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Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act No 89 of 1998, as amended.

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PREFACE

These guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998, as amended ("the Act") which allows the Competition Commission ("Commission") to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act.

In recent years there has been a growing number of cases involving the failure to notify mergers as well as the implementation of mergers contrary to Chapter 3 of the Act. In order to deter firms from failing to notify mergers which are notifiable ("failure to notify") and/or implementing notifiable mergers without first obtaining approval from the competition authorities ("prior implementation"), the Commission has developed a methodology setting out its approach in determining penalties in cases of failure to notify and/or prior implementation.

These guidelines present the general methodology that the Commission will follow in determining administrative penalties when concluding consent or settlement agreements and seeking an administrative penalty in the Competition Tribunal in cases of failure to notify and/or prior implementation. The Commission recognises that the imposition of administrative penalties is not a precise science. Therefore these guidelines will not preclude the Commission from exercising its discretion on a case-by-case basis. The primary objective of these guidelines is to provide objectivity, certainty and transparency in the method of determining administrative penalties in cases of failure to notify and/or prior implementation.

1 DEFINITIONS

1.1. Unless the context indicates otherwise, the following terms are applicable to these guidelines –

1.1.1. **"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).

1.1.2. **"The Act"** means the Competition Act No. 89 of 1998, as amended and includes the regulations made under the Act;

1.1.3. **"Administrative penalty"** means a monetary penalty that may be imposed by the Tribunal in terms of section 59 of the Act;

1.1.4. **"The CAC"** means the Competition Appeal Court as established in terms of section 36 of the Act;

1.1.5. **"The Commission"** means the Competition Commission, a juristic person established in terms of section 19 of the Act;

1.1.6. **"Competition authorities"** means the Commission and/or the Tribunal and/or the CAC as the case may be;

1.1.7. "**Failure to notify**" means the failure to notify a notifiable transaction as contemplated in section 13A(1) of the Act;

1.1.8. "**Filing Fee**" means the filing fee payable in respect of either an intermediate merger or a large merger in terms of regulations pursuant to Competition Commission Rule 10(5);

1.1.9. **"Firm"** includes a person (juristic or natural), partnership or a trust;

1.1.10. **"Firm's annual turnover"** means the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year as contemplated in section 59(2) of the Act;

1.1.11. **"Holding company"** means holding company as defined in section 1 of the Companies Act No.71 of 2008, as amended;

1.1.12. "**Intermediate merger**" means a merger or proposed merger with a value between the lower and higher thresholds established in terms of regulations pursuant to section 11(1)(a) of the Act;

1.1.13. "**Large merger**" means a merger or proposed merger with a value at or above the higher thresholds established in terms of regulations pursuant to section 11(1)(a) of the Act;

1.1.14. **"Merger"** means a merger as defined in section 12(1) of the Act;

1.1.15. **"Merging parties"** or "**parties**" include the acquiring firm(s), the Target firm(s) and the Transferred firm(s) which may be party to a notifiable merger in accordance with the Act;

1.1.16. **"Month"** means a calendar month or part thereof. For the sake of clarity part of a calendar month will be deemed to be a month;

1.1.17. **"Prior implementation"** means the premature implementation of a notifiable merger prior to obtaining the necessary approval of the competition authorities as contemplated in section13A(3) of the Act;

1.1.18. **"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;

1.1.19. **"Transferred firm"** means -

(a) a firm, or the business or assets of the firm, that as a result of a transaction in any circumstances set out in section 12 of the Act, would become directly or indirectly controlled by an acquiring firm; and

(b) any other firm, or business or assets of the firm, the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a);

1.1.20. **"The Tribunal"** means the Competition Tribunal, a juristic person established in terms of section 26 of the Act; and

1.1.21. **"Year"** means 12 (twelve) months.

2 PURPOSE AND INTRODUCTION

2.1. The primary objective of these guidelines is to provide transparency, certainty and objectivity in how the *Commission* will determine *administrative penalties* in cases of *failure to notify* and *prior implementation*.

