



Commercial Law Team

Client Circular 2
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Our Cox Yeats Commercial Team is committed to keeping you informed on pertinent legal issues, as well as developments within our firm.

COMPETITION COMMISSION AND BEE

The Competition Act (the **Act**) was introduced in 1998 and required all large mergers to be assessed as to whether the merger was likely to prevent or lessen competition.

Initially, very few mergers were prohibited on competition grounds but, in recent years, the Competition Commission (the **Commission**) has become much more active.

In 2018, the Act was amended to extend the jurisdiction of the Commission. The amendment to the Act allowed the Commission, or Competition Tribunal, to determine whether the merger can or cannot be justified on substantial public interest grounds. These grounds are set out in Section 12A(3) and include the impact of the merger on a particular industrial sector or region, employment, and, *inter alia*, the promotion of a greater spread of ownership, and in particular, increasing the level of ownership by historically disadvantaged persons and workers.

On 1 June, the Commission announced that it had prohibited a proposed transaction by a private equity investment fund (**ECP Africa**), to acquire Burger King (South Africa) and Grand Foods Meat Plant (Pty) Ltd (**Grand Foods**). These two business are currently held by Grand Parade Investments and Grand Parade Investments currently has a black shareholding of 68%. ECP Africa has no BEE shareholding.

For the first time, the Commission refused to sanction a merger on non-competition grounds, namely that it did not promote BEE. The Commission found that the target firm would move from a BEE ownership of 68% to nil. The Commission was concerned that the merger would have a substantial negative effect on the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons.

ECP Africa contended that it had met the requirements of the new Section 12A. It pointed to the fact that it would increase the investment in Burger King by R500 million and increase the number of Burger King outlets to at least 150. The merged entity would increase the number of permanent employees employed by it in South Africa by no less than 1250 historically disadvantaged persons.

It focussed on the additional benefits to employees and on suppliers and that following implementation, it would allocate 5% of its shares in a BEE ownership structure.

Although BEE compliance is not mandatory, the impact of the decision is that a merger will not be approved unless it can be justified on public interest grounds and these grounds include the promotion of a greater spread of ownership.

The decision is likely to be taken to the Competition Tribunal and we are sure that this is not the end of the matter. Nonetheless, it is going to have a significant impact on the structuring of all merger transactions going forward.

Should you require advice or assistance on resolutions, please contact Michael Jackson on 031 – 536 8512, email: mjackson@coxyeats.co.za, or Jason Goodison on 031 - 536 8517, email: jgoodison@coxyeats.co.za, or Wade Ogilvie on 031 - 536 8527, email: wogilvie@coxyeats.co.za, or Benjamin Meadows on 031 - 835 3109, email: bmeadows@coxyeats.co.za, or Adrian Krige on 031 – 536 8567, email: akrige@coxyeats.co.za, or Robyn Bronstring on 031 – 536 8568, email : rbronstring@coxyeats.co.za, or Andrew Seymour on 031 536 8527, email: aseymour@coxyeats.co.za or Savannah Buys on 031 – 835 3134, email: sbuys@coxyeats.co.za



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