



**MERGERS & ACQUISITIONS DIVISION**

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**EXPLANATORY NOTE ON THE NEW MERGER THRESHOLDS**

## **Background:**

During 2015 the Namibian Competition Commission (“the Commission”) reviewed the merger notification thresholds contained in Government Notice 307 of 24 December 2012. The review took into account a wide range of factors including: the International Competition Network’s (“the ICN”) Recommended Practices<sup>1</sup>, the thresholds of similarly situated jurisdictions and past experience.

The reviewed thresholds were published in Government Notice 307 on 21 December, 2015.

## **The ICN Recommended Practices:**

One of the recommended practices is that jurisdictions should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. The thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required, such as material sales or asset levels within the territory of the jurisdiction concerned.<sup>2</sup>

Another recommended practice is that the determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory. Notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned. This criterion may be satisfied if each of at least two parties to the transaction have significant local activities.<sup>3</sup>

## **The 2012 Thresholds:**

The first thresholds were published in Government Notice 307 on 24 December 2012. According to the Notice, if any of the combined values (i.e. any combination of the assets and turnovers of the undertakings involved) was more than N\$20 million or either the assets or turnover of the target undertaking was more than N\$10 million, the transaction was notifiable to the Commission.

This meant that the notification thresholds could be met by the acquiring undertaking alone if either its assets or turnover was more than N\$20 million or by the target undertaking alone if either its assets or turnover was more than N\$10 million. This resulted in very small transactions involving the acquisition of target undertakings with miniscule assets and turnovers by acquiring undertakings with assets or turnovers of over N\$20 million meeting the notification thresholds.

The 2012 thresholds were, therefore, not in line with the above mentioned recommended practices. Transactions that were unlikely to have a significant economic effect in Namibia remained notifiable to the Commission as the practical effect of the thresholds was that only one undertaking (either the acquiring undertaking or the target undertaking) needed to have significant assets or turnover in Namibia for the transaction to be notifiable.

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<sup>1</sup> ICN Recommended Practices for Merger Notification Procedures, 2002

<sup>2</sup> Ibid at p. 1

<sup>3</sup> Ibid at p. 2

## The 2015 Thresholds:

Government Notice 307 of 21 December 2015 is meant to address the shortcomings of the 2012 thresholds by creating two thresholds which must both be met for the transaction to be notifiable to the Commission:

- A N\$30 million threshold for the combined values of the undertakings involved (regulation 2(1) of the Notice); and
- A N\$15 million threshold for the value of the transferred undertaking (regulation 2(2) of the Notice).

According to the Notice, only if any of the combined values (i.e. any combination of assets and turnovers of the undertakings involved) is more than N\$30 million **and, in addition thereto**, either the assets or the turnover of the transferred undertaking is more than N\$15 million, will the transaction be notifiable to the Commission.

Put differently, if either the N\$30 million threshold contained in regulation 2(1) or the N\$15 million threshold contained in regulation 2(2) is not met, the transaction is not notifiable to the Commission (i.e. it falls within a class of mergers excluded from Chapter 4 of the Competition Act).

### Example:

Acquiring Undertaking		Transferred Undertaking	
Turnover	N\$15 million	Turnover	N\$4 million
Assets	N\$25 million	Assets	N\$9 million

Regulations		
Combined values	Calculation	Below or above threshold
<b>2(1)(a)</b> – the <b>combined annual turnover</b> in, into or from Namibia of the acquiring undertaking and transferred undertaking is equal to or valued below <b>N\$30 million</b>	N\$15 mil + N\$4 mil = <b>N\$19 mil</b>	Below
<b>2(1)(b)</b> – the <b>combined assets</b> in Namibia of the acquiring undertaking and transferred undertaking are equal to or valued below <b>N\$30 million</b>	N\$25 mil + N\$9 mil = <b>N\$34 mil</b>	<b>Above</b>
<b>2(1)(c)</b> – the <b>annual turnover</b> in, into or from Namibia of the acquiring undertaking <b>plus the assets</b> in Namibia of the transferred undertaking are equal to or valued below <b>N\$30 million</b>	N\$15mil + N\$9 mil = <b>N\$24 mil</b>	Below
<b>2(1)(d)</b> - the <b>annual turnover</b> in, into or from Namibia of the transferred undertaking <b>plus the assets</b> in Namibia of the acquiring undertaking are equal to or valued below <b>N\$30 million</b>	N\$4 mil + N\$ 25mil = <b>N\$29 mil</b>	Below
Transferred undertaking's values	Value	Below or above threshold
<b>2(2)(a)</b> - the <b>annual turnover</b> in, into or from Namibia, of the transferred undertaking is equal to or valued below <b>N\$15 million</b>	<b>N\$4 mil</b>	Below
<b>2(2)(b)</b> - the <b>asset value</b> of the transferred undertaking in Namibia is equal to or valued below <b>N\$ 15 million</b>	<b>N\$9 mil</b>	Below

In the above example, the value of the merger falls above the threshold contained in regulation 2(1) but below the threshold contained in regulation 2(2). Because it falls below one of the thresholds, it falls within the class of mergers excluded from Chapter 4 of the Competition Act and the merging parties are not required to notify the merger to the Commission.

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