



MERGER ASSESSMENT GUIDELINES

December 2019

TABLE OF CONTENTS

1. FOREWORD	Error! Bookmark not defined.
2. INTRODUCTION.....	4
3. WHAT IS A MERGER	6
4. NOTIFICATION REQUIREMENTS.....	8
5. THE COMPETITION TEST.....	9
6. COMPETITIVE EFFECTS OF MERGERS	14
7. PUBLIC INTEREST CONSIDERATIONS	24
8. PUBLIC HEARINGS	27
9. DECISION OR DETERMINATION OF THE AUTHORITY	27
RELEVANT PROVISIONS OF THE ACT	29
10. APPENDIX 2: SUMMARY OF MERGER REVIEW PROCESS	31

1. FOREWORD

- 1.1 The Competition and Consumer Authority (CCA) is a statutory body corporate established under section 4 of the Competition Act. The CCA's approach to the assessment of mergers has been developed in line with international best practice, such as the International Competition Network Merger Guidelines, SADC (Southern African Development Community) recommendations and other countries' experiences. These Guidelines outline the general principles underpinning the Authority's merger analysis approach under section 52 of the Competition Act ('the Act'). The approach to merger assessment has been developed with an emphasis on the competitive theories of harm and the effects of constraints, which facilitates a more integrated and robust analysis.
- 1.2 The CA will assess each merger on its merits according to the specific nature of the transaction, the industry and the particular competitive impact likely to result in each case. The general principles set out in these Guidelines provide a framework within which mergers will be reviewed. However, the application of these principles to different facts and situations may give rise to different results.
- 1.3 The Guidelines do not cover every issue or circumstance that may arise in a merger review, as, in practice, individual mergers involve a great variety of facts and situations. Consequently, the analysis of particular issues may need to be tailored to the specific circumstances of a merger or deal with competition issues not specifically considered in these guidelines. Merger assessment is inevitably case specific and must take account of the particular transaction and the markets being analysed. The CCA will, therefore, consider each merger with due regard to the particular circumstances of the case, including the information available and the time constraints applicable to the case.
- 1.4 The procedures presented in this document have, as their goal, to serve as a mechanism for administrative transparency, accountability, due process and constituting a description of the criteria and steps in the analyses of mergers by the CCA. These Guidelines should also provide an enhanced level of predictability and certainty to merger parties, their advisors, the business community and the public.
- 1.5 The Guidelines take cognisance of the Competition Policy, which states that market dominance (which may be achieved through mergers and acquisitions) or the possibility that it could be created and subsequently

abused is a key consideration in the design and application of the Competition Policy and its related legislation.

- 1.6 The guidelines are not a substitute for the Competition Act and Regulations and must be read in conjunction with the Act and Regulations. The examples in these Guidelines are thus for illustrative purposes. They are not exhaustive and do not set a limit on the investigation and enforcement activities of the CCA. In applying the Guidelines, the facts and circumstances of each case will be considered.

These Guidelines reflect the views of the CCA at the time of publication. Markets, economic theory, legal thinking and best practice evolve; thus, the CCA may revise the Guidelines from time to time to reflect developments.

2. INTRODUCTION

- 2.1 Protection of competition is not an end in itself, but a means to create an efficient economy and to preserve the economic welfare of society. In an efficient economy, consumers enjoy the greatest variety of products at competitive prices. In such a context, individuals enjoy maximum economic welfare. Competition is a state of rivalry between firms – in terms of price, service, technology and quality. When effective, the competitive process compels firms to win customers by offering better value than their rivals, which enhances consumer welfare¹.
- 2.2 Mergers between firms may produce positive and negative effects on economic welfare. Concentration may, by reducing the number of participants in the market, make the adoption of anti-competitive behaviours (price increases, quality reduction, diminished variety or reduced innovations) easier. However, mergers, as long as they provide competitive advantages for the participating firms (economies of scale, economies of scope and reduction of transaction costs, among others), may also increase economic welfare.
- 2.3 To know what the effect of the concentration is, it is necessary to analyse each case specifically. The understanding that mergers involve potentially both negative and positive effects and that they cannot, therefore, be approved or rejected per se, is recognised in competition

¹ See for example the Australian Competition and Consumer Commission, Merger Guidelines, November 2008

law, which requires the consideration of each transaction's efficiency gains vis-a-vis its negative effects.

- 2.4 In the majority of mergers, sufficient competitive tension remains after the merger to ensure that consumers and suppliers are not worse off. In many instances, consumers and/or suppliers benefit from mergers. In some cases, however, mergers have anti-competitive effects. By altering the structure of the market and the incentives for firms to behave in a competitive manner, some mergers can result in significant consumer detriment².
- 2.5 Mergers that are likely to prevent or substantially lessen competition will be subject to remedy under the Act. However, in making the merger assessment, the CCA may consider any factor which it considers bears upon the broader public interest. Special attention is also paid to the effects of the merger in creating a position of dominance, which is likely to be abused. The main criterion is, however, whether there is a loss of rivalry.

3. RELEVANT LAW

- 3.1 The merger control provisions are contained under Part XI of the Act. The Act prohibits mergers that would have the effect, or be likely to have the effect of preventing or substantially lessening competition in the market.
- 3.2 Specifically, section 52(1) on the assessment of notified mergers, provides that, *"in assessing a proposed merger, the Authority shall first determine whether the merger –*
- (a) *Would be likely to **prevent or substantially** lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services; or*
 - (b) *Would be likely to result in any enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in the market.*
- 3.3 According to section 52(2), *the Authority may in addition, consider any factor which, the Authority considers bears upon the broader public interest in the proposed merger...*

² ICN Merger Guidelines Workbook, April 2006

4. WHAT IS A MERGER?

- 4.1 According to section 45(1) of the Act, a merger occurs when one or more enterprises directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another enterprise.
- 4.2 In section 45(2) Acquisition of control over the whole or part of another enterprise may be achieved in any manner, including –
- (a) The purchase or lease of shares, an interest, or assets of the other enterprise in question; or
 - (b) Amalgamation or other combination with that enterprise
- 4.3 In 45 (3) a person controls an enterprise if that person –
- (a) Beneficially owns more than one half of the issued share capital of the enterprise;
 - (b) Is entitled to exercise a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;
 - (c) Is able to appoint or to veto the appointment of a majority of the directors of the enterprise;
 - (d) Is a holding company, and the enterprise is a subsidiary of that company as contemplated in the Companies Act;
 - (e) In the case of an enterprise being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
 - (f) In the case of the enterprise being a close corporation, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
 - (g) Has the ability materially to influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in part (a) to (f)"
- 4.4 An 'enterprise' is defined under section 2 of the Act to mean any person or group of persons, whether or not incorporated, that carries on a business for gain or reward in the production, supply or distribution of goods or the provision of any service.

4.5 The determination of whether a merger exists for the purposes of the Act is based on both qualitative and quantitative criteria, focusing on the concepts of control and market share.

