
GENERAL NOTICE

NOTICE 86 OF 2015



competitioncommission
south africa

**Guidelines on the assessment of public interest
provisions in merger regulation under the Competition
Act No. 89 of 1998 (as amended)**

23 January 2015

Draft

For comment

This Guideline is drafted by the Commission in terms of Section 79(1) of the Competition Act No. 89 of 1998.

Written comments must be submitted to: SeemaN@compcom.co.za

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Deadline for submission of comments: Monday, 23 February 2015, 17h00 (SA time).

1. PREFACE.....	5
2. DEFINITIONS	6
3. INTRODUCTION.....	7
4. OBJECTIVES	8
5. LEGISLATIVE FRAMEWORK.....	8
6. GENERAL APPROACH TO ASSESSING PUBLIC INTEREST PROVISIONS	11
7. THE EFFECT ON A PARTICULAR INDUSTRIAL SECTOR OR REGION	13
8. THE EFFECT ON EMPLOYMENT	17
9. THE ABILITY OF SMALL BUSINESSES, OR FIRMS CONTROLLED OR OWNED BY HISTORICALLY DISADVANTAGED PERSONS, TO BECOME COMPETITIVE	24
10. THE ABILITY OF NATIONAL INDUSTRIES TO COMPETE IN INTERNATIONAL MARKETS	27
11. DISCRETION.....	27
12. EFFECTIVE DATE AND AMENDMENTS	28

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 provides for the Competition Commission ("Commission") to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act.
- 1.2. These guidelines seek to provide guidance on the Commission's approach to analyzing mergers by indicating the approach that the Commission is likely to follow and the types of information that the Commission may require when evaluating public interest grounds in terms of section 12A(3) of the Act.
- 1.3. The Commission recognizes that merger analysis is dependent on the facts of a specific case and, as a result, these guidelines should not be interpreted to prevent the Commission from exercising its discretion to request information, or assess other factors not indicated in this guideline, on a case-by-case basis.

2. DEFINITIONS

The following terms are applicable to these guidelines –

- 2.1. **“Acquiring Firm”** means an acquiring firm as defined in section 1(i) of the Act;
- 2.2. **“Act”** means the Competition Act No. 89 of 1998, as amended;
- 2.3. **“Commission”** means the Competition Commission;
- 2.4. **“CAC”** means Competition Appeal Court;
- 2.5. **“Small Business”** means a small business as defined in the Small Business Act;
- 2.6. **“Small Business Act”** means National Small Business Act, 102 of 1996;
- 2.7. **“Target Firm”** means a target firm as defined in section 1(xxxiii) of the Act;
- 2.8. **“Transferred Firm”** means a transferred firm as defined in the Determination of Thresholds and Method of Calculation Schedule to the Act dated 1 April 2009;
- 2.9. **“Tribunal”** means the Competition Tribunal.

3. INTRODUCTION

- 3.1. In the preamble to the Act, it is recognized that the South African economy must be open to greater ownership by a greater number of South Africans and that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.
- 3.2. With this in mind, the competition authorities are obliged in terms of section 12A(1) of the Act to consider both the impact that a proposed merger will have on competition in a relevant market and whether a proposed merger can or cannot be justified on public interest grounds.
- 3.3. Public interest issues have taken prominence in the recent past due largely to the high unemployment rate in the country and the state of the South African economy in general.
- 3.4. Certain key cases brought before the competition authorities sparked debate on the assessment standard for public interest issues. Whilst the CAC and the Tribunal have given valuable guidance in certain areas of public interest considerations, there is still a large area that remains undeveloped and requires further development of precedent.
- 3.5. From its evaluation of previous mergers, the Commission has noted that parties to merger proceedings often provide insufficient information relating to public interest considerations, especially in relation to the proposed merger's likely effect on employment. Such deficiencies may result in delays in the Commission's evaluation of the merger as further information may have to be requested. The Commission may also not be able to take an informed decision in the absence of such required information.¹

¹ Para 103 of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (Case:18713)

4. OBJECTIVES

- 4.1. These guidelines seek to provide guidance in the Commission's analysis of mergers by indicating the approach the Commission is likely to follow and the types of information that the Commission may require when evaluating the public interest considerations in terms of section 12A(3) of the Act.

