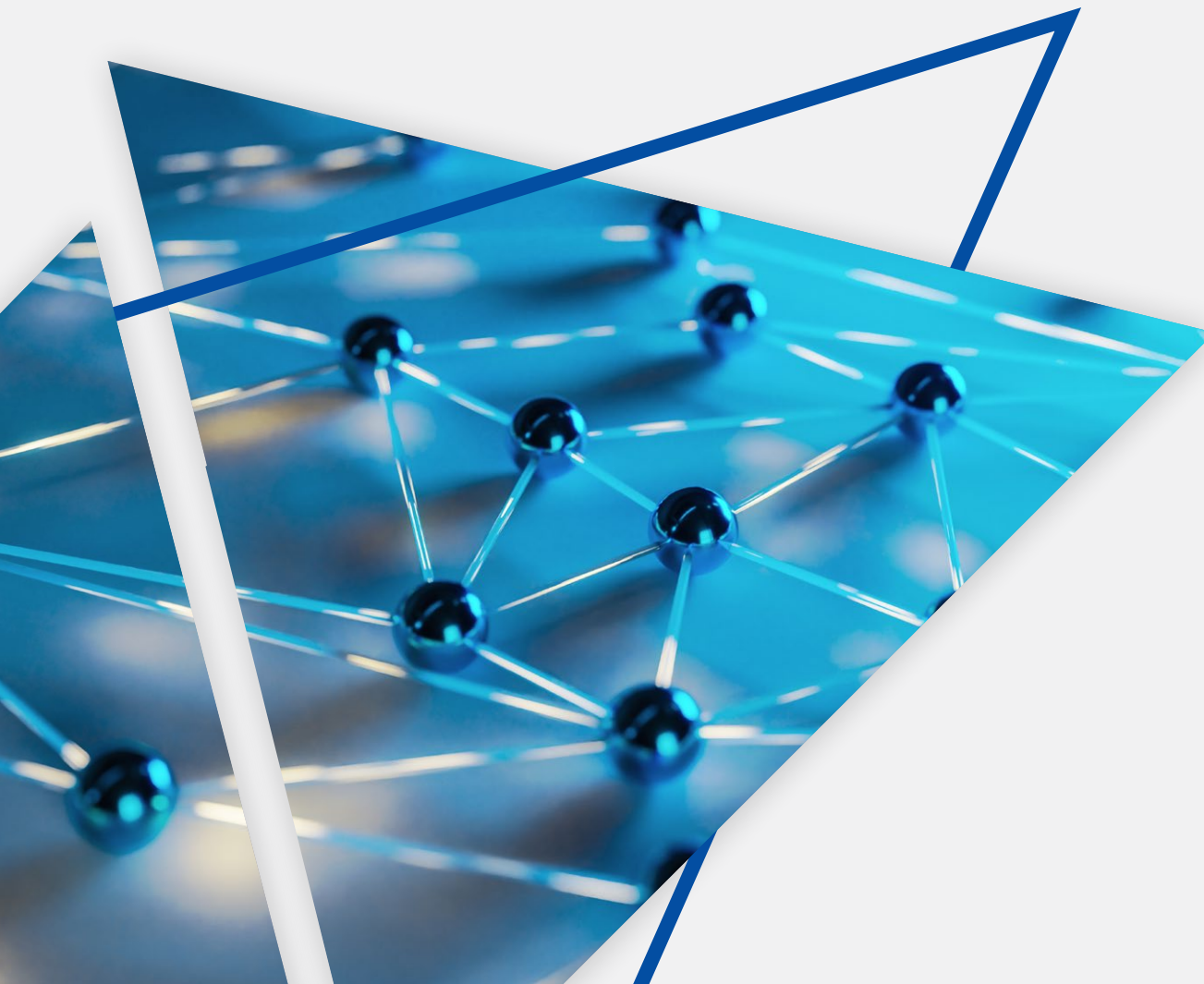


Competition Law and Tax & Exchange Control

ALERT | 13 November 2025



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SOUTH AFRICA

Unlocking value in commercial transactions while avoiding the pitfalls



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Unlocking value in commercial transactions while avoiding the pitfalls

Tax structuring isn't an afterthought or an exercise to be delegated to accountants once the commercial deal is done – it's a strategic imperative that can make or break the deal. Whether you are acquiring a company or restructuring a corporate group for operational efficiency, evaluating transactions through a tax lens alongside commercial considerations can ensure additional efficiencies. When executed properly with genuine commercial substance and where obtaining tax benefits is not the sole or main purpose, sophisticated tax planning can preserve substantial working capital that would otherwise be consumed by immediate tax liabilities, enable more competitive acquisition pricing, facilitate multi-step transactions that achieve optimal outcomes, and provide crucial flexibility in structuring that commercial considerations alone cannot deliver.

