



INTERNATIONAL COMPETITION NETWORK SOUTHERN AFRICA REGIONAL CALL ON MERGER CONTROL IN TIMES OF CRISIS ON 30 SEPTEMBER 2020

1. The Competition Commission of South Africa (“**CCSA**”) hosted the ICN Merger Working Group (ICN MWG) Regional Webinar on Merger Control in Times of Crisis, 2020.
2. The webinar took place on 30 September 2020 via MS Teams and was attended by approximately 44 participants.
3. A panel of speakers chaired by the CCSA presented their experiences related to separate aspects of merger control during the Covid-19 pandemic from different jurisdictional perspectives. The CCSA, Zambia, Botswana and Angola competition authorities made compelling points, highlighting both common challenges faced by each jurisdiction. The Botswana panellist pulled out of the Webinar presentations after forwarding their slides due to a public holiday in the country and inability to access Wi-Fi connection to be part of the Webinar. The CCSA presented the Botswana presentation.
4. The CCSA circulated a full set of the presentations to the ICN MWG prior to the webinar taking place. The following is a list of speakers that constituted the panel, in order of presentation:

Speaker	Topic
Zambian Competition & Consumer Protection Commission (“ CCPC ”) – Mr. Brian Lingela (Director of Mergers and Monopolies)	Practical Aspects of Merger Assessment
Competition Regulatory Authority of Angola (Autoridade Reguladora da Concorrência)	Substantive Merger Assessment

(“ ARC ”) – Mr. Délcio Pradiné Penelas (Chief Economist)	
Competition and Consumer Authority of Botswana (“ CCA ”) – Ms. Nomathemba Dladla (Director of Mergers and Monopolies)	Failing Firm Defense
CCSA – Amanda Mfuphi (Senior Analyst: Mergers & Acquisitions)	Remedies

Practical Aspects of Merger Assessment (Zambia)

In Zambia, the CCPC received a total 91 merger filings pre the Covid-19 pandemic in 2019. The CCPC indicates that it recorded 5.5% reduction in merger filings from Jan-September 2020 (52) compared to same period in 2019 when it facilitated 55 mergers.

The CCPC indicates that it implemented various measures to ensure that it continues with its merger control function during the Covid-19 pandemic. The CCPC implemented, *inter alia*, the following measures to prevent the spread of the virus:

- Submission of merger notification forms online.
- Restrictions on pre-merger physical meetings & duration which has saved on resources.
- Use of online meetings through platforms such as Webex, Microsoft Teams and Zoom Cloud meeting.
- Requiring staff to work from home.
- Telephone, as opposed to physical interviews to obtain third party views.

The CCPC indicates that there have been challenges it has experienced with working from home during the Covid-19 pandemic. The CCPC indicates that some of the challenges include (i) the protection of confidential information or data protection as working from home increases the risk of confidentiality breaches; (ii) Electricity blackouts at staff residencies and (iii) internet connectivity issues for the data. The CCPC further indicated that productivity levels also become an issue due to the nature of home environment.

In order to respond to the challenges, the CCPC placed measures to ensure the agency remains effective and efficient in its merger control function. To this end, the CCPC indicates that it is currently developing a Case Management System incorporating e-filing; ICT systems that assure security of information; and it has enabled longer review periods to accommodate collection of information in times of crises.

In conclusion, the CCPC indicates that it has paid particular attention to the Covid-19 crisis and has put in place deliberate measures to reduce the cost of doing business for merging parties and ensure compliance by the market players through the use of measures illustrated above.

Substantive Merger Assessment (Angola)

In Angola, the ARC indicates that while Angola has already been dealing with a continuous recession, businesses and, consequently, the economy as whole are also being affected by the current Coronavirus Pandemic (Covid-19).

In order to respond to the pandemic and still continue with its merger control function, the Angola authority indicates it created online mechanisms to tackle data-provision challenges while ensuring integrity. Surveys and inquiries were shared online to access market information. The authority indicates that it was able to easily collect data to progress its investigations and did not experience any particular challenges in that regard. ARC might “stop the clock” if merging parties prove unable to provide data by a specific deadline.

The ARC indicates that it did not experience the same increase in the number of mergers filed this year when compared with previous years in the same period. The ARC indicates that this may have been occasioned by the economic recession that preceded the Covid-19 pandemic in the country. The authority further indicates that it has made working arrangements via increased remote working and staff rotations to ensure it is still able to exercise merger control. Meetings are conducted, via videoconferencing or telephone. Face-to-face meetings and site visits are not advised at the moment.

The ARC indicates that the Covid-19 pandemic has not resulted in any relaxation in terms of merger assessment and the authority has maintained rigorous investigation of proposed mergers to maintain competition and protect consumers’ interest. Uncertainty remains about Covid- 19’s impact and its duration. However, ARC still ensures decisions are evidence-based and not speculative. Notifications are carefully considered on a case-by-case approach.

