



MERGER ASSESSMENT GUIDELINES

DRAFT GUIDELINES

2024

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FOREWORD

These Merger Assessment guidelines form part of the advice and information published by the Gibraltar Competition and Markets Authority (the "GCMA"). They are designed to provide general information and advice to companies and their advisers on the procedures used by the GCMA in operating the merger control regime as set out in the Competition Act 2020 (the "Act").

In particular, these guidelines discuss the criteria that the GCMA applies to determine whether it has jurisdiction under the Act and the policies and procedures that the GCMA will use in discharging its functions. This document therefore provides an overview of the merger assessment regime applied in Gibraltar.

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1. ACKNOWLEDGEMENTS

Where appropriate, the Gibraltar Competition and Markets Authority will seek to ensure that locally published guidance notes are consistent with those published by fellow Competition Authorities in other jurisdictions.

As well as reflecting the existing competition standards and practices in Gibraltar, parts of this document reflect and/or incorporate the guidance from the UK's Competition and Markets Authority.

The following document was used in the drafting of these guidelines:

(a) "Mergers: Guidance on the CMA's jurisdiction and procedure", CMA 2 revised¹.

¹ "Mergers: Guidance on the CMA's jurisdiction and procedure", CMA 2 revised, January 2021
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf>, accessed 09/10/23.

2. INTRODUCTION

The Gibraltar Regulatory Authority (the "Authority") is designated as the competent authority for the promotion and enforcement of competition law in Gibraltar. Pursuant to such designation, the Authority must discharge all the functions, duties and obligations in accordance with the Competition Act 2020 (the "Act"), acting in its capacity as the **Gibraltar Competition and Markets Authority (the "GCMA")**.

The GCMA's main duty is the promotion of economy-wide competition for the benefit of consumers and part of its functions includes the investigation of mergers between organisations. Its merger control procedures are designed to fulfil this duty in an efficient manner, while ensuring that the merger parties' rights to due process are fully respected. The GCMA is also required to balance the rights of the merger parties with those held by third parties.

Mergers can bring benefits to the economy and help businesses and markets grow. However, some can harm competition and result in, for example, higher prices, reduced quality or choice for consumers, or reduced innovation. The aim of a merger review is to ensure that mergers do not substantially lessen competition and lead to worse outcomes for consumers.

These Merger Assessment Guidelines (the "Guidelines") form part of the advice and information published by the GCMA. They are designed to provide general information and advice to companies and their advisers on the procedures used by the GCMA in operating the merger control regime set out in the Act. In particular, the Guidelines discuss the criteria that the GCMA applies to determine whether it has jurisdiction under the Act and the policies and procedures that the GCMA will use in discharging its functions. This document therefore provides an overview of the merger regime applied in Gibraltar. For full details, please refer to the Act and accompanying legislation.

While the GCMA will have regard to these Guidelines in handling mergers under the Act, it will apply them flexibly and may depart from the approach described in the Guidelines where there is an appropriate and reasonable justification for doing so. Merger assessment is inevitably case specific and must take account of the particular transaction and the market being analysed. The GCMA will therefore consider each merger with due regard to the specific circumstances of each case including the information available and the time constraints applicable to the case. The specific analytical methods used by the GCMA may vary across investigations and even across cases in the same industry.

It is important that the GCMA continually adapts its approach to merger control to ensure that it is fulfilling its statutory duty in light of a dynamic and evolving economy. It therefore reserves the right to amend these guidelines from time to time in line with regulatory experience gained and expertise acquired when assessing mergers.

3. MERGER REVIEW PROCESS

The GCMA can investigate voluntary notifications of anticipated and completed mergers and also conduct its own initiative investigations into mergers that have not been notified. There is no requirement to notify mergers to the GCMA, therefore notification is voluntary. However, the GCMA has the power to determine whether any unnotified merger may give rise to competition concerns.

Merger parties should therefore carefully consider whether to notify the merger to the GCMA, as a decision not to notify carries particular risks once the merger has been completed. In these specific circumstances, the GCMA has certain powers to prevent merger parties from integrating or from undertaking further integration, amongst others. Companies and their advisers are therefore strongly encouraged to contact the GCMA at an early opportunity to discuss the application of the Act to a merger situation.

