

Precedent-Setting Decision: Burger King Acquisition Prohibited Purely on Public Interest Grounds

By Charl van der Merwe

3 June 2021

The South African Competition Commission (SACC) made headlines with its first prohibition of an intermediate merger that was based solely on [public-interest grounds](#).

Emerging Capital Partners (ECP), a private equity firm founded in the US, was to acquire all Burger King assets from South African Grand Parade Investments, a South African majority black owned entity.

The SACC, while finding that the proposed transaction will have no actual impact on competition, prohibited the transaction on the basis that the transaction will have a substantial negative effect on “the promotion of greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons” (HDPs).

The SACC found that the merger would lead to a 68% reduction in the shareholding of HDPs in the target entity.

As **John Oxenham**, director at **Primerio** points out, “public interest” considerations have long been a feature of competition law in South Africa, particularly in relation to merger control. In this regard, mergers, which may otherwise be deemed problematic, could be ‘justified’ on public interest grounds. Public interest, while initially limited to employment, was first informally expanded through notable mergers such as Walmart/Massmart (2011) and AB Inbev/SAB (2016) where public interest conditions were imposed related to empowerment and ownership, through agreement by the merging parties.



Charl van der Merwe
Senior Associate
South Africa

c.vandermerwe@primerio.international

Cell +27 (0) 84 668 1031



John Oxenham
Director
South Africa

j.oxenham@primerio.international

Cell +27 (0) 83 233 0484

Contact details

Johannesburg, South Africa

John Oxenham, Michael-James Currie
j.oxenham@primerio.international
m.currie@primerio.international
135 Daisy Street Sandton, Johannesburg, 2031

Nairobi, Kenya

Ruth Mosoti, Fidel Mwaki
r.mosoti@primerio.international
f.mwaki@primerio.international
Kalsan Towers, 2nd Floor, The Crescent,
Off Parklands Road, Nairobi

Port Louis, Mauritius

Gilbert Noël
g.noel@primerio.international
Suite 401, St James Court, St Denis Street, Port Louis

Email: info@primerio.international
Tel: +27 (0) 11 083 2411



The Competition Amendment Act, which largely became effective in 2019, formally expanded the recognised public-interest factors contained in Section 12A(3) of the Competition Act to include 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”. Further, the public-interest element was elevated to a separate and self-standing assessment, which must be assessed as an integral part of the merger assessment.

While the Competition Act, as amended, has made provision for mergers to be assessed and prohibited on pure public interest grounds since July 2019, the Burger King merger is the first merger to be prohibited on this basis.

SACC Commissioner, Tembinkosi Bonakele noted that the SACC had no choice but to recommend that the merger be prohibited as, clearly, the merger would result in a reduction of HDP ownership from 68% to 0%, which the SACC believes is substantial. This concern was raised with the merging parties, who were unable to address the concern in a suitable manner.

Regarding the broader impacts of the decision on investment and merger control in South Africa, Bonakele noted that the SACC is merely a statutory agency obliged to impose the law as it currently stands and, according to the Bonakele, there is no uncertainty regarding the transformation objectives which had been introduced to the Competition Act. The SACC is clear on its mandate in terms of the Competition Act, as amended, and will continue to implement such mandate.

The legal basis for the decision is clear, however, as is the case with any new legislation, implementation thereof less so. At the time of the enactment of the amendments to the Competition Act, it was well recognised that the practical implementation of these provisions will be critical and that it may lead to significant unintended consequences – including

adverse effects on consumer welfare and even broader public interest. **Primerio** director, **Michael-James Currie** points out that, ironically, HDP-owned *target* firms might be negatively prejudiced by this criterion, as the pool of potential buyers is limited (and hence the value) if non-black owned firms are not able to successfully acquire the target’s business.

It is not clear, at this stage, what the assessment in the Burger King merger entailed, what evidence was put forward by the parties and what the relevant counterfactual may have been. It is also not clear whether the transaction presented pro-competitive elements which outweigh the adverse effect on public interest – similar to what is required in terms of public interest where a merger may have an adverse impact on competition. The SACC confirmed, however, that the transaction was ultimately prohibited after ECP failed to adhere to requests to proffer conditions relating to shareholding and empowerment.

The SACC has the power to assess and prohibit intermediate mergers. Accordingly, the SACC’s prohibition can only be challenged by way of a request for consideration, to be filed by the merging parties, to the South African Competition Tribunal. The SACC opined, however, that unless the acquiring firm is prepared to make concession to remedy the public interest concerns, the decision is unlikely to be overturned.

Grand Parade has been vocal in its dissatisfaction of the prohibition. The matter will be highly contested, and it is not uncommon for transactions to be approved on a request for consideration to the Tribunal. Furthermore, any decision by the Tribunal is likely to be taken on appeal to the Competition Appeal Court and likely also the Constitutional Court.

The Burger King decision, regardless of its eventual outcome, will leave a lasting precedent and shape merger control proceedings in South Africa going forward.

About Primerio

Our team operates on a global scale, ensuring full compliance with African, European, and U.S./North-American Laws. Our business advisory practice has over 60 years of combined legal and commercial expertise. It includes regulatory compliance, litigation and arbitration, M&A, cartel counselling, antitrust / competition law, anti-money-laundering, anti-corruption / FCPA and fraud investigations.

[Visit our website](#)

[Subscribe to our newsletter](#)

Copyright © 2014-2021 Primerio: Pr1merioTM and PrimerioTM are common-law trademarks of Primerio Ltd, and Primerio Entre Iguais, Ltd. (together, "Primerio"). Prior results do not guarantee a similar outcome. Use of this web site does not establish any attorney-client or other commercial relationship. Information provided on this web site (or on any sites linked to by this site) is given without any warranties of any kind, either express or implied. Any linked sites that are not hosted on primerio.international are not under the control of Primerio and the firm is not responsible for their content. Although this web site may provide information concerning potential legal issues, it is not a substitute for legal advice from qualified counsel. You should not and are not authorized to rely on the website as a source of legal advice. Unless you have an attorney-client relationship with any member of the firm, we are not obliged to keep confidential information you may send us.