

Guidelines on Small Merger Notification

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Presenter

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- Lettie joined SA Accounting Academy in November 2017 as Head of Technical. She is a Chartered Accountant, Registered Auditor and Certified Business Accountant.
- She is a **professional trainer and webinar host**, and with her relaxed and humorous presentation style, she is able to hold the attention of an audience. She has a unique ability to communicate with delegates at their respective levels of knowledge and experience. Over the last 20 years, she has trained thousands of partners, managers, trainee accountants and other professionals.
- She is responsible for our MCLU (Monthly Compliance and Legislation Updates).
- She was the Professional Development Manager at SAICA for 4 years and in charge of accrediting new training offices and monitoring existing ones (including the moderation of training offices and trainee assessments).
- Lettie is passionate about improving the efficiency and standardisation at practices. She has extensive experience on a variety of technical and practical topics which she consults on, including: SAICA re-accreditation assistance and preparation, IRBA inspection assistance and preparation, audit file reviews (post-issuance monitoring and EQCR), Quality control implementation, other office-specific manuals, and FASSET skills development facilitation.



WHAT'S ON THE AGENDA?



Contents

- **Introduction**
- **Basics of the Competitions Act: Focus on Section 13**
 - Some important definitions, Thresholds
- **The role of the Competition Commission**
- **Digital markets: Some of the risks involved**
- **When must the Competition Commission be notified of a merger? : Focus on Criteria (Small M&As and Digital market)**
- **What to consider when you notify the Competition Commission**
- **In closing...**



competition commission
south africa



And while the law of competition may be sometimes hard for the individual, it is best for the race, because it ensures the survival of the fittest in every department.

Andrew Carnegie



INTRODUCTION

Abbreviations used

- **CompCom** = The Competition Commission
- **M&A** = Mergers and Acquisitions

Terminology used in the Act:

- **SMEs** = Small and Medium businesses
- **HDPs** = Historically Disadvantaged Persons
- **FAQs** = Frequently Asked Questions

Purpose of the Draft guideline

- The guideline enables the Commission to evaluate whether a small merger requires notification on its own merits, within the guidance provided by section 13(3) of the Competition Act.
 - The deadline for public comments was 21 June 2021
 - Was set to take effect after 7 June 2021
- Provides clarity on when to notify CompCom of SMALL mergers
- Concerns re Digital market M&As led to new notification requirements

➤ *Refer to Source Document available to you*

THE BASICS OF THE COMPETITIONS ACT

NB Chapters & Sections

- Chapter 1 = Definitions, Interpretation, Purpose and application
- Chapter 2 = Prohibited practices
- Chapter 3 = Merger Control
 - Section 11 = Thresholds & categories of mergers
 - Section 12 = Merger defined
 - **Section 13 = Small merger notification and implementation**
 - Section 13A = Notification and implementation of other mergers
- Chapter 4 to 8 = CompCom. Tribunal & Court, Investigation and Adjudication procedures, Enforcement, Offences, General Provisions

➤ *Refer to Source Document available to you*

Section 13: Large & Intermediate

- **Large & intermediate** merger transactions **require mandatory notification** and approval by the competition authorities
 - **Large** = transactions that are above the higher threshold, where the **target** firm's turnover/gross asset value **is R190 million or more** and the **combined** turnover/asset value of the target and acquiring firms **exceeds R6.6 billion**
 - **Intermediate** = those transactions which fall below the higher threshold but exceed the lower threshold, where the **target** firm's turnover/gross asset value **is R100 million or more** and the **combined** turnover/asset value of the target and acquiring firms **is more than R600 million**

➤ *Refer to the Competition Act, which is available to you as a Source Document*

Section 13: Small

- **Small** mergers (transactions falling below the lower threshold) **do not** require mandatory notification
 - *Small = transactions that fall below the lower threshold*
 - i.e. where the **target** firm's turnover/gross asset value is **less than R100 million** and the **combined** turnover/asset value of the target and acquiring firms is **less than R600 million**
 - BUT CompCom **may**, up to 6 months following implementation, require the notification of a merger if:
 - in the opinion of the Commission, the merger may *substantially prevent or lessen competition* and
 - *cannot be justified on public interest* grounds
 - CompCom will also require notification if criteria are met re prohibited practices
- *Refer to the more detail in the slides on WHEN TO NOTIFY*

When to notify re Small...

To curb the rise of potentially anti-competitive transactions going unchecked, **CompCom will require the notification of all small mergers which meet any of the following criteria:**

- At the time of entering into the transaction, any of the firms (or entities forming part of the group) are subject to an investigation by the Commission in terms of Chapter 2 of the Act
 - *Chapter 2 of the Act contains prohibitions against restrictive horizontal practices (between actual or potential competitors, including cartel conduct), restrictive vertical practices (between firms at different levels of the supply chain) and abuses of dominance. The Commission, upon notification of such a contravention has the authority to investigate, prosecute and refer to the Tribunal, any prohibited practice*
- At the time of entering into the transaction, any of the firms (or entities forming part of the group) are respondents to proceedings referred by the Commission to the Competition Tribunal in terms of Chapter 2 of the Act.

