



Mergers and acquisitions

how the law promotes union participation

The Competition Act 89 of 1998 tries to balance a number of issues. For example, it tries to promote an efficient economic environment and balance this with the interests of workers, owners and consumers. It also needs to focus on development.

The Act also recognises the need for the economy to be open to greater ownership by a greater number of South Africans. It is therefore important to have a credible competition law, and effective structures to administer that law.

The Act is unique in that it provides for the participation of trade unions in the assessment and analysis proceedings of mergers and acquisitions. The participation of unions and other interest groups contributes to ensuring fairness and transparency in the process of approving or prohibiting mergers.

Requirements for unions

Chapter 3 of the Act regulates mergers and acquisitions. The Act clearly requires that all acquisitions of businesses by other businesses be reported to the Commission if they result in the establishment or acquisition of control. In the event of a merger transaction falling within the thresholds, the merging parties have to fulfil certain requirements.

They must notify the Commission

within seven days after either the signing of the merger agreement, the public announcement of the merger, or the acquisition or leasing of a controlling interest by one party over the other.

The party filing the notification to the Commission must by law, also deliver a copy of the notice and the statement of information to a representative trade union representing the employees of the merging firms. This copy may be forwarded to a union, a staff association, or any form of worker representation organisation recognised by the employer, even if it is not registered.

If there is no formal body representing workers in any of the merging entities, then the employer/manager filing the notification to the Commission, must place a notice where employees will be able to see it, for example, on a notice board.

The party that notifies the union or employees of the intention to merge/acquire must provide proof to the Commission that it did notify the union or employees. It must file proof of delivery of such notice with the Commission within three days after the initial notification was filed with the Commission.

While the merging companies must notify the unions that there is an intention to merge, the Act does not compel them to

inform trade unions what action or steps they must take when they receive the notification. It is therefore important for representatives of employees and unions to familiarise themselves with the requirements and procedures related to mergers and acquisitions.

If unions want to be a party to a merger transaction (that is if they want to make a submission on the merger) they must file a Notice of Intention to Participate in form CC5 (1) with the Commission within seven days of receiving a notice from the merging parties.

The Commission has only 30 days within which to finalise its assessment and analysis on intermediate mergers. However, if the Commission applies for an extension, the Tribunal can, under certain circumstances, grant an extension of up to 60 days

Importance of participating

In the process of assessing and analysing a merger, the Commission or the Tribunal must initially determine whether or not a merger is likely to substantially prevent or lessen competition in the market. The Commission must also look at public interest issues even if the merger is likely to substantially prevent or lessen competition. The Act makes provision for four public interest grounds on which the Commission must assess a merger:

- ☐ employment;
- ☐ a particular industrial sector or region,
- ☐ the ability of small business or firms controlled by previously disadvantaged persons to become competitive;
- ☐ the ability of national industries to compete in international markets.

The Notice of Intention to Participate provides unions with an opportunity to participate fully in the proceedings of the Commission in assessing mergers. It also offers them a chance to raise issues that

the Commission may not necessarily have foreseen.

The participation also assists the Commission to check the correctness of the information submitted by the filing parties with respect to issues relating to employment. Moreover, it provides the Commission with insight and more understanding on specific sectoral issues arising from mergers, which may have an effect on employment.

It must be noted that the participation of unions is not only important when they are objecting to or opposed to a merger taking place. Mergers are not necessarily anticompetitive and undesirable. Other mergers are necessary to improve national enterprises' abilities to penetrate international markets, thus enhancing efficiency and growth in the Republic.

It is important for unions to file their intention to participate whether or not they support a merger. Such participation will also assist the Commission to process the transactions quickly. It is ideal that when the Commission takes decisions, all the interested parties, including unions, must have contributed to decision-making.

Participation problems

Although the Act has been in effect since September 1999, it appears that most unions and employee organisations are not familiar with its provisions and the rights and duties emanating from such provisions. Since its inception, the Commission has received 447 merger notifications, an average of about nine cases per week.

Out of the total merger notifications received by the Competition Commission, 349 were approved, in 20 cases the Competition Commission had no jurisdiction, and six were withdrawn by the companies. Furthermore, two were

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rejected by the Commission, six were prohibited while 64 others are still pending.

It became evident to the Commission that union participation has been very minimal.

When the Commission does not receive the Notice of Intention to Participate, it attempts to contact unions to confirm whether they received such notifications. In most instances where unions were contacted, the Commission received responses that indicate that there are major problems affecting the participation of unions.

The following are some of the problems experienced

The Act's provisions

It appears, because the Act is new, that most of the union officials have not familiarised themselves with its provisions and the rights and duties flowing from these provisions. Therefore, the procedures that companies should go through before implementing a merger are foreign to most of the union officials.

Notification

In most instances when a notification is delivered to union officials, they do not know what action to take. In some instances, companies advise unions on what the notice means. However, such instances are limited.

The Commission recommends that unions create a portfolio for a person who will specifically deal with issues relating to mergers and acquisitions. This will assist the organisations in keeping abreast with issues affecting employees.

Decision-making

Unions have only 7 days to file form CC5 (1) with the Commission to indicate their intention to participate in the

proceedings. However, in most cases the decision as to whether or not to file form CC5 (1), takes longer than seven days.

Unions must note that the filing of form CC5 (1) only indicates the intention to participate, and does not in any way indicate that they support or oppose a merger. A decision on whether or not to support a merger can be done at a later stage through a written submission or meeting with the investigation team of the Commission.

Therefore, it is advisable that unions file the intention to participate within the required time frames. There are no penalties if a union decides after it had filed form CC5 (1) that it does not want to participate.

Accessibility

When the Commission has tried to contact unions it has realised that most of them, especially the ones situated in rural areas, are not accessible. Therefore, it becomes difficult to communicate with them on issues that may require their immediate input.

Encouraging unions' participation

In order to ensure that public interest issues are adequately represented in merger proceedings, it is critical that organisations familiarise themselves with the provisions of the Act. The Commission has therefore embarked on an educational training programme for trade unions to build their capacity to participate.

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