5. CONTROL

5.1 An enterprise that buys or proposes to buy a majority stake in another enterprise is the most obvious example of a merger. However, the transfer or pooling of assets may also give rise to a merger. Where Company A acquires a controlling interest in Company B, this is known as de jure or legal control³.

5.2 Where Company A acquires the ability to materially influence the policy of Company B, this is known as 'material influence'⁴. The assessment of whether material influence is capable of being exercised requires a case by case analysis of the entire relationship between the merging parties. In making this assessment, the CCA will have regard for all the circumstances of the case and the variety of the commercial agreements entered into by the enterprises. The acquirer's ability to influence the target's policy can arise through the exercise of votes at shareholders' meetings, together with any additional supporting factors that might suggest that the acquiring party exercises an influence disproportionate to its shareholding. Material influence may also arise as a result of the ability to influence the board of the target and/or through other arrangements.

5.3 Financial arrangements may confer material influence, where the conditions are such that an enterprise becomes so dependent on the lender that the lender gains material influence over the enterprise's policies or activities. For example, where the lender threatens to withdraw loan facilities if a particular activity is not pursued, or where the loan conditions confer on the lender the ability to exercise rights over and above those necessary to protect its investment. The CCA will pay particular attention to financial arrangements to determine whether or not the purpose of the loan goes beyond that of protecting the lender's interest, and has an adverse effect on competition.

5.4 Control may exist where minority shareholders have additional rights which allow them to veto decisions that are essential for the strategic commercial behaviour of the enterprise, such as budget, business plans,

³ Also see the Competition Commission of Mauritius, Merger Guidelines 2009 and Competition Commission of Singapore Guidelines on the Substantial Assessment of Mergers, 2007

⁴ See the Merger Assessment Guidelines, Office of Fair Trading September 2010

major investments, the appointment of senior management or market specific rights. The latter would include decisions on technology to be used where technology is a key feature of the merged enterprise.

- 5.5 Pure economic relationships may also play a decisive role in certain circumstances when determining whether or not control exists. For example, in very important long-term supply agreements, the supplier may be able to exercise decisive influence over a customer by creating a situation of economic dependence.
- 5.6 Parties can write to the Authority for guidance as to whether a transaction or proposed transaction meets the definition of a merger or proposed merger and is notifiable.
- 5.7 Where parties to a merger have notified through a special purpose vehicle (SPV), i.e., a newly registered entity, the CCA shall consider all the relevant subsidiaries and/or holding company direct and indirect interests in Botswana as forming a part of the merger and thus the notification fee and the assessment of the merger shall take these into consideration in so far as there are horizontal, vertical and complementary overlaps.

6. NOTIFICATION REQUIREMENTS

- 6.1 Section 48 of the Act provides that, “no merger falling within the provisions of section 47 may be implemented by any enterprise or enterprises unless-
 - (a) *the merger is approved by the Authority in accordance with the provisions of this Act;*
 - (b) *the merger is implemented in accordance with any conditions attached to the approval granted by the Authority; or*
 - (c) *the period within which the determination of a notification for a proposed merger has elapsed without the Authority having made a determination in relation to the merger.”*
- 6.2 Section 49(1) of the Act further provides that “where a merger is proposed, each of the enterprises involved shall notify the CCA of the proposed merger, in the prescribed manner”.
- 6.3 The mergers that shall be subject to review by the CCA are captured by section 47 of the Competition Act as read with Regulation 22, which state that, “a proposed merger is subject to control in terms of the Act if –

- (a) *The turnover in Botswana of the enterprise or enterprises being taken over exceeds P10, 000, 000;*
- (b) *The assets in Botswana of the enterprise or enterprises being taken over exceeds P10, 000, 000; or*
- (c) *The enterprises concerned would, following implementation of the merger, supply or acquire at least 20 percent of a particular description of goods or services in Botswana.*

6.4 **Form K** of the Competition Regulations clearly outlines the information required from the merging parties to submit to the CCA. Failure to submit the required information will delay the assessment process as the CCA attempts to access the information needed for the assessment. The submission of a merger file must be accompanied by a filing fee, otherwise the filing will be rendered incomplete. The filing is calculated as 0.01% of the combined gross turnover/revenue/sales or assets of the acquirer and the target whichever is high.

Trusts and Related Non-Profit Making Organisations

- 6.5 Trusts and related non-profit making organisations engaging in commercial activity or mergers that would be classified as economic activities within the meaning of section 3(1) of the Act shall be notifiable mergers and assessed like any other mergers and this include liquidated mergers.
- 6.6 Enterprises that go ahead with notifiable mergers without the Authority's approval are liable to fines of up to ten (10) per cent of their annual gross turnover (based on the latest audited financial statement or signed management accounts).

7. THE COMPETITION TEST

- 7.1 In a competitive market environment, market participants are mutually constrained in their pricing, output and related commercial decisions to some extent by the activities of other market participants (or potential market participants). In other words, the greater the degree of competition in a market, the less market power each market participant will possess.

- 7.2 Mergers can alter the level of competition in a market. Some mergers enable the merged firm to meet customer demand in a way that facilitates more intense competition. Where there are sufficient substitution possibilities to effectively constrain the merged firm, the merger will not affect the level of competition⁵.
- 7.3 Other mergers, however, lessen competition by reducing or weakening the competitive constraints or reducing the incentives for competitive rivalry. Mergers that increase the market power of one or more market participants may be detrimental to consumers because they may lead to an increase in price, or deterioration in some other aspect of the service offering. Further, mergers that increase market power may decrease economic efficiency, thereby reducing gains from trade and total welfare.
- 7.4 The assessment of the competitive effects is based on the theories of competitive harm, namely, unilateral⁶ and coordinated effects⁷. Mergers result in unilateral and/or coordinated effects when they weaken or remove the competitive pressure on firms in the market. In cases where unilateral and/or coordinated effects amount to a significant and sustainable increase in the market power of the merged firm and/or other firms in a market, the merger is likely to substantially lessen competition⁸.

8. ASSESSMENT TESTS

- 5.5.1 Section 52(1) on the assessment of notified mergers, provides that, *“in assessing a proposed merger, the Authority shall first determine whether the merger –*
- (a) *Would be likely to prevent or substantially lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services; or*

⁵ See for example the Australian Competition and Consumer Commission, Merger Guidelines, November 2008

⁶ Unilateral effects resulting from a horizontal merger arises when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity to profitably raise prices on its own and without needing to coordinate with its rivals. Unilateral effects can be horizontal or vertical.

⁷ Coordinated effects may arise when firms operating in the same market recognise that they are mutually interdependent and that they can reach a more profitable outcome if they coordinate to limit their rivalry. Coordination may involve enterprises keeping prices higher than they would otherwise have been in a more competitive market.

