GETTING THE DEAL THROUGH

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Merger Control

The international regulation of mergers and joint ventures in 75 jurisdictions worldwide

2014

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Overview Bruce McCulloch, Takeshi Nakao and Gian Luca Zampa Freshfields Bruckhaus Deringer iv
Timelines Michael Bo Jaspers and Joanna Goyder Freshfields Bruckhaus Deringer ix
Acknowledgements xxv
Albania Günter Bauer, Denis Selimi and Paul Hesse Wolf Theiss 1
Argentina Marcelo den Toom M & M Bomchil 6
Australia Fiona Crosbie and Carolyn Oddie Allens 13
Austria Axel Reidlinger and Maria Dreher Freshfields Bruckhaus Deringer 22
Bangladesh Sharif Bhuiyan and Maherin Islam Khan Dr Kamal Hossain and Associates 29
Belarus Ekaterina Pedo and Dmitry Arkhipenko Revera Consulting Group 34
Belgium Laurent Garzaniti, Thomas Janssens, Tone Oeyen and Alexia Burckett St Laurent Freshfields Bruckhaus Deringer 39
Bolivia Jorge Luis Inchauste Comboni Guevara & Gutierrez SC – Servicios Legales 45
Bosnia & Herzegovina Günter Bauer, Sead Miljković and Dina Duraković Morankić Wolf Theiss 49
Brazil José Regazzini, Marcelo Calliari, Daniel Andreoli and Joana Cianfarani TozziniFreire Advogados 54
Bulgaria Nikolai Gouginski and Lyuboslav Lyubenov Djingov, Gouginski, Kyutchukov & Velichkov 59
Canada Neil Campbell, James Musgrove, Mark Opashinov and Devin Anderson McMillan LLP 66
Chile Claudio Lizana, Lorena Pavic and Juan E Coeymans Carey 74
China Michael Han and Nicholas French Freshfields Bruckhaus Deringer 81
Colombia Jorge De Los Ríos Posse Herrera Ruiz 87
COMESA Nkonzo Hlatshwayo and Janine Simpson Webber Wentzel 94
Croatia Günter Bauer, Luka Čolić and Paul Hesse Wolf Theiss 97
Cyprus Anastasios A Antoniou and Louiza Petrou Anastasios Antoniou LLC 103
Czech Republic Tomáš Čihula Kinstellar 108
Denmark Morten Kofmann, Jens Munk Plum and Erik Bertelsen Kromann Reumert 113
Egypt Firas El Samad Zulficar & Partners 118
Estonia Raino Paron and Tanel Kalaus Raidla Lejins & Norcous 122
European Union John Davies, Rafique Bachour and Angeline Woods Freshfields Bruckhaus Deringer 128
Faroe Islands Morten Kofmann, Jens Munk Plum and Erik Bertelsen Kromann Reumert 137
Finland Christian Wik, Niko Hukkinen and Sari Rasinkangas Roschier, Attorneys Ltd 141
France Jérôme Philippe and Jean-Nicolas Maillard Freshfields Bruckhaus Deringer 147
Germany Helmut Bergmann, Frank Röhling & Bertrand Guerin Freshfields Bruckhaus Deringer 155
Greece Aida Economou Vainanidis Economou & Associates 165
Greenland Morten Kofmann, Jens Munk Plum and Erik Bertelsen Kromann Reumert 171
Hong Kong Michael Han and Nicholas French Freshfields Bruckhaus Deringer 174
Hungary Gábor Fejes and Zoltán Marosi Oppenheim 183
Iceland Hulda Árnadóttir and Heimir Örn Herbertsson LEX 190
India Suchitra Chitale C&C Partners (Chitale & Chitale) 196
Indonesia HMBC Rikrik Rizkiyana, Albert Boy Situmorang and Anastasia P R Daniyati Rizkiyana & Iswanto, Antitrust and Corporate Lawyers 200
Ireland Niall Collins and Tony Burke Mason Hayes & Curran 206
Israel Eytan Epstein, Tamar Dolev-Green and Shiran Shabtai Epstein, Chomsky, Osnat & Co & Gilat Knoller & Co 212
Italy Gian Luca Zampa Freshfields Bruckhaus Deringer 219
Japan Akinori Uesugi and Kaori Yamada Freshfields Bruckhaus Deringer 228
Kenya Godwin Wangong'u and CG Mbugua Mboya Wangong'u & Waiyaki Advocates 235
Korea Seong-Un Yun and Sanghoon Shin Bae, Kim & Lee, LLC 241
Liechtenstein Heinz Frommelt Sele Frommelt & Partners Attorneys at Law Ltd 246
Luxembourg Léon Gloden and Céline Marchand Elvinger, Hoss & Prussen 251
Macedonia Vesna Gavriloska, Maja Jakimovska and Margareta Taseva ČAKMAKOVA Advocates 254

Continued overleaf

CONTENTS

Malta Ian Gauci and Karl Sammut GTG Advocates 261

Mexico Gabriel Castañeda Castañeda y Asociados 268

Morocco Corinne Khayat and Maïja Brossard UGGC Avocats 274

Namibia Peter Frank Koep and Hugo Meyer van den Berg Koep & Partners 280

Netherlands Winfred Knibbeler & Peter Schepens Freshfields Bruckhaus Deringer 284

New Zealand Sarah Keene and Troy Pilkington Russell McVeagh 290

Nigeria Babatunde Irukera and Ikem Isiekwena SimmonsCooper Partners 299

Norway Jonn Ola Sørensen, Simen Klevstrand and Øyvind Andersen Wikborg Rein 304

Poland Aleksander Stawicki and Bartosz Turno WKB Wierciński Kwieciński Baehr 310

Portugal Mário Marques Mendes and Pedro Vilarinho Pires Marques Mendes & Associados 316

Romania Anca Iulia Cîmpeanu (Ioachimescu) Rubin Meyer Doru & Trandafir LPC 324

Russia Alexander Viktorov Freshfields Bruckhaus Deringer 331

Saudi Arabia Fares Al-Hejailan, Rafique Bachour and Hani Nassef Freshfields Bruckhaus Deringer 337

Serbia Günter Bauer and Maja Stanković Wolf Theiss 342

Singapore Lim Chong Kin and Ng Ee-Kia Drew & Napier LLC 349

Slovakia Günter Bauer, Zuzana Sláviková and Paul Hesse Wolf Theiss 360

Slovenia Günter Bauer, Klemen Radosavljevič and Paul Hesse Wolf Theiss 366

South Africa Robert Legh and Tamara Dini Bowman Gilfillan 372

Spain Francisco Cantos, Álvaro Iza and Enrique Carrera Freshfields Bruckhaus Deringer 384

Swaziland Kenneth J Motsa and Gabsile A Maseko Robinson Bertram 390

Sweden Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg Mannheimer Swartling 394

Switzerland Marcel Meinhardt, Benoît Merkt and Astrid Waser Lenz & Staehelin 399

Taiwan Mark Ohlson and Charles Hwang YangMing Partners 405

Thailand Chinnavat Chinsangaram and Kallaya Laohaganniyom
Weerawong, Chinnavat & Peangpanor Ltd 413

Turkey Gönenç Gürkaynak ELIG, Attorneys-at-Law 418

Ukraine Alexey Ivanov and Leonid Gorshenin Konnov & Sozanovsky 426

United Kingdom Alex Potter, Alison Jones and Martin McElwee Freshfields Bruckhaus Deringer 431

United States Ronan P Harty Davis Polk & Wardwell LLP 438

Uruguay Alberto Foderé Sanguinetti Foderé Abogados 448

Uzbekistan Bobur Karimov and Bakhodir Jabborov GRATA Law Firm 453

Venezuela José Humberto Frías D'Empaire Reyna Abogados 458

Zambia Sydney Chisenga and Alick Gondwe Corpus Legal Practitioners 462

ICN Introduction 467

Quick Reference Tables 469

South Africa

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation is the Competition Act 89 of 1998, as amended (the Act) and the regulations promulgated in terms of that Act. The Act was amended by the Competition Second Amendment Act 39 of 2000, which came into effect on 1 February 2001. The Competition Amendment Act 1 of 2009, which has been passed into law, has not come into force, with the exception of section 6, relating to market enquiries, which came into force on 1 April 2013. The enforcement agencies are the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (CAC).

2 What kinds of mergers are caught?

Any transaction involving the direct or indirect acquisition or establishment of control, by one or more persons over the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of shares, interest or assets, by amalgamation or any other means, is a 'merger' for the purposes of the Act. Notably, however, the Act does not provide a closed list of how 'control' may be achieved. The Act applies to small, intermediate and large mergers, but in the ordinary course only intermediate and large mergers require prior notification and approval.

