# Competition Law

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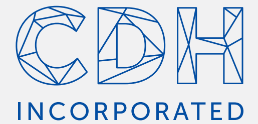


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SOUTH AFRICA

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# Final revised Public Interest Guidelines: Commission doubles down on ownership requirements for mergers

On 20 March 2024, the Competition Commission (Commission) gazetted its final Revised Public Interest Guidelines relating to merger control (PI Guidelines). This followed an initial draft published for comment in October 2023 (see our previous alert on the draft revised PI Guidelines here.

The Competition Act 89 of 1998 (Act) makes it clear that South African merger control involves an assessment of both the competition effects as well as the public interest effects of mergers, and that the public interest test is by no means secondary to the competition analysis but is a separate and equally important consideration. Mergers that have no effect on consumer welfare might still be prohibited if they run contrary to the public interest. Recognising that our economy remains skewed and unequal, the Act's public interest provisions explicitly include public interest grounds to address transformation and the support of small businesses and firms owned or controlled by historically disadvantaged persons (HDPs).

Section 12A(3) of the Act provides that:

*"When determining whether a merger can or cannot be justified on* ***public interest grounds****, 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."*

## General approach

The PI Guidelines provide a layer of insight into the Commission's application of these provisions of the Act. Although non-binding in principle, they effectively cement the Commission's policy on the public interest test for merger control.

The Commission's public interest assessment will consider the effect that a merger has on each of the legislated public interest grounds. In most cases, that effect has to be negative (i.e. result in an outcome that is worse than if the merger were not to take place). However, the Commission asserts that section 12A(3)(e) of the Act operates to impose a positive obligation to promote a greater spread of ownership in every merger. Accordingly, a merger that does not result in an increased spread of ownership will not meet this particular public interest test.

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Perhaps significantly, the Commission has now removed from the PI Guidelines erstwhile references to considering the "*net effect*" on the public interest, or determining whether an effect is "*positive*" or "*negative*". This may be an attempt to water down the notion (previously accepted by the Competition Tribunal in a decision that has not found favour with the Commission) that a holistic approach should be taken to assessing the impact on the public interest. This could allow the Commission to pursue a more binary approach and reduce merging parties' ability to argue for a more conspectus view.

This is carried through to the approach on possible remedies to address the public interest, where the PI Guidelines provide that it is only if specific effects cannot be remedied directly that the Commission may, on a case-by-case basis, consider other equally weighty countervailing public interest grounds identified. These must be measurable and monitorable to be tendered in the form of conditions.

### Retrenchments

It is now trite that retrenchments arising from a merger (typically referred to as "*merger specific*" retrenchments) will generally be considered contrary to the public interest. The final PI Guidelines have replaced the concept of "*merger specific*" with "*merger related*". This likely strengthens the Commission's hand insofar as "*related*" is a lower test than "*specific*" when considering whether a merger might result in retrenchments.

The final PI Guidelines persist in placing an onus on merging parties to prove that any retrenchments implemented or contemplated from when merger discussions began until a period of one year from implementation of the merger are not related to the merger.

Sensibly, however, the final PI Guidelines no longer seek to include in the analysis whether another putative purchaser might have a different approach to headcount.

### Increasing the levels of ownership by historically disadvantaged persons and workers

The PI Guidelines now make it clear that mergers involving firms registered outside of South Africa and notifiable in South Africa are subject to section 12A(3) of the Act more generally, and section 12A(3)(e) in particular. This means that foreign-to-foreign transactions that result in a change of control to a South African business, even if entirely incidental to the overall transaction, may be subject to a condition that a level of Black or worker ownership

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be introduced in South Africa. For mergers with no South African 'centre of gravity' this is likely to result in South African assets being carved out of global mergers where possible, with unfortunate consequences for local investment and participation in the larger global economy.

Although not expressly stated, this 'catch one, catch all' approach could similarly apply to other acquisitions of control where giving up equity might seem inappropriate – such as the acquisition of minority interests to which control-conferring veto rights attach, or other circumstances of joint or negative control.

Notably, the PI Guidelines provide that even if a merger promotes ownership by HDPs, this does not preclude the obligation to consider increased ownership by workers, and vice versa, particularly where a merger results in a dilution of ownership by HDPs or workers. Less clear is whether a broad-based employee share ownership plan (ESOP) could tick both the worker and HDP ownership boxes.

Where a merger does not promote a greater spread ownership as contemplated by section 12A(3)(e), the Commission will, in the first instance, consider ownership remedies, including but not limited to:

- An ESOP holding 5–10% equity post-merger and involving a broad spectrum of workers. Such ESOPs will need to be at no cost to the workers (vendor funded) and endure for a "*reasonable period*". The final PI Guidelines ultimately are less prescriptive than the previous draft on the structure of an ESOP, presumably to provide for some flexibility in implementation.
- Equity sales post-merger to HDPs ranging from 5% to 25%.
- Divestment of business or assets to HDP buyers shortly after merger completion.
- Community or other investment trusts holding shares in a firm for HDP beneficiaries' benefit. This option is welcome, as to date the Commission has sometimes rejected this remedy as not addressing ownership *per se*.

