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Pre-merger filing consultation guidelines

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Persons Responsible:

Mpumelelo Tshabalala

Luke Rennie

Londiwe Senona

Ndivhuwo Moleya

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, *inter alia*, empowers and authorises the Competition Commission ("Commission") to prepare, amend, replace, and issue guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act. Guidelines are not binding on the Commission, the Competition Tribunal ("Tribunal"), or the Competition Appeal Court in the exercise of their respective discretion and their interpretation of the Act but should be taken into account when interpreting or applying the Act.[1]

1.2. The Commission continuously assesses the efficiency of its processes, in order to, *inter alia*, streamline and improve its processes, and contribute to minimising regulatory costs. The Commission has reviewed its merger filing and review processes and has identified various opportunities to improve the efficiency of merger review processes.

1.3. The Commission has identified particular, interrelated areas of improvement that include the following:

1.3.1. First, where remedies are appropriate, but the merger is filed without a tender of appropriate conditions, this may lead to delays in the merger assessment process occasioned by the need to ascertain and frame appropriate conditions. If *appropriate* remedies are tendered upfront in the merger filing, this may focus the merger assessment process and facilitate an expeditious review.

1.3.2. Second, the more complex the competition issues are, the more time required for assessment. Merger parties may consult the Commission on the level of detail that may be required in framing a competitive assessment. It is usually helpful in complex transactions for the merger

[1] Section 79(4) of the Act.

parties to file a detailed, comprehensive and objective competitive assessment canvassing all the relevant markets likely to be impacted by the proposed merger transaction. If a competitive assessment is not objective and balanced this may negate its benefit in facilitating an expeditious review.

1.3.3. Third, merger transactions that raise significant public interest concerns can also occasion delays. These include merger transactions with potential for large-scale retrenchments or where prior retrenchments have been effected; merger transactions that do not promote the greater spread of ownership by historically disadvantaged persons ("HDPs") and workers where remedies may be required; and merger transactions that may negatively affect local supply chains, or result in an increase in prices, thus affect, *inter alia*, access to essential goods and services such as access of healthcare.

1.3.4. Fourth, the Commission has also identified that transaction advisors and/or business rescue practitioners ("BRPs"), due the nature of such transactions, may not sufficiently account for the requirements of the South African merger control regime in selecting purchasers. As a result, they often select potential purchasers or acquirers that may raise competition concerns, lengthening the merger evaluation process.

1.4. To address these issues, the Commission identified the need to establish and implement a process to facilitate the expeditious assessment of merger transactions. As such, the Commission has decided to establish a voluntary, informal, non-binding, and confidential pre-merger filing consultation process. The aim of this process is to facilitate the efficient and timely assessment of merger transactions once they are formally filed.

1.5. It is envisaged that the "pre-merger filing consultation" (or "consultation") process may, in the specific circumstances outlined in these Guidelines, help streamline the merger filing process. A consultation process would enable a discussion between the Commission and potential merger parties about what issues are

likely to emerge during the merger consideration and, in certain instances, whether the parties should begin considering conditions that may resolve the likely issues. This may ensure an expeditious merger assessment once the filing has been formally notified to the Commission.

1.6. These Guidelines are not intended to be applied mechanically and the Commission recognises that merger analysis is dependent on the facts of a specific case and, as a result, these Guidelines should not be interpreted as derogating from the Commission's investigative powers by, *inter alia*, exercising its discretion to request information, or assess all factors whether or not they were canvassed during the pre-merger filing consultation.

2 DEFINITIONS

2.1. Unless the context indicates otherwise, the following terms are applicable to these Guidelines:

2.1.1. "**Acquiring Firm**" means a firm —

(a) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;

(b) that has direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a); or

(c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b);

2.1.2. "**The Act**" means the Competition Act No. 89 of 1998, as amended;

2.1.3. "**BRP**" means business rescue practitioner;

2.1.4. "**The Commission**" means the Competition Commission of South Africa, a juristic person established in terms of section 19 of the Act,

empowered to regulate competition matters in accordance with the Act;

2.1.5. "**Commission Rules**" means the Competition Commission Rules published under Government Notice 1 in Government Gazette 22025 of 1 February 2001, as amended;

2.1.6. "**Consultation**" shall have the same meaning as pre-merger filing consultation.

