive and directed to stabilising a situation in which competition is believed to be excessive. Whether the intention is defensive or exploitive, the classic prescription for improving a bargaining position is to exclude competitors from the market and confine the available trade so far as possible to a manageable number of participants.

132. Of direct interest to this investigation is the reduction of competition by agreements between competitors to keep out of each other's way by market sharing. Unless insignificant in scope and effect, such an agreement is also illegal per se under section 1 of the Sherman Act.

133. Agreements to divide markets may take many forms. Firms may agree to allocate markets geographically; or they may agree to assign customers functionally by class (one serving wholesalers and the other retailers) or technically by type of product.

134. Such agreements are invariably justified on the grounds that they permit more efficient production and marketing. Production facilities can be concentrated and scale economies supported; distribution costs can be reduced and transportation limited. The flaw in the argument for "more rational" organisation of production is that if it were supported by market efficiencies, firms would seek such gains without resort to market allocation agreements. Specialisation would be justified by additional profits, making agreements with competitors unnecessary.

135. Market division agreements may in some respects have an even greater impact on competition than price fixing. By eliminating competitors, the single remaining market occupant - albeit in a limited territory - has a monopoly and is freed of competition not only with respect to prices but also with respect to service, quality, innovation etc.

4. Vertical restraints: resale price maintenance

136. For present purposes resale price maintenance is the only vertical restraint requiring a brief discussion.

137. It seems to be fairly widely believed that resale price maintenance agreements between a manufacturer and his dealers may serve several functions and that their antitrust legality should be measured by the rule of reason on a case-by-case basis.

138./...

138. However, resale price maintenance was condemned on a per se basis by the Supreme Court in 1911. Such pricing was permitted in several states which adopted "fair trade" laws under an exception authorised by Congress, but which Congress later repealed. It is generally regarded as likely that in the future the rule of reason would be applied to resale price maintenance.

UNITED KINGDOM

139. Under the Restrictive Trade Practices Act, 1976, all agreements relating to the supply and acquisition of goods and commercial services, and containing restrictions accepted by two or more parties, are subject to registration and subsequent judicial investigation. The parties to them may, however, demonstrate to the Restrictive Practices Court that they are not against the public interest.

140. The United Kingdom allows considerable freedom to a supplier of goods or services as to the prices at which he will supply them. Yet prices are subject to restrictions or control under a substantial body of legislation and the common law.

141. Under the common law price fixing, that is an agreement between suppliers as to the prices to be charged, may be a restraint of trade and as such unenforceable between parties, unless it can be justified as reasonable. No action will lie against a trader, however, not acting in combination with others with respect to his pricing policies - even if they are pursued with the object of damaging another - provided no unlawful means are employed.

142. In terms of the Restrictive Trade Practices Act of 1976 a common pricing policy practised pursuant to an agreement or an arrangement which is registrable and registered under this act (without prejudice to the common law rights of any party or third party) may be followed so long as it has not been referred to and condemned by the Restrictive Practices Court.

143. If a registrable agreement is not registered, however, it is unlawful to enforce or abide by it and any person prejudiced as a consequence of price fixing under a registrable but unregistered agreement has a claim for damages against the parties to it.

144. The Resale Price Act, 1976, provides that a supplier of goods may not impose conditions as to their minimum resale price unless they have been declared by the Restrictive Practices Court to be "exempt" goods under the Resale Act. A supplier of goods may publish recommended prices for the resale of his goods; but if the recommendation is the consequence of an agreement between suppliers, the agreement must be registered under the Restrictive Trade Practices Act, assuming that the other relevant criteria for registrability have been satisfied.

145. As regards prices, the Fair Trading Act, 1973, provides that where a monopoly situation exists in relation to particular goods or services, the prices charged by the enterprise in question may be subject to investigation by the Monopoly and Mergers Commission. If the Commission finds that any such pricing practice operates against the public interest the Government has extreme powers to force the termination of such practice.

146. Horizontal agreements between competitors limiting markets through the allocation of geographical areas, limitations on the kinds or quantities of goods or services to be supplied, obtained or processed, or the type or class of customers or suppliers to be served, involve the acceptance of relevant restrictions within section 6 or 11 of the Restrictive Trade Practices Act. Such horizontal agreements between companies carrying on business in the United Kingdom would be registrable except where they relate to exports from the United Kingdom, or the provision of services outside the United Kingdom. In addition, horizontal agreements limiting markets may be in restraint of trade at common law and, as such, unenforceable between the parties unless they can be justified on the ground that the restraint is reasonable.

147. In most cases exclusive agreements will, if properly drafted, be lawful. Nonetheless, the Monopolies Commission does view such agreements with suspicion if they seem to protect the market dominance of a monopolist, as defined in the Act.

148./...

148. The provisions of the Restrictive Trade Practices Act set out in the first paragraph of this section apply to collusive tendering. The anti-competitive practices provisions of the Competition Act, 1980, complement the other competition policy functions and powers of the Director-General of Fair Trading, and are the latest of a number of measures introduced since 1948 to encourage competition in British industry and commerce.

149. The provisions of the Competition Act, 1980, which deal with anti-competitive practices, can be seen to be complementary to those of the Fair Trading Act, 1973, and allow investigation of practices of individual firms which restrict, distort or prevent competition.

150. Specific anti-competitive practices are not banned, nor does the Act seek to specify those which are undesirable. It assesses practices, not on their form (as in the restrictive practices legislation), but on their effect on competition. An anti-competitive practice is defined in the Act as a course of conduct pursued by a person in the course of business which -

" of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it".

AUSTRALIA

151. In Australia matters relating to competition, competitive effects and public interest are contained in the Australian Trade Practices Act, 1974, which is administered by the Trade Practices Commission.

152. As far as the promotion of competition is concerned the Act generally prohibits provisions in agreements substantially lessening competition, abuse of monopoly power, resale price maintenance, exclusive dealing and price discrimination, as well as primary and secondary boycotts including some by employees.

153. Certain specific matters dealt with in the Act merit special mention. Making or giving effect to a provision of a contract, arrangement or understanding having the purpose or effect of substantially lessening competition in a market in which a corporation supplies or acquires goods is a contravention of the Act. Instances of such provisions are market sharing agreements, and restrictions on output or quality of goods to be produced, supplied or acquired.

154. The provisions in contracts, arrangements or understandings which are prohibited, whether or not they have the purpose or effect of substantially lessening competition, are -

(a) provisions having the purpose of excluding or limiting dealings with particular suppliers or customers;

(b) provisions having the purpose or effect of fixing the prices of goods or services (except where they are entered into for the purposes of certain kinds of joint venture or by some collective buying groups);

(c) provisions described as price recommendations but which have the purpose or effect of fixing the prices to be charged or paid for goods or services.

155. Resale price maintenance is prohibited as it is believed that a reseller has the right to decide the price of the goods that he is offering for sale and that he should retain his independence. Consequently it is unlawful for a supplier to stipulate a minimum price for the resale of goods he has supplied. However, he may set a maximum price above which the goods may not be re-sold.

156./...

156. A supplier may also recommend a resale price, but he may not require resellers not to charge below the recommended resale price (that has to be made clear in all lists, instructions or other documents about recommended resale prices issued by the supplier). It should be clear that there is no obligation on the reseller to charge the recommended price. It is also unlawful for a supplier to stipulate a price below which a reseller may not advertise the goods for resale.

157. It is not unlawful for an independent body to issue trade guide publications which contain recommended or suggested retail prices. However, it is unlawful for individual businesses receiving such publications to agree among themselves to accept the recommended prices as the actual prices they will charge. The provision of recommended prices by trade associations could be unlawful if it causes substantial damage to competition.

158. In terms of the Act, any rules of trade associations which are directed at fixing prices, stopping discounts and nominating persons with whom members may or may not deal, are unlawful. Rules which are directed at maintaining standards, provided they are not at the expense of competition, are unlikely to contravene the Act.

159. Generally, a code of ethics which seeks to maintain the quality of service of members of an association would not contravene the Act. However, standard forms or uniform terms should not specify prices or discounts, price adjustments, margins or other matters important to the bargaining process as between users of the form.

160. In some industries there may be a case for some matters to be expressed in forms or terms that are specific rather than general. Where such matters serve to strengthen the position of consumers or to strengthen the position of small business against firms with greater economic power, they may be "authorised" by the Trade Practices Commission. Authorisation protects the applicant from legal action for contravention of the Act.

161. Collective purchasing, joint advertising and market information arrangements, activities in which trade associations are frequently engaged in order to achieve economies for members and to help them to compete with larger rivals, would not necessarily contravene the Act. This would be the case where such activity does no more than to allow small businesses to engage in competitive conduct not otherwise available to them. However, if such activity is also used to fix prices (particularly) or impose terms and conditions of sale, it is likely to contravene the Act.

FEDERAL REPUBLIC OF GERMANY

162. The most important legal provisions for the maintenance and promotion of competition in the Federal Republic of Germany are contained in the Act Against Restraints of Competition, administered by the Federal Cartel Office (FCO). The Act provides, inter alia, for a ban on cartels and for the prohibition of other agreements in restraint of competition. In general terms a cartel is defined as a situation where several competing enterprises co-ordinate their behaviour (mostly by means of an agreement) for the purpose of eliminating or restraining competition. Examples are price cartels, quota cartels, cartels relating to the allocation of customers and territories as well as to the allocation of production and capacities. The restrictive business practices legislation is aimed at the protection of competition as a cornerstone of the market economy. Its basic object is to maintain competitive market structures.

163. The ban on cartels is not only designed to prevent such agreements. In terms of the Act all contractual arrangements (agreements and decisions) by enterprises or associations of enterprises are of no effect in so far as they are likely to influence production or market conditions by restraining competition.

164. Although the Act prohibits cartelisation in principle, the effects of this prohibition are similar to those under a rule of reason approach. A number of restrictive practices are excluded from the prohibition. Furthermore, if the parties to an agreement hold a relatively small share of the market and if the goods or services could easily be obtained from sources outside the agreement, then the agreement is not regarded as influencing the market conditions. It is also generally accepted that there may be other considerations justifying cartels, e.g. safety and health reasons. Cartel agreements in regard to promoting the efficiency and economic

strength/...

strength of enterprises, may be authorised (excluded from the prohibition) in so far as -

(a) they deal with the uniform application of general terms of business, delivery and payment (condition cartels);

(b) they relate to rebates on goods supplied which represent a genuine compensation for services rendered and do not lead to discriminatory treatment of individual buyers (rebate cartels);

(c) in the event of a decline in sales due to a lasting change in demand, they bring about an adjustment of productive capacities to the demand, taking into consideration the overall economy and the public interest (structural crisis cartels);

(d) they create uniform standards and types (standardisation cartels), rationalise economic activities (rationalisation cartels) or bring about specialisation (specialisation cartels), while substantial competition continues to exist in the market;

(e) they serve to protect and to promote exports, in so far as only foreign markets are affected (export cartels);

(f) they refer to importation and the German buyers are exposed to no competition or only insignificant competition from foreign suppliers (import cartels); and

(g) they lead to restraints of competition which are necessary for reasons connected with the economy as a whole and the public interest. Considering the complexity of economic developments, special authorisation may be granted for cartels even if the conditions of the Act are not satisfied, i.e. special cartels that can be authorised by the Federal Minister for Economic Affairs.

165. Agreements and decisions which establish uniform methods for specification of services or for price breakdown in certain economic sectors are exempted from the provisions of the Act if they do not fix prices or price elements. These economic sectors are those in which upon an invitation to tender, tenders can be made only on the basis of descriptions which do allow of a qualitative examination at the time the contract is concluded.

166. To assist small and medium-sized enterprises to make up for the structural disadvantages (owing to size) in competition with powerful enterprises, the Act, in addition to the exemption from the ban on cartels granted provides for further co-operation facilities (e.g. small business co-operation).

167. Nearly all forms of co-operation between enterprises are admissible, in so far as they serve to promote the efficiency of small and medium-sized enterprises and competition is not substantially impaired. This includes co-operative action in the fields of production, research and development, financing, administration, advertising, purchasing and distribution. Inter-company co-operation may take the form of co-ordination as well as the hiving-off of one or several functions from the enterprises involved. Such co-operation is excluded from the scope of the application of the Act if it is primarily directed towards the promotion of efficiency and not aimed at the elimination or restriction of competition.

168. It is further argued that inter-company co-operation is likely to improve efficiency of the participating enterprises if it is designed, for example, to increase output or enhance its quality, to broaden the range of products, to shorten routes or periods of delivery, to streamline the purchasing or selling arrangements, to direct orders so as to cut freight costs, or to provide for the common use of expensive publicity media.

169. Mere price agreements are in any event not permissible. Only if such agreements are inherently connected with co-operation directed as a whole at increasing efficiency can agreements on prices or price elements be allowed, provided that this serves the purpose of rationalisation. This may be the case in particular where small or medium-sized firms engage in common advertising or distribution. The obligation to sell exclusively through a common sales agency may also be the object of an agreement in terms of the Act.

170. While section 1 of the Act covers a wide range of restrictive practices and sections 2 to 8 a number of exceptions, sections 15 to 21 apply to certain types of restraints of competition. Of special importance to this investigation is that agreements whereby one business restricts the freedom of another to determine prices or terms of sale are prohibited. This is especially

applicable/...

applicable to resale price maintenance. Restrictions by a purchaser on sellers, such as a most-favoured-buyer clause, are also prohibited. In another section of the Act a licensor is permitted to fix the licensee's resale price of the goods produced in terms of the licensed patent, model or trade secret.

CANADA

171. In terms of section 32 of the Combines Investigation Act "conspiracy" is a heavily punishable criminal offence. It is committed when a person conspires, combines, agrees or arranges with another person -

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product;

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product, or to enhance unreasonably the price thereof;

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property; or

(d) to otherwise restrain or injure competition unduly.

172. Despite certain exceptions the scope of the statutory provisions is conspicuously wide.

173. In terms of section 32.2 of the Act "bid-rigging" (collusive tendering) is prohibited. Everyone who is a party to bid-rigging is guilty of an offence and there is no need to show that the restraint on competition is undue. Bid-rigging will, however, not contravene the Act if the agreement or arrangement is made known to the person calling or requesting the bids or tenders at or before the time the bid or tender is made. This exemption is included in order to permit parties to act as part of a joint venture, a practice which is often economically desirable.

174. Section 38 of the Combines Investigation Act prohibits resale price maintenance. The suggestion of prices by a producer or seller is acceptable. However, the reseller is under no obligation to accept any suggestion in respect of prices.

FRANCE

175. The practice of fixed minimum prices is prohibited in France by section 37(4) of Ordinance No 45 of 30 June 1945. However, fixed resale prices may be authorised by way of exemption. Such exemptions are only granted for a prescribed period.

176. The Ordinance of 28 September 1967 prohibits a producer, importer or wholesaler from conveying to a retailer by any means whatsoever price recommendations for the sale of certain products to the public.

177. The following practices are per se illegal:

(a) All price fixing agreements accompanied by compensation schemes are illegal whatever their stated motives.

(b) Posted price lists and uniform discounts are illegal, if they are associated with a system of fines for firms cutting prices or if they are in fact followed.

(c) Systematic similarity of prices even without a posted price list is also illegal.

178. It can in fact be recognised that publications by a trade association may contribute to better information of customers and may also help firms to evaluate their costs when they concern a number of small firms without a sophisticated system of accounting. For these reasons the publication of price lists by a trade association is not in itself illegal.

179./...

179. Market sharing and production quotas are illegal practices even if in fact they are not respected, because they are regarded to be designed to protect less efficient firms that would have disappeared or lost of significant market share if competition prevailed. If an agreement calls for flexible quotas or market shares, but this flexibility does not occur, the agreement is also illegal.

180. Collusive tendering is the subject of a prohibition specially laid down by section 412 of the Penal Code. The law on cartels applies to concerted action to decide which enterprise should be awarded the contract and to arrange that, when the tenders are opened, this enterprise's bid will be taken to be the lowest.

EUROPEAN ECONOMIC COMMUNITY

181. The European Economic Community's constitutional document, the Treaty of Rome of 1957, contains provisions, notably articles 85 and 86, which deal with competition policy.

182. The one area of consensus that lay behind articles 85 and 86 of the Treaty of Rome was that the formation of the Common Market through the dismantling of tariffs and other trade barriers should not be frustrated by allowing private cartel agreements or dominant firms to erect new or substitute obstacles to trade between the member countries. Thus the prohibitions in these articles are epitomised in the Treaty not as contrary to the needs of free competition or economic efficiency but as "incompatible with the Common Market". Although the European Commission contains many strong proponents of a forceful competition policy, the actual development of the community system inevitably reflects differences in background and belief.

183. The latter are responsible for the position that the prohibition of restrictive agreements in article 85(1) of the Treaty is expressly made inapplicable in article 85(3) to agreements which promote economic progress, subject to further conditions about undue effects on competition.

184. The significance of this is not just that it embroils the European Court inexorably in weighing economic arguments, but it also greatly affects the enforcement process, because no agreement can be characterised as in a strict sense illegal per se. Some types of restrictive arrangement may come near to this position in practice as the precedents in the case-law accumulate, but in principle a possible claim for exemption under article 85(3) can always be envisaged.

185. However much the Commission stresses, therefore, that its regulations require all restrictive agreements to be notified (with the incentive that no fines will subsequently be imposed in respect of illegal agreements that are notified), many businessmen in Europe are likely to take the risk of not doing so and the extent of voluntary compliance is limited.

186. The prohibition of restrictive arrangements which offend against this aim has almost the force of a per se rule, but otherwise the Community policy works basically on a presumption that restrictive arrangements are likely to harm consumers, but that this may be rebutted by showing that the arrangements are needed for technological advance or improved productivity. There are dangers in attempting to lay down principles which apply generally to decisions under article 85(3). However, certain types of agreement have been consistently refused exemption. These are, in particular, market sharing agreements and agreements relating to price fixing and quotas.

