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Competition Law
ALERT

IN THIS ISSUE

New merger guidelines: In the 'public interest' to comment

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FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

New merger guidelines: In the 'public interest' to comment

The public has until 17 November 2023 to comment on the Competition Commission's (Commission) revised draft merger assessment public interest guidelines (Guidelines).

The Commission is applauded for attempting to usher certainty into the unpredictable minefield of public interest assessment in South African merger control and for providing the public with the opportunity to critique its proposed policy.

The Guidelines

Broadly, the Guidelines outline the Commission's approach to:

- the legislative framework,
- the statutory public interest provisions overall, and
- its more detailed views on each of the public interest considerations listed in section 12A(3) of the Competition Act 89 of 1998 (Competition Act), which must be considered when determining whether a merger can or cannot be justified on substantial public interest grounds.

At the outset, the Guidelines reiterate what is now well known, namely that the competition and public interest assessments are equal in status, and notwithstanding a clear competition bill of health, a merger can only proceed if it is also justifiable on substantial public interest grounds.

In 2019 the Competition Act was amended with the critical aim of remedying high levels of concentration, racially skewed ownership, and lack of support for small businesses. However, an inconsistent approach in assessing the amended statutory public interest factors has caused controversy.

Predictability has been made more elusive by an absence of guiding jurisprudence, coupled with a myriad of 'negotiated outcome' public interest commitments, sometimes seemingly far removed from the legal requirement of 'merger specificity'.

Approach to ownership

Undoubtedly the provision that causes investors, dealmakers and sellers the most consternation is section 12A(3)(e) of the Competition Act (one of the factors to be considered in the public interest

New merger guidelines: In the 'public interest' to comment

CONTINUED

assessment) which requires a consideration of *"the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in the market"*.

Zoning in on section 12A(3)(e), the Guidelines propose, among other things, that:

- Unlike the other public interest factors, the Commission considers section 12A(3)(e) to confer *"a positive obligation"* to promote or increase ownership by historically disadvantaged persons (HDPs) and/or workers.
- Put differently, *"it is possible that a merger that does not promote spread of ownership in terms of section 12A(3)(e) of the [Competition] Act is substantial enough to render a merger unjustifiable on public interest grounds"*.
- The 12A(3)(e) obligation pertains to all mergers that have an effect in South Africa (this appears to capture foreign-to-foreign mergers where there is no transacting company domiciled in South Africa).
- Even if a merger promotes ownership by HDPs, this does not preclude an obligation to increase worker ownership and vice versa.
- 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.
- A historical policy to not allow additional third-party shareholding is unlikely to be considered an acceptable reason for failing to remedy this public interest factor.
- Where an employee share ownership plan (ESOP) is proposed, it should **remedy the full dilution** (for example, if a merger results in a dilution of shareholding by HDP/workers of 10%, an ESOP of 10% will be required) and if the merger is neutral as to its effect on HDP/worker ownership, the ESOP proposed should hold no less than 5% of the value/shares of the merged entity (unless required to hold a higher share). The Guidelines are also prescriptive as to how 'acceptable' ESOPs are to be structured.
- When HDP transactions are proposed to promote ownership in terms of section 12A(3)(e), they *"should be no less than 25% + 1 share and should ideally confer control on the HDPs"*.

New merger guidelines: In the 'public interest' to comment

CONTINUED

Concerns

A glaring area of concern is black-owned businesses. How will black private equity firms unlock the full value of their investments if they can only sell to a suitor with higher HDP ownership credentials than their own? Surely, enabling black investors to redeploy sale proceeds to new investment opportunities (and in so doing, fostering growth and job creation) are also in the public interest? In some cases, a merger's value creation for HDPs offsets the decrease in HDP shareholding but the Guidelines don't appear to give credits for that.

A draconian approach may incentivise some firms to minimise black ownership prior to engaging in any merger activity or exclude South African operations from global deals.

'Mega deals' aside, how will foreign investors react to these requirements?

One must also question whether the Commission is at liberty to impose more stringent requirements on companies than is required in terms of applicable B-BBEE legislation, particularly when firms are willing to improve the non-ownership elements of their B-BBEE scorecards.

The Guidelines do not appear to consider the variation in the spectrum of commercial transactions notified to the Commission. For example, a 5% – 10% ESOP might tangibly benefit workers in certain organisations but be a commercial non-starter in others. A merger may be notified based on a firm acquiring a lettable enterprise only, a minority (but controlling) interest in another firm, or a 'technicality' – is it **proportional** to expect such transactions to attract a 10% ESOP or a 25% + 1 black shareholding transaction?

The time to comment is now

There is no doubt that we must make South Africa a more equitable society and the competition authorities have achieved momentous outcomes in their efforts to date. But let us pause and think carefully about whether we are still on track to achieve the legislative goal responsibly, or whether we are at risk of running further away from it?

Stakeholders are urged to take up the opportunity to engage with the Commission in co-creating a credible approach that enhances transformational objectives without unintended consequences. It's no easy task but we cannot afford not to try.

Susan Meyer and Robin Henney

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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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