COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: SM325Mar18

In the matter between:

Joyson KSS Holdings No.2 S.A.R.L	First Applicant
Joyson KSS Auto Safety S.A	Second Applicant
Takata Corporation	Third Applicant

and

The Competition Commission	Respondent

In *re* the small merger between:

Joyson KSS Holdings No.2 S.A.R.L and Joyson KSS Auto Safety S.A	Primary Acquiring Firms

and

Takata Corporation	Target Firm

Panel	: Anton Roskam (Presiding Member) : Andiswa Ndoni (Tribunal Member) : Medi Mokuena (Tribunal Member)
Heard on	: 19 December 2018
Order Issued on	: 11 September 2019
Reasons Issued on	: 11 September 2019

Reasons for Decision

Request for Consideration of a Small Merger

[1] This was an application for consideration of a small merger that had been conditionally approved by the Competition Commission ("Commission") on 13 March 2018. The small merger was duly considered by the Competition Tribunal ("Tribunal") and was approved on 11 September 2019. The reasons for doing so are detailed below.

[2] The application had been brought by the parties to that small merger in terms of section 16(1)(a) of the Competition Act 89 of 1998 ("the Act"), read with Rule 32 of the Tribunal Rules. The application was filed on 27 March 2018.

[3] The applicants are the acquiring firms, Joyson KSS Holdings No.2 S.A.R.L and Joyson KSS Auto Safety SA (collectively referred to as "Joyson"), as well as the target firm, Takata Corporation[1] ("Takata"). For the sake of clarity, we will from now on refer to the applicants, collectively, as the merging parties and when relevant, by their respective names.

[4] In their consideration application the merging parties sought an order approving the small merger subject to the conditions proposed by them, rather than those which the Commission subjected to its approval of the merger. However, despite tendering their own conditions, the merging parties were of the view that no conditions were warranted given the circumstances of the merger. The Commission did not change its position and continued to defend its decision to impose its conditions on the merger.

[5] It should be noted that the merging parties only sought to amend the conditions relating to the establishment of an Escrow Fund.[2] They did not seek any amendment to the conditions addressing any of the public interest concerns arising as a result of the merger.[3]

Background

The merging parties

[6] The primary acquiring firms are the collective Joyson entities, which were incorporated for the purposes of the merger and are wholly-owned subsidiaries of Ningbo Joyson Electronic Corporation ("Ningbo Joyson"), headquartered in the peoples Republic of China.

[7] Ningbo Joyson and its subsidiaries (the "Ningbo Joyson Group") develop and supply products and systems in a number of automotive component sectors. Within the Ningbo Joyson Group, KSS Holdings Incorporated ("KSS"), headquartered in the United States of America, is active in research and development, design, manufacture, marketing and sale of automotive safety systems, including passive safety products, such as airbags, seatbelts and steering wheels.

[1] Takata Corporation had changed its name to TKJP Corporation as of 21 June 2018.
[2] Annexure A to the Commission's Merger Clearance Certificate and Reasons dated 13 March 2018.
[3] Annexure B to the Commission's Merger Clearance Certificate and Reasons dated 13 March 2018.

[8] Ningbo Joyson is also involved in the supply of active safety products (including event protection devices, integrated safety and electronics solutions, and autonomous technologies) and specialty products (products for aerospace or heavy industrial applications and personal protection systems).

[9] Ningbo Joyson's five main technical centres are located in China, Germany, Japan, South Korea and the United States of America. Ningbo Joyson does not have any subsidiaries in South Africa.

[10] The primary target firm is Takata, an automotive safety systems supplier to major automakers. Takata is headquartered in Tokyo, Japan and has regional offices in the United States of America, Brazil and Germany.

[11] Takata's product range includes seatbelts, airbag systems, steering wheels, child seats and electronic devices such as satellite sensors and electronic units.

[12] Takata operates in South Africa through Takata SA, which manufactures/assembles and supplies passive safety systems such as steering wheels, airbags and seatbelts in South Africa and to different Original Equipment Manufacturers ("OEMs") with whom they would be contracted to supply. Takata SA has a single factory located in Durban.

[13] Globally, the merging parties are active in the manufacture and sale of airbags, seatbelts and steering wheels. With regards to South African customers, the activities of the merging parties overlap in the supply of seatbelts to South African based OEMs.

The global restructuring of Takata

[14] Takata is in the final stages of a fundamental global restructuring process in the wake of a series of lawsuits and a series of recalls by several vehicle manufacturers equipped with Takata airbag inflators containing phase-stabilized ammonium nitrate as propellant ("PSAN inflators"). These recalls are as a result of concerns that some of the PSAN inflators may rupture during deployment, creating a safety risk to vehicle occupants.

[15] The recalls triggered billions of dollars in contractual indemnity, reimbursement, and contribution claims asserted by the OEM's against Takata as a result of the costs to remove and replace the recalled PSAN inflators. Takata also faced a multitude of individual and class action personal injury or wrongful death lawsuits, as well as economic loss lawsuits.

[16] Further, the United States National Highway Traffic Safety Administration ("NHTSA") imposed a penalty on Takata in November 2015 as well as obligations on Takata to store and preserve the recalled PSAN inflators and phase out the manufacture of certain PSAN inflators.

