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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 4543 **20 March 2024**

competitioncommission
south africa

Guidelines on the filing of merger notifications for hostile transactions under Competition Act No.89 of 1998 (as amended)

FINAL - March 2024

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1. PREFACE

1.1. These Guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) ("the Act") which, *inter alia*, empowers and authorises the Competition Commission ("Commission") to prepare, amend, replace, and issue guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act. These Guidelines are not binding on the Commission, the Competition Tribunal, or the Competition Appeal Court in the exercise of their respective discretions and of their interpretation of the Act but must be taken into account when interpreting or applying the Act.

1.2. The Commission identified a need to provide guidance to potential merger parties on the filing of a merger notification in hostile transactions with a focus on how the Commission will exercise its discretion to allow for the filing of a separate merger notification, and when the Commission will view the merger review timelines to begin running in the case of a separate merger notification.

1.3. The principles set out herein are not intended to be applied mechanically, as the determination of whether to permit the filing of a separate merger notification is evaluated on a case-by-case basis. The Commission may from time to time amend the Guidelines where necessary.

2. DEFINITIONS

Unless the context indicates otherwise, the following terms are applicable to these Guidelines-

2.1. "**Acquiring Firm**" means a firm —

(a) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;

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(b) that has direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a); or

(c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b);

2.2. "**The Act**" means the Competition Act No. 89 of 1998, as amended;

2.3. "**The Commission**" means the Competition Commission, a juristic person established in terms of section 19 of the Act, empowered to regulate competition matters in South Africa in accordance with the Act;

2.4. "**Commission Rules**" means the Competition Commission Rules published under Government Notice 1 in Government Gazette 22025 of 1 February 2001, as amended;

2.5. "**Guidelines**" mean these guidelines which have been prepared and issued in terms of section 79(1) of the Act;

2.6. "**Hostile Merger**" includes an unsolicited merger whereby a bid or the firm intention to acquire a Target Firm may be opposed by the management or board of directors of the Target Firm, yet the Acquiring Firm has decided to proceed with the acquisition by, *inter alia*, going directly to the shareholders;

2.7. "**Merger**" means a proposed transaction where one or more firms directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another firm which may be achieved in any manner, including through—

(a) purchase or lease of the shares, an interest or assets of the other firm in question; or

(b) amalgamation or other combination with the other firm in question.

2.8. "**Primary Firm**" means either the Acquiring Firm or the Target Firm that is intended to be party to the Proposed Merger;

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2.9. "**Proposed Merger**" means a proposal to conclude a merger transaction;

2.10. "**Target Firm**" means a firm—

(a) the whole or part of whose business would be directly or indirectly controlled by an Acquiring Firm as a result of a transaction in any circumstances set out in section 12 of the Act;

(b) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring firm; or

(c) the whole or part of whose business is directly or indirectly controlled, by a firm contemplated in paragraph (a) or (b);

2.11. "**Tribunal**" means the Competition Tribunal, a juristic person established in terms of section 26 of the Act empowered to adjudicate competition matters in accordance with the Act.

3. INTRODUCTION

3.1. These Guidelines concern guidance to potential merger parties to Hostile Mergers on the exercise of the Commission's discretion to allow for the filing of a separate merger notification and the processes leading up to the commencement of the merger investigation period.

3.2. These Guidelines do not deal with the question of control and considerations of which transactions are subject to merger notification in terms of section 12(1) of the Act. These Guidelines also do not canvass factors related to merger assessment as captured under section 12A.

3.3. The Act sets out the merger notification and investigation process. In the ordinary course, this entails a joint notification by the parties to the transaction and the process relies on the parties co-operating to compile the filing to be submitted by one of the merger parties. However, in the circumstances of a Hostile Merger, the Target Firm may not wish to facilitate the process by co-operating with the

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Acquiring Firm. The Act makes provision for separate merger notification, but some difficulties may arise where a Target Firm unduly frustrates the notification process since the Act does not prescribe a time period for the Commission to make its decision in respect of separate merger filings.

3.4. Hostile Mergers may be particularly time-sensitive due to company or securities law deadlines and the possibility of competing, and potentially non-reportable, bids. In such transactions, the Target Firm may be apathetic or even hostile to the proposed transaction and correspondingly disinclined to cooperate in a notification and investigation process. Where the filings are incomplete or inadequate in the sense that more information has to be sought by the Commission, the merger investigation process can be prolonged thus heightening the uncertainty for stakeholders, including, the firms, key staff or customers. The uncertainty surrounding the Target Firm would be even more pronounced.

3.5. Merger investigations, whether agreed or hostile, consume vast public and private resources and time. The purpose of the enquiry under Commission Rule 28 is for the Commission, to assess whether there is a Proposed Merger or a transaction that lays a sufficient basis for the Commission to commence a process of merger review. The merger investigation process consumes significant public resources, and the Commission has to be satisfied that a notifiable transaction has come into existence before it warrants expending scarce public resources to assess the Proposed Merger's impact on competition and the public interest.

3.6. The Commission and potential merger parties have, in prior cases, disagreed on the satisfaction of the threshold test of whether there is in fact a merger to be reviewed. Conflict has also arisen between the Commission and potential merger parties over the moment of when the merger investigation period has started running which is premised on the Commission's view of when the merger notification is deemed complete.

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3.7. These Guidelines are intended to provide clarity on how the Commission will approach a request for a separate filing while ensuring a fair process is followed, without resulting in undue delay of the commencement of the merger investigation. This will be done by canvassing the following:

3.7.1. The threshold question of when a Proposed Merger is likely to be viewed as sufficiently mature to warrant notification by way of separate merger notice in terms of Commission Rule 28;

3.7.2. The factors that the Commission is likely to take into account when considering whether it is just and reasonable to allow a separate merger notification under Commission Rule 28; and

3.7.3. The timelines applicable to separate merger notifications.

3.8. These Guidelines are general and are not market, sector, or industry specific.

4. OBJECTIVES

4.1. The primary objective of these Guidelines is to provide potential merger parties with some measure of certainty and transparency regarding the factors that the Commission is likely to take into account when permitting and facilitating the process of separate merger notifications.

4.2. These Guidelines are further intended to assist potential merger parties to make informed decisions about when it is best to bring a separate merger notification and when such application may be permitted by the Commission.

4.3. These Guidelines clarify when the initial period in terms of section 14(1) or section 14A(1)(b) read with Commission Rule 28 has been triggered.

4.4. The principles outlined in these Guidelines are based on the Commission's experience permitting and not permitting separate merger notifications, the

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Tribunal's findings on these decisions, as well as guidance from other jurisdictions where appropriate.

5. THE MERGER FILING LEGAL FRAMEWORK

5.1. Merger control is regulated by chapter 3 of the Act and given effect to by, *inter alia,* the Commission Rules.

5.2. The regulation of a Merger necessarily requires the existence of such a Merger, as defined in the Act under section 12. Without the existence of a Merger there can be no consideration thereof by the competition authorities. Section 11(5) of the Act indicates that Mergers include Proposed Mergers. Section 12 of the Act was promulgated to define the concept of a Merger.

5.3. Accordingly, where a Merger (or Proposed Merger) is before the competition authorities it falls to be considered under the legal framework created by chapter 3 of the Act.

