South Africa – Law & Practice

Contributed by Bowman Gilfillan

2016
The ‘Law & Practice’ sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.
Law & Practice

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Bowman Gilfillan competition practice group has been at the forefront of developments in competition law since the inception of the Competition Act and provides a full range of competition law services including in relation to merger control, cartels, abuse of dominance and other restrictive practices. Members of the practice group are regular contributors to local and international competition law publications and participate in the special committees on competition law of the law societies of the Cape and Northern Provinces. Lawyers have been involved in various competition law matters in other African countries and are increasingly expanding their experience in competition law regimes across Africa. The team recently hosted its second Africa competition law seminar, where representatives of competition authorities and legal counsel from around Africa shared their experiences and views on competition law in Africa.

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1. **Legislation and Enforcing Authorities**

1.1 **Merger Control Legislation**

The relevant legislation is the Competition Act, 89 of 1998, as amended (Act) and the regulations promulgated in terms of the Act. The Act was amended in 2000 by the Competition Second Amendment Act which came into effect in 2001. The latest amendment is the Competition Amendment Act, 1 of 2009, which, although passed into law, has not come into full effect at the time of writing. The only section that has come into effect is the section relating to market inquiries.

The Act recognises that there are circumstances where sector legislation provides for the assessment or consideration of competition issues. In this regard, the Act provides a mechanism for resolving conflicts arising from concurrent jurisdiction. One of the amendments to the Act which is still to come into effect, deals specifically with concurrent jurisdiction.

Although banks and insurance mergers are subject to the ordinary rules, the Act provides that the Competition Commission (Commission) and the Competition Tribunal (Tribunal) may not make a determination in relation to a merger
requiring permission in terms of the Banks Act, 94 of 1990 or the Co-operative Banks Act, 40 of 2007, in circumstances where the Minister of Finance has issued a notice to the Commission that it would be in the public interest that the merger fall within the auspices of the banking sector regulator.

The telecommunications sector is one in which various regulatory approvals are required in order to effect a merger and, more relevant, competition issues may be considered by both the competition authorities and the sector regulator. At the time of writing, issues of concurrent jurisdiction were raised by the telecommunications sector regulator in the course of the merger review proceedings before the Tribunal in the Neotel/Vodacom matter.

1.2 Enforcement
The Act is enforced by the Commission, the Tribunal and the Competition Appeal Court (CAC). Parties can also appeal decisions to the Supreme Court of Appeal and, on constitutional grounds, to the Constitutional Court.

The Commission investigates all mergers notified in terms of the Act and makes a final determination in the case of intermediate-sized and small mergers. In the case of large mergers, the Commission investigates the transaction and makes a recommendation to the Tribunal for final determination.

2. Jurisdiction
2.1 Notification
Mergers that are classified as large and intermediate-sized must be notified to the Commission. Small mergers do not have to be notified. However, the Commission can require the notification of a small merger in circumstances where competition or public interest concerns are identified, provided that the Commission may not require notification more than six months after the small merger is implemented.

The small merger guidelines issued by the Commission in 2009 provide that parties to a small merger are advised to notify voluntarily if, at the time of entering into the transaction:

- any of the merger parties, or firms within their group, are subject to an investigation by the Commission in relation to abuse of dominance, vertical or horizontal restrictive practices; or
- any of the merger parties, or firms within their group, are respondents to pending proceedings referred by the Commission to the Tribunal for abusive, vertical or horizontal restrictive practices.

Parties may also notify of small mergers on a voluntary basis – particularly where it is anticipated that the Commission may call upon the parties to notify of the transaction, or if the parties wish to have aspects of the transaction sanitised through the merger review process. This may be in the case of a merger which takes place within a sector which is the subject of a market inquiry or investigation by the Commission.

2.2 Failing to Notify
Proceeding to implement a merger without obtaining the required approvals is a contravention of the Act and exposes both parties to administrative penalties of up to 10% of the firms’ annual turnovers. If detected, the Commission may refer the matter to the Tribunal or conclude a settlement agreement which must be approved by the Tribunal. In either case, the matter is brought before the Tribunal and is published in the government gazette and on the Tribunal’s website. The matter may also receive press coverage in South Africa. Fines paid by merger parties are not regarded as confidential and are made public.

To date, maximum penalties have not been imposed. A divestiture order may also be issued by the Tribunal. However, such an order has not been issued to date. The Tribunal considers the specific circumstances of each case in its assessment of the conduct and the appropriate penalty.

Examples of recent cases include Old Mutual Life Assurance/Momentum, where the merging parties notified of a merger that was approved by the Tribunal in 2008. An indirect effect of the transaction was that investments of policyholders of Momentum fell under the control of Old Mutual and, in 2013, the Commission found that this resulted in the acquisition of control by Old Mutual over part of the business of Momentum. The parties admitted the contravention and agreed to pay an administrative penalty of ZAR175,000. In this case, the Tribunal considered extenuating circumstances in deciding on the appropriate quantum, finding that the failure to notify was a bona fide and reasonable mistake. The highest penalty to date has been in the WBHO Construction case, in which a fine of ZAR1.1 million was levied. The Commission noted in relation to this matter that it had adopted a tougher approach in light of the fact that the relevant provisions of the Act had been in place for several years and ought to be widely known by firms conducting business in South Africa.

