BAKER & MCKENZIE

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

***Introduction***

1. We refer to the draft "*Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act 89 of 1998*" ("**Guidelines**"), which were published by the Competition Commission ("**Commission**") on 23 January 2015 for comment.
2. Baker & McKenzie welcomes both the publication of guidance on the consideration of public interest factors in merger regulation as well as the opportunity to submit comments in relation to the draft Guidelines.
3. Our comments on the draft Guidelines are set out below, both generally and in respect of specific aspects of the Guidelines.

***General Comments***

4. Baker & McKenzie acknowledges that public interest factors are statutorily part and parcel of the merger regulation process and need to be given due consideration in the assessment of mergers. As such, we are in agreement with the interpretation of the Commission in paragraph 5.4 of the Guidelines that the evaluation of whether the merger will substantially impact any of the public interest grounds (either positively or negatively) is a separate enquiry to the competition assessment contemplated in section 12A(1)(a) of the Competition Act No. 89 of 1998 (as amended) ("**Act**"). As such and as articulated in paragraph 5.6 of the Guidelines, the competition authorities may, in terms of the Act, conceivably prohibit or conditionally approve a transaction that has no competition concerns on public interest grounds.
5. In the context of the described public interest mandate of the Commission, it is noted that one of the purposes of the Guidelines is to elucidate the information that would be required at the outset from a public interest perspective to enable the Commission to ensure an expedited evaluation of the merger by avoiding the delays that may arise from a multiplicity of information requests.
6. However, as a broad comment, it is submitted that caution should be exercised to ensure that these considerations are not over-emphasised to the detriment of healthy economic activity, competition and ultimately consumers. Put differently, there is an apprehension

that an over-emphasis on public interest factors may ultimately undermine the public interest by chilling merger activity, disincentivising investment and disproportionately increasing the cost base of firms that are subjected to public interest conditions as a consequence of the merger approval process. In this regard and while the Guidelines acknowledge in paragraph 3.3 that "*public interest issues have taken prominence in the recent past due largely to the high unemployment rate in the country*", care should be taken to ensure that the impact on merger activity due to this increasing focus does not have similarly detrimental effects on employment. Regard should be had to comparative anti-trust jurisdictions in respect of which public interest considerations are not elevated over the benefits of merger activity and the promotion of competition.

7. The final general comment is that paragraph 8.2.4.4 of the Guidelines itemises certain countervailing public interest arguments that can be raised where a merger specific, substantial effect on employment is likely. As a general point, we propose that countervailing public interest arguments should be provided in respect of *all* public interest considerations.
8. Against this background, we turn to deal with our specific comments below.

***Specific Comments***

General Approach to Assessing Public Interest Provisions

9. Paragraph 5: This paragraph deals with the line of enquiry that is relevant where a positive competition finding is reached by the Commission. In particular, the paragraph alludes to a consideration of both substantial negative and positive public interest effects. For the avoidance of doubt, we submit that the parties should not be required to demonstrate positive public interest benefits but only prove that there will be no substantial negative public interest effects.

10. Paragraph 6.4: This paragraph states that where there are substantial negative competition and public interest effects that are merger specific, the Commission will consider a prohibition of the merger. In this regard, it is submitted that there may be legitimate bases upon which a conditional approval may equally cure any merger specific concerns rather than prohibiting the transaction altogether. As such, we propose that the Guidelines include reference to a conditional approval of the merger in this context.

11. Paragraph 6.6: This paragraph states that, following from a positive competition finding and where the public interest effect is neutral, *"the Commission will consider what the negative and positive effects are and balance these*". It is respectfully submitted that this is unclear. In particular, if the public interest effects are neutral, it is not clear what the negative and positive effects are that would require balancing.

The Effect on a Particular Industrial Sector or Region

12. Paragraph 7.3.1: This paragraph describes the considerations that the Commission will consider in determining the likely effect on the industrial sector or region. It is assumed from the use of the word "*may*" that these considerations are non-exhaustive. As a general comment, it is submitted that factors should be included that would demonstrate that the merger will result in a positive effect on the industrial sector or region such as enhanced procurement, product variety and increased innovation as well as positive consumer benefits.