187. The 1951 Treaty which established the European Coal and Steel Community (ECSC) provides, in respect of the common market that it establishes, rules governing competition which are directly applicable to undertakings in the coal and steel industries. The essential provisions are as follows:

agreements tending to restrict competition are, save as otherwise provided, prohibited (article 65 ECSC);

concentration/...

concentration operations in the coal and steel sectors are subject to prior vetting (article 66 ECSC); and

undertakings in a dominant position are subject to abuse control (article 66(7) ECSC).

188. Article 65 ECSC forbids all agreements among enterprises, all decisions of associations of enterprises and all concerted practices tending, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the common market, and in particular those tending:

to fix or determine prices;

to restrict or control production, technical development or investments;

to allocate markets, products, customers or sources of supply.

189. Agreements may be authorised for firms to specialise in the production of, or to engage in the joint buying or selling of specified products, if it is found that -

such specialisation or such joint buying or selling will contribute to a substantial improvement in the production or distribution of the products in question;

the agreement in question is essential to achieve these results, and is not more restrictive than is necessary for that purpose; and

it is not capable of giving the interested enterprises the power to determine prices, or to control or limit the production or selling of a substantial part of the products in question within the common market, or of protecting them from effective competition by other enterprises within the common market.

Chapter IV/...

CHAPTER IV

COMMON REASONS FOR THE EXISTENCE OF THE PRACTICES AND THEIR OCCURRENCE IN THE REPUBLIC OF SOUTH AFRICA

190. In this chapter the typical reasons for the existence of collusion on prices and conditions, market sharing and restrictive tenders are first of all discussed, especially as found in the literature on the subject. Thereafter the occurence of the practices in the Republic will be considered.

COMMON REASONS FOR THE PRACTICES

191. Market parties in collusion in respect of the relevant practices may become involved in such practices for a number of reasons and in a variety of ways.

192. In this way the collusion may range from a formal, explicit agreement to a loose, informal and unorganised arrangement between participants in the same industry. Involvement may be voluntary or the participant may be compelled, either directly or indirectly, to participate. Compliance with the agreement or arrangement may rest upon an agreed enforcement thereof; on the other hand it may also rest on a "gentleman's agreement" without penalty clauses.

193. The most common form of collusion is in respect of prices of commodities which may be supplemented by agreements or arrangements in connection with conditions of sale, products and varieties of products, packaging, tender practices and of the sharing of the market.

194. Normally more than one reason may exist for the establishment of the practices. The most important reasons for collusion are grouped under various headings hereunder.

1. Structure of the industry

195. The basic prerequisite for a pure competitive market is that the number of parties on both sides of the market should be so great that no single supplier or buyer is able to influence the impersonal market factors which determine prices. It stands to reason that in practice this ideal situation does not exist anywhere, least of all in South Africa. It follows that structural imperfections in the South African market may lead to restrictive practices.

196. The probability of collusion of one form or another is especially high in a duopolistic or oligopolistic market structure, particularly for the purpose of increasing profitability. The motive may also be to regulate the market or restrict entry for newcomers.

197. In the case of a duopolistic or oligopolistic market structure the possibility of collusion may be further enhanced if the product marketed by the parties concerned is of a non-differentiated and homogeneous nature. In such a market situation the market parties are dependent on each other to such a degree that the behaviour of one has a direct effect on the behaviour of the others. An interdependency between the suppliers therefore exists. The conditions for collusion are favourable when the number of participants in the market is limited, the supply and demand curves of the parties are similar, the opportunity for "cheating" small and the purchasing pattern of customers relatively constant. Although the total demand for the product may be relatively inelastic, each competitor usually has a kinked demand curve with the result that a price reduction by one has a direct influence on the turnover of his competitors. For this reason, it is alleged, price competition

is/...

is not generally found in an oligopolistic market. In the longer term oligopolists with relatively homogeneous products would tend to apply the same conditions of sale. Collusion which results from the nature of the market structure essentially aims at establishing "orderly" marketing by averting cut-throat competition in the industry.

2. Intensity of competition

198. The intensity of the competition existing in an industry in many instances has an important influence on the market parties' inclination and ability to collude. In the case of cut-throat competition some form of collusion is often applied to obtain or maintain "discipline" in the industry.

3. Profitability

199. The primary purpose of any form of collusion in respect of participating parties is to increase and stabilise the parties' profitability. The opinion is held that long term planning is facilitated if the uncertainties arising from excessive competition can be removed. It is also alleged that collusion between market parties in one or more areas may assist in stabilising economic trends.

4. Cost structure

200. It is the general view that the circumstances in capital intensive industries with a high fixed cost are conducive to collusion on prices with the purpose of eliminating competition and ensuring a certain return on capital. The reason is given that it is especially during downward phases of the economy with a resultant decline in demand and excess or idle capacity that market parties will turn to price wars to increase volumes in order to recoup a greater part of their fixed costs.

201. It is especially in regard to those industries with relatively large fixed cost that collusion is seen by the parties as a method of ensuring that excess capacity is not created, or that existing excesses are reduced. In this way, it is alleged, forward planning is facilitated and risks reduced.

5. Structure of the buyer's market

202. In many cases a buyer's market which is not highly concentrated would tend to encourage suppliers to collude. Should certain purchasers place large orders the temptation to deviate from agreed conditions of sale in order to take such business away from competitors may arise. It is generally accepted that the success of collusion is greater in the case of small buyers as the larger buyers are able to exercise a countervailing power of their own. It may also happen where effective collusion between small buyers exists.

6. Existence of trade associations

203. A trade association is often usefully employed as a vehicle for the application of restrictive practices and collusion. Such an association can also create the social environment conducive to collusion.

7. Other reasons

204. Other reasons given for the existence of the practices are the elimination of price competition between manufacturers or resellers, the promotion of stability especially in respect of prices and sales, the reduction of marketing costs, the maintenance of a satisfactory level or quality of service, the "ethical" nature of the product or service, guidance to resellers, the prevention of "chaos" and "unfair" competition, the maintenance

of/...

of profit margins, reduction of risk, the protection of the small enterprise and the consumer, protection of the image of the product and finally to counter the existence of monopsonistic power.

THE OCCURRENCE OF THE PRACTICES

205. According to the reasons put forward for the existence of the practices in the first part of this chapter extremely favourable opportunities are present in the South African economy for the existence and occurrence of collusion on prices and conditions, market sharing and restrictive tenders. It is clear from the submissions received and the Board's own experience that these practices are found to exist in a large number of industries and a wide range of commodities. Allegations[1] in respect of the occurrence of the practices included in the investigation were raised, inter alia, in respect of the following industries or commodities[2]:

LIST OF PRACTICES AND ALLEGED PRACTICES[3]

Commodities[4]	Practices and alleged practices
Accountancy services	Horizontal price recommendation in respect of certain secretarial services
Advertising services	Horizontal price collusion
Alcoholic beverages	Horizontal price collusion; Horizontal/Vertical price recommendation
Architectural services	Horizontal price recommendation
Bakers products	Horizontal price collusion; Market sharing
Beverages (non alcoholic)	Horizontal price collusion
Bitumen and roadbuilding material	Horizontal price collusion; Market sharing; Collusive tenders
Books	Horizontal price recommendation
Books (school)	Collusive tenders
Building activities	Horizontal collusion in respect of conditions of tender

Cement/...

1) The Board does not necessarily agree with the allegations.

2) Practices which are arranged by law or regulation are mostly excluded.

3) As defined in Act 96 of 1979.

4) (a) Practices regulated in terms of other legislation excluded.

(b) Price includes conditions of sale.

(c) The incidence of individually recommended prices is so great that it has been excluded from the above list.

(d) Allegations of resale price maintenance not listed.

Commodities	Practices and alleged practices
Cement	Horizontal price collusion; Market sharing; Collusive tenders
Chemicals (rubber)	Market sharing
Chlorine (liquid)	Collusive tenders
Cigarettes	Horizontal price collusion; Market sharing; Collusive tenders
Cisterns, plastic	Horizontal price collusion; Market sharing
Coal	Market sharing; Collusive tenders
Containers, plastic	Horizontal price collusion
Conveyor belting	Collusive tenders
Electrical household appliances (domestic)	Horizontal price collusion
Elevators	Collusive tenders
Engineering services	Horizontal price collusion; Tender procedure recommendation
Estate agents	Horizontal price recommendation
Explosives	Horizontal price collusion; Market sharing
FEDHASA (Federated Hotel Association of S A)	Horisontal price recommendation
Fine paper	Horizontal price collusion; Collusive tenders
Fire extinguisher installation	Collusive tenders
Fishmeal	Market sharing (joint venture)
Flour	Market sharing
Food, frozen	Horizontal price collusion
Freight forwarding services	Horizontal price recommendation
Gas (industrial)	Market sharing
Gravel and stone	Collusive tenders; Horizontal price collusion; Market sharing
Insurance services (short term)	Horizontal price collusion; Market sharing
Legal services	Horizontal price collusion
Lime (slaked)	Horizontal price collusion; Market sharing; Collusive tenders

Maize grits/...

Commodities	Practices and alleged practices
Maize grits	Collusive tenders
Margerine	Horizontal price collusion
Medicine, prescription	Horizontal price collusion; Horizontal price recommendation
Metal connectors	Horizontal price collusion
Milk (condensed)	Horizontal price recommendation; Horizontal, vertical price recommendation
Milk (fresh)	Horizontal price collusion; Market sharing
Motors (electric)	Collusive tenders
Newspapers	Horizontal price collusion
Oats (rolled)	Horizontal price collusion
Paint	Horizontal price collusion; Collusive tendering
Peas and lentils	Market sharing (joint marketing)
Petrol	Market sharing; Collusive tenders
Pipes - reinforced concrete	Horizontal price collusion
- stormwater	Collusive tenders
- galvanised steel	Collusive tenders
- accessories	Collusive tenders
Potato chips	Horizontal price collusion
Quantity Surveying services	Horizontal price recommendation
Records	Horizontal price collusion
Safes	Horizontal price collusion; Market sharing
Solvents	Horizontal price collusion
Soup (in packets)	Horizontal price collusion
Spectacle frames	Horizontal price collusion
Stockbroking services	Horizontal price recommendation
Televisions	Horizontal price collusion
Timber	Horizontal price collusion
Travel agency services	Horizontal price collusion
Tyres	Horizontal price collusion
Vegetables (frozen)	Horizontal price collusion

Washing/...

Commodities	Practices and alleged practices
Washing powder	Horizontal price collusion
Wheat products	Collusive tenders
Yeast	Horizontal price collusion; Collusive tenders

206. The circumstances in South Africa are definitely also conducive to the occurrence of the practices. In this respect the extremely high level of concentration of economic power in the South African economy may be considered to be a major contributing factor. The structure of many of the industries, which may be termed duopolistic or oligopolistic, is also a factor which favours the development of these practices. Besides this the nature of the commodity, or the manufacturing process, is often such that the sellers of the commodities endeavour to entrench themselves against competition. In this connection the homogeneous nature of many commodities, the high investment and the relatively high proportion of fixed cost in the production process are in all probability also of importance.

207. The characteristics of the market, which is especially small in size but comprises a large number of often small consumers, also contribute to the existence of the practices. It is, however, uncertain to what degree the practices are employed as countervailing power. Nevertheless there can be little doubt that other practices which arise from powers obtained from laws and regulations may be seen as a reason for exercising countervailing power.

208. Based on the Board's experience and from the submissions received it is clear that the practices of collusion on prices and conditions, market sharing and restrictive tenders may take on a number of forms. These would range from direct to indirect practices; informal practices between two or more parties to formal practices between market parties; and from practices which are not enforceable to practices which are enforced through a variety of penalties. In certain cases the particular practices are administered by trade associations.

209. Due to the fact that the Republic's competition policy does not provide for the compulsory registration of restrictive practices (as is the case in certain countries) it is a virtually impossible task to determine the full extent of the practices in the South African economy through an investigation of this nature, especially in view of the large variety of forms in which the practices may occur and the often "secret" nature of such practices. It is however true that the extent or occurrence of the practices is larger than the Board had originally suspected. In fact, in response to the investigation several industries reported practices of which the Board was not aware.

Chapter V/...

CHAPTER V

THE QUESTION WHETHER OR NOT THE PRACTICES INVOLVED CONSTITUTE "RESTRICTIVE PRACTICES"

INTRODUCTION

210. In this chapter the Board considers whether or not the practices described in Chapter II are, or may be, responsible for restrictive practices in terms of the Maintenance and Promotion of Competition Act, 1979.

211. Section 1 of the Act defines a "restrictive practice" as -

"(a) any agreement, arrangement or understanding, whether legally enforceable or not, between two or more persons; or

(b) any business practice or method of trading, including any method of fixing prices, whether by the supplier of any commodity or otherwise; or

(c) any act or omission on the part of any person, whether acting independently or in concert with any other person; or

(d) any situation arising out of the activities of any person or class or group of persons,

which by directly or indirectly restricting competition, has or is likely to have the effect of -

(i) restricting the production or distribution of any commodity; or

(ii) limiting the facilities available for the production or distribution of any commodity; or

(iii) enhancing or maintaining the price of any commodity; or

(iv) preventing the production or distribution of any commodity by the most efficient and economical means; or

(v) preventing or retarding the development or introduction of technical improvements or the expansion of existing markets or the opening up of new markets; or

(vi) preventing or restricting the entry of new producers or distributors into any branch of trade or industry; or

(vii) preventing or retarding the adjustment of any profession or branch of trade or industry to changing circumstances."

212. Consequently, a restrictive practice is established once the following three elements are present simultaneously -

(a) a restriction of competition, either direct or indirect;

(b) the restriction of competition has or is likely to have one or more of the effects numbered (i) to (vii) above; and

(c) the restriction of competition is the result of one or more of the conditions numbered (a) to (d) above.

213./...

213. The practices involved undoubtedly comply with (c) above.

214. In considering the question whether or not the practices involved are responsible for a restriction of competition (the first element, (a) above), it is apparent from evidence received and according to the Board's own experience that all the practices involved restrict or may in several respects restrict competition, either directly or indirectly. It is clear from the evidence that, on account of these practices, competitors are unable to compete to the best of their ability. The Board does not deny that severe competition is actually possible in certain areas and indeed occurs notwithstanding the elimination of competition in one area. The question, however, arises whether or not effective competition does exist.

215. In this regard the Board agrees with the view expressed in the Report of the Study Group on Strategy for Industrial Development that effective competition, which is a prerequisite for the efficient functioning of the market economy, represents a market situation which -

(i) is not inevitably perfect competition, but provides for entry, leaves an option to buyers and does not enable a supplier to enforce his conditions (inter alia prices) on to buyers;

(ii) is practically feasible; and

(iii) is reconcilable with the public interest.

216. In view of the above-mentioned criteria, it is evident that any of the practices investigated can certainly be responsible for ineffective competition, notwithstanding severe competition in certain respects. It is also possible that the practices involved do not have any significant effect on competition. The question then arises why these practices are being applied at all.

217. The Board has no reason to doubt that all the business agreements, arrangements, understandings, business practices or methods of trading in regard to collusion on prices and conditions, market sharing and tender practices identified in Chapter II, restrict competition either directly or indirectly.

218. The question whether or not the second element mentioned in (b) above is satisfied, is now considered.

COLLUSION ON PRICES AND CONDITIONS[1)]

1. Horizontal collusion on prices

(a) Prices and conditions

219. As described in Chapter II, horizontal collusion on prices is defined as any agreement, understanding or arrangement which, for a common purpose, can eliminate, reduce or control competition on prices either directly or indirectly between or among the parties involved. Consequently, the individual supplier does not act independently, but jointly with other parties and therefore the freedom of the individual enterprise to act at his own discretion is restricted.

220./...

1) As mentioned earlier, the concept of price or prices is also used in this chapter to include prices as well as conditions.

220. This practice refers to a situation in which two or more enterprises collude in order to fix the prices of their commodities on a collective basis. They therefore intentionally eliminate one element which, in a competitive environment, distinguishes enterprises from each other, namely price. Evidently enterprises will, in competitive conditions, compete with each other on a number of levels, inter alia, on the basis of product, quality, price, conditions of sale and delivery. These elements can be seen as an inseparable set of conditions. If one or more of the elements are left out from the set, it has a negative or restrictive effect on competition.

221. A direct result of effective competition is that margins are being put under pressure. This calls for higher productivity in order to maintain or reach realistic margins. Collusion on prices lessens the downward pressure on prices with the result that prices will tend to be on a higher level than would otherwise have been the case.

222. Moreover, the benefits of higher productivity or technical innovation and improvement will not be passed on to the buyer by means of a price reduction, but will primarily tend to increase the supplier's margins. Since collusion on prices can also be aimed at neutralising competition outside of the group, it can have a restrictive effect on entry into an industry; the mere existence of such an agreement can inhibit entry.

223. A most detrimental economic effect of horizontal collusion on prices is that it tends to promote inefficiency. In competitive conditions the inefficient supplier will tend to disappear from the market in the course of time. The very nature of collusion on prices is precisely that the circumstances of each participant is taken into account. The prices which stem from collusion, will consequently tend to ensure, or at least to improve, the viability of the relative inefficient participant. Since the price agreed upon collectively also has to accommodate the most inefficient enterprise, the upward pressure on prices is strengthened to the benefit of the relative efficient firms and to the detriment of the buyers.

224. In conclusion it is obvious from the evidence submitted to the Board that a group often adapts much slower to changing circumstances than the individual firm. In a collusive situation the entire group has to move into a particular direction and then only if all or the majority of the members agree to do so.