2.3 Types of Transactions that are Caught
A transaction must be notified to the Commission if:

- it constitutes a ‘merger’ as defined in the Act;
- meets the prescribed financial thresholds; and
- constitutes economic activity within, or having an effect within, South Africa.
In terms of the Act, a merger occurs when one or more firms, directly or indirectly, acquire or establish control over the whole or part of the business of another firm. The Act contemplates a number of ways in which a merger may be carried out, including through a purchase or lease of shares, interests or assets, or through an amalgamation or other combination with another firm. The concept of control is not defined, but the Act does set out a list of instances in which control is achieved – this is by no means a closed list (see 2.4).

In ordinary circumstances, an internal restructuring would not constitute a merger (assuming that it does not result in the acquisition of control by one firm over another firm’s business) and a filing can be excluded on this basis. Similarly, changes to the incorporation documents of a company will not constitute a merger, unless the change results in a firm acquiring control as contemplated in the Act (see 2.4).

2.4 Definition of Control
For purposes of the Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. There is no closed list of how a merger may be achieved. However, the Act declares that a person controls another firm if that person:

• beneficially owns more than half of the issued share capital of the firm;
• is entitled to the majority of votes that may be cast at a general meeting of the firm, or has the ability to control the voting of the majority of those votes, either directly or through an entity controlled by that person;
• is able to sanction or veto the appointment of the directors of the firm;
• is a holding company, and the firm is a subsidiary of that company as contemplated in the Act;
• in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to 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 points listed above.

The last consideration is a catch-all intended to capture forms of control, such as minority and other interests, where these interests confer de facto control. The assessment of control exercised through a minority shareholding or other interest is fact-specific. Common examples of control in terms of the catch-all provision include minority protections over and above standard protections, which afford a minority shareholder the ability to influence the strategic direction of the firm; or minority shareholdings in a publicly held company where the remaining shares are widely dispersed and voter turnout is low.

2.5 Jurisdictional Thresholds
Compulsory notification is only applicable to intermediate-sized and large mergers (although the Commission can require the notification of small mergers in certain circumstances).

Intermediate-sized mergers are those that meet the following thresholds:

• the combined annual turnover in, into or from South Africa of the acquiring firm and the target firm is valued at ZAR560 million or more; or
• the combined value of the assets in South Africa of the acquiring firm and the target firm is valued at ZAR560 million; or
• the annual turnover in, into or from South Africa of the acquiring firm plus the assets in South Africa of the target firm is valued at ZAR560 million; or
• the annual turnover in, into or from South Africa of the target firm plus the assets of the acquiring firm is valued at ZAR560 million.

In addition, the annual turnover in, into or from South Africa or the asset value of the target firm must be ZAR80 million or more.

A large merger is one where one of the four calculations referred to above results in a figure that is equal to or exceeds ZAR6.6 billion and the annual turnover or assets of the target firm equals or exceeds ZAR190 million.

The values of the turnover and assets are calculated with reference to the previous financial year of the parties. The thresholds apply to all mergers, regardless of the sector or industry in which the merger takes place. For the purpose of threshold calculations, the acquiring firm is broadly construed as the entire group of which the acquirer forms a part. The target firm is construed narrowly, referring to the actual business or assets being acquired.

2.6 Calculating Thresholds
The method for the calculation of merger thresholds is set out in the Notice on the Determination of Merger Thresholds and Method of Calculation (Threshold Notice). The Threshold Notice provides that the annual turnover of a firm is the gross revenue of that firm in, into or from South Africa, based on the firm’s income statement for the most recent financial year. The asset value of a firm is calculated based on
the gross assets as recorded on the firm's balance sheet for the end of the most recent financial year. The assets and turnover values used for the purpose of threshold calculations must be calculated in accordance with generally accepted accounting practice (GAAP) which is in line with IFRS.

In terms of the Commission's 2010 Practice Note on merger filing requirements, where the turnover or asset values of any of the parties are reflected in a foreign currency, the figures should be converted using the average exchange rate applicable to the parties' audited financial statements for the most recent accounting period. In practice, the applicable exchange rates as quoted by any reputable institution may be used.

The Act defines an acquiring firm broadly, referring to the entire group of which the acquirer forms a part. The acquiring group includes the firm which acquires direct control as a result of the merger (primary acquiring firm), any firm which controls the primary acquiring firm (ultimate acquiring firm) and the firms controlled by the ultimate acquiring firm. A target (or transferring) firm is defined narrowly, referring to the actual business, part of a business or assets being acquired.

The thresholds comprise two separate tests:
- the first in relation to the merging firms' combined asset and/or turnover values and,
- separately, the target firm's asset and/or turnover value.

The Threshold Notice allows for adjustments to the asset and turnover values where acquisitions or disposals have occurred between the date of the most recent financial statements and the time at which the assessment of merger thresholds is conducted.

