INVITATION FOR PUBLIC COMMENT ON THE DRAFT AMENDED PUBLIC INTEREST GUIDELINES RELATING TO MERGER CONTROL

1. The Competition Commission of South Africa has amended its Public Interest Guidelines relating to merger control.

2. Stakeholders and interested parties are invited to submit comments on the revised draft public interest guidelines within a period of 30 business days from the publication of this notice in the Government Gazette. Comments should be submitted to the Mergers & Acquisitions Division of the Competition Commission of South Africa for the attention of Ms. Phillipine Mpane, email: phillipinem@compcom.co.za.

Brief background note

In February 2019, the Competition Act No. 89 of 1998 (as amended) ("the Act") was amended by the Competition Amendment Act, No. 18 of 2018 ("the Amendment Act"). The main objectives of the Amendment Act were to deal with the structural challenges of high levels of concentration and the racially skewed spread of ownership of firms in the South African economy. In this regard, the public interest provisions in merger control were amended to explicitly create public interest grounds to address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.[1]

The Competition Commission's ("Commission") likely approach to the amendments to section 12A of the Act are set out in the draft revised public interest guidelines attached hereto (the "Draft Guidelines"). Paragraphs 4, 5 and 6 of the Draft Guidelines set out the Commission's approach to the public interest assessment contemplated in section 12A of the Act. The Amendments to section 12A now make it explicit that -

1. the competition and the public interest assessments are equal in status;

2. notwithstanding the outcome of the competition assessment, a determination must be made as to whether the merger is justifiable on substantial public interest grounds, and

3. a merger's effect on each individual public interest factor must be assessed to reach an overall determination on the merger's justifiability or otherwise, on substantial public interest grounds.

The Commission's approach to section 12A of the Act is informed by the imperative of transformation enshrined in the Act. In this regard, the Commission notes that the Preamble to the Act provides:

> "*That apartheid and other discriminatory laws and practices of the past resulted in…unjust restrictions on full and free participation in the economy by all South Africans*;
>
> *That the economy must be open to greater ownership by a greater number of South Africans;*
>
> *In order to-*
>
> *provide all South Africans equal opportunity to participate fairly in the national economy…"*

That aspirational transformative intent is endorsed by the Constitutional Court in *Mediclinic*:[2]

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[1] Background note on Competition Amendment Bill, 2017. Published in Government Gazette No. 41294, pages 5 – 71. The Bill resulted in the adoption of the Competition Amendment Act 18 of 2018.

[2] Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another 2022 (4) SA 323 (CC) at paragraph 4.

> *"Colonialism, neo-colonialism and apartheid orchestrated an institutionalised concentration of ownership and control of all things of consequence in our national economy along racial lines. Unsurprisingly, the commanding heights of the corporate sector are seemingly the exclusive terrain of our white compatriots. It is this indisputable reality and our shared commitment to ensuring that South Africa really does get to belong to all who live in it, that the constitutional imperatives, laid out in the Preamble, to improve the quality of life of all citizens and free the potential of each are realised, that the likes of the Competition Act had to and got to see the light of day."*

The Draft Revised Public Interest Guidelines take guidance from these principles.

DRAFT REVISED PUBLIC INTEREST GUIDELINES

1. PREFACE

1.1. These guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) ("the Act") which allows the Competition Commission ("Commission") to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act.

1.2. In February 2019, the Act was amended by the Competition Amendment Act, 18 of 2018 to deal more deliberately with the structural challenges of concentration and the racially skewed spread of ownership of firms in the South African economy. In this regard, the public interest provisions have been amended to explicitly create public interest factors that address ownership, control and support to small businesses and firms owned or controlled by historically disadvantaged persons.

1.3. These guidelines are intended to indicate the approach that the Commission may adopt and the type of information the Commission may require when evaluating the public interest factors in section 12A(3) of the Act.

1.4. However, merger analysis is inherently dependent on the facts of a specific case and these guidelines do not prevent the Commission from exercising its discretion to request information or assess factors not indicated in these guidelines, on a case-by-case basis. Further, the guidelines are subject to change based on the experience of the Commission in assessing mergers, as well as the jurisprudence emanating from the decisions of the Competition Tribunal, Competition Appeal Court and Constitutional Court.

1.5. These guidelines are not binding on the Commission, the Tribunal or the Courts but any person interpreting or applying section 12A(3) of the Act must take the guidelines into account.[3]

2. DEFINITIONS

The following terms are applicable to these guidelines –

2.1 **"Acquiring Firm"** means an acquiring firm as defined in section 1(1)(i) of the Act;

2.2 **"Act"** means the Competition Act No. 89 of 1998, as amended;

2.3 **"Commission"** means the Competition Commission;

2.4 **"CAC"** means Competition Appeal Court;

[3] Section 79(4) of the Act.

