

## **COMPETITION LAW COMMITTEE OF THE LAW SOCIETY OF THE NORTHERN PROVINCES**

### **SUBMISSIONS ON THE COMPETITION COMMISSION OF SOUTH AFRICA'S DRAFT GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION DATED 23 JANUARY 2015**

#### **INTRODUCTION**

The Competition Commission's (the "Commission") publication and call for comments on the draft Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 (as amended) ("the Guidelines") is a welcome development and the Competition Law Committee of the Law Society of the Northern Provinces ("LSNP") of South Africa thanks the Commission for the opportunity to comment thereon. We believe that the adoption of guidelines will bring more certainty on how the Commission intends applying section 12A(3) of the Competition Act No. 89 of 1998 ("the Act") in future.

Since the Competition Law Committee of the LSNP consists of lawyers from Gauteng, Mpumalanga, the NorthWest and Limpopo provinces of South Africa who frequently practise before the Competition Authorities in South Africa and engage in a multitude of merger filings, we believe we are uniquely qualified to comment on the Guidelines. We therefore trust that you will find our submissions useful and shall be happy to engage in discussions with the Commission about them.

At the outset we wish to emphasise what we believe is a common point of departure in respect of the Guidelines, namely that it does not constitute a legally binding document and does not fetter the discretion of the Commission, the Competition Tribunal or any court of law. That much is suggested in paragraphs 5.1 and 11 of the Guidelines. What must also be clear, however, is that the Guidelines (and the Commission's concomitant exercise of discretion in terms thereof) could never be permitted to go beyond the parameters and provisions of the Act and the case law developed by South Africa's courts.

What must also be recognised is that the Guidelines cannot cater for every eventuality or possible public interest factor in a merger.

References to paragraph numbers below refer to paragraph numbers in the Guidelines.

#### **DEFINITIONS**

1. Paragraph 2.1

1.1 The reference should be to section 1(1)(i) of the Act and not to section 1(i).

## 2. Paragraph 2.7

The reference should be to section 1(1)(xxxiii) of the Act and not to section 1(xxxiii).

## 3. Paragraph 2.8

The word "Merger" should be inserted at the beginning of the second line, before the words "Thresholds and Method of Calculation Schedule to the Act dated 1 April 2009;".

**LEGISLATIVE FRAMEWORK**

## 4. Paragraph 5.1

As this is a direct quote from the Act, the word "this" should replace the word "the" which appears in the second line of the quote of sub-section 1 before the word "Act". In addition, the word "The" should be replaced with the word "A" at the beginning of the quote of sub-section 2.

## 5. Paragraph 5.4(ii)

The correct legal test as set out in Section 12A(1)(a)(i) of the Act ought to be referred to. Instead of stating that "... and whether there are any public interest considerations that would outweigh the negative competition effects" please state "...and whether there are any substantial public interest considerations that could justify the anti-competitive merger."

## 6. Paragraph 5.5

6.1 Once again the correct legal test as set out in Section 12A(1)(a)(i) of the Act ought to be referred to. In the second sentence, instead of stating that "... In the first line of enquiry, following from a negative competition finding, the Commission must consider whether there are any public interest grounds that could outweigh any negative competition effects..." please state: "... In the first line of enquiry, following from a negative competition finding, the Commission must consider whether there are any substantial public interest grounds that could justify the anti-competitive merger".

6.2 In addition, we note that the word "justify" appears to be used here in a different context to its meaning in paragraph 5.6 of the Guidelines. For the sake of clarity, "justify" should be changed to "substantiate" in the last sentence of paragraph 5.5 (unless the suggestion in paragraph 6.1 above is accepted).

## 7. Paragraph 5.6

7.1 In the third line of this paragraph, please add the word "substantial" before "public interest".

7.2 The last sentence of this paragraph is unclear and should be amended to read as follows "In this case, parties are required to justify any *prima facie* findings by the Commission that there is a substantial negative effect on the public interest".

- 7.3 Generally speaking, we believe that it should be clarified that if no significant lessening of competition is established, the Commission should only be concerned with whether there are any negative public interest issues, as there is no need to further legitimise a merger that does not raise competition issues with positive public interest arguments.

