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### **South Africa’s Proposed Guidelines on Penalties for Failure to Notify a Merger—Some Predictability, Some Uncertainty**

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On February 17, 2017, the South African Competition Commission (“Commission”) published “Draft Guidelines for the Determination of Administrative Penalties for Failure to Notify a Merger and Implementation of Mergers Contrary to the Competition Act” (the “Guidelines”). The Commission published the Guidelines in response to the identification of a number of cases of failure to notify mergers and implementation of mergers contrary to Chapter 3 of the Competition No. 89 of 1998 (as amended) (the “Act”) and to the Competition Tribunal (“Tribunal”) calling upon the Commission to formulate guidelines in this regard.<sup>1</sup>

The proposed Guidelines attempt to provide an approach for determining penalties in instances where parties have failed to notify a merger or have implemented a merger prior to receiving approval from the competition authorities. The Act requires that intermediate and large mergers be notified to the Commission and such mergers may not be implemented until they are approved, with or without conditions, by the competition authorities.

An intermediate merger is one where the value of the target firm’s assets in South Africa or its turnover generated in, into or from South Africa, is between Rand (“R”) 100 million<sup>2</sup> and R 190 million<sup>3</sup> and the combined value of the turnover generated in, into or from South Africa or the assets in South Africa of the acquiring firm and the target firm is between R 600 million<sup>4</sup> and R 6,6 billion.<sup>5</sup> A large merger is one where the value of the target firm’s assets in South Africa or its turnover generated in, into or from South Africa is R 190 million or more and the combined value of the turnover generated in, into or from South Africa or the assets in South Africa of the acquiring firm and the target firm amount to or exceed R 6.6 billion.

<sup>1</sup> See for example, *The Competition Commission v. BB Investment Company (Pty) Ltd*, Case No: FTN200Dec15. In terms of Section 79 of the Act, the Commission may prepare guidelines to indicate its policy approach to any matter within its jurisdiction in terms of the Act.

<sup>2</sup> Approximately USD 7,610,760.

<sup>3</sup> Approximately USD 14,460,500.

<sup>4</sup> Approximately USD 45,664,600.

<sup>5</sup> Approximately USD 46,121,200,000.

The Guidelines provide that for prior implementation of intermediate mergers, the minimum penalty will be double the applicable filing fee for an intermediate merger and the maximum penalty will be R 5,000,000. The Guidelines further provide that for prior implementation of large mergers, the minimum penalty will be double the applicable filing fee for a large merger and the maximum penalty will be R 20,000,000. Although the wording in the Guidelines only refers to “prior implementation,” the Guidelines reflect that these penalty computation methods are also to be used when dealing with cases of failure to notify a merger.

The filing fees payable for an intermediate merger is R 150,000 and the filing fee payable for a large merger is R 500,000. The current filing fees have been in effect since October 1, 2017. Prior to October 1, 2017, the filing fee payable for an intermediate merger notification was R 100,000 and a filing fee of R 350,000 was payable when notifying a large merger. These filing fees were in place from April 1, 2009 until September 30, 2017.<sup>6</sup>

While the Guidelines provide for each case to be considered on its own merits, at first glance, the Commission’s proposed methodology on the calculation of administrative penalties for failure to notify or for prior implementation appears very clear. However, as noted above, the Guidelines provide that a minimum penalty (both for failure to notify and for prior implementation) will be an amount equal to double the applicable filing fee for an intermediate or large merger, as the case may be. It is not clear from the Guidelines what is meant by the “applicable filing fee.” Is the applicable filing fee the fee that applied at the time that the failure to notify arose or the prior implementation occurred, or is it the filing fee applicable at the time at which the Commission or the Tribunal identify or consider the failure to notify or the prior implementation?

From December 24, 1999 to February 1, 2001, the filing fees payable for an intermediate merger were R 5,000, R 125,000 or R 250,000, depending on the value of the assets or turnover of the merging parties, and the filing fees payable for a large merger were R 500,000.<sup>7</sup> From February 1, 2001 until April 1, 2009, the filing fees payable for an intermediate merger were R 75,000 and the filing fees payable for a large merger were R 250,000.<sup>8</sup> While the filing fees for mergers have increased in 2017, the filing fees have also changed in the past. For example, from April 1, 2009 to September 30, 2017, the filing fees payable for an intermediate merger were R 100,000 and the filing fees payable for a large merger were R 350,000. These changes to the filing fees over time reflect that the precise meaning of the “applicable filing fee” as used in the Guidelines is of importance, particularly when considering the period of time it may take before the failure to notify or the prior implementation of a merger is detected.

