# The Merger Control Review

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research

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# EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, particularly in Asia, are poised to add pre-merger notification regimes within the next year or so. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 41 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and their participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine, the competition authority focused its efforts on discovering consummated transactions that had not been notified, and imposed fines in 32 such cases in 2015 alone.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia and India provide for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the EC and the United States in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun-jumping' fine in 2014 and recently issued guidelines on gun-jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction nonreportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multijurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe, and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, it is becoming the norm for coordination among the jurisdictions in multinational transactions that raise competition issues.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The UK also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the International Merger Remedies chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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July 2016

# Chapter 32

# SOUTH AFRICA

*Candice Upfold*[1]

## I INTRODUCTION

### i Competition authorities

The South African Competition Act, 1998 (Competition Act) establishes three specialised bodies each tasked with distinct functions,[2] namely the Competition Commission (Commission),[3] the Competition Tribunal (Tribunal)[4] and the Competition Appeal Court (CAC).[5]

The Commission is the body tasked with investigating intermediate and large mergers (and small mergers if these are notified). The Commission must, after considering an intermediate merger, approve the merger, with or without conditions, or prohibit the merger.[6] 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.[7]

The Tribunal is an adjudicative body and may hear appeals from, or review any decision of the Commission that may, in terms of the Competition Act, be referred to it.[8] When the Tribunal receives a referral of a large merger and recommendation from the Commission, the

1 Candice Upfold is a senior associate at Norton Rose Fulbright South Africa Inc.
2 See Sections 21, 27 and 37 of the Competition Act.
3 Section 19 of the Competition Act.
4 Section 26 of the Competition Act.
5 Section 36 of the Competition Act.
6 Section 14 of the Competition Act.
7 Section 14A of the Competition Act.
8 Section 27(1)(c) of the Competition Act.

Tribunal must consider the merger and the recommendation, and approve the merger, with or without conditions, or prohibit the merger.[9] The Tribunal can also reconsider a decision of the Commission if a party to the merger requests it to do so.[10]

The CAC has a similar status to a High Court,[11] and may review any decision of the Tribunal, or consider an appeal arising from the Tribunal in respect of any of its final decisions other than a consent order made in terms of Section 63; or any of its interim or interlocutory decisions that may, in terms of the Competition Act be taken on appeal.[12]

A decision of the CAC can be appealed to the Constitutional Court in South Africa if constitutional issues arise.

**ii Pre-merger notification**

A transaction is automatically notifiable as a merger to the competition authorities in South Africa if it falls within the definition of a merger in terms of the Competition Act and if it meets the monetary thresholds for compulsory notification.

Section 13A of the Competition Act provides that parties to an intermediate or large merger may not implement that merger, until it has been approved, with or without conditions. If a notifiable merger is implemented without prior approval, an administrative penalty may be imposed on the transacting parties of up to 10 per cent of their annual turnover in, and exports from, South Africa in the preceding financial year.[13]

In February 2016, the Tribunal imposed the largest administrative penalty to date (10 million rand) on Life Healthcare and Joint Medical Holdings (JMH) for the implementation of a merger without approval.[14] The Tribunal has, in previous cases, indicated that it takes the failure to notify a notifiable merger very seriously and intends imposing higher penalties. This stance is evident from the hospital groups case, since the previous administrative penalties imposed for this type of contravention did not exceed 1 million rand.

The Tribunal can also, in terms of Section 60 of the Competition Act: order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger; or declare void any provision of an agreement to which the merger was subject. In the hospital groups case referred to above, the parties agreed, in anticipation of the consent agreement, to Life Healthcare divesting from JMH, and JMH acquiring nearly all of the shares in Life Healthcare by way of a share buy-back arrangement.

**iii Guidelines**

The competition authorities are obliged in Section 12A of the Competition Act to consider whether a merger is likely to substantially prevent or lessen competition, and whether a

9 Section 16(2) of the Competition Act.
10 Section 16(1)(a) of the Competition Act.
11 Section 36(1)(a) of the Competition Act.
12 Section 37(1) of the Competition Act.
13 Section 59(2) of the Competition Act.
14 *The Competition Commission and Life Healthcare Group (Proprietary) Limited and Joint Medical Holdings Limited* Case No. 2010Oct5392/2012Feb5781.

merger can be justified on public interest grounds. Public interest considerations in merger transactions have taken prominence in recent years, due to the high unemployment rates in South Africa and the state of the economy as a whole.[15]

On 2 June 2016, the Commission published its final guidelines on the assessment of public interest provisions in merger regulation (the Public Interest Guidelines).[16]

The Public Interest Guidelines have been implemented to provide merging parties with guidance on the approach the Commission is likely to follow, and the types of information the Commission may require when evaluating public interest grounds in terms of Section 12A(3) of the Competition Act.[17]

The Public Interest Guidelines provide insight into the approach adopted by the Commission in relation to:

*a* the effect on a particular industrial sector or region;
*b* the effect on employment;
*c* the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
*d* the ability of national industries to compete in international markets.

