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I. INTRODUCTION

African countries are increasingly adopting competition law. To date, sixteen countries in Africa have adopted legislation to regulate mergers, and 11 are in the process of promulgating competition statutes. In particular, Southern Africa has seen some interesting developments in the last few years.

II. SOUTH AFRICA

The South African Competition Act was promulgated in 1998 and has been in full effect since September 1999. The South African Competition Commission (the investigative and prosecutorial body) and the Competition Tribunal (the administrative body responsible for adjudication) have developed significant experience with both merger regulation and the prosecution of prohibited practices like cartels, resale price maintenance, and abuses of dominance.

Merger notifications have increased steadily since the inception of the legislation, and in the Commission's financial year ended March 31, 2011 alone, there was a 20 percent increase in merger notifications. The majority of these transactions were approved without conditions, but conditions were imposed in 14 transactions. In the 2010/11 financial year, only 2 mergers were prohibited and 4 filings were withdrawn. However, since December 2011, 7 mergers have been prohibited. Four of these were horizontal mergers involving concentrated industries such as horse racing and healthcare. Three of these prohibited mergers were vertical mergers. The recent trend suggests that the South African Commission may be adopting a more stringent approach to merger reviews.

The Act requires the South African competition authorities to consider public interest factors in addition to the impact of a proposed merger on competition. In recent years, the Commission has placed more emphasis on this aspect of its investigations, and conditions intended to address the impact of proposed mergers on employment in South Africa (such as moratoria on retrenchments for two years after the merger takes place), have been imposed in a significant number of transactions.

The relationship between competition issues and public interest considerations was the focus of the recent large merger in which international retail giant Walmart acquired Southern African retailer Massmart. Although the Commission recommended approval of the transaction without any conditions, three Government ministries (Economic Development Department, the Department of Trade And Industry and the Department of Agriculture, Forestry and Fisheries) participated in the Tribunal hearing and argued that Walmart would significantly increase

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imports and harm small and medium South African suppliers. Trade unions also raised concerns that Walmart was likely to discourage union participation in the Massmart stores and that the merger would lead to a significant deterioration in the conditions of employment enjoyed by Massmart employees.

The Tribunal accepted that the Act requires it to consider whether jobs in the merging companies and in the supply chain may be threatened by a merger, as well as whether the merger is likely to have an adverse effect on South African workers' conditions of employment. The Tribunal imposed the conditions tendered by the merging parties in order to address these effects. However, this decision was set aside by the Competition Appeal Court, which held that the Tribunal should have interrogated the conditions tendered by the merging parties more carefully.

As this case demonstrated, parties to merger notifications in South Africa will need to give proper consideration to issues such as job losses and changes to workers' conditions of employment at an early stage of planning their transactions and, if necessary, tender appropriate conditions which address any negative effects on a much wider range of public interest issues.

The time periods for review of mergers in South Africa are generally in line with international standards, although in 2010 the Commission revised its service standards and provided new guidelines to merging parties on how long clearances of various categories of mergers are likely to take, depending on their complexity.

Mergers in South Africa cannot be implemented prior to receiving the approval of the competition authorities. In the 2010/2011 period, the Commission considered 5 cases in which the parties had implemented mergers prior to obtaining the requisite approval. Over the past 10 years, the fines levied by the Tribunal for firms failing to notify their merger have ranged from between R1 and R500,000. In one recent case, however, the Commission found that WBHO and Edwin Construction were negligent in not notifying their transaction and the parties were fined R1 million and R100,000 respectively in terms of a consent agreement. Royal Bafokeng and Mogs also agreed to pay substantial fines of R1 million and R100,000 respectively for failing to notify their transaction.

The Commission has focused intensively on the detection and prosecution of cartels in the last 5 years, particularly in those sectors of the South African economy identified by the Commission as "priority sectors" because of their impact on poor consumers, namely food, intermediate industrial products, and construction. The Commission has a dedicated unit that leads cartel investigations, and the Commission's Corporate Leniency Policy continues to be a highly effective weapon in the Commission's war on cartels. In the 2010/11 financial year, for example, the Commission received 33 leniency applications. To date, fines in excess of R2.3 billion have been paid by firms for participating in cartels in South Africa. In November 2010, the Tribunal imposed the maximum 10 percent of turnover penalty permitted by the Act on Southern Pipeline Contractors for its participation in a cartel in the concrete pipes industry. Pioneer Foods was also fined the maximum penalty for its involvement in the bread cartel.

