UNIVERSITY OF PRETORIA

FACULTY OF LAW

IMPLICATIONS OF NON-NOTIFICATION OF NOTIFIABLE MERGERS IN SOUTH AFRICAN COMPETITION LAW

by

BOTHWELL DEKA

(Student number: 14438683)

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Prepared under supervision of Professor Corlia Van Heerden of the University of Pretoria

UNIVERSITY OF PRETORIA

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Dedication
To my lovely wife and kids, with a lot of admiration to my mother and father.
Acknowledgements
I feel greatly indebted to my supervisor Professor Corlia Van Heerden for her brilliant guidance over the course of the study. I also take this opportunity to say thank you to my lovely wife Vimbai Deka for her support. My daughter Ruvarashe Deka and son Mufaro Deka thank you for the smiles.

Finally, I am grateful to my classmates including Ngonidzashe and Michelle.
Declaration

I, BOTHWELL DEKA, declare that this dissertation is my original work. It has not been submitted before to any other university or institution. Where works of other people are used, references have been provided. I hereby present this work in partial fulfilment for the award of the LLM degree in Mercantile Law.

Signed

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Bothwell Deka

31 October 2015

Pretoria,

South Africa
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<tbody>
<tr>
<td>CAC</td>
<td>Competition Appeal Court</td>
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<tr>
<td>CCR</td>
<td>Competition Commission Rules</td>
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<td>CHG</td>
<td>Community Hospital Group</td>
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<td>CMA</td>
<td>UK Competition and Markets Authority</td>
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<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<tr>
<td>COSATU</td>
<td>Congress of South African Trade Unions</td>
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<tr>
<td>Commission</td>
<td>Competition Commission</td>
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<tr>
<td>DME</td>
<td>Department of Minerals and Energy</td>
</tr>
<tr>
<td>EBH</td>
<td>Elgin Brown and Hamer Group Holdings (Pty) Ltd</td>
</tr>
<tr>
<td>Edcon</td>
<td>Edgars Consolidated Stores Ltd</td>
</tr>
<tr>
<td>EC</td>
<td>European Council</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>ICN</td>
<td>International Competition Network</td>
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<tr>
<td>IDC</td>
<td>Industrial Development Corporation</td>
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<tr>
<td>OECD</td>
<td>Organisation of Economic Cooperation and Development</td>
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<tr>
<td>SACCAWU</td>
<td>South African Commercial, Catering and Allied Workers Union</td>
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<tr>
<td>SARS</td>
<td>South African Revenue Services</td>
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<tr>
<td>SPV</td>
<td>Special Purpose Vehicle</td>
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<td>TNPA</td>
<td>Transnet National Ports Authority</td>
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<tr>
<td>Tribunal</td>
<td>Competition Tribunal</td>
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<td>UK</td>
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Summary

Competition regulation is meant to encourage the attainment, maintenance and promotion of high levels of competition in order to facilitate a number of economic and social objectives. From an economic theory perspective firms are motivated by self-interest and profit maximisation which may result in attempts to subvert the competition process. Mergers are often economically good for the prosperity of merged entities and the economy in general but may sometimes result in negative welfare consequences for consumers and other competitors if left unregulated. Chapter 3 of the Competition Act deals with merger control and provides that an intermediate or large merger may not be implemented until it has been approved by the competition authorities, with or without conditions while small mergers may be implemented without approval of competition authorities unless the parties to the small merger voluntarily decides to notify or the Competition Commission requires them to do so, if in the Competition Commission’s opinion the merged entity may substantially prevent or lessen competition; or cannot be justified on public interest grounds.

It is trite that notifiable mergers must be notified before implementation to the competition authorities and failure to notify notifiable mergers attracts costly consequences such as the imposition of administrative penalties, requiring divestiture or even prohibition of the merger deal *ex post* amongst others.

The focus of the dissertation revolves around the merger notification process; and consequences of implementing a notifiable merger prior to or without notification to the competition authorities. It also incorporates a discussion of implications to small mergers which despite legally not obliged to notify before implementation the Competition Act provides that the Competition Commission may require the parties to notify the merger even after implementation.

The main conclusion is that merging parties should not expose their businesses to the legal uncertainty inherent with non-notification of notifiable mergers prior implementation. Small mergers are also encouraged to apply to avoid costly consequences because the Competition Commission may require them to notify *ex post*, which may result in conditions being imposed or the merger being unscrambled.
CHAPTER 1: BACKGROUND TO THE STUDY

1.1 Introduction

Economic and public interest dictate that rivalry and cooperation between firms should be regulated, and this phenomenon has been common in medieval times and continues in modern day commerce. Notable in medieval times is the Edict of Charles V of the Netherlands promulgated on 4 October 1540 which made it an offence for any person to enter into an agreement that smacked of a monopoly or was prejudicial of public interest.\(^1\) Today South African competition is regulated by the Competition Act (referred hereafter as the Competition Act), which provides the regulatory framework for regulation of competition and lack thereof.\(^2\) The Competition Act’s main objective is the attainment, maintenance and promotion of high levels of competition in order to facilitate a number of economic and social objectives as emphasised in *Distillers Corporation (SA) Ltd v Bulmer (SA) (Pty) Ltd*.\(^3\) The objectives of the Competition Act are:\(^4\)

- to promote the efficiency, adaptability and development of the economy;
- to provide consumers with competitive prices and product choices;
- to promote employment and advance the social and economic welfare of South Africans;
- to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

To achieve these objectives the Competition Act regulates restrictive vertical practices,\(^5\) restrictive horizontal practices,\(^6\) uncompetitive pricing,\(^7\) abuse of dominance,\(^8\) and introduces a mechanism to control mergers.\(^9\)

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\(^2\) Competition Act No. 89 of 1998.

\(^3\) Case no 2002 (2) SA 346 (CAC).

\(^4\) Chapter 1 section 2 of the Competition Act.

\(^5\) S5 of the Competition Act.

\(^6\) S4 of the Competition Act.

\(^7\) S9 of the Competition Act.

\(^8\) S6 –S9 of the Competition Act.

\(^9\) Chapter 3 of the Competition Act.
1.2 Mergers

Mergers can widely be defined as the direct or indirect acquisition or establishment of control by one or more firms over the whole or part of a business of another firm.\(^\text{10}\) Mergers play an important role in any economy through organic growth and diversification as they lead to increasing economies of scale which ultimately improve competitiveness of firms.\(^\text{11}\) Many mergers therefore raise little negative economic and competition concerns and usually there is no reason for intervention unless public policy objectives are trumped (or likely to be trumped) by the merger.\(^\text{12}\) However some mergers can restrain and/or be detrimental to competition through increasing concentration of economic power in a few firms. This has been a historical challenge for South African policy makers for the last two decades.

Neuhoff emphasised that horizontal mergers often give rise to serious competition concerns, as they give rise to removal of one competitor by another, which increases market share and concentration of merged entity, ultimately reducing consumer choice.\(^\text{13}\) Unilateral effects of horizontal mergers are feared to arise if there are no other constraints to abuse of market power by the merged entity, while coordinated effects arise when the number of market participants in the market is already limited and a further reduction of participants leads the remaining firms to collude.\(^\text{14}\)

Sections 11 to 18 of the Competition Act are important as they provide the framework for merger regulation. The merger control process happens \textit{ex ante} to ensure that a result which is anti-competitive does not arise or to avoid unscrambling a merger \textit{ex post}. It is submitted that unscrambling a merger may have negative consequences in the operations of the company, employment, contracts and may lead to a loss of shareholders’ confidence in the company. In addition \textit{ex ante} analysis gives competition authorities time to evaluate, prohibit or restructure potentially anti-competitive transactions before implementation. In \textit{Mondi Ltd/Kohler Cores and Tubes}\(^\text{15}\) the Competition Tribunal stated that merger adjudication involves a “probabilistic” element, arguing further that no amount of reliable evidence could be adduced to provide clear certainty inherent in merger assessments \textit{ex ante}.\(^\text{16}\)

\(^{10}\) S12(1)(a) of the Competition Act. See also \textit{Distillers Corporation (SA) Ltd v Bulmer (SA) (Pty) Ltd} 2002 (2) SA 346 (CAC).
\(^{11}\) \url{http://www.academia.edu/3722223/Corporate_Restructuring_through_Mergers_and_Acquisition}, accessed on 5 April 2015.
\(^{12}\) These public policy and public interest objectives include black economic empowerment, procurement, labour regulations, restrictions on foreign ownership and control, promotion of ‘national champions. Examples of cases are where public interest objectives took centre stages are \textit{Wal-Mart/Massmart} case no: 110/CAC/Jul 11, and \textit{Momentum/Metropolitan} case no: 41/LM/Jul10.
\(^{14}\) Neuhoff \textit{et al} (2006) at 179.
\(^{15}\) Case 06/LM/Jan 02.
\(^{16}\) Neuhoff \textit{et al} (2006) at 181; Case no 06/LM/Jan 02 at 24.
1.2.1 Types of mergers in South Africa
There are three types of mergers in South Africa: are small, intermediate and large mergers. The determination of the size of a merger is important for notification purposes as not all mergers need to be notified to the competition authorities.

1.2.1.1 Small mergers
Small mergers are not required by law to be notified to the Competition Commission (Commission), unless the Commission requires it to do so.\(^{17}\) This implies that a small merger may be implemented without approval unless the party to a merger voluntarily decides to notify.\(^{18}\) However there is a caveat in section 13(3) of the Competition Act because within six (6) months after a small merger is implemented, the Competition Commission may require the parties to the merger to notify the Commission of the merger, if in the opinion of the Commission the merged entity may substantially prevent or lessen competition, or cannot be justified on public interest grounds.

1.2.1.2 Intermediate and large mergers
Intermediate and large mergers must be notified to the Competition Commission, and no implementation of an intermediate or large merger can proceed without the Competition Commission and Competition Tribunal’s approval respectively.

1.3 Assessment of Mergers in South Africa
The ex-ante analytical framework for competitive assessment of mergers is set in section 12A of the Competition Act, wherein the substantive test is whether or not the merger is likely to substantially prevent or lessen competition in the identified market.\(^{19}\) The second leg of the test is that if it appears that the merger is likely to substantially prevent or lessen competition, then one has to determine whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gains which will be greater than, and/or offset, the anti-competitive effects, that may result or is likely to result from the merger, and would likely be obtained if the merger is prevented and/or whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors listed in section 12A (3) of the Competition Act. Section 12 A (3) list the public interest grounds which must be considered by the Competition Commission and/or Competition Tribunal in assessing mergers and these are: effects on a particular industrial sector or region; effects on employment; effects on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive and effects on the ability of national industries to compete in international markets.

\(^{17}\) S13(1) of the Competition Act.
\(^{18}\) S13(1) of the Competition Act.
\(^{19}\) S12A(1) of the Competition Act.
The most important part of the merger assessment entails assessing the level and strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to the competition in that market including:

(a) the actual and potential level of import competition in the market;
(b) the ease of entry into the market, including tariff and regulatory barriers;
(c) the level and trends of concentration, and history of collusion in the market;
(d) the degree of countervailing power in the market;
(e) the dynamic characteristics of the market, including growth, innovation and product differentiation;
(f) the nature and extent of vertical integration in the market;
(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;
(h) whether the merger will result in the removal of an effective competitor.

1.4 Scope of the study
Within the scope and context of merger regulation, serious consequences of a legal, economic, financial and operational nature may follow where a notifiable merger is implemented without having been notified and approval obtained from the competition authorities. Even small mergers, which in terms of section 13 (1) of the Competition Act do not have to be notified before implementation, may result in serious financial consequences should the Competition Commission decide in terms of section 13 (3) of the Competition Act that the merger should have been notified and must be unscambled. In a media release during 2004 by the Competition Commission prior to implementation, the Commission prohibited the small merger between ABSA, First Bank, Nedbank, Standard Bank and Comcorp Online, which had voluntarily been notified.

