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# South Africa's Antitrust Framework for M&A Transactions

by Byron Crowe*

Sub-Saharan Africa continues to grow at an impressive rate, and South Africa has been characterized as the "gateway" to investment in the region.[1] This, coupled with the increasing popularity of cross-border M&A deals, means that foreign transactional attorneys are today much more likely to confront South African commercial law issues. One area of South African commercial law that is particularly important in the context of cross-border M&As is antitrust. This article presents an overview of South Africa's antitrust framework in the context of M&A transactions and identifies some of the challenges that companies may face.

## THE COMPETITION ACT

In South Africa, the Competition Act of 1998[2] is the primary piece of legislation dealing with antitrust issues. Under the Competition Act, firms are generally prohibited from engaging in restrictive horizontal or vertical practices that have the effect of preventing or lessening competition in the market.[3] Firms are also not allowed to abuse a dominant position in the market by, among other things, charging excessive prices to the detriment of consumers.[4]

Perhaps most importantly for transactional attorneys, the Act also contains a number of provisions relating to the control and approval of M&A transactions by the Competition Commission, the Competition Tribunal, and the Competition Appeal Court, the three antitrust authorities established by the Act. Where a transaction is considered a

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[1] *The Gateway to Africa?*, ECONOMIST (June 2, 2012), http://www.economist.com/node/21556300.

[2] *See* Competition Act No. 89 of 1998 (S. Afr.), *available at* http://www.saflii.org/za/legis/num_act/ca1998149.pdf

[3] *See id.* §§ 4(1)(a), 5(1). However, the Act does not apply to all types of activities. *See id.* § 3(1).

[4] *Id.* § 8.

"merger"[5] under the Act—the definition of which includes share or asset purchase as well as statutory mergers—the provisions apply, triggering a number of responsibilities for the parties to the transaction.

**THRESHOLD REQUIREMENTS**

The Act's merger control provisions divide transactions into three groups—small, intermediate, and large mergers—and treat them differently depending on the size of the deal. Under South African regulations, small mergers are those where either (A) the value of the transaction between both firms is less than 560 million rand (about $56 million USD); or (B) the target company's domestic assets or turnover in, into or from South Africa is less than 80 million rand (about $8 million USD).[6] The value of the transaction for the purposes of (A) is determined by taking the value of the target company's domestic assets or domestic turnover[7] (whichever is greater) and adding it to the value of the acquiring company's domestic assets or domestic turnover (whichever is greater).[8]

If either (A) or (B) is satisfied, the transaction is a small merger and the parties to the merger are generally[9] not required to notify the Competition Commission of the merger.[10] However, if neither (A) or (B) can be satisfied, the transaction is either an intermediate or large merger, and each party to the transaction must notify the Commission. If it is an intermediate merger, the Competition Commission investigates the details of the transaction and approves it, prohibits it, or approves it subject to certain conditions.[11] If the transaction is a large merger, [12] the Commission decides whether or not the merger should be approved. However, its decision is only a recommendation which is then considered by the more senior antitrust authority, the Competition Tribunal.[13] Parties to an intermediate or large merger may not implement the transaction

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[5] For purposes of the Act, a merger occurs where "one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm." *Id.* § 12(1)(a). Under the Act, parties can structure a merger in any manner, including through a share or asset purchase or through a statutory amalgamation or merger. *See id.* § 12(1)(b).

[6] *See* Determination of Merger Thresholds and Method of Calculation No. 1246 of 2008 § 2, Gov. Gazette, Oct. 10, 2008 [hereinafter Competition Regulations] (S. Afr.).

[7] Domestic turnover means turnover in, into or from South Africa.

[8] *See* Competition Regulations, *supra* note 6, § 2.

[9] However, the parties to a small merger may still have to notify the Competition Commission, if the Commission later decides the transaction will substantially prevent or lessen competition or cannot be justified on public interest grounds. Competition Act § 13(3)

