

ICN MERGER NOTIFICATION AND PROCEDURES TEMPLATE

Merger Working Group

COMPETITION COMMISSION OF SOUTH AFRICA

28 FEBRUARY 2021

IMPORTANT NOTE: This template is intended to provide background on ICN jurisdiction’s merger notification and review procedures.

Reading the template is not a substitute for consulting the referenced statutes and regulations.

[Please include, where applicable, any references to relevant statutory provisions, regulations, or policies as well as references to publicly accessible sources, if any.]¹

1. Merger notification and review materials [references to publicly accessible sources (homepage address) and indication of the languages in which these materials are available]

Statutory Laws

A. Notification provisions

The Competition Act 89 of 1998, as amended (the Act):

Section 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*.**

¹ Editor’s note: all the comments in [square brackets] are intended to assist the agency when answering this template but will be removed once the completed template is made public.

	<p>(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.</p> <p>13. Small merger notification and implementation</p> <p>(1) A party to a small merger –</p> <p>(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</p> <p>(b) may implement that merger without approval, unless required to notify the Competition Commission in terms of subsection (3).</p> <p>(2) A party to a small merger may voluntarily notify the Competition Commission of that merger at any time.</p> <p>(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 merge –</p> <p>(a) may substantially prevent or lessen competition; or</p> <p>(b) cannot be justified on public interest grounds.</p> <p>(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.</p>
<p>B. Substantive merger review Provisions</p>	<p>Section 12A. Consideration of Mergers</p> <p>(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 –</p>

(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)].

(1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also 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;

	<p>(f) the nature and extent of vertical integration in the market;</p> <p>(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;</p> <p>(h) whether the merger will result in the removal of an effective competitor;</p> <p>(i) the extent of ownership by a party to the merger in another firm or other firms in related markets;</p> <p>(j) the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and</p> <p>(k) any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission.</p> <p>(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 –</p> <p>(a) a particular industrial sector or region;</p> <p>(b) employment;</p> <p>(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;</p> <p>(d) the ability of national industries to compete in international markets; and</p> <p>(e) 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.</p>
<p>C. Implementing regulations</p>	<p>In terms of section 21 (4) of the Competition Act, the Minister of Trade, Industry and Competition, in consultation with the Competition Commission, made and published regulations relating to the functions of the Competition Commission, to come into operation at the time that the Competition Second Amendment Act, 2000 (Act No. 39 of 2000) comes into operation. These Regulations may be cited as the Competition Commission Rules.</p>

	<p>In terms of section 27(2) of the Competition Act, the Minister of Trade, Industry and Competition, in consultation with the Chairperson of the Competition Tribunal, made and published regulations relating to the functions of the Competition Tribunal to come into operation at the time that the Competition Second Amendment Act, 2000 (Act No. 39 of 2000) comes into operation. These Regulations may be cited as the Competition Tribunal Rules.</p> <p>The relevant Rules / Regulations are found on the below website:</p> <p>http://www.compcom.co.za/the-competition-commission-rules/.</p>
<p>D. Notification forms or information requirements</p>	<p>The merging parties to a merger are required to file a merger in the following prescribed manner (through filing the following Forms):</p> <p>Form CC 4(1) – Merger Notice Form Form CC 4(2) – Statement of merger information Form CC 7 – Claim for confidentiality</p> <p>The prescribed merger notification forms are accessible on the below website:</p> <p>http://www.compcom.co.za/forms/.</p>
<p>Interpretative Guidelines and Notices</p>	
<p>E. Guidance on Merger Notification Process [e.g., information on calculation of thresholds, etc.]</p>	<p>The Commission’s website contains guidance on the notification process for the public’s ease of reference: http://www.compcom.co.za/merger-thresholds/. Below we explain the process:</p> <p>The Commission must be notified of all intermediate mergers and acquisitions if the value of the proposed merger equals or exceeds R600 million (calculated by either combining the annual turnover of both firms or their assets), and the annual turnover or asset value of the transferred/target firm is at least R100 million.</p>

	<p>If the combined annual turnover or assets of both the acquiring and transferred / target firms are valued at or above R6.6 billion, and the annual turnover or asset value of the transferred / target firm is at least R190 million, the merger must be notified to the Competition Commission as a large merger.</p> <p>The Commission has developed a merger notification calculator to assist practitioners and the merging parties in determining whether a merger is small, intermediate or large based on the amended thresholds. It should be noted, however, that the merger notification calculator is not in any way intended to be or to replace independent legal advice and is non-binding on the Competition Commission. You may follow this link to access the merger notification calculator: http://www.compcom.co.za/merger-thresholds/.</p> <p>If the proposed transaction does not meet criteria of intermediate or large mergers it will be categorized as ‘small merger.’ Section 13(2) of the Act allows for voluntary notification of small mergers by the parties at any time. Section 13(3) of the Act further determines that the Commission may require the parties to a small merger to notify the merger to the Commission within 6 months after implementation.</p> <p>The Commission has developed guidelines for the notification of small mergers, to communicate the approach it will follow to the notification of small mergers. The Small Merger Guidelines are contained in the below website:</p> <p>http://www.compcom.co.za/wp-content/uploads/2019/02/Small-Merger-Notification.pdf.</p>
<p>F. Guidance on Substantive Assessment in Merger Review [Please include reference separately, if applicable]</p>	<p>The Commission does not have guidelines on Substantive Assessment in Merger Review for the Competition aspect of the assessment. The Commission is, however, in the process of developing these guidelines.</p>

	<p>The Commission does, however, have Guidelines for the Assessment of Public Interest Provisions in Mergers. These Guidelines can be found on the below website:</p> <p>http://www.compcom.co.za/wp-content/uploads/2017/11/Gov-Gazette-Public-Interest-Guidelines.pdf.</p>
<p>G. Has your agency published guidelines or directives on notification of mergers involving specific sectors (e.g., digital economy)? [If affirmative, please provide references and languages available]</p>	<p>None at this stage. However, in September 2020 the Competition Commission published a paper on competition in the digital economy for public comment. The paper details competition and regulatory issues in the South African digital economy and sets out the Commission's intended strategic actions in relation to competition law issues, and proposed strategic actions for other regulators to consider concerning their respective regulatory areas, namely telecommunication and broadcasting, data protection and financial services regulators. The below extract is relevant for Mergers & Acquisitions:</p> <p>“Notice of mandatory requirements for specified dominant tech companies to inform the Commission of small domestic acquisitions. The Commission intends to require specific tech companies that dominate different digital markets in South Africa to inform the Commission of all small domestic acquisitions, including investments in start-ups and global acquisitions of targets with some presence locally. This will enable the Commission to determine if a small merger notification is required as permitted within the legislation, but without making this mandatory in all cases as that may inhibit pro-competitive venture capital investments in start-ups.”</p> <p>The Commission’s paper is accessible on the below website: http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy_7-September-2020.pdf.</p> <p>In addition to the above, the Commission is in process of amending its Small Merger Guidelines to include guidelines on the approach the Commission adopts for mergers</p>