The case of Digital Healthcare Solutions (Pty) LTD/ Competition Commission, which dealt with consequences of punitive breach of conditions imposed by the Competition Commission in respect of a small merger approved subject to conditions; shows that even small mergers face legal uphill should the parties ignore the prescripts of the Competition Act including the conditions imposed by the Competition Commission. This is despite the “supposed default position” that small mergers

20 S12A(2) of the Competition Act.
22 In Iscor Ltd / Saldanha Steel (Pty) Ltd case no: 67/LM/Dec01, the Competition Tribunal emphasised that the onus is on the merging parties to invoke the doctrine of the failing firm.
23 JD Group / Ellerines Case no: 78/LM/Jul00.
24 Media release 8 of 2004.
26 Case no: 41/AM/Jun02.
do not have to be notified prior to implementation. Large and intermediate mergers also face serious legal consequences should they fail to notify a merger.

The purpose of this dissertation is therefore to focus on the merger notification process; and consequences of implementing a notifiable merger prior to or without notification. The dissertation will also touch upon the position of implementation of small mergers which although they are not required to be notified prior implementation, may *ex post* be required to the notified and subsequently may face unscrambling. In the discussion that follows the merger notification requirements as set out in the Competition Act will be discussed and analysed in detail with reference where applicable to case law. An analysis will also be conducted of cases where mergers were implemented prior to or without notification and the consequences thereof will be discussed. Intermediate and large merger notifications requirements are also discussed in detail and reference is be made to international countries with comparative merger systems. Finally certain recommendations for reform will be proposed.
CHAPTER 2: MERGER NOTIFICATION PROCEDURES AND CONSEQUENCES OF NON-NOTIFICATION OF NOTIFIABLE MERGERS IN SOUTH AFRICA

2.1 Introduction
The legal position and requirement for notification of a merger depends on whether it is small, intermediate or large as explained in the preceding Chapter. In terms of the Competition Act, intermediate and large mergers may not be implemented at all, until they have been notified to and approved by the competition authorities, with or without conditions.\(^{27}\) Failure to notify a notifiable merger attracts serious consequences including but not limited to the imposition of an administrative penalty, imposition of behavioural and/or structural conditions to the merger, interdicting such conduct (implementation of merger) from continuing, requiring divestiture or even prohibition of the merger deal. Below an analysis is provided of what constitutes a merger and procedures of notifying mergers.

2.2 What constitutes a merger and notifiable merger
The determination of what constitutes a merger transaction is critical to the merger notification process since only “mergers” should be notified. The definition of a merger is important for the analysis and review of mergers and the International Competition Network (ICN) recommends that any merger review regime must define the type of transactions that potentially qualify for notification as mergers.\(^{28}\) The Organisation of Economic Cooperation and Development (OECD) also states that the definition of a merger transaction plays an important role in a well-functioning merger review regime that seeks to be effective, efficient, and transparent.\(^{29}\) The OECD further states that while notification thresholds are used to identify transactions that have a sufficiently material nexus to a given jurisdiction, the definition of a merger transaction seeks to identify those transactions that are suitable for merger review.\(^{30}\) There are three categories of mergers: horizontal; vertical and conglomerate mergers.\(^{31}\)

\(^{27}\) S13A(3) of the Competition Act.
\(^{31}\) http://www.dummies.com/how-to/content/types-of-mergers-investment-bankers-should-know.html, accessed on 5 August 2015.
2.3 Definition of a merger in South Africa

A merger arises from either mutual consent of entities to merge or the hostile takeover of one entity by another. Section 12(1)(a) of the Competition Act defines a merger widely to cover horizontal; vertical or conglomerate mergers and provides that a merger occurs, “when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another”. In *Competition Commission / Edgars Consolidated Stores Ltd (Edcon) and Retail Apparel Group* the Competition Tribunal emphasised that, “whole or part of a business” as contemplated in section 12 of the Act, should not be defined and interpreted too narrowly and that a transaction should be looked at holistically and not piecemeal. In this case the amassing of an asset base book debt and certain ancillary rights of the target firm following provisional liquidation qualified the transaction as a merger. In the view of the Competition Tribunal; Edcon was given access to a significant client base which was likely to boost Edcon’s market share or pre-empt a rival from increasing its own market share.

Further a merger is achieved in any manner, including through purchase or lease of shares, an interest or assets of the other firm in question; or an amalgamation or other combination with the other firm in question. Another form of merger which often happens in the financial sector is called “securitisation”, and it has been acknowledged as a *genre* of a merger by the Competition Commission.

2.4 Establishment of control

Key to the definition of a merger is the acquisition of control of a target firm by an acquiring firm, therefore it is critical to establish the meaning of “control”. In terms of section 12(2) of the Competition Act a person controls a firm if that person:

(a) beneficially owns more than one half of the issued share capital of the firm;

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33 Case no: 95/FN/Dec02.
34 Case no: 95/FN/Dec02 at 20, 22 and 66.
35 Case no: 95/FN/Dec02.
36 Case no: 95/FN/Dec02 at 68.
37 S12(1) (b) of the Competition Act.

Securitisation consists of the “pooling” of a group of assets, the sale of this pool to a special purpose company or trust and the issue by that entity of marketable securities against the pooled assets. It is an established method of funding used by banks and other registered credit providers, in which the credit provider sells certain loans to a company generally, referred to as a special purpose vehicle (SPV); and SPV approaches a group of investors to invest in the SPV. Further the Competition Commission Practise Note Issue 5 provides that “in terms of securitisation schemes, the sale of the bank’s assets to the SPV (as a going concern) appears to be a sale of income generating assets, and therefore a sale of part of the business of the seller. This sale may therefore constitute a merger as contemplated in section 12 of the Act”.

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(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

(c) is able to appoint or to veto the appointment of a majority of the directors of that firm;

(d) is a holding company and the firm is a subsidiary of that company as contemplated in Section 1(3)(a) of the Companies Act of 1973;\(^{39}\)

(e) in the case of a firm that is a trust; has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation; owns the majority of members’ interest or controls directly or has the right to control the majority of members’ votes in the close corporation; or

(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Perusal of case law shows that the establishment of control is central to the definition of a merger. In *Ethos Private Equity Fund IV/Tsebo Outsourcing Group (Pty) Ltd*\(^{40}\) it was authoritatively established that a firm can be controlled by more than one person simultaneously and that a firm will be deemed to have sole control of another firm in terms of the Competition Act; if it acquires more than 50 per cent of the shareholding of that firm, irrespective of the fact that there was no *de facto* change of control.\(^{41}\) The Competition Tribunal emphasised that there are certain “bright lines”, which once crossed, has the effect that the transaction will constitute a merger.\(^{42}\) In *Distillers Corporation (SA) Ltd/Bulmer SA (Pty) Ltd*\(^{43}\) the Competition Appeal Court emphasised that, “the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities a wide range of transactions which could result in an alteration of the market structure and in particular reduce the level of competition in the relevant market”.\(^{44}\)

It was acknowledged by the court in *Cape Empowerment Trust Limited v Sanlam Life Insurance and Sancino Projects Limited*\(^{45}\) that section 12 of the Competition Act does not set out to pinpoint control of a firm in the normal sense of who, to the exclusion of others, directs the pulling of the levers which move the firm, but only whether there is one or more set of

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\(^{39}\) Act No. 61 of 1973.

\(^{40}\) Case No: 30/LM/Jun03 at 42-43.

\(^{41}\) Case no: 30/LM/Jun03. See also [http://www.compcom.co.za/file-a-merger](http://www.compcom.co.za/file-a-merger), accessed on 07 April 2015.

\(^{42}\) Case no: 30/LM/Jul03 at 42-43.

\(^{43}\) Case no. 08/CAC/May01.

\(^{44}\) Case no. 08/CAC/May01 at 26; Neuhoff *et al* (2006) at 207-209.

\(^{45}\) Case no. 05/X/JAN06.
power relationships in play which call for consideration by the competition authorities as representing a potential threat to competition.\textsuperscript{46}

In \textit{Gold Fields Ltd v Harmony Gold Mining Co Ltd}\textsuperscript{47} the applicant argued that “majority” did not mean more than 50% of the votes establishing that it was common cause that one company may control another despite the fact that it owns less than half of its voting shares arguing that; “Harmony is able to control the majority of the votes at an annual general meeting and hence this amounts to control by virtue of section 12(2)(b) of the Act or section 12(2)(g)”.\textsuperscript{48}

The definition of a merger is wide enough that even minority shareholders who can materially influence company policies in a manner comparable with a person that enjoys the economic or political benefits of ownership contemplated in terms of section 12(2)(a) - (f) have control of that firm.\textsuperscript{49} In Neuhoff’s view this probably explains why the legislature inserted section 12(2)(g) into the Competition Act which seems an “all-encompassing clause”; because it relates to the mere ability of the person to exercise “material influence” which may not necessarily mean “actual influence”.\textsuperscript{50} It is submitted that this wide definition was inserted by the legislature to ensure that the competition authorities’ powers to analyse and control all transactions which may prevent and lessen competition in the market will not be limited.

\section*{2.5 Advisory opinions}

Should merging parties be unsure of whether a specific transaction meets the definition of a merger and whether it is notifiable, they can seek advice from the Competition Commission in the interpretation and guidance on the legal status of such transactions.\textsuperscript{51} Advisory opinions are not law and do not replace or transfer or excuse the parties from their duty to notify a notifiable merger.\textsuperscript{52} The Competition Commission is not bound by its own advisory opinion, and can require that a certain transaction be notified later, against its own previous advice that the transaction does not meet the definition and set thresholds.\textsuperscript{53} However should parties rely on an advisory opinion and the transaction is later found to contravene the Competition Act, this may mitigate against imposition of an administrative penalty.\textsuperscript{54} In \textit{Seagram Africa (Pty) Ltd v Stellenbosch Farmer’s Winery Group Ltd and Others} \textsuperscript{55} it was

\begin{itemize}
\item \textsuperscript{46} Case no. 05/X/JAN06 at 50.
\item \textsuperscript{47} 86/FN/Oct04.
\item \textsuperscript{48} Sutherland and Kemp \textit{Competition Law of South Africa} Service Issue 18 (2014) at 8-21; Case no: 86/FN/Oct04 at 29, 67–73.
\item \textsuperscript{49} Neuhoff \textit{et al} (2006), at 209.
\item \textsuperscript{50} Neuhoff \textit{et al} (2006) at 207.
\item \textsuperscript{51} \url{http://www.compcom.co.za/advisory-opinions-and-clarifications/} accessed on 20 July 2015.
\item \textsuperscript{52} \url{http://www.compcom.co.za/advisory-opinions-and-clarifications/} accessed on 20 July 2015.
\item \textsuperscript{53} Neuhoff \textit{et al} (2006) at 362.
\item \textsuperscript{54} Ibid.
\item \textsuperscript{55} Case no: 2001 (1) All SA 484 (C).
\end{itemize}
authoritatively decided that advisory opinions are not binding. The Competition Tribunal also pronounced on the legality and substance of the advisory opinions in Bulmer SA (Pty) Ltd v Distillers Corp (SA) Ltd and described the distinction between a decision and advisory opinion as artificial. However, there were special facts surrounding this case which showed that the Commission had made a final decision in this case.

Finally, merging parties can notify under protest if they feel the advice from the Competition Commission is unreasonable. For example in Ethos Private Equity Fund IV/Tsebo Outsourcing Group (Pty) Ltd notification was done under protest, given that the parties had no option but to comply with notification requirement.

