



NAMIBIAN COMPETITION COMMISSION

**MERGERS & ACQUISITIONS
MERGER GUIDELINES 2018**

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1. FOREWORD

- 1.1 The Namibian Competition Commission (“the Commission”) is a statutory body established under section 4 of the Competition Act 2 of 2003 (“the Act”). The Commission’s approach to the assessment of mergers has been developed in line with international best practice, such as the International Competition Network’s Merger Guidelines, SADC (Southern African Development Community) recommendations and other countries’ experiences. The Guidelines outline the general principles underpinning the Commission’s approach to merger analysis under section 47 of the Act.
- 1.2 As is recognized in other jurisdictions, merger guidelines do not cover all the possible issues that may arise in a merger review. Every merger involves a different set of facts and, therefore, 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 the guidelines.¹ Merger assessment is inevitably case specific and must take account of the particular transaction and the markets being analysed.² The Commission will, therefore, consider each merger with due regard to the particular circumstances of the case.
- 1.3 The Guidelines serve as a mechanism for administrative transparency, accountability, due process and aim to provide an enhanced level of predictability and certainty to merging parties, their advisors, the business community and the public. The Guidelines are not a substitute for the Act and Rules made thereunder and must be read in conjunction with the Act and Rules.
- 1.4 The Guidelines reflect the views of the Commission at the time of publication. Markets, economic theory, legal thinking and best practice evolve; thus, the Commission may revise the Guidelines from time to time to reflect developments.

¹ Australian Competition & Consumer Commission Merger Guidelines, November 2008, at p 1

² Merger Assessment Guidelines, Joint publication of the Office of Fair Trading & Competition Commission, September 2012, at p 5

2. Introduction

- 2.1 Competition is a state of rivalry between undertakings – in terms of price, service, technology and quality. The protection of competition is not an end in itself, but a means to create an efficient economy and to preserve consumer welfare.
- 2.2 In an efficient economy, consumers enjoy the greatest variety of product choices at competitive prices. When effective, the competitive process compels undertakings to win customers by offering better value than their rivals, which enhances consumer welfare.³
- 2.3 Most mergers do not harm competition. 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 undertakings to behave in a competitive manner, some mergers can result in significant consumer detriment.⁴
- 2.4 Mergers that are likely to substantially prevent or lessen competition will be subject to remedy under the Act. The Commission may either prohibit the merger or approve it subject to conditions that will remedy the foreseen harm.
- 2.5 In making its determination on a merger, the Commission may also take into account the impact of the merger on public interest factors.

Relevant Law

- 2.6 The merger control provisions are contained under Chapter 4 of the Act.
- 2.7 In terms of sections 47(1) and 47 (6) of the Act the Commission may approve, approve with conditions or prohibit the implementation of a merger.
- 2.8 Section 47(2) provides that:

³ ICN Merger Guidelines Workbook, April 2006, at pp. 6 -7

⁴ Ibid

The Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger including -

- (a) The extent to which the proposed merger would be likely to **prevent or lessen** competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services; or*
- (b) The extent to which the proposed merger would be likely to result in any undertaking, including an undertaking which is not involved as a party in the proposed merger, **acquiring a dominant position in the market or strengthening a dominant in a market.***

2.9 Further, according to section 47(2) of the Act, the Commission may consider any factor which bears upon the broader public interest, including those stated under section 47(2)(c) – (h) of the Act.

A. MERGER PROCEDURE

3. What is a merger?

3.1 The Act defines the term “merger” very broadly. It does not only include amalgamations but a wide range of acquisitions as well.

3.2 According to section 42(1) of the Act:

A merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

3.3 In terms of section 42(2), acquisition of control may be achieved in any manner, including:

(a) *The purchase or lease of shares, an interest, or assets of the other undertaking in question; or*

(b) *Amalgamation or other combination with that other undertaking.*

Control

3.4 In terms of section 42(3):

A person controls an undertaking if that person –

(a) *Beneficially owns more than one half of the issued share capital of the undertaking;*

(b) *Is entitled to exercise a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;*

- (c) *Is able to appoint or to veto the appointment of a majority of the directors of the undertaking;*
- (d) *Is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act;*
- (e) *In the case of an undertaking 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 undertaking 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 undertaking 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).*

3.5 It is important to note that this is not a closed list of ways in which one undertaking can acquire or establish control over another undertaking. For example, excluded from this list is the acquisition of control by one undertaking over the assets of another or the transfer of a business or part thereof of a sole proprietor or partnership.

Material Influence

3.6 In terms of section 42(3)(g) of the Act, a merger may occur when an undertaking acquires the ability to materially influence the policy of another undertaking.

3.7 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 Commission will have regard for all the circumstances of the case and the commercial agreements entered into by the undertakings. 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.

- 3.8 Financial arrangements may confer material influence, where the conditions are such that an undertaking becomes so dependent on the lender that the lender gains material influence over the undertaking'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.

Minority Shareholding

- 3.9 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 undertaking, such as budget, business plans, 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 undertaking.

