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Investors beware — Public-interest considerations in merger review are significant: The *Burger King* matter

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Abstract

In South Africa, statutory competition law serves as a vehicle to address both traditional economic goals and broader social and political concerns. This is particularly apparent in the field of merger regulation, where public interests must be considered in the merger analysis. This note focuses on the so-called Burger King merger, which was notified to the Competition Commission and initially prohibited. Notably, this marks the first time since the inception of the Competition Act 89 of 1998 that an intermediate merger has been prohibited solely on public-interest grounds. However, the Tribunal subsequently cleared the merger, but only after the merging parties agreed to accept the onerous conditions imposed upon them.

Competition law – merger analysis – public interest – investors

Introduction

The Competition Act 89 of 1998 ('the Competition Act' or 'the Act') finds its origins in the narrative that highlights South Africa's departure from its prolonged history of apartheid and segregation. It is also grounded in policies crafted to address historical injustices, poverty, and dispossession that characterised the period before the era of democracy. In the democratic era, it became evident that South Africa's competition law could serve as a crucial tool in tackling an economy characterised by a lack of competition

and high levels of concentration and a society burdened by deep-seated socio-economic disparities. Competition law was seen as a vehicle to address traditional economic goals as well as to serve a broader social and political purpose (Jacqueline Church 'Aspects of the interface between the promotion of small and medium enterprises (SMEs) and statutory competition law' (2018) 81 *THRHR* 194 at 205).

The Preamble to the Competition Act acknowledges a dual efficiency and equity approach in that, inter alia, it recognises that not only will an 'efficient, competitive economic environment' be beneficial to all South Africans but, more particularly, it will promote an economy that balances the interests of workers, owners and consumers and which will be focused on development. Moreover, s 2 of the Act, detailing the objectives of the Act, signifies that competition law in South Africa is devised to serve a plurality of goals, encompassing economic goals as well as 'public interest' goals. Furthermore, the importance of public interest is echoed in the merger analysis provisions of the Act (see s 12 A). However, while the 'public interest' goals embodied in s 2 are broad, as they relate to the public interest and benefit in general in respect of the promotion and maintenance of competition, the 'public-interest considerations' embodied in s 12A form part of a closed list of considerations and are applicable specifically to merger regulation.

Where a transaction meets the statutory requirements to be defined as a merger, the Commission must be notified. Subsequently, a consideration of the proposed merger will take place in accordance with s 12A in order to determine whether the merger should be prohibited or approved, with or without conditions (ss 14(1)*(b)* and 16(2)).

As I discuss below, the merger review process follows a two-pronged approach, comprising the evaluation of economic considerations, on the one hand, and public-interest considerations, on the other hand. During the assessment process, the competition authorities must compare two speculative future situations: the state of the market before the merger takes place and the state of the market assuming that the merger was to proceed. The former scenario is described as the counterfactual position, while the latter is termed the factual position. Sutherland & Kemp correctly point out that both counterfactual and factual positions must be considered prospectively. Although there is a status quo position before the merger that, in many cases, would form a worthy counterfactual, the most probable state of the market without a merger must be compared with the post-merger position. As the authors point out, this would align with international practice (Philip Sutherland & Katherine Kemp *Competition Law of South Africa* (2006) (RS 2022) para 10.2).

The recent cases of *ECP Africa Fund IV LLC and ECP Africa Fund IV A LLC and The Burger King (South Africa) RF (Pty) Ltd and Grand Foods Meat Plant (Pty) Ltd* 2021Mar0009 (published in GN 1823 *GG* 46000 of

4 March 2022) ('*Burger King-Commission*') and *ECP Africa Fund IV LLC, ECP Africa Fund IV A LLC, Burger King (South Africa) RF (Pty) Ltd, Grand Foods Meat Plant (Pty) Ltd and Competition Commission of South Africa* IMO53Aug21 ('*Burger King-Tribunal*') highlight the need for transformation and more specifically the need to increase the ownership stakes of historically disadvantaged persons ('HDPs'), as a new and important public-interest consideration introduced by the 2018 amendments to the Act. Moreover, they illustrate the practical reality that if investors choose not to pay due regard to them, there could be dire consequences, as the merger could be prohibited.