## GENERAL APPROACH TO ASSESSING PUBLIC INTEREST PROVISIONS

### 8. Paragraph 6.1.2

- 8.1 The use of the word "sufficient" in the second line of this paragraph is unclear and may lead to confusion. It is important that there be no confusion, since causality is key in determining merger specificity, and as stated in the case of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (case number 018713), at paragraph 57, "*Not every change that results post-merger is necessarily attributable to the merger.*" In the circumstances, we propose that the word "sufficient" be deleted and the words "as demonstrated on a balance of probabilities, or in other words but for the merger, the alleged public interest outcome would not occur" be inserted at the end of the last sentence of this paragraph. Please see paragraph 93 of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (case number 018713).

- 8.2 We note in general that the Guidelines introduce a number of alternative "definitions" for merger specificity which does not aid clarity. Viz: "causal nexus between the merger and alleged effect" (6.1.2); "caused by a merger, is the result of the merger, or flows from the merger" (7.3.2.1); "conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the new controller" (8.2.2.5). We suggest that it would be better to refer to the suggested wording above in all these cases so as to ensure a consistent application of the relevant principles.

### 9. Paragraph 6.3

- 9.1 The second line of the first sentence of this paragraph should be amended to read as follows "Commission will consider efficiencies (section 12A(1)(a)(i)) and what the public interest effects are".
- 9.2 The correct legal test as set out in Section 12A(1)(a)(i) of the Act should be referred to. In the fourth line, instead of stating that "...such that the claimed positive effects could outweigh the negative competition effects...", please state: "...such that the claimed positive public interest effects could justify the anti-competitive merger".
- 9.3 It is submitted that there is no legal basis for placing the onus on the merging parties to justify the Commission's finding of a substantial positive effect on public interest. In the circumstances, the third sentence of this paragraph should be deleted. In this regard, please refer to paragraph 68 of *Metropolitan Holdings Limited and Momentum Group Limited* (case

number 41/LM/Jul10) and paragraph 6.1 of *Harmony Gold Mining Company Limited and Gold Fields Limited* (case number 93/LM/Nov04).

10. Paragraph 6.4

The words "or imposition of conditions to address public interest effects" should be inserted at the end of the last sentence of this paragraph, as this is contemplated in paragraph 6.1.5 of the Guidelines.

11. Paragraph 6.5

It is submitted that, pursuant to a positive competition finding, it is not necessary for the Commission to even determine whether there are positive public interest effects, but only if there are negative effects.

12. Paragraph 6.6

12.1 It is unclear how the Commission is to balance positive and negative effects after determining that the public interest effect is neutral - in order to have neutral public interest effects the positive and negative effects must be in balance. A possible solution may be to change the second sentence to read: "The public interest effect may be neutral where there is either no effect on public interest or where the Commission has considered what the positive and negative effects are and found them to balance one another out".

12.2 The last sentence of this paragraph is superfluous and should be deleted.

## **THE EFFECT ON A PARTICULAR INDUSTRIAL SECTOR OR REGION**

13. Paragraph 7.1

13.1 The Act does not make reference to a "sub-sector" in section 12A(3)(a). Accordingly, the second line of this paragraph should read as follows "region, the Commission will consider the specific sector or region in question and analyse the".

13.2 The lack of transparency on what industrial sectors may be caught here is a concern and could have negative consequences for investment. It is suggested that the Guidelines states that the Commission will from time to time indicate particular sectors that are of concern or under scrutiny. If parties had a sense that their sector was receiving some focus (e.g. the subject of a DTI or Commission impact study, or was under investigation) then it would assist to admonish a focus on the public interest issue in question, which could then be addressed pro-actively in the merger filing.

#### 14. Paragraph 7.3

14.1 We note in general that the structure of this section also appears to take a preliminary view that foreign investment or foreign ownership is prima facie contrary to the public interest. We would caution against such a message.

14.2 Moreover, there is a concern that the effect and remedies components in this paragraph might not be consistent with South Africa's international law obligations, particular under the WTO and regional trade agreements. It is arguable that the Guidelines contravene the non-discrimination principle in these agreements to the effect that foreign firms must be treated no less favourably than local firms (referred to as the "national treatment" principle). The Guidelines could also lead to trade law disputes with other countries and have a chilling effect on foreign investment. In order to give effect to the above concerns, we suggest that the words "*having regard to South Africa's international law obligations*" be inserted after the words "*...the Commission will do the following analysis*".

#### 15. Paragraph 7.3.1.1

15.1 In our view, this paragraph is framed in the negative and only appears to contemplate adverse effects on a particular industrial sector or region, whereas there may well be positive effects arising from the events contemplated in this paragraph. It is submitted, for example, that the reference to "detrimental consequences" in paragraph 7.3.1.1(e) could be rephrased to simply refer to the "consequences for local markets, sectors and regions".