2.5 **"ESOP"** means an Employee Share Ownership Plan;

2.6 **"HDPs"** means historically disadvantaged persons as contemplated in section 3(2) of the Act;

2.7 **"Medium-sized business"** means a medium-sized firm as determined by the Minister by notice in the Gazette;

2.8 **"Public Interest"** means the Public Interest factors articulated in section 12A(3) of the Act;

2.9 **"SMEs"** means small and medium-sized businesses as defined in section 1(1)(xxxix) of the Act;

2.10 **"SPLC"** means substantial prevention or lessening of competition, as contemplated by the Act;

2.11 **"Target Firm"** means a target firm as defined in section 1(1)(xxxxi) of the Act;

2.12 **"Transferred Firm"** means a transferred firm as defined in the Determination of Merger Thresholds and Method of Calculation Schedule to the Act dated 1 April 2009;

2.13 **"Tribunal"** means the Competition Tribunal; and

2.14 **"Workers"** means workers as defined in section 1(1)(xxxxiv) of the Act.

3. LEGISLATIVE FRAMEWORK

3.1 Section 12A of the Act sets out how the Commission is required to consider a proposed merger. It reads as follows:

"(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and if it appears that the merger is likely to substantially prevent or lessen competition, then determine –

(a) whether or not the merger is likely to result in any technological, efficiency or other procompetitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(b) whether the merger can or cannot be justified on substantial public interest factors by assessing the factors set out in subsection (3).

(1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest factors by assessing the factors set out in subsection (3)."

3.2 In relation to the assessment of public interest considerations in a merger, section 12A(3) of the Act provides as follows:

"When determining whether a merger can or cannot be justified on public interest factors, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;

(d) the ability of national industries to compete in international markets; and

(e) *the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and Workers in firms in the market."*

4. THE COMMISSION'S APPROACH TO THE LEGISLATIVE FRAMEWORK

4.1 Section 12A of the Act makes it explicit that the competition assessment and the Public Interest assessment are equal in status and that the Commission must assess the effects of all mergers on both competition and Public Interest grounds.[4]

4.2 If the Commission finds that a merger is likely to result in a SPLC, the Commission will, in terms of section 12A(1)(a), establish whether the merger will result in any technological, efficiency or other procompetitive gain which will be greater than, and offset, the effects of the merger on competition. A determination must then be made in terms of section 12A(1)(b) of the Act regarding whether the merger can nonetheless be justified on substantial Public Interest grounds.

4.3 If the Commission finds that it is unlikely that a merger will result in a SPLC, the Commission must still determine whether the merger is justifiable on Public Interest grounds. In this regard, the Commission will determine the effect of the merger on each

[4] This is particularly clear from the amendment to section 12A(1A) of the Act.

public interest element arising from the merger. Thereafter, the Commission will determine the merger's net effect on the Public Interest.

4.4 The determination above will be conducted by the Commission on a case-by-case basis and on a balance of probabilities.

5. GENERAL APPROACH TO ASSESSING PUBLIC INTEREST PROVISIONS

5.1 As a point of departure, the Commission considers that the framework for merger assessment contemplated under the Act requires a determination into the merger's *likely* effect (i.e., positive or negative) on each Public Interest factor set out in section 12A(3). In this regard, the outcome of the assessment must be more probable than not, and the parties will be required to provide qualitative and quantitative evidence for any claims regarding the effect of a merger on Public Interest.

5.2 The Commission's assessment will focus on those Public Interest factors that are merger specific and raise substantial positive or negative effects.[5] Guidance on the Commission's approach to the assessment of each Public Interest factor is set out in section 6 below.

5.3 Where the Commission concludes that a particular Public Interest factor is substantially positively affected by the merger, no further assessment into that factor will be required.

5.4 Where the Commission concludes that a particular Public Interest factor is substantially negatively impacted by a merger, the Commission will consider remedies that address the negative impact on that particular Public Interest factor.

5.5 If a merger results in a negative effect on a particular Public Interest factor, the Commission will require remedies that specifically address the negative effect identified (e.g., a negative effect on employment should be addressed by a remedy that addresses the employment harm and not, for instance, by a remedy positively advancing another Public Interest factor). However, if the negative effect on the Public Interest factor cannot be remedied, the Commission may, on a case-by-case basis, consider equally weighty countervailing Public Interest factors that outweigh the negative impact identified.

5.6 The Public Interest assessment will follow the general approach set out below:

5.6.1 determine the likely effect of the merger on each Public Interest factor;

5.6.2 determine whether such effect, if any, is merger specific;

[5] A merger specific Public Interest effect is an effect that is causally related to, or results from, the merger. See Walmart Stores Inc./Massmart Holdings Ltd, 73/LM/Dec10.

5.6.3 determine whether such effect, if any, is substantial;[6]

5.6.4 where the effect on a Public Interest factor is negative, merger specific and substantial, consider possible remedies to remedy that effect; and

5.6.5 where the negative effect contemplated in paragraph 5.6.4 cannot be remedied, the Commission may, on a case-by-case basis, consider other equally weighty countervailing Public Interest factors, whose effect outweighs the negative impact identified.