2.6 Thresholds of a notifiable mergers in South Africa.

The qualification of whether a merger is small, intermediate or large is informed by the set of financial thresholds as determined and set by the Minister from time to time. In general merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required, such as material sales or asset levels within the territory of the jurisdiction concerned. The table below summarises the current merger thresholds which were last revised in April 2009.

Table 1: Merger thresholds

<table>
<thead>
<tr>
<th>Category of merger</th>
<th>Acquiring Group Plus Target Gross assets and/or turnover</th>
<th>Target gross assets and/or turnover</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small</td>
<td>&lt; R560 million</td>
<td>&lt; R80 million</td>
</tr>
<tr>
<td>Intermediate</td>
<td>≥ R560 million but &lt; R6,6 billion</td>
<td>≥ R80 million but &lt; R190 million</td>
</tr>
<tr>
<td>Large</td>
<td>≥ R6,6 billion</td>
<td>≥ R190 million</td>
</tr>
</tbody>
</table>

57 Case no: [2001] ZACT 13 at 12.
58 Sutherland and Kemp, Competition Law of South Africa Service Issue 18 (2014); at 9-19.
59 Case no. 30/LM/Jun03.
60 Minister means Minister of Trade and Industry as defined in section 1 of the Competition Act. Section 11(1) of the Competition Act provides that the Minister, in consultation with the Competition Commission, must determine a lower and a higher threshold of combined annual turnover or assets, or a lower and higher threshold of combinations of turnover and assets, in the Republic, in general or in relation to specific industries, for purposes of determining categories of mergers and a method for the calculation of annual turnover or assets to be applied in relation to each of those thresholds.
A small merger occurs when the combined annual turnover or assets (whichever is greater) of the acquiring firm(s) and target firm(s) into or from South Africa is less than R560 million and the annual turnover or assets (whichever is greater) of the target firm in, into or from South Africa is less than R80 million.\(^6^4\)

An intermediate merger occurs when the combined annual turnover or assets (whichever is greater) of the acquiring firms and target firms into or from South Africa is greater than or equal to R560 million but less than R6.6 billion and the annual turnover or assets (whichever is greater) of the target firm in, into or from South Africa is greater than or equal to R80 million but less than R190 million.\(^6^5\) As mentioned above the merging entities have to notify this merger to the Competition Commission.\(^6^6\)

A large merger occurs when the combined annual turnover or assets (whichever is greater) of the acquiring firms and target firms into or from South Africa is equal or greater than R6.6 billion and the annual turnover or assets (whichever is greater) of the target firm in, into or from South Africa is greater than or equal to R190 million.\(^6^7\)

2.7 Timelines, merger filing fees and required approval of mergers

Time is an important aspect in merger notifications and in an effort to increase efficiency in merger proceedings, the Competition Commission adopted the “fast-tracking” procedure, which entails the Competition Commission making its decision about an application for merger approval within the original period of 20 business days from the notification date.\(^6^8\) It is submitted that this is a good step forward by the Competition Commission because shortened periods will encourage entities to notify mergers because sometimes, despite bona fide efforts to keep notification information confidential, pre-merger notification may allow speculators and rival bidders to cash in on the entrepreneurial insight of the notifying firms, while its awaiting approval. In practice Neuhoff notes that the process is usually quick and delays usually happen either because the Competition Commission is experiencing a large case load or because there are delays from merging parties when they are requested by investigators to provide more information.\(^6^9\)

Generally notification fees are meant to fully or partially recover the cost of merger review and/or the competition agency’s total budget is relieved of costs which are more properly

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\(^6^7\) S13A(3) of the Competition Act.

\(^6^8\) Neuhoff \textit{et al} (2006) at 235.

\(^6^9\) \url{http://www.compcom.co.za/file-a-merger} accessed on 07 April 2015.
borne by the users who benefit directly from the service. In South Africa a fee of R100000 and R350000 is charged for filing a merger notice for intermediate and large mergers respectively. There is no fee for filing a merger notice for a small merger. It should be noted that the South African Revenue Services (SARS) does not treat these merger notification fees and payments as tax deductible, but expenses of a capital nature, thus merging parties cannot claim these fees for tax purposes. It is respectfully submitted that this legal position is correct because the cost of merging entities is part of the cost of building a revenue generating entity, which is thus a capital nature expense in terms of the SARS provisions. Depending on the nature of a particular transaction, in the eyes of a Competition prescripts a primary target firm and primary acquiring firm may be difficult to distinguish and in that case, before filing a merger notice the merging entities may request the Commission to issue directions as to how to calculate the filing fees and apply the threshold calculator within the context of that transaction.

As indicated large mergers require approval from the Competition Tribunal and without complexities ENSAfrica estimates that it takes about three months for the approval to be granted.

2.8 Purpose of notifying notifiable mergers and merits thereof.

Section 13A of the Competition Act deals with “notification and implementation of other mergers” and provides that a party to an intermediate or a large merger must notify the Competition Commission of that merger in the prescribed manner and form and further provides that parties to an intermediate or large merger may not implement that merger until

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70 International Competition Network Merger notification filing fees (2005); available at http://www.internationalcompetitionnetwork.org/uploads/library/doc331.pdf accessed 10 October 2015. ICN further states that notification fees should be easily understood, readily determinable at the time of filing, easily administered, and consistent with the jurisdiction’s legislative and policy framework and should consider affordability to merging parties, non-discrimination among enterprises, and predictability to parties.
71 Rule 10 of the Competition Act under Rules for the Conduct of Proceedings in the Competition Commission.
72 South African Revenue Services makes a distinction between expenses pertaining to a taxpayer’s income producing structure and expenses pertaining to a taxpayer’s income producing activities. The first kind of expenses are of a capital nature and not deductible and the second are of a revenue nature and deductible. The payment of merging fees is in our view meant to establish an income producing structure. In CIR v George Forest Timber Co Ltd 1924 AD 516 at 524, it was emphasised that: money spent in creating or acquiring an income producing concern must be capital expenditure. It is invested to yield a future profit; and while the outlay does not recur the income does. There is a great difference between money spent in creating or acquiring a source of profit and money spent working it. The one is capital expenditure the other is not.
73 Rule 26(2) of the Competition Act under Merger Procedures.
74 A law firm based in Africa specialising among others in competition law.
it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b) if it is an intermediate merger, the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of Section 17 if it is a large merger.

The prior notification requirement for a merger is prescribed by the Competition Act and is cemented in Chapter 5 of the Companies Act 76 (hereafter referred to as the Companies Act) which provides for “Fundamental Transactions, Takeovers and Offers”. The Companies Act requires confirmation that an amalgamation or merger has been approved in terms of the Competition Act, if so required by that Act.77 In terms of the section 116 (4) of the Companies Act a notice of amalgamation or merger must include confirmation that the amalgamation or merger:

a) has satisfied the requirements of sections 113 and 115;
b) has been approved in terms of the Competition Act, if so required by that Act;
c) has been granted the consent of the Minister of Finance in terms of section 54 of the Banks Act,78 if so required by that Act; and
d) is not subject to-
   (i) further approval by any regulatory authority; or
   (ii) any unfulfilled conditions imposed by or in terms of any law administered by a regulatory authority.

Within the context of the Competition Act, the purpose of notification can be viewed firstly from the competition authorities' perspective and secondly from that of the merging entities’. Competition authorities are interested in analysing whether a merger is likely to substantially prevent or lessen competition in the relevant market, and avoiding unscrambling of a merger at a later stage. So notification fulfils a preventative purpose: it prevents the establishment of a large firm that can behave anti-competitively. It is thus in the interest of the competition authorities to evaluate whether a merger will give rise to any technological, efficiency or other pro-competitive gains which outweigh any anti-competitive effects arising from the merger; and whether the merger may be justified on substantial public interest grounds.79 From an economic theory perspective firms are motivated by self-interest and profit maximisation and therefore could subvert the competition process in different ways, including market division, price fixing between competitors, excessive pricing and predatory pricing by a dominant firm and lastly, may merge their different entities so as to incidentally or intentionally achieve

76 Act 71 of 2008.
77 Section 116(4) (a) (ii) of the Companies Act 71 of 2008.
78 Act No. 94 of 1990.
79 S12A(1) of the Competition Act.
market power and abuse it.\textsuperscript{80} The competition authorities find these practises destructive to consumer welfare and economic development, and thus require notification of mergers thereof. \textsuperscript{81} Notification therefore provides the Competition Commission with the detail, platform and framework to analyse notifiable mergers. Complying with the duty to notify a merger enhances the competition authorities’ ability to control such a merger prior to its implementation and mitigate likely competition effects and it also affords them an opportunity to assess the merger’s potentially irreparable effects on competition within a relevant market.\textsuperscript{82}

From the merging entities point of view the main purpose of notification is legal compliance as required by the Competition Act and related legislation; primarily because merging parties usually do not prefer to expose their businesses to the legal uncertainty inherent with non-notification of notifiable mergers, which may result in huge administrative fine and/or unscrambling of the merger.\textsuperscript{83}

Generally besides propositions of economic theory above, firms have a number of other reasons and incentives not to want to notify notifiable mergers voluntarily. Firstly merging parties may be worried that their proposed merger may be approved with conditions which may weaken their market position post-merger.\textsuperscript{84} Secondly, merger transactions sometimes involve hostile takeover or the takeover process may be subject to other competitive bids for which the parties would want to quickly conclude a deal without the hindrance of the competition prescripts.\textsuperscript{85} It is submitted further that some firms merge because they may be struggling financially either with liquidity or profitability such that parting with high merger fees would be inconceivable, thus may tend to be unwilling to notify. Further it is submitted that some companies may be worried that notification will expose their confidential business transactions to public scrutiny.

In the case of small mergers which do not need to be notified, unless merging parties voluntarily do so it is advisable to notify given that the Commission has the discretion to order

\textsuperscript{80} Philip Mohr and Louis Fourie \textit{Economics for South African Students} (2008) 4th Edition Van Schaik Publishers. All these are prohibited practises under Chapter 2 of the Competition Act. It is emphasised that these firms’ practises result in increased market share, potential efficiency gains, increased profits and an increased competitive edge, from an economist’s perspective.


\textsuperscript{83} Extensive discussion of these consequences follow below.


\textsuperscript{85} Nuehoff \textit{et al} (2006) at 218. For example in \textit{Competition Commission v Tiso Consortium} Case no: 82/FN/Oct04, there were two rival bids for New Africa Investments Limited, and the transaction was settled rapidly.
ex post notification in terms of section 13(3) of the Competition Act, which may complicate business operations later.

2.9 Responsibility to notify mergers in South Africa.

Once merging parties have established and determined that indeed a prospective transaction meets the legal definition and financial test of a notifiable merger they are required to complete and submit in the prescribed notification form CC4(1) among others to the Competition Commission. This form CC4(1), "sets the scene" by alerting competition authorities that there is a proposed merger between the identified merging parties and the envisaged classification (whether intermediate or large) thereof. Competition Rules 26 to 34 apply to the notification of a small merger whether that notification is voluntary in terms of section 13(2), or is in response to the requirement to notify by the Competition Commission and must therefore file form CC4(1) similar to intermediate and larger mergers.

The primary acquiring firm and the primary target firm in the case of an intermediate or a large merger must notify the Competition Commission of South Africa. The Competition Commission’s Rules provide for some flexibility by allowing for joint notification as both the acquiring firm and the target firm are duty bound to notify the transaction. Competition Commission Rule 28 allows for separate merger notification and provides that the primary firm may apply to the Competition Commission for permission to file separate notification of a proposed merger and, on considering an application under this sub-rule, the Competition Commission may allow separate filing if it is reasonable and just to do so in the circumstances. It also gives appropriate directions to give effect to the requirements of the Act and in particular, specifying which primary firm must satisfy which of the requirements set out in Rule 27; and in an appropriate case, may further permit the applicant to file any document on behalf of the other primary firm.