5.4. Where there exists an intermediate or large merger, section 13A of the Act, dictates that "*[a] party to an intermediate or large merger must notify the Competition Commission of that merger, in the prescribed manner and form"* (own emphasis).

5.5. Where the Merger is an intermediate merger, as defined, section 14 of the Act circumscribes the merger review process and provides that "*[w]ithin 20 business days after all parties to an intermediate merger have fulfilled all their notification requirements in the prescribed manner and form, the Competition Commission…"* may either extend its review period (section 14(1)(a)) or decide to approve, conditionally approve or prohibit the intermediate merger (section 14(1)(b)). The Commission is bound by the Act to publish its decision on the intermediate merger and issue reasons where it decides to conditionally approve or prohibit an intermediate merger (section 14(3)). Where the review period expires, and the Commission has not issued a decision; the intermediate merger is deemed to have been approved (section 14(2)).

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5.6. Section 14A of the Act circumscribes the Commission's merger investigation process for large mergers. The Commission's investigation period for a large merger commences "*[a]fter receiving notice of a large merger"*, and "*after all parties to a large merger have fulfilled their prescribed notification requirements"* (section 14A(1)). The Commission has 40 business days within which to investigate a large merger and issue its reasoned recommendation for the approval, conditional approval or prohibition of the large merger (section 14A(1)(b)). The Commission can apply for the extension of the investigation period from the Tribunal (section 14A(2)). Where the merger investigation period expires, and the Commission has not issued its recommendation "*any party to the merger may apply to the Tribunal to begin the consideration of the merger without a recommendation from the Commission"* (section 14A(3)).

5.7. Subsequent to notification, the Commission is required to investigate and consider the likely effects of mergers on (i) competition in any market, and (ii) the public interest, in terms of section 12A of the Act, and make a determination as to whether to approve (either conditionally or unconditionally) or prohibit the Merger before it. In the case of intermediate mergers the Commission has to make its determination within 20 days (subject to potential extension of 40 days) of all parties having fulfilled their prescribed notification requirements under the Act and Commission Rules; and, in the case of large mergers it must make a recommendation (as to whether to approve, conditionally approve or prohibit) to the Tribunal within 40 days (subject to potential extension) of all parties having fulfilled their prescribed notification requirements under the Act and Commission Rules.

5.8. What gives effect to and initiates the process of merger consideration under section 12A of the Act, is notification to the Commission as required under the Commission Rules, and forms created therein. Axiomatically, the due notification of a Merger is a jurisdictional prerequisite before the Commission obtains the power to investigate, consider and take a decision to prohibit, approve unconditionally, or conditionally (in the case of intermediate or small mergers) or make a recommendation to the Tribunal (in the case of large mergers). Phrased

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differently, the Commission's power to investigate and consider a Merger is established at the notification of the Merger, or Proposed Merger in the prescribed manner and form (section 13A(1)). The "*prescribed*" manner and form, is defined as the manner and form "*prescribed by regulation*". The Commission Rules, being regulations issued by the Minister in terms of section 21(4), constitute such regulation.

5.9. The prescribed manner and form of filling is regulated by Part 6 of the Commission Rules, specifically Rules 26 to 30.

5.10. The plain wording of Commission Rules 26 through 30 provide that the process of notification can be conducted through one of three ways:

5.10.1. a joint filing by the Acquiring Firm and Target Firm under Commission Rule 27;[1] or

5.10.2. in circumstances where a Primary Firm applies for such, and the Commission is satisfied that such a manner of filing would be reasonable and just in the circumstances, a separate filing under Commission Rule s28;[2]

5.10.3. finally, where a separate filing is being frustrated, and on good cause shown, a separate but unilateral filing by one of the Primary Firms, usually the Acquiring Firm, on behalf of both parties.[3]

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[1] Rule 27(1):
"*A joint merger notification must be made in a single filing by one of the primary firms, and must include ...*"

[2] Rule 28(1)
"*A primary firm may apply to the Commission for permission to file separate notification of a merger and, on considering an application under this subrule, the Commission -*
(a) may allow separate filing if it is reasonable and just to do so in the circumstances;
(b) may give appropriate directions to give effect to the requirements of the Act and in particular, specifying which primary firm must satisfy which of the requirements set out in Rule 27; and
(c) in an appropriate case, may further permit the applicant to file any document on behalf of the other primary firm."

[3] Rule 28(2):

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5.11. To summarise the legal framework, the Commission is enjoined by the Act to consider a Merger in terms of the Act. In order for the threshold, jurisdictional question to be met in the case of an intermediate, or large merger, same must be notified to the Commission in the "*prescribed manner and form".*[4] The commencement of the merger consideration timelines is linked to a "*merger notification*".[5] The prescribed merger notification requirements are in turn regulated by Commission Rules 26,[6] 27 and 28, and is either a joint filing, a separate filing by each of the firms, or a separate filing where one Primary Firm files, firstly on its own behalf and secondly on behalf of the other Primary Firm.

5.12. Where a separate filing is utilised as a means of notification, the merger notification "*of each firm will have been fulfilled when the notification requirements of their respective primary firms, as ordered by the Commission, have been fulfilled*".[7] In the event of any Primary Firm attempting to frustrate the process by not filing timeously, the other Primary Firm may apply to the Commission to allow it to file a document on behalf of the other Primary Firm upon the expiry of 10 business days and on good cause shown.

5.13. Under the legal framework set out above, the Commission has the discretion to allow a party to file a separate merger notification. There is a two-stage enquiry as to whether the Commission will exercise its discretion. It first requires the Commission to assess whether a Merger or Proposed Merger is in existence (the

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"*A primary firm may apply to the Commission for an order on good cause shown allowing it to file any document on behalf of the other primary firm, if that other primary firm has failed within 10 business days to file—*
(a) a document that the Commission or the Tribunal has ordered it to file; or—
(b) any other document or additional information required by the Commission in terms of this Part."

[4] Section 13A(1)

[5] Commission Rule 29(1) states:
"*The Initial Period for a merger begins on the business day following the date on which a merger notification was filed unless –*
(a) the Commission issues Form CC 13 (2) to the filing firm within the time allowed by Rule 30; and
(b) *either the filing firm does not appeal against that form, or the Tribunal, on hearing an appeal, does not set aside the form entirely*."

[6] Which reads:
"*Parties to a merger must notify the Commission of that merger.*
(a) by filing a joint notification in terms of Rule 27; or
(b) if permitted by order of the Commission, by filing separately in terms of Rule 28."

[7] Commission Rule 28(4).

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"threshold enquiry"). Once the threshold issue has been met, the Commission may inquire into whether it is reasonable and just to allow a separate filing in the circumstances. The threshold enquiry, which is whether a Merger is determined to be in existence, together with the consideration of whether it would be reasonable and just to allow separate merger notifications in the circumstances, detail the ambit of the Commission's discretion on whether to permit separate merger notifications.

5.14. On consideration of whether to permit separate merger notifications in satisfaction of the two-stage enquiry; the Commission will seek comment from the other Primary Firm in line with the dictates of fairness. Parties can expect that once the Commission has determined whether to allow separate merger notification the Commission will issue reasons for its decision.

