



*competition***commission**
south africa

Mergers & Acquisitions Division

Final

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MERGERS & ACQUISITIONS DIVISION SERVICE STANDARDS

1. Introduction

Most advanced and high performance regulatory agencies have service standards which facilitates both internal productivity and external service delivery expectations. Importantly service standards should at all times be realistic and in all instances measurable and achievable.

During March 2002 the Mergers & Acquisitions Division (“M&A”) of the Competition Commission published and presented service standards to the business community which had at aim to indicate in advance the likely outputs which could be expected in finalising cases. The service standards as proposed during 2002 for phase 1 (non complex), phase 2 (complex) and phase 3 (very complex) cases were as set out in the table below:

Table 1: M&A Service Standards 2002

Category	Turnaround times
Phase 1	20
Phase 2	25
Phase 3	45

The Commission has not been able to meet these standards as can be seen from the table below which indicate the set standards as compared to the outcomes for the preceding four years.

Table 2: M&A Outcomes as compared to the 2002 service standards

Category	2002 Service standard	2006	2007	2008	2009
Phase 1	20	21	26	28	29
Phase 2	25	44	44	47	51
Phase 3	45	64	60	60	65

From the above graph it is clear that the service standards as set in 2002 have not been met and of particular concern are phase 2 (complex) and phase 3 (very complex) investigations.

The M&A division has reviewed the standards in order to bring them in line with the changed regulatory environment (new merger thresholds) as well as the resources available to the division. The division further recognised that the nature and complexity of merger activity has increased over time and is likely to be a contributing factor to the failure to meet the current service standards.

2. Defining outputs and cases

The Commission has categorised cases according to Phase 1, 2 and 3 ranging from non complex to very complex and will continue to use this methodology in defining the service standards. The matrix below provides a guide to differentiating between the three categories:

DIFFERENTIATING FACTORS			
Characteristics	Phase 1	Phase 2	Phase 3
Combined market shares	< 15%	< 30%	>30%
Multiple markets	No	Yes	Yes
Deregulated markets	No	Yes	Yes
Control structure complexity	No	No	Yes
Complex market definition	No	No	Yes
Significant documentation and information requests	No	No	Yes
Likely or potential extent of anti competitive harm	No	No	Yes
Complexity of investigation	Non complex	Complex	Very complex

2.1. Phase 1 cases (non complex)

Phase 1 cases are readily identifiable by the absence of competition issues and involve a merger where either one or more of the following criteria apply to the facts presented by the parties:

- i. There is no overlap between the activities of the parties.

- ii. In the event there is an overlap between the activities of the parties the combined market share is below 15%.
- iii. No complex control structures arise for the merger.
- iv. No public interest issues arise from the merger.

2.2. Phase 2 cases (complex)

Phase 2 cases are complex mergers which involve transactions between direct or potential competitors (horizontal mergers) or between customers and suppliers (vertical mergers) where the parties hold market share in excess of 15% in their respective markets. Phase 2 transactions generally involve challenges which include either of the following:

- i. Defining the relevant market/s;
- ii. Multiple product or geographic markets;
- iii. Markets which are subject to deregulation;
- iv. Public interest issues arise from the transaction.

2.3. Phase 3 case (very complex)

Phase 3 cases are very complex cases which are likely to create or result in a substantial prevention or lessening of competition. Mergers between leading market participants in any one of the markets in which the parties compete falls within this category. Phase 3 transactions will necessitate a thorough investigation including obtaining specific documents and information from the merger parties (not limited to the complete filing documents and information) and third party industry participants.

3. Proposed new service standards

As mentioned earlier the proposed new service standards needs to be realistic and in all instances measurable and achievable. Having considered our resources and anticipated volumes of notifications and changed complexity of transactions, the Commission has adopted the following new service standards. The service standard refers to the number of business days the Commission

anticipates to review the transaction calculated as from the business day following the date on which a complete merger notification was filed.

Category	2002 service standard	2010 service standard
Phase 1 (non complex)	20	20
Phase 2 (complex)	25	45
Phase 3 (very complex)	45	60

3.1. Complete merger notification

To achieve these new service standards the Commission requires parties to a merger to comply with the minimum filing requirements required by the Competition Act 89 of 1998 (“the Act”), the Competition Commission Rules (in particular Part 6 Merger Procedures) and the relevant CC forms. In order to assist parties and practitioners the Commission has prepared a practice notice on what according to the Commission is required for purposes of a complete merger notification¹.

3.2. Small merger notifications

Over and above the investigation and analysis of intermediate and large mergers the Commission has issued guidelines in respect of the reporting of small mergers. In terms of the guideline any firm or firms within their group who at the time of entering into the transaction are subject to an investigation by the Commission in terms of Chapter 2 of the Act or are respondents to pending proceedings referred by the Commission to the Competition Tribunal in terms of Chapter 2 of the Act ought to inform the Commission of the small merger they intend entering into.²

The Commission undertakes to respond and advise parties whether or not they are obliged to notify their small merger to the Commission within 10 business days from receipt of the letter setting out the requisite details as required by the published guideline.

¹ See practice notice 6

² Guideline on small merger notification

3.3. Operational commitments

Each and every employee of M&A commits to do the following:

- Act in all instances professionally and respectfully with all people with whom they interact;
- Timiously (within 24 hours) respond to telephone messages and e-mails;
- Provide informative feedback to stakeholders.

4. Fast tracking procedure

In 2004 the Commission introduced a “*fast track*” procedure to address the expeditious finalisation of unproblematic merger investigations. The procedure was aimed at improving efficiency and turnaround time of the Commission’s decisions regarding non complex mergers. The Commission committed itself to a turnaround time of 20 business days given that certain minimum criteria are met when filing these transactions.

It is the Commission’s experience that the criteria set was too high and a minimal number of matters technically qualified for fast tracking. Notwithstanding that parties were not able to comply with the fast tracking procedure requirements the matters were generally of a non complex nature and the Commission naturally cleared them in an expeditious manner.

Considering that the proposed new service standard for phase 1 (non complex) matters is 20 business days which is the same as the standard the Commission set for fast tracking, the Commission has decided to abandon any commitment to fast tracking matters. The Commission however, undertakes to adhere to the above proposed service standards (with specific reference to non complex matters) which in the Commission’s view is reasonable and compares favorably to international standards.

5. Conclusion

The Mergers & Acquisitions Division of the Commission as a priority seeks to discharge of its duties in a timely manner. The division will continue to strive for improved turnaround times in order to provide some sense of predictability to merging parties.