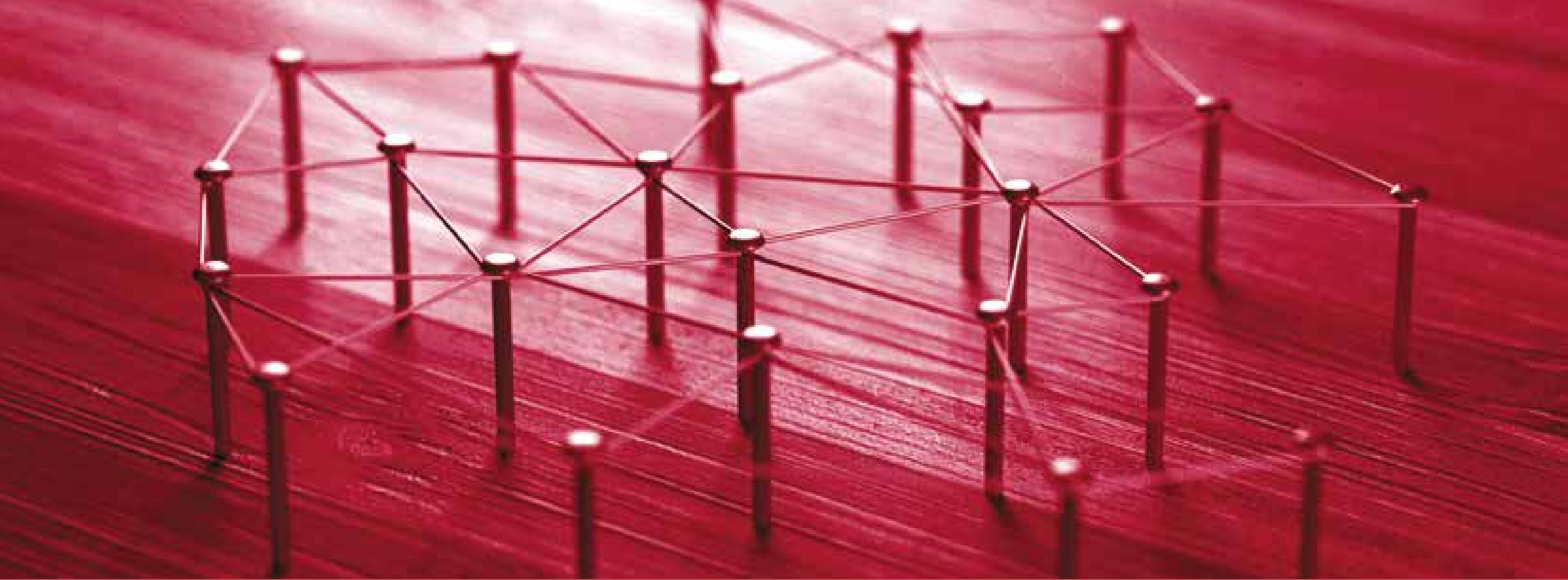

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The International Comparative Legal Guide to:

Merger Control 2019

15th Edition

A practical cross-border insight into merger control issues

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EDITORIAL

Welcome to the fifteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 55 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Nigel Parr of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

There are three specialised bodies each tasked with distinct functions, namely the Competition Commission ("**Commission**"), the Competition Tribunal ("**Tribunal**") and Competition Appeal Court ("**CAC**") established to implement the merger control regime in South Africa.

The Commission is the body tasked with investigating intermediate and large mergers (and small mergers if these are notified). After considering an intermediate merger, the Commission must approve the merger with or without conditions, or prohibit the merger. The Commission is not authorised to make a determination in relation to large mergers and must, after investigation, refer the large merger, together with a written recommendation to the Tribunal and the Minister of Economic Development ("**Minister**").

The Tribunal is the adjudicative body and may hear appeals from, or review any decision from the Commission that may be referred to it. When the Tribunal receives a referral of a large merger and recommendation from the Commission, the Tribunal must consider the merger and recommendation and, after a public hearing, approve the merger with or without conditions, or alternatively prohibit the merger. The Tribunal can also reconsider a merger decision of the Commission if a party requests it to do so.

The CAC has a similar status to a High Court and may review any decision of the Tribunal, or consider an appeal from the Tribunal in respect of a final decision, other than a consent order, or any of its interim or interlocutory decisions that may, in terms of the Competition Act, be taken on appeal.

A decision of the CAC can be appealed to the Constitutional Court if constitutional issues or an *arguable point of law of general public importance arises*.

The Minister is notified of intermediate and large mergers and the Minister is entitled to participate in merger proceedings in order make representations on any public interest ground. Pending amendments to the Competition Act will permit the Minister to appeal a merger decision by the Tribunal to the CAC, a power the Minister does not currently have.

1.2 What is the merger legislation?

The merger control regime in South Africa is regulated by Chapter 3 of the Competition Act, 1998 ("**Competition Act**").

