

This document was submitted by the Fair Trading Commission to the International Competition Network as part of a Merger Notification and Procedures Project. It sets out the jurisdiction of the Commission in mergers and examines procedural matters such as scope of the initial merger filing and timing of merger reviews.

## INFORMATION ON MERGER NOTIFICATION AND PROCEDURES

### 1. Merger notification and review materials

<b>A.</b>	<b>What are your Merger Notification Provisions?</b>	<p>Section 20 of Fair Competition Act, 2002-19 outlines the merger notification provisions.</p> <p>Pre-merger notification is mandatory for all mergers that are of a size in excess of the threshold set in the Fair Competition Act 2002-19.</p> <p>Generally enterprises are encouraged to voluntarily seek notification if they are unclear whether their market share is beyond that set by the Fair Competition Act.</p> <p>If enterprises have proceeded to merge without the prior approval of the Commission, the Commission may direct the enterprises concerned to have the merger assessed by the Commission in accordance with the Act within such time as specified in the direction.</p>
<b>B.</b>	<b>Are there any Notification forms or information requirements?</b>	<p>Merger applications are to be filed on Merger application forms.</p> <p style="padding-left: 40px;">Form A - Merger Notification Form Form B - Merger Clearance Form</p>
<b>C.</b>	<b>What are the substantive merger control provisions?</b>	<p>Fair Competition Act, 2002-19 Section 20. (1): "From the commencement of this Act, all mergers by an enterprise that</p> <p style="padding-left: 40px;">(a) by itself controls, or</p> <p style="padding-left: 40px;">(b) together with any other enterprise with which it intends to effect the merger is likely to control</p> <p>not less than 40 percent of any market for goods and services in Barbados or such other amount of the market as the Minister may by Order prescribe are prohibited unless otherwise permitted by the Commission in accordance with this section."</p>
<b>D.</b>	<b>Are there any Implementing regulations?</b>	None
<b>E.</b>	<b>Are Interpretive guidelines and notices currently available?</b>	Merger guidelines are currently being prepared.

### 2. Authority responsible for merger enforcement.

<b>A.</b>	<b>What authority is responsible for merger enforcement?</b>	Fair Trading Commission
-----------	--	-------------------------

B.	<b>Address, telephone and fax (including country code), e-mail, website address and languages available.</b>	Manor Lodge, Lodge Hill, St. Michael, Barbados <i>Fax (246) 424 - 0300</i> <i>Tel: (246) 424 - 0260</i> E-mail: <a href="mailto:info@ftc.gov.bb">info@ftc.gov.bb</a> Website address: <a href="http://www.ftc.gov.bb/">http://www.ftc.gov.bb/</a> Language: English
C.	<b>Is agency staff available for pre-notification consultation?</b>	Yes
D.	<b>Identify the contact person for questions on merger filing requirements and/or consultations.</b>	Director of Fair Competition Fax (246) 424 - 0300 Tel: (246) 424 - 0260 <a href="mailto:info@ftc.gov.bb">info@ftc.gov.bb</a>

### 3. Notification requirements

A.	<b>Is notification mandatory pre-merger?</b>	Yes, for enterprises at or beyond the established threshold.
B.	<b>Is notification mandatory post-merger?</b>	No
C.	<b>Can parties make a voluntary pre or post-merger filing even if filing is not mandatory?</b>	Any party can make a pre or post filing voluntarily, but pre merger filing is mandatory for those beyond the threshold

### 4. Merger transactions

A.	<b>Which merger transactions are covered by the legislation?</b>	<ul style="list-style-type: none"> <li>The cessation of two or more enterprises from being distinct, whether by amalgamation, or by one or more enterprises acquiring control over another or otherwise; and</li> <li>The engagement in a joint venture between enterprises which result in two or more enterprises ceasing to be distinct entities.</li> </ul>
B.	<b>How is control defined?</b>	Company A obtains a controlling interest in Company B by securing a shareholding carrying more than 50% of the voting rights in the company;  Company A obtains a shareholding sufficient to control the policy of Company B; or  Company A acquires a shareholding sufficient to materially influence the policy of Company B.
C.	<b>Are partial (less than 100%) stock acquisition/minority shareholdings covered? At what levels?</b>	Yes (as at 4B)
D.	<b>Do the notification requirements cover production joint ventures or</b>	Joint ventures are considered to the extent that the transaction between the enterprises means that one of them will cease to be distinct.

	any other type of joint venture?	
E.	Are any sectors excluded from notification requirements? If so, which sectors?	No
F	Are transactions that do not meet merger notification thresholds subject to substantive merger control?	No

