

SUBMISSIONS BY THE LAW SOCIETY OF THE NORTHERN PROVINCES (INCLUDING GAUTENG, MPUMALANGA, NORTHWEST AND LIMPOPO) ("the Law Society") IN RESPONSE TO THE CALL BY THE PARLIAMENTARY PORTFOLIO COMMITTEE ON ECONOMIC DEVELOPMENT ("Committee") FOR COMMENTS ON THE MERGER BETWEEN WALMART STORES INC AND MASSMART HOLDINGS LIMITED – CASE NO: 73/LM/Dec10 ("the Walmart Case")

1 INTRODUCTION

1.1 As there is currently an appeal before the Competition Appeal Court against the judgment of the Competition Tribunal in the Walmart Case, the Law Society does not believe it is appropriate for it to deal with the merits of or the Tribunal's judgment in the Walmart Case or in respect of the Walmart/Massmart merger generally, in these submissions. The Law Society however welcomes the opportunity to make submissions to the Committee on the structure and functioning of the South African competition authorities in assessing mergers.

1.2 The Law Society wishes to make submissions on the following matters –

1.2.1 the institutional structure of the competition authorities created by the Competition Act No. 89 of 1998 ("**the Act**");

1.2.2 the jurisdiction and powers of the competition authorities;

1.2.3 the process in the Act for assessing mergers;

1.2.4 the test for assessing mergers in the Act.

2 INSTITUTIONAL STRUCTURE OF THE COMPETITION AUTHORITIES

2.1 The Act creates three distinct and *independent* competition authorities, details of which are set out below.

2.1.1 **The Competition Commission**, an *independent* administrative body which investigates all mergers and decides intermediate mergers. The

Competition Commissioner is appointed by the Minister of Economic Development.

2.1.2 **The Competition Tribunal**, an *independent* adjudicative body which decides large mergers and appeals against the Commission's decision on intermediate mergers. The members of the Competition Tribunal are appointed by the President on recommendation of the Minister of Economic Development from persons nominated by the Minister either on his own initiative or in response to a public call for nominations. The Tribunal members are required to have suitable experience in economics, law, commerce, industry and/or public affairs and represent a broad cross section of the South African population.

2.1.3 **The Competition Appeal Court**, which is a division of the High Court of South Africa and decides appeals against decisions of the Tribunal. In certain cases, the decisions of the Appeal Court may be appealed to the Supreme Court of Appeal and, with regard to Constitutional issues, to the Constitutional Court.

2.2 Key features of the institutional structure of the competition authorities are –

2.2.1 their independence. This gives their decisions credibility and allows an impartial and objective assessment of mergers by the competition authorities;

2.2.2 the checks and balances in the structure by separating investigative and decision making roles and allowing appeals. This promotes independence, administrative justice and fairness;

2.2.3 their specialist nature. This is a key benefit of the structure of the authorities in terms of the Act. Competition law enforcement is a highly specialist field involving both law and economics. The creation of specialist agencies considerably enhances their effectiveness in enforcing the Act and allows the development of specialist knowledge, skills and experience within the authorities. It has also contributed to the active and successful development of South African competition law jurisprudence since the Act came into effect in 1999.

- 2.3 The Law Society supports the current structure of the competition authorities under the Act and submits that it has contributed to the successful, credible and effective enforcement of the Act. In practice, the structure put in place by the Act has proven to be robust and draws an adequate balance between the need to protect consumers, strengthen the economy and provide legal and procedural certainty to stakeholders.

3 JURISDICTION AND POWERS OF THE COMPETITION AUTHORITIES

- 3.1 The Act sets out the jurisdiction of the competition authorities including with regard to merger control. Section 3(1) of the Act provides that the Act applies to all economic activity within, or having an effect within South Africa. The Act accordingly applies to economic activity outside South Africa but only to the extent that it has an effect in South Africa. The Law Society supports this approach as it excludes irrelevant matters and ensures the most appropriate use of the staff and resources of the competition authorities.
- 3.2 The merger control test in the Act is considered in more detail below but covers an assessment of a merger both with regard to its effect on competition and four public interest factors set out in the Act. It is beyond the powers of the competition authorities to assess a merger with regard to matters falling outside the scope of the merger control test. To do so would be unlawful. The Law Society submits that it is not the role of the competition authorities to make, regulate or implement other industrial and economic policies which currently fall under the jurisdiction of Government departments or other regulators.
- 3.3 Furthermore, having specialist competition authorities with broad investigative powers is a key benefit of the Act. This benefit would be lost if the competition authorities were required to regulate matters unrelated to competition law. This would also divert staff and resources away from competition law enforcement.
- 3.4 The Law Society accordingly submits that the jurisdiction and powers of the competition authorities with regard to merger control are appropriate and effective and need not be reconsidered.

