**SUBMISSIONS:**

**DRAFT AMENDED PUBLIC INTEREST GUIDELINES RELATING TO MERGER CONTROL**

**For attention:**
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## BACKGROUND

1. **Sakeliga** notes the publication of the *Draft Amended Public Interest Guidelines Relating to Merger Control* ("Guidelines") and the invitation for written submissions.

2. Should it be promulgated, Sakeliga has around 9,000 business members that stand to be affected by the Guidelines. We are also concerned about the business environment and economy at large and undertake our non-profitable activities in the public interest.

3. Our submissions herein are made within the limited timeframe available for public comment. This does not constitute a complete or final analysis of the Guidelines or Sakeliga's position in response thereto. Sakeliga's rights in the matter remain reserved.

4. Abbreviations and definitions used herein are the same as in the Guidelines, save where otherwise indicated.

## OVERVIEW OF SUBMISSIONS

5. Our submissions will be structured as follows:

    5.1. First, we make general observations.
    5.2. Second, we make submissions as to the specific aspects of the Guidelines.

## GENERAL OBSERVATIONS

6. We note the Commission's own distinction in the Guidelines between "the competition assessment" on the one hand, and "public interest grounds" on the other hand.[1]

7. Indeed, the considerations misnomered as "public interest" considerations have nothing to do with competition as understood in conventional competition law. On the strength of the curious import of such considerations in the Competition Act ("Act"), it appears from the Guidelines that the Commission and/or Tribunal invented for itself multiple roles that have nothing to do with competition law and that fall outside of both the law and the field of expertise of the Commission. To name a few of these roles that the Commission and/or Tribunal has assumed:

    7.1. A *mero motu* arbiter of Constitutional rights;
    7.2. A custodian of employment related issues;
    7.3. A custodian of the environment; and
    7.4. A protector of consumers.

8. It is concerning that the Commission is attempting to stretch the provisions of section 12A(3) of the Act far beyond the scope of its actual mandate, regulating the market in view of competition law to position itself as a super-regulator for public interest considerations beyond the scope of competition law.

[1] "Brief background note" of the Guidelines.

9. Above all, the Guidelines impose a presumption that all transactions that are subject to competition regulation are presumed to be "unjustifiable", unless proved otherwise by merging parties. This reverse evidentiary onus imposes a type of "duty of care", or horizontal duties, on private sector parties to implement and promote government policies. This strategy amounts to the instrumentalisation of businesses (and especially transacting parties) to promote government policy and is contrary to the provisions of section 8 of the Constitution.

10. Furthermore, the Guidelines adopt an approach whereby companies, through prior compliance with government policies such as B-BBEE, are presumed to have taken on a voluntary assumption of duty in relation to promoting such policies and must be continually held to the "progress" already made. For instance, where a reduction of B-BBEE ownership in a target entity is probable, it might be considered unjustifiable on "Public Interest" grounds. The Commission and Tribunal do not have the powers to force entities to keep up with prior conduct in relation to government objectives.

11. To insist, as the Guidelines do, that those socio-economic objectives that the government considers binding on itself are also binding on private companies is to rupture the long-recognised public-private distinction, disregard private property, and nationalise business transactions.

## GENERAL APPROACH TO ASSESSING PUBLIC INTEREST PROVISIONS

12. The Guidelines indicate that parties will be required to provide qualitative and quantitative evidence for any claims regarding the effect of a merger on "Public Interest".[2] Read together with the implicit rebuttable presumption in the Guidelines that all proposed intermediate mergers are unjustifiable, the approach in the Guidelines place a reverse onus on businesses to justify going about their business. This approach will stultify businesses, discourage

[2] Para 5.1 of the Guidelines.

investment in the country and politicise merger transactions. In fact, the public response to the *Burger King*[3] saga reveals a broad public and international disdain for the Commission's approach, as now confirmed in the Guidelines.

13. Where the Commission concludes that a merger substantially negatively impacts a particular "Public Interest" factor, the Guidelines provide that the Commission will consider "remedies" that address the negative impact on that particular "Public Interest" factor.[4]

14. Sakeliga rejects the broad discretion that the Commission arrogates for itself to make definitive findings on abstract concepts and ideals, couched in terms of "negative impact" or "positive impact" on the "Public Interest". Sakeliga submits that the Guideline overreaches the basic structure of the Act and is, for that reason, also unlawful and unconstitutional. It grants almost limitless powers to the Commission to infuse private transactions with virtually any political objective under the guise of "Public Interest" considerations.

