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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 4239

5 January 2024

**Draft Guidelines on the filing of merger notifications for hostile transactions**

The Competition Commission hereby, in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended), which allows the Competition Commission to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction, issues these draft guidelines on the filing of merger notifications for hostile transactions under Competition Act, for public comment.

Written comments are invited by the Competition Commission from any interested person.

The Draft Guidelines on the filing of merger notifications for hostile transactions under Competition Act is attached hereto and can also be downloaded from www.compcom.co.za.

Email: MpumiT@compcom.co.za or LukeR@compcom.co.za

The Competition Commission South Africa

Private Bag X23

Lynwood Ridge, 0040

CLOSING DATE FOR SUBMISSION OF COMMENTS: 16 February 2023 at 16h30.



***competition*commission**
south africa

**Guidelines on the filing of merger notifications for hostile transactions under
Competition Act No.89 of 1998 (as amended)**

Draft 05 January 2024

Persons Responsible:

Maya Swart

Mpumelelo Tshabalala

Luke Rennie

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, *inter alia*, empowers and authorises the Competition Commission (“Commission”) to prepare, amend, replace, and issue guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act. These Guidelines are not binding on the Commission, the Competition Tribunal, or the Competition Appeal Court in the exercise of their respective discretions and of their interpretation of the Act but must be taken into account when interpreting or applying this Act.
- 1.2. The Commission identified a need to provide guidance to potential merger parties on the filing of a merger notification in hostile transactions with a focus on how the Commission will exercise its discretion to allow for the filing of a separate merger notification, and when the Commission will view the merger review timelines to begin running in the case of a separate merger notification.
- 1.3. The principles set out herein are not intended to be applied mechanically, as the determination of whether to permit the filing of a separate merger notification is evaluated on a case-by-case basis. The Commission may from time to time amend the Guidelines where necessary.

2. DEFINITIONS

Unless the context indicates otherwise, the following terms are applicable to these Guidelines-

- 2.1. “**Acquiring Firm**” means a firm —
- (a) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;

- (b) that has direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a); or
- (c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b);

- 2.2. **“The Act”** means the Competition Act No. 89 of 1998, as amended;
- 2.3. **“The Commission”** means the Competition Commission, a juristic person established in terms of section 19 of the Act, empowered to regulate competition matters in South Africa in accordance with the Act;
- 2.4. **“Commission Rules”** means the Competition Commission Rules published under Government Notice 1 in Government Gazette 22025 of 1 February 2001, as amended;
- 2.5. **“Guidelines”** mean these guidelines which have been prepared and issued in terms of section 79(1) of the Act;
- 2.6. **“Hostile Merger”** includes mergers whereby a bid or the firm intention to acquire a Target Firm may be opposed by the management or board of directors of the Target Firm, yet the Acquiring Firm has decided to proceed with the acquisition by, inter alia, going directly to the shareholders;
- 2.7. **“Merger”** means a proposed transaction where one or more firms directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another firm which may be achieved in any manner, including through—
- (a) purchase or lease of the shares, an interest or assets of the other firm in question; or
 - (b) amalgamation or other combination with the other firm in question.
- 2.8. **“Primary Firm”** means either the Acquiring Firm or the Target Firm that is intended to be party to the Proposed Merger;

2.9. “**Proposed Merger**” means a proposal to conclude a merger transaction;

2.10. “**Target Firm**” means a firm—

- (a) the whole or part of whose business would be directly or indirectly controlled by an acquiring firm as a result of a transaction in any circumstances set out in section 12 of the Act;
- (b) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring firm; or
- (c) the whole or part of whose business is directly or indirectly controlled, by a firm contemplated in paragraph (a) or (b);

2.11. “**Tribunal**” means the Competition Tribunal, a juristic person established in terms of section 26 of the Act empowered to adjudicate competition matters in accordance with the Act.

3. INTRODUCTION

3.1. These Guidelines concern guidance to potential merger parties to Hostile Mergers on the exercise of the Commission’s discretion to allow for the filing of a separate merger notification and the processes leading up to the commencement of the merger investigation period.

3.2. These Guidelines do not deal with the question of control and considerations of which transactions are subject to merger notification in terms of section 12(1) of the Act. These Guidelines also do not canvass factors related to merger assessment as captured under section 12A.

