December 4, 2023

The Competition Commission of South Africa
Mergers & Acquisitions Division
Attention: Ms Phillipine Mpane
Email: phillipinem@compcom.co.za

South Africa: Comments on the Draft Amended Public Interest Guidelines relating to Merger Control

Dear Ms. Mpane,

We have great pleasure in enclosing a submission prepared by the Mergers Working Group of the Antitrust Section of the International Bar Association in response to the public consultation process initiated by the Competition Commission of South Africa on the Draft Amended Public Interest Guidelines relating to Merger Control.

The Co-Chairs and representatives of the Antitrust Section would be delighted to discuss the enclosed submission in more detail with the representatives of the Competition Commission of South Africa as appropriate.

Yours Sincerely,

Samantha Mobley
Co-Chair Antitrust Section

Janet Hui
Co-Chair Antitrust Section

1. Introduction

1.1 The IBA is the world's leading international organization of legal practitioners, bar associations and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at http://ibanet.org.

1.2 The IBA Antitrust Section, which is broadly representative of the global antitrust community, regularly makes submissions on developments related to the implementation and refinement of competition laws worldwide. The IBA's Antitrust Section includes antitrust and competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. The extensive and varied experience of its members places the Section in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The Working Group's contributions draw on the vast experience of the Section's members in merger control law and practice around the world.[1]

1.3 These comments have been prepared by the Section's Mergers Working Group (**MWG**) which includes members from various jurisdictions in the Americas, Europe, Africa and the Asia-Pacific region. Further information about the Section, including the submissions of the MWG and other working groups, is available at https://www.ibanet.org/unit/Antitrust+Section/committee/Antitrust+Section/3001.

2. General comments

2.1 The MWG welcomes the opportunity to provide comments on the Draft Amended Public Interest Guidelines on Merger Control (**Guidelines**).

2.2 These comments are limited to only certain aspects of the Guidelines, and in particular, the proposed approach to the assessment of section 12A(3)(e) of the Competition Act, No. 89 of 1998 (as amended) (**Act**). The MWG appreciates that this section of the Act is informed by socio-political factors and imperatives which are specific to South Africa. The main goal of

[1] Further information about the Antitrust Section and its Working Groups is available at: https://www.ibanet.org/LPD/AntitrustSection/Antitrust/Default.aspx.

the comments presented herein is to call the attention of the Competition Commission of South Africa (**CCSA**) to recommendations prepared by global organizations, such as the International Competition Network (**ICN**) (of which the Commission is a member) and the Organisation for Economic Co-operation and Development (**OECD**), that may contribute towards greater alignment of the Guidelines with international practice.

3. Best practice principles

3.1 As a general principle, the MWG encourages convergence toward best practices by all jurisdictions in terms of the development and operation of merger control regimes, and for this convergence to be rooted deeply in the principles of transparency, consistency, predictability, certainty and procedural fairness.

3.2 The ICN has issued Recommended Practices for Merger Analysis (the **ICN Recommended Practice Document**)[2], which the MWG considers to be an important indicator of best practices for all jurisdictions considering the implementation of new approaches that will have an impact on merger analysis, especially when those new approaches are envisaged to have far reaching impacts.

3.3 The core best practice principles are also reflected in the ICN's Guiding Principles for Merger Notification and Review (the **ICN Guiding Principles Document**).[3] In particular, the ICN Guiding Principles document highlights (inter alia) transparency as a key tenet of merger review in order to foster "*consistency, predictability, and fairness*".

3.4 Similarly, the recommended best practices by the OECD are also useful benchmarks by which merger rules, practices, and procedures can be measured.[4]

3.5 Merger review primarily involves an *ex-ante* assessment to guard against the potential negative outcomes of a transaction. The standard approach in merger review involves several key layers of analysis, and includes: (i) an assessment as to whether a potential adverse effect on competition is identified and a consideration as to whether the adverse effect is, as a matter of causation, **specific** to the merger (i.e. the test for merger-specificity); (ii) and then if so, whether the potential merger-specific adverse effect is likely to be substantial (i.e. the test for substantiality); (iii) and then where the potential for substantial

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2 Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf.

3 Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidingPrinciples.pdf.

4 Relevant materials are available at: https://www.oecd.org/competition/mergers/.

and merger-specific harm to competition is identified, whether there are any appropriate remedies proportionate to the harm may mitigate that adverse effect. The MWG recognises that the assessment framework in the Act insofar as competition assessment criteria are concerned, is structured in this manner.

3.6 Whilst the public interest assessment in merger control is unique and specific to only a few countries, including South Africa (where its application is generally more prevalent), the MWG submits that these universally understood principles for competition assessment should also be applied to the public interest analysis, thereby providing a sound economic framework for the examination of public interest factors under the Act. This approach, which is consistent with the position taken by both the ICN and OECD, can provide greater transparency, certainty and predictability, and when applied consistently, ensures that the merger assessment is procedurally fair. From a reading of the Guidelines, the CCSA, in most respects, appears to be supportive of this approach to merger analysis.