⁸ Merger Assessment Guidelines, Office of Fair Trading, September, 2010

- (b) *Would be likely to result in any enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in the market.*

5.5.2 Section 52(2) states that *the Authority may, in addition, consider any factor which the Authority considers bears upon the broader public interest in the proposed merger...."*

9. TYPES OF MERGERS⁹

9.1 There are three distinct types of mergers, each of which may affect competition in a different way, namely, horizontal, vertical and conglomerate¹⁰.

10. HORIZONTAL MERGERS

10.1 These are mergers between enterprises that operate in the same relevant market(s) at the same level of business. For example, between two manufacturers, two distributors or two retailers. Horizontal mergers can substantially lessen competition in two, not mutually exclusive ways. First, it can make it profitable for the merged entity to unilaterally raise its price or reduce its output, post-merger. Second, it can make it more likely or easier for the enterprises remaining in the market to coordinate, either tacitly or explicitly. The loss of a competitor (actual or potential) during a horizontal merger can change the competitive incentives of the merging parties, their rivals and their customers, thus leading to changes in the intensity of competition.

11. VERTICAL MERGERS

11.1 These are mergers between enterprises which operate at different levels of the production or supply chain of an industry. That is, a merger between an upstream firm and a downstream firm (e.g., a manufacturer and a distributor), where the upstream firm is an actual or potential supplier of an input into the production process of the downstream firm. Although vertical mergers are often pro-competitive, they may, in some circumstances, reduce the competitive constraints faced by the merged entity by foreclosing a substantial part of the market to competitors or by increasing the likelihood of post-merger collusion. This risk is, however,

⁹ ICN Merger Guidelines Workbook, April 2006

¹⁰ Merger Assessment Guidelines, Office of Fair Trading, September 2010.

unlikely to arise except in the presence of existing market power at one level in the production or supply chain at least, or in markets where there is already significant vertical integration or restraints.

12. CONGLOMERATE MERGERS

- 12.1 These are mergers between undertakings in different markets, with no functional link. Often conglomerate mergers will allow firms to achieve efficiencies and result in better integration, increased convenience and reduced transaction costs. Conglomerate mergers will rarely lessen competition substantially, but might, in some cases, reduce competition.
- 12.2 Non-horizontal mergers, such as, vertical and conglomerate mergers typically will not raise competition concerns. However, where insufficient competitive constraints remain in the relevant market post-merger, some non-horizontal mergers will raise competition concerns when the merged firm is able to increase its unilateral market power. One way in which this can occur is through the merged firm 'foreclosing' rivals.

13. CREEPING MERGERS

- 13.1 A creeping merger, also known as a creeping acquisition, is a takeover strategy involving the gradual acquisition of a public company's shares on the stock market, instead of making a direct bid. Creeping mergers are often cited as a problem in the context of concentrated industries, but practical competition law solutions are rarely suggested.
- 13.2 The issue of so-called creeping mergers is one that periodically gains attention in competition law circles, usually in response to growing concentration in a particular sector or industry. Concern usually arises where a large/dominant firm is involved in the acquisition of one or more smaller firms such that each individual transaction cannot be said to substantially lessen competition, but where concentration in the industry overall is steadily increasing over time.
- 13.3 In terms of section 52(a) of the Competition Act, the competition authorities must determine whether or not a given merger “is likely to substantially prevent or lessen competition. Although the Act suggests that a range of factors may be taken into account when performing this assessment, including ease of entry, level and trends in concentration and whether or not the merger results in the removal of an effective competitor, it is clear that the merger must result in competition being prevented or lessened substantially. Thus it is possible that even in a highly concentrated industry with high barriers to entry, the merger of a dominant firm with an effective (or potentially effective) but small competitor may be permitted in terms of the Act. Furthermore, even if the same dominant firm has merged with three other smaller firms in the same market in the recent past, there would be no basis for prohibiting the merger under the Act. The combined effect of the transactions on competition, however, may be substantial.

14. HOSTILE MERGER/TAKEOVER

14.1 A hostile takeover is the acquisition of one company (called the target company) by another (called the acquirer) that is accomplished by going directly to the company's shareholders or fighting to replace management to get the acquisition approved.

15. ACQUISITION OF ASSETS

15.1 Section (45)(a) covers acquisition of assets. The Authority will consider a merger to have been created when one enterprise buys or leases the assets belong to another, if such assets have a market presence, or a market turnover which can clearly be attributed to them and the control now exercised over them has changed the competitive situation in the relevant market.

16. COMPETITIVE EFFECTS OF MERGERS

16.1 Not all mergers give rise to competition issues. Some mergers are pro-competitive (because they positively enhance the level of rivalry) others are competitively neutral. Some mergers may lessen competition, but not substantially, because sufficient post-merger competitive constraints exist to ensure that competition (or the process of rivalry) continues to discipline the commercial behaviour of the merged entity¹¹.

16.2 The precise threshold between lessening of competition and a substantial lessening of competition is a matter of judgment and will always depend on the particular facts of the merger under investigation. The CCA will generally take the view that lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices. The level at which an increase in market power is likely to become significant and sustainable will vary from merger to merger.

16.3 In assessing proposed mergers, according to section 52(1)(a) of the Act, the CCA will also determine whether the merger would be likely to prevent competition. Prevention of competition arising from the merger

¹¹ Merger Assessment Guidelines, Office of Fair Trading, 2010

could be in the form of increasing barriers to entry into the market as well as foreclosures¹².

- 16.4 In establishing whether a substantial lessening of competition (SLC) has occurred, or is likely to occur, or if competition has been or will be prevented, the CCA will carry out a structured analysis, which it will use to inform its decision, as well as in providing the reasons to the merging parties and the public for its decision. Merger analysis is inherently forward-looking and necessarily involves predictions to be made about the future. The CCA will form an expectation using all the available relevant evidence it can reasonably obtain. No specific weight is given to the factors upon which the Authority will rely when it considers whether there are mitigating factors that could constrain market power, post-merger. When the CCA evaluates a transaction on the basis of the factors to be discussed below, it will perform a delicate balancing act, the outcome of which is determined for the most part by the specific facts of each case.
- 16.5 In the assessment of the competitive dynamics of the market in so far as prevention or substantial lessening of competition due to the merger is concerned, the CCA will take into account factors that are relevant to competition in that market. These factors include the following (not necessarily in the order of sequence)¹³:
- (a) Market definition;
 - (b) Market concentration;
 - (c) Counter-factual (what would happen without the merger);
 - (d) Industry Barriers (i.e., assessment of entry and expansion constraint);
 - (e) Theory of harm and effects;
 - (f) Import or foreign competition;
 - (g) Countervailing buyer power;
 - (h) Removal of a vigorous and effective competitor;

¹² Strategic behaviour by a firm or group of firms to restrict market access possibilities of potential competitors either upstream or downstream. Foreclosure can take different forms, from absolute refusal to deal to more subtle forms of discrimination, such as through exclusionary contracts.

