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Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such ‘hot’ M&A sectors as pharmaceuticals, and high technology and media, in key jurisdictions to provide a more in-depth discussion of recent developments.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In Phonak/ReSound (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 32 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions...
in which the parties’ turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use ‘market share’ indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV’s products ‘could be’ imported into Turkey. In Serbia, there similarly is no ‘local’ effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of ‘competitively significant influence’. Although a few merger notification jurisdictions remain ‘voluntary’ (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a ‘self-assessment’ of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

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

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile’s antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

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

The United States and the European Commission both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as ‘gun-jumping’, even fining companies who are found to be in violation. For example, the European Commission (EC) imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. The Korea Fair Trade Commission (KFTC) has imposed fines on over 50 transactions in the past two years that it deemed were not reported, were reported late, or were properly reported but implemented before the end of the waiting period. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the KFTC, but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the European Commission has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the Facebook/WhatsApp acquisition).

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

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

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

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

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

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

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

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

Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada’s decision in the Loblaw/Shoppers transaction, China’s MOFCOM remedy in Glencore/Xstrata and France’s decision in the Numericable/SFR transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2019
Part II

JURISDICTIONS
Chapter 30

SOUTH AFRICA

Xolani Nyali and Shakti Wood1

I INTRODUCTION

Competition law in South Africa is regulated by the Competition Act 89 of 1998 (as amended) (the Act) and the regulations promulgated in terms of the Act. The Act is enforced by the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (CAC). The Constitutional Court (CC), as the apex court, also has jurisdiction in certain competition matters. The Commission is responsible for the investigation and evaluation of mergers, including being the decision-maker in relation to small and intermediate mergers. Large mergers are investigated by the Commission and referred to the Tribunal for a decision.

A transaction is required to be notified to the Commission if it: (1) constitutes a merger (as defined in the Act); (2) meets financial thresholds (of assets and turnover) set out in the Act; and (3) constitutes economic activity within, or having an effect within, South Africa. If a transaction meets these requirements, pre-merger notification is required and the transaction may not be implemented without competition approval.

In terms 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. The law provides for instances of legal control (a majority interest, or similar) as well as instances of control arising as a function of a person’s factual ability to control a firm.

The financial threshold test applied is two-fold: (1) the turnover or asset value (whichever is greater) of the target must meet the stipulated thresholds; and (2) the combined value of the assets or turnover (whichever is greater) of the target and the acquirer must meet the stipulated thresholds. In the case of intermediate mergers, the annual turnover or the asset value of the target firm or firms must be 100 million rand or more, and the combined value of the annual turnover or assets of the targets and acquirers must be at or above 600 million rand. A transaction will meet the thresholds for a large merger where the annual turnover or the asset value of the target firm or firms equals, or exceeds, 190 million rand and the combined value of the annual turnover or assets is at or above 6.6 billion rand. Turnover for purposes of the calculation includes all turnover in, into or from South Africa as reflected in the firms’ most recent audited financial statements.

For purposes of calculating thresholds, the Act defines an acquiring firm broadly, referring to the entire group of which the acquirer forms a part, while a target (or transferring) firm is defined narrowly, referring to the actual business (or assets) being acquired.

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1 Xolani Nyali and Shakti Wood are partners at Bowmans.
In the ordinary course, only intermediate and large mergers require pre-merger notification and approval from the competition authorities before their implementation. Small mergers are not ordinarily required to be notified to the Commission and may be implemented without approval unless notification is specifically requested by the Commission. The Commission has issued a Guideline on small merger notification, which provides that it may require notification of small mergers where the merging parties are under investigation for prohibited practices by the competition authorities, or if the merging parties are respondents in pending proceedings referred by the Commission to the Tribunal in terms of the Chapter 2 of the Act (dealing with prohibited practices). Parties to a small merger may also voluntarily submit a merger notification, and in such circumstances, must await clearance before implementing the merger.

Failure to notify the Commission of a notifiable merger or implementing a notifiable merger before approval being obtained is a contravention of the Act, and exposes the parties to administrative penalties of up to 10 per cent of turnover derived in, into or from the Republic, as well as potential injunctions on implementation. The level of penalties applied has varied, depending on the circumstances. On 2 April 2019, the Commission published final Guidelines for the Determination of Administrative Penalties for Failure to Notify a Merger and Implementation of Merger, which set out its approach to prosecuting parties for non-notification or the pre-approval implementation of mergers. The Commission uses a filing fee-based methodology for penalties for failure to notify mergers, unlike the turnover-based methodology for determining administrative penalties in cartel cases.