5.15. Only once the Commission has exercised its discretion to allow separate merger notification does merger notification process commence. Rule 26(1)(b) provides that parties to a Merger must notify the Commission of that Merger "*if permitted by order of the Commission*" to do so. Rule 28(1)(b) provides for the Commission to issue directions to specify which firm is required to satisfy the relevant merger notification filing requirements.

5.16. Where either Primary Firm has been directed to file merger documents as part of the merger notification and this direction has been defied, Rule 28(2) provides for the one Primary Firm to make application to the Commission for an order allowing it to file a document on the other recalcitrant Primary Firm's behalf. A pre-requisite for a Rule 28(2) application is that the recalcitrant Primary Firm must have failed to file the documentation directed by the Commission (or the Tribunal), or any other document or additional information required by the Commission, within 10 business days of the requested date for filing. A successful Rule 28(2) application must be able to demonstrate good cause for an order allowing a Primary Firm to file any documentation on behalf of the other recalcitrant Primary Firm.

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6. DECISIONS WHETHER OR NOT TO PERMIT SEPARATE MERGER NOTIFICATIONS

6.1. The Tribunal in *Caxton and CPT Publishers and Printers Ltd v Competition Commission SA and Mpact Ltd*[8] *("Caxton")* expressed the view that the Commission, is required to provide guidance to parties on the application of Commission Rule 28.

The threshold determination

6.2. The requirement that there be a "*merger*" for consideration includes a Proposed Merger and can be difficult to determine in instances of a Hostile Merger, where the very existence of a Proposed Merger transaction may be contested by the Target Firm. To successfully convince the Commission that there is a Merger or Proposed Merger in existence, potentially warranting separate merger notification, the Commission must be convinced that there is sufficient evidence thereof to warrant the use of scarce public resources and yield meaningful results under the merger assessment.[9]

6.3. The Tribunal in *Johnnic Holdings Ltd v Hosken Consolidated Investment Ltd*[10] has held:

> *"[I]n short, we consider that the use of the term "proposed merger" in the Act is not intended to create a category of mergers different from mergers simpliciter, as referred to generally in the Act. At most the use of the word "proposed" places some emphasis, in the particular context where it occurs in the Act, on the fact that the merger is at that stage prospective."*

6.4. A Proposed Merger cannot, however, exist in a vacuum but has to be assessed in the context of the competitive dynamics of the relevant market within a foreseeable period of time. Merger review in terms of the Act does not envisage

[8] RVW11Oct21 (***Caxton***) at para 175.
[9] Caxton at para 133.
[10] 65/FN/Jul05.

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any set of facts in which a potential Merger may arise long into the uncertain future. A mere intention to conclude a Merger without more is insufficient.[11]

6.5. Essential to any Proposed Merger transaction is an offer. The Tribunal in *Caxton* indicated in circumstances where there was no firm or indicative offer on the part of the Acquiring Firm that an "*offer and the terms on which it is made are not only the nuts and bolts of commercial deals – they are also relevant facts for the Commission to take into account when it considers the impact of a transaction on competition, whether in a joint or separate filing."*[12] Without an offer, there is insufficient context within which any merger assessment can be made.

6.6. The Commission accordingly considers as essential to a Proposed Merger, at the very least, in order to trigger the merger notification and consideration process, the existence of an offer on the part of the Acquiring Firm, whether binding or indicative to shareholders, whether in public circulars or in private correspondence.

6.7. An offer should contain the price and the terms and conditions of the Proposed Merger, including an indication of the proposed date of implementation.

The reasonable and just inquiry

6.8. In the instance that the Commission is satisfied that the jurisdictional threshold has been met, that is, where the Commission is satisfied that there exists a Merger or a Proposed Merger, the Commission will proceed to the second enquiry – whether a separate filing is "*reasonable and just*" in the circumstances.[13]

6.9. The wording of Commission Rule 28(1) is plain from the reading thereof. The Commission retains a discretion to permit a separate filing in circumstances where the facts justify same, on the grounds that it would be "*reasonable and*

[11] See also Caxton at para 82-86.
[12] Caxton at para *81.*
[13] Rule 28(1)(a).

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just to do so". The inquiry to be undertaken by the Commission is clearly a discretionary inquiry into reasonableness, the exercise of which discretion should be done lawfully and rationally. What will constitute a reasonable decision will depend on the circumstances of each case. Similarly, what will constitute a fair procedure will depend on the circumstances of each case.[14] The second stage assessment on the merits requires an assessment by the Commission as to whether the circumstances and facts, reasonably assessed, justify the granting of separate filing. This necessarily involves a weighing exercise.

6.10. Factors relevant to this consideration, amongst others, are:

6.10.1. Any prejudice to the Target Firm that may be occasioned by a separate filing;[15]

6.10.2. The ability of each Primary Firm to submit a meaningful separate filing.[16]

6.10.3. The implications for the Primary Firms who may be required to provide information to the Commission if the investigation commences;[17]

6.10.4. The implications for third parties who may be required to provide information to the Commission if the investigation commences;[18]

6.10.5. The implications for the Commission and its resources if the investigation commences;[19]

6.10.6. Whether merger control will be effective; for instance, if undertakings are to be sought from the Acquiring Firm in respect of competition or public interest issues and the Acquiring Firm is not a willing party to the

[14] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15).
[15] Caxton at para 144
[16] Caxton at para 144.
[17] Freeworld Coatings Limited v Competition Commission and Kansai Paint Company Limited 62/X/Oct10 (***Freeworld***) at *para* 26.
[18] Freeworld at para 26.
[19] Freeworld at para 26.

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filing;[20]Any other factor that may be deemed relevant by the Commission.

6.11. The uncertainty of the particulars of the transaction and the impact of the proposed acquisition of control on the Target Firm are not cognisable considerations under the just and reasonableness assessment. The uncertainty of the transaction would have been already taken into account in the threshold question of whether there exists a Proposed Merger and the impact of the proposed acquisition of control on the Target Firm would be more appropriately assessed under a merger assessment in due course.[21]

6.12. The Commission will provide reasons for its decision whether to permit a separate filing or not. In instances where the Commission finds against the applicant, the Commission will provide guidance on what it will consider as essential and/or relevant elements of a transaction required as well as a date by which further submissions should be made for a successful application.

7. TIMELINES APPLICABLE TO SEPARATE MERGER NOTIFICATIONS

7.1. Where application is made for separate merger notification there are multiple hurdles to be overcome prior to the start of the running of the Merger review period. In order to ensure a fair process in respect of separate merger notifications, submissions made by either Primary Firm will be shared with the other Primary Firm and an opportunity for comment will be allowed. During the process, the Commission will impose strict timelines in order to ensure that the merger filing process is not unduly delayed.

7.2. First, the period within which the Commission determines whether or not to permit separate merger notifications is not determined by the Commission Rules. This period commences with an application in terms of Rule 28(1) and ends with the Commission communicating its decision whether or not to permit a separate

[20] Freeworld at para 26.
[21] Caxton at para 131, 135 and 156.

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merger notification to the parties. During this period, the Commission will engage the Primary Firms in order to satisfy itself of the requirements of the two-stage enquiry.