Although the reconsideration application to the Competition Tribunal of South Africa ('the Tribunal') was not opposed by the Competition Commission of South Africa ('the Commission'), and the merger was subsequently cleared by the Tribunal, these cases are of significance, as they pertain to the latest amendment of the public-interest considerations that should be taken into account by the competition authorities. In addition, it is the first time, since the inception of the Act, that an intermediate merger has been prohibited solely on public-interest grounds despite there being no competition concerns.

Facts and judgment

The primary acquiring firms, namely ECP Africa Fund IV LLC and ECP Africa Fund IV A LLC, private equity funds registered in Mauritius ('ECP Funds' or 'the acquiring group'), intended merging with the target group, namely Burger King South Africa (RF) (Pty) Ltd ('Burger King') and Grand Foods Meat Plant (Pty) Ltd ('Grand Foods Meat'). The parties delivered a notice of the intermediate merger to the Commission, stating that ECP Funds IV would acquire 95.78 per cent of the issued share capital of Burger King, and the balance of the shares was to be held by its current minority non-controlling shareholder Restaurant Brands International Inc. Furthermore, ECP Funds IV would also acquire 100 per cent of the issued share capital of Grand Foods Meat.

At the time of the proposed merger, Burger King and Grand Foods Meat were controlled by Grand Foods (Pty) Ltd ('Grand Foods'), which is, in turn, a wholly owned subsidiary of Grand Parade Investments ('GPI'). Burger King is an American multinational chain of fast-food restaurants. At the time of the transaction, through its various franchise subsidiaries, it had more than 90 fast-food restaurants in operation across South

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Africa. Grand Foods Meat is a meat and manufacturing plant in Cape Town that sells some of its burger patties to Burger King (*Burger King-Commission* paras 1–6). GPI is an empowerment entity listed on the Johannesburg Stock Exchange, with the majority of its shareholding (ie 68.56 per cent) being held by HDPs, approximately a third of which (ie 22.87 per cent) is held by black women.

As I have already mentioned, the merger review process follows a two-pronged approach, comprising the evaluation of economic considerations on the one hand (the competition assessment) and public-interest considerations on the other hand (see also the discussion below). After conducting the competition assessment, the Commission found that the transaction would not result in any vertical or horizontal overlap between the activities of the merging parties (paras 7–8). Notably, the Commission found further that the proposed merger would not lead to any increase in market share and that no substantial prevention or lessening of competition would ensue in any market (para 9).

As s 12A of the Competition Act requires, the Commission proceeded with the public-interest analysis. As I discuss below, it is clear that in terms of this section the Commission must also determine the effect of the proposed merger on various public-interest concerns or so-called public-interest grounds. Here, the Commission first determined whether the proposed merger would raise employment concerns. In its assessment, the Commission not only relied on a clear statement made by the merging parties in which it was disclosed that the proposed transaction would not result in any employment loss or retrenchments, but it also relied on the fact that no concerns relating to employment were raised by the Southern African Clothing and Textile Workers' Union ('SACTWU'). The Commission accordingly found in favour of the proposed merger in that it would be unlikely to 'raise significant employment concerns' (paras 10–12).

Continuing with the public-interest analysis, the Commission turned to the latest addition to the closed list of public-interest grounds, namely the effect of the proposed merger on 'the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market' (s 12A(3)*(e)*).

The Department of Trade, Industry and Competition ('the DTIC') submitted its concerns relating to the same public interest to the Commission. Section 18(1) of the Competition Act grants the Minister responsible for administering this Act (the Minister of the DTIC) special powers to participate in merger proceedings. More specifically, the DTIC expressed the concern that the merger might negatively impact Burger King's broad-based black economic empowerment levels due to the decrease in shareholding of its controlling owner, GPI. To remedy this concern, the DTIC suggested that ECP Funds set up an employee share ownership plan ('ESOP') valued at a minimum of 5 per cent of the issued share capital of the target group. However, the merging parties did not react positively to the presented proposal and did not commit to setting up such an ESOP (*Burger King-Commission* paras 34–5).

