



# A CLOSER LOOK AT SOCIO-ECONOMIC RIGHTS: COMPETITION COMMISSION'S REVISED DRAFT PUBLIC INTEREST GUIDELINES

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On 22 December 2015, the Competition Commission ("the Commission") issued revised *Draft Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act, 1998* ("draft guidelines"). This is the second draft of the guidelines published by the Commission, which remains subject to further comment by stakeholders.

### INTRODUCTION

It is therefore still to be seen how the Commission will give effect to the draft Guidelines once they become final and are implemented. However, what remains clear is that the objective of the Commission continues to be to ensure that there is proper and sufficient information disclosure in relation to public interest matters for purposes of its merger assessment and decision making.

Further, beyond encouraging the disclosure of proper and sufficient information what is also apparent from the recent draft guidelines is that the Commission has introduced and adopted a robust approach in considering constitutional rights in relation to the public interest considerations as contemplated in section 12A(3) of the Competition Act 89 of 1998 ("the Act"). This is particularly in relation to section 12A(3)(a) of the Act, which considers the effect of a merger on a "particular industrial sector or region".

### EFFECT OF MERGER ON CONSTITUTIONALLY ENTRENCHED RIGHTS

In considering the likely effect of a merger on a particular industrial sector or region, the draft guidelines prescribe that consideration be given to whether the sector in question involves or influences any constitutionally entrenched rights. The Commission would consider an effect of a merger as being substantial *inter alia* where –

- > the goods and services traded involve or influence constitutionally entrenched rights;
- > where the impact on the region would threaten that region's livelihood and sustainability.

Interpreted through the lens of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and purposes of the Act, including the object of providing "*for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire*", this provides the competition authorities with room to withhold approval for mergers, or subject approval to conditions, in instances in which a merger is likely to result in harm to constitutional rights.

Precedent for this approach that could be deemed to underpin the approach adopted in the draft guidelines can be found in the Competition Tribunal's ("Tribunal") decision in *Nasionale Pers Limited v Educational Investment Corporation Limited*<sup>1</sup>. The matter pertained to a merger of two firms operating in various markets relating to "further education" but including an overlap between secondary and tertiary education services, the Tribunal noted that "*the potentially pervasive economic and social consequences of monopolistic structures and conduct in the education sector demand that the Tribunal pays particularly close attention to its public interest mandate*".<sup>2</sup>

Although there was no direct reference to the Constitution, the importance of the education sector, given South Africa's legacy in the education arena, was considered on the surface of both the Tribunal's competition analysis, its public interest assessment and ultimately the innovative conditions it provided for approval of the merger, which "*were designed to ameliorate the potentially negative consequences of the transaction for the public interest*".<sup>3</sup> The Tribunal concluded that in directly assessing the impact of the merger on the public interest in terms of s 12A(3)(a) it was "*bound to accord the education sector a stature reserved for few others*".<sup>4</sup> It was concluded that the merged entity was required, over two years, to identify and participate in joint programmes with the Department of Education aimed at building capacity in public education.

Furthermore, in another matter the Tribunal noted that this public interest provision referring to a particular industrial sector or region "*opens up for consideration an enormous range of issues without doing any violence to the language*".<sup>5</sup> In *Industrial Development Corporation v Anglo American Holdings*<sup>6</sup>, the Tribunal found that the "wide ambit" of s 12A(3) means that the sections of the Act which set out its "purposes and objectives" may be used as a "lens" through which the public interest provisions of the Act should be interpreted. It then proceeded to determine that the meaning of "sector" extends beyond the merger's impact on the particular market in which the merger is taking place, holding that "*clearly the legislature intended that in undertaking the analysis of the public interest, the competition authorities were to have regard to some sphere of economic activity wider than the mere relevant market*".<sup>7</sup>

## CONCLUSION

In light of the above, if the draft guidelines are to be finalised and adopted in terms of the current draft wording, then in circumstances where an economic sector in question involves the trade of products or offers services which affect constitutionally entrenched rights, the Commission will also consider the impact of the merger on access to constitutionally entrenched rights.

It would therefore be crucial that when considering and notifying the Commission, the following be considered by merging firms –

- > whether the firms form part of an industrial sector which trades goods or offers services which involve or may influence constitutionally entrenched rights, such as, education, health care, food, water and social security; and
- > whether the merger may result in a threat to the specific region's livelihood and sustainability?

In the converse, if the impact of the merger would be to allow for the region's continued livelihood and sustainability, this could be presented as a factor constituting a positive public interest effect in support of approval of a merger transaction, this must then also be brought to the attention of the Commission as a positive public interest effect.

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<sup>1</sup> Case No: 45/LM/Apr00

<sup>2</sup> Ibid, paragraph 25

<sup>3</sup> Ibid, paragraph 55

<sup>4</sup> Ibid, paragraph 47

<sup>5</sup> Ibid, paragraph 37

<sup>6</sup> Case No: [2002] ZACT 74

<sup>7</sup> Ibid, paragraph 44

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