Once notified, the Commission must undertake both a competition and public interest assessment of the merger. In February 2019, the President signed the Competition Amendment Act 2018 (the Amendment Act) into law; however, the amendments are not yet in effect. The Amendment Act introduces additional considerations in the assessment of a merger, including the extent of common ownership and common directorship in competing firms, and recent mergers undertaken by the merging parties.

Of particular significance is the expansion of the public interest factors relevant for merger assessment. Relevant considerations will now include the ability of small or medium-sized enterprises (SMEs) or firms controlled or owned by historically disadvantaged persons ‘to effectively enter into, participate in or expand within the market’ and ‘the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market’.2

The Amendment Act has also introduced a new provision concerning acquisitions by foreign acquiring firms and their likely impact on national security. In this regard, the acquisition of a South African firm by a foreign acquiring firm is required to be notified to the Commission and a Government Committee (to be constituted) if the merger may impact national security interests of the Republic. The Committee must decide whether the transaction may have an adverse effect on national security interests. The competition authorities may not make any decision where the merger has been prohibited on national security grounds. As at the date of writing, there is no indication as to the composition of the Committee, the list of relevant national security interests, or the form or process to be followed for the submission of a notice in respect of national security.

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2 The original grounds include the impact of the merger on a particular industrial sector or region, employment, the ability of SMEs or firms controlled or owned by historically disadvantaged persons to become competitive and the ability of national industries to compete in international markets.
Finally, the Amendment Act allows for greater participation by the designated Minister in merger proceedings, through the ability to appeal merger decisions on the expanded public interest grounds. In relation to the latter, the Commission is specifically required to provide the Minister with a copy of a large merger notification to allow the Minister to decide whether to make representations on public interest grounds.

II YEAR IN REVIEW

According to its 2017/2018 annual report, the Commission considered 377 mergers, and finalised 338 of them. Of the 338 reviewed, 52 mergers were approved with conditions and 12 were prohibited. The property sector was the biggest sector that notified mergers, followed by manufacturing and wholesale.

i Prohibited transactions

In a press release dated 23 January 2019, the Commission advised that it has prohibited the intermediate merger between Ostrich Skins (Pty) Ltd (Ostrich Skins), Mosstrich (Pty) Ltd (Mosstrich) and Klein Karoo International (Pty) Ltd (KKI). KKI and Mosstrich are both active in the production of ostrich meat, leather and feathers. The Commission found that the proposed merger is likely to result in unilateral effects in the market for the production and supply of ostrich meat as the merged entity would have a post-merger combined market share in excess of 90 per cent in South Africa.

Notably, the Commission found that the notified transaction did not raise horizontal concerns in the production of ostrich leather, as ostrich leather is mainly exported. However, the Commission still identified vertical concerns in this market as the Commission found that the merged entity had the incentive and ability to foreclose downstream processors of feathers.

In a bulletin dated 16 May 2019, the Commission indicated that it has recommended that the Tribunal prohibit the proposed acquisition of WeBuyCars (Pty) Ltd (WeBuyCars) by MIH eCommerce Holdings (Pty) Ltd (MIH eCommerce), an entity of the Naspers Group. In terms of the notified transaction, MIH eCommerce, an investment holding company that does not supply or produce any products or services in South Africa, intends to acquire 60 per cent of WeBuyCars. MIH eCommerce has investments in OLX and the Naspers subsidiary Car Trader, which trades as AutoTrader. Although the Commission held that the proposed acquisition did not present any horizontal overlap in the Republic as Naspers is not actively in the business of the online buying and selling of used cars, it found that the Naspers Group, through Frontier Car Group, has been anticipating entering this market for the wholesale and online buying of used cars in competition with WeBuyCars. These entry plans were thwarted directly as a result of the proposed acquisition.

