Fair Trading Commission

MERGER GUIDELINES

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1 Introduction

The Fair Trading Commission ("the Commission") was established by the *Fair Trading Commission Act, CAP.326B*. Part of the responsibilities of the Commission includes the administration of the *Fair Competition Act, CAP 326C* ("Act").

This Guideline outlines the Commission's administrative and enforcement policy for dealing with mergers under the Act. The Guideline is designed to assist businesses, their advisers and the general public in understanding the goals, objectives and processes for merger regulation in Barbados.

Each merger will ultimately be considered in the context of its own unique factual circumstances. However, the Guideline provides an analytical and administrative framework that will be used by the Commission in assessing merger activity.

In administering and enforcing the merger provisions of the Act the Commission must have regard to its underlying purpose: "*to promote and maintain and encourage competition*". Mergers and acquisitions play a very important role in competitive markets and the Commission will seek generally not to obstruct those mergers that enhance or are likely to have a minimal effect on competition.

However, it is the responsibility of the Commission under the Act to carefully examine, and in some instances prohibit, any mergers that are likely to harm competition, consumers or the Barbados economy.

2 Key Provisions and Terms used in the Act

The key provisions of the Act relevant to mergers include:

- Mergers - Section 20;
- Interpretation of "merger" - Section 2(1);
- Interpretation of "market" - Section 2(4)(b);
- Permitted mergers - Section 21;
- Order for determination of merger - Section 22;
- Appeals - Section 36;
- Powers of Court - Section 37;
- Failure to comply - Section 43;
- Civil liability - Section 44.

These provisions are discussed in more detail in the following chapters. Whilst the Commission believes this publication provides an accurate summary and interpretation of the legislation, the nature of the Act requires that its actual provisions be consulted and legal advice sought in cases of uncertainty. The Act also needs to be read in the context of other legislation, including the *Fair Trading Commission Act*.

The key merger prohibition is found in section 20(1) of the 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."*

The Commission's responsibility for maintaining competition means that when necessary it will want to exercise its discretion to investigate mergers where the 40% threshold has not been met, but the Commission believes that the effect of the transaction is such that competition in the market may be significantly affected.

Section 20(2) goes on to state:

"Where an enterprise, referred to in subsection (1), is desirous of effecting a merger, it shall apply to the Commission for permission to effect the merger."

"Merger" is defined in section 2(1) of the Act, which states:

"'merger' means

(a) 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; or

(b) the engagement in a joint venture between enterprises which results in two or more enterprises ceasing to be distinct entities."

Enterprise is defined in section 2(1) and includes sole trader, partnerships and companies.

Mergers are considered in the context of a "market". Subsection 2(4)(b) of the Act states:

"'market' is a reference to a market for goods and services supplied in Barbados."

The Commission will through consultation take into account the views of competitors, suppliers, business customers and final consumers when seeking to define the market for consideration in the merger.

In some circumstances the Commission is able to permit a merger that would otherwise be prohibited. Section 20(6) of the Act states:

"Before granting permission the Commission shall conduct an investigation into the proposed merger in order to satisfy itself that the proposed merger would not affect competition adversely or be detrimental to consumers or the economy."

In seeking to assess the impact of the merger on the economy, the Commission will consider the extent to which the Company is seeking to increase its size in order to allow it to achieve the economies of scale necessary to compete more successfully in the region and internationally.

Section 21(1) of the Act states:

"A merger may be permitted if the parties establish that either

(a) the merger is likely to bring about gains in real as distinct from pecuniary efficiencies that are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the merger; or

(b) *one of the parties to the merger is faced with actual or imminent financial failure, and the merger represents the least anti-competitive among the known alternative uses for the assets of the failing business."*

Section 21(2) goes on to state:

> *"A person seeking permission for a merger under section 20(2) shall demonstrate*
>
> *(a) that if the merger was not completed it is not likely that the relevant efficiency gains would be realised by means that would limit competition to a lesser degree than the merger ; or*
>
> *(b) that reasonable steps have been taken within the recent past to identify alternative purchasers for the assets of the failing business and describe in detail the results of the search for alternative purchasers."*

3 What Constitutes a Merger

The definition of a merger as outlined in the Act is wide and will cover several different types of transactions 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 Basic Criteria

A merger will occur when two or more businesses cease to be distinct entities. The Act provides no guidance with respect to the meaning of the words "cease to be distinct".

There are essentially two ways in which businesses can cease to be distinct:

a) they are brought under common ownership, control or influence; or

b) there is a transaction between the persons carrying on the businesses such that one of the businesses will cease to be carried on.

Partial Shareholdings

There is no fixed shareholding threshold for determining when two companies have ceased to be distinct business entities.

Some joint ventures combine firms so completely that they really should be analysed as mergers. In ordinary circumstances the Commission would consider two companies to have ceased to be distinct if:

a) Company A obtains a controlling interest in Company B. A controlling interest means a shareholding carrying more than 50% of the voting rights in the company;

b) Company A obtains a shareholding sufficient to control the policy of Company B; or

c) Company A acquires a shareholding sufficient to materially influence the policy of Company B.

It is not only the size of a shareholding that determines whether the holder can materially influence the policy of the company concerned. Other factors such as the distribution of the remaining shares and the composition of the board of directors will be important.