Yet tax structuring can also be a minefield. Structuring a transaction purely for the tax benefits it can provide, without genuine commercial substance, risks triggering the General Anti-Avoidance Rule (GAAR) or the simulation doctrine with consequences that can be financially devastating.

The stakes are even higher when considering that commercial transactions rarely operate in a vacuum. Depending on the transaction type, multiple regulatory bodies, from the Competition Commission

to sector-specific regulators and, for cross-border transactions, the South African Reserve Bank, may scrutinise the deal. The reality is, successfully structuring and implementing a transaction that achieves commercial objectives while withstanding scrutiny from the South African Revenue Service (SARS) and other regulatory bodies requires a holistic and multi-dimensional approach.

This alert explores the value that tax structuring can provide, the critical warnings from South Africa's landmark GAAR judgment, the often-overlooked intersection with competition law, and why co-ordinated professional guidance across multiple disciplines isn't just advisable, it's absolutely essential for transaction success.

Why tax structuring matters

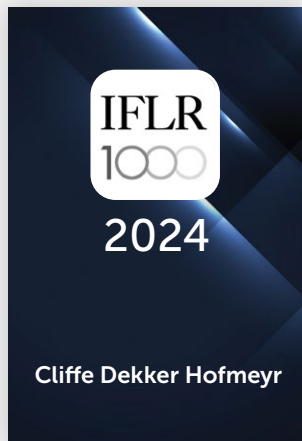
Strategic liability management

When approaching transactions, taxpayers naturally focus on commercial objectives first. While this commercial perspective is essential, it represents only part of the value equation. A sophisticated tax analysis may identify structuring options that could defer or eliminate tax liabilities, provided such arrangements have genuine commercial substance and are not entered into with the sole or main purpose of obtaining tax benefits.

Take the rollover relief provisions in sections 41 to 47 of the Income Tax Act 58 of 1962 (ITA), for example. These provisions enable South African taxpayers to restructure their affairs on a tax-neutral basis without immediate adverse consequences, provided they're correctly applied and not abused. Instead of triggering substantial capital gains tax (CGT), recoupments, or other income tax liabilities that would normally arise from asset transfers or

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corporate reorganisations, these provisions allow the tax base cost to 'roll over', deferring taxation until a genuine realisation event occurs.

This preservation of working capital can create real competitive advantages. In an acquisition scenario, for example, if a competitor must factor in immediate tax liabilities of 20–30% of transaction value while an alternative structure defers those liabilities, the party with the tax-efficient structure can afford to pay more for the target while achieving the same after-tax return. In a competitive auction, that difference could determine who wins the deal.

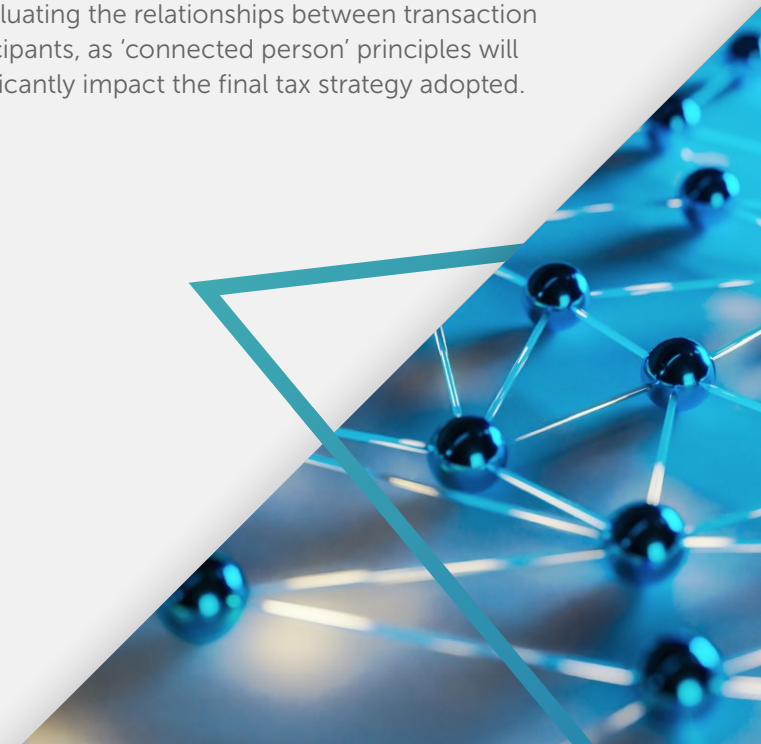
The same principle applies to internal restructurings. Working capital preservation through tax-efficient structuring can unlock resources for operational investment, debt reduction or shareholder distributions, creating value that flows directly to the bottom line.

