BALANCING PUBLIC INTEREST MERGER CONSIDERATIONS BEFORE SUB-SAHARAN AFRICAN COMPETITION JURISDICTIONS WITH THE QUEST FOR MULTI-JURISDICTIONAL MERGER CONTROL CERTAINTY

John Oxenham[*]

The growing importance of public interest considerations, and the uncertainty that it creates, in South Africa and other sub-Saharan jurisdictions, including Zambia, Namibia and Botswana, pose an additional challenge for merging entities attempting to coordinate multi-jurisdictional merger notifications. These difficulties were, most recently, brought to the fore during the much publicized and highly opposed proceedings involving Wal-mart's takeover of the South African listed retailer Massmart. While the growing importance of public considerations increases the complexity and cost of multi-jurisdictional merger filings, the author suggests that these challenges can be countered by addressing public interest considerations as an integral part of submissions in support of merger filings in the sub-Saharan African region.

INTRODUCTION

The number of countries requiring a mandatory merger notification has substantially increased over the past decade. It is now commonplace that most developed, and an increasing number of developing economies, have some form of merger control regime. The increase in the number of merger control regimes in the developing world is particularly apparent in sub-

[*] John Oxenham, BA LLB (University of Cape Town) is a director of the law firm Nortons Incorporated in South Africa, practising in the field of regulatory law and specifically in antitrust.

Saharan Africa where there has been a proliferation of merger control legislation in recent times. In 2007 Swaziland enacted competition legislation, followed by Botswana and Mauritius in 2009 respectively. The merger control regimes of South Africa, Namibia and Zambia have been in place for some time. South Africa's competition authorities have made significant contributions to merger jurisprudence in sub-Saharan Africa.

Mergers between multinational and transnational corporations have the potential to have a significant impact on various national economies. The 2008 economic crisis has undoubtedly brought the issue of the impact of transactions on economies (and ultimately affected citizens) into sharp relief. The challenge for companies engaging in multi-jurisdictional mergers (or, in essence, mergers that require notification in more than one jurisdiction) is that the assessments conducted by the respective antitrust agencies in each jurisdiction are not consistent across all these economies and, as in the case of South Africa (and more recently the sub-Saharan region), certain unique merger review considerations have recently re-emerged which have the capacity to increase the costs of and the time required to complete multi-jurisdictional filings by increasing the scope of the merger investigation process, and therefore the types of remedies which may be imposed.

This paper is intended to provide an overview of the key issues typically considered by competition agencies (and merging parties' legal practitioners) when fashioning and negotiating merger remedies in the case of multi-jurisdictional and cross-border mergers. The overview is done with specific reference to the South African context. In particular, we consider the jurisdiction-specific issues when designing and implementing remedies in South Africa.

The structure of this paper is as follows:

Part I, by way of introduction, provides certain insights into South African merger remedy design;

Part II provides an overview of the specific factors that are taken into account when remedies are considered in South Africa—this section contains a particular emphasis on so-called "public interest" considerations;

Part III provides a brief review of the approach to merger review and the imposition of merger remedies in the sub-Saharan region is then considered;

Part IV highlights certain practical issues that ought be considered by parties to a proposed merger before making a multi-jurisdictional filing are discussed—including the current trend amongst sub-Saharan agencies to focus on public interest issues; and, finally;

Part V concludes by setting out the practical realities merging parties are exposed to when filing merger notifications in the sub-Saharan region and the possible concomitant increase in transaction costs.

I. BACKGROUND OF MERGER CONTROL IN SOUTH AFRICA

As is the case with most national competition authorities worldwide, the South African competition authorities recognise that certain mergers may lead to appreciable detrimental effects on competition in the market or markets affected by a proposed merger[1]. In cases where the South African competition authorities are of the view that a merger will result in a substantial lessening of competition which cannot be outweighed by any claimed and proved efficiency benefits, the proposed transaction may be prohibited outright. However, the competition authorities are also empowered to grant conditional approval of a proposed merger, and to utilise remedies as a means to address a merger's anti-competitive effects.

Davies and Lyons (2007)[2] defined a remedy as an "*intervention that is designed to avoid the anti-competitive effects of a merger, while not impeding its anticipated efficiency gains*". When designing an effective remedy in a merger case, the ultimate goal is to utilise a remedy (or a number of remedies) to preserve the competitive dynamic of the market, and possibly even enhance it, with granting approval for the merger in question.