The Commission will rarely consider a shareholding less than 15% to be sufficient to cause two enterprises to cease being distinct business entities.

Horizontal, Vertical and Conglomerate Mergers

The provisions of the Act are wide enough to cover horizontal, vertical and conglomerate mergers.

The Commission will be primarily concerned to examine mergers between enterprises that produce competing or substitute products. These types of mergers are usually referred to as "horizontal mergers", and may raise competition concerns because they will usually increase concentration levels in a relevant market.

A "vertical merger" occurs when two enterprises at different, but related, stages of production or distribution merge. For example, where an enterprise that manufactures a particular good merges with an enterprise that distributes or retails that good. Because such a merger will not ordinarily increase concentration levels in a relevant market they are less likely to raise competition concerns. Such a merger may also give rise to significant efficiencies.

Vertical mergers will only potentially raise concerns if there is a sufficiently concentrated industrial structure at one or more of the related or integrated stages of production or distribution. When the Commission investigates such a merger it will consider matters such as:

- whether the merged firm has power in one market that could be leveraged into a vertically related market;
- whether the target firm is a likely entrant into a vertically related market;
- whether the merged firm will control access to an essential input; and
- whether the vertical integration raises barriers to new entry.

A merger between two enterprises that operate unrelated businesses is often referred to as a "conglomerate merger". These types of mergers may sometimes raise concerns under the Act, especially where there is a substantial risk of elimination of an important potential competitor, through the creation of barriers to entry, in the form of patents, technical know-how and processes.

Mergers Affecting a Market in Barbados

Only mergers that have an effect on a market in Barbados will potentially be subject to the Act. Where a merger has no effect upon a market for goods or services in Barbados, the Act will not apply.

In some instances mergers involving foreign owned enterprises may be subject to the provisions of the Act. Irregardless of the ownership (foreign or local) when the market share of the merging parties is greater than 40% then the Commission will take an interest in the matter. Consider the following example:

> "A foreign based company A controls 30% of a market in Barbados through a locally incorporated subsidiary or agent. It plans to merge with Company B, which also controls 30% of the same market in Barbados. Together the merging enterprises will control around 60% of a market in Barbados and the merger will be subject to the Act."

4 Notifying the Commission and the Evaluation Process

Notifying the Commission

The Commission strongly encourages parties to approach it, on a formal or informal basis, as soon as there is a real likelihood that a proposed acquisition that may be subject to the Act is certain to proceed, and certainly well before the completion of any merger.

Merging parties that believe a proposed merger will breach the 40% market share threshold can choose to provide the Commission with the Merger Notification Short Form and the Merger Clearance Form concurrently. This may assist the Commission in making its final decision in a timely manner.

Application Process

Enterprises are encouraged to file separate applications. The date of commencement of the merger review procedure will be the date of receipt of the last application.

Applications must be submitted on the prescribed forms set out in the Appendix to these guidelines and be accompanied by the prescribed fee.

The Evaluation Process

The market share threshold for clearance by the Commission is if one of the merging parties, or the merging parties combined, control 40% or more of any market for goods or services supplied in Barbados.

At the first stage of the evaluation process parties that propose to merge should provide the Commission with all the details set out in the Merger Notification Form ("**Form A**") and pay the prescribed Notification fees.

The Commission will then conduct an initial market enquiry so as to define the relevant markets and determine the relevant market shares.

To calculate market shares, the Commission will firstly define the relevant market/s[1]. Defining the market will be critical in determining whether or not the merger must be cleared by the Commission. However, merging parties should not simply assume that the Commission's definition of the relevant market/s will accord with their own submissions. For this reason the

[1] Section 5 of the Guidelines sets out the method the Commission will utilise to determine market share.

Commission strongly encourages merging parties to approach it at the earliest possible stage if there is any possibility that the threshold may be breached.

The initial market inquiry will ordinarily be completed within one month of the initial application. During this period, the Commission, in investigating the transaction, will consult with the merging firms' competitors, key industry stakeholders, as well as the sector regulator to gather further information or to verify that which it has received. Parties will then be advised in writing either that the merger does not need to be cleared by the Commission (because the market share threshold has not been surpassed) or that the merger must be cleared by the Commission.

If a merger must be cleared, the prescribed merger investigation fee will be required and an investigation will be undertaken to determine the effect that the transaction will have on the markets affected.

At this stage the Merger Clearance Form ("**Form B"**) if not submitted before, must be submitted to the Commission. If the effect of the merger on the market is positive (enhances competition) the merger will be permitted. If the merger is likely to result in any limitation of competition, the parties will be required to show that the merger is likely to bring about gains in real efficiencies that more than offset the effects of such limitation. (see Section 5)

In any event, the Commission will ordinarily reach a final position on a proposed merger three months after receipt of a formal application, and will notify the parties in writing of its decision.

There are three circumstances in which a merger that exceeds the threshold may be permitted by the Commission:

- If the merger will not affect competition adversely nor be detrimental to consumers or the economy;

- If the merger is likely to bring about real efficiency gains that more than offset the effects of any limitation upon competition that are likely to result from the merger; or

- If one of the merger parties is faced with imminent financial failure and the merger represents the least anti-competitive option among the known alternative uses for the assets of the failing business.