On the Commission’s assessment, the notified transaction therefore had the effect of removing a potential competition in South Africa. The Commission also noted potential vertical concerns in that Naspers owns and operates online classified automotive advertising platforms. The merged entity would, therefore, have the ability to leverage its significant

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3 Annual Report 2017-18 Competition Commission of South Africa.
AutoTrader position as well as the OLX platform to exclude rivals of WeBuyCars. According to the Commission, the notified transaction would result in the foreclosure of other traditional dealers – rivals of WeBuyCars on the sell side.

ii The concept of control

In *Competition Commission of South Africa v. Hosken Consolidated Investments (HCI) Limited & Another*, the Tribunal provided direction in respect of firms’ obligations to notify a transaction where the merger had been previously approved. In this case, HCI had in 2014 notified the Commission of an intended merger that was subsequently approved and confirmed by the Tribunal without conditions. Although HCI secured approval for legal control (over 50 per cent interest) in the target entity, it acquired an effective interest of below 50 per cent but was able to exercise *de facto* control. In 2017, HCI decided to consolidate the assets of its subsidiaries stemming from the 2014 unconditional approval. Although the restructuring would result in HCI’s interest in the target increasing to above 50 per cent, HCI did not believe that this restructuring constituted a merger and considered that it was therefore not notifiable. HCI sought an advisory opinion from the Commission, which regarded the intended 2017 transaction to be a notifiable merger as it entailed an acquisition of more than 50 per cent of the shares of Tsogo (one of HCI’s subsidiaries). HCI took the matter to the Tribunal, which held that it did not have jurisdiction to issue declaratory orders and dismissed the matter. HCI and Tsogo appealed the matter to the CAC, where it was successful. The Commission in turn appealed the matter to the CC.

The CC, among other things, had to decide whether it was appropriate for the Tribunal to grant a declaratory order and whether the 2017 transaction was notifiable in terms of the law. Regarding the former, the CC held that the Tribunal may make any ruling or order that is necessary or incidental to the performance of its functions in terms of the Act. Section 58 of the Act further grants the Tribunal the power to make an appropriate order in relation to a prohibited practice, including an order interdicting any such practice. Both of these sections are formulated widely enough to include the power to grant declaratory relief in respect of issues in dispute referred to it. The Tribunal has, in numerous instances, exercised its discretion and granted declaratory relief in a variety of cases. The CC noted that parties would ordinarily approach a High Court for declaratory relief, but since this jurisdiction is ousted for competition matters, this would unfairly leave parties without relief. Declaratory orders can bring clarity and finality to disputes that may, if unresolved, have far-reaching consequences for each party. Finally, the CC found that litigants have a constitutional right to have a remedy to resolve a dispute in an appropriate forum. The CC concluded that the Tribunal is competent to grant declaratory orders.

Regarding whether the 2017 transaction required notification to the competition authorities, the CC reiterated the two-step approach to merger control, namely (1) a transaction must meet the definition of a merger as set out in Section 12 of the Act, and (2) the financial thresholds for an intermediate or large merger must be met. To determine the definition of a merger, the CC critically analysed the meaning of control. Control can either be *de jure* control (e.g., acquisition of more than half of the issued share capital) or *de facto* control (the ability to materially influence). Central to this issue is the ‘bright line’ principle, which monitors instances of when control is assumed. The 2014 transaction

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resulted in HCI acquiring de facto control of Tsogo. The effect of the 2017 transaction would be HCI’s acquisition of de jure control within the meaning of Section 12(2)(a). The relevant consideration was whether notification obligations arose simply because the nature of control has changed. The CC held that once a firm has acquired control, it need not notify again simply because the nature of control has changed. If the statute required a new notification regime once the form of control has changed, it would have explicitly stated so. A change in the quality of control does not in itself constitute a merger. Obligating firms to notify in such instances is not only overly formalistic, but also burdensome. In the CC’s view, merger approval gives the merged entity immunity from any challenges as it necessarily involves a forward-looking assessment of the likelihood of competition harm, and effects on the public interest. Specifically, the CC also noted that the Commission was aware from the 2014 transaction that its approval would likely result in further changes down the line.

The true import of this judgment of the CC is still being debated, and it remains to be seen whether the fact of the notification of the 2014 transaction is interpreted by the Tribunal and CAC as being decisive in the CC’s reasoning.

### iii Public interest

The recent CAC case of *Association of Mineworkers and Construction Union (AMCU) and Another v. Competition Tribunal of South Africa and Others*5 dealt with public interest concerns in the context of a proposed merger. Some 32,000 employees of the merged entity were at risk of losing their jobs and with this in mind, the Tribunal imposed certain public interest conditions on the merging parties to mitigate the potential job losses. Unsatisfied with the decision of the Tribunal, AMCU approached the CAC arguing that insufficient weight had been given to the public interest concerns it raised and asked that the merger be prohibited or alternatively, be approved subject to additional restrictions or an amendment of some of the existing conditions. It was common cause that there were substantial potential job losses but the key question was whether these were related to the merger or not. The CAC considered this question, as well as the relevant counterfactual. The merging parties submitted that the job losses were not related to the merger but, rather, were a direct consequence of the target firm’s precarious financial state and the need to strategically restructure to save the company from being placed in business rescue. Regarding the counterfactual, the CAC was convinced that the extent of job losses would be even greater if the merger was not approved.

