

COMPETITION AUTHORITY OF KENYA

Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act



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Foreword by the Director General

It gives me great pleasure to present these consolidated guidelines on merger analysis. These guidelines on merger analysis are meant to improve the business regulatory framework and enhance business environment.

The Competition Authority of Kenya (“the Authority”) is established under Section 7 of the Competition Act and is charged with, *inter alia*, promoting and enforcing compliance with the Competition Act. One of the objectives of the Competition Act is to bring national competition law, policy and practice in line with international best practice and in furtherance of that objective and in accordance with the powers conferred on the Authority under Section 93 of the Competition Act, the Authority hereby publishes these consolidated guidelines on the substantive assessment of mergers which is intended to:

- Equip businesses and their legal representatives with information on how the Authority carries out its legal and economic analysis to (i) determine whether a merger is subject to a notification and review within the meaning of the Competition Act and (ii) make a determination as to whether a merger should be given approval, declined or approved with conditions;
- Clarify the position of the Authority on how the conceptual frameworks or legal and economic tests are applied to the evidence gathered by the Authority; and
- Highlight how the assessment of the provisions on mergers under the Competition Act is aligned with international best practice even as the Authority gives equal consideration to domestic factors.

This guidance document is not intended to be a substitute for the provisions on mergers under Part IV of the Competition Act or any rules to be published by the Minister made pursuant thereto or any court judgement. The guidelines should be read together with the Competition Act and any rules to be published by the Minister made pursuant thereto and with any other applicable legal instruments of Kenya including binding or persuasive legal precedent from competition law cases. These guidelines do not constitute legal advice and do not have the force of law and is not binding on the Tribunal or any court of law.

Section 1 - Introduction

1. The primary law provisions on mergers are set out under Part IV of the Competition Act No.12 of 2010 (“the Act”). In addition to the primary law, the Cabinet Secretary may publish rules that are subsidiary to the Act
2. The word “merger” is used in these Guidelines to mean a merger or acquisition as defined in the Act and explained in rules to be published. .
3. This document will explain how the substantive law provisions and rules to be published are interpreted by the Authority and will explain the various tests to be applied by the Authority pursuant to Section 46(1) of the Act in determining whether a proposed merger is: (i) subject to notification and review by the Authority and (ii) to be approved, declined or approved with conditions. For this purpose, the Authority must assess pursuant to Section 46(2):
 - a) the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
 - b) the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
 - c) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
 - d) the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
 - e) the extent to which the proposed merger would be likely to affect employment;
 - f) the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market;
 - g) the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and

- h) any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.
4. The Authority recognises that the Act requires it to apply both competition and public interest tests in determining whether a merger should be: (i) approved; (ii) declined or (iii) approved with conditions. In this regard, the Authority will use a balancing approach in assessing the competition test and the public interest test while ensuring that the principle of merger specificity is maintained.
 5. The Authority recognises that the competition test encompasses both the dominance test and the prevention or lessening of competition test. The Authority will apply the dominance test within the analytical framework of the substantial prevention or lessening of competition test. This will entail assessing the unilateral effects of a merger which is akin to assessing whether the merger will create or strengthen a dominant position held by one or more undertakings in a market in Kenya or a substantial part of Kenya. The market share threshold for assessing dominance will be consistent with the definition of dominance under Section 23 of the Act.
 6. The Authority will apply the concept of counterfactual in assessing the effects of a merger on competition and/or the public interest tests. The Authority will compare the situation that would result from the notified merger with the situation that would have prevailed without the merger. It is common for the relevant counterfactual to be the existing situation at the time of the merger for assessing the effects of a merger. The Authority recognises that in certain circumstances it may be necessary to take into account future changes to the market that can reasonably be predicted to constitute the relevant counterfactual. For example, the Authority may take into account the likely entry or exit of undertakings if the merger did not take place.
 7. These Guidelines also provide direction and clarity regarding the analytical framework and the factual evidence the Authority considers in assessing notified horizontal, vertical and conglomerate mergers.
 8. These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-finding process through which the Authority applies a range of tools to evaluate merger transactions.
 9. The principles contained here will be applied and further developed and refined by the Authority in individual cases. The Authority may revise these Guidelines from time to time in the light of new developments to reflect changes in best practice and of evolving insight.
 10. In this document the Authority explains the following:

In **Section 2 - the Authority's Exercise of Jurisdiction with Respect to Mergers**: this section provides a brief description of the breadth of the Authority's jurisdiction with respect to transactions subject to review under Part IV of the Act.

In **Section 3 - Transactions Subject to Merger Notification**: there are various types of transactions that are subject to notification and review because they satisfy the definition of the term "merger" as used under the Act and there are some transactions that may satisfy the definition but which will be excluded from notification. There are also transactions that may not fit within the definition of the term "merger" at all. This section, through the explanations of certain merger review parameters set by the Authority and through the use of examples, clarifies certain bright-line rules the Authority uses in determining whether a transaction is subject to notification and therefore review.

In **Section 4 - Merger Analysis**: this section explains the economic principles and legal tests the Authority will use when it reviews a notifiable transaction. For example, in reviewing a transaction, the Authority considers the relevant market to be affected by the transaction and therefore defines the relevant market to start, together with an assessment of the market shares, market concentration levels; followed by a full assessment of the competitive effects of the merger, including a consideration of the type of merger (horizontal, vertical or conglomerate merger), any market entry barriers, countervailing power, whether there are any failing undertaking issues for consideration, efficiencies; and finally, any issues of public interest concern. The Authority explains the parameters and conceptual frameworks used in its assessment of all the foregoing.

In **Section 5 - Prescribing Conditions to Mergers**: this section explains the Authority's preferred mixed approach to remedying anticompetitive mergers and the guiding principles that will be applied when the Authority assesses possible remedies.

In **Section 6 - Glossary of Terms**: a glossary of terms and applicable definitions are provided.

Section 2 - The Authority's Exercise of Jurisdiction with respect to Mergers

THE AUTHORITY WILL EXERCISE ITS JURISDICTION TO REVIEW MERGERS OF UNDERTAKINGS ENGAGED IN ECONOMIC ACTIVITY

11. The Act applies to “undertakings” as defined under Section 2 (“Interpretation”) of the Act. In determining whether the provisions of the Act, including the provisions under Part IV, are applicable to an undertaking, the Authority will look at whether the undertaking subject of the applicable provision is engaged in an economic activity.
12. Therefore, the provisions under Part IV of the Act apply to all publicly or privately owned undertakings whose activities are likely to have impact on competition in the market, the competitive process and ultimately the consumers in Kenya or a substantial part of Kenya. In the context of a transaction subject to notification under Section 41(2) of the Act, the Authority will look to whether the party or individual whose assets, shares or other interests are to be acquired is engaged in trade.
13. Even as the Authority ensures that it is applying the provisions under Part IV to undertakings, it will ensure that the proposed transactions have an appropriate nexus within Kenya. In fulfilment of the provisions under Section 46(1) of the Act (“Determination of a Proposed Merger”), the Authority will therefore exercise its jurisdiction to review transactions between undertakings for which at least one aspect of the proposed merger will have an effect on competition or the public interest within Kenya or a substantial part of Kenya.
14. The Authority considers that in determining whether a transaction is subject to its jurisdiction, it will apply both the published merger notification thresholds and other economic or business indicators to ascertain whether the merger will have an appropriate nexus on competition within Kenya or substantial part of Kenya. The Authority may consider a number of factors including the following:
 - Whether an undertaking party to the merger has a significant presence in Kenya, as evidenced by turnover or assets, held by an undertaking party to the merger in or into Kenya (sales turnover and assets figures are as determined by the Authority and published by Notice);
 - Whether revenue is generated in Kenya by an undertaking party to the merger;
 - Whether an undertaking party to the merger acquires direct or indirect control over the strategic commercial affairs of the other undertaking party to the merger and such strategic commercial decisions will have an effect on trade in or into Kenya.

Section 3 - Transactions Subject to Notification

TRANSACTIONS TO BE NOTIFIED

15. Section 41(1) provides that “a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking”. Section 41(3) establishes a presumption of control but the Authority will look at other strategic documents or issues which evidence control including share ownership levels that are greater than or less than 50% when determining whether control is held.
16. For the purpose of determining whether a transaction satisfies the definition of the term “merger” as defined under Section 41(1) and in assessing the provisions under Section 41(2) to Section 41(3) for the purposes of determining whether the transaction is subject to notification and review, the Authority will consider that the following class of activities satisfy the definition of “merger” and are subject to notification:

Acquisition of Direct Control

17. The Authority considers that a proposed transaction can lead to a situation where one of the undertakings party to the merger has full control over whole or part of the business to be acquired so that it can effectively exercise full and decisive influence over the affairs of the acquired party and consequently lead to an effect on competition in a market in Kenya. Where there is an acquisition of direct control, as evidenced by the exercise of full or decisive influence over the affairs of the target undertaking, this is deemed by the Authority to constitute the acquisition of direct control.
18. In determining whether there is an acquisition of direct control, the Authority will look at the relationship between the parties due to the mix of commercial arrangements between the undertakings party to the merger as evidenced in various business documents including, share or asset purchase agreements, other contractual arrangements between the undertakings party to the merger, contractual provisions regulating the undertakings, consent agreements, deeds, articles of incorporation, and commercial policy.
19. In reviewing the evidence the Authority will be interested in whether the arrangements between the undertakings lead to the exercise of full control and/or decisive influence of the commercial decisions of the target undertaking. The determination of whether there has been acquisition of direct control will be on a case-by-case basis.
20. The Act under Section 41(3) specifies that a person controls an undertaking if it beneficially owns more than one half of the issued share capital of the undertaking. In line with international best practice, the Authority considers that the acquisition of less than 50% of

the shares of an undertaking with attached voting rights and unanimous decision making raises a presumption that direct control has been acquired.

21. The Authority will also consider other evidence that decisive influence can be exercised over the target undertaking, such as, any currently exercisable veto rights attributable to the shares being acquired, allowing the shareholder to veto decisions of the Board or the appointment of directors to the board, ability to determine the appointment of senior management, a strategic commercial policy, the budget or the business plan of the undertaking or has a controlling interest in an intermediate undertaking that in turn has a controlling interest in the undertaking.

