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Rules and Discretion in Competition Policy: Large Horizontal Mergers in South Africa

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1. Introduction

The new South African competition legislation, the Competition Act no.89 of 1998, has now been in force for four years. The purpose of this article is to review the operation of the law in regard to large mergers.[1] The Competition Act is not restricted to mergers, but also covers the other main areas of competition policy, including collusive arrangements between firms, unilateral anticompetitive conduct and vertical restraints. The new institutions set up by the Act – the Competition Commission and Competition Tribunal – have, however, devoted a large part of their attention to mergers. The Act newly provided for pre-notification and pre-clearance of certain types of merger, ensuring a steady stream of cases, and there have been more reports published in this area than in the other areas combined. The current paper restricts attention to large mergers, which are those that must come before the Tribunal, and within that set to a number of the more notable horizontal mergers.

The legislation as it applies to mergers is set out in sections 11-18 of the Act, in particular section 12A, which is reproduced in the appendix to this paper. The key test is whether the merger is found to be "likely to substantially prevent or lessen competition". If such a result is found, the possibility of an offsetting efficiency defense must be examined.[2] An anticompetitive merger might also be justified on substantial public interest grounds, but it is also true that a competitively neutral merger might be prevented on the basis of adverse public interest effects. Four public interest criteria are specified, concerning the

[1] For other reviews of South African merger policy, see Theron (2001) and Legh (2002), and for South African competition policy more generally, see Brassey et al (2002) and OECD (2003).
[2] To be precise, "any technological, efficiency or other procompetitive gain". See the appendix.

effects of the merger on (a) the particular sector or region, (b) employment, (c) the competitive prospects of small firms or firms owned or controlled by historically disadvantaged persons, and (d) the international competitiveness of the industry.

Most competition laws concerning mergers include a form of words like "substantially prevent or lessen competition". The public interest criterion is less standard, but not unprecedented – the effect on the public interest was for many years the avowed standard of British competition law. Legislators are concerned that enforcement of competition law will conflict with other economic and social priorities. Commentators are correspondingly concerned that inclusion of broad criteria will hamper efficient operation of the competition laws (e.g. Reekie (1999)). One issue is clearly how predictable the operation of the law then becomes. The breadth of the public interest standard means that it must be interpreted by the authorities, who have substantial discretion. It is therefore of interest to see how the authorities address these questions in practice.

Although analysis of the competitive implications of the merger is a central concern, the criteria qualifying a merger for consideration are understandably cast in terms of more transparent turnover and assets figures.[3] As a consequence many of the large mergers considered have been found to raise no significant competition concerns. To date, the Competition Tribunal (henceforth simply "the Tribunal") has produced over 150 reports on large mergers. About half of these run to no more than three A4 pages.

[3] At present a large merger is one in which *both* the combined annual turnover or assets of the firms are at least R3,5 billion *and* the target firm's annual turnover or assets are at least R100 million.

At the other extreme the Tribunal has prohibited four mergers and has approved eleven others only conditionally. The majority of these cases concern horizontal mergers, i.e. where the merging firms are direct competitors. A significant minority of the cases – and two of the four prohibitions – are by contrast concerned with vertical mergers, i.e. mergers between firms at different – usually adjacent – stages of the production and distribution process. The competition concerns of these two types of mergers are distinct. The current paper focuses on horizontal mergers. I shall briefly review the cases in which a substantial effect on competition was found, and where this has led to either prohibition or conditional approval.

The remainder of the paper is structured as follows. Section 2 provides a discussion of horizontal mergers. Section 3 presents some of the key cases of the Tribunal, and section 4 draws together some of the emerging themes.

2. Horizontal mergers

Horizontal mergers – mergers of competing firms – are one of the core concerns of competition policy. At their most extreme, they can involve merger-to-monopoly, and thus the creation of avoidable monopoly positions and the consequent likelihood of high prices. Competing firms can align their interests more securely through merger than by a price-fixing agreement or arrangement: merger removes the possibility of the agreement collapsing as individual firms pursue their individual incentives to expand output.

Firms do not simply merge to better exploit market power, however. There are a series of motivations under the heading of "the market for corporate control". Merger – or takeover – provides a means by which the management of a firm can be changed. This may be because a target firm is perceived as poorly managed, in which case it may also be true that there is more than one potential suitor. Many mergers have a considerable amount of urgency about them, partly because one potential deal might be replaced by another. This gives mergers a rather different character to other aspects of competition policy.