4. Specific observations on the CCSA's approach to section 12A(3)(e) of the Act

4.1 The Guidelines adopt the perspective that section 12A(3)(e) "*confers a positive obligation on merging parties to promote or increase a greater spread of ownership, in particular by HDPs* [i.e. historically disadvantaged persons] *and/or Workers in the economy*". The CCSA's point of departure, therefore, seems to be that "*all mergers are required to promote a greater spread of ownership*" and that "*[a] finding that a merger does not promote a greater spread of ownership…will inform the Commission's determination of whether the merger can or cannot be justified*" on substantial public interest grounds.

4.2 The Guidelines also envisage that where mergers result in negative empowerment outcomes (i.e. where a merger fails to promote ownership by HDPs), or even where they are neutral to empowerment outcomes, the imposition of a 5% employee share ownership scheme (**ESOP**) is a strict requirement to merger approval. Where ESOPs are not feasible, the Guidelines contemplate that the merging parties enter into transactions whereby they divest parts of their businesses to HDP shareholders or introduce HDP shareholders to hold no less than 25% + 1 share of the issued shares of the relevant entity, coupled ideally with controlling rights. Even where a merger is additive to empowerment outcomes, the Guidelines still suggest that at least a 5% ESOP could be required in all instances as a matter of policy.

4.3 In this context, the MWG offers the following comments:

4.3.1 While the MWG recognises that public interest considerations form a core part of the South African merger review structure, the MWG respectfully submits that public interest considerations, like competition considerations and remedies, should be narrowly tailored to address effects that are merger-specific. Accordingly, there ought not to be requirement that, as a positive obligation, for all transactions to advance policy objectives beyond the scope of that particular merger, where doing so is not necessary to address any identified adverse harm arising from the transaction. This principle was recognised at the OECD Roundtable on Public Interest Considerations in Merger Control, held on 20 March 2017 (OECD Roundtable). The Executive Summary of the findings of the Roundtable[5] noted that:

> *"… merger control requires a sufficient causal link between the merger and the alleged anticompetitive effects for a competition authority to intervene. Arguably, if public interest considerations are part of the assessment, they should also be merger-specific; that is, in case a merger is cleared or blocked on public interest grounds, these grounds need to be firmly linked to the likely effects of the specific merger. There is a risk that when applying public interest clauses, relevant authorities may address policy objectives going beyond the specific merger".*

4.3.2 The analytical framework of the Act should be followed to ensure that outcomes that are procedurally and substantively fair are achieved. Section 12A(1A) of the Act requires that the CCSA "*must … determine whether the* merger *can or cannot be justified on substantial public interest grounds by assessing the factors…*" listed in section 12A(3) the Act, without any identified prioritisation. Accordingly, the competition authorities should analyse each of these public interest factors individually, but ultimately make a determination on the effect of the merger on the public interest on a holistic basis. As such, there is no foundation on which to conclude that a transaction would not be capable of justification where it does not advance or promote a policy objective - let alone where there are no other substantial public interest grounds which suggest that the transaction results in negative public interest, or for that matter competition, outcomes.

4.3.3 As such, the MWG respectfully submits that the Guidelines intended approach to require empowerment commitments in all mergers, including mergers which have a neutral effect on section 12A(3)(e) as well as mergers which may already demonstrate a

[5] Available at: https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN5/FINAL/en/pdf.

positive effect on section 12A3(e), may deviate from both the principles of proportionality and merger-specificity.

4.3.4 Even where a potential merger-specific adverse effect on public interest is identified, it is necessary to determine whether that effect is likely to be substantial. Intervening only where there is likely to be a substantial adverse impact on public interest factors assists competition regulators in minimising the risk of false-positive findings and prohibiting mergers which are unlikely to be problematic from a broader competition / public interest perspective and could actually have positive benefits for the market / sector concerned and for the broader economy if implemented.

4.3.5 The MWG also notes that there may be different practical and innovative means to facilitate public interest outcomes, on a sustainable basis, in line with the broad requirements of section 12A(3) – ownership conditions or otherwise. The CCSA has a mandate which allows it to recognise different ways of achieving public interest outcomes, and to do so in a manner proportionate to any harm identified, whilst still balancing selling shareholder interests – especially those of HDP shareholders.

4.3.6 Remedies of the kind suggested by the CCSA ought to be reserved for mergers which make competition or the public interest worse. The approach suggested in the Guidelines seems to deviate from the principle - which is widely adopted by regulators around the world (and, to the extent the MWG is aware, also by the Competition Tribunal and the Competition Appeal Court in the past) – according to which merger assessment generally involves considering whether a merger "*makes things worse*" as opposed to an obligation on the part of merging parties to "*make things better*".[6] To be effective, competition authorities should require merger remedies directed at, and proportionate to, the competition and/or the public interest harm. In that sense, the ICN Recommended Practice Document states that:

> "*Agencies should only intervene to prohibit or remedy a merger when it is necessary to prevent anticompetitive effects that may be caused by that merger*".

4.3.7 This approach should apply equally to public interest goals.

6 See for example, ICN Merger Remedies Guide, 2016 (here).

5. **Conclusion**

5.1 The MWG appreciates the opportunity provided by the CCSA to comment on the Guidelines and will remain at the disposal of the CCSA to respond to any questions that the CCSA may have regarding these comments or provide additional information that may assist the CCSA to finalize the Guidelines.

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