Whilst the Competition Act stipulates the merger notification requirements, the merger thresholds are set out in the Determination of Merger Thresholds and Method of Calculation Notice, published in Government Gazette Number 40902 on 9 June 2017 ("**Merger Threshold Notice**").

Substantial changes are proposed to the Competition Act, including to the merger control provisions, in the Competition Amendment Bill, 2018 ("**Amendment Bill**"). The parliamentary process is ongoing but it is anticipated that the Amendment Bill will be promulgated in the near future.

1.3 Is there any other relevant legislation for foreign mergers?

There is no separate foreign investment control legislation, but the Amendment Bill introduces a requirement into the Competition Act for mergers involving a foreign acquiring firm and which may have an adverse effect on the national security interests of South Africa to be notified to a Committee to be constituted by the President of South Africa.

The Amendment Bill provides that the Committee will consider and decide, within 60 days of receipt of a notice of the merger, whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of South Africa. This time period can be extended by the President on good cause shown. In terms of the proposed amendments, the Commission and the Tribunal may not consider the merger if the foreign acquiring firm failed to notify the Committee. Furthermore, where the Committee has prohibited a merger, any decision made by the Tribunal or the Commission approving the merger will be automatically revoked.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Other South African legislation regulates mergers in particular sectors, including the insurance, banking and telecommunications industries.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

A transaction is automatically notifiable as a merger to the competition

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authorities in South Africa if it falls within the definition of a merger in terms of the Competition Act and if the monetary thresholds for compulsory notification are met.

A merger is defined in section 12(1) of the Competition Act as the direct or indirect acquisition or establishment of control over the whole or part of the business of another firm. Mergers can be achieved in any manner, including through:

- purchase or lease of the shares, an interest or assets of the other firm in question; or
- amalgamation or combination with the other firm in question.

Section 12(2) of the Competition Acts provides a list of the circumstances in which a person will acquire control of a firm. This includes where a person beneficially owns more than half of the issued share capital of the firm and is entitled to vote a majority of the votes that may be cast at a general meeting of the firm and/or is able to appoint or to veto the appointment of a majority of the directors of the firm.

The Tribunal has previously found that the list mentioned in section 12(2) of the Competition Act is not exhaustive. The Tribunal stressed that whether control is in fact acquired is a factual question. The fact that a transaction may not give the acquiring firm more than a 50% shareholding in the target firm does not mean that there has not been a change in control.

In the *Distillers* case (case number 08/CAC/May01), the CAC stated that "*the Act was designed to ensure that the competition authorities examine the widest possible range of merger transactions to examine whether competition was impaired and this purpose provides a strong pro-pointer in favour of a broad interpretation of the Act.…For this reason the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of market structure and in particular reduces the level of competition in the relevant market*".

This approach is embodied in section 12(2)(g) of the Competition Act, which refers to a person acquiring control when he or she "*has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)*" of the Competition Act.

The CAC has made some useful remarks regarding the ambit of section 12(2)(g) in the Caxton decision (case number 136/CAC/15):

- the 'policy' that is being materially influenced must relate to issues of strategy, which is usually guided by the board or the shareholders;
- the issue of 'materiality' of influence relates to the range of matters over which the power extends rather than the decisiveness of each matter; and
- 'ability' refers to both a power to do something and a power to prevent something from being done.

In *Ethos* (case number [2003] 2 CPLR 371), the Tribunal held that:

- more than one party can simultaneously exercise control over a company for purposes of section 12 of the Act;
- a firm can at the same time be subject to joint control and sole control; and
- a change from joint to sole control triggers the obligation to notify a transaction.

More recently in *Hosken Consolidated Investments* (case number 154/CAC/Sept17), the CAC found that where a shareholder already has sole control by virtue of section 12(2)(g) of the Competition Act, for example, and no other shareholder has any form of control or decisive influence, that shareholder will not need to re-notify a merger if it crosses a bright line (i.e. by acquiring more than 50% of the shares, for example).

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, the acquisition of a minority shareholding can amount to a merger as defined in the Competition Act if the minority shareholding is coupled with minority protection rights that will confer control on the acquirer or if it, in fact, acquires control (see question 2.1).

The competition authorities have previously found that a minority shareholder that has the ability to approve or veto matters of strategic importance such as the hiring or firing of senior employees and the approval of the budget or business plan, for example, will result in a minority shareholder acquiring section 12(2)(g) control.

2.3 Are joint ventures subject to merger control?

The definition of a merger in section 12(1) of the Competition Act does not expressly mention joint ventures, and joint ventures are not exempted from any portion of the Competition Act. Therefore, if the joint venture results in a firm acquiring control of all or the part of another firm's business, it will be considered a merger and will require notification if the thresholds are met. As such, depending on the way in which a joint venture is structured, it may constitute a merger.

In light of the uncertainty on which joint ventures ought to be subject to merger control in South Africa, the Commission issued a non-binding practitioner update which sets out the approach the Commission is likely to adopt in respect of joint ventures. The practitioner update includes examples of joint venture structures which may trigger notification, such as where two or more firms jointly form a new entity for a specific purpose, or where two or more firms acquire joint control over an existing firm or business. The practitioner update is available at http://www.compcom.co.za/wp-content/uploads/2014/09/Practitoner-Update-Joint-Ventures-Published-version.doc.