## II YEAR IN REVIEW

During the Commission's 2014/2015 financial year (the most recent reported information), it received 395 merger notifications, and finalised its investigation in relation to 375 of the notified transactions. This demonstrates a 19 per cent increase in merger notifications from the previous financial year and an 18 per cent increase from the 2012/2013 financial year. Of the finalised mergers, 108 were large, 251 were intermediate and 16 were small mergers. During this period, 321 mergers were approved without conditions while 43 were approved subject to conditions. This is a significant increase from the 22 conditional approvals in the previous financial year.[18]

The Commission also prohibited five merger transactions in the 2014/2015 financial year, which is an increase from one prohibited merger in 2013/2014 and no prohibited mergers in 2012/2013.

### i Public interest conditions

The focus on public interest considerations has markedly increased over time. Only four public interest conditions were imposed in the 2010/2011 year, which increased to 22 and 28 in 2011/2012 and 2012/2013 respectively. There was a decrease in 2013/2014, with only 10 transactions being approved subject to public interest conditions but this number increased substantially to 39 for the 12 months ending 31 March 2015.

15 Paragraph 3.3 of the Public Interest Guidelines.
16 Government Gazette Notice No 39 of 2016.
17 Paragraph 1.2 of the Public Interest Guidelines.
18 See the Competition Commission's annual report available at www.compcom.co.za/wp-content/uploads/2014/09/COMPETITION-COMMISSION-ANNUAL-REPORT-2015.pdf.

***SABMiller and Coca-Cola***[19]

On 19 March 2015, the Commission received notice of a large merger whereby SABMiller, Gutsche Family Investments Proprietary Limited, and The Coca-Cola Company (TCCC) proposed combining the bottling operations of their non-alcoholic beverages businesses in South Africa under a single entity to be known as Coca-Cola Beverages South Africa Proprietary Limited (CCBSA), which would be a subsidiary of Coca-Cola Beverages Africa Limited. SABMiller would also transfer its Appletiser and Lecol brands to TCCC. Once the proposed transaction consumated, TCCC would own SABMiller's Appletiser and Lecol brands.[20]

The proposed merger raised both competition and public interest concerns. In order to address the concerns raised, the merging parties agreed to a number of conditions. The public interest conditions included:

*a* maintaining the local procurement of inputs procured by Appletiser SA;[21]

*b* committing to a broad-based empowerment transaction that would increase the current Broad-Based Black Economic Empowerment ownership of CCBSA from 11 per cent to 20 per cent;[22]

*c* divesting 20 per cent equity in Appletiser to a qualifying black company or consortium;[23]

*d* the investment of an 800 million rand fund;[24]

*e* ensuring cooler and refrigerator space for small local competitors in micro and small outlets;[25]

*f* local procurement of all tin and aluminium cans and ends, glass and PET bottles, PET closures, packaging, crates and sugar;[26] and

*g* no retrenchments of bargaining unit employees as a result of the merger (retrenchments of employees outside the bargaining unit would be limited to 250 employees of Grade 12 education and above).[27]

A number of the concerns raised were received by the trade unions and the Minister of Economic Development. In relation to employment concerns, the merging parties also entered into separate agreements with the trade unions.

As is evident from the rather extensive merger conditions imposed in this transaction, the competition authorities take the concerns raised by the Department of Economic

19 *Coca-Cola Beverages Africa Limited, a subsidiary to be formed of SABMiller Plc and Coca-Cola Sabco Proprietary Limited, Coca-Cola Shanduka Beverages South Africa Proprietary Limited, Waveside Proprietary Limited and Coca-Cola Canners of Southern Africa Proprietary Limited* Case No. 021154.

20 Competition Commission's recommendation para 4.

21 Non-Confidential Conditions para 4.

22 Non-Confidential Conditions para 5.1.

23 Non-Confidential Conditions para 5.2.

24 Non-Confidential Conditions paras 6.1 and 6.5.

25 Non-Confidential Conditions paras 6.2 and 6.3.

26 Non-Confidential Conditions para 8.1.

27 Non-Confidential Conditions paras 9.1 and 9.2.

Development and trade unions very seriously and are able to impose creative and far-reaching conditions to address these concerns. It bears mentioning that this merger transaction took approximately 14 months to reach finalisation.

***AB Inbev and SABMiller***[28]

The merger transaction between Anheuser-Busch Inbev (AB InBev) and SABMiller, was notified to the competition authorities on 14 December 2015 and approved subject to extensive conditions on 30 June 2016. The merger contemplated AB InBev acquiring the entire issued and to-be-issued share capital of SABMiller. During its investigation of the proposed merger, the Commission identified several competition and public interest concerns that it proposed to address with the implementation of conditions.[29]

The public interest conditions proposed are in some respects similar to those imposed in the *SABMiller/Coca-Cola* merger, but in other respects go further.