¹³ Merger Assessment Guidelines, Office of Fair Trading, 2010

- (i) Effective remaining competition (post-merger); and
- (j) Theory of harm and effects – unilateral/monopolisation effects, coordinated effects and foreclosure.

17. MARKET DEFINITION

17.1 A market is the product and geographic space in which rivalry and competition take place. Market definition is an activity common to all the CCA's investigations, not just in the case of mergers. Under section 85(4) of the Act, the CCA is supposed to define the market for purposes of assessing the effects on competition or whether some alternative definition of the market should be substituted for this purpose. Accordingly, in assessing whether a merger substantially lessens competition, the CCA will examine the competitive impact of the transaction in the context of the markets relevant to the merger. Market definition is discussed in detail in the Market Definition Guidelines developed by the CCA.

18. MARKET CONCENTRATION

18.1 Market concentration is a measure used to determine the structure of the market, as determined by the market shares of the players in a defined relevant market. Market shares are a key input when determining concentration. A dominant market position¹⁴ in the context of section 2 of the Act refers to a situation in which one or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors. Regulation 4 of the Competition Regulations states that an enterprise acquires a dominant position if it supplies or acquires at least 25 percent of the goods or services in the market. For instance, this might occur through the elimination of an effective source of competition which weakens the rivalry among the players left in the market, after the merger.

18.2 In assessing market concentration, the CCA takes into account the pre- and post-merger market shares of the merged firm and its rivals and the actual increase in concentration. The level of concentration in the market can be an indicator of competitive pressure within that market. Market concentration generally depends on the number and size of the participants in the market.

¹⁴ Substantial market power

- 18.3 A merger which increases the level of concentration in a market may reduce competition by increasing the unilateral market power of the merged entity and/or increasing the scope for coordinated conduct among the competitors in the market, post-merger.
- 18.4 A merged entity with substantial market power may be able to increase prices or decrease quality or output without being threatened by competitors. It can also undertake strategic behaviour such as predation, which may in turn affect market structure and market power. A reduction in the number of firms in the market may also increase the scope of coordinated conduct, as it becomes easier for competitors to reach agreement on the terms of coordination, signal intentions to one another and monitor one another's behaviour.
- 18.5 The two principal measures used by the CCA in examining market concentration and structure are market shares and concentration ratios. Market shares are usually measured by sales revenue. Other measures, such as production volumes, sales volumes, capacity or reserves, may be used as appropriate. Comparison of the merged entity's market shares with those of other players in the market may give an indication of the rivalry and potential market power and whether the other players are able to provide any competitive constraint.
- 18.6 The two commonly used measures of concentration that the Authority uses include:-
- (a) the Herfindahl-Hirschman Index (HHI) is a measure of the size of firms in relation to the industry and an indicator of the degree of competition among them. It is calculated by taking the sum of the squares of the market shares of every firm in the industry. These market shares are squared in the calculation to place more weight on the larger firms. An HHI of less than 1000 represents a relatively unconcentrated market, with no competition concerns. An HHI between 1000 and 1800 represents moderate concentrated markets and, therefore, competition concerns, while an HHI of over 1800 represents high concentration and serious competition concerns¹⁵.
 - (b) the three firm concentration ratio (CR3), which is calculated as the sum of the market shares of the three largest firms in the industry, shows the proportion of the market supplied by the three leading firms. It has generally been adopted that competition concerns are unlikely to arise

¹⁵ see ICN Investigative Techniques Handbook for Merger Review, June 2005

unless the merger results in a merged entity with a market share of between 20% and 40% and a post-merger CR3 ratio of 70% or more.¹⁶

- 18.7 While useful, the concentration ratio provides an incomplete picture, as it does not use the market shares of all the firms in the industry; nor does it provide information about the distribution of firm size. In contrast, the HHI takes into account the differences in the sizes of the market participants, as well as their number.
- 18.8 The thresholds set out in the preceding paragraph are simply indicators of potential competition concerns, but they do not give rise to a presumption that such a merger will lessen competition substantially. Further investigation is required to determine whether a merger will prevent or substantially lessen competition. Similarly, a substantial lessening of competition could potentially be established at thresholds below that set out in the preceding paragraph if other relevant factors provide strong evidence of any prevention or substantial lessening of competition.

19. COUNTERFACTUAL

- 19.1 A competitive counterfactual can be considered to be the state of competition in the absence of the merger. The concept of a prevention or substantial lessening of competition implies a reduction, a change compared to something else. This something else is the state of competition if the merger does not take place (or had the merger not taken place).
- 19.2 A prevention or substantial lessening of competition occurs when it is expected there will be substantially less competition following the merger than would have occurred without the merger. Thus, this would be assessed by considering how competitive the market was/is before the merger and what is likely to happen after the merger. One such critical factor to consider is the scenario of a failing firm¹⁷.

20. INDUSTRY BARRIERS

- 20.1 Industry barriers are impediments (structural, regulatory or administrative) that may exist to make entry into a particular market difficult to achieve. Entry by new competitors or expansion by existing competitors may be

¹⁶ see Competition Commission of Singapore

¹⁷ Discussed in detail under the section of public interest.

sufficient in likelihood, scope and time to deter or defeat any attempt by the merging parties or their competitors to exploit the reduction in rivalry resulting from the merger (whether through coordinated or uncoordinated strategies).

- 20.2 New entry and the threat of entry can represent important competitive constraints on the behaviour of merging parties. If entry is particularly easy and likely, then the mere threat of entry may be sufficient to deter the merging parties from raising their prices, since any price increase or reduction in output or quality would provide an incentive for new entry to take place.
- 20.3 The analysis of entry conditions includes considering whether the merged entity would face competition from imports, to the extent that these have not already been taken into account in the market definition. What is important is that the competitive constraints posed by imports are considered in the analysis (whether under market definition or entry). Given the open nature of the Botswana economy, and its membership in SACU, the competitive constraints posed by imports are likely to be an important factor in the analysis.
- 20.4 Higher prices make it more attractive to enter the market. Even if a merger would result in one or more suppliers having the ability to raise prices, a merger might still be allowed if the CcA believes that entry is sufficiently timely, likely and effective that no long-term damage to competition will result. To prevent or reverse a substantial lessening of competition, entry needs to be sufficiently effective to restore whatever rivalry was lost as a result of the merger. The loss of a large, effective competitor might not be fully compensated by the appearance of a small new entrant. It is not enough for a new enterprise to appear in the market, it must be expected to grow to represent at least as significant a competitor as the enterprise that was eliminated by the merger. Furthermore, the merger must not have resulted in irreparable harm to competition, by for example, locking customers into long-term contracts.
- 20.5 It is not sufficient to simply demonstrate that there are no legal or other impediments to entering the market, the CCA must reasonably expect that viable entry will occur in the event of any price rise, as a result of the merger. In assessing the likelihood of sufficient and timely entry, the CCA will consider, amongst others, the presence of legal/regulatory and administrative barriers to entry (e.g., licensing requirements), capital requirements, customer brand loyalty, switching costs and the history of entry, per industry.

