GETTING THE DEAL THROUGH

GCR GLOBAL COMPETITION REVIEW

Merger Control

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South Africa

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation is the Competition Act 89 of 1998, as amended (the Act) and the regulations promulgated in terms of that Act. The Act was amended by the Competition Second Amendment Act 39 of 2000, which came into effect on 1 February 2001, and more recently by the Competition Amendment Act 1 of 2009, which, as at the date of writing, has not yet come into force. The enforcement agencies are the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (CAC).

2 What kinds of mergers are caught?

Any transaction involving the direct or indirect acquisition or establishment of control, by one or more persons over the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of shares, interest or assets, by amalgamation or any other means, is a 'merger' for the purposes of the Act. Notably, however, the Act does not provide a closed list of how 'control' may be achieved. The Act applies to small, intermediate and large mergers, but in the ordinary course only intermediate and large mergers require prior notification and approval.

Thresholds of combined annual turnover or assets are set by the minister of trade and industry in consultation with the Commission, to determine what constitutes intermediate and large mergers (see question 5). Small mergers are those falling below the lower thresholds. Small mergers can be implemented without prior notification and approval, but parties to a small merger can be called upon to notify the merger to the Commission. In addition, the Commission recently published a guideline in terms of which it requires notification of small mergers if at the time of entering into the transaction any of the firms, or firms within their group, are subject to an investigation by the Commission of a prohibited practice or are respondents to pending proceedings in respect of a prohibited practice referred by the Commission to the Tribunal. Intermediate mergers require prior notification to and approval of the Commission. Large mergers require prior notification to the Commission, which conducts an investigation and makes a recommendation to the Tribunal, which is the decision maker in respect of large mergers and decides whether or not to approve large mergers.

The Tribunal has the power to approve or block mergers, and decisions of the Commission can be appealed to the Tribunal. Decisions of the Tribunal, whether at first instance or in appeals from decisions of the Commission, can be appealed to the CAC, which is a division of the High Court. Its decisions in competition law matters were, initially, deemed to be final in terms of the provisions of the Act. However, in a decision in the *Ansac/Botash* matter, Ansac appealed directly to the Supreme Court of Appeal (SCA) to hear the matter, without the requisite leave to appeal. The SCA held that it had jurisdiction to hear the matter as the Constitution provides the SCA with final appellate jurisdiction in all instances except constitutional matters. On procedural, constitutional and jurisdictional matters, the ordinary high court system effectively has parallel jurisdiction to the CAC, and High Court decisions may be subject to further appeals to the SCA or Constitutional Court, South Africa's two most senior courts.

During the year under review, there were 199 merger decisions. Horizontal mergers accounted for 55 per cent of the merger decisions, vertical mergers for 12 per cent, horizontal and vertical for 13 per cent and conglomerate mergers accounted for 20 per cent of the merger decisions.

3 Are joint ventures caught?

The Act does not specifically refer to joint ventures. To the extent that the effect of a joint venture constitutes a 'merger' as defined, the merger control provisions of the Act will apply. Generally 'greenfield' joint ventures will not be caught by the Act, but a combination of existing operations may be. The Commission has published a non-binding practitioners' note to help determine whether a joint venture is caught. To the extent that a joint venture is not a 'merger', the prohibited practices provisions of the Act may nevertheless apply.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

A party has control of a firm for purposes of the Act if that party:
- beneficially owns more than half the issued share capital of the firm;
- is entitled to a majority of the votes that may be cast at a general meeting of the firm or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that party;
- is able to appoint or to veto the appointment of a majority of the directors of the firm;
- is a holding company, and the firm is a subsidiary of that company;
- is a trust and has the ability to control the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- in the case of a close corporation, owns the majority of members' interests or controls directly or has the right to control the majority of members' votes in the close corporation; or
- has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the categories above.

The last item is a catch-all, intended to catch minority and other interests, but only to the extent that they have the effect described in that bullet point.

The position on control was complicated by the judgments of the Tribunal and the CAC in the *Distell* merger case. In this matter, two public companies merged. They both had three main shareholders each holding a 30 per cent stake, with the government holding a 10 per cent stake in each. They competed against each other in the liquor market. Post-merger, the same major shareholders ended up with the same major stake in the merged company. The parties argued that no approval was required as there was no change in ultimate control. The Tribunal accepted this concept in principle but on the facts found that the three shareholders did not jointly exercise control between them; therefore, there was no common 'controlling' mind in either company. They were competitors and in the one acquiring the other, even though the shareholders were largely in common, there was a change of control, which thus led to a requirement to notify the merger for approval. On appeal, the CAC did not dismiss the Tribunal's approach, but took a more expansive view. It said that the categories specified in the Act were merely illustrative and did not constitute a closed list. The Act did not expressly limit scrutiny to changes in ultimate control alone. Transactions between a company and its wholly owned subsidiary were not necessarily excluded. A wide definition was required, so as to allow the authorities to examine a wide range of transactions which could result in a change to market structure and reduce competition.

This has caused much confusion and uncertainty, and as a consequence many mergers, which on an ordinary commercial reading of the Act would not have been considered notifiable, are submitted for approval. Concern has even been expressed that this definition extends to internal group restructurings. It is submitted that the *Distell* case must be read conservatively and was largely influenced by the relevant facts, where two independent operators that competed in the same market (albeit with common shareholders) merged their businesses into one.

The question as to what constitutes an acquisition of control was expanded upon by the Tribunal in the *Ethos/Tsebo* case. Prior to the transaction, Ethos exercised joint control over Tsebo with two other firms and no individual shareholder owned more than 50 per cent of the issued share capital of Tsebo. The transaction concerned an acquisition by Ethos of an additional shareholding, which would result in Ethos' total shareholding marginally exceeding 50 per cent. According to the shareholders' agreement, any material decision required the assent of at least 67 per cent of the shareholders' vote and no shareholder had the ability to achieve this required percentage prior to or after the merger. In its ruling, the Tribunal reaffirmed the principle that a firm can be controlled by more than one person at the same time and that an acquisition of more than 50 per cent of the shares in that firm will result in sole control, although there is no de facto change in control. In other words, a firm can have a joint controller (de facto control) and a sole controller (de jure control) at the same time. There had thus been a move from joint control to deemed sole control and the transaction was notifiable.

