

# The punishment must fit the transgression

**THE** Competition Act provides that a notifiable merger may not be implemented without the required approval.

If the parties to a notifiable merger have implemented that merger without approval, the Competition Tribunal may impose an administrative penalty not exceeding 10% of the firm's annual turnover in and from SA during its preceding financial year.

In the Structa Technologies case, the tribunal recognised that the commission's task is to ensure that business complies with the Competition Act and that its aim should be to stop unlawful conduct, to punish the wrongdoer and to deter unlawful conduct from occurring or being repeated. However, the tribunal recognised that high penalties, although sending strong signals that breaches of the Competition Act will not be tolerated, must be imposed only if the relevant facts of the case warrant such a penalty. Of importance to the tribunal in this case was that the respondents did not deliberately flout the commission's authority and had acknowledged their contravention. The tribunal emphasised that one of the main objectives of compliance is to con-



**COMPETITIVE  
EDGE**

Justin  
Balkin

vince people that it is in their best interests to comply with the law and not to force them to hide their transgressions once they realise that they had made a bona fide mistake. Since the contravention in this case was based on a bona fide error that embodied no negative consequences and that the parties had, as soon as they had become aware of their error, diligently set about complying with their obligations, the fine was set at a symbolic level of R1.

Conversely, in the Edgars case, the tribunal imposed a fine of R250 000 for failing to obtain approval for a notifiable merger pri-

or to its implementation. In determining that this amount was appropriate, the tribunal considered the factors in section 59(3) of the Competition Act, which include the nature, duration, gravity and extent of the contravention; any loss or damage suffered as a result thereof; the level of profit derived from the contravention and the degree to which the respondent has co-operated with the competition authorities.

Since the respondents had never intended to evade substantive scrutiny of the merger, a high penalty was not imposed. The tribunal did, however, recognise that the penalty cannot be so low that a firm would regard it as worth evading the requirements of the Competition Act to secure a quick deal. On this basis, since the motive for avoiding notification (although bona fide) was one of expediency, a fine of R250 000 was deemed to be appropriate.

In the consideration of the settlement agreement between the Tiso Consortium and the commission in relation to the acquisition of New Africa Investments Ltd, the tribunal confirmed the agreement to pay an administrative penalty of R500 000 for the pre-implemen-

tion of the merger. The tribunal found that the failure to notify was not motivated by a desire to avoid regulatory scrutiny because the merger might be prohibited, but rather to present a "risk-free" bid to shareholders. The tribunal accepted the commission's findings that the parties were bona fide. On this basis, the fine was deemed to be appropriate. However, the tribunal cautioned that if the motivation for failure to notify had not been bona fide, a sum of R500 000 would have been inadequate by a large degree – the fine for jumping the light should significantly diminish the spoils of the prize.

Most recently, the tribunal refused to confirm the Netcare/CHG consent agreement, where the commission's calculation of the penalty was considered to be too low. The tribunal said the commission had failed to consider various factors in the calculation of the penalty, including that Netcare ought to have had an appreciation of the law; that Netcare had an interest in not appearing as a controlling shareholder of CHG; the history of inconsistent explanations to assess the firms' behaviour and degree of co-operation; and the long duration between imple-

mentation and notification. The tribunal recognised that firms may construe low penalties as an acceptable cost of doing business if prior implementation impedes proper adjudication and thus rejected the consent agreement.

The case law has been entirely consistent. The determination of an appropriate penalty for failure to obtain the required approval prior to implementing a merger is tested by reference to the factors set out in section 59 of the Competition Act. However, of importance in this regard are the parties' bona fides and the rationale for the non-notification. If the merging parties have willfully failed to notify in order to seek an advantage, the administrative penalty imposed should be high.

Conversely, however, where the parties have made a bona fide error, have not flouted the competition laws and have not intentionally evaded competition scrutiny, the amount of the penalty should be set at such a level to encourage firms to regularise their conduct by approaching the commission.

■ *Justin Balkin is a director in the competition law department at Edward Nathan Sonnenbergs.*