

GUIDELINES ON INDIVISIBLE TRANSACTIONS

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1 Preface

- 1.1 This Guideline has been prepared in terms of section 79(1) of the Competition Act 89 of 1998 (as amended) ('the Act') which provides that the Competition Commission ('Commission') may prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act.
- 1.2 This Guideline is intended to provide guidance on the Commission's approach when evaluating whether *two or more transactions* can be filed with the Commission under a single merger notification where each transaction, if treated separately, may on its own constitute a merger as defined in section 12(1) of the Act.
- 1.3 The Commission recognises that each transaction structure is different and as a result, this Guideline should not be interpreted as preventing the Commission from exercising its discretion on a case-by-case basis on whether multiple transactions should be notified and assessed under a single merger filing. Accordingly, this Guideline is not exhaustive of all factors that the Commission will take into account in determining whether multiple transactions are indivisible.
- 1.4 This Guideline is not binding on the Commission, the Tribunal or the courts but any person interpreting or applying section 12(2) of the Act must take this Guideline into account. *

2 Definitions

The following terms are applicable to this guideline:

- 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 **'Act'** means the Competition Act 89 of 1998, as amended;

* Section 79(4) of the Act.

- 2.3 **'CAC'** means Competition Appeal Court established in terms of section 36 of the 1998 Act;
- 2.4 **'Commission'** means the Competition Commission of South Africa established in terms of section 19 of the 1998 Act;
- 2.5 **'Competition Authorities'** refers collectively to the Commission, the Tribunal and the CAC as the case may be;
- 2.6 **'Failure to notify'** means the failure to notify a notifiable transaction as contemplated in section 13A(1) of the Act;
- 2.7 **'Firm'** includes a person (juristic or natural), partnership or a trust;
- 2.8 **'Guideline'** means this guideline which has been prepared and issued in terms of section 79(1) of the Act;
- 2.9 **'Indivisible Transaction'** refers to multiple transactions which can be notified and assessed under a single merger filing;
- 2.10 **'Merger'** means a merger as defined in section 12(1) of the Act and includes a proposed merger;
- 2.11 **'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) above.
- 2.12 **'Tribunal'** means the Competition Tribunal of South Africa established in terms of section 26 [of the] Competition Act, 89 of 1998.

3 Introduction

- 3.1 This Guideline has been prepared to provide guidance to merger parties when structuring and notifying multiple transactions to the Commission.
- 3.2 This Guideline is intended to set out factors which the Commission will take into account in determining the indivisibility of multiple transactions. These factors are non-exhaustive.
- 3.3 This Guideline does not deal with the definition of control and the type of control which a party to a transaction will be acquiring, in terms of section 12(2) of the Act, when notifying a transaction to the Commission. Accordingly, this Guideline assumes that there is acquisition of control in respect of each transaction.
- 3.4 This Guideline applies to all merger transactions and is not market, sector or industry specific.

4 Legislative framework

- 4.1 There are two requirements for the notifiability of a transaction. The first requirement is that a transaction must fall within the definition of a merger, as contemplated in section 12(1) of the Act. The second requirement is that a transaction must meet the requisite monetary threshold for a notifiable merger.
- 4.2 Section 12(1) of the Act defines what constitutes a merger. Section 12(1) provides as follows:

'For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. (b) A merger contemplated in paragraph (a) may be achieved in any manner, including through-(i) purchase or lease of the shares, an interest or assets of the other firm in question; or (ii) amalgamation or other combination with the other firm in question'.

- 4.3 Section 12(2) of the Act provides for various instances that can be considered to determine a merger, however the subsection is non-exhaustive. [†] In *Distillers Corporation (SA) Ltd v Bulmer (SA) Ltd* (Distillers) the Competition Appeal Court ('CAC') held that the Act '*envisages a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of the market structure and in particular reduce the level of competition in the relevant market*' [‡].
- 4.4 Section 13A(1) and (2) requires that parties to intermediate or large mergers must notify their transaction to the Commission. Generally, merging parties are not required to notify a small merger. [§] However, a small merger may be voluntarily notified to the Commission at any time ^{**} or the Commission may, within six months of the implementation of a small merger, require the merging parties to notify the small merger, if in the opinion of the Commission, a small merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. ^{††} Section 13A(3) expressly prevents the implementation of an intermediate and large merger without the prior approval of the competition authorities. ^{‡‡}