15. While the Guidelines confirm that the Commission considers itself as having, notwithstanding the Guidelines, the power to make assessments on a "case-by-case basis", neither the Commission nor the Tribunal enjoys powers to impose requirements or "remedies" on a case-by-case basis.[5] This is a power reserved for courts functioning under section 172 of the Constitution. The Guidelines are *ultra vires* to this extent.

16. The Guidelines determine that if the Commission finds that a merger has a "net positive effect on the Public Interest", the Commission will "likely conclude that the merger is justifiable on substantial Public Interest grounds".[6] This should not be necessary, as all mergers should be presumed to be justifiable.

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[3] *ECP Africa Fund IV LLC and Others v Competition Commission Of South Africa* (IM053Aug21) [2021] ZACT 99.
[4] Para 5.4 off the Guidelines.
[5] Para 5.9 of the Guidelines: "If a merger results in a negative effect on a particular Public Interest factor, the Commission will require remedies that specifically address the negative effect identified. However, if the negative effect on the Public Interest factor cannot be remedied, the Commission may, on a case-by-case basis, consider equally weighty countervailing Public Interest factors that outweigh the negative impact identified."
[6] Para 5.8 of the Guidelines.

## THE EFFECT ON A PARTICULAR INDUSTRIAL SECTOR OR REGION

17. The Guidelines provide that when assessing the likely effect of a merger on a particular industrial sector or region, the Commission will consider the effect of the merger on "development, environmental sustainability and employment in a particular industrial sector or region of South Africa" *inter alia*.[7]

18. In undertaking such an assessment, the Guidelines provide that the Commission may consider "industrial and environmental policy objectives or best practices". In so far as such policies exist that are binding on the parties, those policies are administered by other bodies, and it is not for the Commission to ensure compliance with such policies or, even less, best practices. The Commission would be acting *ultra vires* when disapproving a transaction based on such grounds, *inter alia.*

19. The Guidelines further provide that impact on local production, manufacturing, or deindustrialisation may be considered in the assessment. This provision is reliant on an assumption that private companies are duty-bound to promote local production, *inter alia*, and that the Commission is empowered to enforce the undertaking of such "duties". Both assumptions are Constitutionally flawed.

20. Similarly, while the effect of the merger on the environment may also be considered as per the Guidelines,[8] it would patently be the role of other departments (such as the Department of the Forestry, Fisheries and the Environment) to review such impacts according to their policies designated for the administration of such matters. The same concern applies to the consideration of "commitments made in terms of sector or industry specific legislation or license conditions"[9] which are clearly not for the Commission to administer.

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[7] Para 6.1.1 of the Guidelines.
[8] Para 6.1.2.4 of the Guidelines.
[9] Para 6.1.2.8 of the Guidelines.

21. To take into account, with prejudice to merging parties, the effect of the proposed transaction on government revenue would be an egregious overstepping of powers and disregard for the established principles in South African law that "[e]very man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be".[10] There is no obligation on merging parties to keep up a certain level of government revenue contribution if a merger can result in a lawful reduction of such contributions.[11] To pretend that there is would be unconstitutional.

22. In determining whether the likely effect on the industrial sector or region is substantial, the Guidelines provide that the Commission will, in general, consider the following factors, *inter alia:*

    22.1. Whether the merger impedes or contributes towards any public policy goals or economic development plans that are relevant to that sector or region;[12]

    22.2. whether the sector in question involves or influences any constitutionally entrenched rights.[13]

23. The problem for the Commission is that there is no general obligation on a company to contribute towards public policy goals or economic development plans. Even, however, if this were to be the case from time-to-time *ex consensu*, such obligations would be regulated by the relevant policy makers. It is not for the Commission to regulate and assess those obligations, or to take them into account when deciding if a proposed transaction is "justified".

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[10] Per Lord Tomlin in The *Commisioners of Inland Revenue v The Duke of Westminster* 1936 AC 1 at 19, as confirmed in *Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue* 1996 (3) SA 942 (SCA) and other cases.