2.7 Foreign-to-Foreign Transactions
The Act applies to all economic activity having an effect within South Africa. In relation to mergers, the thresholds are calculated with reference to South Africa, in particular, the assets in South Africa and the revenue generated by the merger parties which is attributable to South Africa. By implication, foreign-to-foreign mergers have to be notified if the financial thresholds relevant to South Africa are met. The competition authorities have considered foreign-to-foreign mergers on this basis since the Act came into effect in 1999.

2.8 Market Share Jurisdictional Thresholds
South Africa does not have a market share jurisdictional threshold. The market shares of the merging parties are relevant only in relation to the substantive assessment of the proposed transaction.

2.9 Joint Ventures
While the Act does not specifically refer to joint ventures, if a joint venture constitutes a merger in terms of the Act and the financial thresholds for mandatory notification are met, then notification of the joint venture must be made. However, where the joint venture does not involve the acquisition or establishing of control by either of the parties over the whole or part of the business of the other, as may be the case in greenfield joint ventures, the merger control provisions of the Act will not be triggered. The Commission has published guidance on the notification obligations triggered by joint ventures. However, it only addresses a limited number of questions in relation to joint ventures. In certain circumstances, parties may elect to notify of a joint venture in order to sanitise the arrangement, taking into account the competition concerns that may be raised with respect to the arrangement.

2.10 Powers to Investigate a Transaction
Even though parties to a small merger are not obliged to obtain clearance before implementing the transaction, the Act empowers the Commission to require parties to notify of small mergers. See 2.1.

2.11 Closing Before Clearance
The merger control regime in South Africa is suspensory – a notifiable merger may not be implemented without competition approval. Implementation of a notifiable merger without approval exposes the parties to an administrative fine of up to 10% of the firms' annual turnovers. The Commission is vigilant and will approach the parties to request a merger filing where it believes that a notifiable transaction has been implemented and will seek a penalty. See 2.2.

2.12 Exceptions to Suspensive Effect
The Act does not provide for exceptions to the suspensive effect. However, the Commission and the Tribunal have considered the impact of unintended delays on the merging parties in such circumstances and have attempted to accommodate the merger parties by concluding the proceedings as speedily as possible where practicable.

The Act does not expressly provide for ring-fencing arrangements – to minimise the effect of the implementation locally – nor has the Commission stated its position on this officially. However, such arrangements have become established practice in South Africa. The conceptual basis for this is that, to the extent that South Africa can be ring-fenced from the implementation of the merger elsewhere or worldwide, no contravention of the Act will arise (as the implementation of the merger in other jurisdictions will have no effect in South Africa). The practical aspects of ring-fencing can be challenging. However, the aim of a ring-fencing structure may be achieved by providing appropriate undertakings in
relation to holding the businesses of the parties to the proposed transaction separate pending approval.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification
The Act does not provide deadlines for notification. However, a merger that meets the financial thresholds for mandatory notification must be approved by the Commission prior to being implemented.

3.2 Requirement for a Binding Agreement
The most recent version of all the documents constituting the merger agreement must be submitted as part of the filing. While the Commission prefers signed copies of the agreements, if available, a draft agreement and documents such as a non-binding memorandum of understanding will be accepted, provided that the competitive impact of the proposed transaction will not change once the agreement is finalised.

3.3 Filing Fees
Filing fees are ZAR100,000 for an intermediate-sized merger and ZAR350,000 for a large merger. (Small mergers, if notified, do not attract a filing fee.) The filing fees must be paid by the time that the merger filing is submitted to the Commission. The Act does not stipulate which party bears the responsibility for paying the filing fees – this is agreed between the parties to the merger.

Both parties to a merger are responsible for the merger filing. In terms of the Commission’s Rules, parties to a merger must notify the Commission by filing a joint notification. Where a joint notification is not possible (for example, in a hostile takeover), the Commission’s Rules allow merging parties to make separate filings subject to obtaining the Commission’s consent to do so.

3.4 Information Required for Filing
A merger filing is comprised of three prescribed forms:

- Form CC4(1) – Merger Notice – filed by either party to the transaction (typically the acquirer);
- Form CC4(2)s – Statements of Merger Information – filed by each of the parties to the transaction; and
- Form CC7s – filed by each of the parties to the transaction – these forms allow the merger parties to claim specific information as confidential.

In addition, a joint competitive report by the parties is generally submitted as part of the filing. In complex merger cases, parties often file expert economic reports to bolster the merger filing.

The prescribed filing forms request information about the corporate structure and control of the merging parties; the value of the parties’ turnovers and assets in South Africa during their preceding financial years; details of the transaction notified; detailed information about the interchangeable products and/or services which the parties provide in South Africa; detailed information about products and/or services which the parties provide to each other; and contact details of the parties’ top five customers and competitors. The competitive report generally includes information about the impact of the transaction on the relevant market/s in which the parties operate in South Africa, estimated market shares of the merger parties and their competitors; information about barriers to entry and import competition, as well as the countervailing power of customers and competitors.

The details of trade unions or employee representatives representing a substantial number of employees of the merging parties must be included on the merger filing (in the Form CC4(1)) and non-confidential versions of the filing must be served on the trade unions or employee representatives. In line with the requirements of the Act, the Commission has issued a practice note (in September 2000) emphasising that the notification of trade unions is compulsory and that proof of service on the trade unions must be submitted to the Commission.

