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ECONOMIC DEVELOPMENT DEPARTMENT

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**Guidelines on the assessment of public interest
provisions in merger regulation under the Competition
Act No. 89 of 1998 (as amended)**

21 December 2015

Draft

FOR COMMENT

This Guideline is drafted by the Commission in terms of Section 79(1) of the Competition Act No. 89 of 1998. This is the final draft for comments.

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Deadline for submission of comments: Friday, 29 January 2016, 17h00 (SA time)

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1. PREFACE

- 1.1. These guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) ("the Act") which provides that the Competition Commission ("Commission") may prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act.
- 1.2. These guidelines seek to provide guidance on the Commission's approach to analyzing mergers by indicating the approach that the Commission is likely to follow and the types of information that the Commission may require when evaluating public interest grounds in terms of section 12A(3) of the Act.
- 1.3. The Commission recognizes that merger analysis is dependent on the facts of a specific case and, as a result, these guidelines should not be interpreted as preventing the Commission from exercising its discretion to request information, or assessing other factors not indicated in this guideline, on a case-by-case basis.

2. DEFINITIONS

The following terms are applicable to these guidelines –

- 2.1. **"Acquiring Firm"** means an acquiring firm as defined in section 1(1)(i) of the Act;
- 2.2. **"Act"** means the Competition Act No. 89 of 1998, as amended;
- 2.3. **"Commission"** means the Competition Commission;
- 2.4. **"CAC"** means Competition Appeal Court;
- 2.5. **"Negative competition finding"** means a finding that a merger is likely to lead to a substantial prevention or lessening of competition;
- 2.6. **"Positive competition finding"** means a finding that a merger is not likely to lead to a substantial prevention or lessening of competition;
- 2.7. **"Small Business"** means a small business as defined in the Small Business Act;
- 2.8. **"Small Business Act"** means National Small Business Act, 102 of 1996;
- 2.9. **"Target Firm"** means a target firm as defined in section 1(1)(xxxiii) of the Act;
- 2.10. **"Transferred Firm"** means a transferred firm as defined in the Determination of Merger Thresholds and Method of Calculation Schedule to the Act dated 1 April 2009;
- 2.11. **"Tribunal"** means the Competition Tribunal.

3. INTRODUCTION

- 3.1. In the preamble to the Act, it is recognized that the South African economy must be open to greater ownership by a greater number of South Africans and that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.
- 3.2. With this in mind, the competition authorities are obliged in terms of section 12A(1) of the Act to consider both the impact that a proposed merger will have on competition in a relevant market and whether a proposed merger can or cannot be justified on public interest grounds.
- 3.3. Public interest issues have taken prominence in the recent past due largely to the high unemployment rate in the country and the state of the South African economy in general.
- 3.4. Certain key cases brought before the competition authorities sparked debate on the assessment standard for public interest issues. Whilst the CAC and the Tribunal have given valuable guidance in certain areas of public interest considerations, there is still a large area in respect of which the law remains undeveloped.
- 3.5. From its evaluation of previous mergers, the Commission has noted that parties to merger proceedings often provide insufficient information relating to public interest considerations, especially in relation to the proposed merger's likely effect on employment. Such deficiencies may result in delays in the Commission's evaluation of the merger as further information may have to be requested. The Commission may also not be able to take an informed decision in the absence of such required information.¹

¹ Para 103 of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (Case:18713)

4. OBJECTIVES

- 4.1. These guidelines seek to provide guidance regarding the Commission's analysis of mergers by indicating the approach the Commission is likely to follow and the types of information that the Commission may require when evaluating the public interest considerations in terms of section 12A(3) of the Act.

5. LEGISLATIVE FRAMEWORK

- 5.1. These guidelines have been prepared in terms of section 79 of the Act which provides that:

"(1) The Competition Commission may prepare guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of the Act.

(2) A guideline prepared in terms of section (1) –

(a) must be published in the Gazette, but

(b) is not binding on the Competition Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretion, or their interpretation of this Act."

