VODACOM (PTY) LTD'S WRITTEN SUBMISSION ON THE GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION UNDER THE COMPETITION ACT

(NOTICE 86 OF 2015)

1. INTRODUCTION

Vodacom (Pty) Ltd ("Vodacom") welcomes the opportunity to comment on the Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act ("the Guidelines") in response to the notice of invitation for comments published in terms of section 79(1) of the Competition Act no.89 of 1998, ("the Act") in Government Gazette 38448 Notice 86 of 30 January 2015.

Vodacom confirms its willingness to participate in any further consultations which the Competition Commission, ("the Commission") may convene for the purpose of deliberating on the Guidelines.

The structure of Vodacom's submission is as follows:

- General comments on the framework underpinning the Guidelines, and
- Specific comments on the Guidelines.

2. GENERAL COMMENTS

Vodacom applauds the Commission for the publication of the Guidelines as an effort to provide guidance on the Commission's approach to analysing mergers.

Vodacom acknowledges that given South Africa's history, there is good reason for the inclusion of public interest in the Act. However, despite its importance, the inclusion of public interest has stimulated debate and controversy in that it is often divorced from and, at times, directly at odds with the primary objectives of competition law policy.

According to Hantke-Domas (2003) public interest in the legal context has more to do with the realisation of political and moral values and it is this concept of public interest that informs the decision-makers on how to decide disputes where there is a conflict.[1] Public interest is not defined in the Act; however the considerations to which public policy is to be applied are clearly specified. What is lacking is guidance on how these considerations are to be measured; this is left to Competition

[1] M Hantke-Domas 'the Public Interest Theory of Regulation: Non Existence or Misinterpretation?' (2003) 15(2)European Journal of Law and Economics

Authorities[2] to determine on a case by case basis. While this system may have worked well, recent cases show that there are different interpretations of the limits to which public interest can be applied. This has led to the prioritization of specified public interest considerations which ultimately has undermined the primary competitive analysis in mergers, thus harming the broad public interest that competition law policy aims to promote. Vodacom submits that it is crucial, to ensure that there is an appropriate balance between competitive assessment and public interest factors in evaluating mergers.

The mandate of addressing broader public interest objectives resides solely with the government. Although competition law policy can be used as a tool to archive some of these objectives, it cannot be the only tool used to address all public interest objectives of the country. There ought to be clear boundaries of how public policy considerations are applied for purposes of competition law policy; otherwise there is the danger of conflating public interest considerations with public interest objectives best left to the Government to achieve.

Vodacom therefore submits that it is important that the objectives of what competition law policy is expected in relation to public interest considerations to achieve be clearly articulated.

3. SPECIFIC COMMENTS

3.1 GENERAL APPROACH TO ASSESSING PUBLIC INTEREST PROVISIONS

Paragraph 6

- The Commission in general will adopt the following steps when analysing each of the above public interest provisions:
- determine the likely effect on the public interest;
- determine whether the alleged effect on a specific public interest is a result of that merger or is merger specific. In other words, is there a sufficient causal nexus between the merger and the alleged effect;
- determine whether these effects are substantial;

[2] Competition Authorities includes, The Competition Commission, Competition Tribunal and Competition Appeal court

Vodacom proposes the inclusion of principle based definitions for "merger specific" and "substantial", for application throughout the Guidelines. These principles must be applied uniformly in all the areas listed in the Act namely:

a) particular industrial sector or region;
b) employment;
c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
d) the ability of national industries to compete in international markets.

Vodacom recommends that these terms be worded as follows:

"Substantial"

Generally, the Commission will consider as substantia where the:

a) ramifications arising from the merger significantly impacts on the area concerned;
b) merger impedes one or more public policy goals that would have far reaching consequences for the areas listed in the Act, namely:
    - particular industrial sector or region
    - employment;
    - the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
    - the ability of national industries to compete in international markets.
c) impact or effect must be of such magnitude and scale that if unleased, would be irreversible and cannot be undone

"Merger Specific"

When determining whether the alleged effect is merger specific, the Commission will consider whether the alleged effect:

a) is caused by the merger;

b) is the result of the merger or flows from the merger; and

c) exacerbates an existing effect.