Thresholds of combined annual turnover or assets, set by the minister of trade and industry in consultation with the Commission, determine what constitutes intermediate and large mergers (see question 5). Small mergers are those falling below the lower thresholds and can be implemented without prior notification and approval, but parties to a small merger can be called upon to notify the merger to the Commission. In addition, the Commission published a guideline in 2009, in terms of which it requires notification of small mergers if at the time of entering into the transaction any of the firms, or firms within their group, are subject to an investigation by the Commission of a prohibited practice or are respondents to pending proceedings in respect of a prohibited practice referred by the Commission to the Tribunal. Intermediate mergers require prior notification to the Commission. Large mergers require prior notification to the Commission, which conducts an investigation and makes a recommendation to the Tribunal. With large mergers, the Commission makes recommendations to the Tribunal, which is the decision-maker in respect of large mergers.

The Tribunal has the power to approve or prohibit mergers, and decisions of the Commission can be appealed to the Tribunal. Decisions of the Tribunal, whether at first instance or in appeals from decisions of the Commission, can be appealed to the CAC, which is a division of the High Court. Its decisions in competition law matters were initially deemed to be final in terms of the provisions of the Act. However, in a decision in the *Ansac/Botash* matter, Ansac appealed directly to the Supreme Court of Appeal (SCA) to hear the matter, without the requisite leave to appeal. The SCA held that it had jurisdiction to hear the matter as the Constitution provides the SCA with final appellate jurisdiction in all instances except constitutional matters. On procedural, constitutional and jurisdictional matters, the ordinary high court system effectively has parallel jurisdiction to the CAC, and High Court decisions may be subject to further appeals to the SCA or Constitutional Court, South Africa's two most senior courts.

During the year ending February 2013, the Competition Authorities finalised the investigation of 327 mergers, of which 70 were large, 227 were intermediate and 30 were small. None of these mergers were prohibited. Of the 327 mergers, 278 were approved unconditionally, 37 mergers were approved subject to conditions and 12 were withdrawn.

3 What types of joint ventures are caught?

The Act does not specifically refer to joint ventures. To the extent that the effect of a joint venture constitutes a 'merger' as defined, the merger control provisions of the Act will apply. Generally 'greenfield' joint ventures will not be caught by the Act, but a combination of existing operations may be. The Commission has published a non-binding practitioners' note to help determine whether a joint venture is caught. To the extent that a joint venture is not a 'merger', the prohibited practices provisions of the Act may nevertheless apply.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

A party has control of a firm for purposes of the Act if that party:

- beneficially owns more than half the issued share capital of the firm;
- is entitled to a majority of the votes that may be cast at a general meeting of the firm or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that party;
- is able to appoint or to veto the appointment of a majority of the directors of the firm;
- is a holding company, and the firm is a subsidiary of that company;
- is a trust and has the ability to control the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- in the case of a close corporation, owns the majority of members' interests or controls directly or has the right to control the majority of members' votes in the close corporation; or
- 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 the categories above.

The last item is a catch-all, intended to catch minority and other interests, but only to the extent that they have the effect described in that point.

The position on control was complicated by the judgments of the Tribunal and the CAC in the *Distell* case. In this matter, two public companies merged. They both had three main shareholders, each holding a 30 per cent stake, with the government also holding a 10 per cent stake in each. They competed against each other in the liquor market. Post-merger, the same major shareholders ended up with the same major stake in the merged company. The parties argued that no approval was required as there was no change in ultimate control. The Tribunal accepted this concept in principle but on the facts found that the three shareholders did not jointly exercise control between them; therefore, there was no common 'controlling' mind in either company. They were competitors and in the one acquiring the other, even though the shareholders were largely in common, there was a change of control, which thus led to a requirement to notify the merger for approval. On appeal, the CAC did not dismiss the Tribunal's approach, but took a more expansive view. It said that the categories specified in the Act were merely illustrative and did not constitute a closed list. The Act did not expressly limit scrutiny to changes in ultimate control alone. Transactions between a company and its wholly owned subsidiary were not necessarily excluded. A wide definition was required so as to allow the authorities to examine a wide range of transactions that could result in a change to market structure and reduce competition.

This decision caused much confusion and uncertainty, and as a consequence many mergers, which on an ordinary commercial reading of the Act would not have been considered notifiable, are submitted for approval. Concern has even been expressed that this definition extends to internal group restructurings. It is submitted that the *Distell* case must be read conservatively and was largely influenced by the relevant facts, where two independent operators that competed in the same market (albeit with common shareholders) merged their businesses into one.

The question as to what constitutes an acquisition of control was expanded upon by the Tribunal in the *Ethos/Tsebo* case. Prior to the transaction, Ethos exercised joint control over Tsebo with two other firms and no individual shareholder owned more than 50 per cent of the issued share capital of Tsebo. The transaction concerned an acquisition by Ethos of an additional shareholding, which would result in Ethos' total shareholding marginally exceeding 50 per cent. According to the shareholders' agreement, any material decision required the assent of at least 67 per cent of the shareholders' vote and no shareholder had the ability to achieve this required percentage prior to or after the merger. In its ruling, the Tribunal reaffirmed the principle that a firm can be controlled by more than one person at the same time and that an acquisition of more than 50 per cent of the shares in that firm will result in sole control, although there is no de facto change in control. In other words, a firm can have a joint controller (de facto control) and a sole controller (de jure control) at the same time. There had thus been a move from joint control to deemed sole control and the transaction was notifiable.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Notification and approval of intermediate and large mergers is compulsory. Small mergers are those that fall below the thresholds prescribed for an intermediate merger and do not have to be notified in the ordinary course and may be implemented without approval unless required by the Commission. The Commission is entitled to require that a small merger be notified if the Commission considers that it may substantially prevent or lessen competition or cannot be justified on public interest grounds. Further, in terms of a Guideline issued by the Commission in April 2009, the Commission requires parties to notify a small merger if, at the time of entering into the transaction, any of the firms, or firms within their group, are subject to an investigation by the Commission of a prohibited practice or are respondents to pending proceedings in respect of a prohibited practice referred by the Commission to the Tribunal.

In 2009, the intermediate and large merger thresholds, as well as the applicable filing fees, were increased. This decision was made to allow the Commission to focus on the regulation of more significant mergers. The new thresholds and fees came into effect on 1 April 2009. In terms thereof, an intermediate merger is one where:
- the combined turnover in, into or from South Africa of the acquiring and target firms is valued at or above 560 million rand but below 6.6 billion rand;
- the combined assets in South Africa of the acquiring and target firms are valued at or above 560 million rand but below 6.6 billion rand;
- the turnover in, into or from South Africa of the acquiring firm plus assets in South Africa of the target firm are valued at or above 560 million rand but below 6.6 billion rand; or
- the assets in South Africa of the acquiring firm plus the turnover in, into or from South Africa of the target firm are valued at or above 560 million rand but below 6.6 billion rand; and either:
  - the annual turnover in, into or from South Africa of the target firm exceeds 80 million rand; or
  - the value of the assets in South Africa of the target firm exceeds 80 million rand.

A large merger is one where:
- the combined turnover in, into or from South Africa of the acquiring and target firms is valued at or above 6.6 billion rand;
- the combined assets in South Africa of the acquiring and target firms are valued at or above 6.6 billion rand;
- the turnover in, into or from South Africa of the acquiring firm plus the assets in South Africa of the target firm are valued at or above 6.6 billion rand; or
- the assets in South Africa of the acquiring firm plus the turnover in, into or from the target are valued at or above 6.6 billion rand; and either:
  - the turnover in, into or from South Africa of the target firm exceeds 190 million rand; or
  - the value of the target firm's assets in South Africa exceeds 190 million rand.

Mergers falling under these thresholds constitute small mergers.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The Act applies a mandatory system, requiring notification to the Commission of large and intermediate mergers. Provision is made for voluntary notification of small mergers. The Commission may also require notification of a small merger if there are competition concerns at stake and, in terms of a Guideline issued by the Commission in April 2009, the Commission has stated that it requires notification of a small merger if, at the time of entering into the transaction any of the firms, or firms within their group, are subject to an investigation by the Commission of a prohibited practice or are respondents to pending proceedings in respect of a prohibited practice referred by the Commission to the Tribunal. Intermediate and large mergers may not be implemented until approval has been obtained. All mergers are now subject to the provisions of the Act. Previously, mergers under the thresholds were exempt.

Despite the application of the Act to all mergers, certain banking mergers may be exempt where permission and consent is required in terms of the Banks Act 94 of 1990, and the minister of finance has issued the required notice to the commissioner (see question 8).

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

The Act applies to all economic activity having an effect within South Africa. However, insofar as the notification of mergers is concerned, the thresholds are calculated in relation to combined turnover or assets in relation to South Africa only and it appears that notification is only necessary if a company's South African assets or South African-derived turnover meet the thresholds. Accordingly, the Act is applicable to foreign-to-foreign mergers to the extent that the parties have assets in South Africa or turnover generated in, into or from South Africa.

It should be noted that the informal view of the Commission is that neither party requires a presence in South Africa and that it is sufficient that both or one of the parties have turnover in South Africa so as to meet the thresholds. Arguably this goes too far and goes against our general legal principle that statutes are not extra-territorial in application. No final case law exists on this point, although in the context of restrictive practices analysis the CAC has ruled that South African authorities have jurisdiction in relation to agreements entered into outside South Africa, as long as they have an effect in South Africa. These effects are not limited to anti-competitive or deleterious effects (this was confirmed by the SCA in *Ansac/Botash*).