2.2. *Failure to notify* and *prior implementation* of notifiable *merger*s denies *competition authorities* the opportunity of investigating transactions and making the determination at the time of the *merger* whether the *merger* is likely to give rise to a substantial lessening of competition that may permanently alter the structure of the market and raise public interest issues. In the context of *failure to notify* or *prior implementation, administrative penalties* serve as a specific deterrent against failure to notify or prematurely implementing a *merger* that could result in distortions in the market, which constitute a contravention of the *Act*. In general, *administrative penalties* in cases of *failure to notify* and/or *prior implementation* serve to ensure compliance with *merger* regulations.

2.3. The *Act* provides for *administrative penalties* to be imposed on *firm*s if they are *parties* to a *merger* and:

2.3.1. fail to give notice of the *merger* as required by Chapter 3 of the *Act*; and/or[1]

2.3.2. proceed to implement the *merger* without the approval of the *Commission* or *Tribunal*, as required by the *Act*[2] (whether or not the *merger* has been notified to the *competition authorities*).

[1] Section 59(1)(d)(i)
[2] Section 59(1)(d)(iv)

2.4. The *Tribunal* has noted the need to provide guidance on how *administrative penalties* ought to be determined in cases of *failure to notify* and *prior implementation*.[3] The *Tribuna*l has, however, cautioned against using the exact factors set out in the *Competition Commission v Aveng (Africa) Ltd and Others Case No: 84/CR/DEC09 ("Aveng")*[4] six-step methodology for *failure to notify* and *prior implementation* cases. As a result, the *Tribunal* has provided guidance on the methodology that should be used in calculating fines in *failure to notify* and *prior implementation* cases.[5] Accordingly, being mindful of the fact that *failure to notify* and *prior implementation* cases involve different considerations from cartel and abuse of dominance contraventions, the *Commission* decided to issue separate guidelines on the determination of penalties for *failure to notify* and *prior implementation*. These guidelines will consider factors specific to *failure to notify* and *prior implementation* cases.

2.5. In developing these guidelines, the *Commission* conducted a review and comparison of guidelines developed by other competition authorities including India, Brazil, the European Commission and the US Fair Trade Commission, as well as the Act, the Tribunal's decisions in *failure to notify* and *prior implementation* cases[6] and the principles laid out by the *Tribunal* (and endorsed by the CAC) in the *Aveng* case. In doing so, the *Commission*

[3] *Competition Commission and Fruit & Veg Holdings (Pty) Ltd and others* – consent agreement (Case No. FTN131Sep15)
[4] *The Competition Commission v Aveng (Africa) Limited t/a Steeledale and others* (84/CR/DEC09)
[5] See *Competition Commission v Deican Investments (Pty) Ltd and New Seasons Investments Holding (Pty) Ltd* (FTN151Aug15 / *Competition Commission v Dickerson Investments (Pty) Ltd and Nodus Equity (Pty) Ltd* (FTN127Aug15) and *Competition Commission v Standard Bank of South Africa Ltd* (FTN228Feb16).
[6] The cases include, *inter alia*, *The Competition Commission v Aveng (Africa) Limited t/a Steeledale and others* (84/CR/DEC09), *Competition Commission v Deican Investments (Pty) Ltd and New Seasons Investments Holding (Pty) Ltd* (FTN151Aug15 / *Competition Commission v Dickerson Investments (Pty) Ltd and Nodus Equity (Pty) Ltd* (FTN127Aug15), *Competition Commission and Fruit & Veg Holdings (Pty) Ltd and others* (Case No. FTN131Sep15), *Competition Commission / Edgars Consolidated Stores Limited and others* (95/FN/Dec02), *Competition Commission / Structa Technology (Pty) Ltd and others* (83/LM/Nov02), *Competition Commission / The Tiso Consortium and others* (82/FN/Oct04), *Competition Commission v Standard Bank of South Africa Ltd* (FTN228Feb16).

was mindful of the nuances and variations in each jurisdiction, including the statutory mandate that the competition authorities in these jurisdictions have to impose *administrative penalties*. The *Commission* was further mindful of the different considerations for prohibited practices under Chapter 2 of the Act and *failure to notify* and *prior implementation* contraventions under Chapter 3 of the *Act*.