Mergers are usually assessed in 3 stages, **Pre-notification, Phase 1 and Phase 2.**

Pre-notification involves preliminary meeting/s with parties to help clarify the information and evidence that the GCMA will require, discuss the approach to the assessment of potential competition concerns and in some cases, potential remedy options if the probability of the merger lessening competition is high.

Where merger parties wish to formally notify a merger to the GCMA for investigation, they should submit a Merger Notice, available on the GRA website. The submission of a Merger Notice enables the GCMA to allocate a case team to lead the GCMA's **Phase 1** investigation. The case team is the principal point of contact within the GCMA for the merger parties and their representatives.

Merger parties should keep the GCMA informed of any material developments, in particular in relation to the timing or status of the transaction, following the submission of the original Merger Notice.

For completed mergers, the GCMA is likely to impose an initial enforcement order (IEO) and issue an information request to ascertain the extent of any integration.

Any interested party that wishes to make the GCMA aware of a merger that it considers could raise competition concerns can contact the GCMA confidentially at **competition@gra.gi**.

Phase 1 commences the first working day after the GCMA confirms to the relevant parties that it has received a complete Merger Notice (a "satisfactory notification").

A satisfactory notification is provided when the GCMA receives a Merger Notice,

- (i) in the prescribed form,
- (ii) it contains the prescribed information, and
- (ii) it confirms that the merger (or merger proposal) has been made public (by providing evidence).

Where the GCMA opens an own-initiative investigation, **Phase 1** will commence on the first working day after the GCMA confirms to the notifying party/ies that it has received sufficient information. The GCMA has a statutory deadline of **40 working days** to complete this initial

stage of the merger review process, although the deadline can be frozen in certain circumstances such as when specific information requested by the GCMA remains outstanding.

Please note that a Merger Notice can be withdrawn at any time. Withdrawals must be made in writing by the notifier or the authorised representative. The GCMA can also reject a Merger Notice (even after it has been accepted) for various reasons including, if it suspects the information provided to be false or misleading or fails to provide any information requested by the GCMA.

The Act imposes a duty on the GCMA to refer completed (section 74) and anticipated (section 85) mergers for an in-depth **Phase 2** investigation if the criteria set out directly below is fulfilled.

During **Phase 1**, the GCMA must consider whether to refer the merger for a **Phase 2** investigation². This will be the case where the GCMA believes that it is or may be the case that –

a) a relevant merger situation³ has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and

b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in Gibraltar for goods or services.

The GCMA may, however, decide not to make a reference for a **Phase 2** investigation if it believes that -

a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference;

b) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned; or

c) in the case of an anticipated merger, the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference.

In certain limited circumstances, the GCMA is not able to refer a merger. For example, in the case of a completed merger, the GCMA is not able to refer a merger if the **four-month** period following the completion of the acquisition (as extended where applicable) has expired⁴.

Where the GCMA finds that it is under a duty to refer a merger for a **Phase 2** investigation⁵, it may, under section 128 of the Act, accept from any of the parties concerned, undertakings

² To refer the merger for a Phase 2 investigation, the GCMA shall make a reference to its chair for the constitution of a group under Schedule 11 of the Competition Act 2020.

³ See section 6 below.

⁴ Exceptions apply. See below.

⁵ The investigation is limited to 24 weeks, but can be extended.

in lieu of reference (UILs) to remedy, mitigate or prevent the substantial lessening of competition concerned or any adverse effect which has, may have or may be expected to result from it.

Following a reference for a **Phase 2** investigation, the GCMA must decide:

- a) whether a relevant merger situation has been or will be created; and
- b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in Gibraltar for goods or services (where both limbs are satisfied, this is referred to as an "anti-competitive outcome").

If the GCMA finds that there is an anti-competitive outcome, it must decide:

- a) whether action should be taken by it, or by others, to remedy, mitigate or prevent the substantial lessening of competition concerned or any adverse effect that has resulted from, or may be expected to result from, that substantial lessening of competition; and
- b) if action is to be taken, what action should be taken and what is to be remedied, mitigated or prevented.

