Global Mergers Conference

The politics of international merger review –
the African Perspective

John Oxenham
# Proliferation of merger control in Africa

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<thead>
<tr>
<th>Jurisdiction</th>
<th>Fees</th>
<th>Process &amp; Time Lines</th>
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*COMESA*

**Jurisdiction Fees Process & Time Lines**

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**Notes:**

- **Process:** Mergers must be notified within 30 days of the decision of the parties to merge as prescribed form. A fee will be payable at the time of filing, the amount of which is still to be determined. The Commission will inform the parties within 30 days of receipt of the notification whether they will deal with evaluating the merger or whether a part of the investigation will be referred to the relevant Member State for evaluation in accordance with their own national competition law. The Commission shall make a decision within 120 days. Period may be extended upon application to the relevant Board.

- **Filing fee:** 0.01% of the combined annual turnover or combined value of assets in the Common Market, whichever is higher.

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**Nortons Inc**

*Attorneys at Law*
Impact of unique local aspects on global mergers in S.A.

- Preamble to the Competition Act - objectives of the legislation
- Section 12A(1) sets out test: SPLC
  - Traditional merger analysis
  - Investigation by Commission
- Commission can approve merger, even if there is an SPLC – but only if:
  - parties show likely resulting technological, efficiency or other pro-competitive gain
    - Or:
  - the merger can be justified on public interest grounds.

- 2004 OECD Peer Review of the SA Competition Act noted that:
  “interest groups have planted their flags in the competition law and process”
Focus on South Africa - impact of unique local aspects on global mergers - 3rd Party Intervention

• Third parties can seek to intervene in proceedings

• Two broad groups of interveners:
  
  – Minister of the Economic Development
    
    and
  
  – Trade unions or employee representatives of parties’ employees
  
  – All other third parties:
    
    • Competitors, Customers, Suppliers; Industry associations; Sector regulators; Other government departments; and
    
    • Any other third party which can show an interest as defined in terms of Section 53 of the Competition Act. Anglo South Africa Capital (Pty) Ltd & 3 Others and Industrial Development Corporation of South Africa & Another [case no. 26/CAC/Dec02]
Focus on South Africa - impact of unique local aspects on global mergers - 3rd Party intervention

• Intervention by competitors, private parties, government, and trade unions is generally permitted where they can establish a theory of harm or lead evidence which the Tribunal believes is not already being addressed by the Commission.

• Interveners are generally confined to leading evidence and cross examining witness in respect of issues raised in terms of the intervener’s application to intervene.

• But intervention also allows for discovery / disclosure
Focus on South Africa - impact of unique local aspects on global mergers - Public Interest test

Section 12A(3): “public interest grounds”

When using public interest grounds, the agencies MUST consider the effect that the merger will have on ... a particular industrial sector or region; employment; historically disadvantaged persons; and the ability of national industries to compete in international markets.
**Focus on South Africa - political influence?**

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<th>Minister Patel</th>
<th>Ex-Commissioner Ramburuth</th>
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<td>“Our law is not predicated on competition fundamentalism. Instead, it seeks to harness the power of competition to the broader developmental needs of our society…”</td>
<td>“We are a completely independent institution, I am completely independent. But are politicians trying to use us, exploit us for political agendas? Yes.”</td>
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Focus on South Africa- impact of unique local aspects on global mergers – Public Interest test

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<td>Shell South Africa (Pty) Ltd // Tepco Petroleum (Pty) Ltd Tribunal Case No: 66/LM/Oct01</td>
<td>The Commission’s role is to promote and protect competition and a specified public interest. It is not to second-guess the commercial decisions of precisely that element of the public that it is enjoined to defend, particularly where no threat to competition is entailed.” “The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory instruments…”</td>
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<td>Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd 08/LM/Feb02</td>
<td>“Thus the public interest asserted pulls us in opposing directions. Where there are other appropriate legislative instruments to redress the public interest, we must be cognisant of them in determining what is left for us to do before we can consider whether the residual public interest, that is that part of the public interest not susceptible to or better able to be dealt with under another law, is substantial” “…public interest is … a “policy at war with itself””.</td>
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<td>Metropolitan/Momentum (Case No: 41/LM/Jul10)</td>
<td>“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……. 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. Hence section 12 A makes use of the term “justified” in conjunction with the public interest inquiry.”</td>
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Focus on South Africa- impact of unique local aspects on global mergers – Public Interest test

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<td>Kansai Paint// Freeworld Coatings</td>
<td>“We failed to find any substantive anticompetitive effects to the merger that could not be addressed by the revised agreed to conditions and that the dire condition of a divestiture initially required of the merging parties was found to be unwarranted. In addition, conditions relating to merger related public interest concerns such as employment, the development of local manufacturing with concomitant research and development were agreed between the Commission......”</td>
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<td>Massmart // Walmart CAC</td>
<td>“There is merit in the argument that the Act should be read in terms of an economic perspective that extends beyond a standard consumer welfare approach. By virtue an embrace of the goals of a free market and effective competition together with uniquely South African element…the legislature imposed ambitious goals upon the competition authorities created in terms of this Act. Within the context of the present disputes, this ambition is further captured in S12A which mandates an enquiry into substantial public interest grounds.”</td>
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Impact on Global Mergers – Schering-Plough and Organon

- Schering-Plough and Organon global merger had implications across many geographic markets including the US, EU and South Africa.
  - a remedy “package”, which related mainly to certain product divestitures, had to be negotiated, taking into account the implications across many markets.
  - In addition, South African—specific considerations featured, whereby the parties had to agree to the extension of a distribution agreement involving a player that had black economic empowerment credentials (namely Afrivet).
  - The issue of black economic empowerment credentials went specifically to the public interest consideration of promoting enterprises that are owned by historically disadvantaged persons who were previously excluded from participation in the formal economy.
  - It is noteworthy that in this case, it was the intervention of Afrivet, a third party, which led to the imposition of this condition
Impact on Global Mergers – Kansai / Freeworld

