

Merger Thresholds

The Setting of a Merger threshold: No simple matter

For clarity of interpretation the law must always be certain. Any waffling and the line between what is lawful and unlawful gets blurred. With this in mind the Fair Competition Act states explicitly that only those mergers likely to control in excess of 40% of any market must be approved by the Commission. This article attempts to briefly analyse the rationale behind the setting of these thresholds.

Firstly it must be recognized that all mergers will not present a potential for the lessening of competition. This is because the sizes of the enterprises effecting a merger and the resulting union may be so small that they do not significantly alter the existing concentration of the related markets. The size of the enterprises or the merger unions that need to be targeted by a country's legislation should be consistent with those that have the potential to significantly lessen competition. A threshold too low will mean that too many inconsequential mergers will have to be scrutinised at the increased expense of the tax payer, whilst too high a threshold will allow mergers that are likely to have a detrimental effect on competition to be missed.

Size of the Economy

It is sometimes argued that merger regulation and by extension low merger thresholds are not appropriate for small open economies like Barbados. This view is based on the fact that the 'openness' of our markets forces domestic firms to compete with international companies domestically and internationally. As such our inherently micro-sized undertakings should be encouraged to merge in order to develop the 'mass' necessary for the economies of scale required to compete in international markets. Stringent merger controls it is felt will stifle this.

The opposing view is that merger regulation is not intended to prohibit merger undertakings. In fact most mergers are approved because of their pro-competitive benefits, and in addition the scrutiny of these mergers is a responsibility of good governance in seeking to safeguard the interests of domestic consumers.

Size of industries

The size

of the particular industries within a country is also paramount. The merger threshold must be related to the average size of the domestic industries. By being aware of the general size (gross output value) of the industries and the sizes (gross turnover) of the respective firms in those industries, one then has a base from which one can begin to compute a nominal value threshold that ensures that all potentially dominant mergers can be reviewed.

If the

various domestic industries are vastly different in size one may not wish to set a nominal dollar-threshold that caters to firms across all sectors. In such circumstances one may wish to consider a percentage estimate, which will vary in nominal value from sector to sector.

Market orientation

When one

is seeking to estimate effective merger thresholds one must also give consideration to the market orientation of the various industries, whether they are export or import oriented. Special consideration must be given to those industries in the import oriented non-traded sector (in Barbados these are Construction, Utilities, Distribution, Mining and Quarrying, Transport Storage and Communications, Business services, General Services, and Government). Merger thresholds in these industries will have the greatest potential to manage anti-competitive risks in the domestic market. In Barbados, mergers in the traded sector (e.g. Non-Sugar Agriculture, Tourism and Manufacturing), the products of which are largely destined for international markets, may want to be encouraged to increase their concentration of power and likewise their opportunity to penetrate overseas markets.

International Comparisons

In reviewing the merger thresholds of countries worldwide, it was observed that several countries tended to have similar provisions. The majority have nominal dollar-value thresholds above which all potential mergers have to be reviewed. Several countries also have established nominal thresholds for the individual firms involved in the merger regardless of the final merged company size. These are thought to be more easily interpreted by the enterprise. On the other hand several countries like Barbados also have established percentage market-share thresholds for the resulting merged company as well as the individual firms involved.

Other

countries like Canada

have a more detailed process, establishing specific thresholds for the various types of business unions undertaken. In addition there is also the case where no specific nominal value is established in the Act, but rather reference is made to a figure set by the regulator. This allows for some flexibility, but may reduce the certainty of the prevailing business environment.

There is

no hard and fast rule. All approaches have their relative advantages, and disadvantages. Even a combination of the above does not eliminate all the concerns.

If you have any queries about fair competition, please contact the Commission at 421-2FTC or 421-2832.