The merging parties are also required to make specific statements regarding the likely impact of the merger on levels of employment in South Africa. The Commission requires the merger parties to consider the effect (the worst case scenario) that the transaction may have on employment. Even if the parties are not able to estimate likely employment effects accurately, the filing must include an explanation of the envisaged process relating to employees.

Supporting documentation that is required to be submitted by each of the parties to the merger consists of the following: the merger agreement; board minutes in which the proposed transaction is discussed; any reports and presentations (prepared in the ordinary course of business) that assess the competitive conditions in the markets in which the merger parties compete; reports and presentations that focus on the competitive aspects of the proposed merger; strategic documents relating to the rationale for the merger; most recent annual financial statements; most recent business plans or budgets; most recent report to the Takeover Regulation Panel (in terms of the Companies Act), where relevant; affidavits attesting to information that is not available; proof of service on trade unions and proof of payment of the merger filing fee. The affidavits must be attested to by a duly authorised representative of the merger parties and must be signed before a commissioner of oaths or notary public. Where obtaining an affidavit is not feasible, the Commission accepts a written statement by an authorised representative.
Documents are required to be submitted in English. In circumstances where key supporting documents are not in English, the Commission may request a translated version.

3.5 Penalties for Incomplete Notification
If an incomplete filing is submitted, the Commission may issue a Notice of Incomplete Filing. The notice must be issued by the Commission within five business days of receiving the merger filing of a large merger and within ten business days for any other merger. This notice suspends the merger review period until the outstanding information has been submitted.

At any stage during an investigation of a merger, the Commission may issue a Demand for Corrected Information if it believes that a document filed contains false or misleading information. This demand suspends the merger review period until the corrected information has been submitted to the Commission's satisfaction.

The Commission may also revoke its decision to approve a merger if the decision was based on incorrect information for which a party to the merger was responsible.

In March 2010, the Commission issued guidelines explaining the requirements for a complete merger filing. The guidelines are not binding in that they do not limit the Commission's ability to exercise its discretion in determining whether or not a filing is complete. The guidelines emphasise that the initial merger review period will not commence until the merging parties have satisfied all the notification requirements and that the Commission may issue a Notice of Incomplete Filing if all the notification requirements are not met.

3.6 Phases of the Review Process
The Act provides that:

- in the case of an intermediate-sized merger, the Commission has an initial period of 20 business days and may request a single extension of up to 40 business days to complete the merger investigation – with a maximum of 60 business days to issue a decision; and
- in the case of a large merger, the Commission has 40 business days to investigate the merger and send a written recommendation to the Tribunal.

This period may be extended with the consent of the Tribunal by periods of no more than 15 business days at a time.

A merger will be regarded as approved in the case of an intermediate-sized merger, where the Commission has not extended the review period upon expiry of the initial 20 day business or has not issued a decision upon expiry of the 40 business-day extension period.

In the case of a large merger, if the Commission has not applied to extend the initial review period upon expiry of the 40 business days or has not issued a recommendation to the Tribunal within the 40 business days (or any extended period granted by the Tribunal), any party to the merger may then apply to the Tribunal for consideration of the merger in the absence of the Commission's recommendation.

In 2010, the Commission issued service standards in relation to the merger review periods, thereby replacing the former fast-track review procedure published in 2002, which allowed a 20 business-day review of non-complex mergers meeting certain criteria. The 2010 service standards categorises mergers according to the level of complexity – Phase 1 (non-complex), Phase 2 (complex) and Phase 3 (very complex). These review periods do not replace the review periods set out in the Act. The objective of these review periods is to commit the Commission to expediting the assessment of non-complex mergers in particular.

Phase 1 cases (non-complex):
In such cases, there are generally no competition law issues and no overlap between the activities of the parties. In the event that there is an overlap between the activities of the parties, the combined market share of the parties is below 15%. No complex control structures arise and no public interest issues arise from the merger. The expected review period is 20 business days.

Phase 2 cases (complex):
This involves transactions between direct or potential competitors (horizontal mergers) or between customers and suppliers (vertical mergers), where the parties hold market share in excess of 15% in their respective markets. These transactions generally involve challenges, including:

- defining the relevant market/s;
- multiple product or geographic markets;
- markets which are subject to deregulation; and
- public interest issues arising from the transaction. The expected review period is 45 business days.

Phase 3 cases (very complex):
This involves cases which are likely to create or result in a substantial prevention or lessening of competition. Mergers between leading market participants in any one of the markets in which the parties compete fall into this category. The expected review period is 60 business days.

In the case of large mergers, once the Commission has issued its recommendation, the Registrar of the Tribunal must schedule a date for a hearing (or in complex cases a pre-hearing) within ten business days. This period may be extended by ten business days by the Tribunal and for a further period by the Tribunal with the consent of the parties. After
4. Substance of Review

4.1 Substantive Test

The substantive test that must be employed by the competition authorities is whether or not the proposed merger is likely to substantially prevent or lessen competition. In applying the test, the competition authorities must assess the strength of competition in the relevant market, and the probability that the firms in the market, after the merger, will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market including:

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

If it appears that the proposed transaction is likely to substantially prevent or lessen competition, then the competition authorities must determine whether or not the proposed transaction is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and off-set, the effects of any prevention or lessening of competition, that may result or is likely to result from the proposed transaction, and would not likely be obtained if the proposed transaction is prevented.

