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CLIFFE DEKKER HOFMEYR

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Much of the subsequent media frenzy around these ground breaking amendments, threaten fines up to R500,000 and/or imprisonment up to 10 years. Although this was the clear intention when the Amendment Act was first published in 2009, it appears that the actual sanctions require some clarification.

This is because the April 2016 Proclamation only brought into effect certain sections of the 2009 Amendment Act. It did not bring into force the proposed amendment to our existing Competition Act, which would have included this new collusion offence as one which attracts fines up to R500,000 and/or imprisonment up to 10 years (s74). The result is that, for the time being, the new collusion offence falls into the category in our existing Act which provides for fines up to R2,000 and/or imprisonment up to six months.

The original proposed amendments received strong criticism. If intentional, this s74 omission could be an attempt to retain personal, criminal liability as a deterrence to collusion, *albeit* with 'softer' sanctions than originally envisaged. While a R2,000 fine may be a mere slap on the wrist for a wealthy executive, facing a possible criminal record, disqualification as a director and significant reputational damage, topped with six months jail time, is scarier than a career limiting move. Arguably, Mr Patel has not softened the blow and what remains is a strong incentive not to collude.

Competition law training and audits undoubtedly need to be at the top of the compliance agenda for directors and all employees who act in management roles. Caution should not however come at the risk of stifling pro-competitive, innovative behaviour. For example, *bona fide* efficiency-enhancing joint ventures between competitors potentially contribute to the economy's growth and development. Seeking expert competition law advice can assist in balancing the obvious need for strict compliance (in avoidance of jail time), against the desire for lawful collaboration with competitors in a transactional or business environment.

The controversial reverse onus provision (s73A(5)) was also not promulgated. In terms of this proposed amendment, a settlement agreement approved by the Tribunal containing an admission of liability, or a finding by the competition authorities, that the firm had engaged in

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collusion, could constitute *prima facie* proof of the contravention. This omission of a provision which undermined the rights to a fair trial and to be presumed innocent until proven guilty, was assumedly intentionally aimed at averting constitutional challenges.

However, it remains that the National Prosecuting Authority (NPA), as opposed to the specialist competition authorities, will be responsible for prosecuting these new criminal offences. The competition authorities have had many successes in routing out anti-competitive behaviour with the use of their leniency programme.

Going forward disclosures to the competition authorities, whether during leniency or in general dealings, are likely going to become much more circumspect. This is because of the risk of evidence of self-incrimination, which could be used by the NPA.

While white-collar crime deserves its day in court, given South Africa's uphill battles against the most heinous of crimes and our overcrowded jails, one wonders whether this is currently the wisest use of the NPA's limited resources.

Susan Meyer

CLIFFE DEKKER HOFMEYR

HIGHEST FINE TO DATE FOR FAILURE TO NOTIFY A MERGER AND PRIOR IMPLEMENTATION

Life Healthcare Group (Proprietary) Limited (LHG) and Joint Medical Holdings Limited (JMH) agreed to pay an administrative penalty of R10 million – the highest fine ever imposed to date for a failure to notify a merger.

The threshold for a large merger was met, the Commission found that LHG and JMH failed to give notice of the merger as required by Chapter 3 of the Act and proceeded to implement the merger without Tribunal approval, in contravention of s13A(3) of the Act.

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In this case, despite LHG not having a majority shareholding in JMH, the Commission found that no major business decision regarding JMH's business would be taken without LHG's approval, including its budget, the appointment of key employees and items of major capital expenditure. Importantly, the Commission found that this quality of LHG's control over JHM constituted a merger in terms of s12(1) of the Competition Act, No 89 of 1998 (Act).

Since the threshold for a large merger was met, the Commission found that LHG and JMH failed to give notice of the merger as required by Chapter 3 of the Act and proceeded to implement the merger without Tribunal approval, in contravention of s13A(3) of the Act. This failure to notify a merger and prior implementation was admitted by both LHG and JMH which subsequently entered into a consent agreement with the Commission. Moreover, LHG disinvested from JMH.

In addition, the Commission found that LHG and JMH agreed that all their prices would be set jointly, with all price negotiations being conducted by LHG on its own behalf and on behalf of JMH, in contravention of s4(1)(b)(i) of the Act. However, in return for their admission pertaining to prior implementation of the merger absent approval, the Commission agreed (in an addendum to the consent order) not to pursue a price-fixing case against the parties.

Yusrah Ehrenreich and Natalie von Ey

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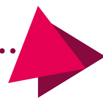
TOUCH, PAUSE, ENGAGE, BUT ONLY ONCE CLEARED...

It is imperative for the merging parties to remain and act like separate independent entities and continue, in the case of competitors, to compete ahead of receipt of competition clearance.

The parties must be highly cautious and restrained in exchanging documents and information during the due diligence which may lead to a substantial lessening or prevention of competition.



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It is imperative for the merging parties to remain and act like separate independent entities and continue, in the case of competitors, to compete ahead of receipt of competition clearance.

The Competition Act, No 89 of 1998 (Act) imposes a *per se* prohibition on competitors from reaching agreements with one another relating to, *inter alia*, price, trading terms and markets. And while a due diligence investigation is on its own unlikely to result in a per se contravention of competition law as this would require that an agreement be reached between the parties to fix prices, set trading terms or divide markets, the parties must be highly cautious and restrained in exchanging documents and information during the due diligence which may lead to a substantial lessening or prevention of competition.

Competitively sensitive non-public information and documents which should not be shared before competition clearance include:

1. information related to current or future trading terms and prices in relation to the products and/or services offered by the respective parties. This includes price initiatives, targets, ranges, margins, recommendations, minimum prices, together with the proposed timing and/or amount of a price increase, as well as any element or component of a price such as discounts, rebates, commissions, formulas or transport charges;
2. margin information by product or customer;
3. information on customer strategies (whether specific or general), including information with respect to the sales volumes to customers;
4. marketing, sales and pricing strategies. As a general rule of thumb, the parties should not engage in any discussions which may influence or impact on either of the parties' respective business strategies going forward. Therefore any information or documents which increases transparency and reduces uncertainty regarding the future competitive moves of the other party should be off limits; and
5. budgets and business plans.

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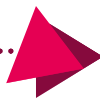
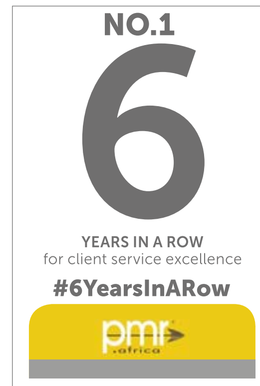
Each of the parties should ask whether it would be willing to share such information with the other party during the ordinary course of business absent the proposed merger. If not, then the information should probably not be shared to avoid falling foul of the rules of pre-merger engagement.

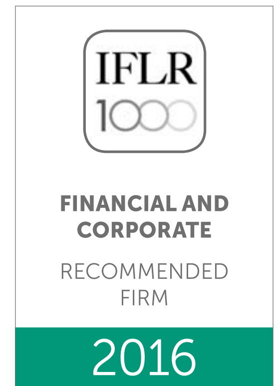


Information which is in the public domain or which is generally known to others may be exchanged between the parties. Information pertaining to human resources, regulatory compliance, and projected profitability of the combined entity may also be exchanged.

As a final guideline, each of the parties should ask whether it would be willing to share such information with the other party during the ordinary course of business absent the proposed merger. If not, then the information should probably not be shared to avoid falling foul of the rules of pre-merger engagement.

Natalie von Ey





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