The Commission hence proceeded to compare the ownership structures of the pre-merger and post-merger entities and found that the 'proposed

transaction [did] not promote the greater spread of ownership in that it [did] not increase the levels of ownership by HDPs and workers in firms in the market' (para 20). Hence, the Commission was of the opinion that the proposed transaction lacked justification based on significant public-interest considerations relating to the failure of the proposed merger to encourage wider ownership distribution of HDPs and workers within the market. Furthermore, it held that the stance taken by the merging parties contradicted the obligatory stipulations outlined in s 12A(3)*(e)* of the Competition Act. The Commission therefore prohibited the proposed transaction (paras 38, 40).

The parties subsequently applied to the Tribunal for reconsideration of the Commission's decision to prohibit the merger in terms of s 16(1)*(a)* of the Act (*Burger King-Tribunal* para 7). The reconsideration application was based on a modified set of merger conditions ('the Revised Conditions'), which were presented as enhancements compared to the version submitted to the Commission during its decision to prohibit the merger. The merger was ultimately cleared, subject to conditions being imposed.

Analysis of the legal position

The acquisition by the acquiring group met the statutory requirements to be defined as an intermediate merger in terms of ss 11 and 12 of the Competition Act read together with the Notice in terms of s 11 of the Competition Act 89 of 1998 ('Amendments to the method of calculation' GN 1254 in *GG* 41125 of 10 November 2017). The Commission received notification of the proposed merger and subsequently undertook a consideration of the proposed merger in accordance with s 12A.

While the competition and public-interest assessments involve separate enquiries, they may be interrelated. As the Commission correctly stated in *DSV South Africa (PTY) Ltd and Globeflight Worldwide Express SA (Pty) Ltd* (LM169Dec20 para 52) 'sections 12A(1)–(3) read as a whole involve a balancing exercise of the impact on both competition and the public interest'. Before the Act's amendment, it did not explicitly state that these enquiries or stages of the assessment were on an equal footing. However, it was broadly understood that the two assessments were at least of equal importance (see *Harmony Gold Mining Ltd/Goldfields Ltd* 93/LM/Nov04 para 45, where the Commission found that the wording of the Act prior to its amendment indicated that 'a merger that has failed the competition test can still be passed on the public interest test and hence be approved. Conversely, that a merger that has passed the competition test could still fail the public interest test and hence be prohibited'). Be that as it may, the Commission correctly pointed out that, in terms of the analytical framework embodied in s 12A(1A), it is clear that 'the competition assessment and the public-interest assessment are co-equal. A merger transaction must therefore be assessed on both competition and

public interest grounds' (*Burger King-Commission* para 14). Moreover, the Commission correctly stressed that the amendment has the effect that it is 'peremptory in merger control to consider whether a merger can or cannot be justified on substantial public-interest grounds regardless of the outcome of the competitive assessment' (ibid).

During the first leg of the assessment, the Commission had to determine to what extent, if any, the proposed merger would be likely to substantially prevent or lessen competition (see generally Sutherland & Kemp op cit ch 10). Thus, in keeping with s 12A(2), the strength of competition in the relevant market and the probability that the firms in the market, after the merger, will behave competitively or co-operatively would need to be assessed. In this assessment, factors relevant to competition in the relevant market would be considered. These could include those enumerated in s 12A(2) (which is not a closed list), such as:

- the actual and potential level of import competition in and the ease of entry into the relevant market;
- the concentration and history of collusion in the market;
- the degree of countervailing power in the relevant market;
- the dynamic characteristics of the market and the nature and extent of vertical integration in the market;
- the failure or likely failure of a business or part of the business of a party to the merger or proposed merger;
- the removal of an effective competitor occasioned by the merger;
- the extent of the merging party's ownership in other firms in related markets;
- the extent to which merging parties are related to other firms in related markets, for instance by way of common members or directors; and
- (lastly) any other mergers that the merging parties may have been engaged in for a time period as may be stipulated by the Commission.

