

Competition Commission of South Africa: Guidelines for the Assessment of Public Interest Provisions in Mergers

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 contents.

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Consultation Response

General remarks

The Competition Commission's plans to introduce guidance on its approach to merger assessments under section 12A of the Competition Act No.89 of 1998 is to be welcomed. In addition to reinforcing the transparency under which the South African merger control regime operates, the Draft Guidelines are effective at codifying the key procedural principles that have arisen from the relevant case law. It is hoped that this will have the effect of making the merger assessment rules more accessible to the merging parties and stakeholders, thereby facilitating procedural transparency.

The importance of facilitating procedural transparency should not be understated, particularly as the incentives for firms to merge is often very much dependent on the parties' ability to predict the outcome of the assessment process. The South African regime exhibits a number of characteristics that encourage legal certainty, including assigning decision-making powers to competition authorities (rather than government ministers), publishing the rulings of the Competition Tribunal and, of course, seeking to publish guidance on the Commission's approach to assessing public interest criteria. Given the extensive role that is afforded to public interest criteria under the 1998 Act, it is arguable that the South African merger control regime has a greater need than other jurisdictions to adopt transparency-enhancing measures such as these.

Despite the widespread convergence amongst national competition authorities to enforce an economic effects-based approach to merger assessment,¹ most domestic regimes continue to reserve a limited role for public interest criteria for certain types of merger. Indeed, what makes the South African regime such a draw for academic commentary is not that it considers public interest criteria per se, but that these criteria are directly balanced against competition criteria as part of the substantive test.² Accommodating the public interest in this way brings its own challenges regarding legal certainty and predictability for merging firms.³ The process of comparing and, in particular, 'balancing' competition and non-competition interests, each with their own differing units of measure,⁴ is an inherently arbitrary task. As such, the main aim of the Draft Guidelines should be to shed light on this process as much as is practically possible.

In the most part, the Draft Guidelines succeed in achieving this aim. The task of devising guidelines for procedures that are subject to variation on a case-by-case basis is onerous and it is entirely understandable that certain parts of the Draft Guidelines should be written broadly so as to allow for a degree of flexibility in the assessment process. There are aspects of the Draft Guidelines that may benefit from further elaboration and these are briefly outlined below.

Evidential requirements

Although I appreciate that evidential requirements imposed on the merging parties will vary on a case-by-case basis, it is notable that a significant proportion of merger transactions in South Africa break down as a result of firms failing to submit relevant information to the Commission of a sufficient quality; this is particularly true in cases where the employment criterion is invoked.⁵ The Draft Guidelines fail to reference the *type* of information which the merging parties would generally be expected to submit and, although legal practitioners are becoming increasingly familiar with the procedure, it appears that there is a preference

¹ For a recent review of merger control convergence internationally, see Frédéric Jenny, 'Substantive convergence in merger control: An assessment' (2015) 1 *Concurrences Journal* 21.

² Most regimes choose to keep separate the competition and public interest tests. In the United Kingdom, for example, on the rare occasion where the public interest test is invoked, a minister will determine whether the effect of the merger on the public interest is sufficiently substantial to warrant *overriding* the competition findings. The procedure stops short of requiring an official 'balancing act' to take place.

³ These challenges are well-presented in the Background Note to the Draft Guidelines; Competition Commission of South Africa, *Background Note to the Public Interest Guideline* (23 January 2015).

⁴ James Hodge, Sha'ista Goga and Tshepiso Moahloli, 'Public-interest provisions in the South African Competition Act: A critical review' in Kasturi Moodaliyar and Simon Roberts (eds), *The development of competition law and economics in South Africa* (HSRC Press 2013) 2.

⁵ Competition Commissioner Tembinkosi Bonakele has made this observation in the context of the employment public interest ground, see Ann Crotty, 'New focus on how merger affect jobs' (22 February 2015, *Sunday Times*), available at <www.timeslive.co.za/business/times/2015/02/22/new-focus-on-how-mergers-affect-jobs>.

for greater guidance on this matter.⁶ If the Draft Guidelines were to contain a non-exhaustive list of the types of information the Commission is likely to request when assessing each public interest issue, this would enable the merging firms and their legal counsel to gather this information in advance. This would go some way towards avoiding delays in the submission of evidence and, moreover, should reduce the occasions in which mergers break down due to a failure to satisfy the evidential burden.