As noted in the introduction, the Tribunal must establish whether a merger "is likely to substantially prevent or lessen competition", a similar criterion to those in force in other jurisdictions. As part of this it must assess "the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively…" In doing so, it must take into account "any factor that is relevant to competition in that market". Eight relevant criteria are then listed. These include some factors that would certainly have to be part of any evaluation of competition, e.g. levels of concentration, and others that might be expected to figure in some mergers but not all.[4] There is then the efficiency defense to consider. The legislation therefore provides considerable detail of what the merger evaluation might include, but not much guidance as to how an inquiry should be structured – which factors might have predominance, how any trade-offs should be carried out, etc. These questions

[4] Although the list includes most of the factors that could be relevant, pricing and profitability are not explicitly mentioned.

are only resolved through operation of the laws, and it is interesting to see how the Commission and Tribunal have set about these issues.

In other jurisdictions with long-standing merger policies, the USA in particular, enforcement agencies have over time adopted a system of guidelines that outline the basis of challenges to mergers. [5] There are two principal advantages to such a system. First, it increases clarity and predictability. Second, it leads to important deterrent effects. If the policies of the enforcement agencies carry through to final decisions – in the US case that is if prosecutions are upheld by the courts – then firms will usually choose to avoid the cost and delay of investigations by proposing only mergers consistent with the guidelines. The policy is then carried out without the need for many cases.

There is clearly a tension between the number of factors that can be brought into consideration, and the predictability of the resulting policy. In US merger policy one of the central considerations has been the level of concentration in a market and the increase in concentration caused by the merger. Since 1982 these guidelines have been expressed in terms of the Herfindahl-Hirschman Index (HHI), which is the sum of squared market shares of all suppliers of the market. This is not the only concentration index available – indeed the earlier 1968 guidelines were cast in terms of four-firm concentration ratios – but it is well-known and widely understood. The index runs in principle from zero – where all firms are atomistic – to 10 000 – which represents a monopoly. The guidelines define safe harbours in terms of the level and increase in the index that will not normally be prosecuted. There are three ranges: first, if the HHI post-merger is less than 1 000,

[5] See http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

then a merger will not be challenged; second, if the HHI post-merger lies between 1 000 and 1 800, then mergers will not be challenged if the increase in the index is less than 100; third, if the post-merger HHI is above 1 800, then the merger will not be challenged if the increase in the HHI is less than 50. At higher levels of concentration there is therefore increasing concern with smaller mergers.

The apparent transparency of this standard is reduced by the fact that it must first be established what the relevant market is. Clearly a broad definition of the market – including core products plus many possible substitutes – will generally result in lower levels of concentration than a definition focusing on the core products alone. Whether a merger is judged on the basis of the HHI or simply the combined market shares of the participating firms, this has traditionally been the area of contention in merger proceedings. The broader the market definition, the lower the levels of market shares and concentration indices, and thus the more likely the merger is to be allowed. The US guidelines address this issue by requiring that the market defined is one that could in principle be profitably monopolized. Starting from the initial definition, a small but significant, non-transitory increase in price ("SSNIP") is proposed. If it is found that customers would switch to substitute products, then these products are included in the product market definition and market shares recomputed. The guidelines also set out how new entry is to be considered as a constraint on the exercise of market power and how efficiency defenses are to be addressed.

The operation of merger policy in the USA and other jurisdictions provides lessons that the South African authorities might want to draw on, and that merger participants are likely to be familiar with. At the same time, the South African legislation has some different concerns from legislation elsewhere, and South African industry has its own distinct characteristics. The early operation of the legislation shows how the global principles, local concerns and local issues balance, and it is to these I now turn.

3. Tribunal cases

In this section I shall briefly review ten of the large horizontal merger cases brought before the Tribunal under the Competition Act. These include the cases in which mergers were prohibited, or in which approval was made conditional on some divestiture of assets.

3.1 Bromor Foods/National Brands (14 April 2000)[6]

This merger concerned the sale by National Brands, a subsidiary of Anglovaal, of the sports drink business Game to Bromor Foods, a subsidiary of Cadbury Schweppes. The merger took place the day before Competition Act came into force, and therefore consummation of the merger did not have to wait for clearance by the Tribunal.