The public interest conditions include ensuring that there is cooler and refrigerator space for small local competitors in retail outlets and taverns that are solely supplied by the merged entity;[30] continued supply to small beer producers of crucial inputs to endure in perpituity, maintaining the current ratio of local procurement; not entering into new exclusive supply arrangements or renew existing supply arrangements with raw material suppliers, which prohibits those suppliers from dealing with small beer producers;[31] the investment of a 1 billion rand fund;[32] no retrenchments as a result of the merger, to the extent that any employees of DGB (who distribute AB InBev's alcoholic beverages in South Africa) are retrenched if the distribution agreement is terminated – the merged entity will employ those employees;[33] any apple juice concentrate in excess of 1 million litres per annum must be procured from imports or local sources brought about by investment by the merged entity;[34] and an outline of the merged entity's black economic empowerment plans setting out how it intends to maintain black participation in the company, including equity, with the outline to be submitted to both the government and the Commission no later than two years from the closing date.[35]

A number of other conditions unrelated to the public interest concerns were also imposed. To prevent the exchange of commercially sensitive information between competitors, SABMiller will divest of its shareholding in Distell,[36] and employees involved in bottling operations for Coca-Cola would not also be involved in the Pepsi bottling arrangements.[37] To prevent foreclosure as a result of the merged entities' dominance in the supply of tin-metal

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28 *Anheuser-Busch Inbev SA/NV and SabMiller plc* Case No. 2015Dec0690/LM211JAN16 (023283).

29 Conditions to the approval of the merger (Public Version).

30 Conditions to the approval of the merger (Public Version) para 7.3.

31 Conditions to the approval of the merger (Public Version) paras 9 and 10.

32 Conditions to the approval of the merger (Public Version) para 15.

33 Conditions to the approval of the merger (Public Version) para 8.

34 Conditions to the approval of the merger (Public Version) para 11.

35 Conditions to the approval of the merger (Public Version) para 13.

36 Conditions to the approval of the merger (Public Version) para 4.

37 Conditions to the approval of the merger (Public Version) para 5.

crowns in South Africa through its subsidiary Coleus, the merged entity will continue to supply third parties with tin metal crowns on a reasonable, non-discriminatory and market-related basis and not enter into any exclusive agreements with Coleus.[38]

The conditions relating to the public interest were largely driven through interactions with the Minister of Economic Development, the Minister of Agriculture, Forestry and Fisheries of South Africa and the Minister of the Department of Trade and Industry. A separate agreement that has been confirmed by the Tribunal has been entered into between the merging parties and those government departments. There was also trade union participation in relation to employment concerns.

### ii Prohibited mergers

***Life Healthcare, Lowveld Hospital and Interstate Clearing (126)***[39]

The Commission prohibited the proposed merger between Life Healthcare, Lowveld Hospital Group (Lowveld), and Interstate Clearing on the basis that the merger would result in an immediate and significant increase in hospital tariffs for the Lowveld hospital, and because it raised a negative effect on the healthcare sector in Nelspruit. The merging parties initially filed an appeal to the Tribunal, but the appeal was ultimately withdrawn.

***Nkunzi Milkyway and Clover SA***[40]

In the intermediate merger between Clover SA (Clover) and Nkunzi Milkway (Nkunzi), the Commission was of the view that while the market share accretion that arose from this transaction was not significant, Nkunzi had substantial growth prospects and that a big competing player taking over that capacity would reduce the competitive constraint that Nkunzi exercised over larger players in the market. Competitors of Nkunzi also raised concerns in relation to Clover being in a position to pay suppliers of Ayrshire milk more for their milk, which is in short supply in South Africa. This would foreclose other competitors from gaining access to Ayrshire milk. The Commission therefore prohibited the merger. The merging parties brought a request for consideration to the Tribunal, which, on 27 May 2015, approved the transaction subject to conditions aimed at addressing these concerns.

***Hosken Consolidated Investments and the Gallagher Convention Centre***[41]

In the intermediate merger between Hosken Consolidated Investments and Atterbell Investments Proprietary Limited trading as the Gallagher Convention Centre, the Commission prohibited the merger on the ground that it would result in a substantial prevention or lessening of competition in the market for the provision of exhibition venues and exhibition facilities. Given the horizontal overlap between the parties, it was argued

38 Conditions to the approval of the merger (Public Version) para 6.

39 See the Competition Commission's annual report available at www.compcom.co.za/wp-content/uploads/2014/09/COMPETITION-COMMISSION-ANNUAL-REPORT-2015.pdf.

40 Request for Consideration between *Clover SA (Pty) Ltd and Nkunzi Milkway (Pty) Ltd and the Competition Commission* Case No. IM175Dec14 (020461).

41 Request for Consideration between *Hosken Consolidated Investments Limited and Atterbell Investments Proprietary Limited t/a the Gallagher Convention Centre and the Competition Commission* Case No. 020578.

that the transaction would reduce the number of competitors from four to three, which would allow the merged entity to raise prices unilaterally post-merger. The Tribunal, however, approved the transaction on 7 May 2015, subject to certain conditions aimed at addressing the Commission's concerns.

