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COMPETITION

Manna or a bitter pill – a perspective on public interest

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Public interest considerations

There is little debate around public interest considerations carrying the same weight as competition issues in South African merger investigations – a position which other African competition regulators are starting to adopt.

Where a transaction has a negative impact on the public interest grounds listed in section 12A(3) of the Competition Act No.89 of 1998 (**Competition Act**),[1] this may lead to the prohibition or imposition of conditions even on a merger that enhances the competitive landscape. Such conditions, however, must only be imposed where the merger is the cause of the negative public interest outcome.

[2]Recent decisions of the competition authorities could be interpreted as suggesting that a policy or practice has developed meaning that not only must a transaction not be the cause of negative public interest outcomes, but transactions must proactively create a better world. This is specifically the case and observable in how the merger investigation process is being used to improve the spread of ownership of businesses.

While the cause is noble, it does not seem to be firmly rooted in the interpretation of the Competition Act, and per *Oudekraal*,[3] until this trend is outright challenged, its factual and legal consequences cannot be ignored.

We have looked at how the competition authorities are applying the principles set out in the Competition Act to address the issues underlying the 2018 amendments,[4] primarily the high levels of concentration in the economy and the skewed ownership profile.

Here's what we found:

Mergers

In the merger investigation process, the Competition Commission (**Commission**) is obliged to "consider" the effect of the merger on the five stipulated public interest grounds. The statute does not give any weighting or preference to any one of the five grounds. Consequently, it should be that the negative and positive outcomes should be balanced against each other to ultimately decide whether, as a whole, the positive outcomes outweigh the negative outcomes and vice versa.

This is how it has been done in the past. The initial prohibition of the Burger King transaction[5] solely based on the perceived negative impact on the spread of ownership by historically disadvantaged persons (**HDPs**), despite the other positive public interest outcomes that would result from further investments in new stores opening (and job creation)[6] certainly raised questions as to whether there has been a policy shift.

Our analysis shows that for the period between 1 April 2021 and 1 April 2022, the Tribunal conditionally approved 29 mergers. Of the 29 conditional approvals, 19 of those (66%) were subject to public interest conditions only (there being no competition issues) with 12 (thus, 63% of public interest conditional approvals) having conditions relating to B-BBEE or worker-ownership schemes being developed. The Tribunal, speaking through the post-script drafted by part-time Tribunal member, Enver Daniels, stated that:

> "*It would seem to me that greater attention should be given to section 12A(3)(e) in future to ensure that shareholders and entities wishing to dispose of their businesses first try, where possible and practical, to obtain local buyers. This is particularly important as*

> *many of our largest firms have already taken primary listings abroad and the process of developing firms of the same stature is well underway in South Africa*."
>
> ...
>
> "*I do not read section 12A(3)(e) as prescribing a greater spread of ownership only for historically disadvantaged persons. Rather the focus is a on a greater spread of ownership by South Africans, particularly historically disadvantaged persons and workers.*"[7]

Now, whether the preference for local buyers is supported by the wording of the Competition Act (specifically when worker-ownership is considered as a consideration to HDP-ownership) is a matter for debate. For present purposes, this is indicative of what businesses and investors can expect and what they must consider in deal negotiations and structuring.

Unlike the jurisprudence relating to the merger-specific impact of a transaction on employment levels, the HDP / worker-ownership consideration does not appear to go through the merger-specificity filter.

Parties are expected, to improve their HDP / worker-ownership levels without consideration as to whether the merger has an impact on this ground or not.

Public interest outcomes

By way of example in *TLG MidCo // The Logistics Group*, the competition authorities held that the transaction did not result in any competition issues and did not give rise to negative public interest outcomes. On the section 12A(3) benefits, the parties indicated that the buyer had no empowerment partner as a shareholder directly but derived its B-BBEE rating through a structure within the acquiring group more broadly.

Additionally, The Old Mutual Group (one of the controlling shareholders) intended to implement a new B-BBEE structure at the TLG shareholder level, had identified suitable partners and this transaction was at an advanced stage. Importantly, the B-BBEE transaction was not in any way related to the merger, however, the merger transaction was approved on the condition that the B-BBEE transaction takes place.

Increasingly, parties are expected to create opportunities for establishing or increasing HDP or worker-ownership levels (including through ESOPs). In some mergers, the parties have agreed on the HDP or worker-ownership levels (%) that should be achieved over a period of time.

