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**TO:** Mergers and Acquisitions Division, Competition Commission  
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To whom it may concern,

**DRAFT AMENDED PUBLIC INTEREST GUIDELINES FOR MERGER CONTROL, 2023**

THE FREE MARKET FOUNDATION RECOMMENDS THAT THE GUIDELINES BE WITHDRAWN.

**ABOUT THE FREE MARKET FOUNDATION**

1. The Free Market Foundation (FMF), founded in 1975, promotes and defends the principles of individual liberty, private property, free enterprise, and limited constitutional government. The FMF primarily engages with the policy environment by informing the public of the benefits of liberalisation and generating pressure on political authorities to lessen and cease their interference in market exchanges and private affairs.

**PROBLEM STATEMENT**

**Context**

2. The FMF is opposed to the institution of the draft amended Public Interest Guidelines for Merger Control (the Guidelines), as these will make the completion of mergers uncertain and more costly. These regulations will make doing business in South Africa more difficult, making the South African economy less competitive.

3. The South African economy is currently experiencing growth levels significantly lower than their counterparts on the continent.<sup>1</sup> The Guidelines will make mergers, which are beneficial and wealth producing measures for the economy, harder to complete.<sup>2</sup>

## **Certainty**

4. The South African state and its organs, including regulators, are bound by the Constitution of South Africa, 1996. The Constitution sets out the Rule of Law as a foundational value of the South African state.<sup>3</sup> The Rule of Law encompasses legal certainty as one of its aspects.<sup>4</sup>
5. Legal certainty will be undermined by the adoption of the Guidelines, since a determination on whether a company has satisfied the public interest requirements, even with a list outlining said requirements, will be left to the discretion of the Commission.<sup>5</sup>
6. This value judgement by the regulator means that companies will find it impossible to forecast their future with certainty should they want to acquire another company in the future. Certainty in the law is integral to commercial operations. These guidelines and the general public interest approach by the Commission leaves the determination to an official's decision on a balance of probabilities, which violates the Rule of Law.

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<sup>1</sup> "World Bank. 2023. Africa's Pulse, No. 27, April 2023: Leveraging Resource Wealth During the Low Carbon Transition. © Washington, DC: World Bank. <http://hdl.handle.net/10986/39615> License: [CC BY 3.0 IGO](https://creativecommons.org/licenses/by/3.0/)." P12. Figure 1.4.

<sup>2</sup> Uddin, Mohammed Ahmar, A Study of the Benefits of Mergers and Acquisitions in the Indian Context (April 22, 2012). Available at SSRN: <https://ssrn.com/abstract=2967917> or <http://dx.doi.org/10.2139/ssrn.2967917>

P3-4. In this paper the benefits of mergers and acquisitions are discussed in the Indian context. Mergers and acquisitions are found to spur corporate growth. Therefore, if corporates are growing, it follows that so is the economy.

<sup>3</sup> Constitution of the Republic of South Africa, 1996. Section 1(3).

<sup>4</sup> Parliamentary Assembly of the Council of Europe. Report. 'The Principle of the Rule of Law'. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik JURGENS, Netherlands, Socialist Group. <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11593>. Accessed 01 November 2023.

<sup>5</sup> Draft Revised Guidelines on Public Interest. Competition Commission of South Africa. Pp7. "General Approach to Assessing Public Interest". This section outlines the approach the Commission has when determining whether a merger satisfies the public interest requirements or not. The final determination is left to the commission to inherently make a value judgment guided by the guidelines. The term "where the commission concludes" is in the section, showing that the determination, is ultimately left to the Commission, creating uncertainty in the law.

7. One of the imperatives of the Rule of Law is that whatever discretionary power is given through legislation or in this case, the Guidelines, must be given an objective criterion under which said powers will be exercised.<sup>6</sup>
8. The Guidelines contain no objective criteria. Rather than limiting the discretionary power of the Commission, the Guidelines expand that power without providing a standard to measure the rationality of potential decisions. A good standard would eliminate the discretion of the Commission and limit it to whether a company met clearly formulated requirements or not, creating a much more certain business environment.
9. The public Interest considerations as currently outlined in the Guidelines are not in line with the Rule of Law, thus making them unconstitutional. It will create uncertainty and it gives the Commission powers to effect merger proceedings substantively without recourse to an objective standard.

### **Separation of powers**

10. Another violation of the constitutional Rule of Law provision is the fact that the Commission is treated as a law-making body. As part of the substantive elements of the Rule of Law we have the separation of powers and the principle that law or legislation must be made by the body responsible for it and no one else – the legislature.<sup>7</sup>
11. Even though these guidelines do not have the force of law in that their violation will not lead to sanction or punishment, they still are a violation of the spirit of separation of powers and subsequently, the Rule of Law. Merger guidelines by a body responsible for making decisions about all mergers above a certain threshold, will clearly attract a certain force in society, similar to that of law, especially among those affected by said guidelines.