20.6 The ability of rival firms in the market to expand their capacity quickly can also act as an important competitive constraint on the merging parties' behaviour. When considering the likelihood of such expansion in response to price increases, the CCA will similarly consider the factors which have been set out for new market entry.

21. THEORY OF HARM AND EFFECTS

21.1 In most cases, the CCA's decision on the competitive effects of a merger will be influenced by its assessment of the merger's effects on competition, post-merger. These fall into three main categories discussed below, two of which apply principally to horizontal mergers, one to vertical or conglomerate mergers. These include unilateral and coordinated effects. Mergers result in unilateral and/or coordinated effects when they weaken or remove the competitive pressure on firms in a market. Where unilateral and/or coordinated effects amount to a significant and sustainable increase in the market power of the merged firm and/or other firms in a market, the merger is likely to substantially lessen competition in contravention of the Act.

(a) *Unilateral effects*

Unilateral effects are the simplest and most obvious form of anti-competitive effect arising from a horizontal merger. Two enterprises that were previously competing merge and there is, therefore, a reduced competitive constraint on each, compared to what there was before. The CCA will investigate to determine the likely scale and duration of this reduction in the competitive constraint. If it finds that the merged enterprise is likely to face reduced competitive constraints as a result of the merger and could, therefore, increase profits by exploitative behavior, such as price rises, the CCA will assume that the merged enterprise will do so. In making its decision, the CCA may take into account, amongst other things:

- (i) Market shares, the number of suppliers and market concentration; customer behaviour to switch suppliers;
- (ii) Buyer power to exert pressure on suppliers to reduce prices; and
- (iii) Reaction of rivals in providing the needed competitive constraint on the merged enterprise.

(b) *Coordinated effects*

In addition to unilateral effects, mergers can lessen competition through coordinated effects. Mergers have coordinated effects when they reduce the intensity of rivalry between the remaining suppliers in the market. This is termed coordinated effects. This describes a situation in which suppliers choose to compete less fiercely against one another; for example, by not reducing prices even though they could profitably increase sales by doing so, because they are aware that their rivals might respond to the price reduction. Collusive agreements prohibited under sections 25, 27 and 28 of the Act provide one mechanism to coordinate. However, coordination can occur without explicit agreements and can result in high prices, simply through mutual awareness of shared interests between enterprises in the industry. Coordination entails actions by a group of enterprises that are profitable for each of them only as a result of accommodating actions by the others. For coordination to be sustained, all three of the following conditions must be present in the market¹⁸:

- (i) It must be possible for enterprises engaged in coordination to reach an implicit agreement about the price level, and to monitor compliance, becoming aware if any among them undercut it;
- (ii) It must be in each of the participating enterprises interests to maintain the coordination, for example, through credible threats to launch a price war if one of the enterprises undercuts the collusive price; and
- (iii) Constraints from rivals outside the coordinating group (e.g., new entrants) must be weak.

(c) *Foreclosure*

As discussed earlier, in general, vertical and conglomerate mergers are mostly either beneficial for competition and efficiency, or at worst neutral. However, in some cases vertical and conglomerate mergers between makers of complementary goods may give rise to concerns of foreclosure, which may have the effect of preventing competition. This entails, the abuse of a strong market position in one market to restrict, distort or prevent competition in another market, eliminating or weakening rivals and thereby damaging consumers' interests in the long

¹⁸ While most mergers will have no effect on the likelihood of coordination, others might make coordination less likely. Horizontal mergers, however, by reducing the number of suppliers in the market, might make it easier to monitor compliance, or make it more profitable for the remaining enterprises to coordinate. Vertical mergers might result in more information being available, again making it easier to coordinate.

run. A vertical or conglomerate merger might create a market structure in which such foreclosure is likely, where it was not before. This can happen in the following manner:-

- (i) by controlling downstream re-sellers, an upstream enterprise might be able to deny access to the market for its rivals and eliminate competition. In a conglomerate merger, the merged enterprise might bundle together two products so that customers must buy both at the same time. If one of these products is a monopoly and the other faces competition and has scale economies, this can result in leverage of monopoly power to eliminate rivals in another market. If the CCA expects a merger to create a profitable opportunity for anti-competitive foreclosure, it will reach a substantial lessening of competition finding.
- (ii) when the damage to the process of competition is sufficiently great and sufficiently irreversible, that consumers or the economy as a whole suffer as a result of a less competitive market structure in the future. Anti-competitive foreclosure does not occur every time a business refuses to deal with another, or reaches an exclusive arrangement with a trading partner. Nor is damage to competitors sufficient to demonstrate that anti-competitive foreclosure has occurred. Such behaviour can be part of the normal process of competition.

22. IMPORT OR FOREIGN COMPETITION

22.1 Actual or potential direct competition from imported goods or services can provide an important competitive discipline on domestic firms. Where the Authority can be satisfied that import competition – or potential for import competition provides an effective constraint on domestic suppliers, it is unlikely that a merger would result in a substantial lessening of competition.

22.2 Imports are most likely to provide an effective and direct competitive constraint in circumstances where all of the following conditions are met¹⁹:

- (a) There are no barriers to the quantity of independent imports rapidly increasing that would prevent suppliers of the imported

¹⁹ Australian Competition and Consumer Commission, Merger guidelines, November 2008

product from competing effectively against the merged firm within a duration of one to two years;

- (b) The imported product is a strong substitute in all respects for the relevant product of the merged firm; and
- (c) Importers are able to readily increase the supply volume of the product they import with minimal or no increase in the price paid.

23. COUNTERVAILING POWER

23.1 In the assessment of the competitive effects of a merger, the CCA also considers whether one or more buyers would have sufficient countervailing power to constrain any attempted increase in market power by a supplier²⁰. Countervailing power exists when buyers have special characteristics that enable them to credibly threaten to bypass the merged firm, such as by vertically integrating into the upstream market, establishing importing operations or sponsoring new entry. Countervailing power is more than the ability of buyers to switch to alternative domestic or imported products. The availability of effective alternatives to the merged firm provides all buyers with a means of bypassing the merged firm. Countervailing power, however, exists when the specific characteristics of a buyer – such as its size, its commercial significance to suppliers or the manner in which it purchases from suppliers – provide the buyer with additional negotiating leverage. In some cases, a buyer may have countervailing power because they have market power.

23.2 In assessing whether countervailing power is likely to prevent a substantial lessening of competition by constraining any attempt by the merged firm to increase market power, the CCA will consider the following factors, amongst others:

- (a) Whether the threat to bypass the merged firm is credible on commercial grounds;
- (b) Whether the buyer is likely to bypass the supplier; and

²⁰ See for example the Competition Commission of Mauritius Merger Guidelines 2009 and the Competition Commission of Singapore Guidelines on the Substantive Assessment of Mergers 2007

- (c) The proportion of the downstream market able to wield a credible threat.

