

Guidance Note

Merger Notification

March 2019



Disclaimer: This Guidance Note has been prepared as an aid to enterprises to facilitate application for guidance of the Competition Commission as to whether a proposed merger is likely to result in a substantial lessening of competition within any market for goods or services.

This document does not represent a legal advice. Specialist legal or other professional advice may be sought by enterprises considering applying for the guidance of the Competition Commission.

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I. This Guidance Note

- 1.1 This guidance note elaborates and clarifies the mechanism put in place by the Competition Commission to facilitate the application for guidance of the Competition Commission on whether a merger situation is in conformity with the Competition Act 2007 (the 'Act').
- 1.2 The Act provides for the control of merger situations by the Competition Commission and where a merger situation leads to substantial lessening of competition in any market in Mauritius, the Commission may impose appropriate remedies on the parties concerned to address the competition concerns or its effects. Where a merger situation harms competition, the Competition Commission is empowered to block the implementation of such mergers or require the divestment of the assets acquired if the merger has already been implemented or impose other appropriate directions.
- 1.3 Parties to a merger situation are under no legal obligation to inform (notify) or seek the approval of the Competition Commission prior to implementing a merger transaction. Nonetheless, the Act provides parties to a merger situation with the possibility to seek the guidance of the Competition Commission on whether or not the merger may substantially lessen competition, and as such whether or not the merger is in conformity with the Act. Seeking the guidance of the Competition Commission on a merger situation is voluntary as per the Act. Such application for guidance is also referred to as merger notification¹.
- 1.4 Cognisant with the fact that each merger is different, the Competition Commission takes a flexible approach on merger notification through a flexible notification mechanism made available, and which is explained in this document. It aims to enlighten potential applicants on the 'business friendly', flexible and expedient nature of the notification mechanism and to encourage parties to seek the guidance of the Competition Commission on potential mergers to ensure the transactions are compliant with the law.

¹ Notification refers to notifying the Competition Commission of a merger in view of seeking guidance of the Commission on whether the merger may substantially lessen competition in Mauritius

1.5 The table below summarises the notification and review mechanism.

Stage	Details	Timeline
Merger Decision	Parties decide to enter into a transaction which may qualify as merger situation and to seek the guidance of the Competition Commission	
Pre-notification (Optional)	Discussions between merging parties and the Competition Commission prior to formal notification to facilitate and discuss the notification.	Can be done in parallel to preparing notification
Notification	<p>Application for the guidance of the Competition Commission on whether or not a merger situation will substantially lessen competition and as such whether it is in conformity with Act.</p> <p>Can be full form (information requirement available on 'Form 1' on www.competitioncommission.mu) or short form (subject to agreement with Competition Commission)</p>	Complete notification triggers the review process timeline upon receipt by the Competition Commission.
Preliminary Review (Enquiry)	A preliminary assessment to determine whether there are grounds to believe that the notified transaction may substantially lessen competition. Upon completion of the preliminary assessment notifying parties are informed about whether the transaction is likely to raise competition concerns (in which case an in-depth assessment is triggered, and possible solutions discussed with parties) or there are no grounds to believe that the transaction will raise competition concerns (in which case the assessment is closed).	Completed within 30 working days from receipt of complete notification.
In-Depth Review (Investigation)	Upon having reasonable grounds to believe that a merger situation may substantially lessen competition, a formal review is triggered. However, the Competition Commission engages with parties to discuss potential solutions to the competition concerns. After completion of the review, a report is sent to the Commissioners for their determination – in relation to prospective mergers, can normally result in:	Report to Commission submitted within 6 months from start of review. Timeframe shorter where