	<p>in the Digital Economy that may not meet the existing criteria for mandatory or voluntary notification contained in the Small Merger Guidelines. As indicated, this is a work in progress, and it will be published on the Commission’s website as soon as the Small Merger Guidelines have been amended.</p>
<p>H. Other relevant notices, policy statements, interpretations, rules, or guidance on aspects of merger review or the agency’s decision-making process</p>	<p>The Commission has also issued various Practice Notes for Competition Practitioners in South Africa on various topics such as:</p> <ol style="list-style-type: none"> 1. Practice Note on Complete merger filing requirements: http://www.compcom.co.za/wp-content/uploads/2019/02/Complete-filing-notice-Mch-2010.pdf. 2. Practice Note on the application of merger provisions of the Competition Act 89 of 1998, as amended, to Asset Securitization Schemes: http://www.compcom.co.za/practice-notes-2/. 3. Practice Note on the application of merger provisions of the Competition Act 89 of 1998, as amended, to Risk Mitigation Financial Transactions: http://www.compcom.co.za/practice-notes-2/. 4. Practice Note on the application of merger provisions of the Competition Act 89 of 1998, as amended, to Joint Ventures: http://www.compcom.co.za/practice-notes-2/. 5. The Commission is also in the process of developing a Practice Note on the Assessment of Creeping Mergers. The Note will also be published on the Commission’s website once it has been completed and adopted by the Commission. <p>The Mergers & Acquisitions Division of the Commission published and presented service standards to the business community which aim to indicate in advance the likely outputs which could be expected in finalizing cases: http://www.compcom.co.za/wp-content/uploads/2019/02/Service-Standards 2015 Final.pdf.</p>

2. Agency (or Agencies) responsible for merger enforcement.	
A. Name of the Agency which reviews mergers. If there is more than one agency, please describe the allocation of responsibilities.	<p>The Competition Commission of South Africa reviews and approves mergers classified as small and intermediate in terms of the Competition Act. In relation to mergers classified as large mergers, the Commission has an obligation to review and make a recommendation to the Competition Tribunal for approval.</p> <p>The Competition Tribunal is primarily an adjudicative body, but it has the obligation to consider and approve / prohibit large mergers in South Africa. The Tribunal can either endorse the Commission's recommendation or reject it and have its own finding on a large merger.</p>
B. Contact details of the agency [address and telephone including the country code, email, website address and languages available on the website]	<p>The Competition Commission, The DTI Campus, Mulayo (Block C), 77 Meintjies Street, Sunnyside, Pretoria</p> <p>Telephone: (+27) 12 394-3200 Email: ccsa@compcom.co.za. Language: English</p>
C. Is agency staff available for jurisdiction/filing guidance? [If yes, please provide contact points for questions on merger filing requirements and/or consultations]	<p>Yes. Ms. Precious Mathibe International Relations Specialist – Office Of The Commissioner. Email: preciousm@compcom.co.za.</p>
3. Covered transactions	
A. Thorough definition of potentially covered transactions [i.e., share acquisitions, asset acquisitions, mergers, de-mergers,	The Competition Act requires the notification of mergers and the Act defines the concept of a “merger.” Section of 12 Competition Act – Merger defined:

<p>consolidations, consortia, amalgamations, joint ventures or other forms of contractual relationships, such as partnerships and alliance agreements]</p>	<p>(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.</p> <p>(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).</p>
<p>B. What is the geographic scope of transactions covered?</p>	<p>The Competition Act applies to all economic activity within, or having an effect within, the Republic of South Africa.</p>

<p>C. If change of control is a determining factor, how is control defined and interpreted in practice?</p>	<p>Section 12 of the Competition Act provides the following:</p> <p>(2) A person controls a firm if that person –</p> <ul style="list-style-type: none"> (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).
<p>D. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels? Are acquisitions of assets ever covered? If so, do the assets have to form a free-standing business or can the combination of the assets with the business of the acquirer be considered in order to have jurisdiction? Does the authority have jurisdiction over "bare" asset purchases, e.g. where the assets purchased do not relate to the acquirer's existing business?</p>	<p>Yes, they are covered if they confer control over the minority shareholder through either of the elements mentioned in section 12(2) above.</p>

4. Thresholds for notification	
<p>A. What are the general thresholds for notification? [If the thresholds are subject to adjustment, state on what basis and how frequently (e.g., for inflation, annually)]</p>	<p>The Commission must be notified of all intermediate mergers and acquisitions if the value of the proposed merger equals or exceeds R600 million (calculated by either combining the annual turnover of both firms or their assets), and the annual turnover or asset value of the transferred/target firm is at least R100 million.</p> <p>If the combined annual turnover or assets of both the acquiring and transferred / target firms are valued at or above R6.6 billion, and the annual turnover or asset value of the transferred / target firm is at least R190 million, the merger must be notified to the Competition Commission as a large merger.</p>
<p>B. To which entities do the merger notification thresholds apply, i.e., which entities are included in determining relevant undertakings/firms for threshold purposes? If based on control, how is control determined?</p>	<p>The Government Gazette Notice No.41124 of 15 September 2017 which came into effect on 01 October 2017 on “The Determination of Merger Thresholds and Method of Calculation” (General Notice) regulates how merger thresholds are calculated.</p> <p>On the Acquiring Side: The primary acquiring firm and the firms controlling the primary acquiring firm are considered for purposes of threshold calculation – value of the proposed merger equals or exceeds R600 million (calculated by either combining the annual turnover of both firms or their assets).</p> <p>On Target Side – The transferred firm is considered, and it must either have an asset value of R100 million / annual turnover value of R100 million.</p> <p>The Act defines the “transferred firm” as follows: “transferred firm” means – (a) a firm, or the business or assets of the firm, that as a result of a transaction in any circumstances set out in section 12 of the Act, would become directly or indirectly controlled by an acquiring firm; and (b) any other firm, or business or assets of the firm, the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a).”</p>

C. How is the nexus to the jurisdiction determined (e.g., sales or assets in the jurisdiction)? If based on an “effects doctrine”, please describe how this is applied in practice. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?”	<p>The CCSA considers sales made into South Africa, that attract revenue, whether through a subsidiary or through imports for firms with no physical presence in South Africa.</p> <p>For firms present in South Africa, the CCSA considers the assets held by the firm in South Africa and any sales it made to generate revenue from South Africa.</p>
D. Can a single party trigger the notification threshold (e.g., one party’s sales, assets, or market share)?	<p>Yes. The Target Firm can trigger notification thresholds if it has an Asset / Turnover value of over R600 million on its own.</p> <p>However, the Acquiring Firm on its own cannot trigger notification thresholds because the Target Firm needs to have a minimum of R100 million in Asset / Turnover value for a merger to be notifiable.</p>
E. Are any sectors excluded from notification requirements? If so, which sectors? To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?	<p>No. However, the Minister of Finance can withdraw the Commission’s jurisdiction to assess a merger that involves an acquisition of a Bank in terms of the Banks Act 94 of 1990. When a Commission receives a merger relating to an acquisition of a Bank, the Commission is required to send formal correspondence to the Minister of Finance to enable the Minister to determine whether it wants to exercise its power to withdraw the Commission’s jurisdiction. The relevant provisions are section 18 of the Competition Act and Rule 36 of the Commission Rules.</p> <p>Section 18 of the Competition Act provides:</p> <p>(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 –</p> <p>(a) merger constitutes –</p> <p>(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</p>

- (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).