### 5. Thresholds for notification

A.	What are the general thresholds? Are the thresholds subject to adjustment: (e.g. annually for inflation)?	S 20 (1) (a) (b) Fair Competition Act, as at question 1c above.  The thresholds are not subject to adjustment.
B.	To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?	No specific time is mandated.  The Fair Trading Commission will assess the market shares at the time of investigation.
C.	Describe methodology for identifying and calculating and values necessary to determine if notification is required, including:	The Fair Trading Commission will, having defined the relevant markets, add the individual market shares of all businesses in the market, to determine the proportionate market shares of the relevant enterprises. The criteria used to determine these shares will be the respective value and volume of product turnover of the enterprises.
i.	The methodology for identifying and calculating the value of the transaction, if applicable.	The methodology is as at 5c above. In regard to this there is no formal additional guidance by the Commission for parties to determine their market shares but parties can seek the guidance of the Commission at any time in order to clarify any issues including clarification of market shares.
ii.	The methodology for identifying and calculating relevant sales or turnover, if applicable.	As per the enterprise's audited financial records from the company's most recent financial year.
iii.	The methodology for identifying and calculating the value of relevant assets, if applicable.	N/A
iv.	Methodology for calculating exchange rates.	N/A
D.	Do thresholds apply to worldwide sales/assets, or to sales/assets within the	The thresholds are calculated in reference to the Barbados Market, or a section of that market as applicable.

	<b>jurisdiction, or both?</b>	
E.	<b>How is the nexus to the jurisdiction determined? If based on an “effects doctrine,” please how this is applied?</b>	Domestic presence used to conduct business in Barbados, and the relevant market shares as established in the Act.
F.	<b>If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?</b>	Sales are allocated according to the location of the customers.  Exported goods are assessed in relation to the domestic firms’ abilities to divert such goods into the domestic market in response to price signals.
G.	<b>If there are market share tests, are there guidelines for calculating market shares?</b>	Yes, as at 5C.
H.	<b>If there are market share tests, do they apply even if there is no horizontal overlap in the parties’ activities, either in the jurisdiction or worldwide?</b>	The market share test relates to each enterprise involved in the merger as well as the union of the enterprises and therefore applies even where there is no horizontal overlap.
I.	<b>Describe the methodology for determining relevant undertakings/firms for threshold purposes (e.g., group-wide? Only the acquired entity? If based on control, how is control determined?).</b>	There is no set methodology for determining relevant firms. Each case is assessed in relation to the market shares of undertakings or subsidiaries that operate continuously in the market being investigated.
J.	<b>Are there special threshold calculations for joint ventures?</b>	No
K.	<b>Are there special threshold calculations for particular sectors? (e.g.; banking, airlines) of particular types of transactions (e.g. partnerships, financial investments)</b>	No

**6. Transactions in which the acquiring and acquired parties are foreign.**

A.	<b>How are the jurisdictional thresholds determined?</b>	This is determined according to whether the mergers meet the threshold of market shares established in the legislation with respect to the Barbados market.
B.	<b>What information is required to be submitted?</b>	The information required is the same whether foreign or domestic enterprise.
C.	<b>What are the waiting periods?</b>	The rules are the same with respect to the periods.

**7. Simplified procedures**

A.	Describe any special procedures for notifying transactions that do not raise competition concerns (e.g. short form, simplified procedures, advanced ruling certificates, waivers, etc.).	Form A, the merger notification form would be all that is necessary if the merger did not raise competition concerns.
----	--	---

**8. Timing of notification**

A.	What is the earliest that a transaction can be notified? (e.g., is a definitive agreement required; if so, when is an agreement considered definitive?)	There is no earliest date by which a notification can be made given that the intention to merge has been established.
B.	Must notification be made within a specified period following a triggered event? If so, described the triggering event (e.g., definitive agreement) and the deadline following the event.	As soon as there is a real likelihood that a proposed merger that may be subject to the Act may proceed, and certainly well before the competition of the merger.

**9. Documents to be submitted**

A.	Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents).	<ul style="list-style-type: none"> <li>• Description of merger proposal.</li> <li>• Notices to other regulatory authorities</li> <li>• Background information about parties</li> <li>• Assessment of market and degree of competitiveness</li> <li>• Financial reports</li> </ul>
B.	Are there any document legislation requirements (e.g., notarisation of apostille)?	No.

**10. Translation**

A.	Describe any requirements to submit translations of documents with the initial notification, or later in response to requests for information. This includes the categories or types of documents for which translation is required, requirements for certification,	All responses to questions and other prepared information should be submitted in English.
----	--	---

	language(s) accepted, and whether selected excerpts are accepted in lieu of complete documents.	
--	---	--

#### 11. Review and waiting periods/Suspensive effects

A.	Describe any applicable review and/or waiting periods following notification, including whether closing is suspended during any initial review of waiting period and/or further review periods (i.e., second-phase proceedings).	Within 3 months after the receipt of an application, or as soon as practicable thereafter. The closing is suspended to the extent that such mergers and prohibited unless permitted by the Commission.
B.	Are there different rules for public tenders (e.g. open market stock purchases of hostile bids)?	No
C.	Are the applicable waiting-periods limited to aspects of the transaction that occur within the jurisdiction? (e.g. acquisition of merger of local undertakings/business units.) If not, to what extent do they apply to the parties' ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance. (e.g. request for a derogation from the bar on closing, commitment to hold separate the local business operations)	The waiting periods are limited with respect to the transactions that relate to the market in Barbados. In this regard, the merger is prohibited unless permitted by the Commission. If 3 months has passed without an objection by the Commission, the parties should not assume that they can proceed with the merger, the Commission will at all times be contacted for their direction in these regards, even beyond the initial time period.
D.	Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period. Is there a statutory maximum for extensions of the review period by the authority?	There is no statutory maximum period for extensions, but the Commission can go beyond the 3 months period provided for in the Act, to a period "as soon as practicable thereafter".
E.	Describe any procedures for obtaining early termination of the applicable waiting period,	N/a

