

## MERGER NOTIFICATION AND PROCEDURES TEMPLATE



PAPUA NEW GUINEA

DECEMBER 2005

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**IMPORTANT NOTE: This template is intended to provide introductory material. Reading the template is not a substitute for consulting the referenced statutes and regulations. If you are analysing a particular transaction, this template should be a starting point only.**

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1. Merger notification and review materials (please provide title(s), popular name(s) and citation(s))	
<b>A. Notification provisions</b>	<p>Pre-merger notification is not mandatory in PNG. However, due to the significant pecuniary penalties that apply should the merger result in a substantial lessening of competition in a market, the Independent Consumer and Competition Commission (ICCC) encourages parties to seek its view before engaging in any merger transaction.</p> <p>Mergers that are prohibited under section 69 of the ICCC Act may be authorised by the ICCC if the benefits accruing from the merger outweighs the negative competition effects in the market.</p>
<b>B. Notification forms or information requirements</b>	<p>There is no specific form for merger notification required.</p>
<b>C. Substantive merger control provisions</b>	<p>Part VI of the ICCC Act (sections 47, 69 and Division 4).</p>
<b>D. Implementing regulations</b>	<p>Independent Consumer and Competition Commission Act 2002. (ICCC Act 2002)</p>
<b>E. Interpretive guidelines and notices</b>	<p>ICCC merger guidelines. This provides a short summary for merger requirement either under an authorisation or</p>

	clearance application. This can be accessed from the ICCC's website at <a href="http://iccc.gov.pg">http://iccc.gov.pg</a>
<b>F. Annual report</b>	ICCC Annual Report 2004 - 2005
<b>2. Authority or authorities responsible for merger enforcement</b>	
<b>A. Name of authority. If there is more than one authority, please describe allocation of responsibilities.</b>	Independent Consumer and Competition Commission (ICCC)
<b>B. Address, telephone and fax (including country code), e-mail, website address and languages available.</b>	Independent Consumer and Competition Commission (ICCC) 1 <sup>st</sup> Floor, Garden City Angau Drive P O Box 6394 BOROKO 111 National Capital District Papua New Guinea Tel: +(675) 325 2144 Fax:+(675) 325 3980 Website: <a href="http://www.iccc.gov.pg">www.iccc.gov.pg</a> Language: English
<b>C. Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.</b>	<b>Gima Maro</b> <i>Executive Manager</i> Competitive Market & Fair Trade Division Independent Consumer and Competition Commission P O Box 6394 BOROKO 111 National Capital District Papua New Guinea Tel: +(675) 325 2144 Fax:+(675) 325 3980
<b>3. Notification requirements</b>	
<b>A. Is notification mandatory pre-merger?</b>	No
<b>B. Is notification mandatory post-merger?</b>	No
<b>C. Can parties make a voluntary pre-or post-merger filing even if</b>	Yes- this is the usual practice in PNG.

filing is not mandatory?	
<b>4. Covered transactions</b>	
<b>A. Definitions of potentially covered transactions</b>	<p>Section 69 of the ICCC act 2002 prohibits acquisition that substantially lessening competition in a market.</p> <p>Sub-Section (1) of which provides “A person shall not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening of competition in a market”.</p>
<b>B. If change of control is a determining factor, how is control defined?</b>	N/A. Refer to 4(c) below.
<b>C. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels?</b>	Under the ICCC act 2002, there is no threshold shareholding for the purpose of section 69. Section 69 is applicable to any acquisition of assets and shares which would have, or would be likely to have, the effect of substantially lessening of competition in a market.
<b>D. Do the notification requirements cover production joint ventures or any other type of joint venture?</b>	There is no mandatory notification requirement for merger transactions in PNG. Section 69 applies to all businesses including joint ventures where there is an acquisition by virtue of section 69(2) and (3) of the ICCC Act.
<b>E. Are any sectors excluded from notification requirements? If so, which sectors?</b>	There is no mandatory notification requirement for merger transactions in PNG.
<b>F. Are transactions that do not meet merger notification thresholds subject to substantive merger control?</b>	N/A
<b>5. Thresholds for notification</b>	
<b>A. What are the general thresholds? Are the thresholds subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and how</b>	Under the ICCC Act, merger notification is not compulsory. However, to give some guidance in deciding whether a particular merger acquisition would have the effect or likely effect of substantially lessening competition, the ICCC Act sets out a number of factors in section 69(5).