The competition authorities must then assess whether the proposed transaction can or cannot be justified on substantial public interest grounds by assessing the effect of the proposed transaction on: a particular industrial sector or region; employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets.

Accordingly, any merger assessment by the competition authorities takes into account both competition issues as well as socio-economic and industrial issues. As such, although this has to date not occurred, a merger may be prohibited on public interest grounds alone.

4.2 Competition Concerns

In its ten-year review report (Ten years of enforcement by the South African competition authorities – Unleashing rivalry – 2009), the Commission noted that that the majority of the Commission and Tribunal conditional approval decisions and prohibition decisions had related to the unilateral effects that a merger may have on the market; but that in line with increased practice internationally, co-ordinated effects had more recently increasingly become the focus of the competition authorities. In relation to vertical mergers, the Commission noted that given the small and concentrated nature of the South African economy and extensive crossholdings between major firms being common, it has been wary of mergers that may have the effect of shielding firms from increased competitive forces, such as imports, as well as mergers that potentially provide better monitoring and scope for retaliation against deviations from collusive arrangements, increasing the likelihood of co-ordination or its continuation.

The Commission and the Tribunal considered unilateral and co-ordinated effects in Kansai Paints/Freeworld Coatings. In relation to unilateral effects, the Commission concluded that, post-merger, there would be a strong link (through a joint venture relationship between the target firm, Freeworld, and a competitor, DuPont) between two leading suppliers of paint coatings in South Africa. The Commission was concerned that the merger parties would behave co-operatively by only supplying products through the joint venture and not independently, thereby removing an effective competitor. In
relation to co-ordinated effects, the Commission found that the automotive paint coatings market was concentrated with high barriers to entry and relationships between the various competitors via joint ventures. This included a joint venture between the acquiring firm, Kansai, and a competitor, PPG Industries, that was active in other parts of the world. The Commission's concern was that, post-merger, if this second joint venture was extended to South Africa, the acquiring firm Kansai, DuPont and PPG (which together controlled 80% of the market), would be able to engage in co-ordinated conduct. The Commission imposed three conditions:

- divestiture of the automotive coatings business of the target Freeworld including its shareholding in the Freeworld/DuPont joint venture;
- the acquirer, Kansai, was required to establish an original equipment manufacturing automotive coatings business facility in South Africa; and
- there could be no retrenched for three years. The merging parties requested that the Tribunal reconsider the Commission's decision.

Ultimately, by negotiation between the Commission and the merging parties, it was agreed that the divestiture and local facility development conditions would be removed. This arrangement was approved by the Tribunal.

4.3 Economic Efficiencies
Economic efficiencies become relevant once it appears that the proposed transaction is likely to substantially prevent or lessen competition. A merger that is otherwise found to be anti-competitive may be approved in circumstances where the efficiencies sufficiently outweigh the anti-competitive consequences. The Commission will consider whether the efficiencies are merger-specific, in other words, where a merger is found to be anti-competitive, the efficiencies arising must be a direct consequence of the merger and not unrelated efficiencies that may have occurred regardless of the merger.

A key case on efficiencies in the merger context is Trident Steel/Dorbyl, which involved Trident’s acquisition of three steel processing plants from Dorbyl. In this case, the Tribunal concluded that the efficiency that would be gained prevailed over the likely anti-competitive effects of the merger. The Tribunal identified three categories of efficiencies (in order of decreasing importance): dynamic efficiencies (involving innovation, product and service quality), production efficiencies (involving increased output, reduced costs and/or improved quality), and pecuniary efficiencies (involving tax savings or lower input costs). A significant issue in assessing the efficiencies claimed in this case, was who should benefit from the efficiencies. The Tribunal articulated the following test: if the efficiencies can be shown to result from the merger, there is less need to show a benefit to consumers. If the efficiencies are less compelling, then evidence that the benefits will be passed on to consumers will be more important.

In Pioneer/Pannar Seed, the CAC rejected the findings made by the Commission and the Tribunal that the proposed merger would substantially prevent or lessen competition in the hybrid maize seed market in South Africa and that there were no technological, efficiency or other pro-competitive gains likely to arise that outweighed this anti-competitive effect. The CAC found that without the proposed merger, the target firm (Pannar) would likely decline and exit the market; and that, together, the target and the acquirer (Pioneer) would offer a stronger competitive constraint on the market leader, Monsanto. In the CAC’s view, such competition in the South African hybrid maize seed market (a market that was marked by innovation), would result in long-term dynamic efficiency improvements in the nature and quality of seed produced as well as competitive pricing – to the ultimate benefit of maize farmers and end-consumers.

4.4 Non-Competition Issues
The Act makes express provision for four public interest grounds that must be taken into account, namely, the impact of a proposed transaction on:

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

Indeed, a merger may be prohibited on public interest grounds alone. To date, however, the competition authorities have not issued such a decision, choosing rather to impose conditions aimed at addressing the particular public interest concern identified.

