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COMPETITION ALERT

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THE COMPETITION LAW RISKS OF EARLY INTEGRATION PLANNING

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This begs the question as to what behaviour would constitute *de facto* implementation of a merger.

A merger is defined as an acquisition of *control* over the whole or part of the business of another firm. It follows therefore, that prior implementation should relate to acts which establish the purchaser as a controller over the target firm prior to receiving competition approval. *De facto* acts of control include, for example, the purchaser exercising voting rights at board meetings and/or influencing the strategic business direction of the target firm (in relation to and for example, pricing policies, new product launches and marketing plans). However, experiences in South Africa suggest that acts which fall short of taking effective control, can also be labelled as *de facto* prior implementation.

In 2008 in the merger involving Bonheur 50 General Trading (Pty) Ltd (Bonheur) and Komaitland Forests (Pty) Ltd (KLF), a share sale agreement between the parties recorded that, during the interim period, Bonheur representatives could attend KLF management committee meetings in an observer status, and whilst the representatives were permitted to speak at meetings, they were prohibited from voting, and exercising any control or influence over the management of KLF. Bonheur had legitimate reasoning for its presence at KLF management committee meetings, including among others, the need to retain the commitment of the transaction funders. The Competition Commission (Commission) argued that the Bonheur representatives attending the KLF meetings conducted themselves in a manner that amounted to an exercise of control. Although Bonheur denied that there was any exercise of control, the merger parties settled the matter with the Commission and paid an administrative penalty of R500,000.

Again in 2008, the issue of prior implementation arose in a matter involving Netcare Hospital Group (Netcare) and Community Hospital Group. In order to

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The merger parties conceded that certain of the above conduct may arguably comprise acts of prior implementation and agreed to pay an administrative penalty of R1 million.

rescue the business of the target firm, Netcare commenced involvement in the target firm by providing funding and financial assistance, implementing IT systems, and involving itself in pricing aspects. It was in terms of the aforesaid involvement only, that Netcare was found to have acquired *de facto* control of the target firm, prior to competition approval. The parties settled the matter with the Commission and paid an administrative penalty of R500,000.

In August 2018 a subsidiary firm of the South African Textile and Clothing Workers Union (TCIA) notified the Commission of its acquisition of control over the clothing and manufacturing division of Seardel Group Trading Proprietary Limited (Seardel). Whilst the Commission was investigating the merger and during the Commission's site visit to the premises of Seardel, it became apparent to the Commission that TCIA was involved in, and may have directed, the operations and affairs of Seardel. At the time, Seardel was experiencing a significant loss of orders and customers, which may have resulted in Seardel's closure and the retrenchment of its staff.

The Commission concluded that the following factors supported its findings of prior implementation:

(i) TCIA had access to strategic information and interacted and negotiated with Seardel suppliers and/or customers;

(ii) TCIA negotiated certain customer arrangements in order to ensure that the business would be able to continue operating going forward;

(iii) TCIA was involved in the employment contracts of Seardel staff;

(iv) the CEO of TCIA attended meetings relating to Seardel;

(v) the business name of Seardel was changed and TCIA was involved in communicating the name-change to customers; and

(vi) TCIA and Seardel undertook joint marketing and signage.

The merger parties conceded that certain of the above conduct may arguably comprise acts of prior implementation and agreed to pay an administrative penalty of R1 million.

Click here to read GCR's South African chapter on Antimonopoly & Unilateral Conduct, authored by **Competition Directors Lara Granville & Albert Aukema and Senior Associate, Naasha Loopoo.**

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Given the greyness of this area of the law, merger parties are encouraged to seek competition law advice when planning their integration steps.

In draft guidelines published in 2017, the Commission sets out examples of acts that it considers to be *de facto* implementation of a merger. These acts include for example, an exercise of voting rights, the appointment of even one director to the board of a target firm, influence over strategic business decisions (identifying target markets, developing new products or services, taking charge of placing orders, amending procurement policies, and involvement in customer relations), co-ordinating competitive behaviour, the earlier receipt of profits or other payments in connection with the performance of the target firm, implementing name changes, and marketing the merging firms as a single entity. It is debateable whether the isolated implementation of certain of the aforementioned acts in fact amount to an acquisition of *control*. But what is clear, is that the Commission adopts a strongly conservative approach to what behaviour may amount to prior implementation.

The Commission cautions that the above instances of prior implementation are not an exhaustive list and are intended to be mere guidelines only. Every case will be determined on its own set of facts. In fairness to the Commission, it is hugely difficult to calibrate appropriate legal standards of acts of prior implementation, which are neither underinclusive nor overinclusive. Whilst competition authorities (one would hope) are mindful that many forms of pre-merger integration planning are reasonable, necessary and legitimate, too conservative an interpretation of permissible and impermissible conduct may unduly jeopardise the ability of the merger parties to protect their prospective investment and achieve efficiencies. Given the greyness of this area of the law, merger parties are encouraged to seek competition law advice when planning their integration steps, lest out of fear for the unclear law, they suspend all activity jeopardising transaction-related gains, or out of a robustness in approach, they implement a collection of steps or even one such step, which is then labelled an act of prior implementation.

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