Paragraph 6.1.5

Consider possible remedies to address any likely negative effect on the public interest.

The Commission should ensure when considering such remedies that it strikes an appropriate balance between competitive assessment and public interest factors. The remedies must be appropriate, proportional and enforceable. The remedies must protect rights which existed pre-merger and therefore could potentially be affected by the merger going forward and not to create new rights that did not exist pre-merger.

Paragraph 6.6

If the public interest effects are negative, the Commission will proceed to determine whether these are merger specific, substantial and justifiable. Where the public interest effect is neutral, the Commission will consider what the negative and positive effects are and balance these. The Commission will also determine whether these are merger specific and substantial.

The paragraph is not very clear, further clarity needs to be provided as to what constitutes neutral. How would the weighting and impact of positive and negative public interest be done in determining neutrality?

THE EFFECT ON A PARTICULAR INDUSTRIAL SECTOR OR REGION

Paragraph 7.1

In general, when assessing the likely effect of a merger on a particular industrial sector or region, the Commission will consider the specific sub-sector in question and analyse the likely effect of the merger on the relevant value chain in its entirety.

Although Vodacom is cognisant of the fact that the term 'industrial' stems from the Act, it is however, recommended that this term be replaced with a more generic term. These Guidelines address

competition in all sectors within South Africa, using the word industrial seem to exclude other business sectors, i.e. telecoms, IT, etc.

Paragraph 7.3.1.1

In this regard, the Commission may consider the following: a) whether a South African owned firm is being purchased; b) whether the Acquiring Firm's termination of local production would have far reaching consequences for the economy; c) whether the termination of contracts with local suppliers would have a negative effect on the sector, region or the economy, for example, in circumstances where the Target Firm is involved in the distribution or sale of goods; d) whether the merger results in the substitution of locally produced goods with imports; and/or e) whether the merger results in the movement or diversion of local resources to international markets with detrimental consequences for local markets, sectors and regions.

The considerations focus mainly on the negative effects of a merger where a foreign firm acquire a locally owned firm. This paragraph should be revised to also consider the positive effects (e.g. increase local production) of a foreign firm acquiring a local firm and the negative and positive effects of a local firm acquiring another local firm within a sector and/or across sectors within the local market.

As part of the factors listed above, the Commission should include positive effects that a merger can provide in a sector or region, e.g. an increase in employment, the availability of new products and lower prices. This view was supported in Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery where the Competition Tribunal noted that there may be instances where public interest factors may lead to opposing conclusions.

Paragraph 7.3.3.1

When assessing the substantiality of the effect on a particular industrial sector or region, the

Commission will in general consider the following factors:

a) the strategic nature of the product to the sector, or the sector to the economy; for example, the mining sector being pivotal to employment, or the information technology sector being pivotal to business operations.
b) the importance of the product to the affected sector;
c) the extent of the consequences on the sector and related sectors in the entire value chain;
d) the extent of the effect on the broader economy;
e) whether the merger impedes on any public policy goals; and/or
f) the importance of a firm to the region and the benefits that flow from that firm to that region.

7.3.3.1 (a) and (b) The Commission is requested to clarify what the difference is between "the strategic nature of the product to the sector" and "the importance of the product to the affected sector". These considerations seem to have the same meaning.

7.3.3.2 (c) - Considering the impact on the entire value chain would go beyond the scope of what would be required to assess factors impact on the particular industry or region. Vodacom propose excluding this from the considerations.

7.3.3.1 (d) This requirement is very broad and could potentially be problematic. The question arises as to whether the Competition Authorities are the right institutions to balance welfare and broader public interest considerations. Competition Authorities are not elected officials with a mandate from the electorate to decide on broader public policy issues. Vodacom propose excluding this from the considerations.

