RBB| Economics

Draft amended public interest guidelines

Comments and recommendations

RBB Economics, 16 November 2023

1 Introduction and background

1 In February 2019, the South African Competition Act No. 89 of 1998 (“the Act”) was amended by the Competition Amendment Act No. 18 of 2018 (“the Amendment Act”). Among other things, the Amendment Act revised the public interest provisions relating to merger control, with the stated aim being to address issues of high concentration and racially skewed control and ownership in the South African economy. The amendments also seek to support (the participation of) small businesses and firms owned or controlled by historically disadvantaged individuals (“HDIs”).[1]

2 Since the Amendment Act came into effect in 2019, the public interest aspects of merger control in South Africa have been growing in prominence, with an increasing number of merger decisions appearing to hinge on public interest issues. As a reflection of these developments, on 6 October 2023 the South African Competition Commission (“the Commission”) published draft amended guidelines outlining how it intends to approach issues of public interest in merger control going forward (“the draft guidelines”).[2] More specifically, the draft guidelines set out *“the approach that the Commission may adopt and the type of information the Commission may require when evaluating the public interest factors in section 12A(3) of the Act”*, both in a general sense, and specifically in respect of each public interest item listed under section 12A(3) of the Act, as amended.

[1] Background note on the Competition Amendment Bill, 2017. Government Gazette No. 41294, pages 18-19. Available: https://www.gov.za/sites/default/files/gcis_document/201712/41294gon1345.pdf [accessed 25 October 2023].

[2] The draft guidelines can be accessed here: https://www.compcom.co.za/wp-content/uploads/2023/10/Invitation-for-public-comment-on-the-draft-amended-public-interest-guidelines-relating-to-merger-control.pdf

3 This note has been prepared in response to the Commission's request for public comment on the draft guidelines. We welcome the opportunity to comment on the draft guidelines, and are committed to engaging with the Commission in a constructive manner with the aim of ensuring that the final guidelines will contribute meaningfully to broad-based economic growth.

4 At the outset, we support the Commission's decision to publish guidelines in respect of how it intends to approach issues related to the public interest in the context of mergers in South Africa. This is for two main reasons:

- First, we understand that modern-day South Africa has been shaped by a particular socio-political and economic history, and that there is an ongoing need to address the resulting skewed nature of ownership and control in, and limited development of, the South African economy. The public interest provisions in particular, and the objectives of the Amendment Act more generally, are intended to address these challenges.
- Second, clear guidelines are likely to provide businesses with greater certainty in respect of how the Commission intends to enforce the Amendment Act in practice, and in turn would be expected to reduce the extent to which uncertainty might otherwise deter businesses from engaging in procompetitive and economically beneficial merger activity (for fear that this may be viewed negatively by the competition authorities). Greater business certainty, in and of itself, can be expected to advance the objectives of the Amendment Act.

5 We also strongly endorse some of the economic principles that appear to underpin the Commission's intended approach to assessing public interest issues, in particular those relating to merger specificity, substantiality, and proportionality. In our view, these principles, if applied consistently, would contribute to a sound and objective merger control framework, and would ultimately serve to benefit the public interest in the long term.

6 That being said, in our view there are some aspects of the draft guidelines that appear to deviate from these established economic principles, and hence risk producing unintended adverse consequences if left as currently formulated (for example in terms of undermining business certainty, stifling procompetitive merger activity and pro-development investments, and distorting competition). Rather than advancing the stated aims of the Amendment Act, these effects may run counter to those objectives, and may ultimately harm the very stakeholders that the Amendment Act is intended to benefit.

7 We expand on our views in the balance of this submission, while also identifying those areas of the draft guidelines that, in our view, would benefit from further development or refinement, in order to better achieve the stated objectives. The remainder of this document is structured as follows:

- In Section 2, we discuss those areas of the draft guidelines that we believe are aligned with sound economic principles.
- In Section 3, we outline the potential adverse consequences of a merger control regime that seeks to impose positive obligations on merging firms.

- In Section 4, we cover the potential adverse consequences of the draft guidelines that, as currently formulated, may affect empowered sellers.
- In Section 5, we discuss the draft guidelines that pertain to the participation of SMEs and HDI-owned firms.
- In Section 6, we present our views on the Commission's intended approach to assessing the effects that mergers may have on the competitiveness of local industries in international markets.
- Finally, we provide a set of concluding remarks in Section 7.