Rule 36. Minister of Finance intervention

- (1) The Commission must send to the Minister of Finance a copy of the Merger Notice, and all other documents filed in respect of a merger, if the merger meets the criteria set out in section 18(2)(a).
- (2) The Minister of Finance may issue a notice to the Commission in terms of section 18(2)(b) by filing Form CC 5(3) at any time between –
 - (a) The date on which the Commission sends a notice in terms of sub-Rule (1); and
 - (b) 10 business days after receiving advice from the Commission in terms of sub-rule (3), if applicable.
- (3) If, in respect of a particular merger the Minister of Finance has received a notice in terms of sub-rule (1), but has not yet issued a notice in terms of sub-rule (2), the Commission must advise the Minister of Finance in writing at the time that it is prepared to make a decision in terms of section 13, 14 or 14A.
- (4) Upon receiving a notice from the Minister of Finance in terms of sub-rule (2), the Commission must –
 - (a) serve a copy of the notice on the Tribunal and each other participant in those proceedings; and
 - (b) refund the filing fee to the firm that paid it.

<p>F. Are there special threshold calculations for specific sectors (e.g., banking, airlines, media, digital markets) or specific types of transactions (e.g., joint ventures, partnerships, financial investments)? If yes, for which sectors and types of transactions?</p>	<p>No. All sectors are currently subject to the same method of calculation as contained in the General Notice.</p>
<p>G. Are there special rules or exceptions/exemptions regarding jurisdictional thresholds for transactions in which both the acquiring and acquired parties are foreign (foreign-to-foreign transactions)? [Describe the methodology for identifying and calculating any values necessary to determine if notification is required, including the value of the transaction, the relevant sales or turnover, and/or the relevant assets]</p>	<p>No. All mergers are currently subject to the same method of calculation as contained in the General Notice.</p>
<p>H. Does the agency have the authority to review transactions that fall below the thresholds or otherwise do not meet notification requirements? If so, what is the procedure to initiate a review? [Describe methodology for calculating exchange rates]</p>	<p>Yes, the Commission does have authority in terms of the Act to review mergers that fall below the financial thresholds. If the proposed transaction does not meet criteria of intermediate or large mergers it will be categorized as ‘small merger.’</p> <p>Section 13(2) of the Act allows for voluntary notification of small mergers by the parties at any time. Section 13(3) of the Act further determines that the Commission may require the parties to a small merger to notify the merger to the Commission within 6 months after implementation, if in the opinion of the Commission, the merge may substantially prevent or lessen competition; or (b) cannot be justified on public interest grounds.</p> <p>The Commission has developed guidelines for the notification of small mergers, to communicate the approach it will follow to the notification of small mergers. The Small Merger Guidelines are contained in the below website:</p>

	http://www.compcom.co.za/wp-content/uploads/2019/02/Small-Merger-Notification.pdf .
<p>I. Are current notification criteria catching relevant transactions related to digital markets?</p>	<p>No. The Commission is currently in the process of debating the best way to capture relevant transactions in the digital economy which may not necessarily have the requisite financial thresholds but have an impact on competition. This is an ongoing project, and the Commission issued a public discussion paper for public comment in 2020 as mentioned in the earlier sections of this survey.</p> <p>The Commission will develop the Merger Guidelines that will include guidance on the approaches the Commission will apply for digital mergers. The Commission has also recently announced that it will conduct a Market Inquiry on Online Intermediation Platforms and published the Terms of Reference for the Market Inquiry. The Commission will also take guidance from this market inquiry into Digital platforms on future mergers in the digital markets. The Terms of Reference are contained below:</p> <p>http://www.compcom.co.za/wp-content/uploads/2021/02/OIPMI-Draft-ToR-19-02-2021.pdf.</p>

Calculation Guidance and related issues

<p>J. If thresholds are based on any of the following values, please describe how they are identified and calculated to determine if notification is required:</p> <ul style="list-style-type: none"> i) the value of the transaction; ii) the relevant sales or turnover; iii) the relevant assets; iv) market shares; v) other (please describe). 	<p>As previously indicated, the Commission considered the relevant turnover and relevant assets of the merging parties. The General Notice provides the below guidance on how to determine the assets and/or turnover:</p> <p>Generally accepted accounting practices apply:</p> <p>6. For the purposes of section 11 of the Act, the assets, and the turnover, of a firm in, into or from the Republic must be calculated in accordance with G.A.A.P., subject to the provisions of this notice.</p> <p>Valuation of Assets</p> <p>7. For the purpose of section 11 of the Act, the asset value of a firm at any time is based on the gross value of the firm's assets as recorded on the firm's balance</p>
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sheet for the end of the immediately previous financial year, subject to sub-items (1) and (2).

(1) In particular –

(a) the asset value equals the total assets less any amount shown on that balance sheet for depreciation or diminution of value;

(b) the combined assets are to include all assets on the balance sheets of the firms concerned, including any goodwill or intangible assets included in their balance sheets;

(c) no deduction may be taken for liabilities or encumbrances of the firm;

(d) the combined assets are to be calculated on the basis of the combined assets before giving effect to the merger and accordingly the combined assets do not include any goodwill or intangible assets that would arise as a result of the merger;

(e) the combined assets are not adjusted for any investments the acquiring firm might have in the transferred firm or amounts due by one firm to the other; and

(f) assets in the Republic includes all assets arising from activities in the Republic.

(2) If, between the date of the financial statements being used to calculate the asset value of a firm, and the date on which that calculation is being made, the firm has acquired any subsidiary company, associated company or joint venture not shown on those financial statements, or divested itself of any subsidiary company, associated company or joint venture shown on those financial statement –

(a) The following items must be added to the calculation of the firm's asset value if these items should, in terms of G.A.A.P., be included in the firm's asset value;

(i) The value of those recently acquired assets; and

(ii) Any asset received in exchange for those recently divested assets.

(b) The following items may be deducted in calculating the firm's asset value if these items were included in the firm's asset value:

- (i) The value of those recently divested assets at the date of their divestiture; and
- (ii) Any asset that was shown on the balance sheet and was subsequently used to acquire the recently acquired asset.

Calculation of annual turnover

8. 7. (1) For the purpose of section 11 of the Act, the annual turnover of a firm at any time is the gross revenue of that firm from income in, into or from the Republic, arising from the following transactions and events as recorded on the firm's income statement for the immediately previous financial year, subject to the provisions of sub-items (2), (3) and (4):
- (a) the sale of goods;
 - (b) the rendering of services; and
 - (c) the use by others of the firm's assets yielding interest, royalties, and dividends.
- (2) In particular –
- (a) When calculating turnover the following amounts may be excluded:
 - (i) any amount that is properly excluded from gross revenue in accordance with G.A.A.P.;
 - (ii) taxes, rebates, or any similar amount calculated and paid in direct relation to revenue, as for example, sales tax, value added tax, excise duties, and sales rebates, may be deducted from gross revenue;
 - (b) no adjustment is made for any amount that represents a duplication arising from transactions between the acquiring firm and the transferred firm;
 - (c) revenue excludes gains arising from non-current assets and from foreign currency transactions; and
 - (d) for banks and insurance firms revenue includes those amounts of income required to be included in an income statement in terms of G.A.A.P., but excluding those amounts contemplated in paragraph (c).
- (3) If, between the date of the most recent financial statements being used to calculate the turnover of a firm, and the date on which that calculation is being

