

Competition Law

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SOUTH AFRICA

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Primacy of control or financial benefit in identifying HDPs

Much has been said of the Competition Commission's (Commission) stance that section 12A(3)(e) of the Competition Act 89 of 1998 (as amended) (Act) creates a positive obligation to promote a greater spread of ownership by historically disadvantaged persons (HDPs) or workers in every merger. However, the question of which component of "ownership" is primary in identifying if an entity constitutes an HDP is not always clear cut.

The Commission's Revised Public Interest Guidelines Relating to Merger Control (Guidelines) provide that the:

"Commission will regard ownership to include ownership of voting shares or an interest in either a business or part of a business, including tangible assets (such as property, equipment and land) and intangible assets (such as intellectual property)."

Absent voting rights, what "interest" would be relevant in assessing ownership? The question arises because ownership can involve multiple rights, which may be separated and held by different parties. Ordinarily, one who wholly owns something also controls it (e.g. through voting rights) and can reap the economic benefits that flow from such ownership. However, this is not always the case.

Trust structures

For instance, in a trust structure the beneficiaries reap the economic benefits that flow from assets of the trust, but who "controls" the trust is a more vexed question. The beneficiaries seldom exercise voting rights or determine who exercises voting rights. The Act determines that the controller of the trust is a person who has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust. In many cases, the founder of the trust will specify in the trust deed who the trustees are; who the beneficiaries are; how voting amongst the trustees should work; and who has the power to amend these components of the trust deed. Therefore, in certain circumstances, the founder may be the "controller" of the trust if they fit the Act's definition. If a trust deed grants extensive decision-making powers to a single trustee, it may be that one or more of the trustees could control a trust. How does one then identify whether the trust constitutes an HDP for purposes of section 12A(3)(e)?

In its Guidelines, the Commission notes that it will apply the definition of HDP contemplated in section 3(2) of the Act and that a merger involving a shareholder who does not fall within the definition in section 3(2) of the Act will not be responsive to section 12A(3)(e) of the Act.

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However, the definition of “HDPs” in the Act does not necessarily clarify this question. Section 3(2) of the Act says that:

“[F]or all purposes of this Act, a person is a historically disadvantaged person if that person:

- (a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), came into operation, were disadvantageded by unfair discrimination on the basis of race;*
- (b) is an association, a majority of whose members are individuals referred to in paragraph (a);*
- (c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes; or*
- (d) is a juristic person or association, and persons referred to in paragraph (a), (b) or (c) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes.”*

Even though the Act confirms that a “firm” includes “a person, partnership or a trust”, strictly speaking, in terms of the common law, a trust is not a juristic person, because the trust is merely a collection of assets and liabilities. Therefore, the above definition does not cover a trust.

If a trust **is** considered a juristic person, this definition suggests that no trust can be considered an HDP unless “ownership”, control **and** voting rights sit together, which seldom occurs in a trust. That suggests that an entity that is owned and / or controlled by a trust can never be considered to have HDP ownership, even if, for instance, all beneficiaries are HDPs, the founder is an HDP and all trustees are HDPs. That would leave a major gap in facilitating economic transformation through the Act.

Purposive approach

To achieve the objects of the Act in these circumstances, therefore, one could apply a purposive approach. Merger regulation has, to date, been largely concerned with control – a merger occurs when control is established and the competitive decisions to be exercised by the controllers are most relevant to establishing the effect of the merger. Should public interest considerations in the context of merger regulation similarly be concerned with who the controllers of an entity are in order to identify HDP ownership?



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Lara Granville ranked by Chambers Global 2022–2024 in **Band 5:** Competition/Antitrust.



If the public interest objectives in the Act are seen as ultimately serving competition goals (i.e. that a more diverse and less concentrated economy is more likely to be competitive and lead to economic growth), then, arguably, conferring control on HDPs should be prioritised. If the public interest goals are intended to be a tool to effect redistribution, then economic benefit should potentially be prioritised.

Although not related to trusts *per se*, the South African competition authorities seem to endorse both:

- The Commission and Tribunal have found that a dilution in HDP shareholding was counter-balanced (and HDP ownership was “*promoted*”) because a target firm’s pre-merger shareholding was non-controlling but the diluted post-merger shareholding conferred control over the target firm.
- We have also seen instances where the competition authorities accept dilutions in controlling HDP shareholding because HDP sellers are realising their investments, notionally because they may be able to apply such funds to acquire other investments and thereby participate/grow in the market.
- Worker participation schemes are highly valued by the Commission as a significant promotion of ownership, but they predominantly provide non-controlling shareholding to workers.

The Guidelines provide for remedies involving the creation of community or other investment trusts that hold shareholding in an operational firm for the benefit of HDP beneficiaries (and thus, pre-existing trusts of this nature are likely to be considered as “*owned*” by HDPs, or as “*HDPs*” themselves).

In our view, the Commission’s flexible approach is appropriate, as mergers must be considered on a case-by-case basis and call for different conclusions in different circumstances. It also appears aligned with the objects of the Act which seem to be directed at achieving both economic participation and financial welfare.

Lara Granville and Ntobeko Rapuleng



OUR TEAM

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



Chris Charter

Practice Head & Director:
Competition Law
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:
Competition Law
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com



Lara Granville

Director:
Competition Law
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com



Andries le Grange

Director:
Competition Law
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com



Lebohang Mabidikane

Director:
Competition Law
T +27 (0)11 562 1196
E lebohang.mabidikane@cdhlegal.com



Martha Mbugua

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E martha.mbugua@cdhlegal.com



Susan Meyer

Joint Sector Head: Healthcare
Director: Competition Law
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



Nelisiwe Khumalo

Senior Associate:
Competition Law
T +27 (0)11 562 1116
E nelisiwe.khumalo@cdhlegal.com



Reece May

Senior Associate:
Competition Law
T +27 (0)11 562 1071
E reece.may@cdhlegal.com



Duran Naidoo

Senior Associate:
Competition Law
T +27 (0)21 481 6463
E duran.naidoo@cdhlegal.com



Robin Henney

Associate:
Competition Law
T +27 (0)21 481 6348
E robin.henney@cdhlegal.com



Taigrine Jones

Associate:
Competition Law
T +27 (0)11 562 1383
E taigrine.jones@cdhlegal.com



Mmakgabo Makgabo

Associate:
Competition Law
T +27 (0)11 562 1723
E mmakgabo.makgabo@cdhlegal.com



Ntobeko Rapuleng

Associate:
Competition Law
T +27 (0)11 562 1847
E ntobeko.rapuleng@cdhlegal.com



Shandré Smith

Associate:
Competition Law
T +27 (0)11 562 1862
E shandre.smith@cdhlegal.com

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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.

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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 cdh Stellenbosch@cdhlegal.com

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