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Round Table on recent developments in merger control standards

Contribution

Competition Commission of South Africa

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Roundtable on recent developments in merger control standards

Contribution by the Competition Commission of South Africa

A. INTRODUCTION

1. The United Nations Conference on Trade and Development will hold a roundtable on recent developments in merger control standards at the Twenty-second Session of the Intergovernmental Group of Experts on Competition Law and Policy scheduled for July 2024 in *Palais des Nations*, Geneva, in respect of which it has invited written contributions from interested participants. This note serves as the contribution of the Competition Commission of the South Africa (the Commission) to this roundtable.

2. In this note, the Commission shares its experiences, approaches and contributions on recent developments in merger control standards.

3. From South Africa's perspective, public interest considerations remain an integral part to any credible competition law and policy. That much has been reiterated given the recent amendments to South Africa's competition law to more explicitly address the need for greater economic participation by historically marginalised persons and small firms. Similarly in other jurisdictions there are increasing calls to reexamine the purpose of competition law and how it can be used to more broadly address other aspects of public interests such as industrial development, fair wages and climate change.

4. This paper also examines recent developments in South Africa's merger control under the following themes: (i) the role of structural remedies to address competition and public interest outcomes; (ii) re-enforcing constitutional imperatives through merger control; (iii) the need for greater international co-operation in merger control; and (iv) insights from monitoring merger conditions.

B. THE REVISED PUBLIC INTEREST GUIDELINES RELATING TO MERGER CONTROL

5. In February 2019, the Competition Act No. 89 of 1998 (as amended) ("the Act") was amended by the Competition Amendment Act, No. 18 of 2018 ("the Amendments"). The main objectives of the Amendments were to deal with the structural challenges of high levels of concentration and the racially skewed spread of ownership of firms in the South African economy.

6. In this regard, the Amendments relating to the public interest provisions of South Africa's merger control regime aim to explicitly create public interest grounds to address ownership, control and the support of small businesses and firms owned or controlled by

historically disadvantaged persons ("HDPs").[1] Consequently, the merger control provisions of the Act have been amended to –

i. clarify that the competition and the public interest assessments are equal in status.

ii. pro-competition justifications for a merger that raises competition concerns, must be justifiable on substantial public interest grounds.

iii. the amended section 12A(3)(c) of the Act now requires an assessment of a merger's impact on *"…small and medium businesses or firms controlled by HDPs to effectively enter into, participate in or expand within the market…"*[2]

iv. introducing a new section 12A(3)(e) which requires the assessment of a merger's impact on *"... the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market…"*

7. The Commission's likely approach to the Amendments is set out in the Revised Public Interest Guidelines Relating to Merger Control (the "Guidelines") which were published on 20 March 2024[3]. The Guidelines (in draft form) were also subject to a public commentary process.

8. The Commission's approach to its public interest mandate is informed by the imperative of transformation enshrined in the Act. In this regard, the Commission notes that the Preamble to the Act provides:

> "*That apartheid and other discriminatory laws and practices of the past resulted in…unjust restrictions on full and free participation in the economy by all South Africans*;
>
> *That the economy must be open to greater ownership by a greater number of South Africans;*
>
> *In order to-*
>
> *provide all South Africans equal opportunity to participate fairly in the national economy…"*

[1] *Background note on Competition Amendment Bill, 2017. Published in Government Gazette No. 41294, pages 5 – 71. The Bill resulted in the adoption of the Competition Amendment Act 18 of 2018.*

[2] *Section 12A(3)(c) originally required an assessment of a merger's impact on "…the ability of small businesses or firms controlled by HDPs to become competitive…"*

[3] *Competition Act: Public interest guidelines relating to merger control: Revised (www.gov.za)*

9. That aspirational transformative intent is endorsed by the Constitutional Court in *Mediclinic*:[4]

> *"Colonialism, neo-colonialism and apartheid orchestrated an institutionalised concentration of ownership and control of all things of consequence in our national economy along racial lines. Unsurprisingly, the commanding heights of the corporate sector are seemingly the exclusive terrain of our white compatriots. It is this indisputable reality and our shared commitment to ensuring that South Africa really does get to belong to all who live in it, that the constitutional imperatives, laid out in the Preamble, to improve the quality of life of all citizens and free the potential of each are realised, that the likes of the Competition Act had to and got to see the light of day."*

10. The Guidelines take guidance from the aforementioned principles. The role of the South African Competition Authorities exercise of their public interest mandate is further clarified by the Constitutional Court in *Mediclinic* as follows:[5]

> *Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to somehow elude them in their decision-making process. The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence. The legitimisation through legal sophistry or some right-sounding and yet effectively inhibitive jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system.*