Acquisition of Indirect Control:

22. The Authority considers that a proposed transaction can lead to a situation where the acquiring undertaking has less than full control over a whole or part of the business to be acquired but nevertheless still has the ability to materially influence the affairs of the acquired party and consequently competition in a market in Kenya. Where there is an acquisition of indirect control, as evidenced by the ability of the acquiring undertaking to materially influence (Material influence may be considered as decisive influence for the purpose of this analysis) the business affairs of the target undertaking, this is deemed by the Authority to constitute the acquisition of indirect control.
23. In determining whether there is an acquisition of indirect control the Authority will also consider whether the commercial arrangements between the undertakings party to the merger gives the acquiring undertaking the ability to materially influence key commercial decisions of the target undertaking. The ability to materially influence the decisions of the acquired undertaking may be evidenced, for example, an acquisition of minor shareholding (less than 20% in a company but the remainder of the shares are so widely dispersed that the acquirer can exercise his share interests in such a way as to materially influence key strategic decisions made by the target undertaking).
24. Other examples of commercial arrangements that will be examined by the Authority in this context includes, any lending arrangements between the undertakings party to the merger which give the lender the ability to effectively veto strategic decisions of the acquired undertaking, any exclusive and long-term supply source contracts between the undertakings, any transfer of managerial control to the acquiring undertaking or any arrangement where the undertaking becomes a business advisor to the acquired undertaking. In a case where only a minority shareholding is acquired, the Authority may also consider patterns of shareholders at meetings in previous years.
25. The Authority assesses the commercial arrangements in the context of an acquisition of indirect control on a case by case basis.

26. The Authority will not deem as acquisition of indirect control: an acquisition of a minority interest (below 20%) of the voting securities of an undertaking held solely for the purpose of passive investment and without exercising influence over affairs of the undertakings.

Over Whole or Part of the Business

27. Section 41(1) provides, in part, that a merger occurs where control is acquired “over the whole or part of the business”. What matters to the Authority is whether the acquisition in question is of assets/interests from which revenue can be generated or asset that affects the strategic competitive impact of the business. The asset must comprise a business with a market presence to which a turnover can be clearly attributed.
28. Also it is to be noted that the acquisition can manifest as the acquisition of one or more undertakings, shares or other securities, assets such as manufacturing plants and equipment, brands, licenses or other intellectual property rights, title to real property, etc. The acquisition can also be via the indirect acquisition of any of the foregoing, for example, where an undertaking uses another to acquire a controlling interest in another undertaking and consequently control of the rights attributable to that interest.
29. In situations of indirect acquisition of control, to determine the acquirer *in fact*, the Authority will look at the origin and source of financing for the transaction, any previous business arrangements or family links, and any evidence of coordination of conduct among market players that fall within the portfolio of a private equity acquirer.

Joint Ventures

30. Some joint ventures involve the integration of parts of the business activities of the undertakings to the joint venture, including a contribution of productive assets to the new joint venture. This can result in a reduction or elimination of competition between the undertakings to the joint venture in the joint venture’s field of activity. Whether it does so depends on the relative permanence of the joint venture and the degree of autonomy it enjoys from its parent companies.
31. For a joint venture to constitute a “merger” within the meaning of Section 41 of the Act, it must be a “full-function” joint venture. This means that it must perform, for a long duration (typically 10 years or more) all the functions of an autonomous economic entity, including:
- (a) operating on a market and performing the functions normally carried out by undertakings operating on the same market; and

(b) having a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets (tangible and intangible) in order to conduct for a long duration its business activities within the area provided for in the joint-venture agreement.

32. A joint venture established for a purposefully finite period (e.g., for a major construction project) will not be viewed as having a long duration.
33. The Authority will consider a joint venture not to be “full-function” if it only takes over one specific function within the parent companies’ business activities without access to the market. This is the case, for example, for joint ventures limited to research and development or production. Such joint ventures are auxiliary to their parent companies’ business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies’ products or services and therefore acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as full-function as long as the parent companies are acting only as agents of the joint venture, distributing the products or services of the joint venture itself.
34. The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence leads to substantial sales or purchases between the parent companies and the joint venture. The fact that the joint venture relies almost entirely on sales to its parent companies or purchases from them only for an initial start-up period (e.g., three years) does not normally affect the full-function character of the joint venture. Such a start-up period may be necessary in order to establish the joint venture on a market. The start-up period depends on the dynamics of the market in question.

Restructuring, liquidation and other matters

35. The Authority regards an internal restructuring within a group of undertakings (where one undertaking already controls the other undertaking or the undertakings concerned are ultimately controlled by the same undertaking) as not constituting a merger for the purposes of section 41 of the Act.
36. The Authority will consider other transactions entered into solely for financing purposes on a case-by-case basis. Parties may seek advisory opinion from the Authority in that regard.

Notifiable Acquisitions

37. Under Section 41(2) the Act provides examples of the various types of acquisitions over which control may be acquired. The following are other examples of acquisitions that the

Authority deems to be covered under Section 41(2) and which, the Authority wishes to highlight as clearly notifiable for the benefit of the business community and their legal representatives:

- i. Undertakings which have a minimum combined turnover or assets of one billion shillings and the turnover of the target undertaking is above one hundred million shillings.
- ii. In the health-care sector, where the undertakings which have a minimum combined turnover or assets of five hundred million shillings and the turnover of the target undertaking is above fifty million shillings.
- iii. In the carbon based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger exceeds four billion shillings.
- iv. In the oil sector, where the merger involves pipelines and pipeline systems which receive oil and gas from processing fields belonging to and passing through the meters of, the target undertaking, even where the value of the reserves is below four billion shillings.

TRANSACTIONS EXCLUDED FROM NOTIFICATION

38. Certain types of transactions may satisfy the definition of merger as defined under Section 41(1) of the Act. However, the Authority considers that having regard to the object of the Act which is to, *inter alia*, enhance the welfare of the people of Kenya and to protect effective competition in markets, pursuant to Section 3 of the Act, the following types of transactions, though they may otherwise satisfy the definition of a merger within the meaning of Section 41(1) may be considered for exclusion from the provisions of Part IV and are not subject to mandatory notification:

- Any acquisition of voting shares where the acquisition is less than 25 %, that does not amount to control as defined in paragraphs 17 *et seq.* and 22 *et seq.*, (acquisition of control and acquisition of indirect control) where the shares are acquired solely for investment purposes or in the ordinary course of business;
- Any acquisition of further voting securities by an undertaking which already holds more than 50% of the shares unless the acquisition is a transfer of joint control to sole control.
- Any acquisition of assets, which meets the mandatory notification thresholds, where the assets in question are those acquired solely as an investment or in the ordinary course of business, not leading to control of the acquired undertaking. This latter example would also include any acquisition of shares or voting rights by a person

acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients; and an acquisition of stock –in-trade, raw materials, stores and spares;

- Any transaction involving parent or holding company and its subsidiary or otherwise already vertically integrated company where the companies previously function as one undertaking operating under prior unified control. This latter example would also include an acquisition of control or shares or voting rights or assets by one person or enterprise of another person or undertaking within the same group that functions as a single undertaking;
- Any mergers where the combined turnover or assets of the merging parties is between one hundred million shillings and one billion shillings;
- In the healthcare sector, where the combined turnover or assets of the merging parties is between fifty million shillings and five hundred million shillings;
- In the carbon based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger is below four billion shillings; and
- Undertakings in the carbon based mineral exploration and prospecting sectors.

39. For the sake of clarity, the Authority notes that the foregoing list is not an exhaustive list of scenarios of notifiable and non-notifiable transactions. Businesses and their legal representatives must review the Act and the rules to be published by the Minister, and these guidelines in determining whether their transaction is subject to notification.

40. Where an undertaking is unclear as to whether its proposed transaction is subject to filing and review under the Act, it should seek an advisory opinion from the Authority to clarify the matter. The Authority notes that there is no block exemption for mergers and as such, whether a proposed transaction is subject to merger review will be assessed on a case by case basis.

Section 4 - Merger Analysis

41. The following section explains the main elements of the Authority's merger analysis process. The Authority subjects mergers to two main review assessments: (i) a competition assessment and (ii) a public interest assessment. Under the competition assessment the Authority reviews the transaction to see whether it is likely to lead to a substantial lessening of competition which may be manifested through unilateral or coordinated effects. The foregoing test is now contemplated by the Authority as a means of ensuring that the merger assessments are carried out in accordance with Section 3(g) of the Act. The public interest assessment uses a separate but complementary assessment to the competition assessment and allows the Authority to ascertain whether otherwise anticompetitive or pro-competitive mergers will conflict with certain government policies, for example, employment stability and the protection and encouragement of the growth of small businesses.

THE COMPETITION ASSESSMENT

42. The applicable competitive effects test is whether proposed merger is likely to prevent or lessen competition or create or strengthen a dominant position. These tests are interrelated as prevention or lessening of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged undertaking, unilaterally or in coordination with other undertakings, to exercise market power. The Authority recognises that mergers involving parties in competition with each other may prevent or lessen of competition in a market. However, the mergers that are likely to raise concerns are those that substantially or adversely affect competition by creating, maintaining or enhancing the ability of the merged undertaking, unilaterally or in coordination with other undertakings, to exercise market power.
43. The object of testing a proposed merger to see whether it will likely substantially prevent or lessen competition is not to protect competitors from the merger but to ensure that effective competition in the post-merger market will be maintained or restored via the application of prescribed conditions aimed at remedying any anticompetitive effects arising from the merger. The Authority considers that its main priority is ensuring there will be strong rivalry between undertakings in the post-merger market and there is the prospect of consumers having a choice of suppliers and switching options which would further prompt businesses to effectively compete for customers.
44. Mergers between undertakings may raise a combination of horizontal, vertical and/or conglomerate issues. In such a case, the Authority will assess horizontal, vertical and/or conglomerate effects as appropriate.

45. In assessing the competitive effects of the merger, the Authority will look at the effect of the merger on price, resellers, end consumers, quantity, quality, and whether the incentive to innovate is reduced or eliminated by the prospect of the merger.
46. Certain quantitative and legal and economic conceptual constructs will be undertaken to reach a decision as to whether a merger is likely to substantially prevent or lessen competition. These may include, but are not limited to:
- Market Definition
 - Market Concentration
 - Horizontal Mergers and their Possible Unilateral and Coordinated Effects
 - Non-Horizontal Mergers and their Possible Foreclosure and Coordinated Effects
 - Barriers to Entry
 - Countervailing Power
 - Efficiencies
 - Failing Undertakings
47. The competitive effects assessment will factor in all the foregoing and will consider:
- i. The relevant counterfactual - that is, the state of competition without the merger: the central tenet of this analysis is what the competition in the market would look like without the merger. In this regard, the Authority will seek to establish competitive situation that would prevail but for the merger being put into effect and will draw a distinguishing line between competitive effects that would obtain irrespective of the merger being put into effect and the competitive effects that are merger-related. This forward-looking assessment is intended to assess the credibility of any arguments put forth by the merging undertakings about the state of competition in the market if the merger does not take place. The Authority recognises that in the context of a failing undertaking, certain non-merger specific competitive effects may prevail irrespective of whether the merger took place. To that end, in the context of assessing “failing party mergers” the pre-merger status of competition scenario may not be taken by the Authority to be a credible picture of the status of competition without the approval of the “failing party mergers”.