3.3. The Act sets out the merger notification and investigation process. In the ordinary course, this entails a joint notification by the parties to the transaction and the process relies on the parties co-operating to compile the filing to be submitted by one of the merging firms. However, in the circumstances of a Hostile Merger, the Target Firm may not wish to facilitate the process by co-operating with the

Acquiring Firm. The Act makes provision for separate merger notification, but some difficulties may arise where a Target Firm unduly frustrates the notification process since the Act does not prescribe a time period for the Commission to make its decision in respect of separate merger filings.

- 3.4. Hostile Mergers may be particularly time-sensitive due to company or securities law deadlines and the possibility of competing, and potentially non-reportable, bids. In such transactions, the Target Firm may be apathetic or even hostile to the proposed transaction and correspondingly disinclined to cooperate in a notification and investigation process. Where the filings are incomplete or inadequate in the sense that more information has to be sought by the Commission, the merger investigation process can be prolonged thus heightening the uncertainty for stakeholders, including, the firms, key staff or customers. The uncertainty surrounding the Target Firm would be even more pronounced.
- 3.5. Merger investigations, whether agreed or hostile, consume vast public and private resources and time. The purpose of the enquiry under Commission Rule 28 is for the Commission, to assess whether there is a Proposed Merger or a transaction that lays a sufficient basis for the Commission to commence a process of merger review. The merger investigation process consumes significant public resources, and the Commission has to be satisfied that a notifiable transaction has come into existence before it warrants expending scarce public resources to assess the transaction's impact on competition and the public interest.
- 3.6. The Commission and potential merger parties have, in prior cases, disagreed on the satisfaction of the threshold test of whether there is in fact a merger to be reviewed. Conflict has also arisen between the Commission and potential merger parties over the moment of when the merger investigation period has started running which is premised on the Commission's view of when the merger notification is deemed complete.

3.7. These Guidelines are intended to provide clarity as to how the Commission will approach a request for a separate filing while ensuring a fair process is followed without resulting in undue delay of the commencement of the merger investigation. This will be done by canvassing the following:

3.7.1. The threshold question of when a Proposed Merger is likely to be viewed as sufficiently mature to warrant notification by way of separate merger notice in terms of Commission Rule 28;

3.7.2. The factors that the Commission is likely to take into account when considering whether it is just and reasonable to allow a separate merger notification under Commission Rule 28; and

3.7.3. The timelines applicable to separate merger notifications.

3.8. These Guidelines are general and are not market, sector, or industry specific.

4. OBJECTIVES

4.1. The primary objective of these Guidelines is to provide potential merger parties with some measure of certainty and transparency regarding the factors that the Commission is likely to take into account when permitting and facilitating the process of separate merger notifications.

4.2. These Guidelines are further intended to assist potential merger parties to make informed decisions about when it is best to bring a separate merger notification and when such application may be permitted by the Commission.

4.3. These Guidelines clarify when the initial period in terms of section 14(1) or section 14A(1)(b) read with Commission Rule 28 has been triggered.

4.4. The principles outlined in these Guidelines are based on the Commission's experience permitting and not permitting separate merger notifications, the

Tribunal's findings on these decisions, as well as guidance from other jurisdictions where appropriate.

5. THE MERGER FILING LEGAL FRAMEWORK

- 5.1. Merger control is regulated by chapter 3 of the Act and given effect to by, *inter alia*, the Commission Rules.
- 5.2. The regulation of a merger necessarily requires the existence of such a merger, as defined in the Act under section 12. Without the existence of a merger there can be no consideration thereof by the competition authorities. Section 11(5) of the Act indicates that mergers include proposed mergers. Section 12 of the Act was promulgated to define the concept of a merger.
- 5.3. Accordingly, where a merger (or Proposed Merger) is before the competition authorities it falls to be considered under the legal framework created by chapter 3 of the Act.
- 5.4. Where there exists an intermediate or large merger, section 13A of the Act, dictates that “[a] party to an intermediate or large merger must notify the Competition Commission of that merger, in the prescribed manner and form” (own emphasis).
- 5.5. Where the merger is an intermediate merger, as defined, section 14 of the Act circumscribes the merger review process and provides that “[w]ithin 20 business days after all parties to an intermediate merger have fulfilled all their notification requirements in the prescribed manner and form, the Competition Commission...” may either extend its review period (section 14(1)(a)) or decide to approve, conditionally approve or prohibit the intermediate merger (14(1)(b)). The Commission is bound by the Act to publish its decision on the intermediate merger and issue reasons where it decides to conditionally approve or prohibit an intermediate merger (section 14(3)). Where the review period expires and the Commission has not issued a decision; the intermediate merger is deemed to have been approved (section 14(2)).