Another interesting requirement on notification is the requirement for merging parties to submit a report which focuses on competition in affected markets, including the level of competition within the geographically outlined market, economic considerations and any identified public interest effects of the merger which are related to the proposed merger. It is submitted that this is a costly exercise because merging parties will be playing the role of the regulator despite being applicants and besides the Competition Commission will ultimately perform the same market analysis.

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90 CCR 27, read with CCR 26(1).
91 http://www.compcom.co.za/file-a-merger accessed on 07 April 2015
The Competition Act does not expressly state at what point a proposed merger must be notified, and it is submitted that it must be done within a reasonable time from the conclusion of an agreement to merge and/or as was stated in *Gold Fields Ltd v Harmony Gold Mining Co Ltd*\(^\text{92}\) by the Competition Appeal Court (CAC) wherein it emphasised that the Competition Act imposes a duty on the parties to such a merger to notify the merger as soon as a merger is “proposed”.\(^\text{93}\) Once a notifiable merger has been conceived it should be notified to the Competition Commission. In *Anglo-American Holdings Ltd/Kumba Resources Ltd*\(^\text{94}\) the Competition Tribunal emphasised that a merger cannot be notified when it is still academic but that it may be notified even before all details about the transaction that will constitute a change of control are known and “before they have completed the process of acquisition”.\(^\text{95}\)

### 2.10 Role of trade unions, and employee organisations

Merging parties are required to notify trade unions, employees concerned or representatives of employees concerned. Section 13A(2) provides that in the case of an intermediate or large merger, the primary acquiring firm and primary target firm must each provide a copy of the notice contemplated in subsection(1) to any registered trade union that represents a substantial number of its employees; or the employees concerned or representatives of the employees concerned, if there are no such registered trade unions.\(^\text{96}\)

In Neuhoff ‘s view public interest considerations, in particular, the impact on employment is one of the main motivations behind the requirement to notify employees and trade unions.\(^\text{97}\) In the *Wallmart Stores/Massmart Holdings Ltd*\(^\text{98}\) merger the relevant trade unions argued that the new entity after the merger would force its suppliers to lower prices with the intention of being seen as benefitting consumers through lower prices with disastrous consequences to jobs within supplying firms.\(^\text{99}\) This resulted in several conditions being imposed such as a moratorium on merger-related retrenchments and insistence that an undertaking be made by the merging parties to give preference to more than 500 employees who were retrenched.

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\(^\text{92}\) Case No: 43/CAC/Nov04.
\(^\text{94}\) Case no: 46/LM/Jun02.
\(^\text{95}\) Case no. 46/LM/Jun02 par 34; see also Sutherland and Kemp *Competition Law of South Africa* Service Issue 18 (2014) at 9-14.
\(^\text{96}\) Competition Commission Rule 37 provides that a person who receives a notice in terms of section 13A(2) may notify the Commission of its desire to participate in merger proceedings by filing Form CC 5(1) within 5 business days after the date on which that person received the notice.
\(^\text{99}\) The Congress of South African Trade Union (COSATU) and its affiliate South African Commercial, Catering and Allied Workers Union (SACCAWU) presentations to the Competition Authorities. SACCAWU was worried that merger approval would lead to increased concentration in an already oligopolistic sector; with negative effects on the local market –including for suppliers, manufacturers and small businesses; and was worried that procurement policies will adversely affect the local supply base.
earlier in June 2010, should employment opportunities arise in future.\textsuperscript{100} In \textit{Unilever Plc v Competition Commission}\textsuperscript{101}, the Competition Tribunal emphasised that the requirement to notify trade unions helps to ensure that employees’ representatives are provided with the necessary information to enable them to make representations to the competition authorities, if they so wish.\textsuperscript{102}

2.11 Revocation of merger approval after notification

Section 15 of the Competition Act deals with revocation of merger approvals and provides that the Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if the decision was based on incorrect information for which a party to the merger is responsible, the approval was obtained by deceit and/or the firm concerned has breached an obligation attached to the decision. For example in \textit{Sasol Oil/Engen Petronas International Corporation}\textsuperscript{103}, the Competition Commission initially recommended approval of this merger subject to conditions which were intended to ameliorate the likely threat to competition after discovering that the merger was likely to lead to substantial lessening of competition.\textsuperscript{104} Later, in its closing arguments the Competition Commission revised its position and decided to recommend prohibition of the merger contrary to its earlier recommendation.\textsuperscript{105} The Competition Tribunal was convinced that the change of recommendations to prohibit the merger after initially supporting it was based on cogent reasons and found that there were no public interest issues or efficiencies which outweighed the competition concerns arising from this case; and prohibited the merger.\textsuperscript{106} It is submitted that the change of decision due to new information and/or evidence is prudent, given the dynamism of competition matters and it also incentivise merging parties to disclose sufficient information.

2.12 The role of the Ministers in merger prior notification and other intervening parties

In terms of section 14A(1) of the Competition Act, the Competition Commission must refer a notice of a large merger to the Competition Tribunal and to the Minister of Trade and Industry.\textsuperscript{107} Within 40 business days after all parties to a large merger have fulfilled all their prescribed notification requirements the Competition Commission must forward to the

\textsuperscript{100} Case no 110/CAC/Jun11 at 69-70.
\textsuperscript{101} Case no. 55/LM/Sep01.
\textsuperscript{102} Case no. 55/LM/Sep01 at 40.
\textsuperscript{103} Case no: 101/LM/Dec04.
\textsuperscript{104} Case no: 101/LM/Dec04 at 570; 586.
\textsuperscript{105} Case no: 101/LM/Dec04 at 12.
\textsuperscript{106} Case No: 101/LM/Dec04 at 518.
\textsuperscript{107} The Minister refers to the Minister of Trade and Industry, in terms of the Competition Act, but currently the Competition Commission and other competition authorities report to the Minister of the Economic Development Department for government administrative purposes.
Competition Tribunal and the Minister a written recommendation, with reasons, whether or not implementation of the merger should be approved, approved subject to any conditions or prohibited.\textsuperscript{108} Section 18(1) of the Competition Act, empowers the Minister to participate as a party in an intermediate or large merger. This enables the Minister to make submissions on any public interest grounds referred to in section 12A(3) of the Competition Act or beyond.\textsuperscript{109} For example in the \textit{Massmart/Wallmart} \textsuperscript{110} merger concerns around black economic empowerment and local procurement were raised by the Minister of Economic Development.\textsuperscript{111} In financial matters the jurisdiction of competition authorities incorporates the role of the Minister of Finance. In terms of section 18(2) of Competition Act the Competition Commission, may not make any decision in terms of section 13(5)(b) or 14(1)(b), and the Competition Tribunal may not make any order in terms of section 16(2) if the merger constitutes an acquisition of shares for which permission is required in terms of section 37 of the Banks Act \textsuperscript{112} or a transaction for which Minister of Finance consent is required in terms of section 54 of the Banks Act .\textsuperscript{113} It is trite that intervention into merger proceedings serves public policy and thus the intervener is entitled to \textit{subpoena} witnesses, use documentary evidence during the Competition Tribunal hearings and access all documents filed by the merging parties.\textsuperscript{114} In \textit{Sasol Oil/Engen Petronas International Corporation} \textsuperscript{115}, there were a number of interveners including the Department of Minerals and Energy (DME) \textsuperscript{116}, with BP Southern Africa (Pty) Ltd being the first intervener.\textsuperscript{117} The DME's concerns included, amongst others, fears that the merger would result in a need for government interference in product pricing between industry players, the impact on entry into the market by black economic empowerment players and small businesses; and that the merger may undermine and compromise government's market liberalisation policy for the energy sector by raising the costs of doing business.\textsuperscript{118}

\textsuperscript{108} S14A(1) of the Competition Act.
\textsuperscript{109} S12A(3) of the Competition Act list factors such as effect of the merger on a particular industrial sector or religion, employment, the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive and the ability of national industries to compete in international markets.
\textsuperscript{110} \textit{Minister of Economic Development & others v Competition Tribunal and others [2012] JOL 28640 (CAC).}
\textsuperscript{111} \textit{Minister of Economic Development & others v Competition Tribunal and others [2012] JOL 28640 (CAC) – at 36 and 37.}
\textsuperscript{112} Act no.94 of 1990.
\textsuperscript{113} Act no.94 of 1990.
\textsuperscript{114} Neuhoff (2006) at 271.
\textsuperscript{115} Case no: 101/LM/Dec04.
\textsuperscript{116} As it was previously referred to, but now there is Department of Energy and Department of Mineral Resources as separate government departments.
\textsuperscript{117} Case no: 101/LM/Dec04.
\textsuperscript{118} Case no: 101/LM/Dec04 at 34.
Further section 13B of the Competition Act, empowers any person whether or not a party to or a participant in merger proceedings, to voluntarily file any document, affidavit, statement or other relevant information in respect of that notified merger. In Anglo American Holdings Ltd/Kumba Resources Ltd and another and Industrial Development Corporation of South Africa Ltd/Anglo American plc and others, the Competition Appeal Court upheld the intervention of the Industrial Development Corporation (IDC), despite strong opposition from the other parties. The parties had argued that the IDC did not have a material interest in the matter, a view disputed by the Competition Tribunal, which found that IDC had shown good cause in its application to participate in the merger. This view was upheld by the Competition Appeal Court, emphasizing that; “there is no cogent reason for adopting a narrow approach as suggested by the appellants, to the issue of participation in merger proceedings”.

2.13 Role of the Competition Tribunal and Competition Appeal Court.

In terms of section 16(1)(a) of the Competition Act, upon the Competition Commission approval of a small or intermediate merger subject to any conditions, or if it prohibits such merger then any party to the merger may by written notice and in the prescribed form request the Competition Tribunal to consider the conditions or prohibited merger. For example, recently in the case of Hosken Consolidated Investments Ltd and Atterbell Investments (Pty) Ltd v Competition Commission, Hosken Consolidated Investments challenged the decision of the Competition Commission to prohibit approval of an intermediate merger. The Competition Commission had prohibited the proposed merger on the basis that it would result in substantial prevention or lessening of competition in the market for the provision of exhibition venues and exhibition facilities. In contrast the merging parties held the view that the proposed merger would not result in any competition concerns and that the merger was justified on public interest concerns particularly employment. The Competition Tribunal subsequently approved the merger subject to some conditions.

Further, section 16(1)(b) of the Competition Act requires that if the Competition Commission consider the approval of any intermediate merger subject to any conditions then a person

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119 Cases 46/LM/Jun02 and 45/LM/Jun02.
121 Ibid.
122 Anglo South Africa Capital [Pty] Ltd/ Industrial Development Corporation of South Africa Case no: 26/CAC/Dec02 at 18. The Competition Appeal Court stated that “in short, the Tribunal has acted judicially when it exercised its discretion in favour of allowing a party who is in a position to show that the party’s participation would assist the Tribunal in fulfilling its mandate in accordance with the provisions of the Act”.
123 Case no.020578.
124 Case no.020578 at 2.
125 Case no.020578 at 2.
126 Case no.020578 at 28.
who in terms of section 13A(2), is required to be given notice of the merger, by written notice and in the prescribed form, may request the Competition Tribunal to consider the approval or conditional approval, provided the person had been a participant in the proceedings of the Competition Commission.

