

REGULATORY

Part 2: The “One-Shot” Pre-Merger Consultation in South Africa. Preparation, Risk, and the Question no-one is asking

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Confidentiality and gun-jumping – the tension at the heart of the process

The one-shot design of the pre-merger consultation process creates an inherent tension: you need to bring sufficient substance to the table to make the meeting worthwhile, but doing so requires sharing information that may be competitively sensitive and that, if handled carelessly, could give rise to gun-jumping concerns.

Preparation is crucial. The Competition Commission's ("**Commission**") procedures contemplate formal confidentiality claims via Form CC7, and parties should prepare non-confidential summaries and redactions aligned to those mechanisms for any materials shared during or following the consultation. Clean-team protocols and need-to-know controls should be established in advance, particularly where market data, strategy documents, or remedy proposals involve sensitive forward-looking information.

It bears repeating that the consultation confers no permission to integrate operations or exercise control. Parties must not treat the meeting as an informal green light to begin implementation. The prohibition on pre-implementation for notifiable intermediate and large mergers remains absolute, and the Commission's post-COVID enforcement posture on gun-jumping has, if anything, become more assertive.

Equally important is the transition from the consultation to the formal filing. Submitting inconsistent narratives or changing key factual predicates between the two can erode trust and trigger broader follow-up requests. Overstating certainty during the consultation can box you into positions that later discovery or third-party input renders untenable. A conservative approach to information-sharing and disciplined documentation of what was discussed is essential to managing both confidentiality and process risk.

Public-interest strategy – do not leave it to the end

South Africa's merger regime assigns public-interest considerations equal weight with competition effects. The Revised Public Interest Guidelines articulate a positive obligation to promote a greater spread of ownership by historically disadvantaged persons and workers in every merger. This is not a box-ticking exercise. It is a substantive requirement that drives outcomes in complex matters.

The consultation is expressly designed to allow upfront discussion of possible remedies and information scope, creating a structured opportunity to test the feasibility, structure, and monitoring of potential public-interest commitments alongside competition remedies. Given the Commission's emphasis on employment, ownership, investment, and localisation outcomes, parties should arrive prepared to discuss realistic commitments, their timing, and their interaction with global remedy packages.

Sequencing within the meeting itself matters. Opening with the public-interest narrative, then presenting concrete remedy sketches with implementation mechanics, governance, and monitoring pathways, invites feedback on proportionality and evidential support. This approach respects the non-binding character of the meeting while eliciting guidance that can be translated into condition proposals during the formal review.

Integrating public-interest design early can materially reduce later negotiation cycles, particularly in very complex matters where HDP and worker ownership structures or employment moratoria often drive the final outcome.

The risks you need to manage

The principal procedural risk is over-reliance on non-binding impressions, mistaking preliminary feedback for comfort on substantive or public-interest issues, and then under-preparing for the formal review. The one-shot design amplifies this: if you do not put the right questions or remedy constructs on the table, you may forfeit your only chance to shape the Commission's early focus.

Inconsistent narratives between the consultation and the eventual filing can damage credibility and expand the scope of information requests, making meticulous internal coordination across jurisdictions and functions non-negotiable.

The mitigation strategies flow directly from the guidelines' architecture. Crystallise your theory of the case advance. Align cross-border positions. Prepare public-interest proposals capable of iteration into enforceable conditions. Treat the session as a scoping and design workshop, not a persuasion hearing.

The question that should be keeping practitioners up at night

The one-shot consultation framework is, on its face, a welcome development, a structured, transparent mechanism for early engagement on complex transactions. But it rests on a classification distinction that has become increasingly difficult to apply in practice.

The guidelines reserve the consultation process for Phase II and Phase III matters. Phase I transactions, those deemed straightforward, are excluded. In principle, this makes sense: routine mergers do not warrant the same level of pre-filing engagement.

But here is the difficulty. Since the onset of COVID, practitioners have observed a marked shift in the Commission's classification practice. The Commission has, in effect, adopted the habit of classifying virtually all notifiable mergers as either Phase II or Phase III matters. Phase I classifications have become vanishingly rare. Whether this reflects a genuine increase in transactional complexity, a resource allocation preference, or an institutional tendency towards caution, the practical consequence is the same: the Phase I category has been largely hollowed out.

This raises a question that goes to the heart of the new consultation framework, and indeed to the broader functioning of South Africa's merger control regime.

How do we actually know whether a transaction is a Phase I or Phase II matter and does the distinction, as currently applied, still serve a meaningful purpose?

If the Commission classifies nearly everything as Phase II, then the consultation mechanism is not really reserved for complex cases at all, it is available for most transactions, which in turn raises questions about the Commission's capacity to deliver on the one-shot model at scale. And if the Phase I classification has effectively fallen into disuse, practitioners are left without a reliable framework for advising clients on likely timelines, procedural expectations, and the strategic value of seeking a pre-filing consultation in the first place.

That is not a question the guidelines answer. But it is the question that will determine whether this process works as intended.



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