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**Update**

**Issue 6:  
Complete merger filing requirements**

**1. Preface**

- a) The Competition Commission (“Commission”) prepares and disseminates Updates to inform and clarify the Commission’s policies and adopted approaches to specific issues on any matter within its jurisdiction. This update sets out the general approach taken by the Commission and is not intended to be a binding statement of how discretion will be exercised in a particular situation and should not be taken as such.

**2. Background**

- a. This is the first practice note providing guidance on the completeness of a merger filing. It covers the essential documents that the merging parties should submit together with guidelines on the submission of any other documents which the Commission views as being relevant, necessary and sufficient to constitute a complete filing.

- b. In terms of the Competition Commission (“Commission”) Rule 30(1), the Commission may, within 5 business days after receiving a Merger Notice filed in respect of a merger declared to be a large merger or within 10 business days after receiving a Merger notice filed in respect of any other merger, deliver to the filing firm a Notice of Incomplete Filing, Form CC13(2).
- c. The initial period for consideration of the proposed merger will not begin until the merging parties have satisfied all notification requirements set out in the Form CC13(2).
- d. The Commission may deliver a Notice of Complete Filing, Form CC13 (1), however if neither Form CC13 (1) nor Form CC13 (2) is delivered within the statutory period, the filing will be deemed to be complete.

### **3. Commission policy**

In order to ensure that the merging parties provide a full and complete filing, the Commission proposes the following requirements as constituting a complete merger filing:

**FILING REQUIRMENTS FOR MERGER NOTIFICATIONS TO  
THE COMPETITION COMMISSION SOUTH AFRICA  
MARCH 2010**

No	Schedule	Question / Annexure	Description	Commentary
1.	<b>Form CC 4(1) Merger Notice (signed certificate of accuracy)</b>			
	<b>Schedule 1</b>		Names and principal address of all other acquiring or target firms as defined in the Competition Act and a list of all trade union or employee representatives of the primary acquiring and primary target firms.	<b>Note 1.</b>
	<b>Schedule 2</b>		Provide a summary of the effect of the proposed merger on employment.	<b>Note 2.</b>
2.	<b>Form CC 4(2) Statement of merger information – Primary acquiring firm</b>			
3.	<b>Schedule 3</b>	<b>Identification</b>		
		Question 1	Name and address of primary acquiring firm.	
		Question 2	Provide a complete list of shareholders and their respective shareholding, including minority shareholders, for the primary acquiring firm and / or any firm that directly or indirectly controls the primary acquiring firm.	Organograms of the group structures are very helpful.
		Question 3	Provide a complete list of names of firms and their respective shareholding directly or indirectly controlling the firms listed in question 2 above.	Organograms of the group structures are very helpful.
		Question 4	Subsidiaries of primary acquiring firm: Provide a complete list of names of	

			firms and shareholding of each firm directly or indirectly controlled by the primary acquiring firm.	
		Question 5	State the names, nature and extent of ownership control of historically disadvantaged persons.	
		Question 6	State the annual turnover in, into or from the Republic for primary acquiring group's preceding financial year.	<b>Note 3</b>
		Question 7	State the value of assets in the Republic for the primary acquiring group's preceding financial year.	<b>Note 4</b>
		Question 8	State the annual turnover in, into or from the Republic for the primary acquiring group as of the date of the merger notice.	
<b>4.</b>	<b>Schedule 4</b>	<b>Transaction Information</b>		
		Question 9	Indicate whether the party filing this notice is acquiring assets, share or other interest, selling assets, shares or other interests or is acquiring and selling assets, shares or other interests.	
		Question 10	Indicate whether the transaction involves, foreign direct investment, a management buy-out or a buyback of shares.	
		Question 11	Fully describe the merger including the timing, consideration and rationale.	<b>Note 5</b>
		Question 12	Unless the firm has provided a report addressing the following issues, provide the following detail: a) The <b>estimated market shares</b> of the merging parties and their competitors. b) Information regarding <b>barriers to entry</b> including, capital requirements, sunk costs, time it would take for potential entrants to enter the market, regulatory requirements and contact details of	<b>Note 6</b>

