Merger Transactions Under the Fair Competition Act

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The Commission has noted with interest the recent upsurge in merger activity in the commercial banking sector in Barbados. It is clear from this recent activity, that there is a move to consolidate operations in this area in order to respond to the competitive pressures which exist in the market.

The Commission will always approve of activity that stimulates competition, and mergers represent perhaps the most effective means of increasing market share whether through assimilating the share of a rival, or creating the scale of output that will allow firms to better compete for market share.

Most of the recent mergers have fallen below the threshold level of 40% market share, the level at which the merging firms are required to seek the approval of the Commission to merge. Nevertheless, it is important that amidst this resurgence in activity that firms are aware of their obligations and responsibilities with regard to merger transactions under the competition legislation in Barbados.

It is important first of all to understand the type of transactions that constitute a merger. The law describes a merger as:

“The cessation of two or more enterprises from being distinct, whether by amalgamation, by one or more of the enterprises acquiring control over another or otherwise.”

Section 6 of the Act also states that the Commission has the power to prohibit the acquisition of one company by another company, and the acquisition of the assets of one company by another company.

The range of transactions therefore falling under the jurisdiction of the Commission includes several different types of combinations and arrangements. The most obvious example is where a company proposes to buy a majority shareholding or a significant minority shareholding in another company. However, a merger subject to the Act may also include

the purchase of assets such as businesses, plant and equipment, intellectual property or the formation of a joint venture.

The key merger prohibition is found in Section 20(1) of the Fair Competition Act (Act), which states:

“From the commencement of this Act, all mergers by an enterprise that

(a) by itself controls, or

(b) together with any other enterprise with which it intends to effect the merger is likely to control not less than 40 per cent of any market or other such amount of the market as the Minister may by Order prescribe are prohibited unless permitted by the Commission in accordance with this section.”

Section 20(2) also states that if an enterprise wishes to effect a merger, an application must be made to the Commission for permission to do so.

Based on these provisions Barbados can be said to have a mandatory notification system, which requires parties to contact the Commission once the transaction meets the threshold level established.

Parties are strongly encouraged to approach the Commission on a formal or informal basis, as soon as a proposed acquisition that may be subject to the Act is certain to proceed, and to do so well before the completion of any merger.
Merging parties that believe a proposed merger will breach the 40% market share threshold should as early as possible provide the Commission with the requisite information using the Merger Application Form (Schedule of Statutory Instrument 2009 No. 104). This form requires information such as the background of the companies, the reasons for the transaction, the efficiencies to be generated as well as supporting financial information. This information will help the Commission to make a final decision on the matter in a timely manner.

Once the transaction is placed before the Commission, an investigation into the proposed merger is conducted. The Commission examines the

transaction giving consideration to whether the merger is likely to:

- create a firm with market power or market dominance, or is likely to enhance the existing power or dominance of a firm;

- reduce the availability of closely substitutable goods or services after the merger is completed; or

- cause substantial harm to competition, consumers and the economy of Barbados.

If a proposed merger does raise substantial competition concerns the Commission may still permit the merger to proceed if it can be demonstrated that the merger is likely to bring about significant efficiency gains that can more than offset the competition concerns.

If a proposed merger is not permissible in its existing form, in some instances the Commission will indicate to the parties how its concerns might be remedied by modifying the proposal so that the merger does not contravene the Act.

If the merger parties also consider that the transaction could be modified to reduce or eliminate the Commission’s concerns, they may choose to offer the Commission binding undertakings aimed at restructuring the proposal to address the problem areas identified. If this occurs the Commission will permit the merger. These actions are designed to reduce the anti-competitive detriment associated with the proposed merger.

However, if upon the conclusion of its investigation and the exhaustion of possible remedies, the Commission determines that a proposed merger is likely to contravene the Act it will serve a copy of its findings on the applicant indicating that completion of the merger is prohibited.

Generally the prohibition of a merger is a last resort and is rare among competition authorities. For example, the European Commission last year reported that it had prohibited 21 mergers out of approximately 4,500 transactions reviewed since the European Union Merger Regulation came into force in September 1990. Similarly, the Fair Trading Commission recognises the importance and value of mergers to economic activity and only in circumstances where the detriment to competition is overwhelming, is the transaction likely to be prohibited.