

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 1823

4 March 2022

NOTIFICATION TO PROHIBIT THE TRANSACTION INVOLVING:

THE ECP AFRICA FUND IV LLC AND ECP AFRICA FUND IV A LLC

AND

THE BURGER KING (SOUTH AFRICA) RF (PTY) LTD AND GRAND FOODS MEAT PLANT
(PTY) LTD

2021MAR0009

The Competition Commission hereby gives notice, in terms of Rule 38 (3)(c) of the 'Rules for the Conduct of Proceedings' in the Competition Commission', that it has prohibited the transaction involving the abovementioned firms:

1. On 04 March 2021, the Competition Commission ("Commission") received notice of an intermediate merger wherein ECP Africa Fund IV LLC and ECP Africa Fund IV A LLC (together known as the Primary Acquiring Firms or ECP Funds IV) will acquire 95.78% of the issued share capital of Burger King South Africa (BKSA) and 100% of the issued share capital of Grand Foods Meat Plant (Grand Foods). Upon implementation of the Proposed Transaction, ECP Funds IV will acquire sole control over BKSA and Grand Foods. The balance of BKSA's shares (4.22%) will continue to be held by its current minority non-controlling shareholder Restaurant Brands International Inc.
2. The primary acquiring firms are ECP Funds IV. The ECP Fund IV Funds are private equity funds registered in Mauritius.

3. ECP Funds IV and all the firms it controls in South Africa are collectively referred to as the Acquiring Group.
4. The primary target firms are Burger King South Africa (RF) Proprietary Limited ("BKSA") and Grand Foods Meat Plant Proprietary Limited ("Grand Foods"). BKSA and Grand Food are collectively referred to as the Primary Target Firms or Target Group. The Primary Target Firms are controlled by Grand Foods Propriety Limited which is in turn a wholly owned subsidiary of Grand Parade Investments ("GPI"). GPI is an empowerment entity listed on the Johannesburg Stock Exchange.
5. BKSA is an American multinational chain of fast-food restaurants. Through its various franchise subsidiaries, BKSA operates more than 90 fast food restaurants across South Africa.
6. Grand Foods operates a meat plant, in Cape Town, that manufactures burger patties. Approximately [**Confidential**] of this meat plant's output is sold to BKSA to fulfil the requirements of the Burger King restaurants in South Africa.

Areas of overlap

7. The Commission considered the activities of the merging parties and found that there is no horizontal overlap between the activities of the merging parties. The Acquiring Group has interests in firms that are active in the market for procurement / payment services for cross-border road transportation as well as various financial services while the Target Firms are active in the quick service restaurant market and the market for the manufacture and distribution of meat products.
8. In addition, the proposed transaction does not result in any vertical overlap.
9. The Commission has found that the proposed transaction is unlikely to have any impact on competition. It will not result in any accretion of market share and no substantial prevention or lessening of competition will occur in any market.

Public interest analysis

10. The Commission considered the effect of the proposed merger on public interest and found that the merger (1) will have no negative effect on employment and, (2) that the merger has a substantial negative effect on the promotion of a greater spread of ownership as contemplated in section 12A(3)(e) of the Act. Section 12A(3)(e) states as follows:

“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.”

The effect of the merger on employment

11. The merging parties provided an unequivocal statement that the proposed transaction will not result in any employment loss or retrenchments. The Commission found that a substantial number of Grand Foods' employees are represented by the Southern African Clothing and Textile Workers' Union (“SACTWU”). The Commission contacted SACTWU, and no concerns were raised.
12. The Commission is therefore of the view that the proposed transaction is unlikely to raise significant employment concerns.

Effect of the merger 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

Legal framework

13. Section 12A(1A) of the Act states as follows:
- “Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).”*
14. The effect of section 12A(1A) is to make it peremptory in merger control to consider whether a merger can or cannot be justified on substantial public interest grounds regardless of the

outcome of the competitive assessment. This means that even where a merger transaction is not likely to raise competition concerns, competition authorities are obliged to determine whether a merger can or cannot be justified on substantial public interest grounds. In terms of the analytical framework of section 12A(1A), the competition assessment and the public interest assessment are co-equal. A merger transaction must therefore be assessed on both competition and public interest grounds. The assessment of public interest grounds is not dependent on the outcome of a competitive assessment. Thus, section 12A(1A) of the Act, to some extent, affirms the Tribunal's public interest jurisprudence in cases such as Metropolitan Holdings Limited and Momentum Group Limited (Metropolitan case) and Anglo-American Holdings Ltd and Kumba Resources Ltd case which was based on the interpretation of the previous section of 12A(1)(b) of the Act:

14.1. In the Metropolitan case, the Tribunal said:

"The schema of section 12A of the Act, which provides for a consideration of mergers, requires the Tribunal to "initially determine" the competition effects of a merger. If the merger is not "... likely to substantially prevent or lessen competition", as is the case with this merger, then the Tribunal must still consider its effect on the public interest. This is in terms of section 12A(1)(b) which states:

"... otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)." Emphasis added

14.2. Anglo American Holdings Ltd and Kumba Resources Ltd decision, the Tribunal emphasised that:

"[...] the use of the word "otherwise" in section 12A(1)(b) means that the public interest evaluation must still be undertaken by the Tribunal, regardless of the outcome of the section 12A (2) 'competition' analysis. As we have previously stated the public interest can operate either to sanitise an anticompetitive merger or to impugn a merger found not be anticompetitive".