In terms of section 14A(1) of the Competition Act, the Competition Commission after receiving a notice of a large merger must refer such notice to the Competition Tribunal and to the Minister, because the Competition Tribunal, rather than the Competition Commission, takes primary responsibility for approving or prohibiting large mergers as highlighted above.127 The Competition Tribunal is also responsible for confirming consent orders and the courts have in the past emphasized that in exercising its discretion whether to confirm a consent order it must be satisfied that the objectives of the Competition Act, together with the public interest, are served by the agreement.128

The Competition Appeal Court has a status similar to that of a High Court, with jurisdiction throughout the Republic and its decisions are subject to appeal to the Supreme Court of Appeal as confirmed in American Natural Soda Ash Corporation and Another v Competition Commission.129 In terms of section 17 of the Competition Act any party to a merger or a person who in terms of section 13A(2) of the Competition Act is required to be given notice of the merger; and provided the person had been a participant in the merger proceedings can appeal a decision of the Competition Tribunal within 20 business days after notice of the decision to the Competition Appeal Court. The Competition Appeal Court may set aside the decision, or amend the decision by ordering or removing restrictions or by including or deleting conditions; or it may confirm the decision.

2.14 Consequences of failure to notify notifiable mergers and breach of Chapter 3 of the Competition Act

The Competition authorities have a wide range of measures to address and punish non-notification of notifiable mergers and they are not limited to a single remedy to address failure to comply with the requirements of Chapter 3 of the Competition Act and any other provisions of the Competition Act. The list includes the imposition of an administrative penalty, imposition of behavioural and/or structural conditions to the merger, interdicting such conduct from continuing, requiring divestiture or even prohibition of the merger deal which has very serious consequences if a merger which was not notified and which was implemented has to

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128 Case no:75/CAC/Apr08 at 29.
129 Case no 554/03. See American Natural Soda Ash Corporation and another v Competition Commission 2005 (6) SA 158.
be unscrambled *ex post facto.*\(^{130}\) In *Competition Commission/South African Airways (Pty) Ltd* \(^{134}\) it was affirmed that the authorities are not limited to a single remedy, after the Competition Commission sought four remedies.\(^{132}\) The measures that competition authorities can employ have both punitive and deterrent objectives while civil damages can also be pursued in terms of section 65 of the Competition Act. An application for these measures can be bought by any aggrieved party before the Competition Tribunal as confirmed in *Bulmer SA (Pty) Ltd v Distillers Corp (SA) Ltd.*\(^{133}\) Below a brief discussion follows of the remedies which can be pursued by the competition authorities, including for failure to notify notifiable mergers.

### 2.14.1 Administrative penalties

Section 59 of the Competition Act grants the Competition Tribunal powers to impose administrative penalties for failure to comply with the provisions of the Competition Act, for which the fine must be paid into the National Revenue Fund. Failure to notify a small merger when required to do so as provided for in section 13(3) of the Competition Act or intermediate or large merger is a serious contravention of the Competition Act. Section 59(1)(d) of the Competition Act provides that the Competition Tribunal may impose an administrative penalty if the parties to a merger have:

a) failed to give notice of the merger as required by Chapter 3;
b) proceeded to implement a merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger;
c) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Competition Commission in terms of section 13 or 14, or the Competition Tribunal in terms of section 16; or
d) proceeded to implement the merger without the approval of the Competition Commission; or Competition Tribunal, as required by the Act.

Section 59(2) sets the level of the penalty and provides that, an administrative penalty imposed in terms of subsection (1) may not exceed 10% of the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year. In *Competition Commission/ Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others*\(^{134}\) the Competition Tribunal however emphasised that the 10% limit was appropriate for the most egregious anticompetitive behaviour.\(^{135}\)

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\(^{130}\) Neuhoff *et al* (2006) at 287.

\(^{131}\) Case no 18/CRT/Mar01.


\(^{133}\) Case no 94/FN/Nov00; Case no. 101/FN/Dec00.

\(^{134}\) Case no. 08/CR/Mar01.

\(^{135}\) Neuhoff *et al* (2006) at 291. For example the most egregious recent case could be a cartel case in the bread industry involving Pioneer Foods, where Pioneer was accused of being obstructive, its witnesses were *mala fide* in their representations, and with the level of poverty and unemployment in South Africa the collusion was found to have affected the most vulnerable in society as it increased
The Competition Tribunal is not obliged to accept the penalty as proposed by the Competition Commission. In *Competition Commission/Netcare Hospital Group (Pty) Ltd*[^36^], the Competition Tribunal rejected a settlement agreement and consent order in terms of which a low penalty was imposed for failure to notify a merger arguing that “if administrative penalties are about deterring wrongful conduct then the present penalties exhibit insufficient disincentive on firms not to notify – and indeed firms may well construe low penalties as an acceptable cost of doing business if prior implementation impedes proper adjudication.”[^137^] This decision was however overturned and the penalty was accepted on appeal.[^138^]

Nuehoff gives another example to illustrate the wide discretion in enforcing and varying administrative penalties.[^139^]

The legislature has in section 59(3) of the Competition Act listed the factors which must be considered to determine an appropriate penalty and these include the nature, duration, gravity and extent of the contravention, any loss or damage suffered as a result of the contravention, behaviour 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 has co-operated with the Competition Commission and the Competition Tribunal and whether the respondent has previously been found in the contravention of the Act.

Attempts have been made to expand and further qualify these factors, and in a matter involving abuse of dominance by South African Airways (*Competition Commission/ South African Airways*[^140^]) a guide was given as to how each factor provided for in the Act was weighted.[^141^]

[^36^]: Case no. 27/CR/Mar07.

[^136^]: Case no. 27/CR/Mar07 at 19.

[^137^]: *Netcare Hospital Group (Pty) Ltd v Manoim* Case no: 75/CAC/Apr 08 27/10/2008.

[^138^]: Neuhoff *et al* (2006) at 293. In *Competition Commission/Structa Technology and Others* case no 83/LM/Nov02 the Competition Tribunal reduced a proposed fine from R250000 to R1 because it found out that respondents had made a *bona fide* mistake in not notifying a merger to the Competition Commission, and held that if a penalty were to be imposed on a *bona fide* party it would discourage parties from cooperating with the Competition Commission for fear of prosecution.

[^140^]: Case no. CPLR 303 (CT).

a) The nature, duration, gravity and extent of the contravention - this factor is afforded the highest percentage of 3% as it encompasses the widest range of factors.

b) The loss or damage as a result of the contravention - this factor, which received a rating of 1%, relates to the loss or damage suffered by consumers and/or competitors and is curtailed because of the rights of both parties to recoup their damages through a civil action.

c) The behaviour of the respondent - this factor operates on a sliding scale of 1% and depending on the conduct in question can work as an aggravating or mitigating feature.

d) The market circumstances in which the contravention took place - this aspect, which is assigned a weighting of 1%, is concerned with the structure and history of the market and the actual effects the unlawful conduct had on the structure of the market.

e) The level of profit derived from the contravention - this is given a low weighting of 0.5%, due to the difficult nature of proving this requirement.

f) The degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal - this factor is afforded a weighting of 1.5% and operates on a sliding scale basis as a mitigating or aggravating feature.

g) Whether the respondent has previously been found in contravention of the Act - due to its serious consequences this factor has been assigned 2% and is used by the Tribunal as a deterrent against subsequent offences.

In the recent judgment of Competition Commission v Aveng Africa Limited, the Competition Tribunal established a six step guideline on the calculation of penalties. This follows criticism by the Competition Appeal Court in many cases about the lack of precise, formulistic guidelines. In the Aveng case the Competition Appeal Court accepted the dictum of Harms DP in Woodlands Dairy v Competition Commission that, “the so-called ‘administrative penalties’ (more appropriately referred to as ‘fines’ in s 59(2)) bear a close resemblance to criminal penalties.” Further the Competition Appeal Court in Southern Pipeline Contractors v Competition Commission pointed that, “although the Competition Tribunal did consider certain of the factors which were set out in s59 (3), it never even commenced a process of determination of an appropriate penalty, pursuant to the criteria set out in s59 (3) which


143 Case no 24/CR/Feb09 see also Case no. 84/CR/Dec09.

144 For example in Southern Pipeline Contractors v Competition Commission Case no: 105/CAC/Dec10, and 106/CAC/Dec10) [2011] ZACAC 6 the Competition Appeal Court bemoaned the arbitrary and subjective nature of penalty determination. See also Competition Commission v. Southern Pipelines Contractors & Conrite Walls (Pty) Ltd Case no: 23/CR/Feb09 at 40, 42 and 43.


represent a framework within which its discretion should be exercised. Rather, its reasoning is confined to certain considerations relating to the nature and duration of the offence and generalised comments about the harm caused to the public purse and ultimately to the South African taxpayer”. ¹⁴⁷

The Competition Commission has now subsequently in May 2015 released *Guidelines for the Determination of Administrative Penalties for Prohibited Practices* ¹⁴⁸. The preface of the guidelines reads:

“These guidelines present the general methodology that the Commission will follow in determining administrative penalties for purposes of concluding consent orders and settlement agreements and recommending an administrative penalty in a complaint referral before the Tribunal. The Commission recognises that the imposition of administrative penalties is not a precise science. Therefore these guidelines will not prevent the Commission from exercising its discretion on a case-by-case basis. The primary objective of these guidelines is to provide objectivity and transparency in the method of determining administrative penalties”. ¹⁴⁹ It is submitted that the new proposal will present an objective determination of penalties.

In *Competition Commission v WBHO Construction (Pty) Ltd & Edwin Construction (Pty) Ltd* ¹⁵⁰ Competition Tribunal imposed an administrative penalty of R1.1 million for failure to notify the competition authorities of an intermediate merger before implementing it. ¹⁵¹

### 2.14.2 Consent orders

Consent orders arise from an agreement/settlement entered into between the Competition Commission and another party, which will only be effective and binding to the extent that the parties agree to apply to the Competition Tribunal for confirmation and approval of such an agreement. ¹⁵² Consequences of a consent order depend on the content of the order rather than on the fact that it is a consent order, as highlighted in *Competition Commission v South African Airways (Pty) Ltd*. ¹⁵³

The Competition Commission is empowered to enter into these consent orders by section 49D(1) of the Competition Act which provides that if, during, on or after the completion of the

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¹⁵⁰ Case no. 69/AM/Oct10.
¹⁵¹ Case no. 69/AM/Oct10 at 6.
¹⁵² S49D(2) of the Competition Act.
¹⁵³ Case no: 83/CR/Oct04 at 52.
investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b).