2.4 What are the jurisdictional thresholds for application of merger control?

As noted above, there must be an acquisition of control to constitute a merger. Mergers are classified as small, intermediate or large, based on the financial thresholds for notification.

Small mergers are not required to be notified to the Commission and may be implemented without approval unless notification is specifically requested by the Commission.

Intermediate and large mergers require notification to the Commission by the merging parties and may not be implemented until approved.

An intermediate merger is one where the 'combined figure' is ZAR600 million or more and the asset value in South Africa or the turnover value in, into or from South Africa of the target firm (depending on which is the highest) in the preceding financial year is equal to or more than ZAR100 million.

A large merger is one where the asset value in South Africa or the turnover value in, into or from South Africa of the target firm (depending on which is the highest) in the preceding financial year is equal to or more than ZAR190 million and the "combined figure" is ZAR6.6 billion or more.

The 'combined figure' is the combined asset values in South Africa, or turnover values in, into or from South Africa, of the acquiring firm (being the primary acquiring firm, its controllers (up to the ultimate controlling entity) and all subsidiaries in the group) and the target firm in their respective preceding financial years or the assets

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of the one and the turnover of the other, whichever combination reaches the highest figure.

Importantly, both legs of the inquiry must be met. Thus, if the asset/turnover value of the target firm is ZAR100 million or more, but the combined figure is not as much as ZAR600 million, one would be dealing with a small merger, which would not be automatically notifiable. Similarly, if the combined figure is ZAR600 million or more, but the asset/turnover value of the target is less than ZAR100 million, the merger is a small one.

2.5 Does merger control apply in the absence of a substantive overlap?

All transactions that meet the definition of a merger and fall within the thresholds for an intermediate or large merger must be notified to the competition authorities even in the absence of a substantive overlap.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

A foreign-to-foreign transaction is notifiable if it is a merger as defined (see question 2.1) and meets the financial thresholds for automatic notification (see question 2.4). It is not necessary for the target firm to have a physical presence in South Africa for notification to be triggered. Sales made by the target firm into South Africa will be sufficient to trigger a notification requirement if the financial thresholds are met.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

In terms of section 18(2)(a) of the Competition Act, the competition authorities may not make a decision if the merger constitutes an acquisition of shares for which permission is required in terms of section 37 of the Banks Act, 1990 (**Banks Act**), or a transaction for which consent is required in terms of section 54 of the Banks Act or section 29 of the Co-operative Banks Act, 2007 (**Co-operative Banks Act**). In these circumstances, the Minister of Finance must certify that the merger is a merger which is contemplated in section 18(2)(a) and it is in the public interest that the merger is subject to the jurisdiction of the Banks Act or the Co-operative Banks Act.

Since the Minister of Finance will need to certify that the merger falls within the jurisdiction of the Banks Act or Co-operative Banks Act, the merger must, as a matter of course be notified to the competition authorities. The filing fee will, however, be refunded if the competition authorities are not entitled to make a decision in respect of the merger.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Whether a merger implemented in stages constitutes a single transaction will ultimately depend on the factual position. Accordingly, provided the intermediary steps are all part of the same transaction and cannot be commercially de-linked, the competition authorities are likely to consider that the various stages constitute a single transaction.

The timing applicable to the implementation of the various stages plays an important role. The Tribunal has, in a number of decisions, approved the acquisition of joint control (by virtue of the acquisition of a minority shareholding together with minority protection rights) and sole control (by virtue of the acquisition of the remaining shares through the exercise of a call option to be exercised in the future), provided that the call option was exercised within an 18-month period. To the extent that the call option was not exercised within the relevant period, which is ultimately determined at the competition authorities' discretion, the acquisition of the remaining shares would need to be separately notified and approved before the exercise of the call option.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

In terms of section 13A of the Competition Act, a party to an intermediate or large merger must notify the Commission of that merger.

There is no legislated time period within which the parties to the merger must notify the Commission, but an intermediate or large merger cannot be implemented until the merger has been approved with or without conditions.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

The Commission has issued a practitioner update to advise practitioners of their approach to the application of merger provision to risk mitigation financial transactions (available at http://www.compcom.co.za/wp-content/uploads/2014/09/practitioner-update-4-risk-mitigation-transactions.pdf).

Whilst risk mitigation techniques, for example, where a bank or state-owned finance institution acquires control over a business on default by the debtor, technically fall within the ambit of the merger control provisions, the Commission recognises that the principal objective of risk mitigation techniques is to secure the interests of the financier in the finance transaction and to enable the financier to recoup the capital advanced to the debtor. In most instances, the intention is not to retain the investment but rather to onsell.