15. In the case involving Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd, the Tribunal confirmed that a merger transaction can be prohibited on public interest ground and said that:

“[...] if it could be demonstrated that the merger specific employment effects are so adverse and that no other law or regulator can remedy them, then we would be obliged to intervene to either prohibit or set conditions on an approval.”

Ownership structure of the merging parties

16. The Acquiring Firms have no ownership by historically disadvantaged persons (HDPs) and workers (the ownership structure of the Acquiring Firms is reflected in paragraph 1 and 2 above). The Target Firms are ultimately controlled by GPI, an empowerment entity with 68.56% of its shareholdings held by Historically Disadvantaged Persons, 22.87% of which is held by black women. As pointed out above, following the implementation of the merger transaction, the Acquiring Firms will acquire 95.78% in the Target Firms and the balance of 4.22% will continue to be held by its current minority non-controlling shareholder Restaurant Brands International Inc.
17. The end result is that after the implementation of the proposed transaction both the Acquiring and the Target Firms will have no ownership by HDPs and workers.

Commission’s assessment of the effect of the merger 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

18. The Commission found that the Target Firms are ultimately controlled by GPI, an empowerment entity with 68.56% of its shareholdings held by historically disadvantaged persons (HDPs), 22.87% of which is held by black women. The Acquiring Firms have no ownership by HDPs. Thus, as a direct result of the proposed merger, the merged entity will not have any ownership by HDPs and workers. The merging parties have not proposed any remedies aimed at addressing the lack of ownership by HDPs and workers.

19. Section 12A(3)(e) of the Act imposes an obligation on the competition authorities to consider the effect of a merger transaction 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. Section 12A(3)(e) of Act falls under legislative measures contemplated in section 9(2) of the Constitution, which states that to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
20. The proposed transaction does not promote the greater spread of ownership in that it does not increase the levels of ownership by HDPs and workers in firms in the market as required by section 12A(3)(e) of the Act. The Commission is therefore of the view that the proposed merger cannot be justified on substantial public interest grounds.
21. The Commission invited the Merging Parties to consider various commitments ranging from an ownership stake by (other) HDPs, an ESOP for workers, the incorporation of black-owned firms into their supply chain or setting aside - through sub-franchise licences - several stores (per year on its growth) for HDPs. These suggestions were proposed as a way of getting the Merging Parties to address the public interest concern raised by the Commission.
22. The Merging Parties did not propose any remedies that address the Commission's concerns regarding the effect of the merger on Section 12A(3)(e) of the Act.

Merging parties' response to the concerns raised by the Commission

23. The merging parties indicate that:

"Given the current economic uncertainty, the acquiring firms are not in a position to conclude the transaction at any cost and appreciate that the Commission may take a decision to prohibit the transaction. Having said that, such an outcome would disadvantage them by precluding them from realising their desired return in line with their commercial objectives."

24. In addition, the parties indicate that the Target Firms, particularly BKSA, is likely to benefit from aggressive investment resulting from the proposed merger. According to the merging parties this will allow BKSA to grow and contribute positively to employment creation, training

and remuneration of the employees of the Target Firms. In this regard, the parties indicate that:

- 24.1. With the capital support of ECP and its sector expertise, BKSA will be in the position to grow its restaurant base to over [Confidential] outlets in the next coming [Confidential] which equates to a total capital expenditure of over [Confidential]. This will result in a substantial economic benefit by growing the employee base of the Target Firms by approximately [Confidential], resulting in an estimated increase of the payroll benefits to over [Confidential]
 - 24.2. In anticipation of this capital support, BKSA has already started to implement actions that would have a positive impact on the lives of employees
 - 24.3. Upon implementation of the proposed transaction, ECP will be able to continue with this initiative. The BKSA vision with the new shareholder would be to grow [Confidential]
25. On the subject of sub franchise licences, the Merging Parties confirmed that that was not the business model of Burger King.
26. In this regard, the merging parties have proposed the following condition which are subject to prevailing economic conditions in South Africa and the merging parties' ability to cover their operational expenses:
- 26.1. *Acquiring Firms shall procure the investment of no less than R 500 million in aggregate capital expenditure by the end of 2026, which will be utilised towards the establishment of new Burger King® stores in South Africa;*
 - 26.2. *The merged entity will increase the number of Burger King® outlets in South Africa to at least 150 by the end of 2026;*
 - 26.3. *The merged entity will increase the number of permanent employees employed by it in South Africa by no less than 1,250 historically disadvantaged individuals by the end of 2026; and*

26.4. The merged entity will increase the total value of all payroll and employee benefits in respect of all employees employed by not less than R120 million by the end of 2026.