24. REMOVAL OF A VIGOROUS AND EFFECTIVE COMPETITOR

- 24.1 Mergers involving a vigorous and effective competitor (sometimes referred to as a maverick firm) are more likely to result in a significant and sustainable increase in the unilateral market power of the merged firm or increase the ability and incentive of a small number of firms to engage in coordinated conduct. Vigorous and effective competitors may drive significant aspects of competition, such as, pricing, innovation or product development, even though their own market share may be modest. These firms tend to be less predictable in their behaviour and deliver benefits to consumers beyond their own immediate supply, by forcing other market participants to deliver better and cheaper products. They also tend to undermine attempts to coordinate the exercise of market power. A merger that removes a vigorous and effective competitor may, therefore, remove one of the most effective competitive constraints on market participants and thereby result in a substantial lessening of competition.

25. EFFECTIVE REMAINING COMPETITION (POST- MERGER)

- 25.1 In making the assessment of the effects of the merger on competition, the CCA will have due regard to the continued existence of competitive constraints that will remain in the relevant market to ensure that rivalry continues to discipline the commercial behaviour of the merged firms. This is in recognition of the fact that some mergers will lessen competition, but not substantially, because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merged firms²¹.

26. PUBLIC INTEREST CONSIDERATIONS

- 26.1 While most jurisdictions have an SLC and dominance test for mergers, section 52 of the Act also addresses, in a discretionary manner, public interest. In this regard, after considering the SLC and dominance test, the CCA may also determine whether a merger can or cannot be justified on public interest grounds. Section 52(2) of the Competition Act states,

²¹ Merger Assessment Guidelines, Office of Fair Trading, September 2010

"The Authority may in addition, consider any factor which, the Authority considers bears upon the broader public interest in the proposed merger, including the extent to which -

- (a) the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition or to the acquisition or strengthening of a dominant position in a market;*
- (b) the merger may improve, or prevent a decline in the production or distribution of goods or the provision of services;*
- (c) the merger may promote technical or economic progress, having regard to Botswana's development needs;*
- (d) the proposed merger would be likely to affect a particular industrial sector or region;*
- (e) the proposed merger would maintain or promote exports or employment;*
- (f) the merger may advance citizen empowerment initiatives or enhance the competitiveness of citizen-owned small and medium sized enterprises; or*
- (g) the merger may affect the ability of national industries to compete in international markets".*

26.2 The implication of the consideration of issues that impact on public interest is that a transaction with no anti-competitive consequences may be prohibited or approved subject to certain conditions²², where the CCA is of the view that it is likely to have an adverse effect on public interest, as envisaged by the Competition Act.

26.3 Essentially, the CCA is required to apply requisite public policy when considering mergers; and the weight given on the public benefit will be on a case by case basis. The public interest test in section 52(2) is neither exclusive nor prescriptive. Rather, it provides a list of *indicative* factors the CCA could look at in considering the benefits and costs to society, and should allow the CCA to also take other factors into consideration²³. While these other factors are not and should not be limitless, it is difficult to

²² The merger of Tiger Brands Ltd/Ashton Canning Company (Pty) Ltd and others in South Africa would have resulted in a loss of 45 permanent jobs and 1,000 seasonal jobs. For this reason, the Competition Tribunal approved the merger subject to conditions which included that (1) the merging parties would not retrench more than 45 employees from the aggregate number of employees; (2) the merging parties make available an amount of R2million for the purpose of training all affected persons.

²³ As learnt from the National Competition Policy, chapter 4 on 'The Public Interest Test', a publication of the National Competition Council of Australia
<http://ncp.ncc.gov.au/docs/OINcpIm-006.pdf>

classify them as limited. However, extraordinary merger cases shall guide the CCA as to whether to extend the list under section 52(2). Ordinarily, the CCA shall limit itself to the list of issues thereunder.

26.4 The inclusion of public interest in such a law is a realization that:

Competition policy is not about the pursuit of competition for its own sake. Rather, it seeks to facilitate effective competition in the interests of economic efficiency, while accommodating situations where competition does not achieve economic efficiency or conflict with other social objectives²⁴.

26.5 Where public interests are assessed, the following will be taken into account:

- (a) Whether the merger would result or be likely to result in a public benefit that outweighs the likely public detriment constituted by any prevention or lessening of competition.
- (b) Whether the merger would result or be likely to result in such a benefit to the public that the provision should be permitted to be made or the conduct should be allowed to take place.

Decision making based on public interest

26.6 Because of the nature of varying understandings/interpretations of public interest, the CCA shall engage the parties to the merger on the public interest issues raised during the assessment and before a decision is reached to explore ways on how the concerns could be addressed through feasible undertakings or other related commitments.

26.7 The CCA may in, addition to consulting with the parties to the merger, consult relevant stakeholders on the feasibility and/or viability of the public interest being reasonably addressed through the undertakings and/or commitments. Such stakeholders may include consumers, regulators or statutory bodies, associations or government offices.

26.8 Once such consultations have taken place, within reasonable time periods as may be set by the CCA, a decision shall be made taking into account the undertakings and other commitments made by the parties and the comments of third parties (notwithstanding that where third parties have not responded within the set time, the CCA shall proceed to make a decision based on its assessment of the available information).

²⁴ Australian National Competition Policy Report of Independent Committee of Inquiry 1993, p.6.

Failing Firm

- 26.9 A failing firm is a firm that has been consistently earning negative profits and losing market share to such an extent that it is likely to go out of business.²⁵ A failing firm may be authorised exceptionally, to be taken over, resulting in post-merger anti-competitive effects.
- 26.10 In order to satisfy the failing firm defence against a finding that a merger would be anti-competitive, conditions along the following lines will be considered by the CCA²⁶:
- i) It must be clear that the firm is in such a deteriorated financial situation that without the merger, its assets would exit the market and this would occur in the near future;
 - ii) There must be no serious prospect of re-organising the business;
 - iii) There should be no less anti-competitive alternative to the merger.

27. Public Hearings

27.1 Pursuant to section 51 of the Act, the Authority shall hold public hearings on mergers where at least one party to a merger is a dominant firm.

27.2 The hearing will be intended to cast the net wide in terms of taking into account stakeholder views with respect to the possible effect of the merger on competition, amongst other things. The Authority is entitled to make a decision within 30 days after a public hearing is held.

28. Decision or Determination of the Authority

28.1 A decision of the CCA on a merger shall be made by a panel comprising a minimum of 3 members, being the Chairperson and two other heads of department within the CCA. The Head of mergers shall be the secretary of the proceedings. See **Appendix 3** on the Terms of reference for the Mergers Committee.

28.2 A summary of the decision or determination on a merger shall be issued within 24 hours after the Committee's sitting to the joint representative of the parties to the merger, in addition to publication in the Government Gazette.

