



COMPETITION

Recent Competition Tribunal Case clarifies approach to ownership conditions in South African merger approvals

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In a recent case, the Competition Tribunal clarified its approach regarding the imposition of conditions for a merger approval relating to the ownership of historically disadvantaged persons (“**HDPs**”).

1. In terms of the South African Competition Act, a merger must be assessed by the Competition Commission having regard to its effect on competition as well as on certain specified public interest grounds including the effect of the merger on the promotion of a greater spread of ownership and in particular to increase the levels of ownership by historically disadvantaged persons (“**HDPs**”) and workers in firms in the market.

2. The Commission’s Revised Public Interest Guidelines Relating to Merger Control (“**Guidelines**”) provide that the Commission considers that merging parties have a “positive obligation” to promote or increase a greater spread of ownership and that the Commission’s analytical starting point is that all mergers are required to promote a greater spread of ownership. The Guidelines state that where a merger does not do so, the Commission will consider ownership remedies.

3. The imposition of ownership remedies is a highly sensitive commercial issue. The approach set out in the Guidelines is very wide and causes uncertainty especially for mergers which do not result in a decrease in (or otherwise negatively affect) ownership by HDPs and workers. Even though ownership conditions are not imposed on all mergers in practice, it is important that the Commission and Competition Tribunal establish clear and certain precedents on ownership remedies.

4. The recent Competition Tribunal decision in the merger involving CP Spruce Holdings, S.C.SP and the Vantive kidney care segment of Baxter International Inc. is helpful. Important facts were –

- The merging parties were based in Luxembourg and the USA and did not have any shareholding by HDPs

- None of the merging parties had any subsidiaries, branches, offices or production activities in South Africa
- Vantive was only active in South Africa through the sale of its products to a third party. Such third party had a 29% HDP shareholding and a Level 1 Broad-Based Black Economic Empowerment rating
- CP Spruce was only present in South Africa through its investment portfolios
- Less than a certain (unspecified and confidential) percentage of Vantive's global turnover was derived from South Africa
- The merger was a "foreign to foreign" transaction with only a tangential link to South Africa
- No horizontal or vertical overlap existed between the merging parties and the merger raised no competition concerns in South Africa.

In line with the approach set out in the Guidelines, the Commission had requested the merging parties to consider ownership remedies or propose "other equally weighty remedies that would adequately countervail the lack of promotion of ownership by HDPs or workers". The merging parties however submitted that this was not warranted having regard to the above facts and the Commission found that no further intervention was necessary. The Competition Tribunal agreed with the Commission and did not impose an ownership condition.

5. The above approach of the Commission and Tribunal is to be commended for bringing some certainty to the approach regarding ownership conditions with regard to "foreign to foreign" mergers. Requiring ownership conditions for such mergers is inappropriate. However the approach to other mergers also needs clarification. It is instructive that in the CP Spruce/Vantive case, the Tribunal found that the merger would have no "negative effect" on the other public interest grounds set out in the Competition Act. It accordingly seems inappropriate to require an ownership condition if a merger has no negative effect on ownership by HDPs or workers and this would be inconsistent with the Tribunal's approach to the other public interest grounds. Furthermore the Competition Act does not impose a "positive obligation" on merging parties to promote or increase a greater spread of ownership and the Guidelines are not legally binding.

6. Where HDPs or workers sell their shares, HDP and worker ownership will necessarily decrease unless the buyers are HDPs or workers. The 2021 Burger King merger was initially prohibited by the Commission because HDP ownership decreased from 68% to 0%. The merger was subsequently approved subject to a condition that an employee share ownership program would acquire an "effective 5% interest" in the merged entity. Imposing a compensatory ownership condition may however negatively affect the price and the ability of HDPs and workers to exit their investment. Even where HDP or worker ownership decreases, ownership conditions should be carefully considered on a case by case basis and not apply automatically.

7. It is important that merging parties have certainty on the circumstances where ownership conditions may be imposed. The approach in the Guidelines does not achieve this. A more nuanced approach to sales by HDPs and workers and clearly excluding "foreign to foreign" mergers and mergers with no negative effect on HDP and worker ownership would greatly assist merging parties (and their advisors) when considering and negotiating their transactions.



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