[6] I use abbreviated titles of the reports and give the date of publication. Full titles and formal case numbers are listed at the end of the paper.

The Tribunal found that the relevant market was the South African market for ready-to-drink sports drinks, a much narrower definition than that put forward by the Commission, which did not object to the merger. The justification for this is provided in paragraph 14 of the report. On this basis the merger eliminated one of three major competitors, leaving only competition between Bromor Foods with its Energade brand and Coca Cola with Powerade, and a fringe of smaller firms with combined 10% market share, with no firm having more than 1%.

The HHI was calculated to increase from 3995 pre-merger to 4540 post-merger with the addition of Game's 4.4% market share to Energade's 55.1%. Entry barriers in the form of sunk marketing costs were considered high, and the U.S. FTC decision against the merger of Coca Cola and Dr Pepper was cited in support of this.

Because the merger had taken place and the Game drink was not subsequently promoted, a divestiture was not recommended. The conditions imposed on the merger were therefore milder: (a) that the condition of the merger agreement preventing National Brands from re-entering the market be declared void; (b) that Bromor maintain the game brand marketing at then current levels for two years; (c) that if the brand was to be sold this would not be to Coca-Cola or a Bromor subsidiary and that the transaction be notified to the Commission.

3.2 Naspers/Educor (30 June 2000)

This case concerned the merger of the education businesses of Nasionale Pers Limited (Naspers) and Education Investment Corporation (Educor) into a new company, NewEd. The Tribunal defined three relevant markets within the general education sector: (a) secondary level education of young adults; (b) certain broadly defined courses in tertiary education; and (c) further education in business skills; and found a likelihood of substantial reduction of competition in the first and third of these. No market share or concentration measures were presented, though the new company was the largest provider of the two groups of services. The discussion of efficiency gains was very brief. Under the public interest heading the Tribunal noted the particular importance of the sector, having earlier discussed the legacy of apartheid for the education system. Ultimately it gave a conditional approval to the merger, the main condition being the divestiture of Success College, an issue which it postponed and entrusted to the Commission.

3.3 JD Group/Ellerines (30 August 2000)

This was the first merger to be prohibited under the act. There was very extensive discussion of the relevant market, which the Tribunal concluded to be "the sale of furniture and appliances on credit to consumers in the LSM3-5 category through national chains of 'furniture shops'". On the basis of this definition the merger would combine JD Group's 11.7% market share with Ellerine's 22.0%, increasing the HHI from 1809 to

2324, a change of 515. Estimates of the 4-firm industry concentration ratio were also offered. The report then stated: "given the widely disparate HHI calculations, we are not willing to place complete reliance on any of these measures. Nor do we believe that the HHI, even when a relatively straightforward calculation, should, on its own, constitute the basis for deciding on the outcome of a merger investigation. The HHI are *indicative* statistical measures; they are not determinant. They must always be bolstered by a deeper, qualitative enquiry in order to arrive at a realistic assessment of the impact of the transaction on competition in the relevant market." (p.23) The report went on to discuss the importance of competition in offering credit – not in terms of price, but availability – and the difficulty of entering this business.

3.4 Tongaat-Hulett/Transvaal Suiker Beperk (27 November 2000)

This was the second large merger prohibited by the Tribunal. It involved the Tongaat-Hulett Group (THG) and the Transvaal Suiker Beperk (TSB) group of companies, respectively the second and third largest sugar millers and refiners in South Africa. The report detailed the very extensive amount of protection and regulation of the industry worldwide. The Tribunal accepted the Commission's argument that the appropriate geographic market definition was because of this the national market and not the world market.