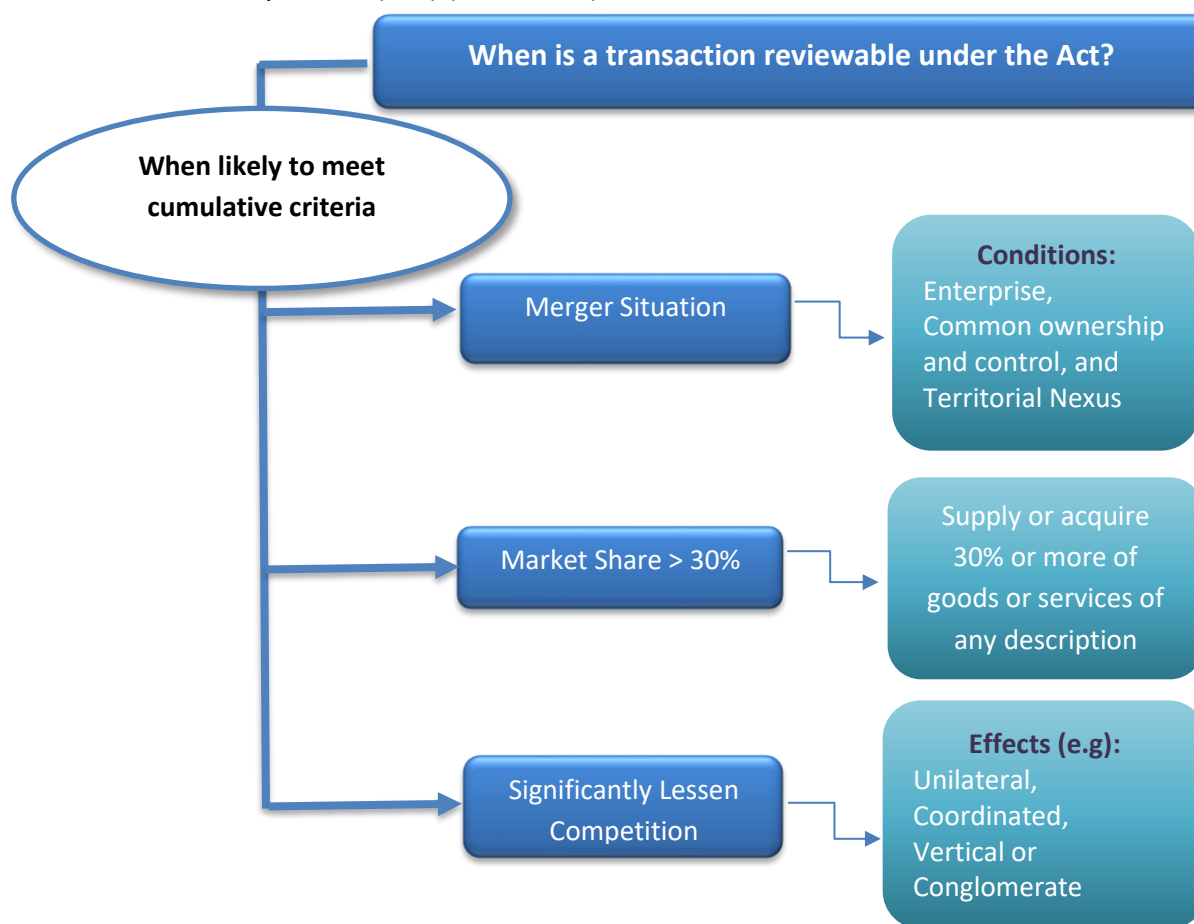
clearance of merger, clearance of merger subject to conditions or prohibiting the undertakings are submitted promptly.
merger. Parties can also opt to desist/withdraw the merger.

2. Review of merger situations

2.1 This guidance note does not aim to explain in detail the substantive assessment of merger situations by the Competition Commission. For detailed information on the substantive assessment of merger situations please refer to the CC5 Guidelines on Mergers. Nonetheless, a brief overview of the merger control provisions of the Act is provided in this chapter.

2.2 In determining whether a transaction may be reviewed in light of the merger control provisions of the Act, the Act poses a three-pronged test which assesses whether:

- (a) the transaction has created or is likely to create a merger situation (section 47);
- (b) the enterprises party to the merger situation meet the applicable statutory market share threshold (section 48); and
- (c) this situation has resulted in or is likely to result in a substantial lessening of competition (SLC) (section 48).



What amounts to a merger situation?

