

## GENERAL NOTICES

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### NOTICE 294 OF 2010

#### NOTICE IN TERMS OF SECTION 10(7) OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED): REFUSAL TO GRANT AN EXEMPTION

Notice was published in the Government Gazette of 16 October 2009 (Government Notice 1369 of 2009) regarding an application received from Allens Meshco (Pty) Ltd for an exemption in terms of section 10 of the Competition Act, No 89 of 1998, as amended ("the Act").

In its exemption application Allens Meshco sought a two year exemption to discuss prices and exports in relation to wire products; and prices, margins and vertical agreements or industry restructuring in relation to the supply of wire rod, with Cape Gate (Pty) Ltd, Consolidated Wire Industries (Pty) Ltd,<sup>1</sup> ArcelorMittal South Africa Ltd and Scaw South Africa (Pty) Ltd. The application was premised on the applicant's assertions that the discussions and agreements are required to achieve the objectives contained in section 10(3)(b)(i), (ii), (iii) and (iv) of the Act, which are:

- The maintenance or promotion of exports (section 10(3)(b)(i)); and
- Promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive (section 10(3)(b)(ii)); and
- Change in productive capacity necessary to stop decline in an industry (10(3)(b)(iii)); and
- The economic stability of any industry designated by the Minister of Trade and Industry, after consulting the Minister responsible for that industry (10(3)(b)(iv)).

In its evaluation, the Commission found that the exemption sought by the applicant may constitute a prohibited practice in terms of section 4(1)(b)(i), 4(1)(b)(ii) and

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<sup>1</sup> Consolidated Wire Industries ("CWI") is owned by ArcelorMittal and Anglo South Africa Capital (Pty) Ltd, and Scaw South Africa (Pty) Ltd is responsible for the management of CWI

5(1) of the Act. This is based on the fact that the exemption sought by the applicant involves discussions on margins, prices, export volumes and export markets, as well as vertical integration of the industry. These discussions would take place between Allens Meshco, its suppliers and their subsidiaries who are also the applicant's competitors.

The Commission has decided not to grant the exemption for the following reasons:

Firstly, with regards to section 10(3)(b)(i), the Commission found that exports could be promoted without coordinated discussions. Currently, the South African Wire Association and the South African Wire Business Council do research on possible export markets and the marketing for the wire industry, with the dti's assistance. This seems to go some way in promoting exports without requiring firm level discussions on prices to these markets. Further, information at the Commission's disposal does show that South African exports of wire and wire products have been on the rise, at least up to 2008.

With regards to section 10(3)(b)(ii), the Commission found that Allens Meshco does not meet the statutory definition of a small business as defined in the National Small Business Act, 102 of 1996, as amended.

In the motivation for an exemption on section 10(3)(b)(iii) grounds, the Commission found that the applicant was not able to substantiate the exemption on section 10(3)(b)(iii) grounds as no independent information reflecting a decline in the industry was put forward. In fact other industry players suggested that Allens Meshco may feel threatened by competition given that its preferential supply agreement with ArcelorMittal has now come to an end.

It was however confirmed that the wire industry is characterized by fairly low margins, and some firms have suffered financial losses in the past, or continue to do so. However, this on its own was not enough to show an industry in decline as

the financial losses incurred did not necessarily occur over the same period for all parties, nor is this peculiar to the wire industry.

In relation to job losses, the Commission found that indeed there have been job losses in various firms in the industry, however these were possibly attributable to other factors in the industry such as the ArcelorMittal supply agreement which benefitted the applicant. Allens Meshco also seems to have cut jobs as a result of a reduction in sales at least in one instance. However a reduction in sales could be as a result of a number of things and not just a declining industry.

Further, looking at unemployment trends in the manufacturing industry as a whole, the Commission is of the view that the job losses in the wire industry may be in line with the general decline in the manufacturing industry as a whole, due to various pressures including the global recession.

The Commission did not dwell on the proposal put forth to have the industry rationalized/restructured into three vertically integrated firms as this seems to go beyond the Commission's mandate, unless firms individually consider applying for a merger transaction.

Finally, in terms of section 10(3)(b)(iv), we did not evaluate the application in terms of this section as the industry has not been designated by the Minister of Trade and Industry as required by the Act.

The Commission also took into account the submissions from various industry players who all, with the exception of ArcelorMittal, advised that the exemption application should be rejected on the basis that it did not meet the requirements for granting an exemption.

In previous investigations, the Commission has also raised concerns about the history of collusion in the wire industry involving Allens Meshco, and has investigated and referred some of these matters to the Tribunal for adjudication.

Notice is further hereby given in terms of section 10(8) of the Act that the firm concerned, or any other person with a substantial financial interest affected by the decision of the Commission, may appeal to the Competition Tribunal in the prescribed manner.

Any queries in this regard should be directed to:

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In correspondence kindly refer to case number 2009Jan4218.