- ii. The state of competition post-merger: the Authority will assess the likely competitive effects of the merger by reference to current competitors, and actual and potential competitors that are likely to be present in the post-merger market. The Authority will treat its assessment of potential competitors in the same way it does its assessment of actual/current competitors. The Authority recognises that potential competitors can present as a potential competitive constraint to the merged undertaking. A proposed merger could discourage a potential market entrant or simply eliminate the prospect of a viable competitive threat.

48. The Authority considers any evidence used by the merging parties to substantiate their arguments on the status of competition with or post-merger. It should be noted that any evidence and analysis presented should obviously be consistent with the parties own internal pre-merger assessments on the likely status of competition pre-merger and with or without the merger.

49. It should be noted that even as certain quantitative measures are used in the Authority's assessment of the competitive effects given rise by a proposed merger, all credible theories of harm are considered and each merger is considered based on the particular facts of the case before the Authority.

MARKET DEFINITION

50. The first step is to identify and define relevant market(s) of goods and services produced by the undertakings parties to the merger. If the goods/services of the merging undertakings are found to be in more than one market (multiple overlaps), each of the markets are examined separately because the state of competition might vary significantly between them.

51. The relevant product market comprises all those goods and or services that consumers regard as reasonably interchangeable or substitutable by reason of the goods/services characteristics, prices (using the SSNIP test) and intended use.

52. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of goods or services under conditions of competition that are sufficiently homogenous and which can be distinguished from neighbouring areas because such conditions of competition are appreciably different in those areas.

53. The relevant market within which to assess a given competition issue is therefore established by a combination of product and geographic markets.

54. The key to market definition is substitutability; the ease with which customers switch between alternative products (and across different geographical areas) - demand

substitution - and the extent to which suppliers can switch their facilities between supply of alternative products (and across different geographical areas) - supply substitution.¹

IDENTIFICATION OF MARKET PARTICIPANTS

55. The Authority identifies major suppliers/buyers by name, both local and external. If there are numerous small suppliers/buyers they are grouped appropriately.
56. The Authority also examines history of market entry since outcomes of past market entry may be significant indicator of entry and exit in the market. Issues of interest are how long the new undertakings stayed in the market, how successful they were in winning market share and how long it took them to get a significant size.
57. The Authority also considers undertakings that could readily enter the market by adjusting their mix of products or by expanding the geographical area they supply, without any significant new investment.

MEASUREMENT OF MARKET SHARES AND MARKET CONCENTRATION

58. Market concentration can be measured using such data as sales revenue, quantity of goods/services sold or capacity of the suppliers. The measures the Authority uses depend on the facts of the case and the availability of information.
59. The Authority considers that there are several ways in which concentration can be measured, including:
 - Number of undertakings: a straightforward count of the undertakings in a market is a basic measure of concentration. The Authority attaches greater weight to the number of undertakings when considering coordinated effects. However, counting undertakings does not take into account differences in market shares and the size and distribution of undertakings. The Authority will consider that in certain markets (e.g., bidding market) a merger resulting in fewer players is likely to raise competition concerns and will require further investigation.
 - Market shares of undertakings in the market: the Authority considers both absolute and relative market shares since they can give an indication of the extent of an undertakings' market power. This involves identifying the relative importance of the major undertakings in the market through apportionment of market shares. The Authority calculates pre and post-merger market shares. The combined market shares of the merging undertakings, when compared with their respective pre-

¹ For further details on the Authority's approach to defining markets, refer to the Guidelines on Relevant Market Definition on the following link: www.cak.go.ke.

merger market shares, can provide an indication of the change in market power resulting from a merger. For a merger involving undifferentiated products, unilateral effects are more likely where the merger results in an undertaking with a large market share.

History of market shares over a period of time is also taken into account since it is typically more informative in terms of market power than market shares at any particular point in time. Market power is more likely to exist if an undertaking or a group of undertakings has a persistently high market share and when all other competitors have very low market shares. Therefore, mergers resulting in the merged undertaking acquiring more than 50% market share will require further investigation.

- Concentration ratios, which may include the following assessment:
 - CR4: CR4 measures the aggregate market share of a small number of undertakings (four or five generally) of the leading undertakings in a market. The Authority uses four undertaking concentration ratios (CR4) and shows the proportion of the market supplied by the undertakings. The ratios are absolute in value and take no account of differences in the relative size of the undertakings that make up the leading group. If a small number of suppliers account for a large proportion of supply, the market is said to be concentrated. High concentration does not necessarily indicate market power and a competition problem. However, mergers in concentrated markets, especially of potentially more efficient competitors, may raise competition concerns and will be investigated further.
 - The Herfindahl-Hirschman Index (HHI): this is a measure of market concentration that takes account of the differences in the sizes of market participants, as well as their number. It is not the ultimate test on market concentration and is used by the Authority as an indicator of market concentration levels. The HHI is calculated by adding together the squared values of the percentage market shares of all undertakings in the market. The change in the HHI is calculated by subtracting the market's pre-merger HHI from its expected post-merger HHI. The absolute level of the HHI post-merger and the change arising from the merger can provide an indication of the change in market structure resulting from the merger. The application of the HHI as a relevant structural feature to measure concentration levels in addition to market shares. The Authority may undertake a calculation of the pre-merger and post-merger HHI values in respect of all the affected markets.

(For more details on measurements of concentration refer to the Appendix 1.)

ASSESSMENT OF HORIZONTAL MERGERS: UNILATERAL AND COORDINATED EFFECTS

60. A horizontal merger is a merger between two or more undertakings producing or offering substantially similar goods or services in the relevant market at the same level of business (e.g., a merger between two manufacturers or two distributors or two retailers).
61. The central tenet held by the Authority, with respect to the merger review standard it should apply, is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. All horizontal mergers will have some effect on competition and ultimately the market power held in the post-merger market. The Authority is therefore concerned with mergers that meet the criteria as set out in Section 46(2)(a) of the Act and in particular, the Authority is concerned primarily with mergers that are likely to prevent or lessen competition by assessing the strength of competition in the relevant market, and the probability that the undertakings in the market after the merger, will behave competitively or co-operatively.
62. When assessing horizontal mergers, the Authority considers both the possible effects of the merger on competition, substantiated efficiencies benefiting consumers, effects of the merger on employment, a particular industrial sector or region, endangering the continuity of supplies or services, the ability of national industries to compete in international markets, among others. The Authority examines the various chains of cause and effect with a view to ascertaining which of them is the most likely. The more immediate and direct the perceived negative effects of a merger, the more likely the Authority will raise concerns. Likewise, the more immediate and direct the positive effects of a merger, the more likely the Authority will find that they counteract any negative effects.
63. In analyzing a horizontal merger, the Authority compares situations that would result from the notified merger with those that would have prevailed without the merger (i.e., the relevant counterfactual). In most cases the situations at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Authority takes into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry or exit of undertakings and future market developments that result from impending regulatory changes.
64. The Authority considers whether the merger could lead to (i) non-coordinated (or unilateral effects) or (ii) coordinated effects.

Unilateral Effects

65. With respect to unilateral effects, the Authority will consider the potential of the merger to cause (i) loss of existing competition (including import competition), (ii) loss of potential

competition, and (iii) potential vertical effects. Not all of the factors need to be present for unilateral effects to be considered likely. Nor should this be considered an exhaustive list.

66. The Authority, as part of its overall competition assessment, will also conduct a unilateral effects test. The Authority will assess whether the proposed merger would likely result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position or strengthening a dominant position in a market such that the ability of profitably exercising market power is materially greater than would have been possible for either of the merging parties prior to the merger. The assessment of unilateral effects will be guided by the definition of the relevant market, the stability of market shares, concentration measures capacity constraints, availability and responsiveness of alternative suppliers, buyer power, the degree product differentiation and closeness of competition, the ability of the merged entity to act independent of its competitors in the post-merger market, or any factors dictating that there are barriers to entry, and countervailing power or the ability of customers to constrain the actions of the undertakings in the post-merger market.
67. The fact that a merger involves a sufficiently large share of the market does not necessarily imply that the newly formed undertaking will exercise its market power unilaterally. The factors that the Authority considers to determine if the acquisition, strengthening or exercise of market power is likely are considered below.

Assessment of Market Power

68. Market power to a seller is the ability to profitably maintain prices above competitive levels for a significant period of time. In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few undertakings account for most of the sales of a product, those undertakings can exercise market power like a monopolist, by either explicitly or implicitly coordinating their actions. Circumstances also may permit a single undertaking, not a monopolist, to exercise market power through unilateral or non-coordinated conduct, the success of which does not rely on the concurrence of other undertakings in the market or on coordinated responses by those undertakings.
69. Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a dominant buyer to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers.
70. A merger may prevent or lessen competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market

power. The most direct effect of the merger will be the loss of competition between the merging undertakings. For example, if prior to the merger one of the merging undertakings had raised its price, it would have lost some sales to the other merging undertaking. The merger removes this particular constrain. Non-merging undertakings in the same market can also benefit from the reduction of competitive pressure that result from the merger, since the merging undertakings' price increase may switch some demand to the rival undertakings, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market.

71. Generally, a merger giving rise to such non-coordinated effects would seriously prevent or lessen competition by creating or strengthening the dominant position of a single undertaking, one which, typically, would have an appreciable larger market share than the next competitor post-merger. Furthermore, mergers in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in prevention or lessening of competition.

Entry and Barriers to Entry

Entry

72. The possibility of entry of new competitors into the market is a factor considered by the Authority that inhibits the exercise of market power. The exercise of market power is unlikely when entry is "likely," "timely," and "sufficient." For the analysis of conditions of entry, the Authority takes into account the behaviour that a hypothetical undertaking that wishes to enter into the market must adopt. In this step, it is not necessary to identify an undertaking with a real intention of entering the market. However, the Authority bases itself on a hypothetical undertaking that is not similar to potential entrants. Examples of new undertakings entering the market in the last 5 years may be used as evidence for conditions of entry.

- Likely entry: the Authority considers entry likely when it is economically profitable at pre-merger prices and when these prices can be assured by the potential entrant. Prices will not be able to be assured by the possible entrants when the minimum increment of supply offered by the potential entrant is sufficient to cause a reduction in market prices.
- Timely entry: the longer it takes for potential entrants to become effective competitors, the lesser the likelihood that the incumbent undertakings will be deterred from exercising market power.