	<p>made, the firm has acquired any subsidiary company, associated company or joint venture not shown on those financial statements, or divested itself of any subsidiary company, associated company or joint venture shown on those financial statements –</p> <p>(a) the turnover generated by those recently acquired assets must be included in the calculation of the firm’s turnover if this turnover should in terms of G.A.A.P. be included in the turnover of the firm; and</p> <p>(b) the turnover generated by those recently divested assets in the immediately previous financial year may be deducted from the firm’s turnover if this turnover was included in the turnover of the firm.</p> <p>(4) If the financial statements used as a basis for calculating turnover or the turnover included in terms of sub-item 3(a) are for more or less than 12 months, the values recorded on those statements must be pro-rated to the equivalent of 12 months.</p>
<p>K. Which entities are included in determining relevant investment funds for threshold purposes? If based on control, is the definition of control in these cases any different from the definition of control in general (question 3C)? If yes, how?</p>	<p>The investment funds are subject to the same control definition provided in question 3C above. As such, the same firms as provided in an answer to question 4B above are included in determining thresholds, i.e. the acquiring firm and the transferred firm. Section 1(1)(i) provides that ‘acquiring firm’ means a firm –</p> <p>(a) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;</p> <p>(b) that has direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a); or</p> <p>(c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b).</p>
<p>L. In case an investment fund is part of a transaction, are its controllers required to present turnover information related to other funds under same manager (general partner) control?</p>	<p>Yes, if those other funds directly or indirectly control the primary acquiring firm and/or if those funds are indirectly or directly controlled by the transferred firm (i.e. primary</p>

Are those other funds considered as part of the transaction for turnover purposes?	target firm) – their financial information will be relevant for calculating merger thresholds.
M. Describe the methodology applied for currency conversion [e.g. which exchange rates are used].	
Not Applicable.	
5. Pre-notification	
A. If applicable, please describe the pre-notification procedure and whether it can be mandatory or not [e.g., time limits, type of guidance given, etc.].	The South African regime does not make a pre-notification procedure a requirement for filing a merger to the Commission. In more complex mergers or mergers of interest, the merging parties do request pre-notification meeting with the Commission to explain the merger but this is not a regulated process and it is not a requirement of the Competition Act.
B. If applicable, what information or documents are the parties required to submit to the agency during pre-notification?	N/A.

6. Notification requirements and timing of notification	
A. Is notification mandatory? [Please describe if notification is mandatory in pre-notification phase, post-merger or voluntary]	As previously indicated above, section 13A requires a party to a large or intermediate merger (i.e. a merger that meets the necessary financial thresholds) to notify the Commission of that merger in the prescribed manner and form before implementing the merger in question. The Act further prevents the parties from implementing that merger until it has been approved by either the Commission or the Competition Tribunal or the Competition Appeal Court, as the case may be.
B. If parties can make a voluntary merger filing when may they do so?	Section 13(2) provides that a party to a small merger may voluntarily notify the Competition Commission of that merger at any time.

	Should the Commission require a small merger to be notified, that merger must be notified within 6 months after a small merger is implemented in terms section 13(3) of the Competition Act.
C. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; if so, when is an agreement considered definitive?)	When there is an intention to acquire a firm. There is no need for a definitive or signed agreement, the merging parties can approach the Commission once there has been a meeting of minds about the acquisition and a Term Sheet, Accepted Offer Letter or Draft Agreement in place.
D. When must notification be made? If there is a triggering event, describe the triggering event (e.g., definitive agreement) and the deadline following the event. Do the deadline and triggering event depend on the structure of the transaction? Are there special rules for public takeover bids?	The trigger for notification in South Africa is an intention to acquire a target firm. As explained, once the parties have agreed on the salient terms and there has been a meeting of minds, they are obliged to notify the Commission. For public takeovers, the Acquiring needs to have an intention to control through making an offer to the Board of Directors or directly to the Shareholders to acquire their shares for the notification requirements to be triggered.
E. If there is a notification deadline, can parties request an extension for the notification deadline? If yes, please describe the procedure and whether there is a maximum length of time for the extension.	There is no deadline necessarily, however, the merging parties are required not to implement the (notifiable) merger before approval from the Competition Authorities.

7. Simplified Procedures	
A. Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, discretion to waive certain information requirements, etc.).	The SA Regime does not have these procedures, all mergers have to be filed in a prescribed form (as explained above) and the merger filing needs to be complete before the Commission can consider the merger.

	<p>The Commission does, however, phase mergers according to complexity for purposes expediting mergers in line with the Service Standards. The level of complexity are as follows:</p> <ol style="list-style-type: none"> 1. Phase 1 – includes non-complex transaction with low market shares (less than 15%) and no competition or public interest concerns. No competitive overlap cases. These mergers are completed within 20 business days of notification. 2. Phase 2 – normally means that the merged entity’s market share in one or more relevant (product and geographic) market(s) where the activities of the parties overlap is above 15% but still below 30% in all relevant markets where the activities overlap. The transaction may also raise public interest concerns. These mergers are completed within 45 business days of notification. 3. Phase 3 – these are complex mergers, which typically require interdivisional teams. The merged entity usually has a post-merger market share of over 30% in a market or multi-markets or has significant public interest considerations.
<p>B. Describe the criteria adopted to consider a transaction under the simplified procedure.</p>	<p>N/A</p>

<p>8. Information and documents to be submitted with a notification</p>	
<p>A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents, internal documents).</p>	<p>The merging parties are required to submit the following documents:</p> <ol style="list-style-type: none"> 1. Completed merger forms with all required information (Form CC4(1), Form CC4(2), Form CC7) 2. Merger Agreement / Term Sheet, etc 3. Annual Financial Statements 4. Annual Reports 5. Internal Documents: Recent Budget Plans, Board Meeting Minutes, Board Resolutions, Shareholders Resolutions, Reports, Presentations and summaries, prepared for the Board of Directors.

	<p>6. Report or other document assessing the transaction with respect to competitive conditions.</p> <p>7. The most recent report the firm provided to the Securities Regulation Panel during the past year.</p>
<p>B. Is there a distinction between tangible and intangible (e.g., customer portfolio, data on consumers, etc.) assets in the description of the transaction? [In respect to digital markets, state if the agency considers the amount of user data the companies have, and which will be passed on in the transaction]</p>	<p>Currently, the assets have to be quantifiable as illustrated on the General Notice and should be captured on the firms' Balance Sheet.</p> <p>As previously mention in 1G above, the Commission is in a process of assessing the best mechanism to catch problematic mergers in the digital markets. The below is relevant:</p> <p>“Notice of mandatory requirements for specified dominant tech companies to inform the Commission of small domestic acquisitions. The Commission intends to require specific tech companies that dominate different digital markets in South Africa to inform the Commission of all small domestic acquisitions, including investments in start-ups and global acquisitions of targets with some presence locally. This will enable the Commission to determine if a small merger notification is required as permitted within the legislation, but without making this mandatory in all cases as that may inhibit pro-competitive venture capital investments in start-ups.”</p> <p>The Commission's paper is accessible on the below website: http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy_7-September-2020.pdf.</p> <p>In addition to the above, the Commission is in process of amending its Small Merger Guidelines to include guidelines on the approach the Commission adopts for mergers in the Digital Economy that may not meet the existing criteria for mandatory or voluntary notification contained in the Small Merger Guidelines. As indicated, this is a work in progress, and it will be published on the Commission's website as soon as the Small Merger Guidelines have been amended.</p>