Employment
The Commission has approved a significant number of mergers subject to conditions aimed at limiting job losses as a consequence of the merger, including mergers where no competition concerns were identified. In instances where the Commission has imposed a moratorium on job losses (to either restrict or, in very limited cases, to entirely prevent retrenchments), the moratorium applied for a limited period – typically one to two years after the merger approval date (Metropolitan Holdings/Momentum Group and Walmart Stores/Massmart Holdings). There have been a few cases where a three-year time limit or no time limit was specified for the moratorium (Hebei Iron and Steel Group/DuferrIn- ternational Trading Holding; Clover SA and Nkunzi Milk-
The Commission issued draft Public Interest Guidelines (January 2015) with the objective of providing guidance on how it will assess the four public interest provisions in the Act. In relation to employment, the guidelines indicate that the question of substantial impact takes into consideration several factors, and not only the number of employees affected. The other relevant factors include the skill level of affected employees, the likelihood of the employees obtaining alternative employment, the nature of the sector in relation to the employment loss and the predominant nature of the acquiring firm's business. As such, the view that a transaction will have a substantial impact on employment may be remedied by addressing these other factors and not only by just reducing the number of affected employees. The Commission is generally more inclined to prevent job losses in relation to semi-skilled and unskilled employees than in relation to skilled employees (Bytes People Solutions/Inter-Active Technologies).

In addition to either imposing a limit on the number of employees that may be retrenched or imposing an absolute bar on retrenchment, the competition authorities have also imposed the following conditions: undertakings on the merger parties to create new positions and to offer to retrenched staff (Lewis Stores/Ellerine Furnishers); redeployment of employees and assistance with finding alternative employment (Walmart Stores/Massmart Holdings; and Walmart Stores/Massmart Holdings; and Noordfed Eiendoms/Empangeni Milling) and establishing a training fund (Takealot Online/Kalahari; and Glencore/Xstrata). See further examples in 5.3.

The Act stipulates that a copy of the merger notification must be served on trade unions representing the parties' employees and makes provision for participation by trade unions in the merger assessment process. Trade unions regularly participate in merger proceedings where job losses are anticipated (Metropolitan Holdings/Momentum Group and Walmart Stores/Massmart Holdings).

The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive
In terms of the Act, the Commission is required to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons. In line with this mandate, the Commission has expressed its support for the national legislation which governs black economic empowerment (BEE), the Broad-Based Black Economic Empowerment Act. The Tribunal has cautioned the Commission about its approach to the public interest provisions generally and in Shell/Tepco, the Tribunal overturned the Commission's decision to prohibit a merger on the grounds that it undermined BEE. The Tribunal held that no purpose was served by preventing the merger in order to keep the failing target firm on life-support merely because it satisfied the BEE criterion. (Sasol Oil/Excel and Media 24/Natal Witness which considered the empowerment of historically disadvantaged persons).

Most recently, in Vodacom/Neotel, the Commission imposed a condition aimed at maintaining or improving black economic empowerment status by requiring Vodacom to ensure that the value of the shares held by its BEE shareholders would increase by a particular percentage, equivalent to the BEE shareholders' direct shareholding in Neotel. (At the time of writing, this matter was before the Tribunal and, as such, no final decision is available.)

A particular industrial sector or region/the ability of national industries to compete in international markets
The competition authorities have also imposed conditions aimed at maintaining or expanding local production facilities and restricting the diversion of resources to overseas markets. In Hebei/Dufermo, the Commission found that the merger was likely to raise public interest concerns in the steel sector. These concerns arose from Hebei's intention to sell products beyond China – which would increase the tendency for the local targets (DSP and DDS) to import products instead of manufacturing products locally. The Commission stipulated that:

- the merged entity must continue operating the businesses of DSP and DDS post-merger;
- Hebei may not change its plans to develop a steel plant in South Africa; and
- Hebei must invest in the Saldanha steel processing plant of DSP in order for the plant to continue operating efficiently.

In Walmart/Massmart, the merged entity was required to establish a programme to develop local suppliers, including small and medium-sized enterprises. In Pioneer/Pannar, the CAC required Pioneer to establish an International Research and Technology Centre in South Africa, which, in the CAC's view, would serve the public interest by implementing world-class technology in hybrid seed breeding in South Africa.

The Commission has issued draft public interest guidelines explaining how it will assess each of the four public interest provisions in the Act.

5. Decision: Prohibitions and Remedies
5.1 Prohibition of Transactions
The Commission investigates all mergers notified under then terms of the Act. In the case of intermediate-sized and
small mergers, the Commission investigates and makes a
final determination on the transaction – it may prohibit or
approve the transaction, or approve the transaction subject
to conditions.

In the case of large mergers, the Commission investigates
the transaction, makes a recommendation, and the matter
is referred to the Tribunal for final determination. The Tri-


bunal may also consider intermediate-sized or small merg-

ings where it is requested to do so by the merging parties, or

an interested party. The Tribunal may approve or prohibit a
transaction, or may approve the transaction subject to con-
ditions.

