

Statutory Instrument 295 of 1999

Competition (Authorization of Mergers) Regulations, 1999

SIs 295/1999, 372/1999, 96/2006

ARRANGEMENT OF REGULATIONS

1. Title.
 2. Interpretation
 3. Application for authorization of merger under Part V of Act
- Schedule: Merger application form
Competition Commission: Guidance notes to merger application form

IT is hereby notified that the Minister of Industry and Commerce has, in terms of section 50 of the Competition Act [Chapter 14:28], made the following regulations after consultation with the Industry and Trade Competition Commission:—

1. Title

These regulations may be cited as the Competition (Authorization of Mergers) Regulations, 1999.

2. Interpretation

In these regulations—

“application” means an application for authorization made in terms of subsection (1) of section 35 of the Act;
“notice” means a notice referred to in subsection (1) of section 36 of the Act.

3. Application for authorization of merger under Part V of Act

An application shall be made in the form set out in the Schedule and be accompanied by a fee of fifty thousand dollars.

4. Determination of application and fee payable in the event of an investigation

- (1) On receipt of an application the Commission shall—
 - (a) as soon as practicable publish a notice calling upon interested persons to submit written representations to the Commission in regard to the application within thirty days from the date of publication of the notice; or
 - (b) if it considers that a notice need not be published for the reasons specified in the proviso to subsection (1) of section 36 of the Act, proceed to determine the application.
- (2) The Commission shall determine an application—
 - (a) within ninety days from the date—
 - (i) specified in the notice relating to the application as the final day on which written representations may be submitted to the Commission; or
 - (ii) when the Commission, after a written request to the applicant, receives from the applicant such information as it considers adequate to determine the application;whichever is the later date; or
 - (b) if no notice is published, within ninety days of the receipt of the application.
- (3) Where the Commission considers that an investigation referred to in section 28 of the Act is necessary for the purpose of determining an application, a fee of one hundred and twenty thousand dollars per day of the investigation shall be payable by the applicant.

SCHEDULE (Section 3)

[Part Two and Part Three substituted by s.i 372 of 1999]

MERGER APPLICATION FORM

1. Please complete Parts I and IV of the form in typescript of block letters.
2. Give your answers to Part II in typescript on separate sheets.
3. Read the Guidance Notes in full before answering any of the questions.
4. If you need any help or further information contact the Competition Commission.

PART ONE: GENERAL INFORMATION

See Guidance Note 1

1. State names and addresses of the merging enterprises:

See Guidance Note 2

2. Who is the authorized person completing this form?

Name:

	<p>Position:</p> <p>Company:</p>
<p>See Guidance Note 3</p>	<p>3. To which person and address should the Competition Commission send any correspondence?</p> <p>Name:</p> <p>Address:</p> <p>Telephone number:</p> <p>Fax number:</p> <p>E-mail:</p>
<p>See Guidance Note 4</p>	<p>4. Briefly describe the nature of the merger for which authorization is being sought.</p>
<p>See Guidance Note 5</p>	<p>5. Briefly describe the steps taken to publicise the proposal, if any.</p>

“PART TWO: MERGER DETAILS

<p>The Merger Situation See Guidance Note 6</p>	<ol style="list-style-type: none">1. Give details of the proposed arrangements by which the main enterprises will cease to be distinct (“the merging enterprises”). Include share acquisitions, changes of directorships, etc. and any factors upon which completion of the merger is conditional.2. Give details of the ownership and control of the merging enterprises—<ol style="list-style-type: none">(a) before the merger; and(b) following the merger.3. What other enterprises may cease to be distinct as a result of the notified arrangement? Give details of the proposed change in shareholdings or in other relationships by which they might cease to be distinct.
<p>Financial Information See Guidance Note 7</p>	<ol style="list-style-type: none">4. Supply, for each of the merging enterprises, two copies of the latest annual report and accounts. If annual reports are not available, give, for each of the merging enterprises, the most recent annual figures for: total turnover; profit before and after tax; and total assets.
<p>Timing</p>	<ol style="list-style-type: none">5. What is the expected time scale for the completion of the merger?
<p>Plans and Motives See Guidance Note 8</p>	<ol style="list-style-type: none">6. What are the reasons for the merger and the plans for the merged businesses? What benefits are expected to accrue? Supply copies of the merger agreement and other internal documents analysing the transaction. Comment on any other aspects of the merger which may affect the public interest or have any other adverse effects (e.g. degree of competition in the particular economic activity, unemployment, etc.).
<p>Markets See Guidance Note 9</p>	<ol style="list-style-type: none">7. Briefly describe the main products and services supplied by each of the main enterprises. Give an estimate of the market share in Zimbabwe for each product or service of the main enterprises and of the merged enterprise by value or volume.