5 What are the jurisdictional thresholds?

Notification and approval of intermediate and large mergers is compulsory. Small mergers do not have to be notified and may be implemented without approval unless required by the Commission, or, in terms of a Guideline issued by the Commission in April 2009, if at the time of entering into the transaction, any of the firms, or firms within their group, are subject to an investigation by the Commission of a prohibited practice or are respondents to pending proceedings in respect of a prohibited practice referred by the Commission to the Tribunal. The Commission is entitled to require that a small merger be notified if the Commission considers that it may substantially prevent or lessen competition or cannot be justified on public interest grounds.

In 2009, the intermediate and large merger thresholds, as well as the applicable filing fees, were increased. This decision was made to allow the Commission to focus on the regulation of more significant mergers. The new thresholds and fees came into effect on 1 April 2009. In terms thereof, an intermediate merger is one where:

- the combined turnover in, into or from South Africa of the acquiring and target firms is valued at or above 560 million rand but below 6.6 billion rand;
- the combined assets in South Africa of the acquiring and target firms are valued at or above 560 million rand but below 6.6 billion rand;
- the turnover in, into or from South Africa of the acquiring firm plus assets in South Africa of the target firm are valued at or above 560 million rand but below 6.6 billion rand; or
- the assets in South Africa of the acquiring firm plus the turnover in, into or from South Africa of the target firm are valued at or above 560 million rand but below 6.6 billion rand; and either:
  - the annual turnover in, into or from South Africa of the target firm exceeds 80 million rand; or
  - the value of the assets in South Africa of the target firm exceeds 80 million rand.

A large merger is one where:

- the combined turnover in, into or from South Africa of the acquiring and target firms is valued at or above 6.6 billion rand;
- the combined assets in South Africa of the acquiring and target firms are valued at or above 6.6 billion rand;
- the turnover in, into or from South Africa of the acquiring firm plus the assets in South Africa of the target firm are valued at or above 6.6 billion rand; or
- the assets in South Africa of the acquiring firm plus the turnover in, into or from the target are valued at or above 6.6 billion rand; and either:
  - the turnover in, into or from South Africa of the target firm exceeds 190 million rand; or
  - the value of the target firm's assets in South Africa exceeds 190 million rand.

In both cases the turnover figures are assessed on an annual basis. Mergers falling under these thresholds constitute small mergers.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The Act applies a mandatory system, requiring notification to the Commission of large and intermediate mergers. Provision is made for voluntary notification of small mergers. The Commission may also require notification of a small merger if there are competition concerns at stake and, in terms of a Guideline issued by the Commission in April 2009, the Commission requires notification of a small merger if, at the time of entering into the transaction any of the firms, or firms within their group, are subject to an investigation by the Commission of a prohibited practice or are respondents to pending proceedings in respect of a prohibited practice referred by the Commission to the Tribunal. Intermediate and large mergers may not be implemented until approval has been obtained. All mergers are now subject to the provisions of the Act. Previously, mergers under the thresholds were exempt.

Despite the application of the Act to all mergers, certain banking mergers may be exempt where permission and consent is required in terms of the Banks Act 94 of 1990, and the minister of finance has issued the required notice to the commissioner (see question 30).

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

The Act applies to all economic activity having an effect within South Africa. However, insofar as the notification of mergers is concerned, the thresholds are calculated in relation to combined turnover or assets in relation to South Africa only and it appears that notification is only necessary if a company's South African assets or South African-derived turnover meet the thresholds. Accordingly, the Act is applicable to foreign-to-foreign mergers to the extent that the parties have assets in South Africa or turnover generated in, into or from South Africa.

It should be noted that the informal view of the Commission is that neither party requires a presence in South Africa and it is sufficient that both or one of the parties have turnover in South Africa so as to meet the thresholds. Arguably this goes too far and goes against our general legal principle that statutes are not extra-territorial in application. No final case law exists on this point, although in the context of restrictive practices analysis the CAC has ruled that our authorities have jurisdiction in relation to agreements entered into outside South Africa, as long as they have an effect in South Africa. These effects are not limited to anti-competitive or deleterious effects (confirmed by the SCA in *Ansac/Botash*).

Since the Act came into effect in 1999, the Tribunal has considered and approved many foreign-to-foreign transactions and, as a matter of general practice, foreign-to-foreign mergers, where the target has a subsidiary or a business in South Africa, are notified to the authorities.

Notification and clearance timetable

8 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines for filing, but an intermediate or large merger may not be implemented until notified and approved. Failure to notify and implementation without approval of intermediate and large mergers exposes the parties to administrative penalties of up to 10 per cent of turnover, as well as potential injunctions on implementation.

Sanctions for failing to notify are applied in practice. In 2006 to 2007, the Commission recommended the prohibition of a large merger between Netcare Hospital Group and Community Hospital Group (CHG) on the basis that the merger was likely to lead to the substantial lessening or prevention of competition. The transaction came to the attention of the Commission through a complaint alleging price fixing by the two hospital groups. Upon investigating the complaint, the Commission was advised that in 2003 Netcare had acquired a controlling stake in CHG, which had not been notified to the Commission at the time. The parties agreed to pay an administrative penalty of 6 million rand. The settlement was referred to the Tribunal for confirmation. When the matter came before the Tribunal, the Tribunal rejected the settlement agreement, saying that it failed to adequately protect the public interest. The Tribunal found that the Commission had erred in its determination of an inappropriately low penalty. It held that the Commission ought to have considered the following important factors: Netcare should have been familiar with the relevant legislation; Netcare had an interest in not appearing to be a controlling shareholder of CHG in its formative years; the parties were inconsistent in their explanations to the Commission and their levels of cooperation, and, the period of time that had lapsed between implementation and notification was significant. The Tribunal also expressed a fear that 'firms may well construe low penalties as an acceptable cost of doing business' if implementation prior to notification serves to hamper proper adjudication.

In 2008, the Tribunal confirmed a consent order between the Commission, Bonheur 50 General Trading (Pty) Ltd (Bonheur) and Komatiland Forests (Pty) Ltd (Komatiland), for the implementation of a merger without prior notification to the Commission. In terms of the settlement agreement, Bonheur and Komatiland agreed to pay an administrative penalty of 500,000 rand.