Market shares for the national market were 36% for Tongaat-Hulett Sugar, Illovo 31%, TSB 18% and Swazi Sugar 15%, and the merger would thus increase the HHI by 945

points from 2629 to 3474. (The level and increases in the direct sales sub-market were even higher.) The Tribunal still had to address the question of whether competition would be reduced, given that domestic prices were at the level of import prices. It argued that the reason for this was because of lack of competition, itself engendered by the Equitable Proceeds Arrangement ("EPA"), a revenue sharing scheme operated by the industry and sanctioned by the government. The basis for opposing the merger was then that it would preclude any increase in competition should the regulatory regime be changed: "while a lessening of competition may not be reflected in a price rise, the introduction of competition may result in a price decrease." (p.16) Although it did not see a removal of the EPA as inevitable, it concluded that the merger would adversely affect potential competition: "while it may be difficult, given the low baseline, to assert with confidence that competition will be '*substantially* lessened', we are satisfied that *potential* competition will be 'prevented' by this merger" (p23)

3.5 Trident Steel/Dorbyl (30 January 2001)

This case concerned the purchase by Trident Steel of the Baldwins Steel division of Dorbyl. The key relevant market was that for a particular kind of steel, improved surface finish or ISF, used in the automotive industry. The two firms were the only domestic producers, with 35% of the market each. No market share breakdown was available for the 30% of supplies that were imported. The parties and the Commission argued that this was an international market, but the Tribunal did not accept this, proposing instead that it was a national market subject to some import competition. The basis for this was that the

imported products were imperfect substitutes for the domestic ones, and used only in the event of shortages; that there were tariffs in the range 32%-43% and the export incentive scheme meant that importing components would be costly to subsequent exporters; currency fluctuations were also mentioned. Counterveiling power was also dismissed and it was concluded that there would be a substantial lessening of competition.

The case was notable in being the only one to date in which an efficiency defense was accepted. The report contained about eleven pages of discussion of the legal issues concerning efficiency defenses. It then discussed the efficiencies under three headings. Plant efficiencies covered the issue that Trident had under-utilized plant that could process certain products more efficiently than could Baldwins, and that the Baldwins plant could be efficiently redeployed. Supply efficiency covered the fact that the increases in scale of joint operation would enable the merged firm to buy correctly sized products from its supplier, Iscor. Volume discounts covered precisely that, and were not counted. The Tribunal concluded that the efficiencies were "so overwhelming…that they will dwarf the anticompetitive effects. We must bear in mind that the merging firms ability to increase price is only up to the import parity price…Had this not been the case, we may have either found the trade off had not been sufficiently established or we might have considered approving the merger, but subject to appropriate behavioural conditions." (p.24)

3.6 Nestle/Pets Products (18 June 2001)

The case concerned the acquisition by Nestle of Pets Products from its joint owners, Heinz SA and Tiger Foods. Both firms manufactured and sold pet food, of which overall market they had market shares of 10.5% (Nestle) and 18% (Pets Products). The other large supplier was Masterfoods with a 23.1% share and imports had approximately 7% of the market.

The Commission had presented a further division of the market which the Tribunal accepted. Cat food and dog food were distinct since they were marketed in different ways and had different ingredients – cat food was more palatable. Wet food – typically tinned – was distinguished from dry food since these were manufactured in different ways and there was slight evidence of complementarity, wet food being a treat. The final distinction was between the retail and non-retail channel of distribution. The latter was through veterinarians and other specialist outlets, where nutritional value was foremost and there were significant price differences from the retail channel in which the parties supply was concentrated.

Market share and concentration information were presented for the three markets of substantial overlap. In wet cat food the HHI would increase by 190 points from 2772 to 2961 and in dry cat food by 900 points from 3538 to 4438: "sufficient to cause concern on most conventional analysis". In dry dog food the increase was by 232 from 815 to 1047, which "[a]t first blush…appears innocuous". The Tribunal went on to further

distinguish economy, medium and premium segments of the market and to present figures for supermarket sales of dry dog food, where the merger would cause a 556 point increase in the HHI from 1423 to 1979. Further evidence of direct pricing competition between the parties' brands was also mentioned.

The Commission had recommended that the merger be approved because high concentration was offset by counterveiling power of the retailers and by low barriers to entry. The Tribunal, however, found that the costs of developing branded products in order to get supermarket distribution were a "huge" barrier to entry. Therefore it recommended only conditional approval of the merger, subject to the divestiture of two Pets Products brands, Dogmor and Catmor. These were identified after consultation with the firms, did not constitute "the crown jewels of the merger, for that would be unfair to the merging parties, but nevertheless could be sold as viable brands to a third party." The Commission was to approve the formal divestiture.