7.3. Second, the period in Rule 28(1)(b), whereby the Commission issues directions on which Primary Firm should satisfy which merger filing notification requirements. The Commission will share all issued directions with both parties. This period begins with the Commission issuing said directions and ends with both Primary Firms providing a merger filing in response to the Commission direction. The Commission will then proceed to issue a Notice of Complete Filing in Form CC 13(1) where all requirements for separate filing have been satisfied, or where there has been non-compliance with the direction, a Notice of Incomplete Filing in Form CC 13(2).[22]

7.4. Where there is non-compliance with the Commission's stated timelines for filing of the merger notification documents, the Commission will issue a Notice of Incomplete Filing in Form CC 13(2).[23] Where a Primary Firm fails to submit its filing in the period specified by the Commission in its direction, the other Primary Firm can only advance the filing process by making further application to the Commission, after 10 business days from the date specified in the Commission direction, for an order, on good cause shown, allowing it to file on behalf of the

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[22] Rule 30(2)

"(2) The Competition Commission must issue Form CC 13(1) in terms of sub-rule (1) if—

…

(c) in the case of—

…

(ii) a merger notified separately, all the requirements set out by order of the Commission in terms of Rule 28 have been satisfied;

…

(3) The Commission may issue Form CC 13(2) if after a filing of a merger notice, or other information, the merger file does not meet the applicable criteria set out in sub-rule (2).

[23] Rule 29 details the consequences of this:

"(1) The Initial Period for a merger begins on the business day following the date on which a merger notification was filed unless—

(a) the Commission issues Form CC 13(2) to the filing firm within the time allowed by Rule 30; and

…

(2) If the Commission issues Form CC 13(2), and it is not set aside entirely by the Tribunal, the Initial Period for the merger begins on the business day following the date on which the filing firm subsequently files documents in response to Form CC 13(2), if as a result of that filing, the Commission subsequently issues, or is deemed to have issued, a Notice of Complete Filing in Form CC 13(1)."

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recalcitrant Primary Firm. This commences a potential third period of consideration by the Commission.

7.5. The third period commences with a Rule 28(2) application. During this period, the Commission will engage both Primary Firms in order to assess whether the threshold of good cause is present to allow a Primary Firm to file any documentation on behalf of the other recalcitrant Primary Firm. The outcome of a Rule 28(2) application will either be a direction and directions on the filing of the merger documentation; or a direction and reasons not allowing the unitary filing of the merger documentation.

7.6. At any stage where a merger filing has been made by both Primary Firms, whether in terms of Commission Rule 28(1) separately or Commission Rule 28(2), one Primary Firm unilaterally on behalf of both Primary Firms, the Commission must deliver either a Form CC 13(1); or Form CC 13(2) to both Primary Firms within five or 10 business days – failing which the Commission will be deemed to have issued Form CC 13(1) to the filing firm(s).[24]

8. CONCLUSION

8.1. These Guidelines present the general approach that the Commission will follow in assessing applications for separate merger notification. These Guidelines are not exhaustive and will not affect the discretion of the Commission and/or the Tribunal and courts to consider separate merger notification issues on a case-

[24] Rule 30:

"*(1) Within 5 business days after receiving a Merger Notice filed in respect of a merger declared to be a large merger, or within 10 business days after receiving a Merger Notice filed in respect of any other merger, the Commission must deliver to the filing firm either—*

(a) a Notice of Complete Filing in Form CC 13(1); or

(b) a Notice of Incomplete Filing in Form CC 13(2).

…

(6) If the Commission does not issue either Form CC 13(1) or Form CC 13(2) within the time allowed by sub-rule (1), or if the Tribunal sets aside all requirements set out by the Commission in Form CC 13(2), the Commission will be deemed to have issued Form CC 13(1) to the filing firm—

(a) as of the date on which the last material was filed; and

(b) subject to further review and subsequent notice in terms of Rule 31 or 32."

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by-case basis, taking into account, amongst other criteria the information placed before the Commission at the time the decision is made.

8.2. Should market participants be uncertain regarding the application of this Guideline or a particular stage of consideration of the filing of a Hostile Merger, such market participants should approach the Commission for further guidance.

9. EFFECTIVE DATE AND AMENDMENTS

9.1. These Guidelines become effective on the date indicated in the Government Gazette and may be amended by the Commission from time to time.

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DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 4544 **20 March 2024**

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REVISED PUBLIC INTEREST GUIDELINES RELATING TO MERGER CONTROL

1. The Competition Commission of South Africa has revised its Public Interest Guidelines relating to merger control.

2. The Revised Public Interest Guidelines are effective from from the date of publication in the Government Gazette and may be amended by the Commission from time to time.

Briefing note

In February 2019, the Competition Act No. 89 of 1998 (as amended) ("the Act") was amended by the Competition Amendment Act, No. 18 of 2018 ("the Amendment Act"). The main objectives of the Amendment Act were to deal with the structural challenges of high levels of concentration and the racially skewed spread of ownership of firms in the South African economy. In this regard, the public interest provisions in merger control were amended to explicitly create public interest grounds to address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.[1]

The Competition Commission's ("Commission") likely approach to the amendments to section 12A of the Act is set out in the revised public interest guidelines attached hereto (the "Revised Public Interest Guidelines"). Paragraphs 4, 5 and 6 of the Revised Public Interest Guidelines set out the Commission's approach to the public interest assessment contemplated in section 12A of the Act. The Amendments to section 12A now make it explicit that -

1. the competition and the public interest assessments are equal in status;

2. notwithstanding the outcome of the competition assessment, a determination must be made as to whether the merger is justifiable on substantial public interest grounds; and

3. a merger's effect on each individual public interest ground must be assessed to reach an overall determination on the merger's justifiability or otherwise, on substantial public interest grounds.

The Commission's approach to section 12A of the Act is informed by the imperative of transformation enshrined in the Act. In this regard, the Commission notes that the Preamble to the Act provides:

[1] Background note on Competition Amendment Bill, 2017. Published in Government Gazette No. 41294, pages 5 – 71. The Bill resulted in the adoption of the Competition Amendment Act 18 of 2018.

> "*That apartheid and other discriminatory laws and practices of the past resulted in…unjust restrictions on full and free participation in the economy by all South Africans*;
>
> *That the economy must be open to greater ownership by a greater number of South Africans;*
>
> *In order to-*
>
> *provide all South Africans equal opportunity to participate fairly in the national economy…"*

That aspirational transformative intent is endorsed by the Constitutional Court in *Mediclinic*:[2]

> *"Colonialism, neo-colonialism and apartheid orchestrated an institutionalised concentration of ownership and control of all things of consequence in our national economy along racial lines. Unsurprisingly, the commanding heights of the corporate sector are seemingly the exclusive terrain of our white compatriots. It is this indisputable reality and our shared commitment to ensuring that South Africa really does get to belong to all who live in it, that the constitutional imperatives, laid out in the Preamble, to improve the quality of life of all citizens and free the potential of each are realised, that the likes of the Competition Act had to and got to see the light of day."*

The Revised Public Interest Guidelines take guidance from these principles. The role of the Competition Authorities as regards the purpose of the Act is further clarified by the Constitutional Court in *Mediclinic* as follows:[3]

> *Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to somehow elude them in their decision-making process. The equalisation*

[2] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* 2022 (4) SA 323 (CC) at paragraph 4.
[3] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* 2022 (4) SA 323 (CC) at paragraph 7.

and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence. The legitimisation through legal sophistry or some right-sounding and yet effectively inhibitive jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system.

