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Competition Commission

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Per email: SeemaN@compcom.co.za

CONFIDENTIAL

Attention: Ms Seema Nunkoo

Dear Ms Nunkoo,

PUBLIC COMMENTS ON DRAFT GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION

1. Introduction

1.1 We refer to the publication of draft "Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998 (as amended)" dated 23 January 2015 (the "**Guidelines**") on which the Competition Commission (the "**Commission**") is seeking public comment. We value the opportunity of participating in this process and providing our comments on the Guidelines to the Commission.

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1.2 Members of Bowman Gilfillan’s Competition Law Practice Group have considered the Guidelines and our observations and comments are included in this letter.

1.3 From the outset we commend the Commission both on developing the Guidelines and on seeking public input in this regard. In our view, the Guidelines are well-considered and very clearly drafted. We also consider that the implementation of Guidelines that are closely followed and applied objectively may assist the Commission to establish a transparent, credible and consistent approach to assessing the public interest provisions in merger regulation, drawing on case law from the Competition Tribunal (the “Tribunal”) and the Competition Appeal Court (the “CAC”).

1.4 We are pleased to be involved in this process and we provide our comments in the spirit of constructive and co-operative engagement with the Commission.

1.5 Our comments on the Guidelines are set out below.

2. **General comments**

2.1 We note that the Guidelines are non-binding on the Commission, as contemplated by section 79 of the Competition Act No. 89 of 1998 (“the Act”). We note, however, that the Commission has wide discretion in applying the Guidelines according to the general methodology set out in the Guidelines. On the other hand, we note from, *inter alia*, the Preface that the objective of the Guidelines is to “provide guidance on the Commission’s approach to analysing mergers by indicating the approach that the Commission is likely to follow...”.

2.2 We respectfully consider that the non-binding nature of the Guidelines, together with the wide discretion afforded to the Commission, may be in tension with the stated goal of indicating the approach the Commission is likely to take in assessing the public interest provisions of the Act. Given this, it is respectfully suggested that, where appropriate, the five-step general approach to assessing public interest provisions and the specific

approach to assessing each of the public interest factors listed in section 12A(3) of the Act, be made more “concrete” in the interests of objectivity and certainty.

3. Paragraph 6: General approach to assessing public interest provisions

3.1 We welcome the Commission’s publication of its general 5-step approach and the “Rule of Thumb” set out in paragraph 6.2. The 5-step approach, in our view, is methodical and clearly articulated.

3.2 We note, however, that paragraph 6.4 provides that where a merger has (i) negative competition effects and (ii) a negative, merger-specific, and substantial public interest effect, the Commission would consider a prohibition of the merger without considering (i) whether the merging parties can justify a merger-specific substantial negative effect, and (ii) possible remedies to address such a negative effect. We respectfully submit that the Commission should consider (i) justification and (ii) remedies in such a case, consistent with the general approach outlined in paragraphs 6.1.1 to 6.1.5. This is in line with the provisions of the Act, which allow the Commission to (i) approve a merger without conditions, (ii) approve a merger subject to conditions; or (iii) prohibit a merger.¹ It is respectfully submitted that appropriate remedies should be sought when it is feasible to do so and that prohibition should be a last resort.

3.3 With reference to the public interest enquiry articulated in paragraph 6.5, we respectfully submit that the high burden of establishing “a positive competition finding” is not an appropriate test and that this should be replaced with establishing that “there will not be a substantial prevention or lessening of competition”, consistent with the determination that the Commission is required to make under the Act, in terms of section 12A(1) and 12(A)(2).

3.4 Paragraph 6.6 provides that, following from a positive competition finding, if the public interest effects are negative, the Commission will proceed to determine whether these are

¹ In relation to intermediate mergers, this is set out in section 14 of the Act.

merger-specific, substantial and justifiable. Presumably, the Commission would also consider possible remedies to address any negative public interest effects which are found to be merger-specific and substantial. However, this is omitted from paragraph 6.6. We respectfully suggest that the Commission include the consideration of remedies in such cases.

3.5 Further, it would be useful for the Commission to indicate its approach in the following circumstances:

3.5.1 Following a positive competition finding, if the public interest effects are negative and found to be merger-specific, substantial, and not justified by the merging parties, is the Commission likely to prohibit the merger? It is respectfully submitted that in such situations the Commission consider possible remedies to address the negative public interest effects.

3.5.2 Following a positive competition finding, if the public interest effects are negative and found to be merger-specific, substantial, but are justified by the merging parties, is the Commission likely to approve the merger? Where the merging parties have justified such negative public interest effects, in what circumstances (if any) would the Commission nevertheless prohibit the merger?

3.6 It is not clear what kind of justification should be put forward by the merging parties in relation to negative public interest effects. It is respectfully submitted that the guidelines are the appropriate document in which the Commission's views in this regard should be articulated.

3.7 Further, we respectfully submit that a neutral public interest effect implies that a merger has positive and negative effects which are roughly equal and therefore offset each other, so it would seem that it would be unnecessary for the Commission to "balance" the negative and positive effects as contemplated in paragraph 6.6. It would be useful if the

Commission could clarify its approach with respect to a merger with positive competition effects and a neutral public interest effect, as logically it would seem that such mergers should be approved.