Although cases referred to the Tribunal for hearing have been on an upward trend since 2006, the majority of cases are still settled in terms of consent agreements, which are required to be confirmed by the Tribunal. In the 2010/11 financial year, for example, the Tribunal levied

R794,190,704 in administrative penalties, including a fine of R500 million paid by Pioneer Foods for its participation in a bread cartel, and a fine of R112 million paid by South African petrochemical giant Sasol.

Section 59(3) of the Act provides that when determining an appropriate penalty, the Tribunal must consider the nature, duration, gravity, and extent of the contravention; the loss or damage suffered as a result of the contravention; the behavior of the respondent; the market circumstances in which the contravention took place; the level of profit derived from the contravention; the degree to which the respondent co-operated with the Commission and the Tribunal; and whether the respondent has previously been found in contravention of the Act. In a recent wire mesh cartel case, the Tribunal gave guidance on the method to be applied when calculating penalties. The Tribunal took into account the EU guidelines but adapted some of its features to meet the requirements of the Competition Act.

In addition to administrative penalties, the Tribunal has imposed innovative remedies, particularly in cartel cases. For example, Sasol Chemical Industries was ordered to divest five of its six fertilizer blending facilities and to commit to equitable pricing of ammonium nitrate-based fertilizers. In addition to paying a R500 million fine, Pioneer agreed to increase its capital expenditure by R150 million.

III. NAMIBIA

The Namibian Competition Act was promulgated in 2003, but the legislation only came into effect in February 2008 and the Namibian Competition Commission ("NaCC") was only appointed in December 2009.

To date, the NaCC has tended to focus on merger notifications and it has reviewed several large acquisitions, including the takeover of the world's fourth-largest uranium deposit by Taurus Mineral, a subsidiary of state-owned China Guangdong Nuclear Power Holding Company ("CGNPC"). The decision allowed Taurus to purchase controlling shares in Australian-owned Extract Resources, after it was granted an exploration licence for the Husab uranium deposit in Namibia in November 2011.

In March 2012, the Namibian Minister of Trade and Industry approved the acquisition by Walmart of the Massmart retail stores in Namibia, on conditions similar to those imposed by the South African Competition Tribunal. These are that the merged entity must ensure there are no retrenchments resulting from the transaction for two years and must also honor existing labor agreements and continue to recognize trade unions for two years. In addition, the merged entity was required to consult with the Minister of Trade and Industry with regard to the establishment of a program of activities for Namibian supplier development. The NaCC had originally required the merged entity to introduce a local shareholder.

At present, there are no prescribed monetary thresholds for compulsory merger notification in Namibia, which means that all mergers involving Namibian entities or which have an effect in Namibia have to be notified. To date, the NaCC has reviewed mergers in a variety of sectors of the Namibian economy, including mining, banking and financial, cementitious products, telecoms, and retail. In November 2010, the NaCC issued its first merger prohibition in respect of the proposed transaction between Afrisam (a South African cement producer) and local cement manufacturer Ohorongo.

The NaCC is required to provide a determination on a proposed transaction within 30 days of receipt of the notification, alternatively within 30 days after receipt of additional information if such information is requested. If the NaCC convenes a conference on a proposed transaction, the NaCC is required to provide their determination within 30 days after conclusion of the conference. Any of these time periods can be extended by notice in writing for a further period not exceeding 60 days. As in South Africa, mergers may not be implemented prior to obtaining the requisite approval from the NaCC. A penalty of up to 10 percent of the global turnover of the undertaking during its preceding financial year may be levied for the implementation of a merger in contravention of the Namibian Competition Act.

The NaCC has also investigated anticompetitive practices in Namibia like price-fixing, particularly in the manufacturing, agriculture, and construction industries. The Bank of Namibia recently signed an agreement with the country's competition authority, promising to help facilitate a competitive banking market. There is currently no corporate leniency policy; however, the NaCC is currently drafting a policy. Companies held to have contravened the Act may be fined up to 10 percent of their global turnover during the preceding financial year.

IV. BOTSWANA

The Botswana Competition Act came into effect with the implementation of the regulations on October 14, 2011. Before this, the only sections in effect were those that established the Authority to enforce the legislation.

The Botswana Competition Authority approved its first merger in December 2011, the merger between Marsh Botswana and Alexander Forbes Risk Services Botswana. To date, no mergers have been prohibited.

The Authority is required to decide on a merger within 30 days of receipt of the notification, alternatively 30 days from receipt of additional information if such information is requested or 30 days from the date of conclusion of a hearing. Any of these time limits can be extended for a period of 60 days. Mergers may not be implemented prior to obtaining approval from the Authority. There is no fine specified in the legislation for implementation of a merger prior to clearance, but the Authority may give directions that, among other things, the parties must refrain from implementing the transaction. Should they fail to comply, an application to Court may be made requiring them to make good the default.