The South African Competition Act is unlike legislation in most other jurisdictions which will typically focus on "pure" competition issues, or strictly on the economic consequences of a proposed merger. In South Africa, there is an additional consideration of public interest in the adjudication of mergers. While this feature of the South African Competition Act is not new, its prominence of late in recent merger control matters (including multi-jurisdictional merger filings) necessitates further consideration[3]. In short, and as will be discussed below, public interest considerations are in addition to the typical economic considerations that accompany the adjudication of a proposed merger.

As is the case in many other antitrust jurisdictions, merger remedies in South Africa are generally classified as being either "structural" or "behavioural" in nature. When structural remedies are imposed, the parties are typically required to divest of certain assets, such as, fan entire division

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[1] This analysis is conducted in terms of Section 12 of the Competition Act 89 of 1998 (the SOUTH AFRICAN COMPETITION ACT).

[2] S. Davies and B. Lyons, *Mergers and Merger Remedies in the EU, European Commission, Edward Elgar Publishing Limited: Massachusetts* (2007).

[3] The Competition Tribunal had previously distinguished between competition issues (being primary considerations) and the public interest (being secondary considerations).

of a company[4], or certain products or brands[5]. Behavioural remedies, on the other hand, are designed to regulate or constrain the behaviour of merging parties. For example, within the South African context, behavioural remedies, which have been imposed in the context of vertical transactions, typically include putting in place contracts that regulate supply conditions. In 2008, the international horizontal merger between *Yara International ASA and Kemira GrowHow Oyj*[6] was approved, subject to the merging parties agreeing to supply urea to purchasers in South Africa for a period of two years. Similarly, the transaction involving *Current Electric and Alstom Electrical SA (Pty) Ltd.*[7] was approved subject to the merging parties agreeing to continue their supply of transformers to various switchgear manufacturers.

While the South African competition authorities have displayed a willingness to impose both structural and behavioural remedies (on vertical and horizontal mergers), it appears, like most competition agencies, to favour the imposition of structural remedies in the context of horizontal mergers[8]. In the context of vertical mergers, the South African competition authorities tend to prefer behavioural remedies. This approach is not dissimilar to that followed in the European Union ("the EU") and the United States ("the US")[9]. However, it has also been observed that the South African authorities, as relatively new participants in the antirust arena, have tended, in the past, to impose a greater number of behavioural remedies in horizontal mergers than its counterparts in the developed antitrust jurisdictions.[10]

There is no published general consensus as to the South African authorities' views on what constitutes the optimal remedy, policy or design[11]. However, in a recently published paper[12], representatives of the South African Competition Commission ("the Competition Commission") acknowledged that certain behavioural conditions that were imposed in

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[4] *See* in this regard *Lafarge Roofing (Pty) Ltd. and Kulu Concrete Products (Pty) Ltd. 63/LM/Jul06.*
[5] *See Distillers Corporation (SA) Ltd. and Stellenbosch Farmers Winery Group Ltd. 08/LM/Feb02.*
[6] Yara International and Kemira Growhow 133/AM/Dec07—an intermediate merger notification.
[7] 2008/Feb/3525.
[8] L. Binge and J. van Eden, Remedy Design and Application in South Africa, Paper presented at the Fourth Annual Competition Commission, Competition Tribunal and Mandela Insitute Conference on Competition Law, Econex, at 11,2007.
[9] Ibid Binge and van Eeden at 13.
[10] R. Ngwenya and G. Robb, *Theory and practice in the use of merger remedies: Considering the South African experience*, Paper presented at the Fourth Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, at 8, 2010.
[11] Ibid R. Ngwenya and G. Robb, at 8 & 9.
[12] Ibid R. Ngwenya and G. Robb, at 15.

vertical transactions have not been successful in adequately addressing foreclosure concerns (with specific consideration being given to the *Astral Foods and National Chick* case)[13]. This may herald a shift in favour of the imposition of structural remedies in South Africa, and is something to be borne in mind by practitioners tasked with overseeing a merger notification in the jurisdiction.

II. The Consideration of South African and Specific Regional Conditions when Designing Remedies

While the South African Competition Act incorporates familiar provisions that can be found in the antitrust laws and merger control regulations of other jurisdictions, public interest considerations are most unique. Section 12A(3) of the South African Competition Act specifically requires the competition authorities (using the imperative “must”) to consider whether a merger “can or cannot” be “justified” on public interest grounds, with reference to the effect of the merger on: a particular industrial sector or region, the ability of small businesses owned by historically disadvantaged persons to compete (persons who were excluded from formal participation in the economy during apartheid), employment, and whether the merger will affect South Africa’s ability to compete internationally[14].