Change in Form of Control

- 3.10 A transaction is also notifiable if there is a change of the form of control from sole to joint control and vice versa. An illustration:
- A and B each hold 50% of the shares in company C and one cannot make any decisions regarding company C without the consensus of the other. Under these circumstance, A and B jointly control C.
 - In the event that A sells any of its shares to B (and in the absence of any agreement to the contrary) there is a change of the form of control from joint to sole control as A can now make decisions regarding company C without the consensus of B. This is considered a change of control which is notifiable to the Commission.

4. Notification Requirements

- 4.1 Chapter 4 of the Act applies to every proposed merger not excluded by the Minister by notice in the Government Gazette.⁵ No one may implement a proposed merger unless it is approved by the Commission.⁶
- 4.2 Where a merger is proposed, each of the undertakings involved must notify the Commission of the proposed merger, in the prescribed manner.⁷

Merger Thresholds

- 4.3 On the 21st of December, 2015, Government Notice 307, containing the Minister's determination made in terms of section 43(1), was published in Government Gazette 5905. It provides as follows:

Class of mergers excluded from Chapter 4 of the Act

2. (1) Chapter 4 of the Act does not apply to a merger if –

- (a) the combined annual turnover in, into or from Namibia of the acquiring undertaking and transferred undertaking is equal to or valued below N\$30 million;*
- (b) the combined assets in Namibia of the acquiring undertaking and transferred undertaking are equal to or valued below N\$30 million;*
- (c) the annual turnover in, into or from Namibia of the acquiring undertaking plus the assets in Namibia of the transferred undertaking are equal to or valued below N\$30 million; and*
- (d) the annual turnover in, into or from Namibia of the transferred undertaking plus the assets in Namibia of the acquiring undertaking are equal to or valued below N\$30 million.*

⁵ Section 43(1)

⁶ Section 43(3)

⁷ Section 44(1)

(2) In addition to subregulation (1), Chapter 4 of the Act also does not apply to a merger if -

(a) the annual turnover in, into or from Namibia, of the transferred undertaking is equal to or valued below N\$15 million; and

(b) the asset value of the transferred undertaking in Namibia is equal to or valued below N\$ 15 million.

4.4 The Notice creates two thresholds which must both be met for the transaction to be notifiable to the Commission:

- A N\$30 million threshold for the combined values of the undertakings involved (regulation 2(1) of the Notice); and
- A N\$15 million threshold for the value of the transferred undertaking (regulation 2(2) of the Notice).

4.5 According to the Notice, only if any of the combined values (i.e. any combination of assets and turnovers of the undertakings involved) is more than N\$30 million **and, in addition thereto**, either the assets or the turnover of the transferred undertaking is more than N\$15 million, will the transaction be notifiable to the Commission.

4.6 Put differently, if either the N\$30 million threshold contained in regulation 2(1) or the N\$15 million threshold contained in regulation 2(2) is not met, the transaction is not notifiable to the Commission (i.e. it falls within a class of mergers excluded from Chapter 4 of the Competition Act).

Example:

Acquiring Undertaking		Transferred Undertaking	
Turnover	N\$15 million	Turnover	N\$4 million
Assets	N\$25 million	Assets	N\$9 million

Regulations		
Combined values	Calculation	Below or above threshold
2(1)(a) – the combined annual turnover in, into or from Namibia of the acquiring undertaking and transferred undertaking is equal to or valued below N\$30 million	N\$15 mil + N\$4 mil = N\$19 mil	Below
2(1)(b) – the combined assets in Namibia of the acquiring undertaking and transferred undertaking are equal to or valued below N\$30 million	N\$25 mil + N\$9 mil = N\$34 mil	Above
2(1)(c) – the annual turnover in, into or from Namibia of the acquiring undertaking plus the assets in Namibia of the transferred undertaking are equal to or valued below N\$30 million	N\$15mil + N\$9 mil = N\$24 mil	Below
2(1)(d) - the annual turnover in, into or from Namibia of the transferred undertaking plus the assets in Namibia of the acquiring undertaking are equal to or valued below N\$30 million	N\$4 mil + N\$ 25mil = N\$29 mil	Below
Transferred undertaking's values	Value	Below or above threshold
2(2)(a) - the annual turnover in, into or from Namibia, of the transferred undertaking is equal to or valued below N\$15 million	N\$4 mil	Below
2(2)(b) - the asset value of the transferred undertaking in Namibia is equal to or valued below N\$ 15 million	N\$9 mil	Below

- 4.7 In the above example, the value of the merger falls above the threshold contained in regulation 2(1) but below the threshold contained in regulation 2(2). Because it falls below one of the thresholds, it falls within the class of mergers excluded from Chapter 4 of the Competition Act and the merging parties are not required to notify the merger to the Commission.

Rules

- 4.8 Section 22 of the Act provides that the Commission may make rules prescribing, inter alia, the procedures to be followed in respect merger notices.

