



Mergers and acquisitions

prepare yourself to engage

In the last three editions of the Bulletin, the Competition Commission has run a series of articles on mergers and acquisitions, the role of labour and how the Competition Commission assists trade union participation. The focus of this article is the manner in which the trade unions have participated in merger transactions/proceedings. It also raises issues on the role of labour in relation to merger transactions.

Commission's role

The Competition Commission is responsible for:

- making decisions on intermediate mergers;
- making recommendations to the tribunal on large mergers.

When it receives a merger notice from companies, the Competition Commission will first do the economic analysis of the transaction by defining the relevant market, to determine whether a merger is likely to prevent or lessen competition.

Public interest

No matter what it decides in the economic analysis, the Competition Commission must then determine the extent to which the transaction will impact on public interest issues. The Competition Commission must assess a

merger on the following public interest grounds:

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

It is here that labour can play a key role by participating in the proceedings of the Competition Commission in assessing mergers. Labour's participation can ensure that issues are raised before the Competition Commission and some of the issues may be issues that the Competition Commission may not necessarily have foreseen. It also assists the Competition Commission in checking the correctness of the information submitted by the filing companies - specifically information related to employment. Lastly, it provides the Competition Commission with insight and more understanding of issues arising in each sector as the result of a merger.

Labour's participation

How far does labour's participation go? In the past ten months, we have seen an increased number of trade unions participating in merger proceedings and requests for training workshops. Although

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we have seen an increase, it has not been easy for everyone to participate fully due to a number of issues.

In order to ensure effective participation, trade unions should know what information they should expect from the merging companies in terms of the Competition Act.

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Companies should provide the trade union with a copy of the notice form, which states the names and addresses of the parties.

In addition to this information, the Act requires that the companies provide the trade unions with the Statement of Merger Information Form. This information entails the company's state of assets/turnover and products/services and description of the merger indicating any relevant facts

concerning the impact of the merger on employment, or other public interest issues.

The Intention to Participate Form CC5(1) that the trade union must submit does not require them to indicate whether they are in favour of or against a merger. Because the companies are required to inform the Competition Commission within seven days of proposing a merger, their (employers') submission on employment is not always a true reflection of what is happening during the process and what will happen after the merger.

Therefore, it is important for trade unions to keep in constant contact with the Competition Commission. They can do so through meetings and giving written motivation on how they think the transaction will impact on employment and the processes they are engaged in with management.

The Competition Authorities can examine the information they have received from the companies and compare it to the information they have received from the union.

Short checklist

1. Merging parties must notify the Competition 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.
2. The filing party must deliver a copy of the notice and the statement of information to a representative trade union representing the employees of the merging firms.
3. The party that notifies the union or employees of the Intention to merge/acquire must provide proof to the Competition Commission that it did notify the union or employees.
4. If the union wants to make a submission to the Competition Commission it must file a Notice of Intention to Participate in form CC5 (1) with the Competition Commission within seven days of receiving the notice from the merging parties.
5. The Competition Commission has only 30 days within which to finalise its assessment and analysis on intermediate mergers. However, the Tribunal can grant the Competition Commission an extension of up to 60 days.

Experiences

The Competition Act states that companies should not implement the merger until it is approved. The Competition Act does also not apply to certain economic activities such as collective bargaining within the meaning of section 23 of the Constitution, and the LRA. Some companies use these provisions as delaying tactics not to engage unions. They say they cannot engage the union until a decision is taken, knowing that by that time the company structure would have changed or the company bought or operating under new management.

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At times, even before a decision is taken, some companies will engage in restructuring without engaging the trade union. In most cases, benefits for the workers are not the same in merging companies, making it difficult for the trade union to negotiate for better offers. This is clearly not a competition issue but is very often used as an excuse for not engaging the union. Unlike other relevant legislation, such as the LRA, the Competition Act has strict time frames and all the parties including trade unions are expected to adhere to them.

The Competition Commission may approve a merger with conditions attached. Sometimes what the companies promise in their filings is not necessarily what they do after the merger. Where this has taken place, trade unions were able to come back to the Competition Authorities to complain that the company is

contradicting what they have promised to do after the merger. Because the trade union had filed their intention to participate in merger proceedings, they were able to file a complaint with the Competition Commission to investigate the company's anti-merger approval activities.

Approaching issues

It is important for every union official and shopsteward to understand and know the procedures followed to finalise a merger. If the union has not registered to participate within the given time frames, it can be impossible for them to contest any decision taken by the Competition Authorities. It will not even be able to access the information related to that merger.

As representative bodies of the workers, it is understandable that trade unions would like to save every job that may be lost as a result of restructuring or any other means. In fact, the Competition Act does not give everything to any one of the stakeholders - but it does give space to engage, like any other legislation.

Training

In the previous articles, we offered training assistance to all trade unions, a number of trade unions responded and were all given training.

Our training workshops are held for one day only. If you would like us to keep your organisation on our mailing list or would like to arrange a training session, please forward the contact person's name and details to the following address:

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