

COMPETITION

Small mergers in digital markets are on the Competition Commission's radar

26 September 2022 8 min read

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Guidelines on small merger notification

The Competition Commission of South Africa ([Commission](#)) recently published its final guidelines on small merger notification (Final Guidelines), approximately sixteen months after the Commission issued a draft for public comment. The Final Guidelines expand on the types of small mergers to be notified to the Commission.

According to the Commission's media statement dated 23 September 2022, the Final Guidelines are aimed primarily at assisting the Commission in clearly identifying small mergers and acquisitions in digital markets. Furthermore, the Commission's media statement states that the Final Guidelines are a response to increased concerns that acquisitions of new and innovative companies in digital markets may be escaping regulatory scrutiny because acquisitions take place at an early stage in the life of the target companies.

Although small mergers do not require mandatory notification prior to being implemented, the Commission may require small mergers to be notified to it within a period of six months after the small merger in question has been implemented.^[1]

In this regard, the Commission may, in terms of section 13(3) of the Competition Act, call on parties to a small merger to notify that small merger to the Commission if in the opinion of the Commission^[2] the small merger:

- may substantially prevent or lessen competition; or
- cannot be justified on public interest grounds.

Commission's concerns

According to the Final Guidelines, the Commission is concerned that acquisitions in digital or technology markets which are potentially anti-competitive are escaping competition law scrutiny. "Mergers"^[3] that occur in circumstances where the target firm does not generate sufficient turnover or has not accumulated capital and physical assets to meet the prescribed merger thresholds fall into the category of small mergers. These small mergers are often not subject to merger control evaluation by the competition authorities.

In digital markets, the Commission may be interested in small mergers where the target firm's valuation is high because of its prospective future value of a concept, technology, intellectual property or skills of the target firm, which prospective future value is self-evidently not recorded in the balance sheet or income statement of the target firm in question.

The Final Guidelines state that such acquisitions may substantially prevent future competition with incumbents or lessen competition with incumbents or lessen competition by strengthening the portfolio of dominant companies (whether they are currently classified as operating in digital markets or not).

Whether this stated concern materialises depends on a number of different factors, including the factual circumstances applicable to the small merger in question.

Although the Commission's stated concern with small mergers is in relation to digital or technology markets, the criteria identified in the Final Guidelines are, in their express terms, not limited to transactions only in the digital or technology markets.

At this stage, it is unclear whether the Commission intended to broaden the criteria to apply beyond the scope of digital or technology markets, and whether the new criteria should be read as subject to the stated rationale of identifying potentially concerning small mergers in digital or technology markets only. Hopefully, the Commission will provide clarity in that regard soon.

Jump the gun, bite the bullet: [Consequences of failure to notify a merger in Africa](#).

Commission's criteria for small merger notification

As with the original small merger guidelines which the Final Guidelines replace^[4], the Commission requires firms to inform the Commission of **all** small mergers and share acquisitions where at the time of entering into the transaction any of the firms involved in the merger, or firms within their group are:

- subject to an investigation by the Commission in terms of Chapter 2 of the Competition Act, No 89 of 1998, as amended (Competition Act); or
- respondents to pending proceedings referred by the Commission to the Competition Tribunal in terms of Chapter 2 of the Competition Act.

According to the Final Guidelines, the Commission now also requires that it is informed of **all** small mergers and share acquisitions^[5] where:

- the acquiring firm's turnover or asset value alone (that is, without including the target firm's turnover or asset values) exceeds the large merger combined asset/turnover threshold which is currently R 6.6 billion; **and**
- at least one of the following criteria is met for the target firm:
 - the consideration for the acquisition or investment (i.e. not the turnover of the target firm) exceeds R 190 million^[6]; or
 - the consideration for the acquisition of a part of the target firm is less than the R 190 million prescribed merger threshold but effectively values the target firm at R 190 million or more. For example, the acquisition of a 25% shareholding for R 47.5 million would constitute a consideration of less than R 190 million but equates to a target firm valuation of R 190 million for 100% of the shareholding in the target firm, i.e. the "enterprise value" of the target firm.

Procedure

In terms of the Final Guidelines, parties to a small merger which meet the above criteria are advised to voluntarily inform the Commission in writing of their intention to enter into the transaction. The Final Guidelines require the parties to provide "sufficient details" of the parties, the proposed transaction and the markets in which those parties operate.

The Commission will respond in writing to the parties to a small merger within 30 business days with the Commission's decision whether or not the parties are required to notify the small merger to the Commission in the prescribed manner and form.

As indicated above, the Commission may only do so if it is of the opinion that the small merger may substantially prevent or lessen competition or cannot be justified on public interest grounds.

Conclusion

The Commission has for many years (in the prior small merger guideline) taken the stance that it should be alerted to small mergers where the parties thereto are under investigation, or are parties to pending proceedings before the Competition Tribunal, for a prohibited practice. Whether the fact that parties to a small merger are under investigation or involved in Competition Tribunal proceedings for a prohibited practice has any relevance to the potential effects on competition or the public interest, is debatable.

The new criteria in the Final Guidelines for notifying small mergers are ostensibly based on the possibility for small mergers in digital or technology markets to have anti competitive effects, a question that is increasingly being considered in competition law jurisdictions worldwide.

The Final Guidelines have implications for firms that have substantial revenue or capital and assets, who intend to acquire start-ups or small firms in a transaction that constitutes a small merger. These firms would benefit from obtaining legal advice on whether a particular transaction is likely to require notification by the Commission as a small merger notification.

A full merger notification will have implications for the parties to that small merger from a timing and budgeting perspective. Although the Final Guidelines are non-binding, they reflect the Commission’s approach to the notification of small mergers.

Therefore, where firms are uncertain of whether their transaction constitutes a “merger” as defined in section 12(1) of the Competition Act, whether they meet the prescribed merger thresholds and/or whether they meet the criteria in the Final Guidelines for the notification of a small merger, it would be prudent for those firms to take advice prior to signing or consummating the commercial agreements regulating the transaction in question.

The Commission states in the Final Guidelines that it will remain vigilant in identifying small mergers that may require notification by continuing with its own monitoring and relying on public to alert the Commission to possible anti competitive transactions.

Footnotes

- [1] Section 13(3) of the Competition Act, No. 89 of 1998, as amended.
- [2] Having regard to the provisions of section 12A of the Competition Act which deals with the consideration of mergers.
- [3] As defined in section 12(1)(a) of the Competition Act No. 89 of 1998, as amended.
- [4] Published in the Government Gazette on 17 April 2009.
- [5] In the draft guidelines on small merger notification which was issued for public comment, one of the pertinent criteria identified by the Commission in that draft was that at least one of the parties to the small merger in question operated in one or more digital markets. This criteria has not found its way into the Final Guidelines.
- [6] The Final Guidelines erroneously refers to the large merger target firm threshold of R190 million as the combined asset/turnover threshold for intermediate mergers.



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