REVISED PUBLIC INTEREST GUIDELINES

1. PREFACE

1.1. These guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) ("the Act") which allows the Competition Commission ("Commission") to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act.

1.2. In February 2019, the Act was amended by the Competition Amendment Act, 18 of 2018 to deal more deliberately with the structural challenges of concentration and the racially skewed spread of ownership of firms in the South African economy. In this regard, the public interest provisions have been amended to explicitly create public interest grounds that address ownership, control and support to small businesses and firms owned or controlled by historically disadvantaged persons.

1.3. The Revised Public Interest Guidelines are intended to indicate the approach that the Commission may adopt and the type of information the Commission may require when evaluating the public interest grounds in section 12A(3) of the Act.

1.4. However, merger analysis is inherently dependent on the facts of a specific case and these guidelines do not prevent the Commission from exercising its discretion to request information or assess grounds not indicated in these guidelines, on a case-by-case basis. Further, the guidelines are subject to change based on the experience of the Commission in assessing mergers, as well as the jurisprudence emanating from the decisions of the Competition Tribunal, Competition Appeal Court and Constitutional Court.

1.5. These guidelines are not binding on the Commission, the Tribunal or the Courts but any person interpreting or applying section 12A(3) of the Act must take the guidelines into account.[4]

[4] Section 79(4) of the Act.

2. DEFINITIONS

The following terms are applicable to these guidelines –

2.0 **"Acquiring Firm"** means an acquiring firm as defined in section 1(1)(i) of the Act;

2.1 **"Act"** means the Competition Act No. 89 of 1998, as amended;

2.2 **"B-BBEE"** means broad-based black economic empowerment as defined in the B-BBEE Act 53 of 2003 (as amended);

2.3 **"Commission"** means the Competition Commission;

2.4 **"Competition Authorities"** means collectively, the Commission, Tribunal and the CAC;

2.5 **"CAC"** means Competition Appeal Court;

2.6 **"ESOP"** means an Employee Share Ownership Plan;

2.7 **"HDPs"** means historically disadvantaged persons as contemplated in section 3(2) of the Act;

2.8 **"Medium-sized business"** means a medium-sized firm as determined by the Minister by notice in the Gazette;

2.9 **"Public Interest"** means the public interest grounds articulated in section 12A(3) of the Act;

2.10 **"SMEs"** means small and medium-sized businesses as defined in section 1(1)(xxxix) of the Act;

2.11 **"SPLC"** means substantial prevention or lessening of competition, as contemplated by the Act;

2.12 **"Target Firm"** means a target firm as defined in section 1(1)(xxxxi) of the Act;

2.13 **"Transferred Firm"** means a transferred firm as defined in the Determination of Merger Thresholds and Method of Calculation Schedule to the Act dated 1 April 2009;

2.14 **"Tribunal"** means the Competition Tribunal; and

2.15 **"Workers"** means workers as defined in section 1(1)(xxxxiv) of the Act.

3. LEGISLATIVE FRAMEWORK

3.1 Section 12A of the Act sets out how the Commission is required to consider a proposed merger. It reads as follows:

"(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and if it appears that the merger is likely to substantially prevent or lessen competition, then determine –

(a) whether or not the merger is likely to result in any technological, efficiency or other procompetitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(b) whether the merger can or cannot be justified on substantial public interest s by assessing the factors set out in subsection (3).

(1A) 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 grounds set out in subsection (3)."

3.2 In relation to the assessment of public interest considerations in a merger, section 12A(3) of the Act provides as follows:

"When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;

(d) the ability of national industries to compete in international markets; and

(e) *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."*

4. THE COMMISSION'S APPROACH TO THE LEGISLATIVE FRAMEWORK

4.1 Section 12A of the Act makes it explicit that the competition assessment and the Public Interest assessment are equal in status and that the Commission must assess the effects of all mergers on both competition and Public Interest grounds.[5]

4.2 If the Commission finds that a merger is likely to result in a SPLC, the Commission will, in terms of section 12A(1)(a), establish whether the merger will result in any technological, efficiency or other procompetitive gain which will be greater than, and offset, the effects of the merger on competition. A determination must then be made in terms of section 12A(1)(b) of the Act regarding whether the merger can nonetheless be justified on substantial Public Interest grounds.

4.3 Notwithstanding the Commission's findings on whether the merger is likely or unlikely to result in a SPLC, the Commission must still determine whether

[5] This is particularly clear from the amendment to section 12A(1A) of the Act.

the merger is justifiable on Public Interest grounds. In this regard, the Commission will determine the effect of the merger on each public interest element arising from the merger.

4.4 The determination above will be conducted by the Commission on a case-by-case basis and on a balance of probabilities.

5. GENERAL APPROACH TO ASSESSING PUBLIC INTEREST PROVISIONS

5.1 As a point of departure, the Commission considers that the framework for merger assessment contemplated under the Act requires a determination into the merger's *likely* effect on each Public Interest ground set out in section 12A(3). In this regard, the outcome of the assessment must be more probable than not, and the parties will be required to provide qualitative and quantitative evidence for any claims regarding the effect of a merger on Public Interest.

5.2 The Commission's assessment will focus on the effect that the merger has on the Public Interest grounds. Guidance on the Commission's approach to the assessment of each Public Interest ground is set out in section 6 below.

5.3 If a merger has an effect on a particular Public Interest ground, the Commission will require remedies that specifically address the effect identified (e.g., an effect on employment should be addressed by a remedy that addresses the employment harm and not, for instance, by a remedy advancing another Public Interest ground). However, if the effect on the Public Interest ground cannot be remedied, the Commission may, on a case-by-case basis, consider equally weighty countervailing Public Interest grounds that outweigh the effect identified. For the avoidance of doubt and as articulated at 6.5 below, the Commission considers that the Public Interest ground contemplated in 12A(3)(e) of the Act creates a positive obligation to promote a greater spread of ownership in every merger. Therefore a merger that does not promote a greater spread of ownership is not responsive to the obligation arising under section 12A(3)(e) of the

Act.

5.4 The Public Interest assessment will follow the general approach set out below:

5.4.1 determine the likely effect of the merger on each Public Interest ground;

5.4.2 determine whether such effect on each Public Interest ground, if any, is substantial;[6]

5.4.3 where the merger has an effect on a Public Interest ground and is substantial, consider possible remedies to remedy that effect; and

5.4.4 where the effect contemplated in paragraph 5.4.3 cannot be remedied, the Commission may, on a case-by-case basis, consider other equally weighty countervailing Public Interest grounds identified. These must be measurable and monitorable and thus must be tendered in the form of conditions.

5.5 The steps in paragraphs 5.4.1 to 5.4.4 above are cumulative. In other words, where the merger does not have an effect on the Public Interest grounds, the enquiry into that effect will stop at that stage. Likewise, where the effect on the Public Interest grounds is not substantial, the enquiry into that effect will stop at that stage.

5.6 Where the Commission finds that a merger does not have an effect on the Public Interest, the Commission will likely conclude that the merger is justifiable on substantial Public Interest grounds.

5.7 Where the Commission finds that a merger has an effect on the Public Interest, the Commission will likely conclude that the merger is not justifiable on substantial Public Interest grounds. This may result in remedies being imposed to address the specific Public Interest grounds that are substantially affected by the merger. Where the Commission finds

[6] Section 12A 1(b) of the Act.

that any substantial Public Interest effects arising from the merger countervail any substantial positive Public Interest effects, the Commission will likely consider that the merger is not justifiable on substantial public interest grounds.