At **Phase 1**, the GCMA's test for reference (its "duty to refer") will be met if the GCMA has a reasonable belief, objectively justified by relevant facts, that there is a **realistic prospect** that the merger will lessen competition substantially. At **Phase 2**⁶, the GCMA is then required to base its decisions on whether the merger will lessen competition substantially on the **balance of probabilities**.

While many mergers will not raise competition issues, the merger control process is designed to allow the GCMA to identify those where such issues may arise, so that they may be properly investigated and, where necessary, resolved through appropriate remedies.

⁶ This part of the investigation is carried out by a GCMA panel which is to consist of persons who are available for selection as a member of a group constituted to carry out functions on behalf of the GCMA and which includes as far as possible persons who possess specialist knowledge in subject matter areas that are likely to be dealt with by GCMA groups.

4. PHASE 1 INVESTIGATION PROCESS

The table below shows the key stages and indicative timing of a typical Phase 1 investigation by the GCMA, together with a high-level summary of the actions that are typically taken by the GCMA and by the merger parties (and, where relevant, third parties) at each stage.

As noted in the table, certain actions may in practice occur at various stages of the Phase 1 process, including prior to the formal commencement of the investigation timetable. The GCMA will apply a reasonable and proportionate approach to these actions according to the complexity of the issues under investigation.

	MILESTONES	GCMA	PARTIES
STAGE 1: Initial discussions between merger parties and GCMA (voluntary notifications)			
Typically, minimum of 2 weeks before initial submission of draft notification	Initial contact between parties and GCMA	GCMA allocates team to review transaction and liaise with parties	Merger parties engage in initial contact with the GCMA
STAGE 2A: Pre-notification discussions begin (voluntary notifications)			
Duration will differ on a case-by-case basis depending on complexity and prima facie competition concerns	Pre-notification process begins Merger parties submit voluntary notification (Merger Notice)	GCMA checks draft Merger Notice and typically issues information requests (including statutory requests under section 168 of the Act) GCMA checks completed Merger Notice and once it confirms it is a satisfactory notice, it informs the parties of the statutory deadline GCMA publishes a commencement notice	Merger parties submit draft Merger Notice and respond to any information requests Merger parties submit completed Merger Notice Third parties respond to requests for information and to any invitation to comment

		<p>GCMA is likely to engage with third parties and may issue a public invitation to comment, inviting submissions about the potential competitive impact of the merger</p> <p>GCMA considers interim measures to prevent or unwind pre-emptive action⁷</p>	
STAGE 2B: Own-initiative investigation (merger not voluntarily notified)			
	<p>GCMA becomes aware of a transaction that has not been voluntarily notified</p>	<p>GCMA considers whether there is a reasonable chance that its duty to refer would be met if it investigated the transaction</p> <p>Where appropriate, the GCMA will send an enquiry letter to the merger parties requesting further information about the transaction</p> <p>GCMA is likely to engage with third parties and may issue a public invitation to comment, inviting submissions about the potential competitive impact of the merger</p>	<p>Merger parties reply to enquiry letter and provide GCMA with requested information</p> <p>Third parties respond to requests for information and to any invitation to comment</p>

⁷ The Competition Act 2020 permits the GCMA to make initial enforcement orders (IEOs), including unwinding orders, at any stage of the Phase 1 investigation process (including prior to the formal commencement of its Phase 1 investigation), in order to prevent action which may prejudice any reference to Phase 2 or impede any action by the GCMA which may be justified by its findings following a Phase 2 investigation. See section 127 of the Competition Act 2020.

		<p>GCMA considers whether interim measures are necessary to prevent pre-emptive action</p> <p>When the GCMA has sufficient information to begin its investigation, it will inform the merger parties and confirm the statutory deadline for its Phase 1 investigation</p> <p>GCMA publishes a Commencement Notice</p>	
STAGE 3: Phase 1 assessment			
Working day 1		40 working day initial period for the GCMA's Phase 1 investigation begins on the first day after it confirms to the merger parties that it has received a completed Merger Notice or that it has sufficient information to begin its investigation	
	Information gathering	GCMA continues to engage with merger parties as appropriate and may request further information ⁸	<p>On-going liaison between GCMA team and merger parties</p> <p>Merger parties respond to any information requests</p>

⁸ Failure to comply with a notice issued under section 168 of the Competition Act 2020 will delay the statutory timetable. This permits the GCMA to extend the 40 working day deadline until the party has produced and/or supplied the information and the GCMA has assessed whether the documents and/or information form a satisfactory response to its notice (the GCMA refers to this as "stopping the clock").

