Competition Law

ALERT

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IN THIS ISSUE

Striking the balance: The correct approach to competing public interest considerations

The Competition Amendment Act 18 of 2018 (Amendment Act), was signed into law on 13 February 2019 by President Cyril Ramaphosa. It made several significant amendments to the Competition Act 89 of 1998 (Competition Act), one of which was the amendment of section 12A by the addition of a paragraph (e) in subsection (3). This paragraph directs the competition authorities, when considering whether a merger can or cannot be justified on public interest grounds, to consider the effect that the merger will have on *"the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market"*.

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The Competition Amendment Act 18 of 2018 (Amendment Act), was signed into law on 13 February 2019 by President Cyril Ramaphosa. It made several significant amendments to the Competition Act 89 of 1998 (Competition Act), one of which was the amendment of section 12A by the addition of a paragraph (e) in subsection (3). This paragraph directs the competition authorities, when considering whether a merger can or cannot be justified on public interest grounds, to consider the effect that the merger will have on "*the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market*".

Since the amendment, the Competition Commission (Commission) has put more and more emphasis on this consideration, namely, that a merger must promote the greater spread of ownership of historically disadvantaged persons (HDP ownership). Despite the fact that it is but one of several public interest grounds listed in section 12A(3), the Commission has often created the impression that the greater spread of HDP ownership is more important than any of the other public interest considerations, and that a merger which results in a dilution of HDP ownership is *res non grata*.

Notwithstanding this, the Competition Tribunal (Tribunal) has made it clear that the public interest analysis under section 12A(3) of the Competition Act is a holistic one; in other words, the different public interest grounds listed in section 12A(3) must be separately assessed, and then, if necessary, weighed against each other in order to arrive at a net conclusion on the public interest effects of the merger. This position is not new – the Tribunal said as much in decisions two decades ago.

Past examples

For example, in *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd* (Case no. 08LM/Feb02) the merging parties argued that the proposed transaction would create an internationally competitive firm and that the merged firm would be good for the industry as a whole. The merger was thus justified, according to the parties, on substantial public interest grounds. The unions, on the other hand, argued that the merger would have an adverse effect on employment due to the high number of job losses occasioned by the merger. The prohibition of the merger was thus justified, according to the unions, on public interest grounds.

The Tribunal had to grapple with the fact that multiple public interest grounds were implicated, which suggested contradictory outcomes. It held that the correct approach is to view each public interest ground in isolation to determine whether it is substantial. If that is the case, and if more than one ground exists which

Striking the balance: The correct approach to competing public interest considerations

CONTINUED

contradicts the others, they ought to be reconciled. However, if they cannot be reconciled, the competition authority **must balance the different public interest grounds and come to a net conclusion**.

Another matter in which the Tribunal emphasised the holistic nature of the public interest analysis, is that of *Harmony Gold Mining Company Ltd and Gold Fields Ltd* (Case no. 93/LM/Nov04). In its decision, the Tribunal explained that an evaluation of public interest grounds may lead to opposing conclusions, which requires *"an internal weighing up to lead to some net conclusion on the public interest"*. For example, if the Tribunal finds that a proposed merger leads to some employment loss, it will be public interest negative. However, the merger could also lead to the creation of an internationally competitive entity, which would be public interest positive. In these circumstances, the Tribunal held, it is required to perform an internal balancing of two conflicting public interest considerations before coming to a net conclusion on the public interest.

While this previously expressed approach (that the public interest analysis must be holistic) predates the amendments to section 12A brought about by the Amendment Act, the Tribunal recently clarified that the amendments did not impact upon the holistic approach to be followed in the assessment of public interest considerations[1]. This means that even if, on a consideration of all the evidence, a merger would have a substantial negative effect insofar as HDP ownership is concerned, that effect might be outweighed by positive effects *vis-à-vis* one or more of the other public interest grounds listed in section 12A(3).

An example of this approach can be found in *Swanvest 120 (Pty) Ltd and Indwe Broker Holdings (Pty) Ltd* (Case no. LM120Nov21). In its assessment of the proposed transaction, the Commission found that it would result in the reduction of HDPs at the target group. However, the Tribunal found that the merging parties' commitments to the development of HDP insurance brokers had *"a net positive effect on public interest"* and *"offset any significant public interest concerns raised by the proposed transaction"*.

Following a holistic approach

Furthermore, despite the notion that the Commission is loath to approve a merger if it does not promote the greater spread of HDP ownership, recent decisions by the Commission seem to indicate that it will, in accordance with the Tribunal's pronouncement on the matter, follow a holistic approach when conducting the public interest analysis under section 12A(3) of the Competition Act.

[1] *This statement is found in a recent decision of which the reasons are yet to be issued by the Tribunal.*

Striking the balance: The correct approach to competing public interest considerations

CONTINUED

For example, in *Atlantis Food Holdings (Pty) Ltd and Snoek Wholesalers (Pty) Ltd and the property located at 1 Becker Street, Erf 41115, Hanover Park, Philippi, Cape Town* (Case no. 2022Aug0035), the Commission was satisfied with the merging parties' submission that the acquiring firm would continue making contributions towards various development initiatives, as opposed to establishing an employee ownership scheme or implementing other remedies to contribute to the promotion of the greater spread of HDP and worker ownership. In other words, the Commission considered the merger's net effect on public interest to be positive, even in the absence of any remedies to contribute to HDP ownership.

In conclusion, the promotion of the greater spread of HDP ownership is an important public interest consideration, but it is not the be-all and end-all of the public interest analysis under section 12A(3) of the Competition Act. The correct approach to this analysis is to balance the different public interest grounds before coming to a net conclusion on the public interest; in other words, the correct approach is a holistic approach.

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