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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by South Africa --

14-15 June 2016

This document reproduces a written contribution from South Africa submitted for Item 3 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm*

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SOUTH AFRICA

1. Introduction

1. The Organisation for Economic Co-operation and Development (“OECD”) has requested submissions in respect of public interest considerations in merger review. Specifically, the requested submissions are to focus on how competition authorities apply public interest considerations, if at all, in their merger review processes. This is the context within which the Competition Commission of South Africa (the “Commission”) makes this submission.

2. The South African Competition Act no 89 of 1998 (as amended) (the “Competition Act”) was drafted shortly after South Africa’s first democratic elections. During this time, the democratically-elected government was faced with the mammoth task of re-shaping the South African economy into one that would be accepted by the international community and address the socio-economic inequalities in society, arising from years of apartheid and the exclusion of the majority of the population from the mainstream economy. This approach recognised that South Africa is a developing economy and that competition policy needed to respond to the country’s challenges.

3. The South African government held the view that traditional competition law objectives and the needs of a developing state were not at odds (Department of Trade and Industry (1997), pp 4). Government believed that competition policy could successfully control private enterprise in the public interest (Department of Trade and Industry (1997), pp 15), as also outlined in the competition policy framework for South Africa in 1997 in the extract below (Department of Trade and Industry (1997), pp 8):

“The competition policy proposed here accepts the logic of free and active competition in markets, the importance of property rights, the need for greater economic efficiency, the objective of ensuring optimal allocation of resources, the principle of transparency, the need for greater international competitiveness, and the facilitation of entry into markets—all within a developmental context that consciously attempts to correct structural imbalances and past economic injustices”.

4. Government envisioned a framework for competition and economic development supported by a well-structured competition policy to achieve a more competitive, efficient and inclusive economy. As a result, not only does the Competition Act incorporate features which reflect the unique challenges facing South Africa’s economic development but it also performs a dual role in South Africa. In addition to stimulating competition and achieving market efficiency, it also aims to be an instrument of economic transformation and a tool (as part of a suite of economic development policy tools) to address the historical economic structure and encourage broad-based economic growth.

5. The approach adopted is not unique to South Africa. Fox and First (2015) find that a number of jurisdictions, globally, expressly require or allow consideration of public interest factors in merger review and that even more regimes implicitly allow for the use of non-competition conditions in settlements. For instance, most jurisdictions in developing countries (especially in Africa) have incorporated public interest considerations in merger review in their competition laws, and in contrast, some developed countries (such as the USA, UK, Canada and Australia) do incorporate public interest considerations in merger review, but these are considered outside the ambit of competition law.

6. This submission is structured to respond to the specific areas the OECD requires input on, namely:

- What is the standard for merger review by the competition agency under the competition law in your jurisdiction?
- Are public interest factors – factors other than consumer welfare, economic efficiency, or effects on the competitive process – included explicitly in your competition law, or do they otherwise play a role in the competition agency’s review? If so, please describe them, and their relationship to competition analysis.
- Is there a separate review by another government body (apart from judicial review), on public interest grounds, of the competition agency’s merger decision? What public interest factors are considered, and when does this review take place? Who is responsible for this review, and what is the process?
- Is there any judicial review of decisions relating to public interest factors?
- Has the relevance of public interest factors in merger review recently changed in your jurisdiction? Are there plans for future changes?
- Please provide examples, if any, of any merger reviews by competition agencies where public interest considerations were a significant factor in the outcome.

7. Accordingly, this submission is structured as follows: section two deals with the standard for merger review in South Africa, which incorporates both competition and public interest considerations. Section three sets out the legal provisions which allow for the consideration of public interest factors in the South African competition regime. Section four deals with issues of jurisdiction and the judicial review provisions as regards the consideration of public interest factors in merger review. We conclude that jurisdiction vests with the competition authorities only and that there is a judicial review process in place should stakeholders not be satisfied with the decisions of the competition authorities in this regard. Section five considers the relevance of public interest factors over time and finds that this has been constant over time and that the role of competition authorities in considering same has increased. Section six concludes.

2. The standard for merger review by the competition agency under the competition law in South Africa

8. The legislative framework for merger review in South Africa provides for the consideration of competition and public interest considerations. This requires a balancing act between competition effects, potential efficiency or procompetitive gains and public interest considerations.