5.7 The steps in paragraphs 5.6.1 to 5.6.5 above are cumulative. In other words, where an effect is not merger specific, the enquiry into that effect will stop at that stage. Likewise, where an effect is found to be merger specific but not substantial, the enquiry into that effect will stop at that stage.

5.8 Where the Commission finds that a merger has a net positive effect on the Public Interest, the Commission will likely conclude that the merger is justifiable on substantial Public Interest grounds.

5.9 Where the Commission finds that a merger has a net negative effect on the Public Interest, the Commission will likely conclude that the merger is not justifiable on substantial Public Interest grounds. This may result in remedies being imposed to address the specific Public Interest factors that are substantially negatively impacted by the merger. Where the Commission finds that any substantial negative Public Interest effects arising from the merger countervail any substantial positive Public Interest effects, the Commission will likely consider that the merger is not justifiable on substantial public interest grounds.

5.10 It bears mention that the determination into a merger's net effect on the Public Interest includes consideration of both the quantitative and qualitative effects of the merger on each Public Interest factor, and cumulatively, on the Public Interest factors as a whole. Thus, by way of example, despite finding that most of the Public Interest factors applicable to a merger are substantially positively affected by a merger, those effects may be countervailed by substantial negative effects arising from a single Public Interest factor.

5.11 The likely approach to each Public Interest factor as well as the information that the Commission is likely to require relating to each Public Interest factor is discussed below.

6. APPROACH TO EACH PUBLIC INTEREST FACTOR

[6] Section 12A 1(b) of the Act.

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

6.1.1 When assessing the likely effect of a merger on a particular industrial sector or region, the Commission will consider the effect of the merger on development, environmental sustainability and employment in a particular industrial sector or region of South Africa, amongst others.

6.1.2 In determining the likely effect, the Commission will consider, amongst others, the following:

6.1.2.1 the applicable industrial and environmental policy objectives or best practices;

6.1.2.2 local economic conditions;

6.1.2.3 impact on local production, manufacturing or deindustrialisation, for example closure or relocation of existing local production facilities or opening of new production facilities and/or substitution of locally produced goods or services with imports;

6.1.2.4 the effect of the merger on the environment (e.g., pollution, increased carbon emissions, etc.);

6.1.2.5 impact on social projects and upliftment programs that contribute to upliftment of the region or sector;

6.1.2.6 impact on local resources or inputs, for example, whether the merger results in the movement or diversion of local resources to other (e.g., international) markets or the creation of opportunities to beneficiate local resources;

6.1.2.7 contribution of either or both the merger parties to the revenue of local municipality/government, for example through levies, rates and taxes, and the effect of the merger on this contribution; and

6.1.2.8 commitments made in terms of sector or industry specific legislation or license conditions.

6.1.3 In determining whether the likely effect on the industrial sector or region is substantial the Commission will, in general, consider the following factors:

6.1.3.1 the importance and strategic nature of the relevant products to the sector or region, and of the sector or region to the broader economy;

6.1.3.2 the importance to a sector, region or community within a region of the identified social projects and upliftment programs undertaken by the firms;

6.1.3.3 the general socio-economic circumstances of the inhabitants of the region;

6.1.3.4 whether the sector in question involves or influences any constitutionally entrenched rights;

6.1.3.5 whether the merger impedes or contributes towards any public policy goals or economic development plans that are relevant to that sector or region; and/or

6.1.3.6 the importance of a firm to the sector or region and the benefits that flow from that firm to that sector or region.

6.1.4 Generally, the Commission may consider the effect on a particular industrial sector or region to be substantial:

6.1.4.1 where the effects arising from the merger's impact upon the primary market under consideration are far-reaching and flow beyond that market and sector;

6.1.4.2 the merger impedes public and/or industrial policy goals that would have far-reaching consequences for the sector as a whole;

6.1.4.3 the sector has extensive forward and backward linkages;

6.1.4.4 the sector employs a large number of low-skilled or semi-skilled Workers;

6.1.4.5 the effect of the merger on the region would threaten that region's livelihood and sustainability or would support its continued livelihood and sustainability;

6.1.4.6 where the sector under consideration is one where the goods or services traded involve or influence constitutionally entrenched rights;

6.1.4.7 the effect is of such magnitude and scale that if allowed, would be irreversible and cannot be undone; and

6.1.4.8 expansion of productive capacity and increased capital expenditure over a period of time will likely be considered substantial as opposed to short term or consumption expenditure on non-core goods and services.

6.1.5 The Commission will consider remedies on a case-by-case basis. Appropriate remedies to address any likely negative effect on the industrial sector region may include:

6.1.5.1 capital expenditure in the operations of the firm in the affected sector or region or within the affected value chain. This capital expenditure must be incremental to pe-merger capital expenditure plans;

6.1.5.2 increased localisation;

6.1.5.3 the establishment of a fund or other initiatives to develop local production in the relevant value chain. These funds and/or initiatives must be incremental to any previously planned/committed funds;

6.1.5.4 the obligation to continue to supply to local producers; and/or

6.1.5.5 the obligation to continue sourcing from local suppliers.