15.2 It is not clear how the consideration in paragraph 7.3.1.1(a) is indicative of an effect on an industrial sector or region. On its own, it is not a relevant public interest consideration and to bring it within the confines of the Act would require legislative amendment. Accordingly, it should be deleted.

15.3 The preoccupation with supplier contracts is a concern. Merging parties should as a point of departure be free to optimise their suppliers and interfering with such freedom risks protecting inefficient suppliers. It is suggested that the possible public interest issue sub-paragraph 7.3.1.1(c) should be assessed more generally under (d) and need not be separately listed. But if that is retained, we suggest that an additional relevant consideration which should be mentioned under the same rubric is whether the merger results in developing and sustaining local supplier chains.

#### 16. Paragraph 7.3.2.1

The words ", is the result of the merger" which appear in the first line of paragraph 7.3.2.1(a) is superfluous and should be deleted.

## 17. Paragraph 7.3.3.1

In our view, other relevant considerations which go to the substantiality of the effect on a particular industrial sector or region include the importance of the social projects and/or programs undertaken by the firm and the effects of a termination thereof.

## 18. Paragraph 7.3.3.1(a) and (b)

The considerations listed in 7.3.3.1(a) appear to be a more particular expression of the principle in 7.3.3.1(b) and the two should be combined.

## 19. Paragraph 7.3.3.1(e)

The words "whether the merger impedes on" are too narrow and one-sided. We suggest that this paragraph should be amended so as to read "*whether the merger has any effect on any public policy goals*".

## 20. Paragraph 7.3.3.2(b)

It would be useful if the Commission could provide guidance as to the source of stated public policy goals from time to time.

## 21. Paragraph 7.3.3.2(c)

21.1 It is submitted that the consideration as currently framed does not provide practical guidance as to what the Commission would consider as being substantial. Ideally, the Commission should clarify this consideration.

21.2 The word "unleased" should be replaced with the word "unleashed".

## 22. Paragraph 7.3.4.1

The words "or positive" appearing in this sentence should be deleted, alternatively, the Commission should qualify that the onus is placed on the merging parties to justify a positive public interest effect in instances where the Commission has determined *prima facie* that the competition effects on the merger are negative.

## 23. Paragraph 7.3.4.2

With reference to the words "or positive" which appear in this paragraph, please refer to our comments in relation to paragraph 7.3.4.1 above.

## 24. Paragraph 7.3.5.2(c)

It is unclear what is meant by the words "diversion of resources" and therefore these words should be clarified.

## THE EFFECT ON EMPLOYMENT

25. As a general comment, the information that the Commission appears to require from the merging parties is very detailed, and will require a level of interaction between the merging parties that could lead to risks of pre-implementation or inappropriate information sharing. We invite the Commission to clarify its approach to this problem.

26. Paragraphs 8.2.1.1 and 8.2.2.2

These provisions place an onerous requirement on merging parties to declare retrenchments that are not merger specific. It is also not clear how far back in time merging parties are required to go in order to provide details of retrenchments made prior to the consummation of the merger. Clearly, this is a burdensome requirement for merging parties. Moreover, the reference in paragraph 8.2.1.1 to "declaring all contemplated retrenchments" is not in accordance with the Act, which requires only merger-related retrenchments to be declared. At most, the Commission might request all existing retrenchments proceedings be disclosed as contemplated in paragraph 8.2.2.2.

Moreover, information which is not necessarily merger specific, such as all retrenchments that have occurred in the recent past, or non-merger specific retrenchments are required to be provided. This also raises confidentiality concerns as trade unions and employee representations may get access to information which does not relate to the merger.

The employees who have concerns regarding any of those retrenchments have recourse to the labour courts. There is concern that information such as operational requirements could get into unions hands, and also possibly competitors' since those unions or employee representatives are not under confidentiality undertakings not to pass such information on.

There should therefore be a distinction between the information provided to unions or employee representatives and the information provided directly and only to the commission, which can be more expansive.

The concern can also put in these words: There is only a burden on merging parties to provide the authorities with information that is relevant to assessment of the merger. Requiring merging parties to declare all contemplated retrenchments regardless of whether same are merger specific goes beyond the spirit and letter of the Act.