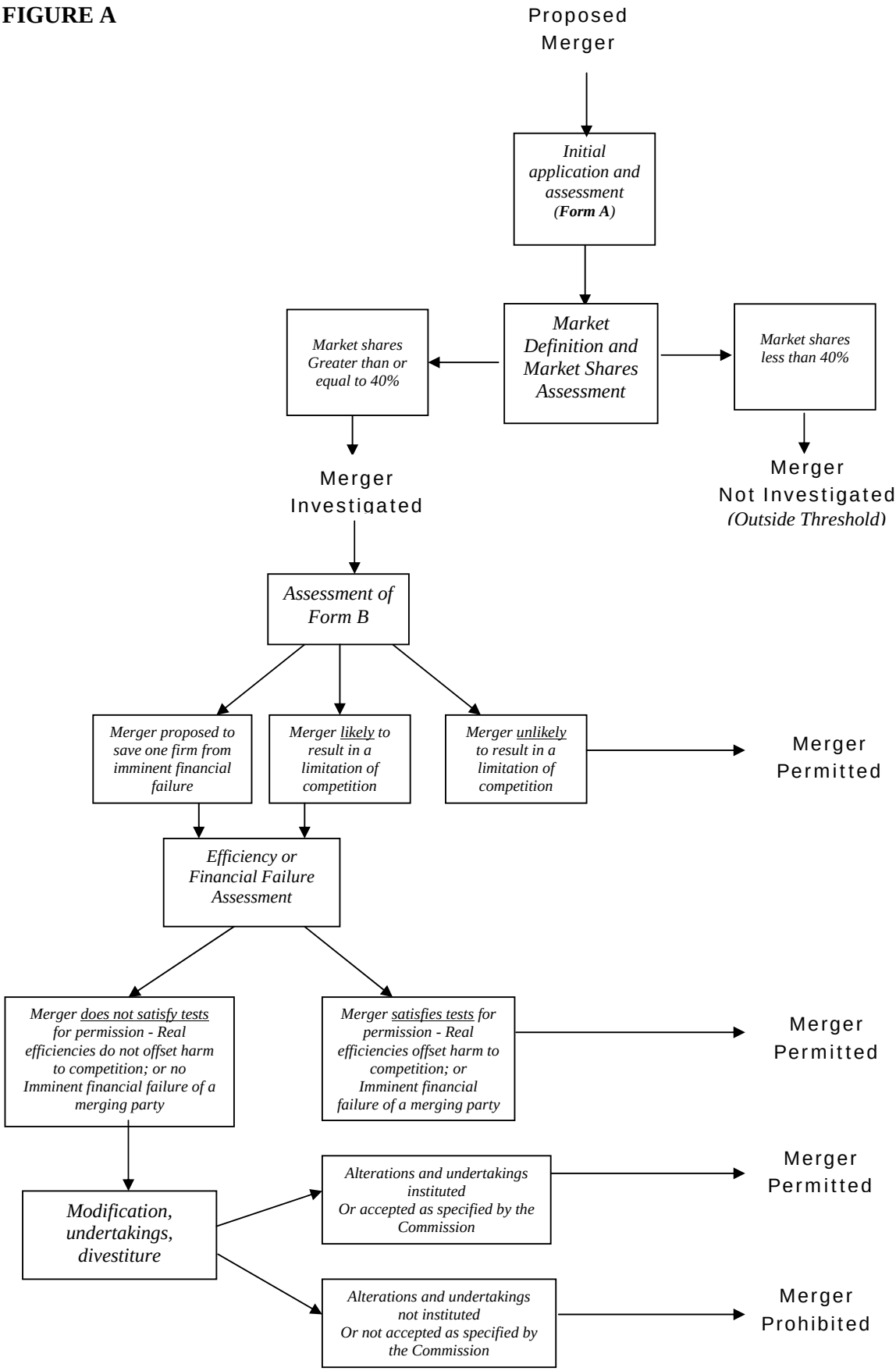
If a proposed merger exceeds the market share threshold and does not qualify for permission in its existing form, then the Commission can either:

- Specify the actions that must be undertaken by the merger parties prior to the completion of the merger to reduce the likely anti-competitive effects; or

- Prohibit the completion of the merger.

The Commission's evaluation process is summarised in the flow chart set out at **Figure A**.

FIGURE A


Proposed Merger
Initial application and assessment (Form A)
Market Definition and Market Shares Assessment
Market shares Greater than or equal to 40%
Market shares less than 40%
Merger Investigated
Merger Not Investigated (Outside Threshold)
Assessment of Form B
Merger proposed to save one firm from imminent financial failure
Merger likely to result in a limitation of competition
Merger unlikely to result in a limitation of competition
Merger Permitted
Efficiency or Financial Failure Assessment
Merger does not satisfy tests for permission - Real efficiencies do not offset harm to competition; or no Imminent financial failure of a merging party
Merger satisfies tests for permission - Real efficiencies offset harm to competition; or Imminent financial failure of a merging party
Merger Permitted
Modification, undertakings, divestiture
Alterations and undertakings instituted Or accepted as specified by the Commission
Merger Permitted
Alterations and undertakings not instituted Or not accepted as specified by the Commission
Merger Prohibited

Confidential Guidance

The formal merger notification process described above applies to offers once they are in the public domain. However, before a proposed merger becomes public knowledge, the parties concerned can seek informal and non-binding confidential guidance from the Commission. If this path is taken, the merging parties should complete Form A and Form B as if the merger was already public.