(For an extensive discussion of these factors see Minette Neuhoff, Marylla Govender, Martin Versfeld & Daryl Dingley *A Practical Guide to the South African Competition Act* 2 ed (2017) 246ff.)

The competition analysis in *Burger King-Commission* was uncomplicated and will not be discussed at any length. The Commission noted that

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the transaction would not result in any vertical or horizontal overlap between the activities of the merging parties. There was no horizontal overlap as the acquiring group was not involved in activities that could be deemed substitutable with those of the target group. As the Commission stated (*Burger King-Commission* para 7):

> 'The Acquiring Group has interests in firms that are active in the market for procurement/payment services for cross-border road transportation as well as various financial services while the Target Firms are active in the quick service restaurant market and the market for the manufacture and distribution of meat products.'

There was no vertical overlap in the activities of the merging parties since they operated at distinct tiers within the same supply chain. Moreover, the Commission determined that the transaction would not result in any accrual of market share, and it was unlikely that the proposed transaction would have any impact on competition (paras 8–9).

In accordance with s 12A(1)*(a)* and *(b)*, if it appeared to the Commission that the proposed merger would likely result in a significant prevention or reduction of competition, then it would need to determine whether the merger was expected to yield technological advancements, improved efficiency, or other pro-competitive benefits that exceed and offset the potential negative effects of the merger on competition. These benefits should be unlikely to be achieved if the merger were prevented. In addition, the Commission would then need to proceed with the public-interest analysis. However, as the Commission found that no substantial prevention or lessening of competition would occur, proceeding with this second step in the first leg of the competition assessment was unnecessary.

The Commission therefore turned to the second leg of the assessment, namely the public-interest assessment in terms of s 12A(1A). As already mentioned, the Commission correctly noted that the competition assessment and the public-interest assessment are equally important and that the amendment to the Competition Act clearly hosts a peremptory requirement in merger control, requiring the evaluation of whether a merger can be justified based on significant public-interest considerations, irrespective of the competitive assessment outcome. That this is so is now clear from the new wording of s 12A(1A), which reads:

> 'Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public-interest grounds by assessing the factors set out in subsection (3).'

However, this clarification through the amendment to the Competition Act merely confirms the Tribunal's merger jurisprudence before the amendment (see *Metropolitan Holdings Ltd v Momentum Group Ltd* [2010] ZACT 87 para 66, where the interpretation of s 12A was based on the Act before the latest amendment).

Section 12A(3) is concerned with the effects of the merger in certain instances and consequently embodies a closed list of factors that must be considered during the public-interest assessment. The proposed merger's effect on these factors must be considered in determining whether a

merger can or cannot be justified on public-interest grounds. The factors delineated in this subsection are:

- a particular industrial sector or region;
- employment;
- the ability of small and medium businesses, or firms controlled or owned by HDPs, to effectively enter into, participate in or expand within the market;
- the ability of national industries to compete in international markets; and
- the promotion of a greater spread of ownership, in particular to increase the ownership levels by HDPs and workers in firms in the market.

Each public-interest ground should be assessed separately to ascertain whether the merger will significantly impact it. Additionally, all the public-interest factors must be collectively considered (see eg *K2014202010 (Pty) Ltd & AM Alberts (Pty) Ltd (in business rescue) t/a Progress Milling* LM081Jun17 (LM191Jan17) para 49 where the Tribunal stated that '[e]ach of the above factors must be considered. The public interest issues raised by the merger cannot be considered in isolation but as part of the overall inquiry into whether or not to approve the merger.' See also *DSV South Africa (Pty) Ltd v Globeflight Worldwide Express SA (Pty) Ltd* [2021] ZACT 56).