Conditions are imposed where the competition authorities
find that the transaction is likely to substantially prevent or
lessen competition and there are no countervailing techno-
logical, efficiency or pro-competitive gains, or public interest
considerations which outweigh the adverse impacts of the
transaction. Conditions may also be imposed to address ad-
verse public interest outcomes, even where no adverse com-
petition impacts are found. The vast majority of cases before
the competition authorities are approved, as the authorities
seek to impose conditions which address the competition
or public interest harm anticipated rather than prohibiting
a transaction.

5.2 Negotiation of Remedies
The Commission typically engages with merging parties
where competition or public interest concerns arise – this
engagement takes place in the course of the Commission's
investigation of the merger. Merging parties may also proac-
tively offer remedies in mergers where competition or public
interest concerns have been identified. These may be offered
at the outset or during the course of the Commission's inves-
tigation or in the course of proceedings before the Tribunal.

Many of the merger remedies imposed in previous cases
have been the result of commitments offered and negotiated
by merging parties in response to issues identified by the
competition authorities (for example Nestlé SA/Pfizer Infant
Business where the parties offered a remedy involving the
licensing of certain infant formula brands to a third party;
and Massmart/Walmart in which a host of commitments
including the licensing of certain infant formula brands to a third party;

5.3 Typical Remedies
The remedy imposed will depend on the nature of the harm
identified. Remedies may be structural (typically divestiture)
or behavioural. Behavioural remedies may include a host
of innovative remedies. Such behavioural remedies include:
the conclusion of long-term supply arrangements, pricing
commitments (Pioneer Hi-Bred/Pannar Seed), licensing of
intellectual property or other rights (Nestlé SA/Pfizer Infant
Business see 5.2), obligations to source from existing or past

The Act provides for an assessment of both competition and
public interest outcomes, and while a merger has yet to be
prohibited on the basis of public interest concerns alone,
conditions have been imposed in transactions in which
only public interest concerns arose (ie notwithstanding
that there were no competition issues). Public interest cases
have principally related to employment, in which case the
most common condition is a moratorium on merger-relat-
ed retrenchments for a period (although there have been a
limited number of decisions in which the Commission has
imposed a restriction on retrenchments for an indefinite
period). Public interest concerns also include issues such
as foreclosure of certain national industries, in which case
a behavioural remedy compelling supply to local firms may
be imposed for a period (IDC and Hebei/Rio Tinto where
the merging parties were required to ensure that the local
demand for iron ore would be met by the merged entity).

In the context of employment-related concerns, innovative
remedies which have been imposed include: training or re-

skilling employees (including providing funding for training/
re-skilling as was the case in the Tiger Brands/Ashton
Canning merger), providing assistance with finding alter-
native employment (Empangeni Milling where the merg-
ing parties were required to approach recruitment agencies
in the area to investigate possible job opportunities for re-
trenched employees), re-deployment and re-employment
where jobs are subsequently created.

5.4 Remedial Procedures
Remedies may be raised with the competition authorities
at any stage of the Commission's investigation, or during
proceedings before the Tribunal. Merging parties who are of
the view that a transaction is likely to raise competition or
public interest concerns may elect to offer remedies up front –
remedies may be tendered in the merger filing submitted
to the Commission.

Typically the Commission informs the merging parties of any
concerns which arise from the transaction and will indicate
that it intends to impose remedies to address its concerns
in advance of making a final determination. In practice, the
Commission affords the merging parties an opportunity to
engage with it on the parameters of the remedies and the
parties may be able to negotiate an acceptable remedy which
addresses the Commission's concerns. However, if consensus
cannot be reached, the Commission will impose conditions
(in the context of small or intermediate-sized mergers) and
in such circumstances the merging parties may request the
Tribunal to consider the Commission's decision. Where the
transaction is a large merger, the Commission will still en-
gage with the merging parties on conditions but may only recommend that these be imposed. In both a request for consideration and large merger reviews, the Tribunal will consider the conditions and may accept, amend or remove them. Parties may appeal a decision of the Tribunal to the CAC, the Supreme Court of Appeal or the Constitutional Court (if constitutional issues are relevant).

5.5 Standard Approach for Divestitures and Other Remedies
The Tribunal may impose an administrative penalty (not exceeding 10% of the firms’ annual turnovers in South Africa and their exports from South Africa in the preceding financial year) where firms implement a merger in a manner contrary to a condition imposed by the Commission or the Tribunal. As such, parties generally may not proceed to implement a merger without having complied with the conditions to the approval. However, in the case of a divestiture condition where the parties are afforded time in which to divest of an asset or business, the Tribunal has taken the view that there is no need for a divestiture to take place before the parties proceed to implement, where adequate measures are in place – such as holding the divested business separate from the merged entity (Mercanto Investments/Johnnic Holdings). In the Mercanto Investments case, the Tribunal was satisfied that measures, including the appointment of a trustee to oversee the divested business in the interim period, would ensure that the business to be divested would be maintained separately from the business of the merged entity.

Merging parties should, however, note that they will bear the risk in the event that the conditions are not complied with. Where parties fail to meet the conditions of an approval and have proceeded to implement the merger, the Commission may issue a Notice of Apparent Breach. The party issued with such notice may inform the Commission of its proposed plan to remedy the breach or may approach the Tribunal to challenge the notice. If a firm does not respond to the notice, or conducts itself so as to frustrate the process of remediying its breach, the Commission may revoke the approval of the merger.