²⁵ OECD Glossary of statistical terms

²⁶ ICN Merger Guidelines Workbook, April 2006

APPENDIX 1:

RELEVANT PROVISIONS OF THE ACT

MERGER ASSESSMENT TIME PERIOD (S49)

1. The CCA shall consider and make a determination in relation to a notified merger within a period of 30 days after the date on which the Authority receives that notification.
2. That notwithstanding, the CCA may, within the 30 days of receipt of the notification, extend the assessment period by a period not exceeding 60 days.
3. Where the CCA extends the assessment period for a merger, the CCA shall give notice to the merging enterprises not later than seven days before the expiry of 30 business days from the date of receipt of the notice.

PUBLIC HEARINGS (S51)

1. Where the CCA considers it appropriate, it may determine that one or more hearings should be held in relation to a proposed merger. In such an event, prior notice will be given to concerned enterprises and third parties.
2. The CCA would thus decide whether to hold individual hearings with each of the enterprises and other interested parties separately or to hold a single hearing attended by all the enterprises involved and by interested third parties.

REFERRAL OF A MERGER CASE (S50)

1. For the purpose of considering a notified merger, the CCA may refer the notification of the proposed merger to an inspector for an investigation and report in relation to the merger assessment criteria contained in section 52 of the Act.

ACCEPTANCE OF UNDERTAKINGS (S54)

1. One or more enterprises may offer an undertaking to the CCA to address any concern that has arisen, or may be expected to arise, during the CCA's consideration of a notified merger.

2. The CCA may make determinations in relation to a merger on the basis of such an undertaking if it is satisfied that the undertaking covers all the concerns that need to be addressed as part of the merger assessment.

REVOCAION OF APPROVAL OF MERGER (S56)

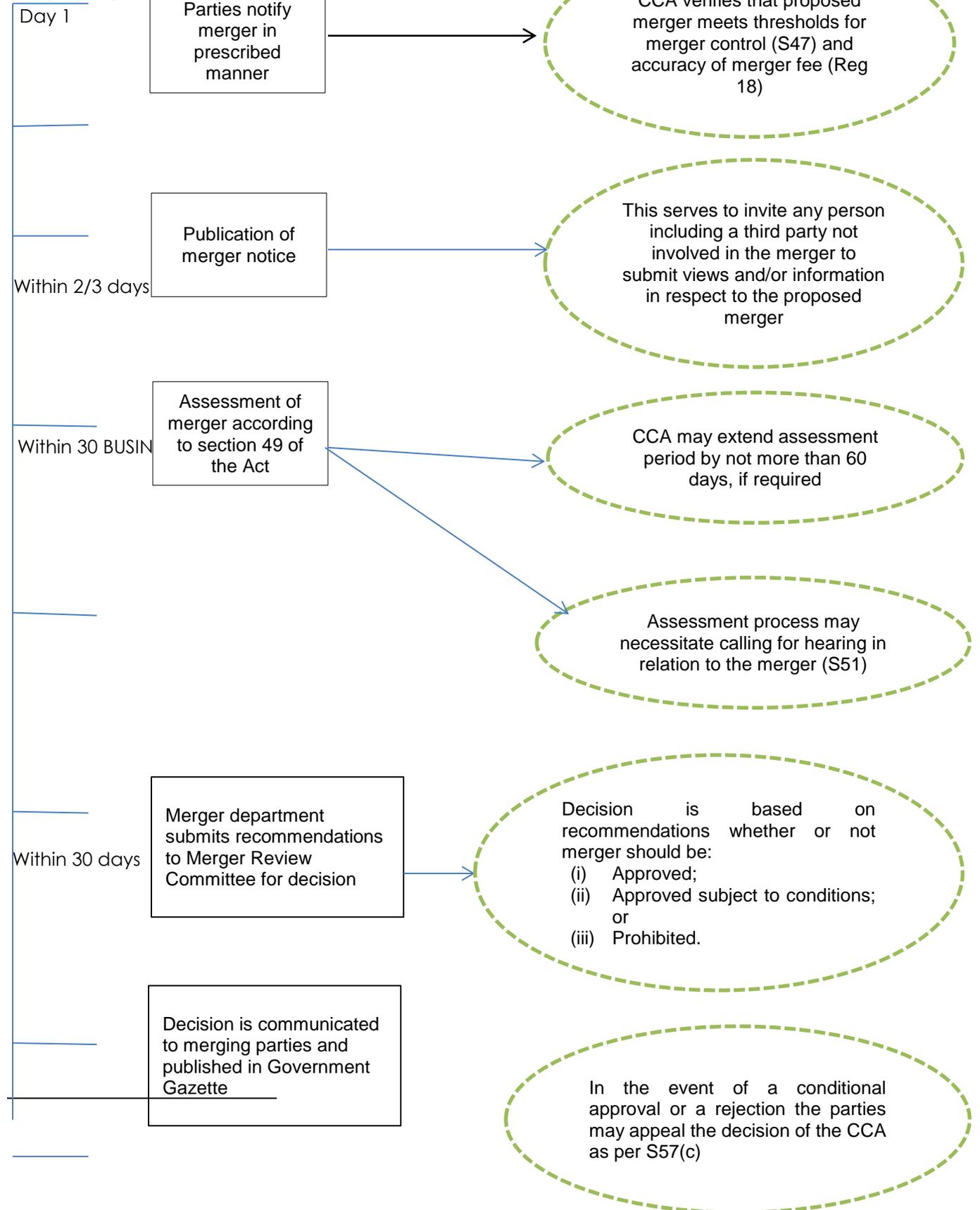
1. The CA may at any time, after consideration of any representations made to it, revoke a decision approving the implementation of a merger if –
 - (a) The decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or
 - (b) Any condition attached to the approval of the merger that is material to the implementation is not complied with.

APPEALS (S57)

1. Section 57 of the Act states - “an enterprise or person aggrieved by a determination of the Authority to issue or not to issue a direction, or by the terms of a direction -
 - (c) In relation to a merger pursuant to part XI, may appeal to the High Court against that determination.

APPENDIX 2: SUMMARY OF MERGER REVIEW PROCESS

Timeframe²⁷



APPENDIX 3:



MERGERS REVIEW COMMITTEE

Terms of Reference

January 2011

Introduction

1. The Competition Authority is established under Section 4 of the Competition Act of 2018 and under Section 5(1), the Competition Authority is empowered to prevent, redress and remove constraints on the free play of competition in the market. One role the Authority has been expressly granted under the Act is to assess and approve mergers notified under Section 52 and Section 53 of the Act.
2. Under Section 5(b), 5(m) and 5(n) of the Competition Act, the Competition Authority is empowered to “regulate the merging of enterprises”; “authorise with or without conditions, mergers which it receives notification under Part XI”; and “prohibit or refer mergers of which it receives notification under Part XI”.
3. To prevent arbitrary decisions in relation to a merger, the office of the Chief Executive of the Authority proposed the constitution of a committee that would assist him to review/assess and approve mergers under the Act.