[17] Takata also pleaded guilty to charges by the United States Department of Transportation and agreed to pay an amount in restitution but lacked the resources to fully fund the OEM restitution fund. As a result of this, a fifteen-member informal OEM Customer Group (comprised of the largest United States, European and Japanese OEMs) was formed in 2016 to negotiate a restructuring and/or sale of Takata.

[18] It was clear that the only way Takata could meet its obligations under the criminal plea agreement was to sell its global business, which spanned five continents. The abovementioned indemnity liabilities to OEMs and the individual and government liability emanating from Takata's defective PSAN inflators, however, made it difficult to achieve a market sale absent protections for a buyer for present and future liabilities.

[19] The sale of Takata had to be consummated by 27 February 2018, the deadline in the plea agreement for Takata to fund all restitution payments. Furthermore, any sale of assets or the Takata business would need to allow for a smaller, reorganised Takata to continue to operate its PSAN inflator business, in order to meet its recall-related obligations to OEMs and to the NHTSA, including the storage, preservation and ultimate disposition of recalled PSAN inflators.

[20] In order to facilitate the restructuring of the global enterprise, there were coordinated insolvency filings in the United States and Japan, which were then supplemented with ancillary proceedings in other regions of the world. These filings and ancillary proceedings are detailed below:

a) On 25 June 2017 Takata's main United States subsidiary, TK Holdings Inc, and eleven of its US and Mexican affiliates ("US Debtors") each filed voluntary petitions under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware;

b) On 26 June 2017, Takata Corporation, Takata Kyushu KK, and Takata Service KK ("Takata Japan") commenced an insolvency proceeding under the Civil Rehabilitation Act in Tokyo, Japan; and

c) On 28 June 2017, the US Debtors commenced an ancillary proceeding under the Companies' Creditors Arrangement Act (Canada), RSC 1985, c C-36, as amended, in the Ontario Superior Court of Justice;

[21] The coordinated proceedings aimed to implement a global transaction and asset sale of Takata's non-PSAN inflator business to a third party and to continue the PSAN inflator business as a reorganised Takata entity in order to provide OEMs with replacement parts for the recalls they were carrying out in addition to collecting, storing and disposing of the recalled PSAN inflators.

[22] As part of the restructuring, Takata commenced an expansive marketing and sales process to identify either a third-party investor or purchaser for Takata's global assets and operations. Its advisors determined that, due to the strong interdependencies among and between global regions, a sale on a region-by-region basis would be destructive and would not be in the best interests of the creditors of Takata.

[23] Moreover, Takata's OEM customers were, because of the substantial claims that they held or would potentially hold against Takata, involved in the review and selection process of potential purchasers. The preference of these OEMs was for Takata's assets to be transferred to a company with experience in automotive passive safety products. This would ensure that the purchaser could operate the assets without interruption and ensure sustainability of supply. Pursuant to this process, the OEMs, the management of Takata, and the advisors of Takata recommended that the Takata board proceed with the bid submitted by KSS.

[24] In November 2017, Takata ultimately finalised a global sale agreement and transaction with KSS. KSS agreed to sponsor Takata's restructuring efforts by purchasing substantially all of Takata's assets and operations through the globally coordinated restructuring effort. Specifically, KSS would acquire:

a) the US and Mexican Takata assets pursuant to a court approved chapter 11 plan in the United States Bankruptcy Court;

b) the Japanese assets through a court approved asset sale in the civil rehabilitation proceedings in Japan; and

c) certain other assets through various out-of-court transactions throughout Europe, Asia and other regions.

[25] KSS would acquire all of Takata's assets and business, except for operations that related to the manufacturing and sale of PSAN inflators.

[26] In February 2018, the Japanese court approved the asset sale of Takata's Japanese business. On 21 February 2018, Bankruptcy Judge Brendan Shannon for the United States Bankruptcy Court for the District of Delaware, approved a chapter 11 plan that implemented a restructuring and sale of the US Debtors' assets to KSS. With both courts' approval, KSS was able to close on the global transaction in April 2018.

[27] The closing of the transaction in April 2018 enabled Takata to remit $850 million in restitution to the OEMs pursuant to Takata's criminal plea agreement, further fund a bankruptcy trust to compensate individuals injured by Takata's PSAN inflators, and structure a reorganised Takata to carry out the PSAN inflator recalls and other obligations.

[28] There were two final bids for all of Takata's assets and business (excluding operations that related to the manufacturing and sale of PSAN inflators). However, it was recommended to Takata's board of directors that it proceed with the bid submitted by the Acquiring Firms, without exclusivity, as it was the highest and best offer submitted for Takata's assets by a significant margin.

[29] In addition, there was concern that the bid submitted by the other candidate presented substantial hurdles to obtain certain regulatory approvals, which would probably result in a lengthy and uncertain review and approval process by various governmental entities in multiple jurisdictions, and could require significant asset dispositions in connection with seeking to obtain applicable competition approvals, with the potentiality that such necessary approvals would not be obtained.

[30] Therefore, it was submitted by the merging parties that the Acquiring Firms' proposal was the only proposal that would have allowed Takata to survive independently.

[31] Absent the Merger, the restructuring concept would fail, as Takata would not be able to continue operations past 2019 and its production assets would probably exit the market.

[32] In South Africa, the exit of Takata would lead to the closure of Takata SA and would, as submitted by the merging parties, have an effect on employment. All 192 employees of Takata SA would be at risk of retrenchment upon the closure of Takata SA.

