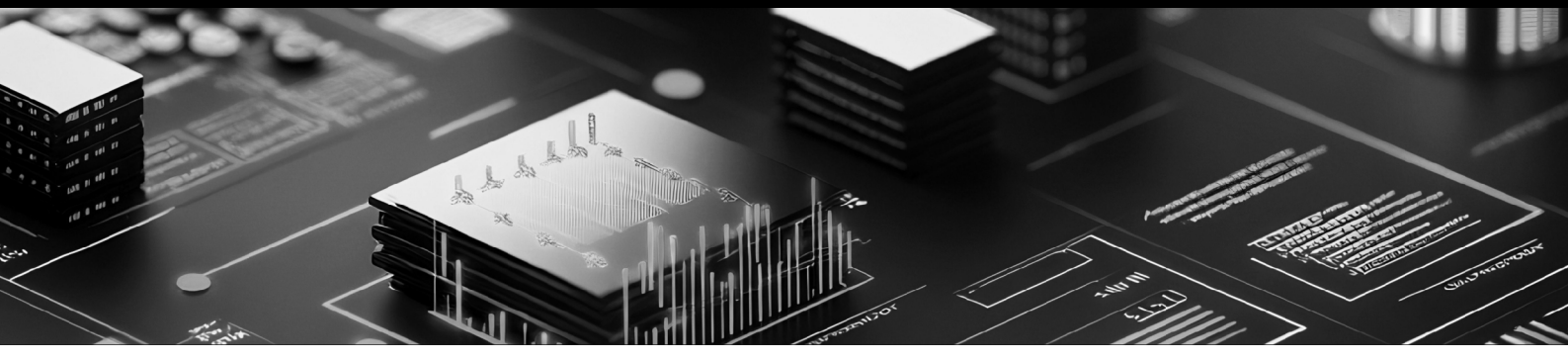




COMPETITION

Merger condition compliance: Proposed Rule 39 amendment brings improvements to process but shifts the burden of proof to merged entities

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Key implications of the proposed amendment to the procedure that will be followed by the Competition Commission when firms subject to merger conditions (“**merged entities**”) are believed to have breached those conditions.

Introduction

Rule 39 of the Competition Commission’s Rules sets out the process to be followed by the Commission if it has information indicating that firms (“**merged entities**”) which were given conditional merger approval have failed to comply with the merger conditions. On 6 May 2026, the Minister of Trade, Industry and Competition published, for public comment, a notice proposing to repeal the current Rule 39 in its entirety and replace it with a new rule.

In summary, the proposed amendment is a mixed development: it introduces a more structured and transparent procedure but simultaneously increases the evidentiary and compliance burdens on merged entities.

The current rule

Under the current Rule 39, there is no express provision for the Commission to conduct a formal investigation into possible non-compliance with merger conditions. However, where it appears to the Commission that a firm has breached a merger condition, the Commission must issue a “Notice of Apparent Breach”. The merged entity then has 10 business days either to submit a remedial plan or to request the Tribunal to review the Notice on the ground that it has “substantially complied” with its obligations. The textual language indicated that this is a review. A review involves challenging an administrative decision (or other exercise of public power) on the basis that it was not rational, reasonable, or procedurally fair. This is different from an appeal, where the question would be whether, on all the facts, the Commission was correct or incorrect. However, in *Coca-Cola*,^[1] the Constitutional Court held that this is not an ordinary administrative-law review but a “*special statutory review*”, the single permissible ground being whether the firm has substantially complied, based on an objective enquiry by the Tribunal into actual, not merely apparent, breach.

Key changes under the proposed rule

Investigation and finding before any notice

The proposed rule replaces the Notice of Apparent Breach with a “Notice Requesting Compliance”. However, before issuing a Notice Requesting Compliance, the Commission must conduct an investigation into whether a breach has occurred. This is a significant procedural improvement, affording the merged entity a meaningful opportunity to engage with the Commission before any formal notice is issued. The merged entity would therefore need to be informed by the Commission of the investigation and to provide information and documents requested by the Commission. In that process, the merged entity has the opportunity to provide additional information if it believes it will assist its case and to make representations that no breach has occurred, all in the context of a formal investigation.

In contrast, under the current rule a party that receives a Notice of Apparent Breach is immediately placed under pressure, within 10 business days, either to bring review proceedings to the Tribunal on the grounds that it has substantially complied with the conditions or propose a remedial plan. The new power to investigate is discretionary (“may”), so the Commission retains flexibility, but the investigation is a procedural prerequisite to any further action.

An additional benefit to merged entities is that the Commission must make a finding that there has been a breach of a merger condition. The Commission can no longer issue a Notice on the basis of only an “apparent” breach. We expect that the Commission will be more careful to ensure it weighs all the relevant facts before issuing a Notice under the proposed rule.