		GCMA may also directly contact third parties to seek views and information on the transaction	
Working day 15 - 20	State of play discussion	GCMA may meet or hold discussions with merger parties before deadline elapses	Merger parties participate in discussions
STAGE 4A: Phase 1 decision (no serious competition concerns)			
By working day 40	Phase 1 decision	GCMA clears transaction GCMA drafts clearance decision and communicates this to the merger parties GCMA publishes full clearance decision omitting any confidential information ⁹	
STAGE 4B: Phase 1 decision (complex or serious competition concerns)			
Before working day 40	Phase 1 decision	GCMA holds internal "case review meeting" and decides whether its duty to refer has been met	
	Draft decision	GCMA sends merger parties a "draft decision" stating reasons for reference to Phase 2	Merger parties may provide written response to "draft decision"

⁹ The full decision may be made public after the initial 40 working day deadline has elapsed.

		GCMA will indicate that it will consider Undertakings in Lieu of reference (UILs) in final decision	Merger parties may comment on whether they may wish to offer UILs
	Notice of decision	GCMA provides merger parties with its reasoned decision ¹⁰ within the deadline GCMA publishes notice of full decision omitting any confidential information ¹¹	
STAGE 5: Phase 1 potential remedies – Where GCMA decides duty to refer is met			
0 – 5 working days after merger parties given decision	Offer of UILs		Merger parties decide whether to offer UILs to remedy identified concerns Merger parties who wish to offer UILs submit completed “merger remedies notice” and draft UILs to the GCMA
Up to 10 working days after merger parties given decision	Consideration of UILs offered	If no UILs offered within 5 working day period, GCMA refers transaction to Phase 2 GCMA considers any UILs offered GCMA decides whether to provisionally accept UILs or a modified version of them	Merger parties respond to any modifications to the UILs proposed by the GCMA

¹⁰ Decision pursuant to section 74(1) (completed mergers) or 85(1) (anticipated mergers) of the Competition Act 2020 on relevant merger situation and substantial lessening of competition.

¹¹ The full decision may be made public after the initial 40 working day deadline has elapsed.

		If GCMA rejects UILs, transaction is referred to Phase 2	
Within 50 working days of merger parties being given decision (subject to extension for special reasons)	Agreement and acceptance of UILs	<p>GCMA gives detailed consideration to terms of proposed UILs to determine if any modifications required before they can be finally accepted</p> <p>GCMA publishes draft UILs for third party comment (if relevant)</p> <p>GCMA considers whether to formally accept draft UILs with possible shorter consultation if required, following any material changes to the UILs</p> <p>If UILs are considered sufficiently clear cut and effective, the GCMA will publish a notice of acceptance of UILs</p> <p>If UILs are not agreed, transaction is referred to Phase 2</p>	<p>Merger parties discuss any necessary modifications to the UILs so as to agree a version for publication for third party consultation</p> <p>Third parties submit comments on draft UILs within the consultation period (at least 15 days for initial consultation and at least 7 days for any subsequent consultation)</p> <p>If GCMA agrees with UILs, merger parties sign UILs</p>
	Implementation of UILs if agreed	<p>GCMA publishes final UILs</p> <p>If relevant, GCMA assesses and approves proposed purchaser(s) of the business(es) being divested by merger parties (will occur prior to acceptance of UILs in "upfront buyer" cases)</p>	<p>Merger parties implement UILs, including (where no upfront buyer was required) submitting for GCMA approval details of proposed purchases of any divestments required under the UILs</p>

5. PHASE 2 INVESTIGATION PROCESS

The key stages of a typical Phase 2 inquiry are shown in the tables below. These cover the steps the GCMA will usually take and what the merger and third parties will usually need to do at each key stage of a Phase 2 inquiry. Although indicative timings for each stage have been set out, the steps described may not, in practice, always take place or may not take place sequentially and may sometimes overlap. In particular, information gathering takes place throughout the inquiry.