[33] The merging parties submitted that the merger is a *bona fide* transaction to enable the acquiring firms to acquire all of Takata's assets and business (excluding operations that related to the manufacturing and sale of PSAN inflators) and to enable the continuation of the acquired entities' activities, including the supply of seatbelts to South African based OEMs.

The investigation into the Occupation Safety Systems cartel and the Joyson/Takata transaction

[34] On 3 August 2012, the Competition Commissioner ("Commissioner") initiated a complaint against various respondents, including Takata and Takata SA.[4] The respondents are alleged to have engaged in prohibited practices in contravention of section 4(1)(b) of the Act in respect of tenders issued by various OEMs for the manufacture and supply of OSS parts, including airbags, seatbelts, and steering wheels that contain driver airbags, as referred to above as the Occupational Safety Systems cartel ("the OSS cartel").

[35] On 21 November 2016, the Commissioner expanded its August 2012 complaint initiation to add other respondents allegedly involved in the OSS cartel.[5]

[36] On 14 December 2017, the merging parties notified the Commission of a small merger in terms of which Joyson intends to acquire sole control over the substantial majority of Takata's assets and operations, in terms of section 12 of the Act. The merger was to be structured as follows:

a) In terms of the Asset Purchase Agreement, Joyson would acquire a substantial majority of the assets of Takata (the "purchased assets").

b) The transaction, however, excluded the assets relating to Takata's manufacturing and sale of PSAN inflators (the "excluded assets").

[4] Commission Case No. 2012Aug0465.
[5] Commission Case No. 2016Nov0627.

c) With regard to the purchased assets, also regarded as the "good assets"[6] Joyson would acquire Takata's assets, properties, contractual rights, subsidiaries, goodwill, going concern value, purchase orders and equipment relating to Takata's steering business, seatbelt business, airbag module production business, electronics business, non-PSAN Inflator production business, Kitting Operations, equipment for testing and support with respect to PSAN inflators and any other businesses that do not involve the manufacture or sale of PSAN inflators.

d) The excluded assets, also regarded as the "bad assets"[7], relate to Takata's manufacturing and sale of PSAN inflators, which include airbags and modules formerly or currently containing PSAN inflators.

[37] Takata would therefore no longer have the purchased assets under its stable, but will remain with the "bad" PSAN Inflator assets (i.e. the excluded assets).

[38] The exclusion of the PSAN inflators assets therefore entailed that Joyson would not continue with the "bad assets" that have been the subject of the recalls.

[39] On 13 March 2018, the Commission approved the merger between Joyson and Takata, subject to conditions, including the condition that Takata set up an Escrow Fund to cover any fine that may be imposed on Takata or Takata SA, as a result of the Commission's investigation of and referral against the OSS cartel.

[40] Between March and June 2018, the Commission referred 21 separate complaints to the Tribunal against, amongst others, Takata and Takata SA. The referrals relate to Takata and Takata SA's alleged participation in the OSS cartel.

[41] In the referrals, the Commission seeks an order declaring that:

a) Takata and Takata SA have contravened section 4(1)(b)(i),(ii) and (iii) of the Act; and

b) Takata is liable for the payment of a fine in terms of section 59 of the Act.

[6] Assets that were not the subject of vehicle recalls that have caused third-party personal injury and economic loss and other claims against Takata.
[7] Assets that were the subject of a number of vehicle recalls for having caused a number of third-party personal injury and economic loss and other claims against Takata.

[42] The Commission is aware that in some international jurisdictions, Takata has admitted its involvement in the cartel conduct and has settled some of the allegations. As noted in the merging parties' consideration application, the Commission and Takata attempted to engage in settlement discussions.[8] Unfortunately, a settlement could not be reached.

[43] Subsequent to the Commission's referrals, Takata and Takata SA filed exception applications. In its exception applications Takata contends that no personal or subject matter jurisdiction has been established over it, while Takata SA excepts on the basis that the pleadings do not disclose a cause of action against it.

[44] With respect to the merger, on 27 March 2018, the merging parties filed a consideration application with the Tribunal to amend the Commission's condition on the Escrow Fund. The Conditions proposed that the Escrow Fund be established to cover any potential administrative penalty which may be imposed on Joyson and any of the Takata entities that Joyson has acquired.

The Commission's Decision in respect of the merger

[45] The Commission found that the Merger would not give rise to unilateral horizontal competitive concern as separate product markets exist for seatbelts, airbags and steering wheels.

[46] The Commission considered the post-transaction market shares of the merged entity on both a national and global basis and concluded that the merged entity would on both a national and global level continue to face competition from other players in the market. Accordingly, the Commission was satisfied that the merger would not give rise to any unilateral horizontal effects.

[47] The Commission did, however, find that the merger might give rise to anti-competitive coordinated effects, primarily because of the conduct investigated in the cartel proceedings. However, the Commission imposed no condition related to the potential for coordinated effects.

[8] Request for consideration at [36.1], page 13.