The Commission has therefore adopted the approach in terms of which certain risk mitigation transactions, namely the general exercise of a security interest, sale and leaseback transactions and government concessions in infrastructure development, where a bank or state-owned finance institution acquires an asset or controlling interest in a firm in the ordinary course of its business in providing finance based on security or collateral, the Commission would not require notification of the transaction at the point at which the asset is acquired. Similarly, if on default by the firm, the bank or state-owned finance institution takes control of the asset or controlling interest in that firm with the intention to safeguard its investment or onsell to another firm or person to recover its finance, a notification would not be required.

If, however, the bank or state-owned finance institution fails to dispose of the assets or the controlling interest within a period of 24 months, notification is required on the expiry of the 24-month period.

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3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The Competition Act stipulates that penalties of up to 10% of the annual turnovers in, and exports from, South Africa in the preceding financial year can be imposed on the parties to a merger for failing to give notice of a merger. The notifiable merger cannot be implemented without the required approval, and as such, the parties could also be ordered to unwind the merger.

3.4 Is it possible to carve-out local completion of a merger to avoid delaying global completion?

The Competition Act does not deal specifically with carve-out arrangements in order to avoid delaying global completion.

In practice, however, arrangements of this nature have been successfully implemented in various transactions in the past, on the basis that the Competition Act extends only to "all economic activity within, or having an effect within" South Africa. It is therefore arguable that, to the extent that South Africa can be "carved out" from the implementation of the merger elsewhere, no contravention of the Competition Act will arise (because the implementation of the merger in other jurisdictions will have no "effect" in South Africa).

Importantly, whether a carve-out is practically possible will ultimately depend on the business arrangements in South Africa. Where activities are conducted through subsidiaries or divisions located in South Africa, a carve-out is more practical than in circumstances where sales are made into South Africa and the transaction is a share-sale.

Depending on the specific structure, it may therefore be challenging to implement a carve-out structure that is defensible.

3.5 At what stage in the transaction timetable can the notification be filed?

Notification can be made to the Commission at any time.

It is permissible to submit a merger filing on a term sheet or draft agreement, however, the material terms of the transaction should be settled.

The competition authorities will consider and approve the transaction that is notified. Accordingly, if any material terms change after approval has been obtained, depending on the nature of the amendments, a new notification may be required.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The Competition Act prescribes different time periods for the review of intermediate and large mergers.

The Commission has up to 60 business days to review intermediate merger filings.

In terms of the Competition Act, the Commission has an initial 20-business-day period to investigate an intermediate merger but this review period may be extended by the Commission for a further period of up to 40 business days subsequent to the issuance of an extension certificate.

If, on the expiry of the 20-business-day period, or the extended period, the Commission has not issued any certificate evidencing its determination, then the Commission will be deemed to have approved the proposed merger.

In contrast, there is no time limit for the review of large mergers.

The Commission has an initial 40-business-day period within which to review the transaction, and make a recommendation to the Tribunal. This period may, however, be extended for up to 15 business days at a time for an unlimited number of times. In the event that the Commission requires an extension, it must apply to the Tribunal. In practice, the Commission requests an extension from the parties which obviates the need for a formal application to the Tribunal.

Once the Commission makes its recommendation to the Tribunal, a pre-hearing must be scheduled within 10 business days, although this period too can be extended.

The Tribunal must then hold a hearing to consider the proposed transaction. During this hearing, interested parties (for example, competitors, customers, or employees) may be granted the opportunity to make submissions and all hearings are public. The timetable for the procedures leading up to and the actual hearing of the matter by the Tribunal will be scheduled at the pre-hearing referred to above.

After the hearing, the Tribunal has to decide whether to confirm or overrule the recommendation of the Commission. The Tribunal must approve, approve subject to conditions, or prohibit the merger within 10 business days after the end of the hearing, and within 20 business days thereafter, issue written reasons for its decision and publish a notice of its decision in the Government Gazette (official publication used by the government as an official way of communicating to the general public).

A decision of the Tribunal can be appealed to the CAC by the merging parties. Under the Amendment Bill the Commission and the Minister will also have the right to appeal.

The time periods will run without interruption unless a notice of incomplete information or a demand for corrected information is issued. In these circumstances, the notification requirements will not have been met and the time periods will only start running on the day following receipt of the outstanding or corrected information.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The Competition Act stipulates that parties to a notifiable merger may not implement that merger prior to receiving approval from the competition authorities. Penalties of up to 10% of the annual turnovers in, and exports from, South Africa in the preceding financial year can be imposed. In addition, the competition authorities can also order that the transaction be unwound, declare void any provision of the agreement or can order divestiture of certain assets.

3.8 Where notification is required, is there a prescribed format?

Yes. A merger notification must be made in the prescribed manner and form.

A joint merger filing must be made by one of the parties and must include:

- A Form CC4(1) which must declare whether the merger is small, intermediate or large. The Form CC4(1) is accompanied by schedules 1 and 2 and includes the following information:

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- Schedule 1: Identification of the acquiring or target firms, and of all trade unions, or employee representatives of the primary acquiring and target firms.
- Schedule 2: A summary of the effect of the proposed merger on employment.

