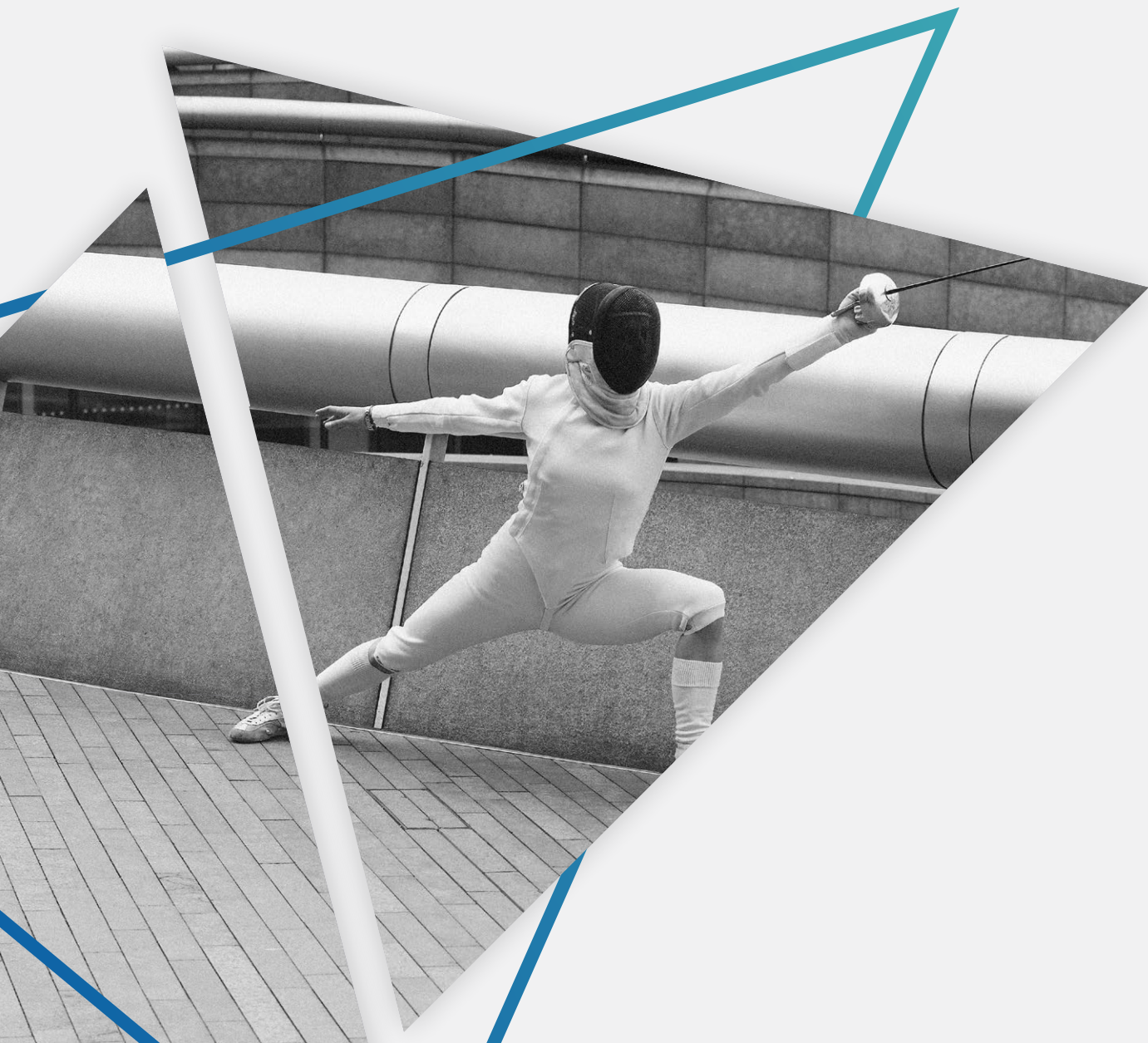


# Competition Law

ALERT | 17 October 2024



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## Navigating merger waters: The Competition Commission's final guidelines on indivisible transactions

On 4 October 2024, the Competition Commission (Commission) published its final guidelines on indivisible transactions (Guidelines). The Guidelines provide clarity on the Commission's approach when determining whether two or more separate transactions should be notified as a single, indivisible transaction. The Guidelines aim to ensure that merger parties understand when they are required to notify mergers as a single indivisible transaction.