The Commission will assess the merger on a confidential basis to the best of its ability and advise the parties either that:

- The merger appears unlikely to raise concerns under the Act;
- It is impossible to say whether or not the merger raises concerns under the Act without conducting an investigation; or
- The merger appears to raise concerns under the Act.

The Commission should be able to provide this non-binding guidance within a one month period, subject to the receipt of all relevant information.

This process does not waive any requirement for the merger parties to "publicly" notify the Commission of the merger in the manner prescribed and set out above, but it may assist parties by providing them with guidance at an early stage and may expedite the formal process.

5 Commission Assessment of a Merger

Market Definition and Market Share

Market definition is a critical component of competition analysis. It enables the Commission to perform its market share threshold test and is also the underpinning for the broader competition analysis required by the Act. It identifies the sellers and buyers who might constrain the price and output decisions of a merged firm, describes the field of competition and enables an evaluation of matters such as import competition and barriers to entry.

Generally, a market can be described as the smallest area over which a hypothetical monopolist (or monopsonist) 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, if anything, would happen? If consumers or producers would move to buy or sell closely substitutable products then those substitute products should 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 involve three dimensions:

- Product;
- Geographic; and
- Functional.

To define the relevant product market (or markets) the Commission must identify the goods and/or services supplied by the merged firm and sources, or potential sources, of substitute products. In considering the relevant product market the Commission will consider the ability and likelihood of buyers substituting between products and the ability and likelihood of sellers producing a product that is closely substitutable.

To define the relevant geographic market (or markets) the Commission must identify the area/s over which the merged firm and its rivals currently supply, or could supply, the product. The Commission will also consider the area/s to which buyers can or would practically turn to find alternative sources of supply.

As previously discussed, the Act defines a market to be a market for goods and services supplied in Barbados. Accordingly, the Commission will ordinarily define a geographic market to be Barbados or part of Barbados, but including imports where appropriate. However, in some circumstances it may be proper to define a geographic market broader than Barbados, for example a Caribbean Community market. In all cases the Commission will only be concerned with the likely effects of a merger within Barbados.

Identification of the relevant functional market requires demarcation of the vertical stage/s of production and/or distribution which comprise the relevant field of competition. This will involve consideration of the efficiencies of vertical integration, commercial reality and substitution possibilities at adjacent vertical stages. In some instances it will not be possible, for the purposes of market definition, to separate two or more stages of production and/or distribution. A manufacturing firm and a retailer of the manufacturer's products would encompass two functional stages, and will find that they compete within two different markets and against two different sets of competitors. A firm doing both of these activities would be operating in both markets. The functional demarcations in such a circumstance would be manufacturing and retailing.

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:

- Value of the product supplied by each market participant; and
- Volume of the product 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 considering the likely total market share of a merged firm, the primary consideration for the Commission will be the simple addition of the separate market shares of the merging parties. If the figure exceeds 40% then the merger parties must apply to the Commission for permission to effect the merger.

Permitted Mergers

As outlined above, once it is established that the market share threshold has been exceeded, there are a number of circumstances in which a proposed merger may nonetheless be permitted by the Commission.

In preparing the submission required by Form B an applicant should clearly indicate why the merger should be permitted and provide as much supporting evidence as possible. Outlined below are some of the primary considerations for the Commission when making its decision. An applicant should to the best of its ability address these considerations.

Merger unlikely to affect competition adversely

Section 20(6) of the Act states that before granting permission, the Commission must conduct an investigation into the proposed merger in order to satisfy itself that the proposed merger would not affect competition adversely or be detrimental to consumers or the economy. The Commission is likely to permit a merger to proceed if it is so satisfied.

When conducting its investigation the Commission must take into account the factors set out in section 20(7) of the Act. These "merger factors" are discussed below.

The structure of the markets likely to be affected by the proposed merger.

Market structure includes consideration of matters such as:

The number and size of participants in the market;

A merger that increases the level of concentration in a market may reduce competition by increasing the market power or dominance of the merged firm and/or increasing the possibility of coordinated conduct between the remaining competitors, including both overt and secret collusion. Any merger that increases the concentration level in an already concentrated market will be of particular concern to the Commission.

Barriers to new entry

Barriers to entry will always be a very important consideration for the Commission. When barriers to entry are low, the Commission is unlikely to prohibit a merger, because existing firms are likely to be significantly constrained by the threat of potential competition.

Barriers to entry are any feature of the market that places an efficient new entrant at a significant disadvantage compared with the existing firms. Barriers may include high sunk costs; legal or regulatory restrictions; access to scarce resources controlled by incumbent firms; economies of scale and scope; high levels of product differentiation and brand loyalty; and the probability of retaliatory action by powerful incumbents.