5 Assessment of the indivisibility of a transaction

- 5.1 The compulsory notification regime of the Act obliges parties, to a notifiable merger (intermediate or larger mergers), to notify the Commission in the manner and form prescribed of a proposed merger. ^{§§} The investigative powers of the Commission, are triggered when a transaction constitutes a notifiable merger in-terms of section 13A(1) of the Act. ^{***}
- 5.2 Transactions are typically interdependent and indivisible where each transaction would not be implemented without the other transaction(s). Different transactions would not be considered indivisible if a transaction would proceed irrespective of whether or not the other transaction proceeds.
- 5.3 The indivisibility of a transaction may occur on a factual or legal basis or both. The Commission recognises both forms of indivisibility for purposes of determining whether multiple transactions should be notified under a single merger filing.
- Factual and legal indivisibility*
- 5.4 In *Crown Gold Recoveries (Pty) Ltd, the Industrial Development Corporation of SA Ltd and Khumo Bathong Holdings (Pty) Ltd (Khumo)*, the Tribunal, in the context of a two-phased transaction, held that '*[t]he first leg is merely to facilitate the possibility for the second to happen. Legally and factually the two legs constitute parts of a single transaction*'. ^{†††} The Tribunal considered the

[†] *Bulmar SA (Pty) Ltd and Another v Distillers Corporation (SA) Ltd* 94/FN/Nov00 and 101/FN/Dec00 at p13.

[‡] 08/CAC/May01 at page 26.

[§] Section 13(1)(a) of the Act.

^{**} Section 13(2) of the Act.

^{††} Section 13(3) of the Act.

^{††} *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* [2018] ZACC 37; 2018 JDR 1674 (CC); 2018 (12) BCLR 1533 (CC) para 43.

^{§§} *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* [2018] ZACC 37; 2018 JDR 1674 (CC); 2018 (12) BCLR 1533 (CC) para 36.

^{***} *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* [2018] ZACC 37; 2018 JDR 1674 (CC); 2018 (12) BCLR 1533 (CC) para 43.

^{†††} *Crown Gold Recoveries (Pty) Ltd and Industrial Development Corporation of South Africa Limited/Khumo*

transactions to comprise a single merger where the transactions were both legally and factually related to each other.

- 5.5 The Tribunal recognises that in determining whether a transaction is indivisible or not, a transaction can be factually indivisible and/or it can be legally indivisible. The transaction will have to be factually indivisible or legally indivisible or both if the transaction is to be considered indivisible. ^{***}

Factors that the Commission will consider in determining indivisibility

- 5.6 For purposes of determining whether multiple transactions should be treated as a single indivisible transaction, in the sense that one transaction cannot be implemented without the implementation of the other transaction(s), the Commission will assess a number of interrelated factors. These factors include: ^{§§§}

- 5.6.1 the manner in which the transaction is structured;
- 5.6.2 the relationship between the transactions;
- 5.6.3 the interdependence of the transactions (whether one transaction could be carried out without the other transactions);
- 5.6.4 the rationale underlying the multiple transactions;
- 5.6.5 whether the transactions will be implemented simultaneously under same agreement;
- 5.6.6 whether there are multiple acquiring firms, under common shareholding, acquiring the same target firm(s);
- 5.6.7 whether there are multiple target firms with common shareholders/sellers and common acquiring firms;
- 5.6.8 whether there are multiple acquiring firms in terms of a single agreement pertaining to the same target firm (eg property transactions and consortium arrangements);
- 5.6.9 whether the transactions involve a similar competitive and public interest assessment and whether similar conditions are likely to be applicable to the transactions; and
- 5.6.10 whether the single notification is aimed at circumventing the applicable filing fees.

- 5.7 The assessment of indivisibility is a holistic assessment and no one factor is determinative of indivisibility. The assessment of indivisibility is also not about the convenience to the merging parties.
- 5.8 If a transaction meets the requirements of indivisibility, the Commission will assess the transaction under a single merger notification. However, if a transaction does not meet the requirements of indivisibility, the Commission may require merging parties to file the transactions separately.
- 5.9 A non-exhaustive list of examples of instances of indivisibility is provided in Annexure A which is attached to this Guideline.

Bathong Holdings (Pty) Ltd (31/LM/May02) [2002] ZACT 38 (4 June 2002), page 3.

^{***} *Peermont Holdings (Pty) Ltd and LCI (Overseas) Investments (Pty) Ltd (LM059Jun19)* para 9. This transaction involved two separate transactions. The first transaction involved the purchase (by a majority shareholder – Emerald Safari Resort (Pty) Ltd ('Emerald')) of shares held by minority shareholders, this was regarded as the minority transaction. Emerald was owned by LCI Overseas Investments (Pty) Ltd (the primary target firm). In the second transaction Peermont Holdings (Pty) Ltd ('Peermont') was to acquire 100% of the issued share capital of the primary target firm. This was regarded as the majority transaction. The Tribunal agreed with the Commission that both the minority and majority transactions were both factually and legally indivisible.