Further, the Tribunal considered that the parties had undertaken a reasonable and rational process in assessing the number of retrenchments, whether merger specific or not. Notwithstanding this view, the CAC still amended the public interest conditions to better protect employees by requiring the parties to publish a notice of the conditions – presumably so that employees could rely on the condition in direct actions against the merging parties.

On 9 March 2018, the Tribunal approved a merger between Sinopec Corp (Sinopec) and Chevron South Africa (CSA), subject to a wide range of employment, investment and other public interest conditions. Among the conditions imposed by the Tribunal was that Sinopec would establish its head office in South Africa and invest 6 billion rand over and above its investment plans to develop a refinery in South Africa. Sinopec was required to

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make this investment within a five-year period of the merger. Sinopec is also required to use reasonable endeavours to promote the export of South African manufactured products for sale in China.

III THE MERGER CONTROL REGIME

i Review periods and time frames

The review process or periods for intermediate mergers comprises an initial waiting period of 20 business days. This period may be extended by a single period not exceeding 40 business days. The Act provides for a ‘default’ approval in cases where the Commission fails to extend the review period before the expiry of the initial waiting period, or fails to render a decision within the stipulated time frames.

In the case of large mergers, the Commission must, within 40 business days, forward to the Tribunal a written recommendation, with reasons, regarding the merger. This period is extendable with the consent of the Tribunal or the merging parties by periods of no more than 15 business days at a time. If upon the expiry of the period of 40 business days (or any extended period of time granted by the Tribunal) the Commission has neither applied for a further extension nor forwarded a recommendation to the Tribunal, any party to the merger may apply to the Tribunal to begin the consideration of the merger without a recommendation from the Commission.

When the Commission has forwarded a recommendation to the Tribunal, the registrar of the Tribunal must schedule a date within 10 business days for either the beginning of the hearing of the matter or for a pre-hearing conference in relation to the merger (should the circumstances require). This period of 10 business days may be extended for a further 10 business days by the chairperson of the Tribunal or for a further period by the chairperson with the consent of the parties. After completing its hearing in respect of a merger, the Tribunal must issue its decision within 10 business days after the end of the hearing, and within 20 business days thereafter, issue written reasons for its decision.

The Commission has published a medium-term performance plan that sets out the maximum number of business days within which the Commission aims to complete its review of notified transactions. The review period is calculated from the business day following the date on which a complete merger notification was filed. The 2018/2019 performance plan contemplates the following timelines.

Phase I (non-complex)

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

Phase II (complex)

The Commission aims to review a Phase II merger within 45 business days. These are mergers between direct or potential competitors, or between customers and suppliers, where the merging parties have a combined market share of more than 15 per cent, or where public interest issues arise.
**Phase III (very complex)**

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

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**ii Ability to accelerate the review procedure, tender offers, hostile transactions**

If a merger is a hostile transaction and the target is unwilling to submit a joint merger notification to the Commission, the acquiring firm may make an application to the Commission in terms of Rule 28 of the Commission Rules for an order authorising the parties to submit separate filings and directing the target to prepare and submit its merger notification within a specified period of time. The acquiring firm may also, to the extent possible, apply to submit certain information or documents on behalf of the target firm. The target firm will have an opportunity to contest the acquiring firm’s application.

Mergers effected by way of tender offer are subject to competition review.

Once a merger notification is made and to the extent that there may be a need to accelerate the review periods, the Commission and Tribunal are prepared to consider expediting matters. However, neither the Commission nor the Tribunal have a formal ‘fast track’ procedure.

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**iii Third-party access to the file and rights to challenge mergers**

The Minister of Economic Development (now Trade and Industry) has the power to intervene in merger proceedings on public interests grounds. Employee representatives and trade unions also have locus standi to intervene in respect of employment-related matters, as per Section 12A of the Act and Rule 37 of the Commission Rules.