In March 2004, the South African Forestry Company Ltd (SAFCOL), Bonheur and Komatiland had entered into a share sale agreement in terms of which Bonheur was to acquire a 75 per cent interest in Komatiland. The parties met the thresholds for an intermediate merger and the proposed transaction was duly notified as such. In September 2004, the Commission decided that the merger would result in the substantial lessening or prevention of competition in the relevant markets and prohibited it. The parties asked for the Tribunal's consideration of the Commission's decision but subsequently abandoned the merger. At the time of the parties' application for the Tribunal to consider the Commission's decision, the Commission commenced an investigation as to whether there had been prior implementation of the proposed merger, based on the parties' conduct before, during and after the merger review process. The share sale agreement provided for attendance by representatives of Bonheur at Komatiland management committee meetings. Bonheur representatives would attend these meetings on an observer status. Although permitted to speak at the meetings, they were prohibited from voting and from otherwise exercising control or influence over the management or operation of Komatiland. The Commission found that, contrary to the provisions of the share sale agreement, some of the Bonheur representatives had, through their level of participation in the discussions and deliberations in the meetings, conducted themselves in a manner that amounted to the exercise of control over the management or operation of Komatiland. The Commission also found that attendance at the Komatiland management committee meetings by the Bonheur representatives had resulted in the latter being exposed to certain competitively sensitive information that, but for their attendance at these meetings, would not have been readily available to Bonheur, then a competitor of Komatiland in the upstream market for the production and supply of softwood sawlogs and the downstream market for the production and supply of sawn timber.

The Commission found that the conduct of the representatives went beyond the scope of normal commercial interaction between competitors in the ordinary course of business and normal commercial interaction between competitors in the process of a merger and, effectively, amounted to the implementation of the merger without the requisite approval being obtained. The parties contended that the rationale for allowing Bonheur representatives to attend the management meetings of Komatiland was to provide Bonheur with insight into the business of Komatiland and its management in order to protect Bonheur's position as a prospective investor. It was submitted that this practice was followed in the bona fide belief that attendance at the meetings would not give rise to any contravention of the Act and that they had not in fact contravened the Act. The parties nevertheless concluded the matter with the Commission in terms of a settlement agreement.

9 Who is responsible for filing and are filing fees required?

Both parties to a merger are responsible for filing.

Fees are 100,000 rand for intermediate and 350,000 rand for large mergers. The Act does not stipulate which party is responsible for payment of the fees – that is generally a matter for commercial negotiation between the parties.

10 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Parties to an intermediate or large merger may not implement the merger before obtaining the requisite approval. In the case of an intermediate merger, the Commission, within 20 business days of certifying that the notification is complete, must approve or prohibit the merger, but may extend the period it has to consider the merger by no more than 40 business days. In practice, the Commission often makes use of an extension period to complete its investigations. If no response is received from the Commission within the time specified, the merger is deemed approved. Unlike in certain other jurisdictions, the Commission need not have competition concerns to make use of the extension period and is not required to justify the use of the extension period.

In the case of a large merger, which the Commission is obliged to refer to the Tribunal, a date for hearing must be set within 10 days of the matter being referred. A certificate of approval or prohibition must be issued within 10 days of the end of the hearing and reasons must be provided within 20 days of the issue of the certificate. There is a clear gap here in that there is no prescribed period in which a hearing must be held and there is no deemed approval if the hearing does not take place. The Act provides that the matter must be referred by the Commission within 40 business days and that the Tribunal, on application, may grant extensions of 15 business days each to the Commission. However, in the event that the first period or any subsequent period expires, the party may apply to the Tribunal to consider the merger without a recommendation from the Commission.

In practice, the Tribunal has proved efficient, and disposes of matters in a reasonably short time. There has been a reduction in the time for approval of mergers.

In 2009, the M&A Division of the Commission revised its service standards, publishing review periods that the Commission will commit to achieve for phase 1 (non-complex), phase 2 (complex) and phase 3 (very complex) mergers. These review periods do not replace the review periods set out in the Act but the Commission seeks to adhere to these periods, particularly in the interests of expediting the review of non-complex mergers

Phase 1 (non-complex) mergers are categorised as those where the parties' combined market share is below 15 per cent, where no complex control structures arise or no public interest issues arise. The Commission commits to reviewing phase 1 mergers within 20 business days.

Phase 2 (complex) mergers involve transactions between actual or potential competitors (horizontal mergers) or between customers and suppliers (vertical mergers) where the parties hold more than 15 per cent in their respective markets. The Commission considers that phase 2 cases generally include challenges relating to defining the relevant product markets; multiple product or geographic markets; markets that are subject to deregulation; or public interest issues arising as a result of the merger. The Commission commits to reviewing phase 2 mergers within 45 business days.

Phase 3 (very complex) mergers are those that the Commission considers likely to give rise to a substantial lessening or prevention of competition, such as mergers between leading market participants. The Commission considers that the thorough investigation of phase 3 cases requires requests for specific documents or information from the merging parties as well as third parties. The review period for phase 3 mergers is 60 business days.

In terms of meeting the review periods for mergers, the Commission has emphasised that complete merger filings are required to be submitted and the Commission has published a guideline in respect of the information and documents required to be filed in order for a merger to be accepted as complete. Merger filing requirements for specific mergers may be discussed in a pre-notification meeting by arrangement with the manager of the Commission's M&A Division.

The review periods in terms of the Commission's revised service standards replace the former 'fast-track' review procedure published in 2002, which provided for a 20-business-day review of non-complex mergers meeting certain criteria.

11 What are the possible sanctions involved in closing before clearance and are they applied in practice?

Failure to notify the Commission of a merger or implementing a notifiable merger prior to approval being obtained, is a contravention of the Act, rendering the parties liable to pay an administrative penalty. For more details, see question 8. The Tribunal also has wide discretion to direct the taking of steps to prohibit the merger or set it aside.

12 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

This arose for the first time in the *AP Moller–Maersk/Royal P&O Nedlloyd* merger, where the parties unilaterally agreed to certain 'hold-separate' arrangements to ring-fence the South African aspects of the merger. The merger was approved and closed in Europe prior to the South African approval being obtained. The arrangements were accepted by the Commission and Tribunal without comment. Subsequently a number of hold-separate arrangements have been put in place in order to close mergers without implementation in South Africa but there has been no official or express acknowledgement by the authorities that this is acceptable.

