

## **Part 6 - Merger Procedures**

### **24. Review period and extensions**

(1) In this Part, “Initial Period” means the 20 business day period allowed by section 13 (5)(a), or section 14 (1)(a), for the consideration of a small or intermediate merger, and the 40 business day period allowed by section 14A(1)(b) for the consideration of a large merger.

(2) For each merger, the Initial Period begins on the date determined in accordance with Rule 29.

(3) An extension of time, whether granted by the Commission in terms of section 13(5)(a) or 14(1)(a), or deemed to have been granted by the Commission in terms of Rule 34(2)(a), or granted to the Commission by the Tribunal in terms of section 14A(2), begins -

(a) on the business day following the date on which the Initial Period expires, or  
(b) in the case of a second or subsequent extension granted in terms of section 14A(2), on the business day following the date on which the previous extension expires.

(4) For each merger, the Initial Period, and any extension, once begun, continues without interruption for any reason, other than the issuance of a Demand for Corrected Information in Form CC 13 (4), and then only to the extent allowed by Rule 32.

### **25. Small merger notification**

(1) The Commission may require the parties to a small merger to notify the Commission of that merger in terms of section 13(3), by serving Form CC 9 on the parties to the merger.

(2) The parties to a small merger must fulfil the notification requirements set out in this Part within 20 business days after receiving Form CC 9.

(3) If a small merger has already been implemented before the Commission serves Form CC 9, the Commission will have complied with sub-rule (1) when it has served Form CC 9 on the Primary Acquiring Firm.

(4) Rules 26 - 34 apply to the notification of a small merger, whether that notification is voluntary in terms of section 13(2), or in response to Form CC 9.

### **26. General merger notification requirements**

- (1) Parties to a merger must notify the Commission of that merger -
  - (a) by filing a joint notification in terms of Rule 27, or
  - (b) if permitted by order of the Commission, by filing separately in terms of Rule 28.
- (2) If, given the nature of a particular transaction, a firm is both a primary target firm and a primary acquiring firm, that firm, before filing a Merger Notice, may request the Commission to issue directions as to how, in the context of the transaction, to calculate the filing fee and apply the threshold calculation.
- (3) Within 5 business days after receiving a direction in terms of sub-rule (2), a firm concerned may apply to the Tribunal to reconsider the direction of the Commission with respect to the calculation of the filing fee, or the application of the threshold calculation.

## **27. Joint merger notification**

- (1) A joint merger notification must be made in a single filing by one of the primary firms, and must include:
  - (a) a Merger Notice in Form CC 4 (1), which must declare whether, in the opinion of the filing firm, the merger is small, intermediate or large;
  - (b) for each of the Primary Acquiring Firm and the Primary Target Firm, a Statement of Merger Information in Form CC 4 (2), which in each case -
    - (i) satisfies all the filing instructions set out in that Form, and
    - (ii) has attached to it all the documents required by those instructions;
  - (c) if the merger as declared on the Merger Notice is an intermediate or large merger, proof of service of a copy of the Merger Notice as required in terms of section 13A(2); and
  - (d) the prescribed merger notice fee, in the appropriate amount for the merger as declared on the Merger Notice, subject to sub-rule (2).
- (2) The prescribed merger notice fee may be paid separately from the remaining items required under sub-rule (1), but must be received by the Commission on or before the date of filing of those items.
- (3) In respect of a merger that is jointly notified, the merger notification requirements of every firm that is a party to the merger will have been fulfilled, when a primary firm has fulfilled the notification requirements set out in Rule 27, subject to -

- (a) any Notice of Incomplete Filing in Form CC 13(2) issued to it by the Commission in terms of Rule 30, and either not appealed or confirmed on appeal; or
- (b) any Demand for Corrected Information in Form CC 13(4) issued to it by the Commission in terms of Rule 32, and either not appealed or confirmed on appeal.

## **28. Separate merger notification**

(1) A primary firm may apply to the Commission for permission to file separate notification of a merger and, on considering an application under this sub-rule, the Commission -

- (a) may allow separate filing if it is reasonable and just to do so in the circumstances;
- (b) may give appropriate directions to give effect to the requirements of the Act and in particular, specifying which primary firm must satisfy which of the requirements set out in Rule 27; and
- (c) in an appropriate case, may further permit the applicant to file any document on behalf of the other primary firm.