[11] Para 6.1.2.7 of the Guidelines provide that the Commission may consider "contribution of either or both the merger parties to the revenue of local municipality/government, for example through levies, rates and taxes, and the effect of the merger on this contribution…"

[12] Para 6.1.3.5 of the Guidelines.

[13] Para 6.1.3.4 of the Guidelines.

24. Furthermore, the issue of determining "constitutionally entrenched rights" is outside the Commission's purview. These determinations are made by superior courts. In any event, if an interested party with *locus standi* is concerned with the impact that a proposed merger might have on their Constitutional rights, they are empowered to approach a court to set a proposed transaction aside. It is not for the Commission to pre-emptively make such determinations.

25. The Guidelines provide that if the Commission is of the view that a transaction cannot be "justified" based on the "Public Interest" referred to above*, inter alia*, remedies such as "increased localisation" may be imposed.[14] The Commission does not have the requisite powers.

26. In summation, section 6.1. of the Guidelines purports to authorise the Commission to consider factors that the Commission either does not have the powers to make determinations on, that are administered by other regulators/bodies and/or that imply non-existent legal obligations on the relevant merging parties. The scheme of determination is unlawful and un-Constitutional.

**THE EFFECT ON EMPLOYMENT**

**Employment "within merger parties"**

27. The Guidelines provide that the Commission may consider the effect of a proposed transaction on employment "within the merger parties". An enquiry of such nature is neither public nor related to the interests of the public generally. Such an enquiry is related to the private affairs of a company and not necessarily to any broader markets concerned.

28. Section 116(7) of the Companies Act determines that when an amalgamation or merger agreement has been implemented, each newly amalgamated, or surviving merged company is liable for all of the obligations of every amalgamating or merging company. These obligations would include

[14] Para 6.1.5 of the Guidelines.

employment contracts, which are amply regulated by the Basic Conditions of Employment Act (BCEA) and Labour Relations Act (LRA).

29. Any possible reductions of employment, retrenchment and related matters as a result of mergers are regulated by the Companies Act, BCEA and LRA, *inter alia*. The Commission cannot make prejudicial determinations in its "Public Interest" assessments in relation to such matters because it does not have the powers to regulate such matters. The Commission is also not empowered to prejudice merging parties based on an *a priori* conjecture that the standards imposed by those sets of legislation would not be complied with post-merger.

30. Any employment-related infringements can be dealt with post-merger by the relevant authorities in terms of legislation regulating employment. The Commission does not even consider that the Guidelines may conflict with labour legislation.

31. Even though government policies emphasise the importance of job-creation, private companies have no general obligation in law to promote employment. Further, as long as contractual provisions, provisions of the BCEA and LRA are complied with, there is no obligation in law for any entity not to retrench employees. The Commission cannot impose such an obligation directly, nor can it do so indirectly by way of adverse decisions in relation to a proposed transaction.

**Likely indirect effect of the merger on the general level of employment in a particular sector or region**

32. The part of the Guidelines dealing with employment further provides that the Commission will also consider the "likely indirect effect of the merger on the general level of employment in a particular sector or region". [15]

[15] Para 6.2.3 of the Guidelines.

33. In assessing this effect, the Commission will consider whether the merger impacts the level of employment post-merger due to, *inter alia:*

    33.1. job creation or loss of job opportunities;

    33.2. duplications;

    33.3. cost-cutting measures;

    33.4. cancellation of supply/distribution arrangements; and/or

    33.5. relocation of offices, factories, and facilities.

34. While a merger, like many everyday business decisions, may have an "effect" on the level of employment in a "sector" generally, such effects cannot be interpreted to the prejudice of merging parties. Businesses are not Constitutionally or otherwise obligated to promote employment, although any such endeavours might trigger government incentives or other benefits.

**THE ABILITY OF SMALL AND MEDIUM BUSINESSES, OR FIRMS CONTROLLED OR OWNED BY HISTORICALLY DISADVANTAGED PERSONS, TO EFFECTIVELY ENTER INTO, PARTICIPATE IN OR EXPAND WITHIN THE MARKET**

35. The Guidelines provide that the Commission may consider whether a merger will either "prevent" / "deny" or "allow" / "grant access to" certain conditions/resources/benefits.[16]

36. When the terminology of "prevent" and "deny...access to" is used, it is unclear what degree of causality is required. For instance, when the Commission considers whether a merger will "den[y] or gran[t] access to funding for business development and growth" of HDPs and/or SMEs, what is meant by "deny"?