Although these factors hold equal importance (see OECD *Competition Law and Policy in South Africa* (2003) 34), the Commission and Tribunal typically do not conduct a detailed examination of each criterion. Instead, the Commission often relies on the submissions made by the merging parties and third parties. Additionally, the Tribunal relies on the submissions and recommendations made by the Commission. This practice may have developed due to the extensive rights that the Competition Act gives third parties to participate in merger hearings. Section 53*(c)* determines that these would include the parties to the merger, the Commission, certain registered trade unions or employee representatives as the case may be, the Minister for Trade, Industry and Competition if he has indicated an intention to participate, as well as any other person whom the Tribunal recognises as a participant. In the case of the latter, the Tribunal has a wide discretion, and the participant does not need to show a material interest in the matter (*Anglo SA Capital (Pty) Ltd v Industrial Development Corporation of SA* (CAC 26/CAC/Dec02)).

For example, the Commission would probably be notified if an intermediate or large merger could impact employment. In terms of s 13A, the parties to the merger must each provide a copy of the notification of the proposed merger forms to any registered trade union that represents a substantial number of its employees or to the employees concerned or to

representatives of the employees concerned, if there are no such registered trade unions. Where the Commission has received notification of a large merger, the notice must be referred to the Tribunal and to the Minister (s 14A(1)*(a)*: for a discussion of the relevant forms and their respective content see Neuhoff et al op cit at 328ff).

In the *Burger King* merger case, the Commission and the Tribunal investigated only two of the five factors, namely employment and the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by HDPs and workers in firms in the market.

From a reading of the many merger cases, it appears evident that employment is invoked as a public-interest ground more frequently than others and has been held in higher regard than the rest (Anton van Wyk, Anmar Pretorius & Derick Blaauw 'Evaluating public interest considerations in South African merger enforcement: An overview of the last decade' (2023) 47 *Studies in Economics and Econometrics* 374). This esteem is reflected in the fact that the Tribunal often considers employment first, distinguishes between employment and the remaining public-interest grounds, or even exclusively refers to employment even where the merger does not raise employment concerns. *Burger King-Commission* reflects this too. Here, it was the only public interest to be mentioned even though there were, as the Commission indicated, 'no significant employment concerns' (*Burger King-Commission* paras 10–12). Although the Commission often relies on the submissions made by the merging parties and third parties, the Commission, in this matter, acted inquisitorially with regard to employment. It discovered that a significant portion of Grand Foods' workforce was affiliated with the SACTWU, subsequently contacted SACTWU on its own accord, and found no employment concerns (para 11).

The Commission then turned to the public-interest factor embodied in s 12A(3)*(e)*, relating to spread of ownership in relation to HDPs and workers. This subsection was inserted into the Act by the Competition Amendment Act 18 of 2018. As the Commission correctly noted (see *Burger King-Commission* para 19), s 12A(3)*(e)* of the Act no doubt falls under legislative measures contemplated in s 9(2) of the Constitution of the Republic of South Africa, 1996, which states that to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. This is also in line with the Preamble to the Competition Act, which acknowledges that the people of South Africa recognise, inter alia, the unjust limitations imposed by past discriminatory laws on the complete and equitable participation of all South Africans in the economy and which calls for the opening up of the economy to grant all South Africans access to control and ownership of the national economy.

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Section 3(2) of the Competition Act contains a definition of HDPs and provides that such definition is applicable for 'all purposes' of the Act. For the purpose of s 12A(3)*(e)* this would accordingly be a person who:

'*(a)* is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race;

(b) is an association, a majority of whose members are individuals referred to in paragraph *(a)*;

(c) is a juristic person other than an association, and individuals referred to in paragraph *(a)* own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes; or

(d) is a juristic person or association, and persons referred to in paragraph *(a)*, *(b)* or *(c)* own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes.'

To determine the effect of the proposed merger on the public interest, it was thus necessary to compare the ownership structures of the pre-merger and post-merger entities. As indicated above, before the proposed merger, the target group was ultimately controlled by GPI, with the majority of its shareholding being held by HDPs. Consequently, the merged entity would not possess any ownership by HDPs and workers (paras 16–18). The Commission therefore concluded (para 20) that

'the proposed transaction does not promote the greater spread of ownership in that it does not increase the levels of ownership by HDPs and workers in firms in the market as required by section 12A(3)*(e)* of the Act. The Commission is therefore of the view that the proposed merger cannot be justified on substantial public interest grounds.'