The extent of vertical integration

Vertical relationships between firms can range from ordinary transactions, through long-term contracts, to complete vertical integration. Vertical relationships may affect the likely competitive impact of a horizontal merger. Likewise vertical mergers may affect the degree of horizontal competition. The Commission will look at both of these effects in relevant circumstances.

The degree of control exercised by the enterprises concerned in the proposed merger in the market and particularly the economic and financial power of the enterprises.

The degree of control exercised by the enterprise relates to the market power of the enterprise and the extent to which the merged firm will be able to operate in the market without effective competition. Firms with significant market power will be in a position to, within reason, profitably supply less while charging a higher price. They could do this without having to worry that they will be under priced by other establishments, because their product is either substantially differentiated or their market share is so substantial that consumers must patronize them.

If a 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, then it will be closely examined by the Commission. The Commission will be concerned if a merged firm is likely to have sufficient control of a market to allow it to unilaterally exercise market power.

Firms with unilateral market power may be able to profitably "give less and charge more". Such firms may also be willing and able to undertake strategic behaviour such as predatory pricing, which may be designed to remove existing competitors or raise barriers to new entry. When considering whether or not a merged firm is likely to be able to exercise unilateral market power the Commission will have regard to matters such as market concentration and the economic and financial power of the merger parties in relation to other existing or potential competitors.

The availability of alternatives to the services or goods provided by the enterprises concerned in the merger.

In defining the relevant market/s the Commission will have considered the likely availability of closely substitutable goods or services after the merger is completed.

When considering this factor the Commission will also give due weight to the actual and potential level of import competition in the market. If imports and importers can freely compete with domestic firms in the market, thereby

acting as an effective check upon the exercise of domestic market power, then the Commission will be unlikely to prohibit the merger.

However, in some markets in Barbados the import parity price may be significantly above otherwise competitive levels. This may be the case because of factors such as tariffs or high shipping costs. There may also be other barriers to increased levels of imports after a merger, such as the existence of industry standards, licensing arrangements or other factors that limit the ability of independent importers to effectively expand operations in a sustainable manner.

Significant imports in related upstream or downstream markets may also effectively constrain a firm from exercising market power. For example, if the merged firms' customers are constrained in their ability to pass on any input price increases by effective import competition in a downstream market, the merged firm may not be able to significantly increase its prices.

The likely effect of the proposed merger on consumers and the economy; and the actual or potential competition from other enterprises and the likelihood of detriment to competition.

These factors encapsulate one of the critical decisions that must be made by the Commission. If a proposed merger is likely to cause substantial harm to competition, consumers and the economy of Barbados then the Commission is likely to prohibit it from being completed in its existing form. The most obvious manifestations of an anti-competitive merger include the likelihood of sustained price increases, the removal of adequate alternative supplies, the protection of inefficient operations or the likelihood of making excessive profits.

On the other hand, if the Commission is satisfied that a proposed merger is likely to have few harmful effects, then it will allow the merger to proceed.

Efficiencies

If a proposed merger does raise substantial competition concerns the Commission may permit the merger to proceed if the merger is likely to bring about gains in real (as distinct from pecuniary) efficiencies that more than offset any competition concerns.

To meet the efficiencies test the applicant must also demonstrate that if the merger was not completed the relevant efficiency gains would likely be realized by means that would limit competition to a lesser degree than the merger. Such means of otherwise achieving the claimed efficiencies could include the expansion of the operations of one or both of the parties, other mergers that would be less anti-competitive, or arrangements between the

firms that fall short of a merger. In applying this test the Commission will only have regard to less restrictive alternatives that are practical and not alternatives that are merely theoretical.

The types of efficiencies that may be recognized by the Commission include:

- "production efficiencies" – These efficiencies may result from cost savings that allow a firm to produce more or better quality output from the same amount of input. Such cost savings may result from achieving economies of scale or scope, reduced transportation costs, rationalization of product mix among plants, or increased use of superior production techniques; and

- "dynamic efficiencies" – These efficiencies may include improvements in product or service quality gained from research and development and innovation.

"Pecuniary efficiencies", which will **not** be recognized, include savings such as reduced taxation or lower input costs that may result from the improved bargaining power of the merged firm against its suppliers. Pecuniary efficiencies do not produce real savings in resource use.

The Commission recognizes that efficiencies are generally difficult to precisely quantify. Nevertheless, efficiency claims that are vague or speculative or otherwise cannot be verified will not ordinarily be accepted. The onus is on the applicant to fully substantiate all of its efficiency claims. The Commission will give more weight to efficiency claims that it can readily verify by reasonable means.

Failing Firm

If a proposed merger raises substantial competition concerns the Commission may also permit the merger to proceed if one of the parties to the merger is faced with imminent financial failure and the merger represents the least anti-competitive among the known alternative uses for the assets of the failing business.

To meet this test the applicant must also demonstrate that reasonable steps have been taken within the recent past to identify alternative purchasers for the assets of the failing business and describe in detail to the Commission the results of the search for alternative purchasers.

Investigations and Confidentiality

When investigating a proposed merger the Commission will ordinarily obtain information from a variety of sources including the merging parties, competitors, suppliers, consumers as well as from relevant industry or Government organizations.