Parties to the Merger

- 4.9 Rule 27 sets out who the merger parties are. It provides that the acquiring undertaking includes not only the undertaking acquiring control over the business of another undertaking, i.e. the primary acquiring undertaking (rule 27(1)(a)), but:
- every undertaking directly or indirectly controlled by the primary acquiring undertaking (rule 27(1)(c),
 - every undertaking directly or indirectly controlling the primary acquiring undertaking (rule 27(1)(b), and
 - every undertaking directly or indirectly controlled by the undertakings controlling the primary acquiring undertaking (rule 27(1)(c).
- 4.10 As provided for the in the definition of “undertaking” in section 1 of the Act, the undertakings referred to in Rule 27 can take on any form or legal status (i.e. a private individual, body corporate, an unincorporated body of persons or a trust).
- 4.11 Further, control can be in any of the forms discussed in paragraphs 3.4 – 3.10 above.
- 4.12 For the purposes of merger control a group of undertakings is not seen in the same light as it is in company law. It is seen as an “economic unit” or “one entity” if the control mechanisms and structure of the relations between the undertakings in the group imply that competition between them is excluded. All the undertakings that form part of the group, even if in law that economic unit consists of several natural or legal persons, are considered as part of the acquiring group.

Notification Forms

- 4.13 The Rules prescribe the manner in which merger must be notified to the Commission. Rule 28 provides that undertakings involved in a proposed merger must notify the Commission of the proposal in the Merger Notice in the form of **Form 38** and must

attached thereto a completed Statement of Merger Information in the form of **Form 39**.

- 4.14 Form 38 serves to inform the Commission of the proposed merger and the effect of the proposed merger on employment.
- 4.15 Form 39 requires the parties to provide information in Schedules 2 to 5 on, inter alia, the parties to the proposed merger, the proposed transaction, the markets that the merging parties are active in (including who their competitors and customers are, information on the barriers to entry, import competition and countervailing power of customers and suppliers).
- 4.16 Parties must attach to this Form 39 the following items:
- most recent version of all documents constituting the signed merger agreement(s);
 - competitiveness report assessing the economic effects of the proposed transaction;
 - any document, including minutes, reports, presentations and summaries, prepared for the Board of Directors regarding the proposed transaction;
 - most recent business plan;
 - most recent audited financial statement.

Filing Fees

- 4.17 Rule 7(4) sets out the fee for filing a merger notice which ranges from N\$10,000 to N\$500,000 depending in the combined figure of the merging parties.
- 4.18 The combined figure is the greater of:
- The combined annual turnover in Namibia of the acquirer and the target;
 - The combined assets in Namibia of the acquirer and the target;
 - The annual turnover in Namibia of the acquirer plus the assets in Namibia of the target;
 - The assets in Namibia of the acquirer plus the annual turnover in Namibia of the target.
- 4.19 For the purposes of calculating the filing fee the acquirer and target are defined in rule 27. Therefore, when determining the turnover and asset of the acquirer, the turnover

and assets of the total of all undertakings that make up the acquiring group must be taken into account.

- 4.20 Rule 5(5) provides that if a filing fee is required in respect of a document (e.g. a merger notice), the document is only deemed to be filed on the date that the document is filed provided that the filing fee is paid within 5 days otherwise on the day that the filing fee is paid.

Timeframes

- 4.21 It may take between 30 - 150 days from the date a completed merger notification is received for the Commission to make its determination. In terms of rule 3(1)(a), the calculation of days excludes public holidays, Saturdays and Sundays.
- 4.22 The Commission has an initial 30 day period after the date a merger is notified to make a determination.⁸ However, this period can be extended:
- (a) By a request for additional information within the initial 30 day period.⁹ The request will stop the clock until the information is provided and the Commission will have 30 days after the date that it receives the requested information to make its determination.
 - (b) If the Commission convenes a stakeholders' conference in terms of section 46. If a conference is convened the Commission must make a determination within 30 days after the date the conference is concluded.¹⁰
 - (c) If the merger is complex and the Commission is of the opinion that any of the periods referred to above should be extended, it may extend such period by a further period not exceeding 60 days.¹¹

⁸ Section 45(1)(a)

⁹ Section 44(2) read with section 45(b)

¹⁰ Section 45(1)(c)

¹¹ Section 45 (2)

5. Conference in Relation to a Proposed Merger

- 5.1 Pursuant to section 46 of the Act, if the Commission considers it appropriate, it may determine that a conference be held in relation to a proposed merger.
- 5.2 The purpose of the conference is to afford stakeholders an opportunity to express their views with respect to the possible effects of the proposed merger on competition and the broader public interest and to afford the merging parties an opportunity to address the views raised if they so wish.

6. Determinations of the Commission

- 6.1 In terms of sections 47(1) and 47 (6) of the Act, the Commission may approve, approve with conditions or prohibit the implementation of a merger.
- 6.2 The Commission must give notice of the determination made to the parties involved in the proposed merger in writing and by notice in the Government Gazette and issue written reasons for its determination if it prohibits or conditionally approves a proposed merger; or if it is requested to do so by any party to the merger.¹²
- 6.3 The Commission may at any time, after consideration of any representations made to it, revoke a decision approving the implementation of a proposed 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.¹³
- 6.4 Merging parties may, not later than 30 days after notice of the determination is given by the Commission in the Government Gazette, make application to the Minister to review the Commission's decision.¹⁴

¹² Section 47(7)

¹³ Section 48(1)

¹⁴ Section 49(1)

B. MERGER ASSESSMENT

7. Types of Mergers

- 7.1 There are three distinct types of mergers, namely: horizontal, vertical and conglomerate mergers. Each of these mergers may affect competition in a different way.¹⁵ Before considering the framework within which mergers are analysed, it is important to understand the types of mergers that may arise.¹⁶
- 7.2 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 undertaking is able to increase its unilateral market power. One way in which this can occur is through the merged undertaking 'foreclosing' rivals.