The Competition Tribunal in terms of section 58(1)(b) and pursuant to 49D(2) of the Competition Act may confirm a consent agreement as an order of the Competition Tribunal. The Competition Tribunal therefore can confirm, refuse and change the draft order as received from the Competition Commission in terms of section 58(1)(b) and pursuant to 49D(2) of the Competition Act to ensure that objectives of the Competition Act are met. Most of the recommendations on consent agreements are approved by the Competition Tribunal, as it often acknowledge that these agreements are entered into by the Competition Commission are prudent based on available information and this was acknowledged by the Competition Appeal Court in *Netcare Hospital Group (Pty) Ltd v Manoim* 154, when it was emphasized that “the consent agreement between the Commission and the particular respondent represents the culmination of detailed investigation of the complaint over a period of time. Armed with the information at its disposal the Commission is well positioned to evaluate the true extent and seriousness of respondents’ misdemeanours”. 155 However the Competition Tribunal in some cases exercises its discretion on consent orders as opposed to merely confirming the agreement/settlement for example in *Competition Commission/Netcare Hospital Group (Pty) Ltd* 156, where it refused to confirm an agreement between the Competition Commission and Netcare, because it took a view that the settlement amount was too low. However on appeal in *Netcare Hospital Group (Pty) Ltd v Manoim* 157, the Competition Appeal Court granted the consent order. 158

### 2.14.3 Interdicting the merger

Implementing a notifiable merger without notification can result in interdict proceedings against such actions. These interdict proceedings can take place in the context of interim relief in terms of section 49C of the Competition Act, which allows a complainant to apply to the Competition Tribunal for an interim order in respect of the alleged practice. 159 For example in *Tiso Consortium/New Africa Investments* 160, when Tiso made an offer which later became unconditional, the Kagiso Consortium brought an urgent application to the Competition Tribunal, requesting an interdict against further implementation of Tiso’s offer. 161

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154 Case no: CAC 75/CAC/Apr08.
155 Case no: CAC 75/CAC/Apr08 at 28.
156 Case no : 27/CR/Mar07.
157 Case no: CAC 75/CAC/Apr08.
158 Case no : CAC 75/CAC/Apr08 at 40.
159 S49C(1) of the Competition Act.
160 Case no: 59/LM/Oct 03.
161 Case no: 59/LM/Oct03.
the competition authorities and therefore the parties contravened section 13(A) (3) of the Competition Act.\textsuperscript{162}

\textbf{2.14.4 Divestiture}

Divestiture is a special form of positive measure that can be used in the event of failure to notify notifiable mergers. Section 60(1) of the Competition Act provides that, if a merger is implemented in contravention of Chapter 3, the Competition Tribunal may order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger. Divestiture can be defined as the disposal of asset(s), shares and/or interest(s) in a business portfolio, in order to prevent or limit the potential anti-competitive conduct post-merger, when it is evident that there are alternative buyers in the market.\textsuperscript{163} The requirement that there should be potential buyers is important to promote competition as emphasised in the large merger of Boart Longyear (a division of Anglo Operations Limited)/Huddy (Pty) Ltd and Huddy Rock Tools (Pty) Ltd\textsuperscript{164} where it was stated that “we have previously noted our scepticism regarding divestiture remedies in circumstances where a buyer has not been identified and where there are solid reasons for questioning the post-merger viability of the divested business.”\textsuperscript{165} In Neuhoff’s view this reinforces the founding principles of the competition law, which is to promote competition rather than prohibit it by maliciously ordering a divestiture which may lead to some firms failing.\textsuperscript{166}

The Competition Tribunal in the case of JD Group Ltd /Ellerine Holdings Ltd\textsuperscript{167} listed the factors which must be taken into account when divestiture is considered. These are the precise assets to be divested, the identity of the purchaser, the price, the length of time required for divestiture, post-divestiture relationship between the merged and divested entities and the prospect of competition being maintained in the relevant market post-merger.\textsuperscript{168}

Once a divestiture order has been issued, it can be varied by applying to the Competition Tribunal.\textsuperscript{169} Divestiture orders have serious consequences to businesses commercial interest and in Neuhoff’s view this explains why the legislature attempted to avoid its abuse by the insertion of section 60(3) into the Competition Act which provides that an order made

\textsuperscript{162} Case no: 59/LM/Oct03 at 5.
\textsuperscript{163} Neuhoff et al (2006) at 298.
\textsuperscript{164} Case no: 41/LM/Aug03.
\textsuperscript{165} Case no: 41/LM/Aug03 at 12.
\textsuperscript{166} Neuhoff et al (2006) at 299.
\textsuperscript{167} Case no. 78/LM/Jul00.
\textsuperscript{168} Neuhoff et al (2006) at 299. see also JD Group Ltd /Ellerine Holdings Ltd Case no. 78/LM/Jul00 at 4.8.
\textsuperscript{169} Neuhoff et al (2006) at 300.
by the Competition Tribunal in terms of section 60(2) is of no force or effect unless confirmed by the Competition Appeal Court providing a balancing act in divestiture considerations.\textsuperscript{170}

On 7 December 2005 the Competition Tribunal approved the merger between \textit{Mercanto Investments (Pty) Ltd} and \textit{Johnnic Holdings Ltd}\textsuperscript{171} subject to the condition that the merged entity should, within 12 months of the date of the order, divest certain business (the business of the Gallagher Estate Exhibition and Convention Centre as a going concern; and/or the entire shareholding of Johnnic Holdings in Gallagher Estate Holdings Ltd).\textsuperscript{172} The Competition Tribunal emphasized that the divestiture of Gallagher Estates, was a structural remedy meant to remove any overlap between the merging parties in the exhibition and conference facilities market.\textsuperscript{173}

\textbf{2.14.5 Prohibition/ and rescission of the merger}

\textit{Ex post} in terms of section 60(1)(b) of the Competition Act, the Competition Tribunal can declare void any provision of an agreement to which the merger was subject. This should be contrasted to the powers conferred by section 16(2)(c), and 14(1)(b)(iii) which are \textit{ex ante} measures, where the Competition Tribunal can prohibit the merger for example the merger of \textit{Pioneer Hi-Bred International Inc and Pannar Seed (Pty) Ltd}\textsuperscript{174} which was prohibited \textit{ex ante}.\textsuperscript{175} Recently the Competition Commission reported\textsuperscript{176} that it prohibited the transaction between \textit{Senmin International (Proprietary) Limited} (Senmin) and \textit{Gauteng Asphalt (Pty) Ltd Road Seal (Pty) Ltd} and \textit{Road Seal Properties (Pty) Ltd} after finding that the merger would most likely lead to substantially preventing or lessening competition in the Gauteng market for the production and supply of asphalt.\textsuperscript{177}

\textbf{2.14.6 Criminal sanctions}

Criminal sanctions can be imposed for contravention of certain sections of the Competition Act.\textsuperscript{178} However the Competition Act currently does not provide for criminal sanction for failure to notify a merger. Criminal sanctions are not used generally for contravening the

\textsuperscript{170} Neuhoff et al (2006) at 300.
\textsuperscript{171} Case no 78/LM/Aug05) [2006] ZACT 2.
\textsuperscript{172} Case no:78/LM/Aug05 [2006] ZACT 2 at 1.
\textsuperscript{173} Case no: 78/LM/Aug05[2006] ZACT 2 at 64.
\textsuperscript{174} Case no.:81/AM/Dec10.
\textsuperscript{175} Case no.: 81/AM/Dec10.
Competition Act, given its quasi-civil nature and also challenges posed by admissibility of evidence obtained in competition proceedings.  

2.14.7 Merger conditions

Conditions to a merger are not a straightforward measure to regulate the enforcement of Chapter 3 of the Competition Act, but in the merger notification process imposition of merger conditions may result in increasing the merging parties' transaction costs. The Competition Commission is empowered in terms of section 14(1)(b) and 13(5)(b) of the Competition Act to approve an intermediate or small merger respectively subject to any conditions. Section 13(A)(3) provides that, the parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b); the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17”

The conditions are often meant to address public interest considerations, promote competition policy and address whatever concerns may arise. Even when a merger has been notified or there are no anti-competitive effects triggered by the merger to promote competition principles and public interest concerns conditions are sometimes imposed.

There are different types of conditions such as behavioural and/ or structural conditions. Structural conditions are meant to prevent anti-competitive post-merger structures and

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The paper was focusing on cartels but is also applicable to Chapter 3 of the Competition Act. For example on page 6 it was stated that, “In essence therefore, the Competition Act maintains the characteristic of being a quasi-civil piece of legislation, intended to achieve broad socio-economic and redistributive policy objectives, rather than the individualised prosecution of criminal conduct which coincides with certain types of cartel conduct contemplated in the Competition Act. The quasi-civil nature of the Competition Act is further entrenched by the fact that the applicable standard of proof for any proceedings in terms of the Competition Act is on a balance of probabilities, as specifically provided for in section 68 of the Competition Act”.


181 For example in a recent approved merger Clover SA (Pty)(Ltd)/Nkunzi Milkway (Pty) case no. IM175Dec14 (020461) at 14, merger was approved conditions meant to address concerns of milk producers, concerns of customers, concerns surrounding the restraint of trade which applies to owners of Nkunzi, and concerns over employment. (at 14 ). Also the Competition Tribunal took a decision in the merger involving DCD-Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd case no. 108/LM/Oct08 to impose a condition on the merging parties which ensured that 50% of the quay that is located at the entrance of the Cape Town harbour and although specifically designated for the repair of rigs can be used to repair other vessels will remain accessible to other players than DCD-Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd on a common user basis after the merger.
include the divestiture of businesses or limitations on cross-shareholdings or directorships in competitors while behavioural remedies are designed to prevent harmful behaviour.\textsuperscript{182} Conduct or behavioural remedies would only be entertained when potentially transgressive conduct can be clearly specified and easily detected and remedied.\textsuperscript{183}

### 2.14.8 Small mergers implemented without notification: consequences

As mentioned above, the parties to a small merger are not obliged to notify the Competition Commission.\textsuperscript{184} The challenge is that if the Competition Commission may require notification \textit{ex post} and possibly unscramble the merger if it is found to be uncompetitive. This creates a challenge for merging parties as to whether to voluntarily notify or take the risk of implementing without notification and implement the merger knowing the Competition Commission may require notification if the merger could substantially prevent or lessen competition or cannot be justified on public interest grounds.\textsuperscript{185} In line with other mergers where a small merger is envisaged to have competition concerns this may result in conditions being imposed and/or unscrambling of the merger, and later consequences for putative breach of conditions can be imposed should the firm fail to comply with consequences as discussed above.

In \textit{Digital Health Solutions (Pty) Ltd/ Competition Commission}\textsuperscript{186} which was a small merger a notice of apparent breach of merger conditions was issued. The case dealt with consequences of breach of conditions imposed by the Competition Commission and the failure of the applicants/parties to establish that they had substantially complied with the obligations contained in the conditional approval of the small merger.\textsuperscript{187}

### 2.15 Selected cases on implications of non-notification of notifiable mergers and consequences.

This section focuses on selected cases related to non-notification of mergers of notifiable mergers and consequences thereof. It details the facts, judgment and reasoning and the author’s own analysis. The purpose of this part of the discussion is to use examples to show the implications and consequences of non-notification of notifiable mergers in South African competition law.

\textsuperscript{182} \texttt{http://www.mondaq.com/x/273156/Antitrust+Competition/Recent+Trends+In+Merger+Conditions+Imposed+By+South+African+Competition+Authorities} accessed 08 June 2015.

\textsuperscript{183} Case 101/LM/04 at 557.

\textsuperscript{184} \textsuperscript{S13(1)(a)}.

\textsuperscript{185} S13(3).

\textsuperscript{186} Case no. 41/AM/Jun 02.

\textsuperscript{187} Case no. 41/AM/Jun 02 at 1.
2.13.1 Large merger: Netcare Hospital Group (Proprietary) Limited (Netcare) and Another v Norman Manoim and others: Case no: CAC 75/CAC/Apr08

- Facts of the case

This was an appeal following a dismissal by the Competition Tribunal of a consent agreement between Netcare and the Competition Commission arising from failure to notify a notifiable merger before implementation in contravention of section 13A(3) of the Competition Act and engaging in prohibited practice in contravention of section 4(1)(b) of the Competition Act.\(^{188}\) The facts were that Netcare acquired a 43.75% stake in Community Hospital Group (CHG)\(^{189}\) in 2002 thus acquiring joint control over CHG, but did not notify this transaction as a merger.\(^{190}\) Later Netcare acquired CHG wholly which was notified and approved by the Competition Tribunal without conditions.\(^{191}\)

Netcare and CHG acknowledged the contravention of section 13(A)(3) of the Competition Act and section 4(1)(b) of the Competition Act and entered into consent agreement with the Competition Commission which was rejected by the Competition Tribunal resulting in this appeal to the Competition Appeal Court.\(^{192}\) On appeal in its founding affidavit, Netcare conceded that funding and provision of various forms of assistance to CHG resulted in Netcare acquiring \textit{de facto} control over CHG in terms of section 12(2)(g) of the Competition Act and that control was acquired incrementally over some period and so it was difficult to say with certainty when the obligation to notify the Competition Commission arose.\(^{193}\)

The basis for the Competition Tribunal dismissal of the consent order agreement which was subject of appeal was:\(^{194}\) The Competition Tribunal was concerned that there was no

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\(^{188}\) Case no. 27/CR/Mar07 at 33.