5.6 Formal Decisions
A formal decision on the outcome of the merger review is issued to the merging parties. In the case of small and intermediate-sized mergers, the Commission’s decision is published in the Government Gazette. The Commission has recently begun publishing fairly detailed statements of its merger decisions. Merger determinations (including the reasons for the decision) by the Tribunal are also published. Any confidential aspects of the merger are not disclosed in the decisions of the authorities.

5.7 Examples of Prohibitions and Remedies
See 2.7. The competition authorities have jurisdiction and are competent to impose remedies in transactions which have an effect in South Africa. It is possible that a remedy may apply in relation to foreign-to-foreign transactions which affect competition or the public interest in South Africa.

6. Ancillary Restraints
Merger clearance does not automatically cover ancillary restraints. Particular arrangements may, however, be disclosed to the Commission in the merger filing to invite the Commission’s review in order to sanitise the arrangements. There are no formal or additional notification requirements in relation to ancillary restraints.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third Parties’ Involvement
A party filing a merger notification is required to provide a non-confidential copy of the merger filing to any registered trade union or representatives of the employees of the merging parties. In conducting its investigation, the Commission will contact these trade unions or employee representatives as well as the customers and competitors of the merging parties to assess their views on the competitive effects and public interest outcomes of the merger. The Commission may request that these third parties provide information, including data, to assist the Commission in its investigation. In addition, interested parties may independently approach the Commission and make submissions in relation to a transaction. Where a merger falls for determination before the Tribunal, a party with a material interest in the matter may apply to intervene in the proceedings. In submitting an application to intervene, the party must state the nature of its interests in the proceedings and the matters on which it wishes to make representations. The Tribunal must either allow or deny the intervention and may limit the scope of the party’s intervention. Customers, competitors or any relevant third party may also be asked to act as a witness for the Commission.

7.2 Confidentiality
The names of the parties in a merger which has been notified to the Commission are available on the Commission’s website shortly after filing and no further details of the transaction are disclosed at this stage. However, merging parties are required to submit a copy of the merger notification to all representative trade unions and employee representatives. As such, the basic, non-confidential details of the transaction are disclosed.
Parties filing a merger may claim competitively sensitive information and business secrets as confidential. It should be noted that, while confidentiality claims are respected by the Commission, there is scope to challenge confidentiality claims. A merging party cannot rely on a mere assertion as to the confidentiality of its information but must describe the nature and economic value of such information in its claim (Commission v ArcelorMittal (SCA 680/12).

7.3 Co-operation with Other Jurisdictions
The Commission engages fairly often with other regulators and has, on occasion, requested confidentiality waivers (from the owner of the confidential information) in order to disclose the information to a competition regulator in another jurisdiction. The Commission may also receive information from a foreign regulator – and in such cases the parties may submit additional confidentiality claims in respect of the additional information.

8. Appeals and Judicial Review
As noted above, the Commission makes a determination in relation to small and intermediate mergers, while the Commission must refer large mergers to the Tribunal for final determination. The Act provides that merging parties may request the Tribunal to consider a merger decision of the Commission. The Tribunal’s consideration is not an appeal as the Tribunal has significant scope to hear and request information outside of the record of the Commission’s investigation. Merging parties must file a request for consideration with the Tribunal within ten business days of the Commission’s decision. This request must also be served on the Commission and any participant in the merger proceedings before the Commission. Once a request for consideration has been filed, the registrar of the Tribunal must schedule a date, within ten business days, for either the commencement of the hearing or a pre-hearing conference. The timetable for a hearing is usually scheduled at the pre-hearing conference and the timelines will depend on the complexity of the issues raised, the number of witnesses and the number of intervening parties.

A decision of the Tribunal (whether in relation to a large merger, or on consideration of the Commission’s decision in respect of a small or intermediate merger) may be taken on appeal to the CAC. A notice of appeal must be filed with the CAC within 15 business days of the order of the Tribunal.

9. Recent Developments
9.1 Recent or Impending Changes to Legislation
The Commission issued draft public interest guidelines on 23 January 2015. The guidelines provide guidance and certainty on the manner in which the Commission will approach its assessment of the various public interest issues set out in the Act as relevant in the consideration of mergers.

9.2 Recent Enforcement Record of Authorities
The South African competition authorities actively enforce the merger control provisions in the Act. As a general observation, the competition authorities often seek to remedy anti-competitive or adverse public interest outcomes through conditions, rather than the outright prohibition of mergers. In its latest annual report (2014-2015), the Commission indicated that, in the relevant period, a total of 375 mergers were reviewed and finalised and that of these, 43 were approved with conditions and five were prohibited. Of the 43 conditional approvals, 39 included remedies which sought to address public interest concerns (most of which concerned job losses attributable to the merger, but some also sought to protect small businesses).

9.3 Current Competition Concerns
Notable trends in merger control include the focus of the competition authorities on public interest issues, including the impact on employment, the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive, and the ability of national industries to compete in international markets. The competition authorities are also concerned with the security of the supply of vital inputs for national industries. The Commission’s investigation of a merger may be intensified where the transaction takes place in a sector which is the subject of a market inquiry or a cartel or abuse of dominance investigation.