

GUIDELINES ON SMALL MERGER NOTIFICATION: REVISED SMALL MERGER GUIDELINE

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REVISED SMALL MERGER GUIDELINE

- 1 The Competition Commission of South Africa has amended its Guideline on Small Merger Notification.
- 2 The Revised Small Merger Guideline is effective from 1 December 2022.

GUIDELINES ON SMALL MERGER NOTIFICATION

Introduction

The Competition Act 89 of 1998, as amended ('the Act') requires that the Minister responsible for the administration of the Act determine a lower and a higher threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets in general or in relation to specific industries, which classify transactions as:

- Large (above the higher threshold);
- Intermediate (between the lower and higher thresholds); and
- Small (below the lower threshold).

Large and intermediate merger transactions require mandatory notification and approval by the competition authorities. Small mergers do not require mandatory notification, but in terms of section 13(3) of the Act, the Competition Commission ('Commission') may require, up to six months after the small merger has been implemented, that such mergers be notified and approved by the Commission if, in the opinion of the Commission, the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. According to section 13(4), merging parties may not take further steps to implement a small merger that has been notified until it has been approved or conditionally approved.

On 15 September 2017, the Minister of Economic Development published a notice in the *Government Gazette* raising the merger thresholds and the filing fee for their notification. These thresholds came into effect on 01 October 2017.

There are concerns that potentially anti-competitive acquisitions in digital or technology markets are escaping regulatory scrutiny due [to] the acquisitions taking place at an early stage in the life of the target before they have generated sufficient turnover or accumulated capital and physical assets that would trigger mandatory merger notification as set by the turnover or asset thresholds. This is particularly the case where the target firm valuation is high due to the prospective future value of the concept, technology, intellectual property or skills of the target firm. These are not recorded in the financial statements as 'assets' and therefore currently do not trigger a mandatory merger notification. Such acquisitions may substantially prevent future competition with incumbents or lessen competition through strengthening the portfolio of

dominant companies (whether they are currently classified as operating in digital markets or not).

The Commission will remain vigilant in identifying small mergers that may require notification. In addition to its own monitoring, the Commission relies on the public to alert it to possible anticompetitive transactions. This notice communicates the approach of the Commission to the notification of small mergers.

Guidelines

The Commission will evaluate whether a small merger requires notification on its own merits, within the guidance provided by section 13(3) of the Act. Notice is hereby given, however, that the Commission must be informed in writing before implementation of all small mergers which meet any of the following criteria:

- at the time of entering into the transaction any of the firms, or firms within their group, are subject to an investigation by the Commission in terms of Chapter 2 of the Act;
- at the time of entering into the transaction any of the firms, or firms within their group, are respondents to pending proceedings referred by the Commission to the Competition Tribunal in terms of Chapter 2 of the Act.

Furthermore, the Commission will require that it be informed of all small mergers and share acquisitions where the acquiring firm's turnover or asset value alone exceeds the large merger combined asset/turnover threshold (currently R6.6 billion). For avoidance of doubt, only the acquiring firm's turnover or asset value (without including the target firm) must exceed the large merger combined turnover/asset value threshold; and at least one of the following criteria must be met for the target firm:

- the consideration for the acquisition or investment exceeds the target firm asset/turnover threshold for large mergers (currently R190 million).
- the consideration for the acquisition of a part of the target firm is less than the R190 million threshold but effectively values the target firm at R190 million or more.

Procedure

Parties to small mergers which meet the above criteria are advised to inform the Commission in writing of their intention to enter into the transaction. The parties should provide sufficient detail on the acquiring and target firms, the proposed transaction, and the relevant markets in which the firms compete. Communication should be addressed to:

The Manager: Mergers & Acquisitions Division
The Competition Commission
Mulayo Building
77 Meintjies Street
Sunnyside,
Pretoria
Private Bag X23, Lynnwood Ridge 0040
E-mail: ccsa@compcom.co.za

The Commission will reply to the parties within a period of 30 business days in writing and inform them whether or not they would be required to notify the small merger to the Commission in the prescribed manner and form, in terms of section 13 of the Act.

This Guideline is effective from 1 December 2022.