[16] Paras 6.3.1.1 – 6.3.1.5 of the Guidelines.

There is naturally a distinction between a positive act of denying funding to HDPs, for instance, and simply not continuing to provide funding to such HDPs for whatever reason. These are not the same, but it seems that "denying" in the Guidelines would also include conduct of ceasing to do what has been done pre-merger.

37. The Commission seeks to attach prejudicial consequences to omissions on the part of the private sector to promote policies that bind that state. This is unconstitutional.

38. To abandon post-merger, pre-merger conduct of funding or procuring from HDPs is not tantamount to "denying" or "preventing" anything. This wording suggests that HDPs and SMEs are automatically entitled to such benefits arising from the prior conduct of merging parties. The Act imposes no such obligations on merging parties, and it is contrary to established constitutional principles.

39. Similarly, it is unclear from where the Guidelines source the ostensible obligation on merging parties to provide "continued support or procurement of services or products from SMEs and firms owned/controlled by HDP suppliers" post-merger. There simply exists no such obligation in any legislation; imposing a "remedy" of this nature would be *ultra vires* the Commission and/or the Tribunal's powers.

**THE PROMOTION OF A GREATER SPREAD OF OWNERSHIP, IN PARTICULAR TO INCREASE THE LEVELS OF OWNERSHIP BY HISTORICALLY DISADVANTAGED PERSONS AND WORKERS IN FIRMS IN THE MARKET**

40. The Guidelines confirm that the Commission considers that "unlike the other Public Interest factors", section 12A(3)(e) of the Act confers "a positive obligation on merging parties to promote or increase a greater spread of ownership, in particular by HDPs and/or Workers in the economy."[17]

[17] Para 6.5.2 of the Guidelines.

41. However, as explained above in these submissions, many positive obligations are implied or expressly provided for at other "Public Interest" factors. In the light of the concession above that this should not be the case, every part of the Guidelines providing for implicit or direct positive obligations should be scrapped.

42. Turning to the alleged positive obligation on merging parties arising from section 12A(3)(e), the Commission's reliance on and interpretation of the preamble is misplaced for the following reasons *inter alia:*

    42.1. The relevant part of the Preamble refers to concentration and ownership within markets, while the relevant part of the Guidelines primarily assesses ownership within firms themselves. The preamble does not support the Commission's approach.

    42.2. The preamble's notion that the Commission may ostensibly take into account whether firms "proactively" address ownership and concentration matters is markedly different from concluding that firms have a "positive obligation" to do so. They do not.

43. It is clear from section 6.5 of the Guidelines that the Commission seeks to impose ostensible measures under section 9(2) of the Constitution on natural and juristic persons. The problem for the Commission is that while such measures could be binding on the state, it is not binding on natural or juristic persons. The Commission's attempt to impose positive obligations on private and juristic persons is un-Constitutional.

44. The Guidelines provide further that merely because section 12A(3)(e) of the Act is a "feature of every merger assessment", this aspect will possibly be decisive for a finding that a merger is unjustifiable.[18] This construction is illogical. The mere fact that a particular "Public Interest" factor tends to feature in all merger

[18] Para 6.5.5 of the Guidelines.

assessments should not affect the relative weighting of "Public Interest" features *inter se* in a given merger assessment. It instead seems that the Commission seeks justification for its absolutisation of section 12A(3)(e).

45. The Commission further considers that the "obligation" to promote or increase a greater spread of ownership pertains to all mergers that have an effect in South Africa.[19] Again, however, this "obligation" is not sourced from legislation and any such "obligation" imposed would be *ultra vires* and un-Constitutional.

46. The Guidelines further provide that even if a merger promotes ownership by HDPs, this does not preclude the obligation to consider increased ownership by Workers, and *vice versa*.[20] The issue is that there is no obligation on the private sector in any legislation or the Constitution to promote the ownership of workers. The Act also does not provide for such an obligation. The Commission cannot whimsically employ legal nomenclature without appreciation of the implications of certain legal terms.

