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COMPETITION LAW **ALERT**

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CDH insights on recent trends in merger control and prohibited practice

It is important to note that any retrenchments prior to a merger are bound to attract attention from the competition authorities even if the parties allege that they were effected for operational reasons prior and entirely unrelated to the merger.

This alert addresses some of the recent competition law developments in merger control and prohibited practice before the South African competition authorities.

Merger control

Employment conditions

A recent large merger before the Competition Tribunal (Tribunal) involving Hatfield Holdings Proprietary Limited's acquisition of Summit Auto Trading South Africa Proprietary Limited, has attracted attention because of an unusual employment condition that was imposed. The Competition Commission (Commission) found that the merging parties had retrenched certain employees in the months prior to the transaction taking place. While it is commonplace for the Commission to impose conditions to ensure that proposed transactions do not result in adverse effects on public interest and competition, the condition in this instance broadens the reach to considerations that are not entirely merger-specific. Despite confirming that the job losses prior to the transaction were not merger-related, the competition authorities imposed a condition obligating the merging parties to give preference to the previously retrenched employees when vacancies became available, for a period of 24 months after implementation of the transaction. It is important to note that any retrenchments prior to a merger are bound to attract attention from the competition authorities even if the parties allege that they were effected for operational reasons prior and entirely unrelated to the merger.

Public interest

In case law from as early as 2003, the Tribunal has highlighted the importance of evaluating a merger on public interest grounds, which may have led to a prohibition, even if the transaction was unlikely to result in a substantial lessening of competition. Prior to the 2019 amendments, section 12A(3) of the Competition Act 89 of 1998 (Act) included four public interest factors to be considered in mergers. Following these amendments, the scope and factors for an assessment of the impact on public interest were broadened to include the promotion of a greater spread of ownership of workers and historically disadvantaged people.

Various recent mergers before the competition authorities have highlighted a growing trend to interrogate the effects of mergers on the public interest factors in the Act more robustly, resulting in the imposition of conditions to address public interest concerns. Recent examples of such conditions include requiring acquirers to transfer a portion of their shareholding to one or more broad-based black economic empowerment shareholders or workers (through various mechanisms such as employee trusts and employee share schemes); and requiring acquirers to ensure that, post-transaction, they limit business closures, use all reasonable endeavours to improve their local procurement from small, medium and micro enterprises and historically disadvantaged persons, and ensure that local procurement is done on reasonable commercial terms in the spirit of supplier

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development. The upshot of conditional approvals incorporating public interest components is that these considerations should be borne in mind by parties, particularly where proposed transactions may negatively implicate the public interest provisions of the Act.

Prohibited practice

Settlement agreements

Three independent media owners that provide outdoor digital advertising services recently agreed, in separate consent orders, to settle matters investigated by the Commission regarding a price fixing investigation that originated in 2020. While each settlement included the payment of a financial penalty, the three respondents did not (and were not required to) admit guilt, when entering into settlement agreements with the competition authorities and paying their respective penalties. The Commission has, until recently, often been hesitant to conclude consent orders without admissions of guilt. The penalties ranged between R24,145.68 and R65,071.62 and included a commitment by the parties to refrain from engaging in price fixing, or contravening section 4(1)(b)(i) of the Act, and to independently determine the prices at which they market and sell advertising slots. The Commission was amenable to concluding settlement agreements without admissions of guilt on the basis that it was an efficient means of resolving the matter by correcting the conduct as opposed to pursuing litigation. This stance may also have been informed by the fact that the conduct in question was fairly short-lived and limited in scope, and the respondents had no prior infringements of the Act.

Collusive conduct

The Tribunal recently found that Tourvest (Pty) Ltd (Tourvest) and the Siyazisiza Trust (Trust) contravened section 4(1)(b)(iii) of the Act in response to a 2013 bid for a tender issued by the Airports Company South Africa (ACSA). In summary, Tourvest submitted its bid, and then assisted the Trust with preparing its bid, after which a memorandum of understanding (MoU) was concluded. The financial details provided by the Trust in its bid were identical to the information provided by Tourvest. The similarity in the bids' pricing projections gave rise to a suspicion of collusion by ACSA, which then submitted a complaint to the Commission.

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The ability of a party to a collusive agreement to ultimately perform is not relevant when deciding whether or not there was an agreement to collude ...

Tourvest argued that there had always been full disclosure of the arrangement between it and the Trust. The parties denied the Commission's allegations that when they submitted bids, they became competitors, and a horizontal relationship was established. Tourvest argued that it merely assisted the Trust, which had no previous experience in bidding and could not meet the requirements of the tender by itself. Importantly, in considering whether the respondents were in a horizontal relationship as competitors, the Tribunal noted that:

> *"... the respondents' argument that because the Trust could not have fulfilled the requirements of the tender by itself absent the agreement with Tourvest (as a service provider) – even though it had submitted its own bid – does not find support in competition jurisprudence. The ability of a party to a collusive agreement to ultimately perform is not relevant when deciding whether or not there was an agreement to collude ...*
>
> *... we find that at the point the bid was submitted, the Trust was in fact holding itself out as a competitor of Tourvest and the other bidders. We, therefore, conclude that Tourvest and the Trust were in a horizontal relationship..."* (emphasis added)

Based on this, the Tribunal found that (i) submitting bids for the same opportunity, meant that the parties were competitors; (ii) although inexperienced in bidding, the Trust was still able to compete in the market in which Tourvest was active; (iii) although ACSA allowed bidders to be party to more than one bid, this had to be fully disclosed and achieved through a joint venture (which Tourvest and the Trust did not enter into); and (iv) the MoU between the respondents served only to protect Tourvest's interests and regulate the relationship between the parties. The Tribunal therefore concluded that a horizontal relationship had indeed existed between the parties and the MoU was entered into in contravention of section 4(1)(b)(iii) of the Act. In deliberating the appropriate quantum of the penalty, the Tribunal took various aggravating and mitigating factors into account, such as, on the one hand, the egregious nature of collusion, and on the other hand, the fact that Tourvest had not previously contravened the Act. The Tribunal imposed a penalty of R9,181,073.75.

The above cases highlight the evolving nature of merger and prohibited practices cases. Firms should remain cognisant of these developments and seek legal guidance as early as possible in order to avoid falling foul of the Act.

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