- Sufficient entry: the competitive impact of entry must be of sufficient scope and magnitude to deter or defeat the anticompetitive effects of the merger. Small-scale entry, for instance into some market "niche", may not be considered sufficient.

73. The Authority's assessment of timelines, likelihood and sufficiency of entry will depend on the circumstances of each particular merger under consideration. However, the underlying test is always whether the potential for entry provides an effective competitive constraint that would prevent a significant and sustainable increase in the market power of market participants post-merger.

Barriers to Entry

74. For a market to remain competitive, it must be possible for new undertakings to enter, and for existing ones to expand or to leave. If there are barriers that either prevent entry or delay it considerably, or that which makes it costly to enter the market, the existing undertakings might be able to raise prices above the competitive level. Similarly, if the merged entity attains a dominant position in a market with high entry barriers, there is likelihood that it can wield market power. Entry can be through actual entry by new undertakings or expansion of capacity by existing undertakings. Barriers to entry may be classified as natural, strategic and regulatory:

- Natural or Intrinsic Barriers: these are unavoidable costs necessarily incurred when setting up or expanding a commercial operation. Natural barriers include economies of scale (such as with network industries), economies of scope, absolute cost advantages and capital costs. Other natural barriers include problems that new entrants would have in obtaining access to technology, raw materials, or distribution channels. Another example is where entry into a market would require large 'sunk costs' (i.e., those that could not be recovered if an entrant subsequently decided to leave the market).

In assessing the effect of mergers/acquisitions on competition, the Authority determines: the existence of any natural barriers to entry into or exit from the relevant markets; and how natural barriers affect prospective entrants by comparing categories of prospective entrants, e.g. established vs. new undertakings, or domestic vs. foreign undertakings.

- Strategic Barriers: strategic barriers result from actions by existing suppliers, whether individually or collectively that is intended to discourage new entry. The Authority considers the following to include strategic barriers:
 - Installing excess production capacity that is significantly above market requirements so as to discourage potential entrants;

- Limiting or restricting production, market access, investment, among others through predation or other practices;
 - “Bundling and tying” (forcing new entrants either to compete for the grouped products or to compete on one product; however, there might be good reasons for bundling if it is cheaper to produce the products together than separately);
 - Arranging long-term exclusive contracts: these might sometimes be justified, but exclusivity makes the market less competitive than otherwise;
 - Product differentiation: this means building brands that competitors cannot challenge through advertising and promotion, service contracts and warranties, style and many more ways;
 - Discrimination in dealing: this can take the form of pricing, granting discounts, credit terms and delivery;
 - High expenditure on activities not directly related to production such as in advertisements and R&D;
 - Collusion, cartels and activities of trade associations such as price fixing, bid rigging and market allocation;
 - Resale Price Maintenance;
 - Refusal to deal; and
 - Increasing switching costs by, for example, offering fidelity discounts. An ideal example is the provision of supermarkets buying cards whose accumulated points are redeemed after a period of time.
- Regulatory and Policy Barriers: these include patents, licenses, laws and regulations. There can be sound public policy reasons for restrictions, such as health and safety concerns, national security, or even short-term industrial policy to develop infant industries or particular geographical districts or even for ensuring stability of the financial markets. If there are significant barriers to entry that may harm competition post-merger, the Authority may only recommend the approval of the application if satisfactory reasons are tendered such as imminent failure of target undertaking that can only be saved by the merger.

Countervailing Power

75. This refers to the ability of large buyers or suppliers to prevent the exercise of suppliers' or buyers' market power. For example, a customer or a group of customers acting together may be able to successfully constrain a supplier to exploit them through high prices or otherwise cause harm to competition.
76. In some markets, buyers may have sufficient bargaining power to prevent the exercise of suppliers' market power. The fact that the market is characterized by buyers that are large relative to the size of the suppliers does not necessarily mean that there is countervailing buyer power in the market. Factors that will influence the ability of buyers to constrain suppliers include, but are not limited to:
- A small number of large and informed buyers;
 - The buyer's ability to find credible alternative suppliers;
 - The ease with which buyers can switch suppliers, i.e., switching costs relative to product prices;
 - The ability of the buyers to produce the goods or services themselves or sponsor new entry;
 - The extent to which buyers can credibly threaten to stop purchasing other goods or services sourced from the supplier;
 - The extent to which buyers can impose costs on suppliers (for instance by delaying purchases).
77. While buyer power can offset the market power of suppliers, the benefits from the exercise of buyer power in lowering suppliers' prices are not necessarily passed on to customers. Much depends on how effective competition is between the various buyers in the market that they supply.
78. In general, when considering the overall arguments on countervailing power, the Authority looks at whether there is evidence that the customer has sufficient size, is commercially significant to the supplier, is able and also possesses the incentive to use their negotiating position to prevent exploitative pricing by the supplier or other harm to competition. In particular, the Authority will look at whether the customers that have the power to constrain the entity in the post-merger market possesses the incentive to exert countervailing power for the benefit of itself but also to the benefit of small and medium-sized entities that may not have sufficient countervailing power to effectively constrain the merged undertaking.

79. The Authority will also consider circumstances under which countervailing power will not prevent certain types of competitive harm such as slow or reduced innovation and reduction in consumer choice.

80. Other factors which will be relevant in the Authority's assessment of countervailing power include, but are not limited to:

- Whether individual customer negotiation is a typical feature of the market;
- Whether pricing on the market is transparent; and
- Whether end users of a good display a high degree of brand loyalty that would prevent them from switching to alternative suppliers.

The onus would be on the undertakings party to the merger to put forth evidence which sufficiently establishes that, post-merger, even though the merger may weaken somewhat the position of the customer or group of customers, the customers or group of customers would still have an effective negotiating position to constrain the merged entity.

81. Importantly, the Authority will consider the particular features of the market in question, on a case-by-case basis, by taking into account the particular relationship that exists between the manufacturer, distributors, retailers and end-users on a market. This will assist the Authority in forming a view in determining whether the evidence as proposed by the merger parties adduces sufficient facts to convince the Authority that the countervailing buyer power will prevent or lessen competition in a market within Kenya.

Supplier Power

82. In some situations, the structure or behaviour of undertakings in upstream markets may have an appreciable effect on downstream markets. For instance, upstream suppliers may possess many of the characteristics of power outlined for buyers above.

Imports

83. Imports and the possibility of importing are factors that inhibit the exercise of market power. The larger the participation of imports and/or the possibility of importing, the smaller the probability that market power will be exercised. Note that a reduced volume of imports is not enough to consider the exercise of market power probable. In addition, the possibility that imports may increase, in reasonable quantities and period of time, in response to a "small but significant and non-transitory" increase in prices are considered.

84. It is important to consider elasticity of imports demand, i.e., the responsiveness of quantity imported to changes in domestic prices. If a small increase in domestic prices will result in a big switch to imports, then imports will constrain the ability of merged entity to exercise market power.
85. In order to verify the elasticity of imports, the Authority consider barriers to imports, such as: import tariffs; distribution costs; the degree of dependency of imports in relation to local producers; the existence of exclusivity contracts between local importers and foreign undertakings; and the capacity of importers to accommodate increments in imports without the need to invest in new physical assets.

Coordinated Effects

86. Coordinated effects arise where the merger changes the nature of competition in such a way that undertakings that previously were not coordinating their behavior, are now more likely to coordinate to raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for undertakings which were coordinating prior to the merger.
87. Market coordination may arise where competitors are able, without entering into an agreement or resulting to a concerted practice, to identify and pursue common objectives, avoiding the normal mutual competitive pressure by a coherent system of implicit threats. The fewer the competitors in a market, the easier it will be to coordinate market behavior.
88. Coordination requires market conditions in which: i) a common understanding on the terms of coordination can be reached; ii) monitoring by the coordinating undertakings is possible to detect deviation; iii) deterrence mechanisms are available to “punish” deviation; and iv) there is lack of outsider reaction from current and future competitors as well as customers that might jeopardize the gains from coordination.
89. In assessing the likelihood of coordinated effects, the Authority takes into account all the available relevant information on the characteristics of the markets concerned, including both structural features and the past behavior of undertakings. Evidence of past coordination is important if the relevant market characteristics have not changed appreciably or are not likely to do so in the near future. Likewise, evidence of coordination in similar markets may be useful information.

Reaching Terms of Coordination

90. Coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work. Coordinating undertakings should have similar views regarding which actions would be considered to be in accordance with the aligned behaviour and which actions would not.

91. Generally, the less complex and the more stable the economic environment, the easier it is for the undertakings to reach a common understanding on the terms of coordination. For instance, it is easier to coordinate among a few players than among many. It is also easier to coordinate on a price for a single, homogeneous product, than on hundreds of prices in a market with many differentiated products. Similarly, it is easier to coordinate on a price when demand and supply conditions are relatively stable than when they are continuously changing. In this context, volatile demand, substantial internal growth by some undertakings in the market or frequent entry by new undertakings may indicate that the current situation is not sufficiently stable to make coordination likely. In markets where innovation is important, coordination may be more difficult since innovations, particularly significant ones may allow one undertaking to gain a major advantage over its rivals.
92. Coordination by way of market division will be easier if customers have simple characteristics that allow the coordinating undertakings to readily allocate them. Such characteristics may be based on geography; on customer type or simply on the existence of customers who typically buy from one specific undertaking. Coordination by way of market division may be relatively straightforward if it is easy to identify each customer's supplier and the coordination device is the allocation of existing customers to their incumbent supplier.
93. Coordinating undertakings may, however, find other ways to overcome problems stemming from complex economic environments short of market division. They may, for instance, establish simple pricing rules that reduce the complexity of coordinating on a large number of prices. One example of such a rule is establishing a small number of pricing points, thus reducing the coordination problem. Another example is having a fixed relationship between certain base prices and a number of other prices, such that prices basically move in parallel. Publicly available key information, exchange of information through trade associations, or information received through cross-shareholdings or participation in joint ventures may also help undertakings reach terms of coordination. The more complex the market situation is, the more transparency or communication is likely to be needed to reach a common understanding on the terms of coordination.
94. Undertakings may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetric, especially in terms of cost structures, market shares, capacity levels and levels of vertical integration. Structural links such as cross-shareholding or cross directorship or participation in joint ventures may also help in aligning incentives among the coordinating undertakings.

Monitoring Deviations

95. Coordinating undertakings are often tempted to increase their share of the market by deviating from the terms of coordination, for instance by lowering prices, offering secret

discounts, increasing product quality or capacity or trying to win new customers. Only the credible threat of timely and sufficient retaliation keeps undertakings from deviating. Markets therefore need to be sufficiently transparent to allow the coordinating undertakings to monitor to a sufficient degree whether other undertakings are deviating, and thus know when to retaliate.