<p>C. Are documents proving the efficiencies of the transaction required? [If applicable, please provide the type of documents normally required]</p>	<p>Efficiencies are required (as a defence) in instances where the merger presents anti-competitive effects.</p>
<p>D. What information is required in case the target company is experiencing financial insolvency?</p>	<p>Annual Financial Statements of the firm over a period of years – the Commission typically considers a minimum of 3 years for failing firm assessments.</p>
<p>E. Is there a specific procedure for obtaining information from target companies in the case of hostile/ unsolicited bids?</p>	<p>Yes – Rule 28 of the Commission Rules regulates the procedure around hostile takeovers. The Commission has the power to issue Directions to require the Target firm to file merger documents separately. The procedure is set out below:</p> <p>28. Separate merger notification</p> <p>(1) A primary firm may apply to the Commission for permission to file separate notification of a merger and, on considering an application under this sub-rule, the Commission –</p> <p>(a) may allow separate filing if it is reasonable and just to do so in the circumstances;</p> <p>(b) may give appropriate directions to give effect to the requirements of the Act and in particular, specifying which primary firm must satisfy which of the requirements set out in Rule 27; and</p> <p>(c) in an appropriate case, may further permit the applicant to file any document on behalf of the other primary firm.</p> <p>(2) A primary firm may apply to the Commission for an order on good cause shown allowing it to file any document on behalf of the other primary firm, if that other primary firm has failed within 10 business days to file –</p> <p>(a) a document that the Commission or the Tribunal has ordered it to file; or –</p> <p>(b) any other document or additional information required by the Commission in terms of this Part.</p> <p>(3) If a primary firm files a Statement of Merger Information on behalf of the other primary firm, the firm that files that Statement is not required to file proof of service of a copy of that statement on the other primary firm.</p>

	<p>(4) In respect of a merger that is separately notified, the merger notification requirements of each firm will have been fulfilled when the notification requirements of their respective primary firms, as ordered by the Commission, have been fulfilled, subject to –</p> <p>(a) any Notice of Incomplete Filing in Form CC 13(2) issued to it by the Commission in terms of Rule 30, and either not appealed or confirmed on appeal; or (b) any Demand for Corrected Information in Form CC 13(4) issued to it by the Commission in terms of Rule 32, and either not appealed or confirmed on appeal.</p>
<p>F. Are there any document legalization requirements (e.g., notarization or apostille)? What documents must be legalized?</p>	<p>Affidavits need to be signed before a Commission of Oaths.</p>
<p>G. What are the agency's rules and practice regarding exemptions from information requirements (e.g., information submitted or document legalization) for transactions in which the acquiring and acquired parties are foreign (foreign-to-foreign transaction)?</p>	<p>There are no Rules to this effect.</p>
<p>H. Can the agency require third parties to submit information during the review process? Can third parties voluntarily submit information or otherwise contact the agency to intervene?</p>	<p>Yes.</p>
<p>I. Are parties allowed to submit information beyond what is required in the initial filing voluntarily (e.g., to help narrow or resolve potential competitive concerns)?</p>	<p>Yes – parties can submit any additional information to assist the Commission but these needs to be information in addition to the information required in terms of answer provided in question 8A above.</p>

J. Are there different forms for different types of transactions or sectors?	No.
<p>K. With respect to investment funds:</p> <p>i) Is it requested that an investment fund taking part in a transaction provide a statement that its controllers do not manage any other investment funds in the same relevant market?</p> <p>ii) Should an investment fund be controlled by an entity that is also responsible for other funds in the same relevant market, are such funds considered part of the transaction? Is it requested that the controlling entity provide market information (e.g., market share) related to the other funds it manages and which are in the same relevant market?</p> <p>iii) Should there be no classic concentration, is there any sort of exemption regarding presenting certain information requested in the form?</p>	<p>(i) Yes – in investment fund transactions the Commission may require the merging parties to provide an affidavit confirming that the investment fund is not invested in a competing market with the Target Firm.</p> <p>(ii) Should the investment control other entities in the relevant market, the activities of that entity will be considered in the Commission’s assessment and market share information will be required to assess the impact of the merger on competition.</p> <p>(iii) No.</p>

9. Translation	
A. In what language(s) can the notification forms be submitted?	English.
<p>B. Describe any requirements to submit translations of documents:</p> <p>i) with the initial notification; and</p> <p>ii) later in response to requests for information.</p>	The Commission conducts its business in English and therefore it requires the merging parties to provide English translated documents to enable the Commission to process the merger review.

<p>In addition:</p> <p>iii) what are the categories or types of documents for which translation is required;</p> <p>iv) what are the requirements for certification of the translation;</p> <p>v) which language(s) is/are accepted; and</p> <p>vi) are summaries or excerpts accepted in lieu of complete translations and in which languages are summaries accepted?</p>	
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10. Review Periods	
<p>A. Describe any applicable review periods following notification.</p>	<p>For Small and Intermediate Mergers – The Review Period is 20 initial business days. Should the Commission not complete its review of the merger, it may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days. The Commission therefore has a maximum of 60 business days for Small and Intermediate Mergers.</p> <p>For Large Mergers – The Review Period is 40 initial business days. Should the Commission not complete its review of the merger, 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. There is no maximum period for the review of large mergers.</p>
<p>B. Are there different rules for public tenders (e.g., open market stock purchases or hostile bids)?</p>	<p>No.</p>
<p>C. What are the procedures for an extension of the review periods, if any? Do requests for additional information suspend or re-start the review period?</p>	<p>In Large Mergers, the Commission makes an application to the Tribunal (the Commission typically requests the merging parties to consent to the application).</p>

	<p>In Intermediate Mergers, the Commission issues an extension certificate for a further period of 40 business days (please note the merging parties do not need to consent to the extension)</p>
<p>D. Is there a statutory or other maximum duration for extensions?</p>	<p>Yes – please refer to question 10A above for answers.</p>
<p>E. Does the agency have the authority to suspend review periods? Does suspending a review period require the parties' consent?</p>	<p>Yes, it does in instances of false or misleading information and/or in instances where the merger filing is incomplete. The Commission does not require the consent of the parties. Rules 29 and 32 of the Commission Rules governs this process as follows:</p> <p>32. Apparently False or Misleading Information</p> <p>(1) If, at any time, the Commission believes that a document filed in respect of a merger contains false or misleading information, the Commission may issue a Demand for Corrected Information in Form CC 13(4) to the firm that filed that document.</p> <p>(2) Within 5 business days after being served with a Demand for Corrected Information, the firm concerned may appeal to the Tribunal for an order confirming or setting aside the Demand.</p> <p>(3) If a firm does not appeal a Demand for Corrected Information within the time allowed by sub-rule (1), or if the Tribunal, on hearing the appeal, confirms the demand in whole or in part,</p> <p>(a) the firm concerned must file corrected information;</p> <p>(b) even if the Initial Period or an extension had already begun, the parties to the merger will not have fulfilled their notification requirements until that corrected information has been filed to the satisfaction of the Commission; and</p> <p>(c) the Initial Period for that merger begins anew on the day following the date on which the party concerned files replacing information to the satisfaction of the Commission.</p> <p>(4) If the Tribunal, on hearing an application in terms of subrule (2), sets aside the Demand entirely, the Demand is a nullity, and the fact that it was issued does not</p> <p>(a) delay the beginning of the Initial Period; or</p>