Section 13B (3) allows any person, whether or not a party to or a participant in merger proceedings, to submit any information that could be relevant to the investigated merger proceedings. However, this provision does not confer rights on any person to access the Commission’s investigation file especially insofar as some material may be claimed as confidential by the parties or constitute ‘restricted information’. Rule 46 of the Tribunal Rules permits a person who has a ‘material interest’ in a matter to apply for intervention by filing the prescribed documents which should include a substantiation of that person’s interest in the matter. A material interest is a factual analysis to be analysed by the Tribunal that will also inform the extent of the intervention the Tribunal will allow. In *Caxton and CTP Publishers and Printers Limited and Media 24 (Pty) Limited*, Caxton, a competitor of Media24, was allowed to intervene and have rights, among others, to discover documents and attend pre-hearings in the merger involving Media24.
Resolution of authorities’ competition concerns, appeals and judicial review

The Commission is empowered to investigate any merger activity. Upon investigating a notified small or intermediate merger, the Commission can unconditionally approve the merger, approve the merger with conditions or prohibit the merger. Large mergers are investigated by the Commission and decided on by the Tribunal. If the Commission or the Tribunal identify competition or public interest concerns during the merger assessment, they will typically invite the parties to offer remedies to address the concerns or to adduce further evidence to demonstrate that the concerns do not arise, or are not merger-specific. In cases where conditions are imposed, the merger parties are consulted beforehand and generally afforded an opportunity to make submissions in respect of the proposed conditions.

The Commission is empowered to revoke its own decision pertaining to an earlier merger approval of a small or intermediate merger. Revocation may be applicable if the approval was based on materially incorrect information provided by the parties to the merger, if the approval was obtained by deceit, or if the firm concerned has breached a condition attached to the approval.

Intermediate or small mergers considered by the Commission can be referred to the Tribunal for re-consideration by an aggrieved party. A party aggrieved by the Tribunal’s decision can approach the CAC for a review or appeal of the decision. The final court of appeal is the CC, which can also be approached by an aggrieved party where constitutional issues arise. The jurisdiction of an ordinary High Court has been ousted by competition legislation.

The Commission habitually publishes its decisions on proposed merger activity in the form of weekly bulletins found on its website.

Effect of regulatory review

The Commission has exclusive jurisdiction under the Act in relation to the review of mergers having an effect within South Africa. There are, however, new provisions under the Amendment Act that introduce parallel consideration of the national security concerns that may arise from a merger involving a foreign acquiring firm. While national security concerns are distinct from the competition and public interest assessment undertaken by the Commission, there is potential scope for overlap in relation to considerations of public interest issues.

In cross-border mergers, foreign competition authorities may simultaneously review a merger as it relates to their jurisdiction, but cannot make determinations that are binding on the South African competition authorities.

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7 Section 13B(1).
8 Section 14(1)(i)-(iii).
9 Section 14A(1)(b).
10 Section 15(1).
11 Section 15(1)(b).
12 Section 15(1)(c).
13 Section 16.
IV OTHER STRATEGIC CONSIDERATIONS

i How to coordinate with other jurisdictions;

South Africa is a member of the Southern African Development Community (SADC) and BRICS, and the Commission is a member of the African Competition Forum, International Competition Network and regularly participates in activities of the Organisation for Economic Cooperation and Development. The competition authorities of the SADC countries signed a memorandum of understanding (MOU) in 2016 and the BRICS competition authorities similarly signed an MOU in May 2016. The Commission also has MOUs with the following entities and regulators: International Finance Corporation; eSwatini Competition Commission; Administrative Council for Economic Defense of Brazil; Competition Authority of Kenya; Competition Commission of Mauritius; Namibian Competition Commission; Federal Antimonopoly Service of the Russian Federation; and the Directorate-General for Competition of the European Commission. In the context of these MOUs, it is not unheard of for the Commission to reach out to these regulators in the course of its investigation of mergers. To expedite the Commission’s review in South Africa, parties may wish to seek to facilitate the speedy interaction of regulators and assist them in ironing out the issues being investigated by each regulator. Where an issue has already been resolved by a foreign regulator, it is often beneficial for this to be shared (if appropriate) with the Commission.

ii How to deal with special situations

There are no special rules dealing with financial distress and insolvency or minority ownership interests. These are dealt with in the ordinary course. However, the Commission has published a Practice Note on Risk Mitigation Transactions (the Practice Note). The Practice Note provides that where a bank or state-owned finance institution acquires an asset or controlling interest in a firm in the ordinary course of its business of providing finance based on security or collateral, the Commission would not require notification of the transaction at this point. Similarly, if upon default by the firm, the bank or state-owned finance institution takes control of the asset or controlling interest in that firm with the intention to safeguard its investment or onsell to another firm or person to recover its finance, a notification would not be required. However, if the bank or state-owned finance institution fails to dispose of the assets or the controlling interest within a period of 24 months (the disposal period under a previous version of the Practice Note was 12 months), notification would be required upon the expiry of the 24-month period.

