

Business Law & Tax Review

COMPETITIVE EDGE

Competition watchdog has wary eye on transactions



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Mergers and acquisitions are important for the efficient functioning of the economy because they allow firms to achieve efficiencies, such as economies of scale or scope, and to diversify risk across a range of activities.

In practice, most mergers are competitively neutral and do not eliminate competition or harm consumers, competitors or suppliers.

However, in some cases mergers can harm customers, competitors or suppliers by altering the structure of markets and the incentives for firms to behave competitively. For this reason the competition authorities analyse mergers and acquisitions.

The ability of a merger to harm, or substantially prevent or lessen competition through unilateral effects takes place when a merger creates or enhances market power or facilitates its continued exercise. The purpose of merger review is to determine whether such effects are likely to occur that would result in harmful effects on the public.

The Competition Act of 1998 gave the South African competition

authorities the powers to review mergers. The competition authorities, unlike many of their international counterparts, do not have formal, published merger guidelines that outline their general approach to the analysis of the competitive effects of mergers, acquisitions and similar corporate combinations, which use a safe-harbour market-share threshold of 15% and certain Herfindahl Hirschman Index (HHI) thresholds to filter out mergers unlikely to raise competitive concerns.

SA's competition authorities have borrowed from the horizontal merger guidelines (the guidelines) of the US Department of Justice Antitrust Division and the Federal Trade Commission in adopting the safe-harbour thresholds, particularly insofar as the HHI thresholds are concerned. This is a formula whereby the sums of the squares of the individual percentage market share figures of the competitors in the market are calculated. The guidelines provide that certain mergers that would result in moderately concentrated industries with HHI thresholds between 1 000 and 1 800 "potentially raise significant

competitive concerns".

The South African competition authorities have adopted similar HHI standards to gauge the effect of a proposed transaction on concentration in a particular market, and also use a safe-harbour market-share threshold of 15% to consider competitive concerns.

Actual practice, however, suggests that the South African Competition Commission, being the investigative arm of the competition authorities, rarely challenges mergers when the combined market shares of the merging parties is below 35% on the basis of unilateral effects.

When the commission challenged such transactions its decisions or recommendations have generally been rejected by the Competition Tribunal.

For example, last year the commission recommended that the tribunal prohibit the proposed merger between Masscash and Finro Enterprises, two businesses who were involved in the wholesale grocery market in Port Elizabeth. The merged entity would have enjoyed a combined market share of between 30% and 40%. The tribunal

concluded that the merger would not lead to a substantial prevention or lessening of competition in the relevant market, one of its reasons being that post-merger there remained several significant competitors in the relevant market, including three large wholesalers effectively competing with the merged entity, each with market shares exceeding 10%, as well as several smaller competitors.

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