			<p>market participants that have entered the market during the last three years.</p> <p>c) Information concerning <b>import competition</b>, such as import duties.</p> <p>d) The degree of <b>countervailing power</b> customers and / or suppliers has over your firm.</p>	
		Question 13	<p>If you are relying on failing firm doctrine provide the following information:</p> <p>a) Financial information demonstrating that the firm will be unable to meet its financial obligations in future.</p> <p>b) Information concerning efforts taken to elicit reasonable alternative offers.</p> <p>c) Information indicating that the failing firm would reasonably be expected to exit the market unless the merger is implemented.</p> <p>Importantly, firms should state categorically whether it relies on this doctrine and provide information that can be used as evidence supporting this doctrine.</p>	<b>Note 7</b>
<b>5.</b>	<b>Schedule 5</b>	<b>Products and Services</b>		<b>Note 8</b>
		Question 14	<p>Identify each product and service that is sold by the acquiring group in, into or from the Republic. In addition identify any products or services that you believe are considered by buyers as reasonably interchangeable with or a substitute for a product or service provided in into or from the Republic by another party to the merger. Use the 5 digit Standard Industrial Codes to identify products.</p>	
		Question 15	<p>For each identified product or service, state the geographic area(s) in the Republic in which you sell.</p>	

		Question 16	For each product or service identified and in every geographic area provide the following: <ul style="list-style-type: none"> <li>Names and accurate contact details of the five largest competitors.</li> <li>The five competitors estimated turnover in value.</li> <li>The competitors estimated share of the total turnover during the last 12 months.</li> </ul>	
		Question 17	For each product or service state your turnover in each of the identified geographic area during the last full 12 months.	
		Question 18	For each product or service identified and in every geographic area provide the following: <ul style="list-style-type: none"> <li>Names and accurate contact details of the five largest customers</li> <li>The aggregate value of purchases during the last 12 months.</li> </ul>	
<b>6.</b>	<b>Schedule 6</b>	<b>Business relationship among parties</b>		<b>Note 9</b>
		Question 19	Describe any business relationship between the parties	
	<b>Schedule 7</b>	<b>Certificate of accuracy (hard copy filed with Form CC 4(2))</b>		
<b>7.</b>	<b>Form CC7 Claim for confidentiality - Primary acquiring firm</b>			<b>Note 12</b>
<b>No</b>	<b>Schedule</b>	<b>Question / Annexure</b>	<b>Description</b>	<b>Commentary</b>
<b>8.</b>	<b>Form CC 4(2) Statement of merger information – Primary target firm</b>			
<b>9.</b>	<b>Schedule 3</b>	<b>Identification</b>		
		Question 1	Name and address of primary target firm	
		Question 2	Provide a complete list of shareholders and their respective shareholding, including minority shareholders, for the primary target firm and / or any firm	Organograms of the group

			that directly or indirectly controls the primary target firm.	structures are very helpful.	
		Question 3	List the name and principal business address of each firm directly or indirectly controlled by each firm referred to in item 2.	Organograms of the group structures are very helpful.	
		Question 4	Provide a complete list of names of firms and shareholding of each firm directly or indirectly controlled by the primary target firm.		
		Question 5	Only applicable to acquiring firm		
		Question 6	State the annual turnover in, into or from the Republic for primary target firm for the preceding financial year.	<b>Note 10</b>	
		Question 7	State the gross value of assets in the Republic for the primary target firm for the preceding financial year.	<b>Note 11</b>	
		Question 8	State the annual turnover in, into or from the Republic for the primary target firm as of the date of the merger notice.		
<b>10.</b>	<b>Schedule 4</b>	<b>Transaction Information</b>			
		Question 9	Indicate whether the party filing this notice is acquiring assets, share or other interest, selling assets, shares or other interests or is acquiring and selling assets, shares or other interests.		
		Question 10	Indicate whether the transaction involves, foreign direct investment, a management buy-out or a buyback of shares.		
		Question 11	Fully describe the merger including the timing, consideration and rationale.		
		Question 12	Unless the firm has provided a report addressing the following issues, provide the following detail:	<b>Note 6</b>	