(2) A primary firm may apply to the Commission for an order on good cause shown allowing it to file any document on behalf of the other primary firm, if that other primary firm has failed within 10 business days to file -

- (a) a document that the Commission or the Tribunal has ordered it to file; or-
- (b) any other document or additional information required by the Commission in terms of this Part.

(3) If a primary firm files a Statement of Merger Information on behalf of the other primary firm, the firm that files that Statement is not required to file proof of service of a copy of that statement on the other primary firm.

(4) In respect of a merger that is separately notified, the merger notification requirements of each firm will have been fulfilled when the notification requirements of their respective primary firms, as ordered by the Commission, have been fulfilled, subject to -

- (a) any Notice of Incomplete Filing in Form CC 13(2) issued to it by the Commission in terms of Rule 30, and either not appealed or confirmed on appeal; or
- (b) any Demand for Corrected Information in Form CC 13(4) issued to it by the Commission in terms of Rule 32, and either not appealed or confirmed on appeal.

## **29. Commencement of Initial Period**

(1) The Initial Period for a merger begins on the business day following the date on which a merger notification was filed unless -

(a) the Commission issues Form CC 13(2) to the filing firm within the time allowed by Rule 30; and

(b) either the filing firm does not appeal against that form, or the Tribunal, on hearing an appeal, does not set aside the form entirely.

(2) If the Commission issues Form CC 13(2), and it is not set aside entirely by the Tribunal, the Initial Period for the merger begins on the business day following the date on which the filing firm subsequently files documents in response to Form CC 13(2), if as a result of that filing, the Commission subsequently issues, or is deemed to have issued, a Notice of Complete Filing in Form CC 13 (1).

### **30. Review of notification**

(1) Within 5 business days after receiving a Merger Notice filed in respect of a merger declared to be a large merger, or within 10 business days after receiving a Merger Notice filed in respect of any other merger, the Commission must deliver to the filing firm either -

(a) a Notice of Complete Filing in Form CC 13 (1); or

(b) a Notice of Incomplete Filing in Form CC 13 (2).

(2) The Competition Commission must issue Form CC 13 (1) in terms of sub-rule (1) if -

(a) the merger appears to fall within the jurisdiction of the Act;

(b) the declared category appears to be correct; and

(c) in the case of -

(i) a merger notified jointly, all the requirements set out in Rule 27 have been satisfied,

(ii) a merger notified separately, all the requirements set out by order of the Commission in terms of Rule 28 have been satisfied;

(iii) a subsequent filing by a firm in response to Form CC 13(2), all the requirements set out in that Form have been satisfied; or

(iv) a subsequent filing by a firm in response to an order of the Tribunal in terms of sub-rule (4), all the requirements set out in that order have been satisfied.

(3) The Commission may issue Form CC 13(2) if after a filing of a merger notice, or other information, the merger file does not meet the applicable criteria set out in sub-rule (2).

(4) Within 5 business days after receiving Form CC 13 (2), the firm concerned may

appeal to the Tribunal for an order setting aside any requirement set out in that form.

(5) Upon hearing an appeal in terms of sub-rule (4), the Tribunal may make an order-

- (a) Setting aside Form 13(2) entirely;
- (b) Confirming any or all of the requirements set out in Form CC 13(2);
- (c) Substituting other requirements for any of the requirements set out in Form CC 13(2); and
- (d) Combining any or all of the requirements set out in Form 13(2) with additional or substitute requirements.

(6) If the Commission does not issue either Form CC 13(1) or Form CC 13(2) within the time allowed by sub-rule (1), or if the Tribunal sets aside all requirements set out by the Commission in Form CC 13(2), the Commission will be deemed to have issued Form CC 13(1) to the filing firm -

- (a) as of the date on which the last material was filed; and
- (b) subject to further review and subsequent notice in terms of Rule 31 or 32.

(7) Sub-rules (1) - (6), read with the changes required by context, apply to a subsequent filing by any party to the merger in response to -

- (a) a notice issued to it in Form CC 13(2); or
- (b) an order of the Tribunal in terms of sub-rule (4).

### **31. Request for additional information**

(1) At any time during a merger investigation, the Commission may -

- (a) informally request additional information from a party to a merger; and
- (b) require a party to a merger to provide additional information, at any time, as provided in section 13B(2), by serving on the party a demand in Form CC 13(3), setting out the specific information that the Commission requires.