6.2 **THE EFFECT ON EMPLOYMENT**

6.2.1 The merger parties must declare all (i) potential retrenchments that are being considered at the time of the merger and/or (ii) retrenchments that have been considered and/or (iii) retrenchments that have been implemented from the time of the initiation of merger discussions to the date of filing, irrespective of whether they contend that these are due to the merger or due solely to operational reasons.[7]

6.2.2 In determining the effect of a merger on employment, the Commission's primary consideration will be the direct effect on employment within the merger parties. In assessing this, the Commission will consider, inter alia, the overall nature of the transaction, including the extent of overlap and duplication in the merger parties' activities, the rationale for the transaction, and the intention of the merger parties relating to employment and the target business as well as any plans to create further employment opportunities within the merged entity.

6.2.3 As a secondary consideration, the Commission will also consider the likely indirect effect of the merger on the general level of employment in a particular sector or region. In assessing this effect, the Commission will consider whether the merger impacts on the level of employment post-merger due to, inter alia, job creation or loss of job opportunities, duplications, cost-cutting measures, cancellation of supply/distribution arrangements, and/or relocation of offices, factories, and facilities.

6.2.4 In determining whether any identified effect on employment is merger-specific the Commission will:

[7] BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd (case:18713) paragraphs 109 - 110.

6.2.4.1 consider whether the proposed employment effects are in any way linked to the intentions, incentives, policies, rationale and decisions of the acquiring group and the incentives of the target group to be attractive to potential purchasers or prepare itself for a potential merger;

6.2.4.2 accept retrenchments or new jobs declared by the merger parties to arise from the merger, as being merger-specific; and

6.2.4.3 assess the merger specificity of retrenchments when merger parties claim that retrenchments are not merger related and when merger parties are relying on this argument to approve a merger that is likely to result in an SPLC.

6.2.5 Where retrenchment proceedings by the Target Firm or Transferred Firm or the Acquiring Firms are proposed or initiated in terms of the Labour Relations Act 66 of 1995 (i) shortly before the proposed merger is notified, (ii) during the merger notification process or (iii) are anticipated, proposed or initiated shortly after the merger approval date, the merger parties should inform the Commission of such retrenchments.[8]

6.2.6 For purposes of paragraph 6.2.5, the Commission will generally consider an appropriate pre-merger period to be the time from the initiation of merger discussions to the date of filing, and an appropriate post-merger period to be one year following the date on which the merger is implemented.

6.2.7 Without derogating from paragraph 6.2.4 and for the avoidance of doubt, the Commission is likely to conclude that any retrenchments implemented or contemplated by either merger party, within the time periods contemplated in paragraph 6.2.6, are merger specific. Therefore, the merging parties will bear the onus to prove (on a balance of probabilities) that any such retrenchments, are not merger specific.

6.2.8 In determining whether the likely effect on employment is substantial, the Commission will consider:

6.2.8.1 the counterfactual to the merger and whether the retrenchments or employment creation would, in any event, have occurred absent the merger or were unavoidable. Where the Commission finds that the counterfactual is likely to be the acquisition of a target / transferred firm by another purchaser who is likely to retain all or some of the Workers, the merger parties may not be able to claim all employment creation or job retention as merger-specific;

[8] Walmart Stores Inc. and Massmart Holdings Limited 110/CAC/Jul11 and 111/CAC/Jul11.

6.2.8.2 the number of Workers who are likely to be affected relative to the affected workforce;

6.2.8.3 the affected Workers' skill levels. The Commission will consider information on the affected Workers' qualification, experience, job grade, job description and position within the organization in determining the skill level;

6.2.8.4 the likelihood of the Workers being able to obtain alternative employment in the short-term considering various factors. In this regard, the Commission may assess the possibilities for redeployment within the merged entity, the natural attrition rate within the merger parties, the type of skills and their transferability to other industries and businesses, the economics of the region, opportunities for re-employment in the region and the overall unemployment rate in the country;

6.2.8.5 the nature of the sector relevant to the employment effect, including whether the sector employs largely unskilled Workers, the unemployment rate in the sector, whether the sector is experiencing a trend of retrenchments, whether the sector is a mature or declining sector, and whether the sector is an emerging sector which would suggest future employment opportunities; and

6.2.8.6 the predominant nature of employment by the acquiring firm for example, whether the parties employ seasonal or permanent Workers, and/or are engaged in a business that involves bidding or contracting.

6.2.9 The Commission will consider substantiality on a case-by-case basis and may exclude management Workers from the affected number of Workers should it view these Workers as having alternative employment prospects in the short term.

6.2.10 The Commission will provide an opportunity to the merger parties to substantiate any positive effects or to submit arguments to justify any substantial negative effects arising from the merger on employment.

