Public Consultation on Merger Guide

The Commission recently conducted a public consultation on its draft Merger Guide. The guidelines contained therein, detail the analytical and procedural framework to be followed by the Commission when reviewing a merger under the Fair Competition Act. The Merger Guide was developed specifically to assist businesses, their advisers and the general public in understanding the goals, objectives and processes for regulatory merger review in Barbados.

The consultation process was aimed at encouraging the widest possible discussion on the issues addressed in the document with the hope that a more informed and inclusive Merger Guide could be compiled.

The responses received were small in number but quite insightful, reflecting a high level of understanding of the key concepts addressed in the document. The Commission welcomed all of the comments received and wishes to publicly thank those agencies which took the effort to respond to the document. All comments received will be considered in developing the final document.

One of the key issues wherein respondents displayed some uncertainty was on the question of ‘threshold market share’. Respondents appeared unclear as to the manner in which the Commission would determine whether the combined market shares of the merging firms was in excess of threshold market share (40% of the market in which they were operating), thereby requiring them to seek the permission of the Commission to undertake the merger.

This article seeks to describe this process in order to bring a greater sense of clarity to the issue.

Determination of Market Share

The key factor to be determined prior to the start of a merger investigation is whether the merger transaction will account for more than 40% of the market in which it competes. If it does the merging parties are required to make an application to the Commission for permission to merge.

To determine the relevant market share of the merging firms, a clear and unambiguous definition of the relevant market must be done. The relevant market always includes the merging firms’ competitors, imports of substitutable products, and all consumers who might constrain the price and output decisions of a merged firm.

Generally, a market can be described as the smallest area over which a hypothetical monopolist (the single supplier in the market) could exercise a significant degree of market power. In making this assessment the Commission will often consider a simple question - if the hypothetical monopolist was to give less and charge more, what would happen? If consumers decided to buy closely substitutable products, then those substitute products would be included in the market.

In defining a market the Commission will ordinarily consider substitution possibilities over the longer term, but still in the foreseeable future. The Commission will not ordinarily focus its attention upon a short-run transitory situation that may result from a merger.

A market will usually be defined according to:

- The products (i.e. goods and services) supplied by the merged firm, and sources, or potential sources, of substitute products;
- The geographic area over which the merged firm and its rivals currently supply, or could supply, the product(s).
- The relevant activity involved, whether manufacturing, wholesaling, retailing, or combinations of these.

After defining the relevant market(s) the Commission will calculate the market shares of the leading firms. To calculate market shares the Commission will ordinarily consider the following matters:

- The value of the product(s) supplied by each market participant; and
- The volume of the product(s) supplied by each market participant.

Imports will be included in the calculation of market shares. For example, where a company is an importer and a local manufacturer, the two types of supply will be treated as a single market share.

When calculating the likely combined market share of the merging firms, the Commission will simply add the separate market shares of these firms. If this figure exceeds 40% of the total value or volume of the total defined market, then the merger must be assessed by the Commission. If it is less than 40%, the Commission is unlikely to take any further interest in the transaction. It is important to note however that, the Commission reserves the right to investigate any transaction regardless of market share, which is likely to have a substantial impact on competition in any domestic market.

It is hoped that this explanation provides a clearer understanding of the procedure surrounding the determination of whether the merging firms’ market share meets the threshold necessitating an application to the Commission.

For further information, please contact the Commission at 424-2FTC.