225. It also appears from the evidence that the practice of horizontal collusion on prices can restrict competition directly or indirectly. Without doubt this restriction has or is likely to have the effect of enhancing or maintaining prices, preventing the production or distribution by the most efficient and economical means and preventing or restricting the entry of new producers or distributors. It is, therefore, a restrictive practice in terms of the Act.

(b) Price information systems

226. This practice comprises the exchange of information on prices among suppliers operating on the same level of the production and distribution chain.

227. The Board is convinced that the exchange of information on prices can have the effect that prices on the suppliers' levels are fixed and maintained at the same level, whether or not it is planned that way. It is, therefore, unnecessary for a supplier to establish, through market research, at which prices his competitors sell their commodities. The equalising of prices in turn has the clear effect of transferring differences among similar commodities to elements other than prices whilst differences among suppliers are also pushed into the background.

228. The exchange of information on prices can therefore have the same effect in practice as in the case of horizontal price collusion, namely rigidity of prices, the maintenance of the status quo among suppliers and the discouragement of efficiency.

229./...

229. The Board, therefore, has no doubt that this practice, which can have a restrictive effect on competition, constitutes a restrictive practice in terms of the Act. If it was not the intention of the various parties to link prices in some way or other with price information systems, there would be no logic in the exchange of prices. Nevertheless, the fixing of prices on a specific level does not necessarily require collusion.

2. Vertical price maintenance (resale price maintenance)

230. The practice of vertical price maintenance generally known as resale price maintenance, refers to the trade practice whereby the supplier prescribes to a buyer or group of buyers, fixed or minimum prices at which the commodity may be sold by the buyer. At the same time, pressure is exerted to ensure that the buyers (resellers) adhere to the prescribed prices.

231. The Board of Trade and Industries, in its investigation into individual and collective price maintenance in the Republic of South Africa[1] has found that the practice of resale price maintenance indeed restricts competition. Measured against the definition of a restrictive practice it was found that vertical price fixing -

> in essence will restrict the distribution of the target-commodity to a particular group (resellers), namely to those who are prepared to maintain the prescribed prices. Large scale low cost enterprises for example will tend to prefer those commodities which are sensitive to prices and for which economies of scale are being carried through to the final buyer, to those commodities which are subject to price maintenance, especially, since they are normally not prepared to tolerate a restriction of their freedom of action by suppliers;
>
> is naturally aimed at the elimination of price competition among resellers. This means that prices are not only maintained, but also that they can be fixed at prices higher than would have been the case in a competitive situation;
>
> has the effect that the selling price of a commodity bears little relation to the cost structure of each individual reseller; totally restricts the possibility of passing on to the buyer the savings on distribution costs. The pressure on resellers to increase their efficiency in order to obtain reasonable margins, is being reduced because of guaranteed minimum margins. Efficiency can thus indeed be inhibited. The result is serious discrimination against the final buyers who are compelled by the practice to pay the same price for a commodity, irrespective of the nature and quality of the services accompanying its sale;
>
> can restrict the entry of a competitive product because the rigid margins and the creation of "bonded" or "sympathetic" or "faithful" resellers imply that those groups of resellers will in all likelihood not be available to new entrants.

232. The Competition Board is of the opinion that the considerations which applied at the time are still applicable and that resale price maintenance is a restrictive practice.

3. Recommended prices

233. A recommended price is a declaration whereby one party indicates that a specific price or method of price determination can be to the benefit of another party and hence recommends that such a price be followed. Recommended prices can be divided into three groups, namely horizontal, collectively vertical and individually vertical. These groups are considered below .

(a)/...

1) Board of Trade and Industries, Investigation into individual and collective price fixing in the Republic of South Africa, Report No 1220(M), December 1967.

(a) Horizontally recommended prices

234. Horizontally recommended prices are usually issued by an association which represents suppliers (manufacturers, wholesalers, retailers, professional groups or suppliers of services) in a particular industry and entails a recommendation of the prices at which the relevant suppliers must supply their commodities to buyers. Suppliers can also meet in less formal ways to collectively determine their prices.

235. The answer to the question of whether this practice restricts competition lies within the effect which it has on the market itself. In the first place, recommended prices in general tend to become the ruling prices; if a whole group of suppliers is involved in the recommendation, the price for the whole group can therefore be the ruling price. In practice, therefore, the recommended price often becomes the ruling price and because all the suppliers involved may tacitly accept the recommendation or may use it as a guide, price competition is eliminated or reduced to a greater or lesser extent.

236. A reduction of price competition may have the effect that prices are fixed on a higher level than would have been the case otherwise. The practice may also have the effect that the elimination of price competition can lead to rigidity in the relative position of the suppliers in the market. As in the case of horizontal collusion on prices, this practice can therefore lead to the maintenance of the status quo among suppliers and the promotion of inefficiency.

237. There can, therefore, be little doubt that this practice may indeed be considered a restrictive practice in terms of the Act.

(b) Collective vertically recommended prices

238. A form of collective vertically recommended prices occurs when resale prices are recommended by a representative trade association on behalf of suppliers (not resellers), although it does not occur very often. Practical experience has shown that recommended prices usually become the ruling prices of transactions[1]. In an earlier report it was found[2] that a system of recommended prices can indeed retard the development of effective competition. It is clear that a system of recommended prices is a collective action whereby the supplier voluntarily terminates his independence in determining prices.

239. By being part of the collective action, the supplier binds himself to the effects thereof in the market which in essence is tantamount to uniformity of prices and margins. From the evidence it is obvious that the reseller in such a situation is, to a large extent led into the direction which the prescribers (recommenders) of prices consider advisable whilst collective recommended prices will tend to push the differences among similar commodities into the background. It can indeed be said outright that such a practice can lead to price rigidity and the elimination of price competition. Evidence brought to the attention of the Board indicates that it is precisely the subtle methods being applied to eliminate differences among commodities at the resale level which lead to identical prices for similar commodities irrespective of their production costs. A more

serious/...

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1) Vide Report No 1220(M) of the Board of Trade and Industries, Investigation into individual and collective price fixing in the Republic of South Africa, par 291.

2) Report No 1220(M), par 394.

serious aspect of this effect is that uniform prices are often charged by resellers notwithstanding the fact that resale price maintenance is illegal. The existing prohibition is thus being circumvented.

240. Considered against the definition of a restrictive practice and in view of the effects or possible effects thereof, the Board is convinced that this practice does indeed restrict or may restrict competition, not only on a horizontal level, but also on the vertical level. It therefore inevitably follows that the effects of collective vertically recommendations are in practice, the same as that of resale price maintenance.

(c) Individual vertically recommended prices

241. A recommendation of resale prices in this group is common and entails the recommendation of the selling price by a single supplier to the buyers of his commodity.

242. As in the previous cases where prices are vertically recommended, it is experienced in practice that recommended prices will tend to become the ruling prices. Whether or not it is the intention, a recommendation by a supplier may in many instances tend to enhance or maintain prices especially since the purchase price of the reseller is often based on recommended resale prices. It is evident to the Board that in many instances where recommended prices are indeed deviated from, this occurs because the recommended prices are intentionally set at a high level in order to enable resellers to allow big discounts to attract customers. It may have the effect that the end buyer strives to obtain the biggest discount on a given recommended price and that the real purchase price of the commodity becomes of secondary importance. Thus the transparency of the market is obscured and price comparisons impeded.

243. The Board is convinced that the practice of individual vertically recommended prices, since it restricts competition directly or indirectly and has or is likely to have the effect of enhancing or maintaining prices, is a restrictive practice in terms of the Act.

MARKET SHARING

1. Horizontal market sharing

244. Horizontal market sharing occurs among suppliers, and sometimes consumers, on the same level of the production and distribution chain and in respect of the same or more or less the same commodities (with the same or different trade marks) which can satisfy similar needs. In a market orientated economic system each of the suppliers will normally compete with each other with the aim of maximising profits or achieving a satisfactory profit. This implies that the different suppliers will compete with each other inter alia by means of product policy, price policy, distribution policy and sales promotion policy (the policy instruments of marketing) with the object to enlarge each supplier's own market share or at least to protect it. Horizontal market sharing usually prevents, restricts or regulates this competition which can be expected from a market orientated economy.

245. The nature and possible consequences of such restrictions for the various forms of horizontal market sharing are subsequently discussed.

(a) The division or allocation of markets by suppliers amongst themselves

246. The division or allocation of markets by suppliers amongst themselves in the form of, inter alia, the allocation of consumers or different categories of consumers in accordance with geographical areas or quantitative restrictions, has the effect of either creating for each supplier his own demarcated market in order to prevent suppliers from competing in the same market, or of restricting the quantity of a product or service being provided by the suppliers collectively to the demand or the size of the market. In the latter event, competition to enlarge market share is eliminated to protect the market share of each

supplier/...

supplier involved. A supplier will be able to sell his full quota in a specific period provided that his product is physically or price-wise acceptable to the market.

247. As mentioned earlier, this form of market sharing restricts competition directly or indirectly. The effects or likely effects of such a restriction of competition include the enhancement or maintenance of prices since suppliers do not have to compete on the basis of price, and because it can prevent the distribution of a product by the most efficient and economical means since allocations can be done on an arbitrary basis without taking any business-economic considerations into account. The expansion of existing markets or the opening up of new markets can be prevented or retarded especially in the case of quantitative restrictions. It can also prevent or restrict the entry of new producers or distributors since the existing suppliers do not compete amongst themselves and since they are able, either individually or collectively, to act more effectively against new entrants.

248. This leaves little doubt that this form of market sharing is a restrictive practice in terms of the Act.

(b) Restrictions on production or supply

249. Mutual restrictions on the production of goods or the supply of services in the form of, inter alia, quantitative restrictions (quotas) and restrictions on facilities usually have the effect of suppliers restricting supply to the available market or demand and consequently it is not necessary or possible to compete with each other especially by means of price policy, distribution policy or sales promotion policy to protect or enlarge market shares. Since the price in a market orientated economic system is decided by demand and supply, such restrictions on production, and thus on supply, can contribute to the maintenance or enhancement of prices and hence it can indeed be used as an alternative to price collusion, or in support of it.

250. Restrictions on the production or supply and the facilities available for production or distribution, are by themselves effects which are included in the definition of a restrictive practice. It is furthermore obvious that such practices by restricting competition directly or indirectly, will also have or are likely to have some of the other effects described, inter alia, to enhance or maintain prices; to prevent the production or distribution of any commodity by the most efficient or economical means; and to prevent or retard the adjustment of any profession or branch of trade or industry to changing circumstances.

251. Indirect restrictions on production by the use of technology, models, patent rights, copyrights and trade-marks can also have the effect of restricting competition since suppliers may agree not to use new technology and rights until such time as the capital invested in existing facilities has been recovered, or to pool technology or rights among suppliers or to restrict cross-licensing to the colluding suppliers, thereby restricting the entry of other suppliers or potential suppliers to the market. It can also be used to support or to render market sharing more efficient by forcing parties not having the technology or rights, to submit to market sharing or other collusive practices, or to force them to accept restrictive conditions. These forms of restrictions on production will therefore restrict competition directly or indirectly and will have or are likely to have several of the effects described, especially the prevention of production and distribution; the enhancement or maintenance of prices; the prevention or retardation of the introduction of technical improvements; and the prevention or restriction of the entry of new suppliers.

252. Restrictions on the variety of products or services manufactured or supplied by each of a group of suppliers, or the division of the production process in successive stages and the mutual allocation of those stages result in a decrease in the number of suppliers of a specific product or service and therefore amount to the allocation of a particular market segment to a few suppliers. It is usually aimed at and also has the effect of restricting competition among the reduced number of suppliers since the market effort of each one with respect to the specific product or service is not fully exploited. Such

action/...

action, by restricting competition directly or indirectly, has or is likely to have one or more of the effects described, inter alia, to limit the facilities available for production or distribution and to prevent or restrict the entry of new suppliers of a product or service.

253. It is evident, therefore, that restrictions on production are restrictive practices in terms of the Act.

(c) Joint ventures

254. Joint ventures occur in a variety of forms and can be employed for divergent purposes. The aspect in question here is whether joint ventures can be seen as a restrictive practice in terms of the Act.

255. Collusion in regard to joint ventures does not exist in the action of the (single) enterprise as such, but an agreement, arrangement or understanding is indeed present when the joint venture is established, either in the form (mostly) of a contract, participation in the establishment or the contribution of capital, or directly or indirectly by the management of the enterprise in one way or another.

256. The possible restrictions on competition which stem from joint ventures can be direct or indirect. Direct restrictions originate in cases where the establishment of joint ventures has the effect of eliminating existing competition among the founders, irrespective of whether it is the objective of the joint venture. It can happen horizontally where such an enterprise acquires the existing activities of the two or more founders in the same market (usually it can be seen as a merger or acquisition), or vertically, where the joint venture assumes certain vertical functions of the founders, such as pool type undertakings for the supply of raw materials or the marketing of end products. In these cases, the number of competitors is reduced which, in the case of two founders with relatively big market shares, can have a serious effect on competition or, in a duopolistic or oligopolistic market structure, can eliminate competition completely. The joint venture can also acquire a competitive benefit relative to its competitors by, inter alia, the acquisition of more favourable conditions of purchase and sale due to bigger quantities, thereby preventing or restricting entry.

257. Indirect restrictions on competition include restrictions on competition among the founders in other markets, which stem from the link or co-operation created by the joint venture, the restriction on potential competition by the entry of a single joint venture into a new market instead of the possible entry by each of the two or more founders, as well as the exclusion of existing or potential new suppliers or buyers by joint ventures among founders which are in a vertical relation to each other. Even in the case of a joint venture being established with a view to research and development, competition can be restricted if the participants, by the better product which they have developed, acquire a competitive advantage relative to their competitors, or prevent or restrict the entry of new producers to the relevant branch of the trade or industry.

258. It is clear that joint ventures, because they can restrict competition directly or indirectly, have or are likely to have one or more of the specified effects of a restrictive practice inter alia by restricting the production or distribution of any commodity; limiting the facilities available for the production or distribution of any commodity; enhancing or maintaining the price of any commodity; or preventing or restricting the entry of new producers or distributors. Hence this practice can be considered a restrictive practice in terms of the Act.

2. Vertical market sharing

259. Vertical market sharing in the form of the allocation of markets by a supplier to the resellers of his commodities, in the form of geographical areas or of consumers or classes of consumers, has the effect of eliminating or reducing the competition which normally exists among the resellers of the same product. Competition among the distributors of the products of the suppliers will then normally be restricted to the competitive products of other suppliers which may consist of the same products with different trade marks or

substitute/...

substitute products. Provided that the price and quality of the relevant product compare favourably to those of competitive products, there will be no or at least less pressure on the resellers of the specific product to reduce prices or to improve their facilities or service. At the same time, entry into the specific market is restricted or, should all the suppliers in a oligopolistic market structure apply vertical market sharing, entry is prevented completely.

260. In the case of dual distribution i.e. where a supplier has its own outlets or distribution organisation, but also uses selected resellers, vertical market sharing can be aimed at protecting the supplier's own outlets or organisation against competition.

261. Vertical market sharing, therefore, restricts competition directly or indirectly and it is obvious that the practice will have, or is likely to have, one or more of the effects described for a restrictive practice, namely the enhancement or maintenance of prices; the prevention or restriction of entry; the restriction on the production or distribution of commodities; the limitation of the facilities available for the production or distribution of commodities; the prevention of the production or distribution of a commodity by the most efficient and economical means; the prevention or retardation of the expansion of existing markets or the opening up of new markets; and the prevention or restriction of the entry of new producers or distributors into any branch of trade or industry. It therefore complies with the conditions of a restrictive practice.

RESTRICTIVE TENDER PRACTICES

1. Identical tenders

(a) Standard tender documents and conditions

262. Identical tenders imply, inter alia, the existence of standard tender documents which indicate the pre-determined conditions on which tenderers have to tender. The individual tenderer is, therefore, not allowed to indicate more favourable conditions on his tender himself. This has the effect that one tenderer cannot be in a better competitive position vis-à-vis another with regard to tender conditions. The real aim of standard tender documents (tender conditions) is indeed to enable tenderers to tender on an equal footing in regard to tender conditions. The suppliers are therefore in a much stronger position than the buyers and by the employment of other methods of manipulation, a condition can develop in which the tender buyers have no alternative than to accept the uniform tender conditions which are prescribed in the tender documents.

263. The Board is convinced that this form of tender practice restricts competition directly or indirectly and has or is likely to have the effect of limiting the facilities available for the distribution of the commodity required. It can also prevent the distribution of a commodity by the most efficient and economical means or prevent or retard the introduction of technical improvements and the adjustment to changing circumstances. The use of standard tender documents and conditions is, therefore, a restrictive practice in terms of the Act.

(b) Tender prices

264. The underlying intention of collusion, with the aim of bringing about identical tender prices, is usually the elimination of price competition. Even if this is not the explicit intention, competition on prices is eliminated by implication. Identical tender prices which result from the use of common price lists or a uniform scale of discounts, also eliminate competition on prices. Identical tender prices therefore undoubtedly eliminate competition directly.

265. The maintenance of prices, at least in regard to a specific tender, is the obvious result of identical tender prices. Usually it has a wider effect with the result that

prices/...

prices are generally maintained. It can even have the effect of enhancing prices. Should the agreed tender price be lower than the prevalent price, it is indeed a reduction of prices with regard to that particular tender, but because "losses" thus incurred are usually compensated for by higher prices elsewhere, identical tender prices may tend to increase prices in general. Identical tender prices, therefore, have or are likely to have the effect of enhancing or maintaining prices.