6.2.11 The Commission will consider the following in analysing such representations made in respect of a negative effect on employment:

6.2.11.1 whether a rational process has been followed to arrive at the determination of the number of jobs to be lost; that is, whether there is a

rational link between the number of jobs proposed to be shed and the reasons for the job losses/reduction;[9]

6.2.11.2 whether the merger-specific substantial job losses are justified by an equally weighty and countervailing effect on another Public Interest factor;[10]

6.2.11.3 whether the merger parties have provided full and complete information to the Commission and sufficient information to the Workers to enable them to consult fully on all issues.[11]

6.2.12 The parties will need to meet all three requirements in paragraphs 6.2.11.1 to 6.2.11.3 above for the Commission to accept their submissions as justifying the negative effect arising from the merger.

6.2.13 Where the merger parties submit a Public Interest justification for the job losses, the Commission may accept the following as countervailing Public Interest arguments:[12]

6.2.13.1 the merger is required to save a failing firm. Such information should be submitted as part of the competition assessment in terms of Form CC4(2);

6.2.13.2 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 this can only be achieved by employment reduction through the merger; or

6.2.13.3 where the merging parties provide substantive evidence that the merger will lead to lower prices for consumers because of the merged entity's lower cost base and this lower cost base can only come about or is materially dependent upon the proposed employment reduction.[13]

6.2.14 Where parties make submissions on how they arrived at the proposed figure for retrenchments, this should not be arbitrary, random or a "guess estimate".[14] A simple task of comparing the merger parties' list of Workers or making assumptions on the likely job losses is unlikely to suffice.

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[9] Metropolitan Holdings and Momentum Group Limited (41/LM/Jul 10), paragraph 69.
[10] Metropolitan Holdings and Momentum Group Limited (41/LM/Jul 10), paragraph 69 -72.
[11] BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd (Case: 18713), paragraphs 107-110.
[12] Metropolitan Holdings and Momentum Group Limited (41/LM/Jul 10), paragraph 77.
[13] Metropolitan Holdings Limited and Momentum Group Limited (41/LM/Jul10).
[14] Metropolitan Holdings Limited and Momentum Group Limited (41/LM/Jul10).

6.2.15 Failure to show that a rational process has been followed in determining the likely effect on employment will generally result in the Commission making an adverse finding.

6.2.16 The Commission will consider the appropriate remedy on a case-by-case basis. The following remedies may be considered to remedy a negative effect on employment:

6.2.16.1 requiring that merger parties commit to a minimum headcount employment number for up to 5 years post-merger,

6.2.16.2 placing a moratorium on job losses for a period of time not less than 3 years post implementation (including the date between merger approval and implementation);

6.2.16.3 placing a cap on the number of job losses;

6.2.16.4 staggering the number of job losses over a period of time;

6.2.16.5 providing funding to reskill affected Workers in order to improve their prospects of obtaining alternative employment within a short period of time;

6.2.16.6 obliging the parties to re-employ or give preference to affected Workers should positions become available; and

6.2.16.7 creating jobs and preferential re-employment for previously retrenched Workers.

6.3 THE ABILITY OF SMALL AND MEDIUM BUSINESSES, OR FIRMS CONTROLLED OR OWNED BY HISTORICALLY DISADVANTAGED PERSONS, TO EFFECTIVELY ENTER INTO, PARTICIPATE IN OR EXPAND WITHIN THE MARKET

6.3.1 In determining the likely effect of the merger on the ability of SMEs and firms owned/controlled by HDPs to effectively enter into, participate in or expand within the market, the Commission will determine whether the merger has an effect on any of the following factors:

6.3.1.1 entry conditions or expansion opportunities within a market including raising or lowering barriers to entry or expansion;

6.3.1.2 preventing or granting access to key inputs, services, pricing and supply conditions with respect to volume discounts, quality, and the imposition/application of private standards, having regard to prevailing market circumstances;

6.3.1.3 whether the merger parties will continue purchasing from/supplying to SMEs or firms owned/controlled by HDPs for a reasonable period post-merger;

6.3.1.4 preventing or allowing training, skills upliftment, and development in the industry; and

6.3.1.5 denying or granting access to funding for business development and growth.

6.3.2 In analysing this provision, the Commission will, amongst other factors, consider:

6.3.2.1 whether any impediment arising from the merger limits the entry, growth, and expansion of SMEs and firms owned/controlled by HDPs and their participation in the relevant market or adjacent markets;

6.3.2.2 whether SMEs or firms owned/controlled by HDPs rely on the target firm for supply of inputs to a significant extent;

6.3.2.3 whether the target firm is a significant customer of SMEs or firms owned/controlled by HDPs;

6.3.2.4 whether the merger will result in a notable adverse change in terms and conditions of trade or supply between the target firm and SMEs or firms owned/controlled by HDPs; and

6.3.2.5 whether any effect on SMEs or firms owned/controlled by HDPs has a secondary effect on other Public Interest factors such as employment and the industrial/sector or region.