Further, subject to agreement with the GCMA, it may be possible to omit certain stages of the process where to do so would lead to greater efficiency. There may also be reason to adjust the typical process where the merger may be subject to review in other jurisdictions. In all cases, merger parties and their advisers are encouraged to speak to the GCMA to discuss.

	MILESTONES	GCMA	PARTIES
FOLLOWING REFERRAL: Possible suspension of reference (anticipated mergers only)			
Following reference to Phase 2	Possible abandonment of transaction	GCMA considers, in response to any request by merger parties, whether transaction may be abandoned and whether to suspend the Phase 2 investigation for up to 3 weeks If transaction is abandoned, GCMA cancels reference GCMA publishes notice of suspension (and termination of any suspension if merger is not abandoned)	Merger parties may request suspension of reference in light of any possible abandonment of transaction
STAGE 1: Phase 2 information gathering - Weeks 1 to 6			
	Reference	GCMA issues Phase 2 opening letter to merger parties	

		GCMA considers need for modified interim measures	<p>Where appropriate, merger parties attend case management meeting and data meeting with GCMA case team</p> <p>Merger parties discuss with the GCMA any ongoing Phase 1 initial financial orders (IEOs) or if necessary, Phase 2 interim measures and reporting on compliance. GCMA makes interim order or merger parties accept interim undertakings. GCMA may also consider unwinding integration</p>
	Initial information gathering	<p>GCMA issues information requests to merger parties under section 168 of the Act (and to third parties, usually on a voluntary basis) as necessary</p> <p>GCMA may conduct a consumer survey or attend a site visit</p>	<p>Merger parties (and third parties) respond to information requests</p> <p>Merger parties may be provided opportunity to comment on draft consumer survey and/or organise a site visit</p>
STAGE 2: Phase 2 assessment - Weeks 7 to 15			
		<p>GCMA conducts analysis of evidence</p> <p>GCMA holds a "main party hearing" with each merger party</p>	<p>Merger parties attend main party hearing</p>

		GCMA consults on draft final report	
STAGE 3: After provisional findings - Weeks 16 to 24			
Week 24	Statutory deadline for publication of the final report	GCMA considers responses to draft final report GCMA publishes final report by the end of week 24 (subject to any extension of statutory deadline)	Merger parties (and third parties) comment on draft final report
STAGE 4: Implementation of remedies – after publication of the GCMA’s final report – Weeks 24 to 36			
		GCMA considers whether any variation to interim measures is necessary GCMA creates timetable for implementation of undertakings/order, and informs merger parties of key milestones GCMA consults merger parties (and, where relevant third parties) on draft undertakings/order GCMA consults publicly on draft undertakings/order	GCMA varies interim order or merger parties accept revised or additional interim undertakings if appropriate. GCMA may also consider unwinding any integration Merger parties (and where relevant, third parties) comment on draft undertakings/order and request excisions (if any) prior to publication

Week 36	Statutory deadline for implementation of remedies (subject to extensions of statutory deadlines)	GCMA accepts final undertakings/makes final order within statutory 12-week deadline (subject to extension if there are special reasons for doing so)	Merger parties (and third parties) comment further on draft undertakings/order
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6. RELEVANT MERGER SITUATIONS

A **relevant merger situation**¹² is created if all three of the following criteria are met:

1.

(a) Either

(i) two or more enterprises¹³ must cease to be distinct¹⁴; or

(ii) there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct.

2.

(a) and either

(i) the Gibraltar turnover of the enterprise which is being acquired exceeds **£25 million** (or £1 million for relevant enterprises¹⁵) (**The turnover test**) or

(ii) the enterprises which cease to be distinct supply or acquire¹⁶ goods or services of any description and, after the merger, together supply or acquire at least **two-thirds** of all the goods of that description which are supplied in Gibraltar. The merger must also result in an increment to the share of supply or acquisition (**The share of supply test**).

3.

(a) and either

(i) the merger must not yet have taken place; or

(ii) the date of the merger must be no more than **four months**¹⁷ before the day the reference is made, unless the merger took place without having been made public and without the GCMA being informed of it (in which case the four-month period starts from the earlier of the time the merger was made public or the time the GCMA was told about it).

