FAIR COMPETITION COMMISSION

MERGER GUIDELINES

TANZANIA

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Abbreviations

EAC	East Africa Community
FCA	Fair Competition Act No. 8 of 2003
FCC	Fair Competition Commission
FRP	Fair Competition Commission Rules of Procedure,2010

Fair Competition Commission

1.0 Introduction

The Fair Competition Commission is an independent government body established under the Fair Competition Act No. 8 of 2003, to promote and protect effective competition in trade and commerce and to protect consumers from unfair and misleading market conduct. The ultimate goal of the FCA is to increase efficiency in the production, distribution and supply of goods and services in the economy. Establishment of FCC is a significant step in Tanzania's effort to establish a market economy.

FCC is mandated to control mergers and acquisitions that have the effects of appreciably preventing, restraining and distorting competition in relevant markets among other duties and responsibilities.

The Guidelines outline the procedural and analytical framework that FCC applies when reviewing mergers and acquisitions and merger exemptions under the FCA. Hence, the guidelines are intended to give stakeholders guidance and wider understanding of the goals and objectives for regulating mergers in Tanzania.

In administering and enforcing the provisions of FCA on mergers and acquisitions, FCC is guided by the underlying purpose of its establishment which is "*to promote and protect competition and consumer welfare in the economy*".

The control of mergers and acquisitions play an important role in ensuring that markets in different sectors of the economy remain competitive. It is the responsibility of the FCC to examine merger applications and exemptions with the view to establish their likely effects to competition.

However, in this modern era of industrial organization, mergers can be viewed as almost essential for sustained economic expansion. Therefore, the spirit of the law is not to prevent or restrict in any way the merger transactions or business expansion in Tanzania. FCC is aware that combination of resources through a merger; firms are able to increase efficiencies through reduced costs, strategic reorganization, adoption of new technologies and combined expertise. FCC is equally aware that mergers and acquisitions are the quickest means for firms to source capital that can transform them to more efficient and competitive firms.

These guidelines aim at reducing uncertainty for the merging parties and raising the standard of their merger applications; therefore the guidelines should not in any case be taken as a replacement of the FCA and the Rules thereof.

2.0 Types of Mergers

Mergers can be categorized as horizontal, vertical or conglomerate mergers.

2.1 Horizontal Mergers

This is a merger occurring between companies producing and selling similar goods or offering similar services. Thus is a merger between competing firms. This type of mergers raises competition concerns as they usually increase concentration levels in a relevant market.

2.2 Vertical mergers

This is a merger occurring between firms operating at different stages of production. For example a manufacturer of bottled milk buys a dairy farm, or steel manufacturer merging with an iron ore producer. Vertical mergers usually increase economic efficiency, although they may sometimes have anticompetitive effects.

Vertical mergers will only raise competition concerns if there is already a concentrated market at one or more would be integrated stages of production or distribution. In the course of analyzing such mergers FCC will consider among other matters:

i. Whether the merged firm will have market power in one market that could be leveraged into a vertically related market,
ii. Whether the target firm is a likely entrant into a vertically related market,
iii. Whether the merged firm will control access to an essential input, and
iv. Whether the vertical integration raises barriers to new entry.

2.3 Conglomerate Mergers

This is a merger between two firms in unrelated businesses. For example a merger between an automobile and food processing firms. This type of mergers may raise competition concerns, especially considering diverse nature of the merging firms and the risk of elimination of an important competitor in the relevant market. Furthermore a conglomerate may facilitate anticompetitive practices through cross subsidization of less profitable activities aimed at driving out competition and reciprocal arrangement with other conglomerate in the purchase and sell of inputs-outputs.

2.4. Cross Boarder Mergers

A cross-border merger is a transaction in which the assets and operation of two firms belonging to or registered in two different countries are combined to establish a new legal entity. In a cross-border acquisition, the control of assets and operations is transferred from a local to a foreign company, with the former becoming an affiliate of the latter. While considering these kinds of mergers, the Commission will look into nationality of the foreign merging party before determining the route to take in reviewing the merger.

Tanzania is a partner state of East African Community which has a Supra national Competition Act i.e. the East African Competition Act, 2006. EAC Act provides that all competition issues with cross broader effect are subject of its jurisdiction. Regarding foreign merging parties that are from outside EAC, the conversional procedure for merger review will be followed.