\(^{189}\) CHG- referred to Community Hospital Group, which owned five hospitals which were Montana Private Hospital, and Bougainville Private Hospital in Pretoria, Kulls River Private Hospital and UCT Private Academic Hospital in Cape Town, and East Rand N17 Private Hospital.

\(^{190}\) Case No: 68/LM/Aug06 at 1. In terms of the 2002 agreement, shareholding in CHG was structured as follows: Netcare (with a 43.75% shareholding), Community Hospital Holdings (Pty) Ltd (CHH) (with a 43.75% shareholding), Duelco Investments 65 (Pty) Ltd (“Duelco”) (with a 6.25% shareholding, and PrivatePreview Investments 27 (Pty) Ltd (“Private Preview”) (with a 6.25% shareholding)(see case Case no: 68/LM/Aug06 at 26). The non-notification of the initial acquisition was brought to the Competition Commission by Pro Sano Medical Scheme, who had brought a complaint to the Commission alleging that CHG had adopted the Netcare tariffs for the purpose of determining its fees. The process leading to the acquisition of control involved Netcare assisting CHG in implementing a resuscitation strategy around the rescue efforts, lending money to CHG, and, once the hospitals were rescued, introduced some of its systems into the hospitals and took over their pharmacies which could have given or exercised joint control over CHG for the period preceding the conclusion of the shareholders agreement. Netcare continued to exercise joint control over the group until its decision to acquire the entire shareholding in CHG from the other shareholders and this was subsequently notified to the Competition Commission.

\(^{191}\) Case no: 68/LM/Aug06. The approval was granted on 2 August 2007.

\(^{192}\) Case no: CAC 75/CAC/Apr08 at 2.

\(^{193}\) Case no: CAC 75/CAC/Apr08 at 9 and 11.

\(^{194}\) Case no 27/CR/Mar07 at 8 to 24.
explanation of the failure to notify after the conclusion of the agreement between Netcare and CHG.\textsuperscript{195} The Competition Tribunal took exception to the fact that the Netcare provided know-how and capital to CHG following liquidation thus enjoying joint control but did not provide an explanation during consent negotiations and submissions; why it did not notify such an acquisition of joint control.\textsuperscript{196} The Competition Tribunal found that Netcare may have been very economic with facts based on evidence provided by then CEO of CHG in a previous case of \textit{Business Venture Investments and Afrox Healthcare Ltd}.\textsuperscript{197} These inconsistencies, in the view of the Competition Tribunal, should have served as an aggravating factor in considering the quantum of the penalty for contravening the Competition Act.\textsuperscript{198} The penalty agreed was R6 million with R500 000 for failure to notify a notifiable merger and R5 500 000.00 for contravention of section 4(1)(b) of the Competition Act.

In addition it should be noted that the Competition Tribunal remarked that it was not impressed by the fact that consent agreement was entered prior to the finalisation of the merger hearings thus compromising the Competition Commission’s ability to properly investigate the subsequent notification of the merger.\textsuperscript{199}

\begin{itemize}
  \item \textbf{Case analysis}
\end{itemize}

As indicated Netcare faced a fine for failure to notify a large merger. The fine was pronounced more than 5 years after the failure to notify a notifiable merger, which shows the drastic implications of implementing a notifiable merger without notification to the competition authorities. The Competition Commission pursued the fines more than 5 years after Netcare started supporting CHG incrementally acquiring joint control, indicating that there are no time limits for imposing administrative penalties for non-notification of notifiable mergers. It is submitted that this position is correct because setting timelines will result in some non-notified mergers evading punishment despite uncompetitive effects ensuing in the affected market, because they are detected outside the defined timelines.

\begin{itemize}
  \item \textbf{CAC findings and decision}
\end{itemize}

The CAC took time to analyse the provisions of section 49D of the Competition Act\textsuperscript{200}, and compared them to plea bargaining within the context of criminal law, meant to bring

\begin{flushright}
\textsuperscript{195} Case no: 27/CR/Mar07 at 8
\textsuperscript{196} Case no 27/CR/Mar07 at 8 to 24
\textsuperscript{197} Case no 105/LM/Dec04. In this case the then CEO of CHG alleged joint control by Netcare was existent and known. Case no 27/CR/Mar07 at 10 and 12
\textsuperscript{198} Case no 27/CR/Mar07 at 14.
\textsuperscript{199} Case no 27/CR/Mar07 at 16.
\textsuperscript{200} Section 49D provides:
(1) If during, on or after completion of the investigation of a complaint, the Competition Commission and respondent agree on the terms of an appropriate order, the Competition Tribunal, without

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expeditious conclusion of cases, avoid protracted hearings and conserve resources. It was established in the affirmative that section 49D gives the Competition Tribunal discretion in deciding on consent orders submitted before it. It was also noted that the Competition Commission is well positioned to evaluate the true extent and seriousness of the respondent’s misdemeanours; armed with information at its disposal. The CAC noted that the Competition Tribunal does not rubberstamp the decisions of the Competition Commission on consent agreements, neither is it a court of appeal but it plays an important role in ensuring that objectives of the Competition Act together with public interest are served. Consequently the CAC approved the consent agreement.

2.13.2 Intermediate merger: *Competition Commission of South Africa /Pangbourne Properties Limited and Others* case no: 016246

- **Facts and decision**

  In 2008 certain firms; Morulat and Proud Heritage offered to buy 71 of the 76 property letting enterprises from Pangbourne on offer in two separate sale agreements. The first agreement concerned the purchase of 46 property letting enterprises by Morulat and the second being purchase of 25 property letting enterprises by Proud Heritage. The parties implemented these two transactions without notification to the Competition Commission on the understanding that they constituted small mergers. The Competition Commission contended that both transactions should have been combined as one intermediate merger for purposes of the Competition Act. The respondents lodged an interlocutory application seeking to set aside the Competition Commission’s opinion that the transaction should be notified as a single intermediate merger but this application was postponed *sine die* by the Competition Tribunal on 8 August 2012. The parties then through a consent agreement agreed jointly and severally liable to pay an administrative penalty of R75 000.
By agreement the Competition Commission and concerned parties filed the two transactions as a single intermediate merger, and it was approved without conditions, as it did not give rise to any public interest concerns nor posed any competition concerns.  

- **Case analysis**

This case evidences the some challenges in notification process in South Africa because by definition each transaction/agreement that was entered into by Morulat and Proud Heritage constituted a small merger which did not require notification. However the Competition Commission required that the transactions be combined, so that the transactions could meet the threshold as an intermediate merger in terms of the Competition Act for notification purposes. It is submitted that such a move is legally spiteful especially if it is accompanied by a penalty.

2.13.3 Small merger: Claxton and CTP Publishers and Printers Limited/ Competition Commission and others case no: 13/X/Feb 11

- **Facts and decision**

This was a review application brought by Caxton and CTP Publishers and Printers Limited (Claxton) to the Competition Tribunal to set aside the decision of the Competition Commission to unconditionally approve a small merger between Paarl Media Limited and a division of Primedia (Pty) Ltd, Primedia@Home. Caxton alleged that the process followed by the Competition Commission in its assessment of the merger was tainted with errors and irregularities and that thus the decision was irrational and unreasonable. The Competition Commission together with other respondents defended the decision to approve the small merger unconditionally but the the Competition Tribunal set aside the Competition Commissions decision to unconditionally approve the small merger between Paarl Media Limited and a division of Primedia (Pty) Ltd, Primedia@Home citing irregularity that the original decision was taken without properly considering all the relevant facts or evidence gathered in the investigation.

- **Case analysis**

It is submitted that review of the Competition Commission decisions as a checks and balances measure should be encouraged. However the case under review concerned a small merger which was later certified to have no public interest and competition concerns. It the author’s view that review of small mergers should be grudgingly encouraged because in most case they do not give rise to competitions concerns. Larger firms may innovatively bring

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211 Case no: 016246 at 2.2  
212 Case no. 13/X/Feb11 at 1  
213 Case no. 13/X/Feb11 at 7  
214 case no: 13/X/Feb 11 at 34; 35
review applications to curtail market competition from small mergers cases. Otherwise it compulsory notification of small mergers should be legislated. In this case had the small merger between Paarl Media Limited and a division of Primedia (Pty) Ltd, Primedia@Home been notified, Claxton would have raised its concerns without a protracted legal battle in the Competition Tribunal. Had the merger been implemented without notification the legal challenges were bound to be faced despite it being a small merger which defeats the purport of voluntary notification.
CHAPTER 3: COMPARATIVE STUDY, CONCLUSION AND RECOMMENDATIONS

3.1 Introduction
This Chapter intends to compare the definition of mergers across selected comparative jurisdictions; compare the notification requirements and fees across selected comparative jurisdictions and consequences of implementation of a merger prior notification where applicable. The rigidity and/or flexibility of South African merger notification requirements can only be sufficiently analysed by comparing them to the requirements in other jurisdictions hence this chapter seeks to make a comparison of the notification requirements across selected jurisdictions. This chapter also intends to make a comparison of the quantum of merger notification fees in other selected jurisdictions and compare them to South Africa. The competition jurisdictions which will be compared are the Common Market for Eastern and Southern Africa (COMESA)\(^\text{215}\); the European Union (EU) and the United Kingdom (UK). COMESA is a new competition jurisdiction, but a very important one given the number of South African companies expanding into the African market and merging with regional entities in the region. Finally in this chapter conclusions and recommendations are drawn focusing on what constitutes notifiable mergers and consequences of failure to notify notifiable mergers before implementation.

3.2 Merger definition in COMESA and EU.
In COMESA the merger regulation regime is found in the COMESA Competition Regulations\(^\text{216}\) and in the EU the merger regulation regime is found in Council Regulation (EC) no 139/2004 of 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation).\(^\text{217}\)

According to Article 23(1) of the COMESA Competition Regulations\(^\text{218}\) a merger is constituted if there is a direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of the competitor, supplier, customer or other person whether that controlling interest is achieved as a result of the purchase or lease of the shares or assets of a competitor, supplier, customer or other

\(^{215}\) COMESA is an organisation of 19 Member States, which are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.


person; the amalgamation or combination with a competitor, supplier, customer or other person; or any means other than as specified.

In COMESA the establishment of “controlling interest”, is defined in Article 23(2) of the COMESA Competition Regulations\(^\text{219}\) to mean “any interest which enables the holder to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking”. It is submitted that the definition of a merger in COMESA is wide and mirrors the South African definition. Article 23(1)(C) of the COMESA Competition Regulations provides that a merger is achieved by “any means other than as specified” which mirrors, section 12(2) (g)\(^\text{220}\) of the Competition Act.

EU merger regulation applies to "concentrations" with a "community dimension".\(^\text{221}\) A concentration (similar to a merger in South Africa and COMESA) is defined by the EU Merger Regulation as arising where two or more previously independent undertakings merge; or one or more undertakings acquire, whether by the purchase of securities or assets, by contract or otherwise, direct or indirect control of the whole or parts of at least one other undertaking; or a joint venture is created which performs, on a lasting basis, all the functions of an autonomous economic entity.\(^\text{222}\)

Further Article 3(2) of EC Control of Concentrations Regulations, defines "control" and provides that it shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by ownership or the right to use all or part of the assets of an undertaking; and rights or


\(\text{220} \) It provides that a person controls a firm if that person has the ability to materially influence the policy of the firm in a manner comparable to a person who in ordinary can exercise an element of control.\(^\text{221}\) http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf accessed on 05 August 2015.

contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking. The ability to exert influence on an undertaking as part of merger definition is similar to the definition in South Africa and COMESA.