2 An objective economic approach to merger control

8 As a point of departure, it is useful to consider some of the potential benefits of merger and acquisition activity.

- There is a market for corporate control, and mergers can discipline and provide accountability for underperforming managers, thereby enhancing the ability and incentive of firms to compete effectively with one another.
- Mergers can lead to the sharing of technological knowledge and expertise, thereby accelerating technological advancements and raising industry standards.
- Mergers can give rise to efficiencies, and in turn lower prices/better quality (e.g., by combining complementary capabilities, and/or by generating economies of scale/scope).
- Mergers can enhance the abilities and/or incentives of companies to invest in research, development, and infrastructure, thereby stimulating innovation.
- Mergers can be an avenue for foreign direct investment, and can involve the transfer of capital skills, expertise, and intellectual property from foreign investors to domestic firms.
- Mergers can allow firms to diversify their risks, which can help protect against economic downturns and market fluctuations, making the firm(s) in question (and the economy as a whole) more stable and resilient.
- Mergers can create opportunities for expansion into new markets, in turn enhancing competition in those new markets.
- Mergers can help domestic firms compete more effectively in regional or global markets.

9 In many cases, the benefits listed above translate into direct benefits for the public interest, both in terms of the specific public interest factors discussed in the Act, and in terms of the broader economic growth and development of South Africa. In particular, through these benefits, mergers can contribute towards lower prices, better-quality products and services, job and wealth creation, a larger set of opportunities for broad-based investment, the expansion of ownership, and a more effective and efficient economy in general.

10 However, in some cases mergers can cause economic harm, in particular where they lead to a substantial prevention or lessening of competition, and create opportunities for abuses of market power. Anticompetitive mergers can harm consumers, by leading to higher prices, worse-quality products and services, lower levels of investment and innovation, and poorer opportunities for growth and development.

11 Therefore, merger control exists as an important *ex-ante* policy tool for guarding against potential negative outcomes. However, as far as the impact of mergers on competition is concerned, competition authorities generally aim to only target the regulation of mergers that are likely to result in substantial harm to competition (otherwise, attempts to micro-manage economic activity may risk stifling potentially significant merger-specific benefits).

12 A standard approach to the competition elements of merger control thus usually involves several key layers of analysis, including the following:

- First, where a potential adverse competition effect is identified, it is necessary to confirm whether it is specific to the merger under evaluation. If the merger itself is unlikely to cause the identified harm (i.e., the harm would be as likely arise regardless of whether the merger takes place), then prohibiting the merger would simply involve forgoing potentially significant merger-specific benefits.

- Second, where a potential merger-specific adverse effect on competition is identified, it is necessary to determine whether that effect is likely to be substantial. This is because many mergers (especially horizontal ones) are likely to have at least some impact on competition. Accordingly, intervening only where there is likely to be a substantial adverse impact on competition assists decision-makers in minimising type one errors, i.e., prohibiting mergers that are unlikely to be problematic from a competition perspective, and would likely have positive benefits for the relevant market and/or broader economy if implemented.

- Third, where the potential for substantial and merger-specific harm to competition is identified, competition remedies may be formulated and applied. In this regard, limiting remedies to those that offset, but do not overcompensate for, merger-specific harm is a sensible approach, since doing so ensures that remedies are proportionate to the harm that is actually caused by the merger. Such an approach fosters certainty for firms in terms of the remedial actions they might be required to take to address any competition concerns arising from their mergers.

13 In our view, these same principles should also be applied when thinking about the implications of mergers for the public interest (i.e., they should not only be applied to the competition component of merger assessments). That is, for the reasons set out above, we believe that an objective approach to addressing issues relating to the public interest should (i) establish whether a merger-specific negative effect on the public interest is likely to arise, (ii) test whether any negative merger-specific effect is likely to be substantial, and, where relevant (iii) consider remedies that are proportional to the merger-specific harm that is identified.