- A Form CC4(2) statement of merger information for each of the primary acquiring firm and the primary target firm. The Form CC4(2) is accompanied by schedules 3 to 6 and includes the following information:
  - Schedule 3: Identification of the party filing the notice including details of all controllers and subsidiaries and financial information.
  - Schedule 4: Details of the proposed transaction.
  - Schedule 5: Details of the activities of the party filing the notice and information on customers and competitors.
  - Schedule 6: Information on any business relationships between the acquiring and target firms.
- Whilst not strictly speaking necessary, a competitiveness report providing a detailed market analysis is usually submitted.
- The Commission has issued a guideline document of the information it requires in these forms and schedules as well as the required supporting documents. In practice, it may issue a notice of incomplete filing if the information specified in the guideline is not fully provided.

Copies of the relevant forms are available at http://www.compcom.co.za/forms/.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There is no fast track process available to merging parties or short-form notification. The Commission has, however, published service standards applicable to the mergers and acquisitions division. The 2015 Mergers & Acquisitions Service Standards explains that the Commission will categorise mergers into three phases ranging from non-complex to very complex. Depending on the categorisation, the Commission aims to complete its review within the following time frames:

- Phase 1 (non-complex)

The Commission will aim to review a phase 1 merger within 20 business days. These are mergers in which there is little or no overlap between the activities of the merging parties, no public interest issues and a simple control structure.

- Phase 2 (complex)

The Commission will aim to review a phase 2 merger within 45 business days. These are mergers between direct or potential competitors, or between customers and suppliers, where the merging parties have a combined market share of more than 15%, or where public interest issues arise.

- Phase 3 (very complex)

The Commission will aim to review a phase 3 merger within 60 business days for an intermediate merger and 120 days for a large merger. Phase 3 mergers are likely to result in a substantial prevention or lessening of competition (including any transactions where the combined market share of the merging parties is more than 30%).

3.10 Who is responsible for making the notification?

In terms of section 13A of the Competition Act, a party to an intermediate or large merger must notify the Commission of that merger.

Rule 27 of the Rules for the Conduct of Proceedings in the Competition Commission (**Commission's Rules**) states that a joint merger notification must be made in a single filing by one of the primary firms (i.e. either the acquiring or target firm). There are circumstances where a separate merger notification may be required, such as a hostile takeover. Rule 28 of the Commission's Rules provides the procedure to follow for separate merger notification.

3.11 Are there any fees in relation to merger control?

The competition authorities charge merging parties a fee for analysing a merger. The filing fee for an intermediate merger is ZAR150,000 and for a large merger, ZAR500,000. No VAT is payable.

If a small merger is notified to the Commission, no fee is payable.

The filing fee must be paid (and have cleared in the Commission's account) on the day that the merger notification is submitted in order for the filing to be complete.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The Competition Act does not contain any specific provisions in relation to public offers. The normal procedures will apply.

3.13 Will the notification be published?

Prior to submitting the notification to the Commission, the parties must provide a copy of the non-confidential version of the merger filing to any registered trade union representing a substantial number of the employees; or an employee representative, of the acquiring and target firms.

In addition, as part of its investigation, the Commission will engage with third parties in order to obtain their views on the proposed transaction. The fact of the transaction will be disclosed but third parties do not ordinarily receive copies of the filing. If a request for the filing is made, the merging parties are usually informed, and a non-confidential version is made available.

The fact of the transaction is also published on the Commission's website, and the decision is published in the Government Gazette and a summary of the decision in the Commission's media releases and other publications such as the Annual Report.

Where the transaction constitutes a large merger, a public hearing will take place and the reasons for the decision will be published on the Tribunal's website.

No information that has been claimed as confidential (unless the Tribunal makes a decision that the information is not confidential) can be made available to any third party, or included in any publication. In terms of the Amendment Bill, the Commission will be the decision-maker on when information constitutes confidential information.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The competition authorities must determine "whether or not a merger is likely to substantially prevent or lessen competition". The

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competition authorities seek the relevant facts that will enable them to establish the likely impact of a proposed merger on competition in the relevant market(s). Therefore, the competition authorities will need information regarding the structure of the transaction, as well as the markets being affected (usually, the product and geographic markets in which the activities of the merging parties overlap). The factors that the competition authorities will consider are:

- the actual and potential level of import competition in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration, and history of collusion, in the market;
- the degree of countervailing power in the market;
- the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- the nature and extent of vertical integration in the market;
- whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
- whether the merger will result in the removal of an effective competitor.

The Amendment Bill, if implemented in its current form, will also require the competition authorities to consider:

- the extent of ownership by a party to the merger in another firm or other firms in related markets;
- the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and
- any other merger engaged in by a party to a merger for such period as may be stipulated by the Commission.

In most instances where a merger has been prohibited on the basis that it will lead to a substantial prevention of lessening of competition, this has been as a result of the merger creating or entrenching a dominant position. For example, in the intermediate merger between Imerys and Andalusite Resources (case number 147/CAC/Oct16), the proposed transaction would change the structure in the domestic market from a duopoly to a monopoly. In the absence of countervailing pro-competitive gains or public interest considerations, the CAC found that a prohibition rather than conditional approval was a legitimate choice of remedy.

