South Africa: Guidelines for the Determination of Administrative Penalties for Failure to Notify Mergers and Implementation of Mergers Contrary to the Competition Act

1. Under the Competition Act, implementation of a merger without approval in South Africa may attract an administrative penalty of up to 10% of the firm’s annual turnover in, and its exports from, South Africa during the firm’s preceding financial year where this is a first time offence. The penalty may now increase to up to 25% where there is a repeat offence.

2. The Competition Commission issued Guidelines for the Determination of Administrative Penalties for Failure to Notify Mergers and Implementation of Mergers Contrary to the Competition Act which became effective on 1 April 2019.

3. The Penalty Guidelines indicate that the Commission may consider the following scenarios, amongst others, as premature implementation or failure to notify:
   3.1. a senior executive of the acquiring firm engaging in the day-to-day operations of the target firm;
   3.2. the merging parties marketing themselves as a single entity prior to approval being obtained;
   3.3. the acquiring firm changing the name of the target firm;
   3.4. premature integration and consolidation of the merging firms; or
   3.5. the acquiring firm becoming involved in the making and/or executing of strategic decisions regarding the future of the target firm, including identifying markets for the target firm to pursue, developing new products or services for the target firm, taking charge of ordering the target firm’s raw materials, amending the target firm’s procurement policies or becoming involved in its customer relations.

4. The minimum penalty (or base amount, as it is referred to in the Penalty Guidelines) for premature implementation or a failure to notify is double the application filing fee.¹

5. The Penalty Guidelines further provide that, once the Commission has established the base amount, it will take into account the duration of the merging parties’ contravention. In doing so, the Commission will add to the relevant base amount a proportion of the relevant base amount for each month of the contravention according to the following formulae:

¹ In the case of an intermediate merger, the filing fee for an intermediate merger is currently R165,000 and so the minimum penalty would be R330,000. In the case of a large merger, the filing fee for a large merger is currently R550,000 and so the minimum penalty would be R1.1 million.
5.1. for contraventions not exceeding a year, the additional amount will be \((50\% \times \text{base amount}) \times \text{number of months of contravention}\);

5.2. for contraventions exceeding a year but less than two years, the additional amount will be \((75\% \times \text{base amount}) \times \text{number of months of contravention}\); and

5.3. for contraventions exceeding two years, the additional amount will be \((100\% \times \text{base amount}) \times \text{number of months of contravention}\).

6. Once the amount is determined according to the above formulae, the Commission will adjust this figure based on relevant aggravating and mitigating factors. If the final amount arrived at exceeds the 10% statutory cap, the Commission will apply the maximum allowable administrative penalty.

7. However, the Commission is not bound by the Penalty Guidelines; the Commission has discretion to seek a lower penalty or the maximum penalty of 10% of turnover in exceptional circumstances. Exceptional circumstances may include intentional disregard of the Competition Act.

8. In terms of the Penalty Guidelines, the penalty could be levied on the acquiring firm, the seller, the target or transferred firm and/or the holding company of any of these firms, depending on the circumstances.
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