3 LEGISLATIVE FRAMEWORK

3.1. These guidelines have been prepared in terms of section 79(1) of the *Act* which allows the *Commission* to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the *Act*. These guidelines are aimed at providing guidance in terms of section 79(2)(b) of the *Act* and are not binding on the *Commission*, the *Tribunal* or the *CAC* in the exercise of their respective discretion, or their interpretation of the *Act*.

3.2. Section 13A(1) of the *Act* obliges a party to an *intermediate* or *large merger* to notify the *Commission* of that *merger* in the prescribed manner and form.

3.3. Section 13A(3) prohibits *parties* to an *intermediate* or *large merger* from implementing that *merger* until it has been approved, with or without conditions, by the *Commission* in terms of section 14(1)(b), the *Tribunal* in terms of section 16(2) or the *CAC* in terms of section 17 of the *Act*.

3.4. In terms of section 59(1)(d) of the *Act*, the *Tribunal* may impose an *administrative penalty* if the *parties* have:

"(i) failed to give notice of the merger as required by Chapter 3 of the Act;

(ii) proceeded to implement the merger in contravention of a decision by the Commission or Tribunal to prohibit that merger;

(iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Commission in terms of section 13 or 14, or the Tribunal in terms of section 16; or

(iv) proceeded to implement the merger without the approval of the Commission or Tribunal, as is required by this Act."

3.5. In respect of section 59(1)(d)(iv), the need for approval only arises if the *merger* is notifiable under the *Act*. Approval is thus required prior to implementation of the *merger*.

3.6. Pursuant to sections 49D and 58(1)(b) of the *Act*, the *Commission* and the respondent may reach an agreement on the terms of an appropriate order, which may be confirmed by the *Tribunal*. The terms of such order may include an agreement on the payment of an appropriate *administrative penalty*.

3.7. In terms of section 27(1)(b) of the *Act*, the *Tribunal* may adjudicate on any matter that may in terms of the *Act* be considered by it and upon making a determination, may make any order provided for in the *Act*. In terms of section 58(1)(a)(iii), orders that the *Tribunal* may make include the imposition of an *administrative penalty*.

4 METHODOLOGY - NOTIFICATION AND/OR IMPLEMENTATION OF A MERGER CONTRARY TO CHAPTER 3 OF THE ACT

4.1. As a general approach, the *Commission* will apply the following methodology when determining the *administrative penalty* that a *firm* will be liable to pay for contravening sections 13A(1) and/or 13A(3) of the *Act*.

4.2. This methodology will be applied in the following way:

4.2.1. Step 1: Determination of the nature or type of contravention;
4.2.2. Step 2: Determination of the base amount;
4.2.3. Step 3: Duration of the contravention;
4.2.4. Step 4: Consideration of factors that might mitigate and/or aggravate the amount reached in step 3, and
4.2.5. Step 5: Rounding off this amount if it exceeds the cap provided for in section 59(2) of the Act.

4.3. Step 1: Determination of the nature or type of contravention

4.3.1. The *Commission* will first look at the nature of the conduct which gave rise to the *failure to notify* and/or *prior implementation* contravention. A *failure to notify* or *prior implementation* contravention can take different forms and the *Commission* will consider how the *failure to notify* and/or *prior implementation* occurred.

4.3.2. In the event that the relevant conduct is a section 4(1)(b) contravention, such as if the *merging parties* are competitors and agree on prices or, allocate customers prior to approval of a *merger*

being granted, the *Commission* will assess such conduct under section 4(1)(b), and any such penalty will be determined under the *Commission's Guidelines for the Determination of Administrative Penalties for Prohibited Practices.*[7]

4.3.3. Should the *Commission* determine that the relevant conduct is wilful or deliberate, these guidelines will not apply to such conduct and *Commission* will seek the maximum allowable penalty as stipulated in section 59(2) of the *Act* as well as a divestiture, where appropriate.

4.3.4. For the sake of clarity, it should be noted that no amount is calculated under step 1 of the methodology of these guidelines.

4.4. **Step 2: Determination of the base amount**

4.4.1. The *Act* requires that an *intermediate* or *large merger* must be notified to the *Commission* and such *merger* may not be implemented until it has been approved, with or without conditions, by the relevant *competition authorities*.