<p>frequently.</p>	<p>There are five steps in analysis the likely competition effects of a merger acquisition.</p> <p>Firstly, it is essential that the relevant market is identified and defined in terms of the product, its function, the geographical settings and the time dimensions.</p> <p>The second stage involves establishing the concentration thresholds to filter out mergers which are not likely to result in a substantial lessening of competition.</p> <p>This is followed by analysing the level of import competition, barriers to entry into the market and finally other structural and behavioural features of the market are taken in to account.</p> <p>As a rule of thumb, business acquisitions not involving competitors are cleared unless there are unusual circumstances.</p>
<p><b>B. To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based test, calendar year-end, fiscal year-end, other)?</b></p>	<p>Through market enquiries, the ICCC estimates the market shares of all the players in the relevant market pre-and-post merger. The ICCC will consider the market share over time since it is the future competition or likely dominance that is important to understand. Once the market share of the players in the relevant market is established, the size of entry into the market is carefully considered as it helps determine dynamic growth aspects of the relevant market. There is no set time frame and each case is analysed on its own merit.</p>
<p><b>C. Describe methodology for identifying and calculating any values necessary to determine if notification is required, including:</b></p>	<p>Because of information asymmetry, market share is collated from estimates provided by the applicant. This is then verified against the ICCC's market enquiries with other existing and likely competitors in the market.</p>
<p><b>i. The methodology for identifying and calculating the value of the transaction, if applicable.</b></p>	<p>-</p>
<p><b>ii. The methodology for</b></p>	<p>-</p>

identifying and calculating relevant sales or turnover, if applicable.	
iii. The methodology for identifying and calculating the value of relevant assets, if applicable	-
iv. Methodology for calculating exchange rates.	-
D. Do thresholds apply to worldwide sales/ assets, to sales/assets within the jurisdiction, or both?	Determined on a case by case basis but only to the extent that an acquisition affects a market in PNG.
E. How is the nexus to the jurisdiction determined? If based on an "effects doctrine," please describe how this is applied.	-
F. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?	N/A
G. If there are market share tests, are these guidelines for calculating market shares?	N/A
H. If there are market share tests, do they apply even if there is no horizontal overlap in the parties' activities, either in the jurisdiction or worldwide?	N/A
I. Describe the methodology for determining relevant undertakings/firms for	The ICCC takes into account the facts of the merger case before it. Matters of significance include management; directorship; possible discriminatory arrangements

threshold purposes (e.g., group-wide? Only the acquired entity? If based on control, how is control determined?)	pertaining to supply, price, and allocation of other resources; degree of independence and other information crucial to determining the competition effects in the market.
J. Are there special threshold calculations for joint venture?	Joint ventures are assessed within the same framework of a merger analysis provided in section 69 of the ICCA Act. Section 50 also prohibits joint ventures from engaging in anti-competitive arrangements.
K. Are there special threshold calculations for particular sectors (e.g., banking, airlines) or particular types of transactions (e.g., partnerships, financial investments?)	No.
<b>6. Transactions in which the acquiring and acquired parties are foreign. Are there special rules or exemptions</b>	
A. With respect to application of jurisdictional thresholds?	The provisions governing mergers also apply to conduct outside of Papua New Guinea which is engaged in by anyone who is resident or carries on business in PNG; but only to the extent that the conduct affects a market in PNG.
B. With respect to information required (e.g., information submitted or document legalization)?	There are no special rules or exemptions with respect to information where the parties to the merger are foreign.
C. With respect to waiting periods?	There are no special rules or exemptions with respect to waiting periods where the parties to the merger are foreign.
<b>7. Simplified procedures</b>	
A. Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, waivers, etc.).	There are no separate set procedures for notifying transactions that do not raise competition concerns.