5. LEGISLATIVE FRAMEWORK

- 5.1. These guidelines have been prepared in terms of section 79 of the Act which provides that:

“(1) The Competition Commission may prepare guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of the Act.

(2) The guideline prepared in terms of section (1) –

(a) must be published in the Gazette; but

(b) is not binding on the Competition Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretion, or their interpretation of this Act.”

- 5.2. The traditional approach to merger regulation is to analyse the effect of a merger on competition as required in terms of the Act and to consider the effect of the merger on public interest grounds. In its consideration, the Commission may approve the merger without conditions, with public interest conditions or prohibit the merger on public interest grounds.

- 5.3. Section 12A of the Act, sets out the manner in which the Commission is required to consider a proposed merger.

"(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and –

(a) If it appears that the merger is likely to substantially prevent or lessen competition, then determine –

(i) Whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and off-set, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(ii) Whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or

(b) Otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)".

5.4. Section 12A (1) above sets out three separate but interrelated enquiries that the Commission must engage in:

- (i) Determine whether the merger is likely to substantially prevent or lessen competition;
- (ii) If the enquiry reveals a substantial lessening of competition, then determine whether there are any technological, efficiency or pro-competitive gains that would outweigh the negative competitive effects, and whether there are any public interest considerations that would outweigh the negative competition effects;
- (iii) Notwithstanding the conclusion of the enquiry in (i) or (ii) above, the assessment of whether the merger would have a substantial positive or negative impact on any of the public interest grounds as set in Section 12A (3) of the Act.

5.5. With respect to the public interest enquiry itself, there are two lines of enquiry that follow from the above. In the first line of enquiry, following from a negative competition finding, the Commission must consider whether there are any public interest grounds that could outweigh any negative competition effects. This means that the Commission could otherwise approve an anti-competitive merger if there are substantial public interest grounds for it to approve the merger. This requires a balancing of competition and public interest issues and is dealt with on a case by case basis. In this case parties must justify a substantial positive public interest effect.

5.6. In the second line of enquiry, following from a positive competition finding, the Commission is required to consider whether there are any substantial negative or positive public interest effects. In this case, the Commission may prohibit a merger on public interest grounds or impose conditions to remedy the negative public interest effect on a merger even if the merger has a positive competition finding. In this case, parties are required to justify a substantial negative effect on the public interest.

5.7. The public interest considerations as stated in section 12A (3) of the Act are:

“When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

- (a) a particular industrial sector or region;
- (b) employment;
- (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- (d) the ability of national industries to compete in international markets.”

5.8. The general approach that the Commission may follow and the information that the Commission is likely to require relating to each of the above public interest considerations is discussed below.

6. GENERAL APPROACH TO ASSESSING PUBLIC INTEREST PROVISIONS

6.1. The Commission in general will adopt the following steps when analysing each of the above public interest provisions:

- 6.1.1. determine the likely effect on the public interest;
- 6.1.2. determine whether the alleged effect on a specific public interest is a result of that merger or is merger specific. In other words, is there a sufficient causal nexus between the merger and the alleged effect;²
- 6.1.3. determine whether these effects are substantial;³
- 6.1.4. consider whether the merging parties can justify the likely effect on the particular public interest; and
- 6.1.5. consider possible remedies to address any likely negative effect on the public interest.

6.2. As a Rule of Thumb, in applying the general approach, where an effect is found to be non-merger specific, the enquiry should stop at that stage. Where an effect is found to be merger specific but not substantial the enquiry should stop at that stage. In other words, there is no need for parties to justify an effect that is not substantial.

² Para 54-56 of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (Case:18713)

³ Section 12A 1(b) of the Act;

6.3. In the first line of public interest enquiry following from a negative competition finding, the Commission will consider what the effects are. If there are positive public interest effects, the Commission will assess whether the claimed positive effects are merger specific and substantial such that the claimed positive effects could outweigh the negative competition effects. In such an instance, the merging parties will have to justify the substantial positive effects on public interest. This will be followed by a balancing of the negative competition effects and the positive public interest effects.

6.4. In the event that the competition finding is negative and the public interest effect is negative, the Commission will consider whether these are merger specific and substantial. In this case, the Commission would consider a prohibition of the merger.

