MERGER GUIDELINES

One of the most visible areas of competition enforcement is in mergers. This document highlights the SCC's enforcement and procedural requirements, thus offering guidance to merging parties and third parties in relation to what to expect from the SCC regarding mergers. As a young agency the Commission seeks to be transparent in its dealings with all affected parties.

The purpose of pre-merger notification

1. The pre-merger notification regime embodied in the Competition Act is aimed at offering the SCC the opportunity to assess mergers before implementation. Those mergers which are likely to have an adverse effect on competition can be identified in good time and prohibited before implementation and thus preventing any distortions in the relevant market. The SCC is committed to use its investigative powers in a manner that does not unduly interfere with the parties' time table, except where the transaction in question raises significant competition concerns.

2. The SCC is able to preserve and maintain competition in the relevant market through the pre-merger notification regime.

The essence of a pre-merger notification regime

3. A pre-merger notification system means that merging parties have to suspend their commercial decision to implement a transaction whilst waiting for approval;

4. The sale of a business or assets serves an extremely useful economic purpose in an economy in that it enables those who desire to exit from a business to do so with ease and those who wish to expand or enter into new markets to do so without the need to set up a time-consuming and costly green fields operation.

5. In the unique context of Swaziland, the SCC also appreciates the distinction between local and international transactions. Whilst both may be subject to stringent deadlines that the parties set for themselves, there may be a class of international transactions whose deadlines may be imposed on the parties by the law of primary jurisdiction. Unless the parties meet these deadlines, they could lose the opportunity to implement that transaction. Consequently, the SCC will always bear in mind that the time table

disclosed by the parties during a merger filing should be taken into account when assessing a transaction, except in circumstances where it is patently obvious that the transaction raises such significant competition concerns that it is highly unlikely that it will be allowed to go through.

The essence of a merger review

6. The essence of a merger review framework is to-

6.1 identify those transactions that are likely to confer market power or facilitate its exercise by the merged entity; and

6.2 protect consumer welfare. Consequently, the SCC will always ask itself a number of questions in the process of the investigation:

6.2.1 are consumers likely to pay higher prices as a consequence of the merger?

6.2.2 is the merger likely to lead to diminishing quality or service levels?

6.2.3 is the supply of the product likely to decrease?

6.2.4 will the merger increase the costs of entry by new entrants into the market?

6.2.5 will the merger facilitate collusion in the market?

6.2.6 will the amount of research and development aimed at improving the quality of the product in question likely to decrease post merger?

6.3 in conducting the investigation and analysing the information before it, the SCC will always have the issues set out above at the back of its mind.

The investigation process

7. The investigation process is split into two broad areas:

7.1 the pre-review phase, which itself is split into two:

7.1.1 the jurisdictional question; and

7.1.2 the completeness of the filing.

7.2 the substantive investigation.

The pre-review phase

8. The jurisdiction question

8.1 At this level, the SCC is required to consider the structure of the transaction in its totality to determine whether it has jurisdiction to review the transaction. Even where the parties have filed the merger for adjudication, it bears emphasis that unless the SCC enjoys jurisdiction in terms of the Competition Act, it has no authority to pronounce on that merger. For this reason, it is important that the SCC determines whether the acquisition of a controlling interest as envisaged by section 2 of the Competition Act occurs as a consequence of the transaction.

8.2 First and foremost, the transaction must satisfy the definition of a merger, which is set out in section 2 of the Competition Act. In essence, a merger is the acquisition of a controlling interest in a business or asset.

8.3 What does controlling interest mean? Although the Competition Act does not define controlling interest, it is defined in Regulation 3(g) of the SCC's Regulations. In essence it means the acquirer acquires:

8.3.1 more than one half of the voting capital or economic interest of the target;

8.3.2 the right to vote a majority of the votes that may be cast at a general meeting;

8.3.3 the right to appoint or veto the appointment of a majority of the directors of a firm; or

8.3.4 the ability to exercise a decisive influence over the strategic behaviour of the target firm.

8.4 By way of example, given the absence of useful precedents at this time, the SCC would consider the following transactions to be notifiable:

8.4.1 Companies A, B and C are shareholders in company D. Company A holds 49% of company D whilst company B holds 31 and company C only 20%. If company A decides to increase its stake in company D by buying 2% shares from company B, and therefore increase its shareholding from 49% to 51%, the notification requirements of the Competition Act will be triggered. What this means is that although both companies A and B are shareholders in the

same company (company D), company A cannot take transfer of the shares belonging to company B in company D before the transaction is notified and approved by the SCC. Further, the size of the acquisition does not really matter in this context. The critical point is that the acquisition of 2% would, in this context, amount to an acquisition of a controlling interest. Prior to the transaction, company A held only 49% of the voting shares in D. Post transaction, it would hold 51%, which constitutes more than one half of the voting shares in D.