3. Public interest factors in the law

9. The provisions dealing with merger control in the Competition Act provide a closed list of public interest factors to be considered when evaluating proposed mergers and acquisitions. Specifically, section 12A(3) of the Competition Act states that:

“When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

- a) Particular industrial sector or region;*
- b) Employment;*
- c) The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and*
- d) The ability of national industries to compete in international markets”.*

10. The South African view is that the public interest factors as contained in the Competition Act are interlinked with the competition analysis conducted in merger review. This view was articulated by the Competition Tribunal (the “Tribunal”) in the hostile *Harmony Gold/Gold Fields* takeover and the following citation is instructive (*Harmony Gold/Gold Fields*, para 56)¹:

“This prioritisation of the competition inquiry explains the use of the word justification in the public interest test. The public interest inquiry may lead to a conclusion that is the opposite of the competition one, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down on public interest grounds, but that does not mean that in coming to the conclusion on the latter, one will have no regard to the conclusion on the first.”²⁰ Hence section 12 A makes use of the term “justified” in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior competition conclusion.”

4. Jurisdiction and judicial review in respect of public interest factors

11. The South African legislative framework is designed such that the review of public interest factors rests only with the competition authorities.

12. In the event that parties to a merger and other stakeholders (government, trade unions and the general public) are not satisfied with the decisions (in respect of public interest considerations) reached by the competition authorities, the Competition Act provides for the appeal and/or review of these decisions by the Competition Appeal Court (“CAC”).

5. Changes to the public interest factors in merger review

13. The relevance of public interest factors in South Africa has not changed since the Competition Act came into force. It is, however, noteworthy that the approach adopted by the competition authorities in the assessment of public interest factors has developed over time. The *Shell / Tepco*² transaction was one of the earlier mergers where the Tribunal envisioned a limited role for competition authorities in those instances where there are other statutes (such as the Employment Equity Act, for example) that have primary jurisdiction. However, over time, the competition authorities have adopted a more involved approach and the *Metropolitan / Momentum* transaction is a landmark case in this regard³.

¹ Harmony Gold Mining Company Limited and Gold Fields Limited, Tribunal case no: 93/LM/Nov04, para 56.

² Shell South Africa Proprietary Limited and Tepco Petroleum Proprietary Limited, Tribunal case no: 66/LM/Oct01, para 58. This conditionally-approved merger involved the acquisition of a failing firm, Tepco. The Tribunal found that the merger would not give rise to competition concerns but that it would have a negative impact on the competitive position of a firm controlled by historically disadvantaged persons since Tepco was owned and controlled by previously disadvantaged individuals. The Tribunal observed that in addressing public interest Competition Authorities ought to give due regard to other existing applicable legislation, particularly where competition is not harmed as a result of the transaction.

³ Metropolitan Holdings Limited and Momentum Group Limited, Tribunal case no: 41/LM/Jul10. In this transaction, the Tribunal held that any negative impact on public factors cannot be arbitrarily arrived at without establishing a clear connection between the envisaged negative impact and whatever claimed efficiencies. Further, the Tribunal emphasised that while a negative impact on employment may be clearly connected to a particular claimed efficiency this does not discharge the