266. Identical tender prices also entrench the inefficient enterprise which, as a result of identical tender prices, can be difficult to distinguish from the efficient tenderers. It may happen that a tender is allocated to an inefficient enterprise, in which case identical tender prices have or are likely to have the effect of preventing the production or distribution of the required commodity by the most efficient and economical means.

267. The practice whereby identical tender prices are applied is, therefore, a restrictive practice in terms of the Act.

2. Pre-selection of tenderers

268. Pre-selection of tenderers is brought about when tenderers determine who the successful tenderer will be by arranging beforehand that a certain tenderer will offer the most favourable tender conditions or tender at the prevailing price whilst all the others increase their prices artificially. In this way the impression is created to the tender buyer that tendering takes place on a competitive basis.

269. By the application of this practice the aim of tendering, namely to obtain the best prices, is frustrated. Consequently, this practice has or is likely to have the effect of maintaining or enhancing prices. Since the tender buyer is under the impression that the manipulated tender is the most favourable, he is indirectly deprived of the other facilities available for the distribution of the relevant product. It therefore limits these facilities. It may also have the effect of preventing the distribution of the commodity concerned by the most efficient and economical means.

270. Hence, there can be no doubt that this practice is a restrictive practice in terms of the Act.

3. Prevention of competitive tenders

271. This practice principally entails the existence of some form of agreement among potential tenderers not to tender in competition with each other.

272. An interesting variation of this practice occurs in the case where an association prohibits its members from tendering in competition with non-members, although members are allowed to compete among themselves for the allocation of a tender. Usually an association applying this practice, is so prominent in the market that it can often dictate tender conditions to a tender buyer. Although competition among members is allowed, the tender buyer is deprived of the opportunity to consider tenders submitted by members as well as non-members and to accept the tender which is most suitable for his needs, regardless of whether the tender is submitted by a member or a non-member. Moreover, a section of the suppliers is excluded from the tender buyer's market. It also deprives a section of the suppliers of the opportunity to obtain a tender allocation. The Board is consequently convinced that this practice indeed restricts competition.

273. It is also evident that these tender practices may have one or more of the effects embodied in the final element of the definition of a restrictive practice and therefore constitute a restrictive practice in terms of the Act.

4./...

4. Market sharing in regard to tenders

274. Collusion to divide the market can be applied for various reasons. One of its most important objectives is to allot tenders to tenderers in such a proportion that no tenderer receives an advantage over the others. Sometimes tenderers do tender collectively so that each one can take care of a part of the tender, although the size of the tender project does not justify a collective tender. The aim in this regard clearly is to enable tenderers involved in collective tendering to share in the project. Competition among tenderers is thereby eliminated directly or indirectly.

275. Another method whereby tenders can be allotted on an equal basis is to allocate repetitive tenders on a basis of rotation. This ensures that each tenderer in turn gains the opportunity to receive the tender allocation. This method creates the impression that tendering took place in a competitive environment whereas the most favourable tender submitted may possibly be less favourable than in the absence of this form of market sharing. It may also be price enhancing since the "unsuccessful" tenderers may endeavour to recover their losses in turnover during the tender cycle, by increasing their prices elsewhere.

276. Market sharing on a geographical basis prevents the submission of tenders by potential tenderers in areas being served by existing tenderers. Consequently, competition among tenderers is eliminated.

277. In market sharing on the basis of the allotment of customers, tenderers usually agree beforehand that a specific tenderer will serve a specific tender buyer. If a tender buyer is also the existing customer of a tenderer, he is usually allotted to that tenderer.

278. Competition is undoubtedly restricted by all these methods of market sharing with regard to tenders and they have or are likely to have the effect of limiting the facilities available for the production or distribution of the commodities involved. In addition prices can be enhanced or maintained and the production or distribution of the required commodities by the most efficient or economical means, prevented.

279. Market sharing with regard to tenders hence complies with the conditions required by the Act, for the existence of a restrictive practice.

5. Refraining from tendering

280. By colluding to refrain from tendering, potential tenderers are prevented from tendering or influenced not to tender. Hence the tender buyer does not get the opportunity to consider all possible tenders which would have been submitted in the absence of such collusion. Consequently, the fundamental object of buying by means of tenders, namely to get the best prices and conditions through open competition, is being frustrated and the full potential of the market not exposed. In addition, the restraint of tenders constitutes a powerful instrument with which the restrictive practices already identified, can be applied.

281. The Board is convinced that collusion to restrain tenders, is a restriction of competition which has or is likely to have one or more of the effects mentioned earlier. For example, it can limit the facilities available for the production or distribution of the commodities involved, enhance or maintain prices and prevent the production or distribution of the commodities called for by the most efficient and economical means. This practice hence constitutes a restrictive practice in terms of the Act.

GENERAL

282. From the above it is obvious that all the tender practices mentioned can be regarded as restrictive practices. In fact, the Board of Trade and Industries in its Report

1475(M)/...

1475(M)[1] came to the same conclusion.

SUMMARY

283. In this chapter the following practices were identified as restrictive practices in terms of the Act:

Horizontal price fixing

Price information systems

Vertical price fixing

Recommended prices

Horizontal market sharing

Vertical market sharing

Identical tenders

Pre-selection of tenderers

Prevention of competitive tenders

Market sharing in regard to tenders

Restraint of tenders

284. In the following chapter the Board will consider whether or not these restrictive practices can be considered as being in the public interest.

Chapter VI/...

1) Board of Trade and Industries, Investigation into restrictive tender practices in the Republic of South Africa, Report 1475(M).

CHAPTER VI

THE RESTRICTIVE PRACTICES AND THE PUBLIC INTEREST

285. In this chapter the Board considers, in the light of the representations received, whether circumstances exist which justify the restrictive practices identified in the previous chapter, in the public interest.

286. During the investigation the Board once again found that interested parties mistakenly believed their own interests to be synonymous with the public interest. The public interest is, however, a much wider concept which also embraces the broad national interest, the interests of the relevant industries and those of the general public (specifically as consumers).

COLLUSION ON PRICES AND CONDITIONS OF SUPPLY

1. Horizontal price collusion

(a) Prices and conditions of supply

287. According to submissions received, the most important advantage attributable to price collusion is that it can contribute towards market stability which benefits suppliers as well as buyers, especially where the products are fairly homogeneous and the number of market parties small.

288. Proponents of the practice also believe that price collusion enhances the possibilities for rationalisation and other production efficiencies (see also the sections dealing with market sharing and tender practices). A trade association representing a very strong cartel in the Republic summarised the reasons for this practice as follows:

> "... demand for [product] is highly elastic and ... prices ... will always tend to be uniform. Where no co-operation between suppliers is possible ... other methods for attaining market equilibrium will develop with more or less the same results as open co-operation but with far more uncertainty for both suppliers and buyers of the products concerned. The fact is that an oligopolistic market structure for products which are either homogeneous or completely interchangeable is not conducive to price competition at the manufacturing level."

289. A further benefit claimed for collusion is that it protects employment, especially when certain socio-economic factors exist in an economy in which high or stable employment opportunities enjoy a high priority. Horizontal collusion ensures that the status quo is maintained for the suppliers, especially when investment is considerable. It is argued that the protection of investment is of the utmost importance when the economy is relatively small, since such economic systems cannot afford to lose capital and employment opportunities. The protection of investment furthermore ensures that investors will not only remain in the industry with a greater measure of confidence but that they would also be more inclined to make new investments. Another organisation stated this viewpoint as follows: "Industry stability (which can only be guaranteed by collusion) is essential in order to ensure a reasonable return on capital already invested and for attracting funds that may be required in future. This is even more important in the light of the present international situation where South Africa is continuously subjected to threat or boycotts and calls for disinvestment." The point is made by certain supporters of the practice that confidence to re-invest in capital intensive industries is only possible if price collusion exists or that a new investor will only be prepared to enter if he can

become/...

become a part of the cartel. Uncertainty in regard to the market behaviour of competitors will otherwise render investment in the relevant industry too risky.

290. A further argument was that control, if at all necessary, should rather be in the hands of the private sector and that collusion on prices is a better alternative than price control.

291. Proponents of horizontal price collusion pointed out that the elimination of price competition does not mean a complete absence of competition between the parties. It allows them to concentrate rather on other elements of competition, such as service and quality, and to compete with one another in that way.

292. According to certain respondents, horizontal price collusion can also be used as an instrument for resisting the importation of commodities. The advantages of this include the following: the protection of domestic employment opportunities; the saving of foreign currency in the interest of the country and safeguarding the investments of the parties to price collusion.

293. It is alleged that in several instances "... a cartel is justified because demand is monopsonistic or oligopsonistic". In another submission it is stated that "the manufacturers were being held to ransom by large merchants who would manoeuvre between manufacturers with huge orders and obtain prices at such cut-throat rates that the manufacturers were forced into such a position, whereby they had to enter into this agreement". An interesting argument in favour of uniform credit terms is the following: "Should wholesalers apply favourable credit terms it can be to the detriment of the retailer who may plunge himself in debt". Another group saw it as follows: [conditions of sale] are aimed at the most effective distribution system, effective credit control to minimize the risk of bad debts, to maintaining quality and safety standards and providing a fair system of dealing with claims".

294. Serious objections and criticism were, however, raised against horizontal price collusion. It has been stated that the practice distorts the competitive relationships between suppliers and buyers and prevents the buyer from availing himself of the benefits of a market orientated economic system. Price competition between different suppliers of identical commodities is being eliminated. Basically the parties involved in collusion possess monopoly power in regard to price fixing. A very pertinent question is being asked in this regard: "... how can the producers expect the transporters, wholesalers and retailers to introduce a competitive element to their product whilst refraining from doing so themselves?"

295. Another objection generally raised against this practice is that it inhibits innovation, since competition is the most effective incentive for innovation. In the absence of competition the pressure for innovation is consequently decreased. Even where suppliers do introduce innovations the advantages, especially when cost reducing, will not be passed on to the buyer or the consumer.

296. The existence of horizontal price collusion in a specific market sector is regarded by certain opponents of the practice as a strong discouragement to entry, since it may have the same effect as an attempt to enter a monopolistic market. The suppliers responsible for the collusion can, for example, keep out newcomers by the application of a predatory pricing policy. A respondent stated in this connection "... in order to finance their campaign against imported (products) they have increased their prices excessively elsewhere ... it shows the lengths the industry will go to protect its monopoly".

297. Because prices are in many cases fixed at a level which will ensure the survival of even the most inefficient participant, it means that prices must be generally higher than under competitive conditions. By implication it means that -

the scarce resources of the economy are not utilised in the most efficient manner;

the/...

the market parties' level of profitability differs from what it would have been under competitive conditions; and

monopoly profits are made in certain instances.

298. A further objection against horizontal price collusion is that it can reduce the quality of commodities or at least inhibit the introduction of quality improvements. An increase in quality will inevitably lead to increased costs which cannot be simply recovered.[1)]

299. From the demand side of the market came the complaint that the buyer's freedom to negotiate with a supplier is largely restricted and that the individuality of both the supplier and the buyer is being limited. It follows that the prices of certain buyers, as suppliers in the distribution channel, may reflect a measure of uniformity. A very important buyer of groceries stated categorically that "these practices ... restrict competition and may result in higher prices and variety, quality, and other factors may be adversely affected to the detriment of the public".

300. The argument by the supporters of the practice that competition is merely shifted from price to non-price elements, is rejected by critics for various reasons. It is specifically argued that price constitutes one element in an indivisible set of conditions of sale and that the removal of one element must have an adverse effect on the efficacy of the whole set. It can also compel buyers to pay for services which are not essential for their purpose. A buyer of a product supplied by a cartel, stated: "... because they are part of a cartel they remain unnegotiable on any condition".

301. From an evaluation by the Board of the arguments presented in the previous paragraphs, it would appear that the basic reasons for collusion are the own interests of the parties involved in the practice. To put it more explicitly: Collusion will have the following advantages for them –

(i) the continued existence of the parties to it, in other words, maintaining the status quo;

(ii) savings on duplicated costs, which are not necessarily passed on to the buyers;

(iii) prevention of losses;

(iv) profits for all parties at a higher level than under competitive conditions; and

(v) elimination, or at least a reduction, of risks.

302. It is interesting to note the comments of an important group in the grocery trade in this regard: "Cartels claim that they are able to give cheaper unit pricing through rationalised production and distribution operation. They also claim to stabilise the market. The reverse is true. They become less efficient, prices go up, service goes down and 'stabilisation' means protection of the inefficient. Their whole raison d'etre is to behave like a monopoly and benefit accordingly. Consequently they are inflationary and harmful."

303/...

1) It is important to re-iterate that "price" represents just one element of a horizontal agreement and that provisions for maintaining the status quo as represented in market shares are in many instances incorporated in the agreement either explicitly or by implication.

303. On the other hand the comments of a prominent investment company cannot be discarded. This respondent stated that "buyers should be in a position to determine themselves the terms and conditions under which they buy without blanket restrictions by the Board". This is, in other words, a plea for the free operation of the market mechanism without any official regulation, which "... would serve to distort the normal inter-play of market forces".

304. The benefit of stability claimed for retaining horizontal price collusion, is not acceptable to the Board. The stability argument is not valid only for those industries and commodities in respect of which price collusion is being applied, but for all enterprises. The Board is also not convinced that the practice is justified in situations where products are homogeneous, market structures concentrated and high investments required. The Board concedes that competition is not limited to price only or that price competition is the most important, but believes that competition is in most cases largely restricted.

305. The very nature of the practice is such that the advantages of the price mechanism are being lost. Furthermore, the Board is convinced that the mere existence of horizontal price collusion can inhibit new entry while the mechanism created by collusion, can actively keep out new entrants.

306. It is important to note that the advantages of the maintenance of agreements designed to inhibit the competitive forces, including the ease of entry to the market, can be realised in ways other than higher prices and by implication higher returns on capital. Advantages for enterprises and their shareholders who are part of agreements restricting competition, can also be realised in the form of lower risk of the business. The objective of any business enterprise is the one or other optimal combination of return on capital for risk. A sacrifice of return on capital for lower risk can undoubtedly be seen as in the interest of the enterprises and their shareholders. As a general rule this optimal combination is best determined by competitive market forces, including price competition, however without artificial high cost of entry to the branch of industry. In the absence of competition and potential competition and the possibilities for new entrants to the market, the assumption cannot be made that the consumer, in contrast with the supplier, ever reaps the benefit of lower risk.

307. The Board has no doubts that the practice of price collusion is, on balance, not justified in the public interest. Collusion of this nature negates the benefits of effective competition. It -

(i) does not ensure that the country's scarce resources are utilised in the most effective manner;

(ii) can protect inefficient enterprises;

(iii) can have the tendency to fix the level op progressiveness, as measured in terms of innovation, research and product development, below the level it would have been under competitive conditions. Collusion of this nature also helps to ensure that the status quo of the parties involved is maintained; and

(iv) can cause prices to the buyer to be maintained at a higher level than under competitive conditions.

(b) Price information systems

308. As previously stated, market parties can agree, directly or indirectly, to exchange information on a regular basis in regard to prices and conditions of supply.

309. Respondents indicated that the exchange of price information takes place mainly to enable suppliers to ascertain market conditions. In this way the information obtained

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by a supplier's own market research can be confirmed, or guidance be obtained for decision-making. Smaller suppliers find the practice especially useful since it saves them the expense and trouble of obtaining the information themselves.

310. According to certain proponents of the practice, it contributes towards a high measure of price stability in the market. Others maintained that even if the information should not be furnished to competitors, it would still become available to them, for example from buyers or ex-employees. For this reason the information is sent to other market parties without any benefits being expected from the practice.

311. The main objection by the opponents of the practice is that it will promote price rigidity in respect of the relevant commodities. It is even possible that prices may be fixed at a higher level. It may be useful to repeat a statement by a respondent: "Since it is poor publicity for any company to publish an official price list which may show price levels higher than those of competitors, identical price lists are therefore published".

312. Opponents of the practice maintain that the arguments which generally apply in the case of horizontal price maintenance are also applicable in respect of this practice.

313. It is clear to the Board that the exchange of price information systems may possibly have a price-increasing effect. Each participant, however, retains the right to establish his own prices and will in any case fix his prices in accordance with conditions in the market. There are also many other methods for obtaining the same information. The Board is consequently of the opinion that the exchange of price information is, on balance, justified in the public interest.

2. Vertical price maintenance (resale price maintenance)

314. As stated in Chapter I, the practice of vertical price maintenance (resale price maintenance) had been previously investigated by the Board of Trade and Industries[1] and in due course prohibited[2].

315. The Board of Trade and Industries, after a thorough investigation and consideration of all its advantages and disadvantages, concluded that the practice had a restrictive effect on competition and was, on balance, not justified in the public interest. The Competition Board is convinced that the same considerations which applied at the time of the previous investigation were still valid today and agrees that the practice of vertical price maintenance or resale price maintenance, whether or not applied individually or collectively, cannot be justified in the public interest.

316. It is interesting to note that the representations received by the Board in regard to this investigation, but for a few exceptions, contained no comments on this practice. It can therefore be assumed that the respondents were not of the opinion that the ban on resale price maintenance was detrimental to their business activities and that they accepted the present status quo in this regard.

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1) Board of Trade and Industries Report 1220(M).

2) Government Notice R.1038 of 25 June 1969.

3. Recommended prices

317. Three forms of recommended prices were distinguished earlier and found to be restrictive practices, namely horizontally recommended prices, collective vertically recommended prices and individual vertically recommended prices. The Board now considers whether or not these restrictive practices are justified in the public interest.

