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COMPETITION ALERT

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JUMPING THE GUN: HEFTY FINES PROPOSED BY THE COMPETITION COMMISSION FOR PRIOR IMPLEMENTATION AND FAILURES TO NOTIFY

The Competition Commission has released Guidelines for the Determination of Administrative Penalties for Failure to Notify Mergers and Prior Implementation of Mergers (the Guidelines).

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JUMPING THE GUN: HEFTY FINES PROPOSED BY THE COMPETITION COMMISSION FOR PRIOR IMPLEMENTATION AND FAILURES TO NOTIFY

The Guidelines are designed to deter firms from failing to notify mergers which are notifiable and/or implementing notifiable mergers without first obtaining approval from the competition authority.

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The Guidelines are designed to deter firms from failing to notify mergers which are notifiable and/or implementing notifiable mergers without first obtaining approval from the competition authority. The methodology that the Commission will follow in determining administrative penalties in such cases is as follows:

- Step 1: The Commission will first look at the nature of the conduct which gave rise to the failure to notify and/or prior implementation contravention. No amount is calculated at this point.
- Step 2: Determination of the base amount. This is an amount equal to double the applicable filing fees (ie R330,000 for an intermediate merger and R1,100,000 for a large merger).
- Step 3: Duration of the contravention:
 - ▶ For contraventions that do not exceed a year, each month of the contravention will attract an additional amount equal to 50% of the base amount. (eg Implementation of an intermediate merger which was not notified, or which was prior implemented, will attract an amount of R495,000 for Step 3, if one month has passed since the implementation (subject to Step 4 and 5 below));
 - ▶ For contraventions that exceed two years, each month of the contravention will attract an additional amount equal to 100% of the base amount. (Implementation of a large merger which was not notified, or which was prior implemented, will attract an amount of R15,400,000 for Step 3, if two years and one month have passed since the implementation (subject to Step 4 and 5 below).
- Step 4: Consideration of factors that might mitigate and/or aggravate the amount reached in step 3 and adjusting the amount accordingly:
 - ▶ Mitigating factors would include (amongst others): If the parties were bona fide in their failure to notify; If the parties had acted on competition law advice; And if the parties co-operated with the Commission, including by pro-actively approaching the Commission with the contravention, being transparent with the Commission; and demonstrated willingness to settle with the Commission.

CHAMBERS GLOBAL 2011–2018 ranked us in Band 2 for competition/antitrust.

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There are multiple reasons why a failure to notify or prior implementation can occur.



- ▶ Aggravating factors would include (amongst others): If the parties were trying to avoid scrutiny of the transaction by the competition authorities; If the parties had delayed in approaching the Commission when they discovered the contravention; If the transaction led to a substantial lessening or prevention of competition, or raised public interest concerns; And if the parties derived profits from the contravention.
- Step 5: Rounding off this amount if it exceeds the provided for in s59(2) of the Act, being 10% of turnover, or in terms of the Amendment Act which is still to be brought into effect, 25% of turnover if it is a repeat offence).

In addition to the methodology, the Guidelines also note that the Commission will take into account the company's ability to pay the fine – such as if the penalty would irretrievably jeopardise the economic viability of the firm and cause it to exit the market.

In terms of who is liable to pay the fine, the acquiring firm and seller are typically jointly and severally liable. However, the Commission notes that it will use its discretion depending on the circumstances, to levy the penalty only the acquiring firm, only on the seller, only on the target firm or on the holding company of these firms. (However, it is not clear who the "holding company" would be in this case other than those parties already provided for, because the holding company of the target is the Seller and the holding company of the direct acquiring firm is the "Acquiring Firm", which is defined as the acquiring group as a whole)).

Comment on the Guidelines

As is evident from the example set out in Step 3 above, the methodology may well lead to much higher penalties than other contraventions, such as cartel conduct. There does not appear to be any reason why duration should be a multiplier, since in most instances, there is no correlation between the harm suffered due to a failure to notify or prior implementation and the time that has passed. There are multiple reasons why a failure to notify or prior



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The Guidelines match the global trend of applying an increased focus on gun jumping conduct.



implementation can occur, from bona fide, unintentional misunderstandings to wilful conduct designed to avoid the scrutiny of the competition authorities. These contraventions are thus classic examples of instances where the regulator should be allowed the maximum available discretion.

Duration as a multiplier is likely to end up having perverse incentives, such as discouraging parties who have become aware of a long-ago bona fide failure to notify to come forward and settle with the Commission.

Another curious aspect of the Guidelines is that they seem to conflate the distinct contraventions of failure to notify and prior implementation. A failure to notify occurs without any notification of a transaction at all, while prior implementation occurs where there has been notification, but the transaction implemented before approval is acquired.

This conflation is evident in the portion of the Guidelines which purport to provide "examples" of the (joint?) contravention of failure to notify and prior implementation. These examples sometimes simply

describe what may be considered to constitute a "merger" and others examples of conduct that may amount to prior implementation (such as changing the name of the target before approval, or marketing as a single entity prior to approval). However, in the latter case, this discrete list of examples does not provide any guidance on what general principles the Commission will apply in determining whether conduct constitutes prior implementation or not.

Conclusion

The Guidelines match the global trend of applying an increased focus on gun jumping conduct.

While the Guidelines unfortunately do not provide much assistance in assessing whether conduct constitutes prior implementation, they do threaten hefty fines when companies fall foul of the relevant prohibitions. A lot of work will need to be done by the aggravating and mitigating factors in the methodology to result in proportionate penalties.

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