11. Though not binding, the Guidelines promote legal certainty as regards the application of the public interest provisions of the Act. The Act is one of few competition legislation that clearly demarcate a closed list of public interest ground relevant to a merger assessment. Notwithstanding this, there has been some discontent expressed by various stakeholders (business and the legal fraternity) alleging (amongst others) that the Amendments / Guidelines promote uncertainty, discourage foreign investment and that they and public

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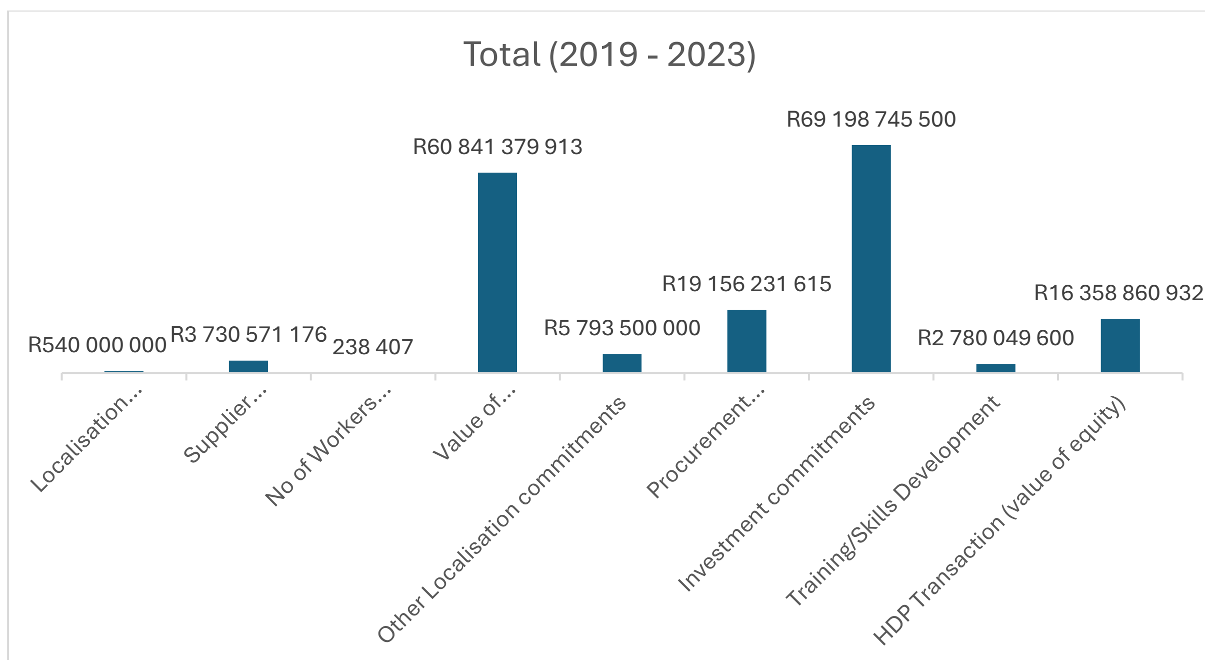
[4] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another 2022 (4) SA 323 (CC) at paragraph 4.*

[5] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another 2022 (4) SA 323 (CC) at paragraph 7.*

interest considerations, have no place in merger control. Accordingly, it is likely that at some point, the points of contention will be clarified through jurisprudence.

12. Notwithstanding the foregoing, undoubtedly, the public interest provision of the Act (as amended) have yielded some truly transformative outcomes as regards economic participation, ownership by HDPs and workers. The Figure 1 below depicts the approximately R178 billion worth of public interest outcomes attained during the period January 2019 until 31 March 2024:

Figure 1 – Impact of public interest interventions through merger control



Source: Competition Commission, South Africa

C. MERGERS RESULTING IN STRUCTURAL PROBLEMS REQUIRE STRUCTURAL REMEDIES – SUCH REMEDIES CAN FACILITATE PUBLIC INTEREST POSITIVE OUTCOMES

13. The Commission has previously identified the need to tackle market concentration in order to promote competition and public interest outcomes. This is particularly relevant in merges resulting in structural changes, enhanced market concentration or that have a history of collusive behaviour.

