

Your Ref Ms Seema Nunkoo

Our Ref Mark Thomas / Roxanna Valayathum / Competition Department
Email MT2@tabacks.com / RV@tabacks.com

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Ms Seema Nunkoo
Competition Commission of South Africa
Department of Trade and Industry Campus
77 Meintjies Street
Sunnyside
Pretoria

Per email: SeemaN@compcom.co.za

Dear Seema,

SUBMISSIONS ON THE GUIDELINES FOR THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION

1. **INTRODUCTION**

1.1 We refer to the Competition Commission's ("**Commission**") "*Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998 (as amended)*" ("**Draft Guidelines**"). We wish to provide our high-level submissions to the Commission in response to the Commission's invitation for comments.

2. **SUMMARY**

2.1 In summary, our submissions are:

2.1.1 the Draft Guidelines appear to pursue particular pre-determined outcomes;

2.1.2 the Draft Guidelines should be amended to stress the Commission's independence as a competition law regulator; and

2.1.3 the Draft Guidelines impose a far too substantial obligation on the merging parties to expand on public policy considerations when notifying the Commission of a merger.

2.2 We will now deal with each of the submissions in turn.

3. **SUBMISSIONS**

3.1 **The Draft Guidelines appear to pursue particular pre-determined outcomes**

3.1.1 The current wording of the Draft Guidelines appears to be an attempt to expand on pre-determined post-merger objectives. As a general comment on this point, we refer the Commission to the Competition Tribunal's ("**Tribunal**") decision in the merger between *Walmart Stores and Massmart Holdings Limited*¹ ("**Walmart merger**") that holds:

*"...Our [competition authorities] job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction.....".*²

3.1.2 We submit that the Draft Guidelines lose sight of promoting a holistic view of the Competition Act³ ("**Act**") in favour of policies designed to achieve pre-identified results. For example the Draft Guidelines appear to focus on using mergers and public policy as a tool for remedying high unemployment rates in South Africa.⁴ It is undisputed that labour issues are an important public policy consideration, but the Tribunal has indicated that "*...protecting existing rights is legitimate, creating new rights is beyond our competence.*"⁵

¹ 73/LM/Dec10

² Walmart merger, p 11 pp 32.

³ No 89 of 1998 (as amended)

⁴ See Draft Guidelines p 5 pp 3.3; p 15 pp 8.1 (second sentence); p 16 pp 8.2.1.4; p 17 pp 8.2.2.3; p 18 p 8.2.3.1 (c); p 18 pp 8.2.3.3; p 20 pp 8.2.4.5; p 22 pp 9.2.1.1 (e); p 23 pp 9.2.3.1 (d) and p 24 pp 9.2.5.1 (c).

⁵ Walmart merger, p 34, pp 68.

- 3.1.3 We submit that when the Commission considers public policy in respect of labour matters, it should do so in order to:
- 3.1.3.1 protect existing labour rights⁶ as opposed to attempting to expand labour rights; and
- 3.1.3.2 develop a competitive economic environment⁷ where the interests of owners, consumers, and (not solely) the interests of the workers are taken into account.⁸
- 3.1.4 In a similar vein to the above, we have concerns with other sections of the Draft Guidelines, such as Section 7.⁹ Section 7 appears to place emphasis on how the Commission intends to pursue a pre-determined policy of imposing conditions and positive obligations on foreign acquiring firms in order to, for example, expand local operations. This would appear to echo the government's sentiments in the Walmart merger.¹⁰
- 3.1.5 Bearing these comments in mind, we submit that the Commission reassess the Draft Guidelines in order to holistically reflect the competition policies of the Act and the extent of the Commission's powers as an independent competition regulator.

3.2 Amend to reflect the Commission's independence

- 3.2.1 For reasons alluded to above, we submit that in promoting a competitive environment, the Commission must be an independent competition regulator that

⁶ Subject to the *caveat* that such protection is reasonable, merger specific, and takes into account economic arguments and defences.

⁷ For example, we refer the Commission to the decision in *Iscor Limited and Saldahna Steel (Pty) Ltd*, 67/LM/Dec01.

⁸ Preamble to the Act; "...an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans" (our emphasis).

⁹ "The effect of a particular industrial sector or region", p 11 – p 14.

¹⁰ For example, see "South African Government Statement on Wal-Mart, Massmart merger" <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=agE6oOnXPHQg>, last accessed 20 February 2015.

promotes a “...credible competition law, and effective structures to administer that law...” (our emphasis).

3.2.2 The present interpretation of the Draft Guidelines raises questions around the extent of the Commission’s regulatory independence. We note that the Act empowers the Commission to be an independent competition regulator¹¹ and are of the view that the Commission must remain independent in order to pursue competition policy and be free to consider a merger, regulation, and policies in light of the Act and the Constitution.¹²

3.2.3 It is submitted that in preparing the final version of the Draft Guidelines, the Commission should consider this implication and amend the Draft Guidelines to specifically reflect the Commission’s independence.

3.3 **Draft Guidelines impose a substantial obligation on merging parties**

3.3.1 The Draft Guidelines, amounting to 26 pages with at least 80 separate steps for analysis, impose a significant obligation on merging parties to expand on existing public policy considerations in merger notifications.

3.3.2 The Commission will be aware that merging parties will feel obligated to fully ventilate public policy considerations in accordance with the Draft Guidelines, with a view of facilitating the approval of the proposed merger. This obligation adds at least three additional dimensions to the public policy consideration process:

3.3.2.1 the Draft Guidelines create a rebuttable presumption that mergers are *prima facie* contrary to public interest and, as such, the merging parties carry the onus of discharging this presumption from the moment that the idea to merge is conceived;¹³

¹¹ See section 20(1)(b0); 21(2)(a); 21(2)(b) and 20(3) of the Act.

¹² *Hulett Group Ltd and Transvaal Suiker Bpk* 83/LM/Jul00.

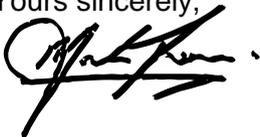
¹³ This creates a ‘guilty until proven innocent’ situation, contrary to section 35(3)(h) of the Constitution.

- 3.3.2.2 discharging this presumption, based on the steps in the Draft Guidelines, will increase the already significant costs of merger notification as public policy is a complex matter that will require additional hours of legal and economic input based on the Draft Guidelines; and
- 3.3.2.3 in practice, we believe that this will make public policy debates adversarial in nature as merging parties will be defending their submissions as opposed to encouraging engagement between the merging parties and the Commission.
- 3.3.3 It is proposed that the Commission review the Draft Guidelines with the objective to simplify the Draft Guidelines in order to alleviate these additional burden's and expenses.

4. **CONCLUSION**

- 4.1 We thank you for the opportunity to make submissions on the Draft Guidelines, trust that the Commission will find the above comments useful and that the Commission will consider the extent of the implications in revising the Draft Guidelines.
- 4.2 These submissions do not represent our settled views or findings, but rather highlight initial points that we believe should be considered by the Commission. In the event that the Commission wishes to engage further on any of the above issues, we would be pleased to provide assistance.

Yours sincerely,



MARK THOMAS / ROXANNA VALAYATHUM
MERVYN TABACK INC

Tel: +27 (0) 11 358 7773 / 7719

Email: MT2@tabacks.com / RV@tabacks.com