

COMPETITION

Merger approval without a specific acquiring or target firm

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Merger approval

The Competition Act 89 of 1998 (“**Competition Act**”) and Commission Rules^[1] contain review provisions that establish a mandatory filing regime for transactions that meet the statutory definition of a merger. The Competition Act and Commission Rules set out these mandatory requirements from the premise of there being a primary acquiring firm and primary target firm. This is clear from section 13A(2) of the Competition Act which provides that “*In the case of an intermediate or a large merger, the primary acquiring firm and the primary target firm must each provide a copy of the notice...*” [Emphasis underlined].

However, how does the Competition Commission conduct its investigation pursuant to section 13B of the Competition Act when at the time of filing, it is not clear as to which firm would be a subsidiary of the other?

The competition authorities had occasion to consider the above issue on 23 September 2021, when the Competition Tribunal (“**Tribunal**”) unconditionally approved a large merger in terms of which either Fairvest Property Holdings Limited (“**Fairvest**”) or Arrowhead Properties Limited (“**Arrowhead**”) would be a subsidiary of the other.

The Tribunal recognised that the outcome as to which of the two parties would be the holding company and which the subsidiary will be driven by the route the merging parties choose to follow.^[2] The transaction had two possible outcomes in that the merging parties would either –

- pursue a full merger through a scheme of arrangement where 100% of Fairvest shareholders swap their ordinary shares in Fairvest for newly issued B ordinary shares in Arrowhead; alternatively
- Fairvest would pursue the acquisition of sufficient Arrowhead shares that will make it, at a minimum, a majority controlling shareholder of Arrowhead, this will trigger an obligation to make comparable offers to acquire all the remaining shares in Arrowhead to all shareholders.^[3]

Approved by the Tribunal

The transaction was ultimately approved by the Tribunal even though either firm could ultimately be a subsidiary of the other.

As to which entity constitutes the acquirer was not material to the competitive analysis of the transaction. This was because the effect of the merged entity on the competitive landscape would still be the same – whoever the acquirer might be.

Therefore, irrespective of whichever route is taken, this would result in the same outcome from a purely substantive competition and public interest perspective. The market structure impact would be the same post-merger – arising from the amalgamation of the Fairvest and Arrowhead portfolios.

Understanding the competitive landscape and clearly articulating the impact of a merger/amalgamation in instances such as these is critically important. Interpreting the relevant factors and succinctly articulating the transaction from a competition law perspective, can assist parties

in moving forward towards a mutually beneficial outcome for all shareholders. And yes, it is possible to approach the competition authorities even though the final controlling entity might be unknown.

Werksmans Attorneys acted as the commercial and competition law advisors to Fairvest in this matter

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[1] See Rule 27(1)(b) of the Rules for the Conduct of Proceedings in the Competition Commission (“**Commission Rules**”)

[2] See *Fairvest Property Holdings Limited or Arrowhead Properties Limited* Case no: LM047Jul21 at paragraph 1.

[3] *Ibid* at paragraph 2.



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