

COMPETITION

Section 12A(3)(e) – Is it really all about promoting HDP or worker ownership?

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by Graeme Wickins, Director

Section 12A(3)(e) of the Competition Act

Much has been written about the hyper-focus the Competition Commission ([Commission](#)) is currently applying to the public interest aspects of merger control, particularly the recent addition of section 12A(3)(e) of the Competition Act which requires the Commission to consider the effect that the merger will have on the promotion of a greater spread of ownership of historically disadvantaged persons (HDPs) and workers in the market.

Some have applauded the Commission's bold steps in using this new section of the Competition Act to drive change in the demographically skewed ownership profile of corporate South Africa. Others have criticized the Commission for what is deemed as its dogmatic application of the newly added section which may actually result in unintended, negative consequences for HDP owners looking to dispose of their shares (especially if the Commission will not approve a merger in which HDP shareholders are trying to exit).

HDP ownership

As is often the case with amendments to legislation, one must wait for a body of jurisprudence to develop to give practitioners and the public guidance as to how regulators, like the Commission, will apply changes to the law. Since the Commission's decision to prohibit the Burger King transaction[1], there have been several cases dealing with the promotion and/or dilution of HDP ownership[2], but the outcome of a recent large merger is particularly interesting.

The matter involved an acquisition by a joint venture comprising of Pharma-Q Holdings and Imperial Logistics of Ascendis Pharma (and others) [3]. It makes for interesting reading about how the Commission, and the Competition Tribunal (Tribunal), apply this new section, specifically in cases which result in a dilution of HDP ownership.

As appears from the decision, during its investigation the Commission identified the merger would result in a substantial dilution of indirect HDP ownership and therefore had concerns that the merger did not promote a greater spread of ownership by HDPs and workers. Following the reasoning used by the Commission in prohibiting the Burger King decision, one would expect a negative outcome in this merger assessment.

Indirect HDP ownership

However, the merging parties submitted that the target firm's pre-merger indirect HDP ownership was fragmented and spread among many HDP shareholders, with no single HDP shareholder owning more than 10% of the shares. They further argued that notwithstanding the decrease in indirect HDP ownership, the post-merger scenario would result in –

- one of the joint venture participants (which was controlled by an HDP shareholder) having a 51% shareholding in the target firms;
- the consequence of which is that the HDP controlled joint venture participant would acquire *de jure* control over the target firms, a position that would significantly concentrate decision making power in the hands of one HDP controlled firm; and
- furthermore, would give rise to increased HDP representation on the Board of the target firms.

It was therefore argued that the proposed transaction would allow more meaningful and extensive management participation and control at Board level of the target firms, despite the perceived dilution of indirect HDP ownership.

While the Commission held the view that the merger raised substantial concerns relating to the promotion of a greater spread of ownership by HDPs, it nevertheless recommended that the merger be approved subject to a merger condition which provided for more HDP management representation and control on the Boards of the target firms.

In this regard, the acquiring firms agreed to a condition which would commit them to having no less than 75% HDP Board representation in the target firms for as long as they held shares therein.

Solutions that benefit HDP inclusion

This demonstrates that the Commission is not being as dogmatic in its application of the new section as some may have initially suspected and is also prepared to engage with merging parties in finding solutions that benefit HDP inclusion at a senior corporate level or by providing HDPs with more extensive management control rights.

That said, there is some debate about whether or not the Commission, in adopting such an approach, is acting within the confines of the Competition Act, as the relevant section only contemplates that the Commission must assess the effect that the merger will have on the promotion of a greater spread of ownership and not on matters pertaining to management representation and control.

The Commission may argue that a purposive approach to the new section is warranted and that this gives it the freedom to explore many ways of benefitting the public interest that need not focus exclusively on HDP or worker ownership.

It will be interesting to note how the Commission's approach to section 12A(3)(e) will develop in the coming years and if it will continue to explore other avenues which may benefit HDPs or workers that extend beyond mere ownership of shares in the merging parties.

In any event, the implications of section 12A(3)(e) on merger investigations are significant and something that merging parties need to anticipate and be ready to proactively deal with when notifying transactions to South African competition authorities.

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

Footnotes
[1] [Commission Prohibits Acquisition Between ECP Africa Fund, Burger King South Africa and Grand Foods](#)
[2] [Part 1 and Part 2](#)
[3] [Competition Tribunal of South Africa – Case No: LM198Mar22](#)



Graeme Wickins

Director

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