See Guidance Note 10

8. Where the merger will create or increase a market share for the merged businesses of 5% or more, by value or volume, in any product or service of any description, in Zimbabwe as a whole, give the following information (use the most recent figures available and specify the period they cover):
- (a) a brief description of each product or service market, including the extent to which it is served at national level;
 - (b) an estimate of the merged enterprises' market share;
 - (c) an estimate of the value and volume of the Zimbabwean market as a whole (i.e. production less exports plus imports);
 - (d) the names and market shares of your competitors;
 - (e) the names of your five largest Zimbabwean customers;
 - (f) a brief description, in terms of characteristics/price differences, of any product(s) or service(s) which might be considered close substitutes;
 - (g) an estimate of the capital expenditure required to enter the market on a scale necessary to gain a significant market share (say 5% or more), both as a new entrant and as a company which already has the necessary technology and expertise;
 - (h) an estimate of the scale of annual expenditure on advertising/promotion relative to sales required to enter the market on a scale equivalent to your main competitor(s);
 - (i) an indication of any other factors affecting market entry, e.g. planning restraints, technology or R and D requirements, availability of raw materials, length of contract;
 - (j) an assessment of the ease of exit from the market. Indicate any trends in both market entry and exit over the last five years;
 - (k) an assessment of any effects the merger may have at local level. Describe the nature of local competition and give details of any localities where competition may be reduced as a result of the merger;
 - (l) a brief assessment of any other features of the market that the Commission should take into account in considering the effect of the merger.

See Guidance Note 11

See Guidance Note 12	9. Give details of the nature and extent of any vertical links between the merging enterprises.
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PART THREE: ADDITIONAL INFORMATION

Please return the application form with your answers and documentary attachments, together with the merger application fee of \$50 000 (fifty thousand dollars) to:

The Director
 Industry and Trade Competition Commission
 Sixth Floor, Travel Centre (South Wing)
 Corner Third Street/Speke Avenue
 Private Bag 7774, Causeway
 Harare

- (b) by the deletion of the "Guidance Notes to the Merger Application Form" of the Note on "Part Three: Additional Information" and the substitution of—

"PART THREE: ADDITIONAL INFORMATION

Section 35 (2) of the Competition Act provides for merger application submission requirements as follows:—

"(2) An application (for a merger authorization) shall be made in such form and manner as may be prescribed and shall be accompanied by the prescribed fee, if any, and such

information and particulars as may be prescribed or as the Commission may reasonably require."

The merger application fee to accompany this completed merger Notification Form is to cover part of the Competition Commission's expenses in investigating and assessing the application."

PART FOUR: DECLARATION

I understand that:

- It is a criminal offence for a person to supply information in a Merger Application Form which he knows to be false or misleading.
- The Competition Commission may bring to the attention of the public the existence of the proposed merger described in this form and the application relating thereto by publishing a notice in the *Gazette* and in a newspaper in terms of section 36 (1) of the Competition Act, 1996.

Name: (Block Letters)

Position: (Block Letters)

Date:

Signed:

Have you attached (as appropriate):

- Press release
- Two copies of the latest Annual Reports and Accounts (including Balance Sheets)
- Copies of the Merger Agreement and other internal documents analysing the proposal.

COMPETITION COMMISSION

GUIDANCE NOTES TO MERGER APPLICATION FORM

PART ONE: GENERAL INFORMATION

Guidance Note 1

Parties to the transaction must be clearly and precisely identified. In the case of an acquisition, the "acquiring enterprise" and the "acquired enterprise" must be indicated.

Guidance Note 2

Only an authorized person can submit a merger application. An authorized person is any person carrying on an enterprise to which the applied for arrangements relate.

Guidance Note 3

You must give a full address to which the Competition Commission can send all correspondence. Give details of the person within your company who will deal with correspondence.

If your address changes, you must notify the Competition Commission immediately in writing.

Guidance Note 4

A full description of the proposed merger is requested in Part Two of the Application Form. Here, just give a short description on the following:

ABC Holdings Limited resolved on 1st January that it was to acquire the whole of the assets and business of Cybernet (Pvt.) Limited (which is a wholly owned subsidiary of XYZ Group) by share issue, for a consideration of \$10 million. The overlap of products/services is in business computers.