(2) A request or demand for information in terms of this Rule does not -

- (a) delay the beginning of the Initial Period; or
- (b) suspend the Initial Period or any extension.

### **32. Apparently False or Misleading Information**

(1) If, at any time, the Commission believes that a document filed in respect of a merger contains false or misleading information, the Commission may issue a Demand for Corrected Information in Form CC 13(4) to the firm that filed that

document.

(2) Within 5 business days after being served with a Demand for Corrected Information, the firm concerned may appeal to the Tribunal for an order confirming or setting aside the Demand.

(3) If a firm does not appeal a Demand for Corrected Information within the time allowed by sub-rule (1), or if the Tribunal, on hearing the appeal, confirms the demand in whole or in part,

(a) the firm concerned must file corrected information;

(b) even if the Initial Period or an extension had already begun, the parties to the merger will not have fulfilled their notification requirements until that corrected information has been filed to the satisfaction of the Commission; and

(c) the Initial Period for that merger begins anew on the day following the date on which the party concerned files replacing information to the satisfaction of the Commission.

(4) If the Tribunal, on hearing an application in terms of sub-rule (2), sets aside the Demand entirely, the Demand is a nullity, and the fact that it was issued does not

(a) delay the beginning of the Initial Period; or

(b) suspend the Initial Period or any extension.

### **33. Questions of jurisdiction and categories**

(1) If the Commission has indicated on Form CC 13(2) that a merger appears to fall outside the jurisdiction of the Act -

(a) the Commission must -

(i) refund the filing fee to the firm that paid it;

(ii) return the Merger Notice to the primary firm that submitted it; and

(iii) send a copy of Form CC 13(2) to -

(aa) the other primary firm if the filing was in terms of Rule 29; and

(bb) each person identified in the Merger Notice as being entitled to receive a copy of the Merger Notice in terms of section 13A(2); and

(b) no party to that merger is required to file any further documents concerning that merger.

(2) If the Commission has indicated on Form CC 13(1) or CC13(2), as the case may be, that the merger appears to fall within the jurisdiction of the Act, the Commission must -

(a) send a copy of the Merger Notice and accompanying Statement of Merger Information to the Minister;

(b) if it appears to be a large merger, send a copy of the Merger Notice to the Tribunal.

(3) Within 5 business days after receiving Form CC 13(1) or Form CC 13(2), as the case may be, the firm concerned may appeal to the Tribunal for an order setting aside the opinion of the Commission -

(a) that the merger is within the jurisdiction of the Act; or

(b) in the case of Form CC 13(2), that the merger falls within a particular category other than that declared on the Merger Notice.

(4) If, upon hearing an appeal in terms of sub-rule (2) -

(a) the Tribunal sets aside the opinion of the Commission that the merger is within the jurisdiction of the Act, the provisions of sub-rule (1) apply; or

(b) the Tribunal sets aside the opinion of the Commission that the merger falls within a particular category other than that declared on the Merger Notice, the opinion of the Commission is a nullity.

(5) If, within the time allowed by sub-rule (4), a firm does not appeal against the opinion of the Commission that the merger falls within a particular category other than that declared on the Merger Notice, or if the Tribunal, on hearing the appeal, confirms the Commission's opinion one of the primary parties must pay to the Commission the difference between --

(a) the appropriate filing fee for the category determined by the Commission; and

(b) the filing fee previously paid in respect of the merger.

(6) The Initial Period for a merger referred to in this Rule begins -

(a) On the date following the day that the merger notice was filed if, following the order of the Tribunal, there are no outstanding notification requirements, and

(i) The application to the Tribunal concerned only a matter of the jurisdiction of the Act,

(ii) The Tribunal set aside the Commission's category determination, or

(iii) The Tribunal upheld the Commission's category determination and one of the firms concerned paid the amount required in terms of sub-rule (5) within 5 business days after the Tribunal makes its order; or

(b) In any case, on the date determined in accordance with Rule 29(2).

### **34. Abandonment of merger**

(1) The primary acquiring firm may notify the Commission in Form CC 6 that it has abandoned the intended merger transaction and has no intention to implement it.

