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In substance South Africa's jurisprudence is about 12 years old and the issue of innovation has certainly not been one which has been high on the list of issues focused on by the Competition Authorities. To the limited extent that innovation has been considered by the South African competition authorities this has come up in two recent cases. One has been decided and the other has yet to be determined. I am happy to discuss each of these cases and to illustrate how the competition authorities in South Africa are treating the aspect of innovation.

Prior to specific discussion on these cases I will contextualise how South African law is being applied in the context of mergers. A very important consideration in South Africa is the application of certain public interest factors, aside from efficiency factors prior to approval of the merger. These public interest factors are defined in the legislation and comprise the promotion of: employment, black empowerment, small firms and international competitiveness. The aspects of employment, black empowerment and promotion of small firms are given detailed consideration.

Essentially this means that even a merger which can be regarded as competitive, ordinarily, can be turned down if it has an adverse impact on, by way of example employment. Recently the aspect of employment has received much focus by the competition authorities and this has largely been due to the high rate of unemployment in the country.

It is in the context of these public interest concerns that innovation has to be balanced. In one of the cases that I will discuss, the parties to a merger raised innovation benefits as a key reason for the competition authorities to promote a merger in an industry (the seed market) where the number of existing competitors would be reduced to from 3 to 2. Various objections are currently being raised not just by the competition authorities but also by social groups who have labelled the arguments put forward on innovation as nothing but a tactic and put forward by the parties only to secure approval. This matter will be heard shortly and it will be interesting to see how the competition authorities decide this issue.

A further case which I will discuss is the acquisition of Freeworld Coating by a company called Kansai Paint Co.

The Commission took quite a long time to decide this matter but eventually approved the merger with conditions that address competition and public interest concerns that arise from the transaction. An argument put forth in this matter is that the merger would allow the parties greater resources and ability to innovate, which would not arise absent the merger.

Both parties are active in the market for the supply of automotive coatings. Freeworld is also active in the market for decorative coatings through a brand known as Plascon brand. The automotive coatings market is a concentrated market with high barriers to entry and linkages between the various market players through joint ventures. The Commission found that the merger would have re-enforced concentration in the South African market and would create a forum for collusion.

between Kansai and du Pont (another multinational automotive paint company) through the joint venture that currently exists between Freeworld and du Pont.

In order to address these concerns, the Commission imposed various conditions including divestiture of Freeworld's shareholding with du Pont, conditions to ensure that the parties follow through with proposed innovation strategies and other public interest conditions.

I may also offer some views on why innovation can and should be given more deference where this can benefit a developing economy such as South Africa.