96. Transparency in the market is often higher, the lower the number of active participants in the market. Further, the degree of transparency often depends on how market transactions take place in a particular market. For example, transparency is likely to be high in a market where transactions take place on a public exchange or in an open outcry auction. Conversely, transparency may be low in a market where transactions are confidentially negotiated between buyers and sellers on a bilateral basis. When evaluating the level of transparency in the market, the key element is to identify what undertakings can infer about the actions of other undertakings from the available information. Coordinating undertakings should be able to interpret with some certainty whether unexpected behaviour is the result of deviation from the terms of coordination. For instance, in unstable environments it may be difficult for an undertaking to know whether its lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices. Similarly, when overall demand or cost conditions fluctuate, it may be difficult to interpret whether a competitor is lowering its price because it expects the coordinated prices to fall or because it is deviating.
97. In some markets where the general conditions may seem to make monitoring of deviations difficult, undertakings may nevertheless engage in practices which have the effect of easing the monitoring task, even when these practices are not necessarily entered into for such purposes. These practices, such as, voluntary publication of information, announcements, or exchange of information through trade associations, may increase transparency or help competitors interpret the choices made. Cross-directorships, participation in joint ventures and similar arrangements may also make monitoring easier.

Deterrent Mechanisms

98. Coordination is not sustainable unless the consequences of deviation are sufficiently severe to convince coordinating undertakings that it is in their best interest to adhere to the terms of coordination. It is thus the threat of future retaliation that keeps the coordination sustainable. However the threat is only credible if, where deviation by one of the undertakings is detected, there is sufficient certainty that some deterrent mechanism will be activated.
99. Retaliation that manifests itself after some significant time lag, or is not certain to be activated, is less likely to be sufficient to offset the benefits from deviating. For example, if a market is characterized by infrequent, large-volume orders, it may be difficult to establish a sufficiently severe deterrent mechanism, since the gain from deviating at the right time may

be large, certain and immediate, whereas the losses from being punished may be small and uncertain and only materialize after some time. The speed with which deterrent mechanisms can be implemented is related to the issue of transparency. If undertakings are only able to observe their competitors' actions after a substantial delay, then retaliation will be similarly delayed and this may influence whether it is sufficient to deter deviation.

100. The credibility of the deterrence mechanism depends on whether the other coordinating undertakings have an incentive to retaliate. Some deterrent mechanisms, such as punishing the deviator by temporarily engaging in a price war or increasing output significantly, may entail a short-term economic loss for the undertakings carrying out the retaliation. This does not necessarily remove the incentive to retaliate since the short term loss may be smaller than the long-term benefit of retaliating resulting from the return to the regime of coordination.
101. Retaliation need not necessarily take place in the same market as the deviation. If the coordinating undertakings have commercial interaction in other markets, these may offer various methods of retaliation. The retaliation could take many forms, including cancellation of joint ventures or other forms of cooperation or selling of shares in jointly owned companies.

Reactions of Outsiders

102. For coordination to be successful, the actions of non-coordinating undertakings and potential competitors, as well as customers, should not be able to jeopardize the outcome expected from coordination. For example, if coordination aims at reducing overall capacity in the market, this will only hurt consumers if non-coordinating undertakings are unable or have no incentive to respond to this decrease by increasing their own capacity sufficiently to prevent a net decrease in capacity, or at least to render the coordinated capacity decrease unprofitable.
103. The effects of entry and countervailing power of customers are analyzed elsewhere in the guidelines. However, special consideration is given to the possible impact of these elements on the stability of coordination. For instance, by concentrating a large amount of its requirements with one supplier or by offering long-term contracts, a large buyer may make coordination unstable by successfully tempting one of the coordinating undertakings to deviate in order to gain substantial new business.
104. With respect to coordinated effects, the Authority considers whether as a result of a merger, it is likely that undertakings remaining in the market after the merger will be able to coordinate (either tacitly or explicitly) their behaviour or strengthen existing coordination in order to exercise market power.

Merger with a Potential Competitor

105. Transactions where an undertaking already active on a relevant market merges with a potential competitor in this market can have similar anti-competitive effects to mergers between two undertakings already active on the same relevant market and, thus, significantly impede effective competition, in particular through the creation or the strengthening of a dominant position.
106. A merger with a potential competitor can generate horizontal anti-competitive effects, whether coordinated or non-coordinated, if the potential competitor significantly constrains the behaviour of the undertakings active in the market. This is the case if the potential competitor possesses assets that could easily be used to enter the market without incurring significant sunk costs. Anti-competitive effects may also occur where the merging partner is very likely to incur the necessary sunk costs to enter the market in a relatively short period of time after which this company would constrain the behaviour of the undertakings currently active in the market.
107. For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Authority to reach such a conclusion. Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger.

Mergers Creating or Strengthening Buyer Power in Upstream Markets

108. The Authority may also analyze to what extent a merged entity will increase its buyer power in upstream markets. On the one hand, a merger that creates or strengthens the market power of a buyer may significantly impede effective competition, in particular by creating or strengthening a dominant position. The merged undertaking may be in a position to obtain lower prices by reducing its purchase of inputs. This may, in turn, lead it also to lower its level of output in the final product market, and thus harm consumer welfare. Such effects may in particular arise when upstream sellers are relatively fragmented. Competition in the downstream markets could also be adversely affected if, in particular, the merged entity were likely to use its buyer power vis-à-vis its suppliers to foreclose its rivals.
109. On the other hand, increased buyer power may be beneficial for competition. If increased buyer power lowers input costs without restricting downstream competition or total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices.

110. In order to assess whether a merger would significantly impede effective competition by creating or strengthening buyer power, an analysis of the competitive conditions in upstream markets and an evaluation of the possible positive and negative effects described above are therefore required.

NON-HORIZONTAL MERGERS: VERTICAL AND CONGLOMERATE EFFECTS

Vertical Mergers

111. Vertical mergers involve undertakings operating at different levels of the supply chain. For example, when a manufacturer of a certain product (the upstream undertaking) merges with one of its distributors (the downstream undertaking). Generally the commercial relationship is one where the downstream undertaking purchases:

- a) the output from the upstream undertaking and uses it as an input in its own production, which it then sells on to its customers; and
- b) finished products from the upstream undertaking for sale to its customers.

112. Vertical mergers rarely pose threat to effective competition unless the merged entity can gain a significant degree of market power in at least one of the markets concerned. Therefore, the extent to which the proposed merger would likely prevent or lessen competition or restrict trade depends on the degree of market power enjoyed by the undertaking.

Foreclosure Resulting from Vertical Mergers

113. Non-coordinated effects may principally arise when vertical mergers give rise to foreclosure. The term foreclosure describes any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated thereby reducing these companies' ability and/or incentive to compete.

114. Foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market. However, it is sufficient that the rivals are disadvantaged and consequently compete less effectively. As a result of such foreclosure, the merging undertakings may be able to profitably increase the price charged to consumers.

115. The guidelines focus on two principal methods by which market power in a vertical market could permit an undertaking to attempt foreclosure through non-coordinated effects. The first is where the merger is likely to raise the costs of downstream rivals by

restricting their access to an important input (“input foreclosure”). The second is where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base (“customer foreclosure”).

116. Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied in the absence of the merger, thereby raising its downstream rivals’ costs by making it harder for them to obtain supplies of the input under similar prices and conditions absent the merger. This may lead the merged entity to profitably increase the price charged to consumers, resulting in a significant impediment to effective competition. As indicated above, for input foreclosure to lead to harm, it is not necessary that the merged undertaking's rivals are forced to exit the market. The relevant benchmark considered by the Authority is whether the increased input costs would lead to higher prices for consumers. Any efficiencies resulting from the merger may, however, lead the merged entity to reduce price, so that the overall likely impact on consumers is neutral or positive.

117. Input foreclosure may occur in various forms. The strategies may include refusals to deal, supply restriction, or the adoption of non-compatible technology.

118. Input foreclosure may raise competition problems only if it concerns an important input for the downstream product. For example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market, or it may represent a significant source of product differentiation for the downstream product. It may also be that the cost of switching to alternative inputs is relatively high.

119. In assessing the likelihood of an anticompetitive input foreclosure, the Authority applies a three part analysis:

- The ability of the merged entity to foreclose competitors’ access to inputs;
- Its incentive to foreclose; and
- The overall likely impact of foreclosure on effective competition.

120. In practice, these factors are often examined together since they are closely intertwined.

Ability to Foreclose Access to Inputs

121. For input foreclosure to be a concern, the vertically integrated undertaking resulting from the merger must have a significant degree of market power in the upstream market. It

is only in these circumstances that the merged undertaking can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.

122. The merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality. This may be the case where the remaining upstream suppliers are less efficient, offer less preferred alternatives, or lack the ability to expand output in response to the supply restriction, for example because they face capacity constraints or, more generally, face decreasing returns to scale. Also, the presence of exclusive contracts between the merged entity and independent input providers may limit the ability of downstream rivals to have adequate access to inputs.
123. When determining the extent to which input foreclosure may occur, it must be taken into account that the decision of the merged entity to rely on its upstream division's supply of inputs may also free up capacity on the part of the remaining input suppliers from which the downstream division used to purchase before. In fact, the merger may merely realign purchase patterns among competing undertakings.
124. When competition in the input market is oligopolistic, a decision of the merged entity to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow them to raise the input price they charge to non-integrated downstream competitors. In essence, input foreclosure by the merged entity may expose its downstream rivals to non-vertically integrated suppliers with increased market power. This increase in third-party market power will be greater the lower the degree of product differentiation between the merged entity and other upstream suppliers and the higher the degree of upstream concentration. However, the attempt to raise the input price may fail when independent input suppliers, faced with a reduction in the demand for their products (from the downstream division of the merged entity or from independent downstream undertakings), respond by pricing more aggressively.
125. In its assessment, the Authority considers, on the basis of the information available, whether there are effective and timely counter-strategies that the rival undertakings would be likely to deploy. Such counter-strategies include the possibility of changing their production process so as to be less reliant on the input concerned or sponsoring the entry of new suppliers upstream.

Incentive to Foreclose Access to Inputs

126. The incentive to foreclose depends on the degree to which foreclosure would be profitable. The vertically integrated undertaking will take into account how its supplies of inputs to competitors downstream will affect not only the profits of its upstream division,

but also of its downstream division. Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers.