27. With respect to the establishment of an ESOP, the merging parties submit that this puts the proposed transaction at a serious risk which will be to the detriment of all of GPI's shareholders, the majority of whom are historically disadvantaged persons. According to GPI, the ESOP requirement is likely to have unintended consequences in that this may result in a situation where black shareholders, who are looking to divest and unlock value as in the present case, will be forced to accept major discounts as buyers will factor in the economic effects of such requirements in determining the purchase price.

28. In this regard, the merging parties relied on the Tribunal case law (Shell SA/Tepco, CT Case Number LM046Dec01 or "Shell/Tepco") wherein the Tribunal cautioned the Commission against intervening in a commercial decision by a historically disadvantaged party in the name of supporting the historically disadvantaged investors.

Commission view' on the public interest concerns resulting from the proposed transaction

29. The Commission is of the view that the proposed conditions do not address the significant public interest concern resulting from the proposed merger. The conditions do not propose any commitment or intention to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

30. Furthermore, the Commission is of the view that the proposed conditions or commitments do not address public interest concerns as contemplated in section 12A(3)(e) of the Act. In any event, BKSA's own documents (see BKSA letter dated 21 May 2021 and the board minutes submitted by GPI) reflect plans to grow the Burger King franchise, albeit at a slower rate than the intended store rollout by the Acquiring Firms which would also have been accompanied by a concomitant increase in employment. Therefore, the conditions proposed by the merging parties do not generate substantial positive public interest benefits that would not have materialised absent the merger.

31. Considering the above, the Commission remains concerned that the proposed merger will have a substantial negative effect on the promotion of a greater spread of ownership, in particular the levels of ownership by historically disadvantaged persons, of firms in the market. The Commission is therefore of the view that the proposed merger cannot be justified on substantial public interest grounds.
32. With respect to the merging parties' reliance on the Shell/Tepco decision, this decision is not of assistance to them. This is because the relevant section 12A(3)(e) of the Competition Act had not been a feature of the Act at the time. This section, in fact, only came into effect in July 2019. In addition to that, the Commission notes that the legislation that speaks directly to section 12A(3)(e) of the Act, that is, the B-BBEE Act was only enacted in 2003. This, too, was after the decision in Shell/Tepco.
33. Accordingly, the law on public interest and empowerment of historically disadvantaged persons has significantly evolved since the Shell/Tepco matter.

Concerns raised by the Department of Trade Industry and Competition ("DTIC")

34. The Commission received concerns from the DTIC relating to a reduction in the HDP ownership status in the Target Firms as a result of the transaction. To remedy this concern, the DTIC proposed that the Acquiring Firms should set-up an Employee Share Ownership Plan ("ESOP") valued at a minimum of 5% of the issued share capital of the Target Firms. According to the DTIC this remedy will result in a public interest benefit that will be consistent with section 12A(3)(e) of the Act which calls for the promotion of greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

Merging parties' view on the concerns raised by the DTIC

35. The Merging Parties did not respond favourably to the proposal made by the DTIC and did not make any commitment to the establishment of an ESOP or alternative structure that would promote a greater spread of ownership, or, specifically, to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

Counterfactual

36. The merging parties indicate that if the merger is prohibited such an outcome will disadvantage them by precluding them from realising their desired return in line with their commercial objectives.
37. The Commission notes the parties submission, particularly the empowerment shareholders' submission that they are entitled to a return on their investment. The Commission accepts that the empowerment shareholders are entitled to a return on their investment. However, a return on investment is a private gain to the empowerment shareholders. In the *Association of Mineworkers and Construction Union and another vs Competition Tribunal of South African and others*, the Competition Appeal Court endorsed the Tribunal approach in *Metropolitan Holdings Limited and Momentum Group Limited* to the effect that a public interest ground must be balanced against an equally weighty countervailing public interest. A gain to shareholders is not a countervailing public interest ground. The Act imposes a public interest obligation on the merging parties to structure the proposed merger transaction in a manner that accords with the requirements of section 12A(3)(e) of the Act. In terms of section 12A(3)(e) of the Act, a merger transaction must promote the greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market. In any event, the position that the empowerment shareholders find themselves in is as a direct result of the merging parties' reluctance to ensure that the merger transaction complies with the requirements of section 12A(3)(e) of the Act by putting in place a compliant post-merger ownership structure.

Conclusion

38. Considering the above, the Commission is of the view that the proposed transaction cannot be justified on substantial public interest grounds in view of the fact that it does not promote the greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market. This is contrary to the mandatory provisions of section 12A(3)(e) of the Act.

39. The Commission has shared the concerns with the merging parties and invited the merging parties to propose possible remedies for the significant public interest concerns resulting from the proposed merger. The remedies provided by the parties do not adequately address the public interest concern identified by the Commission.
40. The Commission therefore prohibits the proposed transaction.

Enquiries in this regard may be addressed to the Manager: Mergers and Acquisitions Division at Private Bag X23, Lynnwood Ridge, 0040. Telephone: (012) 394 3298, or Facsimile: (012) 394 4298.