5.8 It bears mention that the determination into a merger's effect on the Public Interest includes consideration of both the quantitative and qualitative effects of the merger on each Public Interest ground, and cumulatively, on the Public Interest grounds as a whole. Thus, by way of example, despite finding that most of the Public Interest grounds applicable to a merger are substantially affected by a merger, those effects may be countervailed by substantial effects arising from a single Public Interest ground.

5.9 The likely approach to each Public Interest ground as well as the information that the Commission is likely to require relating to each Public Interest ground is discussed below.

6. APPROACH TO EACH PUBLIC INTEREST GROUND

6.1 THE EFFECT ON A PARTICULAR INDUSTRIAL SECTOR OR REGION

6.1.1 When assessing the likely effect of a merger on a particular industrial sector or region, the Commission will consider the effect of the merger on development, environmental sustainability and employment in a particular industrial sector or region of South Africa, amongst others.

6.1.2 In determining the likely effect, the Commission will consider, amongst others, the following:

6.1.2.1 the applicable industrial and environmental policy objectives or best practices;

6.1.2.2 local economic conditions;

6.1.2.3 impact on local production, manufacturing or deindustrialisation, for example closure or relocation of existing local production facilities or opening of new production facilities

and/or substitution of locally produced goods or services with imports;

6.1.2.4 the effect of the merger on the environment (e.g., pollution, increased carbon emissions, etc.);

6.1.2.5 impact on social projects and upliftment programs that contribute to upliftment of the region or sector;

6.1.2.6 impact on local resources or inputs, for example, whether the merger results in the movement or diversion of local resources to other (e.g., international) markets or the creation of opportunities to beneficiate local resources;

6.1.2.7 contribution of either or both the merger parties to the revenue of local municipality/government, for example through levies, rates and taxes, and the effect of the merger on this contribution; and

6.1.2.8 commitments made in terms of sector or industry specific legislation or license conditions.

6.1.3 In determining whether the likely effect on the industrial sector or region is substantial the Commission will, in general, consider the following factors:

6.1.3.1 the importance and strategic nature of the relevant products to the sector or region, and of the sector or region to the broader economy;

6.1.3.2 the importance to a sector, region or community within a region of the identified social projects and upliftment programs undertaken by the firms;

6.1.3.3 the general socio-economic circumstances of the inhabitants of the region;

6.1.3.4 whether the sector in question involves or influences any constitutionally entrenched rights;

6.1.3.5 whether the merger impedes or contributes towards any public policy goals or economic development plans that are relevant to that sector or region; and/or

6.1.3.6 the importance of a firm to the sector or region and the benefits that flow from that firm to that sector or region.

6.1.4 Generally, the Commission may consider the effect on a particular industrial sector or region to be substantial:

6.1.4.1 where the effects arising from the merger's impact upon the primary market under consideration are far-reaching and flow beyond that market and sector;

6.1.4.2 the merger impedes public and/or industrial policy goals that would have far-reaching consequences for the sector as a whole;

6.1.4.3 the sector has extensive forward and backward linkages;

6.1.4.4 the sector employs a large number of low-skilled or semi-skilled Workers;

6.1.4.5 the effect of the merger on the region would threaten that region's livelihood and sustainability or would support its continued livelihood and sustainability;

6.1.4.6 where the sector under consideration is one where the goods or services traded involve or influence constitutionally entrenched rights;

6.1.4.7 the effect is of such magnitude and scale that if allowed, would be irreversible and cannot be undone; and

6.1.4.8 expansion of productive capacity and increased capital expenditure over a period of time will likely be considered substantial as opposed to short term or consumption expenditure on non-core goods and services.

6.1.5 The Commission will consider remedies on a case-by-case basis. Appropriate remedies to address any likely effect on the industrial sector region may include:

6.1.5.1 capital expenditure in the operations of the firm in the affected sector or region or within the affected value chain. This capital expenditure must be incremental to pe-merger capital expenditure plans;

6.1.5.2 increased localisation;

6.1.5.3 the establishment of a fund or other initiatives to develop local production in the relevant value chain. These funds and/or initiatives must be incremental to any previously planned/committed funds;

6.1.5.4 the obligation to continue to supply to local producers; and/or

6.1.5.5 the obligation to continue sourcing from local suppliers.

6.2 **THE EFFECT ON EMPLOYMENT**

6.2.1 The merger parties must declare all (i) potential retrenchments that are being considered at the time of the merger and/or (ii) retrenchments that have been considered and/or (iii) retrenchments that have been implemented from the time of the initiation of merger discussions to the date of filing, irrespective of whether they contend that these are due to the merger or due solely to operational reasons.[7]

6.2.2 In determining the effect of a merger on employment, the Commission's primary consideration will be the direct effect on employment within the

[7] BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd (case:18713) paragraphs 109 - 110.

merger parties. In assessing this, the Commission will consider, inter alia, the overall nature of the transaction, including the extent of overlap and duplication in the merger parties' activities, the rationale for the transaction, and the intention of the merger parties relating to employment and the target business as well as any plans to create further employment opportunities within the merged entity.

6.2.3 In determining whether the merger has an effect on employment the Commission will:

6.2.3.1 consider whether the proposed employment effects are in any way linked to the intentions, incentives, policies, rationale and decisions of the acquiring group and the incentives of the target group to be attractive to potential purchasers or prepare itself for a potential merger;

6.2.3.2 consider any retrenchments or new jobs declared by the merger parties to arise from the merger; and

6.2.3.3 assess whether retrenchments are merger related where merger parties claim that retrenchments are not merger related and when merger parties are relying on this argument to approve a merger that is likely to result in an SPLC.

6.2.4 Where retrenchment proceedings by the Target Firm or Transferred Firm or the Acquiring Firms are proposed or initiated in terms of the Labour Relations Act 66 of 1995 (i) shortly before the proposed merger is notified, (ii) during the merger notification process or (iii) are anticipated, proposed or initiated shortly after the merger approval date, the merger parties should inform the Commission of such retrenchments.[8]

6.2.5 For purposes of paragraph 6.2.4, the Commission will generally consider an appropriate pre-merger period to be the time from the initiation of merger discussions to the date of filing, and an appropriate post-merger

[8] Walmart Stores Inc. and Massmart Holdings Limited 110/CAC/Jul11 and 111/CAC/Jul11.

period to be one year following the date on which the merger is implemented.

6.2.6 Without derogating from paragraph 6.2.3 and for the avoidance of doubt, the Commission is likely to conclude that any retrenchments implemented or contemplated by either merger party, within the time periods contemplated in paragraph 6.2.5, are merger related. Therefore, the merging parties will bear the onus to prove (on a balance of probabilities) that any such retrenchments, are not merger related.