***Tsogo Sun and Worcester Casino***[42]

The Commission recommended to the Tribunal that the acquisition of 40 per cent equity interest in SunWest International and Worcester Casino by Tsogo Sun Holdings be prohibited. During its investigation, the Commission found that the merging parties are likely to coordinate their behaviour post-merger. In the Commission's view, the absence of rivals and no possibility of new entry would provide the acquiring firm and target with the ability and incentive not to invest in innovation, and to offer poor quality services and high prices to the detriment of consumers. The merging parties subsequently abandoned the merger during hearings at the Tribunal.

***Ferro Industrial Products and Arkema Resins***[43]

The Commission recommended that the acquisition of Arkema Resins by Ferro Industrial Products be prohibited on the basis that the merger would lead to a monopoly in the mining segment. The Commission also found that not only would the merged firm have high market shares, but the rest of the market consisted of small ineffective competitors. The market was also categorised by high barriers to entry. On 4 August 2014, the Tribunal approved the merger with conditions that include divestment and pricing conditions.

**iii Increasing interventionist approach to merger control**

From the above cases, it is clear that large international transactions garner significant interest by the Ministers and trade unions and, where appropriate, significant creative conditions are imposed. In past years, employment considerations have been of significant concern, and continue to play a big role. However, in addition to maintaining employment levels, the competition authorities have now imposed far more onerous conditions on merging parties to ensure local procurement, continued promotion of historically disadvantaged individuals through equity shareholding and the creation of large funds. These funds in particular have significantly increased over the years, from a 200 million rand fund in the *Walmart/Massmart* merger in 2012 to a 1 billion rand fund in 2016 in the *AB Inbev* merger.

The conditions imposed, while aimed at protecting local industry, place a significant burden on international companies seeking to invest in South Africa.

In addition to the trend to impose extensive public interest conditions, the Commission is also taking a more interventionist approach by prohibiting mergers between competitors that create, or have the potential to create, high-market share accretion or a monopoly position. However, the Tribunal does seem more willing to impose conditions aimed at addressing these concerns.

42 See the Competition Commission's annual report available at www.compcom.co.za/wp-content/uploads/2014/09/COMPETITION-COMMISSION-ANNUAL-REPORT-2015.pdf.

43 *Ferro Industrial Products (Pty) Ltd and Arkema Resins (Pty) Ltd* Case No. 018358.

This interventionist trend is likely to continue, particularly with the implementation of the Public Interest Guidelines, which clearly indicate the Commission's approach in merger transaction. Considering the current economic climate, the competition authorities are likely to focus on ensuring the protection of local industry and employment.

## III THE MERGER CONTROL REGIME

In terms of Section 12(1)(a) of the Competition Act, 'a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.'

### i Change of control

Changes in indirect, as well as direct, control may give rise to a notifiable merger.[44]

The Tribunal has previously found that the list mentioned in Section 12(2) of the Competition Act merely lists instances of control and that the list is not exhaustive. The Tribunal stressed that whether or not control is in fact acquired is a factual question. This question cannot purely be answered by examining the shareholding acquired in the relevant target firm. The very fact that a transaction may not give the acquiring firm more than a 50 per cent shareholding in the target firm does not mean that there has not been a change in control. As the CAC noted in the *Distillers* case:

> *…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.*[45]

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)'.

On 25 November 2015, the CAC provided some useful guidance in the *Media 24* decision,[46] on the interpretation of Section 12(2)(g) of the Competition Act in overturning a decision of the Tribunal. Pre-merger, Media 24 and Lambert Philips Retief (Retief) jointly controlled Novus Holding Limited (Novus) by virtue of a management agreement dated 6 October 2008 (the old agreement). The proposed transaction contemplated the conclusion of a new management agreement (the new agreement) between Retief, Novus and Media

44 *Distillers Corporation (South Africa) Limited and Stellenbosch Farmers' Winery Group Limited/ Bulmer (SA) Proprietary Limited, Seagram Africa Proprietary Limited* Case No. 08/CAC/ May01.

45 *Distillers Corporation SA Ltd v. Stellenbosch Farmers' Winery Group Limited and Bulmers (SA) Pty Ltd and Seagram Africa Pty Ltd* Case No. 08/CAC/May01.

46 *Caxton and CTP Publishers and Printers and Media 24 Proprietary Limited and Others* Case No. 136/CAC/March 2015.

24 to be effective on the listing of Novus on the JSE Limited. The issue that the CAC had to determine was whether the joint control that Retief shared with Media 24 under the old agreement had been diminished by the provisions of the new agreement to the extent that Media 24 acquired sole control.[47] In South Africa, parties are required to notify the acquisition from joint to sole control.