- 2.3 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.'
- 2.4 From the above definition therefore, a merger situation will arise where the following elements are satisfied:
- (a) at least 2 enterprises (as defined under the Act) are involved (being brought under control);
 - (b) the enterprises are being brought together under common ownership and control; and
 - (c) territorial nexus with Mauritius wherein the activity of least one of the enterprises is carried on in Mauritius or through a body corporate.
- 2.5 Broadly there are three thresholds at which control can occur:
- (a) Control through material influence
 - (b) De facto control
 - (c) Controlling interest
- 2.6 Change in the level of control amounts to a change in control. For example, a change from material influence *to* de facto control amounts to a merger situation.

Reviewable merger situations

- 2.7 For a merger situation to be reviewable by the Competition Commission, it must:
- (a) meet the market share thresholds set under the Act; and
 - (b) lead to substantial lessening of competition.

Market Share requirement

- 2.8 For the transaction to be reviewable, either one of the parties to the merger situation or the parties combined market share must be above 30% in any market for goods and services.
- 2.9 Assessment of market shares depends on the manner according to which the relevant market has been identified using the approaches listed in CC5 Guidelines on Market Definition and the Calculation of Market Shares. In the event of uncertainty, parties are advised to seek the guidance of the Competition Commission.
- 2.10 A relevant market within the meaning of the Act is usually different from the common notion of market.

Substantial Lessening of Competition (SLC)

- 2.11 In general, SLC may be found where a transaction lead to, inter alia:
- (a) **Unilateral effects:** This occurs where the merger involves two competing firms and removes the rivalry between them, normally allowing the merged firm to profitably raise prices.
 - (b) **Coordinated effects:** This occurs where the merger increases the ability of firms within the market to jointly increase price by facilitating coordination.
 - (c) **Vertical or conglomerate effects:** This occurs where the merger creates or strengthens the ability of the merged firm to use its market power to hinder competition, usually across related markets.

How will I know if a merger is reviewable under the Act?

- 2.12 Assessment of the effect of mergers on competition is a complex and technical exercise. It is advisable for enterprises which are parties to a merger situation to discuss the transaction with the Competition Commission on whether it is advisable to seek the formal guidance of the Competition Commission on whether the transaction may lead to competition concerns.

3. Pre-notification consultations

Pre-notification consultation is an opportunity provided by the Competition Commission to parties to discuss the transaction with the Competition Commission and to facilitate and guide the notification process.

- 3.1 In order to facilitate the notification process and with the aim of providing more information thereon, the Competition Commission has set up a consultative process for parties which intend to seek the guidance of the Competition Commission. Such consultation is held prior to formal notification where parties opt to engage in pre-notification consultation.
- 3.2 The purposes of such consultations are:
- (a) to inform parties if notification of the transaction is advisable,
 - (b) to assist parties in filing their notification,
 - (c) to discuss with the parties on the type of information that should be submitted in the notification,
 - (d) to discuss potential timelines of the review,
 - (e) to discuss any other matter that may be relevant to the notification and review.
- 3.3 The pre-merger notification consultation is an opportunity for the parties to highlight and discuss specific circumstances of the merger, if any.
- 3.4 These consultations are not a statutory requirement per se but have been developed by the Competition Commission in light of international best practices and in an attempt to simplify the notification process. This being said, parties which intend to seek the guidance of the Competition Commission are under no legal obligation to request for pre-notification consultations with the Competition Commission in relation to their proposed transaction but are highly encouraged to engage in such consultations. This is because these

consultations can help to expedite the notification process, where appropriate, by focussing on the scope of information required from the party and simultaneously reducing the time taken for the Competition Commission to complete its assessment.

- 3.5 Pre-merger notification consultations also allow the Competition Commission to start informal researches prior to formal notification, which may expedite the review period.
- 3.6 Pre-merger notification consultations are confidential to the Competition Commission and the parties and may be done simultaneously while the party is preparing the notification, and as such, do not delay the notification itself.

How to request for pre-notification consultations with the Competition Commission?

- 3.7 Parties wishing to obtain more information on the pre-notification consultations process are welcome to contact the Competition Commission either by phone, fax, and email or call in at our office.
- 3.8 A request for pre-notification consultations may be done by the parties, their legal representatives or other authorised representatives verbally over the phone or in writing, via email or letter to the Competition Commission.