6.5. In the second line of enquiry following from a positive competition finding, the Commission will determine whether the public interest effects are positive, negative or neutral. If the public interest effects are positive, then the enquiry will stop.

6.6. If the public interest effects are negative, the Commission will proceed to determine whether these are merger specific, substantial and justifiable. Where the public interest effect is neutral, the Commission will consider what the negative and positive effects are and balance these. The Commission will also determine whether these are merger specific and substantial.

7. THE EFFECT ON A PARTICULAR INDUSTRIAL SECTOR OR REGION

7.1. In general, when assessing the likely effect of a merger on a particular industrial sector or region, the Commission will consider the specific sub-sector in question and analyse the likely effect of the merger on the relevant value chain in its entirety.

7.2. In performing this analysis, the Commission will consider particular factors, amongst others but not limited to, import substitution and the overall effect of the transaction on domestic production.

7.3. As a general approach, when assessing the impact on a particular industrial sector or region, the Commission will do the following analysis:

Step 1: determine the likely effect on the industrial sector or region;

Step 2: determine whether the likely effect on the industrial sector or region is merger specific;

Step 3: determine whether the likely effect on the industrial sector or region is substantial;

Step 4: consider whether the likely substantial effect on the industrial sector or region can be justified; and

Step 5: determine the appropriate remedy to address the likely negative effect on the industrial sector or region.

7.3.1. Step 1: Determining the likely effect on the industrial sector or region.

7.3.1.1. In this regard, the Commission may consider the following:

a. whether a South African owned firm is being purchased;

- b. whether the Acquiring Firm's termination of local production would have far reaching consequences for the economy;
- c. whether the termination of contracts with local suppliers would have a negative effect on the sector, region or the economy, for example, in circumstances where the Target Firm is involved in the distribution or sale of goods;
- d. whether the merger results in the substitution of locally produced goods with imports; and/or
- e. whether the merger results in the movement or diversion of local resources to international markets with detrimental consequences for local markets, sectors and regions.

7.3.2. Step 2: Determining whether the likely effect on the industrial sector or region is specific to the merger

7.3.2.1. When determining whether the alleged effect is merger specific, the Commission will consider:

- a. whether the alleged effect is caused by the merger, is the result of the merger or flows from the merger.
- b. where an alleged effect already exists, the Commission will consider whether the merger exacerbates the effect.

7.3.3. Step 3: Determining whether the likely effect on the industrial sector or region is substantial

7.3.3.1. When assessing the substantiality of the effect on a particular industrial sector or region, the Commission will in general consider the following factors:

- a. the strategic nature of the product to the sector, or the sector to the economy; for example, the mining sector being pivotal to employment, or the information technology sector being pivotal to business operations.
- b. the importance of the product to the affected sector;

- c. the extent of the consequences on the sector and related sectors in the entire value chain;
- d. the extent of the effect on the broader economy;
- e. whether the merger impedes on any public policy goals; and/or
- f. the importance of a firm to the region and the benefits that flow from that firm to that region.

7.3.3.2. Generally, the Commission will consider as substantial:

- a. where the ramifications arising from the merger's impact upon the primary market under consideration are far reaching, and flow beyond that market and sector;
- b. The merger impedes public policy goals that would have far reaching consequences for the sector as a whole; and/or
- c. The impact or effect must be of such magnitude and scale that if unleashed, would be irreversible and cannot be undone.

7.3.4. Step 4: Considering possible justifications for the likely substantial effect on the particular industrial sector or region

7.3.4.1. The onus will rest on the merging parties to justify any substantial negative or positive effects arising as a result of the merger on an industrial sector or region.

7.3.4.2. The Commission will consider any public interest argument in justification of the substantial negative or positive effect on the industrial sector or region.

7.3.5. Step 5: Determining the appropriate remedy to address the likely negative effect on the industrial sector or region

7.3.5.1. The Commission will consider the appropriate remedy on a case by case basis.

7.3.5.2. Possible remedies that may be considered include:

- a. investment into the domestic supply chain, which may include but is not limited to, setting up new local production facilities and establishing funds or other initiatives to develop local production in the relevant value chain;
- b. maintaining or expanding local production facilities;
- c. restricting the diversion of resources to overseas markets;
- d. the obligation to continue supply to local producers, and/or
- e. the obligation to continue sourcing from local suppliers.