	<p>(b) suspend the Initial Period or any extension.</p> <p>Rule 29. Commencement of Initial Period (1) The Initial Period for a merger begins on the business day following the date on which a merger notification was filed unless – (a) the Commission issues Form CC 13(2) to the filing firm within the time allowed by Rule 30; and (b) either the filing firm does not appeal against that form, or the Tribunal, on hearing an appeal, does not set aside the form entirely. (2) If the Commission issues Form CC 13(2), and it is not set aside entirely by the Tribunal, the Initial Period for the merger begins on the business day following the date on which the filing firm subsequently files documents in response to Form CC 13(2), if as a result of that filing, the Commission subsequently issues, or is deemed to have issued, a Notice of Complete Filing in Form CC 13(1).</p>
F. What are the time periods for accelerated review of non-problematic transactions, if any?	The Commission’s Service Standards provides that the Commission will endeavour to complete the review of non-complex mergers (Phase 1) within 20 business days.
G. If remedies are offered, do they impact the timing of the review?	No – the remedies have to be finalized within the prescribed period (e.g. in Intermediate or Small mergers within 60 business days) and the Commission cannot extend the maximum period for merger reviews due to remedies.
11. Waiting periods / suspension obligations	
A. Describe any waiting periods/suspension obligations following notification (e.g., full suspension from implementation, restrictions on adopting specific measures) during any initial review period and/or further review period.	There are no waiting periods.

B. Can parties request a derogation from waiting periods/suspension obligations? If so, under what circumstances?	N/A
C. Are the applicable waiting periods/suspension obligations limited to aspects of the transaction that occur within the agency's jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent can the parties implement the transaction outside the agency's jurisdiction prior to clearance (e.g., through derogation from suspension, hold separate arrangements)?	N/A
D. Are parties allowed to close the transaction if no decision is issued within the statutory period?	Yes – Should the Commission fail to issue a decision on a Small or Intermediate Merger, that merger will be deemed as approved and the merging parties may implement same (Section 14(2) of the Competition Act).
E. Describe any provisions or procedures available to the enforcement agency, the parties and/or third parties to extend the waiting period/suspension obligation.	N/A
F. Describe any procedures for obtaining early termination of the applicable waiting period/suspension obligation, and the criteria and timetable for deciding whether to grant early termination.	N/A
G. Describe any provisions or procedures allowing the parties to close the transaction at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).	N/A

12. Responsibility for notification / representation

A. Who is responsible for notifying – the acquiring company(ies), acquired company(ies), or both? Does each party have to make its own filing?	Both – the Act requires either party to the merger to notify.
B. Do different rules apply to public tenders (e.g., open market stock purchases or hostile bids)?	No.
C. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?	No – there are no Rules in the South African Regime. Most merging companies employ the services of competition attorneys, however, some companies file to the Commission directly without employing attorneys.
D. How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized, or apostilled?	There is no requirement for the filing of a Power of Attorney. The Merger Forms indicate who the filing firm or filing party is.

13. Filing fees	
A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined (e.g., flat fee, fees for services, tiered fees based on complexity, tiered fees based on size of transaction)? [Please provide the amount in local currency and in USD as of December 31 st , 2020]	The filing fees are as follows in SA: <ol style="list-style-type: none"> 1. Small merger – R0.00 (free) 2. Intermediate merger – R165 000.00 / US\$ 11 232.13 3. Large merger – R550 000.00 / US\$ 37 440.44
B. Who is responsible for payment?	Either /both the Acquiring Firm / Target Firm
C. When is payment required?	Proof of Payment is required when the merger filing is filed with the Commission and prior to the commencement of the merger investigation.

D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?	The Commission accepts cheques or Internet Bank Transfers.
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14. Process for substantive analysis and decisions [Please give a brief summary and provide information on relevant Guidance papers]

A. What are the key procedural stages in the substantive assessment (e.g., screening mergers, consulting third parties)?	<p>The Commission conducts the following:</p> <ol style="list-style-type: none"> 1. Consults third parties (competitors, customers) 2. Consults industry bodies. 3. Desktop research 4. Quantitative data 5. Other competition authorities
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B. What merger test does the agency apply (e.g., dominance test or substantial lessening of competition test)?	The Commission tests whether the merger is likely to substantially prevent or lessen competition in the relevant market and whether the merger can/cannot be justified on public interest grounds
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C. What theories of harm does the agency consider in practice?	<p>The Commission typically considers the following, inter alia, Theories of Harm:</p> <ol style="list-style-type: none"> 1. Unilateral Effects 2. Coordinated Effects 3. Portfolio Effects 4. Vertical Effects 5. Impact on Public Interest
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D. What are the key stages in the substantive analysis? Does this differ depending on the type of transaction (e.g., joint venture)?	No.
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<p>E. Are non-competition issues ever considered (in practice or by law) by the agency? If so, can they override or displace a finding based on competition issues?</p>	<p>Yes – the Competition Act requires the Commission to consider Public Interest Issues.</p>
<p>F. What are the possible outcomes of the review (e.g., unconditional/conditional clearance, prohibition, etc.)?</p>	<p>A higher number of mergers are approved without conditions per financial year.</p>
<p>G. What types of remedies does the agency accept? Is there a preference on any particular type of remedies? How is the process initiated and conducted?</p>	<p>There is no preference for a remedy in the SA regime – the type of remedy imposed depends on the harm identified. The Commission imposes both structural and behavioural conditions as well conditions to address public interest concerns.</p> <p>The Commission engages extensively with the merging parties prior to imposing conditions and in most cases the conditions are agreed to between the Commission and the merging parties.</p>

<p>15. Confidentiality</p>	
<p>A. To what extent, if any, does the agency make public the fact that a premerger notification filing was made or the contents of the notification? If applicable, when is this disclosure made?</p>	<p>The Commission publishes merger activity updates on the website which contains information on cases filed with the Commission and the status of such cases, for the relevant financial years. The information is published at the end of each quarter on the Commission’s website. The merger activity update is contained on the below link:</p> <p>http://www.compcom.co.za/merger-and-acquisition-activity-update/.</p> <p>The Commission Rules provide that a non-confidential version of the merger filing can only be made available to the public once the Commission has made a decision on the merger (i.e. approved the merger or prohibited) or made its recommendation to the Competition Tribunal. The relevant Rule that regulates access to the Commission’s record is Rules 15 read with Rule 14(1)(c)(ii) of the Commission Rules.</p>

B. Do notifying parties have access to the agency's file? If so, under what circumstances can the right of access be exercised?

Section 44 read with section 45 of the Competition Act regulates the treatment of confidential information filed with the Commission. In essence, the parties can access the Commission's file, save for any confidential information of a third party that has been claimed as confidential in terms of the Competition Act through filing the relevant Form CC 7. The parties can also approach the Tribunal for order compelling the Commission to release third party confidential information if they make out a satisfactory case before the Tribunal. The relevant sections are quoted below for convenience:

Section 44. Right of informants to claim confidentiality

(1) (a) A person, when submitting information to the Competition Commission or the Competition Tribunal, may identify information that the person claims to be confidential information.

(b) Any claim contemplated in paragraph (a) must be supported by a written statement in the prescribed form, explaining why the information is confidential.

(2) From the time information comes into the possession of the Competition Commission, Competition Tribunal or Minister until a final determination has been made concerning that information, the Commission, Tribunal and Minister must treat as confidential, any information that is the subject of a claim in terms of this section.