4.2 To what extent are efficiency considerations taken into account?

If the competition authorities conclude that the proposed transaction is likely to substantially prevent or lessen competition in the relevant market(s), the competition authorities must then consider whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain, which will be greater than the effects of the lessening or preventing of competition. Even if the merger cannot be justified on these grounds, the Competition Act requires the competition authorities to determine whether or not the merger can be justified on substantial public interest grounds (see question 4.3). Anticompetitive mergers are rarely approved only on efficiency grounds.

In the large merger between *Tongaat-Hulett and Transvaal Suiker Beperk* (case number 83/LM/Jul00), the Tribunal found that an efficiency gain contemplated in the Competition Act is one that may compensate for the anti-competitive consequences of a merger that otherwise falls foul of the Competition Act. This may include "*new products or processes that will flow from the merger of the two companies, or that identifies new markets that will be penetrated in consequence of the merger, markets that neither firm on their own would have been capable of entering, or that significantly enhances the intensity with which productive capacity is utilised*". The Tribunal stressed that the above is by no means a closed list, but merely demonstrates that the efficiencies which were put forward by the merging parties fell outside the ambit of what is required to be demonstrated and fell into the ambit of "*firm level commercial gain*".

Ultimately, the merging parties were unable to show that the pro-competitive gains outweighed the anti-competitive effect of the merger and the transaction was prohibited. The following is instructive of the competition authorities' view on the high standard of proof in demonstrating pro-competitive gains:

> "*Note that, in balancing a lessening of competition with pro-competitive gains, the only limit drawn by the Act is that the claimed efficiencies, in addition to the offsetting the effects of a lessening of competition, should be attributable to the merger and that, in the absence of the merger, would not have occurred. However, despite the absence of a clear set of criteria in effecting the trade off between a lessening of competition, on the one hand, and pro-competitive gains, on the other, we, nevertheless, hold that an accurate reading of the Act requires us to set a high standard for establishing possible countervailing efficiency gains.*"

In light of the difficulty in demonstrating that the pro-competitive gains outweigh the anti-competitive effect, in most instances, merging parties are amenable to accepting conditions aimed at addressing the anti-competitive effect.

4.3 Are non-competition issues taken into account in assessing the merger?

The impact of a merger on the public interest is a key consideration in assessing a merger in South Africa. When determining whether a merger can be justified on public interest grounds, the competition authorities will consider the effect that the merger will have on a particular industrial sector or region, on employment, on the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive and on the ability of national industries to compete in international mergers.

The competition authorities have imposed onerous conditions on merging parties where a merger has a substantial impact on the public interest. Some of the most onerous conditions imposed to date include those imposed on AB InBev and SAB (case number LM211JAN16). Some of the conditions imposed to alleviate public interest concerns included that a ZAR1 billion development fund will be set up to support smallholder farmers as well as to promote enterprise development, commitments by AB InBev to support the participation of small craft-beer producers in domestic markets, economic empowerment and access by small brewers to fridges and cooler space.

The public interest considerations will be broadened under the Amendment Bill. By way of example, the competition authorities will be required to consider the impact of the merger not only on small but also medium businesses, and in particular the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons to "*effectively enter into, participate in or expand within the market*". This will substantially broaden the analysis.

A further factor (in addition to the four already mentioned) will also be introduced namely "*the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market*". It bears mentioning that whilst the current legislation does not include a similar factor for consideration, the competition

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authorities have, in a number of mergers, imposed conditions to increase ownership by historically disadvantaged persons.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

As part of the Commission's investigation of a merger, it will, as a matter of course, liaise with customers, competitors and employees (usually through the trade union or employee representative) of the merging parties.

Any third party (such as a customer, competitor or trade union) can provide information to the Commission, which the Commission will consider, but if the third party seeks to formally participate in the process, a notice of intention to participate will need to be filed.

In addition to a third party, the Minister who wishes to participate in any intermediate or large merger; must file a notice of intention to participate within 10 days of receipt of the merger notification. In practice, the time periods are not strictly adhered to. As dealt with in question 1.1, the Minister can only make representations in respect of the public interest grounds in the Competition Act. These representations must be received before the Commission makes a decision, in respect of an intermediate merger, or a recommendation in the case of a large merger.

Once a party has indicated their intention to participate, they will be entitled to make representations at a Tribunal hearing, if applicable, and will be entitled to reasonable access to the record, subject to any confidentiality ruling (see question 4.6). In practice, the legal representatives of the intervening parties sign appropriate confidentiality undertakings which enable the legal representatives to have sight of confidential information to appropriately advise their clients.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

The Commission can, in terms of Rule 31 of the Commission's Rules, request additional information from the merging parties. This can either be done through an informal request for information, or the Commission can, in terms of section 13B(2) of the Competition Act, require the parties to provide information by serving a demand for information. In practice, information is usually gathered from the merging parties in terms of informal requests for information.