14 We note that some parts of the draft guidelines appear to have been drafted with these principles in mind. For instance, the following cumulative steps are mentioned in paragraph 5.6 of the draft guidelines as being relevant to the Commission's likely general approach to assessing public interest issues in mergers:

5.6 "The Public Interest assessment will follow the general approach set out below:

5.6.1 determine the <u>likely effect</u> of the merger on each Public Interest factor;

5.6.2 determine whether such an effect, if any, is <u>merger specific</u>;

5.6.3 determine whether such effect, if any, is <u>substantial</u>;

*5.6.4 where the effect on a Public Interest factor is <u>negative, merger specific **and** substantial</u>, consider remedies to remedy <u>that effect</u>;*

5.6.5 where the negative effects contemplated in paragraph 6.4 cannot be remedied, the Commission may, on a case-by-case basis, consider other equally weighty countervailing Public Interest factors, whose effect outweighs the negative impact identified."

[own emphasis added]

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15 Some of these principles also appear to be reflected, in various forms, in the Commission's stated likely approach to the individual public interest factors listed under section 12A(3) of the Act, as amended. For instance:

- **The effect on a particular industrial sector or region** – Paragraph 6.1.1 of the draft guidelines states that, when assessing the effect on a particular industrial sector or region, the Commission will likely consider *"the effect of the merger"* on, among other things, development, environmental sustainability, and employment. Thereafter, paragraphs 6.1.3 and 6.1.4 set out the factors that the Commission will consider when evaluating whether the effect of the merger is likely to be *"substantial"*.

- **The effect on employment** – Paragraph 6.2.4 of the draft guidelines states that the Commission is likely to evaluate whether any effect on employment is *"merger-specific"*, and paragraph 6.2.8 indicates that the Commission will seek to determine whether any identified effect on employment is likely to be *"substantial"*.

- **The effect on the ability of national industries to compete in international markets** – Paragraph 6.4.1 of the draft guidelines states that the Commission will consider *"the impact of the merger"* on the ability of national industries to compete in international markets, while paragraph 6.4.2 similarly states that the Commission will assess whether any identified effect is *"merger-specific"*. Moreover, paragraph 6.4.3 lists those factors that the Commission is likely to consider when determining whether an identified effect is *"substantial"*.

16 At the level of general economic principle, we endorse these aspects of the draft guidelines. As noted above, an approach to merger control that considers merger-specificity, substantiality, and proportionality, in our view would make for a sound economic framework for examining the public interest implications of mergers in South Africa. Such an approach would assist the competition authorities in identifying and limiting their interventions to only those mergers that are likely to cause substantial harm to the public interest. It would also likely foster certainty among firms in terms of the scrutiny to which their mergers can be expected to be subject, and in terms of the public interest remedies that they may be expected to consider.

17 That being said, we wish to highlight several features of the draft guidelines that, in our view, would benefit from further development and refinement. We discuss these features in more detail in the balance of this document.

3 Impact on merger activity

18 In the previous section, we explain why it makes sense from an economic perspective for merger control to (i) intervene only where there is likely to be substantial merger-specific harm, and (ii) consider remedies to offset, but not overcompensate for, that harm. However, concerns have been raised that, in practice, the South African competition authorities have deviated from this approach, and have instead sought to impose positive public interest obligations in some cases.

19 As a general point of principle, in our view there are risks associated with adopting such an approach. Specifically, imposing positive obligations on merging firms equates to raising the costs of engaging in merger activity, relative to a situation where a “do-no-harm” approach to merger control is applied. All else equal, this can naturally be expected to undermine firms’ incentives to merge.

- Most obviously, in cases where the additional costs of merging outweigh the value derived from merging (i.e., where commercial incentives to merge are altogether eroded), it is likely that such mergers will not be initiated.
- Moreover, unlike in situations where remedies are designed to (at most) offset the potential harm of a transaction, there is no clear upper bound attached to positive obligations. Instead, the satisfactory amount and scale/scope of public interest conditions is ultimately arbitrary, and up to the subjective discretion of the relevant decision makers. The additional uncertainty caused by this can be expected to further increase the costs and risks associated with merger activity.
- Raising the costs of merging can also be expected to disadvantage newly-merged firms *vis-à-vis* their existing rivals (i.e., if their costs of doing business increase due to the additional public interest obligations that they face). This can once again be expected to further disincentivise mergers from taking place.

