Pre-Merger Notification

South Africa

Is there a regulatory regime applicable to mergers and similar transactions?

Yes. The relevant legislation is the Competition Act 89 of 1998 (the Act) and the regulations promulgated in terms of that Act, as amended by the Competition Second Amendment Act which came into effect on 1 February 2001.

Identify Applicable National Regulatory Agency/Agencies

The enforcement agencies are the Competition Commission, the Competition Tribunal and the Competition Appeal Court.

Is there a supranational regulatory agency (e.g., the European Commission) that has, or may have exclusive competence? If so, indicate.

No. There is no obligation on the Commission to cooperate in relation to foreign investigations or to recognise any determinations made by other antitrust authorities. The Act provides, however, that the President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of the Act, to exchange information with a similar foreign agency. The Commission appears to regard the analysis by other antitrust authorities as persuasive in its own deliberations. The authorities are specifically empowered to rely on foreign law in interpreting and applying the Act. Precedents established in foreign systems are still of great significance although the body of South African case law is growing. There has been cooperation between the Commission and other regulators such as the US Department of Justice, Federal Trade Commission and the EU Merger Task Force. Personnel from the Department of Justice and Federal Trade Commission have been seconded to the Commission in advisory capacities.

Are there pre-merger filing requirements; if so, where are they published?

Yes. They are contained in the Act and in the Rules for the Conduct of Proceedings in the Competition Commission and the Competition Tribunal.

What kinds of transactions are "caught" by the national rules? (Identify any notable exceptions)

Any transaction involving the direct or indirect acquisition or establishment of control, by one or more persons over the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of shares, interest, or assets; by amalgamation or any other means, is a “merger” for the purposes of the Act. The Act applies to small, intermediate and large mergers, but only intermediate
and large mergers require prior notification and approval. Thresholds of combined annual turnover or assets, in South Africa, are set by the Minister of Trade and Industry in consultation with the Competition Commission to determine what constitutes intermediate and large mergers (see below).

The Act does not specifically refer to joint ventures. To the extent that the effect of a joint venture constitutes a ‘merger’ as defined, the Act will apply. Generally ‘greenfield’ joint ventures will not be caught by the Act, but a combination of existing operations may be. The Commission has published a non-binding practitioners’ note to assist in a determination of whether or not a joint venture is caught.

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**Additional Comments**

Small mergers are those falling below the lower thresholds. Small mergers can be implemented without prior notification and approval, but can be investigated (within six months of being implemented) and blocked by the Commission. Intermediate mergers are investigated by the Commission. It has the right to approve or block the merger. Large mergers require prior notification to the Commission, which conducts an investigation and makes a recommendation to the Tribunal. The Tribunal has the power to approve or block the merger. Decisions of the Commission can be appealed to the Tribunal. Decisions of the Tribunal, whether at first instance or in appeals from the Commission, can be appealed to the Competition Appeal Court. The Competition Appeal Court is a division of the High Court and its decisions in competition law matters are final. On procedural, constitutional and jurisdictional matters the ordinary High Court system effectively has parallel jurisdiction to the Competition Appeal Court, but ordinary High Court decisions may be subject to further appeals to the Supreme Court of Appeals or Constitutional Court, South Africa’s two most senior courts.

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Is there a "size of transaction" threshold?

No.

Is there a "size or turnover of the parties" test; if so, what is it and how are size and turnover to be calculated?

Yes. An intermediate merger is one where either:

- the combined turnover in, into or from the Republic of the target and the acquiring firms is valued at or above R200 million but below R3.5 billion; or
- the combined assets in the Republic of the acquiring firm and the target firm are valued at or above R200 million but below R3.5 billion; or
- the turnover of the acquiring firm plus assets of the target firm are valued at or above R200 million but below R3.5 billion; or
- the assets of the acquiring firm plus turnover of the target firm are valued at or above R200 million but below R3.5 billion; and either:
  - the annual turnover in, into or from the Republic of the target firm exceeds R30 million; or
  - the asset value of the target firm exceeds R30 million.

A large merger is one where either:

- the combined turnover in, into or from the Republic of the acquiring firm and the target is valued at or above R3.5 billion; or
- the combined assets of the acquiring firm plus the assets of the target are valued at or above R3.5 billion; or
- the turnover of the acquiring firm plus the assets of the target are valued at or above R3.5 billion; or
- the assets of the acquiring firm plus the turnover of the target are valued at or above R3.5 billion; and either:
  - the annual turnover of the target firm in, into or from the Republic exceeds R100 million; or
  - the asset value of the target firm exceeds R100 million.
In both cases the turnover figures are assessed on an annual basis. Mergers falling under these thresholds constitute small mergers. Both assets and turnover of a firm must be calculated in accordance with South African generally accepted accounting practice (G.A.A.P.).