- 5.2. The established approach to merger regulation is to analyse the effect of a merger on competition as required in terms of the Act and to consider the effect of the merger on public interest grounds. In its consideration, the Commission may approve the merger without conditions, with public interest conditions or prohibit the merger on public interest grounds.

- 5.3. Section 12A of the Act, sets out the manner in which the Commission is required to consider a proposed merger.

"(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to

substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and –

(a) If it appears that the merger is likely to substantially prevent or lessen competition, then determine –

- (i) Whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and off-set, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and
- (ii) Whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or

(b) Otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)".

5.4. Section 12A(1) above sets out three separate but interrelated enquiries that the Commission must engage in:

- (i) Determine whether the merger is likely to substantially prevent or lessen competition;
- (ii) If the enquiry reveals a substantial lessening of competition, then determine whether there are any technological, efficiency or pro-competitive gains that would outweigh the negative competitive effects, and whether there are any substantial public interest considerations that could justify permitting or refusing the merger;
- (iii) Notwithstanding the conclusion of the enquiry in (i) or (ii) above, assess whether the merger can or cannot be justified on substantial public interest grounds as set in Section 12A(3) of the Act.

5.5. With respect to the public interest enquiry itself, there are two lines of enquiry that follow from the above. In the first line of enquiry, following from a negative competition finding, the Commission must determine whether there are any substantial positive public interest

grounds that could justify the approval of the anti-competitive merger. This means that the Commission could approve an anti-competitive merger if there are substantial merger specific positive public interest grounds that justify the approval of the merger. This requires a balancing of competition and public interest issues and is dealt with on a case by case basis.

5.6. In the second line of enquiry, following from a positive competition finding, the Commission is required to consider whether the merger raises any substantial negative public interest effects. In this case, the Commission may prohibit a merger if it is established that the merger raises substantial negative public interest effects, or impose conditions to remedy the substantial negative public interest effect arising from a merger even if the merger has a positive competition effect. This again requires a balancing of competition and public interest issues and is dealt with on a case by case basis.

5.7. The public interest considerations as stated in section 12A(3) of the Act are:

"When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

(d) the ability of national industries to compete in international markets."

5.8. The general approach that the Commission will follow and the information that the Commission is likely to require relating to each of the above public interest considerations is discussed below.

6. GENERAL APPROACH TO ASSESSING PUBLIC INTEREST PROVISIONS

- 6.1. The Commission in general will adopt the following steps when analysing each of the above public interest provisions:
- 6.1.1. determine the likely effect of the merger on the listed public interest grounds;
 - 6.1.2. determine whether such effect, if any, is merger specific. Merger specific or merger specific effect is a public interest effect that is causally related to, or results or arises from, the merger.
 - 6.1.3. determine whether such effect, if any, is substantial;²
 - 6.1.4. in the first line of enquiry referred to above, substantiate the likely positive effects to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry can be justified which may result in the approval of the merger, with or without conditions; and
 - 6.1.5. consider possible remedies to address the substantial negative public interest effect.
- 6.2. In applying this approach, where an effect is found to be non-merger specific, the enquiry will generally stop at that stage. Likewise, where an effect is found to be merger specific but not substantial, the enquiry will generally stop at that stage.
- 6.3. In the first line of public interest enquiry following from a negative competition finding, the Commission will consider what the effects on the public interest are. If there are positive public interest effects, the Commission will assess whether the claimed positive effects are merger specific and substantial such that the claimed positive effects could justify the approval of the anti-competitive merger. In such an instance, the merging parties will be given the opportunity to substantiate the substantial positive effects on public interest.

² Section 12A 1(b) of the Act.

- 6.4. In the second line of enquiry following from a positive competition finding, the Commission will determine what the public interest effects are. If the public interest effects are positive, then the enquiry will stop. The Commission is likely to approve such a merger without conditions.
- 6.5. Following from a positive competition finding and if the public interest effects are negative, the Commission will proceed to determine whether these are merger specific and substantial. If such effects are merger specific and substantial, the merging parties will be given an opportunity to provide arguments and information to justify any substantial negative public interest effects and ultimately this may lead to the approval of the merger. Where the arguments do not justify the negative public interest effects and approval of the merger, the Commission may consider imposing remedies or prohibiting the merger depending on the substantiality of the public interest effects.