[48] The Commission explained in its recommendation that it is concerned that the Merger might be used to shield Takata from an administrative penalty, and that the Merger results in uncertainty as to which entity would be liable for the payment of any administrative penalty. In this regard, the Commission concluded that it could not "*approve a transaction which is likely to extinguish its claim against Takata for an administrative penalty arising from the cartel investigation and referral*."[9]

[49] In order to remedy its concerns, the Commission imposed a condition ensuring that any potential administrative penalty is preserved. The Commission thus approved the Merger subject to conditions that included provision for the Escrow Fund of *indefinite duration* to cover any potential administrative penalty which may be imposed upon Takata and Takata SA upon finalization of proceedings related to the Commission's complaint in the OSS Cartel.[10]

[50] The Commission was also concerned about the impact of the Merger on employment. The merging parties submitted that absent the Merger, Takata SA would exit the market, necessitating the retrenchment of 192 employees. Further, the merging parties submitted that it is the intention of Ningbo Joyson to preserve all jobs at Takata SA. In a gesture of good faith, therefore, the merging parties agreed to the public interest condition.[11]

[51] We now turn to discuss the Escrow Fund and its associated conditions that are the subject of this reconsideration.

The Escrow Fund and the associated conditions

[52] As mentioned above, as part of the global restructuring of Takata, an Escrow Fund was to be set up as no purchaser was willing to acquire Takata or its business if this meant that they would have to take over liability for these recall and antitrust obligations. For this reason, all parties involved in the reorganisation of Takata agreed to carve out from the merger the business division affected by the recalls (the PSAN inflator business). Takata, as part of the reorganisation plan, is to fund an Escrow Fund for the payment of any antitrust obligations which would otherwise accrue to the purchaser post-merger. The funds of the Escrow Fund are to come from the refunds of value added tax ("VAT").

[9] Commission's Reasons for Decision at [15].
[10] Annexure A to the Commission's Merger Clearance Certificate and Reasons dated 13 March 2018.
[11] Annexure B to the Commission's Merger Clearance Certificate and Reasons dated 13 March 2018.

[53] In order to give effect to this solution, all parties included in the reorganisation of Takata, including the merging parties, agreed on a term sheet for a regulatory escrow agreement, titled the Summary of Terms of Regulatory Escrow Agreement (the "Regulatory Escrow Term Sheet").

[54] In terms of the Regulatory Escrow Term Sheet, an Escrow Fund is to be established as the exclusive source of funds to indemnify *inter alia* the purchaser, i.e. Ningbo Joyson and its affiliates and subsidiaries, including any Takata entities acquired by Ningbo Joyson or its affiliates and subsidiaries through the merger (collectively referred to as the "Plan Sponsor"), for any and all losses, liabilities, expenses, claims, fines and damages resulting from any claims of, or investigations into, alleged conduct of Takata prior to the closing of the merger relating to price fixing, market manipulation, collusion, cartel or for a *specific period of time* any other similar anti-competitive practice which would otherwise accrue to the Plan Sponsor (the "Escrow Fund").

[55] Thus, the purpose of the Escrow Fund is to ensure that any antitrust liabilities accruing to the Plan Sponsor post transaction are paid out of the Escrow Fund. At the end of the period, the Plan Sponsor would have no recourse to the Escrow Fund.

[56] The merging parties thus objected to clauses 3.1, 3.4, 4.1 and 4.3 of Annexure A of the Commission's conditions. These clauses currently read as follows:

> "*3.1 Takata will from the Approval Date to the finalisation of the Commission's investigation and referral ensure that an Escrow Fund of a minimum amount of R180 000 000 (one hundred and eighty million rand), is established and maintained to cover any potential Administrative Penalty which may be imposed on Takata or Takata SA as a result of the Investigation and Referral.*
>
> *3.4 Without derogating from the provisions in clause 3.1 above, Takata and the Commission will engage in bona fide efforts to resolve the investigation and referral against Takata SA within 24 months of the Approval Date.*
>
> *4.1 Within 2 months from the Approval Date, Takata shall establish the Escrow Fund.*

4.3 For as long as the finalisation of the Commission's investigation and referral has not yet occurred, Takata shall, on an annual basis within 1 (one) month of each anniversary of the Approval Date, provide an affidavit by the Chief Executive Officer of Takata to the Commission confirming its compliance with the conditions set out in clauses 3.1 – 3.4."

[57] The merging parties, although maintaining that the circumstances warrant no conditions on the merger, proposed the following conditions:

"3.1 The merging parties will ensure, in terms of the Regulatory Escrow Term Sheet, that after the Closing Date and Escrow Fund of a minimum of R180 000 000 (one hundred and eighty million rand), is established and maintained for a period of 30 (thirty) months to cover any potential Administrative Penalty which may be imposed on the Plan Sponsor as a result of the investigation and referral.

3.4 Without derogating from the provisions in clause 3.1 above, Takata and the Commission will engage in bona fide efforts to resolve the investigation and referral against Takata SA within 24 months of the Closing Date.

4.1 The Escrow Fund shall be established and a minimum of R180 million will be available in the Escrow Fund prior to the imposition of any Administrative Penalty on the Plan Sponsor until 30 (thirty) months after the Closing Date.

4.3 For the duration of the 30 (thirty) month period, Takata shall, on an annual basis within 1 (one) month if each anniversary of the Closing Date, provide an affidavit by the Escrow Agent to the Commission confirming its compliance with the conditions set out in clauses 3.1 to 3.4 above."

[58] The merging parties had altered clause 3.1 to remove the indefinite period of the Escrow Fund; altered clause 3.4 to refer to "Closing Date" instead of "Approval Date"; altered clause 4.1 to remove the two month obligation to establish the Escrow Fund; and altered clause 4.3 to refer to an "Escrow Agent" instead of the Takata CEO, as if Takata was wound down, it may no longer have a CEO and thus be unable to comply with clause 4.3 of the conditions.

