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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from South Africa

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- South Africa --

1. Introduction

1. The South African Competition Commission (the Commission) is an independent authority providing for mandatory merger notifications based on a dual threshold. Firms acquiring direct or indirect control over the whole or part of another firm that meets the minimum lower dual thresholds are required to notify transactions, these transactions are referred to as intermediate mergers. A higher threshold exists which if met classifies the transaction as a large merger. Large mergers are investigated by the Commission and are decided upon by the Competition Tribunal.

2. The current lower merger notification thresholds (intermediate mergers) in South Africa are:

- Combined turnover and/or asset value of the acquiring firm (for the entire group) and target firm needs to exceed R 560 million (approximately US$ 77,463,500); and
- The target firm turnover and/or asset value needs to exceed R 80 million (approximately US$ 11,066,214.39).

3. The current higher merger notification thresholds (large mergers) in South Africa are:

- Combined turnover and/or asset value of the acquiring firm (entire group) and target firm needs to exceed R 6, 6 billion (approximately US$ 912,779,227); and
- The target firm turnover and/or asset value needs to exceed R 190 million (approximately US$ 26,276,977).

4. The current merger notification fees amount to R100 000 (approximately US$ 13,836) for an intermediate merger and R350 000 (approximately US$ 48,425) for a large merger. The substantive test applied in determining whether or not to approve, conditionally approve or prohibit a merger is: "*whether the merger is likely to substantially prevent or lessen competition*" (the SLC test).

5. In considering whether or not a transaction is likely to meet the SLC test the competition authorities consider the following factors:

- Barriers to entry;
- Level and trends of concentration;
- History of collusion in the market;
- Degree of countervailing power;

- The dynamic characteristics of the market (including growth, innovation and product differentiation);
- The nature and extent of vertical integration;
- Whether or not a party to the merger has failed or is likely to fail; and
- Whether the merger will result in the removal of an effective competitor.

6. In addition to the above factors the competition authorities considers the following factors that impact on public interest:

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

7. In the assessments of mergers the authorities explore and consider unilateral effects and co-ordinated effects, as well as the effects of the transaction on the above public interest grounds, which is evident from the judgements of the Competition Commission, Competition Tribunal and Competition Appeal Court.

8. The South African Competition Act[1] (the Act) does not provide for any special provisions for cross border merger control and the competition authorities analyse cross border mergers with the same criteria used to analyse domestic mergers.

9. South African firms are often the target of foreign take-overs and hence cross border issues often arise. South African firms are often used as the springboard to enter the African market. The Commission also see various notifications arising from multinational firms acquiring each other and invariably either firm has some local subsidiary in South Africa which triggers the obligation to file. The major challenge with these types of cross border mergers relates to the timely filing of the transaction and respect for local legislation. Regrettably, major jurisdictions are prioritized by merging parties and we find that it is only at the later stages of the merger process that attention is given to non-priority jurisdictions. Our experience is that merger filings are then submitted late and enormous pressure is place on the jurisdiction to finalise its analysis to 'fit in' with the corporate time table. This often leads to frustration and conflict which could be prevented.

2. Co-operation among competition authorities

10. The Commission has not experienced any conflict with foreign jurisdictions in analysing and deciding on the effects of merger transactions. At present the South African competition authorities are not party to any international agreements in the field of competition law which provide for cross-border merger control.

[1]. Act 89 of 1998, as amended.

11. However, South Africa is a member of the Southern African Development Community (SADC) and signatory to the SADC Declaration on Regional Cooperation in Competition and Consumer Policies (the SADC Declaration). As a member of the SADC Competition Committee (emanating from the SADC Declaration), the Competition Commission is committed to contributing to the policy on regional integration with regard to competition law and policy within SADC.

12. SADC does not have rules dealing with the regulation of cross-border merger operations at either the domestic or regional level as yet but does commit Member States to "pursue case specific cooperation to the extent consistent with each member's laws, regulations, and important common interests in preventing hardcore cartels, abuse of dominance, *anticompetitive mergers* and unilateral conduct"[2]. The SADC Declaration also emphasises that there is a need to: "*formalize a system of cooperation* between national regimes that can harness the collective efforts of relevant national authorities and add value to national enforcement efforts in the face of problems affecting more than one country"[3].