The Commission's stance was that s 12A(3)*(e)* imposes a positive obligation on parties seeking merger approval for their transactions. In other words, not only are all mergers required to promote a greater spread of ownership by HDPs and workers in the economy, but the obligation extends to promoting an *increase* in ownership by HDPs and workers.

Although in the *Burger King* merger, it is clear that there was a total reduction in the spread of ownership by HDPs and workers in the merged entity, by taking such a stance, the Commission seems to have ignored the warning given by the Tribunal 'not to pursue their public interest mandate in an overzealous manner lest they damage precisely those interests that they ostensibly seek to protect' (*Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* [2002] ZACT 13 para 58). As mentioned, GPI is an empowerment entity, with most of its shareholding being held by HDPs. The impact of this decision is that black shareholders cannot sell Burger King to the highest bidder at the optimal price. An approach by the Competition Authorities that restricts shareholders from selling their shares could potentially lead to unintended consequences and arguably weaken the broad objectives of the Competition Act. Furthermore, it

has been suggested that, from a commercial perspective, even if ECP had chosen to incorporate a black ownership component into the transaction, it would likely expect GPI to reduce the sale price because black economic empowerment ownership transactions have substantial associated costs ('Burger King decision: A case of govt policies working against each other?' *Bizcommunity* 14 June 2021, available at *https://www.bizcommunity.com*, accessed on 20 December 2023). Therefore, a broad-based black economic empowerment grouping is now adversely affected by a provision designed to benefit broad-based previously disadvantaged participants.

Moreover, this approach could have the unintended consequence of government policies working against each other. For example, the Southern African Venture Capital and Private Equity Association ('SAVCA'), the industry body and public policy advocate for private equity and venture capital in Southern Africa, raised concerns about the Competition Commission's prohibition of the merger. In a statement on its website, SAVCA first stressed that it endorses broad-based black economic empowerment legislation, South Africa's transformation, and the economy's well-being. Additionally, SAVCA stressed that it strongly supports increased ownership levels by HDPs to foster a more equitable society. Nevertheless, it expressed its apprehension about the prohibition due to its potential precedent-setting effects and the associated risks to South Africa's capacity to sustain foreign capital attraction and its impact on the local private equity industry. It stated further that the decision unintentionally gave rise to concerns within both the international and local investment communities, which could possibly discourage future investment activities and consequently limit essential investment capital in-flows. In SAVCA's view, this would exacerbate perceived risks or investors concerning policy certainty, value realization, liquidity and exit considerations when contemplating investments on the continent (SAVCA 'Statement on Competition Commission prohibiting acquisition between ECP Africa Fund, Burger King South Africa and Grand Foods' 4 June 2021, available at *https://savca.co.za*, accessed on 10 December 2023).

Although the merging parties did offer some expansion commitments, the Commission (in para 22) noted that the merging parties did not suggest any remedies to be imposed as conditions that would speak to the concerns raised by the Commission concerning the effect of the merger on the specific public interest embodied in s 12A(3)*(e)* of the Competition Act — in other words, the removal of Burger King's black shareholding through GPI.

According to the merging parties, the commitments offered would benefit Burger King in that it would experience significant investment growth as a result of the merger and would further yield the following benefits: by the conclusion of 2026, the acquiring group would procure a cumulative capital investment of at least R500 million to establish

new Burger King outlets in South Africa; the merging parties would increase the number of Burger King stores to at least 150; the number of permanent employees in South Africa would be increased by at least 1250 HDPs; and, lastly, the overall value of the merging parties' employees' compensation would be increased by at least R120 million.