Since the Act came into effect in 1999, the Tribunal has considered and approved many foreign-to-foreign transactions and, as a matter of general practice, foreign-to-foreign mergers, where the target has a subsidiary or business activities in South Africa, are notified to the authorities if the relevant thresholds are met.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Banks and insurance mergers are subject to notification and approval under the ordinary rules. The Act allows the minister of finance to overrule the Commission in urgent situations involving bank mergers, generally where he regards it as in the public interest to do so. This will generally be the case with a failing bank requiring immediate rescue without 'jumping through all the hoops' of a formal Commission filing. The minister of finance has been prepared to use this 'trump' card. Indeed, the minister used his powers to approve the *Barclays/ABSA* merger and thus avoid a merger notification process for the parties.

Generally speaking, there are no restrictions on foreign investment into South Africa, save in certain limited sectors such as banking and broadcasting, where there are limits on the levels of foreign ownership in the area of mergers. However, ventures incorporating persons that have been historically disadvantaged are encouraged and may be essential where tenders will be submitted for government or parastatal contracts. In certain sectors of the economy, such as the financial, health information, technology and mining sectors, sectional charters have been developed and a balanced 'scorecard' system is being developed to encourage black economic participation in these sectors. The government has developed a set of codes on broad-based Black Economic Empowerment (BEE). These codes provide for a generic scorecard in terms of which levels of BEE in enterprises are measured. The codes provide for 'points' to be allocated, based on black participation on a number of levels, including equity ownership, shareholding, managerial representation and the use of black-owned firms in the procurement of goods and services. This type of model is being extended to other industries.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines for filing, but an intermediate or large merger may not be implemented until notified and approved. Failure to notify and/or implementation prior to approval being obtained in respect of intermediate or large mergers exposes the parties to administrative penalties of up to 10 per cent of turnover, as well as potential injunctions on implementation. Sanctions for failing to notify are applied in practice. The Tribunal may also order divestiture where a merger is implemented without notification although divestiture would be a remedy of last resort and to date the sanctions that the Tribunal has imposed for not filing have been penalties.

In 2010 the Tribunal confirmed an administrative penalty of 1.1 million rand as part of a settlement agreement concluded between the Commission, on the one hand, and two construction firms, WBHO and Edwin Construction, on the other. The parties failed to notify the Commission of a merger they had implemented in 2005. The Commission stated that it had taken a tougher approach in this case than in earlier decisions for failure to notify because the Act has been in existence for over 10 years and by now firms should be well aware of their obligations. It was nevertheless highlighted that the merging parties had brought the matter to the Commission's attention when they became aware of it and cooperated with the Commission in its assessment of the transaction.

In 2006 and 2007, the Commission had recommended the prohibition of a large merger between Netcare Hospital Group and Community Hospital Group (CHG) on the basis that the merger was likely to lead to the substantial lessening or prevention of competition. The transaction came to the attention of the Commission through a complaint alleging price fixing by the two hospital groups. Upon investigating the complaint, the Commission was advised that in 2003 Netcare had acquired a controlling stake in CHG, which had not been notified to the Commission at the time. The parties agreed to pay an administrative penalty of 6 million rand. The settlement was referred to the Tribunal for confirmation. When the matter came before the Tribunal, the Tribunal rejected the settlement agreement, saying that it failed to adequately protect the public interest. The Tribunal found that the Commission had erred in its determination of an inappropriately low penalty. It held that the Commission ought to have considered the following important factors: Netcare should have been familiar with the relevant legislation; Netcare had an interest in not appearing to be a controlling shareholder of CHG in its formative years; the parties were inconsistent in their explanations to the Commission and their levels of cooperation and the period of time that had lapsed between implementation and notification was significant. The Tribunal also expressed a fear that 'firms may well construe low penalties as an acceptable cost of doing business' if implementation prior to notification serves to hamper proper adjudication.

In December 2012, the Tribunal confirmed a consent order between the Commission, Phelps Dodge National Cables Corporation (PDNCC), Phelps Dodge Corporation (PDC), Freeport Mcmorgan Copper and Gold Inc (Freeport) and National Cables (Pty) Ltd (National Cables), for the implementation of two mergers that had not been notified to the Commission. In October 2006, PDNCC acquired a controlling stake of 60 per cent in National Cables. The parties had sought legal advice but were not advised of the need to obtain the Commission's approval. The failure to obtain approval was discovered through a due diligence conducted in respect of a separate transaction and this merger (the acquisition by PDNCC of a controlling interest in National Cables) was notified more than a year after implementation in February 2008. In March 2007, Freeport acquired PDC, which resulted in the indirect change of control of National Cables. The parties and their legal counsel were of the view that notification was not required but in February 2008 the parties notified the Commission of the transaction out of caution and to avoid a jurisdictional dispute with the Commission. The Commission found that both transactions had resulted in changes of control in respect of National Cables, which constituted a merger in each case and that the thresholds for an intermediate merger were met in both instances. However, as the parties had taken legal advice and had not been advised to notify, the Commission merely required the parties to the transactions to pay the equivalent of the filing fees for the intermediate merger notifications and Freeport agreed to pay an administrative penalty of 150,000 rand, being the equivalent of 75,000 rand per transaction on behalf of all the parties.

10 Who is responsible for filing and are filing fees required?

Both parties to a merger are responsible for filing.

Fees are 100,000 rand for intermediate and 350,000 rand for large mergers. The Act does not stipulate which party is responsible for payment of the fees – that is generally a matter for commercial negotiation between the parties.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Parties to an intermediate or large merger may not implement the merger before obtaining the requisite approval. In the case of an intermediate merger, the Commission, within 20 business days of certifying that the notification is complete, must approve or prohibit the merger, but may extend the period it has to consider the merger by no more than 40 business days. In practice, the Commission often makes use of an extension period to complete its investigations. If no response is received from the Commission within the time specified, the merger is deemed approved. Unlike in certain other jurisdictions, the Commission need not have competition concerns to make use of the extension period and is not required to justify the use of the extension period.

In the case of a large merger, which the Commission is obliged to refer to the Tribunal, a date for hearing must be set within 10 days of the matter being referred. A certificate of approval or prohibition must be issued within 10 days of the end of the hearing and reasons must be provided within 20 days of the issue of the certificate. There is a clear gap here in that there is no prescribed period in which a hearing must be held and there is no deemed approval if the hearing does not take place. The Act provides that the matter must be referred by the Commission within 40 business days and that the Tribunal, on application, may grant extensions of 15 business days each to the Commission. However, in the event that the first period or any subsequent period expires, the party may apply to the Tribunal to consider the merger without a recommendation from the Commission.

In practice, the Tribunal has proved efficient, and disposes of matters in a reasonably short time. There has been a reduction in the time for approval of mergers.

In 2009, the mergers and acquisitions division of the Commission revised its service standards, publishing review periods that the Commission will commit to achieve for Phase I (non-complex), Phase II (complex) and Phase III (very complex) mergers. These review periods do not replace the review periods set out in the Act but the Commission seeks to adhere to these periods, particularly in the interests of expediting the review of non-complex mergers.

Phase I (non-complex) mergers are categorised as those where the parties' combined market share is below 15 per cent, where no complex control structures arise or no public interest issues arise. The Commission commits to reviewing Phase I mergers within 20 business days.

Phase II (complex) mergers involve transactions between actual or potential competitors (horizontal mergers) or between customers and suppliers (vertical mergers) where the parties hold more than 15 per cent in their respective markets. The Commission considers that Phase II cases generally include challenges relating to defining the relevant product markets; multiple product or geographic markets; markets that are subject to deregulation; or public interest issues arising as a result of the merger. The Commission commits to reviewing Phase II mergers within 45 business days.

Phase III (very complex) mergers are those that the Commission considers likely to give rise to a substantial lessening or prevention of competition, such as mergers between leading market participants. The Commission considers that the thorough investigation of Phase III cases requires requests for specific documents or information from the merging parties as well as third parties. The review period for Phase III mergers is 60 business days.

In terms of meeting the review periods for mergers, the Commission has emphasised that complete merger filings are required to be submitted and the Commission has published a guideline in respect of the information and documents required to be filed in order for a merger to be accepted as complete. Merger filing requirements for specific mergers may be discussed in a pre-notification meeting by arrangement with the manager of the Commission's mergers and acquisitions division.

The review periods in terms of the Commission's revised service standards replaced the former 'fast-track' review procedure published in 2002, which provided for a 20-business-day review of non-complex mergers meeting certain criteria.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

Failure to notify the Commission of a merger or implementing a notifiable merger prior to approval being obtained is a contravention of the Act, rendering the parties liable to pay an administrative penalty. The Tribunal also has wide discretion to direct the taking of steps to prohibit the merger. In 2008 the Tribunal confirmed a consent order between the Commission, Bonheur 50 General Trading (Pty) Ltd (Bonheur) and Komatiland Forests (Pty) Ltd (Komatiland), for the implementation of a merger without prior notification to the Commission. In terms of the settlement agreement, Bonheur and Komatiland agreed to pay an administrative penalty of 500,000 rand.