13. The SADC Declaration is especially relevant as the economic effect of mergers within South African markets is sometimes also felt across our borders – given the free-trade agreements that are in place in the region.

14. Other regular interactions occur through networks such as the ICN and the OECD where the competition authorities participate in the respective merger working groups and strive to keep abreast of the latest developments and cutting edge methods of analysis used in merger regulation worldwide.

3. Jurisdictional issues

15. The merger thresholds in South Africa have been increased effective from 1 April 2009 and the Commission is confident that the mandatory regime ensures that the majority of relevant transactions are notified. It is important to note that the Commission also has the authority to call on parties that enter into transactions that fall below the lower threshold to notify such transaction and may subject them to the jurisdiction of the Competition Act if the Commission is of the view that the merger might substantially prevent or lessen competition in any market.

16. The Commission will only consider transactions which have an effect in South Africa - however the Commission does consider the decisions of foreign jurisdictions to the extent where there are similarities between our markets. The Commission regularly interacts with the officials from the European Commission or the US jurisdictions on transactions which are also notified in these jurisdictions and are engaging more and more with competition authorities within the SADC region (e.g. the Namibian Competition Commission).

17. The competition authorities are independent from Government and are required by law to take independent decisions. Should Government wish to making submissions regards transactions being investigated by the Commission, these could be made[4] in the same way as other interested parties and will be considered using the substantive test. The Act does, however, make provision for the Minister of Finance to intervene and establish exclusive jurisdiction in respect of Bank mergers when it is considered to be in the interest of financial stability[5].

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2. Article 1(g) SADC *Declaration on Regional Cooperation in Competition and Consumer Policies*.

3. Preamble of the SADC *Declaration on Regional Cooperation in Competition and Consumer Policies*.

4. Please see section 18 (1) of the Competition Act 89 of 1998, as amended.

5. Please see section 18 (2) (b) of the Competition Act 89 of 1998, as amended.

18. The Competition Act requires the Commission and Tribunal to consider the effects of a merger on the following non-competition or public interest grounds:

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

19. The Commission considers the above effects in all transactions and where necessary has imposed conditions to remedy any negative effects but has never prohibited a transaction based on any of these factors.

20. Cross border transactions are dealt with in the same manner as domestic transactions. From a commercial implementation point of view the parties often experience challenges in coordinating obtaining clearances from all the regulatory authorities. Often these pressures are made known to the Commission and where able the Commission tries to accommodate the parties. Where parties trade with international customers this often provides for challenges in getting adequate responses however, these are not uniquely different from domestic transactions.

4. Remedies

21. The Commission has recently imposed conditions on the cross border merger involving Unilever and Sara Lee which required the parties to divest of a deodorant brand (Status) in order to remedy the competition concerns identified. The Commission defined the market as national and negotiated an effective remedy with the parties that specifically addressed the South African issues. Subsequent to the South African decision the European Commission also imposed conditions to the merger requesting a different brand (Sanex) to be divested. During the investigation the Commission has been in contact with the European Commission in order to understand the focus of their investigation. It appeared that their investigation included markets that were not considered by us (South African Commission) as significantly problematic (i.e liquid soap). However the remedy imposed by the European Commission (to divest the Sanex brand) also had an effect in that this brand was also competing in the deodorants market. Although the parties are not obliged to divest the Sanex brand in South Africa it does not make practical and commercial sense to partially own a brand in certain parts of the world. The resultant effect is that the parties will likely divest of two deodorant brands in South Africa as a result of the two different authorities authorising different divestiture conditions. The relevant question needs to be asked whether the divestiture of Sanex alone in South Africa would have sufficiently addressed the competition concerns identified and the answer thereto is an unlikely no. This brand is still small in the deodorant market in South Africa and would have been an unlikely choice to request the parties to divest. Although this problem did not arise during negotiation the parties did approach the Commission in wanting to amend the order of the Competition Tribunal to align the South African condition with the European decision, had this been envisaged likely difficulties with respect to the effectiveness of the remedy would have been encountered.

22. With respect to the monitoring of conditions the Commission takes responsibility for this task and has to date not made any arrangements with other countries to assist with the monitoring of conditions. Parties are obliged to provide at least annual reports confirming compliance and/or trustees are appointed to ensure timely divestitures are made. Where countries in close proximity are affected the Commission will consider in future sharing such responsibility as it would be of mutual benefit.