¹² Section 75 of the Competition Act 2020.

¹³ The term "**enterprise**" is defined in the Competition Act 2020 as the activities or part of the activities of a business. "**Business**" includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge.

¹⁴ Two enterprises will "cease to be distinct" if they are brought under common ownership or control (Section 79 of the Competition Act 2020).

¹⁵ An enterprise involved in restricted goods, computer processing units and quantum computing (Section 76 of the Competition Act 2020).

¹⁶ Section 191 of the Competition Act 2020.

¹⁷ This deadline may be extended in certain circumstances. Section 78 and 100 of the Competition Act 2020.

THE TURNOVER TEST¹⁸

The value of the turnover¹⁹ in Gibraltar of the enterprise being taken over shall be determined by taking the total value of the turnover in Gibraltar of the enterprises which cease to be distinct enterprises and deducting –

- (a) the turnover in Gibraltar of any enterprise which continues to be carried on under the same ownership and control; or
- (b) if no enterprise continues to be carried on under the same ownership and control, the turnover in Gibraltar which, of all the turnovers concerned, is the turnover of the highest value.

THE SHARE OF SUPPLY TEST²⁰

The 'share of supply test' is satisfied if the merged enterprises:

- a) both either supply or acquire goods or services of a particular description in Gibraltar; and
- b) will, after the merger, supply or acquire at least **two thirds** of those goods or services in Gibraltar.

The GCMA cannot apply the share of supply test unless the merger parties together supply or acquire the same category of goods and services (of any description). The test cannot capture mergers where the relationship between the merger parties is purely vertical in nature and where there is no overlap between the merger parties' activities based on any reasonable description of a set of goods or services.

Where an enterprise already supplies or acquires two thirds of any particular good or service, the test is satisfied so long as its share is increased as a result of the merger, regardless of the size of the increment.

¹⁸ Section 81 of the Competition Act 2020.

¹⁹ The turnover in Gibraltar of an enterprise is determined in accordance with the Competition (Merger Fees and Determination of Turnover) Order 2021.

²⁰ Section 75 of the Competition Act 2020.

7. PUBLIC INTEREST INTERVENTIONS

The Act provides that (as the default position) the GCMA decides whether or not to refer the merger for a Phase 2 investigation, and that the Phase 2 Inquiry Group makes the final decision as to whether any competition issues arise and whether any remedies are required, based purely on whether the merger has caused or may cause a substantial lessening of competition (SLC). However, the Act also allows for the Minister to assume responsibility for determining whether or not to refer a merger when defined public interest considerations are potentially relevant by issuing a public interest intervention notice (PIIN).

If the Minister has referred a merger on such public interest grounds, he or she also takes the final decision on whether the merger operates or may be expected to operate against the public interest, and on any remedies for identified public interest concerns.

Section 100 of the Act provides that the Minister may issue a PIIN in the case of mergers that meet the Act's jurisdictional thresholds (set out in section 4 above), that have public interest implications²¹, and which the GCMA has not referred for a Phase 2 investigation.

To facilitate this, the GCMA has an obligation under section 116 of the Act to inform the Minister where it is investigating a merger (at Phase 1) that it believes raises material public interest considerations.

PUBLIC INTEREST CONSIDERATIONS

Section 117 of the Act details the public interest consideration on which the Minister may intervene in a merger case. This is in the interests of the security of Gibraltar, which includes public security.

In addition to this specified consideration, section 100(3) of the Act also allows the Minister to intervene on the basis of a consideration which is not specified but which the Minister believes ought to be specified. To the extent that the Minister intervenes on the basis of a consideration that he or she believes ought to be specified, he or she is required by section 100 of the Act to seek to have that consideration subsequently inserted into section 117 of the Act by means of an order approved by the Gibraltar Parliament.

PROCESS FOR PUBLIC INTEREST CASES

Phase 1

If a PIIN is issued, the case is handled in the following way:

a) The GCMA will publish an invitation to comment seeking third party views on both competition and public interest issues.