			<p>a) The <b>estimated market shares</b> of the merging parties and their competitors.</p> <p>b) Information regarding barriers to entry including, capital requirements, sunk costs, time it would take for potential entrants to enter the market, regulatory requirements and contact details of market participants that have entered the market during the last three years.</p> <p>c) Information concerning import competition, such as import duties.</p> <p>d) The degree of countervailing power customers and / or suppliers has over your firm.</p>	
		Question 13	<p>If you are relying on failing firm doctrine provide the following information:</p> <p>a) Financial information demonstrating that the firm will be unable to meet its financial obligations in future.</p> <p>b) Information concerning efforts taken to elicit reasonable alternative offers.</p> <p>c) Information indicating that the failing firm would reasonably be expected to exit the market unless the merger is implemented.</p> <p>Importantly, firms should state categorically whether it relies on this doctrine and provide information that can be used as evidence supporting this doctrine.</p>	<b>Note 7</b>
<b>11.</b>	<b>Schedule 5</b>	<b>Products and Services</b>		<b>Note 8</b>
		Question 14	<p>Identify each product and service that is sold by the acquiring group in into or from the Republic. In addition identify any products or services that you believe are considered by buyers as reasonably interchangeable with or a</p>	



			substitute for a product or service provided in into or from the Republic by another party to the merger. Use the 5 digit Standard Industrial Codes to identify products.	
		Question 15	For each identified product or service, state the geographic area(s) in the Republic in which you sell.	
		Question 16	For each product or service identified and in every geographic area provide the following: <ul style="list-style-type: none"> <li>Names and contact details of the five largest competitors.</li> <li>The five competitors estimated turnover in value.</li> <li>The competitors estimated share of the total turnover during the last 12 months.</li> </ul>	Where possible provide accurate telephone numbers and e-mail addresses.
		Question 17	For each product or service state your turnover in each of the identified geographic area during the last full 12 months.	
		Question 18	For each product or service identified and in every geographic area provide the following: <ul style="list-style-type: none"> <li>Names and accurate contact details of the five largest customers</li> <li>The aggregate value of purchases during the last 12 months.</li> </ul>	
<b>12.</b>	<b>Schedule 6</b>	<b>Business relationship among parties</b>		<b>Note 9</b>
		Question 19	Describe any business relationship between the parties	
	<b>Schedule 7</b>	<b>Signed certificate of accuracy (hard copy filed with Form CC4 (2))</b>		
<b>13.</b>	<b>Form CC7 Claim for confidentiality - Primary target firm</b>			<b>Note 12</b>
<b>14.</b>	<b>Annexures</b>	Annexure A	Competitiveness Report	<b>Note 6</b>
<b>15.</b>		Annexure B	The most recent versions of all documents constituting the merger agreements	<b>Note 13</b>

16.		Annexure C	Each report or other document assessing the transaction with respect to competitive conditions	<b>Note 14</b>
17.		Annexure D	Any documents including minutes, reports, presentations and summaries prepared for the Board of Directors regarding the transaction from both the acquiring and target firms (Strategic documents)	<b>Note 15</b>
18.		Annexure E	The primary acquiring firms most recent annual report	<b>Note 16</b>
19.		Annexure F	The primary target firms most recent annual report	<b>Note 16</b>
20.		Annexure G	The primary acquiring firms most recent business plan	<b>Note 17</b>
21.		Annexure H	The primary target firms most recent business plan	<b>Note 17</b>
22.		Annexure I	The most recent report you provided to the Securities Regulation Panel during the past year.	
23.		Annexure J	Affidavit from primary acquiring firm explaining why any of the above required information is unavailable.	<b>Note 18</b>
24.		Annexure K	Affidavit from primary target firm explaining why any of the above required information is unavailable.	<b>Note 18</b>
25.		Annexure L	Proof of payment of filing fee	<b>Note 19</b>

**COMMENTARY TO FILING REQUIREMENTS:**

Note	Topic	Commentary
<b>Note 1</b>	<b>Service on Trade Unions</b>	As set out in the Commission's practice notice issued in 2000 regarding service of documents on registered trade unions of the parties. The Commission records that parties are required to file complete copies of not only the Form CC4(1) but also Form CC4(2) of both acquiring and target

