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REGULATORY

When Mergers Merge: Guidelines on Indivisible Transactions

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The Competition Commission (the Commission) has released its final guidelines on indivisible transactions (the Guidelines). These guidelines are crucial for understanding the Commission's approach to determining whether multiple transactions can be notified and assessed as a single merger filing.

This is a significant development as it offers relief to parties who seek to avoid the burden of multiple merger notifications and the duplication of filing fees. The certainty provided by the Guidelines is of paramount importance to parties considering a transaction.

The Commission's understanding of the indivisibility and interdependence of transactions is a cornerstone of the Guidelines. The Commission recognises that the indivisibility and interdependence of transactions are established when – in the context of two transactions – the implementation of one transaction would not be *factually and/or legally* possible in circumstances where the other transaction has not been implemented. For instance –

"Firm A purchases shares in Firm B who is merely holding it for a period of time while Firm C arranges financing in order to purchase the shares of Firm B from Firm A."

Historically, the Tribunal has played a significant role in shaping the understanding of indivisible transactions. It has provided a clear explanation, stating that –

"the first leg is merely to facilitate the possibility of the second leg to happen. Legally and factually the two legs constitute parts of a single transaction." **[1]**

The Guidelines, in line with the Commission's approach, acknowledge both the factual and legal constructs of indivisibility. This recognition is crucial for the Commission's assessment of whether multiple transactions can be considered a single merger. The Guidelines outline specific factors that the Commission will consider in determining indivisibility.

- The manner in which the transaction is structured;
- The relationship between the transactions;
- The interdependence of the transactions (whether one transaction could be carried out without the other transactions);
- The rationale underlying the multiple transactions;
- Whether the transactions will be implemented simultaneously under the same agreement;
- Whether there are multiple acquiring firms, under common shareholders/sellers and common acquiring firms;
- Whether there are multiple acquiring firms in terms of a single agreement pertaining to the same target firm (e.g. property transactions and consortium arrangements);
- Whether the transactions involve a similar competitive and public interest assessment and whether similar conditions are likely to be applicable to the transactions; and
- Whether the single notification is aimed at circumventing the applicable fees.

Given the unique nature of each transaction structure, the Commission retains the discretion to assess indivisibility on a case-by-case basis. This guideline is not exhaustive and does not include all factors that the Commission will consider in determining indivisibility. It's important

to note that the assessment of indivisibility is holistic and no single factor is determinative.

Those contemplating multiple transactions should take note of the Guidelines when structuring them, in the interest of a seamless and expedited merger notification process. In instances where parties wish to rely on the argument that separate transaction are indivisible and, therefore, require only one merger notification and one filing fee, the Guidelines ought to provide clear direction.

"By the powers vested in me, I now declare these factually and legally indivisible transactions 'a single merger'".

– the Commission

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[1] Crown Gold Recoveries (Pty) Ltd and Industrial Development Corporation of South Africa Limited / Khumo Bathong Holdings (Pty) Ltd (31/LM/May02) [2002] ZACT 38 (4 June 2002).



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