

NOTICE 1246 OF 2008**DEPARTMENT OF TRADE AND INDUSTRY****DETERMINATION OF MERGER THRESHOLDS AND METHOD OF CALCULATION**

In terms of section 11 of the Competition Act, 1998 (Act No. 89 of 1998), the Minister of Trade and Industry, in consultation with the Competition Commission, intends to:

- (a) withdraw the determination of merger thresholds and method of calculation published by Government Notice No. 254 of 1 February 2001, as amended by Government Notice No. 930 of 7 May 2001; and
- (b) make a new determination for merger thresholds as set out in the Schedule hereto.

Interested persons are invited to submit written comments regarding the proposed determination by 31 October 2008 to:

Director-General, Department of Trade and Industry
Private Bag X84
Pretoria
0001

or

77 Meintjies Street
Block B, 1st Floor (CCRD)
Sunnyside
Pretoria

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For attention: Segoane Monnye

SCHEDULE

Part A

Determination of Thresholds

Definitions

1. In this notice any word or expression to which a meaning has been ascribed in the Act bears the same meaning as in the Act unless the context indicates otherwise, and

“GAAP” means the South African Generally Accepted Accounting Practice;

“the Act” means the Competition Act, 1998 (Act No. 89 of 1998); and

“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).

Lower thresholds

2. The lower threshold required to be determined in terms of section 11 of the Act is reached in respect of a merger if the value of that merger equals or exceeds both of the values set out in sub-items (1) and (2):

(1) Either -

- (a) the combined annual turnover in, into or from the Republic of the acquiring firms and the transferred firms is valued below R 560 million;
- (b) the combined assets in the Republic of the acquiring firms and the transferred firms are valued at less than R 560 million;
- (c) the annual turnover in, into or from the Republic of the acquiring firms plus the assets in the Republic of the transferred firms are valued at less than R 560 million; or

- (d) the annual turnover in, into or from the Republic of the transferred firms plus the assets in the Republic of the acquiring firms are valued at less than R 560 million.
- (2) Either -
 - (a) the annual turnover in, into or from the Republic, of the transferred firms is less than R 80 million; or
 - (b) the asset value of the transferred firm is less than R 80 million.

Higher thresholds

3. The higher threshold required to be determined in terms of section 11 of the Act is reached in respect of a merger if the value of that merger equals or exceeds both of the values set out in sub-items (1) and (2):

- (1) Either -
 - (a) the combined annual turnover in, into or from the Republic of the acquiring firms and the transferred firms is valued at or above R 6,6 billion;
 - (b) the combined assets in the Republic of the acquiring firms and the transferred firms are valued at or above R 6,6 billion;
 - (c) the annual turnover in, into or from the Republic of the acquiring firms plus the assets in the Republic of the transferred firms are at or above R 6,6 billion; or
 - (d) the annual turnover in, into or from the Republic of the transferred firms plus the assets in the Republic of the acquiring firms are at or above R 6,6 billion.
- (2) Either -
 - (a) the annual turnover in, into or from the Republic, of the transferred firms is valued at or above R 190 million; or
 - (b) the asset value of the transferred firm is valued at or above R 190 million.

4. The provisions of the Act in respect of:

- (a) a small merger, apply to a merger if it falls below either value of the lower threshold;

- (b) an intermediate merger, apply to a merger if -
 - (i) it equals or exceeds both values of the lower threshold; but
 - (ii) falls below either value of the higher threshold; and
- (c) a large merger, apply to a merger if it equals or exceeds both values of the higher threshold.

Part B

Method of Calculation

Generally accepted accounting practices apply

5. 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.

Valuation of Assets

6. 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 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, joint venture, asset, shares or any other interest not shown on those financial statements, or divested itself of any subsidiary company, associated company, joint venture, asset, shares or any other interest shown on those financial statements -
- (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

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 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.

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- (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 made, the firm has acquired any subsidiary company, associated company, or joint venture, asset, shares or any other interest not shown on those financial statements, or divested itself of any subsidiary company, associated company, joint venture, asset, shares or any other interest shown on those financial statements -
- (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
 - (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.
- (4) If the financial statements used as a basis for calculating turnover or the turnover included in terms of sub-item (3) are for more or less than 12 months, the values recorded on those statements must be pro-rated to the equivalent of 12 months.

Combined valuation of firms

8. (1) If the acquiring firm is a subsidiary of a group of companies as contemplated in the Companies Act, 1973 (Act No. 61 of 1973) for the purposes of calculations required in terms of this notice -
- (a) the combined assets of the firms that are part of that group, and the combined turnover of those firms, must be consolidated; and
 - (b) the consolidated assets and turnover of the group are to exclude turnover or assets arising as a result of transactions by one part of the group with another part of the same group.
- (2) If the transferred firm controls any other firm or business for the purposes of calculations required in terms of this notice -
- (a) the combined assets of those firms and businesses, and their combined turnover, must be consolidated; and
 - (b) the consolidated assets and turnover of the group are to exclude turnover or assets arising as a result of transactions by one part of the group with another part of the same group.

Form of financial statements

9. (1) Financial statements used as a basis for calculating assets or turnover of a firm must -
- (a) be the firm's audited financial statements, if, -
 - (i) in terms of any law, the firm is required to produce such statements; or
 - (ii) the firm has audited statements for the relevant period;
 - (b) otherwise, be prepared in accordance with G.A.A.P.

EXPLANATORY NOTE: DETERMINATION OF THRESHOLDS AND METHOD OF CALCULATION

Section 11 of the Competition Act 1998 (Act No. 89 of 1998) requires that the Minister of Trade and Industry specify two thresholds (lower and higher) and a method for the calculation to be applied in relation to those thresholds, to determine whether a merger is classified as large, intermediate or small.

Transactions with asset values and turnover exceeding the higher threshold are classified as "large", those that lie between the two thresholds are classified "intermediate" and those below the lower threshold are considered "small". This classification determines whether a merger requires notification, and the process of approval by the competition authorities.

Large and intermediate mergers have to be notified to the Competition Commission and may not be consummated until they are approved. The Commission approves intermediate mergers and makes a recommendation on large mergers to the Competition Tribunal. Small mergers do not require notification, although parties may do so voluntarily and the Commission has the power to require notification prior to implementation.

Merger thresholds and the method of calculation were determined by the Minister in 2001, with the publication of Notice 254 of 1 February 2001, and amended by Notice 930 of 7 May 2001.

The Minister, after consultation with the Competition Commission intends to withdraw Notice 254 and replace it with the attached notice. In doing so, the Minister would like to highlight that although the formatting and numbering of Notice 254 has been amended, material changes are proposed only in respect of the following items of Notice 254:

1. Items 1(a)(i) to (iv) of Determinations of Thresholds, by substituting the amount of R200 million with R 560 million;
2. Items 1(b)(i) and (ii) of Determinations of Thresholds, by substituting the amount of R30 million with R80 million;
3. Items 2(a)(i) to (iv) of Determinations of Thresholds, by substituting the amount of R3,5 billion with R 6,6 billion;
4. Items 2(b)(i) and (ii) of Determinations of Thresholds, by substituting the amount of R100 million with R 190 million;