In conclusion, ARC will continue to assess the conduct of its merger assessment and evaluate potential changes to its practice considering Covid-19’s impact, while looking to make sure Angolan consumers are protected in such challenging circumstances.

Failing Firm (Botswana)

The CCA indicates that it had to quickly transition to an electronic filing system (to ensure limited physical contact) in order to continue with its merger control function. The CCA indicates that it had some challenges with collecting evidence for purposes of merger assessment and it had to rely on secondary data and virtual calls. To limit physical contact, the CAA did not conduct any physical meetings or site visits.

The CCA indicates that it prioritized transactions based on firms that are in financial distress in order to preserve employment during the Covid-19 pandemic. To assist the merging parties to mitigate the impact of the pandemic, the CCA committed to conducting merger assessments on an expeditious basis, particularly those mergers where firms are in financial distress.

The CCA referred to a merger it considered which raised substantial competition concerns but was ultimately saved by the failing firm defense. The merger in question involved Choppies acquiring all of the issued shares of Supasave and Megasave in one indivisible transaction. Both target entities were facing financial difficulties and sought retrenchments as a means to lower operational costs. The Commission found that the proposed transaction would result in competition concerns given the high market shares of the merged entity post-merger. However, the CCA considered the fact that the target entities were failing and absent the merger there would be widescale job losses. To prevent the negative impact on jobs, the CCA approved the merger subject to a divestiture condition.

The CCA indicates that it is currently at a stage where it is reviewing the transaction in light of the divestiture order. The CCA indicates that the enforcement of the divestiture order was a challenge for the authority due to the Covid-19 pandemic as it had to close its offices during the lockdown.

Remedies (CCSA)

The CCSA indicates that just as in many countries, South Africa was under a nationwide lockdown from the early part of 2020. The enforcement of the nationwide lockdown resulted in the restriction of commerce in S.A., with only essential services being allowed to operate at the initial stages of the lockdown. There was also a restriction on general movement of individuals with people required to work from home.

The Commission discouraged the filing of all merger transactions except those involving failing firms or those firms in distress.

The CCSA indicates that the Covid-19 crisis had an impact on its role of monitoring conditions imposed in mergers. There were delays in the submission of compliance reports / affidavits due to most companies suspending their business operations for the duration of the lockdown.

The CCSA indicates that there have not been several requests from merging parties for a change or relaxation in the obligations they have under conditions imposed by the competition authorities. Therefore, though merging parties are largely complying with their substantive obligations under the conditions there have been instances where the merging parties have requested a variation of the conditions or informed the Commission, they may have difficulty with complying with commitments, particularly where there have been Fund/Investment conditions.

The CCSA referred to instances where the Commission has received requests to vary conditions and extend the time periods for compliance. On both occasions, the competition authorities granted the merging parties the requested extension.

The Commission has noted some firms have indicated that the effect of the Covid-19 pandemic on their financial status may affect their ability to comply with the conditions. The parties most affected appear to be merging parties who committed to certain Fund/Investment conditions wherein they committed money for public interest outcomes, such as enterprise development, supplier development funds, etc.

In considering the requests the Commission has regard to, *inter alia*, the following:

- The varying impact of the lockdown in different sectors. For example, the effect of the lockdown on a firm in the alcoholic beverages market was likely more severe than the effect on a merged entity in the oil/petroleum market which could trade during the lockdown (albeit on a reduced number of product lines).
- The global performance of multinational business. Some of the merged entities applying for changes in conditions are MNCs with sustained income from elsewhere. They need not fund their operations from the SA balance sheet only.

Questions & Answers session

After the presentations, an interactive Q&A session took place. The questions posed by the audience were directed at the ARC and the panelist from the ARC sufficiently dealt with the questions.

Conclusions and Key Takeaways

The Southern Africa regional webinar was an edifying experience for all participants and revealed the challenges experienced by the authorities in the region as a result of the Covid-19 pandemic.

The regional webinar revealed that there was commonality amongst the authorities in the region on the adoption of remote working procedures and the use of virtual tools to enable the authorities to execute their merger control functions. It was further noted that the Covid-19 pandemic also had an impact on the volume of merger activity in the region with a decline of merger filings when compared to previous years in the same period. This decline in merger activity was attributable to the downward economic turn occasioned by the pandemic. There has also been a prioritization of mergers involving firms that are in financial distress and the authorities in the region have endeavored to assess these expeditiously to save firms from failing and ultimately prevent job losses. Evidence gathering during merger investigation proves to be a slight challenge for the authorities as the ability to conduct face-to-face meetings and site visits has been hampered due to the Covid-19 pandemic. The webinar also revealed that authorities have had to grapple with the potential of non-compliance with some remedies or an extension of the compliance period, due to the adverse effect the Covid-19 has had on the economy and firms.

Taken as a whole, the authorities in the region continue to function effectively and execute their merger control function during the pandemic, having put in place various measures to ensure it continues processing mergers filed with the respective authorities.