The “applicable filing fee” for an intermediate merger in 2007, for example, would have been R 75,000, while the “applicable filing fee” as at October 1, 2017 is R 150,000. On this basis, the minimum penalty amount payable is not clear from a plain reading of the Guidelines.

The Guidelines also provide for a consideration of various factors in mitigation or aggravation of the penalty to be imposed. At this stage, it is still unclear how these factors will be applied in practice. For example, one of the factors which may be seen as mitigating is if the merging parties demonstrate willingness to expeditiously conclude a settlement with the Commission. It remains to be seen, however, if mitigation will apply in circumstances where a firm is willing to reach a settlement but the Commission requires

<sup>6</sup> See Notice 215 of March 6, 2009, under Government Gazette No. 31957 and Notice 1254 of November 10, 2017, under Government Gazette No. 41245.

<sup>7</sup> See Notice 2889 of December 24, 1999, under Government Gazette No. 20752.

<sup>8</sup> See Notice 12 of February 1, 2001, under Government Gazette No. 22025.

settlement on terms that are unacceptable to the firm, or the firm is only willing to conclude a settlement with a token penalty, so that ultimately a settlement is not concluded without protracted negotiations. Similarly, the Guidelines provide that an aggravating factor will include circumstances in which the merging parties were negligent or deliberate and willful in their failure to notify the transaction. It remains to be seen how this factor will be applied in practice. For instance, if legal advice was sought and this advice was not correct, arguably the parties were not negligent in failing to notify. However, if the advice sought was not well-reasoned or well-substantiated, the parties may have been negligent in not interrogating the advice. It may take time, and a number of decided cases, before there is more predictability in relation to the aggravating and mitigation factors.

Notwithstanding the above uncertainties, the Guidelines provide a good starting point when considering administrative penalties for failure to notify and prior implementation contraventions, since they seek to provide a methodology to be used.

A question that is raised is whether there should be different considerations when dealing with a failure to notify as compared to pre-implementation of a merger. Put differently, is there or should there be a distinction between the failure to notify a merger and the prior implementation of a merger (so-called “gun-jumping”) when it comes to considering an “appropriate” penalty?

In the United States, failure to notify a merger is treated as a more serious offence than prior implementation of a merger or “gun-jumping.”<sup>9</sup> There are arguments that can be presented for and against this distinction. Some think that pre-implementation is likely to constitute a contravention for a limited time prior to the relevant approval being granted, while failure to notify could constitute a continuing contravention for a significant period of time. However, in either situation, there may be an element of negligence or even willfulness to contravene and, if so, this should be taken into account. Further, failure to notify in certain circumstances may have no adverse effect, for example, where the merger that should have been notified is non-contentious from a competition perspective, such that no competitive harm could have arisen. Conversely, prior implementation in circumstances where the merger notified is ultimately prohibited, could expose the acquiring firm to competitively-sensitive information of the target in circumstances where the transaction will ultimately be blocked in order to prevent harm to competition.

It seems therefore that when considering either the failure to notify a merger or the pre-implementation of a merger, the conduct and the facts surrounding such conduct remain extremely significant in determining an “appropriate” penalty. In my view, an “appropriate” penalty should always be informed by the facts of the specific case, rather than whether the contravention constituted failure to notify or prior-implementation.

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9 See for example *Input/Output, Inc. / Laitram Corp.*, [<http://www.justice.gov/atr/cases/f203600/203653.htm>]; *Computer Associates International (CA) / Platinum Technology*, [[http://www.justice.gov/atr/public/press\\_releases/2002/11029.htm](http://www.justice.gov/atr/public/press_releases/2002/11029.htm)]; and *Gemstar / TV Guide*, [[http://www.justice.gov/atr/public/press\\_releases/2003/200740.htm](http://www.justice.gov/atr/public/press_releases/2003/200740.htm)]. See also *Gun-jumping: Antitrust Issues Before Closing the Merger* by Richard Liebeskind, Partner, Pillsbury Winthrop LLP, Washington, D.C.