6.3.3 In determining the appropriate remedy to address the identified negative effect on the ability of SMEs and HDPs to become competitive the Commission will consider the following:

6.3.3.1 The establishment of a supplier development fund for technical, financial or other assistance to SMEs and firms owned/controlled by HDPs.

6.3.3.2 The following principles will be considered in designing an acceptable supplier development fund:

6.3.3.2.1 funds committed to the supplier development fund must be incremental to any pre-merger fund/support for smaller firms or suppliers;

6.3.3.2.2 funds may be disbursed by way of grants, preferential or low interest loans, or equity;

6.3.3.2.3 monitoring and reporting obligations must align with the life of the fund;

6.3.3.2.4 if funds are disbursed as loans, the repayment of loans will extend the life of the fund and monitoring and reporting obligations will similarly be extended until all repaid loans are also fully disbursed; and

6.3.3.2.5 no administrative, operational or other transaction fees can be subtracted from the fund value.

6.3.3.3 support for the sustainable integration of SMEs and firms owned/controlled by HDPs into the value chain of the merger parties for a reasonable period;

6.3.3.4 continued support or procurement of services or products from SMEs and firms owned/controlled by HDP suppliers;

6.3.3.5 establishing skills development and training programs and transferring of technology; and/or

6.3.3.6 obliging parties to continue access and supply on reasonable and non-discriminatory terms and conditions.

6.4 THE ABILITY OF NATIONAL INDUSTRIES TO COMPETE IN INTERNATIONAL MARKETS

6.4.1 When assessing the impact of the merger on the ability of national industries to compete in international markets, the Commission will consider the following factors, amongst others

6.4.1.1 the nature/structure of the industry and the market dynamics within the industry, including at a global level;

6.4.1.2 the nature of competition and the market position of the firm in the domestic economy;

6.4.1.3 whether a change in productive capacity is required in order for the merged firm to compete globally against other firms;

6.4.1.4 the policy considerations that are relevant to the sector;

6.4.1.5 the strategy of the merger parties in relation to international competition; and

6.4.1.6 the impact on local consumers for both intermediate and final products.

6.4.2 When analysing whether the effect on the ability of national industries to compete in international markets is merger-specific, the Commission will consider whether economies of scale or increased production could have been attained without the merger.

6.4.3 When assessing the substantiality of any effect of a merger on a national industry's ability to compete in international markets, the Commission will consider, amongst other factors*:*

6.4.3.1 the role and importance of the national industry in the South African market;

6.4.3.2 the role and importance of the national industry or sector in the international market/s;

6.4.3.3 the relative structure and size of the national industry or sector by international standards;

6.4.3.4 the extent of the effect on the sector should the national industry's ability to compete in international market/s be hindered; and

6.4.3.5 whether the merger impedes the realisation of any related public policy goals and relevant industrial policies in relation to the national industry in question.

6.4.4 The Commission may consider the following remedies, amongst others:

6.4.4.1 obliging the merger parties to invest within their operations a specified time period;

6.4.4.2 obligation to create jobs;

6.4.4.3 obligation to introduce new products and technology;

6.4.4.4 commitment to entering export markets or increasing exports; and

6.4.4.5 training, re-skilling or skills upliftment programs.

6.5 THE PROMOTION OF A GREATER SPREAD OF OWNERSHIP, IN PARTICULAR TO INCREASE THE LEVELS OF OWNERSHIP BY HISTORICALLY DISADVANTAGED PERSONS AND WORKERS IN FIRMS IN THE MARKET

6.5.1 The Amendments to the Act intend to advance the economic transformation agenda envisaged in the Preamble to the Act. It bears mention that the Amendments envisage that merging parties "…*proactively address concentration and ownership representativity concerns arising in markets in which they are active*."[15]

6.5.2 Given the foregoing, the Commission considers that unlike the other Public Interest factors, section 12A(3)(e) confers a *positive obligation* on merging parties to promote or increase a greater spread of ownership, in particular by HDPs and/or Workers in the economy.

6.5.3 Considering this, the Commission's point of departure will be that all mergers are required to promote a greater spread of ownership.

6.5.4 A finding that a merger does not promote a greater spread of ownership as contemplated by this Public Interest factor will inform the Commission's determination of whether the merger can or cannot be justified on substantial public interest factors.

6.5.5 As indicated above, the Commission will determine the substantiality of a merger's effect on each Public Interest factor on a case-by-case basis and on a balance of probabilities. However, given that section 12A(3)(e) is a feature of every merger assessment, it is likely to have a significant impact on the overall Public Interest assessment conducted by the Commission. Therefore, it is possible that a merger that does not promote a greater spread of ownership in terms of section 12A(3)(e) of the Act is substantial enough to render a merger unjustifiable on Public Interest grounds.

6.5.6 The Commission further considers that the obligation to promote or increase a greater spread of ownership as contemplated in this Public Interest factor, pertains to all mergers that have an effect in South Africa.