- 5.6. Section 14A of the Act circumscribes the Commission's merger investigation process for large mergers. The Commission's investigation period for a large merger commences "[a]fter receiving notice of a large merger", and "after all parties to a large merger have fulfilled their prescribed notification requirements" (section 14A(1)). The Commission has 40 business days within which to investigate a large merger and issue its reasoned recommendation for the approval, conditional approval or prohibition of the large merger (section 14A(1)(b)). The Commission can apply for the extension of the investigation period from the Tribunal (section 14A(2)). Where the merger investigation period expires and the Commission has not issued its recommendation "*any party to the merger may apply to the Tribunal to begin the consideration of the merger without a recommendation from the Commission*" (section 14A(3)).
- 5.7. Subsequent to notification, the Commission is required to investigate and consider the likely effects of mergers on (i) competition in any market, and (ii) the public interest, in terms of section 12A of the Act, and make a determination as to whether to approve (either conditionally or unconditionally) or prohibit the merger before it. In the case of intermediate mergers the Commission has to make its determination within 20 days (subject to potential extension of 40 days) of all parties having fulfilled their prescribed notification requirements under the Act and rules; and, in the case of large mergers it must make a recommendation (as to whether to approve, conditionally approve or prohibit) to the Tribunal within 40 days (subject to potential extension) of all parties having fulfilled their prescribed notification requirements under the Act and rules.
- 5.8. What gives effect to and initiates the process of merger consideration under section 12A of the Act, is notification to the Commission as required under the rules, and forms created therein. Axiomatically, the due notification of a merger is a jurisdictional prerequisite before the Commission obtains the power to investigate, consider and take a decision to prohibit, approve unconditionally, or conditionally (in the case of intermediate or small mergers) or make a recommendation to the Tribunal (in the case of large mergers). Phrased differently, the Commission's power to investigate and consider a merger is established at the notification of the merger, or Proposed Merger in the

prescribed manner and form (section 13A(1)). The “*prescribed*” manner and form, is defined as the manner and form “*prescribed by regulation*”. The Commission Rules, being regulations issued by the Minister in terms of section 21(4), under notice no. 22025 in Government Gazette Vol 428 on 1 February 2001, constitute such regulation.

5.9. The prescribed manner and form of filing is regulated by Part 6 of the Commission Rules, specifically Rules 26 to 30.

5.10. The plain wording of Commission Rules 26 through 30 provide that the process of notification can be conducted through one of three ways:

5.10.1. a joint filing by the Acquiring Firm and Target Firm under Commission Rule 27;¹ or

5.10.2. in circumstances where a Primary Firm applies for such, and the Commission is satisfied that such a manner of filing would be reasonable and just in the circumstances, a separate filing under Commission Rule 28;²

5.10.3. finally, where a separate filing is being frustrated, and on good cause shown, a separate but unilateral filing by one of the Primary Firms, usually the Acquiring Firm, on behalf of both parties.³

¹ Rule 27(1):

“A joint merger notification must be made in a single filing by one of the primary firms, and must include ...”

² Rule 28(1)

“A primary firm may apply to the Commission for permission to file separate notification of a merger and, on considering an application under this subrule, the Commission -

(a) may allow separate filing if it is reasonable and just to do so in the circumstances;
 (b) may give appropriate directions to give effect to the requirements of the Act and in particular, specifying which primary firm must satisfy which of the requirements set out in Rule 27; and
 (c) in an appropriate case, may further permit the applicant to file any document on behalf of the other primary firm.”

³ Rule 28(2):

“A primary firm may apply to the Commission for an order on good cause shown allowing it to file any document on behalf of the other primary firm, if that other primary firm has failed within 10 business days to file—

- 5.11. To summarise the legal framework, the Commission is enjoined by the Act to consider a *merger* in terms of the Act. In order for the threshold, jurisdictional question to be met in the case of an intermediate, or large merger, same must be notified to the Commission in the “*prescribed manner and form*”.⁴ The commencement of the merger consideration timelines is linked to a “*merger notification*”.⁵ The prescribed merger notification requirements are in turn regulated by Commission Rules 26,⁶ 27 and 28, and is either a joint filing, a separate filing by each of the firms, or a separate filing where one Primary Firm files, firstly on its own behalf and secondly on behalf of the other Primary Firm.
- 5.12. Where a separate filing is utilised as a means of notification, the merger notification “*of each firm will have been fulfilled when the notification requirements of their respective primary firms, as ordered by the Commission, have been fulfilled*”.⁷ In the event of any Primary Firm attempting to frustrate the process by not filing timeously, the other Primary Firm may apply to the Commission to allow it to file a document on behalf of the other Primary Firm upon the expiry of 10 business days and on good cause shown.
- 5.13. Under the legal framework set out above, the Commission has the discretion to allow a party to file a separate merger notification. There is a two-stage enquiry as to whether the Commission will exercise its discretion. It first requires the Commission to assess whether a merger or Proposed Merger is in existence (the “threshold enquiry”). Once the threshold issue has been met, the Commission may inquire into whether it is reasonable and just to allow a separate filing in the