127. The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream. Other things constant, the lower the margins upstream, the lower the loss from restricting input sales. Similarly, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals.
128. The incentive for the integrated undertaking to raise rivals' costs further depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated undertaking can capture. This share will normally be higher the less capacity constrained the merged entity will be, relative to non-foreclosed downstream rivals and the more the products of the merged entity and foreclosed competitors are close substitutes. The effect on downstream demand will also be higher if the affected input represents a significant proportion of downstream rivals' costs or if the affected input represents a critical component of the downstream product.
129. The incentive to foreclose actual or potential rivals may also depend on the extent to which the downstream division of the integrated undertaking can be expected to benefit from higher price levels downstream as a result of a strategy to raise rivals' costs. The greater the market shares of the merged entity downstream, the greater the base of sales on which to enjoy increased margins.
130. An upstream monopolist that is already able to fully extract all available profits in vertically related markets may not have any incentive to foreclose rivals following a vertical merger. The ability to extract available profits from the consumers does not follow immediately from a very high market share. Such a finding would require a more thorough analysis of the actual and future constraints under which the monopolist operates. When all available profits cannot be extracted, a vertical merger – even if it involves an upstream monopolist - may give the merged entity the incentive to raise the costs of downstream rivals, thereby reducing the competitive constraint they exert on the merged entity in the downstream market.
131. In its assessment of the likely incentives of the merged undertaking, the Authority may take into account various considerations such as the ownership structure of the merged entity, the type of strategies adopted on the market in the past or the content of internal strategic documents such as business plans.

132. In addition, when the adoption of a specific course of conduct by the merged entity is an essential step in foreclosure, the Authority examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives.

Overall Likely Impact on Effective Competition

133. First, anticompetitive foreclosure may occur when a vertical merger allows the merging parties to increase the costs of downstream rivals in the market thereby leading to an upward pressure on their sales prices. Significant harm to effective competition normally requires that the foreclosed undertakings play a sufficiently important role in the competitive process on the downstream market. The higher the proportion of rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein. Despite a relatively small market share compared to other players, a specific undertaking may play a significant competitive role compared to other players, for instance because it is a close competitor of the vertically integrated undertaking or because it is a particularly aggressive competitor.

134. Second, effective competition may be significantly impeded by raising barriers to entry to potential competitors. A vertical merger may foreclose potential competition on the downstream market when the merged entity would be likely not to supply potential downstream entrants, or only on less favourable terms than absent the merger. The mere likelihood that the merged entity would carry out a foreclosure strategy post-merger may already create a strong deterrent effect on potential entrants. Effective competition on the downstream market may be significantly impeded by raising barriers to entry, in particular if input foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market. The concern of raising entry barriers is particularly relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future.

135. If there remain sufficient credible downstream competitors whose costs are not likely to be raised, for example because they are themselves vertically integrated or they are capable of switching to adequate alternative inputs, competition from those undertakings may constitute a sufficient constraint on the merged entity and therefore prevent output prices from rising above pre-merger levels.

136. The effect on competition on the downstream market must also be assessed in light of countervailing factors such as the presence of buyer power or the likelihood that entry upstream would maintain effective competition.

Customer Foreclosure

137. Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market. Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete. Downstream rivals may therefore find it harder to supply input supplies in the downstream market.
138. In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Authority follows a three step analysis similar to that for input foreclosure:
- The ability of the merged entity to foreclose access to downstream markets;
 - Its incentive to reduce its purchases upstream; and
 - The likely effects of the foreclosure on competition in the downstream market.

Ability to Foreclose Access to Downstream Markets

139. A vertical merger may affect upstream competitors by increasing their cost to access downstream customers or by restricting access to a significant customer base. Customer foreclosure may take various forms. For instance, the merged entity may decide to source all of its required goods or services from its upstream division and, as a result, may stop purchasing from its upstream competitors. It may also reduce its purchases from upstream rivals, or purchase from those rivals on less favourable terms than it would have done absent the merger.
140. When considering whether the merged entity would have the ability to foreclose access to downstream markets, the Authority examines whether there are sufficient economic alternatives in the downstream market for the upstream rivals (actual or potential) to sell their output. For customer foreclosure to be a concern, it must be the case that the vertical merger involves an undertaking which is an important customer with a significant degree of market power in the downstream market. If, on the contrary, there is a sufficiently large customer base, at present or in the future, that is likely to turn to independent suppliers, the Authority is unlikely to raise competition concerns on that ground.
141. Customer foreclosure can lead to higher input prices in particular if there are significant economies of scale or scope in the input market or when demand is characterized by network effects. It is mainly in such circumstances that the ability to compete of upstream rivals be they actual or potential can be impaired.
142. For instance, customer foreclosure can lead to higher input prices when existing upstream rivals operate at or close to their minimum efficient scale. To the extent that customer foreclosure and the corresponding loss of output for the upstream rivals increase

their variable costs of production, this may result in an upward pressure on the prices they charge to their customers operating in the downstream market.

143. In the presence of economies of scale or scope, customer foreclosure may also render entry upstream by potential entrants unattractive by significantly reducing the revenue prospects of potential entrants. When customer foreclosure effectively results in entry deterrence, input prices may remain at a higher level than otherwise would have been the case, thereby raising the cost of input supply to downstream competitors of the merged undertaking.
144. Further, when customer foreclosure primarily impacts upon the revenue streams of upstream rivals, it may significantly reduce their ability and incentive to invest in cost reduction, R&D and product quality. This may reduce their ability to compete in the long run and possibly even cause their exit from the market.
145. In its assessment, the Authority may take into account the existence of different markets corresponding to different uses for the input. If a substantial part of the downstream market is foreclosed, an upstream supplier may fail to reach efficient scale and may also operate at higher costs in the other market(s). Conversely, an upstream supplier may continue to operate efficiently if it finds other uses or secondary markets for its input without incurring significantly higher costs.
146. The Authority considers, on the basis of the information available, whether there are effective and timely counter-strategies, sustainable over time, that the rival undertakings would be likely to deploy. Such counterstrategies include the possibility that upstream rivals decide to price more aggressively to maintain sales levels in the downstream market, so as to mitigate the effect of foreclosure.

Incentive to Foreclose Access to Downstream Markets

147. The incentive to foreclose depends on profitability. The trade-off faced by the merging entity is similar to the one in input foreclosure: the costs of foreclosure depend on the efficiency of the upstream entity, the attractiveness of its products, and its capacity constraints.
148. The incentive to engage in customer foreclosure further depends on the extent to which the upstream division of the merged entity can benefit from possibly higher price levels in the upstream market arising as a result of upstream rivals being foreclosed.
149. When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Authority examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives.

Overall Likely Impact on Effective Competition

150. The foreclosure is anticompetitive if it results in prices rising in the downstream market. This depends on whether a sufficient amount of competition is foreclosed or if the remaining competitors face significant barriers to expansion.
151. Anticompetitive effects also arise if customer foreclosure raises barriers to entry, especially if competitors have to enter at both the downstream and the upstream level in order to compete effectively on either market. The concern of raising entry barriers is particularly relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future.
152. The Authority assesses the effect on competition in light of countervailing factors such as the presence of countervailing buyer power or the likelihood that entry would maintain effective competition in the upstream or downstream markets.

Other non-coordinated Effects

153. The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals. For instance, by becoming the supplier of a downstream competitor, a company may obtain critical information, which allows it to price less aggressively in the downstream market to the detriment of consumers. It may also put competitors at a competitive disadvantage, thereby dissuading them to enter or expand in the market.

Coordinated Effects

154. The Authority considers coordinated effects in the context of vertical mergers and looks at principles of coordination as explained in the analysis of horizontal mergers above, that is, whether terms of coordination can be reached, whether deviation can be monitored, the issue of deterrence and the reactions of outsiders.

Conglomerate Mergers

155. Conglomerate mergers involve undertakings that operate in different product markets. They may be product extension mergers (i.e., between undertakings that produce different but related products) or pure conglomerate mergers (i.e., between undertakings operating in entirely different markets). Such mergers rarely lead to competition concerns solely because of their conglomerate effects.
156. When assessing conglomerate mergers, the Authority considers both the possible effects of the merger on competition, substantiated efficiencies benefiting consumers, effects of the merger on employment, a particular industrial sector or region, endangering the continuity

of supplies or services, the ability of national industries to compete in international markets, among others. The Authority examines the various chains of cause and effect with a view to ascertaining which of them is the most likely. The more immediate and direct the perceived negative effects of a merger, the more likely the Authority will raise concerns. Likewise, the more immediate and direct the positive effects of a merger, the more likely the Authority will find that they counteract any negative effects.

157. In analysing a conglomerate merger, the Authority compares situations that would result from the notified merger with those that would have prevailed without the merger. In most cases the situations at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Authority takes into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry or exit of undertakings and future market developments that result from impending regulatory changes.

Foreclosure Resulting From Conglomerate Mergers

158. Conglomerate mergers can lead to a situation where the undertaking in the post-merger market is in a position to engage in full line forcing (requiring customers to buy all products from it), or could lead to a situation where it leverages its strong position in one market into a related market through tying, bundling or other exclusionary practices, such as denial of interoperability.

159. The main concern in the context of conglomerate mergers is that of foreclosure. The combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices.

Tying and Bundling

160. Tying and bundling as such are common practices that often have no anticompetitive consequences. It is common for undertakings to engage in tying and bundling in order to provide their customers with better products or offerings in cost-effective ways. Nevertheless, in certain circumstances, these practices may lead to a reduction in actual or potential rivals' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.

161. In assessing the likelihood of foreclosure scenario, the Authority will examine, whether:

- The merged undertaking would have the ability to foreclose its rivals;
- It would have the economic incentive to do so; and

- A foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers.

Ability to Foreclose

162. The most immediate way in which the merged entity may be able to use its market power in one market to foreclose competitors in another is by conditioning sales in a way that links the products in the separate markets together. This is done directly through tying or bundling.
163. Bundling refers to the situation when a package containing at least two different products is offered. The practice in which the undertaking offers only the bundle is called pure bundling, as opposed to mixed bundling when the undertaking also offers some of the products separately.
164. Tying refers to situations where customers that purchase one good (the tying good) are required to also purchase another good from the producer (the tied good). Tying can take place on a technical or contractual basis. For instance, technical tying occurs when the tying product is designed in such a way that it only works with the tied product (and not with the alternatives offered by competitors). Contractual tying entails that the customer when purchasing the tying good undertakes only to purchase the tied product (and not the alternatives offered by competitors).
165. In order to be able to foreclose competitors, the new entity must have a significant degree of market power, which does not necessarily amount to dominance, in one of the markets concerned. The effects of bundling or tying can only be expected to be substantial when at least one of the merging parties' products is viewed by many customers as particularly important and there are few relevant alternatives for that product.
166. Further, for foreclosure to be a potential concern it must be the case that there is a large common pool of customers for the individual products concerned. The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying. Such a correspondence in purchasing behaviour is more likely to be significant when the products in question are complementary.
167. The foreclosure effects of bundling and tying are likely to be more pronounced in industries where there are economies of scale. Notably, where a supplier of complementary goods has market power in one of the products (product A), the decision to bundle or tie may result in reduced sales by the non-integrated suppliers of the complementary good (product B). If further there are network externalities at play this will significantly reduce these rivals' scope for expanding sales of product B in the future. Alternatively, where entry into the market for the complementary product is contemplated by potential entrants, the

decision to bundle by the merged entity may have the effect of deterring such entry. The limited availability of complementary products with which to combine may, in turn, discourage potential entrants to enter market A.