The rollover relief provisions facilitate six distinct restructuring mechanisms: amalgamation transactions (where one company absorbs another); asset-for-share transactions (assets transferred for equity); intra-group transactions (asset movements within corporate groups); liquidation distributions (assets distributed before winding up); substitutive share-for-share transactions (equity shares in linked units exchanged for other equity shares); and unbundling transactions (subsidiary shares distributed by holding companies to shareholders). Each of these has their own requirements and restrictions. It is important, however, to note that the rollover relief provisions are just part of the tax structuring picture. Numerous other provisions in the ITA will play a role in shaping the most efficient tax structure for any specific transaction, and each requires careful evaluation.

No one size fits all

However, the rollover provisions represent just one component of a comprehensive tax structuring analysis. Effective tax planning requires evaluating how transactions impact multiple areas of law and business operations, balancing various interrelated considerations that each carry distinct tax, commercial and regulatory consequences to ensure the transaction structure aligns with the parties' ultimate objectives.

The choice of transaction participants – whether individuals, companies, trusts or other entities – establishes the foundation for everything that follows. This fundamental decision determines not only the immediate tax treatment and applicable rates, but also ongoing compliance obligations and operational flexibility throughout the structure's lifecycle. Equally important is evaluating the relationships between transaction participants, as 'connected person' principles will significantly impact the final tax strategy adopted.



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Funding structure represents another critical consideration. The spectrum of funding options, from equity to debt to hybrid instruments, creates vastly different economic and tax outcomes for both the funding provider and recipient. Selecting the optimal funding structure from the outset can preserve value over the transaction's lifecycle.

Timing considerations extend far beyond mere convenience; they are often legally critical. Many tax provisions impose strict sequencing requirements or time-sensitive conditions that, if missed, result in the permanent loss of favourable tax treatments. Strategic timing can mean the difference between tax-efficient execution and costly compliance failures.

Cross-border elements multiply complexity, requiring co-ordination across multiple tax systems, navigation of treaty benefits, and transfer pricing compliance across different jurisdictions, each with distinct anti-avoidance rules and reporting requirements. Exchange control regulations add yet another layer of complexity, imposing approval requirements and structural constraints that must be integrated into transaction design from inception, not discovered as an afterthought.

This web of considerations (which is by no means exhaustive) reveals why effective tax structuring fundamentally involves finding an optimal balance. Every choice involves trade-offs, and success lies in weighing competing implications against commercial objectives. There is rarely a perfect solution. However, there is usually an optimal solution for specific circumstances. When properly analysed by qualified tax practitioners, this balancing act can preserve the commercial substance that drives transactions forward, while ensuring efficiencies are maintained.

The risks when tax benefits become the main driver

The GAAR boundary

Tax efficiency is legitimate when it serves genuine commercial objectives. It becomes impermissible when obtaining tax benefits becomes the sole or main purpose of the arrangement. It is with the impermissible avoidance of tax that the GAAR concerns itself.

The GAAR empowers SARS to disregard or recharacterize any step(s) or part(s) of a transaction if the transaction constitutes an "*impermissible avoidance arrangement*". SARS may then assess the parties to the transaction on the basis of the tax consequences attaching to the recharacterized transaction.

For a transaction to constitute an impermissible avoidance arrangement, it must satisfy four requirements: it must constitute an arrangement; it must result in a tax benefit; obtaining the tax benefit must be the sole or main purpose of the arrangement; and it must contain one or more tainted elements that render it impermissible.