It was argued by Caxton and CTP Publishers and Printers Limited (Caxton), an interested party in the proposed transaction, that while Retief retained certain of his former functions under the new agreement, he had been stripped of all power-sharing and accordingly no longer had material influence over the strategic aspects of Novus. The change was largely required as a result of the listing of Novus which then necessitated compliance with Section 66(1) of the Companies Act, 2008. This Section of the Companies Act provides that:

> *…the business and affairs of a company must be managed by or under the direction of its board, which has authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.*

The Memorandum of Incorporation to be implemented on listing did not refer to either the new or old agreements.

The CAC found that, even though the new agreement did confer certain powers on Mr Retief, those powers were still subject to the intervention and overriding powers of the board of Novus if it prefers a different course of action. Retief was therefore found to no longer have the ability to materially influence the policy of Novus in a manner contemplated in Section 12(2)(g) of the Competition Act because he could be overridden by the board of directors at any time.

The CAC also made some useful remarks regarding the ambit of Section 12(2)(g):

*a* the 'policy' that is being materially influenced must relate to issues strategy, which is usually guided by the board or the shareholders;[48]

*b* the issue of 'materiality' of influence relates to the range of matters over which the power extends rather than the decisiveness of each matter;[49] and

*c* 'ability' refers to both a power to do something and a power to prevent something from being done.[50]

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47 *Caxton and CTP Publishers and Printers and Media 24 Proprietary Limited and Others* Case No. 136/CAC/March 2015 para 24.

48 *Caxton and CTP Publishers and Printers and Media 24 Proprietary Limited and Others* Case No. 136/CAC/March 2015 para 46.

49 *Caxton and CTP Publishers and Printers and Media 24 Proprietary Limited and Others* Case No. 136/CAC/March 2015 para 48.

50 *Caxton and CTP Publishers and Printers and Media 24 Proprietary Limited and Others* Case No. 136/CAC/March 2015 para 48.

In the *Multichoice* case,[51] the Tribunal on 11 February 2016[52] found that an agreement between Multichoice and South African Broadcasting Corporation (SABC) in terms of which SABC agrees that all channel signals in respect of SABC FTA channels, as transmitted by SABC on the SABC DTT platform, shall be submitted on behalf of the SABC by Multichoice did not constitute a notifiable merger.

The Tribunal found that:

*a* in ordinary commercial practice, a person enjoys at least an ongoing form of control over the company and not merely a specific aspect of it;[53]

*b* the emphasis of control in terms of the Competition Act is the ability to influence the competitive inclination of a company. This suggests that control should only be inferred when the policy covers a wider ambit not a limited specific aspect, particularly in the context of a target firm whose business covers a range of other activities, which remain unfettered by the influence of the putative controller; [54] and

*c* there is a danger in giving this Section of the Competition Act too broad an application since there are many outsiders that may be able to influence a company on one aspect of its business, or at a particular finite moment in time. Accordingly, Section 12(2)(g) of the Competition Act should be given some sensible limitation to both the scope and time of the policy matter in question.[55]

Based on the above factors, the Tribunal was of the view that the agreement on encryption and access did not constitute control by Multichoice over SABC's business for the purpose of Section 12(2)(g) of the Competition Act. This decision was, however, taken on appeal. The CAC, in considering the evidence, found that the obligation of SABC to cooperate with Multichoice to ensure that the Minister of Communication's decision on encryption does not become a burdensome obligation on Multichoice could result in SABC losing its autonomy to decide on and adopt a policy that is consistent with its interests. There was, however, insufficient information to conclude on this issue and the CAC granted the alternative relief sought by Caxton, namely that the Commission investigate whether or not the agreement gives rise to a merger.[56] It remains to be seen what the Commission's investigation will reveal.

51 *Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others* Case No. 020727.

52 The reasons were issued on 11 February 2016 but the hearing took place on 30 September 2015.

53 *Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others* Case No. 020727 para 94.

54 *Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others* Case No. 020727 para 94.

55 *Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others* Case No. 020727 para 95.

56 *Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others* Case No. 140/CAC/Mar 16 CT.

### ii Part of a business

There is no definition of 'part of a business' in the Competition Act, but the Tribunal has previously found that in order to fall within the definition of a merger the acquiring firm must acquire something more than a bare asset that would enhance its competitive position. The Tribunal held that:

> *…when the acquisition of an asset constitutes the acquisition of a business or part of a business is a question of fact that must be examined in the context of the whole transaction. Is the acquiring firm, by acquiring the asset, acquiring something more than a bare asset that would enhance its competitive position? One example would be where the purchase of an asset enables the acquiring firm to increase its market share or pre-empt a rival from increasing its.*[57]

In the *Multichoice* case, the Tribunal found that the right to use material from an archive does not amount to productive capacity that could be considered a business.[58] There was also no evidence to support the contention that the agreement would transfer market share. In reaching this decision, the Tribunal considered the following facts concerning the entertainment channel:

*a* Multichoice has the exclusive right to broadcast the material that comprises the entertainment channel for a period of five years;
*b* the material is made up of SABC archives;
*c* SABC is entitled to broadcast the entertainment channel on its own services, subject to a minimum time delay from date of broadcast by MultiChoice, and provided further that it must be in the same format and schedule as broadcast by Multichoice;
*d* SABC may not authorise any third party to use the material utilised on the Entertainment channel during the course of the agreement;
*e* a clause in the agreement restrains SABC from distributing a channel that is 'substantially similar' to the entertainment channel;
*f* the channel would utilise less than 1 per cent of the archives content;
*g* other than the above, the agreement does not confer any control over the archive on Multichoice;
*h* the choice of what content goes on the entertainment channel is made by the SABC, although Multichoice has a right to veto content it deems to not conform with the standard; and advertising revenue sold on the channel goes to SABC and not Multichoice.[59]

On appeal, the CAC came to the same decision but on different grounds. The CAC found that even though Multichoice is given extensive say over the material distributed through

57 *Competition Commission and Edgars Consolidated Stores Ltd and Others* Case No. 95/FN/Dec02 (24 March 2003).

58 *Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others* Case No. 020727 para 57.

59 *Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others* Case No. 020727 para 49.

the Entertainment channel and SABC is constricted in its ability to reuse the material on its own channels, these two facts do not allow for a conclusion that there has been a change of control over a part of a business. Additional facts would be required to draw this conclusion.[60]

### iii Thresholds

Mergers are classified as small, intermediate or large, based on the 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. The Commission has issued a Guideline on small merger notification,[61] which provides that the Commission will require notification of small mergers where the merging parties are under investigation by the competition authorities in terms of Chapter 2 (the Section dealing with prohibited practices) of the Competition Act, or if the merging parties are respondents to pending proceedings referred by the Commission to the Tribunal in terms of the Chapter 2 of the Competition Act. However, this is simply a guideline and not enforceable by the competition authorities.

Intermediate and large mergers require notification to the competition authorities by the merger parties and may not be implemented until approved.

An intermediate merger is one where the 'combined figure' is 560 million rand 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 80 million rand.

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 190 million rand and the 'combined figure' is 6.6 billion rand 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 and the target firm in their respective preceding financial years or the assets of the one and the turnover of the other, whichever combination reaches the highest figure. Importantly, both legs of the inquiry must be met.

### iv Procedures and filing fees

In order to assist merging parties in complying with the requirements, the Commission has issued a practice note: Practitioner Update Issue 6: Complete Merger Filing Requirements.[62] This document sets out the documents and information, which the Commission will require merging parties to supply in a merger filing.

The competition authorities charge merging parties a fee for analysing the matter. The filing fee for an intermediate merger is currently 100,000 rand, and for a large merger, 350,000 rand. No VAT is payable.

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60 *Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others* Case No. 140/CAC/Mar 16 CT paras 43 and 44.

61 www.compcom.co.za/wp-content/uploads/2014/09/Small-Merger-Notification.pdf

62 www.compcom.co.za/wp-content/uploads/2014/09/Complete-filing-notice-Mch-2010.pdf.

### v Service on trade unions

In terms of Section 13A(2) of the Competition Act, parties to an intermediate or large merger must provide a copy of the non-confidential version of the merger filing to any registered trade union that represents a substantial number of its employees; or the employees or employee representative if there is no registered trade union. In terms of Rule 37 of the Rules for the Conduct of Proceedings in the Competition Commission (the Commission Rules),[63] trade unions or employees are entitled to participate in merger proceedings by filing a Form CC5(1) within five business days after the date on which the merger filing was received. In practice, the competition authorities permit participation even if notice of participation is received after the five-day period.

### vi Time periods

*Intermediate 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.[64]

If upon the expiry of the 20-business-day period, or the extended period, as the case may be, the Commission has not issued any certificate evidencing its determination, then the Commission will be deemed to have approved the proposed merger.[65]

*Large mergers*

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 however, it must apply to the Tribunal, which almost always grants one.

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.

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63 Published under Government Gazette Number 22015 of 1 February 2001.

64 Section 14(1) of the Competition Act.

65 Section 14(2) of the Competition Act.

### vii Acceleration of review period

Unfortunately, there is not much scope to accelerate the review procedure as the competition authorities are only bound by the legislated time periods. The competition authorities are, however, mindful of merging parties' need to implement transactions swiftly and accordingly, do work as fast as possible to investigate and decide upon mergers.

The Commission has issued a helpful guideline on these timelines applicable to merger reviews in South Africa, and it aims, where possible, to stick to these timelines. The 2015 Mergers and Acquisitions Service Standards (the 2015 Service Standards)[66] set out the maximum number of business days that the Commission anticipates to complete its review of notified transactions. The 2015 Service Standards replace the 2010 Service Standards. The rationale for the revision of the timelines takes into account the anticipated volume of notifications and the increasing complexity of mergers notified.[67]

The 2015 Service Standards contemplate the following timelines.

*Phase I (non-complex)*

The Commission aims to review a Phase I 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 II (complex)*

The Commission aims to review a Phase II 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 per cent, or where public interest issues arise.