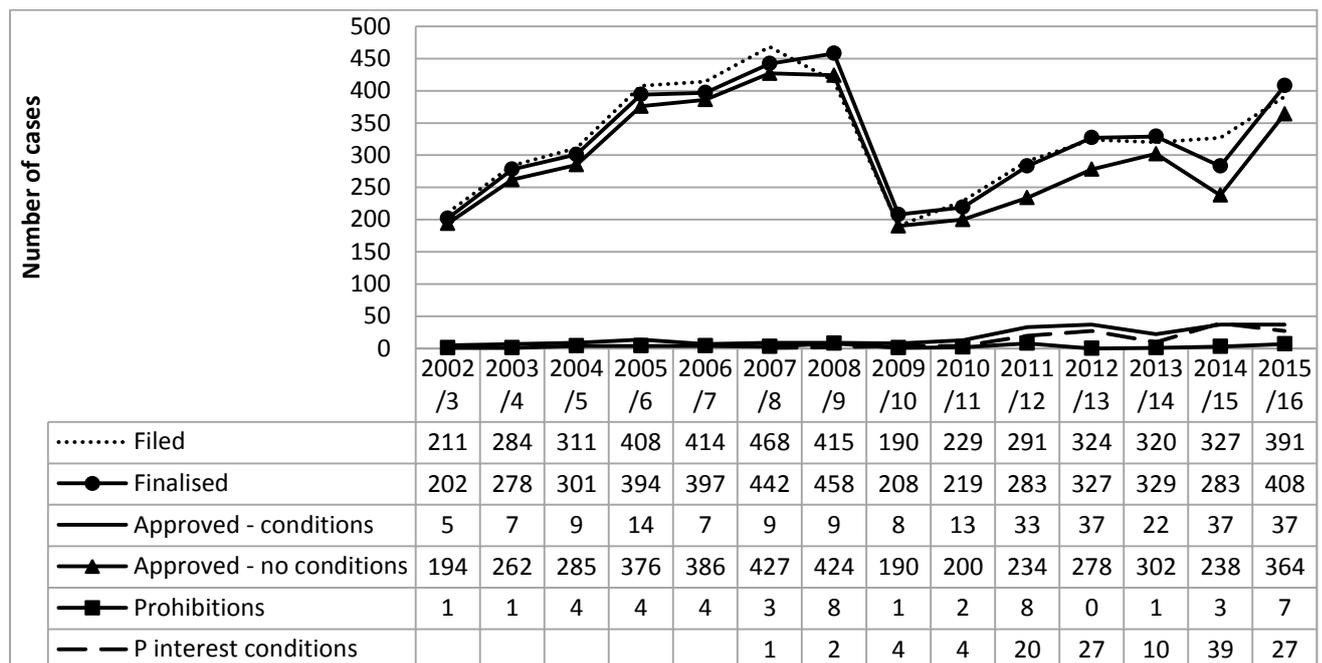
14. The Competition Commission’s approach in respect of the assessment of public interest factors is set out in the *Guidelines for the Assessment of Public Interest Factors in Merger Regulation*, initially published as draft in 2015 and adopted in 2016.

15. There are currently no plans for future changes to the legislative provisions regarding public interest factors.

6. Case studies - key mergers that were driven by public interest considerations

16. Figure 1 below shows notifiable merger activity in South Africa during the period April 2002 to March 2016.

Figure 1: Merger activity: April 2002 - March 2016



Source: Commission’s calculation

Notes: (1) No data collected for public interest conditions in the periods prior to 2007. (2) The drop in mergers notified in 2009 is attributed to the increase in merger notification thresholds.

17. Over the relevant period, the total number of mergers that were finalized was 4529. Of the finalized mergers, 247 were approved with conditions and 134 of these specifically addressed public interest concerns (less than 3% of the total number of mergers finalized). It is evident from the foregoing that while public interest considerations are an integral part of the competition regime in South Africa, most mergers have been approved without public interest conditions attached.

18. The discussion below briefly summarises some of the key cases that turned on public interest considerations in South Africa.

parties of their duty to show that the employment losses can be justified for a reason that is public in nature to offset the public interest in preserving jobs as a result of the merger.

6.1 *Walmart/Massmart*

19. The transaction between Wal-Mart Stores Inc of the United States (Walmart) and South African retailer Massmart Holdings Limited (Massmart) was conditionally approved by the Tribunal during May 2011. The transaction did not raise any competition concerns. The imposed conditions related to public interest considerations, in particular employment and the potential displacement of small businesses in markets underserved by large retailers. The merging parties offered various undertakings which they agreed could be imposed as conditions for the approval of the merger, one of which was the establishment of a R100 million programme aimed exclusively at the development of local South African suppliers, including Small, Medium and Micro-sized Enterprises (SMMEs). In addition, the merged entity would establish a training programme to train local South African suppliers on how to do business with the merged entity and Walmart.

20. Notwithstanding the decision of the Tribunal, the South African Commercial, Catering and Allied Workers Union (SACCAWU), a trade union that had originally intervened in the Tribunal proceedings, sought and was granted leave to appeal the decision of the Tribunal to the CAC on the basis that the merger would be to the detriment of public interest and the Ministers of Economic Development, Trade and Industry and Agriculture, Forestry and Fisheries (collectively “the Ministers”) sought to review and set aside the decision of the Tribunal.

21. Government was concerned that the merged entity would switch some of its procurement away from domestic suppliers to imports post-merger and that this would likely compromise the sustainability and participation of SMMEs and firms owned by historically disadvantaged individuals (HDIs) in productive sectors of the economy. The knock-on effect would be an adverse impact on domestic employment and a reduction in output in sectors, which economic policy was aimed at developing and this would affect broader economic development goals.