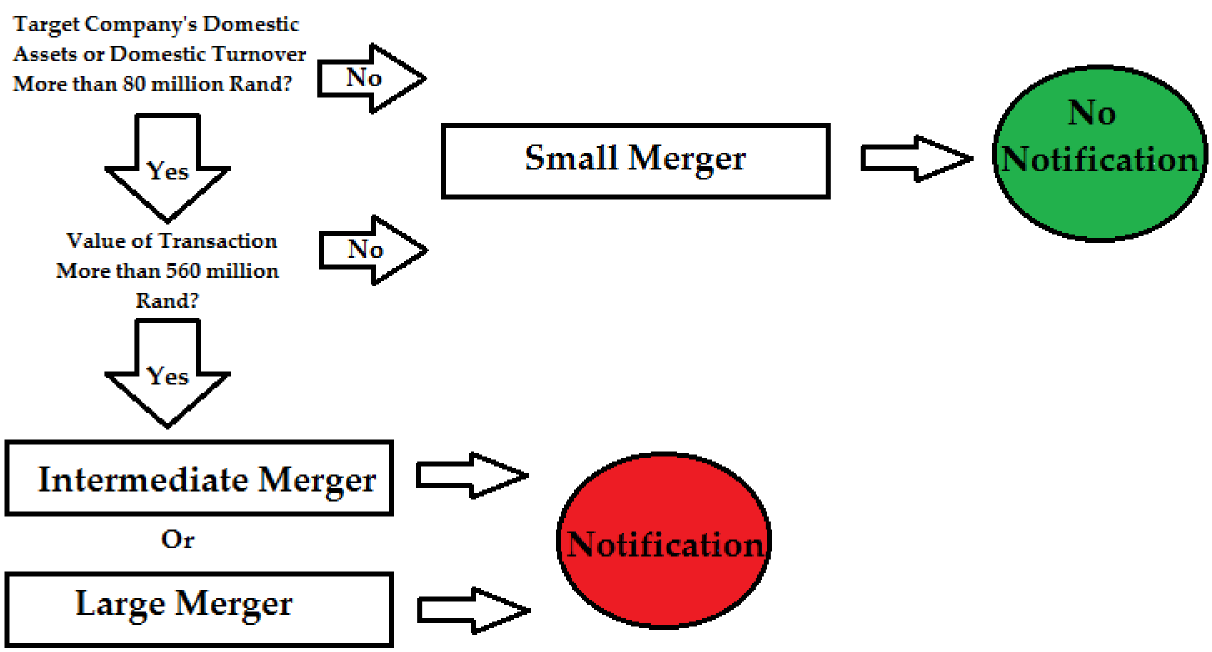
[10] *See* Competition Act No. 89 of 1998, § 13 (S. Afr.).

[11] *See id.* §§ 14(1)(b), 14A(1)(b).

[12] Large mergers are those where (A) the value of the transaction between both firms is greater than 6.6 billion rand; and (B) the target company's domestic assets or turnover (whichever is greater) exceeds 190 million rand. Competition Regulations, *supra* note 6, § 3. A merger being categorized as large—as opposed to intermediate—slightly changes the way it is reviewed. However, it does not change the substantive criteria used to determine whether the transactions will be approved.

[13] *See* Competition Act No. 89 of 1998, § 14 (S. Afr.).

until it is approved by the Competition Commission, the Competition Tribunal, or the Competition Appeal Court.[14]




CRITERIA FOR APPROVAL

The Competition Commission, which is the first of the three antitrust authorities to review a particular transaction, decides whether to approve a merger based on three[15] main criteria: (1) whether the merger will result in a lessening of competition in the relevant market; (2) whether "any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result . . . from the merger, and would not likely be obtained if the merger is prevented"; and (3) whether the merger can or cannot be justified on public interest grounds.[16] In assessing the first criterion, the Commission looks at a number of factors, including the import competition in the relevant market, any barriers to entry, and whether the business of one of the parties to the merger has or is likely to fail.[17]

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[14] *Id.* § 13A(3).

[15] *See id.* § 12A(1) ("[T]he Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors . . . .").

[16] *Id.* § 12A.

[17] *Id.* 12A(2).

In assessing the third criterion, the Commission considers how the merger will affect the particular industrial sector or region, the employment rate, small businesses, and businesses owned by historically disadvantaged persons. [18] It also considers the ability of national industries to compete in international markets.[19] The public interest criterion is interesting from an American perspective because, unlike South Africa, the United States antitrust framework does not consider whether a particular transaction is generally in the public interest.[20] Instead, U.S. antitrust laws focus on whether a merger would hurt competition in the relevant market. In this regard, South Africa's public interest criteria presents an additional hurdle for—particularly foreign—companies looking to consummate deals in the country.[21]

The public interest criteria can be particularly contentious because the Competition Commission's proceedings are not exclusive to the merging companies. Under the Competition Act, South Africa's Minister of Trade and Industry can step in as a party in any intermediate or large merger proceeding in order to represent the public interest.[22] Also, while the Commission is conducting its investigation, any person can volunteer to the Commission any information, document, or affidavit.[23] The acquiring firm and the target firm both must provide a copy of the merger notification to any registered trade union that represents a substantial number of their employees.[24] If there is no union, the companies are required to give the merger notification to the "employees concerned" or their representative.[25] This notice to unions and employees allows them to prepare any materials they may want to submit to the Commission. Any documents submitted by third parties, in turn, may affect the Commission's decision.