20 The consequence of this is that the potential positive benefits outlined above in Section 2 are likely to be lost for at least some mergers, including those benefits that have positive implications for the public interest.

21 By way of illustration, in the event that the additional costs associated with positive obligations are sufficient to render commercially unviable a merger that would have otherwise involved a foreign firm investing in South Africa, this would result in a loss of foreign direct investment (with the foreign firm potentially choosing to redirect its investment elsewhere). In turn, there are likely to be negative effects on the public interest, even if such effects are not immediately observable in the short term. For instance, not only would the opportunity for the transfer of knowledge and intellectual property be lost in this scenario, but there may also be significant dynamic consequences in terms of future employment opportunities, innovation, and overall wealth creation (including for workers and HDIs).

22 Thus, while imposing positive obligations on a merger may result in immediate and observable ostensible benefits to the public interest, it is also necessary to consider whether imposing such obligations is worth curtailing some mergers (or rendering them entirely commercially unviable), and hence losing potentially more significant merger-specific benefits in the longer term (including benefits that would likely accrue to the public interest). In our view, this should be borne in mind in the formulation of the final guidelines, as they relate to potential conditions and remedies.

4 Impact on the spread of ownership

23 As noted above, the draft guidelines indicate that the Commission will, in general, consider whether any identified adverse effects on the public interest are merger-specific before proceeding to intervene on public interest grounds.

24 The exception to this general approach is the set of provisions pertaining to the spread of ownership among HDIs and workers. In particular, paragraph 6.5.2 of the draft guidelines states that the Commission will adopt a view that merging firms have a positive obligation "*to promote or increase a greater spread of ownership, in particular by HDPs and/or Workers in the economy"*. In other words, we understand that the draft guidelines take a position that, even where a merger does not have a diluting effect on ownership among HDIs and/or workers, a failure to *increase* such ownership may count towards a decision to prohibit the merger in question.

25 In this regard, and as noted above, we appreciate the goal of improving the spread of ownership and control in the South African economy, shaped as it has been by its particular socio-political and economic context. We also note the objectives reflected in the preamble of the Act (and cited in the Constitutional Court's decision in *Mediclinic*), namely, to improve the quality of life for all citizens, by using competition law to achieve an efficient economy, and to create a competitive economic environment that focusses on development and balances the interests of workers, owners, and consumers.

26 We therefore wish to highlight certain aspects of the draft guidelines that may lead to unintended adverse consequences, and which may, in turn, run counter to these objectives.

27 First, it appears that, under the current formulation of the draft guidelines, empowered firms (i.e., those with high ownership levels among HDIs and/or workers) would face a significant barrier when seeking to be acquired by less empowered firms, if doing so would dilute the overall ownership of HDIs and/or workers.

28 Rather than advancing the goals of the Amendment Act, such an approach risks restricting the ability of HDIs/workers within empowered firms to realise the value of their ownership. While the public interest may benefit in a narrow sense of maintaining or increasing ownership in percentage terms, it may suffer in a much more real sense of restricting the ability of HDIs/workers to generate wealth for themselves, or to invest that wealth (and hence utilise their ownership) in other parts of the economy.

29 Such a counterintuitive outcome is exemplified by the Commission's recommendation to prohibit the sale of Burger King South Africa ("BKSA") by Grand Parade Investments ("GPI") to ECP Africa (which recommendation was later overturned by the South African Competition Tribunal). In this case, the Commission's prohibition decision was made on the basis that the level of HDI/worker ownership within the target firm would have been reduced from 68% to 0% as a consequence of the merger. This is despite the fact that, according to GPI, its difficult financial position would have been improved through the disposal of BKSA, and the merger may have allowed GPI to re-invest in other parts of the economy.

30 The concern here is that such an approach may ultimately be prejudicial to HDIs and workers. Most obviously, HDIs and workers with a substantial pre-existing interest in a firm would be faced with the disadvantage of only being able to sell their existing interests to the subset of potential investors who are local and more empowered, and not the full set of potential investors (which would not only include less empowered local investors, but also the much larger contingent of foreign investors). This is likely to substantially reduce the value of those pre-existing interests, and the ability of HDIs and workers to monetise their investments. More indirectly, any HDIs/workers acquiring new interests in a firm would know that they are acquiring assets that have limited resale potential, as they would be permitted to only resell those assets to a narrow pool of potential future investors.