4 THE MERGER CONTROL PROCESS IN THE ACT

- 4.1 The first stage of the merger control process is an investigation by the Commission. The Law Society submits that this is appropriate given the investigatory powers and specialist skills and expertise of the Commission. The Law Society submits that the Commission has, since its formation in 1999, established itself as a reputable, transparent and effective regulator. The Commission has also been recognised internationally, including by the Global Competition Review (GCR), which awarded the Commission a rating of three and a half stars out of five for 2008, 2009 and 2010 as well as the GCR "Agency of the Year in Asia-Pacific, Middle East & Africa Award" in 2011. The Commission has also been active in establishing the African Competition Forum, an organisation of African competition agencies.
- 4.2 The second phase of merger control is adjudication by the Tribunal pursuant to a public hearing. The Tribunal has, since its establishment in 1999, gained an enviable reputation as a transparent and effective adjudicator. The Tribunal members and their decisions are held in high regard by their international peers, academics and international commentators. Both the Commission and the Tribunal play an important role in the International Competition Network, an organisation of competition agencies throughout the world. In 2011, the World Economic Forum annual Global Competitiveness Report ranked South Africa 12th out of 139 countries on the extent to which anti-monopoly policy promotes competition.
- 4.3 The Act allows for the participation in the merger control process and Tribunal hearing of all relevant stakeholders including trade unions, employee representatives and the Minister of Economic Development as well as other third parties like competitors or customers with a recognised material interest in the matter. Each merger must be notified to the Minister and he has the right to participate fully in the merger control process on public interest grounds. All participating stakeholders may make representations, lead evidence, cross-examine witnesses and submit documents to the Tribunal. This allows for all relevant views on a merger to be fully aired and scrutinised in a public forum. In the Walmart Case, several trade unions and three Ministers intervened and made submissions to the Tribunal. The Tribunal is

also empowered to call witnesses (in the Walmart Case, the Tribunal called Shoprite's Head of Food Buying to testify). The Tribunal also actively participates in the hearing and questions witnesses. The Law Society supports this process as it allows the Tribunal to hear submissions from all interested parties and actively participate in the hearing before making its decision.

- 4.4 The Tribunal's decision is made after considering the evidence on a balance of probabilities. It gives written reasons for its decisions and its judgements have significantly contributed to the development of South African competition law jurisprudence. These judgements have generally been held in high regard internationally.
- 4.5 The Tribunal may impose conditions on its approval of a merger. In practice (such as in the Walmart Case) such conditions are often volunteered by the merging parties or negotiated and agreed with the Commission before being considered at the Tribunal hearing. This provides important flexibility in addressing any concerns a merger may raise.
- 4.6 The Tribunal's decisions are subject to appeal, which allows for those decisions to be tested by another body. This provides for a check and balance of the Tribunal's powers and promotes independence, administrative justice and fairness.
- 4.7 The Law Society submits that the merger control process in the Act promotes a transparent, fair and effective assessment of mergers and that the competition authorities have, since their formation in 1999, established themselves as reputable, transparent and effective regulators.

5 THE MERGER CONTROL TEST IN THE ACT

- 5.1 Unlike most foreign countries, the merger control test in the Act is not limited to assessing the effect of the merger on competition but also covers the effect of the merger on –
 - 5.1.1 a particular industrial sector or region;
 - 5.1.2 employment;

- 5.1.3 the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- 5.1.4 the ability of national industries to compete in international markets.
- 5.2 The Law Society submits that the inclusion of the above public interest grounds is appropriate for South Africa. The wording is wide enough to cover the purposes set out in section 2 of the Act and enables a wider investigation and assessment of the effects of a merger in South Africa. However, if a merger will not substantially lessen or prevent competition in South Africa, such merger should not be prohibited due to a public interest concern as it appears highly unlikely that a public interest concern could not be addressed by the imposition of an appropriate condition by the Tribunal. The Tribunal, as a specialist body, is best placed, after hearing all stakeholders at a public hearing, to consider both whether a condition is required to address a public interest concern arising from a particular merger and the economic effects of such condition, within the specific context of such merger.
- 5.3 An inherent difficulty of merger control is that it requires an assessment of the possible *future effects* of a merger. Any assessment of a merger involves considering the probabilities that a competition or public interest concern will in fact arise after the merger is implemented. The need for having specialist bodies to investigate and decide mergers has been emphasised above. In addition, the necessary checks and balances between those bodies permits a thorough assessment of a merger's effect.
- 5.4 The Law Society submits that the merger control test has been applied by the competition authorities in a clear, certain and consistent manner and this has contributed to the successful development of South African competition law jurisprudence since 1999. The same rules must apply to all merging parties whether local or foreign. If conditions are imposed, they must be specifically linked to and arise from the merger.
- 5.5 The Law Society submits that the merger control test and public interest grounds set out in the Act are appropriate for South Africa, have been effectively applied in practice and need not be reconsidered.

6 CONCLUSION

The Act was the product of a thorough policy review and extensive negotiations between all stakeholders including Government, trade unions and business. As demonstrated above, the Act has established an appropriate and effective framework for investigating and assessing the economic aspect of mergers (including public interest issues). The merger control regime functions well in practice and allows for full stakeholder participation in a public forum. Accordingly, the Law Society submits that there is no need for the South African merger control regime to be reconsidered.

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