In March 2004 the South African Forestry Company Ltd (SAFCOL), Bonheur and Komatiland had entered into a share sale agreement in terms of which Bonheur was to acquire a 75 per cent interest in Komatiland. The parties met the thresholds for an intermediate merger and the proposed transaction was duly notified as such. In September 2004, the Commission decided that the merger would result in the substantial lessening or prevention of competition in the relevant markets and prohibited it. The parties asked for the Tribunal's consideration of the Commission's decision but subsequently abandoned the merger. At the time of the parties' application for the Tribunal to consider the Commission's decision, the Commission commenced an investigation as to whether there had been prior implementation of the proposed merger, based on the parties' conduct before, during and after the merger review process. The share sale agreement provided for attendance by representatives of Bonheur at Komatiland management committee meetings. Bonheur representatives would attend these meetings on an observer status. Although permitted to speak at the meetings, they were prohibited from voting and from otherwise exercising control or influence over the management or operation of Komatiland. The Commission found that, contrary to the provisions of the share sale agreement, some of the Bonheur representatives had, through their level of participation in the discussions and deliberations in the meetings, conducted themselves in a manner that amounted to the exercise of control over the management or operation of Komatiland. The Commission also found that attendance at the Komatiland management committee meetings by the Bonheur representatives had resulted in the latter being exposed to certain competitively sensitive information that, but for their attendance at these meetings, would not have been readily available to Bonheur, then a competitor of Komatiland in the upstream market for the production and supply of softwood sawlogs and the downstream market for the production and supply of sawn timber.

The Commission found that the conduct of the representatives went beyond the scope of normal commercial interaction between competitors in the ordinary course of business and normal commercial interaction between competitors in the process of a merger and, effectively, amounted to the implementation of the merger without the requisite approval being obtained. The parties contended that the rationale for allowing Bonheur representatives to attend the management meetings of Komatiland was to provide Bonheur with insight into the business of Komatiland and its management in order to protect Bonheur's position as a prospective investor. It was submitted that this practice was followed in the bona fide belief that attendance at the meetings would not give rise to any contravention of the Act and that they had not in fact contravened the Act. The parties nevertheless concluded the matter with the Commission in terms of a settlement agreement.

In *Competition Commission/Royal Bafokeng Holdings (Pty) Ltd, Mogs (Pty) Ltd, Elbroc Mining Products (Pty) Ltd and Stope Technology (Pty) Ltd*, after prior implementation of a merger was established, the acquiring parties reached as settlement agreement with the Commission and collectively paid 100,000 rand for prior implementation, while the target parties collectively paid 100,000 rand.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions may be applied in any cases in which closing takes place before clearance is obtained. However, it is possible to put in place hold-separate and/or ring-fencing arrangements to allow merging parties to close a transaction outside South Africa, if this can be done without implementing the merger in South Africa. While authorities have not provided an official statement in support of this, hold-separate and ring-fencing arrangements have been put in place in many cases. See also question 14.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

This arose for the first time in the *AP Moller–Maersk/Royal P&O Nedlloyd* merger, where the parties unilaterally agreed to certain 'hold-separate' arrangements to ring-fence the South African aspects of the merger. The merger was approved and closed in Europe prior to the South African approval being obtained. The arrangements were accepted by the Commission and Tribunal without comment. Subsequently a number of hold-separate arrangements have been put in place in order to close mergers without implementation in South Africa but there has been no official statement by the authorities on the appropriateness of such arrangements.

15 Are there any special merger control rules applicable to public takeover bids?

No. Where public takeovers fall within the Act's definition of a 'merger', the legislation is applicable. To the extent that the Companies Act 61 of 1973 requires a public offer to be made or stock exchange requirements exist, there may be further obligations.

In the *Harmony/Gold Fields* hostile takeover bid, in an appeal against a decision of the Tribunal, the CAC found that an early settlement offer by Harmony to acquire 34 per cent of Gold Fields amounted to an acquisition of control that triggered the need to notify. The obligation to notify was triggered once the requisite intent to acquire control was formed, and any subsequent steps, although short of de facto or de jure control, amounted to implementation and could not be taken prior to obtaining approval. This case has undoubtedly limited the tactical options available to an acquiring party in the context of a hostile takeover. In the *Johnnic/HCI* large merger, the Tribunal found that the *Harmony/Gold Fields* decisions 'may carry certain enigmas' and held that the decisions should not be interpreted to state that a mere intention to bring about a merger amounts to a proposed merger and that such a proposed merger activates the requirement to notify.

In the ordinary course, merging parties submit a joint notification. However, provision is made for separate notifications and for a firm to file on behalf of another firm in certain circumstances. These provisions are typically applied in hostile mergers.

16 What is the level of detail required in the preparation of a filing?

Prescribed forms and declarations need to be submitted, but are generally not as detailed as those required under the US or EU systems. Generally merging parties submit a joint competitive report as part of the notification. Various documents relating to the transaction are required to be submitted. Filings have become more sophisticated and parties often file expert economic reports in support of their merger filings. In 2010 the Commission also published a practice note setting out requirements for 'complete' merger notifications.

17 What is the timetable for clearance and can it be speeded up?

Approval of intermediate mergers is deemed to have been granted if no reply is received from the Commission within the prescribed periods. Notification ought to be made as soon as possible as the period granted for the Commission's consideration begins when the notification is received and is certified to be complete. Other than applying tactical pressure on an ongoing basis, the timetable cannot be accelerated. It is, however, possible to approach the Commission with regard to speeding up the process if there are special considerations at stake. With large mergers there is no deeming provision and no cap on how long hearings should take. However, certificates and written reasons must be given within prescribed periods following a hearing. In practice, non-contentious intermediate mergers are generally approved within about 20 business days.

In 2009, the mergers and acquisitions division of the Commission revised its service standards, publishing review periods that the Commission will commit to achieve for Phase I (non-complex), Phase II (complex) and Phase III (very complex) mergers. These review periods do not replace the review periods set out in the Act but the Commission seeks to adhere to these periods, particularly in the interests of expediting the review of non-complex mergers. Please also see question 11.

18 What are the typical steps and different phases of the investigation?

After receiving a merger notification, the Commission appoints an investigator to investigate the proposed transaction. The investigator may question any person with knowledge relevant to the investigation. The Commission typically contacts the competitors and customers of the merging parties. Typically, the assessment is made on the basis of the written submissions to the Commission supporting the request for approval of the merger.

In large mergers the Commission has taken to appointing a specialist investigation team prepared to meet with the merging parties on a regular basis to discuss progress in the investigation. Often, site visits to plants and operations will be requested to facilitate the investigation.

In the case of small and intermediate mergers, the Commission is the decision-maker, but in the case of large mergers the Commission concludes its investigation and makes recommendations to the Tribunal, being the decision-maker in respect of large mergers. Please also see question 11.

Substantive assessment

19 What is the substantive test for clearance?

Where a merger occurs, the test is whether the merger is likely to substantially prevent or lessen competition, and, if so, whether any technological, efficiency or other pro-competitive gains are likely to result from the merger that may offset the lessening of competition. Relevant factors to be considered are:

- the strength of competition in the market;
- the probability that firms in the market will behave competitively following the merger;
- the actual and potential level of import competition;
- ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration and history of collusion in the market;
- degree of countervailing power in the market;
- likelihood of the merged firm having market power;
- dynamics of the market, including growth, innovation and product differentiation;
- the nature and extent of vertical integration;
- whether the business of a party has failed or is likely to fail; and
- whether the merger will result in the removal of an effective competitor.

The Commission must also consider whether the merger can be justified on substantial public interest grounds, particularly the effect of the merger on employment; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive; and the ability of national industries to compete in international markets. Accordingly the Act allows issues to be considered that are of a socio-political nature in addition to issues of economic efficiency and consumer benefit. Please also see question 22 and 'Update and trends'.

20 Is there a special substantive test for joint ventures?

No. The ordinary test applies.

21 What are the 'theories of harm' that the authorities will investigate?

In assessing whether a merger is likely to substantially prevent or lessen competition, the Commission is required to assess the strength of competition in the relevant market and the probability that the firms in the market will behave competitively or cooperatively after the merger. In making this assessment, the Commission must take into account the factors listed in question 19. The Tribunal has indicated that it will deal mainly with two theories of harm in assessing whether a merger will substantially prevent or lessen competition, namely coordinated effects and unilateral effects. In doing so, it would specifically consider some or all of those factors set out in question 19 that are relevant to the assessment of each specific transaction. An illustration of the authorities addressing this is the merger between Kansai Paints Company Limited (Kansai) and Freeworld Coatings Limited (Freeworld), a hostile takeover by Kansai of Freeworld. In 2011, the Commission approved the intermediate merger between Kansai and Freeworld subject to conditions addressing competition and public interest concerns.