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<sup>6</sup> Martin van Staden. *The Constitution and the Rule of Law: An Introduction*. 2019. P50.

<sup>7</sup> Van Staden *The Constitution and The Rule of Law*. P51.

12. If a company wishes to have their merger approved by the Commission, they will have to be familiar with the Guidelines. If the Guidelines are what will be guiding the decision making of the Commission, then non-compliance will virtually guarantee that merger will not be approved. This will create more costs as companies would have to appeal said decision of the Commission to the Competition Tribunal. A decision that would have emanated from the 'non-binding' Guidelines can create more costs for a company that chooses to not recognise the Guidelines as law.
13. Therefore, the Guidelines proposed by the commission will have the force and likely consequence of law without the procedural steps necessary to pass as law. Their impact will be similar to law, and so will their operation, yet their adoption is not the one set out in the Constitution for the adoption of or amendments to law.
14. The Guidelines therefore violate the Rule of Law by not respecting the principle of certainty, which is an aspect of section 1(c) of the Constitution. The Guidelines' application is inherently uncertain and discretionary. The Guidelines also violate the spirit of the Rule of Law's separation of powers principle by having the real-life force and consequence of law, without following the procedures necessary to be adopted as law.

### **Misunderstanding of public interest**

15. In the matter of *Epiroc Holdings SA v K2022596519 (South Africa) (Pty) Ltd and Another (LM148Nov22) [2023] ZACT 32* which was before the Competition Tribunal, the court held that, "As regards the public interest analysis under section 12A(3) of the Act, the Tribunal has previously explained that it is a holistic one..."<sup>8</sup>
16. The Tribunal stated unequivocally that the determination of the various public interest considerations in mergers is a holistic exercise. This

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<sup>8</sup> *Epiroc Holdings SA v K2022596519 (South Africa) (Pty) Ltd and Another (LM148Nov22) [2023] ZACT 32* para 75.

holistic understanding of the public interest provisions predates the amendments to section 12A of the Competition Act 89 of 1998 but the amendments do not impact on the holistic approach.<sup>9</sup>

17. This holistic approach to public interest is opposed to the ‘bean counting’ exercise which the Guidelines seek to impose as a guide for public interest. The statement in 5.10 of the Guidelines illustrates this opposition to the holistic approach by directly contradicting the rationale expressed by the Tribunal in the *Epiroc* merger.

18. Paragraph 5.10 of the Guidelines states:

“It bears mention that the determination into a merger’s net effect on the Public Interest includes consideration of both the quantitative and qualitative effects of the merger on each Public Interest factor, and cumulatively, on the Public Interest factors as a whole. Thus, by way of example, despite finding that most of the Public Interest factors applicable to a merger are substantially positively affected by a merger, those effects may be countervailed by substantial negative effects arising from a single Public Interest factor.”<sup>10</sup>

19. This statement stands in direct contradiction to the one advanced by the Tribunal:

“Therefore, even if, on a consideration of all the evidence, a merger would have a substantial negative effect insofar as section 12A(3)(e) is concerned, that effect might be mitigated or outweighed by positive effects in relation to one or more of the other factors listed in section 12A(3).”<sup>11</sup>

20. The guidelines aim to have a single negative effect of a public interest factor applicable to a merger invalidate a majority of positive factors emanating from that merger. This is in opposition to the rationale

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<sup>9</sup> *Epiroc Holdings SA v K2022596519 (South Africa) (Pty) Ltd and Another (LM148Nov22) [2023] ZACT 32* para 76.

<sup>10</sup> Public Interest Guidelines. Op Cit note 5, P8.

<sup>11</sup> *Epiroc*. Op Cit note 9. Para 77.

offered by the courts in that the public interest consideration, despite the amendment, is a holistic exercise.

21. The Guidelines, as they are currently drafted, are in violation of precedent. They are advancing a rationale that is opposed to how the courts understand the issue of public interest and therefore the Guidelines could be said to be in violation of the very law they emanate from.
22. It would not be prudent for the Commission to adopt guidelines which are in opposition to Competition Tribunal precedent.

### **The risk to investment**

23. Mergers are an integral aspect of any dynamic economy as they enable growth. Better certainty in their administration will only increase the likelihood of mergers and more investor confidence in their success, thus increasing the likelihood of economic activity and investment.<sup>12</sup> This benefit will be undermined when mergers are made harder to complete and predict their approval, as these guidelines will make them.
24. The FMF proposes that the regulatory status quo concerning public interest factors in merger consideration remain unchanged. The status quo is preferable to the uncertainty that will be instituted by the adoption of the draft guidelines.
25. We trust that the Competition Commission will see reason and not adopt guidelines that are a violation of a constitutional value in the Rule of Law, case law, and sound economics.

### **RECOMMENDATION**

26. The FMF recommends that the Guidelines be withdrawn. The status quo regarding public interest considerations in mergers should remain intact.

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<sup>12</sup> Op Cit note 2.