8.4.2 Our law does not recognise a distinction between an external purchaser of shares and what may be called an internal purchaser of shares such as we see above. There is a simple policy reason for this. A competitor that desires to buy another competitor may simply choose to buy a small stake in its competitor and once it becomes a shareholder, it may increase its shareholding to more than one half of the voting shares in that competitor. If this transaction were not notifiable on the basis that this was a transaction between shareholders within the same company and therefore internal, the SCC would lose the opportunity to review transactions that are potentially problematic.

8.4.3 Where the parties have agreed either in their Articles of Association or in a Shareholders' Agreement that one of them would enjoy the power to appoint a majority of board members, the acquisition of that power of appointment constitutes the acquisition of a controlling interest.

8.4.4 For instance, in terms of the above example, if company C, which holds only 20% of company D held the right, by virtue of a shareholders' agreement, to appoint 4 of the company's 7 directors, this would be deemed to be a controlling interest. Consequently, any one acquiring company C's 20% interest, which goes with the power to appoint a majority of the board members, would need to notify the SCC.

8.5 Importantly, Swaziland does not have financial thresholds below which transactions are not notifiable. Consequently, all transactions that satisfy the definition of a merger as indicated above are notifiable prior to implementation.

9. **The completeness of the filing**

9.1 Although the SCC has fairly generous time frames within which to finalise investigations, it always strives to investigate and adjudicate mergers within a reasonable time, in most cases within 30 days of filing. However, the SCC's efforts to expedite the investigation and adjudication of a transaction are hampered when the merging parties fail to submit a complete and comprehensive filing.

9.2 Consequently, the SCC will determine whether the filing is complete. This is assessed on the basis of the notification requirements contained in Form 3 under Regulation 19(a). It is only when the filing is complete that the substantive investigation and assessment of the filing may commence. In all other cases, the parties will be promptly advised of the outstanding information or documents that must be submitted to supplement the original filing. For the avoidance of doubt, a request in terms of this guide is distinct and separate from a request for further information on the basis of the substantive investigation below.

9.3 For a joint merger filing, the following documents must be filed:

9.3.1 Form 3 (joint merger application)

9.3.2 Form 6 (certificate of completeness);

9.3.3 Affidavit confirming appointment as parties' representative;

9.3.4 The most recent version of the agreement or other documents relating to the transaction;

9.3.5 The most recent annual report or audited financial statements,

9.3.6 Any press release or other shareholder, board or management statement on the transaction;

9.3.7 Board minutes dealing with the transaction;

9.3.8 Confidentiality claims, if any;

9.3.9 Affidavit in relation to documents that are unavailable.

9.4 For a non-consensual merger, the following documents must be filed:

9.4.1 Form 3 (joint merger application with necessary modifications);

9.4.2 Form 6 (certificate of completeness in relation to the acquirer's information);

9.4.3 Copy of the offer made to the target's management;

9.4.4 Copy of target management's response to offer;

9.4.5 Copy of acquirer's offer to target's shareholders;

9.4.6 Proof of service of joint merger application form on target firm;

9.4.7 Competitiveness report; and

9.4.8 All other attachments required in terms of a joint notification above.

10. **The substantive investigation**

10.1 Once the SCC asserts jurisdiction on the basis of the structure of the transaction and is satisfied that all the filing requirements referred to above have been satisfied, the SCC would then conduct an investigation. Although the SCC receives a substantial amount of useful information from the merging parties, it is required to conduct its own investigation into the matter in order to make its own determination about the impact of the transaction on competition. This process is certainly facilitated by a comprehensive and well presented filing.

10.2 Importantly, merging parties must be aware that the SCC will in all likelihood contact key customers, competitors and other interested parties in relation to a proposed merger. The identities of the customers or competitors contacted may or may not coincide with those provided to the SCC by the merging parties. In its contact with third parties, the SCC will seek to determine for itself:

10.2.1 what other products or services compete with those of the merging parties;

10.2.2 who the competitors are;

10.2.3 how many competitors are there;

10.2.4 the level of concentration in the relevant market;

10.2.5 the level of competitive strengths and weaknesses of the merging parties as well as the remaining competitors in the market, if any;

10.2.6 whether there are any barriers to entry;

10.2.7 whether there has been any entry in the recent past?

10.2.8 who the key customers are;

10.2.9 what alternatives would they have in the event of a significant price increase post merger;

10.2.10 whether they have countervailing power, etc

10.3 Once all the information in relation to the preceding questions has been gathered, the SCC would then assess the transaction to determine whether it would substantially prevent or lessen competition. In making this determination, the SCC would take into account a range of factors including the following:

10.3.1 the definition of the relevant market;

10.3.2 the post merger market concentration;

10.3.3 ease of entry into the market, including tariff and regulatory barriers;

10.3.4 availability of substitute products;

10.3.5 levels of import competition;

10.3.6 levels of countervailing power;

10.3.7 effective remaining competition;

10.3.8 the ability of national industries to compete in international markets;

10.3.9 the competitiveness of a particular industrial sector or region; and

10.3.10 the ability of small enterprises in Swaziland to become competitive.

Can the parties implement the transaction prior to notification?

