

Unpacking the revised Public Interest Guidelines

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On 20 March 2024, the Competition Commission of South Africa (Commission) published revised Public Interest Guidelines relating to merger control (the Revised Guidelines). The Revised Guidelines follow the Draft Public Interest Guidelines (the Draft Guidelines), which were published for public comment in October 2023.



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Although the Revised Guidelines do not have the status of enforceable legislation, they nevertheless provide a clear indication of how the Commission, having received commentary from interested parties on its draft Guidelines, is likely to approach the public interest component of merger regulation in South Africa.

The Revised Guidelines will come into effect on a date still to be published in the Government Gazette. While it is unclear, we assume this is the final version of the Revised Public Interest Guidelines since there are no further calls for comments. In any event, the Commission is empowered to amend its guidelines from time to time based on its experience in assessing mergers.

As highlighted in a series of articles closely examining the [Draft Public Interest Guidelines](#), public interest conditions have previously featured prominently in high-profile transactions such as Walmart's acquisition of Massmart and ABInBev's acquisition of South African Breweries (SAB). In recent years, however, firms seeking merger approval in South Africa have encountered a concerted regulatory drive to include a broader range of public interest-related conditions in routine merger approvals.

Important amendments

While the Revised Guidelines are largely unchanged from the earlier version, the Commission has made certain noteworthy amendments, some of which are highlighted below.

Firstly, there have been several clean-ups presumably to simplify the language in the Revised Guidelines. For example, the Commission has removed qualifiers such as "positive", "negative", and "net" effect when assessing the impact of a merger on the public interest grounds set out in the Competition Act.

The Revised Guidelines now provide that where the merger does not have an effect on the public interest grounds, or the effect on the public interest grounds is not substantial, the competition authorities will not delve further into the public interest assessment. It could also indicate that mergers that may be neutral (ie have no positive or negative effect) are potentially justifiable on public interest grounds. Time will tell.

Secondly, a number of other amendments appear to expand the scope of application of the public interest grounds. For instance, the Revised Guidelines provide that where "a merger has an effect on the Public Interest, the Commission will likely conclude that the merger is not justifiable on substantial Public Interest grounds". This suggests that the Commission's view is that even a single substantial effect on one public interest factor is capable of rendering a merger unjustifiable.

Another example is that the Commission has removed all references to the narrow construction of "merger-specific" effects throughout the Revised Guidelines, opting instead to use broader "merger-related" effects (eg. merger-related retrenchments and job losses).

Promoting a greater spread of ownership

In relation to the Section 12A(3)(e) requirement that a merger must promote a greater spread of ownership by historically disadvantaged persons (HDPs) and workers (one of the more contentious public interest grounds), the Commission has reiterated that this section of the Competition Act creates a positive obligation to promote a greater spread of ownership in every merger.

This means that the Commission's point of departure will be that all mergers are required to promote a greater spread of ownership by HDPs and workers in the economy.

While merger parties may try to argue that it is more challenging for foreign firms to promote ownership given their limited presence in South Africa, the Revised Guidelines expressly state that mergers involving an acquiring firm/s and a target firm/s registered outside of South Africa and notifiable in South Africa are subject to section 12A(3) of the Competition Act more generally, and section 12A(3)(e) in particular.

Notably, the Revised Guidelines no longer refer to a detailed list of the factors that the Commission will consider when assessing whether a merger will promote a greater spread of ownership, examples of the reasons why a merger may not be able to promote a greater spread of ownership, and the remedies that the Commission may consider addressing any substantial effect on the promotion of ownership.

The Revised Guidelines also no longer refer to the Commission's requirements for how an Employee Share Ownership Plan (ESOP) should be structured and governed, which were included in the Draft Guidelines.

Closing remarks

The Commission's views on how it plans to perform the public interest assessment in the context of merger regulation remain unchanged, particularly when it comes to using the Competition Act to drive transformational imperatives in the South African economy. For the most part, the amendments to the Revised Guidelines appear to be aimed at introducing consistency and clarity in the language adopted and giving the Commission room to apply the public interest grounds with greater flexibility.

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