Horizontal Mergers

- 7.3 Horizontal mergers are mergers between undertakings that operate in the same relevant market(s) at the same level of business. For example, mergers between two manufacturers, two distributors or two retailers.
- 7.4 A horizontal merger can substantially lessen competition in two, not mutually exclusive, ways. First, it can make it profitable for the merged undertaking to unilaterally raise its prices or reduce its output post-merger and, second, it can make it more likely or easier for the undertakings remaining in the market to coordinate, either tacitly or explicitly.
- 7.5 The loss of a competitor (actual or potential) through 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.

¹⁵ Merger Assessment Guidelines, Office of Fair Trading, September 2010.

¹⁶ ICN Merger Guidelines (note 3) p. 10

Vertical Mergers

- 7.6 These are mergers between undertakings which operate at different levels of the production or supply chain of an industry. That is, a merger between an upstream undertaking and a downstream undertaking (e.g. a manufacturer and a distributor) where the upstream undertaking is an actual or potential supplier of an input into the production process of the downstream undertaking.
- 7.7 Although vertical mergers are often pro-competitive, they may in some circumstances reduce the competitive constraints faced by the merged undertaking by foreclosing a substantial part of the market to competitors (input foreclosure or customer foreclosure) or by increasing the likelihood of post-merger collusion. This risk is, however, unlikely to arise unless there is existing market power at at least one level in the production or supply chain or in markets where there is already significant vertical integration or restraints.

Conglomerate Mergers

- 7.8 These are mergers between undertakings in different markets, with no functional link. Often conglomerate mergers will allow undertakings 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.
- 7.9 Like horizontal and vertical merger, conglomerate mergers may also harm competition by increasing the likelihood of post-merger collusion.

8. The Competition Test

- 8.1 In terms of the ICN Merger Guidelines, *“a key starting point for any set of guidelines is to explain how the relevant national law translates into a competition test. In particular, it is important to explain how a competition authority expects to identify those situations where a merger will not pass the relevant competition test.”*¹⁷
- 8.2 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.
- 8.3 Mergers can alter the level of competition in a market. Some mergers enable the merged undertaking to meet customer demand in a way that facilitates more intense competition. Where there are sufficient substitution possibilities to effectively constrain the merged undertaking, the merger is unlikely to affect the level of competition.¹⁸
- 8.4 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.
- 8.5 Theories of harm have been developed in the context of mergers. The assessment of the competitive effects is based on the theories of competitive harm, namely, unilateral¹⁹ and coordinated effects²⁰.

¹⁷ OFT Assessment Guidelines (note 15) at p. 6

¹⁸ ACCC, Merger Guidelines (note1) at p. 10

¹⁹ Unilateral effects arise where, as a result of the merger, competition between the products of the merging undertakings is eliminated allowing the merged entity to unilaterally exercise market power. Market power can be exercised, for instance, by profitably raising the price of one or both merging parties' products, thus harming consumers.

²⁰ Coordinated effects arise where, under certain market conditions the merger increases the probability that, post merger, merging parties and their competitors will successfully be able to coordinate their behaviour in an anti-competitive way, for example, by raising prices.

- 8.6 Mergers result in unilateral and/or coordinated effects when they weaken or remove the competitive pressure on undertakings 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 undertaking and/or other undertakings in a market, the merger is likely to substantially lessen competition.
- 8.7 When assessing whether a merger results in anticompetitive unilateral or coordinated effects, the Commission considers a range of merger factors. These factors cover a broad range of possible competitive constraints faced by the merged undertaking. Some assist in identifying the presence of direct constraints, while others provide insights into less direct forms of constraint relating to either the structure and characteristics of the market or the behavior of actual and potential participants in the market.

Assessment Tests

- 8.5 In terms of section 47(2) of the Act, *“the Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger”*. In assessing a proposed merger, the Commission 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 undertaking, including an undertaking which is not involved as a party in the proposed merger, acquiring a dominant position in the market.*
- 8.6 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 Commission will generally take the view that lessening of competition is substantial if it confers an increase in market power on the merged undertaking that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged undertaking 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.

8.7 In establishing whether a substantial lessening of competition is likely to occur, or if competition is likely to be prevented, the Commission will carry out a structured analysis, which it will use to inform its decision. Merger analysis is inherently forward-looking and necessarily involves predictions to be made about the future. The Commission 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 Commission will rely when it considers whether there are mitigating factors that could constrain market power, post-merger. When the Commission 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.