6.2.7 In determining whether the likely effect on employment is substantial, the Commission will consider:

6.2.7.1 the number of Workers who are likely to be affected relative to the affected workforce;

6.2.7.2 the affected Workers' skill levels. The Commission will consider information on the affected Workers' qualification, experience, job grade, job description and position within the organization in determining the skill level;

6.2.7.3 the likelihood of the Workers being able to obtain alternative employment in the short-term considering various factors. In this regard, the Commission may assess the possibilities for redeployment within the merged entity, the natural attrition rate within the merger parties, the type of skills and their transferability to other industries and businesses, the economics of the region, opportunities for re-employment in the region and the overall unemployment rate in the country;

6.2.7.4 the nature of the sector relevant to the employment effect, including whether the sector employs largely unskilled Workers, the unemployment rate in the sector, whether the sector is experiencing a trend of retrenchments, whether the sector is a mature or declining sector, and whether the sector

is an emerging sector which would suggest future employment opportunities; and

6.2.7.5 the predominant nature of employment by the acquiring firm for example, whether the parties employ seasonal or permanent Workers, and/or are engaged in a business that involves bidding or contracting.

6.2.8 The Commission will consider substantiality on a case-by-case basis and may exclude management Workers from the affected number of Workers should it view these Workers as having alternative employment prospects in the short term.

6.2.9 The Commission will provide an opportunity to the merger parties to substantiate any effects or to submit arguments to justify any substantial effects arising from the merger on employment.

6.2.10 The Commission will consider the following in analysing such representations made in respect of effects on employment:

6.2.10.1 whether a rational process has been followed to arrive at the determination of the number of jobs to be lost; that is, whether there is a rational link between the number of jobs proposed to be shed and the reasons for the job losses/reduction;[9]

6.2.10.2 whether the merger-related substantial job losses are justified by an equally weighty and countervailing effect on another Public Interest ground;[10]

6.2.10.3 whether the merger parties have provided full and complete information to the Commission and sufficient information to the Workers to enable them to consult fully on all issues.[11]

[9] Metropolitan Holdings and Momentum Group Limited (41/LM/Jul 10), paragraph 69.
[10] Metropolitan Holdings and Momentum Group Limited (41/LM/Jul 10), paragraph 69 -72.
[11] BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd (Case: 18713), paragraphs 107-110.

6.2.11 The parties will need to meet all three requirements in paragraphs 6.2.10.1 to 6.2.10.3 above for the Commission to accept their submissions as justifying the effects arising from the merger.

6.2.12 Where the merger parties submit a Public Interest justification for the job losses, the Commission may accept the following as countervailing Public Interest arguments:[12]

6.2.12.1 the merger is required to save a failing firm. Such information should be submitted as part of the competition assessment in terms of Form CC4(2);

6.2.12.2 where the merger is required because the firms will not be competitive unless they can lower their costs to be as efficient as their competitors and this can only be achieved by employment reduction through the merger; or

6.2.12.3 where the merging parties provide substantive evidence that the merger will lead to lower prices for consumers because of the merged entity's lower cost base and this lower cost base can only come about or is materially dependent upon the proposed employment reduction.[13]

6.2.13 Where parties make submissions on how they arrived at the proposed figure for retrenchments, this should not be arbitrary, random or a "guess estimate".[14] A simple task of comparing the merger parties' list of Workers or making assumptions on the likely job losses is unlikely to suffice.

6.2.14 Failure to show that a rational process has been followed in determining the likely effect on employment will generally result in the Commission making an adverse finding.

[12] Metropolitan Holdings and Momentum Group Limited (41/LM/Jul 10), paragraph 77.
[13] Metropolitan Holdings Limited and Momentum Group Limited (41/LM/Jul10).
[14] Metropolitan Holdings Limited and Momentum Group Limited (41/LM/Jul10).

6.2.15 The Commission will consider the appropriate remedy on a case-by-case basis. The following remedies may be considered:

6.2.15.1 requiring that merger parties commit to a minimum headcount employment number for up to 5 years post-merger,

6.2.15.2 placing a moratorium on job losses for a period of time not less than 3 years post implementation (including the date between merger approval and implementation);

6.2.15.3 placing a cap on the number of job losses;

6.2.15.4 staggering the number of job losses over a period of time;

6.2.15.5 providing funding to reskill affected Workers in order to improve their prospects of obtaining alternative employment within a short period of time;

6.2.15.6 obliging the parties to re-employ or give preference to affected Workers should positions become available; and

6.2.15.7 creating jobs and preferential re-employment for previously retrenched Workers.

6.3 THE ABILITY OF SMALL AND MEDIUM BUSINESSES, OR FIRMS CONTROLLED OR OWNED BY HISTORICALLY DISADVANTAGED PERSONS, TO EFFECTIVELY ENTER INTO, PARTICIPATE IN OR EXPAND WITHIN THE MARKET

6.3.1 In determining the likely effect of the merger on the ability of SMEs and firms owned/controlled by HDPs to effectively enter into, participate in or expand within the market, the Commission will determine whether the merger has an effect on any of the following factors:

6.3.1.1 entry conditions or expansion opportunities within a market including raising or lowering barriers to entry or expansion;

6.3.1.2 preventing or granting access to key inputs, services, pricing and supply conditions with respect to volume discounts,

quality, and the imposition/application of private standards, having regard to prevailing market circumstances;

6.3.1.3 whether the merger parties will continue purchasing from/supplying to SMEs or firms owned/controlled by HDPs for a reasonable period post-merger;

6.3.1.4 preventing or allowing training, skills upliftment, and development in the industry; and

6.3.1.5 denying or granting access to funding for business development and growth.

6.3.2 In analysing this provision, the Commission will, amongst other factors, consider:

6.3.2.1 whether any impediment arising from the merger limits the entry, growth, and expansion of SMEs and firms owned/controlled by HDPs and their participation in the relevant market or adjacent markets;

6.3.2.2 whether SMEs or firms owned/controlled by HDPs rely on the Target Firm for supply of inputs to a significant extent;

6.3.2.3 whether the Target Firm is a significant customer of SMEs or firms owned/controlled by HDPs;

6.3.2.4 whether the merger will result in a notable adverse change in terms and conditions of trade or supply between the Target Firm and SMEs or firms owned/controlled by HDPs; and

6.3.2.5 whether any effect on SMEs or firms owned/controlled by HDPs has a secondary effect on other Public Interest grounds such as employment and the industrial/sector or region.

6.3.3 In determining the appropriate remedy to address the identified effect on the ability of SMEs and HDPs to become competitive the Commission will consider the following:

6.3.3.1 The establishment of a supplier development fund for technical, financial or other assistance to SMEs and firms owned/controlled by HDPs.

6.3.3.2 The following principles will be considered in designing an acceptable supplier development fund:

6.3.3.2.1 funds committed to the supplier development fund must be incremental to any pre-merger fund/support for smaller firms or suppliers;

6.3.3.2.2 funds may be disbursed by way of grants, preferential or low interest loans, or equity;

6.3.3.2.3 monitoring and reporting obligations must align with the life of the fund;

6.3.3.2.4 if funds are disbursed as loans, the repayment of loans will extend the life of the fund and monitoring and reporting obligations will similarly be extended until all repaid loans are also fully disbursed; and

6.3.3.2.5 no administrative, operational or other transaction fees can be subtracted from the fund value.

6.3.3.3 support for the sustainable integration of SMEs and firms owned/controlled by HDPs into the value chain of the merger parties for a reasonable period;

6.3.3.4 continued support or procurement of services or products from SMEs and firms owned/controlled by HDP suppliers;

6.3.3.5 establishing skills development and training programs and transferring of technology; and/or

6.3.3.6 obliging parties to continue access and supply on reasonable and non-discriminatory terms and conditions.