[59] As noted above, the merging parties had adopted the view that it is not permissible for the competition authorities to impose a condition in respect of a merger if such a condition does not address a theory of harm resulting from the merger itself (i.e. if the harm contended for is not merger-specific).

The Commission's position

[60] The Commission's position before the Tribunal was that the merger undermines cartel enforcement and should not be approved with conditions. The Commission primarily adopts this stance because insofar as the Commission's cartel enforcement against Takata is concerned:

a) The position pre-merger is that:
   i) Takata and Takata SA are respondents in the Commission's complaint referral, with both the "good" and "bad" assets falling under one stable.

b) The position post-merger will be that:
   i) Takata SA, as part of the purchased/ "good" assets, will be transferred to Joyson. Accordingly, Joyson will acquire control over a part of Takata's business that is alleged to be involved in the cartel conduct. This includes Takata SA, which is amongst the respondents in the OSS cartel referral; and

   ii) Takata will remain with the excluded/ "bad" assets and will possibly be wound down. As mentioned above, Takata is also amongst the respondents that the Commission is currently prosecuting in the OSS cartel referral.

[61] With this in mind the Commission's argument culminated in three separate points (which shall be briefly discussed in turn, below):

a) the proposed merger undermines the Commission's cartel enforcement as mandated in terms of the Act;

b) the Commission's function to prosecute cartels is in the public interest; and

c) conditions preserving and protecting the Commission's powers should be imposed in the circumstances.

The merger undermines cartel enforcement

[62] The Commission submitted that the harm created by the merger is that the Commission's function to prosecute cartels and its ability to recover an administrative penalty would be undermined. It was of the view that the merger would cause uncertainty not only as to which firm would be liable for the payment of any fine flowing from the Commission's complaint referral against Takata and Takata SA, but also uncertainty as to the recoverability of the fine.

[63] The Commission was of the view that the merger was likely to extinguish the Commission's claim against Takata for a fine arising from the complaint referral in the OSS Cartel.

[64] The merger not only affects the Commission's exercise of its regulatory functions in the cartel prosecution of Takata, but also its prosecutorial functions in general in terms of the Act.

[65] Absent the merger, the competition authorities would have clarity that Takata is the entity liable for the fine under the cartel prosecution. The fine would have been paid from Takata's stable, including the "good" and "bad" assets. The proposed merger is therefore depriving the competition authorities from properly and effectively performing and discharging their functions in terms of the Act, in that their ability to effectively prosecute the cartel against Takata is being undermined.

[66] Further the Commission submitted that the harm as to the uncertainty of the identity of the firm liable for payment of any fine and uncertainty on the recovery of the fine, is merger specific, in that it is the merger that brought about the structural change in Takata and the intricacies with regard to the payment of possible fine.

Prosecuting cartels is in the public interest

[67] The Commission submitted that in terms of section 12A of the Act it is required to assess the merger on competition and public interest grounds.[12]

[68] The Commission submitted the following argument in support of its contention that its ability to prosecute cartels is a public interest ground.

[12] See *Walmart Inc and Massmart Holdings Ltd* 73/LM/Dec10 at [28] *"One of the unusual features of the Competition Act, 1998 (Act No. 89 of 1998, as amended) ("the Act") is that despite the fact that a merger may raise no competition concerns it may still be susceptible to prohibition, or approval subject to conditions, on public interest grounds."*

[69] It investigates and prosecutes prohibited practices in the public interest to prevent and penalise prohibited anti-competitive conduct. Where its ability to prosecute prohibited practices is undermined, particularly because it approves a merger that would negatively affect and hinder its ability to prosecute cartels, the public interest is harmed.

[70] The Commission acknowledged that there is a list of public interest grounds prescribed by the Act in section 12(A)(3)(a)-(d) but contends that the consideration of public interest is broader than the four specific instances listed under section 12(A)(3) of the Act. Section 12(A)(3) reads as follows:

> "*12(A)(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on-*
>
> > *(a) a particular industrial sector or region;*
> > *(b) employment;*
> > *(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and*
> > *(d) the ability of national industries to compete in international markets*."

[71] To support its argument the Commission relied on a number of previous Tribunal cases, most notably the *Industrial Development Corporation v Anglo American Holdings*[13] matter wherein the Tribunal acknowledged that section 12A(3) has a wide ambit.

> "*The public interest considerations whilst drafted in terse language are broad in scope. For instance, the phrase "...effect on a particular industrial sector or region" opens up for consideration an enormous range of issues without doing any violence to the language. Given that 12A(2) contains a non-exhaustive list, and the wide ambit of 12A(3), it is a legitimate exercise in statutory interpretation to look at other parts of the statute, which set out its purpose and objectives, so as to create the lens through which we should view the interpretation of section 12A. Indeed, this is precisely the approach followed by Marais JA in his minority judgment in the Standard Bank case, which involved the interpretation of a section relating to the application of the Competition Act.*"[14]

[13] Case No. 45/LM/Jun02.
[14] *Industrial Development Corporation v Anglo American Holdings* at [37].