9. Market Definition

- 9.1 A proper examination of the competitive effects of a merger rests on a sound understanding of the competitive constraints under which a merged undertaking will operate. The starting point for identifying the scope of competition involves identifying products and services which are substitutable from the point of view of customers.²¹
- 9.2 A market is the product and geographic space in which rivalry and competition take place. Defining the market is a two stage process. One must first determine the product or set of products which constitute the market and secondly, the set of undertakings that are considered to be participants in that market. When assessing whether a merger substantially lessens competition, the Commission will examine the competitive impact of the transaction in the context of the markets relevant to the merger.
- 9.3 Market definition is important in merger analysis as:
- It provides a useful analytical framework in which to organize the analysis of the effects of the merger on competition; and
 - It enables the Commission to determine the absence or possible existence of market power by calculating the undertakings market shares.
- 9.4 Basic principles of market definition are:

The Product Market²²

- 9.5 Market definition focuses on the empirical question of substitutability of products and services from the point of view of customers. When assessing product market scope, substitutability from both demand- and supply-side is commonly considered.

²¹ ICN Merger Guidelines (note 3) at p. 15

²² Ibid

Demand-side Substitution²³

- 9.6 Demand-side substitutability assesses the extent to which customers could and would switch among substitute products in response to a change in relative prices or quality or availability or other features.
- 9.7 The market definition process starts by considering the narrowest candidate market definition. This is normally a product or service which one (or both) of the merging parties supply. Conceptually, one approach that can be taken to analyse the degree to which customers could and would switch is by applying the so-called hypothetical monopolist test.
- 9.8 Consider a hypothetical undertaking that is the only supplier of the product or group of products. The question to be answered is whether a monopoly supplier (the hypothetical monopolist) of these products would maximise its profits by consistently charging higher prices. This test is also commonly referred to as the SSNIP test where 'SSNIP' stands for 'small, but significant non-transitory increase in price'.
- 9.9 If the hypothetical monopolist would be prevented from imposing at least a small, but significant non-transitory increase in price because of substitution by customers to other products, the candidate market is not a relevant market by itself. The next closest product should be added to the scope of the candidate market and the test applied again. By repeating the process, a point can eventually be reached where a hypothetical monopolist supplying the products or services in question would achieve market power, i.e., the hypothetical monopolist would maximize profits by maintaining prices above prevailing levels. This point is (usually) the relevant product market. With regard to the size of price increase, the common benchmark used is between 5 and 10 percent.
- 9.10 In practice, in many cases, there may be insufficient available data to conduct a full SSNIP test: in such cases, application of the SSNIP test is more likely to be conceptual rather than literal. In other words, the application of the test may be only a framework for analysis.

²³ ICN Merger Guidelines (note 3) at pp. 19 - 20

Supply Substitution²⁴

- 9.11 Supply-side substitutability examines the extent to which suppliers of alternative products could and would switch their existing production facilities to make alternative products in response to a change in relative prices, demand or other market conditions.
- 9.12 If the price of product A rises, undertakings that do not currently supply that product might be able to, at short notice and without incurring significant sunk costs, switch from production of product B to supplying product A. This form of substitutability occurs in the production process of incumbent suppliers and hence is known as supply-side substitutability. It addresses the questions of whether, to what extent, and how quickly, undertakings would start supplying a market in response to a price increase in that market.
- 9.13 Moreover, the mere fact that some undertakings producing product B are able to quickly switch (or extend) supply to product A does not necessarily mean that (i) they can switch (or extend) supply entirely, (ii) they have incentive to do so and (iii) all undertakings producing B would do so. When considering the product market on the basis of supply-side substitutability, the Commission will require that most of the suppliers of product B will be able to offer and sell the various qualities of product A under conditions of immediacy (with the capacity that can be economically reallocated to product A) and in the absence of significant increase in costs before they conclude that product A and B are in the same market.

Geographic Market²⁵

- 9.14 The geographic market is an area within which reasonable substitution for the merging parties' products can occur, i.e. to which customers can look for supply. One approach to defining the geographic market is to conceptually consider the smallest area where a hypothetical monopolist would maximize its profits by imposing at least a small but significant and non-transitory increase in price. Geographic markets are defined using the same processes as those used to define product markets. The geographic market may be local or regional, national, continent wide or worldwide.

²⁴ ICN Merger Guidelines (note 3) at pp. 23 - 24

²⁵ Ibid

- 9.15 As with the product market, in assessing the appropriate geographic market, the objective is to identify substitutes which are sufficiently close that they would prevent a hypothetical monopolist of the product or service in one area from sustaining price increase of at least 5 to 10 per cent.

10. Competitive Effects of Mergers

Theories of Harm and Effects

- 10.1 A merger's effects on competition fall into two main categories, namely, unilateral and coordinated effects. Where unilateral and/or coordinated effects amount to a significant and sustainable increase in the market power of the merged undertaking and/or other undertakings in a market, the merger is likely to substantially lessen competition in contravention of the Act.