3.7 Unilever/Robertsons Foods (4 April 2002)

Robertsons Foods had a joint venture with Bestfoods, and Unilever had merged with the latter, giving rise to this case. The merger parties produced processed food. The Commission had disputed the parties' broader market definition and had used the product classifications of the market research company, AC Nielsen, which had also been used by the European Commission. In ten categories there was found to be very high combined market shares: the market shares below were reported, although HHI concentrations were

also alluded to. The Commission had found a substantial lessening of competition without mitigating circumstances, and had pressed for a divestiture of all the relevant Unifoods brands, these being under the Royco and Oxo brand names. An agreement was subsequently reached in which some of the products under these brand names were exempted from the divestiture.

Table 1 Market shares in processed foods markets

Product	Unifoods	Robertson	Combined
Packet soup	29.4	48.1	77.5
Soya mince	1.7	31.3	33.0
Sishebo mixes	11.6	83.8	95.4
Salad dressing	14.4	55.4	69.8
Recipe mixes	48.2	18.0	66.2
Dry marinades Pour-over sauces	35.3 47.8	64.5 34.4	99.8 82.2
Dry pasta sauces	49.3	32.7	82.0
Instant soups	67.4	21.4	88.8
Black spreads	10.0	89.5	99.5

The Tribunal was thus presented with an agreed divestiture. It did not feel it necessary to take a definitive view on the appropriate market definition: it noted that the Commission's definition may have been too narrow, but the evidence for wider definition

presented by the parties was agreed not to be convincing. The agreed divestiture was considered to be at least sufficient to deal with the competitive harms of the merger.

3.8 Iscor/Saldanha Steel (4 April 2002)

In this case Iscor was taking sole control of Saldanha Steel, which had previously been jointly owned with the Industrial Development Corporation ("IDC"), and the first issue addressed was whether there had in fact been a change in control. The merger was ultimately given conditional approval, with the conditions concerning *vertical* aspects to do with the supply of steel to Duferco Steel Processing, in which the IDC was a shareholder. In horizontal terms, the case was more to do with potential than actual competition. Saldanha Steel had been developed primarily as an export venture in the field of certain types of hot rolled coil (HRC) steel, a market dominated by Iscor with limited competition from Highveld (about 15% market share) and from imports (variable, but in recent years under 5%).[7] The Tribunal was concerned about the initial restraint of trade aspects – that Saldanha Steel was required not to compete domestically – but conceded that entry into the domestic market was improbable given Saldanha Steel's unfavourable location.

The significance of the case is primarily in articulating the failing firm issues in the legislation. The report surveyed at some length failing firm measures in other jurisdictions, noting in particular that the South African legislation failing firm considerations form part of the competitive assessment of the merger rather than – as in

[7] The case was one of the few to present several years of market share data.

some other jurisdictions – a separate defense. In this case, Saldanha Steel was considered to be failing, and thus the merger would not substantially lessen or prevent competition.

3.9 Nampak/Malbak (15 July 2002)

This case concerned the merger of two of the country's largest packaging firms, whose 38.6% of the industry was "a very significant share indeed". There were three particular markets in which there was competitive overlap. The one in which a substantial lessening of competition was found was the relatively small market for thermal insulation, in which each firm had roughly 35-40% market shares, and in which entry barriers were considered to be high. The merged firm was required to sell to a third party the machine necessary to manufacture the relevant products.

More significant was the Tribunal's decision in the other two overlap markets – general folding cartons and printed foil (and foil laminates). In the former Malbak's 21% market share would be joined to Nampak's 20%, raising the HHI by 840 from 1102 to 1942. In printed foil Malbak's 10.9% market share would be added to Nampak's 20.5% - with the next largest supplier having 11% of the market. The HHI would be raised by 271 from 907 to 1178, which fell into the moderately concentrated range by US guidelines standards.

The Tribunal's decision was that there was not a substantial lessening of competition. In its view the packaging market was moving in part to an international basis as multinational customers sourced their requirements for several national markets from a single plant. In the remaining national market for domestic customers, there was thought to be sufficient competition from other domestic producer. The report does not give the breakdown between these two parts of the overall market. Although the argument reads like a case of public interest criterion (d) (enhancing the ability to compete internationally) this was not how it was presented. Instead there was considered to be no significant limitation of competition in terms of this international market.