"*Clearly the legislature intended that in undertaking the analysis of the public interest, the competition authorities were to have regard to some sphere of economic activity, wider than the mere relevant market, the traditional tool of analysis of pure competition law issues*."[15]

[72] The Commission further relied on a large merger with a similar factual matrix between *Robertsons Holdings (Pty) Ltd and Silver 2017 (Pty) Ltd*[16] wherein the question as to which firm would be liable for the payment of any administrative penalty in a cartel litigation, as a result of the merger, was debated. In that merger, Silver 2017 was disposing of the Unilever spread business, which was implicated in the Unilever cartel that was at that time before the Tribunal. The Commission proposed a condition in terms of which Unilever should assume liability for the payment of any administrative penalty that may be imposed post-merger by the Tribunal, the Competition Appeal Court or any other court, in the pending cartel litigation. In its decision, the Tribunal noted that:

"The merging parties, while initially opposing the inclusion of the remedy indicated that the Commission would be able to use mechanisms available in section 64 to enforce an order, accepted the inclusion of a condition at the hearing."[17]

[73] In light of the above, the Commission submitted that its prosecutorial functions could and should fall under the broader public interest interpretation. In addition, it argued that the Commission's functions can be construed as a public interest ground that merits consideration in a merger that undermines effective enforcement of competition law.

Conditions preserving and protecting the Commission's powers should be imposed in the circumstances

[74] The Commission submitted that when its regulatory functions under the merger regime adversely affect its regulatory functions under the enforcement (cartel) regime, the proper functioning of the whole statutory body is affected. This goes against the establishment of effective structures to administer competition law, and also against achieving an efficient functioning economy.

[15] *Industrial Development Corporation v Anglo American Holdings* at [44].
[16] Case No. LM251Dec17.
[17] *Robertsons Holdings (Pty) Ltd and Silver 2017 (Pty) Ltd* at [17].

[75] Accordingly, when one has regard to the purpose of the Act, as set out in its Preamble and section 2 of the Act, any conduct that would undermine the Commission's proper administration of the Act, and therefore the purpose of the Act, should not be allowed. In this case, a merger that undermines cartel enforcement may not be allowed on broader public policy considerations, without conditions that should ensure that the Commission's enforcement functions remain effective.

[76] To this effect the Commission relied upon *AMG and the Competition Commission*[18] wherein the Tribunal noted:

> "*The second reason is determining which firm or firms the penalties should be directed to, if we find that the AMG companies breached the Competition Act we cannot have a situation where penalties imposed on AMG and its companies cannot be recovered because of corporate changes that render one or more of the companies that form part of AMG mere shells*."[19]

[77] The Commission was of the view that the AMG case indicated that the Tribunal will not allow a restructuring that will result in:

a) a respondent in a cartel referral becoming a mere empty shell; or
b) an extinction of a potential fine against a respondent that intends to restructure; or
c) an inability to recover the penalties imposed on the restructured firm.

[78] The Commission argued that this confirms the importance of properly prosecuting cartels for public interest. Accordingly, it submitted that any conduct which would undermine the exercise of the Commission's prosecutorial function vis-à-vis cartel prosecution and the recovery of a fine should not be allowed.

[79] Finally, in support of this argument, the Commission relied on the case of *Anglo South Africa Capital (Pty) Ltd v IDC of SA*:[20]

> *"The purpose of the Act as set out in section 2(f) is unique to the South African Competition regime. Such an objective is contained in neither the United States of America Anti-trust laws nor the European Union Competition Laws. This objective seeks to incorporate in*

[18] *AMG & Others vs the Competition Commission* ZACT CR093Jan07/OTH058Jul16.
[19] *AMG & Others vs the Competition Commission* ZACT CR093Jan07/OTH058Jul16 at [33].
[20] *Anglo South Africa Capital (Pty) Ltd v IDC of SA* (26/CAC/Dec02) [2003] ZACAC 2; [2003] 1 CPLR 10 (CAC) (28 March 2003).

Competition Act the constitutional principles as contained in the Constitution of the Republic of South Africa Act No. 108 of 1996 ("the Constitution")."[21]

[80] The Commission stated that when one balances the merging parties' alleged inability to establish an escrow fund against the prejudice to the public interest and the proper enforcement of the Act, the balance favours the protection of public interests. Allowing a merger that undermines the provisions of the Act, without appropriate conditions, would ultimately affect the proper enforcement of the Act and the public interest. It submitted that the Tribunal has a legislative duty to ensure that the proper enforcement of the Act is not undermined.

[81] The Commission argued that if firms were allowed to constantly raise inability to pay a fine in cartel referrals or threaten that they will not proceed with a merger because of a condition that some funds must be preserved to recover a penalty, then cartel enforcement would be seriously undermined and the Commission's function of prosecuting cartels would become redundant, as a firm will be able to plead financial difficulties or restructure in order to evade the ends of justice.

The position of the merging parties

[82] The merging parties adopted the view that it is not permissible for the competition authorities to impose a condition in respect of a merger if the condition does not address a theory of harm resulting from the merger itself (i.e. if the harm contended for is not merger-specific).

[83] The merging parties submitted that the harm identified by the Commission did not arise as a result of the merger. The harm being the uncertainty about the ability to pay an administrative penalty that may be imposed in future.

[84] The merging parties submitted that the Commission does not have the power to impose a condition in merger proceedings addressing the payment of an administrative penalty, and any such condition would in any event be wholly inappropriate because:

a) First, the issue of the ability to pay an administrative penalty is not merger-specific and it would have arisen even without the Merger.