The Commission can, at any time during an investigation, summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject, to appear before the Commissioner, or a person authorised by the Commissioner to be interrogated. This power can be used to gather information from the merging parties or third parties. In practice, this tool is not necessary to gather information from the merging parties as it is in their best interest to provide the information to enable the Commission to finalise its merger investigation.

A failure to attend when summoned constitutes an offence in terms of the Competition Act. If convicted, the person that failed to attend or provide information may be liable for a fine not exceeding ZAR2,000 or imprisonment for a period of six months, or both.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Any person, when submitting information to the competition authorities may identify information that is confidential information. Confidential information is defined in the Competition Act as "*trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others*".

Once information has been claimed as confidential, the Commission is bound by the claim and cannot disclose the confidential information to any third party (this does not include the Minister, the Tribunal or the CAC). The Commission can at any time during the proceedings refer the claim to the Tribunal to determine whether the information is confidential information. The Tribunal may then determine that the information is not confidential, or if it finds that the information is confidential, it can make an appropriate order concerning access to the information. As mentioned in question 4.4, this is usually achieved by signing appropriate confidentiality undertakings. The Amendment Bill empowers the Commission to determine whether information is confidential. In practice, confidentiality of information is taken very seriously by the competition authorities and Commission employees will be subject to criminal sanctions for unauthorised disclosure.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

After consideration of a merger, the Commission or the Tribunal, as the case may be, must issue a certificate approving the merger, approving the merger subject to conditions, or prohibiting the merger.

In the case of an intermediate merger, the Commission must publish a notice of the decision in the Government Gazette. No written reasons for the decision are published, but a summary of the decision is usually published in the Commission's media releases and other publications such as the Annual Report. Written reasons are provided to the merging parties.

If the transaction is a large merger, the decision will similarly be published in the Government Gazette. Written reasons are also prepared and published on the Tribunal's website.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The Commission usually works with the merging parties in order to arrive at remedies (structural or behavioural) which are suitable to address the identified concerns.

Where agreement cannot be reached, the Commission may impose conditions in an intermediate merger. If the remedies are not acceptable to the parties, they can apply for the Tribunal to reconsider the decision.

In a large merger, the Commission will make a recommendation on the remedies which ought to be imposed, usually by agreement with the parties. The Tribunal will, however, be required to make a final determination.

In global mergers, the Commission will, as a matter of course, liaise with competition authorities in other jurisdictions early on in the process in order to better understand whether concerns have been identified in any other jurisdiction. Whilst the Commission may consider remedies imposed in other jurisdictions, such remedies will only be imposed in South Africa if the same theory of harm

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is identified. In addition, in light of the fact that public interest is a key factor for consideration in South Africa, remedies aimed at protecting the public interest, such as employment may be imposed, which may not similarly be required in other jurisdictions.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Where a merger will give rise to competition law or public interest concerns, remedies are imposed whether or not the transaction involves local players or is a foreign-to-foreign merger.

The likelihood of remedies being imposed may be higher in a foreign-to-foreign merger in light of the competition authorities' protectionist approach to the local economy.

Extensive remedies have been imposed over the years and include the creation of substantial funds to promote small businesses (ZAR200 million in the Wal-Mart/Massmart merger (case number 110/CAC/Jul11) and ZAR1 billion in the AB InBev merger), a moratorium on retrenchments, re-hiring of retrenched employees, ensuring local procurement is maintained or increased and undertakings to increase ownership by historically disadvantaged individuals, etc. The new foreign merger regime proposed by the Amendment Bill will likely see even more onerous conditions being imposed on foreign acquiring firms.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

There is no specified time period within which negotiation of remedies commences. It will, however, only be necessary for discussions to start once a theory of harm has been identified by the Commission.

In light of the fact that the Commission has a limited time period within which to consider an intermediate merger, where parties are aware that the proposed merger may give rise to competition or public interest concerns, remedies may be offered upfront by the parties to avoid any last minute rush and the potential for remedies to be imposed rather than agreed.

There are no specific procedural steps which are followed in the negotiation phase.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Divestment is not a common remedy in South Africa and is usually only imposed where there is a direct horizontal overlap in concentrated markets. Parties do often agree to divestment as a remedy. When it is imposed by the Tribunal as a remedy, it must be confirmed by the CAC.

The approach followed in determining whether a divestment remedy is required is fact-specific and particularly in agreed divestments, may include specific conditions as to the identity or nature of possible purchasers, for example.

In the intermediate merger between Monsanto and Bayer, the Commission found that the proposed merger resulted in the removal of an opportunity for Bayer to independently enter into South Africa and compete against Monsanto. In order to remedy this concern, the Commission imposed a condition that the merging parties sell the global Liberty Link technology and associated agro-chemicals business. In addition, it was required that the purchase of the technology must commercialise the technology and products in South Africa, alternatively oblige the potential purchaser to license the divested business to a South African third party to commercialise should the purchaser be unable to do so.

