



## MERGER PROCEDURES

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The Merger control provisions in the Fair Competition Act 2002-19 allow the Fair Trading Commission to ensure that mergers that would otherwise harm competition in Barbados are prohibited.

A merger occurs where two or more enterprises cease to be distinct, whether by amalgamation or joint venture. To qualify for inspection a merger will have to involve enterprises that individually or through their union, control in excess of 40% share of any market in Barbados.

### ***Application Process***

An enterprise or group of enterprises seeking to effect a merger should notify the Commission by completing a merger application form.

The merger application form consists of two parts; forms A and B.

Form A, the Merger Notification Form requires the applicant to give general information on:

- ❖ the background of the companies involved,
- ❖ the type of merger whether its done by an acquisition, combination or otherwise, and
- ❖ the markets affected and level of competition in those markets.

Form B, the Merger Clearance form is to be completed where the merger appears to raise competition concerns under the Act. It requires the applicant to list the reasons why the merger should be allowed. Including the extent to which the merger will bring about efficiency gains that will more than offset the loss to competition. The Merger Clearance form is also used where one of the firms in the merger is facing

imminent financial failure. In such cases the parties must demonstrate that the merger represents the least anti-competitive use for the failing business's assets.

### ***Confidential guidance***

Enterprises or business persons who are likely to propose a merger can receive confidential guidance. They can complete both parts of the application form as if it were an actual merger request and be advised confidentially as to whether there are any concerns with regard to the union causing harm to competition. In the event that the parties agree to proceed with the merger after being advised, the applicants would have assisted in facilitating the merger process and be eligible to receive a more timely decision given that the necessary information would already be available to the Commission.

### ***Investigation and analysis***

Merger investigation involves the determination of relevant market and the market shares of the applicant firms. The market will always be analysed with respect to its product, functional and geographical dimensions:

- ❖ the product dimension refers to the goods or services being traded by the companies involved,
- ❖ the functional aspect refers to the activities of the firms involved; whether wholesaling, retailing, or manufacturing
- ❖ the geographical aspect refers to the area wherein the product is traded

The investigation also seeks to establish the market strength of the merging firms and the level of competition in the market before and after the merger.

The initial enquiry process will ordinarily be completed within one month of the initial application. The enquiry allows the Commission to establish whether the union will control a market share beyond the threshold in the Act and the extent to which competition in the related market will be affected.

If the merger raises competition concerns, a more intensive investigation would be conducted to analyse the likely effects of the merger and determine whether the efficiency gains from the merger do in fact outweigh the lessening of competition.

In the process of conducting an investigation, information will be sourced from competitors, suppliers and other interested parties.

### ***Decision***

The Commission will consider all the information provided by the parties concerned to determine whether or not the merger is likely to lessen competition significantly. If the merger is unlikely to lessen competition significantly then the merger will be permitted. If the merger is likely to affect competition negatively, permission will only be granted if the parties can demonstrate that the merger is likely to generate sufficient efficiencies to more than offset the losses to competition.

The types of efficiencies usually considered include production and dynamic efficiencies.

- ❖ Production efficiencies allow for the same or greater levels of output to be produced at lower costs.
- ❖ Dynamic efficiencies create improvements in the quality of goods and services and innovation to produce more desirable goods.

In assessing the union the Commission will seek to establish whether the merger is the most reasonable alternative available to realise the efficiency gains expected, among other potential alternatives.

Firms will be notified formally as to whether their proposals have been permitted or rejected. The Commission may permit or prohibit the proposal unconditionally or it may permit the proposal conditionally. In such cases the firms may be asked to

divest specific interests or part of their combined business or operation if the Commission sees this to be the least detrimental alternative to competition.

Failure to comply with the Commissions decisions can result in a severe fine, imprisonment or both. In addition merging parties that contravene the Act are liable in damages for any loss caused to any persons by their conduct.

Enterprises who disagree with the findings of the Commission can appeal to a judge in chambers within fifteen days of the receipt of the notice of rejection or permission of the merger. In such cases the judge may confirm, modify or reverse the Commission's findings.