27. Paragraph 8.2.1.4

It is not clear that it is within the Commission's jurisdiction to consider the "general level of employment" within an industry. The rule of thumb should relate to merger specificity, so that if the merger impacts the "general level of employment in an industry, then that would be within the

scope of the Commission's jurisdiction to consider. The Commission cannot, as a rule, consider the "general levels of employment" if that cannot be tied to the merger – this is for the Department of Labour and other governmental policy enforcement authorities to address. Taking on such an additional burden will add further strain to the Commission's resources, and in an area which is not within its scope of expertise. Reference to this "secondary line of enquiry" should be removed and the words "*of the merger*" should be included after the words "...will consider the likely effect". Please see also our suggestion in paragraph 13.2 on improving transparency.

28. Paragraph 8.2.1.5

We note again the undue focus on supply agreements and suggest that the reference thereto in this paragraph be deleted.

29. Paragraph 8.2.2.2

29.1 Caution should be used by the Commission when referring to the term "contemplated" given that this may give rise to certain obligations in terms of the Labour Relations Act, No. 66 of 1995 ("LRA"). As such, the word "contemplated" should be used in the Guidelines with circumspection. Where the word "contemplated" appears in the second line of this paragraph it appears to be used in a specific context of the LRA. In terms of section 189 of the LRA, when an employer "contemplates" dismissing one or more employees for reasons based on operational requirements, the employer in question must consult in a manner envisaged in section 189 of the LRA. In many instances, retrenchments may flow as a result of the merger and are accordingly conditional on the merger being approved and implemented. It, however, cannot be said in these instances that the merging parties are "contemplating" retrenchments for purposes of section 189 of the LRA.

29.2 If the merging parties were "contemplating" retrenchments as a result of the merger and were "forced" to consult with employees in terms of the LRA before obtaining merger approval, then such conduct could be treated as pre-implementation. We, therefore, suggest that the words "contemplated or" which appear in the second line of this paragraph should be deleted.

30. Paragraph 8.2.2.3

The requirement to notify the Commission of post-merger retrenchments for a year after merger approval is an unfair burden and extends the regulation of merging parties unjustifiably. It is open to employees or unions to argue that post-merger retrenchments are merger specific and were not disclosed.

31. Paragraph 8.2.2.4

A requirement to prove that the retrenchments are not merger related is not in line with the jurisprudence. At page 23 of the background note, reference is made to the Bucket Full merger – which indicates that there is an onus, when there is disagreement, on the Commission to prove that

the retrenchments are merger related. Similarly, in the Tribunal's Walmart decision referred to at page 23 of the background note, it is noted that the union is required to put up a prima facie case as to the retrenchments being merger specific, before the justification burden could shift to the merging parties

32. Paragraphs 8.2.2.5 – 8.2.2.8

32.1 The definition of merger specificity here is very wide and could lead to an unnecessarily extensive and inefficient investigation.

The earlier definition – that of a causal nexus - is more appropriate. The words “conceptually” and “some” nexus, as well as the qualified “associated with the incentives of the new controller” make the definition too wide, and allow for any theoretical impact to be considered as “merger specific”.

32.2 There is no additional clarity provided by paragraph 8.2.2.8 – it states that a “reasonable” link will constitute “sufficient” evidence to prove merger specificity. This simply adds the word reasonable as a qualifier to the word “sufficient” without any additional clarity on either term. In our view, having a "reasonable link of causality" be sufficient to prove merger related retrenchments on a balance of probabilities is contrary to the rule of law and we suggest that paragraph 8.2.2.8 should be deleted.

33. Paragraph 8.2.3.1

In order to make it clear that not all of the factors listed here might be applicable in each instance, the words "where applicable" should be inserted after the words "following factors".

34. Paragraph 8.2.3.1(d)

It is not clear what the "maturity of the affected sector, for instance, a mature sector vs an emerging sector" is indicative of. The Commission should please clarify this.

35. Paragraph 8.2.4.2

35.1 Whether consultations, in terms of the LRA, have been completed or not should be considered by the Commission on a case by case basis. Given the uncertainty of a transaction until competition approval is gained, it is sometimes not possible to start engaging in consultations. Other severe consequences can result if merging parties are required to consult, even before they know whether they are or are not retrenching employees – it can cause mass panic under employees, it can cause resignations which will affect the operation of the business, and can reduce its value.

35.2 Sub-paragraph 8.2.4.2(b) read with 8.2.4.3 is not in line with the Act. There can be no obligation to counter any or all job losses with a public interest gain. That should only be

relevant where the job-losses are so substantial that the merger would be unjustified without a concomitant public interest gain.