The Tribunal case of Competition Commission of South Africa v. Standard Bank of South Africa (FTN228FEB16) [2016] ZACT 56 (5 July 2016) dealt with the application of the Practice Note. The Commission sought to impose an administrative penalty on Standard Bank for its failure to notify a merger and gun-jumping. Standard Bank acquired 100 per cent of the shares of Halberg, pursuant to Halberg defaulting on numerous loan agreements with Standard Bank. Standard Bank had intended to dispose of this acquisition of the shares immediately when it found a suitable buyer within a short period post-acquisition. The Tribunal held that it was necessary for an acquiring party to notify the acquisition in the event that it failed to dispose of its controlling interest after 12 months of it acquiring control of the firm.14 Put differently, the obligation to notify arises immediately upon the expiry of the ‘grace period’.

14 The previous version of the Practice Note provided for a 12-month grace period but at the time of the hearing of the matter by the Tribunal, the extended 24-month grace period was in effect.
On the facts, Standard Bank had previously asked for but was denied an extension of the disposal period by the Commission. On denying the permission, the Commission indicated its intention to investigate Standard Bank for gun-jumping. The Commission and Standard Bank subsequently entered into settlement negotiations in which the Commission sought an administrative penalty of 1 million rand. Standard Bank contested this amount on the grounds that the transaction had no negative effects on competition or the public interest, there was no indication that Standard Bank received any financial gains from the transaction and the contravention was technical in nature and of a limited duration (lasting nine months). Standard Bank was also cooperative and helpful in providing the Commission with information during the investigation. Lastly, Standard Bank had never before been found to be in contravention of the Act. The Tribunal agreed with Standard Bank’s submissions and as in previous cases, held that the six-step penalty methodology typically used for calculating cartel penalties was not appropriate for imposing penalties for merger contraventions. It therefore used a filing fee-based methodology to calculate the appropriate penalty and imposed a penalty of 350,000 rand, which was the amount of the filing fee for large mergers at the time.

V OUTLOOK AND CONCLUSIONS

South African competition legislation has been pivotal in ensuring economic integration of previously disadvantaged persons who were prejudicially affected by apartheid. Merger activity is carefully regulated by the Commission and Tribunal to address the high levels of concentration and skewed patterns of ownership of the South African economy. From a merger control perspective, the regulations underpinning the national security provisions are still under review and it will be interesting to see how these provisions (including the expanded public interest provisions) will be tested by the enforcing authorities and the courts.

Appendix 1

ABOUT THE AUTHORS

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Bowmans

Xolani Nyali is a Partner in our Cape Town office Corporate Department and a member of the Competition Practice.

Xolani advises clients on a variety of competition law matters, including merger notifications, behavioural matters and frequently assists clients in developing competition law compliance programmes. Xolani has experience across a broad range of business sectors and industries, including property, construction (cement), financial services, private equity, technology (including fintech), transport (air, road and sea) and the motor vehicle industry. Xolani has a keen interest in the competition law aspects of disruptive technologies and joint ventures.

Xolani also has experience in competition law in other African countries, advising clients in both merger and behavioral matters in diverse jurisdictions including Botswana, Kenya, Namibia, Tanzania and COMESA.

Xolani is a member of the Association of Competition Law Practitioners. He has also commented on the merger guidelines in COMESA and Kenya, and the rules of procedure in Kenya.

Xolani has B.Com and LLB degrees from Rhodes University and an LLM from the University of the Western Cape.

SHAKTI WOOD

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Shakti Wood is a Partner in our Johannesburg office and a member of the Competition practice.

She specialises in merger control, behavioural competition matters, preparing exemption applications and conducting compliance reviews.

Shakti’s experience has been primarily regarding the South African Competition Act, but she also has experience of competition law in COMESA, Kenya and Zambia. Shakti has acted for clients across various sectors including food and beverages, agriculture, mining, pharmaceuticals and healthcare, petroleum and telecommunications.

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