31 Second, and a related concern, is that the draft guidelines, as currently formulated, can be expected to disincentivise firms from increasing HDI/worker ownership outside of merger/acquisition activity. This is because, if firms can only merge with other firms that have equal or greater levels of HDI/worker ownership, then efforts to increase HDI/worker ownership will necessarily further shrink the pool of eligible acquirers/targets.

32 Third, the draft guidelines appear to be focussed on ownership in percentage terms, rather than the absolute value of any ownership that might be transferred or created. For instance, in a scenario where a large international business wishes to acquire a small local business, an allergy towards ownership dilution in percentage terms might well result in a prohibition of

a merger that would otherwise enhance the ownership of HDIs/workers within the merged entity in absolute (and hence more real monetary value) terms.

33 In our view, a policy that aims to improve the quality of life of all citizens, and aims to provide the greatest possible opportunities for all (in particular considering the opportunities for HDIs and workers), should more strongly weight the absolute value of ownership transferred, its profitability, and prospects for growth (which are ultimately the bases of long-term value creation).

34 With the above in mind, in regard to the promotion of the spread of ownership, we recommend that the draft guidelines be refined with the aim of avoiding these potential unintended adverse consequences. For instance, this might involve introducing a threshold of existing HDI/worker ownership above which positive obligations to increase the spread of ownership do not apply, and/or ensuring/emphasising that the concept of "ownership" (and value to HDIs/workers more generally) will be assessed in a more holistic manner that goes beyond a narrow consideration of percentage ownership.

5 Impact on participation

5.1 Participation as a process

35 The Amendment Act broadens the scope of competition policy in South Africa to not only be concerned with the impact of merger activity and firm conduct on competition, but also on the participation of SMEs and/or firms owned or controlled by HDIs. We support the underlying objective here, namely to encourage participation amongst SMEs and HDI-owned firms, which can contribute to broad-based inclusive growth in South Africa.

36 In this regard, just as the competition element of competition policy is generally concerned about harm to competition as a process, as opposed to harm to individual competitors, in our view the participation component should focus on participation as a process, rather than the protection of individual participants. This is because enhancing the growth of smaller firms in the South African economy is likely to be best achieved by ensuring that they are able to compete on the merits, while also ensuring that they continue to face effective competitive pressures that give rise to incentives to continue engaging in efforts to improve their competitive offerings. Otherwise, if the protection of individual participants simply involves shielding them from competitive pressures, then this would be likely to lead to a situation where the growth and development of such firms is stunted.

37 On our understanding of the draft guidelines as they currently stand, one area that risks deviating from this principle is paragraph 6.3.2.1, which states that the Commission will consider the impact that a merger has on the participation firms *"in the relevant market"*. Based on the existing formulation, we interpret this to mean that the Commission will examine the effect that a merger has on horizontal rivals operating in the same market(s) in which the merger is set to take place.

38 In this regard, outside of very specific circumstances, the competition element of merger control seldom takes issue with mergers that intensify competition between competitors, and which may then cause “harm” to such competitors (as a consequence of them being required to compete more aggressively with each other). This is because a merger that enhances competition can be expected to produce better outcomes for consumers, and will also ensure that rivals face sufficient incentives to seek out efficiencies and innovations (which is ultimately likely to be to their own benefit). From a competition perspective, it is only in instances where a merger gives rise to sufficient foreclosure to render competition significantly less effective that intervention might be warranted.

39 In our view, these ideas should also be borne in mind when assessing the impact of mergers on the participation of SMEs and/or HDI-owned firms. In particular, one should be cautious of interpreting the impediment/harm envisaged in paragraph 6.3.2.1 of the draft guidelines as being a merger-specific effect that requires SMEs and/or HDIs to compete more aggressively in the markets in which they operate (which might involve them facing some incremental impediment or harm). Otherwise, were such an effect to count against merger approval, this would risk unravelling into a merger control regime that prioritises the protection of participants (competitors) rather than the protection of participation (competition) as a process.