Can I obtain information on notification anonymously?

- 3.9 Yes. If an enterprise wishes to anonymously contact the Competition Commission for more information about the pre-notification consultations or notification, it can do so without the need to reveal the identity of the enterprises and specific details of the transaction. However, the Competition Commission will only provide informal guidance on the notification requirement and cannot provide its views on the transaction itself.

Information to be submitted/shared with Competition Commission at pre-notification consultations stage

3.10 As stated, the aim of the pre-notification consultations is to ease the formal notification process. To be able to guide parties on the notification process, the following information is useful:

- (a) Parties involved;
- (b) Shareholding structure of the merging parties pre-transaction;
- (c) Related enterprises to the merging parties;
- (d) Indication of the nature of the transaction;
- (e) Rationale of transaction;
- (f) Products/services offered by each party;
- (g) Indication of relevant sector/industry/market in which parties operate;
- (h) Indication of market shares of parties, if available;
- (i) Indication of any overlap between the product/services supplied by the parties;
- (j) Indication as to the possible impact that the transaction will have on competition in the affected markets, if known.

4. Notification

Seeking the guidance of the Competition Commission provides legal certainty to the merger transaction and avoids costly and complex post-merger remedies

- 4.1 As mentioned above, Mauritius has a voluntary merger notification regime. This means that there is no legal obligation, or mandatory requirement, for merging enterprises to notify a merger situation to the Competition Commission either before or after implementation of the merger. However, under section 47(4) of the Act, merger parties have the option of notifying the merger situation to the Competition Commission and to seek the guidance of the Competition Commission as to whether the proposed merger situation is likely to result in a substantial lessening of competition in any market in Mauritius.
- 4.2 Not notifying a merger situation carries risks since the Competition Commission can investigate mergers on its own initiative. When it does so and finds that a particular merger situation leads to substantial lessening of competition, the Competition Commission has powers to impose structural and/or behavioural remedies on the merging enterprises. For example, the Competition Commission can require the merging enterprises to divest some of their assets, to modify a particular conduct or even to divest of all the acquired assets. The implementation of such remedies may be complex and costly for the merger parties once the merger is completed. It is therefore advisable for parties intending to be party to a merger situation with appreciable effects on the market to discuss the transaction with the Competition Commission prior to implementing the transaction.
- 4.3 This chapter explains when notification of a prospective merger may be appropriate and describes the review process and the different merger notification mechanisms available to merging parties in Mauritius.

When is it advisable for enterprises to notify the Competition Commission of a prospective merger?

- 4.4 Parties are encouraged to contact the Competition Commission, through pre-merger consultations to discuss the nature of the transaction and whether notification is advisable. In particular, notification is strongly advisable if any of the following conditions are present:
- (a) one or all of the merging enterprises are significant players in the economy;
 - (b) one or all of the merging enterprises are significant players on a given market;
 - (c) one or all of the merging enterprises have significant market shares; or
 - (d) the turnover or assets of the enterprises are significant (indicatively above Rs 100 million); and
 - (e) the products supplied or acquired by the merging enterprises are related (either horizontally, vertically or are complementary).

Who may notify the Competition Commission of a prospective merger?

- 4.5 Any party to a prospective merger may notify the Competition Commission. A joint filing is also possible.

Is there a prescribed time frame for notification?

- 4.6 No. The Competition Commission may be notified of a prospective merger at any point in time. However, it is to be noted that the Competition Commission may take up to 30 working days to provide its views on the transaction. Parties are encouraged to notify the Competition Commission as soon as a firm intention to enter into the proposed transaction has been formed.

Is there a prescribed market share threshold to notify the Competition Commission of a prospective merger?

- 4.7 No. The calculation of market shares will depend largely on how the relevant market is defined. There is no market share threshold for notification, but there are market share thresholds below which the transaction will not substantially lessen competition. This is a

technical exercise and it is up to the Competition Commission to define the relevant market and to calculate the respective market shares of the merging enterprises. At times the market share within the meaning of the Act differs from the common notion of market share as perceived by the parties to a merger situation.