²¹ The Minister may also intervene in certain public interest cases where the jurisdictional thresholds are not met (see "public interest in special merger situations" below).

b) As well as generally issuing an invitation for comment, the GCMA may contact other governmental departments, sectoral regulators, industry associations and consumer bodies for their views on public interest issues, where appropriate.

c) The GCMA will carry out its review of the jurisdictional and competition issues in a similar way as it would for any other case, with the caveat that its process and timetable will be adapted in order to enable it to provide its report to the Minister by the deadline specified in the PIIN.

d) The GCMA then provides advice to the Minister on jurisdictional and competition issues, which must be accepted (section 104 of the Act). The GCMA is also required to pass to the Minister a summary of any representations it has received that relate to the public interest matters. The Act allows the GCMA to provide advice and recommendations on the public interest consideration to the Minister; however, given the GCMA's role as a competition agency, the GCMA would not normally provide its advice on public interest issues at Phase 1. (By contrast, following a reference on public interest grounds, the independent Phase 2 Inquiry Group will report to the Minister about whether the merger operates or may be expected to operate against the public interest (see below).

e) The GCMA will also inform the Minister about the applicability of any of the exceptions to the duty to refer and whether it would be appropriate to deal with any competition concerns by way of UILs²².

f) The Minister then makes a decision on the outcome of the case in the light of the GCMA's advice²³. References for a Phase 2 investigation can be made under section 103 of the Act either:

i) because the Minister believes that a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and it is or may be the case that the merger has resulted, or may be expected to result, in an SLC and, combined with the relevant public interest consideration(s), the merger operates or may be expected to operate against the public interest; or

ii) while there is no realistic prospect of an SLC arising from the merger, because the public interest considerations are such that it is or may be the case that the merger operates or may be expected to operate against the public interest.

g) Alternatively, the Minister may decide under section 103(6) of the Act not to make a reference on the basis that an anti-competitive outcome in the form of a GCMA finding of a realistic prospect of an SLC is justified by one or more public interest considerations.

h) Where the Minister is minded to refer the case for a phase 2 investigation, he or she will also consider whether UILs are justified.

²² Sections 102(4) and 102(5) of the Competition Act 2020.

²³ Section 103 of the Competition Act 2020 does not provide a specific time limit within which this decision must be taken.

If the Minister concludes, after receipt of the GCMA's report, that there are no public interest issues that are relevant to the PIIN, the GCMA will be instructed under section 115 of the Act to deal with the merger as an ordinary merger case²⁴.

Phase 2

If a reference is made on public interest grounds (whether or not there are any competition concerns), the GCMA conducts a Phase 2 inquiry and reports to the Minister. If the GCMA considers that the merger operates or may be expected to operate against the public interest, it makes recommendations as to the action the Minister (or others) should take to remedy any adverse effects. The Minister will make the final decision on the public interest test and take whatever remedial steps he or she considers necessary to address the competition and public interest issues.

The GCMA's Phase 2 procedures for public interest inquiries are similar to those for ordinary merger references. The principal differences are that the GCMA provides its report to the Minister and the final decision on public interest matters lies with the Minister. The GCMA has to prepare a report and provide it to the Minister within 24 weeks (subject to a possible eight-week extension) from the date of the reference²⁵. The Act does not require the GCMA to consult the Minister in the event that the GCMA proposes to extend the inquiry.

Once the Minister has received the GCMA's report, he or she has 30 days in which to make and publish his or her decision²⁶. The Minister is bound by the GCMA's decision on whether there is a merger situation and its findings on whether or not there is an SLC, but must decide on whether there is a concern in relation to the specified public interest issue. The Minister must have regard to the findings in the GCMA's report regarding remedies, but can also decide on remedies other than those the GCMA has recommended. If the Minister decides that the public interest issue does not raise a concern, the case will be sent back to the GCMA to decide how to remedy any competition issue identified.

PUBLICATION OF DECISIONS

When the Minister has made a decision as to whether or not to refer the case for a Phase 2 investigation, the Minister is required under section 166 of the Act to publish a non-confidential version of the GCMA's Phase 1 report. At Phase 2, the Minister must publish a non-confidential version of the GCMA's final report no later than the publication of his or her decision on the case²⁷ (that is, within 30 days).