(a) Horizontally recommended prices

318. The arguments raised in favour of horizontally recommended prices are basically the same as those received in respect of horizontal price collusion. The proponents argued specifically that the practice had a stabilising effect on the price level because the majority of suppliers in the industry adhere to the recommended price and that this stabilising influence will have the same effect found in the case of horizontal price maintenance. A manufacturer in the printing industry alleged that recommended prices and discount schedules lead to "a sort of order in the industry ... [and prevent] that the general public is being exploited as a result of the lower gross margin on [certain commodities] ... it nonetheless ensures that the [reseller] earns a reasonable minimum ..."

319. It is further argued that the recommended price was usually determined by a responsible organisation, representing the interests of all, or at least the majority, of the suppliers in an industry. This responsible organisation can be considered to be better equipped for the task of recommending prices than its members and that such prices will be objective and realistic. The point is made that "members are not sufficiently sophisticated [in this specific instance] to do complicated calculations of arriving at the true costs of all (products) sold by them". The practice is also considered to be cost effective, seeing that a single organisation bears the costs instead of each supplier determining and recommending prices individually. Others maintained that the horizontal recommended prices were merely guide prices from which members can, and in fact do, deviate. The recommended price only constitutes the basis or starting point for the individual suppliers' price. "The list price", it is maintained, "eventually established by producers have essentially become the basis for quoting competitive discounts". Certain organisations also maintain that the prices of the individual suppliers would practically have been uniform even without the collective determination of recommended prices. "In the practical situation", it is stated, "members would meticulously abide by these prices, whether as the result of pressure or otherwise cannot be categorically stated".

320. The criticism expressed against the practice is also the same as in the case of horizontal price collusion and is largely measured in terms of its effects on the market. It is alleged that the practice can, inter alia, bring about a large measure of uniformity in prices at levels higher than they would have been under normal competitive conditions. The supplier's confidence that his competitor will not easily trade at prices lower than the recommended prices, strengthens his own resistance against discounts which would directly reduce his profitability. It is argued that although this practice ostensibly allows price negotiation it is in fact a horizontal price fixing agreement in disguise. It is further maintained that the practice can be inflationary and of a discriminatory nature because excessive discounts are allowed to certain buyers while others have to pay the "full" price. An important manufacturer of consumer goods emphasised the following: "On balance the recommended mark-up on the cost prices of the various products are generally high[and we have] experienced refusal ... that discounts being offered to the trade be passed on to the customers". If the desired level of profitability is not attained, the recommended price is increased and not the average price charged.

321. The Board is here also not convinced by the argument of stability, submitted in justification of the practice. The Board is of the opinion that it is the function of each supplier to determine his price individually. The proponents' argument that prices would have been more or less the same in the absence of the collective recommendation, underlines the fact that the practice is not essential.

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322. It is the Board's view that the practice has or may have the effect of inevitably higher prices than under competitive conditions. The benefits of effective competition are largely negated, often resulting in a rigidity in prices. After consideration of all the alleged advantages and disadvantages, the Board is of the opinion that the restrictive practice is, on balance, not justified in the public interest.

(b) Collective vertically recommended prices

323. An argument usually advanced in favour of this practice is that it will, for two reasons, protect the final buyer against exploitation. In the first place the final reseller is assisted in his price determination function, which is of special importance for the small reseller that lacks the personnel or expertise for calculating his own reselling prices. For him the practice is therefore convenient and labour-saving. An important trade association put it as follows: "... small businessmen often rely on .... [the association] to set price guidelines". Secondly, the final buyer will not be prepared to pay a higher price than that recommended. The same association stated that "in practice pricing guidelines have set a ceiling rather than the norm for the industry". The consumer is thus protected by the practice.

324. Proponents of the practice emphasised the fact that prices are merely recommended and not enforced and that any reseller is free to determine his own prices. Another trade association underlined the fact that "recommended prices have been developed purely as a tool to assist its members in calculating the selling prices (for its products)". The point is also made that recommended prices are a very useful promotion instrument, especially when advertising is nationwide and discounts are offered.

325. It is clear from the arguments raised against the practice that its critics are especially opposed to the rigidity in margins and prices caused by such recommendations and that the position is aggravated when it is a group recommendation.

326. A complaint also raised is that the discounts allowed on recommended prices often become more important than the price of the product itself. This means, so it is argued, that recommended prices are in several instances fixed at an unrealistically high level in order to enable resellers to offer attractive discounts. This "trading in discounts" has the effect of diverting the final buyer's attention from the price of the product to the amount of the discount, which means that such a buyer is more interested in the discount which he can negotiate than in the price he pays.

327. A further objection is that in many cases the suppliers attempt to influence resellers in a subtle way to adhere to the recommended prices. It is alleged that where the reseller deviates from the recommended prices, the reseller resorts to discrimination in one form or another in order to induce him to resell at the recommended prices. The practice then actually becomes an alternative for resale price maintenance, which is illegal.

328. The Board has serious objections against the practice of collective vertically recommended resale prices. Its experience is that such prices often tend to become the actual prices. The fact that the same or similar recommendations are made by a whole group of suppliers, in conjunction with the above-mentioned argument, would mean that the resale prices for a group of commodities will be either uniform or almost the same. The Board supports the view that price recommendations of this nature tend not only to fix prices at higher levels than under competitive conditions but also to strengthen any horizontal arrangement in respect of, for example, selling prices or market sharing.

329. The Board fully realises that only recommendations are at issue here and that freedom of individual action still remains. It is, however, a collective action which usually contains a large measure of inducement and therefore tends to lead to similar prices. If it is borne in mind that it often happens that the prices of intermediate buyers are based on recommended resale prices, especially where such buyers conclude contracts for the delivery of goods and services over a period, it becomes clear that these prices can, to an extent, amount to horizontal recommended prices, a practice already rejected by the Board.

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330. It is not unusual for recommended prices to be enforced in one way or another. Under pure competitive conditions a buyer will be free to approach another supplier. The fact, however, that all the suppliers collude in respect of the particular recommended prices strengthens the bargaining power of such suppliers and reduces the possibility that they will deviate from the prices recommended. This is especially the case where the suppliers are grouped together in a strong and well-organised trade association.

331. The Board is, after consideration of all the arguments, not convinced that collective vertically recommended prices are justified in the public interest.

(c) Individual vertically recommended prices

332. Proponents of the practice of recommended prices by individual suppliers point out specifically its benefits for the protection of the final buyer. It is stated that even the most uninformed buyer will immediately become aware of a price in excess of that recommended and will query such price.

333. The advantages of the practice for the supplier is that the price of a commodity is invariably determined in such a manner that it will relate to a particular market segment. The segment is clearly defined for the supplier, for example on grounds of quality, and the reseller is thus enabled to arrange his activities in respect of the relevant commodity in a manner that will prevent him from competing with that commodity in the wrong segment of the market. According to the supporters of the practice, this will ensure that the commodity will reach the right group of final buyers.

334. Resellers are generally in favour of the practice because it saves the very small reseller the trouble and expenses of determining his own reselling price. On the other hand the large reseller can use the recommended price as a marketing and promotion instrument for advertising his discounts and "special prices".

335. It appears from the submissions received that the practice is used fairly generally by suppliers as an instrument in promotion campaigns, for example when it is advertised that special prices to resellers will enable them to reduce their prices with a certain amount. In the process positive sales results can be obtained, which is regarded by the proponents of the practice as an extremely important instrument in a competitive market.

336. The argument is often raised that the prices are merely recommended and that the reseller is free to adapt his price to suit his own circumstances. The majority stated that no pressure is exerted on resellers to adhere to the recommended prices.

337. Arguments submitted to the Board against the practice are mainly based on the following: in the first place it is pointed out that recommended prices usually become the selling price. It is conceded that deviations do occur but, according to studies in this regard, such deviations are limited.

338. A second objection is that pressure is exerted on resellers, in certain cases, to adhere to the recommended prices. This point is especially emphasised in cases where retaining the right to deal in a certain commodity has a direct bearing on a reseller's ability to remain in business.

339. A third objection against the practices is that, as in the case of other forms of recommended prices, the discount becomes more important than the price and distracts attention from the price.

340. A point also raised by opponents of the practice is that purchase prices of the resellers are, in the majority of cases, based on the recommended reselling price. As a result not only the reselling prices but also the margins, are largely standardised.

341. In its evaluation of the arguments in regard to individually recommended reselling prices, the Board of Trade and Industries[1] concluded in 1967 that "... it does, however, not entirely exclude the possibility of effective competition and thereby serving the public interest. It follows that a system of suggested resale prices will have to be kept under close scrutiny to ensure that it does not have the same economic effect as enforced resale prices". The Competition Board came to the conclusion during the present investigation that it is necessary to distinguish between collective and individual recommended prices. As is clear from the previous paragraphs, the Board is of the opinion that any form of collective recommendation is, on balance, not justified in the public interest.

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1) See Report 1220(M)

342. As far as individually recommended prices are concerned, the Board is not convinced that the practice restricts competition among resellers, or primary producers, to the same extent and that there are circumstances which justify the practice in the public interest. Certain factors are very important to the Board in this regard.

343. In the first place, it is clear that a reseller is in the position to determine his own prices. Should it occur that pressure is exerted in any way, the Board can investigate such cases in terms of the Maintenance and Promotion of Competition Act, 1979.

344. A second important point is that resellers as well as final buyers can still exercise their choices. The pressure of competitive products which are marketed independently and in respect of which prices are determined indepedently means that the benefits of effective competition are available.

345. A further consideration is the knowledge that recommended resale prices may very well be an instrument for the protection of the final buyer, especially if the existence of a large, unenlightened public is kept in mind. At the same time it may also have the advantage of convenience to the small reseller of a large variety of products, without the disadvantages of collective and vertical recommended prices.

346. The Board is consequently convinced that, notwithstanding the fact that the practice is a restrictive practice in terms of the Act and does have certain disadvantages, its summary prohibition would, on balance, not be justified.

MARKET SHARING

1. Horizontal market sharing

347. Horizontal market sharing implies that suppliers at the same level of the production and distribution chain, either directly or indirectly, share markets. Divergent reasons and arguments are put forward in support of this practice. Certain arguments apply to all forms of horizontal sharing of markets whilst others apply only in respect of specific forms of market sharing. It is especially in respect of the allocation of markets and restrictions on production, where the object usually is to directly or indirectly control or regulate the supply of commodities, that the arguments are often similar. The different forms will therefore be considered jointly, and mention will be made of those instances where the argument applies to a specific form of market sharing. Agreements which are not necessarily aimed at the regulation of supply, will be discussed separately.

(a) The allocation of markets and restrictions of production

348. The arguments of those in favour of these direct and indirect forms of market sharing, are essentially based on rationalisation and the cost benefits involved, on stability, long term planning, profitability with the view to reinvestments and the advantages to the consumer. Certain defensive arguments in respect of the limited effect of the practice are also put forward.

349. Rationalisation and the resultant savings in capital and costs is an argument which is put forward regularly. The point is often made that in the case of market sharing savings may be obtained in respect of distribution costs, for example where duplication of facilities is eliminated and transport costs and promotional expenses reduced. As far as restrictions on production are concerned it is argued that production costs are curbed or reduced by better recovery of fixed costs in that capacity utilisation is increased or the unnecessary duplication of production facilities avoided. The fixed cost element of the unit cost of products or services is consequently restricted to a minimum. It is furthermore argued that it would be easier to eliminate inefficiencies in that a supplier can close or withdraw relatively inefficient units, as he does not pursue an increase of his market share or have to fight for the retention thereof. Market sharing can also promote specialisation and standardisation, which again could lead to a decrease in costs. It allegedly applies especially to restrictions on the variety of products or services and the division of production processes.

350. An argument which further expands on the cost advantages, is that market sharing facilitates long term planning, especially in respect of investment, and prevents surplus capacity. It is especially important where relatively large amounts of capital have to be invested, such as with capital intensive industries where a high (minimum) production or turnover is required in order to ensure a viable unit. In the relatively small South African market an increase in the supply in such cases can also not take place gradually but only in leaps and bounds. The argument is that surplus capacity can lead to a waste of scarce capital and a poor recovery of fixed cost, which can be avoided by market sharing. A second series of arguments in favour of market sharing deals with so-called stability in an industrial sector, the protection of existing enterprises from ruin and the need for satisfactory profits with

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a view to new investment. It is argued that "excessive" competition creates instability and consequently uncertainty, which in turn prevents adequate investment for adjusting supply to an increasing demand. It is furthermore advanced that existing enterprises, especially the relatively small firm, are forced out of the market by such instability, causing a loss of employment opportunities and finally leads to a smaller number of suppliers and less competition.

351. A further series of arguments for justification of market sharing comprises the application of the practice to improve the image of the enterprise or branch of industry and to protect or benefit the consumer in respect of the properties of the commodity. The proponents of the practice maintain that to co-operate and not to compete, suppliers succeed better in promoting the image of their products and services, or that of the relevant sector. Another argument is that the consumer is protected by preventing price competition from leading to a decrease in quality in order to maintain profits, and that after sales service and the continued existence of suppliers with a view to after sales service, is assured. Quality and value are also increased or assured to the advantage of the consumer by specialisation or standardisation or by pooling or cross-licensing of patent and other rights. The consumer is often also protected by the collective application of ethical rules or codes or of guarantee schemes.

352. A well-known cartel in the Republic states the advantages of market sharing as follows: "... lowest possible price ... rationalised distribution ... eliminate cross haulage ... better utilised sales representation ... equitable spread of availability where unexpected breakdowns occur ... improved SA Transport Service liaison and truck utilisation ... facilitate economies of scale ... (and) improve industry's credit management". A respondent from the chemical industry puts it as follows: "[The] general opinion (is) that the restriction of distribution costs by area demarcation contributes to the industry's cost-efficiency. In the absence of area demarcation, marketing and distribution channels which are not cost-efficient can come into being and existing members of the industry can be forced out of the market, which will be to the detriment of the consumer in the long term".[1)]

353. As already mentioned, there also are certain defensive arguments about the limited efficiency and the objectives of agreements, arrangements and understandings in respect of market sharing. Thus it is advanced that suppliers in an oligopolistic market situation will in any case watch one another and that parallel behaviour will occur, especially where the commodities they supply are homogeneous or relatively homogeneous, and that such agreements, arrangements or understandings are not efficient and can easily be broadened, especially during the low trade cycle. It is furthermore advanced that excessive profits are not pursued by market sharing but only "reasonable" profits with a view to maintaining the existing production capacities and the necessary expansion thereof. Suppliers also cannot exploit consumers as the latter can turn to substitutes and imported products. Another argument is that in the case where suppliers continue to compete in the same market, as with market sharing by means of restrictions on production, competition cannot be totally eliminated but only limited to other areas. The resultant cost advantages can also be passed on to the consumers so that the practice is ultimately to their advantage.

354. The opponents of the practice concede that the allocation of markets and restrictions on production which competitors place on each other by mutual agreements, arrangements or understandings, may have certain direct or demonstrable cost advantages. This group, however, is of the opinion that the practice has or is likely to have serious consequences on competition. It is advanced that effective competition succeeds far better in eliminating inefficiencies. In a market orientated economy the profit motive should be the motivating factor for the owners and management and the profits of a specific supplier can only be increased in a competitive market situation if he can succeed in either offering a better product or service than his competitors, or checking or reducing his costs by the more efficient utilisation of his facilities, the improvement of production methods, better internal control over costs and the increase of the cost-effectiveness of certain expenditures. The Board has further been informed that the experience is that competitors are forced to withdraw or replace their inefficient facilities in order to lower their unit costs while such pressures may be absent under a system of market sharing.

355. The cost advantages of specialisation and standardisation often exist only in theory and do not always compensate for other disadvantages which will be mentioned later. In fact, where specialisation and standardisation are coupled to market sharing (in contrast with its occurrence in a competitive market situation), terms of reference for the evaluation of cost-efficiency are often absent. Effective competition furthermore undoubtedly forces competitors to increase their technical knowledge and skills, which also have a cost-reducing effect. A grocery group expanded on rationalisation as follows: "... judged by the extent to which protection has been granted to existing units and the extent to which the competitive climate has consequently deteriorated, it is more likely that the replacement of unnecessary units has been delayed ... [there has been] little proof of a stabilising effect".

1) Free translation.

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356. It cannot be denied that market sharing promotes long term planning, especially in respect of investment. On the other hand it may be argued that suppliers normally act rationally when investment decisions are taken. Suppliers keep an eye on their competitors and are usually aware of each other's planned capacity expansions. An individual supplier will also not increase capacity if he doesn't have a reasonable degree of certainty that he will be able to utilise it profitably and a supplier with surplus capacity will not be able to increase prices to compensate for low capacity utilisation in a competitive market situation. Surplus capacity in an expanding market furthermore has mainly short term disadvantages and may have a favourable long term effect in situations in which the cost of equipment increases rapidly. Market sharing, which creates a regulated situation, also prevents profits from effectively fulfilling its important role in the allocation of production factors and the rapid adjustment of supply to changes in demand.

357. In regard to the argument that market sharing promotes stability, the opponents of the practice allege that it is precisely a function of competition to promote efficiency and to ensure that suppliers who do not succeed in operating efficiently disappear from the market. Employment is not lost as a result but merely transferred to the more efficient suppliers.

358. In a national economy characterised by efficiency, or where it is actively pursued, suppliers will also be able to compete more successfully with foreign competitors, thereby creating additional employment opportunities.

359. It is alleged that market sharing can, by the allocation of markets and restrictions on production, retard or restrict the processes of innovation and imitation, which are important characteristics of a market orientated economic system. It is only through the development and supply of new, improved products and the differentiation of commodities, that the consumer is assured of the continued supply of new and technologically improved goods and a wider choice.