-
- (a) a document that the Commission or the Tribunal has ordered it to file; or—
 (b) any other document or additional information required by the Commission in terms of this Part.”

⁴ Section 13A(1)

⁵ Commission Rule 29(1) states:

- “The Initial Period for a merger begins on the business day following the date on which a merger notification was filed unless –
- (a) the Commission issues Form CC 13 (2) to the filing firm within the time allowed by Rule 30; and
- (b) either the filing firm does not appeal against that form, or the Tribunal, on hearing an appeal, does not set aside the form entirely.”

⁶ Which reads:

- “Parties to a merger must notify the Commission of that merger
- (a) by filing a joint notification in terms of Rule 27; or
- (b) if permitted by order of the Commission, by filing separately in terms of Rule 28.”

⁷ Commission Rule 28(4).

circumstances. The threshold enquiry, that is whether a merger is determined to be in existence, together with the consideration of whether it would be reasonable and just to allow separate merger notifications in the circumstances, detail the ambit of the Commission's discretion on whether to permit separate merger notifications.

- 5.14. On consideration of whether to permit separate merger notifications in satisfaction of the two-stage enquiry; the Commission will seek comment from the other Primary Firm in line with the dictates of fairness. Parties can expect that once the Commission has determined whether to allow separate merger notification the Commission will issue reasons for its decision.
- 5.15. Only once the Commission has exercised its discretion to allow separate merger notification does merger notification process commence. Rule 26(1)(b) provides that parties to a merger must notify the Commission of that merger "if permitted by order of the Commission" to do so. Rule 28(1)(b) provides for the Commission to issue directions to specify which firm is required to satisfy the relevant merger notification filing requirements.
- 5.16. Where either Primary Firm has been directed to file merger documents as part of the merger notification and this direction has been defied, Rule 28(2) provides for the one Primary Firm to make application to the Commission for an order allowing it to file a document on the other recalcitrant Primary Firm's behalf. A pre-requisite for a Rule 28(2) application is that the recalcitrant Primary Firm must have failed to file the documentation directed by the Commission (or the Tribunal), or any other document or additional information required by the Commission, within 10 business days of the requested date for filing. A successful Rule 28(2) application must be able to demonstrate good cause for an order allowing a Primary Firm to file any documentation on behalf of the other recalcitrant Primary Firm.

6. DECISIONS WHETHER OR NOT TO PERMIT SEPARATE MERGER NOTIFICATIONS

6.1. The Tribunal in *Caxton and CPT Publishers and Printers Ltd v Competition Commission SA and Mpact Ltd*⁸ (“Caxton”) expressed the view that the Commission, is required to provide guidance to parties on the application of Commission Rule 28.

The threshold determination

6.2. The requirement that there be a “merger” for consideration includes a Proposed Merger and can be difficult to determine in instances of a Hostile Merger, where the very existence of a Proposed Merger transaction may be contested by the Target Firm. To successfully convince the Commission that there is a merger or Proposed Merger in existence, potentially warranting separate merger notification, the Commission must be convinced that there is sufficient evidence thereof to warrant the use of scarce public resources and yield meaningful results under the merger assessment.⁹

6.3. The Tribunal in *Johnnic Holdings Ltd v Hosken Consolidated Investment Ltd*¹⁰ has held:

“[I]n short, we consider that the use of the term “proposed merger” in the Act is not intended to create a category of mergers different from mergers simpliciter, as referred to generally in the Act. At most the use of the word “proposed” places some emphasis, in the particular context where it occurs in the Act, on the fact that the merger is at that stage prospective.”

6.4. A Proposed Merger cannot, however, exist in a vacuum but has to be assessed in the context of the competitive dynamics of the relevant market within a foreseeable period of time. Merger review in terms of the Act does not envisage

⁸ RVW11Oct21 (*Caxton*) at para 175.