The initial attitude of the South African competition authorities toward public interest considerations in merger control was summed up by the Chairperson of the Competition Tribunal at the time, David Lewis, when he stated:

> I readily concede that public interest considerations weigh more heavily in developing countries than they do in developed countries. The reasons for this are instructive: first, it is widely accepted that there is a greater role for industrial policy, for targeting support at strategically selected sectors or interest groups, in developing than in developed countries; secondly, developing country competition authorities are still engaged in a very basic struggle to achieve credibility and legitimacy in

[13] *Astral Foods Limited and National Chick Limited 69/AM/Dec01.*

[14] See Metropolitan Holdings Limited and Momentum Group 41/LM/Jul10 at page 20 The schema of Section 12A of the Act, which provides for a consideration of mergers, requires the Tribunal to “initially determine” the competition effects of the merger. If the merger is not…likely to substantially prevent or lessen competition, as is the case with this merger, then the Tribunal must still consider its effects on the public interest. This is in terms of section 12A(1)(b) which states: ... otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

their countries…[15]

More recently, the position regarding the import of public interest considerations in South African competition law has gained even greater attention. The current Minister of Economic Development, Ebrahim Patel[16], noted that he has expectations of competition law and policy which go beyond "pure" competition or antitrust issues by noting that *"...our law is not predicated on competition fundamentalism. Instead, it seeks to harness the power of competition to the broader developmental needs of our society..."*.

Minister Patel's Department of Economic Development ("the DED") has set ambitious targets in terms of the South African Government's New Growth Path's goal to create five million new employment opportunities by 2020. Competition law and policy is seen as an important tool in achieving these targets. This view is borne out in the DED's intervention in the much publicized *Walmart*[17] case (which is discussed at some length below). Over and above the views expressed by the DED, the South African merger control regime has recently witnessed significant attention being paid to the various public interest factors, particularly employment, principally on the basis that these factors are aligned to certain strategic government policies.

III. MERGER REVIEW IN SOUTH AFRICA

From a South African perspective, the initial test in merger control is whether a 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[18]. This was succinctly stated by Mhlanthla AJA of the South African Competition Appeal Court:

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[15] D. Lewis, *The role of Public Interest in Merger Evaluation*, International Competition Network, Merger Working Group Naples, September, 2002, at 2.

[16] "Competition Policy within a developmental framework—Some reflections. Remarks at the competition lawyers' breakfast hosted by the Law Society of the Northern Provinces on November 3, 2011". Speech delivered at the Sandton Convention Centre, Johannesburg. It is important to note that the Competition Commission and the Competition Tribunal were recently (this was officially completed April 2010, although the announcement was made in 2009) housed within the DED, headed by Minister Patel. The Competition Commission and the Competition Tribunal were previously housed within the Department of Trade and Industry.

[17] *Wal-Mart Stores Inc and Massmart Holdings Limited 73/LM/Nov10.*

[18] *See* Section 12(A)(1)(a) of the South African Competition Act. Interestingly, in *Harmony Gold Mining Company Limited and Gold Fields Limited 93/LM/Nov04*, the Competition Tribunal held that the merging parties are not required to affirmatively justify a merger on public interest grounds (i.e., over and above the justifications in terms of Section 12(A)(1)(a)(ii) of the Competition Act).

Within the context of mergers, section 12A provides for a two-stage analysis. The first phase involves the determination by the Tribunal whether the merger is likely to substantially lessen or prevent competition, having regard to the evidence and argument presented before it by the respondent and the parties. The inquiry is conducted by assessing the factors set out in section 12A(2). The word "likely" has its prime meaning of "probability" whilst the word "substantially" means "materially or considerably in amount or duration".

These public interest considerations would have been more appropriately considered during the second phase in terms of section 12A(3), as the need to consider public interest grounds is a separate and subsequent enquiry to that of the primary determination.[19]

Importantly, thereafter, the South African authorities are obliged to consider whether the merger can be justified on substantial public interest grounds. As stated above, the list of public interest grounds is limited to the following:

- the effect of the merger on employment;
- the effect of the merger on a particular industrial sector or region;
- the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive;
- the ability of national industries to compete in international markets[20].

Thus, in addition to issues such as economic efficiency and consumer benefit, the South African Competition Act also requires that polycentric issues of a socio-economic nature have to be considered. It should be emphasized that within the context of mergers, public interest factors are assessed independently of the impact on competition and economic efficiency. By implication, a merger that raises no competition concerns may still conceivably be prohibited because of public interest considerations. Importantly, the Competition Tribunal has recently stated that the public interest considerations must be "merger-specific"[21].