Is geographic scope/national market effect of transaction an issue with respect to filing or approval requirements? If so, specify.

The Act applies to all economic activity having an effect within South Africa. However, insofar as notification of mergers under the Act, is concerned, the thresholds are calculated in relation to combined turnover or assets in relation to South Africa only and it appears that notification is only necessary if a company’s South African assets or South African derived turnover meet the thresholds. Accordingly, the Act is applicable to foreign-to-foreign mergers to the extent that the parties have assets or turnover in, into or from South Africa.

Additional Comments

It should be noted that the informal view of the Commission is that neither party requires a presence in South Africa and it is sufficient that both or one of the parties have turnover in South Africa. Arguably this goes too far and offends against our general legal principle that statutes are not extra-territorial in application. No final case law exists on this point, although in the context of restrictive practice analysis, the Competition Appeal Court has ruled that our authorities have jurisdiction in relation to agreements entered into outside South Africa, as long as they have an effect in South Africa. These effects are not limited to anti-competitive effects.

Practically, since the Act came into effect in 1999, the Tribunal has considered and approved many foreign-to-foreign transactions and as a matter of general practice foreign-to-foreign mergers, where the target has a subsidiary or a business in South Africa, are notified to the authorities.

Is the filing voluntary or mandatory? What are the penalties for non-compliance?

The Act applies a mandatory system, requiring notification to the Commission of large and intermediate mergers. Small mergers are subject to voluntary notification, but the Commission may require notification if there are competition concerns at stake. Intermediate and large mergers may not be implemented until approval has been obtained. Failure to notify and implementation without approval of intermediate and large mergers exposes the parties to administrative penalties of up to 10 per cent of turnover during their preceeding financial year, as well as potential injunctions on implementation.

Additional Comments

Two decisions of the Competition Tribunal in 2003, namely the Edcon and Structa cases, demonstrate the approach of the Tribunal towards the imposition of fines in merger cases. Both these cases, involved an alleged failure by merging parties to notify notifiable mergers to the Competition Commission as required by the Act. In the Edcon case, the Tribunal imposed a fine of R250 000 and in the Structa case the Tribunal imposed a symbolic fine of R1. This is the first time the Tribunal has had to rule on the issue. The Tribunal did not deem it prudent to fine the respondents in the Structa case because the parties acknowledged that they had implemented the transaction without approval. Furthermore, the parties realised the possible contravention and notified immediately, even though the parties had legal advice to the effect that notification was not required. Moreover, they had approached the Commission for an opinion from the onset of doubt in regard to the interpretation of merger provisions. This approach was rewarded by the Tribunal, hence the nominal fine. The position in Edcon was more complicated. Two separate transactions were concluded, one of which the parties argued was not a merger. This involved the sale of a debtors’ book. Both were ultimately notified and the Tribunal held that in the appropriate case the sale of a debtors’ book could constitute the sale of “part of a business” and thus be a notifiable merger. The Tribunal accepted that the infringement was technical in nature and had not involved bad faith. However, they felt it appropriate to impose a fine which was not symbolic and would be a sufficient deterrent to infringing the Act. The fine of R250 000 is
equivalent to the filing fee for a large merger.

The Tribunal has imposed penalties of up to R45 million in prohibited practices cases which is indicative of a clear intention to aggressively pursue any violations of the Act. This suggests that in the event that a failure to notify and an implementation without approval occurs in bad faith the penalty may exceed the equivalent of the filing fee and may be limited only by the stipulation that the penalty may not exceed 10 per cent of the parties’ annual turnover.

Time in which a filing must be made

There are no deadlines for filing, but an intermediate or large merger may not be implemented until notified and approved.

Form and Content of Initial Filing

Prescribed forms and declarations need to be completed, but are not as detailed as those required under the US or EU systems. A competitive report is generally required. The forms may be filed by hand, fax, mail or e-mail. As the system matures, filings are becoming more sophisticated and parties are often filing expert economic reports in support of their merger filings.

Are filing fees required?

Yes. Fees are R75 000 for intermediate and R250 000 for large mergers.

Additional Comments

The Act does not stipulate which party is responsible for payment of the fees – that is generally a matter of commercial negotiation between the parties.

Is There An Automatic Waiting Period? If so, specify.

No.

Are There Time Limits Within Which The Regulatory Agency Must Act? Can they be shortened by the parties or be extended by the regulatory agency?

In the case of an intermediate merger the Commission, within 20 business days of certifying that an application is complete, must approve or prohibit the merger, but may extend the period in which it has to consider the merger by no more than 40 business days. If no response is received from the Commission within the time specified the merger is deemed approved.