The transaction involved horizontal overlaps in the distribution of automotive OEM coatings, particularly primer and base coatings. In South Africa Kansai's activities include OEM automotive coatings, which in turn include primer and base coatings. Kansai's products are distributed via an independent distributor to only one vehicle manufacturer, namely Toyota. Freeworld is a South African paint manufacturing and distributing company and, through its joint venture with DuPont, a leading multinational in the industry, is active in the production of OEM automotive coatings, using DuPont technology. Freeworld supplies all OEMS in South Africa. The Commission investigated the potential unilateral and coordinated effects of the merger.

With regard to the unilateral effects, the Commission noted the strong link between Kansai and DuPont that would result from the merger, as the two firms are the leading suppliers of primer and base coatings in South Africa and, post-merger, would be in a joint venture with respect to the manufacture and distribution of automotive coatings. The Commission's primary concern was that post-merger the two firms would behave cooperatively, supplying their OEM automotive coatings through the *DuPont/Freeworld* joint venture, thereby removing an effective competitor.

In assessing coordinated effects, the Commission found that the automotive coatings market is concentrated, with high barriers to entry and links between the various players through joint ventures. Kansai was party to a joint venture agreement with PPG Industries (PPG) in the automotive OEM coatings industry in other parts of the world. The Commission was concerned that if this joint venture were extended to South Africa post-merger, there was the possibility of future coordination between Kansai, DuPont and PPG. Together, these three major players account for 80 per cent of the market.

To address its concerns, the Commission imposed conditions requiring the divestiture of the entire automotive coatings business of Freeworld, including its shareholding in the *DuPont/Freeworld* joint venture, that Kansai establish an original equipment manufacturer automotive coatings facility in South Africa and not retrench any employees for the next three years. However, Kansai took the Commission's decision on appeal. The merging parties and the Commission renegotiated the conditions imposed and agreed that the obligations regarding divestiture and the development of local manufacturing facilities would be removed. The Tribunal approved the removal of these two conditions.

22 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

In addition to the usual business and economic efficiency criteria, social and political factors may be significant to the assessment and the Act specifically provides for socio-political factors to be taken into account, including the economic empowerment of the country's previously disadvantaged communities. The Commission has shown concern for issues such as employment and black economic empowerment (BEE), with regard to both mergers and complaints. In the *Komatiland Forests* case, involving the proposed privatisation of the South African government's forestry assets, the Commission prohibited the sale of the state's forestry assets to the government's preferred bidder on the basis that the merger would likely substantially prevent and lessen competition in the market for sawn timber, and that the alleged efficiency gains were not likely to offset the anti-competitive effects. Furthermore, the Commission considered that the merger raised significant public interest concerns, in particular, that it would likely result in the exit of small independent saw-millers, giving rise to some 2,000 job losses. The Commission also took into account the concern expressed by trade unions that jobs would be lost at the merged entity itself.

A large merger between the US corporation, Wal-Mart, and South African wholesaler and retailer, Massmart Holdings Limited (Massmart), was notified to the Commission in November 2010. Wal-Mart has no presence in South Africa and the Commission recommended unconditional approval of Wal-Mart's proposed acquisition of a 51 per cent stake in Massmart.

Public interest concerns were raised by trade unions and industry bodies in relation to Wal-Mart's record on labour rights and the effect of its procurement practices on local manufacturers and suppliers. Trade unions and industry bodies made submissions to the Commission in this regard but the Commission nevertheless recommended that the Tribunal approve the transaction unconditionally.

Subsequently, and in an unusual development prior to the Tribunal hearing, three government departments applied for the Tribunal hearing to be postponed to allow them to bring a discovery application and prepare an expert witness statement. The government departments submitted that the acquisition would lead to thousands of job losses, worsening labour conditions and the squeezing out of local suppliers. Arguments from both sides on these public interest aspects were heard before the Tribunal and, in June 2011, the Tribunal approved the merger subject to conditions. The conditions included a moratorium on retrenchments for two years post-merger and an obligation to give preference to the 503 employees retrenched during June 2010 when employment opportunities become available within the merged entity, taking into account those employees' years of service to the Massmart group. The merged entity was also required to establish a programme for the development of local suppliers and contribute 100 million rand to the programme, to be expended within three years (please also see 'Update and trends').

In March 2012, following the Tribunal's decision, the CAC upheld, in part, an appeal by the South African Commercial, Catering and Allied Workers Union (SACCAWU) against the order of the Tribunal. However, the CAC approved the merger subject to conditions and held that there was insufficient evidence to conclude that the public interest concerns set out in the Act (in particular, the effect of mergers on employment and on small and medium sized businesses), was sufficient to refuse the approval of the merger. The CAC found that there was insufficient evidence to conclude that the detrimental effects of the merger would outweigh the clear benefits to consumers.

The CAC held in favour of SACCAWU that the 503 workers who had been retrenched were entitled to reinstatement, on the basis that the circumstances in which these workers had been retrenched from Massmart were so closely linked to the merger and its timetable that the suggestion that the decision to retrench had been taken some six to eight years earlier was unsustainable.

The CAC also accepted that there were legitimate concerns about the effect of the merger on small producers and therefore consequent effects on employment and recognised that the provisions of the Act required measures to be taken to safeguard the public interest concerns, in particular, those regarding small producers. The CAC found that there was insufficient detail as to how the condition that the merging parties would establish a programme aimed at the development of local South African suppliers would operate and whether it would fulfil the statutory requirements of the protection of the public interest. Accordingly, the CAC held that a study should immediately be commissioned by three experts, representing SACCAWU, the ministers, and the merging parties. The three experts were required to be appointed within one month of the CAC's order, with a further two months to produce a report for the consideration of the CAC as to the best means by which South African small and medium sized suppliers could participate in Wal-Mart's global value chain, thereby ensuring that benefits from the merger will flow to this sector of the economy. Once this report has been completed the parties will have an opportunity to consider it. The CAC will then formulate the mandate and the conditions by which such a fund or similar proposal would operate, to ensure that the public interest concerns are addressed. Interestingly, the CAC did not provide any guidance to the concerned parties regarding how to achieve this unprecedented condition.

With regard to BEE, the Commission has publicly expressed its support for the Department of Trade and Industry's Broad-Based Black Economic Empowerment Act, which legislates for economic empowerment changes. However, in the *Shell/Tepco* large merger, the Tribunal criticised the Commission for an overzealous approach to its public interest mandate, and in practice most mergers are approved within conventional competition law parameters that generally apply worldwide. In the *Tiger Brands/Ashton Canning* large merger, the Tribunal imposed a number of employment-related conditions, including a moratorium on retrenchments and payment of 2 million rand towards a training fund to benefit all permanent and seasonal employees retrenched as a result of the merger.

In 2009, the Commission recommended the approval of the *Vodacom Group Plc/Vodafone (Pty) Ltd* large merger. The Tribunal approved the transaction unconditionally, disregarding last minute oral submissions by the Communications Workers' Union, who argued that the domination of foreign capital would pose an 'economic and security risk'.

In the same year, the Commission recommended to the Tribunal that the proposed merger between Masscash Holdings (Pty) Ltd (Masscash) and Finro Enterprises (Pty) Ltd trading as Finro Cash & Carry (Finro) be prohibited. The parties compete in the grocery products market in the Port Elizabeth region, selling products to smaller, independent retailers who sell on to customers in the low-income bracket. In considering the transaction, the Commission took into account that, while all consumers are currently affected by over-inflated food prices, the poorest of the poor are suffering the most and the proposed merger would deprive them of the little rivalry they have between the two regional competitors.

In August 2009 the Tribunal approved the proposed merger unconditionally. The main focus of the Tribunal's decision was on the analysis of potential anti-competitive horizontal unilateral effects arising in the relevant market as a result of the merger. The Tribunal found that Finro is an effective competitor to Masscash in the Port Elizabeth grocery wholesale market. However, the Tribunal also stated that this factor and the fact that the market will be highly concentrated post-merger must be assessed in the context of other evidence, considering that the relevant market in question is characterised by substantial differentiation in relation to individual firms having differences in product range and product mix, customer profiles, margins, location, delivery and credit terms. The Tribunal also considered that post-merger there will remain several significant competitors in the relevant market, including three large wholesalers and four smaller competitors that will be competing with the merged entity.

The main area of dispute between the Commission and the parties was the determination of the extent to which the parties are close competitors in the relevant market. The Commission had embarked on a customer survey with the aid of statistical experts to determine revenue diversion ratios (RDRs) and used these ratios together with the gross margins of the parties' wholesale outlets to predict the likely post-merger price effects of the proposed deal.

The Tribunal concluded that the Commission's economic model did not allow for 'off model' external supply-side factors, namely, various potential reactions from incumbent firms in response to a price incentive, and that this was a serious deficiency in the Commission's analysis. The Tribunal concluded that there were various other deficiencies in the Commission's model used to predict potential price increases post-merger, and that the Commission's model ultimately predicts that the merging parties will in fact have an incentive to engage in an insignificant lessening of competition.

The Tribunal concluded that there was no basis to conclude that consumers would be worse off either from a pricing or service delivery perspective as a result of the proposed merger and that furthermore, the transaction would be unlikely to result in a substantial prevention or lessening of competition in the relevant market. The Tribunal accordingly approved the merger unconditionally.