Types of notifications

4.8 Having regard to the specificities of each merger situation, the Competition Commission is flexible to the information requirements depending on the nature of the merger transaction and the products/markets involved. The Competition Commission may require either:

- (a) a complete notification (full form notification) – where all information in the form 1 has to be provided to the Competition Commission; or
- (b) a short form notification which must be pre-agreed with the Competition Commission.

Unless otherwise agreed by the Competition Commission, merging enterprises wishing to notify the Competition Commission of a prospective merger must submit all information as per form 1 (full form notification).

4.9 Normally applicants should submit the full form notification. The information that should be submitted is available in a document named 'Form 1' available on the website of the Competition Commission.

4.10 In certain circumstances, the Competition Commission may accept a shorter form of notification. This will basically entail providing less information to the Competition Commission than what is required in the notification form (short form notification).

4.11 The possibility of submitting a short form notification is available only to merging parties which have engaged with the Competition Commission through pre-merger consultations

and the informational requirements have been pre-agreed. The Competition Commission will take into account various factors in determining whether less information is acceptable in the particular circumstance. This will depend on the nature of the transaction, the markets involved, the likelihood of competition concerns, and the information already available to the Competition Commission among others.

What if there is an urgency with the merger?

4.12 The Competition Commission is fully aware that certain mergers may be particularly time sensitive and have an element of urgency, and the Competition Commission takes into account such peculiarity of mergers.

Does the voluntary notification of a merger require a fee?

4.13 No. Voluntary merger guidance of the Competition Commission is free.

Seeking merger guidance of Competition Commission is free

Should the transaction be suspended until it is cleared by the Competition Commission?

4.14 There is no legal obligation to suspend the transaction until the clearance of the Competition Commission. However, parties who give effect to or proceed with mergers prior to obtaining the clearance of the Competition Commission do so at their own commercial risk. It is highly advisable to get the guidance of the Competition Commission prior to implementing the transaction.

5. Merger Review Timeframes

- 5.1 The timeframe for review of a notification depends on the complexity of the matter and whether the transaction is likely to raise competition concerns. For transactions which do not raise competition concerns the timeframe for the review is generally shorter.
- 5.2 Pre-notification consultations can be done at any time and in parallel to the party preparing the notification. As such, pre-merger consultations do not affect the review timelines. In the event that the parties opt to have prior pre-merger consultations, such meetings/consultations are held promptly subject to the availability of the parties.
- 5.3 In general, upon receipt of a notification the Competition Commission conducts a preliminary assessment in the form of an enquiry to assess whether there are reasonable grounds to believe that the transaction may lead to substantial lessening of competition and be reviewable under section 48 of the Act.
- 5.4 A reply is provided to the parties upon completion of the preliminary assessment, within 30 working days from the notification. Where the preliminary assessment demonstrates that the transaction is unlikely to lead to substantial lessening of competition, the parties will be informed accordingly, and the matter will be closed. On the other hand, where the preliminary assessment demonstrates that the transaction may raise competition concerns, the parties are informed of those concerns within the 30 working days, and then an in-depth assessment is triggered.
- 5.5 Where an in-depth assessment is required, the Executive Director of the Competition Commission has another 6 months to conduct his assessment. Upon completion of the in-depth assessment, the Executive Director will produce a report and send to the Commission for its determination.
- 5.6 Where the Executive Director identifies competition concerns, he will engage with the parties to discuss possible undertakings which may resolve those concerns. In fact, section

63 of the Act provides parties to the merger with the opportunity to address any competition concerns found during the review through undertakings.

- 5.7 Where the parties offer undertakings to the Competition Commission, the Executive Director will assess those undertakings and submit his report to the Commission for its determination. Normally where parties promptly offer undertakings to the Competition Commission which satisfactorily address the identified competition concerns, the assessment may be completed earlier than the 6 months' timeline for in-depth assessment.
- 5.8 At times the parties may decide not to proceed with the notified transaction, in which case they must inform the Competition Commission. Where this is the case, the assessment will be discontinued by the Executive Director.

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