

# COMPETITION FILING NOTIFICATION FOR HOSTILE TRANSACTIONS



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The Competition Act (the Act) provides that mergers above a defined threshold must be notified to the

Competition Commission (the Commission) and may not be implemented until a merger approval has been granted. Most merger notifications are made in a single filing which contains information about the acquiring and target firm. This assumes that the acquiring and target firm are co-operating with each other and support the merger process.

Rule 28 to the Rules of the Commission provides for the Commission to allow, in certain

circumstances, separate merger notification. The purpose of the Rule is to provide for situations where there is a hostile take-over and the acquiring firm is not co-operating with the target firm.

Rule 28 is subject to abuse. An application has to be made to the Commission to allow separate filings and the Commission may grant the application if it is reasonable and just to do so. Once the Commission has allowed a separate filing in terms of Rule 28, then there is further uncertainty as to the timelines to be followed and the target firm can abuse the process.

In the recent judgement of the Competition Tribunal (the Tribunal) of Caxton and CTP Publishers & Printers Limited vs The Competition Commission of South Africa and Mpac Limited, the Tribunal stated that the Commission should provide guidance to parties on what types of transactions it would consider appropriate for a Rule 28 application.

The Chairman of Caxton had met with the Chairman of Mpac and had discussed the desire of Caxton to increase its shareholding in Mpac. Caxton asked Mpac to co-operate with it in the submission of a joint filing to the Commission for merger approval.

Mpac expressed its opposition to this proposal because no firm offer had been made to its shareholders containing price, terms and conditions and it was unclear whether Caxton had the necessary finances in place.

Although Caxton supplied certain information to the Commission, it was of the view that the Commission did not need to know the exact nature of the transaction before determining whether a separate filing was to be permitted. It stated that the acquisition would occur through either a mandatory offer under Section 123 of the Companies Act or through a general offer by Caxton to Mpac shareholders, under Section 121 of the Companies Act.

Following the judgement, the Commission issued, on 5 January 2024, draft guidelines (the

Guidelines) that it would follow in the determination as to whether or not it would permit a separate merger notification and its approach to timelines applicable to the merger filing process.

These Guidelines, issued under Section 79 of the Act, indicate the policy approach which the Commission will follow.

The first issue which the Commission is required to determine is whether a merger is in existence or whether, like the Caxton case, it is simply proposed. There needs to be a firm or indicative offer on the part of the acquiring firm and the offer must contain the price and terms and conditions of the proposed merger including an indication of the proposed date of implementation.

Once the Commission is satisfied that there exists a merger or a proposed merger, the Commission proceeds to the second enquiry which is whether it is reasonable and just to allow a separate filing. The Guideline states that the Commission exercises its discretion and what constitutes a reasonable decision will depend on the circumstances of each case. This will involve a weighing in exercise and the factors which the Commission will take into account include:

1. Any prejudice to the target firm that may be occasioned by separate filing;
2. The ability of each primary firm to submit a meaningful separate filing;
3. The implications for the primary firms who may be

required to provide information to the Commission if the investigation commences;

4. The implications for third parties who may be required to provide information to the Commission if the investigation commences
5. The implications for the Commission and its resources if the investigation commences;
6. Whether merger control will be effective, for instance, if undertakings are to be sought from the acquiring firm in respect of competition or public interest issues and the acquiring firm is not a willing party to the filing;
7. Any other factors that may be deemed relevant by the Commission.

The Commission must then provide reasons for its decision whether to permit a separate filing or not.

The second issue on which the Commission provided guidance is the timelines applicable to separate merger notifications.

The period within which the Commission determines whether or not to permit a separate merger notification is not determined by the Regulations. The Commission must communicate its decision to the parties and during this period, the Commission must engage the primary firms in order to satisfy itself of the requirements of the two-stage enquiry.

Once the Commission allows a separate filing, the Commission must issue directives to both

parties and share all issued directions with them. This is so as to enable the filing to be brought to completion.

Where there is non-compliance with the Commission's stated timelines for filing of the merger notification documents, the Commission is to issue a notice of incomplete filing. Where a primary firm fails to submit its filing in the period specified, the other primary firm can only advance the filing process by making further application to the Commission allowing it to file on behalf of the recalcitrant filing firm.

Finally, the Commission states in its Guidelines that they are not exhaustive and will not effect the discretion of the Commission and/or Tribunal and Courts to consider separate merger notification issues on a case by case basis, taking into account the criteria or information placed before the Commission at the time the decision is made.

Although the Guidelines provide some clarification to the process followed in a hostile merger, the process is still very cumbersome and can be abused by a target firm which is not prepared to cooperate with the acquiring firm.

The Rules of the Commission should be amplified to deal expressly with this issue. ■

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## UNVEILING OF NEW BUSINESS LOUNGE

The Durban International Convention Centre (Durban ICC) proudly announces the grand opening of its newest venture, the Durban ICC Business Lounge. This upscale space, designed to cater to the needs of business executives and leisure travellers alike, is the latest offering from the iconic centre always striving to meet the needs of its clientele.

The launch event, held on 8 April, was attended by esteemed guests, including the full board of directors of the Durban ICC, along with eThekweni Mayor Mxolisi Kaunda and city manager, Musa Mbhele, underscoring the significance of this milestone for the city.

The Durban ICC Business Lounge sets a new standard for sophistication and comfort,

offering an exclusive environment for relaxation, private meetings, and networking.

With its high-end amenities and personalised service, the lounge provides a sanctuary for discerning guests seeking a premium experience in the bustling Central Business District of Durban.

"We are thrilled to introduce the Durban ICC Business Lounge, which represents our commitment to enhancing the hospitality offerings in Durban," said Lindiwe Rakharebe, Durban ICC chief executive officer. "This new venture reflects our dedication to providing exceptional experiences for our guests while contributing to the economic growth and revitalisation of the city."

The launch event showcased the lounge's elegant design,

contemporary furnishings, and state-of-the-art facilities, all tailored to meet the needs of modern business travellers and executives. Guests had the opportunity to experience first-hand the luxury and convenience of the lounge, which boasts private meeting spaces, high-speed internet access, and a curated selection of culinary offerings.

In addition to providing a premium space for business activities, the Durban ICC is committed to supporting local suppliers and promoting sustainability. The lounge's culinary offerings feature a menu crafted from sustainably sourced ingredients, with an emphasis on showcasing the rich culinary heritage of Durban and its surrounding region.

The launch event marked the beginning of an exciting new chapter for the Durban ICC, as it continues to innovate and elevate the hospitality experience in Durban. The Durban ICC Business Lounge is now open Monday to Saturday from 12:00

to 21:00, welcoming guests to indulge in a world-class experience in the heart of the city.

For more information call Tel: +27 31 360 1000 or visit www.icc.co.za



Speaking at the ribbon cutting ceremony, eThekweni Mayor Mxolisi Kaunda congratulated the Durban ICC for the sterling work it is doing.