4.4.2. Under this step, the base amount for the calculation of the *administrative penalty* for *failure to notify* and/or *prior implementation* of *intermediate* or *large mergers*, will be an amount equal to double the applicable *filing fee*. [8]

[7] Effective 1 May 2015
[8] The Tribunal has indicated that a turnover based methodology for calculating penalties in failure to notify and/or prior implementation cases may be inappropriate.

4.5. **Step 3: Duration of the contravention(s)**

4.5.1. Once the *Commission* has established the base amount, for each month of the contravention i.e. duration, it will add to the base amount an amount calculated in accordance with the formulae set out below.

Contraventions not exceeding a year

4.5.2. For contraventions that do not exceed a *year*, each *month* of the contravention will attract an additional amount equal to 50% of the base amount. The applicable formula is as follows:
(50% × base amount) × number of months of contravention

Contraventions exceeding a year but less than 2 years

4.5.3. For contraventions that exceed a *year* but less than 2 (two) *years*, each *month* of the contravention will attract an additional amount equal to 75% of the base amount. The applicable formula is as follows:
(75% × base amount) × number of months of contravention

Contraventions exceeding 2 years

4.5.4. For contraventions that exceed 2 (two) *years*, each *month* of the contravention will attract an additional amount equal to 100% of the base amount. The applicable formula is as follows:
(100% × base amount) × number of months of contravention

4.5.5. For the sake of clarity, the amount derived in this step will be added to the base amount calculated in step 2.

4.6. **Step 4: Aggravating and Mitigating Factors**

4.6.1. Once the amount in step 3 has been determined, the *Commission* will adjust this figure based on the relevant aggravating and mitigating factors as contemplated in section 59(3)[9] of the *Act*.

4.6.2. This assessment will consider all of the factors contemplated under section 59(3) of the *Act*. The weighing of aggravating and mitigating factors may result in the amount derived in step 3 being upwardly or downwardly adjusted, depending on the circumstances of each case.

Aggravating factors

4.7. The factors which the *Commission* may consider as aggravating include, but are not limited to:

4.7.1. If the *parties* failed to notify the *merger* transaction in order to take advantage of a time-bound *merger* deal or to avoid the *merger* approval process at the outset;

4.7.2. If the *parties* were negligent;

4.7.3. If the *parties* were trying to avoid scrutiny of the transaction by the *competition authorities*;

4.7.4. If the duration of the contravention subsisted for an extended length of time;

[9] See *Competition Commission v Standard Bank of South Africa Ltd* (FTN228Feb16) at para 27 and the remaining factors listed under section 59(3) of the Act.

4.7.5. If the transaction resulted in the substantial lessening of competition or raises public interest concerns;

4.7.6. If there was an undue and unexplained delay by the *parties* in approaching the *Commission* once the *parties* had become aware of their contravention of section 13A;

4.7.7. If the *parties* derived profits from the contravention of section 13A(1) and/or (3) which profits they were not entitled to unless they had obtained prior approval from the *competition authorities*;

4.7.8. If the *parties* have previously been found to have contravened any other provisions of the *Act*;

4.7.9. If the *parties* delayed or obstructed or failed to co-operate with any investigations of the contravention by the *competition authorities*; and/or

4.7.10. If the *merger* was terminated without first informing the *Commission* of the concerned *merger* and with the purpose of avoiding scrutiny by the *competition authorities*.

Mitigating factors

4.8. The factors which the Commission may consider as mitigating include, but are not limited to:

4.8.1. If the *parties* were proactive in approaching the Commission with information of the possible contravention of section 13A of the Act;

4.8.2. If the *parties* co-operated with the investigations of the *competition authorities;*

4.8.3. If the *parties* sought competition law advice on the transaction;

4.8.4. If the *parties* were *bona fide* in their *failure to notify* the transaction;

4.8.5. If the *parties* exhibited a high degree of transparency in their dealings with the *Commission*;

4.8.6. If the *parties* provided full evidence, such as documents, under their control and/or possession of the contravention which was relevant to the *Commission*;

4.8.7. If the *parties* demonstrated willingness to expeditiously conclude a settlement with the *Commission*;

4.8.8. If the *merger* does not raise any competition or public interest concerns;

4.8.9. If the *parties* have not been found to have previously contravened the *Act*; and/or

4.8.10. If the *parties* have already paid the *filing fee* to the *Commission*.

4.9. **Step 5: Consideration of the Statutory Limit**

4.9.1. As stipulated in section 59(2) of the *Act*, the *administrative penalty* may not exceed 10% of the *firm*'s annual turnover in the Republic and its exports from the Republic during the *firm*'s preceding financial year.