14. In recent years, and consistent with international best practice[6], the Commission has proceeded on the basis that mergers resulting in structural changes, are best remedied through structural remedies, failing which, such mergers are prohibited. Behavioural remedies are typically complex and difficult to monitor and/or enforce and their effectiveness (or otherwise) is reliant on the merging parties. Where possible, these structural remedies are preferably applied on a 'fix it first' basis. In other words, the merger can only be implemented post the divestiture. However, thus far, such remedies are the exception and not the rule. Typically, the remedy of choice is a divestiture, which affords the parties an opportunity to divest of the relevant business/ assets with a period of 6-12 months failing which a trustee that is independent of the merging parties and possesses the relevant qualifications is appointed by the parties to effect the divestiture. The Commission must consent to the appointment of the proposed trustee. The trustee has the relevant legal powers to divest the relevant business/ assets within a 6-12 month period at no minimum value. However, it is a requirement that prospective purchasers of the divested business must have majority ownership by HDPs so as to render the competition remedy of divestiture, justifiable under the public interest provisions of the Act. The Commission considers that divestiture remedies present opportunities to promote economic participation and economic ownership by firms with substantial HDP ownership and that HDPs must play an active role in the divested business following the divestiture. This is consistent with the public interest imperatives in the Act. Some recent examples of the Commission's approach to divestiture are set out below.

15. In ***Takatso Aviation (Pty) Ltd and South African Airways***[7] the Commission found that the merger would lead to a substantial lessening or prevention of competition in the domestic passenger airlines market. This was due to the potential exchange of competitively sensitive information between South African Airways ("SAA") and Lift, a domestic passenger airline owned and operated by Takatso's minority shareholders, Global Aviation and Syranix. Takatso's majority stake in SAA would provide it with access to SAA's sensitive information, potentially compromising competition in the industry. The Commission was particularly concerned given that the domestic passenger airlines market was already highly concentrated prior to the merger (especially following the COVID pandemic) with high barriers to entry and a history of collusion.

[6] *Michal Halperin, Remedies, Global Dictionary of Competition Law, Concurrences, Art. N° 12302 accessed from https://www.concurrences.com/en/dictionary/Remedies*
[7] *Case number 2022JUN0016; LM054Jun22*

16. To address these concerns, the Commission recommended that the Competition Tribunal approved the merger on the basis that Global Aviation and Syranix (Takatso's minority shareholders) completely divest from Takatso. Such divestiture could not be made to any affiliate of either Global Aviation and Syranix, or to a competitor of SAA. The merger could only be implemented upon the successful conclusion of the divestiture. In July 2023, the Competition Tribunal approved the merger subject to the Commission's recommended 'fix it first' divestiture remedy.

17. To address concerns in the cider market, the Competition Tribunal approved the ***Heineken / Distell***[8] merger subject to a number of commitments, including a divestiture of Heineken's Strongbow Cider business. That business included a perpetual, royalty free licence to exclusively produce, market, distribute and sell the Strongbow brand in South Africa and neighbouring countries. The Strongbow business was required to be divested to an acquirer with no less than 50%+1 shareholding by HDPs, who was not directly or indirectly related to the either merger party, or to any of their affiliates. There was also provision for a transitional services agreement to provide services such as warehousing, logistics, contract manufacturing, distribution and marketing.

18. In August 2023, the Commission approved the acquisition of the Strongbow business in the merger between ***Cider House / The license for the sale and distribution of the Strongbow brand***.[9] Cider House is a firm with 67% HDP ownership. Cider House and CHI will facilitate the entry of HDPs into the beverages manufacturing sector in a significant way as Strongbow is a notable brand. CHI will also benefit from transitional services support from Heineken such as warehousing, logistics, contract manufacturing, distribution etc. Furthermore, the Commission has augmented the ***Heineken/Distell*** conditions by ensuring that the Strongbow business will remain subject to majority HDP ownership and that the HDPs at Cider House play a meaningful role in its operations.

19. In ***Afrimat Limited / Lafarge South Africa***[10] the Commission found that the merger would result in a substantial lessening or prevention in the supply of general aggregates and ready-mix concrete in various regions of South Africa. The relevant markets were characterised by high levels of concentration and a lack of participation, particularly firms owned by HDPs. To restore the lost competition that would otherwise arise from the merger and in order to ensure that the merger is justifiable on public interest grounds, the

[8] *Case Number LM136Dec21*
[9] *Case number 2023May0020*
[10] *Case number 2023JUL0011*

Commission recommended that the Tribunal approve the merger subject to the merging parties divesting of various general aggregates quarries and ready-mix concrete plants across South Africa to a purchaser/s that is majority owned by HDPs.

D. RE-ENFORCING CONSTITUTIONAL IMPERATIVES THROUGH MERGER CONTROL

20. In September 2021, the Constitutional Court's decision in ***Mediclinic***[11] confirmed the centrality of the Bill of Rights in the interpretation of the Act. The Commission had argued that Mediclinic ought to be prohibited as it would deprive vulnerable and uninsured patients with choice and access to affordable healthcare, a constitutional imperative.

