Key aspects of South Africa's new public interest guidelines

Teboho Bosiu

According to the South African Competition Act, the competition authorities are obliged to consider public interest grounds in merger analysis.[1] The guidelines which were recently finalised by the Competition Commission of South Africa, and gazetted in 2 June 2016, seek to provide guidance on how the Commission will evaluate public interest considerations when evaluating mergers.[2]

An important aspect of the guidelines is the clarification therein that the Commission may approve the merger without conditions, with public interest conditions, or prohibit the merger on public interest grounds.

There are two possible outcomes to a competition enquiry that could inform the public interest enquiry. In the event of a negative competition finding, the Commission must determine whether there are any substantial positive public interest grounds that could justify the approval of the anti-competitive merger. The other possibility is in the event that there are no competition issues, in which case the Commission is required to consider whether the merger raises any substantial negative public interest effects.

In terms of section 12A(3) of the Act, the following public interest provisions should be considered when determining whether a merger can or cannot be justified on public interest grounds:

- Effect on a particular industrial sector or region;
- Effect on employment;
- Effect on the ability of small businesses (SMEs), or firms controlled or owned by historically disadvantaged persons (HDIs), to become competitive; and
- Effect on the ability of national industries to compete in international markets. The guidelines will assist in determining whether this will result in significant positive/ negative externalities that flow back to the domestic economy, i.e., improved technologies, better products/ services, productive capacity, etc.

Previously, the Commission considered these provisions without clearly outlined guidelines which lead to some uncertainty for firms, as demonstrated in the Walmart/Massmart merger. More recently, cases which involved substantial public interest issues include the SABMiller/Coca-Cola, and the SABMiller/AB InBev mergers. These mergers were approved with conditions.

In the former, the Commission found several public interest issues.[3] Firstly, the merged entity would have increased bargaining power which would potentially have negative effects on the local packaging and raw material industries. In this regard, the merging parties agreed to a condition wherein the entity would maintain or improve its level of local production and procurement of inputs made in South Africa. Secondly, the Commission found that the merger would have a negative impact on employment. The parties agreed to the condition that they would maintain the number of employees at the level pertaining at the approval date for a period of not less than three years. Thirdly, the Commission identified that a lack of access to coolers and fridge space would prevent SMEs from competing effectively with the merged entity. In this regard the merging parties agreed to provide 10% of fridge space to SMEs, a landmark condition in the South African context given constraints rival players face in getting their products to be made available in prime fridge space at retail outlets.

In the SABMiller/AB InBev transaction, the Commission also raised public interest concerns.[4] Firstly, the merged entity was likely to foreclose its competitors by refusing them access to input materials. The parties agreed to the condition that they should continue supplying necessary inputs to the third parties for a period of five years, and not to enter into any exclusive agreement not to supply third parties. Secondly, as in the previous case, lack of access to coolers and fridge space was also raised. This issue was addressed in a similar manner as in the SABMiller/Coca-Cola, with the merging parties agreeing to free up 10% of fridge space to SMEs. Thirdly, the merger would result in loss of employment, to which the merging parties undertook not to retrench any employee in South Africa as a result of the merger.

The public interest issues raised in these cases highlight the need for greater certainty on the part of firms when embarking on global, high-value transactions which affect South Africa, and the importance of not deterring firms from investing in the country. However, the cases also demonstrate the importance of the authorities retaining some level of discretion in interpreting the provisions of the Act and agreeing terms with firms on a case-by-case basis as emphasised in the guidelines.

General approach to assessing public interest

In general, the Commission will be guided by the following steps when analysing each of the public interest provisions:

1. Determine the likely effect of the merger on the listed public interest grounds;
2. Determine whether such effect is merger specific;
3. Determine whether such effect is substantial;
4. If the merger is anti-competitive, consider any likely positive public interest effects to justify the approval of the merger; or
5. if the merger is not anti-competitive, determine whether any negative public-interest effects can be justified which may result in the approval of the merger, with or without

conditions; and
6. Consider possible remedies to address any substantial negative public interest effect.

