

# Proposed amendments to merger filing forms



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For the first time in many years, significant amendments have been proposed to the Competition Commission's merger filing forms. These forms prescribe the important strategic information and documents that merger parties must submit to the Commission when seeking approval for potential transactions.

The proposed amendments to the merger filing forms will make the preparation of merger filings substantially more onerous and time-consuming for merger parties. Firms will have to provide extensive information relating to the effect of the merger on public interest considerations, as well as more detailed information on their proposed transactions.

The proposed changes integrate the comprehensive range of amendments introduced by the Competition Amendment Act, 2018 into the merger forms. The Amendment Act introduced measures aimed at addressing high levels of economic concentration and the promotion of a greater spread of ownership, as well as the effective participation of small, medium and micro-sized enterprises (SMMEs) and firms owned or controlled by historically disadvantaged persons (HDPs) in the economy. Over the last two years, merger parties have been asked to provide extensive details on public

interest issues, and several mergers have been approved, subject to conditions related to the new provisions of the Competition Act. For example, in a recent merger involving PepsiCo and Pioneer Food Group, a B-BBEE ownership plan featured as a condition to approval of the transaction.

## Are the new merger filing forms already in effect?

No, not yet. Stakeholders and interested parties were invited to submit comments to the Minister of Trade, Industry and Competition on the proposed changes by 23 April 2021. Since the competition authorities have already been requesting most of the information included in the amended forms from merger parties, it is unlikely that the draft version of the forms will change substantially after the commentary process is complete.

## What are some of the key proposed amendments to the merger filing forms?

- Currently, public interest considerations are broad in nature, with merger filing forms simply requiring relevant facts concerning the impact of the merger on employment or other public interest issues. Merger Notice Form CC4(1) will require merger parties to provide additional detailed information on each of the public interest considerations outlined in section 12A(3) of the Competition Act.



This will, among other things, include information relating to:

- ▶ the effect of the merger on a particular industrial sector or region, including its impact on local production or manufacturing, local or regional supply chains, social and upliftment projects, local resources or inputs, regional sustainability and public policy goals;
- ▶ the effect on employment, including the number of employees that are likely to be affected, their skill level or position, details of the rational process followed to determine the number of jobs to be lost, and any countervailing public interest arguments that may mitigate the negative effects on employment;
- ▶ the ability of SMEs or HDP firms to effectively enter into, participate in or expand within the market, and whether the merger will raise barriers to entry for these firms in any relevant markets;
- ▶ the ability of national industries to compete in international markets;
- ▶ the promotion of a greater

spread of ownership; in particular, whether the merger increases levels of ownership by HDPs and workers in firms in the market (and if not, reasons for this), information on whether employee share schemes are in place, and the extent of employee participation at board level.

- In terms of the proposed amendments to the Statement of Merger Information Form CC4(2), additional documents and more detailed information relating to the transaction (such as the contemplated timing of suspensive conditions) will need to be submitted. Additional information and documents will also have to be provided if the merged entity's market shares will be equal to or more than 35% post-merger, as well as details of the ability of any party to the merger to appoint directors at another firm, operating in a related market.

While the clarity provided by the proposed amendments to the relevant merger forms is welcomed, an unfortunate outcome is likely to be that

the preparation of merger filings will become substantially more onerous for parties to notifiable mergers, potentially resulting in delays and higher costs of transactions in South Africa. The proposed amendments would require a move away from the current reactive approach of merger parties responding to information requests after a merger filing is submitted, to one where parties are more proactive in providing detailed public interest and transaction-related information to the competition authorities upfront. Conversely, this could mean that the Commission will issue fewer information requests, since substantially more detailed information has been provided in advance. This could save time and result in a faster approval process. ■

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## Independent escrow and treasury intermediary support vital during financial restructuring

**C**ompanies that are financially restructured, as well as funders, lawyers and other interested parties, can avoid pitfalls and benefit from independent escrow and treasury intermediary services.

The ongoing effect of COVID-19 has led to an increasing number of companies requiring financial restructuring, with some potentially needing to enter business rescue. According to the latest available Companies and Intellectual

Property Commission's figures, 233 companies started business rescue proceedings between April and October 2020, up from 216 in the same period 2019. As the fall-out from COVID-19 becomes clearer and potentially more