7. THE EFFECT ON A PARTICULAR INDUSTRIAL SECTOR OR REGION

7.1. In general, when assessing the likely effect of a merger on a particular industrial sector or region, the Commission will consider the entire value chain within the relevant sector or region.

7.2. As a general approach, when assessing the impact of the merger on a particular industrial sector or region, the Commission will perform the following analysis:

- Step 1: determine the likely effect of the merger on the industrial sector or region;
- Step 2: determine whether the likely effect on the industrial sector or region is merger specific;
- Step 3: determine whether the likely effect on the industrial sector or region is substantial;
- Step 4: in the first line of enquiry referred to above, substantiate the likely positive effects to justify the approval of the merger or provide information or arguments on whether the likely negative effect in the second line of enquiry can be justified which may lead to the approval of the merger, with or without conditions; and
- Step 5: consider possible remedies to address the substantial negative public interest effect on the industrial sector or region.

7.2.1. Step 1: Determining the likely effect on the industrial sector or region

7.2.1.1. In this regard, the Commission may consider *inter alia* the following:

- a. impact on local production or manufacturing, for example, closure of existing local production facilities or opening of new production facilities and/or substitution of locally produced goods with imports.
- b. impact on local or regional supply chains, including termination of supply or development of local supply chains.
- c. impact on important social projects, and upliftment programs that contribute to upliftment of the region or sector.
- d. impact on local resources or inputs, for example, whether the merger results in the movement or diversion of local resources to international markets or the creation of opportunities to benefit local resources.
- e. impact on regional sustainability.
- f. impact on public policy goals.

7.2.2. Step 2: Determining whether the likely effect on the industrial sector or region is specific to the merger

7.2.2.1. When determining whether the effect is merger specific, the Commission will consider whether the effect is causally related to, or results or arises from, the merger.

7.2.3. Step 3: Determining whether the likely effect on the industrial sector or region is substantial

7.2.3.1. When assessing the substantiality of the effect on a particular industrial sector or region, the Commission will in general consider the following factors:

- a. the importance and strategic nature of the relevant products to the sector or region, and of the sector or region to the broader economy.

- b. the importance to a sector or region of social projects and upliftment programs undertaken by the firms;
- c. the extent of the consequences on the sector and related sectors in the entire value chain;
- d. whether the sector in question involves or influences any constitutionally entrenched rights;
- e. whether the merger impedes or contributes towards any public policy goals that are relevant to that sector or region; and/or
- f. the importance of a firm to the sector or region and the benefits that flow from that firm to that sector or region.

7.2.3.2. Generally, the Commission may consider as substantial:

- a. where the ramifications arising from the merger's impact upon the primary market under consideration are far reaching and flow beyond that market and sector;
- b. The merger impedes or contributes towards public policy goals that would have far reaching consequences for the sector as a whole;
- c. The impact on the region would threaten that region's livelihood and sustainability or allow for its continued livelihood and sustainability;
- d. Where the sector under consideration is one where the goods or services traded involve or influence constitutionally entrenched rights; and
- e. The impact or effect must be of such magnitude and scale that if unleashed, would be irreversible and cannot be undone.

7.2.4. Step 4: Considering possible substantiation of positive public interest effects in the first line of enquiry and arguments for the justification of negative public interest effects in the second line of enquiry which may result in the approval of the merger, with or without conditions.

- 7.2.4.1. The Commission will provide an opportunity to the merging parties to substantiate positive effects to justify the approval of a merger given the substantial negative effects arising from the merger on an industrial sector or region.
- 7.2.4.2. The Commission may consider any public interest argument in justification of the substantial negative effect arising as a result of the merger on an industrial sector or region.
- 7.2.4.3. Types of arguments that the Commission may consider in justifying the approval of the merger include, inter alia, merger-specific investment and/or job creation in another sector or region.
- 7.2.5. Step 5: Determining the appropriate remedy to address any likely negative effect on the industrial sector region
- 7.2.5.1. The Commission will consider the appropriate remedy on a case by case basis.
- 7.2.5.2. Possible remedies that may be considered include:
- a. continued investment into the domestic supply chain, which may include but is not limited to, setting up new local production facilities and establishing funds or other initiatives to develop local production in the relevant value chain;
 - b. maintaining or expanding local production facilities;
 - c. the obligation to continue supply to local producers, and/or
 - d. the obligation to continue sourcing from local suppliers.