13 Are there any special merger control rules applicable to public takeover bids?

No. Where public takeovers fall within the Act's definition of a 'merger', the legislation is applicable. To the extent that the Companies Act 61 of 1973 requires a public offer to be made or Stock Exchange requirements exist, there may be further obligations.

In the *Harmony/Gold Fields* hostile takeover bid, in an appeal from a decision of the Tribunal, the CAC found that an early settlement offer by Harmony to acquire 34 per cent of Gold Fields amounted to an acquisition of control that triggered the need to notify. The obligation to notify was triggered once the requisite intent to acquire control was formed, and any subsequent steps, although short of de facto or de jure control, amounted to implementation and could not be taken prior to making notification and obtaining control. This case has undoubtedly limited the tactical options available to an acquiring party in the context of a hostile takeover. In the *Johnnic/HCI* large merger, the Tribunal found that the *Harmony/Gold Fields* decisions 'may carry certain enigmas' and held that the decisions should not be interpreted to state that a mere intention to bring about a merger amounts to a proposed merger and that such a proposed merger activates the requirement to notify.

In the ordinary course, merging parties submit a joint notification. However, provision is made for separate notifications and for a firm to file on behalf of another firm in certain circumstances. These provisions are typically applied in hostile mergers.

14 What is the level of detail required in the preparation of a filing?

Prescribed forms and declarations need to be submitted, but are not as detailed as those required under the US or EU systems. A competition report is generally required. As the system matures, filings are becoming more sophisticated and parties often file expert economic reports in support of their merger filings.

15 What is the timetable for clearance and can it be speeded up?

Approval of intermediate mergers is deemed to have been granted if no reply is received from the Commission within the prescribed periods. Notification ought to be made as soon as possible as the period granted for the Commission's consideration begins when the notification is received and is certified to be complete. Other than applying tactical pressure on an ongoing basis, the timetable cannot be accelerated. It is however possible to approach the Commission with regard to speeding up the process if there are special considerations at stake. With large mergers there is no deeming provision and no cap on how long hearings should take. However, certificates and written reasons must be given within prescribed periods following a hearing. In practice, non-contentious intermediate mergers are generally approved within about 20 business days.

16 What are the typical steps and different phases of the investigation?

After having received a merger notification, the Commission appoints an investigator to investigate the proposed transaction. The investigator may question any person with knowledge relevant to the investigation. Typically, the assessment is made on the basis of the written submissions to the Commission supporting the request for approval of the merger.

In large mergers the Commission has taken to appointing a specialist investigation team prepared to meet with the merging parties on a regular basis to discuss progress in the investigation. Often, site visits to plants and operations will be requested to facilitate the investigation.

Substantive assessment

17 What is the substantive test for clearance?

Where a merger occurs, the test is whether the merger is likely to substantially prevent or lessen competition, and, if so, whether any technological, efficiency or other pro-competitive gains are likely to result from the merger that may offset the lessening of competition. Relevant factors to be considered are:

- the strength of competition in the market;
- the probability that firms in the market will behave competitively following the merger;
- the actual and potential level of import competition;
- ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration and history of collusion in the market;
- degree of countervailing power in the market;
- likelihood of the merged firm having market power;
- dynamics of the market, including growth, innovation and product differentiation;
- the nature and extent of vertical integration;
- whether the business of a party has failed or is likely to fail; and
- whether the merger will result in the removal of an effective competitor.

The Commission must thereafter consider whether the merger can be justified on substantial public interest grounds, particularly the effect of the merger on employment; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive; and the ability of national industries to compete in international markets. Accordingly the Act allows issues to be considered that are of a socio-political nature in addition to issues of economic efficiency and consumer benefit.

18 Is there a special substantive test for joint ventures?

No. The ordinary test applies.

19 What are the 'theories of harm' that the authorities will investigate?

In assessing whether a merger is likely to substantially prevent or lessen competition, the Commission is required to assess the strength of competition in the relevant market and the probability that the firms in the market will behave competitively or co-operatively after the merger. In making this assessment, the Commission must take into account the factors listed in question 17. The Tribunal has indicated that it will deal mainly with two theories of harm in assessing whether a merger will substantially prevent or lessen competition, namely coordinated effects and unilateral effects. In doing so, it would specifically consider some or all of those factors set out in question 17 that are relevant to the assessment of each specific transaction.

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

In addition to the usual business and economic efficiency criteria, social and political factors may be significant to the assessment. In the past, the impact of an acquisition on employment and investment has been considered and the Act specifically provides for socio-political factors to be taken into account, including the economic empowerment of the country's previously disadvantaged communities. The Commission has shown concern for issues such as employment and black economic empowerment, with regard to both mergers and complaints. In the *Komatiland Forests* case, involving the proposed privatisation of the South African government's forestry assets, the Commission prohibited the sale of the state's forestry assets to the government's preferred bidder on the basis that the merger would likely substantially prevent and lessen competition in the market for sawn timber, and that the alleged efficiency gains were not likely to offset the anti-competitive effects. Furthermore, the Commission considered that the merger raised significant public interest concerns, in particular, that it would likely result in the exit of small independent saw-millers, giving rise to some 2,000 job losses. The Commission also took into account the concern expressed by trade unions that jobs would be lost at the merged entity itself.

With regard to black economic empowerment, the Commission has publicly expressed its support for the Department of Trade and Industry's Broad-Based Black Economic Empowerment Act, which legislates for economic empowerment changes. However, in the *Shell/Tepco* large merger, the Tribunal criticised the Commission for an overzealous approach to its public interest mandate, and in practice most mergers are approved within conventional competition law parameters that generally apply worldwide. Nonetheless, in *Nationwide/Sasol* a prohibited practice case dealing with price discrimination, the Tribunal introduced competition policy favouring small to medium-sized enterprises. The decision was overturned by the CAC on appeal when the CAC disagreed that the position of the complainant could be used as a proxy for the ability of small enterprises to compete effectively. The CAC held that an effect on competition had to be shown and that it was insufficient to only show the effect on a particular competitor. However, the Tribunal's approach may well impact on merger decisions in the future. In the *Tiger Brands/Ashton Canning* large merger, the Tribunal imposed a number of employment-related conditions, including a moratorium on retrenchments and payment of 2 million rand towards a training fund to benefit all permanent and seasonal employees retrenched as a result of the merger.

