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COMPETITION LAW **ALERT**

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Revisions to Small Merger Guideline seek to regulate the dynamic digital market

The Competition Commission (Commission) has proposed amendments to its Guideline on Small Merger Notification (Revised Small Merger Guideline). The proposed changes align with the Commission's new focus on understanding and regulating digital markets, as evidenced by the recently launched online intermediary platforms market inquiry (detailed in our previous article).

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Revisions to Small Merger Guideline seek to regulate the dynamic digital market

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The proposed changes align with the Commission's new focus on understanding and regulating digital markets, as evidenced by the recently launched online intermediary platforms market inquiry (detailed in our previous article).

The Revised Small Merger Guideline highlights the concern that "*the growth of digital players through the rising number of acquisitions of new, innovative companies may have a detrimental impact on innovation …[and that] these potentially anti-competitive acquisitions are escaping regulatory scrutiny due the acquisitions taking place at an early stage in the life of the target before they have generated sufficient turnover that would trigger [mandatory] merger notification*".

Generally, only those transactions termed intermediate or large are subject to mandatory merger notification. Notwithstanding this, in terms of section 13(3) of the Competition Act 89 of 1998 (as amended) (the Act), the Commission retains a discretionary power to require parties to a small merger to notify the Commission of such merger, up to six months after the small merger has been implemented, if, in the opinion of the Commission, that merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. If the Commission calls for notification in these circumstances, further implementation of the merger must be halted until it has been approved.

The Revised Small Merger Guideline retains the previous guidance that the Commission will "*require*" the notification of all small mergers which:

- involve any party that, at the time of entering into the transaction, is subject to a prohibited practice investigation by the Commission; or
- involve any party that, at the time of entering into the transaction, is a respondent to pending proceedings relating to prohibited practices referred by the Commission to the Competition Tribunal.

In addition, the Revised Small Merger Guideline seeks to widen the category of mergers which the Commission wishes to be informed of, to now include all small mergers where one or more of the parties operate in one or more digital market(s) if the acquisition meets at least one of the following criteria:

- the consideration for the acquisition or investment exceeds R190 million provided the target firm has activities in South Africa;
- the consideration for the acquisition of a part of the target firm is less than R190 million but effectively values the target firm at R190 million provided the target firm has activities in South Africa 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 one of the parties to the transaction has a market share of 35% or more in at least one digital market, or

Revisions to Small Merger Guideline seek to regulate the dynamic digital market*...continued*

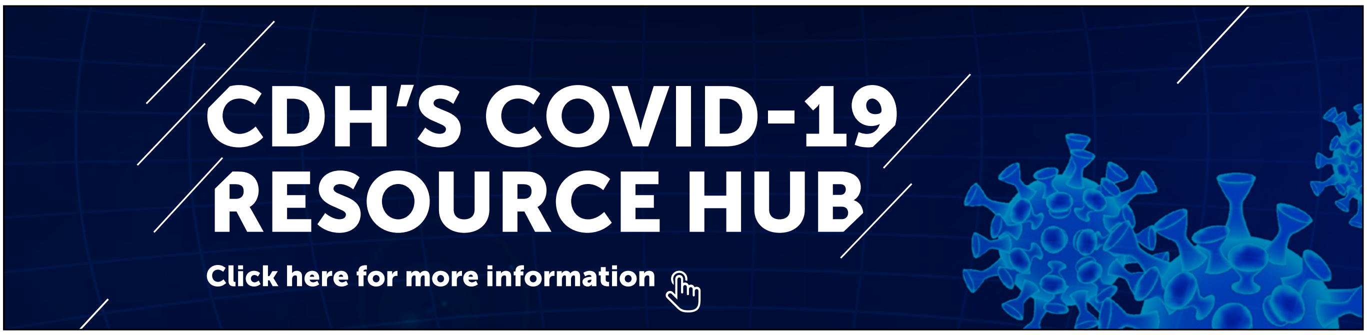
The extended scope proposed by the Revised Small Merger Guideline will be of importance to those firms operating in digital markets (particularly considering the Commission's growing scrutiny of the sector).

- the proposed merger results in combined post-merger market share at which the merger entity gains or reinforces dominance over the market, as defined by the Act.

The Commission calls on parties to the aforementioned small merger transactions to voluntarily inform the Commission, in writing, of its intention to enter into the proposed transaction. The Commission will then inform the parties in writing whether they are required to notify the small merger.

The extended scope proposed by the Revised Small Merger Guideline will be of importance to those firms operating in digital markets (particularly considering the Commission's growing scrutiny of the sector). With the ambit of these markets being undefined, transacting parties should remain vigilant and request competition law advice even where the transaction is perceived to be small. Stakeholders have until 21 June 2021 to provide comments on the Revised Small Merger Guideline.

Lara Granville, Preanka Gounden and Simone Nel



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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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