8. THE EFFECT ON EMPLOYMENT

8.1. The Commission will follow the general approach in assessing the likely employment effects of a merger on employment. However, in instances where there is a dispute around merger specific job losses, this will be evaluated in detail on a case by case basis.

8.2. As a general approach, when assessing the likely impact of a merger on employment, the Commission will do the following in its analysis:

Step 1: determine the likely effect on employment generally;

Step 2: determine whether any identified effect on employment is specific to the proposed merger;

Step 3: determine whether the likely effect on employment is substantial;

Step 4: consider whether such an effect could be justified; and

Step 5: determine the appropriate remedy to address the likely substantial negative effect on employment.

8.2.1. Step 1: Determining the likely effect on employment generally

8.2.1.1. The merging parties must declare all contemplated retrenchments whether these are in their view due to the merger or operational reasons.⁴

8.2.1.2. In determining the effect on employment, the Commission's primary line of enquiry will be the effect on employment within the merging parties.

8.2.1.3. In determining this effect, the Commission will consider the overall nature of the transaction, including the extent of overlap in the merging parties' activities, the

⁴ Para 109-110 of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (Case:18713)

rationale of the transaction and the intention of the parties relating to employment and the target business, among other factors.

8.2.1.4. As a secondary line of inquiry, the Commission will consider the likely effect on the general level of employment in a particular industrial sector or region.

8.2.1.5. In assessing this effect, the Commission will consider whether the merger impacts on the number of jobs in existence post-merger either due to job creation or loss of job opportunities, duplications, cost cutting measures, cancellation of supply/distribution arrangements, relocation of offices, plants and facilities, among others.

8.2.1.6. The Commission will consider the secondary line of enquiry on a case by case basis depending on the industrial sector under consideration.

8.2.1.7. In addition, when evaluating the likely effect on employment, the Commission will place more weight on the primary line of enquiry.

8.2.2. Step 2: Determining whether any identified effect on employment is specific to the proposed merger

8.2.2.1. In general, the Commission will accept those retrenchments declared by the merging parties to arise as result of the merger, as merger specific. The Commission will assess the merger specificity of retrenchments when merging parties claim that retrenchments are not merger related.

8.2.2.2. Where retrenchment proceedings by the Target Firm or Transferred Firm or the Acquiring Firms are contemplated or initiated in terms of the Labour Relations Act 66 of 1995, shortly before (or will be initiated shortly after) the proposed merger is

notified, the merging parties should inform the Commission of such retrenchments.⁵

- 8.2.2.3. The Commission will consider an appropriate period for pre-merger retrenchments to be the time from the initiation of merger discussions to the date of filing. For post-merger retrenchments, a period of one year following the merger approval date.
- 8.2.2.4. The onus shall rest on the merging parties to prove that these retrenchments are not merger related.
- 8.2.2.5. The Commission will determine whether the alleged effect on employment is a result of that merger. In other words, a merger specific effect means "conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller."⁶
- 8.2.2.6. In general, when assessing whether retrenchments are related to the merger or not, the Commission will consider whether the proposed retrenchments are in any way linked to the intentions, incentives, policies and management style of the acquiring group.
- 8.2.2.7. The Commission will also consider the counterfactual of whether the retrenchments would have occurred in any event absent the merger.⁷
- 8.2.2.8. Establishing a reasonable link of causality between the retrenchments and the merger would constitute sufficient evidence to prove merger related retrenchments.

⁵ *Walmart Stores Inc. and Massmart Holdings Limited* 110/CAC/Jul11 and 111/CAC/Jul11

⁶ Para 54-56 of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (Case:18713)

⁷ Para 57 of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (Case:18713)

8.2.3. Step 3: Determining whether the likely effect on employment is substantial

8.2.3.1. The substantiality assessment will in general involve the consideration of the following factors:

- a. the number of employees that are likely to be affected relative to the affected workforce;
- b. the affected employees' skill levels. The Commission will consider information on the affected employees' qualification, experience, job grade, job description and position within the organization in determining the skill level.
- c. the likelihood of the employees being able to obtain alternative employment in the short term considering various factors. In this regard, the Commission will assess the type of skills and their transferability to other industries and businesses, the economics of the region and the opportunities for re-employment in the region.
- d. the nature of the sector in relation to the employment loss, including whether the sector employs largely unskilled employees, the unemployment rate in the sector, whether the sector is experiencing a trend of retrenchments, and the maturity of the affected sector, for instance, a mature sector vs an emerging sector; and
- e. The predominant nature of the acquiring firm's business. For example, whether the parties employ seasonal or permanent employees, and are engaged in a business that involves bidding or contracting.