(2) Upon the filing of Form CC 6 -

(a) the parties to the merger are in the same position as if the merger had never been notified; and

(b) the filing fee paid in respect of that merger is forfeited to the Commission, unless the party that paid the fee applies within 10 business days to the Tribunal for a remission of the fee, and the Tribunal, on good cause shown, orders the Commission to refund all or part of the fee.

### **35. Participation by Minister in Commission merger proceedings**

(1) If the Minister decides to participate in any intermediate or large merger proceedings before the Commission, the Minister must file a Minister's Notice of Intention to Participate in Form CC 5(2) within 10 days after receiving a copy of the Merger Notice from the Commission.

(2) Upon receipt of a Minister's Notice of Intention to Participate in terms of sub-rule (1), the Commission -

(a) in the case of an intermediate merger, is deemed to have issued an extension certificate for 40 business days in terms of section 14(1)(a);

(b) must deliver a copy of the Minister's Notice of Intention to Participate to the primary acquiring firm and the primary target firm; and

(c) must deliver to the Minister a copy of all documents filed in connection with the merger, up to the day on which the Minister's Notice of Intention to Participate was filed.

(3) The Commission must deliver to the Minister any document that is filed in connection with a merger after the Minister's Notice of Intention to Participate was filed.

(4) The Minister may file a concise statement of the public interest grounds on which the Minister relies in respect of a particular intermediate merger, and a statement of the decision, if any that the Minister prefers, at any time between-

(a) The date on which the Minister filed a Notice of Intention to Participate; and

(b) 10 business days after receiving advice from the Commission in terms of sub-rule (5), if applicable.

(5) If, in respect of a particular merger the Minister has filed a Notice of Intention to Participate, but has not yet filed a statement in terms of sub-rule (4), the



Commission must advise the Minister in writing at the time that it is prepared to make a decision in terms of section 13, 14 or 14A.

(6) Upon receiving a concise statement from the Minister in terms of sub-rule (4), the Commission must serve a copy of the statement on each other participant in those proceedings, and each participant may file a written response to the statement within 5 business days after it has been served on them.

### **36. Minister of Finance intervention**

(1) The Commission must send to the Minister of Finance a copy of the Merger Notice, and all other documents filed in respect of a merger, if the merger meets the criteria set out in section 18(2)(a).

(2) The Minister of Finance may issue a notice to the Commission in terms of section 18(2)(b) by filing Form CC 5(3) at any time between -

(a) The date on which the Commission sends a notice in terms of Sub-Rule (1); and

(b) 10 business days after receiving advice from the Commission in terms of sub-rule (3), if applicable.

(3) If, in respect of a particular merger the Minister of Finance has received a notice in terms of Sub-rule (1), but has not yet issued a notice in terms of sub-rule (2), the Commission must advise the Minister of Finance in writing at the time that it is prepared to make a decision in terms of section 13, 14 or 14A.

(4) Upon receiving a notice from the Minister of Finance in terms of sub-rule (2), the Commission must -

(a) serve a copy of the notice on the Tribunal and each other participant in those proceedings; and

(b) refund the filing fee to the firm that paid it.

### **37. Trade Union or employee participation**

A person who receives a notice in terms of section 13A(2) may notify the Commission of its desire to participate in Merger proceedings by filing Form CC 5(1) within 5 business days after the date on which that person received the notice.

### **38. Small and intermediate merger procedures**

(1) If the Commission extends, or is deemed to have extended, the time period for considering a small or intermediate merger, it must issue a copy of the Extension Certificate in Form CC 14 to the firm that filed the merger notification.

(2) If the Commission is deemed to have approved a merger in terms of section 13(6), or section 14(2), the Commission must -

- (a) issue a Clearance Certificate, in Form CC 15, to the firm that filed the merger notification; and
- (b) publish a notice of that approval in the Gazette.

(3) After completing its investigation and consideration of a small or intermediate merger, the Commission must -

- (a) issue, in terms of section 13 (5) or 14(1)(b), either a Clearance Certificate in Form CC 15, or a Notice of Prohibition in Form CC 16, to the firm that filed the Merger Notice; and
- (b) at the same time, make available to each participant a copy of its reasons for decision, if required to issue reasons for decision by section 13 (7) or 14 (3); and
- (c) publish a notice of its decision in the Gazette, as required by section 13(7) or 14(3).