(3) In respect of information submitted to the Competition Commission, the Competition Commission may—

(a) determine whether the information is confidential information; and

(b) if it finds that the information is confidential, make any appropriate determination concerning access to that information.

(4) The Competition Commission may not make a determination in terms of subsection (3) before it has given the claimant the prescribed notice of its intention to make the determination and has considered the claimant's representations, if any.

(5) A person contemplated in subsection (1) who is aggrieved by the determination of the Competition Commission in terms of subsection (3) may, within the prescribed period of the Commission's decision, refer the decision to the Competition Tribunal.

(6) The Competition Tribunal may confirm or substitute the Competition Commission's determination or substitute it with another appropriate ruling.

(7) In respect of confidential information submitted to the Competition Tribunal, the Tribunal may—

(a) determine whether the information is confidential information; and

(b) if it finds that the information is confidential, make any appropriate determination concerning access to that information.

(8) A person aggrieved by the ruling of the Competition Tribunal in terms of subsection (6) or (7) may, within the prescribed period and in accordance with the Competition Appeal Court's rules—

(a) refer the Tribunal's ruling to the Competition Appeal Court, if the Tribunal grants leave to appeal; and

(b) petition the President of the Competition Appeal Court for leave to refer the Tribunal's ruling to the Competition Appeal Court, if the Tribunal refuses leave to appeal.

(9) Unless the Competition Commission, Competition Tribunal or Competition Appeal Court holds' otherwise, an appropriate determination concerning access to confidential information includes the disclosure of the information to the legal representatives and economic advisors of the person seeking access—

(a) in a manner determined by the circumstances; and

(b) subject to the provision of appropriate confidentiality undertakings.

Section 45. Disclosure of information

(1) A person who seeks access to information that is subject to a claim or determination that it is confidential information may apply to the Competition Tribunal in the prescribed manner and form, and the Competition Tribunal may—

(a) determine whether or not the information is confidential information; and

(b) if it finds that the information is confidential, make any appropriate order concerning access to that confidential information.

(2) The provisions of section 44 (8), read with the changes required by the context, apply to the application referred to in subsection (1).

<p>C. Can third parties or other government agencies obtain access to notification materials and any other information provided by the parties (including confidential and non-confidential information)? If so, under what circumstances?</p>	<p>The above answer in 15B. equally applies to this question. The Commission is bound by claims of confidentiality and it can only release confidential information if the owner of the information consents or the Competition Tribunal compels the Commission orders the Commission to release the information.</p> <p>The Competition Act, does however, provide for access to the merger filing and subsequent correspondence to the Minister of Trade, Industry and Competition if he files a formal notice (Form CC 5(2) Notice) to participate in the merger proceedings. The relevant portion of the Rules provide the following:</p> <p>Rule 35 of the Commission Rules – Participation by Minister in Commission merger proceedings</p> <p>(1) If the Minister decides to participate in any intermediate or large merger proceedings before the Commission, the Minister must file a Minister’s Notice of Intention to Participate in Form CC 5(2) within 10 days after receiving a copy of the Merger Notice from the Commission.</p> <p>(2) Upon receipt of a Minister’s Notice of Intention to Participate in terms of sub-rule (1), the Commission –</p> <p>(a) in the case of an intermediate merger, is deemed to have issued an extension certificate for 40 business days in terms of section 14(1)(a);</p> <p>(b) must deliver a copy of the Minister’s Notice of Intention to Participate to the primary acquiring firm and the primary target firm; and</p> <p>(c) must deliver to the Minister a copy of all documents filed in connection with the merger, up to the day on which the Minister’s Notice of Intention to Participate was filed.</p> <p>(3) The Commission must deliver to the Minister any document that is filed in connection with a merger after the Minister’s Notice of Intention to Participate was filed.</p>
<p>D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.</p>	<p>The fact that a merger has been notified to the Commission cannot be kept secret. As indicated above, the party’s confidential information can be kept confidential by the Commission in line with the provisions of the Competition Act and Commission Rules as</p>

	<p>already explained above, i.e. Sections 44, 45 of the Competition Act and Rule 15 read with Rule 14 of the Commission Rules.</p>
<p>E. Can the agency deny a party’s claim that certain information contained in notification materials is confidential? Are there procedures to challenge a decision that information is not confidential? If so, please describe.</p>	<p>Yes, the Competition Act allows the Commission to make a determination on whether information claimed as confidential does amount confidential information as defined by the Act. As indicated above, section 44 provides, <i>inter alia</i>,</p> <p>(3) In respect of information submitted to the Competition Commission, the Competition Commission may—</p> <p>(a) determine whether the information is confidential information; and</p> <p>(b) if it finds that the information is confidential, make any appropriate determination concerning access to that information.</p> <p>Section 1 of the Competition Act provides a definition of confidential information and provides as follows:</p> <p><i>“1(1)(v) ‘confidential information’ means trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others.”</i></p> <p>Section 44 of the Competition Act does provide a mechanism for an aggrieved party to challenge the Commission’s finding regarding the confidentiality of their information or otherwise. In this regard, section 44(5) of the Competition Act provides the below:</p> <p>(5) A person contemplated in subsection (1) who is aggrieved by the determination of the Competition Commission in terms of subsection (3) may, within the prescribed period of the Commission’s decision, refer the decision to the Competition Tribunal.</p>

<p>F. Does the agency have procedures to provide public and non-public versions of agency orders, decisions, and court filings? If so, what steps are taken to prevent or limit public disclosure of information designated as confidential that is contained in these documents?</p>	<p>Yes. The Commission reviews all the Form CC 7s filed by the holders of information to determine what information has been claimed as confidential. As a quality control measure, the Commission also provides the merging parties an opportunity to review the Commission's proposed redacted non-confidential version before it is released to the public.</p>
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<p>16. Transparency</p>	
<p>A. Does the agency publish an annual report with information about mergers? Please provide the web address if available.</p>	<p>Yes. The Commission's Annual Reports can be accessed from the Commission's website. The website with the Annual Reports is provided below:</p> <p>http://www.compcom.co.za/annual-reports/.</p>
<p>B. Does the agency publish press releases related to merger policy or investigations/reviews? If so, how can these be accessed (if available online, please provide a link)? How often are they published (e.g., for each decision)?</p>	<p>The Commission releases a weekly media statement reflecting the decisions taken by the Commission's decision-making structure on investigations. The weekly statements are contained under the "Media Centre" tab of the Commission's website. A link of where the Weekly Statements issued by the Commission can be accessed is below:</p> <p>http://www.compcom.co.za/2021-media-releases/.</p>
<p>C. Does the agency publish decisions on why it challenged, blocked, or cleared a transaction? If available online, provide a link. If not available online, describe how one can obtain a copy of decisions.</p>	<p>Yes, this information is contained on the Commission's Weekly Statement as reflected in answer 16B above:</p> <p>http://www.compcom.co.za/2021-media-releases/.</p>
<p>E. Does the agency publish statistics, or the number of annual notifications received, clearances, prohibitions, etc.? [if applicable, please provide a link for these figures]</p>	<p>These figures are typically contained in the Commission's Annual Report and quarterly newsletters. The links to the annual reports and the Commission's newsletter is contained below:</p> <p>http://www.compcom.co.za/annual-reports/. http://www.compcom.co.za/newsletters/.</p>

