

The challenge of keeping tabs on creeping mergers

WHILE the competition law regime in the US may be said to arise from statute, it is, by and large, a creature of the courts as judicial precedent is responsible for fleshing out the skeletal provisions of the Sherman Act. A similar position prevails in the European Union (EU) where competition law regulators and judges are required to provide the substance behind the articles of the Treaty of Rome pertaining to competition law.

South African competition law jurisprudence is somewhat different, as it derives from a lengthy act of parliament — complete with preamble, definitions and a number of chapters that address all relevant aspects of competition law.

As such, reliance on statutory interpretation and the letter of the law is more relevant to the South African competition legislation experience than it is in an American or European context.

Given the relative infancy of competition law in SA, a constant challenge facing practitioners and regulators alike is that the rapidly changing and increasingly sophisticated face of commercial activity must be assessed against the fairly rigid, mechanistic and formulaic backdrop of the Competition Act.

The issue of the so-called “creeping merger” is illustrative of this difficulty. A creeping merger refers to the acquisition of smaller businesses or the acquisition of individual assets over time that has a cumulative effect both on the market share of the acquiring firm and concentration in the relevant industry.

The individual transactions, however, tend to fly beneath the radar screens of competition law regulators. Since the acquisitions in question will take place over a protracted period, creeping mergers ordinarily increase market power only incrementally — no single acquisition can be identified immediately as giving rise to competition law concerns.

Moreover, a characteristic of creeping mergers is that one cannot easily determine which particular acquisition is responsible for causing an anti-competitive effect on the market in question.

Foreign competition law authorities are seeking to use their somewhat adaptable legislative frameworks to evolve the means to cater for the creeping merger phenomenon. The more flexible legislative framework in the EU has enabled the relevant competition law authorities to adopt a practical approach to creeping mergers.

Where two or more transactions take place between the same undertakings, within a two-year period, these transactions will be treated as a single transaction.

Under US competition law, each individual transaction is assessed by considering whether that particular transaction will give rise to anti-competitive effects.

Finally, the Australian competition law approach to creeping mergers continues to evolve and an ongoing debate is whether or not specific provisions should be included in the relevant legislation in order



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to better control the incidence of creeping mergers.

The legislative framework of the Competition Act in SA, however, militates against a fast and efficient resolution of the creeping merger issue.

In a practice note, the Competition Commission recognises a fundamental challenge posed by creeping mergers as identifying the precise point at which a small or insignificant event should be analysed within its wider context.

In the Edcon/Rag case, it was held that parties should not be allowed to structure transactions in such a way so as to avoid their obligation to notify under the Competition Act.

Further, in both the Edcon/Rapid Dawn and Protector cases, reference was made to the fact that cognisance should be taken of the creeping level of marginal acquisitions as well as the effect that this could have on competition.

What is evident from both the foreign and domestic approaches to creeping mergers is that parties cannot simply turn a blind eye to the competition law effects of a particular transaction where the transaction in question fails to trigger a merger notification requirement under the applicable thresholds.

A creeping merger problem may arise regardless of whether the acquisitions are, in truth, two independent mergers or whether the transactions have been deliberately structured so as to circumvent the notification requirements.

An important consideration is whether or not a particular company employs a strategy to engage in various acquisitions with a view to create or enhance its market power, but without attracting the attention of the competition authorities.

In the circumstances, parties would do well to seek legal advice before engaging in a series of acquisitions, despite the fact that, on the face of them, such acquisitions may seem inconsequential.

The compliance division of the Competition Commission may also be approached by transacting parties for an advisory opinion as to whether or not the proposed acquisition or acquisitions give rise to creeping merger concerns.

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