23 To what extent does the authority take into account economic efficiencies in the review process?

The Act requires mergers to be assessed as to whether they are likely to substantially prevent or lessen competition and, if so, whether any technological, efficiency, or other pro-competitive gains are likely to result that may offset the lessening of competition. Thus, the Act requires the authorities engaged in a merger review process to include, in the event of a substantial lessening of competition, a weighing up of the effects of an anti-competitive merger against efficiency gains. Consequently, merging parties have tended to gloss over efficiencies, or provide abstract theoretical efficiency arguments and await an anti-competitive finding before submitting a comprehensive 'efficiency defence'. However, in the *Mondi/Kohler* decision, the CAC cautioned the appellants' and the competition authorities' general acceptance of the Chicago School postulation that vertical mergers are presumed to be efficiency enhancing. This caution has important legal and economic ramifications in that parties should be advised to prove, a priori, the efficiencies of a proposed transaction. The implication is that the 'efficiency defence' should probably be seen as a factor for consideration in determining whether a merger substantially prevents or lessens competition and not just evaluated once a merger has been deemed anti-competitive.

In January 2009, the Commission prohibited an intermediate merger between Much Asphalt (Pty) Ltd, a subsidiary of Murray & Roberts Holdings Ltd, and Gauteng Asphalt (Pty) Ltd, Road Seal (Pty) Ltd and Road Seal Properties (Pty) Ltd. The firms are active in the market for the supply of asphalt and in the provision of paving services. After considering the vertical and horizontal overlaps in the parties' business operations, as well the efficiencies to be achieved as a result of the merger, and the remedies proposed by the parties, the Commission found that the potential efficiencies and proposed remedies were unlikely to outweigh the possible anti-competitive effects of the merger and would not address the competition concerns identified.

After being prohibited by the Commission in 2010 and by the Tribunal in 2011, the proposed acquisition by Pioneer Hi-Bred International (Pioneer), a US-based multinational seed producer (controlled by Du Pont) of South African seed company, Pannar Seed (Pty) Ltd (Pannar) was conditionally approved by the CAC in May 2012. Both the Commission and Tribunal found that the merger would substantially prevent or lessen competition in the relevant maize seed markets in South Africa that could not be outweighed by technological, efficiency or other pro-competitive gains likely to arise from the merger. The Commission regarded the transaction as a three-to-two merger in the maize seed market as the market in South Africa features only the merging parties and Monsanto. The Commission and Tribunal favoured the purchase of the Pannar business by an alternate buyer (such as Syngenta or Dow).

The CAC, however, took a different approach, cautioning the Tribunal against 'unsubstantiated speculation that the target firm [would] enter into a partnership with another firm which is not a competitor in the market and which is wholly unsuited to a merger.' This would constitute 'an intrusion into the management and control of private companies not justified in the public interest'. The CAC held that the absence of the merger would likely see the decline and, ultimately, the demise of the local Pannar business and the loss of its resources (in particular, its pool of local germplasm); and that combining Pioneer and Pannar would result in an increase in competition for market leader Monsanto. The CAC found that such competition, in the South African hybrid maize seed market, dominated in its nature by innovation competition, will result in long-term dynamic efficiency improvements in the nature and quality of seed produced, as well as its competitive pricing, to the benefit of maize farmers and consumers in South Africa.

On this basis, the parties' appeal was upheld and the order of the Tribunal was set aside. The merger was approved by the CAC conditionally and the merged entity was required to:

- approach its pricing in a prescribed manner in respect of particular products;
- keep the same maize hybrids available to farmers going forward, subject to certain exceptions;
- not retrench any employees as a result of the merger for a period of two years;
- undertake a long-term R&D investment in South Africa. Pioneer intends to invest up to 62 million rand by 2017 to develop a research and technology hub in South Africa;
- work through partnerships with communities, government and other groups to develop programs addressing the challenges faced by small-scale and developing farmers to increase their overall farm productivity, profitability and food security. Pioneer has committed 20 million rand over the next six years to foster such partnerships and collaborations; and
- make available certain licences to public institutions in South Africa on a non-exclusive and perpetual basis.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The authorities have the power to prohibit the implementation of a merger, approve a merger or approve a merger subject to conditions. The Commission approves small and intermediate mergers, whereas in large merger cases the Commission makes a recommendation and refers the case to the Tribunal for approval. In small and intermediate matters, parties may request the Tribunal to consider a prohibited merger or the conditions imposed by the Commission. Appeals in large merger cases against Tribunal decisions lie with the CAC. As outlined in question 9, failure to notify or implementing a merger prior to approval being obtained for intermediate or large mergers exposes the parties to administrative penalties as well as injunctions on implementation.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. It is possible to reach an accommodation with the authorities as to the long-term structuring of the merged entity, behavioural and divestment undertakings. Preferably, these accommodations should be reached with the Commission before it makes a decision. Once it makes a decision it cannot reverse that decision and its functions are discharged. A number of mergers have been approved subject to conditions including undertakings that the merging parties divest a part of the merged business and behavioural undertakings not to foreclose markets or refuse custom.

In 2010 the Commission blocked a merger between Bedrock Mining Support and the hardwood timber operations of Mondi on the grounds that coordination effects would arise as a result of the transaction. On appeal the Tribunal approved the merger subject to behavioural conditions requiring, inter alia, the merging parties to a post-merger price setting mechanism designed to eliminate any significant information exchange between Bedrock and Reatile, one of Mondi's customers. This mechanism provides for an independent expert to determine Bedrock's timber supply prices to Reatile.

In most cases conditions have been recommended by the Commission or by the merging parties and accepted by the Tribunal after assessing the extent to which the proposed conditions deal with concerns arising from the merger. In some cases, the conditions have been imposed unilaterally by the Tribunal. In May 2010, the Tribunal provided reasons for its conditional approval of the merger between Chlor-Alkali Holdings (Pty) Ltd (CAH) and Botswana Ash (Pty) Ltd (Botash). In terms of the transaction, CAH would acquire 50 per cent of the issued share capital of Botash, thus acquiring joint control of Botash with the Botswana government. Both parties manufacture and sell salt. The transaction was also found to have a vertical dimension, as a subsidiary of CAH was involved in the distribution of these products. The Tribunal found that the transaction constituted a 'merger to pure monopoly in the supply of chemical grade salt to the inland areas of South Africa'. Accordingly, it found that the transaction would probably substantially prevent or lessen competition.

The threat of foreclosure occurring post-transaction exacerbated the transaction's potential anti-competitive effect. However, a number of factors mitigated the anti-competitive effect, including the fact that there was only one significant inland customer that had negotiated a favourable long-term supply contract, and that a sole customer would facilitate administration of the transaction. Furthermore, the fact that Botash's salt mine operations have only a limited remaining life disposed the Tribunal towards allowing the merger conditionally.

In April 2011 the Commission approved the acquisition of Freeworld Coating Limited (Freeworld) by Kansai Paint Co Limited (Kansai) subject to conditions aimed at addressing competition and public interest concerns. Both Kansai and Freeworld supply automotive coatings. The Commission's concerns were that the merger would have reinforced the high levels concentration in the South African market and would have created a forum for collusion between Kansai and Du Pont (another multinational automotive paint company) through an existing joint venture between Freeworld and Du Pont. The Commission required that Kansai divest the entire automotive coatings business of Freeworld, which includes Freeworld's shareholding in the joint venture with Du Pont. Kansai will also continue to manufacture decorative coatings for 10 years and establish an automotive coatings manufacturing facility in South Africa within five years. In addition, the Commission imposed public interest conditions requiring Kansai to refrain from implementing any retrenchments for three years; an undertaking to invest in South African research and development in decorative coatings; and an undertaking to implement a BEE transaction within two years. Kansai appealed the Commission's decision and, ultimately, approved the merger subject to conditions renegotiated by the Commission and the parties. The obligations regarding divestiture and the development of local manufacturing facilities were not imposed. A moratorium on retrenchments for a period of three years was imposed. Please also refer to question 23 above in relation to the *Pioneer/Pannar* merger where the conditions imposed include those relating to a two-year moratorium on retrenchments and obligations regarding investment.

