# COMPETITION LAW ALERT

22 FEBRUARY 2022

CLIFFE DEKKER HOFMEYR

INCORPORATING
**KIETI LAW LLP, KENYA**

## IN THIS ISSUE

### A move for inclusion: Competition Commission's Concentration Report

In late 2021, in a move to better measure the current market concentration trajectory in South Africa, the Competition Commission (Commission) released its report on measuring concentration and participation in the South African Economy (Concentration Report). A key finding from the report was that South Africa's low productivity growth and falling export performance can be attributed, in part, to a lack of competition in both upstream and downstream businesses. The Commission's recent approach to assessing public interest in merger proceedings may be seen as a means of addressing these concentration findings.

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

# A move for inclusion: Competition Commission's Concentration Report

In late 2021, in a move to better measure the current market concentration trajectory in South Africa, the Competition Commission (Commission) released its report on measuring concentration and participation in the South African Economy (Concentration Report). A key finding from the report was that South Africa's low productivity growth and falling export performance can be attributed, in part, to a lack of competition in both upstream and downstream businesses. The Commission's recent approach to assessing public interest in merger proceedings may be seen as a means of addressing these concentration findings.

Market concentration measures market structure by evaluating the number and size distribution of enterprises within a market. The Concentration Report found that while large enterprises have the capacity to manoeuvre through adverse economic times, small- and medium-sized enterprises (SMEs) face a mix of constraints such as a high regulatory load, inflexible labour markets, slow economic growth and, most importantly, high levels of concentration. The Commission found that South Africa's SME exit rate was inordinately high. SMEs are cited as having a vital role in creating jobs and the Commission therefore considers facilitating SME economic success to be well within its mandate.

This aligns with the Commission's mandate in terms of the Competition Act 89 of 1998 (as amended) (Act) *vis-à-vis* public interest considerations. The most recent amendments to the Act emphasise this mandate and focus on protecting and stimulating the growth of SMEs and firms owned and controlled by historically disadvantaged persons (HDPs), together with protecting and promoting employment, employment security and worker ownership.

## CONCENTRATED SECTORS

The Concentration Report found that concentration persisted in specific sectors, including farming and agro-processing, healthcare and financial services, and that concentrated sectors were likely to remain so over time. The Commission also noted that concentration could increase in multiple ways – through merger activity; through pro-competitive conduct (such as innovative firms increasing their market share over time); as well as through anti-competitive conduct (such as via abuses of dominance).

Although merger activity itself was not found to necessarily be a main driver for concentration in these industries, the Commission identified that to break down concentration, merger conditions aimed at reducing barriers to entry may be successful. The Concentration Report also flagged

# A move for inclusion: Competition Commission's Concentration Report

CONTINUED

that, in sectors where government licenses are issued, the licensing process itself may achieve the greater spread of ownership which may then be altered through merger activity which results in consolidation.

The Commission appears to be applying these findings by more regularly imposing a wider range of public interest conditions on mergers. Previously, the Commission's public interest conditions had focused on employment issues – in particular curbing merger-related retrenchments. There has since been a shift to developing more extensive conditions addressing, in particular, the ability of SMEs or firms controlled or owned by HDPs to effectively enter into, participate in or expand within the market, and increasing the levels of ownership by HDPs and workers in firms in the market. The Commission now appears to be applying a positive obligation on parties to promote these goals (and not only to ensure that they are not harmed via a merger).

The Concentration Report's findings highlight the emerging shift in focus on the part of our competition authorities from simply protecting competition, to actively promoting the enhancement of competition through the reduction of concentration. This approach is being applied in the merger context through attempts to enhance economic inclusion by promoting broader participation and a greater spread of ownership.

Clients should therefore be mindful of emerging sector-specific competition law enforcement, particularly in markets identified as being concentrated, and seek legal advice early to address perceptions of concentration or lack of market dynamism, in order to prepare for the possibility of intervention by competition authorities.

**PREANKA GOUNDEN AND LARA GRANVILLE**

The Concentration Report's findings highlight the emerging shift in focus on the part of our competition authorities from simply protecting competition, to actively promoting the enhancement of competition through the reduction of concentration.

# OUR TEAM

For more information about our Competition Law practice and services in South Africa and Kenya, please contact:

**Chris Charter**
Practice Head
Director
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com

**Sammy Ndolo**
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

**Albert Aukema**
Director
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com

**Lara Granville**
Director
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com

**Andries le Grange**
Director
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com

**Susan Meyer**
Director
T +27 (0)21 481 6469
E susan.meyer@cdhlegal.com

**Njeri Wagacha**
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

**Naasha Loopoo**
Senior Associate
T +27 (0)11 562 1010
E naasha.loopoo@cdhlegal.com

**Preanka Gounden**
Associate
T +27 (0)21 481 6389
E preanka.gounden@cdhlegal.com

**Nelisiwe Khumalo**
Associate
T +27 (0)11 562 1116
E nelisiwe.khumalo@cdhlegal.com

**Reece May**
Associate
T +27 (0)11 562 1071
E reece.may@cdhlegal.com

**BBBEE STATUS:** LEVEL ONE 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.

**PLEASE NOTE**
This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**JOHANNESBURG**
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

**CAPE TOWN**
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

**NAIROBI**
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

**STELLENBOSCH**
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com