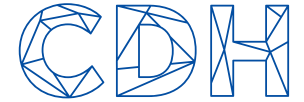


Competition Law

ALERT | 20 November 2024



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COMPETITION LAW ALERT

The ABCs of merger investigations in South Africa: When do the competition authorities need to know about your deal?

The Competition Act 89 of 1998 (Competition Act) requires certain deals to be approved by the competition authorities prior to implementation. This alert unpacks when you would need to notify the competition authorities about a deal and provides practical guidance on how to get your approval.

When is my deal a merger?

For purposes of the Competition Act, a merger occurs when one firm acquires control over the business, or part of the business, of another firm.

A business can, in simple terms, be regarded as a set of activities or assets that could be identified as a separate business in their own right. This is normally the case where turnover or market share is attributable to the assets or activities being transferred. Acquiring bare assets, such as stock, will not be regarded as a business.

Once it is determined that the target is a business, it is necessary to determine if the transaction results in you acquiring control of the business. The Competition Act identifies a number of ways in which this may occur, including where a person:

- owns more than half of the issued share capital;
- is entitled to cast the majority of votes at a shareholders' meeting;
- is entitled to appoint, or veto the appointment of, the majority of directors;

- in the case of a trust, has the ability to control the majority of the trustees' votes, to appoint the majority of trustees, or to appoint or change the majority of beneficiaries; or
- has the ability to materially influence the policy of a firm in a way comparable to the forms of control above. In short, this means having the ability to alter the strategic direction of the firm. This is typically, although not exclusively, the case where a person has the ability to veto the budget/business plan as well as the appointment or removal of executives.

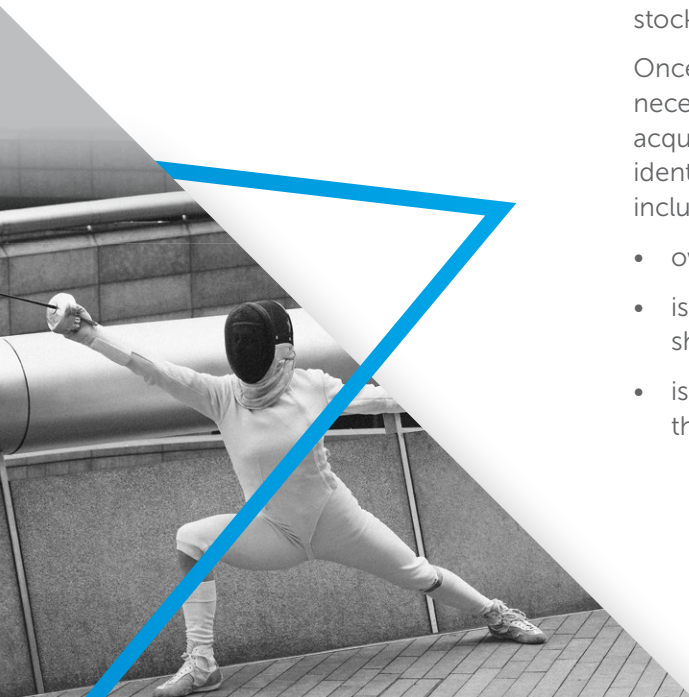
If your deal entails you acquiring control over a business, it is not automatically notifiable to the competition authorities. This is only the case if certain monetary thresholds are met.

When will a deal be subject to a merger investigation by the competition authorities?

Only mergers classified as either "*intermediate*" or "*large*" must be notified to the competition authorities for investigation and approval prior to being implemented.

A merger is an intermediate merger if:

- the annual turnover or total asset value of the target is at least R100 million; and
- the combined annual turnover or total assets of both the entire acquiring group and the target is at least R600 million.



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A merger is a large merger if:

- the annual turnover or total asset value of the target firm is at least R190 million; and
- the combined annual turnover or total assets of both the entire acquiring group and the target is at least R6,6 billion.

If the proposed transaction does not meet the criteria for an intermediate or large merger, it will be categorised as a "*small merger*". Small mergers may generally be implemented without prior approval from the competition authorities.

What happens during a merger investigation?

Once a merger is filed, the Competition Commission (Commission), which is the primary investigator of any merger, will conduct an investigation into the effects that the proposed transaction will likely have on competition and the public interest.

The investigation will include contacting stakeholders, such as employees, trade unions, customers and competitors, to obtain their views on the proposed transaction.

During the investigation, the Commission may issue written requests for information from the parties or ask the parties to attend meetings to discuss the proposed transaction.

How to prepare for a merger investigation?

To adequately prepare for a merger filing and the subsequent investigation, it is necessary to engage competition experts as early as possible to begin the information gathering process. Information about the parties' finances, market positions and market characteristics, and the effect on the public interest, is essential.

It is also important to engage early with stakeholders, particularly employees and trade unions, to notify them of the intention to conclude the proposed transaction.

Complex merger investigations may require parties to engage the services of economists and counsel.

Most common obstacles during a merger investigation

There are several scenarios that can delay the conclusion of a merger investigation. Some of these include:

- Delays in gathering information to respond to the Commission's requests for information.
- Negotiating conditions with the competition authorities.
- Stakeholders, typically competitors or trade unions, intervening in and opposing the proposed transaction.
- Having to engage with trade unions and employees on the effect that the transaction will have on employment.

What are the possible outcomes of a merger investigation?

At the end of a merger investigation, the competition authorities may:

- approve the proposed transaction without conditions;
- approve it with conditions; or
- prohibit it.

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Frequently asked questions about merger investigations

- **How long does a merger investigation take?**

An intermediate merger requires the Commission to investigate and render a final decision within a maximum of 60 business days.

In a large merger the Commission is required to investigate and make a recommendation to the Competition Tribunal (Tribunal), which ultimately decides the merger.

- This recommendation must occur within 40 business days, however, the Commission can extend this period for 15 business days at a time, with the permission of either the parties or the Tribunal.
- Once the recommendation to the Tribunal has been made, the Tribunal will generally make a decision within 10 business days, unless the matter is complex or if it is opposed by intervening parties.

- **Do all mergers require an investigation?**

Only large and intermediate mergers need to be notified and approved by the competition authorities prior to the transaction being implemented.

- **What do the competition authorities evaluate when considering the effect on the public interest?**

In addition to the effects on competition, the competition authorities are obligated to consider the effect that a proposed transaction will have on:

- a particular industrial sector or region;
- employment;
- the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively participate in the market;
- the ability of national industries to compete in international markets; and
- the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

The competition authorities have taken a keen interest in the effect that a transaction has on employment and the spread of ownership.

- **Is there an appeal process if a merger investigation is not successful?**

If an intermediate merger is prohibited by the Commission, the parties may apply for the transaction to be considered before the Tribunal. The Tribunal can confirm or overturn the Commission's earlier decision.

If a large merger is prohibited by the Tribunal, the parties may lodge an appeal to the Competition Appeal Court to overturn the Tribunal's decision.

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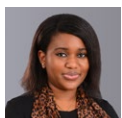
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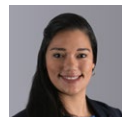
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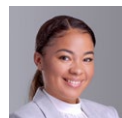
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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