40 Put differently, when considering whether a merger is likely to have an adverse impact on the participation of SMEs and/or HDI-owned firms, we believe that it is important that the guidelines are implemented in a manner that aims to protect the *participation* of SMEs and HDI-owned firms as a *process*, rather than *protecting individual firms*. This is because, as noted above, an approach that amounts to insulating individual SMEs and/or HDI-owned firms from competitive pressures is ultimately likely to be detrimental to such firms, in the sense that they will face lower incentives to innovate, develop, and grow. Moreover, such an approach is not only likely to lead to consumer harm, but is also likely to result in a compounding adverse effect on the development of the South African economy more broadly.

5.2 Measuring the impact on participation

41 For the reasons set out above in Section 2, in our view an objective approach to competition policy should involve evaluating whether any harm to competition arising from mergers (or indeed individual firm conduct) is substantial. Once again, we believe that this principle should not only be applied to the competition elements of merger assessments, but that it should also be applied when assessing the impact of mergers of the participation of SMEs/HDI-owned firms.

42 However, in our view there are two aspects of the draft guidelines pertaining to participation, as currently formulated, that suggest that this principle is likely to be of second order importance when it comes to the practical application of the Amendment Act.

43 First, the draft guidelines do not appear to provide clear guidance in regard to the benchmark that the Commission will apply when assessing whether a merger results in an impediment to participation. That is, the Commission does not seem to have taken to the opportunity presented by the publication of the draft guidelines to provide a more detailed and tractable

definition of what it considers (effective) participation to mean in practice. In the absence of a well-defined benchmark, one would expect it to be difficult to evaluate whether a merger has any adverse impact (let alone a substantial adverse impact) on the ability of SMEs and/or HDI-owned firms to participate.

44 Second, while parts of the draft guidelines suggest that the Commission will assess whether mergers have a *substantial* impact on participation, other parts seem to omit a consideration for substantiality.

- For example, paragraph 6.3.2.2 of the draft guidelines states that the Commission will assess whether SMEs and/or HDI-owned firms rely on the target firm for the supply of inputs *"to a significant extent"*.
- Similarly, paragraph 6.3.2.3 states that the Commission will consider whether the target firm is *"a significant"* customer of SMEs or HDI-owned firms, while paragraph 6.3.2.4 states that the Commission will evaluate whether the merger results in a *"notable adverse change"* to terms and conditions of trade or supply.
- In contrast, paragraph 6.3.2.1 of the draft guidelines states that the Commission will assess whether there is *"any"* (rather than a *substantial*) impediment arising from a merger that limits the entry, growth, expansion, and participation for SMEs and/or HDI-owned firms.

45 Accordingly, the draft guidelines appear to suggest that even if it is found that a merger would result in an arbitrarily small impediment to participation, this may justify merger prohibition. However, such an approach risks foregoing merger-specific benefits, even in cases where participation would remain largely unaffected by the merger in question. Indeed, it is unlikely that arbitrarily small impediments would have a meaningful adverse impact on the ability of SME and/or HDI-owned firms to participate effectively. Instead, it is only where such impediments are material that one would expect SMEs and/or HDI-owned firms to be rendered unable to participate (in the sense of not being on equal footing as the middle-ground or bulk of firms operating in the relevant market(s)).

46 In addition, the absence of a substantiality consideration when it comes to assessing the impact on entry, growth, expansion, or participation can be expected to create further uncertainty for firms hoping to engage in merger activity (see above). For example, if firms do not know how much of an impediment would be tolerated (or even how such an effect might be measured in practice), and if they expect that even arbitrarily small impediments would be viewed in a negative light by the Commission, this would be likely to deter even those mergers that may have significant procompetitive effects, and positive net effects on the public interest.

47 With the above in mind, in our view the draft guidelines would benefit from further development in terms of (i) clarifying the likely benchmark that the Commission will apply when assessing the impact of mergers on participation, and (ii) a consistent application of considerations for substantiality. At the very least, we would recommend that the guidelines be refined to clarify the Commission's positions on these topics.

6 Addressing the competitiveness of local industries in international markets

48 Section 12A(3) of the Act, as amended, states that, when determining whether a merger can or cannot be justified on public interest grounds, it is necessary to consider the effect that the merger will have on the ability of national industries to compete in international markets. Accordingly, the draft guidelines include a section outlining how the Commission intends to approach assessments of this public interest factor.