21. Consequently, in 2024, the Commission found that the ***Life Healthcare***[12] merger raised concerns as regards access to dialysis services by uninsured patients. To remedy this concern, the Commission recommended that the Competition Tribunal approves the merger subject to a commitment that for each type of dialysis service, the lowest tariff charged by each merging party to uninsured patients pre-merger, would apply for at least 5 years post-merger. The Competition Tribunal approved the merger subject to (amongst others), this recommendation.

E. INCREASED CO-OPERATION IN MERGER CONTROL IS REQUIRED TO ENSURE THAT MERGER EFFECTS ARE EFFECTIVELY MITIGATED

22. The ***AkzoNobel / Kansai Plascon***[13] proposed to bring together two of South Africa's largest manufacturers and suppliers of decorative paints in AkzoNobel's Dulux brand and Kansai's Plascon brand. The Commission found that the merger was likely to substantially prevent or lessen competition since the merged entity would be dominant, the merging parties are close competitors in terms of price, quality, and product range and the merger would remove competitive rivalry between two notable brands, thus reducing consumer choice. The merging parties reconsidered the Commission's decision at the Competition Tribunal, which in November 2023, upheld the prohibition.

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[11] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another [2021] ZACC 35, at para 4*

[12] *Life Healthcare Group Proprietary Limited ("Life") and the dialysis services business of Fresenius Medical Car South Africa Proprietary Limited Case No. 2023Jun0013; LM035Jun23*

[13] *Kansai Plascon Africa Ltd ("KPAL") and Kansai Plascon East Africa (Pty) Ltd ("KPEA") by Akzo Nobel N.V Case No. IM147Nov22*

23. Importantly, given that the merging parties are active within the Southern African region, co-operation between the Commission and its peers saw the competition authorities of COMESA also prohibiting the merger in so far as it related to Eswatini, Zambia and Zimbabwe in September 2023. The merger was also prohibited in Botswana. This merger fostered coordination between the respective competition authorities in respect of areas such as market definition, theories of harm and remedies. The outcome was that competition was preserved in the supply of decorative paints within the region.

24. The merger between ***Bunge / Viterra*** was notified in early 2024. The merger will result in the creation of one of the world's largest agricultural commodity traders. The Commission found that in South Africa, the parties compete in the import of wheat, maize and edible oils (vegetable, soya and palm oils) into South Africa. These commodities are primarily traded on commodities exchanges. Although there are other importers of these commodities and some are also produced locally, the Commission was concerned that approximately half of South Africa's wheat needs are obtained from imports. The merging parties are amongst some of the largest global wheat and grain commodities traders. Thus, in order to safeguard food security and to mitigate any competition concerns, in June 2024, the Commission recommended that the Competition Tribunal approves the merger subject to conditions on the duration of any supply agreements for the import of wheat.[14] At the time the Commission concluded its investigation, all regional and most international jurisdictions (barring Canada) had approved the merger unconditionally. Thus, given the absence of a global merger control regime, there was little scope to co-ordinate amongst competition authorities to address concerns arising from the merger.

25. This merger takes place within a context where there are concerns about global concentration of food value chains and the effect that such mergers can have on food security, particularly in less developed nations. However, because these mergers are global in nature and may not result in any overlaps or overlaps raising concerns at a country level, they do raise market power at a global level. This is concerning since the price of commodities such as grains and edible oils are determined at a global level. Consequently, mergers that, on the face of it, do not raise unilateral effects concerns at a country level, may still result in the consequences of global market power concentration being felt at a country level.

[14] *At the time of writing, the merger had not yet been adjudicated by the Competition Tribunal.*

F. MONITORING THE OUTCOMES OF MERGER CONDITIONS

26. The Commission is responsible for monitoring the outcome of mergers that are approved subject to conditions to address competition and/or public interest concerns. This obligation pertains to all mergers, even those where the Commission was not the decision making body (e.g. Competition Tribunal decisions).

27. The Commission received between 300 – 400 merger notifications per year. At the time of writing, the Commission was monitoring at least 480 active merger conditions. There has been a marked increase in the number of mergers approved subject to conditions, since the Amendments became effective. Consequently, the level of complexity of merger assessments has increased. Prior to the Amendments, approximately 44% of mergers were classified as complex and since the amendments, that has increased to over 80% of mergers presently. Prior to the Amendments, approximately 12% of mergers were approved with conditions, presently, that figure is 38% and increasing. The main reason for these increases is section 12A(3)(e) of the Act, which requires mergers to promote ownership by HDPs and workers. This Amendment has been met with resistance.

28. The Commission is considering various ways to address the increased conditions monitoring obligations including incurring resources, and advocacy interventions to pre-empt complaints emanating from merger conditions.