168. It can also be noted that the scope for foreclosure tends to be smaller where the merging parties cannot commit to making their tying or bundling strategy a lasting one, for example through technical tying or bundling which is costly to reverse.

169. In its assessment, the Authority considers, on the basis of the information available, whether there are effective and timely counter-strategies that the rival undertakings may deploy. Bundling is further less likely to lead to foreclosure if a company in the market would purchase the bundled products and profitably resell them unbundled. In addition, rivals may decide to price more aggressively to maintain market share, mitigating the effect of foreclosure.

170. Customers may have a strong incentive to buy the range of products concerned from a single source (“one-stop shopping”) rather than from many suppliers, e.g. because it saves on transaction costs. The fact that the merged entity will have a broad range or portfolio of products does not, as such, raise competition concerns.

Incentive to Foreclose

171. The incentive to foreclose rivals through bundling or tying depends on the degree to which this strategy is profitable. The merged entity faces a trade-off between the possible costs associated with bundling or tying its products and the possible gains from expanding market shares in the market(s) concerned or, as the case may be, being able to raise price in those market(s) due to its market power.

172. Pure bundling and tying may entail losses for the merged company itself. For instance, if a significant number of customers are not interested in buying the bundle, but instead prefers to buy only one product (e.g., the product used to leverage), sales of that product (as contained in the bundle) may significantly fall. Furthermore, losses on the leveraging product may arise where customers who, before the merger, used to “mix and match” the leveraging product of a merging party with the product of another company, decide to purchase the bundle offered by rivals or no longer to purchase at all.
173. In this context it may thus be relevant to assess the relative value of the different products. By way of example, it is unlikely that the merged entity would be willing to forego sales on one highly profitable market in order to gain market shares on another market where turnover is relatively small and profits are modest.
174. However, the decision to bundle and tie may also increase profits by gaining market power in the tied goods market, protecting market power in the tying goods market, or a combination of the two.
175. In its assessment of the likely incentives of the merged undertaking, the Authority may take into account other factors such as the ownership structure of the merged entity, the type of strategies adopted on the market in the past.
176. When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Authority examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful.

Overall Detrimental Impact: Prices and Consumer Choice

177. Bundling or tying may result in a significant reduction of sales prospects faced by single-component rivals in the market. The reduction in sales by competitors is not in and of itself a problem. Yet, in particular industries, if this reduction is significant enough, it may lead to a reduction in rivals’ ability or incentive to compete. This may allow the merged entity to subsequently acquire market power (in the market for the tied or bundled good or service) and/or to maintain market power (in the market for the tying or leveraging good or service).
178. In particular, foreclosure practices may deter entry by potential competitors. They may do so for a specific market by reducing sales prospects for potential rivals in that market to a level below minimum viable scale. In the case of complementary products, deterring entry in one market through bundling or tying may also allow the merged entity to deter entry in

another market if the bundling or tying forces potential competitors to enter both product markets at the same time rather than entering only one of them or entering them sequentially. The latter may have a significant impact in particular in those industries where the demand pattern at any given point in time has dynamic implications for the conditions of supply in the market in the future.

179. It is only when a sufficiently large fraction of market output is affected by foreclosure resulting from the merger that the merger may significantly impede effective competition. If there remain effective single-product players in either market, competition is unlikely to deteriorate following a conglomerate merger. The same holds when few single-product rivals remain, but these have the ability and incentive to expand output.
180. The effect on competition is assessed in light of countervailing factors such as the presence of countervailing buyer power or the likelihood that entry would maintain effective competition in the upstream or downstream markets. In assessing whether a conglomerate merger could have anti-competitive effects, the Authority will consider the ability of customers to exercise countervailing power and in particular the incentives of customers to buy the portfolio from a single supplier. In a situation where customers can and do source the portfolio products from multiple suppliers and are likely to continue to do so post-merger, it is unlikely that the merger would prevent or lessen competition.
181. Further, the effect on competition needs to be assessed in light of the efficiencies substantiated by the merging parties. Notably, when producers of complementary goods are pricing independently, they will not take into account the positive effect of a drop in the price of their product on the sales of the other product. Depending on the market conditions, a merged undertaking may internalize this effect and may have a certain incentive to lower margins if this leads to higher overall profits - this incentive is often referred to as the Cournot effect. In most cases, the merged undertaking will make the most out of this effect by means of mixed bundling, i.e., by making the price drop conditional upon whether or not the customer buys both products from the merged entity.
182. Specific to conglomerate mergers is that they may produce cost savings in the form of economies of scope (either on the production or the consumption side), yielding an inherent advantage to supplying the goods together rather than apart. For instance, it may be more efficient that certain components are marketed together as a bundle rather than separately. Value enhancements for the customer can result from better compatibility and quality assurance of complementary components. Such economies of scope however are necessary but not sufficient to provide an efficiency justification for bundling or tying. Indeed, benefits from economies of scope frequently can be realized without any need for technical or contractual bundling.

Coordinated Effects in Conglomerate Mergers

183. Conglomerate mergers may in certain circumstances facilitate anticompetitive coordination in markets, even in the absence of an agreement or a concerted practice. In particular, coordination is more likely to emerge in markets where it is fairly easy to identify the terms of co-ordination and where such co-ordination is sustainable.
184. One way in which a conglomerate merger may influence the likelihood of a coordinated outcome in a given market is by reducing the number of effective competitors to such an extent that tacit coordination becomes a real possibility. Also when rivals are not excluded from the market, they may find themselves in a more vulnerable situation. As a result, foreclosed rivals may choose not to contest the situation of co-ordination, but may prefer instead to live under the shelter of the increased price level.
185. Further, a conglomerate merger may increase the extent and importance of multimarket competition. Competitive interaction on several markets may increase the scope and effectiveness of disciplining mechanisms in ensuring that the terms of coordination are being adhered to.
186. A merger may change the nature of competition in such a way that undertakings that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for undertakings which were coordinating prior to the merger.

EFFICIENCIES

187. The Authority considers that horizontal and non-horizontal mergers may lead to pro-competitive effects owing to efficiencies that are realized by the mergers. The Authority draws a distinction between the kinds of efficiencies generated by horizontal and non-horizontal mergers.
188. Efficiencies that are related to horizontal mergers include economies of scale and scope, from combining production, distribution and marketing activities, greater innovation yields from combining investment in research and development and reduced transaction costs.
189. In non-horizontal mergers one of the more commonly claimed efficiency is the elimination of double-marginalisation in vertical mergers or conglomerate mergers involving complementary products. Vertical mergers may allow the merged undertaking to absorb any pre-existing double mark-ups. In this context the Authority will look at whether the double marginalization is significant pre-merger. Useful evidence can include vertical supply agreements and verifiable data on pre-merger mark-ups.

190. The Authority considers that both demand- and supply-side efficiencies can result from a merger.
191. Where it is claimed that the merger will result in supply-side efficiencies such as in cost reductions, the Authority will look at whether any claimed cost reductions would be passed on to the consumers. In particular, the Authority will take account of any evidence of variable cost reductions, for example, verifiable data such as whether one of the merging undertakings has access to cheaper inputs, any verifiable past data on savings realized from consolidation of lines of distribution/distribution systems, etc.
192. The Authority considers that product repositioning may also be a claimed efficiency. The Authority considers that mergers between producers of differentiated products may result in product repositioning of the post-merger undertaking and its competitors and that this may result in increased product variety. However, this may lead to effects on prices that are hard to predict or verify.
193. The Authority also considers that efficiencies may result from a merger that results in the removal of investment barriers or hold-ups where the merger results in the aligning of investment priorities to produce new production processes or new products. Useful evidence that the merger would resolve any “investment hold-up” problems can include contemporaneous evidence demonstrating the pre and post-merger investment priorities, strategies or incentives of the merging parties.
194. With respect to demand-side efficiencies the Authority may consider whether the merger results in: (i) network effects, that is, whether the merger will result in the consumer placing a higher value on the network because it is used by a greater number of people; (ii) the merged undertaking offering product bundles that are at a lower combined price; and (iii) whether there are any economies of scope to be had from one-stop shopping by customers of the merged undertaking. Useful evidence in this regard may include evidence of industry practice, evidence quantifying/measuring customer incentives or the value they place on a product or service.
195. Other types of efficiencies that the Authority may consider outside of demand and supply-side efficiency may include dynamic efficiency, that is, any claimed benefits to competition resulting from combining complementary distribution, economies of scope and scale in research and development, upgrade in management skill-sets, etc. The Authority however cautions that of the various types of efficiency subject to assessment, dynamic efficiencies are the hardest to verify and as such evidence in this regard must adduce verifiable data that can demonstrate timeline to realization, a measurable indicator of innovation other than dollar figure to be invested and verifiable/useful data provided by parties other than the merging undertakings, if the data exists.

196. The Authority may consider whether the evidence presented on the demand- and supply-side efficiency are sufficiently compelling so as to negate any findings of substantial lessening of competition reached in the Authority's overall assessment of the merger.
197. The Authority may also considers whether the claimed efficiency prevents a substantial lessening of competition from occurring (likely because it enhances rivalry among market players in the post-merger market) or whether it results in consumer benefits in a reasonable period of time and would not have accrued without the merger.
198. Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging undertakings. Moreover, efficiencies projected reasonably and in good faith by the merging undertakings may not be realized. Therefore, it is incumbent upon the merging parties to substantiate efficiency claims so that the Authority can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged undertaking's ability and incentive to compete and why each would be merger specific.
199. The Authority considers efficiencies whose magnitude and possibility of occurrence can be verified by reasonable means and for which the causes (how) and the moment in which they will be obtained (when) are reasonably specified. The alleged efficiencies will not be considered when they are established vaguely, when they are speculative, or when they cannot be verified by reasonable means.
200. While the Authority will assess any apparent pro-competitive effects resulting from the merger in its overall assessment of the merger, the Authority considers that it is the merging parties that must present the arguments and facts (evidence) underpinning an efficiency claim, making sure to supply the Authority with the information needed to assess whether the claimed pro-competitive effects meets the necessary conditions for establishing whether efficiencies result from the merger. The Authority will consider whether the claimed efficiencies are likely to lead to the undertakings acting pro-competitively, to the benefit of consumers, in the post-merger market.
201. The Authority will nevertheless reach an ultimate decision to approve or disapprove the merger based on the overall impact the merger will have on competition. The relevant question in this regard is whether the effects of the claimed efficiency will counteract any adverse effects the merger will have on competition in the post-merger market. The pro-competitive effects resulting from any efficiencies will therefore be weighed against the net competitive effect of the merger. Efficiencies are treated on a case-by-case basis—they have to be verifiable, merger-specific and there must be demonstrable benefits to consumers.