THE ROLE OF THE COMPETITION COMMISSION

CompCom



competition commission
south africa

<https://www.compcom.co.za/>

- The Competition Commission is a statutory body constituted in terms of the Competition Act, No 89 of 1998 by the Government of South Africa

Their Purpose

- The Commission is empowered by the Competition Act **to investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers in order to achieve equity and efficiency in the South African economy**

<https://www.compcom.co.za/faq/>

DIGITAL MARKETS...

WHAT ARE SOME OF THE RISKS?

Digital markets

- Huge increase in acquisitions of new innovative companies by established players, particularly in the digital markets
- Due to the general timing of the acquisitions, which often occur at the early stages of a small business's entry into the market, these acquisitions tend to escape regulatory scrutiny
- The concern is that potentially anti-competitive transactions often slip through the cracks in this way as the target firms have not yet generated sufficient turnover to trigger merger notification in terms of the relevant thresholds

Digital market is dynamic lately...so new criteria have been set for notifying CompCom

**WHEN MUST THE
COMPETITION COMMISSION
BE NOTIFIED OF A MERGER?**

Criteria relating to small M&As that require notification

- **Small** mergers (transactions falling below the lower threshold) **do not** require mandatory notification
 - *Small = transactions that fall below the lower threshold*
 - i.e. where the **target** firm's turnover/gross asset value is **less than R100 million** and the **combined** turnover/asset value of the target and acquiring firms is **less than R600 million**
- BUT CompCom **may**, up to 6 months following implementation, require the notification of a merger if:
 - in the opinion of the Commission, the merger may *substantially prevent or lessen competition* and
 - *cannot be justified on public interest grounds*

When to notify re Small...re

Prohibited practices

To curb the rise of potentially anti-competitive transactions going unchecked, **CompCom will require the notification of all small mergers which meet any of the following criteria:**

- At the time of entering into the transaction, any of the firms (or entities forming part of the group) are subject to an investigation by the Commission in terms of Chapter 2 (Prohibited Practices) of the Act
 - *Chapter 2 of the Act contains prohibitions against restrictive horizontal practices (between actual or potential competitors, including cartel conduct), restrictive vertical practices (between firms at different levels of the supply chain) and abuses of dominance. The Commission, upon notification of such a contravention has the authority to investigate, prosecute and refer to the Tribunal, any prohibited practice*
- At the time of entering into the transaction, any of the firms (or entities forming part of the group) are respondents to proceedings referred by the Commission to the Competition Tribunal in terms of Chapter 2 of the Act.

Criteria relating to the digital market that require notification

CompCom requires that it be informed of **all small mergers, where either** the acquiring firm, the target **firm or both operate in one or more digital markets**, on condition that at least one of the following criteria is met:

- The consideration for the acquisition or investment > R190 million provided the target firm has activities in SA; or
- The consideration for the acquisition of a part of the target firm < R190 million but effectively values the target firm at R190 million (e.g., the acquisition of a 25% stake at R47.5 million) provided the target firm has activities in SA and, as a result of the acquisition, the acquiring firm gains access to commercially sensitive information of the target firm or exerts material influence over the target firm within the meaning of section 12(2)(g) of the Act;
- At least 1 of the parties to the transaction has a market share of 35% or more in at least 1 digital market; or
- The proposed merger results in a combined post-merger market share at which the merged entity gains or reinforces dominance over the market in question, as defined by the Act

WHAT TO CONSIDER WHEN YOU NOTIFY THE COMPETITION COMMISSION

Procedures

- Parties to small mergers which meet the above criteria are **advised to voluntarily inform CompCom** in writing, by way of a letter, of their intention to enter into the transaction
 - The letter should contain sufficient detail on the parties, the proposed transaction, and the markets in which the parties compete
 - E-mail: ccsa@compcom.co.za
- **CompCom will reply** to the parties 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.

Some Bonus info...

- **Evolution of the merger filing requirements: What you need to know about the proposed changes**
 - On 25 March 2021 the Minister of Trade, Industry and Competition published an invitation for commentary on, among other things, the Competition Commission merger filing forms.
 - The proposed changes to the merger forms require detailed submissions by merger parties on substantive market-related aspects where a merger gives rise to horizontal overlaps and a significant combined market share, and on public interest considerations which address the recent amendments made to the Competition Act 89 of 1998 (Act)
- *Refer to Bonus Document available to you (CDH Alert 28 July 2021)*

Source & Bonus Documents

The following SOURCE Documents are available to you:

1. CompCom_Draft-Guideline-on-small-merger-notification (4 pages)
2. CompCom_Info to invite comment on amendment of the small merger notification guidelines (2 pages)
3. Competition Act of 1998_applies from 13 Feb 2020

The following BONUS Documents are available to you:

1. CDH Competition-Law-Alert-31-May-2021
2. CDH Competition-Law-Alert-28-July-2021

Remember that these are uploaded to your profiles & should be available immediately after the webinar has ended

In closing...

- As accountants and auditors, we always have to remain cognisant of our obligation towards NOCLAR, so we have to be able to apply the latest requirements of the Competition Act to those clients that small mergers (and the large ones) apply to
- Parties to small transactions meeting the new criteria need to make submissions to the Commission prior to entering into such transactions
 - Any party under investigation for Prohibited Practices
 - Any party operating in the Digital Markets?
 - Must meet at least 1 of 4 additional criteria
 - Then they must notify CompCom
- If CompCom is not informed when they should be, this will be seen as contraventions of the Act
- And Offences will have consequences that follow!



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QUESTIONS





for your participation!