Merger Threshold Determination

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Introduction

- ***Objective of the paper:***
  - Identify the impact, on institutional efficiency and effectiveness, of South Africa's merger notification thresholds by assessing the mergers notified to the Competition Commission (the Commission)
  - **First**, we evaluate the current merger thresholds in limiting the occurrence of type I error costs (institutional efficiency) and type II error costs (institutional effectiveness)
    - ***Type I error*** – the wasteful use of scarce resources whenever a reviewed merger does not lead to anticompetitive effects (the costs imposed on the parties having to file and the authority having to review)
    - ***Type II error*** – the costs related to the loss of consumer welfare caused from unnotified mergers that would result in anticompetitive effects
  - **Second**, we evaluate the likely impact on South Africa's merger control regime should the current thresholds be changed
    - This is based on a scenario-based benchmarking approach
    - Our analysis looks at how South Africa's merger thresholds can be adjusted to minimise the sum of expected costs of type I and type II errors

South Africa's merger classification and thresholds

Merger thresholds overtime

	Intermediate merger		Large merger	
	Combined	**Target**	**Combined**	**Target's**
24 December 1999	R50m	R5m	R3.5bn	R100m
1 February 2001	R200m	R30m	R3.5bn	R100m
1 April 2009	R560m	R80m	R6.6bn	R190m
1 October 2017	**R600m**	**R100m**	**R6.6bn**	**R190m**

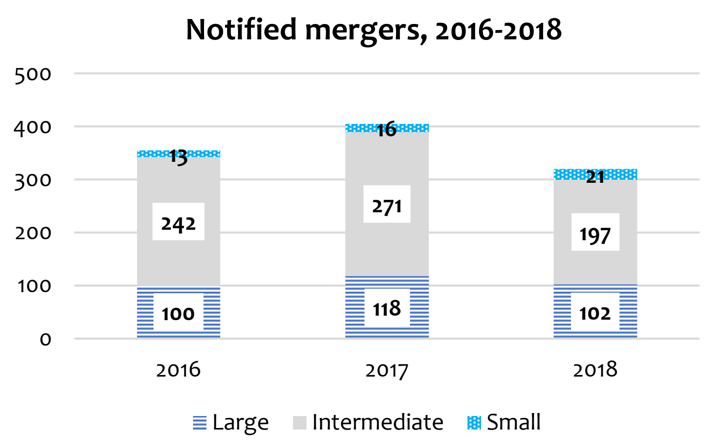
Merger filing fees overtime

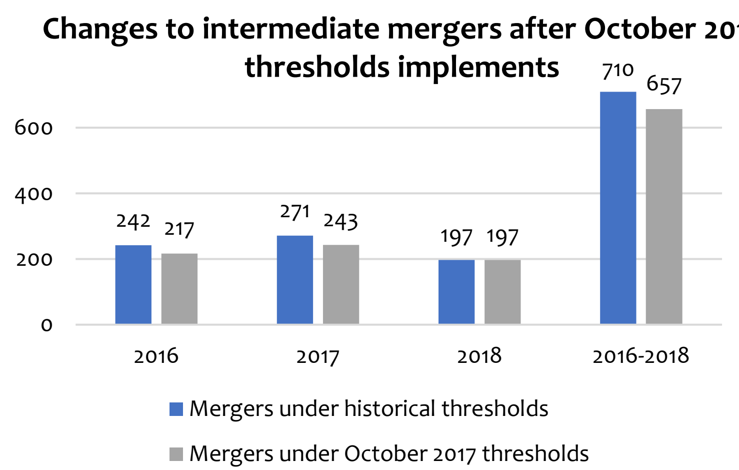
	Intermediate merger	Large merger
24 December 1999	R5 000/R125 000/R250 000	R500 000
1 February 2001	R75 000	R250 000
1 April 2009	R100 000	R350 000
1 October 2017	R150 000	R500 000
1 January 2019	**R165 000**	**R550 000**

- A brief description of South Africa's merger classification and thresholds
  - ***Merger thresholds*** – based on annual asset and/or turnover values by the target firm and combined (target + acquiring firm)
  - ***Classified according to size*** – <u>small</u> (voluntary notification or requested), <u>intermediate and large</u> (mandatory notification)
  - The Commission receives revenue (used as part of its institutional budget) from merger filing fees
  - Once mergers are notified, the Commission further classifies a merger based on its 'complexity':
    - Phase I (not complex) – mergers with no or insignificant overlap in the merging parties' activities, not expected to raise any significant competition concerns but may still raise public interest concerns
    - Phase II (complex) – mergers where the parties may overlap in their activities and may give rise to competition and public interest concerns
    - Phase III (very complex) – mergers where the parties have an overlap in activities and potentially high market shares post-merger, require more in-depth analysis

Efficacy of the Current Thresholds

- Assessed the mergers notified to the Commission over the period 2016 to 2018, approximately 1080 mergers
- To evaluate the effectiveness of the current merger threshold values implemented from 1 October 2017 to date, we assessed the impact of the current merger thresholds on the mergers notified before the increase





	Non-notifiable intermediate mergers
Approved	49
Approved with conditions	3
Prohibited	1
Total	**53**

- The efficacy of the October 2017 threshold adjustment appears to have resulted in few negative consequences in terms of error cost occurrences

Impact of Raising Merger Thresholds - Scenarios

Scenarios	Decrease in notifiable intermediate mergers	Decrease in approved intermediate mergers	Number of non-notifiable mergers approved with conditions	Number of non-notifiable mergers abandoned/withdrawn	Number of non-notifiable mergers prohibited
An increase to only the **target firm's** lower and upper thresholds (5%, 10%, 15% and 20% increase)	2.3% to 9.3%	2.3% to 9.6%	2 to 6	-	-
An increase to only the **combined firms'** lower and upper thresholds (10%, 20%, 30%, 40% and 45%)	2.9% to 11.1%	3% to 11.7%	1 to 5	1	-
A **15% increase to the target and 20% to the combined firms'** lower and upper thresholds	9.4%	10.1%	3	1	-
A **15% increase to the target and 40% to the combined firms'** lower and upper thresholds	14.6%	15.9%	4	1	-
An increase to only the intermediate merger threshold according to the **WBG's approximations**	3.2% to 70.5%	3.3% to 72.2%	1 to 36	1 to 7	3 to 7

Concluding Remarks

- ***Overall Findings***
  - Few problematic mergers that were previously notifiable would not be notifiable given the scenarios tested
  - Given the depressed state of the economy, the South African competition authorities are likely to be inundated with fewer but more complex merger transactions
  - Many smaller transactions may take place due to businesses divesting non-essential operations – many may fall outside of the merger thresholds
  - A cautionary approach could be warranted to ensure that competition and public interest is maintained even during these unprecedented times
- ***Recommendations to reforming the current thresholds***
  - Development of sector-based thresholds (for specific designated sectors) – many sectors in South Africa may not clearly fall within a generalised threshold.
  - *Adoption of a "transaction value" based metric – which may assist with those mergers where the assets and turnover generated by certain companies are too low to trigger mandatory notification. E.g. digital market related mergers.*
  - *The adoption by the Commission of a more stringent and robust merger screening mechanism to identify, early on, less problematic mergers.*
  - *Having the potential to extend merger evaluation times based on the complexity of merger and not just for large mergers.*