22. The CAC then directed that separate studies be commissioned to determine “the most appropriate means together with the mechanism by which local South African suppliers may be empowered to respond to the challenges posed by the merger and thus benefit thereby”. The studies submitted by the merging parties and intervenors concurred that the most appropriate mechanism through which to empower local suppliers to participate in the Massmart supply chains was by means of a supplier development fund (SDF). The CAC directed that the SDF should be designed to respond to the threat of loss of employment and sales by local suppliers, including SMMEs, through their potential displacement by way of imported goods. Consequently, the CAC ordered that a maximum amount of R200 million be allocated by Massmart over a 5 year period. Further, the CAC required the merging parties to reinstate 503 employees, which SACCAWU had argued were retrenched to incentivise the conclusion of the merger.

6.2 *Kansai/Freeworld*

23. The acquisition of Freeworld Coating Limited (Freeworld) by Kansai Paint Co. Limited (Kansai) was conditionally approved to address the competition and public interest concerns that arose from the transaction. Both parties were active in the market for the supply of automotive coatings and Freeworld was also active in the market for decorative coatings through its Plascon brand. The Commission found that the automotive coatings market was highly concentrated and characterised by high barriers to entry and linkages between the various market players through joint ventures. The Commission found that the merger would reinforce concentration in the market and would create a forum for collusion between Kansai and Du Pont (another multinational automotive paint company) through a joint venture that existed between Freeworld and Du Pont. In order to address these concerns, the Commission required Kansai to divest the entire automotive coatings business of Freeworld, which included its shareholding in the Du Pont joint venture.

24. In addition, the merger approval was subject to the following public interest conditions that were raised during the Commission's investigation:

- A moratorium on retrenchments for a period of 3 years following the merger;
- Kansai would continue to manufacture decorative coatings for a period of 10 years, and would establish an automotive coatings manufacturing facility in South Africa within 5 years;
- Kansai would invest in South African research and development in decorative coatings; and
- Kansai would implement a Black Economic Empowerment transaction within 2 years.

25. These conditions were collectively aimed at addressing the anti-competitive and public interest harm that would have resulted from the merger. Further, these conditions would also result in an increase in manufacturing capacity in the paint market in South Africa.

6.3 *Media24/Natal Witness*

26. The Media24/Natal Witness merger was a transaction in which Media24 was acquiring the remaining 50% interest in Natal Witness and through this acquisition would lead to it holding an 80% interest in Africa Web, a competitor to Natal Witness in the Kwa-Zulu Natal and Eastern Cape regions. While the merger raised competition issues around foreclosure, this effect would be felt by small publishers. Hence, this raised a public interest concern rather than a direct competition concern. The Tribunal assessed whether the merger would have a negative impact on the public interest since small community newspaper publishing businesses in Kwa-Zulu Natal and Northern Eastern Cape required coldset printing services such as that provided by Africa Web.

27. The Tribunal considered whether the ability of the small publishers to compete would be hindered by the merger by looking at the ability of small publishers to access printing services at competitive conditions of supply and competitive pricing. The case also considered the role that small publishers played in the relevant market and in maintaining competition in the market. If the merger had a negative impact on the ability of small publishers to compete, then competition would be affected in the market. The Tribunal also considered whether the merger raised existing barriers to entry and expansion and thereby limited competition from small publishers. The Tribunal also considered whether the harm likely to arise and experienced by small publishers was merger specific and arising directly through the merger.

7. Conclusion

28. The South African competition regime explicitly allows for the consideration of public interest factors in merger review. This approach is based on the view that traditional competition law objectives and economic development imperatives are not at odds, but rather complementary. The cases discussed above show how the South African competition authorities have balanced public interest factors and competition considerations in merger review. Importantly, the balancing exercise carried out by the South African competition authorities shows that the consideration of public interest is critical in competition analysis. In addition, the identified public interest effects are based on clearly demonstrable economic evidence which quantifies the likely harm or benefit to the public interest.

29. In essence, as mergers have long lasting effects in the market structure and distribution of wealth, particularly in markets with high barriers to entry, it is inevitable that their assessment ought to traverse beyond the orthodox competition considerations to have regard to their social impact especially in the current environment of rising globally inequality.

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Metropolitan Holdings Limited and Momentum Group Limited, Competition Tribunal case no: 41/LM/Jul10.

Shell South Africa Proprietary Limited and Tepco Petroleum Proprietary Limited, Competition Tribunal case no: 66/LM/Oct01.

Wal-Mart Stores Inc of the United States/and South / Massmart Holdings Limited, Competition Appeal Court case no: 110/CAC/Jun11 and 111/CAC/Jun11.