<b>8. Timing of notification</b>	
<b>A. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; If so, when is an agreement considered definitive?)?</b>	<p>Firms wishing to merge or acquire competitors are encouraged to first seek the views of the Commission before concluding the transaction.</p> <p>If the parties wish to make an application for authorisation, this must be done before conclusion of the acquisition.</p>
<b>B. Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the vent.</b>	No.
<b>9. Documents to be submitted</b>	
<b>A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents)</b>	<p>It is a requirement that the acquirer to the merger provides a written submission on the following:</p> <ul style="list-style-type: none"> <li>- Background information about the parties;</li> <li>- The commercial rational of the merger;</li> <li>- The structure and number of competitors in the market, including any relevant information about the market;</li> <li>- An analysis of the proposed acquisition taking into account the statutory factors in section 69(5) of the ICCC Act.</li> </ul> <p>The ICCC also encourages other supporting documents such as copies of contracts, lease agreements, undertakings, etc...</p>
<b>B. Are there any document legalization requirements (e.g., notarization or apostille)?</b>	No.
<b>10. Translation</b>	
<b>Describe any requirements to submit translations of documents with the</b>	English is the preferred language for notifications and or information requested by the ICCC.

<p><b>initial notification, or later in response to request for information, including the categories or types of documents for which translation is required, requirements for certification, language(s) accepted, and whether selected excerpts are accepted in lieu of complete documents.</b></p>	
<p><b>11. Review and waiting periods/Suspensive effects</b></p>	
<p><b>A. Describe any applicable review and/or waiting periods following notification, including whether closing is suspended during any initial review or waiting period and/or further review periods (i.e., second-phase proceedings).</b></p>	<p>As a rule of thumb:</p> <ul style="list-style-type: none"> <li>- in matters where ICCC is satisfied that the merger is not between competitors, the ICCC may inform the parties within 5 days;</li> <li>- in matters where ICCC is satisfied that the merger is between competitors, the ICCC usually require 10 – 15 days rep up its assessment;</li> <li>- where the matter requires a through analysis of the likely competition effects, the ICCC may take more than 15 days. The expediency of the cases also depends on the cooperation of the parties and the prompt response to the ICCC’s market enquiries;</li> </ul> <p>In authorisation applications, the ICCC has a period of 72 days to make a determination. However, there are no limits for a non-business transaction, but these are handled as promptly as possible. A clearance application would require 20 days. The authorisation and clearance periods may be extended by ICCC requesting additional information or time with agreement of the applicant.</p> <p>The ICCC strictly adheres to its statutory requirement to make a determination within the set time frames. If the ICCC has not made a determination within the required or agreed time frame, the application is deemed to have been granted.</p>
<p><b>B. Are there different rules for public tenders (e.g., open market stock purchases or hostile bids)?</b></p>	<p>No.</p>

<p><b>C. Are the applicable waiting periods limited to aspects of the transaction that occur within the jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent do they apply to parties' ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance. (e.g., request for derogation from the bar on closing, commitment to hold separate the local business operations.)</b></p>	<p>There is no requirement that the parties to the merger await the outcome of the ICCC's determination before proceeding. However, the risk in not waiting for the ICCC's assessment is the possibility of a divestiture order and /or penalties up to K 10 million, if the merger contravenes section 69 of the ICCC act.</p>
<p><b>D. Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period. Is there a statutory maximum for extensions of the review period by the authority.</b></p>	<p>N/A</p>
<p><b>E Describe any procedures for obtaining early termination of the application waiting period, and the criteria and timetable for deciding whether to grant early termination</b></p>	<p>N/A</p>

<p><b>F. describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no “irreversible measures” are taken).</b></p>	<p>N/A</p>
<p><b>12. Responsibility for notification / representation</b></p>	
<p><b>A. Who is responsible for notifying - the acquiring person(s), acquired person(s), or both?</b></p>	<p>There is no statutory pre-merger notification requirement in PNG.</p>
<p><b>B. Do different rules apply to public tenders (e.g., open market stock purchases or hostile bids)?</b></p>	<p>Refer to 12 (A) above.</p>
<p><b>C. Are the parties required to appoint a joint representative?</b></p>	<p>No.</p>
<p><b>D. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?</b></p>	<p>No. In most cases, parties to the merger are represented by a legal firm.</p>
<p><b>E. How does the validity of representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?</b></p>	<p>N/A</p>