Unilateral Effects

- 10.2 Unilateral effects are the simplest and most obvious form of anti-competitive effects arising from a horizontal merger. Unilateral effects arise where, as a result of the merger, competition between the products of the merging undertakings is eliminated allowing the merged entity to unilaterally exercise market power. Market power can be exercised, for instance, by profitably raising the price of one or both merging parties' products, thus harming consumers. In theory, all horizontal mergers involve undertakings active in the same relevant market and therefore remove some competitive constraint: the critical issue is how to distinguish economically 'important' competitive constraints from 'unimportant' ones.²⁶
- 10.3 The Commission will assess the likely scale and duration of this reduction in the competitive constraint. If it finds that the merged undertaking 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 Commission will assume that the merged undertaking will do so. In making its decision, the Commission may take into account, amongst other things:
- Market shares and market concentration;
 - Customer ability to switch suppliers;
 - Buyer power to exert pressure on suppliers to reduce prices; and
 - Reaction of rivals in providing the needed competitive constraint on the merged undertaking.

²⁶ ICN Merger Guidelines (note 3) at p. 11

Coordinated effects

- 10.4 In addition to unilateral effects, mergers can lessen competition through coordinated effects. Coordinated effects arise where, under certain market conditions (e.g., market transparency, product homogeneity etc.), the merger increases the probability that post merger merging parties and their competitors will successfully be able to coordinate their behaviour in an anti-competitive way, for example, by raising prices. The main issue, here, is not the market power of the merging parties resulting from the merger, but instead, whether the merger will create or strengthen certain market conditions which allow undertakings in the to successfully coordinate their actions to the disadvantage of consumers (or customers).²⁷
- 10.5 For coordination to be sustained, all three of the following conditions must be present in the market: ²⁸
- (a) It must be possible for undertakings engaged in coordination to reach an implicit agreement about the price level, and to monitor compliance, becoming aware if any among them undercut it;
 - (b) It must be in each of the participating undertakings interest to maintain the coordination, for example, through credible threats to launch a price war if one of the undertakings undercuts the collusive price; and
 - (c) Constraints from rivals outside the coordinating group of undertakings (e.g., new entrants) must be weak.

Foreclosure

- 10.6 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 mergers and conglomerate mergers between makers of complementary goods may give rise to concerns of foreclosure, which may have the effect of lessening or 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 run. A vertical

²⁷ ICN Merger Guidelines (note 3) at p. 11

²⁸ ACCC Merger Guidelines (note 1) at p. 33

or conglomerate merger might create a market structure in which such foreclosure is likely.

- 10.7 A vertical merger can have anticompetitive effects if it enables the vertically integrated merged undertaking to constrain a rival's ability to compete either by foreclosing it from an upstream or downstream market or by raising its costs in a way that permits the merged entity to exercise market power. The anticompetitive behaviour of the merged undertaking can increase rivals' costs and eventually this will lead the rivals to raise their prices to consumers, thereby enabling the merged entity responsible for the rivals' cost increase to raise its prices as well.²⁹
- 10.7 The main competitive concern in conglomerate merger context is also foreclosure- as a result of tying or bundling, demand for competing rivals' products may be curtailed, as a result of which these rivals become less effective competitors in the longer run. Foreclosure may be inspired by the desire to gain market power in the tied goods market, to protect market power in the tying goods market, or a combination of the two.³⁰

²⁹ ICN Merger Guidelines (note 3) at p 73

³⁰ Ibid at p 78

11. Merger Factors

- 11.1 In the assessment of the competitive dynamics of the market, in so far as substantial prevention or lessening of competition due to the merger is concerned, the Commission will take into account factors that are relevant to competition in that market. These factors include, but are not limited to, the following:
- Market concentration;
 - Counter-factual (what would happen without the merger);
 - Barriers to entry and expansion;
 - Import competition;
 - Countervailing power;
 - Removal of a vigorous and effective competitor;
 - Effective remaining competition.

Market Concentration

- 11.2 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.
- 11.3 In assessing market concentration, the Commission takes into account the pre- and post-merger market shares of the merged undertaking 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.
- 11.4 A merger which increases the level of concentration in a market may reduce competition by increasing the unilateral market power of the merged undertaking and/or increasing the scope for coordinated conduct among the competitors in the market, post-merger.
- 11.5 A merged undertaking 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 undertakings 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, monitor one another's behavior and punishing those deviating from the agreement.

- 11.6 The two commonly used measures of concentration that the Commission uses include concentration ratios and the Herfindahl-Hirschman Index (HHI).
- 11.7 Concentration ratios measure the aggregate market share of a small number of the leading undertakings in a market. Concentration ratios of the first three (CR3) or four (CR4) or five (CR5) undertakings are usually considered. They are absolute measures of concentration and take no account of differences in the relative size of the undertakings that make up the leading group. By way of example, the CR3 ratio in a market where the three largest undertakings within that market each have shares of 15 per cent would be 45 per cent.
- 11.8 While useful, the concentration ratio provides an incomplete picture, as it does not use the market shares of all the undertakings in the industry; nor does it provide information about the distribution of undertaking size. In contrast, the HHI takes into account the differences in the sizes of the market participants, as well as their number.
- 11.9 The Herfindahl-Hirschman Index which is calculated by taking the sum of the squares of the market shares of every undertaking in the industry. Both the absolute level of the HHI and the change in the HHI as a result of the merger can provide an indication of whether a merger is likely to raise competition concerns. The increase in HHI (or delta) can be calculated by subtracting the market's pre-transaction HHI from the post-transaction HHI.³¹
- 11.10 Based on their experience, competition authorities generally classify markets into three types:³²
- (a) *Unconcentrated Markets*: HHI below 1500
 - (b) *Moderately Concentrated Markets*: HHI between 1500 and 2500
 - (c) *Highly Concentrated Markets*: HHI above 2500

³¹ ICN Merger Guidelines (note 3) at p. 34

³² US DoJ & FTC, Horizontal Merger Guidelines (2010)

11.11 The competition authorities further employ the following general standards for the relevant markets they have defined:

- (a) *Small Change in Concentration:* Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- (b) *Unconcentrated Markets:* Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- (c) *Moderately Concentrated Markets:* Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- (d) *Highly Concentrated Markets:* Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

11.12 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 substantially lessen competition. Further investigation is required to determine whether a merger will substantially lessen competition.