As far as an assessment of "pure" competition issues is concerned, the South African Competition Act includes what many have come to understand would be the standard factors for merger assessment. However,

[19] *See Medicross Healthcare Group (Pty) Limited NO and the Competition Commission* 55/CAC/Sept05 at 11.
[20] *See* Section 12(A)(3)(a) to (d) of the SOUTH AFRICAN COMPETITION ACT.
[21] *See Wal-Mart Stores Inc and Massmart Holdings Limited* 73/LM/Nov10 at page 11 and *see Metropolitan Holdings Limited and Momentum Group Limited* 41/LM/Jul10 at page 20.

unlike many of the established jurisdictions[22], there are, currently, no official merger guidelines to assist in the assessment of a merger and merger practice to date has been informed by more than 10 years of Competition Tribunal case precedent. For example, there is no official market share threshold or "safe harbour" for use by practitioners as a preliminary screening mechanism for merger control to ensure consistency in advice. While practitioners are generally guided by precedent, the lack of specific guidance from the South African authorities can lead to a degree of uncertainty when notifying certain transactions and could potentially mean that a particular transaction could be subject to conflicting standards of assessment, which could ultimately impact the remedy process. This is particularly the case when complex issues of public interest are added to the assessment.

In this regard, the impact of a proposed merger on employment[23] has been the core public interest consideration and has received the greatest attention from the South African competition authorities[24]. This is not surprising given South Africa's extremely high rate of unemployment (currently above 25%) and the South African government's recent commitments to rapidly accelerate the creation of employment opportunities.

Where a merger will have an effect on employment (even a minimal effect), before the merger investigation can be concluded, input from the relevant trade unions and employee representatives must be sought. In fact, merging parties are required to serve a copy of the merger notification made to the competition authorities on the representative trade union or employee group[25]. The Competition Commission has stated that "*the Commission's intervention* [on public interest issues] *is determined on a case-by-case basis and the Commission considers factors such as the skill levels of employees, the region of the country in which the employees are based and the prospect of re-employment elsewhere*"[26].

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[22] *US Horizontal Merger Guidelines*, August 19, 2010, available at: http://ftc.gov/ os/2010/08/ 100819hmg.pdf; EU horizontal merger guidelines and non-horizontal merger guidelines available at: http://eurex.europa.eu/LexUriServ/ LexUriServ.do?uri= CELEX:52004XC0205(02):EN:NOT and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC1018(03):EN:NOT respectively.
[23] Section 12A(3)(b) of the South African Competition Act.
[24] *Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10*, at 21 "Thus if on the facts of a particular case, employment loss is of a considerable magnitude and that short term prospects of re-employment for a substantial portion of the affected class are limited, then prima facie this would be presumed to have a substantial adverse effect on the public interest and the an evidential burden would then shift to the merging parties to justify it before a final conclusion can be made".
[25] The parties are entitled to remove confidential data from the version which is filed on the unions.
[26] *See* the Competition Commission's annual report for 2010 to 2011 at 31.

The involvement of or intervention by trade unions, has been a feature of merger proceedings since the early days of the enactment of the South African Competition Act. This is best illustrated by the case of *Unilever PLC/Competition Commission and CEPPWAWU*[27].The main public interest issue identified by the participants in this proposed merger was the number of potential job losses alleged to be a consequence thereof[28].

In this case, the merging parties were unable to provide a definitive analysis of the impact of the merger on employment at the time of notification. This meant that the Competition Tribunal could not make a valid assessment of the effect of the merger on employment. The merger was thus approved subject to the condition (which amounted to an obligation on the merging parties) that, once an agreement was finally concluded with the proposed buyer of the divested assets, the buyer was to consult with the trade unions or their employees on the issue of any job losses[29]. In this regard, the Competition Tribunal noted in its decision that "*In our view the most significant right that the* [South African] *Competition Act extends to employees and their unions is the right to timeous information with respect to the potential employment impact of a merger".*[30]

In the decade following the *Unilever*[31] decision, employment issues have come to the fore more prominently in the deliberations of the South African competition authorities. Considerations of the effect of a proposed merger on employment gained were particularly prominent in the merger involving *Momentum and Metropolitan*[32] —two large South African financial services firms. While it was readily conceded by the Competition Commission that the merger did not give rise to any competition concerns, the anticipated loss of approximately 1,000 jobs, taking into account natural attrition and early retirements in the first three years after implementing the merger, became the focus of the Competition Tribunal's merger deliberations. The intervention of a trade union, the National Education

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[27] *Unilever Plc, Unifoods, a division of Unilever South Africa (Pty) Ltd., Hudson & Knight, a division of Unilever South Africa (Pty) Ltd., Robertsons Foods (Pty) Ltd., Robertsons Food Service (Pty) Ltd. and The Competition Commission of South Africa, CEPPWAWU, FAWU, NUFBWSAW 55/LM/Sep01.*

[28] The unions referred specifically to Section 12(A)(3)(b) of the South African Competition Act.