7.3.3.1 (e) Considering whether a merger impedes on any public policy goal would likely substantially complicate the process and time frames of approving mergers. It is questionable whether it would be practical and possible to consider all or (any) public policy goals as part of merger approval process. Vodacom proposes that this requirement be excluded this from the considerations.

Paragraph 7.3.4.1

The onus will rest on the merging parties to justify any substantial negative or positive effects arising as a result of the merger on an industrial sector or region.

Prior to providing justification on the negative or positive impact of a merger on public interest, there has to be a concern raised by interested third parties warranting a response or justification from the merging parties. This view was supported in Metropolitan Holdings case where the court stated that when a substantial public interest concern has been raised, the merging parties bear the burden of justification. Merging parties should only be required to respond to allegations of negative effects and where applicable, provide mitigating factors that may limit the negative impact when raised by other parties.

Paragraph 7.3.5.2

Possible remedies that may be considered include:

a) investment into the domestic supply chain, which may include but is not limited to, setting up new local production facilities and establishing funds or other initiatives to develop local production in the relevant value chain;
b) maintaining or expanding local production facilities;
c) restricting the diversion of resources to overseas markets;
d) the obligation to continue supply to local producers, and/or
e) the obligation to continue sourcing from local suppliers.

In imposing remedies the Commission is urged to apply remedies that will safeguard conditions that existed pre-merger. The Tribunal in Massmart[3] acknowledged that its duty was to safeguard that which existed pre-merger and therefore could potentially be affected by the merger going forward and that it is not empowered by law to create new rights that did not exist pre-merger.

THE EFFECT ON EMPLOYMENT

Paragraph 8.1

The Commission will follow the general approach in assessing the likely employment effects of a merger on employment. However, in instances where there is a dispute around merger specific job

[3] Walmart Stores Inc. and Massmart Holdings Limited, Case no: 73/LM/Dec10,

losses, this will be evaluated in detail on a case by case basis.

It is not clear why the general approach will not be applied in this instance. Vodacom recommends that the general approach be applied constantly throughout the Guidelines, although there may be justification to extend the enquiry on aspects around disputes covering merger specific job losses.

Paragraph 8.2.1.1

The merging parties must declare all contemplated retrenchments whether these are in their view due to the merger or operational reasons

The Commission should focus on approved retrenchments rather than contemplated retrenchments. This is based on the notion that approved retrenchments would be carried out by the company. Vodacom proposes that the word "contemplated" with be replaced with the word "approved".

Generally at the time of filing, the merging parties are unlikely to have been able to complete detailed analysis of any employment overlap. In complex transaction (especially between competitors) this information can be competitively sensitive and might not be shared in the due diligence process. In addition, when the parties expect long timeframes to obtain regulatory approvals the merging parties may agree not to prepare detailed analyses of employment overlap as the situation can change substantially between date of signature and effective date of the transaction. The Commission should be aware that this information may thus not be available.

Paragraph 8.2.2.3

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.

It is not practical to use the words "initiation of merger discussions". Discussions between parties considering merging can be carried out over a long period without serious intent or formal agreement. It is hard to identify when discussions become serious. Vodacom therefore suggest that wording be changed to include reference to the date of signing a Memorandum of Understanding or from the date a due diligence process commences.

The reference to "a period of one year following the merger proposal" is not practical. The parties will have no indication of when the merger approval might be received and thus can only speculate as to when the one year period might commence and end. Vodacom recommends that the Commission impose an 18 month period from merger filing.

Paragraph 8.2.2.5

> The Commission will determine whether the alleged effect on employment is a result of that merger. In other words, a merger specific effect means "conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller.

The requirement for the nexus association has to be more than just "some nexus associated with the incentives of the new controller." There has to be a direct nexus between the outcome and the incentives of the new controller. Paragraph 6.1.2 provides *"determine whether the alleged effect on a specific public interest is a result of that merger or is merger specific. In other words,* ***is there a sufficient causal nexus between*** *the merger and the alleged effect;* the use of the word sufficient implies that a higher standard has to be met to show that the effect is merger specific. We therefore recommend that the word "some" be replaced with the word "sufficient".