<b>13 Filing fees</b>	
<b>A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined?</b>	<p>There is no fee associated with seeking the ICCC's views pertaining to section 69.</p> <p>The fee for merger application seeking authorisation (for public benefit determinations) is K35, 000.</p> <p>The fee for merger application seeking clearance (assessment of likely substantial lessening of competition) is K20, 000.</p>
<b>B. Who is responsible for payment?</b>	The party making the application for authorisation / clearance. In this case it would be the acquirer.
<b>C. When is payment required?</b>	At the time the application is lodged with the ICCC.
<b>D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?</b>	Cheque payment.
<b>14. Confidentiality</b>	
<b>A. To what extent, if any,, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?</b>	<p>Parties may approach the ICCC either privately or publicly with a proposed acquisition. Confidentiality can be claimed for certain material but the rules are in favour of openness and claims for confidentiality will not be readily granted.</p> <p>The ICCC fosters transparency in ensuring that public benefits of a proposed acquisition must be put to test openly. This requires comments and submission by all parties having an interest in the proposed acquisition.</p> <p>It is a statutory requirement that the ICCC maintains a public register for all cases it handles. The register does not include confidential/sensitive information, but would otherwise include brief details of a proposed merger, and ICCC's determination.</p> <p>Authorisation is a public process and therefore parties having an interest in the proposed acquisition also have access to the public register as well as the website.</p>

<p><b>B. Do notifying parties have access to the authority's file? If so, under what circumstances can the right of access be exercised?</b></p>	<p>Any party that has an interest in the ICCC's decision can access the public register or the Commission's determination and the website. However, confidential materials such as trade secrets will not be made public without the consent of the applicant.</p>
<p><b>C. Can third parties or other government agencies obtain access to notification materials? If so, under what circumstances?</b></p>	<p>Refer to 14(b) above.</p>
<p><b>D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.</b></p>	<p>Parties may request confidentiality on sections or parts of information made available to ICCC. It is possible that, if the requirements of the parties are that the proposed acquisition is confidential, the ICCC may not commit itself in making a determination. The ICCC is in favour of openness and claims for confidentiality will be thoroughly scrutinised before it is granted.</p>
<p><b>E. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?</b></p>	<p>The ICCC has agency cooperation agreements with the Australian Competition and Consumer Commission (ACCC).</p> <p>The ICCC is working towards initiative similar arrangements with other regional and international competition agencies.</p>
<p><b>15 Sanction/penalties</b></p>	
<p><b>A. What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods?</b></p>	<p>A pre-merger notification is not mandatory under the ICCC Act and therefore sanctions do not apply for failure to notify. Through a Court order the ICCC can seek an injunction to prevent a merger from proceeding until the facts are considered and analysed. However, if the parties proceed with the merger which is later found to be in contravention of section 69, the ICCC may seek the Court to divest the assets/shares of the merged entity or apply a penalty not exceeding K10 million.</p>

<b>B. Which party/ies are potentially liable?</b>	All parties to a merger.
<b>16. Judicial review</b>	
<b>Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.</b>	<p>Section 69 only prohibits certain acquisition but does not restrict the proceedings of the acquisition. If the ICCC wishes to stop the merger due to competition concerns, it must apply to the National Court of PNG to issue an injunction blocking the merger. As such, the ICCC's concerns are tested in the court of law.</p> <p>Issues of law are appealable to the National Court and subsequently the Supreme Court of PNG. The Courts also determined the timetable for judicial review.</p> <p>The ICCC through the Courts can prevent merger through permanent injunctions (section 96), seek divestiture of shares and assets (section 98), pecuniary penalties (section 95(3)), damages and other orders.</p>
<b>17. Additional filings</b>	
<b>Are additional filings/clearances required for some types of transactions, e.g., foreign investment or regulated sectors?</b>	Registration with Investment Promotion Authority.
<b>18. Closing deadlines</b>	
<b>When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized?</b>	<p>There are no deadlines for a merger application.</p> <p>In the case of a merger under an authorisation application, once an authorisation is granted the immunity comes into effect. However, any authorisation granted or deemed to be granted expires 12 months after it was given.</p>