8. THE EFFECT ON EMPLOYMENT

8.1. As a general approach, when assessing the likely impact of a merger on employment, the Commission will perform the following analysis:

Step 1: determine the likely effect of the merger on employment;

Step 2: determine whether any identified effect on employment is specific to the proposed merger;

Step 3: determine whether the likely effect on employment is substantial;

Step 4: in the first line of enquiry referred to above, substantiate the likely positive effects to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry can be justified which may lead to the approval of the merger, with or without conditions, and

Step 5: consider possible remedies to address the likely substantial negative effect on employment.

8.1.1. Step 1: Determining the likely effect on employment

8.1.1.1. The merging parties must declare all proposed retrenchments, irrespective of whether they contend that these are due to the merger or due to operational reasons.³

8.1.1.2. In determining the effect on employment, the Commission's primary consideration will be the direct effect on employment within the merging parties.

³ Para 109-110 of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (case:18713)

- 8.1.1.3. In determining this effect, the Commission will consider, *inter alia*, the overall nature of the transaction, including the extent of overlap and duplication in the merging parties' activities, the rationale of the transaction, and the intention of the parties relating to employment and the target business, and any plans to create further employment opportunities within the merged entity.
- 8.1.1.4. As a secondary consideration, the Commission will also consider the likely indirect effect of the merger on the general level of employment in a particular industrial sector or region.
- 8.1.1.5. In assessing this effect, the Commission will consider whether the merger impacts on the level of employment post-merger due to, *inter alia*, job creation or loss of job opportunities, duplications, cost cutting measures, cancellation of supply/distribution arrangements, and/or relocation of offices, plants and facilities.
- 8.1.2. Step 2: Determining whether any identified effect on employment is specific to the proposed merger
- 8.1.2.1. In general, the Commission will accept those retrenchments or employment opportunities declared by the merging parties to arise from the merger, as being merger specific.
- 8.1.2.2. The Commission will assess the merger specificity of retrenchments when merging parties claim that retrenchments are not merger related or when parties are relying on this argument to approve an anti-competitive merger.
- 8.1.2.3. Where retrenchment proceedings by the Target Firm or Transferred Firm or the Acquiring Firms are proposed or initiated in terms of the Labour

Relations Act 66 of 1995, shortly before the proposed merger is notified, or are to be proposed or initiated shortly after the merger approval date, the merging parties should inform the Commission of such retrenchments.⁴

8.1.2.4. For purposes of the previous paragraph, the Commission will generally consider an appropriate pre-merger period to be the time from the initiation of merger discussions to the date of filing, and an appropriate post-merger period to be one year following the merger approval date.

8.1.2.5. The Commission will determine whether the alleged effect on employment is merger specific.

8.1.2.6. In general, when assessing whether retrenchments or employment creation is merger specific, the Commission will consider whether the proposed employment effects are in any way linked to the intentions, incentives, policies, rationale and decisions of the acquiring group.

8.1.2.7. The Commission will also consider the counterfactual and whether the retrenchments or employment creation would have occurred in any event absent the merger or were unavoidable.