17. Cooperation	
A. Is the agency able to exchange information or documents with international counterparts?	Yes, it can exchange non-confidential information with international counterparts or request the merging parties to waive confidentiality over certain information to enable the authorities to engage with other authorities on a specific merger.
B. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?	<p>In cases whereby the Competition Act applies to an industry, or sector of an industry, that is subject to regulation by another regulatory authority must be construed as establishing concurrent jurisdiction over competition matters. The Commission can enter into a Memorandum of Understanding (MoU) with other regulatory authorities to clarify how the concurrent jurisdiction where competition concerns overlap with regulatory responsibilities can be handled.</p> <p>To this extent, the Commission has entered into various MoUs with various sector regulators and foreign authorities. The Commission has entered into MoUs with foreign authorities such as:</p> <ol style="list-style-type: none"> 1. Kenya 2. Kingdom of eSwatini 3. BRICS Country Authorities 4. The European Commission 5. Mauritius 6. Russia 7. Brazil <p>The MoUs are public documents are contained in the Commission’s website: http://www.compcom.co.za/mou/.</p>
C. Does the agency need consent from the parties who submitted confidential information to share such information with foreign competition authorities? If the agency has a model	The parties need to consent in writing and confirm that they provide permission to the Commission to share their confidential information with a foreign agency.

waiver, please provide a link to it here, or state whether the agency accepts the ICN's model waiver of confidentiality in merger investigations form.	
D. Is the agency able to exchange information or documents with other domestic regulators?	The Commission can only exchange documents if the parties agree to their documents being shared with the relevant foreign authority.

18.Sanctions/penalties	
<p>A. What are the sanctions/penalties for:</p> <ul style="list-style-type: none"> i) failure to file a notification; ii) incorrect/misleading information in a notification; iii) failure to comply with information requests; iv) failure to observe a waiting period/suspension obligation; v) breach of interim measures; vi) failure to observe or delay in implementation of remedies; vii) implementation of transaction despite the prohibition from the agency? 	<p>Section 59 of the Competition Act provides that the Commission may request the Tribunal to impose a penalty of a maximum of 10% of a firm's annual turnover for breaching the provisions of the Competition Act. Therefore, that is the maximum penalty that can be imposed, but the Tribunal exercises discretion on the appropriate administrative fine.</p> <ul style="list-style-type: none"> i) The Commission has published Guidelines of its approach on the imposition of a fine for a failure notify. These are contained here: http://www.compcom.co.za/guidelines/. ii) No financial penalty – the Commission can revoke the merger if it has been approved, but if the Commission is still considering the merger it can require the parties to remedy the situation and provide corrected information. The sanction is that the Commission will start the investigation period from zero (0). iii) The Commissioner can issue a summons in terms of section 49B to appear before the Commission or provide information. iv) N/A. v) N/A. vi) The Commission can revoke the merger in terms of section 15 of the Act if there has been a breach of conditions and/or request the Tribunal to impose an administrative penalty in terms of section 59.

	vii) Implementing a prohibited merger would amount to an offence in terms of the Act and would attract an administrative penalty in terms of section 59 and a potential revocation of the merger.
B. Which party/ies (including natural persons) are potentially liable for each of A(i)-(vii)?	The merging parties who may be in breach of the provisions of the Act.
C. Can the agency impose/order these sanctions/penalties directly, or is it required to bring judicial action against the infringing party? If the latter, please describe the procedure and indicate how long this procedure can take.	The Commission is required to make an application to the Tribunal for the imposition of an administrative penalty and the revocation of a merger only. The other actions above, i.e. issuing of summons, requiring corrected information, etc, can be effected by the Commission without any judicial oversight or application.
D. Are there any recent or significant fining decisions?	None.

19. Independence	
A. Is there possibility for any ministry or a cabinet of ministries to abrogate, challenge or change merger decisions issued by the agency or by a court? If yes, to which merger decisions does this apply (e.g., any decision, prohibitions, clearances, remedies)?	<p>Section 20 of the Competition Act guarantees the independence of the Commission. It provides:</p> <p>20. Independence of Competition Commission (1) The Competition Commission – (a) is independent and subject only to the Constitution and the law; and (b) must be impartial and must perform its functions without fear, favour, or prejudice.</p> <p>As previously indicate, the Minister of Trade, Industry and Competition is entitled to participate in merger proceedings of interest to the Ministry. The Minister therefore has a right to review the Commission’s decision, akin to any other affected third-party participant, should the Minister not agree with the Commission’s decision. This right does not derogate from the independence of the Commission.</p>

<p>B. What are the grounds for such ministerial intervention?</p>	<p>As indicated, the Minister can challenge a merger decision to the Tribunal / Court if he has been a participant in the merger on public interest grounds only.</p>
<p>C. Please provide any description or guidance regarding the ministerial intervention process and procedures [If applicable]</p>	<p>The Minister can apply to the Tribunal for a Review or a Consideration of the merger in the ordinary course (Rule 32 of the Commission Rules read with section 16(1) of the Act).</p> <p>Section 16(1) provides: 16. Competition Tribunal merger proceedings (1) If the Competition Commission approves – (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.</p>

<p>20. Administrative and judicial processes/review</p>	
<p>A. Describe the timetable for judicial and administrative review related to merger transactions.</p>	<p>The Tribunal does not have a timeline to consider a Review or Consideration application of a merger. The time typically depends on the capacity of the Tribunal and the complexity of the merger.</p>
<p>B. Describe the procedures for protecting confidential information used in judicial proceedings or in an appeal/review of an agency decision.</p>	<p>The Tribunal is also bound by the provisions in section 44 and 45 of the Competition Act. The Tribunal conducts its hearings in a public forum, however, should the Tribunal need to traverse confidential information – it excludes members of the public and holds hearing in camera for that portion of the hearing. In other words, it conducts Confidential and Non-Confidential sessions as an and when required.</p>
<p>C. Are there any limitations on the time during which an appeal may be filed?</p>	<p>The Rules provides for a period of 10 business days from the date of the decision being taken.</p>

	<p>Rule 32 of the Commission Rules – Requests for consideration of small or intermediate Mergers:</p> <p>(1) A person contemplated in section 16(1) may request the Tribunal to consider the Commission’s decision in a merger in the manner allowed in that section, by filing a Request for Consideration in Form CT 4 within 10 business days after the Commission issues its decision in that merger.</p>
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21. Additional filings	
A. Are any additional filings/clearances required for some types of transactions (e.g., sectoral or securities regulators or national security or foreign investment review)?	No.

22. Closing Deadlines	
A. When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized? If yes, can the parties obtain an extension of the deadline to close?	No.

22. Post Merger review of transactions	
A. Can the agency reopen an investigation of a transaction that it previously cleared or allowed to proceed with conditions? If so, are there any limitations, including a time limit on this authority?	No. The Commission can only investigate whether the parties have breached any remedies to that merger, but it cannot revisit and assess a merger <i>de novo</i> when it has approved it.
B. Does the agency publish studies regarding ex-post analysis of reportable transactions which have been cleared by the agency? Are these studies publicly available? How does the agency obtain data for carrying out these studies?	The Commission’s Economic Research Bureau (ERB) does conduct ex-post effects studies from time to time on certain mergers. For instance, the Commission conduct an ex-post review of the Walmart / Massmart merger in 2016. ERB’s ex-post review study on Walmart / Massmart is contained in the below website: http://www.compcom.co.za/working-paper-series/ .