A missed opportunity to shed light on the process of ‘balancing’ competition and public interest issues?

I am mindful of the fact that this consultation seeks comments on the procedural rules contained within the Draft Guidelines and I shall therefore abstain from commenting on the substantive legal provisions contained within the 1998 Act. I also recognise that the Draft Guidelines concern the Commission’s assessment of public interest provisions, rather than the actual process of balancing these public interest provisions with the competition provisions. That said, although the Draft Guidelines mention the Commission’s duty to balance competition and public interest issues on a case-by-case basis [at paragraph 5.5], they fail to shed light on the processes that this balancing act entails.

Given the arbitrary nature of balancing competition and non-competition interests, it is unfortunate that the Draft Guidelines do not take the opportunity to detail the Commission’s approach. The Competition Appeal Court in *Walmart/Massmart* alluded to the lack of guidance on how to approach the balancing act,⁷ and the Draft Guidelines could be seen as the ideal vehicle in which to formalise the balancing procedure, albeit with general principles.

Even if the Draft Guidelines do not represent an appropriate document in which to explain the balancing act on this occasion, it is worth considering the need for such guidance in the future. Without formalised guidance on the balancing act, there is potential for inconsistencies to occur between the balancing processes of different cases. Such inconsistencies are liable to undermine the legal certainty benefits that these Draft Guidelines are intended to promote. Furthermore, if the Commission utilises certain types of economic analyses during its balancing procedure, the application of these analyses (and the disclosure of their outcomes) could begin to establish a procedural precedent that can be implemented in future public interest assessments. For example, a few academics have considered the potential of utilising economic techniques to facilitate the balancing act by quantifying or ‘translating’ the effects of a merger on the public interest into a figure that was more readily comparable with the competition findings.⁸

Determining whether the effects on the public interest are ‘substantial’

Defining the boundaries of each of the four public interest criteria specified in section 12A(3) becomes particularly complex in the light of the case-by-case nature of the assessment process. The requirement that the effect of the merger on the public interest should be ‘substantial’ is the main reason for this complexity. The case-by-case approach

⁶ Heather Irvine, ‘The World After Wal-mart - will South African mergers ever be the same again?’ (*Norton Rose Fulbright*, 8 May 2012) available at <www.nortonrosefulbright.com/knowledge/publications/67936/the-world-after-wal-mart-will-south-african-mergers-ever-be-the-same-again>.

⁷ *Wal-Mart/Massmart* (Case No. 110/CAC/Jul11) Competition Appeal Court of South Africa, 9 March 2012, at [100].

⁸ See, for example, Hodge (n 4) 12-13 and Willem Boshoff, Daryl Dingley and Janine Dingley, ‘The Economics of Public Interest Provisions in South African Competition Policy’ (6th Annual Conference on Competition Law, Economics and Policy, Johannesburg, September 2012) 28.

has led to a lack of procedural precedent being developed by the Commission and commentators have suggested that this puts the Commission at a disadvantage in terms of determining what is 'substantial' under any of the public interest criteria.⁹

Neither the Draft Guidelines nor the 1998 Act attributes a precise definition to 'substantial' in this context, and nor should they. Yet it may be beneficial for the merging parties to be able to refer to a non-exhaustive list of some of the key factors that the Commission will consider when determining whether an effect is 'substantial' or not. For instance, 'retrenchment' is a major factor that would no doubt very high feature on the list of considerations regarding the employment criterion. The impact of a merger on 'working conditions' is another factor that the Commission may consider, but it may not carry such a degree of 'substantiality' as retrenchment. The Draft Guidelines could reflect this in some way by distinguishing between 'major' and 'minor' influencing factors for each public interest criterion. This obviously carries the risk of overlooking 'minor' influencing factors in the assessment process, so distinguishing between 'major' and 'minor' factors is perhaps inadvisable at this stage.

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⁹ Boshoff (n 8) 23.