8.1.3. Step 3: Determining whether the likely effect on employment is substantial

8.1.3.1. The substantiality assessment will in general involve the consideration of the following factors, where applicable:

⁴ *Walmart Stores Inc. and Massmart Holdings Limited* 110/CAC/Jul11 and 111/CAC/Jul11

- a. the number of employees that are likely to be affected relative to the affected workforce;
- b. the affected employees' skill levels. The Commission will consider information on the affected employees' qualification, experience, job grade, job description and position within the organization in determining the skill level.
- c. the likelihood of the employees being able to obtain alternative employment in the short term considering various factors. In this regard, the Commission may assess the possibilities for redeployment within the merged entity, the natural attrition rate within the merging parties, the type of skills and their transferability to other industries and businesses, the economics of the region and the opportunities for re-employment in the region.
- d. the nature of the sector relevant to the employment effect, including whether the sector employs largely unskilled employees, the unemployment rate in the sector, whether the sector is experiencing a trend of retrenchments, whether the sector is a mature or declining sector; and whether the sector is an emerging sector which would suggest future employment opportunities; and
- e. The predominant nature of employment by the acquiring firm for example, whether the parties employ seasonal or permanent employees, and/or are engaged in a business that involves bidding or contracting.

8.3.1.2. The Commission will consider substantiality on a case by case basis and may exclude management employees from the affected number of employees should it view these employees as having alternative employment prospects in the short term.

8.3.1.3. Following from the first line of enquiry, the Commission will consider as substantial a large number of job opportunities created for unskilled or semi-skilled employees in particular markets or sectors vulnerable to job losses.

8.3.1.4. Following from the second line of enquiry, generally, the Commission will consider as substantial, a large number of job losses and/or where the affected class is comprised of unskilled and semi-skilled employees, and/or where there are no short term prospects of re-employment for a large portion of the affected class.

8.1.4. Step 4: Considering possible arguments in justification of the approval of the merger

8.1.4.1. The Commission will provide an opportunity to the merging parties to substantiate on positive effects or to submit arguments to justify the substantial negative effects arising from the merger on employment.

8.1.4.2. The Commission will consider the following in analysing such representations made in respect of a negative effect:

- a. whether a rational process has been followed to arrive at the determination of the number of jobs to be lost; that is, whether there is a rational link between the number of jobs proposed to be shed and the reasons for the job losses/reduction;⁵
- b. whether the merger specific substantial job losses are justified by an equally weighty and countervailing public interest;⁶

⁵ *Metropolitan Holdings and Momentum Group Limited (41/LM/Jul 10)*, paragraph 69.

⁶ *Metropolitan Holdings and Momentum Group Limited (41/LM/Jul 10)*, paragraph 69 -72.

- c. whether the merging parties have provided full and complete information to the Commission and sufficient information to the employees to enable them to consult fully on all issues.⁷
- 8.1.4.3. The parties will need to meet all three requirements for the Commission to accept their submissions as justifying the negative effect arising from the merger.
- 8.1.4.4. Where the merging parties submit a public interest justification for the job losses, the Commission may accept the following as countervailing public interest arguments.⁸
- a. the merger is required to save a failing firm. Such information should generally be submitted in conjunction with a failing firm defence in terms of Schedule 4.13 of the Form CC4(2);
 - b. where the merger is required because the firms will not be competitive unless they can lower their costs to be as efficient as their competitors and these can only be attained by employment reduction through the merger; or
 - c. where the merger will lead to lower prices for consumers because of the merged entity's lower cost base, and this lower cost base can only come about or is materially dependent upon the proposed employment reduction.⁹
- 8.1.4.5. Where parties make submissions on how they arrived at the proposed figure for retrenchment, this should not be arbitrary, random or a guess estimate.¹⁰ A

⁷ *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (Case: 18713), paragraph 107-110.

⁸ *Metropolitan Holdings and Momentum Group Limited* (41/LM/Jul 10), paragraph 77.

⁹ *Metropolitan Holdings Limited and Momentum Group Limited* (41/LM/Jul10)

¹⁰ *Metropolitan Holdings Limited and Momentum Group Limited* (41/LM/Jul10)

simple task of comparing the parties list of employees or making assumptions on the likely job losses will not suffice.

8.1.4.6. Failure to show that a rational process has been followed in determining the likely effect on employment will generally result in the Commission making an adverse finding.