In the *Wal-mart/Massmart* case, the Tribunal approved the merger subject to conditions. On the final day of the Tribunal hearing, the merging parties offered certain undertakings to be imposed as conditions for the approval of the merger. These undertakings were aimed at addressing labour and local procurement concerns and they included that the merged entity ensure that there will be no retrenchments in South Africa as a result of the merger for two years; that the merged entity must give preference to the 503 employees who were retrenched in June 2010; and that the merged entity must establish a programme aimed at developing local South African suppliers funded in the amount of 100 million rand to be contributed by the merged entity and expended within three years. In addition, the merged entity undertook to establish a training programme to train local suppliers on how to do business with the merged entity and with Wal-Mart. This case went on appeal to the CAC but largely the conditions stood. The CAC ordered the commissioning of a study 'to determine the most appropriate means and the mechanism by which local suppliers may be empowered to respond to the challenges posed by the merger and benefit' from it, as the Tribunal's decision did not deal with the mechanisms for the development programme in any detail. The CAC wanted to ensure that the concerns that had been raised by the government and trade unions about the impact of the merger on South African suppliers and employment would be adequately addressed by the conditions. In this regard, the CAC ordered that the supplier development programme must focus on skills development rather than cash handouts to local producers. Although the CAC ordered Massmart to contribute to a maximum amount of 200 million rand to the programme over its duration, being five years, it was made clear that it may not be necessary to expend the entire amount in achieving the objectives of the programme. Further, the CAC ordered that the programme should seek to incentivise the merged entity to purchase products from local producers over and above the kind of products that would in any event be purchased by it and that the merged entity will report annually to the Commission.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Divestment is a remedy of last resort. The Commission requires divestment to take place in a short period (usually six months), and will generally insist that an independent trustee be appointed to oversee the process. The Commission has tried to argue for the imposition of financial penalties if the divestment is not effected in a timely manner, but the Act does not allow for this. Except for divestment being ordered, the substantive terms of these agreements have been kept confidential.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

During the year under review, the competition authorities approved a number of mergers conditionally. The competition authorities' approach to requiring remedies is the same in foreign-to-foreign mergers as it is to mergers involving local companies.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The competition authorities have approved a number of transactions by imposing behavioural conditions on the parties. Many of these conditions have related to ancillary restrictions such as access to customers, continued supply and confidential information. The Tribunal has also ordered the Commission to investigate certain ancillary restrictions that have come to light during the course of merger hearings.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

An objection to a merger may be made by any person. A party having a material interest may participate in a Tribunal hearing. The Commission is entitled to interview customers and competitors during the conduct of its investigation in order to obtain their views on the potential impact of a merger. The Commission generally requests formal submissions by competitors and customers, particularly where serious competition concerns are raised. The merging parties' counsel can, pursuant to a formal request and confidentiality undertakings, view and respond to the submissions. Representative trade unions have an automatic right to intervene in the proceedings. In the *Masscash/Finro* merger, the Commission contacted almost 400 retailers during its investigation.

Other interested parties may only participate on application to, and with the leave of, the Tribunal, which has generally been granted in the past. The Tribunal has also in the past allowed the participation of persons outside of the ordinary scope of suppliers, customers and competitors. In this regard the Tribunal specifically authorised a statutory agency, the Industrial Development Corporation, to intervene in a merger in the iron ore industry between Anglo American and Kumba Resources. This very liberal approach was endorsed by the CAC on appeal.

However, the authorities have issued a clear warning to potential interveners not to waste their time. For example, in 2008 and 2009, technology firm Altech attempted to intervene in the *MTN/Verizon* merger hearing. The Tribunal dismissed Altech's application with costs, stating that it would have 'considered this an appropriate case to award punitive costs' against Altech, had its jurisdictional scope allowed for it.

In the recent and highly controversial *Wal-Mart/Massmart* merger, the involvement of third parties from the initial stages of the proceedings was a key feature of the case. The target firm was Massmart, a local wholesaler and retailer of grocery, liquor and general merchandise. The acquiring firm, Wal-Mart, the largest retailer globally, had no presence in South Africa. It was common cause that the merger, in and of itself, did not raise any competition concerns and therefore would not substantially prevent or lessen competition in South Africa. Noting the absence of competition concerns, the Commission unconditionally approved the merger without any conditions.

The Commission's decision was met with objections and was taken on appeal to the Tribunal. The main issues raised in the Tribunal were based on public interest concerns, such as the effect of the merger on employment, local manufacturers, local suppliers and small and medium-sized businesses. The public interest factors were raised by a number of trade unions, most notably the South African Commercial, Catering and Allied Workers Union (SACCAWU), the South African Small Business and Micro Enterprises Forum (SMMEF) and the Ministries of Economic Development Department, Department of Trade and the Industry and Department of Agriculture, Forestry and Fisheries, These intervening parties argued for an outright prohibition or the imposition of certain conditions relating to the public interest. In confirming the Commission's approval of the merger, the Tribunal imposed four conditions, namely, that no retrenchments resulting from the merger could occur for two years after the transaction; that 503 employees who had been retrenched in the previous year be entitled to preferential reinstatement if any employment opportunities became available; that Wal-Mart must honour existing labour agreements, observe the current practice of Massmart and not challenge SACCAWU's position as the representative trade union for the next three years; and that the merged entity has to establish a programme to develop local suppliers and SMME's by investing 100 million rand and train local suppliers on how to do business with the merged entity. The Tribunal also required that the merged entity report back annually on its progress.

The Tribunal's decision was taken on further appeal to the CAC by the intervening parties. The Ministers sought a review of the Tribunal's decision and SACCAWU continued to pursue a decision on the outright prohibition of the merger. The CAC confirmed the approval and revised two of the conditions to be imposed on the merging parties, finding that the two year retrenchment moratorium and the three year guarantee of SACCAWU's representative position was sufficient. The CAC ordered the full reinstatement of the employees retrenched in the previous year. With regard to the 100 million rand development programme, the CAC stated that further investigation as to how this would be implemented effectively and practically was required. An order was given for a study to be commissioned by three economic experts, appointed by the Ministers, the merged entity and SACCAWU. The CAC ordered that the experts were required to produce a report for the CAC by June 2012 as to the best way South African small and medium suppliers can participate in Wal-Mart's global supply chain and ensure that the benefits of the merger flow into this sector of the economy.

This case has been criticised for undue government involvement and inappropriate extension of public policy in competition matters.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Provision is made under the Act for the right of parties to request that information submitted to the Commission be treated as confidential and a prescribed form is submitted in merger filings for confidentiality claims. However, the Act provides that a party seeking access to information that has been claimed as confidential may apply to the Tribunal to order disclosure of the information. The Tribunal will then make a decision as to whether the information is confidential, and if so, it will grant or deny access to the confidential information.

The Commission must publish a notice of its merger decision in the government gazette and it must give the parties concerned written reasons for its decision but the text of such reasons is generally not published. The Commission will often release a press statement summarising its reasons for a decision or the reasons for its recommendation to the Tribunal that a large merger be approved. The Tribunal generally publishes its full reasons for approving or disallowing a merger in any given case. To the extent that confidential information has been provided, the Tribunal will provide a confidential version of its judgment to the parties and make available a non-confidential version for public consumption. It is this growing collection of judgments that is providing the basis for developing South African jurisprudence in merger analysis.

In practice, the Commission and the Tribunal each have their own third-party public relations consultants and the business press also pays keen attention to high-profile merger cases. The reasons for the Commission's decision must not contain confidential information. Both institutions operate information websites. These can be found at www.compcom.co.za (Commission) and www.comptrib.co.za (Tribunal).

A copy of the merger notice must also be given to any representative trade union (or to the employee representative representing employees of the merging firms, should there not be a registered trade union representing them).

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

There is no obligation on the Commission to cooperate in relation to foreign investigations or to recognise any determinations made by other antitrust authorities. The Act provides, however, that the president may assign to the Commission any duty of the Republic, in terms of an international agreement relating to the purpose of the Act, to exchange information with a similar foreign agency. The Commission appears to regard the analysis by other antitrust authorities as persuasive in its own deliberations, as was the practice of the former Competition Board. The authorities are specifically empowered to rely on foreign law in interpreting and applying the Act. Precedents established in foreign systems have thus been of great significance. In 2006, the Commission and Tribunal hosted the fifth annual conference of the International Competition Network. There has been cooperation between the Commission and other regulators such as the US Department of Justice, the Federal Trade Commission and the EU Merger Task Force. Personnel from the Department of Justice and the Federal Trade Commission have been seconded to the Commission in advisory capacities.

Judicial review

32 What are the opportunities for appeal or judicial review?

The Commission and the Tribunal are required to give written reasons for their decisions, and parties that are dissatisfied with the decisions may appeal to the CAC. The process is a full appeal and not limited to the mere review of proceedings.

These rights are amplified by the recognition in the South African Constitution of the right of individuals to fair administrative proceedings, as well as in the Promotion of Administrative Justice Act 3 of 2000.

33 What is the usual time frame for appeal or judicial review?

Decisions of the Commission can be appealed to the Tribunal and decisions of the Tribunal, whether at first instance or in appeals from the Commission, can be appealed to the CAC. The CAC prescribes time frames within which appeals and reviews can be brought and such applications will generally be heard within five months after the appeal is lodged. The speed with which appeals and reviews are heard and decided will, to a large extent, depend on the filing of submissions by the parties within the time periods prescribed. Parties can also request an expedited hearing of an appeal or review where there is urgency and directions will be provided as to future conduct of the appeal.

Enforcement practice and future developments

34 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

The vast majority of mergers are approved in the ordinary course. During the year ending February 2013, the Commission finalised 327 merger investigations, of which none were prohibited. These related to 30 small mergers (23 were approved unconditionally, three were approved conditionally and four were withdrawn); 227 intermediate mergers (200 of these were approved unconditionally, 22 were approved conditionally and five were withdrawn); and 70 large mergers (55 of these were approved unconditionally, 12 were approved conditionally and three were withdrawn). However, the authorities will use their powers in relation to domestic and foreign-to-foreign mergers where they consider competition concerns are raised.