4.9.2. The *Commission* will have regard to the *acquiring* and *transferred firm*s' combined turnover during their preceding financial year.

4.9.3. The *Commission* will have regard to the *firm*s' audited financial statements. Where audited financial statements are not available, the *Commission* may consider any other reliable records reflecting the *merging parties*' turnover or estimate the turnover based on available information.

4.9.4. Where the *administrative penalty* determined above exceeds the maximum allowable limit of 10% of the combined annual turnover of the *acquiring* and *transferred firm*s during their preceding financial year, the *Commission* will apply the maximum allowable *administrative penalty*.

4.9.5. The preceding financial year that the *Commission* will generally consider for the purposes of the statutory cap, will be the financial year preceding that in which the *administrative penalty* is imposed. If there is no turnover in that preceding financial year it shall be the year in which the *parties* last traded.

5 FAILURE TO NOTIFY AND PRIOR IMPLEMENTATION

5.1. A contravention of *failure to notify* is committed where:

5.1.1. the transaction constitutes a *merger* under the *Act*;

5.1.2. the transaction meets the thresholds for notification under the *Act*; and

5.1.3. the *parties* have failed to notify the *Commission* of the transaction as is required by section 13A(1) the *Act*.

5.2. A contravention of *prior implementation* is committed where at the point of implementation:

5.2.1. the transaction constitutes a *merger* under the *Act*;

5.2.2. the transaction meets the thresholds for notification under the *Act*; and

5.2.3. the *parties* implement the *merger* without prior approval from the *Commission*, the *Tribunal* or the *CAC*, as the case may be (whether or not the *merger* has been notified to the *Commission*).

5.3. *Failure to notify* and *prior implementation* can take various forms such as when a *firm* acquires control in terms of section 12(2) of the *Act*, in a transaction which amounts to a notifiable *merger*, but the *firm* fails to obtain the approval of the *Commission* and/or the *Tribunal* for that transaction. Section 12(2) provides that a *firm* controls another *firm*, if that *firm*:

5.3.1. beneficially owns more than one half of the issued share capital of the *firm*;

5.3.2. is entitled to vote a majority of the votes at a general meeting of a *firm*, or has the ability to control the voting of the majority of those votes, either directly or indirectly or through a controlled entity of that person;

5.3.3. is able to appoint or veto the appointment of the majority of the directors of a *firm*;

5.3.4. is a *holding company* and the *firm* is a subsidiary of that company under section 1(3)(a) of the Companies Act;

5.3.5. in the case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust;

5.3.6. owns the majority of members' interests or controls directly or has the right to control the majority of members' votes in a close corporation; or

5.3.7. has the ability to materially influence the policy of the *firm* in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control as described in the paragraphs above.

5.4. The *Tribunal* has held that the instances of a change of control set out under section 12(2) of the Act is not an exhaustive list.[10] Acquisition of control is a factual and legal question.

[10] See *Bulmer SA (Pty) Ltd and Seagram Africa (Pty) Ltd / Distillers Corporation SA Limited and others* case nos. 94/FN/Nov00 and 101/FN/Dec00 at page 13, *Caxton and CTP Publishers and Printers Limited v Naspers and Others (CT16/FN/Mar04) at para 23, Hosken Consolidated Investments Ltd and another v Competition Commission [2017] 2 CPLR 519 (CAC) at para 57.*

Instances of failure to notify and prior implementation

5.5. The following list contains examples of instances where the conduct of *parties* has been regarded as a contravention of *failure to notify* and/or *prior implementation*:

5.5.1. The acquisition of 30% of the issued share capital of a company and the accompanying right to veto strategic decisions of the shareholders of that company, if those strategic decisions are sufficiently material to confer material influence in terms of section 12(2)(g) of the *Act*.[11]

5.5.2. The increase of shareholding from 22% to 28% and the accompanying right to veto certain strategic decisions of the company, if those strategic decisions are sufficiently material to confer material influence in terms of section 12(2)(g) of the *Act*.[12]

5.5.3. The acquisition of a 50% share in a company due to the mistaken belief by the merging *parties* that the relevant turnover/asset values of the merging *parties* are below the minimum notification thresholds for the *transferred firm* as prescribed by the *Act*.[13]

5.5.4. The acquisition of 49% of the issued share capital of a company, irrespective of the right to appoint the majority of the directors in the company, coupled with control in the form of section 12(2)(c) of the *Act*.[14]

[11] *Competition Commission v Deican Investments (Pty) Ltd and New Seasons Investments Holding (Pty) Ltd (*FTN151Aug15 / *Competition Commission v Dickerson Investments (Pty) Ltd and Nodus Equity (Pty) Ltd* (FTN127Aug15)
[12] Ibid
[13] *Competition Commission / Structa Technology (Pty) Ltd and others* (83/LM/Nov02)
[14] *Competition Commission v WBHO Construction (Pty) Ltd and Edwin Construction (Pty) Ltd (*69/AM/Oct10)

5.5.5. The acquisition by two wholly-owned subsidiaries of certain properties and the *failure to notify* those acquisition due to the mistaken belief that the transactions amounted to two small *merger*s.[15]

5.5.6. The acquisition of part of a business of a company such as its book debts which included, amongst others, all of the following; the *target firms*' customer base, the rights to its subsequent debts, the right to require it to trade on credit, and control over subsequent debtor management and information.[16]

5.5.7. Where the *acquiring firm* engages in the day-to-day operations of the *transferred firm* prior to approval of the *competition authorities* being obtained. [17]

5.5.8. Where the *merging parties* market themselves as a single entity prior to approval of the *competition authorities* being obtained.[18]

5.5.9. Where the *acquiring firm* changes the name of the *transferred firm*, and if this amounts to the exercise of material influence over the *transferred firm*.

5.5.10. Where there is integration or consolidation of the operations of the *merging parties*.

5.5.11. Where the *acquiring firm* becomes involved in the making and/or execution of strategic decisions such as:

[15] *Competition Commission / Pangbourne Properties and 2* Other (016246)
[16] *Competition Commission / Edgars Consolidated Stores Limited and others* (95/FN/Dec02
[17] *Settlement agreement: Competition Commission v Dunlop Industrial Products (Pty) Ltd and Another* (018688)
[18] Ibid

5.5.11.1. targeting markets for the *transferred firm* to pursue;
5.5.11.2. developing new products or services;
5.5.11.3. influencing the ordering of raw materials;
5.5.11.4. amending procurement policies;
5.5.11.5. becoming involved in customer relations;
5.5.11.6. pricing or terms to be offered to customers;
5.5.11.7. influencing the targeting or servicing of certain customers; or
5.5.11.8. marketing and production of certain products lines or services;

except to the extent that such conduct constitutes engaging in planning steps in respect of post-merger integration (without such planning being implemented prior to *merger* approval being obtained).

5.5.12. Where the *merging parties* agree on the allocation of customers for sales to be made prior to *merger* approval being obtained.

5.5.13. Where the *acquiring firm* receives profits or other payments connected with the performance of the Transferred *firm*.

5.5.14. Where the *acquiring firm* appoints directors to the board of the *transferred firm* in circumstances where the *acquiring firm* will be acquiring control, such that it affords the *acquiring firm* the ability to materially influence and thus control the *transferred firm*.

5.5.15. Where there is a contractual clause in a sale agreement requiring the *acquiring firm* to make full or partial payment of the purchase price in advance for the target *firm*, which is non-refundable and amounts to material influence. This will exclude cases of deposits in escrow and trust accounts, break-up fee clauses or other similar arrangements.