A further market considered was that for cigarette cartons where Malbak's 6% market share would be added to Nampak's 81% and where the other competitor CTP Gravure had a 13% share. The HHI would increase by 972 points from 6766 to 7738. The Tribunal here accepted the counterveiling power argument: British American Tobacco had 93% of the South African market, had a long-term supply agreement with Nampak that allowed it to switch suppliers in the event of price increases, and furthermore directly contracted with Nampak's suppliers for the relevant inputs.

3.10 Distillers/Stellenbosch Farmers Winery (19 March 2003)

The last case to be considered here is also perhaps the most notable one to have come before the Tribunal. It concerned a merger that had already taken place, and was in an

industry long characterised by restrictive arrangements.[8] The Tribunal's findings were different from those of the Commission, both at the competitive diagnosis and remedy stages.

Distillers and Stellenbosch Farmers Winery ("SFW") had merged in September 2000 to form Distell. The two firms had previously had the same major shareholders, Rembrandt-KWV Investments and South African Breweries, and the Commission had originally advised that the merger was not notifiable but instead an internal restructuring. On appeal by certain competitors, the Tribunal – backed in turn on appeal by the Competition Appeal Court – had decided that it was, and it was duly notified in December 2001.

The Commission's decision was that competition was restricted in certain traditional alcoholic drink categories, and that divestiture of some brandy and sparkling wines brands was required. The merging parties contended that there was enough inter-category competition to justify a market definition of overall alcoholic beverages, of which the merged firm's share was just under 20%. The report sets out the Tribunal's distinct view of the situation. The key characteristics of this were that inter-category competition was important – for example, brandy competed with vodka – but that the industry was vertically distinguished into premium, proprietary and value markets.

[8] The Tribunal referred to "the breathtaking audacity of these manifestly anticompetitive agreements and their endorsement by the political powers of the time.."

The development of this decision involved a distinct approach from that adopted in big merger cases in Europe.[9] The pricing and market share data were extensively reviewed, though some of this information was excluded from the report on confidentiality grounds. The main piece of evidence for inter-category substitution was an example of a price increase in Distiller's Oude Meester brandy that led to a big increase in sales of Smirnoff vodka, though principally in the KwaZulu Natal province.[10] But the Tribunal did not accept that there was therefore a single market for alcoholic drinks.[11] On the basis of large price differentials and frequent industry references to distinct product areas the three-way distinction was set out. Market shares for these markets were presented on p. 42 of the report.

Table 2 Market shares in alcoholic spirits markets

	SFW	Distillers	Combined
Value	21.4	8.5	29.9
Proprietary	7.7	37.6	45.3
Premium	16.4	26.1	42.5

[9] "..whilst foreign jurisprudence may be, indeed certainly has been, of great assistance in refining our understanding of legal questions and economic theory and in guiding our factural enquiries, it cannot detract from the strong factual basis that must ultimately underpin all efforts to determine a relevant market" p.14

[10] Paragraph 133 merits a lengthy quote: "Obviously there are some important caveats. The type of statistical 'eyeballing' engaged in here does not prove causality…Oude Meester's 'small, but significant, non-transitory' price increase coupled with the concentration in Kwazulu-Natal of the consumer segment at which Oude Meester was directed, persuades us to treat this experience as the single most plausible piece of evidence fro inter-category substitution on the record." p. 32

[11] "Fish paste and beluga caviar are both commonly spread on crackers and both have some plausible relationship to fish, but this does not make a claim to place them in one market at all plausible." p.36

In the value segment there was a predominant third supplier, E Snell & Co, entry barriers were considered low because of limited branding, and there was further intercategory competition from wine. In the premium category branding was predominant, and all the main brands were international and sold in the country on an agency basis. Therefore the main problems were thought to be concentrated in the proprietary segment. Here branding was significant – Snell's had not been able to successfully upgrade from the value segment – but turnover also important. There was some inter-category competition from flavoured alcoholic beverages ("FABs", e.g. Bacardi Breezer), but in this grouping Distillers had at least a 60% market share, unlike the competition offered to value spirits by wine.

At the subsequent remedy hearings, the Tribunal required Distell to terminate contracts relating to the distribution of Martell brands and KWV brands, and further required that no director or nominee of KWV be on the Distell board. This was the remedy proposed by the firm, and distinct from that proposed by the Commission – the Commission had proposed a series of SFW brands offsetting the 7.7% market share increment noted above, but this package of brands was not though viable by the Tribunal.