		<p>firms and all required schedules and annexures to these forms on the relevant trade unions. Information that the parties claim as confidential may be removed from the documents provided to the trade unions. Importantly, considering the statutory right of trade unions to participate in merger proceedings it is important to provide trade unions with sufficient information to enable their productive participation in merger investigations. The failure to do this will likely result in delayed investigation as a result of uninformed trade unions. Service on trade unions should preferably take place at their head office as opposed to their regional or branch offices.</p>
<b>Note 2</b>	<b>Summary of effect of transaction on employment</b>	<p>The Commission requires the parties to a merger to consider (the worst case scenario) effect that the transaction might have on employment. Even if parties are not able to estimate accurately the likely effects, and explanation of the envisaged process relating to employees must be explained to the Commission. The parties are required to provide a full breakdown of the anticipated job losses including the corresponding skill levels of the affected employees, the mobility of the affected employees in the labour market, the regional impact of these anticipated job losses and all measures current and or planned measures to alleviate the impact of these anticipated job losses.</p>
<b>Note 3</b>	<b>Annual turnover of acquiring firm</b>	<p>What is required in terms of Section 7, 8 and 9 of General Notice 216 of 2009 is the gross consolidated turnover of the acquiring group and not only the primary acquiring firms turnover. The financials used for purposes of determining the turnover is the most recent audited annual financial statements for the year preceding the merger. The Commission recommends in the case of an international merger, that the parties use an average exchange rate based on their audited financial statements for the most recent accounting period.</p>
<b>Note 4</b>	<b>Asset value of the acquiring firm</b>	<p>What is required in terms of Section 6 of General Notice 216 of 2009 the gross value of assets of the acquiring group and not only the primary acquiring firm's turnover. The financials used for purposes of determining the turnover is the most recent audited annual financial statements for the year preceding the merger. The Commission recommends in the case of an international merger,</p>

		that the parties use an average exchange rate based on their audited financial statements for the most recent accounting period.
<b>Note 5</b>	<b>Description of the merger</b>	A detailed description of the merger indicating whether assets, shares or both are being transferred and what the consideration is for the transaction. A pre and post merger structure illustrating the change of control is always helpful. A full explanation of the rationale of the transaction from both acquiring and target firms is required, this explanation should tie in with documents supplied in terms of Annexure D.
<b>Note 6</b>	<b>Market information of acquiring firm activities and the filing of a competitiveness report</b>	The Commission has found that if parties file a comprehensive competitiveness report coherently answering each of the questions set out in question 12 (of schedule 4) there is no need to separately answer these questions. However, a competitiveness report needs to include the following information: Description of the parties, description of the transaction, description of the activities of the parties, an analysis regarding substitutability of the activities of the parties both from a product and geographic market perspective. The estimated market share of the merging parties and their competitors. The Commission requires full reasons and supporting methodologies for the merging parties' submissions on market shares particularly if the market shares are based on their best estimates together with the respective details of the individuals involved in determining the market shares. An analysis covering issues relating to the factors that has to be considered in terms of Section 12A(2) of the Act. (i.e. barrier to entry, countervailing powers, import competition, market dynamics and any public interest aspects that might arise.) also needs to be covered in the competitiveness report.
<b>Note 7</b>	<b>Failing firm</b>	A firm relying on this doctrine should claim it upfront (at the time of filing the merger) and provide full and detailed information as is required in terms of the forms and jurisprudence as it have developed. See for example Competition Tribunal reasons in the Iscor Ltd / Saldanha Steel (Pty) Ltd decision (case no: 83/LM/Jul00).

<b>Note 8</b>	<b>Products and Services</b>	<p>Questions 14 and 15 relate to the product and geographic market definition and should therefore be answered as comprehensively as possible. For purposes of the Commission's investigation and analysis questions 16, 17 and 18 needs to be answered comprehensively. Detailed contact information of <b>competitors</b> (including relevant names and telephone numbers) needs to be provided as well as their estimated turnover in value for the last 12 months. Further, sales turnover for each geographic area need to be provided. Lastly, detailed contact information of <b>customers</b> in each geographic area together with the largest aggregate purchases in value for the last 12 months is required. The Commission recommends that the merging parties provide SIC Codes for the overlapping product markets as per Schedule 5 Item 14 of the Form CC4(2). The Commission uses the Standard Industrial Classification of all Economic Activities (SIC) Fifth Edition as published by Statistics South Africa (Stats SA) in January 1993. The full SIC code list is publically available on the following link: <a href="http://www.statssa.gov.za/additional_services/sic/sic.htm">http://www.statssa.gov.za/additional_services/sic/sic.htm</a>. [Click on the table of contents link to access the categorisation webpage]</p>
<b>Note 9</b>	<b>Business relationship among the parties</b>	<p>Any pre merger business relationship between the parties need to be fully disclosed which should include the nature, timing and the value of their dealings.</p>
<b>Note 10</b>	<b>Turnover of target firm</b>	<p>What is required in terms of General Notice 216 of 2009 is the gross turnover of the transferred firm. The financials used for purposes of determining the turnover is the most recent audited annual financial statements for the year preceding the merger. In the event that a business unit is sold only the annual turnover of the business unit is required to the extent that no financial statements exist for this unit, management accounts of the unit should be used. The Commission recommends in the case of an international merger, that the parties use an average exchange rate based on their audited financial statements for the most recent accounting period.</p>
<b>Note 11</b>	<b>Asset value of the target firm</b>	<p>What is required in terms of Section 6 of General Notice 216 of 2009 is the gross value of assets of the target firm. The financials used for purposes of determining the turnover is the most recent</p>

