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COMPETITION ALERT

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In the public interest: Lessons from Pepsico's acquisition of Pioneer Foods

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Relevant facts

Through this transaction, Simba (Pty) Ltd, an indirect subsidiary of PepsiCo Inc (Pepsico), sought to acquire the entire issued share capital, excluding shares held by subsidiary companies, of Pioneer. The Tribunal concurred with the Competition Commission's (Commission) finding that that the transaction was not likely to substantially prevent or lessen competition in any relevant market, either from a horizontal or vertical perspective.

During its investigation, the Commission engaged with both the Minister and the merging parties regarding the proposed public interest conditions. The Commission recommended that the Tribunal approve the merger, subject to the following public interest conditions:

(1) no retrenchments for five years post-merger, and 500 additional jobs be created at the merged entity; (2) an investment of R5 billion to be made into the local economy, especially impacting HDPs; and (3) the implementation of a Broad-Based Black Economic Empowerment (B-BBEE) plan, which would involve the establishment of a workers' trust (Trust) which would increase the equity level of HDPs and worker participation to approximately 12.9%. The Minister and the merging parties reached agreement on these public interest conditions prior to the Tribunal hearing, which were subsequently revised and strengthened in order to address additional concerns raised.

Employment

The Food and Allied Workers' Union's (FAWU) concern was that the employment conditions *"did not adequately address potential job losses which may arise from the disposal of certain divisions of Pioneer planned to take place post-merger"* (Disposals). FAWU confirmed that its concern was addressed by the condition providing for an aggregate number of employees to remain employed over five years, which would in turn be monitored by the Commission. In bolstering this, the Tribunal added that *"to the extent that the Disposals do not trigger a requirement by the parties to notify the Disposals to the Commission, the merging parties should nevertheless inform the Commission of any Disposals at the conclusion of the sale agreements; and not when the Disposals are implemented"*.

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The Minister's concerns related to the level of shareholding by HDPs in Pioneer pre- and post- merger and the impact of the transaction on a "greater spread of ownership"; board representation by workers who were shareholders; and whether the entity in which the shareholding would be held post-merger would be local or offshore.

Spread of ownership

The Minister's concerns related to the level of shareholding by HDPs in Pioneer pre- and post- merger and the impact of the transaction on a "greater spread of ownership"; board representation by workers who were shareholders; and whether the entity in which the shareholding would be held post-merger would be local or offshore.

Regarding the first concern, the merging parties asserted that there would be an improvement to Pioneer's shareholding directly held by B-BBEE entities and HDPs post-merger (i.e. from some 9.28%, to approximately 12.9%), while both the Commission and the Minister were of the view that the merger would result in a dilution of this shareholding. Despite the difference in calculations, the Minister and the Commission accepted that the possible decrease in B-BBEE and HDP shareholding post-merger was immaterial in the light of the totality of the merging parties' basket of proposed conditions which lead to an overall enhancement in the public interest considerations. In addition, the Tribunal interrogated the concern that potential limitation on who may qualify as a Trust beneficiary could "inadvertently undermine the objective of 'a greater spread of ownership' as contemplated in the Act". To this end, it was noted that the majority of trustees would be chosen by workers with priority given to HPDs and women, and that any employee who ceased employment as a consequence of the Disposals will nonetheless be deemed to be an employee for purposes of the Trust and achieve the same benefits.

The second concern was addressed with the acceptance that the shareholding of the Trust would be unencumbered (an improvement on the past) and would include the following minority protections for the Trust: the right to appoint at least one non-executive director on Pioneer's board and voting rights in proportion to its shareholding.

Thirdly, with regard to the entity in which the Trust shareholding would be held, the Minister noted that the Act referred to a greater spread of ownership in the market and the growth of the South African economy. In order to advance the policy objectives of growing the South African economy and expanding exports, the Minister and merging parties agreed that while the shareholding of the Trust would be held offshore in PepsiCo initially, after five years, it must be converted into a direct shareholding in Pioneer of up to 13%.

Notably, in addition to the B-BBEE plan, the conditions agreed to by the merging parties support HDPs and small, medium and micro sized enterprises (SMMEs) in various other ways, including requiring the merged entity to invest R200 million in education and university partnerships, and additional learnerships to support HDPs who have no formal education and are unemployed. With respect to SMMEs, the merging parties were also required to institute a development plan over a five year period, making available an aggregate amount of R600 million as a development fund for investment in South African programmes in respect of education, SMMEs and agricultural development.

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Key outcomes

Interestingly, the preponderance of merger conditions imposed in this case were negotiated between the merging parties, the Commission and the Minister, prior to the hearing. The Tribunal applauded the agreement reached as being "*progressive and practical*".

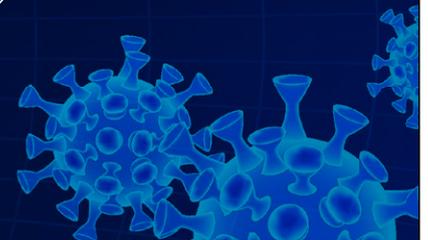
This decision also highlights the competition authorities' approach to the new public interest considerations of an increased spread of ownership for

HDPs and workers and reinforces efforts to promote economic inclusiveness of SMMEs and HDPs. To this end, it is likely that public interest merger conditions offering additional support for SMMEs/HDPs may be increasingly imposed by the South African competition authorities going forward. A keen awareness of the heightened importance of these considerations in future transactions will therefore be necessary.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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