

Competition Law & Economics  
South African Developments in  
Light of Recent European  
Experiences  
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# The failing firm doctrine in South Africa

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# 1. Introduction

- The 3 problems with SA merger law
  - Notification rules
  - Guidelines
  - Development of an SA merger law
  - The failing firm doctrine as manifestation of the 3<sup>rd</sup> problem

## 2. Brief comparative overview

- US failing firm defence
  - Failing firm defence has its origin in the US
  - No explicit statutory basis
  - Requirements in the Merger Guidelines
    - Unable to meet financial obligations
    - Would not be able to reorganize
    - Good faith efforts to elicit reasonable alternative offers that pose a less severe danger to competition
    - Absent the merger assets would exit the market

## 2. Brief comparative overview

- Absolute or per se defence
- Onus
- Basis for the failing firm defence
  - Economic competition concerns
  - Private interests
  - Social cost of failure
  - Efficiency concerns

## 2. Brief comparative overview

- European failing firm defence
  - Basis for the failing firm defence
  - The Horizontal Merger Guidelines
    - Deterioration in competitive structure if failure must at least be as great as would be caused by the merger
    - Firm would in the near future be forced out of the market
    - No less anti-competitive alternative purchaser
    - Assets would exit the market

## 2. Brief comparative overview

- *BASF, France v Commission* C-68/94 and the requirement that market should have gone to the take-over firm on failure
- Onus
- Canada: Competition Act 1986, s 90(3)
  - Merger Enforcement Guidelines

# 3. The SA failing firm doctrine

- Three stages of SA merger analysis
  - Does the merger substantially prevent or restrict competition (s 12A(1))
  - Efficiency defence (s 12A(1)(a)(i))
  - Public interest (s 12A(1)(a)(ii) and 12A(1)(b) and 12A(3))
- The list of considerations s 12A(2)
  - Whether the business or part of the business of a merging firm is failing or has failed (s 12A(2)(g))
  - Provision copied from Canada (s 90(3))

# 3. The SA failing firm doctrine

- *Iscor Ltd /Saldanha Steel* 67/LM/Dec01
  - Survey of foreign law criticisms
    - Misunderstanding of the European test
    - Lack of considering the Canadian test
    - Failure to relate ratios for different tests to their requirements
    - Failure to lay down clear requirements for SA

# 3. The SA failing firm doctrine

- *Iscor Ltd /Saldanha Steel* 67/LM/Dec01
  - Facts that concern the public interest and efficiency if a merging firm were left to fail should be considered under the specific rubrics provided for this purpose in SA
    - Did the Tribunal follow its own principles in *Iscor*?

# 3. The SA failing firm doctrine

- *Isacor Ltd /Saldanha Steel* 67/LM/Dec01
  - Relevance of the fact that failure of a merging firm is regarded as one of a number of factors listed in s 12(2)
    - Failing firm doctrine not defence

# 3. The SA failing firm doctrine

- *Iscor Ltd /Saldanha Steel 67/LM/Dec01*
  - Relevance of anti-competitive consequences of the merger even if the requirements of the failing firm doctrine met
  - Watering down the requirements of the requirements of the failing firm doctrine if the merger has a limited impact on competition (*Phodoclinics (Pty) Ltd/Protector Group Medical Services (Pty) Ltd 122/LM/Dec05*)

# 3. The SA failing firm doctrine

- *Iscor Ltd /Saldanha Steel* 67/LM/Dec01
  - Onus

# 4. Conclusion

- Failing firm doctrine should be distinguished from consideration of possible failure in other respects
- For the real doctrine EC requirements should be particularly relevant although the approach in the US can sometimes be used to help with the interpretation of these criteria, the US failing firm defence must be approached with caution (perhaps some problems with the exit of assets requirement)

## 4. Conclusion

- How should the doctrine be applied in the light of the SA three stage approach
  - First determine the anti-competitive consequences and efficiency benefits of failure =  $X$
  - Determine anti-competitive consequences of merger in isolation =  $Y$
  - If  $X < Y$  consider efficiency gains of merger =  $Z$  and allow the merger if  $X > Y - Z$