• Kansai sought to acquire control of Freeworld by way of a hostile takeover. The Commission approved the merger subject to the following conditions:
  – no merger related retrenchments for a period of 3 years (includes the inability to redeploy);
  – Kansai will dispose of Freeworld’s entire automotive coatings business;
  – Kansai will continue to manufacture decorative coatings for 10 years;
  – Kansai will invest in research and development in decorative coatings in South Africa;
  – Kansai will implement a Black Economic Empowerment deal within two years of approval;
  – Kansai will establish an automotive coatings manufacturing facility in South Africa within 5 years

• Kansai appealed the Commission’s finding.

• DTI was granted intervention rights before the Tribunal on the basis:
  – Take-over constituted a direct threat to SA government’s localisation drive (Freeworld was the only local manufacturer);
  – The takeover may impact on employment levels if Kansai curtailed Freeworld’s operations.

• Matter was settled between Kansai and the Commission
  – Divestiture condition and obligation to manufacture locally withdrawn
Impact on Global Mergers – Pioneer / Pannar

• 3 to 2 merger in seeds for maize, the staple food throughout much of sub-Saharan Africa
• Required approval (with limited scrutiny), in Kenya, Malawi, Namibia, Swaziland, Tanzania and Zambia
• South Africa:
  – Commission prohibition,
  – Tribunal prohibition,
  – Competition Appeal Court overturned the Tribunal prohibition, but maintained conditions:
    – Establish a regional research facility in South Africa
    – Establish a fund to work with small-scale farmers
    – Maintain existing varieties
    – Still on appeal to the Constitutional Court on costs
Impact on Global Mergers – Walmart / Massmart

- The Competition Commission initially recommended the unconditional approval of the merger.
- The Competition Tribunal found that the merger raised no competition concerns, as Walmart does not compete with Massmart in South Africa.
  - However, there was intervention by various government departments being the Departments of Trade and Industry, Economic Development and Agriculture, Forestry and Fisheries as well as various trade unions.
- Government departments and trade unions argued for conditions to be imposed to protect the public interest and focused specifically on the negative impact of the merger on employment (incl. conditions of employment) and procurement for local manufacturers and suppliers.
- Public interest concerns raised by the government departments and trade unions included:
  - Massmart’s retrenchment of 503 employees in anticipation of the merger.
  - Walmart’s global purchasing powers and that the merged firm would be able to source cheaper imports resulting in a switch of Massmart’s procurement away from local manufacturers to imports, with adverse employment effects in these affected sectors.
  - Massmart’s employees’ collective bargaining rights.
Impact on Global Mergers – Glencore / Xstrata

• The Glencore/Xstrata transaction which was a multi-jurisdictional merger was approved by the Commission subject to conditions concerning employment.

• While the Commission concluded that the transaction was unlikely to “substantially prevent or lessen competition” in South Africa, the possible retrenchment of 180 employees raised public interest concerns.

• Intervention: Eskom, National Union of Metalworkers of South Africa (“NUMSA”), and National Union of Mineworkers (“NUM”)
  
  – “Eskom raised a variety of competition-related concerns, which it claimed were merger-specific, i.e. that the proposed merger was the cause of these concerns. These concerns were that Eskom anticipated that the merger would result in Xstrata adopting a different and less favorable pricing strategy toward its negotiations with Eskom and that Glencore may dictate that Xstrata not develop a mine that it would otherwise have developed with Eskom.

• Tribunal approved the merger subject to employment-related conditions
  
  – No more than 80 skilled employees would be retrenched.
  
  – Semi-skilled and unskilled employees would be granted protection. The merging parties would conduct a 90-day review to assess whether retrenchments of semiskilled and unskilled employees were required. Should retrenchments arise, these could only take place two years after the end of the review period and no more than 100 employees could be affected.
  
  – For those semiskilled and unskilled employees who are retrenched, a training fund had been established and each affected employee would be entitled to receive R10 000 towards an approved training course.
Impact on Global Mergers – Namibia and Botswana

• **Namibia**
  - **DCD – Dorbyl / Elgin Brown & Hamer Group**
    - The Namibian Competition Commission imposed a condition that no retrenchments could be made for two years
  - **Walmart / Massmart**
    - The following conditions were imposed
      - No retrenchments for two years
      - Recognition of existing labour agreements
      - Development of domestic supplier activities

• **Botswana**
  Two decisions highlight the public interest factor of spreading ownership in Botswana.
  - **Aon/Aon Botswana**
    - The Authority was concerned that the transaction, which involved the sale of 25% interest that was previously in the hands of Botswana citizens through the Citizen Entrepreneurial Development Agency, would disempower citizens and that the disposal should rather been made to other citizen buyers.
  - **MRI Botswana / BOMAID**
    - This transaction concerned the sale of shares in MRI Botswana held by CEDA Venture Capital Fund Limited, which should be sold to other citizens who are not already part of MRI Botswana.
Conclusion

• Crucial considerations in global mergers are:
  – Certainty
  – Timing
  – Costs

• In relation to the SA and regional merger control arena
  – Mergers can be heavily opposed by third parties, including government departments, trade unions, competitors, customers and suppliers.
  – There can be extensive cross examination and extensive leading of factual and economic evidence.
  – Opposed mergers in South Africa can be protracted, lengthy, have extensive discovery and some decisions may be taken on appeal – Tribunal decisions have been overturned by the CAC on a number of occasions.

• Accordingly it is vital to take into account these participants as these can often be decisive in the outcome of merger proceedings