6.5.7 The Commission's point of departure in establishing the effect of a merger on this Public Interest factor will be to ascertain the extent of ownership by, amongst others, HDPs and / or Workers at each of the acquiring group and the target firm/s. This assessment will include a review of, amongst others, the following documents:

6.5.7.1 independently verified, valid B-BBEE certificates;

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[15] See the Explanatory Note to the Amendments which explains that same are "…*aimed at addressing two key structural challenges in the South African economy: concentration and the racially-skewed spread of ownership of firms in the economy*."

6.5.7.2 incorporation documents; and

6.5.7.3 identity documents of shareholders.

6.5.8 The Commission will consider both the direct and indirect levels of ownership by amongst others, HDPs and/or Workers in each of the merger parties. In this regard, the merger parties must provide the HDP and/or Worker ownership levels by all firms controlling the Acquiring Firm and all firms controlling the Target Firm. The Commission will consider the pre-merger level of HDPs' and/or Worker ownership of a selling firm to be attributable to a target firm where that target firm does not have its own HDP and/or Worker ownership credentials.

6.5.9 For the avoidance of doubt, even if a merger promotes ownership by HDPs, this does not preclude the obligation to consider increased ownership by Workers, and vice versa.

6.5.10 The Commission will regard ownership to include ownership of voting shares or an interest in either a business or part of a business, including tangible assets (such as property, equipment and land) and intangible assets (such as intellectual property).

6.5.11 The Commission will determine a merger's impact on HDP and/or Worker ownership levels by considering any relevant quantitative and qualitative factors. These factors include the number shares or interests held; the value of such shares or interests; whether the shares or interests owned confer additional rights such as board representation; whether the shares / interests held pertain to productive or passive assets; and whether any increase in shares /interests held confers control for the purposes of section 12 of the Act.

6.5.12 To establish the effect of a merger on this Public Interest factor, the Commission will consider the following factors, amongst others:

6.5.12.1 the extent of the dilution and/or increase of the HDP/Worker shareholding within the target firm post-merger, noting that a lack of promotion of ownership levels will not be considered to be responsive to this provision

6.5.12.2 whether the merger promotes participation through, inter alia, board representation, shareholding and participation in decision-making within the merged entity;

6.5.12.3 the breadth of representation of the shareholding i.e., a large number of HDPs and/or a broad base of Workers;

6.5.12.4 the level of transformation in the relevant sector/s

6.5.12.5 sector transformation targets and the HDP/Worker ownership levels of the acquirer relative to these targets;

6.5.12.6 the number of Workers employed by the merger parties in South Africa;

6.5.12.7 the size of the merger parties' operations in South Africa. In this regard, the Commission will consider the revenue and asset value of the firms' South African operations;

6.5.12.8 shareholding that ensures that Workers/HDPs participate in the productive activities / operations of the merged entity are more likely to be considered substantial than a purely economic/financial interest;

6.5.12.9 To establish the extent of harm to this Public Interest factor (and hence the extent of remedial action), the Commission will consider:

6.5.12.9.1 the size of the merger parties' respective operations in South Africa;

6.5.12.9.2 whether the target is empowered and there is a dilution in shareholding by HDPs/Workers;

6.5.12.9.3 whether the acquiring firm is transformed;

6.5.12.9.4 the relevant sector/s have a low level of transformation; and

6.5.12.9.5 the size of the target and acquiring firms in the market.

6.5.12.10 The Commission will provide an opportunity to the merger parties to substantiate any positive effects or to submit arguments to justify any failure to promote a greater spread of ownership, particularly by HDPs and/or Workers.

6.5.12.11 The Commission will consider the following in analysing representations made in respect of a failure to promote a greater spread of ownership:

6.5.12.11.1 whether the target firm is in business rescue;

6.5.12.11.2 whether the transaction reduces debt of HDP/Workers arising from previous empowerment transactions;

6.5.12.11.3 the merger parties' rationale for not promoting HDP and/or Worker ownership or participation within the merged entity, noting that a historical preference or policy not to allow additional third-party shareholding is unlikely to be considered an acceptable reason for failing to remedy this public interest factor;

6.5.12.11.4 whether the merger parties have offered an alternative form of ownership and participation of Workers and/or HDPs elsewhere within the acquiring group or merged entity to mitigate the dilution occasioned by the merger;

6.5.12.11.5 whether the merger results in a change in the quality of shareholding by HDPs and/or Workers, such as whether the shareholding becomes unencumbered or confers voting rights or board representation; and

6.5.12.11.6 whether the acquiring firm has more than 50% shareholding by HDPs.