5.5.16. In addition, *parties* may be found to have contravened the provisions in section 13A(1) of the *Act* when an exemption has been granted allowing for notification to take place, but the exemption then expires. For example, the *Commission's Practitioner Update Issue 4 on risk mitigation financial transactions as amended)*,[19] allows financial services institutions (which include registered banks and state-owned finance institutions) registered in terms of the Banks Act 94 of 1990 to acquire control over a debtor's business assets for a period of twenty four (24) months without notifying the *Commission.*

5.6. The abovementioned instances do not constitute an exhaustive list of instances of *failure to notify* and/or *prior implementation* but merely serves as guidance on instances where the *Commission* may find that certain conduct contravenes section 13A(1) and/or 13A(3) of the *Act*.

6 DISCOUNT FOR SETTLEMENT OF CASES BY FIRM

6.1. The *Commission*, at its sole discretion, may offer a discount of up to 50% off the *administrative penalty* derived in applying the methodology above. In doing so, the *Commission* will be mindful of the mitigating factors set out in step 4 above.

6.2. *Firms* that settle their cases with the *Commission* much earlier on in the investigation are likely to enjoy a greater settlement discount than those *firms* who settle prior to referral.

[19] The Commission's Practitioner Update, Issue 4 (as amended). See also *Competition Commission v Standard Bank of South Africa Ltd* (FTN228Feb16).

7 ABILITY TO PAY THE ADMINISTRATIVE PENALTY

7.1. The *Commission* may, after determining an appropriate *administrative penalty* and in exceptional circumstances, consider the *firm*'*s* ability to pay the *administrative penalty*. This will be the exception and there must be no expectation that that the *administrative penalty* will be adjusted on this basis. In these circumstances, the *Commission* will be mindful of the *firm*'*s* financial position and market circumstances in order to avoid imposing substantial hardship on a particular *firm* that may lead to a significant reduction in competition. This does not negate the need for consideration of the principle of proportionality and fairness.

7.2. To be considered for this, the *firm* must provide the *Commission* with objective evidence that the imposition of the *administrative penalty* as provided in these guidelines would irretrievably jeopardise the economic viability of the *firm* concerned and cause the *firm* to exit from the market. This evidence may include, but will not be limited to, audited financial statements attesting the veracity of the *firm*'s financial position. The *Commission* will consider the financial viability of the *firm* as a whole and not of any specific division(s).

7.3. The mere existence of a loss making financial situation may not suffice for purposes of obtaining special discounts under this consideration.

7.4. If a *firm* is able to demonstrate its inability to pay the *administrative penalty* in accordance with 7.1 and 7.2 above, the *Commission* may consider the use of favourable payment terms. The *Commission* will only consider a discount on this basis if a *firm* can objectively demonstrate that, even in the long term, it will still not be in a position to pay the *administrative penalty*.

8 LIABILITY TO PAY

8.1. Generally, the *administrative penalty* will be paid by both the *acquiring firm* and the seller, jointly and severally, the one paying and the other to be absolved. However, depending on the circumstances of each case, the *Commission* at its discretion may levy the penalty:

8.1.1. only on the *acquiring firm*; or

8.1.2. only on the seller; or

8.1.3. only on the *target* or *transferred firm*s; and/or

8.1.4. the *holding company* of the firms referred to in paragraph 8.1.1 to 8.1.3 above.

9 SPECIAL PROVISIONS AND DISCRETION

9.1. For the avoidance of doubt, the imposition of an *administrative penalty* does not preclude the *Commission* from pursuing other remedies that seek to address the harm caused to competition as a result of the contravention, including divestiture.

9.2. The steps outlined above reflect the general methodology that the *Commission* will follow in the determination of *administrative penalties* in respect of a contravention of section 13A of the Act. However this does not fetter the *Commission's* discretion in seeking any appropriate *administrative penalty* in terms of section 59(2) of the Act.

9.3. These guidelines do not fetter the discretion of the *Commission* and/or the *Tribunal* and/or the *CAC* to consider *administrative penalties* on a case-by-case basis.

10 EFFECTIVE DATE AND AMENDMENTS

These guidelines become effective on 1 April 2019 and may be amended by the *Commission* from time to time.