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**Client Circular**
**October 2023**

# MERGERS AND PUBLIC INTEREST GUIDELINES

Since 1998, the Competition Act (the **Act**) has regulated merger activity. Large mergers need to be assessed and approved by the Competition Commission (the **Commission**) before they can be implemented.

Until February 2019, mergers were assessed only on their impact on competition.

This all changed in February 2019 when the Act was amended to state that the commission must also assess whether the merger can or cannot be justified on substantial public interest grounds.

The public interest factors have been set out in the Act and these include the effect of the merger on a particular industrial sector or region, employment, the ability of small and medium firms or firms controlled by historically disadvantaged persons (**HDPs**) to effectively enter into, participate in or expand within the market, the ability national industries to compete on international markets, and finally, the promotion of a greater spread of ownership in particular, by HDPs and workers in firms.

On 8 October, the Commission published amended guidelines on how it will assess public interest factors. The guidelines are critical to understanding the approach that the Commission will adopt in evaluating a merger. Comment is sought on the guidelines which must be submitted by 6 November 2023.

The Commission has now clarified that that competition factors have equal importance to public interest factors. The Commission is therefore no longer a body assessing mergers based on pure competition. Of course, what can be in the public interest, is a subjective process and the structuring of merger transaction documents now becomes much more difficult.

The first four public interest criteria are dealt with in the guidelines and it would be relatively easy to comply with them.

The last criteria is the promotion of a spread of ownership by HDPs and workers. Complying with this requirement could be more difficult. This is because the Commission stipulates that, unlike the other public interest factors, this factor confers a “positive obligation” on merging parties to promote a spread of ownership and/or workers in the economy. The Commission states:

“*Considering this, the Commission’s point of departure will be that all mergers are required to promote a greater spread of ownership.*”

It would therefore appear that this is the most important criteria in the assessment of a merger transaction. The transaction is likely to fail, if this criteria is not met.

The Commission states that even if the merger promotes ownership by HDPs, this does not preclude the obligation to consider increased ownership by workers, and vice versa. The Commission will consider a

number of factors including the number of shares or interest held, the value of the shares or interest, whether the shares or interest owned confer additional rights such as board representation, whether the shares or interest pertain to productive or passive assets and whether any increase in shares / interest held confer control.

The inclusion of workers in an ESOP owning shares in a company is of course something relatively new to South African practice. Employee ownership schemes are seen by the Government as vital to broad based transformation and re-igniting the South African economy. As the support for worker schemes intensifies, this will become more and more an issue to consider. The guidelines deal with ESOPs as a potential remedy to the issue of worker inclusion. It would seem that the Commission is looking for the worker inclusion to be at about 5% of the merged entity.

The ESOP may be a trust or the allocation of shares for workers in a registry maintained by the company secretary. Workers should not be required to participate in an ESOP. Expenses incurred in the ESOP should be paid by the company. The board of trustees needs to be independent with at least one trustee appointed by workers and one independent trustee. In the ESOP, all current and future workers should be eligible and maternity leave should not have an adverse effect on qualifying criteria.

On the funding of the ESOP, the merged entity should provide some vendor finance which should be interest free. A dividend policy should be introduced to provide for a trickle dividend in the ratio of at least 35:65 meaning that at least 35% of any dividends declared must flow to beneficiaries and at most, 65% may be utilised to service the vendor financing.

The draft guidelines are far reaching. They represent a significant intrusion on the private sector's ability to manage their own affairs. Many of the provisions or insertions appear to be arbitrary and to satisfy a particular political agenda.

The guideline are published under Section 79 of the Act. This section states that the Commission must publish a draft and invite comment within a reasonable period. Once adopted, the guideline is not binding but any person interpreting or applying the Act must take it into account.

The merger approval process is becoming more complex and subjective.

Should you require advice or assistance, please contact Michael Jackson on 031 – 536 8512, email: mjackson@coxyeats.co.za,

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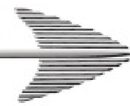

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