Challenges trade unions face in mergers

When the Competition Commission and the Competition Tribunal consider a merger approval application in terms of Chapter 3 of the Competition Act, they look at whether the merger will substantially prevent or lessen competition. Section 12A(2) of the Act stipulates that the authorities must assess the strength of competition in the relevant market, as well as the probability that firms operating in that market after the merger will behave competitively or co-operatively. Factors to be taken into account include:

- the actual and potential level of imports in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration, and history of collusion, in the market;
- the degree of countervailing power in the market;
- the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- the nature and extent of vertical integration in the market;
- whether the business, or part of the business, of a party to the merger or proposed merger has failed, or is likely to fail; and
- whether the merger will result in the removal of an effective competitor.

Under section 12A(3) of the Act, the authorities must also assess the merger on public interest grounds, considering its effect on the relevant industrial sector or region; on employment; on the ability of small business, or firms controlled or owned by historically disadvantaged people, to become competitive; and on the ability of national industries to compete in international markets.

In determining whether a merger is justified on public interest grounds, the potential effect on employment must also be assessed. In doing this, the authorities rely partly on their own investigations, partly on information provided by the merging parties, and partly on feedback they get from the trade unions representing employees at the merging firms. The interests of the merging parties and the unions, and by extension those of the employees, mostly run in parallel. Merging parties are mostly profit-driven, often at the employees' expense, while employees' main concerns are job tenure and security.

Section 13A(2)(a) of the Act provides that in an intermediate or large merger, the primary acquiring firm and the primary target firm must both provide a copy of the notice of the merger in the prescribed manner to any registered union that represents a substantial number of affected employees, or, if there is no union, to the employees themselves.

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After being notified by the merging parties, the competition authorities, must contact the relevant union to establish whether there are employment concerns and whether the union is comfortable with, and supports, the merger. A letter is sent to the union informing it of the imminent merger and inviting it, by way of a standard CC5 (1) form, to participate if it wants to raise employment issues.

The union then sends the competition authorities the completed CC5 (1) form, either indicating its intention to participate or affirming, in a "comfort letter" that it has no problems with the merger. Unions are encouraged to write letters under an official letterhead, signed by designated officials.

In cases of conflict, the authorities have developed an almost foolproof strategy to ensure that the interests of the merging parties and unions are given equal weight in any determination.

The Act is clear on the role of the merging parties. But recently, these parties have included unsigned comfort letters, not necessarily under a union letterhead, to the authorities and the relevant union. The Act stipulates that the merging parties must each provide a copy of the merger notice to the relevant union. It says nothing about the notice including a draft comfort letter for union endorsement.

We are concerned that this practice may lead unions to give their unwitting consent to mergers. We have had experience of unions frantically informing the commission that they intend participating in a merger, when the commission has already received signed comfort letters from them giving their consent.

Is it illegal for merging parties to send such letters with the merger notice? Or is it merely unethical? We understand the merging parties' eagerness to conclude the process as quickly as possible, and the Act neither prohibits nor sanctions the practice. However, we believe that the conduct of the merging parties should be transparent.

Honesty should guide all aspects of the process, so that there is no room for suspicion. South Africa has a less substantial competition law jurisprudence than other countries, but this does not give the merging parties an ethical carte blanche.

Unethical conduct can have the effect of prolonging a merger transaction, costing firms money and time, and even posing a threat to jobs. A much harsher consequence is the commission's withdrawal of its approval of a merger. Under section 15(1) (a) and (b), it can revoke approval if it was based on incorrect information supplied by a party to the merger, or was obtained by deceit. Section 15(2) also empowers the commission to prohibit any such merger in future.

Under section 16(3), the tribunal may also revoke approval of a large merger referred to it for endorsement by the commission. Under section 17(2)(c), even the highest competition authority in South Africa, the Competition Appeal Court, can confirm the tribunal's decision to cancel a merger.

CONCLUSION

Understandably, practitioners and merging parties are showing increasing eagerness to get their transactions promptly concluded. But we would urge all parties to act maturely, compassionately and in the spirit of the Act. The legislation requires us to build an efficient, competitive economic environment while balancing the interests of workers, owners and consumers and striving for development of benefit to all South Africans.

We are painfully aware that there will always be divergent interests. But the various actors should seek to balance their interests with those of South Africa, so that we can one day look to the past with gratitude, to the present with confidence, and to the future with hope. LB

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