Regarding the effect on employment, the competition authorities require that merging parties declare all potential retrenchments or job creations that are being considered irrespective of whether these are due to the merger or due to operational reasons. The authorities will then analyse whether such impacts on employment are due to duplications, cost-cutting measures, cancellation of supply/distribution arrangements, and/or relocation of offices, plants and facilities.

Regarding the effect on the ability of SMEs and HDIs to become competitive, the competition authorities would consider, for instance, entry conditions or expansion opportunities. However the guidelines are not explicit in this regard, particularly given that entry and expansion are already considered in section 12 of the Act. The guidelines will also consider whether the merger prevents or grants access to key inputs and suppliers, and consider pricing and supply conditions with respect to volume, discounts, quality, and services. Moreover, they will consider whether the merger prevents or allows skills development in the industry, and access to funding for business development and growth.

Measuring 'substantiality'

The term substantial can be open to interpretation in competition law cases and there may be questions about measurability. The guidelines propose a case-by-case approach, taking into consideration the following aspects:

On a particular industrial sector or region

Generally, the Commission will consider as substantial the public interest effect of a merger if;

- The merger's impacts are far reaching and flow beyond that market and sector;
- The merger impedes or contributes towards public policy goals that would have far reaching consequences for the sector as a whole;
- The effect threatens or allows for that region's continued livelihood and sustainability;
- The sector is one where the goods or services traded involve or influence constitutionally entrenched rights;
- The effect is of such magnitude and scale that if allowed, it would be irreversible and cannot be undone.

On employment

Regarding the impact of a merger on employment, substantiality is generally measured based on the following factors;

- The number of employees that are likely to be affected relative to the affected workforce;
- The affected employees' skill levels, qualification, experience, job grade, job description and position;
- The likelihood of the employees being able to obtain alternative employment in the short term considering various factors;
- Whether the sector employs largely unskilled employees, the unemployment rate in the sector;
- Whether the sector is experiencing a trend of retrenchments;
- Whether the sector is a mature or declining sector; and
- Whether the sector is an emerging sector which would suggest future employment opportunities.

On SMEs and HDIs

Lastly, regarding this provision, the Commission will consider whether;

- The affected SMEs or HDIs are impeded from or allowed to compete in the relevant market such that their impediment restricts or participation promotes dynamic competition, innovation and growth in the market;
- Such impediment limits the growth and expansion of SMEs and HDIs and their participation in the relevant market or adjacent markets;
- Their ability to compete allows them to expand in the relevant market or adjacent markets; and
- Any effect on SMEs or HDIs has a secondary effect on other public interest factors such as employment and the industry or region.

Despite the additional clarity provided in the guidelines, there are clearly potentially contentious issues when considering 'substantiality'. For instance, as in the case of the abuse of dominance provisions where substantiality is difficult to demonstrate for smaller firms, it is not clear whether a single SME firm being impeded as a result of a merger is sufficient grounds to restrict the transaction on public interest grounds. It could be argued that in the South African developmental context where there is an increased emphasis on supporting new black industrialists in particular, even a small set of SMEs being adversely affected by a transaction should be cause for concern. The effect on SMEs also needs to be considered in detail given the constraints they face together with the high barriers to entry in some industries. However, the authorities are also required to prevent over-enforcement which could arise from prohibiting every transaction where a small firm is adversely affected.

Notes

1. South Africa Competition Act (No. 89 of 1998).
2. Competition Commission of South Africa. Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 (May 2016).
3. Competition Tribunal. Reasons for Decision: Coca-Cola Beverages Africa Limited and Various Coca-Cola and Related Bottling Operations, Case No. LM243Mar15.
4. Competition Tribunal. Merger conditions: Anheuser-Busch InBev SA/NV and SABMiller Plc, Case No. LM211Jan16.