How long does it take to process a Merger?

According to section 56(4), subject to subsection (5), the Authority shall consider and make a determination in relation to a notified merger-

a) Within 30 days after the date on which the Authority receives that notification;

b) Where the Authority is of the opinion that the 30 days should be extended due to the complexity of the issues involved or any other reason, it may, before expiry of that period, by notice in writing to the enterprises involved extend by the relevant period for a further period, not exceeding 60days, specified in the notice.

What happens after the Competition Authority has looked at the Merger notification?

In terms of section 60 (1), in making a determination in relation to a proposed merger, the Authority may —

(*a*) give approval for the implementation of the merger without conditions or subject to such conditions as it considers appropriate; or

(*b*) decline to give approval to the implementation of the merger to the extent that it relates to a market in Botswana.

(2) Where conditional approval is given, the Authority's determination may contain such directions as the Authority considers necessary, reasonable and practicable to remedy, mitigate or prevent any adverse effects of the merger.

(3) Directions issued in terms of subsection (2), may inter alia, and require an enterprise or enterprises to—

(*a*) divest such assets as are specified in the direction within a period also so specified; or

(*b*) to adopt, or desist from, such conduct in relation to prices, as is specified in the direction, before the merger can be completed or implemented.

(4) The Authority shall —

(*a*) give notice of the determination made by the Authority, and of any directions in relation to a merger;

(i) to the parties involved in the merger, in writing, and

(ii) by notice in the Gazette, and

(*b*) issue written reasons for its determination —

(i) if it prohibits or conditionally approves a merger, or

(ii) if it is requested to do so by any person.

I would like to speak to someone at the Competition Authority informally before I notify the Authority of a Merger. Who can I speak to?

The business can request for a pre-notification meeting with the Mergers and Monopolies Department to obtain any other necessary guidance related to the merger notification procedure.

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Mergers and Acquisitions

What is a Merger?

In terms of section 52(1) of the Competition Act (Cap: 46:09), a merger occurs when one or more enterprises directly acquires or establishes direct or indirect control over the whole or part of the business of another enterprise.

Acquisition of control over the whole or part of another enterprise may be archived in any manner including:

a) The purchase or lease of shares, an interest, or assets of the other enterprise in question; or
B) Amalgamation or other combination with that enterprise.

What is Acquisition of Control?

According to section 52(3), a person controls an enterprise if that person:

a) Beneficially owns more than one half of the issued share capital of the enterprise;

b) Is entitled to exercise a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;
c) Is able to appoint or to veto the appointment of a majority of the directors of the enterprise;
d) Is a holding company, and the enterprise is a subsidiary of that company as contemplated in the Companies Act;
e) In the case of an enterprise being a trust, has the ability to control the majority of the votes of the trustees or to appoint or change the majority of the beneficiaries of the trust;
f) In the case of the enterprise being a close corporation, owns the majority of the member's interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
g) Has the ability materially to influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

When should the Competition Authority be notified of a merger?

According to section 54 of the Competition Act read together with Regulation 20 of the Competition regulations of 2011, a merger is subject to review if:
The turnover in Botswana of the enterprise or enterprises being taken over exceeds P10 000 000;
The assets in Botswana of the enterprise or enterprises being taken over exceeds P10 000 000; or
The enterprises concerned would, following implementation of the merger, supply or acquire at least 20 percent of a particular description of goods or services in Botswana.

Who should file a Merger?

Section 56(1) provides that, where a merger is proposed, each of the enterprises involved shall notify the Authority of the proposed merger in the prescribed manner.

I am not sure whether the proposed transaction is notifiable. Who can I speak to?

If an enterprise is uncertain about whether a transaction is a merger and should be notified with the Competition Authority or not, a written request for a non-binding advisory opinion, detailing the nature of the business proposal, may be submitted to the Chief Executive Officer. There is no charge for the advisory opinion. The advisory opinion is non-binding on both the Competition Authority, as well as the enterprise.

How much does it cost to file a Merger?

In terms of regulation 16(2) a merger notice shall be accompanied by a merger fee of 0.01 percent of the merging enterprises combined turnover or assets in Botswana, whichever is higher.

How do I notify the Authority of a Merger?

Each of the enterprises involved shall notify the Authority of the proposed merger through a merger notice in **Form J** set out in the schedule. Failure to submit the required information will delay the assessment process as the Authority attempts to access the information for the assessment.
All documents required as stipulated on the form include:
1. A **complete list of shareholders** and their respective shareholding, including minority shareholders, for the primary acquiring firm and target firm and of any firm that directly or indirectly controls the primary acquiring firm.
2. Description of the merger, including: the parties to the transaction; the assets shares, or other interests being required; whether the assets, shares, or other interests are being purchased, leased, combined or otherwise transferred; the consideration, the contemplated timing for any major events required to bring about the completion of the transaction, and **the intended structure of ownership and control** of the completion of the merger.
3. The **estimated market shares** of the merging parties and other competitors.
4. Information concerning barriers to entry, such as regulatory requirements, capital requirements and sunk costs, the time it will take for potential entrants to enter the market, the names and contact details of entrants to the market during the past three years.
5. Information concerning import competition, such as existing import duties.
6. Countervailing power.
7. A list of each product that you or another acquiring enterprise (or target enterprise, if applicable), **sell,** and each service you or that other enterprise provide in, into or from Botswana.
8. state the **geographic areas** (s) in Botswana in which you sell or provide service
9. a list of the **five producers (competitors)** or providers in each identified geographic area with the largest estimated turnover in value, and their estimated share of the total turnover during the last full 12 months.
10. Providing contact details for your **five customers** in each of identified geographic area with the largest aggregate purchases in value during the last full 12 months.
11. Strategic documents of the merging parties in relation to the affected markets including, but not limited to, the following: Business plans, marketing documents, high-level strategic presentations and board minute might also be included in the merger file as they may help in the assessment of a merger case.

The forms have to be hand delivered to the Competition Authority's offices and should be accompanied by the merger filing fee.

What does the Competition Authority consider in analysing a Merger?

In terms of section 59(1), in assessing a proposed merger, the Authority shall first determine whether the merger –
a) Would be likely to prevent or substantially lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
b) Would be likely to result in any enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in a market.

Section 59(2) further states that, the authority may in addition, consider any factor which, the authority considers bears upon the broader public interest in the proposed merger including the extent to which–
a) The proposed merger would be likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition or to the acquisition or strengthening of a dominant position in a market.
b) The merger may improve, or prevent a decline in the production or distribution of goods or the provision of services.
c) The merger may promote technical or economic progress, having regard to Botswana's development needs.
d) The proposed merger would be likely to affect a particular industrial sector or region.
e) The proposed merger would maintain or promote exports or employment.
f) The merger may advance citizen empowerment initiatives or enhance the competitiveness of citizen owned small and medium sized enterprises; or
g) The merger may affect the ability of national industries to compete in international markets.