**Broad-Based Black Economic Empowerment**

47. The Guidelines reveal how the Commission would go about measuring a "greater spread of ownership" by HDPs and / or Workers. The Commission will review *inter alia* the "independently verified, valid B-BBEE certificates, incorporation documents; and identity documents of shareholders".[21]

48. The problem for the Commission is that the Act does not authorise the Commission to synonymize HDPs with B-BBEE, or HDPs with persons described in the B-BBEE Act. The B-BBEE Act does not feature at all in the Act.

49. Section 3(2) of the Act requires the Commission to <u>independently assess</u> who is a historically disadvantaged person, with reference to individuals who are assessed to have been actually disadvantaged by unfair discrimination on the

[19] Para 6.5.6 of the Guidelines.
[20] Para 6.5.9 of the Guidelines.
[21] Para 6.5.7 of the Guidelines.

basis of race in the past. “Broad-based black economic empowerment”, on the other hand, refers to “all black people, in particular women, workers, youth, people with disabilities and people living in rural areas”.[22]

50. The objects and scope of the B-BBEE Act differ markedly from those of the Act, and the categories of people that the B-BBEE Act purportedly benefits differ from the category of people that the Act purportedly benefits. The Commission cannot conflate the two and certainly cannot substitute the legislative concept of “HDPs” with categories of people described in the B-BBEE Act.

51. The Commission’s attempt to employ B-BBEE as a proxy for what is required of it in the Act in terms of determining who qualifies as an HDP is haphazard and unlawful. The Commission cannot, through its conduct or Guidelines, effectively amend the Act to incorporate objectives other than those that the legislator prescribed.

52. As far as the identity documents of shareholders go, it is entirely unclear how the prominence of HDPs and/or Workers would be determined by perusing identity documents. The state abolished demographic classifications on identity documents decades ago.

**Establishing the effect of the “Public Interest” factor**

53. To establish the ostensible effect of a merger on the “Public Interest” factor in this section, the Guidelines list at least 12 factors that the Commission can consider.[23] To avoid repeating similar previous submissions and to avoid overly lengthy submissions they will not be dealt with individually, save for the following remarks:

    53.1. The Commission does not have the powers to impose positive obligations on merging parties to “promote” or “increase” the levels of

[22] Section 1 of the B-BBEE Act.
[23] Para 6.5.12 of the Guidelines.

ownership held by any category of people within firms themselves. At most, and this would also be subject to debate, the Commission can assess broader impacts on markets or industries. The Commission is not empowered to dictate to specific companies what their shareholding should be constituted of, independent of its effects on markets.

53.2. While the term “transformation” is used, this term is undefined and its objectives indeterminable.[24]

53.3. While the Guidelines provide that merging parties may submit arguments to justify any “failure to promote a greater spread of ownership”, this reverse onus is untoward and pre-supposes, erroneously, that an obligation to promote a “greater spread of ownership” is legally sourced in law in the first place.[25]

54. Regarding " remedies “, the Commission simply does not have the powers to impose any “remedies” on a case-by-case basis. Such powers would be too broad and are reserved for courts.

**CONCLUSION**

55. It is clear from the Guidelines that the Commission now considers itself a super-regulator, ostensibly empowered to regulate vast aspects of companies' internal business, even when unrelated to competition or broader market phenomena.

56. The requirements styled as “Public Interest” often have nothing to do with the public or the interests of the public generally. Sakeliga rejects the misappropriation of the notion of public interest to justify horizontal enforcement of government policies on companies.

[24] Para 6.5.12.4 of the Guidelines.
[25] Para 6.5.12.10 of the Guidelines.

57. The Guidelines confirm that the Commission tendentially invents legal powers for itself that do not exist in legislation. The Commission also seeks to usurp powers already exercised by multiple other regulators provided for in other pieces of legislation.

58. The Commission does not have the powers to impose most requirements and "remedies" in the Guidelines on merging parties, and the Guidelines seem to confirm un-Constitutional conduct that has already become settled practice at the Commission.

59. Due to the interconnectedness of many of the *ultra vires and* un-Constitutional provisions in the Guidelines, the Guidelines should be revoked entirely.

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