[21] *Anglo South Africa Capital (Pty) Ltd v IDC of SA* (26/CAC/Dec02) [2003] ZACAC 2; [2003] 1 CPLR 10 (CAC) (28 March 2003) at page 21.

b) Second, the competition authorities are mandated to enquire and assess only specific types of harm and are therefore only mandated to address those through merger remedies.

Merger specificity

[85] The merging parties submitted that insofar as conditions are intended to address public interest concerns, there can be no attempt from the Commission to address, for example, broader economic concerns; rather they must address public interest concerns raised by the merger.[22] Importantly, conditions ought not to be imposed if they are not merger-specific or there are other mechanisms to address problems.[23]

[86] In support of their contentions, the merging parties mainly relied on the judgement in *Astral Foods Ltd v Competition Commission*[24]. In this matter the CAC held that a Merger Order fell to be set aside because:

> "*the order as formulated was unreasonable and excessive; went beyond the competition concerns (relating to foreclosure) that the Tribunal sought to address; was not justified by the evidence before the Tribunal in the intermediate merger proceedings; was illogical in the light of the commercial realities explained to the Tribunal in the merger proceedings; could potentially contribute to the occurrence of the very prejudicial effects about which the Tribunal and the Commission were concerned … had further potentially deleterious consequences … and was commercially impractical and untenable …*"[25]

[87] The merging parties were of the view that the Commission's case fell precisely into the traps identified in *Astral Foods*:

a) The condition does not address any merger-specific anti-competitive harm.
b) The condition goes too far and it is divorced from commercial reality.
c) The condition is impractical in the circumstances of the conditions attaching to the global restructuring.

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[22] *Minister of Economic Development v Competition Tribunal* (Walmart/Massmart merger) 110/CAC/Jul11 09/10/2012 at [15].
[23] *Walmart Inc/Massmart Holdings Ltd 73/LM/Dec10* 29/06/2011 at [116].
[24] Case No. 39/CAC/Feb04.
[25] *Astral Foods Ltd v Competition Commission* 39/CAC/Feb04 at [32].

d) The condition has the capacity to adversely affect the interests of third parties.

[88] The merging parties further relied on the Tribunal decision in *Wal-Mart*[26] where it was held that "*Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction.*"[27] They also pointed out that this case also held that:

> "*narrow construction of our jurisdiction has not always been appreciated by some of the intervenors who have sought remedies whose ambition lies beyond our purpose*" and that the "*fact that a concern exists independently of a specific merger, however weighty that concern maybe, does not bring it within our jurisdiction in performing merger adjudication.*"[28]

[89] The merging parties argue that in the counterfactual world, Takata would have met its demise and the Commission would have no prospect of recovering an administrative penalty. They submitted that the Commission, through merger regulation, sought to secure something better than what it would have in the absence of the merger.

[90] The merging parties argued that it cannot reasonably be contended that the merger – a global restructuring of Takata - was designed to avoid antitrust liability in South Africa. They submitted that the facts and circumstance of the matter show that the restructuring was necessary and that it was unrelated to questions of antitrust liability. Furthermore, they pointed out that at the time the restructuring decision was taken, and the merger was notified in South Africa, there was no complaint referral against Takata.

[91] In addition, they submitted that notwithstanding the duration of the Escrow Fund, there is no legal basis which would preclude the Commission from pursuing a complaint against Takata SA to the extent that it is found that Takata SA engaged in cartel conduct and that the merger did not render any complaint against Takata SA nugatory.

[92] In relation to Takata Corporation, the merging parties were of the view that the Commission is not in a worse off position insofar as recouping an administrative penalty is concerned, in light of the counter-factual discussed above. They submitted that Takata Corporation

[26] *Wal-Mart Stores Inc and Massmart Holdings Ltd* 73/LM/Nov10.
[27] *Wal-Mart Stores Inc and Massmart Holdings Ltd* 73/LM/Nov10 at [32].
[28] *Wal-Mart Stores Inc and Massmart Holdings Ltd* 73/LM/Nov10 at [33].

would effectively be bankrupt in the absence of the merger, rendering the recoupment of any administrative penalty highly improbable.

[93] In these circumstances, they submitted there is no credible merger-specific theory of harm which justifies the imposition a condition that there be an escrow fund regulated in the terms proposed by the Commission.

[94] Furthermore, the merging parties submitted that the CAC has previously set aside an order made in merger proceedings on the basis inter alia that it was commercially impractical and untenable. These considerations, they argued, operated against the imposition of the condition as formulated by the Commission. They contended that the Commission's insistence on an amendment to the Escrow Agreement could not be unilaterally achieved and imposed on the Merging Parties and the Commission could not insist on securing a possible fine that has not yet been imposed, and which might not be imposed on the parties protected from liability by the Escrow Fund.

The competition authorities are only mandated to assess specific types of harm

[95] The merging parties submitted that upon notification of the merger, the Commission "must initially determine whether or not the merger is likely to substantially prevent or lessen competition" through the assessment of factors set out in section 12A(2) of the Competition Act, which reads as follows:

> "*12(A)(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the 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 accountancy factor that is relevant to 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; and
(h) whether the merger will result in the removal of an effective competitor"

[96] The merging parties contended that if it appeared that the merger is likely to substantially prevent or lessen competition, the Commission must consider merger-specific technological, efficiency or pro-competitive gains that have the capacity to off-set the anti-competitive effects and substantial public interest grounds that may operate to justify the merger. The justification or otherwise of the merger on public interest grounds may also be considered separately. The consideration of whether a merger can or cannot be justified on public interest grounds are to be found in the grounds listed under section 12(A)(3), described above in greater detail.