The Authority also has jurisdiction over restrictive business practices like price-fixing. The maximum penalty imposed in terms of this subsection shall not exceed 10 percent of the turnover of the enterprise during the breach of the prohibition, up to a maximum of three years. Unlike South Africa, however, there is currently no corporate leniency policy in place.

V. SWAZILAND

Although the Swaziland Competition Act was promulgated in November 2007, the Swaziland Competition Commission only began operating in 2010 after the commencement of the Competition Commission Regulations in June 2010.

The Commission regulates both mergers and anticompetitive trade practices. To date, it has ruled on a number of significant transactions, including Walmart's acquisition of Massmart, and U.K.-based Premier Foods' acquisition of two bakeries, Swaziland United Bakeries and

Mister Bread. The acquisition was notified to Swaziland's Competition Commission, which cleared the transaction in December. This approval was unsuccessfully challenged in the High Court in February 2012 by Ngwane Mills, Swaziland's largest milling company and a supplier to the bakeries. The High Court ruled that it had no jurisdiction to hear the case, and also that Ngwane Mills did not have the legal rights to appeal against the Commission's decision as it was not a party to the merger.

Implementation of a merger in Swaziland prior to receiving approval may result in a fine not exceeding 250 000 Emalangeni or to imprisonment for a term not exceeding 5 years, or both, although these sanctions have not yet been applied.

Similarly to Namibia and Botswana, there is no corporate leniency policy and the penalty payable for the contravention of the act is a fine not exceeding 250 000 Emalangeni or to imprisonment to a term not exceeding 5 years or to both.

VI. CO-ORDINATING COMPETITION LAW ENFORCEMENT IN SOUTHERN AFRICA

As cross-border trade in Southern Africa increases, there is a need for greater co-ordination between competition regulators in order to facilitate efficient merger clearances and enhance competition law enforcement.

There is currently no formal mechanism in terms of which the competition authorities in South Africa, Botswana, Swaziland, and Namibia can liaise in order to review mergers. This means that merging companies with operations in each jurisdiction will have to assess whether their transaction constitutes a "merger" as defined in each jurisdiction, and whether the monetary threshold for compulsory notification in each is met. If so, the parties to the merger will have to file separate filings in each country. Different review time periods then apply and the authorities in each jurisdiction may apply different rules when assessing whether to approve the transaction. Some legislation, like that in Swaziland, makes express provision for "ring-fencing," or the implementation of a cross-border transaction in countries other than Swaziland. In other countries, like South Africa, there is no provision that permits the implementation of a merger anywhere in the world prior to clearance if it has an effect in South Africa, and the Competition Commission takes a dim view of this practice.

Complaint investigations are also currently pursued independently by the regulators in each jurisdiction, and there is no provision in any of the legislation, which allows an authority to take into account fines for anticompetitive conduct that have already been paid by a company in a neighboring jurisdiction. Double jeopardy is thus a serious concern: it is possible that a single instance of price-fixing in the Southern African Customs Union could expose the members of the cartel to fines of up to 10 percent of their global turnover in each individual jurisdiction.

However, some moves toward greater co-ordination between the authorities are evident; for example, in terms of treaties such as the Southern African Customs Union Agreement, which provides for the co-operation between Member States with respect to the enforcement of competition laws and regulations; the COMESA Competition Regulations which establishes the COMESA Competition Commission to "monitor, investigate, detect, make determinations or take action to prevent, inhibit and/or penalise undertakings whose business activities appreciably restrains competition within the Common Market;" and the 2009 Southern African Development Community Declaration on regional co-operation and competition. This

Declaration, providing for a system to be established for effective cooperation in the application of Member States' respective competition and consumer protection laws, is a move towards adopting one body to regulate competition concerns cross-border. In addition, the African Competition Forum was launched in Kenya in March 2011 with the principal objective of promoting the adoption of competition principles in the implementation of economic policies in member countries. Participation by the South African, Namibian, Botswana, and Swaziland competition authorities in the International Competition Network will also hopefully enhance their co-ordination on both substantive principles and procedures.

Merging parties involved in Southern African transactions need to take into account the different systems of merger regulation and merger review time periods applied in different jurisdictions and need to allow sufficient time to obtain clearance for their transactions in Southern Africa.

Companies doing business in these jurisdictions need to be aware of the different competition law rules applied in each jurisdiction in which they trade. Comprehensive competition law compliance programs need to be put in place to ensure that companies are not exposed to substantial fines for violations of competition law and protracted litigation with the Southern African competition authorities.