It was agreed in the Monsanto/Bayer merger that an independent third-party trustee would be appointed to oversee the divestiture.

5.6 Can the parties complete the merger before the remedies have been complied with?

The merger can be implemented provided it does not result in a breach of any of the remedies imposed.

If the merger is not capable of implementation without breaching an imposed remedy, the remedy will first need to be complied with.

5.7 How are any negotiated remedies enforced?

The conditions to the merger may also include monitoring mechanisms and the Commission can also pro-actively check that conditions are being adhered to.

If a firm has breached an obligation attached to a merger decision, the merger decision may be revoked by the Commission or the Tribunal as the case may be.

In addition, an administrative penalty of up to 10% of the annual turnovers in, and exports from, South Africa in the preceding financial year can be imposed for implementing a merger in contravention of a decision of the Commission or the Tribunal.

5.8 Will a clearance decision cover ancillary restrictions?

Merger clearance will not provide immunity from prosecution where a restraint in a merger agreement constitutes a prohibited practice.

It is common for the Commission to consider the restraint as part of its merger review and where the Commission has concerns, the merger is usually approved subject to a condition that the restraint be amended, for example, by reducing the duration.

In light of the fact that parties are not exempt from prosecution by virtue of the fact that the merger agreement was included in the merger notification, if there are any concerns, this should be highlighted so that the Commission can consider the relevant provisions. If the restraint is specifically considered, it is unlikely that the Commission will seek to prosecute the parties at a later date.

5.9 Can a decision on merger clearance be appealed?

In the case of an intermediate merger, the merging parties can bring an application for reconsideration to the Tribunal.

A decision of the Tribunal, whether a large merger decision or reconsideration decision can be appealed to the CAC and thereafter to the Constitutional Court if a constitutional or an arguable point of law of general public importance arises.

Usually, the merging parties will appeal a decision if the decision is unfavourable, but it is possible for a third party or the Minister to appeal to the CAC if they participated in the Tribunal proceedings.

The CAC is entitled to set aside the decision of the Tribunal, amend the decision or confirm the decision. The Amendment Bill proposes that the Minister can apply for leave to appeal if he or she did not participate or on grounds other than public interests grounds. The Amendment Bill also gives the Commission a right of appeal.

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5.10 What is the time limit for any appeal?

An appeal to the CAC must be filed within 20 days after notice of a decision of the Tribunal has been made.

5.11 Is there a time limit for enforcement of merger control legislation?

There is no time limit within which the competition authorities can enforce the merger control provisions.

In the case of a small merger, which is not automatically notifiable, the Commission can require the parties to notify the Commission of the small merger within six months after a small merger is implemented. After that period, the Commission cannot require parties to notify the small merger.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The Commission has a number of Memorandums of Understanding with various regulators globally. This includes the eSwatini Competition Commission, the Administrative Council for Economic Defense of Brazil, the Competition Commission of Mauritius, the Federal Antimonopoly Service, the Competition Authority of Kenya, the Directorate-General Competition of the European Commission, BRICS Competition Authorities and the Namibian Competition Commission.

It is common, in global mergers for the Commission to liaise with other competition regulators and for information to be shared. In some instances, waivers will be requested, but usually the exchange takes place in terms of the Memorandums of Understanding which permit the exchange of non-confidential information.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

The Commission is an active and efficient regulator.

The Commission publishes its results annually from a period of 1 April to 31 March each year.

According to the Commission's results for the year ended 31 March 2018, it finalised 388 mergers. Of the mergers finalised, 120 were large, 260 were intermediate and eight were small mergers.

The majority of the mergers finalised were approved without conditions (325). However, 52 mergers were approved subject to conditions, up from the 31 mergers approved subject to conditions in the previous financial year. In addition, the Commission prohibited 12 mergers, a more than 50% increase from the five mergers prohibited in the previous financial year.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

There are substantial amendments proposed to the Competition Act which are likely to come into force in the near future. The proposed amendments have been addressed in the preceding questions. It must, however, be noted that the Amendment Bill is not yet finalised and as such, some changes may be incorporated.

6.4 Please identify the date as at which your answers are up to date.

The answers are up to date as of 30 October 2018.

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Candice is a Senior Associate in the antitrust and competition team. She has extensive experience providing competition law opinions and obtaining merger clearances from the competition authorities within South Africa, other sub-Saharan African jurisdictions and COMESA. She has assisted with several large mergers in the industrial, manufacturing, insurance and mining sectors.

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Candice also advises clients in proceedings before sectoral regulators such as the National Energy Regulator of South Africa and the International Trade Administration Commission.

Candice is a contributor of articles on competition law and related issues to legal journals, including the Competition Policy International's Antitrust Chronicle, the Global Antitrust Compliance Handbook, The Private Competition Enforcement Review and the Public Competition Enforcement Review.

Candice joined the practice as a candidate attorney in January 2010, and holds both an LL.B. and LL.M. degree in business law from the University of KwaZulu-Natal. She also holds an LL.M. degree in international law with a focus on international trade law from the University of the Witwatersrand, Johannesburg.

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