2.1.7. "**Guidelines**" mean these guidelines which have been prepared and issued in terms of section 79(1) of the Act;

2.1.8. "**Merger Filing"** means the adequate and complete filing as prescribed in terms of Commission Rules 26 - 30.

2.1.9. "**Merger Parties**" means both the Acquiring Firm and the Target Firm;

2.1.10. "**Pre-Merger Filing Consultation"** means a voluntary, informal, non-binding and confidential process initiated before the formal filing of a merger notification, through which merger parties or sellers may engage with the Commission to seek preliminary guidance or clarity on the merger filing, investigation and consideration process, as envisaged in sections 5 and 6 of these Guidelines, with the aim of facilitating compliance with legal requirements and promoting an efficient and timely review once the merger is formally filed.

2.1.11. "**Seller**" means the entity or agent authorised to dispose of the target firm, including investment banks and BRPs;

2.1.12. "**Target Firm**" means a firm—

(a) the whole or part of whose business would be directly or indirectly controlled by an acquiring firm as a result of a

transaction in any circumstances set out in section 12 of the Act;

(b) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring firm; or

(c) the whole or part of whose business is directly or indirectly controlled, by a firm contemplated in paragraph (a) or (b);

2.1.13. "**Tribunal**" means the Competition Tribunal of South Africa, a juristic person established in terms of section 26 of the Act empowered to adjudicate competition matters in accordance with the Act.

2.2. These Guidelines shall be read together with the Act, including the definitions so defined under the Act. In the event that there is a conflict between the Act, and these Guidelines, the Act shall prevail.

3. INTRODUCTION AND OBJECTIVES

3.1. These Guidelines establish a framework for pre-merger filing consultation with the aim of improving the efficiency of merger assessment processes. These Guidelines do not replace or substitute the provision for the issuance of non-binding advisory opinions under the Act. Any guidance provided by the Commission during consultation does not constitute legal advice or opinion for purposes of the Act. Where advice is sought as to whether a transaction constitutes a merger or whether it meets the financial thresholds for notifiable merger transactions, that advice should be sought by way of advisory opinion.

3.2. These Guidelines are general and are not market, sector, or industry specific.

3.3. In practice, the Commission has observed that certain issues often arise during the merger assessment process that could have been identified and addressed prior to the filing of a proposed merger transaction. For example, merger parties may be made aware at an earlier stage of the process what issues are likely to

emerge during the merger consideration and, in certain instances, be informed of the level of data required to expedite consideration of complex mergers, and whether the parties should begin considering potential conditions to remedy any likely issues. Another example may be where the seller of a target firm approaches the Commission when structuring a proposed transaction to determine what factors the Commission would consider in identifying whether the proposed transaction is likely to raise competition or public interest concerns which could prolong the merger assessment. This would then allow the seller to factor this into their final decision about the merger's structure.

3.4. The pre-merger filing consultation process is intended to provide an opportunity for merger parties and/or sellers to clarify such issues in a constructive manner before formal notification. By doing so, the Commission anticipates that the assessment of transactions, once filed, can proceed more efficiently and without unnecessary delays, thereby expediting the overall merger review process.

3.5. Any firm, or authorised representative of such firm proposing to enter into an acquisition, merger or amalgamation, as defined under section 12 of the Act, may seek pre-merger filing consultation with the Commission to discuss mergers raising complex competition issues and/or significant public interest concerns identified in these Guidelines.

4. THE MERGER FILING LEGAL FRAMEWORK

4.1. Merger control is regulated by chapter 3 of the Act and given effect to by, *inter alia,* the Commission Rules. The Act prevents the implementation of intermediate and large mergers without the necessary approvals being received, requiring that parties to intermediate and large mergers, notify such transactions to the Commission for investigation and assessment.[2]

[2] Where there exists an intermediate or large merger, section 13A of the Act, dictates that "[*a] party to an intermediate or large merger must notify the Competition Commission of that merger, in the prescribed manner and form*" (emphasis added). Section 13A(3) prevents a party to a merger from "*…implement[ing] that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17*."