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Lessons from Mr Taxpayer G: South Africa's first GAAR judgment

In September 2025, the Tax Court handed down its decision in *Mr Taxpayer G v Commissioner* for the South African Revenue Service (IT 24502), the first case to establish comprehensive precedent on the new GAAR's scope and application. The case provides critical guidance on what constitutes an impermissible avoidance arrangement and clarifies how the new GAAR differs from its predecessor. A summary of the case can be accessed [here](#).

The central question before the court was whether the arrangements through which the appellant received compensation in the form of tax-exempt dividends constituted an impermissible avoidance arrangement under the GAAR provisions. In this context, the court had to determine several interconnected issues, namely:

- Whether the appellant obtained a "tax benefit" by structuring his compensation as tax-exempt dividends rather than receiving taxable income directly.
- Whether the sole or main purpose of the arrangements was to obtain a tax benefit, particularly given the presumption under section 80G of the ITA that if an arrangement results in a tax benefit, it is presumed that obtaining the tax benefit was the sole or main purpose of the arrangement unless the contrary is proved.

- Whether the arrangement was tainted, specifically:
 - whether they were entered into by means that would not normally be employed for *bona fide* business purposes;
 - whether they lacked commercial substance;
 - whether they created rights and obligations not normally created between arm's length parties; and
 - whether they were entered into in a business context that would result in a meaningful economic effect for the person other than a tax benefit.

The court's findings provide critical lessons for taxpayers structuring their affairs:

- **Commercial substance must be genuine and demonstrable:** Structures involving no real cash flows, creating artificial rights and obligations, or employing circular transactions designed purely for tax benefits will fail GAAR scrutiny. The court emphasised that arrangements must have substance beyond mere form.
- **The objective features of arrangements matter more than subjective intentions:** Parties cannot simply assert that commercial considerations drove the transaction. The arrangement itself will be scrutinised objectively, and if its features point to a tax benefit as the sole or main purpose, subjective protestations will carry less weight.
- **Excessive tax engineering is a red flag:** While sophisticated tax planning is legitimate, structures that involve multiple contrived steps, exploit technical loopholes within the provisions of the ITA without commercial rationale, or require extensive legal engineering to achieve tax outcomes signal GAAR risk.

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- **Documentation of the commercial rationale must be comprehensive and contemporaneous:** Board minutes and supporting documents should clearly articulate genuine business drivers rather than merely tax savings. This documentation should be detailed, contemporaneous and demonstrably linked to legitimate business objectives.

The competition law dimension

Commercial transactions don't occur in a vacuum

An often overlooked part of structuring a transaction, particularly if the transaction in question is perceived by the parties as being an "*internal restructure*", is whether the restructure will amount to a change of control that requires the approval of the competition authorities prior to implementation.

This inquiry should occur at an early stage of the deal formation process as the additional costs for obtaining merger approval, as well as the costs/risks of attracting conditions to such an approval, should be weighed against the tax benefits that the particular structure will realise.

If merger approval is required, a central consideration is whether the proposed transaction, if notified to the competition authorities, would attract public interest conditions such as supplier conditions, employment share ownership plans and undertakings relating to future B-BBEE equity transactions. These conditions are becoming increasingly prevalent in merger control and the nature of the remedies acceptable to the competition authorities seem to be in constant flux.

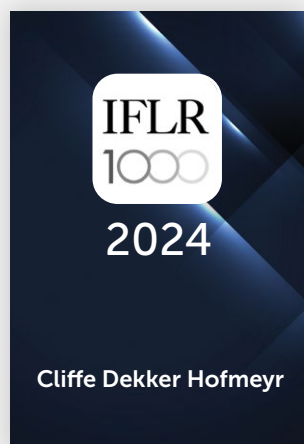
When restructuring triggers merger notification

In terms of the Competition Act 89 of 1998 (Competition Act), a merger occurs where one firm acquires direct or indirect control over the whole or part of the business of another firm.

This acquisition or establishment of control, being the key trigger for a merger, can occur through either acquiring legal or factual control. Legal control consists of clear criteria such as having the ability to appoint the majority of directors on the board, owning more than half the share capital and having the ability to cast the majority of votes at shareholder meetings. Factual control means that a firm (being the term used in the Competition Act to encompass various entities capable of conducting a business such as a company) acquires the ability to materially influence the firm in question in a manner comparable to a majoritarian controller. This is a fact specific analysis, considering the nature of the business in question, but includes aspects such as acquiring strong veto rights over aspects such as the business plan/budget as well as the appointment or removal of executives.