The Commission is advised, with reference to comments on section 6, to adopt a single definition for "merger specific" and apply it consistently and uniformly throughout all the four areas listed in the Act.

Paragraph 8.2.4.2 and 8.2.4.3

> The Commission will consider the following in analysing the submissions:
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> a) whether a rational process has been followed in arriving at the figures proposed for retrenchments and whether there is a rational link between the number of jobs lost and the reasons for the job losses;
> b) whether the job losses are justified by an equally weighty and countervailing public interest argument which is recognized under the Act.
> c) whether the merging parties have provided full and complete information to the

Commission and employees to enable them to consult fully on all issues

The Commission should rather ask for a review of the retrenchment process, if judged to be irrational. Furthermore, the Commission is tasked to do the weighting and assessment of the countervailing public interest effects and not the merging parties. It is not clear what is implied by the requirement "which is recognized under the Act." This should be clarified if used.

Lastly, it is not clear what would be considered as 'full and complete information". It is recommended that this paragraph be revised to state, "full and complete in relation to the merging party's information". The Commission has a duty to also collate its own information from independent or other interested parties in order to be able to reach an objective and fair decision. Merging parties may not have access to relevant or sufficient market information.

Paragraph 8.2.4.5

Where parties make submissions on how they arrived at the proposed figure for retrenchment, this should not be arbitrary, random or a guess estimate. A simple task of comparing the parties list of employees and making assumptions on the likely job losses will not suffice.

The Commission is requested to provide further guidance as to which submissions will it deem sufficient to discharge this onus.

Paragraph 8.2.4.7

Where the merging parties have not disclosed all information relating to retrenchments and where parties claim that an analysis on the effect on employment was not completed, the Commission will consider this to not meet the justification criteria.

The Commission should once more set out in detail the information it requires to ensure that the merging parties submit complete information.

Paragraph 8.2.5.2

To address the likely employment concerns relating to a proposed merger, the Commission may consider the following remedies:

a) restricting or capping the number of job losses;
b) staggering the number of job losses over a period of time;
c) placing a moratorium on job losses for a period of time;
d) provide funding to reskill affected employees in order to improve their chances of obtaining alternative employment within a short period of time;
e) provide counselling and guidance on applying for alternative employment;
f) obliging the parties to re-employ or give preference to affected employees;
g) introducing shift rotations or reducing the number of hours employees work; and
h) introducing a training layoff scheme.

The Commission must ensure that the remedies proposed are "appropriate, proportional and enforceable." These remedies must be weighed against the net competitive effects of the merger. The Commission should consider that some of the remedies mentioned may have cost implications which might be passed on to consumers and are likely to decrease efficiencies that would have followed the merger.

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

Paragraph 9.2.1.1

In analysing this provision, the Commission will determine whether any of the following effects arise on SMEs and HDis, among others:

a) raises existing barriers to entry or creates barriers to entry;
b) prevents access to key inputs;
c) unfair pricing and supply conditions with respect to volume, discounts, quality, and services;
d) denies access to suppliers;
e) prevents training, skills upliftment and development in the industry; and denies access to funding for business development and growth.

The Commission is advised to acknowledge that in certain instances a merger may have positive effects on small businesses or firms controlled by or owned by historically disadvantaged persons. For each of the factors mentioned above there is a positive story to tell depending on that specific transaction. The Commissioned should also include in these Guidelines an analysis of positive effects in order for it to be fair and objective in analysing mergers.

Paragraph 10

The ability of national industries to compete in international markets

Whilst general and more detailed guidelines are provided in paragraphs 7, 8 and 9 on the approach that will be followed by the Commission in analysing mergers, Paragraph 10 does not follow the same format. It does not stipulate if general approach, as detailed in paragraph 6 would be applied. It is not clear how 'merger specific' or 'substantial' effects will be determined. Vodacom propose the Commission redraft this section taking into account comments made on the previous paragraphs.