In the first instance the Commission will almost always seek to obtain information in a voluntary and cooperative manner. However, the Commission is given powers under Act and under the *Fair Trading Commission Act* to compel persons and organisations to provide it with the evidence it requires in the course of an investigation. The Commission will exercise these powers only when it is necessary and appropriate to do so.

Persons, including the merger parties, who are contacted by the Commission in the course of an investigation, should also be aware that it is an offence to impede or obstruct an investigation, or to knowingly give false or misleading information to the Commission. There are significant penalties associated with these offences, including fines or imprisonment or both. These and other related offences are set out in sections 39 to 42 of the Act.

Information provided to the Commission by persons contacted by it in the course of its investigation will be regarded as confidential, in accordance with section 49 of the Act, except insofar as disclosure of the information is considered necessary for the Commission in the proper discharge of its functions.

However, the Commission will not be bound to maintain the confidentiality of material where:

- it has already been published in the public arena; or
- the person providing the information waives confidentiality in respect of the information.

The Commission may also in some cases provide information to other competition agencies whilst maintaining and protecting its confidentiality.

Decision to Allow a Merger

When the Commission makes a decision to allow a merger to proceed because it is unlikely to contravene the Act, the Commission will notify the applicant and any other interested parties the Commission chooses to notify of its decision in writing, and will give a summary of the reasons for its decision.

The Commission will inform the public of its decision and its reasons for allowing the merger with due regard for commercial confidentiality.

Prohibited Mergers

Where the Commission believes that a proposed merger exceeds the market share threshold and it is not permissible in its existing form according to one of the tests outlined above, the Commission will either:

- Specify the actions that must be undertaken by the merger parties prior to the completion of the merger. These actions will be designed to reduce the anti-competitive detriment associated with the proposed merger, and may include modification of the merger, divestiture of certain assets, and/or entering into other legally enforceable agreements with the Commission; or

- Prohibit the completion of the merger.

Modification of merger and enforceable agreements

Where, following its investigation, the Commission forms the view that a merger in its existing form should be prohibited, it will ordinarily provide the parties with the reasons for its view prior to making a formal decision. In some instances the Commission will also 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 proposal 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.

Modifications or agreements that may be acceptable to the Commission will generally fall into two categories:

- Structural undertakings; and/or

- Behavioural undertakings.

The most common form of structural undertaking is where the merged firm agrees to divest a division, or a business area, through the disposal of assets or shares to an effective competitor. The Commission will ensure that the structural modification is completed within a specified timeframe. The Commission will generally look more favourably on appropriate structural undertakings. Structural solutions will provide an ongoing basis for the

operation of competitive markets and will not require ongoing regulatory costs.

Behavioural undertakings include agreements on future price, output, quality and/or service provided by the merged firm. Such undertakings may interfere with the ordinary competitive process and create regulatory difficulties. The duration of such undertakings is also problematic. For these reasons the Commission is less likely to favour behavioural undertakings.

Where the merging parties consent to any changes suggested by the Commission or if the Commission accepts changes proposed by the parties, then they will be required to enter into a legally enforceable agreement with the Commission designed to give effect to those changes. If this occurs the Commission may make a decision to permit the merger in a similar way to that set out in paragraph 5.32 above. The Commission in developing a binding undertaking with the merging parties will where necessary, seek to solicit the views of affected third parties, especially competitors of the merging firm.

Decision to Prohibit a Merger

Where, upon the conclusion of its investigation, the Commission determines that a proposed merger is likely to contravene section 20 of the Act, it will serve a copy of its finding on the applicant together with a notice notifying the applicant that:

- Completion of the merger is prohibited; or

- Completion of the merger will be prohibited unless it is modified by changes specified by the Commission.

The Commission will issue a decision with reasons with due regard for commercial confidentiality. The decision will include a statement of the facts, a summary of the information, evidence and submissions considered and the reasons surrounding the decision.

Determination of a Merger

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 the permission of the Commission, the Commission may, by notice in writing direct the enterprises to have the merger assessed by the Commission in accordance with the Act within such time as is specified in the direction.

Before issuing such a direction, the Commission will give the merger parties an opportunity to be heard.

Powers of the Court

It is an offence for any person to contravene Part III of the Act, which includes the provisions relating to mergers. If merger parties proceed with a merger in breach of section 20 of the Act the Commission may apply to the Court seeking remedies, which may include:

- Injunctions restraining the parties from completing the merger;
- Penalties against individuals knowingly concerned in the merger, including fines up to $150,000;
- Penalties against the merging firms, including fines up to $500,000 or 10 per cent of annual turnover, whichever is the greater.

Section 43 of the Act makes it clear that contravention of Part III of the Act is a criminal offence.

In addition to these penalties, merging parties that contravene the Act will be liable in damages for any loss caused to any other persons by their conduct.

6 Appeals

Commission Decision to Prohibit a Merger

Where the Commission makes a decision to prohibit a merger, as described in paragraph 5.41 above, an appeal lies to a Judge in Chambers pursuant to section 36 of the Act.

FORM A

MERGER NOTIFICATION FORM

This form provides a framework for supplying to the Fair Trading Commission the information required under Section 20 of the Fair Competition Act CAP. 326C. This form should be completed separately for each party to the proposed transaction, although only one party needs to supply a description of the proposed transaction. It is preferable that the parties submit their respective completed forms simultaneously, although they may be submitted separately.