3.0 Key Provisions Guiding Mergers in FCA and FRP

The key provisions of the FCA and FCC Rules of Procedure (FRP) relevant to mergers include:

- (i) Interpretation of “merger” - Section 2
- (ii) Interpretation of “market” - Section 5(4)
- (iii) Notification and Control of Mergers - Section 11
- (iv) Exemption of mergers - Section 13
- (v) Powers of the Commission Related to Control of Mergers – Section 58, 71
- (vi) Procedure for Control of Mergers- Parts V and VI of FRP

3.1 Definition of a Merger

Merger is defined under section 2 to mean an acquisition of shares, a business or other assets, resulting in the change of control of a business, part of a business or an asset of a business. Therefore, according to FCA, the term merger is defined to include acquisitions.

3.2 Merger Notification

The Commission requires a person to notify a merger if it involves turnover or assets above threshold amounts the Commission shall specify from time to time by Order, in the *Gazette*, calculated in the manner prescribed in the Order. Failure to notify a merger is an offence under the Act.

3.3 Control of Mergers

A merger is prohibited if it creates or strengthens a position of dominance in a market. Therefore, FCC will consider whether the post merger firm will result into either creation of a dominant position or strengthening the existing dominant position.

3.4 Interpretation of market

Mergers are considered in the context of a “market” which construed in terms of both geographical and product to mean a market in Tanzania or part of Tanzania and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers and acquirers or potential suppliers or acquirers.

The Commission will through consultation take into account the views of competitors, suppliers, business customers and final consumers when seeking to define the market for consideration in the merger. Details of relevant market determination will be discussed later in these guidelines.

3.5 Exemption of Mergers

Mergers to be considered for exemption are those involving a post merger firm that have market share above 35% and there capable of substantially lessening competition in the relevant market when acting alone.

3.6 Powers of the Commission Related to Control of Mergers

The Commission under sections 58 and 59 of FCA has powers to issue compliance and compensatory orders in relation to infringement of the provisions of the Act other than matters relating to conditions or warranty implied under Part VI or manufacturer’s obligation under Part VII, who are entitled to seek relief in a court of competent jurisdiction.

Furthermore, under Section 71of the FCA, the Commission has power to solicit information from the merging parties. Failure to comply with this section amounts to an offence against the FCA.

3.7 Procedure for Control of Mergers

Parts V and VI of FCC Rules of Procedure, 2010 provide for procedures to be followed from notification of the merger by parties up to the decision by the Commission.

4.0 The Merger Review Process

4.1 Notifying a Merger to the Commission

Under section 11(1) of FCA a merger is notifiable if it involves a turnover or assets above the threshold specified by the Commission. The current threshold is TZS 800,000,000 calculated based on the combined market value of assets of the merging firms.

The FCA requires that within 5 days after filing their application with the Commission; FCC shall issue a notice of either complete filing (Form FCC 11) or incomplete filing (Form FCC 12) depending on completeness of the information as requested under Form FCC 8. In the event the notice of complete filling is issued the FCC will proceed with the merger review. In case of incomplete filing, the applicant will be required to fulfill the requirement as requested under the issued Form FCC 12. It is only after a notice of complete filling is issued that FCC will proceed with the merger review.

Within 14 working days the FCC is required to complete the review and communicate in writing to the applicant. However, FCC may within the 14 working days determine that the merger has to be further reviewed. In this case FCC will inform the applicant in writing that the merger will be reviewed within 90 working days.

4.1.2 Application fees

Rule 77 of the FRP provides for the basis of computing the applicable fees by the applicant. The applicant has to note that the application fee are payable in Tanzanian Shillings. Payment of applicable fee constitutes complete filing.

4.2 The Merger Analysis Process

4.2.1 Market Definition

The starting point in any type of competition analysis is the definition of the "relevant" market. Market definition takes into account both the demand and supply considerations. In defining a relevant market, FCC will ordinarily consider long run substitution possibilities not ordinarily focus its attention upon a short-run transitory situation that may result from a merger. There are two fundamental dimensions of market definition: (i) the product market, that is, which products to group together and (ii) the geographic market, that is, which geographic areas to group together.

(i) Product Market

In defining the product market, FCC takes into account both the demand and supply considerations. One the demand side, products must be substitutable from the buyer's point of view. On the supply side, sellers and producers must be included especially those who produce or could easily switch production to the relevant product or close substitutes. Product market definition generally includes actual and potential sellers, firms that can rapidly alter their production processes to supply substitute products if the price so warrants. The rationale for this is that these firms will tend to dampen or curb the ability of existing firms in the market to raise price above the competitive level.

(ii) Geographic Market

The location of buyers and sellers will determine whether the geographic market is local, regional, national or international. If markets are defined too narrowly in either product or geographic terms, meaningful competition may be excluded from the analysis. On the other hand, if the product and geographic markets are too broadly defined, the degree of competition may be overstated. Too broad to too narrow market definitions lead to understating or overstating market share and concentration measures.