		audited annual financial statements for the year preceding the merger. In the event that a business unit is sold only the value of the business unit is required to the extent that no financial statements exist for this unit, management accounts of the unit should be used. The Commission recommends in the case of an international merger, that the parties use an average exchange rate based on their audited financial statements for the most recent accounting period.
<b>Note 12</b>	<b>Claim for confidentiality</b>	Information claimed as confidential should be properly claimed with a duly filed Form CC7 and annexure. For convenience the Commission recommends that the information that is claimed should be marked confidential where it is stated in the filing.
<b>Note 13</b>	<b>Merger agreements</b>	The parties are requested to file all merger agreements including the sale of shares or business agreements and the draft / final shareholder's agreement (if applicable) preferably signed copies if available.
<b>Note 14</b>	<b>Reports assessing competitive conditions</b>	Any reports held by the parties that assess the markets in which they compete must be provided to the Commission. These refer to reports prepared in the ordinary course of business and not specifically relating to proposed transaction. There reports could include internal or external studies (undertaken by hired consultants) conducted by the acquiring and / or target firms relating to customers, market segmentation and / or any competitive dimensions.
<b>Note 15</b>	<b>Strategic documents</b>	The Commission requires the parties to the merger to file the following strategic documents: all board minutes (not only board resolutions or extracts of board minutes) at which the proposed transaction is discussed, , all reports and presentations including any due diligence reports and SWOT analysis relating to competitors, customers and other stakeholders including public entities, non-governmental organisations and sector regulators which focuses on the competitive aspects of the merger in terms of section 12A(1) to (3) of the Act. All strategic documents relating to the rationale for the proposed merger, including those that may not specifically relate to the overlapping markets must be submitted to the Commission. For example, the acquiring firm may have an

		overall strategy to acquire other firms in related markets (horizontally and / or vertically) to that of the primary target firm and these documents must be submitted to the Commission.
<b>Note 16</b>	<b>Annual report</b>	The Commission requires a copy of the annual report for the year preceding the merger notification.
<b>Note 17</b>	<b>Business Plan</b>	The Commission requires the parties to provide it with its most recent business plan. To the extent that the business plan and budget of the firm are aligned both documents should be provided. If only a budget exist provide same and file an affidavit confirming that no separate business plan exists. Please note that a business plan need not be a business plan relating to the transaction but a plan in the ordinary course of business, however in the event that a business plan relating to the transaction exists same should be filed.
<b>Note 18</b>	<b>Affidavit</b>	In the event that any of the above information and or documents is not available the parties are required to file a signed affidavit explaining why the information is not available. The affidavit ought to be filed by a duly authorised representative of the acquiring or target firms.
<b>Note 19</b>	<b>Filing fees</b>	<p>Proof of payment of the filing fee is required. EFT payments can be made a day in advance to the Competition Commission bank account, account number appears below.</p> <p>Account Holder      The Competition Commission  Account No            4050778576  Branch Code         323 345  Bank                    ABSA BANK (PRETORIA)</p> <p><b>Filing fees:</b></p> <p>Large merger:        R350 000  Intermediate merger: R100 000  Small merger:        R nil</p>

**4. Pre notification meeting**

Should the parties wish to engage in a pre-notification meeting to discuss merger filing requirements on a specific proposed merger in greater detail, the relevant contact person would be the manager of the Mergers and Acquisitions Division. Tel No: (012) 394 3295.

**5. Paperless filing**

In an attempt to move to a paperless filing system, the Commission also encourages the merging parties to file electronically and include a CD of the merger filing.

**6. Very complex investigations**

In addition to the above listed documents and information the Commission would request parties to a very complex merger to provide it with further information on request, including sales data for at least the last three years and strategic documents for at least the past three years from both the merging parties.

COMMISSIONER OF THE COMPETITION COMMISSION

PRETORIA