Counterfactual

11.13 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).

- 11.14 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 undertaking.

Barriers to Entry and Expansion

- 11.15 Barriers to entry are impediments (structural, regulatory or administrative) that may exist to make entry into a particular market difficult to achieve.
- 11.16 Entry by new competitors or expansion by existing competitors may be sufficient in time, scope and likelihood to deter or defeat any attempt by the merging parties to exploit the reduction in rivalry following the merger.³³ The Commission will only conclude that entry/expansion is a real competitive constraint on the merging parties where the entry or expansion is likely, sufficient and timely.
- 11.17 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.
- 11.18 The analysis of entry conditions includes considering whether the merged undertaking 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 Namibian economy, and its membership in SACU, the competitive constraints posed by imports are likely to be an important factor in the analysis.
- 11.19 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 Commission 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.

³³ ICN Merger Guidelines (note 3) at p. 53 -59

It is not enough for a new undertaking to appear in the market, it must be expected to grow to represent at least as significant a competitor as the undertaking 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.

Import Competition

- 11.20 Actual or potential direct competition from imported goods or services can provide an important competitive discipline on domestic undertakings. Where the Commission is 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.
- 11.21 Imports are most likely to provide an effective and direct competitive constraint in circumstances where all of the following conditions are met:³⁴
- (a) There are no barriers to the quantity of independent imports rapidly increasing that would prevent suppliers of the imported product from competing effectively against the merged undertaking 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 undertaking; 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.

Countervailing Power

- 11.22 In the assessment of the competitive effects of a merger, the Commission also considers whether one or more buyers would have sufficient countervailing power to constrain any attempted increase in market power by a supplier. Countervailing power exists when buyers have special characteristics that enable them to credibly threaten to bypass the merged undertaking, such as by vertically integrating into the

³⁴ ACCC Merger Guidelines (note 1) at p. 41

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 undertaking provides all buyers with a means of bypassing the merged undertaking. 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.

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

- (a) Whether the threat to bypass the merged undertaking is credible on commercial grounds;
- (b) Whether the buyer is likely to bypass the supplier; and
- (c) The proportion of the downstream market able to wield a credible threat.

Removal of a Vigorous and Effective Competitor

11.24 Mergers involving a vigorous and effective competitor (sometimes referred to as a maverick undertaking) are more likely to result in a significant and sustainable increase in the unilateral market power of the merged undertaking or increase the ability and incentive of a small number of undertakings 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 undertakings 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.

Effective Remaining Competition

11.25 In making the assessment of the effects of the merger on competition, the Commission 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 undertakings. 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 undertakings.³⁵

Failing Undertaking

11.26 A failing undertaking is an undertaking that has been consistently earning negative profits and losing market share to such an extent that it is likely to go out of business.

11.27 That an undertaking is failing is one of the factors that the Commission will take into account when making its determination on a proposed merger.

11.28 The following will be considered by the Commission³⁶:

- (a) It must be clear that the undertaking is in such a deteriorated financial situation that without the merger it and its assets would exit the market and this would occur in the near future;
- (b) There must be no serious prospect of re-organizing the business;
- (c) There should be no less anti-competitive alternative to the merger.

³⁵ OFT Merger Assessment Guidelines (note15) at p. 19

³⁶ ICN Merger Guidelines (note 3) at p. 67

12. Efficiencies

- 12.1 Mergers may bring about efficiency that counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have. It could, for example, increase productive efficiency, and hence, benefits could be passed on to consumers, for example, in lower prices or increased innovation.³⁷
- 12.2 The quantification of merger-specific efficiencies is often the most speculative single element of merger review. Efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are small and when the degree of post market power is not too high.
- 12.3 For the Commission to consider efficiency claims in its merger assessment and to be in a position to reach the conclusion that as a consequence of efficiencies there are no grounds for prohibiting the merger, efficiencies raised should benefit consumers, be merger specific and be verifiable.³⁸

³⁷ ICN Merger Guidelines (note 3) at p. 61

³⁸ EU Guidelines on the assessment of horizontal mergers. Council Regulation on the control of concentrations between undertakings [Official Journal C 31 of 05.02.2004] at para 78