[29] Further conditions relating to pure competition issues were imposed.

[30] *Unilever Plc, Unifoods, a division of Unilever South Africa (Pty) Ltd., Hudson & Knight, a division of Unilever South Africa (Pty) Ltd., Robertsons Foods (Pty) Ltd., Robertsons Food Service (Pty) Ltd. and The Competition Commission of South Africa, CEPPWAWU, FAWU, NUFBWSAW 55/LM/Sep0* ,at 12.

[31] *Unilever Plc, Unifoods, a division of Unilever South Africa (Pty) Ltd., Hudson & Knight, a division of Unilever South Africa (Pty) Ltd., Robertsons Foods (Pty) Ltd., Robertsons Food Service (Pty) Ltd. and The Competition Commission of South Africa, CEPPWAWU, FAWU, NUFBWSAW 55/LM/Sep01.*

[32] *Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10.*

Health and Allied Workers' Union ("Nehawu"), which represents approximately 6% of Momentum's employees, proved to be a pivotal moment in the merger proceedings. Nehawu argued before the Competition Tribunal that the merging parties had failed to properly justify the need for any job losses, and had not substantiated how loss of approximately 1,000 jobs was estimated.

The Competition Tribunal ultimately approved the merger subject to the condition that no retrenchments would take place in South Africa for two years after the implementation date of the merger. The condition did not, however, apply to senior management of the merged entity. The merging parties also offered (presumably in an attempt to placate the authorities and the Competition Tribunal and strive for a less onerous condition) to provide support, including core skills training, to affected unskilled and semi-skilled employees, outplacement support and counseling, and to use their best endeavours to redeploy affected employees within the merged entity. In conditionally approving the merger, the Competition Tribunal also made significant and important pronouncements on the balancing of the merger efficiencies and the impact of the retrenchments on the public interest[33].

The weight that is to be attached to the specific public interest considerations has recently been brought to the fore in the Competition Tribunal proceedings relating to *Walmart's* acquisition of the South African retailer Massmart. Prior to the acquisition, Walmart had no presence in South Africa. It was a common cause that the transaction raised no competition concerns[34]. On the contrary, there was widespread recognition and acknowledgement that Walmart's entry into South Africa had the potential to reduce prices and improve product range to the benefit of South

[33] *See Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10*, at 21,"The evidential burden that the parties must meet, once the prima facie case has been established, must satisfy two criteria namely that: (1) a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e., that the reason for the job reduction and the number of jobs proposed to be shed are rationally connected; and (2) the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act." Thus even if the merging parties make a good efficiency argument for job losses, this efficiency gain must, if the job losses are substantial, be justified on a ground that is public in nature to countervail the public interest in preserving jobs. This is because the Act refers to a public interest which must be distinguished from a private interest. Thus although a firm may be able to demonstrate that employment loss is rationally connected to an efficiency claim this would on its own not be sufficient if the efficiency gain is a private one. By way of example an employment loss cost saving which is justified solely by a gain to shareholders and to no one else, could not be regarded as a countervailing interest. Gains to shareholders on this scenario would be purely private. If gains to shareholders as a result of efficiencies introduced through job reduction were regarded as a public interest this would have received express mention in the Act. The Act is silent on this point.

[34] *Wal-Mart Stores Inc. and Massmart Holdings Limited* 73/LM/Nov10, at 9.

African consumers. Notwithstanding this, the public interest implications of the transaction became the focus of deliberations of the Competition Tribunal with various South African government departments, trade unions and the certain non-governmental organisations opposing the merger on the basis of public interest concerns. Based on the level of media coverage received before, during and after the merger hearing, it is fair to say that Walmart's proposed entry into South Africa became a highly politicised topic.

As previously noted, public interest factors feature as a separate enquiry when the Competition Commission and Competition Tribunal are required to consider a merger[35]. Of significance is the fact that the South African Competition Act does not permit a balancing act between "pure" competition and public interest factors. Accordingly, even though a merger may not give rise to any pure competition issues whatsoever, conditions may still be imposed which address specific public interest concerns. In the Walmart case, the competition authorities in fact encouraged third party intervention in merger proceedings; which proved to be significant in relation to the merger remedies that were ultimately imposed.

The merging parties initially argued for unconditional approval of the merger, a position supported by the Competition Commission (although the Competition Commission's position changed subsequently following the intervention of the trade unions and South African government departments). Those intervening and opposing the transaction proposed that the merger be approved, but subject to conditions to protect what they identified as public interest considerations. In particular, the trade unions proposed that the merger be approved subject to a wide range of public interest conditions, but that if this was not possible, that the merger should be prohibited outright.

