



Worthwhile participation

what unions should know

This article explains the Commission's analysis process with respect to mergers and acquisitions and how trade unions, specifically, can ensure worthwhile participation in the Commission's proceedings. It also assists trade union representatives in understanding the issues the Commission and/or Competition Tribunal considers before approving or prohibiting a merger transaction.

Merger analysis

When the Commission has satisfied itself that the parties have complied with all the filing requirements for a merger, it:

- ☐ appoints an investigator for the case;
- ☐ publishes notice of the merger in the Government Gazette.

The Commission's analysis procedure on mergers entails the following steps:

Jurisdiction

The Commission must establish if the transaction is a merger in terms of section 12 and whether it meets the threshold determined by the minister. Even if the transaction meets the above requirements, the Commission must further establish if the application of the Act is not excluded in terms of section 3 of the Act.

If the Commission finds that it does not have jurisdiction over the matter, it will

inform the merging parties and refund the fees that they paid in respect of the merger.

Competition

The Commission must assess or determine whether the transaction, if approved, is likely to substantially prevent or lessen competition in the market.

In determining this, section 16(2) of the Act requires the Commission to assess the strength of competition in the relevant market and the probabilities that the firms will behave competitively and co-operatively.

It has to take into account factors relevant to competition in that market, including import competition, barriers to entry, level of concentration, countervailing power, vertical integration, failing firm defence, and the possible removal of an effective competitor.

In determining the relevant market, the Commission will take into account the product (that is the merging companies' goods and/or services) and the geographic area in which they operate. The Commission will as far as possible define the market narrowly in order to establish the market share of the merging parties.

All the factors that the Commission considers may work in favour of or against the merger. The Commission will use all the information presented by the parties.

However, depending on the nature of the transaction and the amount and credibility of information submitted, the investigator may get further information from the companies' competitors, strategic partners, customers and any other source that the Commission may deem reliable.

Defences

Should the Commission find that the merger is likely to substantially prevent or lessen competition in the market, it must establish if there are any efficiency, technological, or any other pro-competitive gains that outweigh the anti-competitive effects that may result from the merger. For instance, companies may state that as a merged entity, they would be able to improve their technological equipment and increase their production capacity to meet the demand.

While the Commission takes the parties submissions into account, it will also check the correctness, feasibility and viability of such defences.

Public interest considerations

The Act requires the Commission to always assess the merger's impact on public interests. The Act is specific in terms of what would constitute public interest.

Section 16(3) provides that in determining whether a merger can or cannot be justified on public interest grounds, the Commission must consider the effect the merger will have on a particular industrial sector or region, employment, small businesses and black business, and international competitiveness of national industries.

It is important to note that employment is not the only public interest consideration.

Although there are no guidelines on the balancing of competition effects and public interest issues, the Commission can prohibit a merger on public interest grounds even

though the merger appears to be competitive.

The union should approach the effect a merger has on employment broadly by assessing the impact on the merging companies and the impact on the sector or industry more broadly. Furthermore, the union must assess the impact of the merger, where possible, both in the short term and long term.

It may be difficult to determine certain factors with accuracy. However, unions may use estimates and probabilities. The Commission will take into consideration all the submissions made by trade unions. In instances where unions are not clear on certain issues, they may contact the Commission for clarity.

Part of the objectives of the Competition Act is to promote competition in the market in order to promote employment and advance the social and economic welfare of South Africans. The participation of trade unions is therefore crucial in the proceedings of the Commission.

Where the Commission has met with union officials and/or worker representatives, the meetings were very fruitful. Workers and officials were able to get first hand information and share experiences that may help influence the recommendation of a particular case.

How unions can participate

Trade unions that have received a notification with respect to a particular merger may, after filing their intention to participate within the required seven-day period, make their views or opinion to the competition authorities in any of the following ways:

Written submission

Unions may write their opinion, views and findings on the impact that the transaction

is likely to have on employment, whether negative or positive. It is advisable for unions to indicate whether they support the merger or not. The union may contact the Commission with queries at any time when it is formulating its response. The union must send the submission to the Commission with the correct case number to enable the Commission to trace the case easily.

Meeting

The union representatives may at any time during the investigation, subject to the availability of the investigator, request a meeting with the investigator in question or/and the labour liaison officer to discuss the matter. Trade unions must also indicate if the discussion at the meeting should be considered by the Commission to be their submission in the matter.

Interview

The investigator in a particular matter may, at any time and depending on the nature of information he/she requires, ask to interview the relevant union representatives. The Commission would appreciate the co-operation of unions in this regard, as such interviews may be important, especially where unions have not filed an intention to participate or made any submissions in the matter. Through these interviews, unions may still have an opportunity to make their views known to the Commission.

Presentation

Trade unions may prepare and make a presentation to the Commission on their views regarding the impact the transaction is likely to have on employment. Such presentation can be arranged through the investigator in the matter and/or the labour liaison officer. The Commission will, as far as practically possible, avail the

equipment and meeting rooms for such presentation to take place.

Telephone contact

Finally, trade unions may communicate their views telephonically to the Commission. However, the Commission would recommend that this option be used in exceptional circumstances, as the other options seem more effective, especially for recording purposes.

Conclusion

In order to ensure effective participation in the proceedings of the Commission, unions must indicate their intention to participate timeously after receiving the notice from the merging parties. This will ensure the unions are involved in and contribute to decisions taken by the competition authorities in merger cases.

It is also important for the unions to note that the Act provides for several appeal mechanisms for any decisions the Commission makes in a particular matter. Decisions taken by the Commission can be appealed in the Competition Tribunal. Tribunal decisions may be appealed in the Competition Appeal Court.

Trade unions may also use these appeal mechanisms where they are not satisfied with the decision taken by the competition authorities in any matter.

The Commission appeals to unions to use the Act effectively in order to protect the interests of employees.

Should you have any queries or require further information on any of the issues relating to the Act, the services provided by the Commission or assistance with notices, please do not hesitate to contact Ms Rhorho Cloete – Labour liaison officer, tel (012) 482-9069, fax (012) 482-9003, e-mail: rhohoc@compocom.co.za. Please also look at our web site: <http://www.compcom.co.za>