8.1.5. Step 5: Determining the appropriate remedy to address the identified effect on employment

8.1.5.1. The Commission will consider the appropriate remedy on a case by case basis.

8.1.5.2. To address the likely employment effects relating to a proposed merger, the Commission may consider the following remedies:

- a. restricting or capping the number of job losses;
- b. staggering the number of job losses over a period of time;
- c. placing a moratorium on job losses for a period of time;
- d. providing funding to reskill affected employees in order to improve their prospects of obtaining alternative employment within a short period of time;
- e. providing counselling and guidance on applying for alternative employment;
- f. obliging the parties to re-employ or give preference to affected employees should positions become available; and
- g. creating jobs as proposed by the merging parties.

9. THE ABILITY OF SMALL BUSINESSES, OR FIRMS CONTROLLED OR OWNED BY HISTORICALLY DISADVANTAGED PERSONS, TO BECOME COMPETITIVE

9.1. In general, when assessing the likely effect on the ability of small businesses ("SMEs") or firms controlled by historically disadvantaged persons ("HDIs") to become competitive, the Commission will follow the approach below:

Step 1: determine the likely effect on the ability of SMEs and HDIs to become competitive;

Step 2: determine whether any likely effect on the ability of SMEs and HDIs to become competitive is specific to the proposed merger;

Step 3: determine whether the likely effect of the merger on the ability of SMEs and HDIs to become competitive is substantial;

Step 4: in the first line of enquiry referred to above, substantiate the likely positive effects to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry can be justified which may lead to the approval of the merger, with or without conditions.

Step 5: consider possible remedies to address the substantial negative or positive effect on the ability of SMEs and HDIs to become competitive.

9.1.1. Step 1: Determining the likely effect of the merger on the ability of SMEs and HDIs to become competitive

9.1.1.1. In analyzing this provision, the Commission will determine whether the merger has an impact on any of the following factors that may have an impact on the ability of SMEs and HDIs to compete, among others:

- a. Entry conditions or expansion opportunities within a market including raising or lowering barriers to entry or expansion;
- b. prevents or grants access to key inputs; pricing and supply conditions with respect to volume, discounts, quality, and services that are defensible having regard to prevailing market circumstances;
- c. denies or grants access to suppliers;
- d. prevents or allows training, skills upliftment and development in the industry; and
- e. denies or grants access to funding for business development and growth.

9.1.2. Step 2: Determining whether any effect on the ability of SMEs and HDIs to compete is merger specific

9.1.2.1. In analyzing this provision, the Commission will determine whether the identified effect on SMEs and HDIs is causally related to, or results or arises from, the merger.

9.1.3. Step 3: Determining whether the likely effect of the merger on the ability of SMEs and HDIs to become competitive is substantial

9.1.3.1. In analysing this provision, the Commission will in general consider:

- a. whether the affected SMEs or HDIs are impeded from or allowed to compete in the relevant market such that their impediment restricts or participation promotes dynamic competition, innovation and growth in the market.
- b. whether such impediment limits the growth and expansion of SMEs and HDIs and their participation in the relevant market or adjacent markets or their ability to compete allows them to expand in the relevant market or adjacent markets.
- c. whether the effect has an impact on other public interest factors such as employment and the industrial/sector or region.

- 9.1.3.2. Where a merger has the effect of restricting or promoting dynamic competition by significantly impeding or allowing the development and expansion of SMEs and HDIs that exert a competitive constraint in relevant markets, and where the merger significantly impedes or promotes the expansion of SMEs and HDIs in adjacent markets and/or resulting in other public interest concerns or benefits, these effects will be considered as substantial.

9.1.4. Step 4: Considering likely arguments in justification of the approval of the merger

- 9.1.4.1. The Commission will provide an opportunity to the merging parties to substantiate the positive effects or to submit arguments to justify the substantial negative effects arising from the merger on the ability of SMEs and HDIs to become competitive.

- 9.1.4.2. In analysing representations made in respect of the negative effects, the Commission will consider whether there is any public interest justification for the negative effect on SMEs and HDIs.

- 9.1.4.3. Some examples that the Commission may consider include: lower prices for consumers, expansion to new product ranges and more choice for consumers, investment in new plant or local industry or region.