**TIMELINE FOR MERGER APPROVAL**

The Competition Act places certain time limits on the Competition Commission regarding its investigation. If the merger is intermediate, the Competition Commission initially has twenty days from when all parties fulfilled their notification requirements to

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[18] *Id.* 12A(3).

[19] *Id.*

[20] HORIZONTAL MERGER GUIDELINES, DEPT. OF JUSTICE (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html ("The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral.").

[21] *See, e.g.*, Letitia Watson, *Massmart/Walmart Still in Limbo*, FIN24 (March 11, 2012), http://www.fin24.com/Companies/Retail/MassmartWalmart-still-in-limbo-20120311 (describing Walmart's difficulties with the competition authorities when the company acquired a South African retailer).

[22] Competition Act No. 89 of 1998, § 18(1) (S. Afr.).

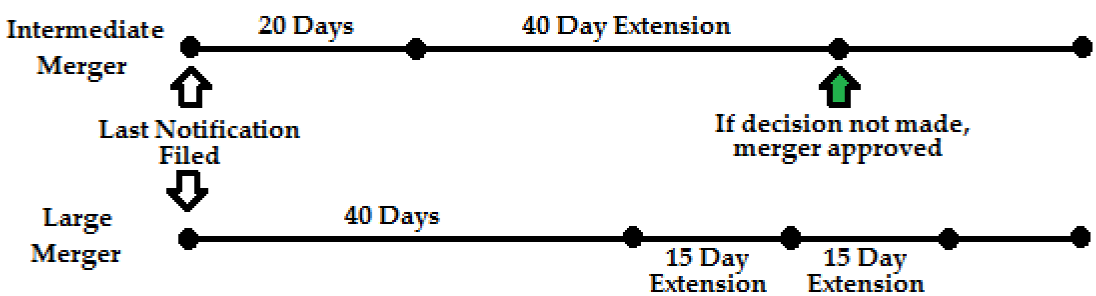
[23] *Id.* § 13B(3).

[24] *Id.* § 13A(2).

[25] *Id.*

make its decision on the merger.[26] However, if the Commission cannot decide within that time frame, it can grant itself a one-time forty day extension. This means parties to a merger may have to wait as long as two months for a decision from the Commission. However, if at the expiration of the extension period the Commission still has not issued its decision, the merger is considered approved.[27]

If the merger is large, the Commission initially has forty days to make its recommendation. However, the Commission can request extensions of fifteen days at a time from the Competition Tribunal. Once the Tribunal receives the recommendation for a large merger from the Competition Commission, it then decides whether or not to approve the transaction based on the same three criteria used by the Competition Commission.[28] If the Tribunal does not receive either a recommendation or a request for an extension within the forty-day period, any party to the merger can then request that the Tribunal begin considering the transaction without the Commission's recommendation.




## APPEALS PROCESS: THE COMPETITION TRIBUNAL AND THE COMPETITION APPEAL COURT

For large mergers, the Competition Tribunal always reviews the Commission's decision, since it is only a recommendation. However, for intermediate mergers, someone must request that that the Tribunal review the Commission's decision. The acquiring company, the target company, a trade union representing one of the company's employees, or—if there is no union—the employees themselves can all seek a review by the Tribunal.[29] This means that even where the Competition Commission has *approved* the transaction, and both parties want to implement the merger, the South African

[26] *See id.* §§ 14(1). This is the same timeframe that applies to a small merger, where the Competition Commission decides it wants to review it. *See id.* § 13(5).

[27] *Id.* § 14(2).

[28] *Id.* § 16(2).

[29] *Id.* § 16(1)(b). In the exceptional case that the Commission renders a decision on a small merger, only the parties to the transaction can request a review of the Commission's decision. *Id.* § 16(1)(a).

framework allows third parties to appeal the Commission's decision in an attempt to alter or terminate the merger.

Once the Competition Tribunal renders its decision in an intermediate or large merger, interested persons—including unions or employees—can appeal the decision to the Competition Appeal Court.[30] The Appeal Court then either affirms, amends, or sets aside the Competition Tribunal's decision.[31]

**CONCLUSION**

South Africa's antitrust laws present a sophisticated framework for preserving competition in the country's markets. However, some of the rules also can create serious hurdles for companies seeking to consummate M&A transactions. Because the Competition Commission considers the broader public interest—outside of preserving competition—in making its decision, companies have a larger range of issues they need to address when presenting their case before the Commission. Moreover, because the proceedings before the Commission are open to more than just the parties to the merger, what begins as a mutually beneficial transaction can become a quasi-adversarial proceeding with trade unions and employees seeking to alter or terminate the merger. Finally, even if the parties know that the merger will be approved, they may have to wait a substantial amount of time to close the deal. All of these issues can have a big impact on the outcome of a particular M&A deal.

[30] *Id.* § 17(1).
[31] *Id.* § 17(2).