	and the criteria and timetable for deciding whether to grant early termination.	
F.	Describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire of clearance is granted (e.g., allowing the transaction to close if no “irreversible measures’ are taken).	<p>Where enterprises have without obtaining permission from the Commission structured themselves in a way that constitutes a merger, the Commission may direct the enterprises concerned to have the merger assessed by the Commission in accordance with the Act within such time as specified in the direction.</p> <p>Where an enterprise fails to comply with this direction, the Commission shall apply to the court for an order against the enterprise in terms of the direction to undertake (divestiture, break up, etc.)</p>

## 12. Responsibility for notification/representation

A.	Who is responsible for notifying - the acquiring person(s), acquired person(s) or both?	Each party is required to complete the notification separately.
B.	Do different rules apply to public tenders? (e.g. open market stock purchases of hostile bids.)	No.
C.	Are the parties required to appoint a joint representative?	Parties are responsible for appointing a representative, but this does not have to be a joint representative.
D.	Are there any rules as to who can represent the notifying parties? (e.g., must a lawyer representing the parties be member of a local bar)	No
E.	How does the validity of the representation need to be attested? (e.g., power of attorney.) Are there special rules for foreign representatives or firms? Must a power of attorney be notarised, legalised or apostilled?	N/A.

## 13. Filing fees

A.	Are any filing fees assessed for notification? If so, in what amount and how is the amount determined?	Yes. The details with regard to the amount of such fees will be released shortly.
B.	Who is responsible for payment?	Both parties are responsible.
C.	When is payment required?	An initial fee is required at notification then a follow up fee is required as determined by the Commission.

D.	<b>What are the procedures for making payments? (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)</b>	Cheque or wire transfer.
----	--	--------------------------

#### 14. Confidentiality

A.	<b>To what extent, if any, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?</b>	<p>Information provided to the Commission will be regarded as confidential, except insofar as disclosure of the information is considered necessary for the Commission in the proper discharge of its functions.</p> <p>Where a person claims that certain information which that person had supplied to the Commission if disclosed would be injurious to the interest of the person. The Commission shall take all reasonable steps to ensure that such information is not disclosed without the consent of that person.</p>
B.	<b>Do notifying parties have access to the authority's file? If so, under what circumstances can the right of access be exercised?</b>	No.
C.	<b>Can third parties of other government agencies obtain access to notification materials? If so, under what circumstances?</b>	<p>The Commission holds information confidential however, the Commission will not be bound to maintain the confidentiality of material where</p> <ul style="list-style-type: none"> <li>• It has already been published in the public arena; or</li> <li>• The person providing the information waives confidentiality in respect of the information.</li> </ul>
D.	<b>Are procedures available to request confidential treatment of the fact of notification and/or notification material? If so, please describe.</b>	Parties may request confidentially. This is honoured to the extent that the disclosure thereof is considered necessary for the Commission in the proper discharge of its functions.
E.	<b>Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?</b>	<p>No</p> <p>The Act provides for the Commission to co-operate with the CARICOM Community Competition Commission and competition authorities of other CARICOM Member States.</p>

#### 15. Sanctions/penalties

A.	<b>What are the sanctions/penalties for failure to file a notification and/or</b>	Where the Commission is of the opinion that a merger has taken place, or is taking place, and the merger parties have not sought and obtained permission of the Commission,
----	---	---

	<b>failure to observe any mandatory waiting periods?</b>	the Commission may direct the enterprises to have the merger assessed by the Commission in accordance with the Act.  S.20(c) provides for a fine of \$500,000 or a fine of 10% of turnover of enterprise for financial year preceding date of offence which ever is the greater
<b>B.</b>	<b>Which party is potentially liable?</b>	Any enterprise that fails to comply with a Commission direction.

#### 16. Judicial review

	<b>Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.</b>	Where, pursuant to section 30 of the Fair Trading Commission Act a notice has been served on a business enterprise, any person who is aggrieved by a finding of the Commission may, within 15 days after the receipt of notice, appeal to the judge in chambers.  Where an appeal is brought against any findings of the Commission, any direction of the Commission that is based on such findings shall remain in force until the determination of the appeal, unless the judge otherwise orders.
--	--	---

#### 17. Additional filings

	<b>Are any additional filings/clearances required for some types of transaction? (e.g., foreign investment of regulated sectors)</b>	There are filing requirements necessary with the Central Bank, the Securities Commission, and the Supervisor of Insurance depending on the transactions and type of unions proposed.
--	--	--

#### 18. Closing Deadlines

	<b>When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorised?</b>	There are no deadlines for closing following permission by the Commission, except to the extent that specific periodic conditions are attached to the permission granted. Where the period may have expired the application would no longer apply.
--	---	--