4. Discussion

The limited number of cases presented here clearly does not provide a basis for an overall assessment of merger policy under the Competition Act. In respect of large horizontal mergers, it remains to examine the characteristics of mergers cleared by the Tribunal. For the other classes of intermediate and small mergers, the procedures are different, but the underlying principles the same. Nevertheless, there are a number of themes that emerge from the limited analysis presented here.

First, the Tribunal has clearly been concerned with mergers that increase already high levels of concentration. Concentration figures are usually presented in terms of the HHI, and the US guideline benchmarks have been used to comment on whether or not concentration is high. Some of the markets considered have been very concentrated, and it is clear that the Tribunal regards further increases as creating a presumption of a substantial lessening of competition that has to be addressed. It is necessary to look at mergers cleared by the Tribunal in order to clarify the general thresholds involved.

Second, market definition is an important and difficult issue. Traditional industry-based definitions are often not satisfactory, but the data needed to address substitutability questions are often either not available or not informative about the central questions. Although it has not followed the formalities of the US guidelines approach (the SSNIP etc), the Tribunal has been concerned with substitutability and has shown itself willing to

move away from more traditional definitions. One repeated concern has been to establish the vertical boundaries of product markets.

Third, the effects of new entry have been kept in mind, but this has not been considered as thoroughly as, say, concentration. The Tribunal will consider entry primarily on the basis of whether there has been recent new entry, and whether the entrants have subsequently been able to grow.

Fourth, the Tribunal has focused on competition and, where a lessening of competition is established, has not then justified mergers on efficiency or public interest criteria. Trident Steel/Dorbyl is the only example here of a successful efficiency defense. As regards the public interest criteria, the Tribunal has carefully outlined its own approach, which is that these objectives must primarily be addressed under the legislation specific to the objective in question, and that the competition legislation can only play a residual role.

Fifth, there has been frequent use of divestiture remedies, and so the numbers of mergers prohibited would not be an accurate indicator of the overall stance of policy towards large horizontal mergers. Just as it is not possible at this stage to say precisely where a merger crosses the line to become anticompetitive, it is not possible to say precisely where a divestiture takes the merged entity back across the line back to safety.

Finally, the reports do show that the Commission's assessments of mergers – or of the appropriate divestitures – are not always shared by the Tribunal. If there was a move towards more formal merger guidelines, this is an issue that would have to be addressed.

Appendix: Extract from the Competition Act no. 89 of 1989 as amended by Act 39 of 2000.

12A Consideration of mergers

(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and –

(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine-

  (i) Whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result form the merger, and would not likely be obtained if the merger is prevented; and

  (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or

(b) otherwise determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(2) When determining whether or not a merger is likely to substantially prevent or lessen competition , the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including –

(a) the actual and potential level of import competition in the market;

(b) the ease of entry into the market, including tariff and regulatory barriers;

(c) the level and trends of concentration, and history of collusion, in the market;

(d) the degree of counterveiling power in the market;

(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;

(f) the nature and extent of vertical integration in the market;

(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and

(h) whether the merger will result in the removal of an effective competitor.

(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

(d) the ability of national industries to compete in international markets.

Cases

Bromor Foods (Pty) Ltd and National Brands Ltd (19/LM/Feb00)

Nasionale Pers Limited and Educational Investment Corporation Limited (45/LM/Apr00)

JD Group and Ellerine Holdings Limited (78/LM/Jul00)

The Tongaat-Hulett Group Limited and Transvaal Suiker Beperk, Middenen Ontwikkeling (Pty) Ltd, Senteeko (edms) Bpk, New Komati Sugar Miller's Parnership, TSB Bestuursdienste (83/LM/Jul00)

Trident Steel (Proprietary) Limited and Dorbyl Limited for the acquisition of three operations of Baldwins Steel, a division of Dorbyl Limited (89/LM/Oct00)

Nestle (SA) (Pty) Limited and Pets Products (Pty) Limited and Heinz South Africa (Pty) Limited and Tiger Foods Limited (21/LM/Apr01)

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 (55/LM/Sep01)

Iscor Limited and Saldanha Steel (Pty) Ltd (67/LM/Dec01)

Nampak Limited and Malbak Limited (29/LM/May02)

Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd (08/LM/Feb02)

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