11. Merging parties are precluded from the implementation of a transaction prior to notification. In other words, until such time that a transaction has been notified, investigated, assessed and approved by the SCC, the parties are obliged to delay the implementation of the transaction.

12. Any party who participates in the implementation of a transaction prior to approval by the SCC commits a statutory offence and may, on conviction face a fine, a term of imprisonment or both.

13. For the avoidance of doubt, the SCC does not get involved in the prosecution of people who violate the provisions of the Competition Act. Consequently, once this violation has occurred, the SCC's duty will be to lay a charge at the local police station and the matter will be run by the police and the Director of Public Prosecution without the involvement of the SCC. The SCC may be called in as a witness against a party which implemented a transaction before approval. This therefore means that the SCC will exercise no influence on the DPP's decision whether or not to prosecute.

14. Further, the Competition Act makes it plain that rights and obligations created by a transaction that has been consummated prematurely are unenforceable in Court, unless the parties obtain condonation from the SCC.

15. An application for condonation must be brought as soon as possible after the parties become aware of the fact that they had an obligation to notify. In determining whether to grant condonation, the SCC will take into account all relevant factors including:

15.1 the parties' knowledge and experience with merger notifications in various jurisdictions;

15.2 legal advice obtained from a reputable law firm with extensive Swazi competition law experience; and

15.3 the parties' conduct in relation to other jurisdictions in respect of the same transaction.

16. The determination of whether or not the parties have implemented a transaction will be dictated by the peculiar facts of each case. However, the following incidents, viewed collectively or individually, depending on the circumstances, could be construed as constituting implementation:

16.1 attending board and management meetings of the target firm whilst the parties are waiting for approval;

16.2 providing the target firm with guidance on how to conduct its business in anticipation of the merger;

16.3 exchanging commercially and competitively sensitive information after the due diligence process;

16.4 using information obtained from the due diligence process in effecting changes in either company prior to approval;

16.5 appointments and announcements of new management prior to approval;

16.6 for the avoidance of doubt, merging parties are entitled to set up pre-merger planning meetings to facilitate the implementation of the transaction once approved. Discussions at these meetings must be restricted to high level, historical information that would not facilitate coordination between the parties' activities.

17. Although not ideal, the SCC may consider ring-fencing arrangements in respect of international transactions. No guidance is available on this at this time but the SCC would consider applications on a case by case basis.

18. Importantly, where parties contemplate a ring-fencing arrangement, it must be raised with the SCC as soon as possible, to give the SCC sufficient time to give a decision. Where the parties have delayed to raise this in good time, the SCC cannot be expected to give a decision in a matter of days given its unique decision making structures.

Who has the responsibility to file a merger?

19. Either party may file a joint merger application on behalf of both parties. However, the representatives of the individual firms would be required to sign the relevant affidavits as well as the certificate of completeness.

20. In non-consensual transactions, the party seeking approval for the transaction, presumably the acquirer, would be entitled to file a joint merger application form on behalf of both parties.

21. Once notified in this fashion, the SCC may give directions to the target firm on how to comply with the requirements of the Competition Act.

Time frames for the adjudication of a merger

22. The SCC has an initial investigation period of 90 business days within which to approve a merger. This period may be extended in one of two ways:

22.1 where it requires information from third parties or industry participants in terms of section 13 of the Competition Act, which has the effect of giving the SCC another 30 days; and

22.2 where the SCC is of the view that the initial investigation period is inadequate. This would give the SCC another 60 days.

23. In practice, however, the SCC seeks to finalise all investigations as speedily as possible. A great majority of all transactions notified to the SCC has been adjudicated within the first 90 days. This turn around time is expected to improve as the SCC continues to employ more investigators.

24. However, despite the SCC intention to improve its turn around time, merging parties must ensure that their time table takes cognisance of the legal requirements in Swaziland.

Filing fees

25. For filing fee purposes, the Regulations create two categories of mergers: small and large mergers.

26. A small merger is defined as a transaction in respect of which the parties' combined assets or turnover is E8 million or less.

27. No filing fee is payable for the notification of a small merger.

28. For all other transactions classified as large mergers, the filing fee payable is 0.1% (zero point one percent) of the merging enterprises' combined annual turnover or assets whichever is greater. The fee is calculated on the assets or turnover of the merging firms situated in and out of the country.

29. The filing fee is capped at E600 000.00.

30. The filing fee does not include VAT or Sales Tax, whichever is applicable.

31. The filing fee must be paid on the date of notification of the merger. If the fee is paid by electronic transfer; proof of payment must be filed with the notification.

32. The parties must furnish the SCC with audited annual financials for the preceding financial year.

Contact in the course of an investigation.

33. Merging parties are entitled to contact the investigating team in respect of their merger on a regular basis. However, the merging parties must not press the investigating team to disclose or commit to time lines and positions that the investigators have no authority to give. Even if given, it must be understood that these will not be binding on the SCC. On the contrary, if the parties refer to commitments that were made to them by investigators, the SCC will take the view that the parties brought undue pressure to bear on the investigating team.