

CHAPTER 3

MERGER CONTROL

CHAPTER 3 WAS AMENDED TO ITS PRESENT FORM BY SECTION 6 OF THE COMPETITION SECOND AMENDMENT ACT, 2000.

11. Thresholds and categories of mergers

- (1) The *Minister* , in consultation with the Competition Commission, must determine-
 - (a) 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 the Republic, in general or in relation to specific industries, for purposes of determining categories of mergers contemplated in subsection (5); and
 - (b) a method for the calculation of annual turnover or assets to be applied in relation to each of those thresholds.
- (2) The *Minister* may make a new determination in terms of subsection (1) in consultation with the Competition Commission.
- (3) Before making a determination contemplated in this section, the Minister, in consultation with the Competition Commission, must publish in the Gazette a notice-
 - (a) setting out the proposed threshold and method of calculation for purposes of this section; and
 - (b) inviting written submissions on that proposal.
- (4) Within six months after publishing a notice in terms of subsection (3), the Minister, in consultation with the Competition Commission, must publish in the Gazette a notice-
 - (a) setting out the new threshold and method of calculation for purposes of this section; and
 - (b) the effective date of that threshold.
- (5) For purposes of this Chapter-
 - (a) " **a small merger**" means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection (1)(a);

(b) " **an intermediate merger** " means a merger or proposed merger with a value between the lower and higher thresholds established in terms of subsection (1)(a); and

(c) " **a large merger**" means a merger or proposed merger with a value at or above the higher threshold established in terms of subsection (1)(a).

(12) Merger defined

(1) (a) For purposes of *this Act* , a merger occurs when one or more *firms directly or indirectly* acquire or establish direct or indirect control over the whole or part of the business of another *firm* .

(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through -

(i) purchase or lease of the shares, an interest or assets of the other *firm* in question; or

(ii) amalgamation or other combination with the other *firm* in question.

(2) A person controls a *firm* if that person-

(a) beneficially owns more than one half of the issued share capital of the *firm* ;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the *firm* , or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

(c) is able to appoint or to veto the appointment of a majority of the directors of the *firm* ;

(d) is a holding company, and the *firm* is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);

(e) in the case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation, owns the majority of members' *interest* or controls directly or has the right to control the majority of members' votes in the close corporation; or

(g) has the ability to materially influence the policy of the *firm* in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

12A. Consideration of Mergers

(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and-

(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine-

(i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or

(b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the *firms* in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including-

(a) the actual and potential level of import competition in the market;

(b) the ease of entry into the market, including tariff and regulatory barriers;

(c) the level and trends of concentration, and history of collusion, in the market;

(d) the degree of countervailing power in the market;

(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;

(f) the nature and extent of vertical integration in the market;

(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and

(h) whether the merger will result in the removal of an effective competitor.

(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on-

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive; and

(d) the ability of national industries to compete in international markets.

(13) Small merger notification and implementation

(1) A party to a small merger-

(a) is not required to notify the Competition Commission of that merger unless the Commission requires it to do so in terms of subsection (3); and

(b) may implement that merger without approval, unless required to notify the Competition Commission in terms of subsection (3).

(2) A party to a small merger may voluntarily notify the Competition Commission of that merger at any time.

(3) Within 6 months after a small merger is implemented, the Competition Commission may require the parties to that merger to notify the Commission of that merger in the *prescribed* manner and form if, in the opinion of the Commission, having regard to the provisions of section 12A, the merger-

(a) may substantially prevent or lessen competition; or

(b) cannot be justified on public interest grounds.

(4) A *party to a merger* contemplated in subsection (3) may take no further steps to implement that merger until the merger has been approved or conditionally approved.

(5) Within 20 business days after all parties to a small merger have fulfilled all their notification requirements in the *prescribed* manner and form, the Competition Commission -

(a) may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days and, in that case, must issue an extension certificate to any party who notified it of the merger; or

(b) after having considered the merger in terms of section 12A, must issue a certificate in the *prescribed* form -

(i) approving the merger;

(ii) approving the merger subject to any conditions;

(iii) prohibiting implementation of the merger, if it has not been implemented; or

(iv) declaring the merger to be prohibited.

(6) If, upon the expiry of the 20 business day period provided for in subsection (5), the Competition Commission has not issued any of the certificates referred to in that subsection or, upon the expiry of an extension period contemplated in subsection (5)(a), the Commission has not issued a certificate referred to in subsection (5)(b), the merger must be regarded as having been approved, subject to section 15.

(7) The Competition Commission must-

(a) publish a notice of the decision in the *Gazette* ; and

(b) issue written reasons for the decision if-

(i) it prohibits or conditionally approves the merger; or

(ii) requested to do so by a party to the merger.

13A. Notification and implementation of other mergers

(1) A party to an intermediate or a large merger must notify the Competition Commission of that merger in the *prescribed* manner and form.

(2) In the case of an intermediate or a large merger, the *primary acquiring firm* and the *primary target firm* must each provide a copy of the notice contemplated in subsection (1) to -

(a) any *registered trade union* that represents a substantial number of its employees; or

(b) the employees concerned or representatives of the employees concerned, if there are no such *registered trade unions* .

(3) The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16 (2) or the Competition Appeal Court in terms of section 17.

13B. Merger investigations

- (1) The Competition Commission may direct an inspector to investigate any merger, and may designate one or more persons to assist the inspector.
- (2) The Competition Commission may require any *party to a merger* to provide additional information in respect of the merger.
- (3) Any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant information in respect of that merger.