An "indivisible transaction" is defined in the Guidelines as multiple transactions that can be notified and assessed under a single merger filing. For a transaction to be notifiable, it must meet two principal criteria:

- Section 12(1) of the Competition Act 89 of 1998 defines a merger as an occurrence where one or more firms directly or indirectly acquire control over the whole or part of another firm's business.
- The transaction must meet the minimum monetary thresholds set by the Minister of Trade, Industry, and Competition from time to time.

### **Jurisprudence on indivisible transactions**

The South African competition authorities have dealt with the principle of indivisible transactions in various cases.

The authorities have emphasised the need to evaluate such transactions holistically rather than piecemeal, warning against structuring transactions in a way that avoids notification obligations (as noted in *Edgars Consolidated Stores and Retail Apparel (Pty) Ltd*, 95/FN/Dec02).

One of the earliest cases addressing this issue was *Crown Gold Recoveries (Pty) Ltd v Industrial Development Corporation of SA Ltd and Khumo Bathong Holdings (Pty) Ltd*, 31/LM/May02. In *Crown Gold*, the Commission approved two separate transactions, which were deemed to constitute a single indivisible transaction. The first transaction facilitated the second, ultimately leading to Khumo Bathong's acquisition of Crown Gold. This case highlighted that those transactions, though formally distinct, could be deemed indivisible if one transaction existed solely to enable the other.

The Competition Tribunal, in this instance, underscored the significance of the transaction's rationale when determining whether separate transactions should be treated as indivisible. If one transaction is only taking place because of the other, then they should be considered under a single notification. This reasoning was also affirmed in *Sandown Motor Holdings (Pty) Ltd v McCarthy Limited and Others*, 33/LM/May02-38/LM/May02.

Building on judicial precedents, the Commission has compiled a non-exhaustive list of factors that will guide its assessment of whether multiple transactions should be treated as a single indivisible transaction.

These factors include:

- The manner in which the transaction is structured.
- The relationship between the transactions.
- The interdependence of the transactions.
- The rationale underlying the multiple transactions.
- Whether the transactions will be implemented simultaneously under the same agreement.



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# Navigating merger waters: The Competition Commission's final guidelines on indivisible transactions

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- Whether there are multiple acquiring firms, under common shareholding, acquiring the same target firm(s).
- Whether there are multiple target firms with common shareholders/sellers and common acquiring firms.
- Whether there are multiple acquiring firms in terms of a single agreement pertaining to the same target firm.
- Whether the transactions involve a similar competitive and public interest assessment and whether similar conditions are likely to be applicable to the transactions.
- Whether the single notification is aimed at circumventing the applicable filing fees.

## Examples of indivisibility

The Guidelines also offer examples to assist merging parties in determining when transactions should be treated as indivisible:

- 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 the acquisition of the other(s).
- The various legs of the transaction are dependent on each other. For example, Firm A acquires shares in Firm B, which holds them temporarily while Firm C arranges financing to purchase the shares from Firm A.
- The target firms are jointly controlled by common shareholders. For example, Firm A seeks to acquire shareholdings in Firms B and C, which are involved in related activities and jointly controlled by common shareholders.

- The target firms are intended to be disposed of simultaneously as an indivisible transaction. For example, Firm A enters into an agreement to purchase Firms B and C simultaneously, where Firm A would not acquire one without the other.

## Conclusion

The Commission's final Guidelines on indivisible transactions provide essential clarity for merging parties. By considering the structure, rationale and interdependence of multiple transactions, the Commission seeks to prevent parties from avoiding regulatory scrutiny through creative transaction structuring. These guidelines, rooted in case law, reinforce the importance of a comprehensive, holistic approach to merger assessments.

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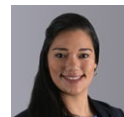
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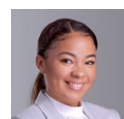
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