If there are any changes in the circumstances of the merger after you have submitted the Application Form, tell the Competition Commission immediately.

Guidance Note 5

This question to be answered only when the merger proposals have already been made public.

You are asked to enclose a copy of any press release or report (including those in specialist or trade journals) and details of any notification to listing authorities (e.g. the Stock Exchange) or any other regulatory authorities.

Please note that in terms of section 36 (1) of the Competition Act, 1996, the Competition Commission may publicise the merger if it feels that not enough publicity has been given to it in the public interest.

PART TWO: MERGER DETAILS

The Merger Situation

Guidance Note 6

This section will enable the Competition Commission to identify each of the merger situations, which may arise from the single transaction being notified.

The Competition Act, 1996, defines a merger as:—

- The acquisition of a controlling interest in—
 - (i) an undertaking involved in the production or distribution of any commodity or service; or
 - (ii) an asset which is or may be utilised for or in connection with the production or distribution of any commodity;

where the person who acquires the controlling interest already has a controlling interest in any undertaking involved in the production or distribution of the same commodity or service; or

- The acquisition of a controlling interest in an undertaking whose business consists wholly or substantially of—
 - (i) supplying a commodity or service to the person who acquires the controlling interest; or

(ii) distributing a commodity or service produced by the person who acquires the controlling interest.

“Undertaking” is defined as any person engaged for gain in the production or distribution of a commodity or service.

Financial Information

Guidance Note 7

The Competition Commission will usually need only the report and accounts of the main parties to the merger. However, where the acquiring company is part of a larger group, the Commission will normally also need the group report and accounts.

If a merger gives rise to a significant increase in market share, the Competition Commission may subsequently wish to review profits, sales and capital employed in the relevant market. Ensure that this information is available, or could be estimated if required, for both the acquiring and target company.

Guidance Note 8

Applicants should refer to section 32 (4) of the Competition Act, 1996, in answering this part.

Markets

Guidance Note 9

Even where there is little or no overlap at horizontal level, the Competition Commission will wish to know whether the merging businesses have high market shares in any product or service. This could, for example, allow the merged company to tie-in sales, or to exclude its competitor's products.

In answering questions 7 and 8 bear in mind that some products and services are capable of different descriptions. They can be defined narrowly (e.g. tea) or widely (e.g. beverages). If you are in doubt about the product or service description, use that which gives rise to the highest market share (or, in reply to question 9, the highest combined market share). If any of the merging businesses supply the market at distinct levels, for example wholesale and retail, these must be treated as separate markets.

Guidance Note 10

In considering the effect of a merger on competition, the Competition Commission will primarily be interested in those markets where the merged businesses overlap.

Guidance Note 11

Even where the market is mainly supplied at national level, competition may take place primarily at national level. There is no statutory definition of a local market. The Competition Commission will want to discover whether the merger will reduce the choice for consumers in the area within which they would normally purchase the products or services being supplied.

Guidance Note 12

The Competition Commission may be interested in vertical links between the merging enterprises even where there is no, or little, overlap at horizontal level. For example, where a supplier company A takes over one of its customers B, the Competition Commission may need to investigate whether A will be in a posi-

tion after the merger to require B to make all its purchases from within the group. In these circumstances, competing suppliers might find themselves excluded from part of their actual or potential market.

PART THREE: ADDITIONAL INFORMATION

Section 35 (2) of the Competition Act provides for merger notification submission requirements as follows:—

“(2) An application (for a merger authorization) shall be made in such form and manner as may be prescribed and shall be accompanied by the prescribed fee, if any, and such information and particulars as may be prescribed or as the Commission may reasonably require.”

The merger notification fee to accompany this completed merger Notification Form is to cover part of the Competition Commission's expenses in investigating and assessing the application.

PART FOUR: DECLARATION

The declaration must be signed by the authorized person. It draws your attention to two important provisions of the

Competition Act, 1996. The first relates to the provision of false or misleading information.

Section 35 (3) of the Competition Act, 1996, provides as follows regarding applications for merger authorizations:—

“(3) Any person who, in or for the purposes of an application (for a merger authorization) makes a statement which he knows to be false or misleading or does not believe on reasonable grounds to be true, shall be guilty of an offence and liable to imprisonment for a period not exceeding ten thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.”

Secondly, the Declaration reminds you that the Competition Commission may publicise the existence of the merger proposal as notified. It may also draw it to the attention of third parties in order to seek their views. The Commission will not of course reveal any commercially confidential information supplied in the notification. Its aim is solely to ensure that those with an interest in the merger are given an opportunity to comment.