3.3 Types of mergers and prior implementation notification requirements in other jurisdictions.

3.3.1 COMESA and EU

COMESA does not clearly distinguish different types of mergers; but provides guidelines on how to determine whether a merger is notifiable in contrast to South Africa where there are three distinct types of mergers (small, intermediate and large). Article 23(5) of the COMESA Competition Regulations provides that notifiable mergers means a merger or proposed merger with a regional dimension with a value at or above the threshold prescribed and a non-notifiable merger means a merger or proposed merger with a value below the threshold prescribed. Regarding the threshold, the COMESA Rules provide that for any merger, where both the acquiring firm and the target firm, or either the acquiring firm or the target firm, operate in two or more member states, such merger shall be notifiable if the combined annual turnover or combined value of assets, whichever is higher, in the common market of all parties to a merger equals or exceeds COM$ 50 million; and the annual turnover or value of assets, whichever is higher, in the common market of each of at least two of the parties to a merger equals or exceeds COM$ 10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the common market.

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225 [Comesa competition regulations as at December 2004 Vol 17 No 12](http://www.comesa.int/attachments/article/26/2012_Gazette_Vol_17_Annex_12.pdf) at 4, accessed on 05 August 2015.
227 A common market is a group of countries imposing few or no duties on trade with one another and a common tariff on trade with other countries outside the defined market. The countries within this geographical area also promote duty free trade and free movement of labour and capital among its members. available at [http://www.businessdictionary.com/definition/commonmarket.html#ixzz3m5SXyjR](http://www.businessdictionary.com/definition/commonmarket.html#ixzz3m5SXyjR) accessed on 02 September 2015.
228 COM$ refers to COMESA dollar currency. Equivalent to about R600million in August 2015.
229 COM$ refers to COMESA dollar currency. Equivalent to about R120million in August 2015.
within one and the same member state. Once a proposed merger satisfies these requirements COMESA requires that such a merger be notified within 30 business days.

The EU recognises large mergers with an EU dimension which are often scrutinised by the EU itself, and small mergers with an EU dimension which are usually subject to referral mechanism to member states. In the EU it is mandatory to notify proposed mergers with a Community dimension and it is illegal to implement without prior approval. According to the European Council Regulation (EC) No 139/2004 mergers should be notified, once there has been conclusion of the agreement; announcement of a public bid; acquisition of control and/or after manifestation of good faith intent to do so. It further provides that notification should take place before implementation and such transactions should be declared compatible with the common market pursuant to a Commission decision.

The EU legal position on prior notification before implementation of mergers is similar to the legal position in COMESA where prior notification is mandatory. In COMESA notification of a merger must be done within 30 business days of the parties’ decision to merge and failure to file the transaction within the 30 business days deadline may lead to fines of up to 10 per cent of the parties combined turnover in the whole COMESA region. In the EU failure to notify mergers before implementation attracts huge penalties of up to 10 per cent of worldwide group turnover. For example in 2009 the EC imposed a fine of €20 million on Electrabel, after acquiring control of Compagnie Nationale du Rhône without prior approval. The EC completed investigations and concluded that Electrabel had already

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233 EC fact sheet on mergers available at http://ec.europa.eu/competition/publications accessed on 1 August 2015 states that principally the European Commission scrutinise larger mergers with an EU dimension, reaching certain turnover thresholds; all smaller mergers are usually subject to referral mechanism which allows the Member States and the Commission to transfer the case between themselves, both at the request of the companies involved and of the Member States.
236 www.comesacompetition.org accessed 15 May 2015. Efforts to get an example of case in COMESA which illustrate the consequences of non-notification did not yield any most probably because it is still a new competition body.
acquired *de facto* sole control of CNR more than four years before notification.\textsuperscript{238} This decision of the EC was confirmed by the Court of Justice on appeal.\textsuperscript{239} Similarly under South African competition law; failure to notify intermediate and large mergers prior implementation results in serious consequences, as indicated in the chapter 2.

In the UK notification of mergers to the Competition and Markets Authority (CMA) is voluntary and there is no prohibition on companies implementing the merger without clearance from the CMA.\textsuperscript{240}

The legal position on merger notification in South Africa, COMESA and the EU is different from other jurisdictions like the UK, where the notification of mergers before implementation is voluntary and there is no waiting period that must expire before a merger can be completed.\textsuperscript{241} This has resulted in legal uncertainty in a number of merger cases. For example *ex post* implementation the UK Competition Commission ordered the prohibition and required divestment of the acquired business in a merger transaction between Stericycle/Ecowaste Southwest \textsuperscript{242}; despite the fact that prior notification is *de jure* not required. This shows that prior notification of a merger before implementation can save firms a lot of time and resources and provides legal certainty.\textsuperscript{243} In fact there are a number of remedies that the Competition and Markets Authority in the UK can apply to remedy an anti-competitive merger include prohibition from entering into the merger, being forced to appoint a trustee at the businesses’ expense to ensure that prior implementation does not continue and to mitigate anti-competitive effects and force the divestiture of the business if the merger is prohibited.\textsuperscript{244}

### 3.3.2 Comparative discussion of notification of merger fees

Although South African merger notification fees may seem expensive; it is clear that compared to other jurisdictions like COMESA they are quite minimal. For example rule 55(4)
of the amended COMESA Competition Rules\textsuperscript{245} states that notification of a notifiable merger shall be accompanied by a fee calculated at 0.5% or COM$ 500000\textsuperscript{246}, or whichever is lower of the combined annual turnover or combined value of assets in the common market, whichever is higher.\textsuperscript{247} According to the explanatory note provided by COMESA interpretation of the above provision implies that the COM$500000 is the maximum fee payable for merger notification of notifiable mergers.\textsuperscript{248} Similarly the Competition and Markets Authority in the UK charges different fees for different sizes of mergers for notification: a fee of £40000 for mergers with a value of UK annual turnover of the enterprises being acquired of £20 million or less; £80000 for mergers where value of the UK annual turnover of the enterprises being acquired is over £20 million but not over £70 million; £120000 for mergers where the value of the UK annual turnover of the enterprises being acquired exceeds £70 million, but does not exceed £120 million and £160000 for mergers where the value of the UK annual turnover of the enterprises being acquired exceeds £120 million.\textsuperscript{249} The EU competition jurisdiction does charge merger filing fees.\textsuperscript{250}

### 3.4 Conclusion

Section 12(1)(a) of the Competition Act defines a merger widely to cover horizontal; vertical or conglomerate mergers and states that a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another. Mergers play a critical role in any economy and life of business enterprises through organic growth and diversification which ultimately improve competitiveness of firms, but also pose serious competition concerns if not properly regulated because there is the likelihood of outcomes that conflict with the policy goals of a competition law regime. The Competition Act seeks to address some of these likely adverse outcomes through compulsory notification of all intermediate and large mergers which meet certain thresholds. Requiring notification before implementation of mergers saves enforcement costs for the competition authorities and provides legal certainty to merging parties. Small mergers are not required by law to be notified to the Competition Commission, unless the Competition Commission on the basis that they may substantially prevent or lessen competition; and/or it


\textsuperscript{246} About R6million in August 2015.

\textsuperscript{247} [http://www.comesacompetition.org/?page_id=393](http://www.comesacompetition.org/?page_id=393) accessed 1 June 2015.

\textsuperscript{248} Ibid.


cannot be justified on public interest grounds; requires it to do so.\textsuperscript{251} The assessment of mergers prior implementation by the competition authorities is meant to critically analyse the level and strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively.

If parties are not sure whether a specific transaction meets the definition of a merger and whether it requires notification, they can seek advice from the Competition Commission on such transactions through the advisory opinions. As indicated above advisory opinions are not law and do not replace/transfer or excuse the parties from their duty to notify a notifiable merger.

Merging parties are encouraged to notify notifiable mergers before implementation to avoid these inherent risks. Failure to notify a notifiable merger attracts serious consequences including but not limited to the imposition of an administrative penalty, imposition of behavioural and/or structural conditions to the merger, interdicting such conduct (implementation of merger) from continuing, requiring divestiture or even prohibition of the merger deal. The current legal position presence a lot of challenges for small merging parties.

3.5 Recommendations

It submitted that for legal certainty inherent in \textit{ex ante} notification of mergers and predictability of legal consequences the Competition Act should be amended to require compulsory notification of all mergers including small mergers before implementation. This recommendation is in sharp contrast with the current legal status where small mergers can be implemented without notification but the law grants the Competition Commission discretion in 13(3) of the Competition Act to follow-up a small merger that have already been implemented and possibly unscramble it. It would be fair and just to require compulsory small merger notification to avoid the costly consequences of requiring post implementation notification. It is submitted that 6 months period when small mergers can be reviewed is a long time in a life of a business and such discretionary period will obviously bring serious operational and business consequences to the parties including wastage of time and resources. While acknowledging the intention of the legislature to possibly eliminate transactions that are unlikely to have material competition concerns and avoid overburdening competition authorities; requiring no notification of small mergers have in practice resulted in costly consequences which may be remedied by amending the Competition Act. The case of the \textit{Competition Commission of South Africa /Pangbourne Properties Limited and others}\textsuperscript{252} discussed in chapter 2 illustrate the legal difficulties which are likely to be faced by small

\textsuperscript{251} S13 of the Competition Act.
\textsuperscript{252} Case no 016246.
mergers when required to notify a merger after implementation in terms of time and resources. The fee for small merger notification should be minimal, for example R10000. As a bonus; the fees\textsuperscript{253} raised from requiring compulsory small merger notification will boost the fiscus which may probably be used to further strengthen the Competition authorities’ investigative capacity.

The Competition Commission is not bound by its own advisory opinion, and can require that certain transaction be notified later, against its own previous advice. It is acknowledged that the Competition Commission is not a court law but it is submitted that the strain of allowing and encouraging parties \textit{bona fide} to seek guidance through advisory opinions from the Competition Commission with all due diligence and then to snub such advice later should be legislatively addressed. It does not help foster cooperative relationship between the Competition Commission and potential merging parties. The Competition Act should be amended to reflect that advisory opinions are not binding on the courts nor limit the court’s inherent review scope but should not allow the Competition Commission to rescind its own on advice which was given with all the relevant facts fully, truthfully, completely, and accurately provided and where there are no changes in the relevant markets since the opinion was provided. One should hasten to mention that advisory opinions should also not be binding on other private parties who indeed can challenge the decision taken based on the advisory opinions. Currently as highlighted in chapter 2 there is nothing in the Competition Act which can stop the Competition Commission from bringing an application to the Competition Tribunal to interdict implementation, impose a penalty for failure to notify and/or order divestiture, in sharp contrast with its own advisory opinion. It is submitted that the view held by the Competition Tribunal regarding the legality and substance of the advisory opinions in \textit{Bulmer SA (Pty) Ltd v Distillers Corp (SA) Ltd}\textsuperscript{254} should be supported and possibly be transposed into legislation.\textsuperscript{255}

\subsection*{3.6 Final remarks}

Notification prior implementation of mergers is an important tool in the merger control process for competition authorities because it provides the framework and opportunity to assess mergers’ potentially irreparable effects on competition and public interest in relevant markets. Many competition jurisdictions are strengthening their competition laws to ensure merging parties notify competition authorities of proposed mergers before implementation. It is recommended that in South Africa small mergers like intermediate and large mergers

\textsuperscript{253} Currently there is no fee but if it has to be notified then a fee should be charged.
\textsuperscript{254} Case no: [2001] ZACT 13. The Competition Tribunal described the distinction between a decision and advisory opinion as artificial. However, there were special surrounding facts which showed that the Commission had made a final decision in this case.
should be compulsorily notified to the Competition Commission at no fee in order to avoid costly consequences where *ex post* they are required to notify. Small merging parties could explore advisory opinions from Competition Commission before implementation of mergers but they are not sufficiently helpful since they are not legally binding and the Competition Commission can require that a certain transaction be notified later, against its own previous advice and possibly unscrambling the merger *ex post*. 
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