6.5.12.12 In considering possible remedies to address any substantial effect on the promotion of a greater spread of ownership by historically disadvantaged persons and/or workers in firms in the market, the Commission may consider the following remedies, amongst others:

6.5.12.12.1 commitments to concluding alternative ownership agreements with HDPs/Workers in the acquiring firm, the target firm or the merged entity within a reasonable period post-merger; and

6.5.12.12.2 divestitures to HDP shareholders which would create a greater spread of ownership in another part of the business, noting that the following factors will be considered in assessing the suitability of a divestiture:

6.5.12.12.2.1 the historical and projected future performance of the divestiture business;

6.5.12.12.2.2 whether the divestiture business can either be a sustainable standalone entity or can otherwise

operate as a viable business in its own right; and

6.5.12.12.2.3 whether the divestiture business requires initial support from the merged entity and whether such support can be provided without raising competition concerns.

6.5.12.12.3 The Commission will generally require that divestitures be done in such a way that HDPs and/or Workers are involved in the operations of the divestiture business and are not primarily (or solely) involved as financial or passive investors in the divestiture business.

6.5.13 Where an ESOP is proposed as a remedy in terms of section 12A(3)(e) of the Act, the following principles will apply, amongst others:

6.5.13.1 If the merger results in a dilution in the level of ownership by (amongst others) HDPs and/or Workers, the ESOP should remedy the full extent of the dilution. For example, if a merger results in a dilution of shareholding by HDPs or Workers of 10 percentage points, an ESOP of 10% will be required.

6.5.13.2 If the merger does not dilute ownership, but does not promote ownership by amongst others, HDPs or Workers, the ESOP proposed should hold no less than 5% of the value/shares of the merged entity but may be required to hold a higher shareholding based on the facts of the case.

6.5.13.3 Structure of the ESOP:

6.5.13.3.1 a unitised employee share ownership trust can be established for allocated shares; and

6.5.13.3.2 the merged entity can also consider apportioning a portion of profit after tax for purchase of shares at market value and for these to be maintained in share registry by the company secretary.

6.5.13.4 Cost to Workers to participate in the ESOP:

6.5.13.4.1 Workers must not be required to pay to participate in the ESOP, unless otherwise elected by the relevant Workers; and

6.5.13.4.2 firms must make provision for independent legal, financial or other experts to act on behalf of Workers in the establishment of the ESOP. For the avoidance of doubt, any expenses incurred by the Workers and/or their representatives shall be paid for by the merged entity.

6.5.13.5 Governance of the ESOP:

6.5.13.5.1 if there is a board of trustees, the board must be balanced and Workers must be represented on the board, e.g., for every trustee appointed by merged entity; one trustee must be appointed by Workers and there should be one independent trustee; and

6.5.13.5.2 the independent trustee will be recommended and appointed by the Workers, subject to the candidate being acceptable to the merged entity.

6.5.13.6 Duration of the ESOP:

6.5.13.6.1 The ESOP must be perpetual/evergreen to cater for a changing workforce.

6.5.13.7 Participants of the ESOP:

6.5.13.7.1 all current and future Workers who are eligible; and

6.5.13.7.2 maternity leave will have no adverse impact on qualifying criteria.

6.5.13.8 Participation benefits of the qualifying Workers:

6.5.13.8.1 beneficiaries will be entitled to: (a) dividends and (b) capital growth/upside based on their participation rights calculated with reference to units allocated to beneficiaries; and

6.5.13.8.2 beneficiaries will cease to participate for bad leaver events such as resignations and dismissals.

6.5.13.9 Value and funding of the ESOP:

6.5.13.9.1 the value of the ESOP will be determined with reference to issued shares and valuation as at the month preceding the establishment and commencement of the ESOP;

6.5.13.9.2 the merged entity must provide some vendor finance if required;

6.5.13.9.3 if there is vendor financing of the ESOP, it should be interest-free; and

6.5.13.9.4 dividend policy must provide for a "trickle" dividend in the ratio of at least 35:65, i.e., at least 35% of any dividends declared will flow to beneficiaries and at most 65% will be utilised to service the vendor financing. The dividend policy must be such that once dividends are declared by the merged entity, the company or the trustees have no discretion on whether to pay same to the trust in accordance with this ratio.

6.5.14 Where an HDP transaction is proposed to promote ownership as envisaged by this Public Interest factor, the following principles will apply, amongst others:

6.5.14.1 HDP transactions should be no less than 25% + 1 share and should ideally confer control on the HDPs to ensure that the remedy is responsive to requirement to promote *ownership* by HDPs in firms in the market.

6.5.14.2 The merger parties will have discretion to choose the HDPs.

6.5.14.3 The parties must inform the Commission of the proposed HDP transaction prior to its implementation to allow the Commission to assess compliance with the conditions.

7. DISCRETION

Section 79(4) provides that guidelines are not binding on the Commission, the Tribunal or the Courts but that any person interpreting or applying section 12A(3) of the Act must take the guidelines into account. The above guidelines thus present the general methodology that the Commission will follow in assessing Public Interest issues in merger analysis. Notwithstanding the above, this will not fetter the discretion of the Commission to consider other factors on a case-by-case basis should a need arise.

8. EFFECTIVE DATE AND AMENDMENTS

These guidelines become effective on the date indicated in the Government Gazette and may be amended by the Commission from time to time.