## The upshot

In its final iteration of the PI Guidelines, the Commission has pinned its colours to the mast and doubled down on its approach to arguably the most controversial element of the guidelines, namely that each merger notified to it will be required to demonstrate a measurable increase in the level of Black or worker ownership (possibly both). This is regardless of whether the merger has any negative effect on the public interest. The implication is thus that any merger that otherwise has no effect on the economic status quo but does not bring with it an increased level of Black and worker ownership is deemed by the Commission to be contrary to the public interest.

The PI Guidelines also work to limit the extent to which a holistic view can be taken, and parties may need to address every public interest effect with a condition, rather than show that, overall, the merger is in the public interest.

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## Chambers Global 2024 Results

### Competition Law

Chambers Global 2011–2024 ranked our Competition Law practice in:
**Band 2**: Competition/Antitrust.

**Chris Charter** ranked by Chambers Global 2018–2024 in **Band 1**: Competition/Antitrust.

**Andries le Grange** ranked by Chambers Global 2022–2024 in **Band 4**: Competition/Antitrust.

**Albert Aukema** ranked by Chambers Global 2023–2024 in **Band 5**: Competition/Antitrust.

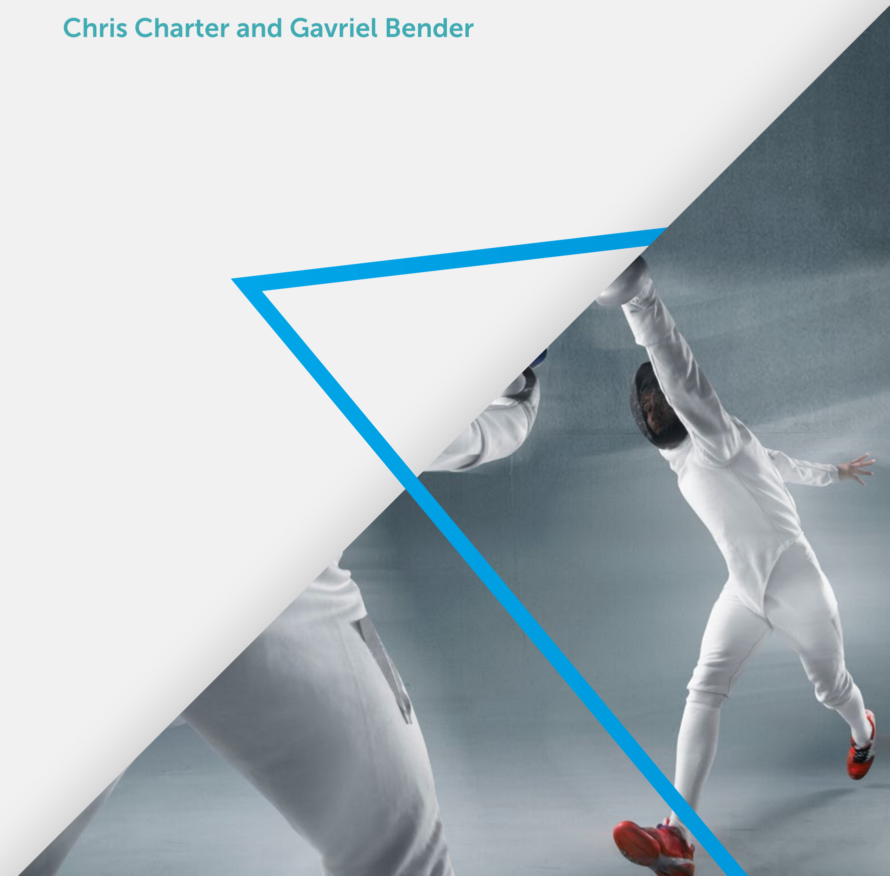
**Lara Granville** ranked by Chambers Global 2022–2024 in **Band 5**: Competition/Antitrust.

The Commission's loadstar for its approach is the Constitutional Court's judgement in *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another 2022 (4) SA 323 (CC)* which enjoins the competition authorities to ensure that:

> *"[T]he equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence."*

Although it is difficult to argue with the ideological sentiment, many may continue to question why the obligation to transform the economy should be laid at the door of those who dare to posit a merger, with its existing inherent risks and uncertainly. Investors and those trying to sell controlling stakes in companies (including existing Black shareholders) may well read this and weep. Whether those stakeholders will dry their eyes and price into their transaction the likely costs of meeting the Commission's policy demands (as many are doing), or whether the PI Guidelines represent another pothole in the road to economic growth and recovery, remains to be seen.

**Chris Charter and Gavriel Bender**



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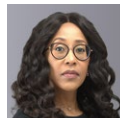

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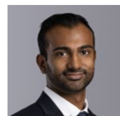

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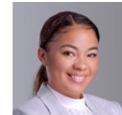

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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