The final decision on the material to be excised from the published report is made by the Minister.

²⁴ Under section 88(4) of the Competition Act 2020, the GCMA may in those circumstances extend the initial 40 working day deadline by no more than 20 working days to decide whether its duty to make a reference for a Phase 2 investigation applies.

²⁵ Sections 95(1) and 95(2) of the Competition Act 2020.

²⁶ Section 113(5) of the Competition Act 2020.

²⁷ Section 166(9)(b) of the Competition Act 2020.

FEES

A merger fee is calculated in respect of cases in which a PIIN has been issued in the same way as for normal competition cases.

PUBLIC INTEREST IN SPECIAL MERGER SITUATIONS

The Minister may also issue a special public interest intervention notice (SPIIN) to the GCMA if he or she believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the special merger situation concerned.

In accordance with section 118(3) of the Act, a special merger situation has been created if -

(a) the condition mentioned in subsection (4) below is satisfied; and

(b) immediately before the enterprises concerned ceased to be distinct, the conditions mentioned in subsection (5) below were satisfied.

(4) The condition mentioned in this subsection is that -

(a) no relevant merger situation has been created because of section 75(1)(b) and (2)(b); but

(b) a relevant merger situation would have been created if those enactments were disregarded.

(5) The conditions mentioned in this subsection are that -

(a) at least one of the enterprises concerned was carried on in Gibraltar or by or under the control of a body corporate incorporated in Gibraltar; and

(b) a person carrying on one or more of the enterprises concerned was a relevant government contractor.

No merger fee is payable in special public interest cases.

6. MERGER FEES

Subject to some limited exceptions²⁸, any merger that qualifies as a relevant merger situation²⁹ and in which the GCMA (or the Minister in public interest cases³⁰) reaches a decision on whether or not to refer the merger for a Phase 2 investigation, is subject to a fee irrespective of whether a reference is made³¹. However, there is an exemption from paying a fee where the acquirer and any group of which it is a member qualify as small or medium sized³². This is defined by reference to qualifying conditions in the Companies Act 2014³³.

Where a fee is due, that fee is payable by the person filing the Merger Notice, or – in cases in which no Merger Notice is filed – the person acquiring control. The fee becomes payable on the publication by the GCMA of either a reference decision or any decision not to make a reference. For cases resolved through UILs, the fee becomes payable when the GCMA loses its duty to refer as a result of its formal acceptance of UILs. In the case of public interest cases decided by the Minister, the fee becomes payable to the GCMA when the Minister publishes a reference decision under section 103 of the Act or publishes any decision not to make such a reference.

Given that a fee is payable in all cases in which the GCMA reaches a decision whether or not to refer in respect of a relevant merger situation, a fee will be payable in cases where the GCMA decides to investigate the merger on its own initiative and proceeds to publish such a decision (save, as noted above, in limited circumstances). Fees vary according to the size of the merger. Details of the fee scales can be found in the Competition (Merger Fees and Determination of Turnover) Order 2021 as amended by the Competition (Merger Fees)(Amendment) Order 2023.

Pursuant to article 3 of the Competition (Merger Fees)(Amendment) Order 2023, the amount of the fee payable is –

(a) where the value of the turnover in Gibraltar of the enterprise which has been taken over or (as the case may be) which it is proposed or contemplated should be taken over, does not exceed £10 million, **£5,310**;

(b) where the value of such turnover exceeds £10 million but does not exceed £25 million, **£10,620**;

(c) where the value of such turnover exceeds £25 million, **£15,930**.

²⁸ A fee shall not be payable in relation to arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, where the GCMA decides pursuant to section 85(2)(b) of the Competition Act 2020 that the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a merger reference.

²⁹ Where the transaction is found not to give rise to a relevant merger situation, no fee is payable.

³⁰ Section 103 of the Competition Act 2020.

³¹ Section 183 of the Competition Act 2020 and the Competition (Merger Fees and Determination of Turnover) Order 2021.

³² Article 8 of the Competition (Merger Fees and Determination of Turnover) Order 2021.

³³ <https://www.gibraltarlaws.gov.gi/legislations/companies-act-2014-3106>.

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