14. Competition Commission intermediate merger proceedings

- (1) Within 20 business days after all parties to an intermediate merger have fulfilled all their notification requirements in the *prescribed* manner and form, the Competition Commission -
 - (a) may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days and, in that case, must issue an extension certificate to any party who notified it of the merger; or
 - (b) after having considered the merger in terms of section 12A, must issue a certificate in the *prescribed* form -
 - (i) approving the merger;
 - (ii) approving the merger subject to any conditions; or
 - (iii) prohibiting implementation of the merger.
- (2) If, upon the expiry of the 20 business day period provided for in subsection (1), the Competition Commission has not issued any of the certificates referred to in that subsection or, upon the expiry of an extension period contemplated in subsection (1)(a), the Commission has not issued a certificate referred to in subsection (1)(b), the merger must be regarded as having been approved, subject to section 15.
- (3) The Competition Commission must-
 - (a) publish a notice of the decision in the *Gazette* ; and
 - (b) issue written reasons for the decision if
 - (i) it prohibits or conditionally approves the merger; or

(ii) requested to do so by a party to the merger.

14A. Competition Commission large merger proceedings

(1) After receiving notice of a large merger, the Competition Commission -

(a) must refer the notice to the Competition Tribunal and to the *Minister* ; and

(b) within 40 business days after all parties to a large merger have fulfilled all their *prescribed* notification requirements, must forward to the Competition Tribunal and the *Minister* a written recommendation, with reasons, whether or not implementation of the merger should be-

(i) approved;

(ii) approved subject to any conditions; or

(iii) prohibited.

(2) The Competition Tribunal may extend the period for making a recommendation in respect of a particular merger upon an application by the Competition Commission, but the Tribunal may not grant an extension of more than 15 business days at a time.

(3) If, upon the expiry of the period contemplated in subsection (1), or an extended time contemplated in subsection (2), the Competition Commission has neither applied for an extension or a further extension as the case may be, nor forwarded a recommendation to the Competition Tribunal, any party to the merger may apply to the Tribunal to begin the consideration of the merger without a recommendation from the Commission.

(4) Upon receipt of an application by a party contemplated in subsection (3), the Tribunal must set a date for proceedings in respect of that merger.

15. Revocation of merger approval

(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if-

(a) the decision was based on incorrect information for which a party to the merger is responsible;

(b) the approval was obtained by deceit; or

(c) a *firm* concerned has breached an obligation attached to the decision.

(2) If the Competition Commission revokes a decision to approve a merger under subsection (1), it may prohibit that merger even though any time limit set out in this Chapter may have elapsed.

16. Competition Tribunal merger proceedings

(1) If the Competition Commission approves -

(a) a small or intermediate merger subject to any conditions, or prohibits such merger, any party to the merger, by written notice and in the *prescribed* form, may request the Competition Tribunal to consider the conditions or prohibited merger; or

(b) an intermediate merger, or approves such merger subject to any conditions, a person who, in terms of section 13A (2), is required to be given notice of the merger, by written notice and in the *prescribed* form, may request the Competition Tribunal to consider the approval or conditional approval, provided the person had been a participant in the proceedings of the Competition Commission.

(2) Upon receiving a referral of a large merger and recommendation from the Competition Commission in terms of section 14A(1), or a request in terms of subsection (1), the Competition Tribunal must consider the merger in terms of section 12A, and the recommendation or request, as the case may be, and within the *prescribed* time -

(a) approve the merger;

(b) approve the merger subject to any conditions; or

(c) prohibit implementation of the merger.

(3) Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger and section 15, read with the changes required by the context, applies to a revocation in terms of this subsection.

(4) The Competition Tribunal must-

(a) publish a notice of the decision made in terms of subsection (2) or (3) in the *Gazette* ; and

(b) issue written reasons for any such decision.

17. Competition Appeal Court merger proceedings

(1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by-

(a) any party to the merger; or

(b) a person who, in terms of section 13A(2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Competition Tribunal.

(2) The Competition Appeal Court may-

(a) set aside the decision of the Competition Tribunal;

(b) amend the decision by ordering or removing restrictions, or by including or deleting conditions; or

(c) confirm the decision.

(3) If the Competition Appeal Court sets aside a decision of the Competition Tribunal, the Court must-

(a) approve the merger;

(b) approve the merger subject to any conditions; or

(c) prohibit implementation of the merger.

18. Intervention in merger proceedings

(1) In order to make representations on any public interest ground referred to in section 12A(3), the *Minister* may participate as a party in any intermediate or large merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in the *prescribed* manner.

(2) Despite anything to the contrary in this Act, the Competition Commission may not make a decision in terms of section 13(5)(b) or 14(1)(b), and the Competition Tribunal may not make an order in terms of section 16(2), if the-

(a) merger constitutes-

(i) an acquisition of shares for which permission is required in terms of section 37 of the Banks Act, 1990 (Act No. 94 of 1990); or

(ii) a transaction for which consent is required in terms of section 54 of the Banks Act, 1990 (Act No. 94 of 1990); and

(b) the Minister of Finance has, in the prescribed manner, issued a notice to the Commissioner specifying the names of the parties to the merger and certifying that-

(i) the merger is a merger contemplated in paragraph (a)(i) or (ii); and

(ii) it is in the public interest that the merger is subject to the jurisdiction of the Banks Act, 1990 (Act No. 94 of 1990) only.

(3) Sections 13(6) and 14(2) do not apply to a merger in respect of which the Minister of Finance has issued a certificate contemplated in subsection (2).