In 2009, the Commission recommended the approval of the *Vodacom Group Plc/Vodafone (Pty) Ltd* large merger. The Tribunal approved the transaction unconditionally, disregarding last minute oral submissions by the Communications Workers' Union, who argued that the domination of foreign capital would pose an 'economic and security risk'.

In the same year, the Commission recommended to the Tribunal that the proposed merger between Masscash Holdings (Pty) Ltd (Masscash) and Finro Enterprises (Pty) Ltd trading as Finro Cash & Carry (Finro) be prohibited. The parties compete in the grocery products market in the Port Elizabeth region, selling products to smaller, independent retailers who on-sell to customers in the low-income bracket. In considering the transaction, the Commission took into account that, while all consumers are currently affected by over-inflated food prices, the poorest of the poor are suffering the most and the proposed merger would deprive them of the little rivalry they have between the two regional competitors.

In August 2009, the Tribunal approved the proposed merger unconditionally. The main focus of the Tribunal's decision was on the analysis of potential anti-competitive horizontal unilateral effects arising in the relevant market as a result of the merger. The Tribunal found that Finro is an effective competitor to Masscash in the Port Elizabeth grocery wholesale market. However, the Tribunal also stated that this factor and the fact that the market will be highly concentrated post-merger must be assessed in the context of other evidence, considering that the relevant market in question is characterised by substantial differentiation in relation to individual firms having differences in product range and product mix, customer profiles, margins, location, delivery and credit terms. The Tribunal also considered that post-merger there will remain several significant competitors in the relevant market, including three large wholesalers and four smaller competitors that will be competing with the merged entity.

The main area of dispute between the Commission and the parties was the determination of the extent to which the parties are close competitors in the relevant market. The Commission had embarked on a customer survey with the aid of statistical experts to determine revenue diversion ratios (RDRs) and used these ratios together with the gross margins of the parties' wholesale outlets to predict the likely post-merger price effects of the proposed deal.

The Tribunal concluded that the Commission's economic model did not allow for 'off model' external supply-side factors, namely, various potential reactions from incumbent firms in response to a price incentive, and that this was a serious deficiency in the Commission's analysis. The Tribunal concluded that there were various other deficiencies in the Commission's model used to predict potential price increases post-merger, and that the Commission's model ultimately predicts that the merging parties will in fact have an incentive to engage in an insignificant lessening of competition.

The Tribunal concluded that there was no basis to conclude that consumers would be worse off either from a pricing or service delivery perspective as a result of the proposed merger and that furthermore, the transaction would be unlikely to result in a substantial prevention or lessening of competition in the relevant market. The Tribunal accordingly approved the merger unconditionally.

21 To what extent does the authority take into account economic efficiencies in the review process?

The Act requires mergers to be assessed as to whether they are likely to substantially prevent or lessen competition and, if so, whether any technological, efficiency, or other pro-competitive gains are likely to result that may offset the lessening of competition. Thus, the Act requires the authorities engaged in a merger review process to include, in the event of a substantial lessening of competition, a weighing up of the effects of an anti-competitive merger against efficiency gains. Consequently, merging parties have tended to gloss over efficiencies, or provide abstract theoretical efficiency arguments and await an anti-competitive finding before submitting a comprehensive 'efficiency defence'. However, in the *Mondi/Kohler* decision, the CAC cautioned the appellants' and the competition authorities' general acceptance of the Chicago School postulation that vertical mergers are presumed to be efficiency-enhancing. This caution has important legal and economic ramifications in that parties should be advised to prove, a priori, the efficiencies of a proposed transaction. The implication is that the 'efficiency defence' should probably be seen as a factor for consideration in determining whether a merger substantially prevents or lessens competition and not just evaluated once a merger has been deemed anti-competitive.

In January 2009, the Commission prohibited an intermediate merger between Much Asphalt (Pty) Ltd, a subsidiary of Murray & Roberts Holdings Ltd, and Gauteng Asphalt (Pty) Ltd, Road Seal (Pty) Ltd and Road Seal Properties (Pty) Ltd. The firms are active in the market for the supply of asphalt and in the provision of paving services. After considering the vertical and horizontal overlaps in the parties' business operations, the Commission found that the potential efficiencies would likely be outweighed by the probable anti-competitive effects of the merger.

Remedies and ancillary restraints

22 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The authorities have the power to prohibit the implementation of a merger, approve a merger or approve a merger subject to conditions. The Commission approves small and intermediate mergers, whereas in large merger cases the Commission makes a recommendation and refers the case to the Tribunal for approval. In small and intermediate matters, parties may request the Tribunal to consider a prohibited merger or the conditions imposed by the Commission. Appeals in large merger cases against Tribunal decisions lie with the CAC. As outlined in question 8, failure to notify or implementing a merger prior to approval being obtained for intermediate or large mergers exposes the parties to administrative penalties as well as injunctions on implementation.

23 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. It is possible to reach an accommodation with the authorities as to the long-term structuring of the merged entity, behavioural and divestment undertakings. Preferably, these accommodations should be reached with the Commission before it makes a decision. Once it makes a decision it cannot reverse that decision and its functions are discharged. A number of mergers have been approved subject to conditions including undertakings that the merging parties divest a part of the merged business and behavioural undertakings not to foreclose markets or refuse custom. For example, a foreign-to-foreign intermediate merger between Yara International ASA and Kemira GrowHow Oyj was approved in 2008, subject to an undertaking provided by the merging parties to the Commission in respect of the supply of urea to purchasers in South Africa for a period of two years. Also in 2008, the Commission approved an intermediate merger between Current Electric (Pty) Ltd and Alstom Electrical SA (Pty) Ltd, subject to an undertaking by the merging parties that the merged entity will continue to supply other switchgear manufacturers with transformers for a period of two years.