4. **Paragraph 7: the effect on a particular industrial sector or region**

4.1 We note the Commission's objectives articulated in paragraph 7.1. However, we respectfully submit that the test applied in section 7.1 is not consistent with the objective and test set out in section 12A(1)(a)(1) of the Act be used. In this regard, we propose that this be reworded as follows: *..." the Commission will consider the relevant sector in question and analyse the likely effect of the merger on different parts of the industrial sector."* Such an amendment would not limit the application of this Guideline but promotes consistency with the Act.

4.2 We note that a number of references are made in this paragraph to the effect of a proposed merger on the wider economy, over and above its effect on a particular industrial sector or region. For example, at paragraph 7.3.1.1(b) the Commission indicates that it will consider *"whether the Acquiring Firm's termination of local production would have far reaching consequences for the economy";* at paragraph 7.3.3.1(a) the Commission will consider *"the strategic nature of the product to the sector, or the sector to the economy"* (our emphasis); and at paragraph 7.3.3.1((d), the Commission will consider *"the extent of the effect on the broader economy"*. We respectfully submit that consideration of the effect of a merger on the broader economy goes beyond the Commission's mandate as specified in section 12A(3)(a) of the Act, being to consider the effect that the merger will have on a particular industrial sector or region. Whilst this may not be problematic in the majority of cases, it appears that such a broad approach may be outside the Commission's mandate.

4.3 It would be helpful for the Commission to clarify how it will determine whether the alleged effect is caused by the merger, as contemplated in paragraph 7.3.2.1. We note

that the Commission has provided further indications of how it will determine the merger-specificity of effects on employment in paragraphs 8.2.2.5 to 8.2.2.8. We respectfully suggest that, in the interests of certainty and clarity, the guidelines for assessing merger-specificity should be consistently applied to each of the public interest factors provided for in section 12A(3) of the Act.

- 4.4 At paragraph 7.3.5, in relation to possible remedies, the Guidelines include “restricting the diversion of resources to overseas markets”. It is respectfully submitted that at a possible remedy this is unclear but it appears to be in conflict with the objective of promoting exports, which is positive for the economy, and the stated positive effect of promoting the ability of national industries to compete in international markets.²

5. **Paragraph 8 – the effect on employment**

- 5.1 As an overall comment, our view is that the aspects of the Guidelines which deal with assessing the effect of a merger on employment are comprehensive and provide a good indication of the Commission’s likely approach in a given case.

- 5.2 However, we respectfully suggest that the proposed test of merger-specificity set out in paragraphs 8.2.2.5 to 8.2.2.8 is not sufficiently narrowly formulated so as to exclude merely incidental effects of a proposed merger on employment. In terms of this test, a merger-specific effect on employment is one which can be shown (on a balance of probabilities) “to have some nexus associated with the incentives of the new controller” (our underlining); alternatively the test is met if the proposed retrenchments are in any way linked to the intentions, incentives, policies and management style of the acquiring group” (our underlining). On this basis, unintentional and unforeseen effects may nevertheless be regarded as indirectly having some nexus with the incentives of the new controller, and therefore would be included as merger-specific effects. We consider that this would be inaccurate and could give rise to unsubstantiated assumptions on the part of the

² Section 12A(3)(d) of the Act.

Commission. It is respectfully submitted that the test “catch” only objectively reasonable causal links. As such, we suggest that a “reasonable causal link” requires a direct and proximal nexus with the incentives/intentions of the acquiring group, and that the test should be reformulated to reflect this.

5.3 In particular, it is respectfully submitted that the inclusion of reference to the “management style” of the acquiring group is vague and bears no proper indication of merger-specific job losses. It is respectfully submitted that this reference should be deleted.

6. **Paragraph 9 – The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive**

6.1 We respectfully suggest that, for consistency and greater clarity, the test of merger-specificity set out in the context of effects on employment (in paragraph 8.2.2 of the Guidelines) should be provided for.

6.2 We consider that it would be useful if the Commission could supplement paragraph 9.2.2 with some examples of public interest justifications that could mitigate the negative effect on SMEs and HDIs or would allow the Commission to approve an anti-competitive merger, along the lines of the examples given at paragraph 8.2.4.4 of the Guidelines in the context of assessing the effects on employment.

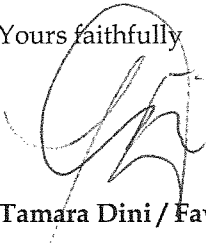
7. **Concluding Remarks**

7.1 Our observations and comments are provided in the spirit of co-operation and constructive engagement with the Commission and we remain at the Commission’s disposal to clarify any of our observations, to discuss our suggestions or to discuss aspects of this letter in which we have commented on the Guidelines without offering a suitable alternative. We would also be happy to meet with the Commission in order to work through the comments set out in our letter and to engage with the Commission on

aspects where helpful solutions could be developed.

7.2 Again, we commend the Commission on preparing the Guidelines and on providing a process for public comment on the Guidelines. We reiterate that we are most pleased to be involved in this process. We trust that our observations will be helpful.

Yours faithfully



Tamara Dini / Fawaaz Satardien
Bowman Gilfillan Inc.