36. Paragraph 8.2.4.4

The examples provided in (a) to (c) in this paragraph are not, strictly speaking, "public interest justifications" as they are not referred to in section 12(A)(3) of the Act. In the *BB Investment Company (Pty) Limited and Adcock Ingram Holdings* case, these justifications are described as simply "justifications" for embarking on merger specific retrenchments (see paragraph 95). For instance, the reference to "failing firm" in paragraph 8.2.4.4(a) is referred to in section 12A(2)(g) of the Act.

37. Paragraph 8.2.4.4(a)

This paragraph states that the "*the merger is required to save a failing firm. Such information should only be submitted in conjunction with a failing firm defence...*"(sic). It is submitted that a firm may be failing but that it may not always be possible to submit a failing firm defence if it is not an anti-competitive merger. The Guidelines should, therefore, make provision for the possibility that firms need not submit a failing firm defence in order to benefit from the countervailing public interest argument that the firm is failing but that firms may perhaps need to provide information akin to the information that would be submitted in the context of a failing firm defence.

38. Paragraph 8.2.4.4(b)

For the sake of clarity, the word "pre-merger" should be inserted in the first line of this paragraph after the words "where the merger is required because the firms will".

39. Paragraph 8.2.4.5

See the comment at paragraph 25 above. In terms of labour law, the obligation to consult employees commences when an employer contemplates dismissing one or more employees for operational reasons. Thus, the decision to retrench must not have been taken before the consultation process begins, otherwise the retrenchments are considered to be a *fait accompli* and will, in almost all circumstances, be found to be unfair. Where an employer has already identified and selected employees for retrenchment before consultation commenced, this will be found to be unfair in terms of labour law. As such, it is submitted that cognisance should be had of the merging parties' obligations in terms of labour law and that there may be circumstances where the merging parties are only able to provide a maximum number of employees who may be retrenched subject to the outcome of due diligence exercises, labour law consultations etc. We reiterate that the information required from the Commission in this regard will require a level of interaction between the merging parties that could lead to the pre-implementation of a merger or inappropriate information sharing between competitors.

## 40. Paragraph 8.2.4.7

It is submitted that the Commission must make an objective assessment on the employment impact of a merger, with all the information it is able to source, and should not make the presumption that, because certain information is not available, the public interest impact of a merger will be negative.

## 41. Paragraph 8.2.5.2(f)

The words "for re-employment should positions become available" should be inserted at the end of the sentence.

**THE ABILITY OF SMALL BUSINESSES, OR FIRMS CONTROLLED OR OWNED BY HISTORICALLY DISADVANTAGED PERSONS, TO BECOME COMPETITIVE**

## 42. Paragraph 9.2

There is a concern that the Commission will presume substantiality (seemingly without more) if the merger gives rise to the effects itemised in paragraph 9.2.1.1, all of which are rather amorphous concepts. There is also a concern that on the one hand, raising or creating barriers to entry will be considered an effect, yet on the other hand this too could be taken as meeting the substantiality requirement. Stated differently, even a *de minimis* raising of a barrier to entry could be deemed substantial.

## 43. Paragraph 9.2.2.1(c)

The use of the word "unfair" in this context is unclear and should not be retained. We suggest that a more useful formulation of this paragraph would be as follows: "*pricing and supply conditions with respect to volume, discounts, quality and services that are defensible having regard to prevailing market circumstances*".

## 44. Paragraph 9.2.4.1

The words "positive or" which appear in the second line of this sentence should be deleted, for the reasons set out in our comments in relation to paragraph 7.3.4.1 above.

## 45. Paragraph 9.2.5.1.b

These conditions obviously have to be subject to lawfulness – therefore requirements to grant favourable prices or discounts need to be considered with reference to the risk of engaging in price discrimination as well.

**THE ABILITY OF NATIONAL INDUSTRIES TO COMPETE IN INTERNATIONAL MARKETS**

As a general remark, we note that this section is disappointingly underdeveloped. Having regard to the contents of paragraph 5.4.1 of the Background Note to the Guidelines, the Commission should ideally provide more guidance of the considerations it will take into account in this regard. By way of example, whether a change in productive capacity is required in order for the merged firm to compete globally against other firms, the consideration of the nature of the products in question and relevant policy considerations. In a developmental economy like South Africa's, this should be an important public interest consideration to consider.

As a final specific comment, we suggest that in paragraph 10.3 it is not clear why efficiencies for the local economy are relevant to the question of whether the merger allows the firm to be efficient in international markets.