35 What are the current enforcement concerns of the authorities?

The Commission's mergers and acquisitions division is distinct from its enforcement and exemptions division. The latter deals with prohibited practices although the Commission's identified areas of priority (discussed below) affect both of these divisions.

The Commission is very active in its investigations of prohibited practices and in order to focus its resources efficiently it has identified markets and sectors, which it considers are most significant to consumers and the economy, as its priority sectors. The Commission considers that these priority sectors should be targeted proactively. Mergers in these sectors can also be expected to attract closer scrutiny. The Commission's current priority sectors are food and agro-processing; construction and infrastructure; intermediate industrial products and financial services. These are regarded as sectors that have an impact on consumers; on the cost of doing business; and on economic growth and development; or reflect competition concerns (such as featuring cartel conduct).

Food and agro-processing concerns the Commission, due to the high concentration in trading, the storage of grain (wheat, maize) and processing (milling and bread production). The Commission regards firms in this sector as being vertically integrated. The Commission considers that new entrants are needed. Cases under investigation in food and agro-processing relate to 'inputs' (raw fish, animal feed, poultry feed, poultry breeding, yeast, fertiliser, grain); 'processing and manufacturing' (bread, fish, fruit, milling, fats and oils, poultry, plastic irrigation piping) and 'retailing' (supermarkets). With regard to intermediate industrial products, the Commission considers that prices of chemicals and metals, as key manufacturing inputs, have risen at rates in excess of producer and consumer inflation and that historically dominant firms feature in the concentrated markets in these sectors. The Commission's concerns include that high prices make industries using these products uncompetitive. Cases under investigation in this priority sector include polymer chemicals, scrap metal, wire, rebar, liquid fuels, mesh, plastic piping, carbon black rubber, bitumen, tyres, flammable gases and mining roof bolts. The construction and infrastructure sector is another priority sector as anti-competitive conduct is regarded as increasing the costs of major infrastructure needed. More than 50 leniency applications have been made in relation to construction, many concerning bid rigging. Cases under investigation in this sector include those in relation to cement, glass, bricks and pre-cast concrete. The financial services sector has also attracted significant attention.

Another area of concern for the Commission is the private health-care sector, in which the Commission is conducting its first formal market inquiry. Section 6 of the Amendment Act became effective in April 2013, granting the Commission powers to conduct 'market inquiries'. A market inquiry is a formal inquiry in relation to the general state of competition in a market for goods or services without necessarily referring to the conduct or activities of a particular firm. The Commission may conduct such an inquiry if it believes that any feature or combination of features of a market prevents, distorts or restricts competition. Pursuant to section 6 coming into effect, the Commission announced its intention to launch a market inquiry into the private health-care sector. The Commission's concerns stem from rising health-care costs in South Africa. The health-care inquiry will probe various segments of the private health-care market to determine the factors that restrict competition and underlie increases in private health-care expenditure in South Africa. The inquiry will be led by a panel, led by a chairperson, to be appointed from the Commission's executive management. The panel is expected to comprise industry experts and will be supported by a technical team led by an inquiry manager reporting to the chairperson of the inquiry. The chairperson of the inquiry will report to the Competition Commissioner. The health-care inquiry is expected to commence by September 2013 and the inquiry will issue draft recommendations by December 2014. Final recommendations will be issued by the end of June 2015.

The only comparable inquiry was the banking inquiry, which was launched in 2006. At that time the Commission had only general powers to conduct an industry-wide inquiry so the banking inquiry involved voluntary participation. However, section 6 of the Amendment Act confers broad investigative and coercive powers and allows the Commission to issue summons to compel individuals to appear and to provide evidence, with corresponding offences applying for failure to answer fully or truthfully.

The construction industry is one of the Commission's priority sectors, to which it has devoted considerable attention in recent years. In 2009 the Commission initiated investigations against major construction firms for possible collusion in the industry. To expedite the investigation, the Commission introduced a fast-track process in 2011 that promised companies leniency in exchange for coming forward to divulge details on deals in which they may have colluded. More than 20 companies have disclosed information pertaining to bid rigging and collusion, which involves more than 130 projects. It is anticipated that these companies will enter into consent agreements with the Commission.

36 Are there current proposals to change the legislation?

The Competition Amendment Act 1 of 2009 (Amendment Act) was passed into law in 2009. The Amendment Act has not yet come into effect and it is speculated that, given the various constitutional law concerns it raises, (particularly in respect of the prosecution of cartel conduct) it may not become operative in its current form.

On 1 April 2013, section 6 of the Amendment Act came into operation and brought into force provisions relating to market inquiries. This section allows the Commission to conduct 'market inquiries', meaning a formal inquiry, in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of a particular firm. It may do so if it believes that any feature or combination of features of a market prevents, distorts or restricts competition within that market. Twenty days before starting a market inquiry, the Commission must publish a notice in the government gazette, inviting the public to provide information. The Commission must publish a report on completion of the market inquiry and must submit the report to the minister of trade and industry, with or without recommendations. On the basis of information obtained during a market inquiry, the Commission may, inter alia, initiate a complaint and enter into a

Update and trends

The provisions of the Competition Amendment Act No. 1 of 2009 relating to market inquiries came into effect on 1 April 2013. These provisions allow the Commission to conduct a formal inquiry into the general state of competition in a particular market without necessarily referring to the conduct of a particular firm. A market inquiry may be initiated if the Commission believes that features of a market prevent, distort or restrict competition. The Commission's powers in respect of market inquiries are broad and allow the Commission to summon individuals to appear before the inquiry and to compel evidence, with corresponding offences applying for failure to answer fully or truthfully. The Commission's first market inquiry will be into the private health-care sector. The Commission indicated its intention to conduct an inquiry into this sector some years ago, based on concerns about the rising health-care costs in South Africa. The health-care inquiry is expected to commence in September 2013 and may take up to two years. This is a complex market in South Africa and the costs associated with health care are attributable to a broad range factors. A significant part of the inquiry is expected to be outsourced to experts and the Commission has already commissioned various studies into the sector. The only similar inquiry undertaken by the Commission in the past was into the banking sector, when the Commission established a panel in 2006 to look into particular aspects of retail banking and the national payment system. At the time, the Commission had only general powers to conduct an inquiry so the banking inquiry involved voluntary participation. The market inquiry provisions introduced in April this year confer more specific powers on the Commission, including provisions that will allow the Commission to issue summons to compel individuals to appear before the Commission and to provide evidence.

In mergers, public interest criteria continue to play a key role as illustrated in the outcome of certain high-profile mergers, including *Glencore/Xstrata*. The merger between Glencore, the world's largest commodities trader, and Xstrata, the world's fourth-largest diversified miner, was subject to antitrust approval in various jurisdictions, including South Africa. Eskom, South Africa's incumbent electricity supplier, intervened in the proceedings on the basis of concerns about the security and prices of thermal coal supply post-merger. Eskom generates almost 95 per cent of South Africa's electricity and 90 per cent of Eskom's electricity is generated from coal-fired power stations. Following Eskom's intervention, the National Union of Mineworkers (NUM) intervened, raising concerns about merger-related retrenchments and, more specific to Eskom's concerns, the negative effect of higher electricity prices on energy-intensive industry in South Africa and workers employed in those industries. Ultimately the merger was approved subject to conditions to address Eskom's coal supply concerns. A condition was also agreed between the merging parties and NUM, essentially providing a cap on the number of retrenchments allowed as a result of the merger and providing for the establishment of a training fund (at the merging parties' costs) for the semi-skilled and unskilled employees who are retrenched. The impact of a merger on levels of employment is one of the public interest criteria to be considered in the merger review process. Other cases in which public interest has played a key role are the *Pioneer Hi-Bred/Pannar Seed* and the *Wal-Mart/Massmart* mergers.

consent order with any respondent, with or without conducting any further investigation.

The Amendment Act introduces significant changes to South African competition law, including the introduction of criminal liability for directors of companies and those holding positions of management who cause the company to engage in cartel activity. The objective of reviewing the Act was to strengthen the power vested in the competition authorities. The Amendment Act also introduces provisions relating to 'complex monopolies', enabling the Commission to investigate complex monopolies and make a recommendation to the Tribunal where it finds that complex monopoly conduct exists within a market and has the effect of substantially preventing or lessening competition.

The Amendment Act also seeks to clarify jurisdiction between the Commission and other regulatory authorities, providing that, insofar as the Act applies to any conduct arising within an industry or sector that is subject to the jurisdiction of another regulatory authority in terms of any other legislation, the Act and the other legislation must be construed as establishing concurrent jurisdiction in respect of any conduct regulated in terms of the Act, and that other national legislation, provided that the other regulatory authority will exercise primary authority to establish conditions within the relevant industry to give effect to the legislation in terms of which it functions and the Commission will exercise primary authority to detect and investigate prohibited practices and to review mergers in any industry or sector, in terms of the Act.

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