8.2.3.2. The Commission will consider substantiality on a case by case basis and may exclude management employees from the affected number of employees should it view these employees as having short term employment prospects.

8.2.3.3. Generally, the Commission will consider as substantial, a large number of job losses and/or where the affected class is unskilled and semi-skilled employees and/or there are no short term prospects of re-employment for a large portion of the affected class.

8.2.4. Step 4: Considering whether such an effect could be justified

- 8.2.4.1. The onus will rest on the merging parties to provide arguments to justify a substantial negative or positive effect on employment.
- 8.2.4.2. The Commission will consider the following in analysing the submissions:
- a. whether a rational process has been followed in arriving at the figures proposed for retrenchments and whether there is a rational link between the number of jobs lost and the reasons for the job losses;
 - b. whether the job losses are justified by an equally weighty and countervailing public interest argument which is recognized under the Act.
 - c. whether the merging parties have provided full and complete information to the Commission and employees to enable them to consult fully on all issues.⁸
- 8.2.4.3. The parties will need to meet all three requirements for the Commission to accept their submissions as justified.
- 8.2.4.4. Where the merging parties submit a public interest justification for the job losses, the Commission may accept the following as countervailing public interest arguments:
- a. the merger is required to save a failing firm. Such information should only be submitted in conjunction with a failing firm defense in terms of Schedule 4.13 of the Form CC4(2);
 - b. where the merger is required because the firms will not be competitive unless they can lower their costs to be as efficient as their competitors and these can only be attained by employment reduction through the merger; or

⁸ *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (Case: 18713), paragraph 107-110.

- c. where the merger will lead to lower prices for consumers because of the merged entity's lower cost base and that this lower cost base can only come about or is materially dependent upon the contemplated employment reduction.⁹

8.2.4.5. Where parties make submissions on how they arrived at the proposed figure for retrenchment, this should not be arbitrary, random or a guess estimate.¹⁰ A simple task of comparing the parties list of employees and making assumptions on the likely job losses will not suffice.

8.2.4.6. Failure to show that a rational process has been followed in determining the likely effect on employment will result in the Commission making an adverse finding.

8.2.4.7. Where the merging parties have not disclosed all information relating to retrenchments and where parties claim that an analysis on the effect on employment was not completed, the Commission will consider this to not meet the justification criteria.

8.2.5. Step 5: Determining the appropriate remedy to address the identified effect on employment

8.2.5.1. The Commission will consider the appropriate remedy on a case by case basis.

8.2.5.2. To address the likely employment concerns relating to a proposed merger, the Commission may consider the following remedies:

- a. restricting or capping the number of job losses;
- b. staggering the number of job losses over a period of time;

⁹ *Metropolitan Holdings Limited and Momentum Group Limited (41/LM/Jul10)*

¹⁰ *Metropolitan Holdings Limited and Momentum Group Limited (41/LM/Jul10)*

- c. placing a moratorium on job losses for a period of time;
- d. provide funding to reskill affected employees in order to improve their chances of obtaining alternative employment within a short period of time;
- e. provide counselling and guidance on applying for alternative employment;
- f. obliging the parties to re-employ or give preference to affected employees;
- g. introducing shift rotations or reducing the number of hours employees work;
and
- h. introducing a training layoff scheme.

9. THE ABILITY OF SMALL BUSINESSES, OR FIRMS CONTROLLED OR OWNED BY HISTORICALLY DISADVANTAGED PERSONS, TO BECOME COMPETITIVE

9.1. In general, when assessing the likely effect on the ability of small businesses ("SMEs") or firms controlled by historically disadvantaged persons ("HDIs") to compete, the Commission will consider whether the effects are merger specific, substantial and justified.