The commitments tendered would mean that the prospective merger would positively impact the other public interests. However, these benefits would not be merger-specific. As the Commission noted, these commitments were already outlined in Burger King's internal documents reflecting the intention to expand the Burger King franchise irrespective of the merger (*Burger King-Tribunal* para 36). Moreover, while the Commission acknowledged that there may be public interest benefits to HDPs in the sense that a return on investment would be realized, the Commission was of the opinion that such benefit 'should be balanced against an equally weighty countervailing public interest to promote a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market' (para 38). The Commission remained unconvinced by the claim that there would be public interest advantages to HDPs due to the potential profits they might generate. This was because such gains would primarily benefit the stakeholders involved in the empowerment, which constituted a form of private benefit. Consequently, the Commission found that the proposed conditions did not create substantial positive public-interest benefits that would not have occurred without the merger (paras 35–6).

Although the DTIC suggested that ECP Funds set up an ESOP to remedy the concerns raised, the merging parties did not heed the call. They argued that they could not do so based on commercial reasons and objectives. They argued further that the target group, more specifically Burger King, would most probably benefit from progressive investment, which would enable it to grow and contribute positively to the creation of employment opportunities and benefits. Conditions relating to investment and employment (but which were subject to prevailing economic conditions in South Africa) were also proposed.

Following the Commission's prohibition of the merger, the merging parties continued with negotiations with the Commission and the DTIC. They also informed the Tribunal of this and then subsequently applied to the Tribunal for a reconsideration of the Commission's decision to prohibit the merger. As already mentioned, the application was founded on the Revised Conditions.

These conditions included the previously suggested conditions regarding investment and employment. Still, these were now couched as firm undertakings and were not contingent upon the prevailing economic conditions in South Africa. Despite their previous objections, the merging parties agreed to the establishment of an ESOP for an effective 5 per cent

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interest in Burger King as well as the divestiture of the Grand Foods Meat Plant, coupled with an undertaking that Burger King would continue to procure inputs from the 'Plant' for a period of fifteen years and a higher target would be set for the enterprise and supplier development element under its empowerment scorecard (*Burger King-Tribunal* paras 35, 48–50).

At the Tribunal hearing, the Commission, the DTIC and SACTWU were all afforded the opportunity to express whether the Revised Conditions resolved their concerns and to share their perspectives on the matter. The Commission expressed satisfaction with the Revised Conditions, while the DTIC confirmed that it had no objections to the Revised Conditions. SACTWU, however, requested clarification regarding certain employment issues (paras 7–8).

SACTWU's concern related to an undertaking that the acquiring group made in the Revised Conditions: it would dispose of a certain portion of the meat plant to HDPs and Burger King would procure inputs from the meat plant for several years. SACTWU was concerned that this would lead to merger-specific retrenchments and that the new meat-supply agreement could negatively impact employees. However, these fears were laid to rest when the merging parties agreed to certain conditions about the meat-supply agreement that would ultimately be imposed (paras 49–50).

While all the parties agreed to the Revised Conditions, and it was consequently not necessary to hear further evidence during the hearing, the Tribunal sought on its own initiative to fortify the Revised Conditions. Eventually, expanded terms, mainly relating to supplementing information that would facilitate evaluation and guarantee effective monitoring, were incorporated in the conditions to be imposed, and the merger was cleared (paras 48–52).

Conclusion

Although the Burger King merger prohibition may be criticised, s 12A(3)*(e)* played a pivotal role in the assessment and prohibition of the proposed merger. Moreover, since this prohibition, the Commission's evaluation of mergers has shown a specific tendency to emphasise s 12A(3)*(e)*. This is apparent in a significant rise over the past two years in the approval of mergers, contingent upon conditions that mandate an augmentation in the ownership levels by HDPs and/or workers.

Whatever may be the resultant effect of s 12A(3)*(e)* on investment in South Africa, it is clear that investors who wish to implement merger transactions in South Africa will need to take note of its requirements and will need to be prepared to factor in conditions relating to these interests when planning their transaction strategies. Should they fail to do so, they will face the very real risk of the merger being prohibited, as was the case in the Commission's decision on the Burger King merger.

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