PUTTING MORE THOUGHT INTO THE "PEOPLE" ASPECT OF A DEAL: COMPETITION COMMISSION’S PUBLIC INTEREST GUIDELINES

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LEGAL BRIEF
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The Competition Commissioner, Tembinkosi Bonakele ("Bonakele"), believes one important reason that so many mergers and acquisitions fail is because the merging parties have not put enough thought into the "people" aspect of the deal. Bonakele was recorded as stating that "a reluctance to look at this aspect of deals was evident in the merger applications that came before the Competition Commission." In his opinion, merging companies are now explicit about the impact of a merger on employment - but not as forthcoming as they should be. When attending the Global Competition Review conference in Cape Town in February 2015, Bonakele indicated that "the competition authorities want merging parties to quantify the effect on employment and establish if there is any alternative".1

INTRODUCTION

The Competition Commission’s ("Commission") Draft Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998 (as amended) ("draft Guidelines") were published on 23 January 2015 for comment. It remains to be seen as to how the Commission will give effect to the draft Guidelines once they become final and are implemented, but through a review of various mergers, including BB Investment Company/Adcock Ingram Holdings2; Bytes Peoples Solutions a division of Bytes Technology Group South Africa (Proprietary) Limited/Inter-Active Technologies (Proprietary) Limited3 and Nashua Mobile/MTN4, it will be shown that proper information disclosure is a key factor in the Commission’s investigation and that sufficient disclosure regarding employment are in the best interests of the merging parties in that it will save the merging parties time delays, cost wastage and the risk of having a merger approval revoked.

MERGER REQUIREMENTS

With regard to mergers, the Act requires that a merger must be assessed with regard to both competition issues as well as public interest grounds. Where there is a merger that raises no competition issues, that merger could still be prohibited or conditionally approved on public interest grounds. On the other hand, if a merger is found to be anti-competitive, it can still be approved if the public interest benefits outweigh the anti-competitive effects of the merger. Employment has been one of the main public interest considerations that the competition authorities have focussed on in its assessment of the impact of certain mergers over the years. It is therefore crucial that the draft Guidelines in respect of the provisions dealing with employment are considered carefully.

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1 Ann Crotty, "New Focus on how mergers affect jobs", BD Live article, 22 February 2015 accessed at http://www.bdlive.co.za/businesstimes/2015/02/22/new-focus-on-how-mergers-affect-jobs
2 Tribunal case number 020123
3 Tribunal case number 019018
To date, it should be noted that no mergers have been prohibited on a public interest basis in South Africa. In addition, there is view that the Commission’s decision making process is faster when there are large public interest issues to consider which results in the merging parties being able to conclude deals more swiftly.\(^5\)

The draft Guidelines set out that the Commission will follow a general approach in assessing the likely employment effects of a merger on employment. However, in instances where there is a dispute around merger specific job losses, this will be evaluated in detail on a case by case basis.

**MERGER IMPACT ON EMPLOYMENT**

When assessing the likely impact of a merger on employment, the Commission will do the following in its analysis, as per its general approach –

> Step 1: determine the likely effect on employment generally;
> Step 2: determine whether any identified effect on employment is specific to the proposed merger;
> Step 3: determine whether the likely effect on employment is substantial;
> Step 4: consider whether such an effect could be justified; and
> Step 5: determine the appropriate remedy to address the likely substantial negative effect on employment.

As appears from the draft Guidelines, the Commission has noted that parties to merger proceedings often provide insufficient information relating to public interest considerations – especially in relation to employment. This results in delays and the Commission not being able to make an informed decision.

**RISK ANALYSIS**

Not disclosing the required information to the Commission poses various risks – risks that should not be taken lightly. As recognised by the Tribunal in the *Bytes Peoples Solutions*\(^6\) merger, there is a significant time delay due to the fact that the Commission will have to further investigate since the required information was not presented to the Commission initially. In addition, this process of further investigation results in a more costly process for the merging parties.

Most importantly with regard to a risk analysis, the merging parties run the risk of their merger approval being revoked. Section 15 of the Act states that in a small or intermediate merger, the Commission may revoke its own decision to approve or conditionally approve the transaction if the decision was based on incorrect information for which a party to the merger is responsible. In addition, Section 16(3) provides that in a large merger, the Commission can apply to the Tribunal for the Tribunal to revoke its decision and section 15 applies in this respect.

It is recognised that in certain cases, pre-merger retrenchments are brought to the Commission’s attention by trade unions declaring that these are merger related. Merging parties should be aware of the fact that trade unions are taking notice of transactions, are now more proactive and raising their concerns with the Commission. Therefore it would only be detrimental to the merging parties and the deal if they do not disclose sufficient information to the Commission initially.

Merging parties should be aware of the fact that, by not submitting the required information upfront, they are only prejudicing themselves and their integrity in terms of time delays, cost wastage and the risks of having their merger approval revoked. In addition, merging parties should bear in mind the impact of the deal value, should the required information not be forthcoming. This may pose an additional financial burden on merging parties.

**CONCLUSION**

In conclusion, the crucial questions that companies have to ask themselves when entering into notifiable transactions are –

> What are the risks of insufficient disclosure of information in relation to employment?
> What will be the impact of the draft Guidelines going forward in relation to the assessment of employment concerns?

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6 Competition Tribunal Case Number: 020123

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Ahmore Burger-Smidt specialises in Competition Law and Data Privacy. She has extensively advised clients in relation to both competition law as well as data privacy-related matters; including clients in numerous African countries. She advises on all aspects of competition law including applications for leniency and for exemption from the Competition Act. She has significant expertise in the competition-related aspects of mergers and takeovers and in dealing with complaints of alleged anti-competitive conduct. She also undertakes compliance audits and programmes and is the principle driver of the Werksmans competition law risk assessment and e-Learning tools. Prior to joining private practice, Ahmore was Deputy Commissioner and headed the Enforcement and Exemptions Division of the South African Competition Commission. She assists clients in relation to data privacy compliance programme development and implementation.

Kriska-Leila Goolabjith joined Werksmans Attorneys as a Candidate Attorney at the beginning of 2012 and in 2014 became an Associate in the firm’s Competition and Antitrust practice. Her areas of speciality include advising on general competition law-related matters, obtaining approval for mergers from the competition authorities, conducting specialised competition law compliance audits and due diligence investigations.

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