In most of the cases the conditions have been recommended by the Commission and accepted by the Tribunal after assessing the extent to which the proposed conditions deal with concerns arising from the merger. In some cases, the conditions have been imposed unilaterally by the Tribunal. In May 2010, the Tribunal provided reasons for its conditional approval of the merger between Chlor-Alkali Holdings (Pty) Ltd (CAH) and Botswana Ash (Pty) Ltd (Botash). In terms of the transaction, CAH would acquire 50 per cent of the issued share capital of Botash, thus acquiring joint control of Botash with the Botswana government. Both parties manufacture and sell salt. The transaction was also found to have a vertical dimension, as a subsidiary of CAH was involved in the distribution of these products. The Tribunal found that the transaction constituted a 'merger to pure monopoly in the supply of chemical grade salt to the inland areas of South Africa'. Accordingly, it found that the transaction would probably substantially prevent or lessen competition. The threat of foreclosure occurring post-transaction exacerbated the transaction's potential anti-competitive effect. However, a number of factors mitigated the anti-competitive effect, including the fact that there was only one significant inland customer that had negotiated a favourable long-term supply contract, and that a sole customer would facilitate administration of the transaction. Furthermore, the fact that Botash's salt mine operations have only a limited remaining life disposed the Tribunal towards allowing the merger conditionally.

24 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Divestment is a remedy of last resort. The Commission requires divestment to take place in a short period (usually six months), and will generally insist that an independent trustee be appointed to oversee the process. The Commission has tried to argue for the imposition of financial penalties if the divestment is not effected in a timely manner, but the Act does not allow for this. Except for divestment being ordered, the substantive terms of these agreements have been kept confidential.

25 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

During the year under review, the competition authorities approved a number of mergers conditionally. With regard to foreign-to-foreign mergers, see question 33.

26 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The competition authorities have approved a number of transactions by imposing behavioural conditions on the parties. Many of these conditions have related to ancillary restrictions such as access to customers, continued supply and confidential information. The Tribunal has also ordered the Commission to investigate certain ancillary restrictions that have come to light during the course of merger hearings.

Involvement of other parties or authorities

27 Are customers and competitors involved in the review process and what rights do complainants have?

An objection to a merger may be made by any person. A party having a material interest may participate in a Tribunal hearing. The Commission is entitled to interview customers and competitors during the conduct of its investigation in order to obtain their views on the potential impact of a merger. The Commission often requests formal submissions by competitors and customers, particularly where serious competition concerns are raised. The merging parties' counsel can, pursuant to a formal request and confidentiality undertakings, view and respond to the submissions. Representative trade unions have an automatic right to intervene in the proceedings. Customers and competitors were contacted by the Commission in the course of the *Vodacom/Vodafone* merger review; and in the *Masscash/Finro* merger, the Commission contacted almost 400 retailers during its investigation of the transaction.

Other interested parties may only participate on application to, and with the leave of, the Tribunal, which has generally been granted in the past. The Tribunal has also in the past allowed the participation of persons outside of the ordinary scope of suppliers, customers and competitors. In this regard the Tribunal specifically authorised a statutory agency, the Industrial Development Corporation, to intervene in a merger in the iron ore industry between Anglo American and Kumba Resources. This very liberal approach was endorsed by the CAC on appeal.

However, the authorities have issued a clear warning to potential interveners not to waste their time. For example, in 2008 to 2009, technology firm Altech attempted to intervene in the *MTN/Verizon* merger hearing. The Tribunal dismissed Altech's application with costs, stating that it would have 'considered this an appropriate case to award punitive costs' against Altech, had its jurisdictional scope allowed for it.

28 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Provision is made under the Act for the right of parties to request that information submitted to the Commission be treated as confidential and a prescribed form is submitted in merger filings for confidentiality claims. However, the Act provides that a party seeking access to information that has been claimed as confidential may apply to the Commission or the Tribunal to order disclosure of the information. The Tribunal will then make a decision as to whether the information is necessary for the applicant's case, and it will grant or deny access to the confidential information.

The Commission must publish a notice of its merger decision in the Government Gazette and it must give the parties concerned written reasons for its decision, but the text of such reasons is generally not published. The Commission will often put out a press statement summarising its reasons for a decision or for a recommendation to the Tribunal that a large merger be approved. The Tribunal generally always publishes its full reasons for approving or disallowing a merger in any given case. To the extent that confidential information has been provided, the Tribunal will provide a confidential version of its judgment to the parties and make available a non-confidential version for public consumption. It is this growing collection of judgments that is providing the basis for developing South African jurisprudence in merger analysis.

In practice, the Commission and the Tribunal each have their own third-party public relations consultants and the business press also pays keen attention to high-profile merger cases. The reasons for the Commission's decision must not contain confidential information. Both institutions operate information websites. These can be found at www.compcom.co.za (Commission) and www.comptrib.co.za (Tribunal).

A copy of the merger notice must also be given to any representative trade union (or to the employees of the merging firms, should there not be a registered trade union representing them).

29 Do the authorities cooperate with antitrust authorities in other jurisdictions?

There is no obligation on the Commission to cooperate in relation to foreign investigations or to recognise any determinations made by other antitrust authorities. The Act provides, however, that the president may assign to the Commission any duty of the Republic, in terms of an international agreement relating to the purpose of the Act, to exchange information with a similar foreign agency. The Commission appears to regard the analysis by other antitrust authorities as persuasive in its own deliberations, as was the practice of the former Competition Board. The authorities are specifically empowered to rely on foreign law in interpreting and applying the Act. Precedents established in foreign systems will thus be of great significance. There has been cooperation between the Commission and other regulators such as the US Department of Justice, the Federal Trade Commission and the EU Merger Task Force. Personnel from the Department of Justice and the Federal Trade Commission have been seconded to the Commission in advisory capacities. In 2006, the Commission and Tribunal hosted the fifth annual conference of the International Competition Network.

30 Are there also rules on foreign investment, special sectors or other relevant approvals?

Banks and insurance mergers are subject to notification and approval under the ordinary rules. The Act allows the minister of finance to overrule the Commission in urgent situations involving bank mergers, generally where he regards it as in the public interest to do so. This will generally be the case with a failing bank requiring immediate rescue without 'jumping through all the hoops' of a formal

Commission filing. The minister of finance has been prepared to use this 'trump' card. Indeed, the minister used his powers to approve the *Barclays/ABSA* merger and thus avoid a merger notification process for the parties.