(iii) Relevant Market

A relevant market is defined as a product or group of products and a geographic area in which it is sold such that a hypothetical, profit-maximizing firm that was the only seller of those products in that area could raise prices by a small but significant and non-transitory amount above prevailing levels.

The result of applying this paradigm is to identify a group of products and a geographic area with respect to which sellers could exercise market power if they were able to coordinate their actions perfectly so as to act like a monopolist. FCC considers both product and geographic market to arrive into a credible relevant market.

4.2.2 Market Shares

After defining the relevant market the FCC will calculate the market shares of the participants in the relevant market. The calculation of market shares can be based on the following:

(i) Value of the product supplied or services provided by each market participant; or

(ii) Volume of the product supplied or services provided by each market participant.

Imports usually form an independent entity in markets where its impact is significant hence could be included in the calculation of market shares.

When considering the likely total market share of a post merger firm, FCC adds individual market shares of the merging parties.

4.2.3 The Prohibition Test

Pursuant to Section 11(1) a merger is prohibited if it creates or strengthens a position of dominance in a market. Therefore, the test is whether the post merger firm will result into either creation of a dominant position or strengthening the existing dominant position. To understand what a dominant position is, section 5(6) of the FCA, provides that a firm will be considered to have a dominant position if:

(i) the post merger firm's share of the relevant market exceeds 35 per cent, and

(ii) acting alone the post merger firm can profitably and materially restrain or reduce competition in the market for a significant period of time.

The prohibition test can bring about three scenarios that will eventually dictate the verdict of the merger application. The scenarios are as follow:

(i) Post Merger Firm's Market Share below 35%

Most of such merger applications are approved during first stage of analysis that is within 14 working days. However, there are certain grounds that may raise substantial competition concerns, which necessitate further request for information and hence full analysis that takes up to 90 days. Usually such mergers are unlikely to prevent, restrain or distort competition as they are anticipated to bring economic efficiencies.

(ii) Post Merger Firm's Market Share above 35% and Acting alone the Firm can not substantially restrain Competition

In the event that the post merger firm's market share exceeds 35%, FCC can still approve a merger provided that parties to the merger demonstrate to FCC that acting alone the post merger firm cannot profitably and materially restrain or reduce competition in the market for a significant period of time.

In considering approval of such a merger with regard to firm's inability to profitably and materially restrain or reduce competition in the market for a significant period of time, FCC shall consider the following factors:

(a) The Number and Size of Participants In the Market

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

(b) Barriers to Entry

Barriers to entry are among important considerations for the FCC. When barriers to entry are low, the Commission is unlikely to prohibit a merger, because existing firms are likely to be significantly constrained by the threat of potential competition. Barriers to entry are any feature of the market that places an efficient new entrant at a significant disadvantage compared with the existing firms. Barriers may include high sunk costs, legal or regulatory restrictions, access to scarce resources controlled by incumbent firms, economies of scale and scope, high levels of product differentiation and brand loyalty and the probability of retaliatory action by powerful incumbents.

(c) Vertical Integration

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

(d) Availability of Alternatives to the Services or Goods Provided by the Merging Firms

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

When considering this factor, FCC will give due weight to the actual and potential level of import competition in the market. If imports and importers can freely compete with domestic firms in the market thereby acting as an effective check upon the exercise of domestic market power; FCC will unlikely prohibit the merger.

(e) Efficiencies

FCC may approve a merger which is likely to bring about gains in real (as distinct from pecuniary) efficiencies. To meet the efficiency test, the applicant must demonstrate that if the merger was not approved, the relevant efficiency gains would likely be realized by means that would limit competition to a higher degree than the merger. Such means of otherwise achieving the claimed efficiencies could include the expansion of the operations of one or both of the parties.

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

Static Efficiencies

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

Dynamic Efficiencies

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

Pecuniary Efficiencies

These efficiencies result from savings such as reduced taxation or lower input costs that may emanate from the improved bargaining power of the merged firm against its suppliers. Pecuniary efficiencies do not produce real savings in resource use, thus FCC will not entertain them.

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

(f) Effect of the Proposed Merger to Consumers, Competition and the Economy

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

Strength of these factors may contribute towards a possibility that FCC approves a transaction whose post merger firm's market share is above 35% and acting alone the firm cannot substantially restrain competition.

(iii) Post Merger Firm's Market Share above 35% and Acting alone the Firm can substantially restrain Competition

If the post merger market share exceeds 35% and acting alone the firm can profitably and materially restrain or reduce competition in the market for a significant period of time, then the applicant will have to apply for an exemption to effect the merger.