^{§§§} For avoidance of doubt, the factors set out in these Guidelines are not exhaustive.

6 Filing fees

- 6.1 The determination of whether a transaction constitutes an indivisible transaction may implicate the applicable filing fee depending on whether the indivisible transaction constitutes an intermediate or large merger or multiple intermediate or large mergers.

7 Discretion

- 7.1 Section 79(4) provides that guidelines are not binding on the Commission, the Tribunal or the Courts but any person interpreting or applying section 12(2) of the Act must take the guidelines into account. The above Guidelines thus present the general methodology that the Commission will follow in assessing whether multiple transactions are indivisible. Notwithstanding the above, this will not fetter the discretion of the Commission.

8 Effective date

- 8.1 This Guideline becomes effective on the date indicated in the *Government Gazette* and may be amended by the Commission from time to time.

Annexure A: Examples of Instances of Indivisibility

- A A non-exhaustive list of examples of instances of indivisibility, which the Commission has considered include:
- (i) The target firms, being purchased by the same ultimate acquirer, are from the same ultimate seller and the acquisition of each target firm will not occur without acquisition of the other(s). ****
 - (ii) The extent to which the various legs of the transaction are dependent on each other. †††† For example, Firm 'A' acquires 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'. ††††
 - (iii) The target firms are jointly controlled by common shareholders. §§§§ For example, Firm 'A' intends to acquire a shareholding in Firm 'B' and Firm 'C' wherein Firm 'B' and Firm 'C' are involved in the same line of business or related activities and Firm 'B' and Firm 'C' are jointly controlled by common shareholders. *****
 - (iv) The target firms are intended to be disposed of simultaneously as an indivisible transaction. For example, Firm 'A' enters into an agreement

**** *Capitalworks Continental Holdings Partnership and Continental Compounds (Pty) Ltd and Continental Engineering Compounds (Pty) Ltd* (Case No: LM058Jul23) para 11. This transaction involved the acquisition of various shareholdings by Capitalworks Continental Holdings Partnership ('CCHP') in (i) Continental Compounds (Pty) Ltd ('CC') and (ii) Continental Engineering Compounds (Pty) Ltd ('CEC'), collectively referred to as 'Continental'. Upon implementation of the proposed transaction, CCHP will acquire control over the Target Firms in terms of section 12(2)(g) of the Act. The Tribunal found that the proposed transactions constitute a single indivisible transaction as the Target Firms are involved in the same or interrelated lines of business, which is plastic compounding and are jointly controlled by common shareholders.

†††† *Capitalworks Continental Holdings Partnership and Continental Compounds (Pty) Ltd and Continental Engineering Compounds (Pty) Ltd* (Case No: LM058Jul23) para 11.

†††† *Crown Gold Recoveries (Pty) Ltd and Industrial Development Corporation of South Africa Limited/Khumo Bathong Holdings (Pty) Ltd* (31/LM/May 02) [2002] ZACT 38 (4 June 2002).

§§§§ *Capitalworks Continental Holdings Partnership and Continental Compounds (Pty) Ltd and Continental Engineering Compounds (Pty) Ltd* (Case No: LM058Jul23) para 11.

***** *Capitalworks Continental Holdings Partnership and Continental Compounds (Pty) Ltd and Continental Engineering Compounds (Pty) Ltd* (Case No: LM058Jul23).

with Firm 'B' and Firm 'C' to purchase those firms simultaneously as one indivisible transaction. In circumstances where Firm 'A' would not have acquired Firm 'B' or Firm 'C' without acquiring the other. ^{††††}

^{††††} *Khumonetix (Pty) Ltd v Auckland Investments 22 (Pty) Ltd, Blane & Company Sales (Pty) Ltd, Wideprops 97 (Pty) Ltd, Red Gold Investments (Pty) Ltd and Dreamfair Properties 11 (Pty) Ltd* LM112. This transaction involved the purchase by Khumonetix (Pty) Ltd ('Khumonetix') of nine industrial properties. Post-merger Khumonetix would gain sole control and ownership of the target properties. The merging parties submitted that the proposed constituted an indivisible transaction as the sale agreements of the properties stipulated that they be sold as one indivisible transaction. The Tribunal agreed with the Commission's view that the nine properties constituted an indivisible transaction as the nature of the target properties are interrelated because the transactional agreements were concluded simultaneously which indicates that the target properties were intended to be disposed of concurrently.