

COMPETITION

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GUIDELINES

COMPETITION COMMISSION ISSUES PUBLIC INTEREST GUIDELINES

On 23 January 2015, the Competition Commission issued draft Guidelines for comment on the assessment of public interest considerations in merger regulation. The Guidelines present the general methodology that the Commission is likely to follow and the type of information that the Commission will require when evaluating public interest grounds in merger review.

When considering a merger notification, the Commission is tasked with conducting three separate but interrelated enquiries. First, it is required to determine whether the merger is likely to substantially prevent or lessen competition. If that enquiry reveals a substantial lessening of competition, then the Commission must determine whether there are any technological, efficiency or pro-competitive gains that would outweigh the negative effects, and whether there are any public interest considerations that would outweigh the negative competition effect. Finally, the Commission must also assess whether the merger would have a substantial positive or negative impact on any of the public interest grounds.

A merger that is found to raise no competition concerns could be prohibited or conditionally approved on public interest grounds. Conversely, an anti-competitive merger that has public interest effects that outweigh the anti-competitive effects thereof may be approved on that basis.

The public interest factors contemplated in the Competition Act, No 89 of 1998 in relation to mergers are the effect that a merger will have on:

- (1) a particular industrial sector or region;
- (2) employment;
- (3) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- (4) the ability of national industries to compete in international markets.

The Guidelines proposes a systematic approach for the Commission to follow in the assessment of each public interest ground, namely:

- Step 1: determine the likely effect on the public interest, whether positive or negative;
- Step 2: determine whether the effect is merger specific;
- Step 3: determine whether the effect is substantial;
- Step 4: consider whether the parties can justify the effect; and
- Step 5: consider possible remedies to address the likely negative effect.

As employment effects seem to be the most frequently occurring public interest issue arising in merger control, it is on this aspect that we focus our attention.

The Commission requests that the merging parties declare all contemplated retrenchments whether they are due to the merger or for operational reasons. The Commission's primary line of enquiry will be the effect on employment within the merging parties. In determining the effect, the Commission will consider the overall nature of the transaction, including the extent of the overlap in the parties' activities, the rationale for the transaction and the intention of the parties relating to employment and the target business. As a second line of enquiry, the Commission will consider the likely effect on the general level of employment in a particular industrial sector or region.

In assessing the effect, the Commission will consider whether the merger impacts on the number of jobs in existence post-merger either due to job creation or losses of job opportunities, duplications, cost-cutting measures, cancellation of supply/distribution arrangements, and relocation of offices.

Whether the effect on the public interest is substantial depends on a number of factors, including the number of employees likely to be affected relative to the affected workforce; the affected employees' skill level (having regard to qualifications, experience, job grades, job descriptions and position within the organisation); and the likelihood that the employees will be able to obtain alternative employment in the short term (assessing type of skills, transferability and opportunities for re-employment).

In assessing whether the retrenchments can be justified, the onus rests on the merging parties. The Commission will consider whether a rational process has been followed in arriving at the proposed retrenchment figure and whether there is a rational link between the number of jobs lost and the reasons for the job losses. They will assess whether the job losses are justified by an equally weighty and countervailing public interest argument and whether the merging parties have provided detailed and complete information to the Commission and employees to enable them to consult fully on all issues.

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Importantly, the Guidelines proposes a list of remedies that may be considered appropriate in alleviating the merge effects on employment. These include:

- capping the number of job losses;
- staggering job losses over a period of time;
- placing a moratorium on job losses for a period of time;
- providing funding to reskill employees;
- providing counselling on applying for alternative employment;
- obliging parties to re-employ or give preference to affected employees;
- introducing shift rotations or reducing the number of hours employees work; and
- introducing a training lay-off scheme.

While the Guidelines highlight the increasing focus on public interest considerations in the context of merger review and indicate the wide-ranging interventions that may be required in order to alleviate merger-specific public interest impacts they are not intended to fetter the discretion of the competition authorities to consider public interest issues on a case-by-case basis should the facts and circumstances warrant this.

Natalie von Ey and Kitso Tlhabanelo

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CONTACT US

For more information about our Competition practice and services, please contact:



Nick Altini
National Practice Head
Director
T +27 (0)11 562 1079
E nick.altini@dlacdh.com



Chris Charter
Director
T +27 (0)11 562 1053
E chris.charter@dlacdh.com



Albert Aukema
Senior Associate
T +27 (0)11 562 1205
E albert.aukema@dlacdh.com



Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@dlacdh.com



Leana Engelbrecht
Senior Associate
T +27 (0)11 562 1239
E leana.engelbrecht@dlacdh.com



Susan Meyer
Director
T +27(0)21 481 6469
E susan.meyer@dlacdh.com



Nazeera Mia
Senior Associate
T +27 (0)21 481 6337
E nazeera.ramroop@dlacdh.com



Natalie von Ey
Director
T +27 (0)11 562 1333
E natalie.von_ey@dlacdh.com



Naasha Loopoo
Associate
T +27 (0)11 562 1010
E naasha.loopoo@dlacdh.com



Kitso Tlhabanelo
Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@dlacdh.com

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dlacdh.com

cliffedekkerhofmeyr.com

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