Please note that the Commission will only communicate on this matter with authorised individuals.

Applications must be submitted in typed form on A4 paper. Any material that is considered properly confidential must be clearly marked and should be included in an annexure to the main submission.

Please provide the requested information for sections 1 and 5 on the form. Information for sections 2, 3, 4 and 6 should be contained in appendices identified by the corresponding section number used in the form.

1. GENERAL INFORMATION

The party supplying this information is

☐ the acquiring party ☐ the acquired party ☐ other party to the proposed transaction

Name of the party to the transaction for which this information is supplied

Address of Head Office and Principal Offices of the party

Website Address

E-mail Address	Telephone Number	Fax Number

Payment of Prescribed Fee

☐ Included in full

☐ Will be made in full by another party to the transaction

☐ Partly included, remaining payment to be remitted by another party to the transaction

☐ Not included but will be remitted by the notifier

☐ Cheque
☐ Wire Transfer

Date expected: _____

Official Receipt for Fee Payment should be issued to:

Name of Authorised Individual		Other individual who may be contacted	
Title		Title	
Telephone Number	Fax Number	Telephone Number	Fax Number
Address		Address	

2. DESCRIPTION OF THE PROPOSED TRANSACTION

	Please indicate the number of pages contained in each appendix in the appropriate column beside each section of this form.	**No of pages**
2.1	Is the proposed transaction public at this time? ☐ Yes ☐ No If no, when will the Commission be able to commence its public inquiry/investigation.	
2.2	Describe briefly the merger proposal, the merging enterprises and the proposed arrangements by which they will merge. The information provided here should include details on: • the type of proposed transaction, for example; a) Acquisition of assets, b)Acquisition of shares, c)Amalgamation, d) Combination, e)Acquisition of an interest in a combination. • the consideration given and received by each of the parties (e.g. cash, assets, shares, interests). • which if any of the merging enterprises will cease to be distinct. • the reasons for the transaction.	
2.3	Give details of any factors upon which completion of the merger is conditional.	
2.4	Supply copies of any agreements or any other contracts on which the merger is based.	
2.5	Please indicate the likely effective closing date for the merger and whether the offer has been recommended by the Board of the target company.	
2.6	Please provide a copy of any board of directors' resolutions with respect to the acceptance of the merger proposal, together with copies of the legal documents, or the most recent drafts thereof if the documents have not been executed that are to be used to implement the proposed transaction.	

3. NOTICE TO REGULATORY AUTHORITIES

3.1	Are there any other jurisdictions in which the proposed merger falls under merger provisions? Please identify those countries and the respective authorities contacted.	
3.2	Please provide a list of all the other regulatory bodies with whom you are required to seek approval, and provide copies of the applications made to those bodies.	
3.3	Please ensure that if and when approval by the other regulatory bodies is granted, that copies of such are made available to the Commission.	

4. INFORMATION REQUIRED FOR EACH PARTY

4.1	Give the following details about each of the merging enterprises: • name and official addresses; • name and positions of senior officers; • ownership and control (e.g. distribution of shareholding, articles of association); • fully describe the nature of all relevant businesses conducted; • detail all relevant group relationships, associated companies, degrees of dependency and percentages of holdings; • where shares in another enterprise are to be acquired, give detail of the amount of the shareholding to be acquired and the total shareholding owned in it by the purchaser or any related company; • provide the total turnover for the last business year of: - each enterprise engaged in the merger in Barbados; and - each relevant group of companies worldwide; • provide gross worldwide assets of each of the enterprises engaged in the merger; and • if any person has taken a decision or entered into a commitment or undertaking to make significant changes in any business to which the proposed transaction relates provide a summary description or the description otherwise made available to shareholders.	
4.2	Enclose a list of the notified mergers involving any of the merging enterprises in any other country during the last five years.	
4.3	Supply, for each of the merging enterprises, three copies of the most recent annual financial report, if any, and accounts.	
4.4	Describe in your view, each product or service market affected and whether the geographic markets are international, national, regional or local. Give reasons for your statements.	

4.5	For the different relevant markets identified, give the following information. Refer to industry data where available. Use the most recent figures available, specify the period they cover and explain the basis for your estimates: • an estimate of the value, and volume of each market; if the affected market is not a national one, also give an estimate for the national market ; • turnover and market shares of the merging enterprises in each relevant market; • the names and market shares of all competitors (including overseas companies/importers) with over five per cent of a market.	
4.6	Describe any barriers or restrictions to new entry in the relevant markets. For example, any legal or regulatory requirements; economies of scale or scope; high sunk costs; restricted access to essential inputs; high levels of product differentiation or brand loyalty; probability of retaliatory action from powerful firms. Provide details of any firms that have entered, exited or merged in the relevant markets in the last 3 years.	
4.7	Give details of the nature and extent of any vertical links involving or between the merging enterprises in a relevant market.	

5. CERTIFICATION AND SIGNATURE

I ..... , ... have
PRINT FULL NAME PRINT POSITION/TITLE

reviewed the matters reported in this application and appendices and certify that the information contained in these documents is complete, true and accurate.