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If a transaction is a merger (ie. if a firm acquires or establishes legal or factual control over another firm), then an analysis needs to take place to determine whether the transaction needs to be notified to, and approved by, the competition authorities. Only so-called "*intermediate*" and "*large*" mergers need to be approved by the competition authorities before implementing the transaction.

A merger amounts to an intermediate merger if:

- the annual turnover or total asset value of the target firm is at least R100 million; and
- the combined annual turnover or total assets of both the acquiring group and target firm is at least R600 million.

A merger amounts to a large merger if:

- the annual turnover or total asset value of the target firm is at least R190 million; and
- The combined annual turnover or total assets of both the acquiring group and target firm is at least R6,6 billion.

Although pure internal restructurings between firms within the same group of companies (such as moving a wholly owned subsidiary underneath a different wholly owned subsidiary) would meet the technical definition of a merger above, these transactions are, by convention, not required to be notified to the competition authorities.

This was confirmed in the *Competition Commission's 2025 Guidelines* on internal restructuring in terms of the Competition Act (Guidelines) where it stated that a restructuring within a group is generally not notifiable if it is purely internal and does not alter the control rights of external minority shareholders. A transaction

becomes notifiable when it entails a change in control as contemplated in the Competition Act, particularly where it changes the control rights of shareholders outside the group.

Examples of such instances in the Guidelines which may be notifiable, and not an internal restructure, is a situation of a move from so-called "*joint*" (multiple) to "*sole*" (singular) control. This occurs when an external shareholder, who had factual control pre-restructure, exits, resulting in the remaining pre-existing shareholder moving from holding the majority of shares to holding all the shares in the target. Although innocuous, this is a step that needs to be closely interrogated before implementing a transaction.

Another example that may trigger a merger notification is where a shelf company is interposed as a new holding company for a group of companies in instances where the previous holding company was not controlled by any firm. In this instance, the shelf company will technically acquire control of the group of companies and it may be notifiable if the group of companies exceed the R600 million threshold mentioned above.



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Both of these examples illustrate that certain restructure steps, which may seem benign from a competition analysis perspective, and which may appear to be internal in nature, could amount to a notifiable merger requiring approval of the competition authorities.

The consequences failure to notify/gun-jumping

If a restructure results in a notifiable merger that is not approved by the competition authorities prior to implementing, the merging parties may be investigated by the Competition Commission, which could culminate in:

- administrative penalties of up to 10% of the firm's annual turnover;
- an obligation to file a merger filing after the fact; and/or
- potentially facing an unwinding/divestiture order to undo the implementation of the transaction.

Conclusion

The complexity of modern commercial transactions demands a fundamental shift in how professional advice is approached. The days when tax, legal and regulatory considerations could be addressed sequentially, or worse, as afterthoughts, are long gone. Today's regulatory environment creates a web of interconnected requirements where a misstep in one area can trigger catastrophic

consequences across multiple disciplines. A transaction structured without proper competition law analysis risks penalties of up to 10% of annual turnover for failing to notify the transaction. Tax planning that ignores commercial substance faces GAAR recharacterisation with potentially devastating financial consequences. Cross-border elements multiply these risks exponentially, introducing transfer pricing adjustments, treaty complications and foreign regulatory requirements that can unravel even well-intentioned structures.

This interconnectedness means that co-ordinated professional guidance isn't merely advisable, it's the only viable approach for transaction success. A tax practitioner working in isolation cannot anticipate competition law notification requirements. A commercial lawyer focused solely on deal mechanics cannot identify GAAR risks or optimise rollover relief applications. Success requires a team approach where all relevant professionals and specialists work together from the start, identifying potential conflicts before they become problems, designing structures that satisfy multiple regulatory frameworks simultaneously, and ensuring that commercial objectives are achieved without triggering unintended legal or tax consequences. In South Africa's current regulatory environment, this co-ordinated expertise isn't a luxury for complex deals, it's the minimum standard for any transaction seeking to unlock value while managing risk effectively.

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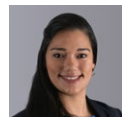
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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