In the case of a large merger, which the Commission is obliged to refer the merger to the Tribunal with a recommendation. A date for hearing must be set within 10 days of the matter being referred. A certificate of approval or prohibition must be issued within 10 days of the end of the hearing and reasons must be provided within 20 days of the issue of the certificate. There is a clear gap here in that there is no prescribed period in which a hearing must be held and there is no deemed approval if the hearing does not take place. The Act provides that the matter must be referred by the Commission within 40 business days and that the Tribunal, on application, may grant extensions of 15 business days’ each to the Commission. However in the event that the first period or any subsequent period expires the party may apply to the Tribunal to consider the merger without a recommendation from the Commission.
In practice, the Tribunal has proved efficient and disposes of matters in a reasonably short period of time. There has been a marked reduction in the time for approval of mergers. The Commission has in place a fast-track programme for non-contentious intermediate mergers in certain categories: new entrants to the market, post-merger market share of less than 15 per cent, imminent commercial failure, commercial property transactions and certain other non-contentious cases. In these cases, mergers will generally be approved within 20 business days of filing.

What is the substantive test for clearance?

Where a merger occurs, the test is whether the merger is likely to substantially prevent or lessen competition, and if so, whether any technological, efficiency, or other pro-competitive gains are likely to result and which may offset the lessening of competition. Relevant factors to be considered are:

- the strength of competition in the market;
- the probability that firms in the market will behave competitively following the merger;
- actual or potential level of import competition;
- ease of entry into the market, including tariff and regulatory barriers;
- the level, trends of concentration and history of collusion in the market;
- degrees of countervailing power in the market;
- likelihood of the merged firm having market power;
- dynamics of the market, including growth, innovation and product differentiation;
- the nature and extent of vertical integration;
- whether the business of a party has failed or is likely to fail;
- whether the merger will result in the removal of an effective competitor.

The Commission must thereafter consider whether the merger is justified on the grounds of public interest, particularly the effect of the merger on employment; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive and the ability of national industries to compete in international markets. Accordingly the Act allows issues to be considered which are of a socio/political nature in addition to issues of economic efficiency and consumer benefit.

What are the common Post-Filing Procedures: Requests for further information, etc?

After having received a merger notification, the Commission appoints an investigator to investigate the proposed transaction, who may question any person with knowledge relevant to the investigation. Typically, the assessment is made based on the written submissions to the Commission supporting the request for approval of the merger. Further information as may be necessary for the Commission to make a decision may be requested.
In larger mergers the Commission has taken to appointing a specialist investigation team prepared to meet with the merging parties on a regular basis to discuss progress in the investigation. Site visits to plant and operations are often requested to facilitate the investigation.

**Describe the sanctions for not filing or filing and incorrect/incomplete notification.**

See above

**Describe the procedures if the agency wants to challenge the transaction?**

The authorities have the power to (i) prohibit the implementation of a merger, (ii) approve a merger, or (iii) approve a merger subject to conditions. The Commission approves small and intermediate mergers, whereas in large merger cases the Commission makes a recommendation and refers the case to the Tribunal for adjudication. In small and intermediate matters, parties may request the Tribunal to consider a prohibited merger or the conditions imposed by the Commission. Appeals in large merger cases against Tribunal decisions lie with the Competition Appeal Court.

It is possible to reach an accommodation with the authorities as to the long-term structuring of the merged entity, behavioural and divestment undertakings. Preferably these accommodations should be reached with the Commission before it makes a decision. Once it makes a decision it cannot reverse that decision and its functions are discharged.

**Additional Comments**

*Increasingly, mergers are approved subject to conditions including undertakings that the merging parties divest of a part of the merged business and behavioural undertakings not to foreclose markets or refuse custom. In these cases formal agreements are reached between the parties and the Commission and the agreements are then made an order of the Tribunal.*

**Describe the penalties applicable to the implementation of a merger before clearance or of a prohibited merger?**

See above.

**Describe, briefly, your assessment of the regulatory agency's current attitudes/activities**

The year 2003/04 was regarded as the year in which black economic empowerment entered a new phase as a generator of M&A transaction flows in South Africa as a result of the introduction of the Broad Based Black Economic Empowerment Act. The number of mergers notified during 2003/04 increased by 34% and 97% of the mergers notified during this period did not raise any competition concerns and were unconditionally approved. These are all signs of a rapidly maturing system in which the regulators seem more certain and consistent in their approach, especially with regard to substantive legal and economic analysis. This trend continued in 2004/2005.

During 2004, a number of significant prohibited practices cases have been heard by the Tribunal. The Tribunal’s decisions lend greater insight into how the authorities intend to apply the legislation and, where appropriate, apply penalties for infringements.
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