4.2. The Act provides that the Commission may direct an inspector to investigate any merger, and may designate one or more persons to assist the inspector; and require any party to a merger to provide additional information in respect of the merger. Furthermore, any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant information in respect of that merger.[3]

4.3. The period of investigation and assessment is regulated by the Act. The commencement of the merger consideration timelines is linked to a merger *"notification*"[4] notified to the Commission in the "*prescribed manner and form".*[5] In the case of intermediate mergers the Commission has to make its determination within 20 days of all parties having fulfilled their prescribed notification requirements, subject to a single potential extension of 40 days.[6] Where the review period expires and the Commission has not issued a decision; the intermediate merger is deemed to have been approved.[7] The Commission is bound by the Act to publish its decision on the intermediate merger and issue reasons where it decides to conditionally approve or prohibit an intermediate merger.[8]

4.4. In the case of large mergers the Commission must make a recommendation (as to whether to approve, conditionally approve or prohibit the merger) to the Tribunal within 40 days of all parties having fulfilled their prescribed notification requirements.[9] The Commission can apply for an extension of the investigation

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[3] Section 13B.
[4] Commission Rule 29(1) states: "*The Initial Period for a merger begins on the business day following the date on which a merger notification was filed …*"
[5] Section 13A(1)
[6] Section 14 of the Act circumscribes the merger review process for intermediate mergers providing that *"[w]ithin 20 business days after all parties to an intermediate merger have fulfilled all their notification requirements in the prescribed manner and form, the Competition Commission…"* may either extend its review period (section 14(1)(a)) or decide to approve, conditionally approve or prohibit the intermediate merger (14(1)(b)).
[7] Section 14(2)
[8] Section 14(3).
[9] Section 14A of the Act circumscribes the Commission's merger investigation process for large mergers. The Commission has 40 business days within which to investigate a large merger and issue its reasoned recommendation for the approval, conditional approval or prohibition of the large merger (section 14A(1)(b)).

period from the Tribunal.[10] Where the merger investigation period expires and the Commission has not issued its recommendation "*any party to the merger may apply to the Tribunal to begin the consideration of the merger without a recommendation from the Commission*".[11] Upon receiving the Commission's referral and recommendation, or a merger parties' request for consideration of the merger in the absence of a Commission recommendation, the Tribunal must consider the merger and either approve the merger with or without conditions or prohibit the merger.[12]

4.5. Subsequent to notification, the Commission is required to investigate and assess the likely effects of mergers on (i) competition in any market, and (ii) the public interest, in terms of section 12A of the Act, and make a considered determination as to whether to approve (either conditionally or unconditionally) or prohibit the merger before it.

5. THE GUIDING PRINCIPLES

5.1. These Guidelines establish a pre-merger filing consultation process, which is made available to merger parties and sellers. The guiding principles of the pre-merger filing consultation process is that it is to be a process which is:

Voluntary

5.2. It is at the discretion of either of the acquiring or target firms, both merger parties jointly or the seller, to determine whether to initiate a pre-merger filing consultation process with the Commission. These parties may elect to cease or discontinue the consultation process at any time. However, the Commission retains the discretion not to participate in a pre-merger filing consultation process where it considers that the issues raised fall outside the scope of these Guidelines or are otherwise unsuitable for resolution through this consultation process.

[10] Section 14A(2).
[11] Section 14A(3).
[12] Section 16(2).

Informal

5.3. The pre-merger filing consultation process is intended to provide an opportunity for an open and frank discussion between the Commission and the merger parties and/or the seller about merger transactions that the merger parties intend to notify to the Commission. To enhance transparency during the pre-merger filing consultation process, the consultation process may be conducted in a manner that is most convenient to the merger parties or seller and the Commission; and may take place in person, by video/teleconference or other digital platforms, or by any other means that the Commission determines is most appropriate to enable the parties and the Commission to discuss in a candid, informal manner.

Confidential

5.4. To create an atmosphere conducive for candid and frank discussions, all discussions between the Commission and the merger parties or seller during the pre-merger filing consultation process will be conducted on a confidential basis. Confidentiality will be governed by the principles outlined in the Confidentiality Guidelines read together with the Act.

Non-Binding

5.5. The discussions emanating from the pre-merger filing consultation process are not binding on the Commission, the merger parties, the seller, the Tribunal and the Courts. Any guidance provided by the Commission during the pre-merger filing consultation process shall therefore not be binding on any party to the consultation, and does not intend to replace, or create a binding expectation of a finding and/or decision of the Commission during any portion of the subsequent section 12A merger assessment that may follow in the event of a merger filing. For the avoidance of doubt, the Commission’s communications with the merger parties or seller during the pre-merger filing consultation process cannot be understood to create any legitimate expectation nor constitute a decision, a final decision, or administrative action.