9.1.5. Step 5: Determining the appropriate remedy to address the identified negative effect on the ability of SMEs and HDIs to become competitive

- 9.1.5.1. The Commission will consider the appropriate remedy on a case by case basis. These could include, among others, the following:

- a. establishing a supplier development fund for technical and financial support and assistance of SMEs and HDIs;
- b. establishing skills development and training programs; and/or
- c. obliging parties to continue access and supply.

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10. THE ABILITY OF NATIONAL INDUSTRIES TO COMPETE IN INTERNATIONAL MARKETS

10.1. As a general approach, when assessing arguments in support of this position, the Commission will follow this process:

Step 1: determine the likely effect of the merger on the ability of national industries to compete in international markets;

Step 2: determine whether the likely effect on the ability of national industries to compete is merger specific;

Step 3: determine whether the likely effect on the ability of national industries to compete is substantial;

Step 4: In the first line of enquiry referred to above, substantiate on the likely positive effects to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry can be justified which may lead to the approval of the merger, with or without conditions; and

Step 5: Consider possible remedies to address the substantial negative public interest effect on the ability of national industries to compete in international markets.

10.1.1 Step 1: Determining the likely effect on the ability of national industries to compete

10.1.1.1. When assessing the impact of the merger on the ability of national industries to compete in international markets, the Commission will consider the following factors, amongst others:

- a. the nature/structure of the industry and the market dynamics within the industry.
- b. the nature and size of the firm relative to the domestic economy and other world producers;

- c. whether a change in productive capacity is required in order for the merged firm to compete globally against other firms;
- d. the policy considerations that are relevant to the sector; and
- e. the strategy of the merging firms in relation to international competition.

10.1.2. Step 2: Determining whether the likely effect on the ability of national industries to compete is merger specific

10.1.2.1. When analyzing whether the effect on the ability of national industries to compete is merger specific, the Commission will consider the extent to which, absent the merger, the merging firms would be able to compete in international markets.

10.1.2.2. The Commission will pay particular attention to whether economies of scale or increased production could have been attained without the merger.

10.1.3. Step 3: Determining whether the likely effect of the merger on the ability of national industries to compete is substantial

10.1.3.1. When assessing the substantiality of the effect of a merger on a national industry's ability to compete in international markets, the Commission will consider, amongst other factors:

- a. the role and importance of the national industry in the South African market;
- b. the role and importance of the national industry or sector in the international market/s;
- c. the relative structure and size of the national industry or sector by international standards;
- d. the extent of the consequences on the sector should the national industry's ability to compete in international market/s be hindered; and

- e. whether the merger impedes on any related public policy goals and relevant industrial policies in relation to the national industry in question.

10.1.4. Step 4: In the first line of enquiry referred to above, substantiate on the likely positive effects to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry can be justified which may lead to the approval of the merger, with or without conditions.

10.1.4.1. Where the ability of national industries to compete in international markets will result in positive economic effects/benefits that flow back to the domestic economy, the Commission is likely to consider these to be substantial.

10.1.4.2. These effects could include further investment in the domestic economy, job creation opportunities, the introduction of improved/advanced technologies and better quality/service among others.

10.1.5. Step 5: Consider possible remedies to address the substantial negative public interest effect on the ability of national industries to compete in international markets.

10.1.5.1. Where the benefits to the domestic economy (efficiencies and public interest) expected to arise from the merger outweigh the negative competition effects, or where the merger raises substantial negative effects on the ability of national industries to compete in international markets, the Commission may consider imposing conditions to ensure that the positive outcome from the merger flows back to the domestic economy or that negative effects do not prevent firms from competing internationally.

10.1.5.2. The Commission may consider the following remedies, among others:

- a. obliging merging parties to invest within a specified time period;
- b. obligation to create jobs;
- c. obligation to introduce new products and technology; and
- d. training, re-skilling or skills upliftment programs.

11. DISCRETION

The above guidelines present the general methodology that the Commission will follow in assessing public interest issues in merger analysis. Notwithstanding the above, this will not fetter the discretion of the Commission to consider other factors on a case-by-case basis should a need arise.

12. EFFECTIVE DATE AND AMENDMENTS

These guidelines become effective on the date indicated in the Government Gazette and may be amended by the Commission from time to time.