Timelines

The current rigid 10-business-day response period (triggered by the Notice of Apparent Breach) is removed under the new rule. Instead, in a Notice Requesting Compliance, the Commission will stipulate the period for compliance or for submission of a remedial plan. While the Commission could in theory set the same 10 business day (or a shorter) deadline, the Commission is, in our view, more likely to set a deadline that is reasonable based on the particular facts and circumstances. Furthermore, the formal investigation phase will likely result in merged entities having better notice before the Commission makes a decision. In most cases, merged entities will likely be in a better position to prepare, as typically one can get a sense of the direction in which the Commission is heading during an investigation. Currently, the lack of a formal investigation as a prerequisite can result in the Commission issuing a Notice of Apparent Breach with little (and sometimes no) advance notice.

Adversarial proceedings before the Tribunal

Under the current rule, the merged entity’s recourse is a statutory review of a Notice of Apparent Breach, which need not be accompanied by an affidavit or other supporting document setting out the Commission’s findings and conclusions. While the Constitutional Court held that the Commission should provide sufficient information for the merged entity to “appreciate the nature of the breach complained of”, under the proposed rule the Commission may apply to the Tribunal for an order compelling compliance, and the firm is expressly entitled to oppose that application. The Commission’s application will need to be brought under Tribunal Rule 42, which is a general provision for proceedings not otherwise specifically provided for. That rule requires the applicant (in this case, the Commission) to bring the application supported by an affidavit setting out the “*facts on which the application is based*”. While the reverse onus (discussed immediately below) is problematic, the Commission will only be able to take the matter forward with an affidavit setting out its findings for why it believes a merger condition has been breached. The merged entity will have the opportunity to assess the Commission’s full case.

Reverse onus

So far, the amendments summarised above are favourable. Unfortunately, sub-rule (6) provides that the firm bears the onus of proving that it has complied with the merger condition. This is not framed as a rebuttable presumption but as a full transfer of the burden of proof to the merged entity. The constitutionality of this provision is questionable but, unless changed in the final rule or successfully challenged, this is where the first significant concern for businesses arises. It is heavily burdensome because the rule purports to shift the entire onus to the respondent, whereas in other matters where a burden is shifted from the applicant to the respondent, it is typically either no more than a presumption that needs to be rebutted by the respondent, or the applicant must, at minimum, first make out a prima facie case. Indeed, in settling the special statutory review standard under the current rule, the Constitutional Court held that if the merged entity makes out a prima facie case of substantial compliance, the evidential burden of rebuttal shifts to the Commission. The Court also referred to the Commission’s “*exceptionally wide*” investigative powers, stating that this provided the Commission with “*more than adequate tools... to gather evidence to satisfy a burden of rebuttal*”. It is hoped that the proposed amendment to impose a full onus on the merged entity – which will, after all, be a respondent in the proceedings – is not retained in the final amended rule.

Removal of the concept of “substantial compliance”

Under the current rule, merged entities can succeed in overturning a Notice of Apparent Breach by demonstrating substantial compliance with the merger conditions. The proposed amended rule replaces this with the requirement that the merged entity must “comply” with a Notice Requesting Compliance or succeed in proving to the Tribunal that it “has complied”. This appears to require absolute compliance (subject only to the common law principle of *de minimis*, in terms of which a trivial non-compliance ought not to be actionable by the Commission). For entities operating under complex or prescriptive conditions, this shift represents a meaningful increase in risk.

Engagement and remedial plans

Notwithstanding the increased burdens, the proposed rule establishes a more meaningful engagement process at both the investigation stage and the remedial plan stage. In practice, one would expect the Commission to engage constructively before launching Tribunal proceedings and to work collaboratively on remedial plans, particularly where the firm has demonstrated good faith.

Conclusion and practical guidance

The proposed amendment is a mixed development. It provides procedural clarity, a meaningful opportunity to engage with the Commission before any notice is issued, and a requirement that the Commission bring an application to the Tribunal to commence adversarial proceedings. However, the reverse onus and the removal of the substantial compliance standard materially increase the burden on merged entities.

Firms subject to merger conditions should consider the following practical steps.

- Conduct a detailed review of all outstanding merger conditions to assess whether current compliance efforts achieve full, actual compliance, not merely substantial compliance.
- Ensure that comprehensive records of compliance are maintained, given that under the proposed rule the evidentiary burden of proving compliance will fall on the merged entity in any Tribunal proceedings.
- Consider whether to submit – or ensure that your industry association or similar body submits – written comments on the proposed amendment by the 17 June 2026 deadline, particularly in relation to the reverse onus provision and the removal of the substantial compliance standard, both of which may have a material bearing on the firm’s position.
- Finally, firms that are currently the subject of any investigation or engagement with the Commission in relation to merger conditions should take stock of how the transition to the new rule may affect any ongoing processes.

[1] The nature of that review was settled by the Constitutional Court in *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* [2024] ZACC 3 (“*CCBA*”)



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