360. The opponents of the practices to share markets or place restrictions on production by mutual agreements, arrangements or understandings, are of the opinion that should it be argued that oligopolists in any case resort, or will resort, to parallel behaviour, even if it is prohibited, or that agreements, arrangements or understandings can be broken freely, the necessity of collusion, arrangements or understandings within the group, is immediately questioned. The suspicion created by such action is in any case only to the detriment of the sector concerned.

361. It is furthermore argued that the consumer can be exploited by the practice without it being the original intention of the colluding parties, that the "reasonable" profits envisaged can protect inefficient suppliers, that effective action can be taken against suppliers who do not want to co-operate, that South African manufacturers are in many cases protected effectively against the importation of products, whether by quantitative restrictions, tariff protection or a decreasing value of the currency, that suitable substitutes are not always available, and that it is difficult to accept that market sharing will be applied if the colluding suppliers do not benefit from it in the first place. It is moreover alleged that market sharing is often used to facilitate the application of other restrictive practices or to apply them more effectively.

362. In the evaluation of the arguments for and against the allocation of markets and restrictions on production the Board by no means questions the statement that market sharing can in certain instances contain substantial advantages. The Board is, however, convinced that market sharing is largely responsible for inhibiting effective competition, which is usually the most important factor for keeping costs in check, or reducing them.

363. The consumers are deprived of the opportunity to make a choice among the goods of the various sellers. Suppliers are also better able to enforce their conditions of sale on to consumers. In this regard it is interesting to quote the following from a letter by a buyer of a cartel which not only agrees on prices but also applies market sharing: "We do not wish the industry to know that we are one of the complainants for fear of reprisals being taken by them against our company." The Board is aware of the fact that in situations where effective competition is lacking, cost savings are mostly not passed on to the consumer. The Board is of the opinion that only effective competition will ensure the discipline which forces suppliers to pursue efficiency and to properly evaluate the profitability of new investments.

364. The Board is also not convinced by the arguments of stability, which is supposed to flow from market sharing, and its alleged advantages. Stability is of significance for every industry, enterprise and product and not only in respect of those where market sharing is practised. The danger also exists that prices may be based on the costs of the marginal or relatively inefficient supplier. This can result in unnecessarily high prices, with a direct effect on the creation of employment opportunities. It is the Board's point of view that uncertainty is an unavoidable part of a market orientated economic system and that the efficient

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supplier will survive conditions of temporary uncertainty and, after the inefficient ones have been eliminated from the scene, will achieve satisfactory profits with the view to the creation of the necessary capacity. Should such suppliers use restrictive practices to force competitors out of the market on grounds other than greater efficiency, or concentration in a specific sector increases excessively through the take-over of unprofitable suppliers, such practices and acquisitions can be investigated in terms of the Maintenance and Promotion of Competition Act, 1979. It should furthermore be borne in mind that the possibility of entry will continue to compel suppliers who grow due to greater efficiencies, to keep prices in check and maintain efficiency.

365. As to the argument that market sharing helps to promote the image of the commodity or the branch of industry, to protect the consumer and to ensure a satisfactory service, the Board does not agree that these arguments contribute towards justifying the practice in the public interest. The Board agrees with the opponents of the practice that the promotion of a market orientated economic system is certain to ensure the desired advantages of innovation and imitation in the long run. Innovation and imitation also directly lead to economic growth in that they induce a cycle of creation of demand, new investment, additional employment opportunity, higher total income of consumers, an increase in total demand, and new opportunity for investment.

366. Although standardisation can undoubtedly lead to cost savings and advantages for the consumer, it often limits his choice, and the cost to satisfy his requirements can increase in that he is not offered sufficient options in regard to the combination of costs and quality of a commodity. Where standardisation appears in a competitive market situation, it is usually based on sound economic principles which is not necessarily the case in a regulated market situation.

367. The Board does not consider market sharing as the best method for the protection of consumers. In a competitive market which is conducive to innovation and product differentiation, consumers will enjoy an adequate choice and prices will be realistic. Basically market sharing counteracts the operation of market forces.

368. If the argument has it that market parties will resort to parallel behaviour, especially in oligopolistic market situations and that agreements, arrangements or understandings will be deviated from, without any penalty, the Board is all the more convinced that such agreements, arrangements and understandings are not in the public interest. The parties can just as well function without it without any injury worth mentioning. The suspicion created by the collusion can only be to the detriment of the parties concerned. The Board is further also convinced that the primary objective of any form of collusion is to benefit the parties concerned.

369. In summary it can be said that in the light of the actual or potential economic consequences of market sharing in the form of the allocation of markets and restrictions on production, it is the Board's view that the practice is against the public interest and should be prohibited.

(b) Joint ventures

370. Joint ventures can be established for a very wide variety of objectives. The economic justifications advanced for this type of co-operation can be grouped as follows:

(i) Joint ventures enable suppliers to spread or share the risk of new industrial development or of investment in capital intensive sectors;

(ii) it enables suppliers to undertake projects of which the cost is too high for individual suppliers;

(iii) it assists suppliers to accumulate or attract large amounts for capital investment;

(iv) suppliers are enabled to erect joint or combined facilities with a view to capacity savings; and

(v) joint ventures make it possible to join different skills or abilities or of production means and technical skills.

371. The proponents of the practice are of the opinion that joint ventures can promote competition in that it enables new entry to a specific market in cases where entry is not possible for the individual founders, whether as a result of a lack of funds, inability to attract sufficient capital, unit costs which are too high as a result of a small volume, a lack of skills or production means or too high a risk. The number of suppliers in a specific market is then increased by means of a joint venture which can have a strong positive effect on

competition/...

competition especially in a monopolistic or even oligopolistic market structure. Joint ventures can also assist smaller suppliers to compete with the bigger ones. Although joint ventures decrease the number of market parties, competition as such can be promoted. According to the proponents joint ventures can also contain other economic advantages, such as the better utilisation of available skills, the promotion of innovation and consequently economic growth by joint research and development which may be too expensive for a single supplier, and the exportation of commodities on a joint basis by which entry to a foreign market can become possible, or more profitable to a country in that the particular suppliers do not compete among themselves. Especially in the relatively small South African market joint ventures can be the only way in which the viability of capital intensive manufacturing projects can be attained or which can confine the risks involved within acceptable bounds. Joint ventures can also entail certain direct cost savings, such as when certain backward or forward functions are performed jointly by the founders.

372. A well-known organisation which operates a joint marketing organisation in the Republic, summarised the advantages as follows: "[Product] as a diminishing and strategic resource requires, particularly in the South African context, this type of marketing and distribution to maximise and ensure full utilisation of the national resource." It incorporates "... co-operative risk sharing ... reliable supply ... availability to strategic and politically sensitive areas ... flexibility ... rigid quality control ... technical backup".

373. On the other hand the view is held that the possible disadvantages of joint ventures can have a bearing on competition as well as on market behaviour. Structural changes can develop where the founders of a joint venture are also suppliers in a particular market and they then withdraw from the market so that a single supplier, the joint venture, replaces two or more suppliers (the founders) in that market. The establishment of a joint venture to act as supplier in another market, in which the founders are not yet involved, can also have the effect of a restriction on potential competition in that it prevents each founder to enter himself. One new supplier therefore enters in the place of two or more potential entrants.

374. It is argued that the possibility, and even probability, that the founders of a joint venture will also co-operate or collude in other fields, is the most important behavioural restriction on competition. The co-operation or contact effected by means of the joint venture, presents the opportunity to discuss and promote co-operation in respect of other commodities which can have detrimental effects for competition, for example, reciprocal transactions or exclusive supply by which other suppliers are excluded. Apparently the latter practice increasingly occurs in South Africa. Such contact can also promote collusion among founders in respect of other commodities.

375. Another alleged detrimental effect that structural as well as behavioural characteristics have on competition, is the exclusion of existing or potential new suppliers by the establishment of joint ventures where the founders are vertically related. A joint venture between a raw material supplier and a raw material processor can exclude other raw material suppliers, a part of their market is taken away, or restrict the market of a potential new raw material supplier.

376. A form of joint venture to which opponents specifically refer is the one where suppliers on the same level of the production and distribution chain establish a joint venture to undertake backward or forward functions on behalf of the founders, for example the supply of raw materials or the marketing function. Such joint ventures which are often "pool-type" enterprises, can, in a duopolistic or oligopolistic market structure, totally eliminate competition among them in respect of the particular function and consequently deny the consumer a choice between suppliers and prevent the realisation of the economic advantages of effective competition. The detrimental results of this type of joint venture can be aggravated if the particular commodity is relatively homogeneous and no suitable substitutes are available, or if the elasticity or the cross-elasticity of the demand is low.

377. In the evaluation of the arguments put forward in favour of and against joint ventures, it is clear to the Board that sound economic reasons for the justification of joint ventures may well exist. Joint ventures can in certain circumstances increase or promote competition. Competition can, however, also be restricted by virtue of the market structure and behaviour. In the Board's opinion the actual effect on competition will depend on the objectives of the joint venture, the form thereof, the nature of the product and the market structure that prevails in each case in the particular branch of industry.

378. The divergent objectives and forms of joint ventures and the very clear economic advantages it may sometimes have, render a general conclusion regarding the justification of joint ventures impossible. In most cases it will only be possible to determine whether or not a joint venture is justified in the public interest in the light of its form, the market structure and the products involved. Of particular importance is the market power, or likely power, of the joint venture, the market power which the founders will have individually or collectively,

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whether the founders are competitors and whether the commodity supplied by the joint venture is horizontally or vertically closely related to the goods supplied by the founders.

379. Only in the case of joint ventures which take over or control the marketing function of competing suppliers in the domestic market, is the Board of the opinion that they can be against the public interest. The Board, however, is of the opinion that where such action leads to the development of restrictive practices, the problem can be investigated and remedied in terms of section 10(1)(a) of this Act.

2. Vertical market sharing

380. Vertical market sharing usually refers to the restrictions imposed by suppliers on re-sellers in respect of geographical sales areas, locations or customers or groups of customers. A supplier may appoint a limited number of resellers for his commodities and then contractually limit each to a specific market. Competition which would normally exist between the resellers of the particular product, is consequently to a greater or lesser degree eliminated, depending on the types of restrictions imposed. The resellers will then for the most part compete with sellers of similar products of other trade marks and substitutes. The reseller should be able to maintain his market share without lowering the price or increasing his service, provided that the price and quality of the commodity compare favourably with competitive products.

381. Arguments put forward in support of vertical market sharing essentially revolve around the advantages of the practice for both supplier and reseller. It is claimed that the advantage to the supplier is that he is ensured that suitable selling points for his commodities are available and that resellers, because their positions are protected, would remain loyal to his product and promote the selling thereof more vigorously in their respective areas. Due to the fact that suppliers would supply to a limited number of selected resellers only, marketing costs may be limited and credit risks reduced to a minimum. It is also possible to enhance the image of the commodity by supplying it exclusively to resellers who have built up a "name" in the area and are able to supply the required technical advice and after-sales service to customers.

382. Proponents of this practice point out that the advantages for resellers include increased protection of their investments, security of planning in respect of facilities and services and the holding of adequate stocks. This is deemed to be especially important in respect of commodites which are expensive and technically intricate. By limiting competition between re-sellers of the same commodity, competition with similar or substitute commodities is enhanced.

383. In contrast the major argument against vertical market sharing is that competition between resellers of the same commodity is either limited or eliminated which may give rise to inefficiencies and high prices. In addition it is claimed that entry is restricted and if all suppliers in an oligopolistic market structure practise vertical market sharing, entry into the distribution of the particular group of commodities may be completely eliminated. The danger may also exist that suppliers with a dual distribution system and therefore in direct competition with their distributors may utilise vertical market sharing for the exclusive purpose of protecting their own sales organisations. A large purchaser of a particular group of durable consumer commodities reported that "... not only the prices of different dealers in the same areas, but also the discounts are identical ... It indicates that the manufacturer prescribes maximum discounts to its agents ... (and) that the distribution rights are also effectively limited to a specific geographical area in order to eliminate any wider geographic competition."[1)]

384. The Board is of the opinion that vertical market sharing as opposed to horizontal market sharing which usually has the effect of restricting competition between suppliers, may have important and sound business objectives as it may ensure efficient distribution and promote competition amongst competing trade marks. In addition the point is well taken that a supplier is geared to increasing his market share and profits and that vertical market sharing may be seen as a part of his marketing strategy to reach this goal. Provided that there is no horizontal collusion between the suppliers competition of similar and substitute products will compel them and their appointed distributors to operate efficiently and to charge realistic prices.

385. The Board is therefore convinced that there is often sufficient justification for the existence of vertical market sharing and that the practice cannot summarily be considered as being against the public interest.

RESTRICTIVE/...

1) Free translation.

RESTRICTIVE TENDER PRACTICES

1. Identical tenders

386. In this category there are essentially two types of restrictive practices, namely standard tender documents and conditions and identical tender prices, which are the result of collusion between tenderers.

(a) Standard tender documents and conditions

387. Standard tender documents and conditions are normally found in instances where the compilation of the tender submission and the supply of the relevant commodities are of a reasonably complicated nature.

388. Arguments put forward in justification of this practice is in essence of a twofold nature, namely that -

it places tenderers on an equal footing so that one tenderer does not obtain an unfair competitive advantage in respect of conditions over another; and

it promotes fair and reasonable tender procedures. On the one hand it ensures that the tender buyer will receive comparable tender prices whilst on the other hand tenders may be prepared subject to conditions with which tenderers are familiar.

389. Certain groups also argue that standard tender documents and conditions merely serve as a guideline for tenderers and are not enforced. In this connection the following extract from a submission by a respondent is quoted: "... (S)tandard documentation is an endeavour to ensure that at tendering stage competition is fair and equitable and that prices, because tenders are submitted on known, tried and tested conditions, are accordingly much keener." The respondent continues by mentioning that his "... insistence on tendering on standard conditions ... is not designed to enforce standard conditions of contract as such. What is enforced is a tendering procedure whereby the basis is provided for the uniform compilation of tender prices and for an accurate evaluation and adjudication on tenders. The essential aim is to promote fair and equitable tendering procedures. In this way the (person who calls for tenders) is assured of receiving readily comparable tender prices while (tenderers) are able to compile and submit their tenders on conditions of contract with which they are familiar".

390. Opponents of the practice, however, maintain that standard tender documents and conditions are one-sided and that the interests of the tender applicant are not properly represented or taken into account; that tender documents and conditions are reasonably static and do not take into account the modifications which may be necessary to adapt to new developments or specific circumstances; and that the freedom to enter into contracts is restricted because the parties are mostly obliged to keep to the prescribed conditions. It is also argued that the rigidity of standard tender documents and conditions inhibit the initiative of individual tenderers to offer more favourable conditions. Due to the one-sided and arbitrary nature thereof it is questioned whether fair and equitable tender procedures are promoted by this practice. It has been stated that it is not the function of a particular industry to either protect the tender applicant or to prescribe to him under what conditions he should accept tenders. In regard to the argument that standard documents and conditions merely serve as guidelines it is argued that experience has shown that such guidelines too often become an instrument through which the practice is enforced. A respondent stated in this regard "... due to ... insistence in using (standard) contract documentation, the compilation of these documents were carried out under the secretariat of [an association] and the various clauses were, therefore, very heavily weighed in favour of the [tenderers]". Another respondent stated that "... in the end each tenderer should be free to tender upon conditions which are acceptable to him".

391. The Board is of the opinion that an association which normally administers this practice finds itself in such a dominant position that it can enforce the use of tender documents and conditions not only on its members (even where it is merely used as a guideline) but also on the tender applicant. In this connection a respondent in fact stated that "... any (tenderer) has the simple free alternative of declining to tender. Employees have no such alternative ... they will toe the line, or they will get no tenders from [the members of an association] who constitute the major parties of (an industry)". The Board also agrees that tender documents and conditions can be relatively one-sided and can have the effect that the tender applicant does not always receive the best tenders. In this way the development or introduction of

improvements/...

improvements or innovations may be prevented or retarded. Generally competition is more effectively promoted in the absence of these practices. In general terms the Board is not convinced that the practice is necessary or justified as being in the public interest.

392. The Board is therefore of the opinion that the termination of these practices in those industries where they either exist or are contemplated, may lead to greater competition in the particular industries.

(b) Identical tender prices

393. One of the arguments put forward for the retention of identical tender prices is closely allied to the elasticity of the demand facing the tenderers. It is alleged that tender purchases are often characterised by large volumes being purchased by a small number of purchasers (often a single one). If appropriate substitutes are not available in respect of the particular commodity, the demand may be considered to be relatively price-inelastic. Tender prices at levels lower than the ruling price generally found in the market may, therefore, adversely affect the total profit in the industry. Under these circumstances, and in an effort to avoid a loss situation and to prevent marginal enterprises leaving the market, identical tender prices are considered to be essential by those in favour of the practice.

394. In addition it is alleged that certain market structures justify identical tender prices. In those industries where a relatively large number of medium sized enterprises are present fierce competition will for example be the order of the day in the absence of identical tender prices. Price competition will, it is alleged, under these circumstances give rise to price wars and destabilisation of the market. This may eventually lead to a reduction of the number of enterprises operating in the industry and the corresponding disadvantages to the economy as a whole. It is alleged that identical tender prices may have a stabilising influence on the market.

395. It is the view of proponents of the practice that in an oligopolistic market situation with relatively homogeneous commodities,a reduction in the price of one tenderer will lead to a reduction in the general level of prices, actually "chaotic" prices, in the industry. Uniform tender prices are therefore considered necessary for maintaining stability in the industry. It is also pointed out that in the case of homogeneous commodities with a relatively high percentage of fixed cost, the cost structures of all the suppliers would be approximately the same and that uniform tender prices would naturally follow. Collusion under these circumstances, especially in the downward phase of the economic cycle, is therefore considered essential to prevent ruthless competition and the elimination of some of the market parties.