*Phase III (very complex)*

The Commission aims to review a Phase III intermediate merger within 60 business days and a Phase III large merger within 120 business days. Phase III mergers are likely to result in a substantial prevention or lessening of competition (including any transactions involving 'leading market participants' where the combined market share of the transacting parties is more than 30 per cent).

### viii Third-party access to the file and rights to challenge mergers

Intervention in merger proceedings is specifically provided for in Section 18 of the Competition Act, albeit only in respect of the Minister of Economic Development[68] and the Minister of Finance[69] (in relation to transactions falling within the jurisdiction of the Banks Act, 1990). Furthermore, Rule 37 of the Commission Rules permits participation in merger proceedings by trade unions or employee representatives. These rules have been used on a number of occasions, both by the Ministers and trade unions to intervene in merger

66 www.compcom.co.za/wp-content/uploads/2014/09/Service-Standards_2015_Final.pdf.

67 Page 5 of the 2015 Mergers & Acquisitions Service Standards.

68 See Rule 35 of the Competition Commission Rules and Rule 29 of the Competition Tribunal Rules.

69 See Rule 36 of the Competition Commission Rules and Rule 30 of the Competition Tribunal Rules.

transactions and extract some benefit, usually for the public interest. These interventions have been used with success in some of the most publicised merger cases in South Africa, namely the *Walmart/Massmart* merger, the *SAB bottling* merger and the *SABMiller/AB Inbev* merger.

In addition to the above rules, 'any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant information in respect of that merger.'[70]

Rule 46 of the Rules for the Conduct of Proceedings in the Tribunal (the Tribunal Rules)[71] indicates that, at any time after an 'initiating document' is filed, any person who has a material interest in the matter may apply to intervene in the Tribunal proceedings by filing the prescribed forms that must include a concise statement of the nature of the person's interest in the proceedings, and the representations the person will make.[72] The Tribunal will be required to make an order allowing the applicant to intervene and can place limitations on the intervention.[73]

If an order is granted permitting the intervention, the Registrar of the Tribunal must send a list of all the documents that have been filed in the proceedings prior to the day on which the intervention application was granted. The intervenor will be permitted access, subject to any order on restriction of access.[74]

In the *Caxton* decision,[75] Caxton was granted permission on 9 November 2015 to participate in the merger hearing, including the right to:

*a* attend pre-hearing conferences;
*b* have access to, and inspect any, document filed by the merging parties and other parties subject to confidential information only being available to legal representatives;
*c* call for discovery of further documents;
*d* request the Tribunal to direct or summon a person to appear at the merger hearing or produce documents;
*e* participate in any interlocutory proceedings in respect of the merger hearing;
*f* adduce oral and documentary evidence at the merger hearing;
*g* cross-examine any of the witnesses; and
*h* present an argument at the merger hearing.

Caxton's participation was limited in certain respects, and in particular to certain key issues.

Intervention by interested parties in mergers has not been prominent over the past year, but it is likely when one considers the competition authorities increasing interventionist approach in approving transactions subject to conditions that interested parties may view merger control as a platform to raise concerns and gain support from the competition authorities to impose remedies. This has been seen most recently in the *SABMiller bottling* merger and the *AB Inbev* transactions.

70 Section 13B(3) of the Competition Act.
71 Published under Government Gazette Number 22025 of 1 February 2001.
72 Rule 46(1) of the Competition Tribunal Rules.
73 Rule 46(2) of the Competition Tribunal Rules.
74 Rule 46(3) of the Competition Tribunal Rules.
75 *Caxton and CTP Publishers and Printers Limited and Media 24 (Proprietary) Limited and Others* Case No. 019323.

### ix Effect of regulatory review

In terms of the Competition Act, it is not possible for a transaction to be considered simultaneously by both the Commission and Tribunal. A merger transaction in terms of the Competition Act can only be investigated by the Commission. If the transaction is a large merger, once the Commission has completed its investigation it will refer the merger to the Tribunal to consider and make a determination.

It is, however, possible for more than one competition authority in multiple jurisdictions to consider the same transaction simultaneously. In these instances, each competition authority considers the effect that the transaction will have on its own jurisdiction. The time periods for consideration of the merger are those set out in each jurisdictions respective competition legislation. Across Africa, the competition authorities are mindful of each other's processes and try as far as possible to work within merging parties' time frames to ensure clearance at similar times. Various competition authorities across Africa have also entered into memorandums of understanding (MOU) to govern the relationships between them in dealing with multi-jurisdictional filings.

## IV OTHER STRATEGIC CONSIDERATIONS

### i Coordination with other jurisdictions

Coordination with other jurisdictions is predominantly done through MOUs entered into between regulators.

In 2015, the Commission entered into its first MOU with the Namibian Competition Commission. In May 2016, the Commission signed an MOU between the competition authorities of the South African Development Community, and the MOU between the competition authorities of Brazil, Russia, India, China and South Africa (BRICS).

