The role of Competition authorities in hostile takeovers and its inter-relationship with the Securities Regulation Panel

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The short answer to the question posed by my topic is that Competition authorities have no role in hostile mergers and have no relationship with the Securities Regulation panel. At least that is the situation as it should be. The reality is, as all of you who have enjoyed the spectacle of a hostile takeover from the sidelines, or better still been well paid for taking up the cudgels on behalf of one of the belligerents know, is that competition authorities have become a vital part of the strategy of parties in hostile takeovers and that like it or not that is not going to change.

Competition law in its purest form is disinterested in the fate of shareholders. Thus whether a merger comes to us as a result of parties totally enamoured with one another or utterly at odds is a matter of sentiment not competition policy. This is distinguishable from enquiring as to the rationale for a merger -something that is of interest to competition authorities, but whether buyer and seller are in harmony or discord is of no interest to us.

That being said the reverse is not so. Competition Authorities are of great interest to parties in a hostile merger. Why this is the case is not hard to figure out. Since mergers cannot be implemented without competition approval and since competition approval does not always move at the speed of light, to the person defending against a hostile takeover it is the ideal choice of battlefield.

Despite what I have said, that whether or not a merger is hostile is irrelevant from the standpoint of competition policy, this is only true as a substantive issue. As a practical issue, whether or not the transaction is hostile is all too apparent for regulators as it creates several areas of contestation, which makes merger control considerably more difficult.

Jurisdiction

In the first place we ask the question does this performance of aggressive acquisitiveness have anything to do with us at all. Is what's going on what our Act would call a 'merger'? If not, we can like the rest of the public enjoy the goings on from the stands. If it is, we are called in to be the umpires.

In its classic guise the first stage in a hostile merger is some intermediate foray, not the full bid - but a transaction, which bidders will always tell you, for some of the most ingenious reasons, is not a merger and which the target board will always tell you, is. What characterises the first strike is that it seeks in one swift move to disable the enemy defences, so that continued resistance becomes futile. Since speed and surprise are of the essence, notification is an anathema. The skilful hostile bidder thus seeks to design a transaction that will capture strategic ground whilst the enemy board is slumbering, but, as importantly, it must be one that can fly beneath the radar screens of the competition authorities. More often than not these bidders are not trying to evade final notification. What they want to do is to create facts on the ground - buy sufficient shares or replace directors before the commencement of notification so that, so to speak, the enemy board has had its air force bombed on the ground before it can take off. Once all internal resistance to the merger has been immobilised notification seems a less threatening prospect to the bidder.

Mindful of this the targets boards' fight their greatest battles over characterising the first strike. This has produced a great deal of jurisprudence in competition law dating back to the Supreme Court of Appeals decision in the failed bid by Nedbank for Standard Bank through the Harmony / Goldfields saga, to the most recent bid by HCI for Johnnic. But this litigation has had some

common themes. Bidders have sought to avoid or delay notification whilst target firms have sought to find an obligation to notify. Has there been a uniform view on these matters by those tasked with deciding them. I think I can safely say that there has not been. Would there have been a better way to go, perhaps clearer definitions in the Act. I would again suggest not. All definitions of what constitutes a change of control, no matter how revised will, when challenged by smart advisors, leak some water; whether as a result of our jurisprudence we now have a flood instead of a puddle, is a topic for another day.

Notification procedures

Let us assume that this hostile bid **is** to be styled a 'merger' the next question is, do our procedures deal adequately with a situation where the so-called merging parties are, to put it euphemistically non- consensual. Notification procedures are designed with consensual parties in mind. Buyer and seller make joint filings and tell the competition authority what they know about their businesses and about the relevant markets in which they operate. In the consensual bid, these interests are aligned and both parties have a common interest in the way they interact with the authorities, usually to tell them as little as they can get away with.

The hostile bid threatens to break the mould. In the first place the bidder can do nothing to control the way the target will handle the filing. For this reason the ICN merger guidelines recommend that merger rules provide that in the case of hostile mergers special rules be provided. Among these suggestions is that the merging parties are not required to make join filings or to give the competition authority the discretion to waive certain requirements for filing. In SA, the Competition Commission rules do just that, they provide that one party may be given a directive not to make a joint filing and in addition, on good cause shown, to file documents on behalf of the other firm. Thus in an important aspect the rules work to accommodate hostile mergers. The difficulty in a hostile merger is not that the target won't file, it usually does this with enthusiasm, but that it files too late.

Atypically of merging parties, the board of the target firm in a hostile merger will file vast tracts of evidence and devise some of the most exotic theories of competitive harm known to competition law. Where pure competition issues fail, the public interest is invoked with enthusiasm. Firms hitherto not known for their love of labour or empowerment become overnight the standard bearers of social equity.

Targets also embark on adventurous discovery applications and there is a risk that documents sought in the competition process are really being sought for some other litigation that forms part of the same war. Rarely in hostile bids is the battle fought on only one front.

What can the authorities do to prevent this? Well they are in a paradoxical situation. Competition authorities as a rule want to encourage firms to come forward to provide information. Dismissing a hostile board's submissions, simply because you have some a priori notion that because its hostile it must be tainted, would be counter productive to competition enforcement, which relies on information to inform its decision making. Many third parties who come to us wishing to oppose a merger do not necessarily do so animated by concerns for the fate of the consumer. Nevertheless they are frequently the source of useful information and it is precisely because, to borrow from Yeats, they are filled with 'passionate intensity', they may do the work that an authority neither has time nor the resources to perform. It is thus not easy for a competition authority to summarily dismiss the supplications of a party because it emanates from a hostile board.

That being said there are times when the authorities will do themselves a disservice by allowing themselves to be used in situations where competition concerns are contrived, and it may require firm handling to prevent a process being subverted.