6.4 THE ABILITY OF NATIONAL INDUSTRIES TO COMPETE IN INTERNATIONAL MARKETS

6.4.1 When assessing the impact of the merger on the ability of national industries to compete in international markets, the Commission will consider the following grounds, amongst others:

6.4.1.1 the nature/structure of the industry and the market dynamics within the industry, including at a global level;

6.4.1.2 the nature of competition and the market position of the firm in the domestic economy;

6.4.1.3 whether a change in productive capacity is required in order for the merged firm to compete globally against other firms;

6.4.1.4 the policy considerations that are relevant to the sector;

6.4.1.5 the strategy of the merger parties in relation to international competition; and

6.4.1.6 the impact on local consumers for both intermediate and final products.

6.4.2 When analysing whether the effect on the ability of national industries to compete in international markets is relevant, the Commission will consider whether economies of scale or increased production could have been attained without the merger.

6.4.3 When assessing the substantiality of any effect of a merger on a national industry's ability to compete in international markets, the Commission will consider, amongst other grounds*:*

6.4.3.1 the role and importance of the national industry in the South African market;

6.4.3.2 the role and importance of the national industry or sector in the international market/s;

6.4.3.3 the relative structure and size of the national industry or sector by international standards;

6.4.3.4 the extent of the effect on the sector should the national industry's ability to compete in international market/s be hindered; and

6.4.3.5 whether the merger impedes the realisation of any related public policy goals and relevant industrial policies in relation to the national industry in question.

6.4.4 The Commission may consider the following remedies, amongst others:

6.4.4.1 obliging the merger parties to invest within their operations a specified time period;

6.4.4.2 obligation to create jobs;

6.4.4.3 obligation to introduce new products and technology;

6.4.4.4 commitment to entering export markets or increasing exports; and

6.4.4.5 training, re-skilling or skills upliftment programs.

6.5 **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**

6.5.1 The Amendments to the Act intend to advance the economic transformation agenda envisaged in the Preamble to the Act. It bears mention that the Amendments envisage that merging parties "…*proactively address concentration and ownership representativity concerns arising in markets in which they are active*."[15]

[15] See the Explanatory Note to the Amendments which explains that same are "…*aimed at addressing two key structural challenges in the South African economy: concentration and the racially-skewed spread of ownership of firms in the economy*."

6.5.2 Given the foregoing, the Commission considers that section 12A(3)(e) confers a *positive obligation* on merging parties to promote or increase a greater spread of ownership, in particular by HDPs and/or Workers in the economy. The Commission will apply the definition of HDP contemplated in section 3(2) of the Act. 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.

6.5.3 Considering this, the Commission's point of departure will be that all mergers are required to promote a greater spread of ownership.

6.5.4 A finding that a merger does not promote a greater spread of ownership as contemplated by this Public Interest ground will inform the Commission's determination of whether the merger can or cannot be justified on substantial Public Interest grounds.

6.5.5 As indicated above, the Commission will determine the substantiality of a merger's effect on each Public Interest ground on a case-by-case basis and on a balance of probabilities. Section 12A(3)(e) is a feature of every merger assessment and represents a legislative measure contemplated in section 9(2) of the Constitution. It is possible that a merger that does not promote a greater spread of ownership in terms of section 12A(3)(e) of the Act is substantial enough to render a merger unjustifiable on Public Interest grounds.

6.5.6 The Commission further considers that the obligation to promote or increase a greater spread of ownership as contemplated in this Public Interest ground, pertains to all mergers that have an effect in South Africa as contemplated in section 3(1) of the Act. For avoidance of doubt, mergers involving an acquiring firm/s and a target firm/s registered outside of South Africa and notifiable in South Africa are subject to section 12A(3) of the Act more generally, and section 12A(3)(e) in particular.

6.5.7 The Commission's point of departure in establishing the effect of a merger on this Public Interest ground will be to ascertain the extent of

ownership by, amongst others, HDPs and / or Workers at each of the acquiring group and the Target Firm/s. This assessment may include a review of, amongst others, the following documents:

6.5.7.1 independently verified, valid B-BBEE verification certificates;

6.5.7.2 incorporation documents; and

6.5.7.3 identity documents of shareholders.

6.5.8 The Commission will consider the levels of ownership by amongst others, HDPs and/or Workers in each of the merger parties. In this regard, the merger parties must provide the HDP and/or Worker ownership levels by all firms controlling the Acquiring Firm and all firms controlling the Target Firm. The Commission will consider the pre-merger level of HDPs' and/or Worker ownership of a selling firm to be attributable to a Target Firm where that Target Firm does not have its own HDP and/or Worker ownership credentials.

6.5.9 For the avoidance of doubt, even if a merger promotes ownership by HDPs, this does not preclude the obligation to consider increased ownership by Workers, and vice versa, particularly where a merger results in a dilution of ownership by HDPs or Workers.

6.5.10 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).

6.5.11 The Commission will determine a merger's impact on HDP and/or Worker ownership levels by considering any relevant quantitative and qualitative factors. These factors include the number shares or interests held; the value of such shares or interests; whether the shares or interests owned confer additional rights such as board representation; whether the shares / interests held pertain to productive or passive assets; and whether any increase in shares / interests held confers control for the purposes of

section 12 of the Act. For the avoidance of doubt, the Commission's determination of whether a merger promotes a greater spread of ownership is conducted in accordance with the Act.

6.5.12 Mergers that either result in a dilution of HDP and/or Worker ownership or otherwise do not promote a greater spread of ownership have a substantial effect on this Public Interest ground.

6.5.13 Where a merger does not promote greater spread ownership as contemplated by section 12A(3)(e), the Commission will, in the first instance, consider ownership remedies, including but not limited to:

6.5.13.1 an ESOP concluded in accordance with the design principles articulated in case precedent and refined by the Competition Authorities from time to time. The ESOP must hold a minimum range of 5 -10% of the equity of a merging party or the merged entity and must represent a broad base of Workers (as opposed to a few highly skilled Workers);

6.5.13.2 the sale of minimum range between 5% to 25% of the equity of a merging party or the merged entity to one or more HDPs ;

6.5.13.3 direct share ownership schemes in terms of which Workers will acquire shares in a merging party or the merged entity, at no cost to Workers for a reasonable period post the merger's implementation;

6.5.13.4 divestiture of a business or assets of a merging party or the merged entity to HDP purchasers within a reasonable period post the implementation of the merger; and

6.5.13.5 Community or other investment trusts that hold shareholding in an operational firm, for the benefit of HDP beneficiaries.

7. DISCRETION

Section 79(4) provides that guidelines are not binding on the Commission, the Tribunal or the Courts but that any person interpreting or applying section 12A(3)

of the Act must take the guidelines into account. The above guidelines thus present the general methodology that the Commission will follow in assessing Public Interest issues in merger analysis. Notwithstanding the above, this will not fetter the discretion of the Commission to consider other factors on a case-by-case basis, should a need arise.

8. EFFECTIVE DATE AND AMENDMENTS

The Revised Public Interest Guidelines become effective from the date of publication in the Government Gazette and may be amended by the Commission from time to time.

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