No hypothetical queries

5.6. The Commission will not convene a pre-merger filing merger consultation regarding hypothetical mergers or academic queries. Implicitly then the request for consultation by the merger parties or seller must include the necessary details for purposes of the consultation process (see below paragraph 6.1). Merger parties or sellers may be represented by legal advisors but the Commission recommends that at least one commercial/business representative must be present during the pre-merger filing consultation process as they are well placed to provide realistic, accurate information.

Commission discretion to extend consultations

5.7. Due to limited resources, the Commission will strive not to engage in more than one consultation regarding the same query. However, the Commission may exercise its discretion to engage in more than one pre-merger filing consultation process regarding the same query. In other words, the same parties are only allowed to approach the Commission once regarding the same query, unless the Commission deems it necessary to have further consultation.

Complexity

5.8. Given its stated aim to expedite the merger investigation and consideration process, logically, the merger transactions appropriate for the consultation process are those that raise complex competition issues and/or public interest considerations. Thus, the consultation process is only available to mergers classified as Phase II or Phase III mergers; namely mergers where the parties may overlap in their activities and may give rise to competition and/or public interest concerns and mergers where the parties have an overlap in activities and potentially high market shares post-merger.

6. THE PROCESS OF ENGAGING A PRE-MERGER FILING CONSULTATION

6.1. In initiating the pre-merger filing consultation process, the merger parties or seller engaged in a business sale process are required to write to the Commission formally and request a pre-merger filing consultation. The written request must include:

6.1.1. The relevant documentation outlining features of the proposed merger transaction.

6.1.2. Details of the merger parties' or seller's own competition assessment of the complexity of the proposed merger.

6.1.3. Details of the merger parties' or seller's query/ies.

6.1.4. Information about who from the merger parties or seller will be in attendance at the consultation.

6.1.5. Provision of dates and times on which representative(s) of the merger parties or the seller are available for consultation in the following 10 business days.

6.2. Duly made written requests will be allocated a query number in order to provide for the tracking of its progression.

6.3. The consultation will be scheduled for the next mutually convenient date and time for both the Commission and the merger parties or seller.

6.4. During the pre-merger filing consultation, the Commission will provide guidance in response to the query/ies raised by the merger parties or seller in their request for a pre-merger filing consultation and may ask any further questions to either of the merger parties and seller about the proposed merger transaction. Post the initial, first consultation there may be the need to provide the Commission with further information or have further consultations. The need for further consultations is at the Commission's discretion and will depend on the complexity of the query raised or the complexity of the proposed merger transaction.

6.5. Consultations will be deemed to have lapsed at the filing of a proposed merger transaction (albeit may be in a different form).

7. THE TRANSACTIONS RECOMMENDED FOR PRE-MERGER FILING CONSULTATION

7.1. The Commission's position in terms of these Guidelines is that the issues on which a pre-merger filing consultation may be requested by merger parties or sellers should be pre-determined and limited to certain circumstances that are known by the Commission to prolong the Commission's assessment of merger transactions. For other queries, merger parties may approach the Commission under the advisory opinion framework.

7.2. Transactions recommended by the Commission for pre-merger filing consultations are, merger transactions requiring remedies; mergers raising complex competition and/or public interest issues; and transactions where a seller, like a BRP, has not taken into account the impact on competition of a purchaser or transaction structure raising significant competition or public interest issues and one of the firms is raising failing firm arguments or is a flailing firm.

Merger transactions requiring remedies

7.3. In certain instances, it is clear upfront that a merger transaction raises some competition or public interest issues and it is also apparent that these issues can be addressed through appropriate conditions. In such circumstances the merger parties may pro-actively tender appropriate conditions aimed at addressing any potential concerns and consult the Commission on the appropriateness of the conditions prior to filing. In order to secure an expeditions review, the proposed conditions must adequately and effectively address the likely harm to the competitive process or public interest that may arise from the proposed transaction. If the proposed conditions are insufficient or hollow this may negate the benefit of the pre-merger consultation process. This process does not detract from the fact that during the investigation the Commission still has to consider

the appropriateness of the conditions, as the testing of the conditions with market participants must be conducted during the investigation.