It was alleged that the entry of Walmart into South Africa would, *inter alia*:

- Negatively impact upon the existing relationships which Massmart had with trade unions (allegedly on the basis of Walmart's reputation for being anti-union);
- Result in a watering-down of employment terms and conditions and substantial job losses, both within the merged entity and across the broader retail industry as a result of other retailers implementing similar strategies in order to remain competitive;

[35] It is telling, however, that mergers which have ultimately been challenged by the South African competition authorities are those in which the likelihood of a substantial impact on a public interest criteria (in terms of Section 12(A)(3) of the SOUTH AFRICAN COMPETITION ACT) is evident.

- Be likely to reduce local procurement of goods as the importation of goods would be favoured as Walmart had a reputation of procuring goods globally at substantially lower prices than they could be manufactured locally.

In terms of the employment effects, the merging parties noted that, as there was no overlap between their respective businesses, there would no retrenchments at the merged entity and, in fact, the merger could result in increased employment. Walmart also pointed out that it has a clear policy of complying with local employment practices in the countries in which it operates and, on this basis, would comply with domestic employment laws.

In terms of procurement issues, it was noted that Massmart already possessed the scale and expertise to import goods into South Africa at competitive prices and that Walmart's entry would result in lower consumer pricing, not because of Walmart's procurement advantage, but because it has superior logistics capabilities which will allow for greater efficiencies across the supply chain.

After lengthy proceedings, during which the Competition Tribunal grappled with the conditions proposed by the merging parties and the intervening parties[36], the merger was approved by the Competition Tribunal subject to certain conditions, including that the merged entity must:

- Ensure there are no retrenchments as a result of the merger for a period of two years;
- Continue to honour existing labour agreements;
- Establish a programme aimed exclusively at the development of local South African suppliers, including small, micro and medium enterprises, funded to the value of R100 million.

These, the Competition Tribunal reasoned, were remedies which were "*rational, proportionate and enforceable*"[37]. In its written reasons, it is interesting to note that the Competition Tribunal sounded a word of caution when the following was stated: "*we step carefully into shop floor issues less we forget our purpose as a competition regulator*"[38].

Notwithstanding the imposition of the abovementioned conditions, the Ministers of Trade and Industry, Economic Development and Agriculture, Forestry and Fisheries, as well as the trade unions elected to appeal the decision of the Competition Tribunal to the Competition Appeal Court. At

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[36] *Wal-Mart Stores Inc. and Massmart Holdings Limited 73/LM/Nov10,* at 34. The Competition Tribunal considered in some detail a number of conditions which the intervening parties had proposed and discounted their efficacy on the basis they were not rational, proportionate and enforceable.
[37] *Wal-Mart Stores Inc. and Massmart Holdings Limited 73/LM/Nov10,* at 38.
[38] *Wal-Mart Stores Inc. and Massmart Holdings Limited 73/LM/Nov10,* at 34.

the time of writing this paper the Competition Appeal Court is yet to hand down its judgment which, it is hoped, may provide greater clarity as to the manner in which public interest considerations ought to feature in the adjudication of mergers in the future.

Due to the increasing prevalence of merger control in the sub-Saharan region[39], this would not be the end of Walmart's merger control travails in Southern Africa. In November 2011, the Supreme Court of Namibia dismissed Walmart's challenges of the Namibian Competition Commission's ("NCC") conditional approval of the merger on the basis that the appeal should rather have been brought before Namibia's Minister of Trade and Industry[40], despite there being no "pure" competition issues as Walmart had no actual presence in Namibia.

The High Court of Namibia had previously set aside the conditions imposed by the NCC[41]. The conditions imposed by the NCC included that the merger would not result in any job losses in Namibia, would not harm small, micro and medium enterprises and would promote a "greater spread of ownership" among black Namibians. The NCC also requested that the Ministry of Trade and Industry conduct a separate review of the merger.

It is noteworthy that public interest issues have loomed large in the NCC's merger investigation process, and have led to the Namibian authorities imposing a number of merger conditions as a result.

The Walmart case is illustrative of some of the unique challenges that firms conducting business face, not only in South Africa but also in the broader Southern African region, when subjected to the unique considerations of local merger control. Conditions related to public interest concerns, particularly employment, have taken the form of behavioural remedies[42]. Rarely, if ever, has a merger been prohibited due solely to public interest concerns. It should also be noted that there appears to be a willingness on the part of the South African competition authorities to find mutually acceptable solutions (namely remedies) in relation to public interest matters.