Generally speaking, there are no restrictions on foreign investment into South Africa, save in certain limited sectors such as banking and broadcasting, where there are limits on the levels of foreign ownership in the area of mergers. However, ventures incorporating persons that have been historically disadvantaged are encouraged and may be essential where tenders will be submitted for government or parastatal contracts. In certain sectors of the economy, such as the financial, health information, technology and mining sectors, sectional charters have been developed and a balanced 'scorecard' system is being developed to encourage black economic participation in these sectors. The government has developed a set of codes on broad-based black economic empowerment. These codes provide for a generic scorecard in terms of which levels of black economic empowerment in enterprises are measured. The codes provide for 'points' to be allocated, based on black participation on a number of levels, including equity ownership, shareholding, managerial representation and the use of black-owned firms in the procurement of goods and services. This type of model is being extended to other industries.

Judicial review

31 What are the opportunities for appeal or judicial review?

The Commission and the Tribunal are required to give written reasons for their decisions, and parties that are dissatisfied with the decisions may appeal to the CAC. The process is a full appeal and not limited to the mere review of proceedings.

These rights are amplified by the recognition in the South African Constitution of the right of individuals to fair administrative proceedings, as well as in the Promotion of Administrative Justice Act 3 of 2000.

32 What is the usual time frame for appeal or judicial review?

Decisions of the Commission can be appealed to the Tribunal and decisions of the Tribunal, whether at first instance or in appeals from the Commission, can be appealed to the CAC. The CAC prescribes time frames within which appeals and reviews can be brought and such applications will generally be heard within five months after the appeal is lodged. The speed with which appeals and reviews are heard and decided will, to a large extent, depend on the filing of submissions by the parties within the time periods prescribed. Parties can also request an expedited hearing of an appeal or review where there is urgency and directions will be provided as to future conduct of the appeal.

Although the SCA has ruled that it has jurisdiction to hear all appeals from the CAC, no appeal has been heard by the SCA on merger issues as yet. It is likely that an appeal to the SCA will follow the SCA prescribed time periods.

Enforcement practice and future developments

33 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

The vast majority of mergers are approved in the ordinary course. During the year under review, the Commission considered 208 merger notifications. These related to 14 small mergers (11 were approved unconditionally, none were prohibited and two were withdrawn); 140 intermediate mergers (131 of these were approved unconditionally, five were approved conditionally, none were prohibited and four were withdrawn); and 54 large mergers (48 of these were approved unconditionally and two conditionally, one was prohibited and three were withdrawn). However, the authorities will use their powers in relation to domestic and foreign-to-foreign mergers where they consider competition concerns are raised. Please see question 23.

34 What are the current enforcement concerns of the authorities?

The Commission has a separate M&A Division, distinct from the Enforcement & Exemptions Division, which deals with prohibited practices. However, current concerns impact both of these divisions. The Commission is very active in its investigations into prohibited practices. Some of these investigations have attracted significant media attention as they concern pricing and pricing practices in industries of substantial interest to the general public and are regarded as the Commission's priority sectors. Mergers in these sectors attract closer scrutiny. The Commission's priority sectors are food and agro-processing; construction and infrastructure; intermediate industrial products and financial services. These are regarded as sectors that impact on consumers; on the cost of doing business; and on economic growth and development; or reflect competition concerns (such as featuring cartel conduct).

Food and agro-processing concerns the Commission, due to the high concentration in trading, the storage of grain (wheat, maize) and processing (milling and bread production). The Commission regards firms in this sector as being vertically integrated. The Commission considers that new entrants are needed. Cases under investigation in food and agro-processing relate to 'inputs' (raw fish, animal feed, poultry feed, poultry breeding, yeast, fertilizer, grain); 'processing and manufacturing' (bread, fish, fruit, milling, fats and oils, poultry, plastic irrigation piping) and 'retailing' (supermarkets). With regard to intermediate industrial products, the Commission considers that prices of chemicals and metals, as key manufacturing inputs, have risen at rates in excess of producer and consumer inflation and that historically dominant firms feature in the concentrated markets in these sectors. The Commission's concerns include that high prices make industries using these products uncompetitive. Cases under investigation in this priority sector include polymer chemicals, scrap metal, wire, rebar, liquid fuels, mesh, plastic piping, carbon black rubber, bitumen, tyres, flammable gases and mining roof bolts. The construction and infrastructure sector is another priority sector as anti-competitive conduct is regarded as increasing the costs of major infrastructure needed. More than 50 leniency applications have been made in relation to construction, many concerning bid-rigging. Cases under investigation in this sector include those in relation to cement, glass, bricks and pre-cast concrete. The financial services sector has also attracted significant attention.

In 2006, the Commission launched an independent public enquiry into particular aspects of competition in retail banking and the national payments system in South Africa. The enquiry was initiated as a result of the findings of a 2004 task group report (the Falkena Report) and a research report prepared for the Commission in 2006 by economists, because of public concern regarding the level of charges made by banks and other providers of payment services to consumers. The enquiry began a consultative process of meeting stakeholders to explain its ambit and to solicit submissions. This included meetings with banks, regulators, consumer groups and members of the public. A research team with economic, legal and actuarial expertise was appointed in August 2006 to provide technical support to the panel. The enquiry received numerous submissions from the various stakeholders and members of the public.

The first public hearings were held in November 2006 and the second public hearings were held between April and June 2007. Only parties specifically requested by the enquiry to make oral presentations or answer questions on specific subjects appeared during the second public hearings. The enquiry's final report was released in June 2008. The Banking Enquiry Panel concluded that transaction and interbank charges (bank charges) in South Africa are higher than what they would be at competitive levels. The Panel found that banks are in a position to abuse their market power, given the

Update and trends

The Amendment Act, which has been passed into law, but, at the time of writing, has not yet come into effect, introduces far-reaching changes to South African competition law. Certain amendments are highly controversial and raise questions of constitutionality, particularly the provisions relating to the criminal liability of directors and other employees with management authority for engaging in cartel conduct. The Amendment Act has created uncertainty and concerns of a 'chilling effect' on business. A first Business Consultative Forum was hosted by the Commission in November 2009 to create a direct relationship between the competition authorities and the business community following reports that business in South Africa was feeling increasingly paralysed by the fear of transgressing competition laws and that, as a result, business would become less competitive, even in legitimate circumstances. In his opening address Shan Ramburuth, the competition commissioner, addressed the chilling effect directly by stating that competition law should not only be seen as a deterrent but as a tool for promoting pro-competitive behaviour among business. Mr Norman Manoim, chairperson of the Tribunal, emphasised the importance of compliance by business. He cautioned business that the United States had 'shown the way' regarding legal action against transgressors and that South Africa would follow suit, advising delegates to conduct business on a compliant basis. It is expected that the Amendment Act will become effective during 2010.