⁹ Caxton at para 133.

¹⁰ 65/FN/Jul05.

any set of facts in which a potential merger may arise long into the uncertain future. A mere intention to conclude a merger without more is insufficient.¹¹

- 6.5. Essential to any Proposed Merger transaction is an offer. The Tribunal in *Caxton* indicated in circumstances where there was no firm or indicative offer on the part of the Acquiring Firm that an “*offer and the terms on which it is made are not only the nuts and bolts of commercial deals – they are also relevant facts for the Commission to take into account when it considers the impact of a transaction on competition, whether in a joint or separate filing.*”¹² Without an offer, there is insufficient context within which any merger assessment can be made.
- 6.6. The Commission accordingly considers as essential to a Proposed Merger, at the very least, in order to trigger the merger notification and consideration process, the existence of an offer on the part of the Acquiring Firm, whether binding or indicative to shareholders, whether in public circulars or in private correspondence.
- 6.7. An offer should contain the price and the terms and conditions of the Proposed Merger, including an indication of the proposed date of implementation.

The reasonable and just inquiry

- 6.8. In the instance that the Commission is satisfied that the jurisdictional threshold has been met, that is, where the Commission is satisfied that there exists a merger or a Proposed Merger, the Commission will proceed to the second enquiry – whether a separate filing is “*reasonable and just*” in the circumstances.¹³
- 6.9. The wording of Commission Rule 28(1) is plain from the reading thereof. The Commission retains a discretion to permit a separate filing in circumstances where the facts justify same, on the grounds that it would be “*reasonable and*

¹¹See also *Caxton* at para 82-86.

¹² *Caxton* at para 81.

¹³ Rule 28(1)(a).

just to do so". The inquiry to be undertaken by the Commission is clearly a discretionary inquiry into reasonableness, the exercise of which discretion should be done lawfully and rationally. What will constitute a reasonable decision will depend on the circumstances of each case. Similarly, what will constitute a fair procedure will depend on the circumstances of each case.¹⁴ The second stage assessment on the merits requires an assessment by the Commission as to whether the circumstances and facts, reasonably assessed, justify the granting of separate filing. This necessarily involves a weighing exercise.

6.10. Factors relevant to this consideration, amongst others, are (list is not a closed list):

6.10.1. Any prejudice to the Target Firm that may be occasioned by a separate filing;¹⁵

6.10.2. The ability of each Primary Firm to submit a meaningful separate filing.¹⁶

6.10.3. The implications for the Primary Firms who may be required to provide information to the Commission if the investigation commences;¹⁷

6.10.4. The implications for third parties who may be required to provide information to the Commission if the investigation commences;¹⁸

6.10.5. The implications for the Commission and its resources if the investigation commences;¹⁹

¹⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15).

¹⁵ Caxton at para 144

¹⁶ Caxton at para 144.

¹⁷ *Freeworld Coatings Limited v Competition Commission and Kansai Paint Company Limited* 62/X/Oct10 (**Freeworld**) at para 26.

¹⁸ *Freeworld* at para 26.

¹⁹ *Freeworld* at para 26.

6.10.6. Whether merger control will be effective; for instance if undertakings are to be sought from the Acquiring Firm in respect of competition or public interest issues and the Acquiring Firm is not a willing party to the filing;²⁰

6.10.7. Any other factor that may be deemed relevant by the Commission.

6.11. The uncertainty of the transaction and the impact of the proposed acquisition of control on the Target Firm are not cognisable considerations under the just and reasonableness assessment in view of the fact that these factors are already taken into account in the threshold question of whether there exists a Proposed Merger.²¹

6.12. The Commission will provide reasons for its decision whether to permit a separate filing or not. In instances where the Commission finds against the applicant, the Commission will provide guidance on what it will consider as essential and/or relevant elements of a transaction required as well as a date by which further submissions should be made for a successful application.

7. TIMELINES APPLICABLE TO SEPARATE MERGER NOTIFICATIONS

7.1. Where application is made for separate merger notification there are multiple hurdles to be overcome prior to the merger review period to begin running. In order to ensure a fair process in respect of separate merger notifications submissions made by either Primary Firm will be shared with the other Primary Firm and an opportunity for comment will be allowed. During the process, the Commission will impose strict timelines in order to ensure that the merger filing process is not unduly delayed.

7.2. First, the period within which the Commission determines whether or not to permit separate merger notifications is not determined by the regulations. This period commences with an application in terms of Rule 28(1) and ends with the

²⁰ Freeworld at para 26.