### **39. Breach of merger approval conditions or obligations**

(1) If a firm appears to have breached an obligation that was part of an approval or conditional approval of its merger, the Commission must deliver to that firm a Notice of Apparent Breach in Form CC 19, before taking any action -

- (a) in terms of section 15(1)(c) to revoke that approval or conditional approval; or
- (b) in terms of section 59 or 60.

(2) Within 10 business days after receiving a Notice of Apparent Breach, a firm referred to in sub-rule (1) may -

- (a) submit to the Commission a plan to remedy the breach; or
- (b) request the Competition Tribunal to review the Notice of Apparent Breach on the grounds that the firm has substantially complied with its obligations with respect to the approval or conditional approval of the merger.

(3) If a firm submits a plan to the Commission in terms of sub-rule (2)(a), the Commission may either-

- (a) accept the proposed plan; or
- (b) reject the proposed plan, and invite the firm to consult with the Commission concerning the apparent breach, with the aim of establishing a plan satisfactory to the Commission by which all of the firm's obligations with respect to the approval or conditional approval may be satisfied.

(4) If the Commission accepts a proposed plan, in terms of either sub-rule (3)(a) or (b), the Commission must monitor the firm's compliance with the plan.

(5) The Commission may act in terms of section 15(1) to revoke the approval or conditional approval of a merger referred to in sub-rule (1), or in terms of section 59 or 60, only if -

- (a) the firm concerned does not respond to the Notice of Apparent Breach within 10 business days after receiving it, in the manner anticipated in sub-rule (2);
- (b) the firm concerned does not agree to meet, or fails to meet as agreed, with the Commission, as required by sub-rule (3)(b);
- (c) the firm and the Commission are unable to agree a plan as contemplated in sub-rule (3)(b);
- (d) the firm acts in a manner calculated to frustrate the Commission's efforts to monitor compliance with a plan, as required by sub-rule (4); or
- (e) the firm fails to employ its best efforts to substantially comply with a plan established in terms of sub-rule (3).

#### **40. Revocation of approval of small or intermediate merger**

(1) If the Commission is contemplating revoking its own decision to approve or conditionally approve a merger in terms of section 15(1), the Commission must -

- (a) if the proposed revocation is based on section 15(1)(c), comply with Rule 39 before taking any further steps in terms of this Rule; and
- (b) in any case -
  - (i) advise any firm concerned, in writing, of the intention to do so; and
  - (ii) publish a notice of the proposed revocation in the Gazette.

(2) The Commission may request further information from any person who submits a representation in response to a notice published in terms of sub-rule (1)(b).

(3) After considering any submissions or other information received in relation to the proposed revocation, the Commission must -

- (a) either -
  - (i) confirm the approval or conditional approval, as the case may be, in writing, or
  - (ii) revoke it by issuing a Notice of Revocation of Merger Decision in Form CC 18 to the firm that filed the merger notification; and
- (b) publish a notice of that decision in the Gazette.

(4) Within 10 business days after receiving a Notice of Revocation of Merger Decision in terms of sub-rule (3), the firm concerned may request the Competition

Tribunal to appeal against the notice on the grounds that there is no factual basis in terms of section 15(1) for the approval or conditional approval to be revoked.

(5) If no appeal is brought in terms of sub-rule (4), or if the Competition Tribunal upholds the Notice of Revocation of Merger Decision, the effect of that notice is -

- (a) the Certificate of approval or conditional approval in respect of the relevant merger is deemed to have been rejected as of the date of that Certificate;
- (b) each party to the merger is, for all purposes of the Act, in the same position as if they had never notified the Commission of that merger; and
- (c) the Commission may further consider that merger only if the primary acquiring firm subsequently files a new Merger Notice with respect to it; and
- (d) if a new Merger Notice is subsequently filed in respect of that merger, the Commission must consider that merger on the basis of that new notice without reference to any previous notice filed in respect of it.

#### **41. Large mergers**

(1) The Commission must submit a recommendation in Form CC 17 in respect of a large merger, with reasons for that recommendation, to the Tribunal and the Minister within -

- (a) 40 business days after receiving the Merger Notice; or
- (b) a longer period established by the Tribunal for that merger in terms of section 14A(2).

(2) The Commission must deliver a copy of its recommendation and reasons to the firm that filed the merger notification, and to any other person, if required to do so in terms of an order made in terms of Rule 28.