13. Paragraph 7.3.2: This paragraph itemises the considerations relevant to determining whether the alleged effects are merger-specific. In particular, the Commission will consider whether the alleged effect is caused by the merger, is a result of the merger or flows from the merger. It is submitted that the Commission should also consider if the alleged effect is related to aspects which are, at the same time, independent of the merger. Put differently, it would be useful for the Commission to elucidate the instances in respect of which it will consider the effects to be non-merger specific.

14. Paragraph 7.3.3: This paragraph deals with the factors that the Commission will consider when determining whether the effects will be substantial. It is submitted that these factors are extremely broad including whether "*the merger impedes public policy goals that would have far-reaching consequences for the sector as a whole*." It is submitted that the broadness of the considerations itemised in this paragraph dilutes certainty and has the potential to introduce factors entirely unrelated to the competition process.

15. Paragraph 7.3.5: This paragraph proposes possible remedies that may be considered where the merger has an effect on a particular industrial sector or region. These remedies are wide-ranging and have the ability to substantially impact upon the business

operations and commercial viability of the entity against which the remedies are being imposed. It is submitted that where other competitors in the market are not subject to similar requirements, this may potentially affect the competitiveness of the merged entities vis a vis its competitors. In such event, transactional activity may actually impede competitiveness and firms may opt to avoid mergers where such remedies are likely to be imposed. Accordingly, it is submitted that express consideration be included on whether the remedies have the potential to impact on the competitiveness of the merged entity. It is further suggested that the countervailing public interest arguments (under the effects of employment in terms of paragraph 8.2.4.4) should also be applicable in this context. For ease of reference, these countervailing public interest arguments include the following -

- *where the merger is required to save a failing firm...;*
- *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 these can only be attained by employment reduction through the merger; or*
- *where the merger will lead to lower prices for consumers because of the merged entity's lower cost base and that this lower cost base can only come about or is materially dependent upon the contemplated employment reduction."*

The Effect on Employment

16. Paragraph 8.2.2.3: This paragraph provides that "*the Commission will consider an appropriate period for pre-merger retrenchments to be the time from the initiation of merger discussions to the date of filing. For post-merger retrenchments, a period of one year following the merger approval date*." In this regard, it is submitted that even where retrenchments occur during this period, the Commission should be cognisant of the fact that such retrenchments may nevertheless be for operational reasons entirely unrelated to the proposed merger.

17. Paragraph 8.2.2.8: This paragraph states that a reasonable link of causality between the retrenchments and the merger would constitute sufficient evidence to prove merger

related retrenchments. We recommend, for purposes of clarity and certainty, that the Commission explicitly set out what is meant by "*a reasonable link of causality*".

18. Item 8.2.4.2 (a): This paragraph requires parties to prove that a rational process has been followed in determining the likely effect on employment. Paragraph 8.2.4.5 states that simply comparing the parties list of employees and deducing assumptions on the effect of likely job losses is insufficient. Lastly, paragraph 8.2.4.6 states that an adverse finding will be made where the parties fail to show that a rational process has been followed. Reading these paragraphs together, it is submitted that such requirements require that an extensive and onerous exercise should be performed before the merger is notified or immediately after the merger is notified. Accordingly, an issue of concern is that such requirements affect the period of time that it would take to conclude a transaction due to the resource-intensive nature of the envisaged task. The requirement that a rational process must be followed further means that it will be insufficient to merely supply the Commission with the number of employees likely to be retrenched. The parties are required to demonstrate how the numbers were arrived at and if other means of averting job losses were envisaged. It is respectfully submitted that these requirements places an onerous burden on the parties at a very early stage of the merger proceedings (particularly at a stage these consequences may not be precisely mapped out by the merging parties).

***Conclusion***

Baker & McKenzie reiterates its recognition of the importance of the Guidelines to clarify issues relating to public interest assessment in merger regulation and welcomes the opportunity to comment. We respectfully request, for clarity and certainty, that the Commission consider the above comments favourably.