Issues of public interest came to the fore again in the proposed merger between Japanese-based coatings manufacturer Kansai, in the acquisition of Freeworld, a South African-based manufacturer. The transaction was

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[39] Jurisdictions which currently have active merger control regimes include Botswana, Mauritius, Namibia, the Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe.

[40] *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated (SA 41/2011) [2011] NASC 11.*

[41] *Wal-Mart Stores Inc v Chairperson of Namibian Competition Commission and Others (A 61/2011) [2011] NAHC 165.*

[42] Econex, Merger Remedies and the Walmart-Massmart case, July 2011, Research Note 23, at 3.

ultimately approved by the Competition Commission subject to conditions and remedies that addressed both competition and public interest concerns.[43] In terms of the public interest concerns, the competition authorities proposed remedies that would address public interest concerns relating to employment, de-industrialisation, a reduction (in investment) in research and development and the "*effect on [the] particular sector*". As was the case in the Walmart merger, a South African government department (in this case, the Department of Trade and Industry) intervened in the merger proceedings primarily on the basis of the public interest factors.

IV. Imposing Remedies in the Case of Multi-Jurisdictional and Cross-Border Transactions

Merger filings in multiple jurisdictions require the merger parties to coordinate the timing of such filings, taking into consideration the closing date for the merger, the coordination of information collation in order to ensure a degree of consistency between filings, local legal conditions and, if relevant, a consideration of the types of settlements or remedies that may be required in various jurisdictions while still satisfying the requirement that a financially sustainable solution is found for the merged entity as a whole.

This is further complicated by the challenges that merging parties face, particularly when they are confronted with varying levels of detail required for filing forms and formal documents which accompany a merger notification, different procedural requirements and review periods. For example, unlike the US which has a pre-notification regime, and Europe, which adopts a phased approach to filings, the South African authorities have a defined time period within which to investigate mergers[44].

Our experience of dealing with multi-jurisdictional transactions has highlighted the fact that while there is no obligation on the South African competition authorities to cooperate in relation to foreign investigations, or to recognise any determinations made by other antitrust authorities, the Competition Commission is frequently guided in its deliberations by outcomes and decisions that are being made by its overseas counterparts. It is often the case that the Competition Commission has requested that

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[43] *Kansai Paint Co. Ltd. and Freeworld Coatings Ltd. 53/AM/Jul11.* Kansai subsequently filed a "Request for a Review of the Intermediate Merger" before the Competition Tribunal in an effort to overturn certain of the conditions imposed by the Competition Commission.

[44] It is also our experience that the vast majority of international multi-jurisdictional mergers which are filed in South Africa are classified as "intermediate mergers". Importantly, only the Competition Commission, and not the Competition Tribunal, is required to review intermediate mergers within a finite period of 60 business days.

merging parties provide waivers to facilitate the inter-agency cooperation. While it is within the discretion of the merging parties to provide these waivers, these are generally agreed to.

The merger between *Schering-Plough* and *Organon*[45] provides an illustration of the manner in which the South African competition authorities will approach a horizontal multi-jurisdictional merger transaction (which had implications across many geographic markets including the US, EU and South Africa).

The case provides an example of a merger where a remedy “package”, which related mainly to certain product divestitures, had to be negotiated, taking into account the implications across many markets. In addition, South African—specific considerations featured, whereby the parties had to agree to the extension of a distribution agreement involving a player that had black economic empowerment credentials (namely Afrivet). The issue of black economic empowerment credentials went specifically to the public interest consideration of promoting enterprises that are owned by historically disadvantaged persons who were previously excluded from participation in the formal economy. It is noteworthy that in this case, it was the intervention of Afrivet, a third party, which led to the imposition of this condition.

In the great majority of cases, the competition authorities will allow parties to implement a merger subject to a divestiture package, before an upfront buyer has been identified. Generally, some of the key terms and conditions of a divestiture order include the determination of a period within which the parties must dispose of the assets or product in question (this is generally fixed at six months), a provision which allows the Competition Commission to approve the purchaser on the basis that it satisfies certain requirements (such as viability, etc.), and the appointment of a monitoring trustee to ensure that the product or business to be divested is preserved until a suitable purchaser has been identified and to oversee the sale process.