Mergers raising complex competition issues

7.4. Mergers with complex competition issues include merger transactions involving mergers between competitors in which the merger parties have high combined market shares; those that result in a merger to monopoly; those that entrench concentration in the relevant markets; those that will remove a significant competitor from the relevant markets; those involving acquisitions of unique or non-replicable assets (e.g. essential infrastructure) by large market players that could necessitate remedies, including divestiture; those that create, enhance or strengthen dominance or co-ordinated effects of the merger parties in the relevant markets; and those that involve a failing firm or occur in the context of a business rescue, where the target firm is financially distressed and the merger is presented as necessary to preserve its operations. The vertical merger transactions with input or customer foreclosure risks involving dominant firms or firms with high market shares upstream or downstream and in concentrated markets also fall into this category; as do mergers that result in the merged entity having unmatched buyer power with the ability to use the buyer power to substantially lessen competition in the relevant market.

7.5. In complex transactions, the *level of detail, information and data* is key in facilitating a seamless merger review process. The competitive assessment to be included in the filing must contain sufficient level of detail, information and data to enable the Commission to focus on the key or main issues that may arise from the proposed transaction. It is helpful to disclose underlying data supporting a competitive assessment upfront in the filing instead of waiting for an information request from the Commission during the course of the investigation. Merger parties may consult the Commission on the level of detail that may be required in a competitive assessment to be filed with the proposed merger transaction.

Merger transactions raising public interest concerns

7.6. From experience, the two main public interest issues that have the largest dilatory effect on the investigation process are the promotion of a greater spread of ownership (section 12A(3)(e)) and employment (section 12A(3)(b)). Parties tend to engage with these issues post-filing, when raised by the Commission. Rather, it is peremptory for merger parties in structuring the transaction to consider and evaluate whether the merger has an effect on the greater spread of ownership to workers and HDPs as required by section 12A(3)(e) and to tender appropriate remedies in how these transactions are structured. Even if both merger parties do not have HDP or worker ownership the merger's effect on this factor must still be considered and remedied. Similarly, where merger transactions have a potential for large-scale retrenchments, or there have already been prior retrenchments, merger parties should identify appropriate conditions upfront. The Commission accepts that the assessment of the public interest must be holistic exercise thus the Commission has in the past accepted other public interest remedies (e.g. procurement commitments) *in lieu* of, for example, ownership remedies where they are not possible. To this end, parties are encouraged to consider the Commission's Revised Public Interest Guidelines relating to Merger Control (as amended from time to time).

Mergers arising from business rescue bidding processes or firms in financial distress

7.7. Firms may seek to sell their business either through a bidding process where multiple bidders for the target firm exist or a single purchaser. This may take place through an agent, transaction advisors or investment bank(s). BRPs may engage in a similar process whereby competing bids are sought for the business under rescue or a single purchaser is identified. Sellers and target firms may then wish to consult the Commission on whether the proposed transaction raises competition or public interest concerns that they may wish to factor into their decision-making.

7.8. A full assessment of the likely effects of a merger transaction on competition and public interest is required even where one of the merger parties is in financial distress. Early engagement between BRPs and the Commission, particularly in exploring potential remedies to address competition concerns or public interest issues, can enhance the efficiency of the review process. This includes early assessments of whether the proposed transaction raises competition or public interest concerns.

7.9. The factors set out under the principle of complexity above are indicators as to whether the proposed transaction is likely to raise significant competition or public interest concerns, possibly impacting on the valuation of the bid.

7.10. In mergers that raise substantial competition issues where one of the firms raises failing firm considerations or the target firm is financially distressed and the merger is presented as necessary to preserve its operations; the target firm is required to satisfy the requirements of a failing firm as set out in case law, including the following:

7.10.1. Credible evidence of financial distress;

7.10.2. Review of audited financial statements and management accounts;

7.10.3. Review of strategic documents;

7.10.4. Demonstrable and documented efforts to find less anti-competitive buyers;

7.10.5. A clear rationale for the selection of strategic buyers; and

7.10.6. Evidence that, absent the merger, the assets would likely exit the market.

7.11. Clearly articulating these factors ensures that pre-merger filing consultation is focused on cases where early engagement is most beneficial, thereby improving the efficiency and effectiveness of the merger review process as set out in section 12A of the Act.

8. EFFECTIVE DATE AND AMENDMENTS

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