396. Opponents allege that the practice of colluding for the purpose of establishing identical tender prices impairs the primary purpose of calling for tenders, namely to promote competition amongst tenderers. The purpose is to obtain competitive tenders in respect of all aspects such as price, quality and service. The price mechanism cannot operate effectively with identical tender prices.

397. That identical tender prices do occur, emerges from a submission in which it is stated that: "It is also not pure coincidence that the (product) manufacturers' prices are practically, if not precisely, identical year after year for a particular tender. It definitely creates the impression that the price for a particular year is determined beforehand."[1] Another respondent states that: "The prices of tenderers for (product) is so precisely similar that one has to believe that there is collusion between the competitors."[2]

398. According to the evidence the Board is of the opinion that the elimination of competition among themselves is the primary aim of identical tender prices. The result is often a price which is high enough to accommodate the performance of the relatively inefficient tenderer and to ensure him at least a normal profit. Identical tender prices therefore artificially encourage the survival of inefficient enterprises with little incentive to increase the efficiency of the industry as a whole.

399. The Board finds the contention that the cost structures of the various enterprises in respect of homogeneous products are identical and therefore responsible for identical tender

prices/...

1) Free translation.

2) Free translation.

prices, unacceptable. Even though fixed cost may represent a large portion of the total cost, differences in variable costs surely occur which should allow individual enterprises to charge lower prices than some of their competitors, especially in those cases where the unit costs of production are sensitive to changes in production volumes.

400. The Board is of the opinion that the unrestricted operation of the market mechanism in respect of tender prices would be to the advantage of all concerned. In this connection it should be noted that the State and local authorities are of the largest purchasers on tender and that manipulation in order to establish uniform tender prices not only affects the tender applicant adversely, but also has a much wider detrimental effect because the taxpayer is indirectly affected. Taking all the facts into account the Board is not convinced of the existence of circumstances which justify the practice of identical tender prices in the public interest.

2. Pre-selection of tenderers

401. As has already been indicated in the description of tender practices, the object of this practice is to manipulate the tenders in such a way that they will be allocated to a specific tenderer. Often the allocation is done by a cartel.

402. It has been submitted that this practice should not be considered as being against the public interest due to the fact that a tenderer will in any event tender at the lowest price or most advantageous conditions and that it is to be doubted whether this could be bettered in the absence of pre-allocation. It is therefore only a method employed to prevent tenderers making inroads on each other's markets or attracting one another's clients. Moreover it is argued that cartel-like agreements are inherently unstable which means that an agreement such as this would have a limited lifespan.

403. Proponents of pre-selection also argue that tenders are sometimes invited from a preference list. Should the tenderers be unable to handle the relative tender project, preselection is rather practised than running the risk of having their names taken off the preference list.

404. According to opponents of this practice it creates the suspicion by the tender applicant that tenders are being submitted under competitive circumstances. In addition it is submitted that the tender caller without realising it, is deprived of the opportunity of properly considering the efficiency of the tenders in terms of prices, quality, service and performance.

405. The Board is also not convinced that the most "favourable" tender submitted under these circumstances is in fact the most favourable. In the absence of this practice the possibility is great that an even more favourable tender could be submitted. Judging by the arguments put forward by proponents of this practice it is clear to the Board that the self-interest of the market parties is of primary importance. The transparency of the market, which is a requisite for effective competition, is impeded because the full spectrum of conditions and prices is concealed from the tender applicant.

406. Taking into account all the arguments put forward the Board is convinced that the preselection or allocation of tenders is not, on balance, justified in the public interest.

3. Prevention of competitive tenders

(a) Agreements not to tender in competition with one another

407. In those instances where tenderers or a group of tenderers agree not to tender in competition with one another, identical tenders may result. The same arguments put forward in respect of identical tenders are used here to justify the practice. It may also result in only one tender, or one tender by a group of tenderers, being submitted.

408. Supporters of this practice state that although the group submits only one or identical tenders those enterprises outside the group are in any event in a position to compete with the group. In addition it is argued that the tender applicant is often the only applicant in the tender market and therefore possesses monopsonistic power. This practice is then followed to create a countervailing power. It may happen that the tender purchases represent the largest portion of the particular branch of industry which would further strengthen such monopsonistic power. Should no countervailing power exist in this particular case the tenderers could be forced to tender at such low prices that losses would result. The opponents of the practice argue that the practice impairs the basis of a market orientated economy as it quite clearly restricts competition. In addition the tender applicant is unable to determine the full potential of the market as far as prices and conditions are concerned.

409./...

409. It has already been pointed out that identical tenders resulting from the prevention of competitive tenders is not acceptable to the Board as being in the public interest. It is clear to the Board that the promotion of own or group interest at the expense of the tender buyer is the underlying motive for the preservation of this practice. The Board finds the argument that competition still exists via those enterprises excluded from the group, unacceptable. It is more often the case that all the market parties are members of the group. The volume of competitive tenders is smaller and the result thereof is that the tender buyer is unable to guage the full potential of the market. In a market orientated economy it is important to promote the transparency of the market as far as possible, and this is not the case when this practice is applied. The question arises whether the individual enterprise in the group will be worse off in the absence of the practice. Should a tender not be awarded to a member of the group, the practice would not have been of much value to the group.

410. The Board is convinced that this practice may cause more harm than the advantage which it might have and that it is not necessary for the existence of the efficient enterprise. The Board cannot accept that in the absence of collusion not to tender in competition with one another, the monopsonistic power of the tender buyer will not be neutralised. The Board has therefore not been convinced by the supporters of this practice that this restrictive practice is on balance justified in the public interest.

(b) Prohibition of an association's members to tender in competition with non-members

411. The practice differs from the previous one in that members of the group (usually an association) are allowed to compete amongst themselves on tenders, but may not compete with non-members of the group or association. This practice normally may be found when tender projects are of a reasonably complicated nature.

412. Supporters of this practice maintain that under these circumstances the quality of the relevant group itself or of the commodity (or work) involved plays an important role. It is maintained that to ensure quality it is necessary for the association to exercise control over its members, control which it obviously cannot exercise over non-members. The practice gives the tender applicant the confidence that the high quality at the tender project will be maintained. It also facilitates organisational problems and has the added advantage of standardisation due to the fact that standard tender documents are normally used which ensures that the tenderer would not only be tendering on a level basis with other tenderers but also that his price would be comparable with those of his competitors. Sometimes an association's regulations contain a provision that its members may, with the association's permission, tender in competition with non-members. A specific procedure to be followed in such a case is laid down by the association and normally provision is made for appeal to a higher authority, should the required approval not be forthcoming. It is claimed that this procedure eliminates the possibility of a conflict with the public interest.

413. The arguments put forward against this practice essentially revolve around the fact that competition between members and non-members of an association is not possible. It is also argued that such an association usually occupies a dominant position in the market and is therefore able to influence tender buyers to only grant tenders to its members. It also has the result that non-members are obliged, even against their wishes, to join the association, thereby strengthening the association even further. It is also not always possible in practice to grant permission to non-members to tender against members. This procedure as well as the appeal procedure is so cumbersome that tenders have often been closed before the laid down procedure has been followed.

414. In this connection a respondent states that the "stranglehold of the (association) is further reinforced by forbidding the consideration of tenders from non-members together with those from (members) ... (it) has resulted in tenders being accepted on less than optimal terms to both employer and (tenderer) and has increased the cost of (the tender project)". Regarding the stipulation in an association's rules that approval should be obtained by non-members wishing to tender in competition with members, the respondent states that "(the association) is hardly a disinterested party in such matters and the overall procedure is so time-consuming as to have very little worth".

415. In its evaluation of this practice the Board considered whether the maintenance thereof was at all necessary to gain the advantages mentioned. It is clear to the Board that this practice only serves to promote the own interest of the tenderers. Once again the tender buyer is precluded from determining the full potential of the market which is necessary for the efficiency of the tender system. It is questioned whether the best tender will be submitted in a closed tender market such as this. It is more likely that in the absence of this practice

better/...

better tenders will be submitted by the members of the association.

416. The Board accepts the fact that the tender itself and the handling of complicated tender projects must be of an outstanding quality but it cannot as a matter of course accept that tenderers outside of the association cannot perform the same quality of work. In a wider tender market the market mechanism would, as a matter of fact, oblige every tenderer to deliver good quality. The impression is also created that the tender buyer should be protected against low quality and that he should not decide this matter for himself. The Board is of the opinion that it is in any event not the function of the tenderer to protect the tender buyer or to decide what would be in the tenderer's best interest. In addition there should not be any attempt to interfere in the tender buyer's choice in respect of the granting of tenders. The tender buyer should be conversant with the qualities and advantages of the association's members. In the same way he should be free to decide whether any risks exist when doing business with non-members.

417. Experience has shown the Board that the procedure to be followed by a non-member to gain permission to tender in competition with members is so time-consuming that it is not practicable.

418. The Board is, therefore, not convinced that the advantages of maintaining this practice outweigh its disadvantages. The Board is also not convinced that this practice is necessary to ensure the aforementioned advantages for the tender buyer. It is therefore of the opinion that this restrictive practice is not justified in the public interest.

4. Market sharing in respect of tenders

419. Market sharing in respect of tenders essentially entails either joint tendering or the allocation of tenders by tenderers to a specific tenderer on a rotation, geographical or client basis.

(a) Joint tenders

420. The argument is usually put forward that in respect of joint tenders the tender project is of such a size that one tenderer would not be in a position to handle it by himself.

421. In defence of joint tenders for the purpose of dividing the market, it is argued that it increases the exchangeability of the relevant commodity or, on the other hand, that the tender purchases represent such a large portion of the total volume sales of the particular commodity in the branch of industry that it justifies a division, thereby allowing all the tenderers a share in the tender.

422. Opponents of this practice point out that by submitting a joint tender with the purpose of sharing the market, the tenderers are placed in a position where they can, without submitting separate tenders, tender at identical prices and conditions. The majority of arguments put forward against identical tenders are also relevant in respect of this practice.

423. The Board holds the opinion that the tender buyer is the best able to judge whether the project is indeed of such a size that a joint tender would be justified and he should indicate on the invitation to tender whether joint tenders will be acceptable. The tenderer in turn should indicate that a joint tender is being submitted. As has already been pointed out the Board does not accept the arguments for the retention of identical tenders and is also not convinced that joint tenders are justified in the public interest.

(b) Allocation of tenders on a rotation, geographical or client basis

424. This form of market sharing in respect of tenders is usually brought about by pre-selection of tenderers or restraint of tenders. As an example of market sharing in respect of tenders, a respondent mentions in his submission: "It is ... conspicuous that some large ... sometimes do not tender for the requirements of a ..., but possibly again the next year when one or more again withdraw. Thus only one ... tendered last year for the ... requirements."[1] Besides the arguments for the retention of pre-selection as already discussed and for/...

1) Free translation.

for the restraint of tenders which will be reviewed later, specific arguments exist for the retention of this form of market sharing. Some of the most important arguments are reviewed below.

425. The proponents of the allocation of tenders on a rotation basis argue that this practice promotes long term planning, especially since each tenderer knows well in advance when he will be awarded a tender and he can therefore adapt to it.

426. It is advanced in respect of tender allocation that it will eliminate cross haulage and therefore decrease transport costs.

427. It is also claimed that the technical nature of some tender projects is such that high costs are incurred for the preparation of a tender. It usually requires a high degree of expertise, and tenderers have to co-operate with the tender buyer to frame the necessary specifications. The tenderers concerned therefore consider it fair that the tenderer who did the spade-work will receive the tender allocation.

428. It has already been indicated that the arguments in favour of pre-selection are not acceptable to the Board. In so far as these arguments are also used in respect of market sharing, they are also not acceptable to the Board.

429. The opponents of this practice argue that, especially in respect of the allocation of tenders on a rotation basis, the presumption is created that tendering takes place under competitive conditions. Once again the transparency of the market is obscured and the "most favourable" tender can be less favourable than in the absence of this practice.

430. It is the Board's opinion that the allocation of repetitive tenders on a rotation basis can have the result that the "unsuccessful" tenderers may attempt to recover their loss of turnover during a tender cycle by increasing prices. In the absence of the practice the market mechanism should ensure that the unsuccessful tenderers cannot increase their prices arbitrarily. On balance the Board believes that the disadvantages of this practice outweigh its possible advantages.

431. The argument that transport costs are decreased by geographical market sharing apparently loses sight of the fact that transport costs form only part of the total cost. The total cost of an efficient enterprise in one area, including transport costs to another area can be lower than the total cost of an enterprise in that other area. This form of market sharing prevents cost advantages from being reflected in tender prices. The Board is convinced that geographical market sharing brought about by the operation of the market mechanism will be of greater advantage to the public interest than a "forced" market sharing and that the tender buyer can make his own decision in this regard.

432. Tenders requiring high technical skill will, in all probability, have high tender costs for all tenderers and a competitive advantage in respect of technique and innovation may be obtained which can reduce the total cost of a tender project. What is more, the tender buyer is usually also technically knowledgeable or he can use technical advisers to assist him with the drafting of tender specifications. No reason therefore exists why a tender should be allocated to a specific tenderer. As a matter of fact, the Board believes that such allocation is only to the advantage of the successful tenderer and the other colluders. It inhibits innovation to the detriment of the public interest and the impediment of the market mechanism in a market orientated economy. The Board is therefore not convinced that this restrictive practice is justified in the public interest.

5. Refraining from tendering

433. The decision not to tender can be taken independently on an individual basis by a potential tenderer, or a group of potential tenderers can decide jointly not to tender. In the latter case collusion is present and it is this element that identifies withholding of tenders as a restrictive practice. In this regard it was stated: "... our enquiry had been embargoed and tenders could not be submitted by [the members of an association and] several invited [tenderers] failed to tender".

434. According to those who defend the practice, a tender buyer often has monopsonistic power, especially where tender purchases comprise a relatively large part of the total turnover of a branch of industry. The tender buyer can be influenced by the withholding of tenders to accept the conditions of a cartel or association or to lay down fairer tender conditions. In this way the tender buyer's power can be neutralised.

435./...

435. According to the opponents of the practice, refraining from tendering is one of the methods by which tenderers can be prevented from tendering in competition with each other. A subtle form of refraining from tendering exists where an association prohibits its members to tender in competition with non-members. By following this practice, the already dominant position of an association in a branch of industry can be strengthened still further. It also has the result that a dominant association restrains non-members indirectly from tendering. It can also be applied as a method to enforce identical tenders especially with regard to standard tender documents on to the tender buyer. Should the latter not find these documents or conditions acceptable, members are instructed by their association to withhold their tenders. Restraint of tenders also facilitates market sharing with regard to tenders. By withholding tenders from other tenderers, it is ensured that a tender will be awarded to a specific tenderer.

436. It is evident to the Board that collusion to withhold tenders centres mainly around the promotion of the interests of a group of tenderers or an association. It once again obscures the transparency of the market for the tender applicant and the primary objective for the call for tenders, namely to bring about competition between tenderers, is frustrated. The Board consequently cannot find any justification in the public interest for this practice.

6. General

437. The different restrictive practices were each evaluated against the public interest. The Board is aware of the fact that these practices are often applied in combination so that their negative influence on the public interest can be much larger than is evident from the evaluation. Furthermore, the evaluation was done mainly against the background of the tender market. Restrictive practices applied to the tender market can have a rimple effect on the total market, with detrimental effects for the entire market. The Board wants to repeat that the arguments submitted for and against collective prices and market sharing, also apply to restrictive tenders. The reverse is equally valid. The Board also cannot fail to mention that it is convinced that many of the restrictive tender practices can be prevented if the tender buyers take the necessary precautions in regard to the specifications of tender requirements.

CHAPTER VII/...

CHAPTER VII

SUMMARY, CONCLUSION AND RECOMMENDATIONS

INTRODUCTION

438. Effective competition is necessary for the efficient functioning of a market orientated economic system. In fact, in the 1983 Constitution of the Republic of South Africa the promotion of effective competition is laid down as a national objective.

439. The aim with an investigation of this nature is to establish the desirability of imposing a general prohibition in regard to a practice that limits competition. Such a prohibition does not concern merely the conduct of a specific person in a particular situation. The implication of such a practice for the public interest cannot therefore be considered on the basis of any specific set of facts. Consequently the recommendations must be based on the policy for the promotion of effective competition, the Board's experience and general arguments in favour of and against these practices, rather than on the basis of emperically established facts. In its recommendations the Board will certainly take into account that a practice viewed undesirable on these grounds, may indeed, in the light of particular circumstances, be justified in the public interest.

440. This implies that parties involved in a specific practice which is the subject of a general prohibition, but can show that the application of that practice is in their particular circumstances in fact justified in the public interest, must be able to acquire an exemption from such prohibition. This is in line with the policy applied in any investigation in terms of section 10(1)(a) of the Act into the conduct of specific persons constituting a restrictive practice. There, too, the Board is obliged to recommend preventive or remedial action by the Minister unless the parties concerned can satisfy the Board that their conduct is justified in the public interest.

SUMMARY

441. Findings that have been mentioned in this report and which are important for the final recommendations of this investigation can be stated as follows -

1. Restrictive practices not justified

442. Of particular importance is the Board's findings in Chapter VI that the following restrictive practices cannot be justified in the public interest -

(a) Vertical resale price maintenance

In this respect the Board came to the further conclusion that it is not justified to summarily prohibit individual vertically recommended prices. Collective vertically recommended prices on the other hand are not regarded as justified in the public interest.

(b) Horizontal price collusion

It has also been concluded that horizontally recommended prices, in contrast to price information systems, are likewise not justified in the public interest.