The competition authorities have focused on priority sectors and areas of particular interest and concern in South Africa. Mergers in sectors which the Commission has identified as priority sectors (including construction and infrastructure, food and agro-processing, intermediate industrial products and financial services) will receive particular scrutiny. These are discussed in more detail in question 34. Other sectors of public interest in South Africa include the availability of pharmaceutical drugs for the treatment of HIV. In September 2009, the Commission imposed a condition for its approval of the transaction between Aspen Pharmacare Holdings Limited (Aspen) and the pharmaceutical division of GlaxoSmithKline South Africa (Pty) Ltd (GSK SA). The condition requires GSK SA to grant licences to generic manufacturers to produce their patented drug 'Abacavir', used primarily for the treatment of children suffering from HIV. The transaction formed part of a larger international transaction between the parties to extend their collaboration. Aspen and GSK will in effect share GSK's trading profits equally in GSK SA's business.

The Commission analysed the likely effect of the merger on future competition considering that a large number of GSK patents are due to expire in the next few years, making them available to generic competition. The Commission was particularly concerned with this aspect in light of its view that increasingly, generic drug manufacturers provide effective competition to patent manufacturers. However, the Commission found that competition from generic companies, both in South Africa and internationally, would prevent the merged entity from substantially lessening competition in the future.

In 2002 the Commission reached a settlement with GSK SA in another matter following a complaint about the high cost of anti-retrovirals in which GSK also agreed to issue licences to generic manufacturers. In terms of this merger GSK is required to grant licences, on a non-exclusive basis, to Adcock Ingram, Cipla Medpro, Ranbaxy, Biotech Laboratories and Feza Pharmaceutical and any other interested generic manufacturer for the manufacture or import of Abacavir, on terms and conditions no less favourable than those granted to Aspen.

The Commission has been determined to pursue charges of providing false information against a former Vodacom legal executive, although the charge of perjury initially laid with the South African Police Service in 2008 was dropped. Then Tribunal chairman, David Lewis, accused the operator of lying to it during the hearings over Vodacom's purchase of Global Telematics, a mobile service provider. Although the Tribunal approved the merger, it alleged that a Vodacom legal executive had lied when asked to provide minutes of a board meeting in which the issue of Global Telematics was discussed. The request was first made to Vodacom's legal representatives in March 2008 and the impression, as alleged by the Tribunal, was that no minutes of such a board meeting were kept. However, once pressed, Vodacom released such minutes four days later. The employee had left Vodacom's employ before the charges were first laid. In terms of section 73 of the Act, it is an offence to provide the competition authorities with false or misleading information. The charge of perjury was dropped because the documents were not necessarily provided under oath but the Commission believes that a criminal offence was committed, as the information was either false or misleading. The South African Police Service's Commercial Crimes Unit, under the direction of the Directorate of Public Prosecutions, investigated the criminal charges. Having reviewed the contents of the minutes, the Tribunal determined that the real reason for the acquisition was to eliminate Global Telematics as a competitor, due to its aggressive pricing strategy. The significance of providing accurate information and responses to the competition authorities in the context of merger and other proceedings has been underlined by the circumstances of this case.

information asymmetry and product complexities present in this particular market structure.

The Panel submitted the following significant recommendations:

- penalty fees for rejected debit orders should be limited;
- ATM carriage fees should be disclosed at the start of all ATM transactions;
- the National Payment System Act should be amended to facilitate market entry by suitably qualified competitors;
- interbank fee settings should be governed by an independent regulatory process and the rules in respect of costs associated with branded payment cards (eg, Visa) should be abolished; and
- product and price comparisons among consumers should be aided by, inter alia, the standardisation of banking terminology and accessible disclosure of price and product information.

In June 2010, as a result of the enquiry, South Africa's finance minister announced that banks have agreed to cut some of their retail banking fees. This includes agreeing to lower their penalty fees on dishonoured debit charges. The finance minister also stated that South Africa's largest banks will be increasing transparency on ATM fees and charges.

35 Are there current proposals to change the legislation?

The Competition Amendment Act 1 of 2009 (Amendment Act) was passed into law in 2009. The Amendment Act has not yet come into effect, although it is expected to enter into force during 2010.

The Amendment Act introduces significant changes to South Africa competition law, including the introduction of criminal liability for directors of companies and those holding positions of management who cause the company to engage in cartel activity. The objective of reviewing the Act was to strengthen the power vested in the competition authorities. The Amendment Act also introduces provisions relating to 'complex monopolies', enabling the Commission to investigate complex monopolies and make a recommendation to the Tribunal where it finds that complex monopoly conduct exists within a market and has the effect of substantially preventing or lessening competition. The Amendment Act allows the Commission to conduct 'market inquiries', meaning a formal inquiry, in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of a particular firm. It may do so if it believes that any feature or combination of features of a market prevents, distorts or restricts competition within that market. Twenty days before starting a market inquiry, the Commission must publish a notice in the Government Gazette, inviting the public to provide information. The Commission must publish a report on completion of the market inquiry and must submit the report to the minister of trade and industry, with or without recommendations. On the basis of information obtained during a market inquiry, the Commission may, inter alia, initiate a complaint and enter into a consent order with any respondent, with or without conducting any further investigation.

The Amendment Act also seeks to clarify jurisdiction between the Commission and other regulatory authorities, providing that insofar as the Act applies to any conduct arising within an industry or sector that is subject to the jurisdiction of another regulatory authority in terms of any other legislation, the Act and the other legislation must be construed as establishing concurrent jurisdiction in respect of any conduct regulated in terms of the Act, and that other national legislation, provided that the other regulatory authority will exercise primary authority to establish conditions within the relevant industry to give effect to the legislation in terms of which it functions and the Commission will exercise primary authority to detect and investigate prohibited practices and to review mergers in any industry or sector, in terms of the Act.

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