[8] Where existing funds or initiatives to improve HDP / worker-ownership ownership interests are in place, parties have been required to increase their spend and undertake to report on their efforts insofar as they advance HDP businesses and workers.

[9] While we have analysed large mergers, such engagements are increasingly also taking up space in intermediate merger investigations – as these are not reported in full, the statistics are not available.

Conclusion

The skewed ownership profile of businesses in South Africa is of concern and something that ought to be proactively dealt with. Attempts to address it, in the merger process, however, must be conducted in a responsible way that takes into account the necessity of encouraging investments and ensure positive public interest outcomes on the other public interest grounds in the Competition Act.

Any approach that aims at improving the ownership profile "by any means possible" risks losing investments that would otherwise be beneficial on the other public interest grounds.

Noble as it may be, from a legality and certainty perspective, the merger-specificity filter is important and cannot be ignored through simply requiring parties to agree to conditions which do not address or prevent any public interest and or competition harm that would have resulted from the implementation of a merger.

The Parliamentary Committee on Trade and Industry in a briefing with the Commission expressed concerns that the Commission may be seeking to overstep its mandate and to become a "super-regulatory authority" intervening in places where it had no statutory authority to do so.[10]

This is Part 1 of a 3-part series looking at the evolving role of public interest considerations in merger investigations following the amendments to the Competition Act.

[1] Section 12A(3) states that:

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 and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;

(d) the ability of national industries to compete in international markets; and

(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

[2] *Wal-Mart Inc and Massmart Holdings Ltd* [2011] 1 CPLR 145 (CT).

[3] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) the Supreme Court of Appeal developed the principle that an unlawful act may produce legally recognisable consequences (known as the *Oudekraal* principle).

[4] Promulgated in 2019.

[5] The transaction was notified as an intermediate merger and prohibited by the Commission. The Tribunal, upon an application for consideration (reconsideration) approved the transaction subject to conditions.

[6] An analysis of the Burger King decision is available here.

[7] *DSV South Africa (Pty) Ltd and Globeflight Worldwide Express SA* (Case No.: LM169Dec20).

[8] *Air Products South Africa (Pty) Ltd and Weldamax (Pty) Ltd* (Case No.: LM127Nov21) (***Air Products***), *Sinosteel Group Corporation Limited and Deen Holdings Corporation Limited* (Case No.: LM123Nov21), *Net1 Applied Technologies South Africa (Pty) Ltd and Ovobix RF (Pty) Ltd and Luxanio 227 (Pty) Ltd* (Case No.: LM121Nov21), *CFAO Holdings South Africa (Pty) Ltd And EIE Group (Pty) Ltd* (Case No.: LM129Nov21) – Reasons and details of conditions for above decisions not published at the date of this article.

TLG Midco (Pty) Ltd and The Logistic Group (Pty) Ltd (Case No.: LM150Dec21) (***TLG Midco // The Logistic Group***), *DP World Logistics FZE and Imperial Logistics Ltd* (Case No.: LM070Sep21), *Sun Valley Estate (Pty) Ltd and Ascendis Vet (Pty) Ltd, Ascendis Animal Health (Pty) Ltd, Kyron Laboratories (Pty) Ltd, and Kyron Prescriptions (Pty) Ltd* (Case No.: LM067Aug21), *K2021544474 South Africa (Pty) Ltd (to be renamed Sandvik SRP (Pty) Ltd) and Kwatani Global (Pty) Ltd* (Case No.: LM052Aug21).

[9] *ETG Chem FZE LLC and Cure-Chem SA (Pty) Ltd* (Case No.: LM114Nov21). The parties were required to increase spend in existing initiatives with regard to: (i) enterprise development i.e., assisting historically disadvantaged persons ("HDPs") to establish, expand or improve their business; (ii) skills development i.e., providing bursaries to HDPs for tuition at local universities and learnerships at Sector Education and Training Authority accredited institutions; (iii) supplier development i.e. procuring from and providing technical support to existing HDP suppliers; and (iv) socio-economic development i.e. recruiting, placing and training previously unemployed youth on a production technology learnership programme, leading to a National Qualifications Framework qualification.

[10] Parliamentary Monitoring Group Meeting Summary on the Competition Commission Economic Concentration Report; Committee Report on DTIC Quarterly Performance, 15 March 2022.



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