

## COMPETITIVE EDGE

# Commission calls for voluntary merger notification



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This guideline has a number of implications for parties engaging in small mergers

**I**N MARCH, the minister of trade and industry issued two notices in the Government Gazette, one of which revised the monetary thresholds for the categorisation of intermediate and large mergers. These amended merger notification thresholds came into operation on April 1.

In summary, the categorisation of a merger determines whether or not there will be an obligation to notify that merger to and receive approval from the competition authorities prior to implementation thereof. In this regard, competition approval is required before the implementation of intermediate and large mergers.

However, parties to a small merger may implement that merger without the approval of the Competition Commission (and, as such, are not obliged to notify the commission of that merger). Notwithstanding this, the Competition Act provides that the commission may call on the parties to a small merger to notify the commission thereof within six months from the date of implementation of that merger if, in its opinion, the merger may substantially prevent or lessen competition or if the merger cannot be justified on public interest grounds.

Previously (before the new notice), a transaction was notifiable as an intermediate merger if the combination of the asset value or turnover value of the acquiring group

and the target firm was greater than R200m and the asset value or turnover value of the target firm alone was greater than R30m.

The new notice increased the combined value to R560m and the target firm value to R80m.

Previously, a transaction was notifiable as a large merger if the combination of the asset value or turnover value of the acquiring group and the target firm was greater than R3,5bn and the asset value or turnover value of the target firm alone was greater than R100m. With the new notice, the combined value increased to R6,6bn and the target firm value increased to R190m.

The revision to the merger thresholds is most welcome, particularly since the old thresholds came into force in February 2001. In this regard, the asset and turnover values of companies have increased exponentially since the publication of the previous thresholds, resulting in too many mergers falling within the competition net.

However, the revision to the thresholds, coupled with the recent economic downturn, has caused some concern for the competition authorities. In particular, the Competition Commission appears to be of the view that potentially problematic small mergers may escape regulatory scrutiny (where previously these transactions would, under the

old thresholds, have been intermediate mergers and therefore subject to automatic analysis).

To cater for this concern, the commission has attempted to informally persuade parties to small mergers to voluntarily bring these mergers to its attention. In this regard, on April 15 the commission issued a guideline on small merger notification.

Notwithstanding the fact the Competition Act allows for implementation of a small merger without approval, the commission's guideline provides it will require notification of all small mergers that meet the following criteria:

- At the time of entering into the transaction, any of the firms, or firms within the group, are subject to an investigation by the commission in terms of Chapter 2 (prohibited practices and abuse of dominance) of the Competition Act; or
- 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 Competition Act.

In terms of the guideline, the commission has advised parties to small mergers that meet the above criteria to voluntarily inform the commission in writing, by way of a letter, of their intention to enter into the relevant transaction.

The letter must contain sufficient detail concerning the parties, the proposed transaction and the markets in which the parties compete. On consideration of the letter, the commission will revert to the parties, informing them whether or not it will require the parties to formally notify that merger in the prescribed manner.

Of particular importance is that the guideline gives rise to a tension between parties' obligations under, and in terms of, the Competition Act on the one hand and voluntary compliance with the guideline (with uncertain legal status). Precisely how this plays out in practice is something to be watched with interest.

Clearly, the guideline has implications for parties engaging in small mergers. In particular, the guideline provides for an additional administrative burden to those set out in the Competition Act. Parties may well elect to comply with the guideline by voluntarily submitting to the jurisdiction of the competition authorities in an endeavour to avoid an adverse effect on their ongoing relationship with the commission.

However, in our view, parties would do well to consider the implications of the commission's guidelines before taking any steps in relation thereto.

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