

SOUTH AFRICA - MERGER CONTROL QUICK FACTS

1. WHAT TRANSACTIONS REQUIRE MANDATORY NOTIFICATION?



A “merger” (as defined) which has an effect within South Africa must be notified where:

- the acquiring and target firms have combined turnover or assets (whichever combination is the higher) of ZAR 600 million or more; and
- the target firm has turnover or assets (whichever is the higher) of at least ZAR 100 million.

2. HOW IS THE THRESHOLD CALCULATED?

The turnover and asset values are determined with reference to the most recent audited financial statements of the merger parties and as follows:

- the only relevant turnover is turnover in, into or from South Africa;
- the only relevant assets are assets in South Africa;
- in the case of the acquiring firm, the entire group of which the acquiring firm forms a part must be taken into account in doing the asset and turnover calculation; and
- in the case of the target firm, only the firm that is transferred is taken into account and any firms that it controls.

3. WHAT ABOUT MERGERS BELOW THE THRESHOLD?

Mergers which fall below the threshold in point 1 are generally not notified and are called small mergers.

BUT, if the Commission is of the opinion that the small merger:

- may substantially prevent or lessen competition; or
- cannot be justified on public interest grounds, it is entitled to call upon the parties to notify the merger within six months after the merger has been implemented.

A merger guideline also provides that a small merger may need to be notified if, at the time of entering into the transaction, any of the firms, or firms within the group are:

- subject to an investigation (in respect of prohibited conduct such as cartel conduct, resale price maintenance or abuse of dominance); or
- respondents to pending proceedings before the competition authorities.

4. WHAT ARE THE NOTIFICATION FEES?



The notification fee is dependent upon whether a merger is categorised as intermediate, large or small.

- intermediate: the acquiring and target firms have combined turnover or assets (whichever combination is the higher) of ZAR 600 million or more and the target firm has turnover or assets (whichever is the higher) of at least ZAR 100 million.
- large: the acquiring and the target firms have combined turnover or assets (whichever combination is the higher) of ZAR 6.6 billion or more and the target firm has turnover or assets (whichever is the higher) of at least ZAR 190 million.

Notification fees:

- no filing fee is payable in respect of small mergers;
- ZAR 165,000 for intermediate mergers; and
- ZAR 550,000 for large mergers.

5. WHAT IS THE TIMEFRAME FOR REVIEW?



The timeframe for review depends on the categorisation of the merger.

- small / intermediate: the authority has a maximum of 60 business days to make a decision.
- large: the time-frame is open-ended.

6. MAY THE PARTIES IMPLEMENT BEFORE MERGER APPROVAL IS OBTAINED?

- NO

The merger control regime is suspensory and parties may not implement prior to approval being provided.

7. WHAT IS CONSIDERED IN THE MERGER REVIEW ASSESSMENT?

In terms of what the authorities are required to consider in a merger assessment, there are two main considerations:

- whether or not the proposed transaction is likely to “substantially prevent or lessen competition”. If it appears that the proposed transaction is likely to “substantially prevent or lessen competition”, then the authorities may determine whether or not the proposed transaction is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and will off-set, the effects of any prevention or lessening of competition that may result or is likely to result from the proposed transaction,

and would not likely be obtained if the proposed transaction is prevented; and

- whether the proposed transaction can or cannot be justified on substantial public interest grounds.

8. WHAT ARE THE RISKS OF NOT NOTIFYING?



The merger parties may:

- face an administrative penalty of up to 10% of annual turnover in South Africa and exports from South Africa during the preceding financial year; and
- be ordered to sell any shares, interest or other assets it has acquired pursuant to the merger (i.e. divestiture) and any provision of an agreement to which the merger was subject may be declared void.

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