Lest I am thought to be sympathetic to only one side of this conflict let me assure you I am not. Hostile bidders are not immune from subverting the process themselves to their benefit, particularly if there is a genuine Competition Act concern lurking. Most bidders urge the competition authorities to fast track investigation of the bid, indulging in special pleading that hostile bids are good for the economy and we should do everything to encourage this Darwinian process that sees a superior species of management evict the moribund mediocrities who run the company at present and who seek to hide behind the shield of regulation, to protect them from the irreversible verdict of nature.

There is no particular reason why hostile bidders should be entitled to any place at the front of the queue if their merger raises competition concerns. If a merger, albeit hostile, raises competition problems then the competition authorities must investigate it properly and not let aggressive bidders force them into hasty errors. There is nothing in the competition act to suggest that the interests of a class of shareholder who may benefit from a merger should outweigh those of consumers who may lose out if the merger is anti-competitive. To suggest that because a merger because it is hostile has some intrinsic virtue which competition law must recognise is in my view fallacious. There should be no presumption either way.

Those not making claims from a sense of the theological good of mergers as a matter of substantive competition policy, may still nevertheless make claims that from an efficient market hypothesis hostile mergers are a social good and that regulation from wherever it emanates should not impede this irresistible force of good, otherwise we interfere with the market's way of imposing natural selection. On this argument hostile mergers must, even if they seem problematic, be fast tracked lest we discourage others from this virtuous activity in future. If hostile mergers cannot be done quickly on this argument they will not be done at all and so the economy will be bereft of this vitalising function.

The Competition Act in general requires that mergers be dealt with expeditiously. There is in my view no special claim for the bidding firm to have its merger dealt with more expeditiously than some other merger waiting patiently for our attention. Their commercial rationale for expedition may be different to those of the hostile bidder, but may be no less compelling.

Those advising firms making a hostile bid that may raise concerns under the Act are well advised to consider that their expectations for expedition may not be met and to plan accordingly. If you cannot win without a blitzkrieg you may have to reconsider going to war. What I am trying to say is that the challenge for competition authorities is to not get caught up in the war. We must aspire, like the Swiss, to retain our neutrality; the hostile bid should neither be retarded by the opportunistic bidder nor accelerated by an aggressive buyer.

Let us assume that the hostile merger is now heard by the Tribunal and it decides to clear the merger without conditions.

Ordinarily, in the friendly merger that would be the end of the matter. But again in a hostile merger things work differently. The Competition Act only recognises two classes of appellant from

a decision of the tribunal in merger cases, the merging parties, and where they have participated in proceedings, employee representatives.

But the Act says that ***any party to the merger*** not just the buyer, has a right to appeal. Thus paradoxically the hostile target can do what no-one else; neither the Competition Commission or an intervenor in the Tribunal's hearings can do, it can oppose on appeal a decision of the Tribunal to approve a merger.

This is probably the best weapon open to a hostile board with the wallet to match its predilections, especially since the Supreme Court of Appeal has now found that **it**, not the Competition Appeal Court has the last word on all matters competition. The road to Bloemfontein may soon be paved with bad intentions.

But a bold court may yet avoid the problem by holding that if one looks at the design of appeal rights under the act that this appeal is limited to an appeal against an adverse decision not an approval.

Relationship with the SRP

My final question is to deal with the relationship between the competition authorities and the Securities Regulation Panel (SRP). Since the ill-fated Harmony bid for Gold Fields there has been much opining on the need to synchronise timetables between the Competition Tribunal and that of the SRP. My view is that this is unnecessary, each has a job to do that is quite different and has to be done, marching to the drumbeat of its own requirements. A transaction that is problematic for the one is not necessarily problematic for the other, given their vastly different considerations.

What does provide a problem is a so-called hard conflict rule. If one regulator requires a transaction to be completed or to become unconditional within a given time period, a time period that the other regulator cannot meet, this creates an irreconcilable conflict which is unfair on a bidder. The Competition Act does not create such a conflict, but the implementation of the SRP code may do, and to that extent, I believe that either the SRP must amend its rules or adopt a practice that harmonises its time periods with that of other regulators. Whilst there may be a value in implementing a guillotine against the behaviour of private parties there is no justification for doing so against other regulatory processes over which private players have no control.

As a carry over from previous legislation the Competition Commissioner sits as a member of the appeals panel of the Securities Regulation Panel. I believe that this is inappropriate as it can create a conflict of interest. An aggressive Commissioner who has not won in one forum may choose to do battle on different grounds in another forum. Secondly, and I say this with no disrespect to the Competition Commissioners past, present and future, there is nothing in their job descriptions that give them any special expertise in implementing the SRP code. Regulators performing different functions should not sit on each other's boards.

The most vicious battles in hostile mergers take place not in the courts, but in the press. Both parties realise that the battle for the hearts and minds of the public, particularly if they are shareholders, is as important as any other site of struggle. In the course of this form of war, where both sides need to fire regular salvoes, the activities of the regulators are under constant

scrutiny. If the competition authority moves with due caution, it will soon find that the bidding company's rottweiler has identified the regulator as a serious threat to the free market and to the prospects of future foreign investment.

If it moves too swiftly, so upsetting the target board's comfort levels, it will be accused of doing a hasty and shoddy job and letting down the public in its hour of need. Since hostile mergers are one of the few times that the soap watching general public follows the financial press, there is a danger that their perceptions of regulation are formed on the basis of this exchange of cross-fire. This is an unavoidable evil - one cannot prevail on companies to shut up and in a democracy this is something regulators just have to grin and bear. It would not in my view be appropriate for them to descend into the trenches to join the propaganda war.

So, if after all that it appears that I am hostile to hostile mergers perish the thought. My life like anyone else's would be much duller without them.