Notification of Mergers

4. Under Section 49 read together with Section 47 of the Act and Regulation 18 of the Competition Regulations, no merger that is subject of notification may be implemented by an enterprises or enterprises unless:
 - (a) the merger is approved by the Authority in accordance with the provisions of this Act;
 - (b) the merger is implemented in accordance with any conditions attached to the approval granted by the Authority; or
 - (c) the period within which the determination of a notification for a proposed merger has elapsed without the Authority having made a determination in relation to the merger.

Period for decision making

5. Under Section 49(4), the Authority is expected to make a decision on a notified merger:
 - (a) within 30 business days after the date on which the Authority receives that notification;
 - (b) where the Authority requests further information...within 30 days after the date of receipt by the Authority of the information;

(c) if a hearing is convened...within 30 days after the hearing is convened.

Under Section 51 of the Act, the Authority may determine to hold one or more hearings on a merger, which hearing may be public, in camera, or selective.

Assessment Criteria

6. The basis of the Authority's assessment of a merger is based on Section 52 of the Act, which lists two mandatory assessment criteria as follows:
 - (i) Whether the merger would be likely to prevent or substantially lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services; or
 - (ii) Whether the merger would be likely to result in any enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in a market; and
 - (iii) The Authority may, in addition, consider any factor which the Authority considers bears upon the broader public interest in the proposed merger.

Decision on a Merger

7. In terms of the decision on a merger, Section 53 of the Act states that the Authority may:
 - (i) Give approval for the implementation of the merger without conditions or subject to such conditions as it considers appropriate. In the latter case, the Authority's determination may contain such directions as the Authority considers necessary, reasonable and practicable to remedy, mitigate or prevent any adverse effects of the merger. Such directions may include divestiture of assets, adoption, cessation from such conduct in relation to prices as specified in the direction²⁸; or
 - (ii) Decline to give approval to the implementation of the merger to the extent that it relates to a market in Botswana.

²⁸ Section 53(2) of the Act

Issuance and publication of Decision

8. The Authority shall give notice of the determination made and any directions in relation to a merger to the parties involved in the merger, in writing, and by notice in the Gazette, and issue written reasons for its determination if it prohibits or conditionally approves a merger, or if it is requested to do so by any person²⁹.

Undertakings to a merger

9. Under Section 54 of the Act, a party or parties to a merger may offer undertakings to the Authority to address any concern that has arisen, or may be expected to arise, during the Authority's consideration of a notified merger. The Authority may make determinations in relation to the merger on the basis of such undertaking if it is satisfied that the undertaking covers all the concerns that need to be addressed as part of the assessment criteria. Such undertaking accepted by the Authority shall be published in form of a decision by the Authority; and shall have effect as if it were a direction.

Revocation of a merger

10. The Authority has the power to revoke a decision approving the implementation of a merger if the decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or if any condition attached to the approval of the merger that is material to the implementation is not complied with. Where the Authority proposes to revoke a merger, it shall³⁰:

- (a) Give notice in writing of the proposed action to every enterprise involved in the merger, and to any person who in the opinion of the Authority is likely to have an interest in the matter; and
- (b) Call upon such persons to submit to the Authority, within 30 days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.

Illegal Merger

11. Where parties to a proposed merger are suspected to be about to implement a merger, or have implemented a merger without authorisation or without

²⁹ Section 60(4) of the Act

³⁰ Section 62 of the Act

following the conditions or directives as given, the Authority may give a direction to the enterprise/s involved³¹ –

- (a) Not to complete or implement a merger;
- (b) To sell or dispose of in any other specified manner, any shares, interest or other assets it has acquired pursuant to the merger;
- (c) To terminate any agreements, or provisions of an agreement, to which the merger was subject ; or
- (d) To take such further measures as may be necessary to restore the conditions of competition existing prior to the merger.

Non-Compliance with Directives

12. Where the Authority determines that a party or parties to a merger have failed to or not complied with a direction, without reasonable excuse, the Authority shall give notice of the intention to the enterprise concerned and consider any representations the enterprises wishes to make. Following this, the Authority may then apply to the Tribunal for an order requiring the enterprise to make good the default within a time specified in the order³².

Compliance with other laws

13. It is noteworthy that approval of a merger granted by the Authority does not relieve an enterprise from obtaining such other approvals as may be required from other bodies in the exercise of their statutory responsibilities³³. It is thus not the place of the Authority to unduly require parties to a merger whether they have complied with any other statutory requirements e.g. registering their new company with the Registrar of Companies or grant of an insurance license.

Constitution of the Mergers Review Committee

14. In light of the foregoing, there is hereby constituted a Mergers Review Committee comprising of the Chief Executive with two Heads of Department who shall review mergers before they are approved by the Authority. The Director of Mergers and Monopolies shall be the Secretary to the Committee and shall present a brief of the relevant issues pertaining to the case, its conclusions and recommendations.

³¹ Section 58 of the Act

³² Section 59 of the Act

³³ Section 61 of the Act

Terms of Reference

- (i) To review whether mergers presented before it meet the notification criteria set under Section 47 of the Act and in Regulation 18 of the Competition Regulations of 2018;
- (ii) To review whether the merger assessment criteria under Section 52 of the Act has been satisfied as follows:
 - (a) Whether the merger would be likely to prevent or substantially lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services; or
 - (b) Whether the merger would be likely to result in any enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in a market; and
 - (c) The Authority may, in addition, consider any factor which the Authority considers bears upon the broader public interest in the proposed merger.
- (iii) To review any conditions proposed and/or undertakings given by enterprises and determine, as empowered under Section 53(1), whether to:
 - (a) Give approval for the implementation of the merger without conditions or subject to such conditions as it considers appropriate; or
 - (b) Decline to give approval to the implementation of the merger to the extent that it relates to a market in Botswana.
- (iv) Review directions as provided for under Section 53(3) to all or targeted merging parties whether to:
 - (a) Divest such assets as are specified in the recommended direction within a specified period;
 - (b) To adopt, desist from such conduct in relation to prices, as may be specified before the merger can be completed or implemented.
- (v) Preside over any public hearing in relation to a merger and consider the presentations thereof as provide for under Section 51 of the Act;

- (vi) Direct the Director responsible for Mergers to ensure that the Authority meets all the post-decision requirements, such as issuance of a decision, informing the parties of the decision and publishing the decision in the Gazette as provided for under Section 53(4) of the Act;
- (vii) Review revocation of the Authority's previous decision to approve the implementation of a merger under Section 56 of the Act;
- (viii) Review reports on mergers implemented in contravention of the Act or against the conditions set or directives given by the Authority under Section 58 of the Act;
- (ix) Review all applications to the Court for an order against enterprises that have, without reasonable excuse, failed to comply with a direction issued by the Authority as provided for under Section 57 of the Act;
- (x) Review assessment reports on the post-merger impact evaluations; and
- (xi) To do all such things as may be lawfully done or conducted under Part XI of the Competition Act.