

Competition Commission South Africa: Revised Guidelines on the assessment of public interest provisions in merger regulation

Consultation response from the

Centre for Competition Policy

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This consultation response has been drafted by the named academic member of the Centre, who retains responsibility for its content.

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Consultation Response

General remarks

After undertaking a public consultation on the first draft of the Public Interest Guidelines in early-2015, the Competition Commission of South Africa (CompCom) should be praised for the steps it has taken since then. Particularly commendable are the public workshop that CompCom organised in the wake of the consultation period,¹ and the session dedicated to ‘public interest issues in competition’ at the 4th BRICS International Competition Conference which CompCom co-hosted.² These events – and the consultation process as a whole – have been a testament to CompCom’s pro-active approach towards generating discussion and gathering feedback on what is, undeniably, a very pressing topic in South Africa. This listening exercise culminated in the release of the Revised Public Interest Guidelines in December 2015,³ which appear to address and clarify a good number of the issues raised during the consultation phase. As such, this consultation response only aims to comment on a particular element of the assessment process – namely, the ‘balancing’ of competition and public interest findings, and whether further guidance on this process is warranted.

Foremost, however, I would briefly like to emphasise the potential significance of this consultation process on the global stage. The South African merger control regime has become something of a ‘torchbearer’ for other countries that are seeking to give effect to competition while protecting important public interest goals; particularly countries with developing and emerging economies. South Africa is among a minority of countries that consider public interest criteria in every merger assessment; a trait shared by around one in every five domestic states.⁴ Of this select group of countries, approximately two-thirds are developing countries,⁵ each facing their own unique obstacles when it comes to balancing competition and development goals. Moreover, South Africa is among approximately one-third of countries worldwide that have assigned public interest decision-making powers to their national competition authorities.⁶ In light of these traits, it is entirely plausible that CompCom’s Guidelines can spur other countries to take equally significant steps towards an effective and transparency merger regime.

The procedure involved in ‘balancing’ competition and public interest findings

In my response to the first draft of the Guidelines,⁷ I considered the potential for using the Guidelines as a vehicle for clarifying the procedure involved in conducting a ‘balancing act’

¹ ‘Public Workshop on Public Interest Guidelines’, Pretoria, 27 May 2015 <<http://www.compcom.co.za/public-workshop-on-public-interest-guidelines/>> accessed 11 February 2016.

² ‘Plenary Session 3: Public Interest Issues in Competition’ (4th BRICS International Competition Conference, Durban, 12 November 2015) 16 <<http://brics2015.co.za/bricsprogramme2.pdf>> accessed 11 February 2016.

³ Competition Commission South Africa, *Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No.89 of 1998 (as amended)* (21 December 2015) <www.compcom.co.za/wp-content/uploads/2015/01/Public-Interest-Guidelines-December-2015.pdf> accessed 11 February 2016.

⁴ In a study of 75 merger regimes across the globe, 19.7% of countries utilise public interest criteria in every assessment; David Reader, ‘Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights’ (2016) CCP Working Paper 16-3, 19. Available at: <http://competitionpolicy.ac.uk/publications/working-papers>.

⁵ *ibid* 26.

⁶ *ibid* 22.

⁷ Centre for Competition Policy, *Consultation Response for Competition Commission of South Africa: Guidelines for the Assessment of Public Interest Provisions in Mergers* (5 March 2015) 3 <<http://competitionpolicy.ac.uk/documents/8158338/8261716/CCP+Response+-+Public+Interest+and+Mergers+March+2015.pdf/98d8b211-8b1a-41de-83c6-50554cf67721>> accessed 11 February 2016.

between competition and public interest findings.⁸ I suggested that, if the Guidelines were to describe CompCom's method of balancing competition and public interest issues, this would have the effect of enhancing legal certainty for the merging parties. The Revised Guidelines remain largely silent on the balancing procedure. Indeed, the reference that was made to the balancing act in paragraph 6.3 of the first draft has now been deleted from the revised draft; although, paragraph 5.5 continues to refer to the general practice of balancing competition and public interest issues on a case-by-case basis.

The reason the Guidelines are silent on the balancing procedure is unclear. One possibility is that information relating to CompCom's balancing procedure is, arguably, of relatively little value to the merging parties, compared to guidance on e.g. evidential requirements and the interpretation of specific public interest provisions – which the merging parties can explicitly frame their transaction to comply with. In contrast, the balancing act is not something to be 'complied' with – rather, it is part of CompCom's assessment toolkit. In other words, it could be argued that a detailed description of the balancing procedure would create unnecessary complexity within the Guidelines, which have been presented in a very accessible form.⁹

This aside, when one considers the significance of the interplay between competition and public interest issues within the South African regime, it is difficult to justify the complete absence of detail that has been afforded to the balancing procedure. Even if this information does not provide any immediately obvious benefits to the merging parties, it may prove beneficial to CompCom itself, in terms of establishing its 'best practices'. For instance, competition experts at the OECD have emphasised the importance of putting measures in place that will ensure public interest provisions are never misapplied in the future.¹⁰ Indeed, although the Guidelines are not legally binding on CompCom, they nonetheless possess a symbolic value which creates informal standards and expectations for those involved in the merger assessment process.

If an explicit objective of the Guidelines is to indicate the approach that CompCom is likely to follow in its merger assessments,¹¹ the lack of detail alluding to the balancing act – a crucial part of the approach – poses problems in terms of achieving this objective. Therefore, if the decision has been made to refrain from describing the balancing procedure in the Guidelines document, it will be interesting to see whether a future guidance document will attempt to do this – perhaps in the form of a joint-publication by CompCom and the Competition Tribunal. Ultimately, given that section 79(1) of the Competition Act No. 89 of 1998 only permits CompCom to prepare guidelines relating to its own policy approaches, the Revised Guidelines are unable to shed light on the balancing procedure enforced by the Tribunal. A joint-publication would therefore seem a viable alternative.

⁸ The motivation for considering this was the *Walmart/Massmart* case, where the Competition Appeal Court referred to the current lack of guidance relating to the balancing procedure; *Wal-Mart/Massmart* (Case No. 110/CAC/Jul11) Competition Appeal Court of South Africa, 9 March 2012, at [100].

⁹ The Minister for Economic Development, Ebrahim Patel, recently suggested that 'Solomon's wisdom' was often necessary when balancing competition and public interest issues, alluding to the complexities of the economic and social trade-offs. Ebrahim Patel, 'Keynote Address' (4th BRICS International Competition Conference, Durban, 12 November 2015). Available at: www.youtube.com/watch?v=2FP6ugir7pc at [1:31:50 - 2:05:30].

¹⁰ The OECD commentators note the issues that ensue when 'it might not always be clear how the agency has balanced efficiency and non-efficiency arguments in reaching its final decision'; Antonio Capobianco and Aranka Nagy, 'Public Interest Clauses in Developing Countries' (2015) *Journal of European Competition Law & Practice* (forthcoming) <<http://jeclap.oxfordjournals.org/content/early/2015/10/29/jeclap.lpv076>> accessed 11 February 2016.

¹¹ Revised Guidelines (n 3) at [4.1].

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