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DRAFT GUIDELINES ON SMALL MERGER NOTIFICATION

INVITATION FOR THE PUBLIC TO COMMENT ON THE AMENDMENT OF THE SMALL MERGER GUIDELINES

1. The Competition Commission of South Africa has amended its Guideline on Small Merger Notification.
2. Stakeholders and interested parties are invited to submit comments regarding the proposed changes to the guidelines on small merger notification, within a period of 30 days from publication of this notice, to the Mergers & Acquisitions Division of the Competition Commission of South Africa for the attention of Ms. Phillipine Mpane, email: phillipinem@compcom.co.za. For enquiries, please contact Ms Tamara Paremoer at tamarap@compcom.co.za.

SCHEDULE

1. The following guidelines are hereby amended as follows:

Introduction

The Competition Act 89 of 1998, as amended (“the Act”) requires that the Minister responsible for the administration of the Act determine a lower and a higher threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets in general or in relation to specific industries, which classify transactions as:

- Large (above the higher threshold)
- Intermediate (between the lower and higher thresholds) and
- Small (below the lower threshold)

Large and intermediate merger transactions require mandatory notification and approval by the competition authorities. Small mergers do not require mandatory notification, but the Competition Commission (“Commission”) may require, up to six months after the small merger has been implemented, that such mergers be notified and approved by the Commission if, in the opinion of the Commission, the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds.

On 15 September 2017, the Minister of Economic Development published a notice in the Government Gazette raising the merger thresholds and the filing fee for their notification. These thresholds came into effect on 01 October 2017.

According to Section 13(3) of the Act, the Commission has discretion to require the parties to a small merger to notify the Commission of that merger, if the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. Merging parties may not take further steps to implement that merger until it has been approved or conditionally approved.

There is an increasing risk that the growth of digital players through the rising number of acquisitions of new, innovative companies may have a detrimental impact on innovation particularly where these digital companies act as gatekeepers in multiple markets. There are concerns 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 merger notification as set by the turnover thresholds discussed above.

The Commission will remain vigilant in identifying small mergers that may require notification. In addition to its own monitoring, the Commission relies on the public to alert it to possible anticompetitive transactions. This notice communicates the approach of the Commission to the notification of small mergers.

Guidelines

The Commission will evaluate whether a small merger requires notification on its own merits, within the guidance provided by section 13(3) of the Act. Notice is hereby given, however, that the Commission 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 firms within their group, are subject to an investigation by the Commission in terms of Chapter 2 of the Act;
- 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 Act;

Furthermore, the Commission will require that it be informed of all small mergers and acquisitions where either the acquiring firm, the target firm, or both, operate in one or more digital market(s) provided at least one of the following criteria are met:

- 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 (for example, the acquisition of a 25% stake at R47.5mn) 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
- the proposed merger results in combined post-merger market share at which the merged entity gains or reinforces dominance over the market, as defined by the Competition Act.

Procedure

Parties to small mergers which meet the above criteria are advised to voluntarily inform the Commission 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. The letter should be addressed to:

The Manager: Mergers & Acquisitions Division
The Competition Commission
Mulayo Building
77 Meintjies Street
Sunnyside,
Pretoria
Private Bag X23, Lynnwood Ridge 0040
E-mail: ccsa@compcom.co.za

The Commission 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.