Under Section 42 of the Fair Competition Act CAP. 326C *it is an offence to give false or misleading information to the Commission.*

6. OPTIONAL INFORMATION

6.2	Any other information which the party considers relevant.	

FORM B

MERGER CLEARANCE FORM

This form provides a framework for supplying to the Fair Trading Commission the information required under Section 20 of the Fair Competition Act CAP. 326C. This form should be completed separately for each party to the proposed transaction. It is preferable that the parties submit their respective completed forms simultaneously, although they may be submitted separately. This form should only be completed after, or in conjunction with, merger Form A.

Please note that the Commission will only communicate on this matter with authorised individuals.

Applications must be submitted in typed form on A4 paper. Any material that is considered properly confidential must be clearly marked and should be included in an annexure to the main submission.

Please provide the requested information for sections 1 and 3 on the form. Information for sections 2 and 4 should be contained in appendices identified by the corresponding section number used in the form.

1. GENERAL INFORMATION

The party supplying this information is

☐ the acquiring party ☐ the acquired party ☐ other party to the proposed transaction

Name of the party to the transaction for which this information is supplied

Address of Head Office and Principal Offices of the party

Website Address

E-mail Address	Telephone Number	Fax Number

Payment of Prescribed Fee

☐ Included in full
☐ Will be made in full by another party to the transaction
☐ Partly included, remaining payment to be remitted by another party to the transaction
☐ Not included but will be remitted by the notifier
☐ Cheque
☐ Wire Transfer

Date expected: _____

Official Receipt for Fee Payment should be issued to:

Name of Authorised Individual		Other individual who may be contacted	
Title		Title	
Telephone Number	Fax Number	Telephone Number	Fax Number
Address		Address	

General instructions for making a submission:

- **Submissions must relate to the reason/s why the merger should be permitted. For a merger to be permitted the applicant only needs to satisfy one of the three tests described in section 2 below.**
- **The onus is on the parties to provide all relevant information. Wherever possible parties should fully substantiate their submissions with detailed evidence.**
- **If parties have already provided the Commission with some of the relevant information in merger Form A, they should refer to this information in the submission.**
- **Parties should include any additional information they believe to be relevant that is not specifically requested in the questions below.**
- **The Commission's Merger Guideline publication is designed to provide assistance to firms in preparing a submission and copies of the Merger Guideline can be obtained from the Commission.**

2. REASONS WHY MERGER SHOULD BE PERMITTED BY THE COMMISSION

Please indicate the number of pages contained in each appendix in the appropriate column beside each section of this form. **No of pages**

2.1 **The merger will not affect competition adversely or be detrimental to consumers or the economy**.

A submission in this category should include submissions on:

1. The structure of the market, including the number and size of participants in the market, barriers to new entry and the extent of vertical integration;
2. The degree of control exercised by the parties to the merger in the relevant markets;
3. The availability of alternatives to the relevant goods or services provided by the parties to the merger, including details of the actual and potential level of import competition;
4. The likely effect of the proposed merger on consumers and the economy;
5. The actual or potential competition from other firms and the likelihood of detriment to competition;

and having regard to these factors, the reasons why the merger will not affect competition adversely or be detrimental to consumers or the economy.

2.2 **The merger is likely to bring about gains in real efficiencies as distinct from pecuniary efficiencies that are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the merger.**

A submission in this category must:

1. Identify and attempt to quantify all real efficiencies that are likely to result from the merger;
2. Demonstrate that each relevant efficiency gain is unlikely to be realised by a means that would limit competition to a lesser degree than the merger
3. Identify and attempt to quantify the likely effects of the limitation upon competition that is likely to result from the merger. Particular consideration should be given to:
    - The structure of the market, including the number and size of participants in the market, barriers to new entry and the extent of vertical integration.
    - The degree of control exercised by the parties to the merger in the relevant markets.
    - The availability of alternatives to the relevant goods or services provided by the parties to the merger, including details of the actual and potential level of import competition.
    - The likely effect of the proposed merger on consumers and the economy.
    - The actual or potential competition from other firms and the likelihood of detriment to competition.
4. Explain why the real efficiencies identified more than offset the effects of the limitation upon competition.

2.3	**One of the parties to the merger is faced with actual or imminent financial failure, and the merger represents the least anti-competitive among the known alternative uses for the assets of the failing business.** A submission in this category must: 1. Identify the party to the merger that is faced with imminent financial failure and fully substantial this claim; 2. Demonstrate that the proposed merger represents the least anti-competitive among the know alternative uses for the assets of the failing business; and 3. Demonstrate that reasonable steps have been taken within the recent past to identify alternative purchasers for the assets of the failing business. The results of the search must be described in detail.	

3. CERTIFICATION AND SIGNATURE

I ..... , ... have
PRINT FULL NAME POSITION/TITLE

reviewed the matters reported in this application and appendices and certify that the information contained in these documents is complete, true and accurate.

Under Section 42 of the Fair Competition Act CAP. 326C *it is an offence to give false or misleading information to the Commission.*

4. OPTIONAL INFORMATION

4.1	Any other information which the party considers relevant.	

Fair Trading Commission
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E-mail: info@ftc.gov.bb
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