Section 13(1) of the FCA provides for exemption of mergers as follows:

"The Commission may, upon the application of a party to a merger, grant an exemption for that merger, either conditionally or subject to such conditions as the Commission sees fit, if the Commission is satisfied in all

the circumstances that paragraph (a) and either paragraph (b) or (c) applies:

(a) the merger is likely to create or strengthen position of dominance in a market;

(b) the merger results or is likely to result in benefits to the public in one or more of the following ways:

(i) by contributing to greater efficiency in production or distribution;

(ii) by promoting technical or economic progress;

(iii) by contributing to greater efficiency in the allocation of resources; or

(iv) by protecting the environment and the merger;

(v) prevents, restrains or distorts competition no more than is reasonably necessary to attain those benefits; and

(vi) the benefits to the public resulting from the merger outweigh the detriments caused by preventing, restraining or distorting competition;

(c) in case of a merger resulting in the change of control of a business, the business faces actual or imminent financial failure and the merger offers the least anti-competitive alternative use of the assets of the business".

Upon satisfying the condition as provided in Section 13 (1) (a) of the FCA, the applicant should then look into the proposed merger and be satisfied that either:

(i) the proposed merger contributes to greater benefits to the public than the detriments to competition as provided Section 13 (1) (b), or

(ii) the target firm is a “failing firm” as provided in Section 13 (1) (c). To meet this test, the applicant must demonstrate that the firm is faced with imminent financial failure and the merger represents the least anticompetitive action among the known alternative uses for the assets of the failing business. The tests would vary from if the target firm can discharge its obligations by paying its creditors and offsetting other current liabilities to more advanced tests such as return on equity and investment.

The applicant must also demonstrate that reasonable steps have been taken within the recent past to procure alternative purchasers for the assets of the failing firm or alternative means of turning the firm around and describe in details to the FCC the results of the search for alternative purchasers or alternative means of turning the firm around.

In assessing the impact of the proposed exemption of a merger to the economy, the Commission will consider the extent to which the firm is seeking to increase its size in order to allow it to achieve economies of scale necessary to compete more successfully either nationally, within the region or internationally.

Pursuant to section 13 (2) of the FCA, when granting an exemption under this section, the Commission shall fix a period, not exceeding one year from the date the exemption is granted, as the period of the exemption. However, the Commission can revoke or vary the exemption any time if it is satisfied that circumstances since the grant of the exemption have materially changed or the exemption was granted on the basis of false, misleading or incomplete information.

4.3 Decisions of the Commission

Pursuant to Rule 51(5) of the FCC Procedure Rules, 2010, the Commission may decide to hear the main parties alone or the main party together with the third parties before it decides on the merger application.

Pursuant to Rule 58 of the FCC Procedure Rules, 2010 before issuing a decision, the Commission will afford the merging parties an opportunity to be heard, when requested by the parties.

4.3.1 Decision to Approve a Merger

When the Commission makes a decision to approve the merger with or without conditions because it is unlikely to harm competition, the Commission will notify the applicant and any other interested parties the Commission chooses to notify of its decision in writing, and will give a summary of the reasons for its decision as provided under Rule 51(13) (a) and (b); and Rule 51(14) of the FCC Procedure Rules, 2010.

The Commission will inform the public of its decision and its reasons for allowing the merger with due regard for commercial confidentiality (Rule 51(14)(c) FCC Procedure Rules.

4.3.2 Decision to Prohibit a Merger

Upon conclusion of its analysis and the Commission determines that a proposed merger is likely to harm competition; it will serve a copy of its decision to the applicant together with a notice notifying the applicant that the merger has been prohibited. The Commission will issue a decision with reasons with due regard for commercial confidentiality. The decision will include a statement of the facts, a summary of the information, evidence and submissions considered and the reasons surrounding the decision.

4.4 Appeals

Where the Commission makes a decision to prohibit a merger, an appeal lies to the Fair Competition Tribunal pursuant to section 61 of the Act.

5.0 Confidentiality

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

In the first instance, FCC will obtain information in a voluntary and cooperative manner. However, the Commission is given powers under section 71of the FCA to compel persons and organizations to provide it with the evidence it requires in the course of review.

Persons, including the merging parties, who are contacted by the Commission in the course of the review, should also be aware that it is an offence to impede or obstruct proceedings of the Commission or to knowingly give false or misleading information to the Commission. There are significant penalties associated with these offences, including fines. These and other related offences are set out in sections 71(6) and 60 of the FCA.

Information provided to the Commission by persons contacted by it in the course of its investigation will be regarded as confidential, in accordance with section 76 of the FCA, except in so far as disclosure of the information is considered necessary for the Commission in the proper discharge of its functions.

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

(i) it has already been published in the public arena; or

(ii) the person providing the information waives confidentiality in respect of the information.

FCC
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