

# The Competition Commission’s Revised Final Public Interest Guidelines: A Critical Framework for Merger Analysis

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## Introduction

The South African Competition Commission ("**Commission**") has published its final revised Public Interest Guidelines ("**the Guidelines**") relating to merger control. The Guidelines serve to clarify the Commission's stance on public interest factors as set out in the Competition Act 89 of 1998 (as amended) ("**the Competition Act**"). There are pivotal updates and key insights that require the attention of parties seeking merger approval from the Commission. Although these are non-binding in principle, they do provide a useful guide on what the Commission's stance is in relation to public interest assessment of mergers.

## General Approach in Assessing Public Interest

In assessing mergers before it, the Commission is also legislatively required to consider the impact that a particular merger will have on public interest considerations set out in section 12A(3) of the Competition Act. These considerations are the impact that a merger will have on (i) a particular industrial sector or region (ii) employment (iii) ability of small and medium sized firms that are owned or controlled by historically disadvantaged persons, to effectively enter or expand within a market (iv) the ability of national industries to compete in international markets, and (v) the promotion of a greater spread of ownership by historically disadvantaged persons ("**HDPs**"). The Guidelines outline that in evaluating a merger's impact on public interest, the Commission will first conduct an assessment of each public interest factor individually, discerning whether the merger is likely to have a positive or negative effect on each factor; then consider whether the effect is merger-specific; and only if so, will it consider whether the effect is substantial.

Where a determination is made that only positive public interest benefits arise from a particular merger, they are merger-specific and substantial, the enquiry into those factors understandably ends.

However, if the Commission concludes that if a specific public interest aspect is adverse, specific to the merger and significant, it will require remedies to address the negative impact. In cases where rectifying the negative impact on that particular public interest aspect isn't feasible, the Commission might weigh alternative public interest aspects of equal significance that counterbalance the identified negative impact.

## The Positive Obligation to Promote HDP Ownership

Although the Guidelines introduce several new provisions, perhaps the most notable and somewhat controversial provision relates to the fact that all mergers will be subject to the requirement that the merger promotes a greater spread of ownership. According to the Guidelines, a failure to do so may render the merger unjustifiable on public interest grounds. This imposes a positive obligation on the merging parties to increase the levels of ownership by HDPs or workers (typically through ESOPs) (potentially both). This is a controversial and onerous provision in our view. We say so because this requirement appears to find application irrespective of the fact that the merger does not raise any public interest concerns.

The critical question that arises is whether or not the Guidelines, particularly the HDP provision, will water-down or undermine the holistic approach that is often taken in terms of which the public interest considerations or factors are weighed and considered holistically as opposed to on an individual basis.

## Examination of Effect on Industrial Sector or Region

Another interesting inclusion relates to environmental considerations or the impact that a merger is expected to have on various environmental considerations. The Guidelines stipulate that the Commission must consider the effect of the merger on development, environmental sustainability and employment within the affected industrial sector or region. This entails an examination of various elements including, but not limited to – the applicable industrial and environmental policy objectives or best practices; the effect on the environment (i.e. pollution, increased carbon emissions etc); and the contribution of the merger parties to local government revenue.

It is important for the merging parties to note the novel inclusions such as environmental effects, contribution of local governmental revenue and commitments made in terms of industry-specific legislation.

## Merger Specificity in Retrenchments

Ordinarily, when there are retrenchments that arise from a merger the Commission will assess whether or not those retrenchments are as a result of the merger before it. If so, then the merger will be considered to be contrary to public interest. In terms of the Guidelines, the standard appears to have been lowered from the requirement that, for the retrenchments to be contrary to public interest, they must be "*merger specific*" to being "*merger related*". This appears to be a lower standard that will be used by the Commission going forward when assessing the impact of a merger on employment.

## Concluding Remarks

It is therefore advisable that merging parties take note of these new inclusions when preparing to file mergers, and to the extent possible, to make provision for them in advance. Critically, it will be interesting to see whether or not the merging parties will be successfully held to this standard or provisions owing to the non-binding nature of the Guidelines. What could potentially give the merging parties the incentive to challenge this HDP provision is the possibility that a merger that has no competition or public interest concerns, but which does not result in increased level(s) of Black or worker ownership, could be deemed contrary to public interest and therefore get prohibited or approved subject to onerous conditions.

For full context, the Guidelines may be accessed [here](#).



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