49 However, in our view the guidelines pertaining to this particular element of the public interest would benefit from further development and clarification. This is because, as currently formulated, we perceive them as lacking the detail necessary to provide market participants with clear and reliable guidance regarding the types of effects that the Commission would be likely to consider, how such effects might be assessed, and how such effects might be appropriately remedied.

50 Most notably, while the draft guidelines have helpfully clarified that the focus is generally on substantial adverse effects, it is not clear whether the purpose of the guidelines in regard to the international competitiveness of local industries is to identify and assess *positive* or *negative* effects on this particular public interest factor (or both).

- For instance, one possible interpretation of paragraphs 6.4.1 and 6.4.3 of the draft guidelines is that the Commission will assess whether a merger gives rise to a substantial *negative* effect on the ability of a local industry to compete internationally. In turn, the remedies listed in paragraph 6.4.4 might be interpreted as being aimed at ensuring that the local industry in question remains internationally competitive (e.g., through *"obligations to introduce new products and technology"*, and/or *"commitments to increasing exports"*).
- However, these same paragraphs of the draft guidelines (in particular when read together with paragraph 6.4.2) might instead be interpreted as setting out the factors that the Commission will consider when determining whether the merger in question has a substantial *positive* effect, with a view to assessing whether that positive effect (partially) mitigates other (potential) negative effects on the public interest. In turn, paragraph 6.4.4 might be read as listing the remedies that may be required to address *residual* public interest concerns arising from the merger in question.

51 It is not clear which of the above interpretations is intended to be the correct one. Since each might have its own set of implications for how the Commission intends to approach this particular public interest factor, a lack of clarity on this score can be expected to cause uncertainty among firms seeking to comply with this aspect of the Amendment Act.

52 From our perspective, it is difficult to see how a merger that does not present competition issues in a local market could diminish the international competitiveness of a local industry, and hence give rise to a need for a separate public interest assessment of this nature. Indeed, one would expect such mergers to either enhance international competitiveness (e.g., through the realisation of merger-specific efficiencies), or to leave it unchanged.

53 Moreover, in terms of the consideration of remedies, it is difficult to see how imposing exogenous obligations on firms (i.e., obligations that are not determined by the firms' own profit-maximising incentives) can be rationally linked to the objective of retaining or improving their international competitiveness. For instance, in the event that a firm has a profit-maximising incentive to wind-down international activities (e.g., if continuing to engage in exports would result in the firm incurring losses), then imposing obligations on the firm to remain active in international markets would likely be detrimental to the firm in question, and would also be expected to damage its ability to compete (both locally and internationally).

54 Accordingly, the second interpretation outlined in paragraph 50 above would appear to be the more plausible of the two. However, if that is indeed the interpretation intended by the draft guidelines, in our view this should be clarified, since further clarity on this score can be expected to foster greater certainty among firms in terms of how the Commission intends to assess merger-specific effects on this area of the public interest.

7 Concluding remarks

55 We support the Commission's decision to publish guidelines in respect of how it intends to approach issues related to the public interest in the context of mergers in South Africa. Indeed, guidelines are likely to provide businesses with greater certainty in respect of how the Commission intends to enforce the Amendment Act in practice, which would in turn be expected to reduce instances where firms might otherwise be deterred from merger activity as a result of uncertainty.

56 We also endorse some of the economic principles that appear to underpin the Commission's intended approach to assessing issues of public interest in merger contexts. In particular, we welcome an approach to merger control that is grounded in considerations of merger specificity, substantiality, and proportionality. In our view, these principles, if applied consistently, would contribute to a sound and objective merger control framework, and would ultimately serve to benefit the public interest in the long term.

57 That being said, in this submission we highlight parts of the draft guidelines that, in our view, may risk producing unintended adverse consequences if left as currently formulated, both in a general sense (e.g., chilling merger activity), and in a more specific sense (e.g., restricting the ability of HDIs/workers to realise the value of their investments). We thus recommend that certain parts of the guidelines revised, developed, or refined, with a view to avoiding such unintended adverse consequences.

Submission led by Simon Lee, Patrick Smith and Jacob Muller.