The BRICS and Namibian MOUs do not specifically relate to cooperation in relation to merger control, but record that the cooperation between the competition authorities will improve and strengthen the effective enforcement of competition laws. The MOU does, however, provide for cooperation on any other means agreed upon in writing between the parties.

The Southern African Development Community MOU (of which the Namibian Competition Commission is a party) does provide for the cooperation and coordinating with each other in the investigation of mergers.

As this MOU has only recently been entered into, the extent of cooperation remains to be seen.

### ii Financial distress and insolvency

In assessing a merger transaction in South Africa, the competition authorities must determine whether or not the merger is likely to substantially prevent or lessen competition. In making this determination, the competition authorities must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or cooperatively, taking into account any factor that is relevant to competition, including whether the business of a party to the merger has failed or is likely to fail.[76]

76 Section 12A(2) of the Competition Act.

The principal case dealing with the test one must satisfy in order to meet the 'failing firm' criteria in terms of Section 12 of the Competition Act is the large merger between Iscor and Saldana Steel.[77] This case makes it clear that whether a firm is truly 'failing' (in the sense of about to exit the market totally) is only one factor among many that should be considered when the competition authorities decide to approve a merger or not. The Tribunal suggests that the merging parties need to show that the target firm would exit the market absent the merger, that its market share would largely accrue to the acquiring firm anyway, and that there were no other potential purchasers who would present fewer competition concerns.

This is an old case (2001), and unfortunately, the rule it lays down has not been extensively applied by the Tribunal in subsequent cases – mainly because merging parties almost always prefer to argue that their merger is not anticompetitive, or even if it is, that it should be allowed on efficiency or public interest grounds.

It is possible, in extreme circumstances, for a merger transaction to receive clearance in record time, if there are compelling financial considerations.

For example, in the merger between Stefannuti Stocks and Energotec,[78] the transaction was approved within three days of filing the merger, because the target firm was in provisional liquidation with imminent job losses and prejudice to its customers.[79] This is, of course, an unusual course of action, but given the competition authorities' focus on public interest concerns and in particular job losses, an outcome of this nature is not impossible and is in fact highly persuasive. It bears mentioning, however, that merely indicating that a company is in business rescue will not prompt such rapid clearance. The facts must be sufficient to support such a contention.

This was demonstrated in the merger between CTP and Compact Disc Technologies,[80] where the Commission rejected the failing firm defence because the merging parties had not met the necessary requirements of that defence – in particular, proof that there was no other buyer for the target firm.[81]

The merger filings submitted to the competition authorities must be quite comprehensive, and must make it clear to the Commission that what is contemplated is not anticompetitive.

## V OUTLOOK AND CONCLUSIONS

The past year has demonstrated the Commission's increasing interventionist approach to merger control, both in terms of the number of mergers prohibited and also the conditions imposed in approving the transactions.

77 *Iscor Limited and Saldana Steel (Pty) Ltd* Case No. 67LMDec01.

78 *Stefannuti Stocks (Pty) Ltd and Energotec (a division of First Strut) (Pty) Ltd* Case No. 017590.

79 *Stefannuti Stocks (Pty) Ltd and Energotec (a division of First Strut) (Pty) Ltd* Case No. 017590 para 1.

80 *CTP Limited and Compact Disc Technologies (a division of Times Media (Pty) Ltd) and the Competition Commission* Case No. IM232Feb16.

81 *CTP Limited and Compact Disc Technologies (a division of Times Media (Pty) Ltd) and the Competition Commission* Case No. IM232Feb16 para 10.

The cases dealt with above show the Commission's developing jurisprudence, and their ability to impose both pragmatic and creative conditions to address concerns raised by interested parties.

The Ministers and trade unions have demonstrated their willingness to participate in mergers, which in their view have significant public interest concerns. The competition authorities pay careful attention to these concerns raised and work pragmatically with the parties to address these concerns.

The most anticipated that was confirmed by the Tribunal on 30 June 2016 is the *SABMiller/AB Inbev* transaction, which demonstrates the imposition of some of the most onerous conditions on merging parties to date.

The creative conditions imposed in these international transactions show that the scope of interpretation of the conditions that can be imposed to address public interest concerns is continuously broadening. It remains to be seen how wide these conditions may go in the future.

The conditions that have been imposed in South Africa also have a significant impact both on the transaction costs and the timeline for approval. AB Inbev is required in terms of the conditions imposed, to make an amount of 1 billion rand available. This is a substantial amount, and is the most that has been imposed by the competition authorities to date.

The Public Interest Guidelines published in June 2016 will require analysis by merging parties, and it is recommended that in transactions where public interest issues are of concern that the parties proactively assess and address these concerns to avoid unnecessary delays in the approval process and the potential for unnecessarily broad conditions.

What is apparent from the year in review is that public interest considerations will continue to play a large role in merger proceedings, and merging parties should ensure that they are prepared for interactions with trade unions, the ministers and the competition authorities to address any concerns that may arise.

# Appendix 1

# ABOUT THE AUTHORS

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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.

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

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