Given the limited period within which the Competition Commission has to review an intermediate merger notification, the issue of timing is a significant consideration when coordinating multi-jurisdictional filings which have an impact in South Africa. In our experience, despite careful planning across many jurisdictions, various legs of the merger adjudication process can be subject to unforeseen delays. In order to permit closing before clearance in South Africa, a hold—separate agreement can be put in place, allowing parties to ring—fences the South African operations pending approval. This has the potential to be a lengthy process requiring

[45] Intermediate merger between *Schering-Plough Corporation and Organon BioSciences N.V. Case:2007Jul3039.*

the appointment of an escrow agent to hold shares pending finalisation. This highlights the need to identify early on where notifications may be required, the collection of basic information and to identify potential issues that may be encountered in the affected jurisdiction.

A report by Whish and Wood, which assessed merger control procedures in various jurisdictions, noted that "[…] *even where all agencies began their reviews contemporaneously, which is a rare occurrence, the lengthy review process of some agencies and the lack of a fixed endpoint by others both created cost and uncertainty for the merging parties*"[46].

This in itself highlights the difficulties that are likely to be encountered even when parties have the best intentions to embark on a coordinated notification process.

Ensuring the coordination in merger review timing between jurisdictions is vital in order to avoid imposing inconsistent or conflicting remedies. In some cases it may be necessary to ensure that remedies adopted in one jurisdiction are effective and do not adversely affect remedy outcomes in other jurisdictions. Furthermore, even greater cooperation across jurisdictions will be required where a single remedy package, which addresses concerns across various jurisdictions, is being negotiated.

V. The Likelihood of an Increase in Transaction Cost to Take into Account the Filing Realities in the Region

Multi-jurisdictional merger notifications are complex and have the potential to significantly reduce transaction certainty (from both a timing and outcome perspectives) while increasing costs.

We have observed that in the case of South Africa, while the local competition authorities will certainly conduct an independent review of the merger, there is a preference (in the context of global transactions) for the competition authorities to seek to ensure consistency in the outcome of the transaction by coordinating and cooperating with its counterparts overseas.

In South Africa, even in cases where no competition issues arise, public interest issues and, in particular the impact of a merger on employment, have played a significant role in the merger review process. In this respect, South Africa is somewhat unusual, and merging parties need to carefully consider the manner in which the merger will ultimately impact

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[46] Richard Whish and Diane Wood, *Merger cases in the real world—A study of merger control procedures* (OECD, 1994) Referred to at the International Competition Network, Report on the Costs and Burdens of Multijurisdictional Merger Review, Mergers Working Group Notification and Procedures Subgroup, November 2004.

upon each specific public interest criterion. In light of the recent highly politicised proceedings in the merger between Walmart and Massmart, this is the case now more so than ever before. A thorough knowledge of the local requirements and an ability to navigate the local regulatory terrain are therefore essential. Recent precedent is indicative of the need to properly canvass these issues upfront with local counsel and take them into account in the merger notification process. Parties to merger proceedings need to prepare their merger submissions accordingly.

We should also highlight that other sub-Saharan African countries such as Botswana, Malawi, Namibia, Swaziland and Zambia include some form of public interest consideration as part of their competition regulations and these considerations tend to be accorded significant weight in the adjudication process.[47] In 2009, the Common Market for Eastern and Southern Africa ("COMESA") launched the COMESA Competition Commission with the main function of applying the COMESA Competition Regulations, whose function also includes facilitating "*exchange of relevant information and expertise*". It is highly likely that authorities and courts in these jurisdictions will look to South African jurisprudence in their treatment of public interest considerations in merger adjudication.

CONCLUSION

While parties continue to seek certainty in the merger review context, the additional public interest criteria contained in the South African Competition Act, which have recently been brought to the fore (during the *Wal-mart* matter and as emphasized by the Minister for Economic Development) will no doubt result in greater transactional costs for international parties filing notifications in South Africa with the concomitant risk of unique remedy conditions being imposed by the competition authorities. It is likely, given the South African government's stated emphasis on providing opportunities to participate in the formal economy to previously disadvantaged persons, that this public interest factor will also become a hotly debated factor in future merger proceedings.

[47] In this regard, it is telling that the following jurisdictions also have a "public interest" assessment included in their respective merger control regulations: Botswana (see Section 59(2)(e) and (f) of the Competition Act No. 17 of 2009); Malawi (see Section 38(1)(b)(vi) and (vii) of the Chapter 48:09, Competition and Fair Trading Act 43 of 1998 G.N. 9/2000); Namibia (see Section 47 (2)(c), (e) and (f) of the Competition Act 2 of 2003); Swaziland (see Section 17(2)(h)(i),(ii) and(iii) of the Competition Act 8 of 2007); Tanzania (see Section 13(1)(b)(vi) of the Fair Competition Act 8 of 2003) and Zambia (see Section 31 (a),(b), (e) and (h) of the Competition and Consumer Protection Act No. 24 of 2010).