



# COMPETITION ALERT

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*A reality often overlooked is that merging parties may not be in a position to give a comprehensive, empirical account of the potential effect on employment – which the Commission then takes to be in dereliction of filing obligations, and cause to impose strict conditions limiting the right to impose retrenchments.*



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The Commission's draft Guideline on Public Interest in Mergers (published 21 December 2015) provides that the Commission should only be concerned about job losses that are merger specific, in other words, that the job loss is causally related to, or results, or arises from the merger.

The Guidelines stipulate that all proposed retrenchments should be disclosed in a merger filing, along with evidence as to why such job losses are not merger specific (ie, would occur even absent the merger). However, whether post-merger job losses are in fact merger specific can give rise to differences in opinion and is increasingly a point of debate between merging parties and the Commission during an investigation. A reality often overlooked is that merging parties may not be in a position to give a comprehensive, empirical account of the potential effect on employment – which the Commission then takes to be in dereliction of filing obligations, and cause to impose strict conditions limiting the right to impose retrenchments.

The Tribunal in *Tegeta Exploration and Resources (Pty) Ltd and Optimum Coal Mine (Pty) Ltd and others* (LM212Jan16) conditionally approved the merger of coal mining assets where certain of the target firms were in business rescue. A particular concern facing the target firms was the potential impact of renegotiations with Eskom in regard to a supply contract. It was common cause that the fate of the mines, and thus the employees, were intertwined with the outcome of negotiations with Eskom, and also that the outcome was not related to the merger.

Given that the merging parties could not with certainty ascertain the likely number of job losses, the Commission defaulted to a blanket moratorium on merger related retrenchments. The merging parties accepted this proposal on the basis that the merger did not create any significant redundancies requiring retrenchments and that any job losses likely would be due to the Eskom situation and not as a result of the merger. The Commission, however, sought to clarify its condition to apply not only to merger-related redundancies but also to job losses occasioned by a change in business policy.

# THE QUESTION OF MERGER RELATED RETRENCHMENTS REMAINS CAUSE FOR SPECULATION

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*The obvious difficulty with treating a change in business policy as a merger-related cause for job losses is the speculation as to whether such a change in policy could not be a rational response to economic conditions that could equally be embarked on absent the merger.*

The obvious difficulty with treating a change in business policy as a merger-related cause for job losses is the speculation as to whether such a change in policy could not be a rational response to economic conditions that could equally be embarked on absent the merger.

In rejecting the Commission's contention for a broader interpretation of merger specificity, the Tribunal was cautious to point out that such an interpretation makes sense only where there is clear

evidence of an imminent change in policy that reasonably leads to an apprehension of retrenchments – absent such circumstances a moratorium on merger related retrenchments should be narrowly couched to refer to redundancies only.

Such a view is commendable, as a more restrictive one would effectively preclude a merged entity from freely developing its business strategy at any time post-merger.

*Chris Charter and Bheki Nhlapho*



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# IT'S THE SMALL THINGS THAT TRIP YOU UP

*Mondi had alleged that the Competition Commission had initiated a complaint against it without first having a reasonable suspicion of a prohibited practice having been committed by Mondi.*

*The court reaffirmed its earlier finding that the protection from disclosure under the relevant sections only kicks in if the confidentiality claim complies with the formal procedures determined by the Competition Act.*

**In a matter that made it all the way to the Constitutional Court and back, the High Court recently reaffirmed the importance of following procedure when claiming confidentiality over information submitted to the Competition Commission.**

In an application for leave to appeal to the Supreme Court of Appeal, (*Mondi Limited and another v the Competition Commission and another*; Case No 47050/13), which recently came before the Gauteng division of the High Court, in Pretoria, Mondi had originally sought to compel the Competition Commission to provide it with documents constituting part of the record of the decision to initiate a complaint of abuse of dominance against it. Mondi had alleged that the Competition Commission had initiated a complaint against it without first having a reasonable suspicion of a prohibited practice having been committed by Mondi. If the Competition Commission could not show grounds on which such a suspicion could be founded, its decision to initiate a complaint would be unlawful.

One of the grounds of objection to disclosure of the information on which the Competition Commission relied when deciding to initiate the complaint against Mondi was that the documents in question had been claimed as confidential when the informants provided the information to the Competition Commission.

The court originally adopted a strict approach in applying the sections of the Competition Act which set out how information is to be claimed as confidential. In dismissing the application

for leave to appeal against the original decision in April this year, the court reaffirmed its earlier finding that the protection from disclosure under the relevant sections only kicks in if the confidentiality claim complies with the formal procedures determined by the Competition Act.

According to the court, before information claimed as confidential receives the significant protection of the Competition Act against disclosure, the claim of confidentiality must be supported by a written statement explaining why the information is confidential and the claim must be made in the prescribed form. Anything short of this would not be subject to protection from disclosure – even in circumstances where the Commission set out the basis for the confidentiality in its court papers, but failed to aver formal compliance or attach the necessary form.

The matter in question dealt with important issues, including the proper exercise of public power. However, a significant factor in the court's decision to allow Mondi access to the documents in question turned on something as mundane as complying with the prescribed form of a confidentiality claim. Sometimes the devil truly is in the detail.

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**Albert Aukema and Bheki Nhlapho**

# AFRICA, WATCH OUT! INCREASED COOPERATION BETWEEN REGIONAL AND NATIONAL COMPETITION AGENCIES

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*The focus on enforcement is also clear, and business can now assume that information submitted to a national agency may well be shared with the CCC and vice versa. This will likely have implications for detecting the prior implementation of mergers and cross-border anti-competitive conduct.*



Yesterday the COMESA Competition Commission (CCC) announced the signing of a Cooperation Agreement with the Competition Authority of Kenya (CAK). This marks significant progress as the CCC and the CAK have, in the past, been at loggerheads in apparent jurisdictional jousting. Last month the CCC also entered into Memorandums of Understanding on Cooperation in the Application and Enforcement of Laws with the Swaziland Competition Commission (SCC) and the Fair Trade Commission of the Seychelles (FTC). Seychelles, Swaziland and Kenya are all COMESA Member States, with the latter two having particularly active national competition agencies.

These agreements, which aim to enhance national and regional cooperation and enforcement across Africa, are reported to cover the following issues:

- Where the agencies are investigating related matters, the organisations will cooperate and share any relevant information in order to ensure the effective enforcement of their respective competition laws. Periodic meetings will be held amongst officials in order to exchange this information.
- The agencies will consult with each other on matters of competition enforcement and policy and similarly will keep each other up to date with any important policy/enforcement developments within their respective jurisdictions.
- The agencies will cooperate in developing technical assistance and capacity building programmes.

The reports on the agreements are eerily silent on avoiding duplicated merger filings, where both regional and national merger thresholds are met. Clarity in this regard would be welcomed, particularly

in respect of Kenya who had apparently previously disputed COMESA's ability to oust its national jurisdiction on the merger front.

While some form of cooperation, in the context of dual jurisdiction, is always implied, these agreements evidence a strong intention to formalise the relationships between the organisations. There are benefits in sharing best practices, exchanging lessons learnt, and offering support.

The focus on enforcement is also clear, and business can now assume that information submitted to a national agency may well be shared with the CCC and vice versa. This will likely have implications for detecting the prior implementation of mergers and cross-border anti-competitive conduct.

The CCC has announced that it intends to sign more cooperation agreements of a similar nature with other COMESA Member States. Beware, Africa is gearing up for greater competition enforcement!

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*Susan Meyer and Sean Jamieson*

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