²¹ Caxton at para 131, 135 and 156.

Commission communicating its decision whether or not to permit a separate merger notification to the parties. During this period, the Commission will engage the Primary Firms in order to satisfy itself of the requirements of the two-stage enquiry

- 7.3. Second, the period in Rule 28(1)(b), whereby the Commission issues directions on which Primary Firm should satisfy which merger filing notification requirements. The Commission will share all issued directions with both parties. This period begins with the Commission issuing said directions and ends with both Primary Firms providing a merger filing in response to the Commission direction. The Commission will then proceed to issue a Notice of Complete Filing in Form CC 13(1) where all requirements for separate filing have been satisfied, or where there has been non-compliance with the direction, a Notice of Incomplete Filing in Form CC 13(2).²²
- 7.4. Where there is non-compliance with the Commission's stated timelines for filing of the merger notification documents, the Commission will issue a Notice of Incomplete Filing in Form CC 13(2).²³ Where a Primary Firm fails to submit its filing in the period specified by the Commission in its direction, the other Primary Firm can only advance the filing process by making further application to the Commission, after ten business days from the date specified in the Commission

²² Rule 30(2)

"(2) *The Competition Commission must issue Form CC 13(1) in terms of sub-rule (1) if—*

...

(c) *in the case of—*

...

(ii) *a merger notified separately, all the requirements set out by order of the Commission in terms of Rule 28 have been satisfied;*

...

(3) *The Commission may issue Form CC 13(2) if after a filing of a merger notice, or other information, the merger file does not meet the applicable criteria set out in sub-rule (2).*

²³ Rule 29 details the consequences of this:

"(1) *The Initial Period for a merger begins on the business day following the date on which a merger notification was filed unless—*

(a) *the Commission issues Form CC 13(2) to the filing firm within the time allowed by Rule 30; and*

...

(2) *If the Commission issues Form CC 13(2), and it is not set aside entirely by the Tribunal, the Initial Period for the merger begins on the business day following the date on which the filing firm subsequently files documents in response to Form CC 13(2), if as a result of that filing, the Commission subsequently issues, or is deemed to have issued, a Notice of Complete Filing in Form CC 13(1)."*

direction, for an order, on good cause shown, allowing it to file on behalf of the recalcitrant Primary Firm. This commences a potential third period of consideration by the Commission.

7.5. The third period commences with a Rule 28(2) application. During this period, the Commission will engage both Primary Firms in order to assess whether the threshold of good cause is present to allow a Primary Firm to file any documentation on behalf of the other recalcitrant Primary Firm. The outcome of a Rule 28(2) application will either be a direction and directions on the filing of the merger documentation; or a direction and reasons not allowing the unitary filing of the merger documentation.

7.6. At any stage where the a merger filing has been made by both Primary Firms, whether in terms of Commission Rule 28(1) separately or Commission Rule 28(2), one Primary Firm unilaterally on behalf of both Primary Firms, the Commission must deliver either a Form CC 13(1); or Form CC 13(2) to both Primary Firms within five or ten business days – failing which the Commission will be deemed to have issued Form CC 13(1) to the filing firm(s).²⁴

8. CONCLUSION

8.1. These Guidelines present the general approach that the Commission will follow in assessing applications for separate merger notification. These Guidelines are not exhaustive and will not affect the discretion of the Commission and/or the Tribunal and courts to consider separate merger notification issues on a case-

²⁴ Rule 30:

“(1) *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, the Commission must deliver to the filing firm either—*

(a) *a Notice of Complete Filing in Form CC 13(1); or*
 (b) *a Notice of Incomplete Filing in Form CC 13(2).*

...

(6) *If the Commission does not issue either Form CC 13(1) or Form CC 13(2) within the time allowed by sub-rule (1), or if the Tribunal sets aside all requirements set out by the Commission in Form CC 13(2), the Commission will be deemed to have issued Form CC 13(1) to the filing firm—*

(a) *as of the date on which the last material was filed; and*
 (b) *subject to further review and subsequent notice in terms of Rule 31 or 32.”*

by-case basis, taking into account, amongst other criteria the information placed before the Commission at the time the decision is made.

- 8.2. Should market participants be uncertain regarding a particular stage of consideration of the filing of a Hostile Merger, such market participants should approach the Commission for further guidance.

9. EFFECTIVE DATE AND AMENDMENTS

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

DRAFT

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