13. Public Interest Considerations

- 13.1 While most jurisdictions only have a substantial lessening of competition (SLC) test and/or dominance test for evaluating mergers, section 47(2) of the Act also contains public interest factors that must be considered by the Commission. In this regard, after considering the SLC and dominance tests, the Commission may also determine whether a merger can or cannot be justified on public interest grounds.
- 13.2 Section 47(2)(c)-(g) of the Act provides the public interest factors which the Commission considers bears upon the broader public interest in the proposed merger, including the extent to which:
- (c) *the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;*
 - (d) *the proposed merger would be likely to affect a particular industrial sector or region;*
 - (e) *the proposed merger would be likely to affect employment;*
 - (f) *the proposed merger would be likely to affect the ability of small undertakings, in particular small undertakings owned or controlled by historically disadvantaged persons, to gain access to or to be competitive in any market;*
 - (g) *the proposed merger would be likely to affect the ability of national industries to compete in international markets.*
- 13.3 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 conditions, where the Commission is of the view that it is likely to have an adverse effect on public interest.
- 13.4 Essentially, the Commission 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 47(2) is neither exclusive nor prescriptive.

Rather, it provides a list of indicative factors the Commission could look at in considering the benefits and costs to society, and should allow the Commission to also take other factors into consideration. While these other factors are not and should not be limitless, it is difficult to classify them as limited. However, extraordinary merger cases shall guide the Commission as to whether to extend the list under section 47(2). Ordinarily, the Commission shall limit itself to the list of issues thereunder.

- 13.5 Where public interests issues are assessed the Commission will consider whether the merger would result or be likely to result in a public benefit that outweighs the likely detriment caused by any prevention or lessening of competition.

Decision making based on public interest

- 13.6 Because of the nature of varying understandings/interpretations of public interest, the Commission engages the parties to the merger on the public interest issues raised during the assessment and before a decision is reached explores ways in which the concerns could be addressed through feasible undertakings or other related commitments.
- 13.7 The Commission 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, trade unions, associations or government offices.

Sources

Legislation:

1. Determination of Class of Mergers to be Excluded from Chapter 4 of the Competition Act (GG 5905, GN 307 of 21 December 2015)
2. Namibian Competition Act, Act No. 2 of 2003
3. Rules made under the Namibian Competition Act (GG 4004, GN 41 of 3 March 2008)

Guidelines:

4. Australian Competition & Consumer Commission Merger Guidelines, November 2008
5. EU Guidelines on the assessment of horizontal mergers. Council Regulation on the control of concentrations between undertakings (Official Journal C 31 of 05.02.2004)
6. ICN Merger Guidelines Workbook, April 2006
7. Merger Assessment Guidelines, Office of Fair Trading, September 2010
8. Merger Assessment Guidelines, Joint publication of the Office of Fair Trading & Competition Commission, September 2012
9. US DoJ & FTC, Horizontal Merger Guidelines, 2010

Annexure “A”: Information Request

In addition to information provide by merging parties in Forms 38 and 39, the Commission, depending on the circumstances of the case, may request parties to submit additional information. The information may include:

The Merger

- Copies of documents prepared by the merging parties or their advisers relating to the merger. This may include any financial due diligence reports, internal and external strategic documents, valuation reports any additional documents relating to the merger.
- Press statements issued or announcement made about the merger.

Parties to the merger

- Pre- and post merger organograms of the merging parties’ corporate structures.
- Details of all shareholders (i.e. who they are, their nationalities and business activities) and the percentage shares they hold in the undertaking concerned.
- Internal communication.
- Any marketing or advertising strategy documents.

The Industry

- Any market research reports or consumer surveys on the appropriate industry sector.

The Market

Product market

- Parties may be requested to provide a broad range of data on the products/services they supply over a period of time (of which the duration will depend on the nature of the products/services and whether the relevant markets have cyclical trends). This data may include: pricing data; information on customers purchasing behavior; the core

skills; attributes or facilities necessary to manufacture/supply the relevant products or service; and details of other companies active in the market or that may be able to enter the market with relative ease.

Geographic market

- Merging parties may be requested to provide data regarding the location of their customers, which may include evidence regarding the distance travelled by customers and customers purchasing habits and trends.

Market Share

- Depending on the industry merging parties may be requested to provide data regarding their plant capacity, sales made, volumes produced, or revenue generated over a period of time, and that of their competitors.

Suppliers

- Merging parties may be asked to provide details on their supply chain and their relationship with their suppliers, including identifying potential alternative suppliers.
- Agreements that merging parties may have with their customers or suppliers.

Customers

- Merging parties may be asked to provide details of their customers and the factors that customers take into account in deciding where to source their requirements (e.g. price, quality, service support etc.) This may include changes in customer's relationships over time and customers historical buying patterns. Parties may be requested to provide information on the likely impact the merger might have on the customers.
- Agreements that merging parties may have with their customers or suppliers.

Competition, pricing and marketing

- In order to assess competition in a relevant market parties may be asked to provide information relating to the way in which they compete with one another and with other

market participants. Information may include costs information, pricing strategy, range of products/services provides, nature of their advertising and marketing.

Rationale for the merger

- Parties have to provide an explanation of the rationale for the merger. Parties also have to provide audited financial statements and any other reports in support of the merger.
- Counterfactual merging parties may be asked to provide information about what they would or would have done absent the merger, including details of any interactions with other potential purchasers in cases of a filing undertaking.