(c) Horizontal collusion on the conditions on which goods or services may be provided

(d) Horizontal market sharing

A generalisation on the variety of possible joint undertakings is, however, not possible.

(e) Collusive tendering

2./...

2. Incidence of the relevant practices

443. As seen in Chapter IV, some of the submissions received by the Board contain allegations about the existence of the five relevant practices in a large number of branches of industry in respect of a variety of commodities. On account of, especially, the confidential nature of the practices it is not possible to establish the exact magnitude thereof in the South African economy. That they do, however, occur fairly generally, in fact more than what was supposed originally, is certain. In some branches of industry they actually play a particularly important role.

3. Foreign systems

444. The different foreign systems referred to in Chapter III, show differences in the approach and purposefulness in regard to the action against the relevant restrictive practices. In several of them, all or some of the relevant restrictive practices are outlawed by a general or a specific statutory prohibition, the contravention of which may sometimes have criminal law sanctions or other consequences. What is important from a policy point of view, is that action against the relevant restrictive practices is by no means a strange phenomenon in other legal systems for the promotion of competition.

CONCLUSION

1. The need for action

445. In the light of the foregoing, it is the opinion of the Board that an appropriate prohibition, contained in a ministerial notice, must be imposed on the relevant practices. The Board will furnish more particulars in this regard when formulating its recommendations.

446. At the same time the Board would be neglecting its duty should if fail to refer, with the necessary understanding, to a viewpoint which was strongly stressed in various submissions. This is that, while active steps are being taken to promote effective competition, the State itself is, in various respects, responsible for serious distortions and restrictions of competition which sometimes give rise to further restrictions by businessmen in the relevant regulated industries. Consequently there is appreciation for the current awareness on the part of the authorities for the need to co-ordinate competition policy. Notwithstanding the very real need for reducing the restrictions on competition imposed by the authorities as soon as possible, the Board is convinced that this does not justify any delay in the action against the practices concerned here.

2. The necessity of a prohibition

447. The Board is convinced that a carefully worded prohibition in terms of section 14(5) of the Act, could have a meaningful effect on the promotion of effective competition. A prohibition of resale price maintenance has in fact existed since 1969.

448. The conducting of ad hoc investigations in terms of section 10(1)(a) of the Act in respect of restrictive practices in a specific industry with a view to taking action against specific parties, still remain a most important aspect of future policy. Such action, however, has no effect on the behaviour of persons whose individual actions are not covered by the relevant investigation. The judicious use of section 10(1)(c) investigations, followed by a general prohibition in terms of section 14(5) of the Act, i.e. a prohibition of a specific restrictive practice which applies to any person who has not been excluded from the effect thereof, is absolutely essential for the implementation of a policy to promote effective competition in the economy as a whole. It is for this very reason that the Maintenance and Promotion of Competition Act, 1979, like its predecessor, provides for this procedure.

3. The importance of exceptions

449. Section 14(5) of the Act provides for exceptions to the prohibition in the ministerial notice.

450. As far as this investigation is concerned, it is clear that the prohibition will have to provide for two kinds or categories of exceptions:

(i)/...

(i) Provision will have to be made for certain "conceptual" exceptions in where the prohibition should not apply on a principle or policy basis. Two cases are of practical importance here.

The first is the result of group formation, where collusion may take place between separate legal entities which in an economic sense form a unity. For example, price collusion between two wholly-owned subsidiaries of a common holding company is irrelevant from a competition policy point of view. 1)

Secondly, as in the case of many other systems, a prohibition of collusion should not be applied when the collusion exclusively concerns goods for export or services which are rendered abroad.

(ii) However much the prohibition may seem necessary in principle, it is particularly important to avoid the disruption of industries by its introduction. Four of the five relevant restrictive practices were not prohibited in the past and are, as indicated earlier, encountered quite frequently in the economy. In this category, a distinction must be drawn between three cases.

In the first instance it is possible that particular circumstances in a specific industry may justify the continued existence of a formal arrangement comprising the practices investigated here, in the public interest.

Secondly, a lack of flexibility to provide for particular and changing circumstances which cannot be sharply defined without creating considerable uncertainty, would be dangerous. Organisations which support small and medium-size undertakings in order to compensate for structural disadvantages when competing with powerful undertakings, should not be eliminated by such a prohibition. A considerable and constant decrease in the demand for goods may justify an arrangement to adapt production capacity to demand. A restriction of competition with significant implications for the economy, may indeed benefit the public interest. Even in countries such as the Federal Republic of Germany and the United Kingdom this possibility is taken into account. To obtain this essential flexibility without having to depend upon definitions which may create uncertainty, the Minister must be provided with powers of exemption in the form of an approval to be granted upon the recommendation of the Board.

Thirdly, exemptions will have to be granted, but for a reasonable period only, in cases where formal arrangements exist which are not justified in the circumstances, but where the immediate termination of such arrangements will cause disruption. The purpose of a time-bound exemption is to afford the parties involved the opportunity to adjust to the new dispensation.

RECOMMENDATIONS/...

1) Representations were received in this regard to the effect that the exemption should be extended to all companies in a group based on the holding/subsidiary relationship. The problem with such an approach is that the holding/subsidiary relationship can also come about where a minimal shareholding exists, and control is effected by a contractual power to control the composition of the other company's directorate. That group relationship therefore does not necessarily imply a substantial shareholding. Although an arbitrary percentage shareholding could be used, in reality an economic unit only arises if the familiar and defined concept of a "wholly-owned subsidiary" is consistently adhered to.

RECOMMENDATIONS

451. The Board hereby recommends to the Minister that -

(a) the following practices be declared unlawful pursuant to section 14(5) of the Maintenance and Promotion of Competition Act, 1979, and that he prohibits anyone from entering into or being a party to such an agreement, arrangement, understanding or practice -

resale price maintenance;

horizontal price collusion;

horizontal determination of conditions on which goods or services are provided or supplied;

horizontal market sharing; and

restrictive tender practices.

The four last practices are based on collusion (an agreement, arrangement or understanding), whereas resale price maintenance can occur without collusion;

(b) provision be made for the continuation of individually recommended resale prices;

(c) on account of the function of professional supervision and professional ethical codes provision be made for non-enforceable recommended fees and recommended conditions for supplying a professional service by members of an organised profession;

(d) general exemptions from the prohibition be allowed in respect of -

(i) company group relations (and mutatis mutandis where a close corporation is used) where separate legal entities are involved in the collusion but the collusion is irrelevant for competition policy in view of the economic unity of the companies concerned; and

(ii) collusion for the purpose of exporting commodities or supplying services abroad;

(e) provision be made in the notice for appropriate exemptions in specific cases which are approved in writing by the Minister at the recommendation of the Board. Flexibility in the form of exceptions is essential in the light of remarks made in the introduction to this chapter. A clear need for flexibility exists in four cases. In the first place account must be taken of the possibility that an understanding might be desirable where it enables small and medium-sized businesses to compete with large ones. Secondly, an arrangement to adjust production capacity to a significant and lasting reduction in the demand may be justified. Thirdly provision must be made for particular circumstances justifying a restriction of competition in the public interest. In the fourth place it is of great importance that parties involved in existing practices should be enabled by means of temporary exemptions to adjust to changed circumstances and to reorganise their business affairs. It is an important policy consideration to avoid disruption and to phase in the new dispensation wisely and reasonably;

(f) Notice R.1038 of 25 June 1969 in which the present prohibition of resale price maintenance is contained be repealed by the proposed notice; and

(g) the notice should explicitly be made applicable to the State itself in terms of the provisions of section 2(3) of the Act. The omission of such a provision would be unjustifiable.

452./...

452. A proposed notice, drafted in accordance with all the above recommendations, appears in Annexure A of the report.

(SGD) S J NAUDé
CHAIRMAN

(SGD) R W BURTON
MEMBER

(SGD) J H DE LOOR
MEMBER

(SGD) J DE V GRAAFF
MEMBER

(SGD) B S KANTOR
MEMBER

(SGD) S J KLEU
MEMBER

(SGD) R P G KOTZE
MEMBER

(SGD) J A LAMBRECHTS
MEMBER

(SGD) A J MARAIS
MEMBER

*(SGD) D J MOUTON
MEMBER

(SGD) C L STALS
MEMBER

(SGD) S J J VAN RENSBURG
MEMBER

(SGD) F N VERMEULEN
DIRECTOR

PRETORIA

9 August 1985

* At the commencement of the investigation this member disclosed his interest in respect of certain institutions which may eventually request an exemption from a prohibition. At the Chairman's request and with the knowledge of the Board the member continued his participation in discussions of the general principles contained in this report.

(R4/1/2/2/10)

ANNEXURE

PROPOSED NOTICE

MAINTENANCE AND PROMOTION OF COMPETITION ACT, 1979

1. I, Dawid Jacobus de Villiers, Minister of Trade and Industry, acting by virtue of the powers vested in me by section 14(5) of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979) (hereinafter referred to as "the Act"), with the concurrence of the Minister of Finance, and by virtue of a general investigation in terms of section 10(1)(c) of the Act, hereby declare any agreement, arrangement, understanding, business practice or method of trading referred to in paragraph 2 to be unlawful.

Prohibition

2. Subject to the provisions of paragraphs 8 and 9, no person shall enter into, be a party to or continue to be a party to any agreement, arrangement, understanding, business practice or method of trading which in terms of this notice constitutes -

(a) resale price maintenance;

(b) horizontal price collusion;

(c) horizontal collusion on conditions of supply;

(d) horizontal collusion on market sharing; or

(e) collusive tendering.

Resale price maintenance

3. "Resale price maintenance" referred to in paragraph 2(a) -

(a) means any agreement, arrangement, understanding, business practice or method of trading which has, or is likely to have, the effect of directly or indirectly compelling or inducing a reseller of any commodity to charge a particular, or a particular minimum, resale price, whether or not such price is determined or is to be determined by calculation or by reference to any discount; and

(b) excludes the recommendation, by an individual supplier, of a resale price as a guide for the convenience of the reseller who may reduce such price at his discretion and which is not directly or indirectly enforced by means of the withholding of supplies, the denial of distribution rights or by means of any discriminatory sales condition or a penalty or by any other method likely to have such effect: Provided that where a recommended resale price appears on or in relation to a commodity, the words "recommended price" shall appear with such price.

Horizontal price collusion

4. "Horizontal price collusion" referred to in paragraph 2(b) -

(a) means any agreement, arrangement or understanding between or among two or more suppliers of any commodity, or of substantially similar commodities, to -

(i) charge a particular, or a particular minimum, price; or

(ii) use in any way, any price as a recommended price or as a guide,

whether or not such price is determined or is to be determined by calculation or by reference to any discount;

(b)/...

(b) includes the use of an association or of a company, close corporation or other juristic person in which such suppliers have an interest, to effect the horizontal price collusion in any way; and

(c) excludes, in respect of a professional service by members of an organised profession, the issue of a tariff of recommended fees as a guide for the convenience of the members of such profession and which is not directly or indirectly enforced: Provided that -

(i) such profession or any rule of law, as a condition for membership, requires the members to have passed an examination in fields of study relevant to practising in that profession; and

(ii) such profession has a code of professional ethics empowering it to exclude from membership, or to set in motion a procedure to exclude from membership, those persons found guilty of improper performance of their duties or of conduct which is discreditable to their profession.

Horizontal collusion on conditions of supply

5. "Horizontal collusion on conditions of supply" referred to in paragraph 2(c) -

(a) means any agreement, arrangement or understanding between or among two or more suppliers of any commodity, or of substantially similar commodities, to supply, or to tender to supply in response to a call or request for tenders, such commodity or commodities -

(i) only on any particular condition or term; or

(ii) using any condition or term as a recommended condition or term or as a guide;

(b) includes the use of an association or of a company, close corporation or other juristic person in which such suppliers have an interest, to effect the horizontal collusion on conditions of supply in any way; and

(c) excludes, in respect of a professional service by members of an organised profession contemplated in paragraph 4(c), a recommendation which is not directly or indirectly enforced that such service be provided on a particular condition or term .

Horizontal collusion on market sharing

6. "Horizontal collusion on market sharing" referred to in paragraph 2(d) -

(a) means any agreement, arrangement or understanding between or among two or more suppliers of any commodity, or of substantially similar commodities, having the effect of dividing wholly or partially the market for such commodity or commodities between or among them -

(i) territorially;

(ii) in respect of customers or classes of customers;

(iii) quantitatively, by reference to the quantities or shares to be produced or supplied by each such supplier or by reference to any limitation of production facilities; or

(iv) in respect of technical factors relating to the commodities concerned; and

(b) includes the use of an association or of a company, close corporation or other juristic person in which such suppliers have an interest, to effect the horizontal collusion on market sharing in any way.

Collusive/...

Collusive tendering

7. "Collusive tendering" referred to in paragraph 2(e) means -

(a) any agreement, arrangement or understanding between or among two or more suppliers of any commodity that one or some or all of such suppliers shall not submit a tender in response to a call or request for tenders; or

(b) the submission by a supplier of any commodity, in response to a call or request for tenders, of a tender that is in any respect arrived at by agreement, arrangement or understanding between or among two or more suppliers, including the first mentioned supplier, of such commodity;

where the agreement, arrangement or understanding is not made known to the person calling for or requesting tenders at or before the time when any tender is made by any person who is a party to the agreement, arrangement or understanding.

Restriction of application

8. (1) The provisions of this notice shall not be so construed as to apply in respect of any agreement, arrangement, understanding, business practice or method of trading between or among -

(a) a holding company and its wholly-owned subsidiary, or between companies which are the wholly-owned subsidiaries of the same holding company;

(b) close corporations which have only the same person or persons as members;

(c) companies of which all the shares are held by the same person or close corporation, or between such close corporation and such companies; or

(d) persons in relation to -

(i) goods which are to be exported to any country other than Botswana, Lesotho, Swaziland, a state the territory of which formerly formed part of the Republic of South Africa and any territory within the Republic of South Africa in respect of which a Legislative Assembly has been established in terms of the National States Consitution Act, 1971 (Act 21 of 1971); or

(ii) any service to be rendered in any country other than the Republic of South Africa or those countries, states or territories referred to in (i) above.

(2) This notice shall not apply in respect of anything done in terms of any other law.

Exceptions

9. The provisions of this notice shall, to the extent specified by me in writing at the recommendation of the Competition Board in respect of a specific case, not apply in respect of any agreement, arrangement, understanding, busines practice or method of trading which -

(a) in the particular curcumstances enables small and medium-sized enterprises to be maintained and to compete against large enterprises despite their structural disadvantages owing to size;

(b) in the event of a lasting reduction in demand, which is not temporary or cyclical, for a commodity, brings about an adjustment of productive capacities to the demand in a manner reconcilable with the public interest;

(c) effects a restriction of competition and which, in the circumstances, is justified in the public interest; or

(d) has been in existence prior to the commencement of this notice and the termination of which by such commencement, without a reasonable opportunity for the parties thereto to rearrange their business affairs, is likely to cause disruption in the industry concerned.

Definitions

10. In this notice -

"close corporation" means a close corporation registered in terms of the Close Corporations Act, 1984 (Act 69 of 1984);

(b)/...

(b) "commodity" includes any make or brand of any commodity, any book, periodical, newspaper or other publication, any building or structure and any service, whether personal, professional or otherwise, including any storage, transporation, insurance or banking service;

(c) "company", "holding company" and "wholly-owned subsidiary" shall have the meaning assigned to them in section 1 of the Companies Act, 1973 (Act 61 of 1973);

(d) "Competition Board" means the Competition Board established by section 3 of the Act;

(e) "price" includes any rental, any fee in respect of a professional or other service, the rate of interest in respect of any loan or debt, the premium in respect of any insurance or any other consideration in respect of a commodity;

(f) "supplier" includes, unless the context otherwise indicates, the manufacturer, producer, seller, and reseller of goods, any supplier of goods by way of lease or hire or otherwise and the provider of any professional, financial or other service.

Withdrawal of notice

11. Government Notice No R.1038 of 25 June 1969 is hereby withdrawn.

State is bound

12. Pursuant to the provisions of section 2(3) of the Act, the provisions of this notice shall, except in so far as criminal liability is concerned, bind the State in so far as the State is concerned in the manufacture and distribution of commodities.

BELANGRIK!!

Plasing van tale:

Staatskoerante

1. Hiermee word bekendgemaak dat die omruil van tale in die *Staatskoerant* nie meer kwartaalliks gedoen word nie, maar dat dit jaarliks sal geskied, beginnende vanaf 1 Oktober tot 30 September, elke jaar.

2. Vir die tydperk 1 Oktober 1985 tot 30 September 1986 word Afrikaans EERSTE geplaas.

3. Hierdie reëling word in ooreenstemming gebring met dié van die Parlement waarby koerante met Wette ens. die taalvolgorde deurgaans behou vir die duur van die sitting.

4. ***Dit word dus van u, as adverteerder, verwag om u kopie met bogenoemde reëling te laat strook om onnodige omskakeling en stylredigering in ooreenstemming te bring.***

—oOo—

IMPORTANT!!

Placing of languages:

Government Gazettes

1. Notice is hereby given that the interchange of languages in the *Government Gazette* no longer takes place quarterly, but that it will now be done annually, starting on 1 October until 30 September, every year.

2. For the period 1 October 1985 to 30 September 1986, Afrikaans is to be placed FIRST, changing annually hereafter.

3. This arrangement is to bring the *Government Gazettes* in conformity with Gazettes containing Acts of Parliament etc. where the language sequence remains constant throughout the sitting of Parliament.

4. ***It is therefore expected of you, the advertiser, to see that your copy is in accordance with the above-mentioned arrangement in order to avoid unnecessary style changes and editing to correspond with the correct style.***

INHOUD

CONTENTS

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