[97] Notably, the listed factors to be taken into account in respect of the assessment of competitive conditions and the public interest do not include a consideration of the ability of the Commission to obtain payment of administrative penalties for historical contraventions of the statute if the merger is approved.

[98] The merging parties submitted that that the legislative intention with keeping merger evaluation, on the one hand, and the imposition of penalties for anti-competitive conduct on the other, separate, is patent.

[99] The merging parties submitted that even further separated from the merger evaluation is the enforcement of orders made in consequence of findings of contravention (i.e. the ability to extract the amount imposed from the firm upon which it is imposed):

a) Section 58(1)(a) of the Competition Act empowers the Tribunal to impose an administrative penalty for engagement in a prohibited practice.
b) An order of the Tribunal may be enforced as if it were an order of the High Court, but if a penalty is not paid, the Commission must institute proceedings in the High Court for recovery of the penalty.
c) Enforcement does not fall within the jurisdiction of the Tribunal, and certainly not the Commission.

[100] It was submitted that the "harm" of the inability to pay a penalty is not one that is contemplated in the context of merger proceedings (whether in the context of competitive harm or effect on the public interest).

Analysis

[101] The small merger in this case is unusual one because, as set out above, it has arisen as the result of a negotiated global restructuring of the target firm, while the target firm is the subject of prohibited practice proceedings before the Tribunal. Ultimately, the question that needs to be answered is whether or not the Commission is able to, in the circumstances, ensure the efficacy of its cartel prosecutorial functions by using its merger control regime.

[102] Given these unique circumstances in which (i) the merger is a result of a bigger, global restructuring process, and (ii) that the restructuring was negotiated by its largest creditors in conjunction with official bankruptcy proceedings filed in the USA and Japan, it was unclear as to how the merger was intended to be used as a device to avoid liability for any antitrust liabilities that the target firm would have incurred. In other words, the negotiated global merger could not reasonably have been seen to have been used to avoid antitrust liability in certain jurisdictions.

[103] It appears from the facts that the merger may in fact be beneficial to the Commission in its endeavor to ensure that its prosecutorial functions are preserved. This is because without the merger there would be no guarantee that Takata would exist in any guise today, the appropriate counterfactual would be one where Takata would have exited the market due to its inability to pay its creditors, making the recovery of any potential penalty nigh on impossible for the Commission.

[104] Following from this, we are of the view that the merging parties first submission, being that the condition imposed to recover a penalty is not merger specific, is a valid one. We accept that the correct counterfactual is the exit of Takata from the market. If Takata had exited the market the Commission would have nevertheless been faced with the proposition of potentially not recovering an administrative penalty.

[105] As it is, the merger at least allows the Commission to potentially recover a penalty through the Escrow Fund, even if the Fund is set up for a limited duration. The Escrow Fund is set up for such a limited duration as Takata's creditors need certainty on when they can expect their respective returns, this is not an unreasonable condition to the Escrow Fund, it cannot exist in perpetuity in these circumstances.

[106] Finally, we note that mergers are not to be used to put parties in better or more advantageous positions than they were before the merger. i.e. we are not to make the world a better one for them through mergers, as we had stated in *Wal-Mart: -* "*Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction.*"[29]

[107] We also find that the merging parties' second submission, being that the competition authorities are only mandated to assess specific types of harm in terms of the Act, is also a valid defence. Section 12(A)(3) allows for certain public interest grounds to be considered in merger control, this is not necessarily a closed list and indeed may have a wide ambit, as has been demonstrated in numerous other cases before the Tribunal, but in a case of this nature with its unique circumstances we cannot accept that merger control be used to preserve the Commission's ability to enforce its cartel prosecutorial functions.

Conclusion

[108] Therefore, both the merging parties' defenses are successful. The Commission could not show why the merger was a tool to avoid liability of an administrative penalty on the part of Takata. Further, the Commission has not shown that the merger would make it impossible to recover an administrative penalty.

[109] The Commission ignores the fact that the Escrow Fund is there for them to pursue a penalty and that but for the merger, they could be faced with the prospect of Takata exiting the market and not being able to recover an administrative penalty in any event.

[110] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market or raise any adverse public interest issues. Accordingly, we approve the proposed merger conditionally subject to the set of public interest conditions[30], as determined by the Commission and attached hereto as **Annexure "A"**.

[29] *Wal-Mart Stores Inc and Massmart Holdings Ltd* 73/LM/Nov10 at [32].
[30] Annexure A to the Commission's Merger Clearance Certificate and Reasons dated 13 March 2018.

Mr Anton Roskam

11 September 2019
DATE

Ms Andiswa Ndoni and Mrs Medi Mokuena concurring

Case Manager	: Kameel Pancham
For the Merging Parties	: Adv. A Subel SC instructed by ENSafrica
	Lizel Blignaut of ENSafrica for Joyson KSS Holdings
	John Oxenham of Nortons Inc for Takata Corporation
For the Commission	: Nelly Sakata, Kriska-Leila Goolabjith, and Thokozile Lekhuleni