

## EXPLANATORY NOTE: AMENDMENTS TO COMPETITION COMMISSION GUIDELINES ON MERGERS

03/08/2020

The Competition Commission has on 3<sup>rd</sup> August 2020 amended its Guidelines on Mergers – Competition Commission Guidelines 5 (the “Guidelines”). The amendments have been made in accordance with section 38 of the Competition Act 2007 (the “Act”). They aim to clarify the meaning of control and remove a possible ambiguity on the assessment of failing firms.

The Act provides that the Competition Commission may review certain merger situations. Where a merger situation substantially lessens competition, the Commission may, after considering any offsetting public benefits impose appropriate remedies to address the lessening of competition or its effects. Such remedies may be in the form of structural remedies, behavioral remedies or blocking the merger.

The Act sets three cumulative tests to assess whether a transaction amounts to a reviewable merger situation, namely:

1. Whether the transaction amounts to a merger situation within the meaning of the Act;
2. Whether the market share threshold is met; and
3. Whether the merger situation has resulted in or is likely to result in substantial lessening of competition.

In turn, the Act defines a merger situation as the *bringing together under common ownership and **control** of 2 or more enterprises of which one at least carries its activities, in Mauritius, or through a company incorporated in Mauritius* [emphasis added]. Thus, one of the central requirements for there to be a merger situation is that two or more enterprises are being brought under common control. Section 47(3) of the Act explains how a person may bring an enterprise under his control. It provides that:

*Any person may be treated as bringing an enterprise under his control where -*

- (a) he becomes able to control or materially to influence the policy of the enterprise, but without having a controlling interest in it;*
- (b) being already able to control or materially to influence the policy of the enterprise, he acquires a controlling interest in it; or*
- (c) being already able materially to influence the policy of the enterprise, he becomes able to control that policy*

The application of the Guidelines revealed that they were not clear with respect to the meaning of control in its interpretation of section 47(3) of the Act. An ambiguity was also identified in the interpretation of

the provisions of the Guidelines on failing firms. To clarify the provisions of the Guidelines, with the aim of removing all ambiguities and uncertainties as to which transactions may amount to a merger situation under the Act, the provisions on “control” have been revised. In the same vein, a minor amendment has been brought to paragraph 3.19 of the Guidelines on failing firms.

The amended Guidelines introduce a new section on “Acquisition of Control” at paragraphs 2.7 to 2.25. In line with provisions of section 47(3) of the Act, the amended Guidelines cater firstly for the three levels of control namely, material influence, control (also known as “de facto” control) and controlling interest and provide for the assessment of each level. The Guidelines also specify that an increase in the level of control may amount to a merger situation. These are briefly set below:

<b>Control</b>	
<b>Material Influence</b>	<ul style="list-style-type: none"> <li>• Lowest level of control.</li> <li>• Requires a case to case assessment.</li> <li>• The main test is the ability to materially influence (and not control) the policy of the enterprise.</li> <li>• As an indicative basis, shareholding conferring 25% voting rights is generally deemed to confer material influence, unless evidence demonstrates otherwise.</li> <li>• Right to appoint directors may also confer material influence.</li> <li>• Shareholdings below 25% may also under certain circumstances confer material influence.</li> </ul>
<b>De Facto Control</b>	<ul style="list-style-type: none"> <li>• Control level between material influence and controlling interest.</li> <li>• Requires a case to case assessment.</li> <li>• It occurs where a person holding a level of shareholding which confers 50% or lower voting rights, can control an enterprise.</li> </ul>
<b>Controlling Interest</b>	<ul style="list-style-type: none"> <li>• Generally, shareholdings conferring more than 50% voting rights.</li> </ul>
<b>Bringing under control</b>	<ul style="list-style-type: none"> <li>• A change from no control to any of the above or an increase from one of the above thresholds to another, may amount to a change in control and hence may give rise to a merger situation.</li> </ul>
<b>Failing Firms</b>	
<b>Paragraph 3.19</b>	<ul style="list-style-type: none"> <li>• Explains that a merger situation involving the acquisition of a failing firm will not result in substantial lessening of competition if the conditions set in paragraph 3.20 of the Guidelines are met.</li> </ul>