9.2. The Commission will follow the approach below:

Step 1: determine the likely effect on the ability of SMEs and HDIs to compete;

Step 2: determine whether any likely effect on the ability of SMEs and HDIs to compete is specific to the proposed merger;

Step 3: determine whether the likely effect of the merger on the ability of SMEs and HDIs to compete is substantial;

Step 4: consider whether such an effect could be justified; and

Step 5: determine the appropriate remedy to address the identified negative effect on the ability of SMEs and HDIs to compete.

9.2.1. Step 1: Determining the likely effect on the ability of SMEs and HDIs to compete

9.2.1.1. In analyzing this provision, the Commission will determine whether any of the following effects arise on SMEs and HDIs, among others:

- a. raises existing barriers to entry or creates barriers to entry;
- b. prevents access to key inputs;
- c. unfair pricing and supply conditions with respect to volume, discounts, quality, and services;
- d. denies access to suppliers;
- e. prevents training, skills upliftment and development in the industry; and

- f. denies access to funding for business development and growth.

9.2.2. Step 2: Determining whether any effect on the ability of SMEs and HDIs to compete is specific to the proposed merger

- 9.2.2.1. In analyzing this provision, the Commission will determine whether the identified effect on SMEs and HDIs is the result of the merger.

- 9.2.2.2. Where an alleged effect already exists, the Commission will consider whether the merger exacerbates the effect.

9.2.3. Step 3: Determining whether the likely effect of the merger on the ability of SMEs and HDIs to compete is substantial

- 9.2.3.1 In analysing this provision, the Commission will in general consider:

- a. whether the affected SMEs or HDIs are impeded from competing in the market;
- b. whether they constrain large players in the market such that their impediment restricts dynamic competition, innovation and growth in the market.
- c. whether the restriction in growth and competition limits growth and expansion of SMEs and HDIs and their participation in other adjacent sectors.
- d. whether the effect has an impact on other public interest factors such as employment and the industrial/sector or region.

- 9.2.3.2. Where a merger has the effect of restricting dynamic competition by raising barriers to entry, impeding the development and expansion of SMEs and HDIs in relevant markets and adjacent sectors and resulting in other public interest concerns, these effects will be considered as substantial.

9.2.4. Step 4: Considering whether such an effect could be justified

9.2.4.1. The onus will rest on the merging parties to provide arguments to justify a substantial positive or negative effect on the ability of SMEs and HDIs to compete.

9.2.4.2. In analysing the arguments presented, the Commission will consider whether there is any public interest justification that could mitigate the negative effect on SMEs and HDIs or would allow it to approve an anti-competitive merger.

9.2.5. Step 5: Determining the appropriate remedy to address the identified negative effect on the ability of SMEs and HDIs to compete

9.2.5.1. The Commission will consider the appropriate remedy on a case by case basis. These could include, among others, the following:

- a. establishing a supplier development fund for technical and financial support and assistance of SMEs and HDIs;
- b. requiring merging parties to provide favourable discounts and prices;
- c. establishing skills development and training programs; and/or
- d. obligating parties to continue access and supply.

10. THE ABILITY OF NATIONAL INDUSTRIES TO COMPETE IN INTERNATIONAL MARKETS

- 10.1. This public interest argument would apply when a party wishes to sanction an otherwise anti-competitive merger or where a merger raises other public interest concerns and the argument is used in justification of those concerns.
- 10.2. The onus would therefore rest on any merging party relying on this factor to advance arguments in support thereof.
- 10.3. As a general approach, when assessing arguments in support of this position, the Commission will consider relevant information advanced by the parties in relation to factors such as, but not limited to, the efficiency benefits to be realised by the domestic economy, whether such potential benefits are created by the merger or cannot be attained without the merger, whether the benefits presented are substantial enough in order to justify any anti-competitive effects or negative public interest concerns arising as a result of the merger.
- 10.4. Such an analysis put forward by the parties may adopt a similar approach as to when efficiency arguments are submitted to the Commission by the merging parties in an attempt to outweigh any anti-competitive effects resulting from a merger.

11. DISCRETION

The above guidelines present the general methodology that the Commission will follow in assessing public interest issues in merger analysis. Notwithstanding the above, this will not fetter the discretion of the Commission and/or the Tribunal and/or the CAC and other courts to consider public interest issues on a case-by-case basis should a need arise.

12. EFFECTIVE DATE AND AMENDMENTS

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