FAILING UNDERTAKING

202. The Authority may decide that an otherwise problematic merger is nevertheless compatible with the Act if one or both of the merging parties is (or are) a failing undertaking. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger.

203. The Authority considers the following three criteria to be especially relevant for assessing a failing undertaking argument. First, the allegedly failing undertaking would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anticompetitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing undertaking would inevitable exit the market.

204. It is for the parties to provide in due time all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the merger is not caused by the merger. This undertakings claim that can undertaking is failing will be based on the facts and figures of the undertaking concerned. This is a case by case analysis and the burden will be on the notifying parties to prove that the one or more undertakings are failing.

EVIDENCE IN A COMPETITIVE EFFECTS ASSESSMENT

205. The Authority considers its competitive effects assessment to be merger specific and therefore relies on the evidence before it. The Authority has, under the Act and its rules to be made by the Minister, the power to summon or otherwise request information from merging parties. Merging undertakings should, nevertheless, be proactively interested in ensuring that the Authority has before it sufficient and reliable evidence to assess whether the proposed merger is likely to substantially lessen competition in the post-merger market. In particular, where the merging undertakings proposes arguments in their favor, in particular those relating potential entry, efficiencies, countervailing buyer power and failing undertaking, they should ensure that the evidence presented to the Authority substantiate these argument.

206. The following are considered to be a non-exhaustive list of potential sources of evidence:

- Public reports prepared by or for the parties, e.g., annual reports, independent analyses or commentaries.
- Market information (including confidential information), prepared by or for the parties, e.g., market research including sales and volume information – both levels and market shares.

- Confidential information prepared by or for the parties concerning the rationale for the merger and the sales process.
- Other confidential reports for Board Members and/or Senior Management prepared by or for the merging parties.
- Past behaviour by, and future intentions of, the merging parties and/or relevant third parties.

THE PUBLIC INTEREST ASSESSMENT

207. The following Guidelines have been developed in order to provide clear assessment criteria regarding Public Interest Test (“PIT”) in mergers’ determinations under the Competition Act No. 12 of 2010.
208. The main objective is to deepen transparency and predictability in the merger enforcement process. This is expected also to enhance accountability in the Authority’s decision making, under the PIT. By explicitly highlighting the parameters the Authority may consider during the merger review, in regard to the PIT, the Guidelines endeavour to insulate the Authority from the risks of Authority, omission or ambiguity.
209. The Guidelines have been informed by international best practice and also case law of mainly Commonwealth jurisdictions. Nonetheless, and most importantly, the parameters encapsulated in the Guidelines are premised on the Kenya Government’s overall economic agenda as articulated in the Vision 2030 and as cascaded in the current Medium Term Plan for the Vision. In summary, the two documents visualize a competitive economy, globally, and to paraphrase, with shared prosperity. This is also the Vision of the Authority.
210. To achieve the above, the Guidelines take cognizant of the need to enhance and sustain employment, of both human and capital resources, through supporting (i) measures to ensure no substantial job losses occur as a result of mergers; (ii) salvaging of failing and dormant undertakings and; (iii) also, encouraging mergers of media undertakings that will enhance production of local content/programmes and thereof support youth employment.
211. In addition, mergers involving Small and Medium Enterprises (“SMEs”) will be fast-tracked as an initiative of enhancing their capacity to penetrate certain markets in order to offer credible competition and enhance employment.
212. The Guidelines also aim at supporting the export market, to facilitate expansion of Kenya’s foreign exchange earnings, through making the local undertakings more competitive in the international market.

213. However, to ensure the vulnerable members of the society are not affected as a result of mergers, sectors which have high impact on the poor will have in- depth scrutiny. This will include mergers concerning utilities.
214. In addition, the Guidelines are predicated upon the need for media plurality. This is aimed at ensuring that no media house should and will be allowed, through mergers, to control and manipulate the media output to the detriment of public interest.

Competition Test v. Public Interest Test

215. In its determination of mergers, the Authority shall take into account both the competition test and the public interest test. As discussed above, the competition test will mainly focus on economic efficiency and consumer benefits issues. This includes the extent to which the merger would likely prevent or lessen competition or restrict output; lead to acquisition or strengthening of a dominant position in a market; and, minimize efficiency in the production and distribution of goods or the provision of services.
216. The PIT will focus on the extent to which a merger would affect: employment; ability of SMEs to gain access or to be competitive in any market; ability of national industries to compete in international markets and a particular industrial sector.
217. The Authority will conduct a public interest assessment regardless of the outcome of the competition assessment. The Authority will apply a balancing approach in assessing the public interest test and the competition test while ensuring that the principle of merger specificity is maintained. The central tenet behind the Authority's exercise of its review powers in this context is to determine whether a merger raises public interest issues. Unless the facts demonstrate that the specific merger warrants cause for public interest concern, the Authority will have no cause to exercise its jurisdiction to prevent the specific transaction.
218. First, the Authority will conduct a competitive effects assessment to establish whether or not the merger is likely to prevent or lessen competition in the post-merger market. Then the Authority will assess whether or not the merger will have a substantial negative effect on public interest. The logical outcome of such an assessment can be that a merger that raises no concerns about its competitive effect can be prohibited on public interest grounds and a merger that does raise concerns because it is likely to lead to anticompetitive effects can be allowed on public interest grounds.

Conflicting or Contradicting Public Interest Factors

219. The Authority considers that there may be instances when a merger may implicate multiple public interest factors with conflicting or contradictory outcomes (i.e., negative and positive impact). For example, a merger may assist in promoting growth of business allowing the domestic company to become more internationally competitive but the merger

may also result in job losses. In such an instance, the Authority will (i) assess each public interest ground asserted in isolation to see if the merger will have a substantial or significant negative effect on the public interest and (ii) if more than one ground exists which contradicts the others, the Authority will assess whether the various issues can be reconciled and if they cannot, Authority will employ a balancing approach, balancing the public interest factors, and come to a net conclusion.

220. Generally, in any case involving a public interest assessment, the Authority will establish whether there is a *prima facie* case adducing evidence of the relevant negative impact to any of the public interest factor(s) set out under the Act and as listed above. Once a *prima facie* case has been established the evidential burden shifts to the notifying parties to justify any negative impacts to the public interest factor(s) under consideration. Any arguments on justification must show a rational link between the advantages put forth by the notifying parties and the negative impact on public interests. The Authority will not give weight to any claims of the potential effects on a public interest factor that are not substantiated by either documentary or oral evidence. The Authority will then conduct a net balancing assessment to reach a conclusion.

Public Interest Factors

Job Losses and Efficiencies

221. Generally, the Authority will assess the track record of the merging undertaking in relation to labour related issues. For example, if the acquirer is known to have less regard to rights of employees. The Authority considers that while a negative impact on employment may be clearly connected to a particular claimed efficiency this does not discharge the notifying parties of their duty to show that the employment losses can be justified for a reason that is public in nature to offset the public interest in preserving jobs as a result of the merger. The Authority will only have to establish whether a *prima facie* case exists for substantial job losses and once a *prima facie* case has been established, the evidential burden shifts to the notifying undertakings to justify the job losses. The notifying undertakings must demonstrate that there is a rational connection between the reason for the employment reduction and the number of jobs proposed to be shed. The public interest in preventing job losses is balanced against the countervailing public interest justifying the job loss.

222. This implies that the way the number of job losses is calculated and the reasons for the job losses should make sense. The number of job losses should not be arbitrary, random or a guess estimate. It will be important for the merging undertakings to clearly demonstrate how the proposed number of job losses loss figures were calculated and how those are linked to claimed post-merger public (and not private) efficiencies.

International or Regional Competitiveness – Clearance on Public Interest Grounds

223. The Authority will weigh any losses to potential competition against interests directed at maintaining the presence of a market in any region or part of Kenya. Therefore, while a merger may give rise to anticompetitive effects, the Authority may approve an anticompetitive merger where it is demonstrated that there would be adverse effects on the regional competitiveness of the undertaking if the merger is not approved.

The Interaction between Foreign Direct Investment and the Public Interest

224. The Authority considers that the impact of foreign direct investment can create certain implications for public interest factors in merger review. Some of the more specific factors the Authority will consider may include whether a merger involving a foreign company would significantly switch its procurement of goods and services from the local market to imports that will detrimentally affect the ability of domestic suppliers to compete in the market. The Authority will also consider whether or not an undertaking to the merger has a reputation of neglect or disregard for labour issues. In this regard, the Authority will assess historical and current information concerning the manner in which the undertaking deal with labour related issues. For example, the Authority will consider whether the undertaking has a track record of laying-off workers following a merger or acquisition without regard to due process.

Evidence in a Public Interest Assessment

225. The Authority will consider the following as evidence during its public interest assessment:

- Due diligence reports, transaction correspondence, financial statements for the relevant business unit/division, auditor's report, official bank letters/reports or statements, or independent consultant's report, and HR plans.
- Documents prepared by and for the board including board minutes, reports or presentations that discuss or mention the transaction.
- Documents that deal with the undertaking's entry strategy into Kenya and/or a substantial part of Kenya including board minutes, reports, presentations, management minutes, notes and transcripts.
- Correspondence between executives of the merging parties from the date of signing of the confidentiality agreement until the deal is publicly announced.
- Correspondence between executives of the enterprise to be acquired from the date of initial discussions until the deal is publicly announced.

- Documentation of synergies or any other document that discusses the efficiencies or cost savings that may arise from the merger.
- Documents dealing with proposals for increasing efficiencies or lowering prices or increasing market share of the merged enterprise, post-merger.
- Documents and reports prepared/generated in the evaluation of the enterprise to be acquired.
- Documents showing which plants, facilities or markets that are going to suffer job losses or gains.
- Documents and/or testimonies or commitments that jobs are not going to be lost.

The Requirements of Parties

226. The Authority also imposes the following requirements during the review of a merger that presents public interest concerns.

Requirements of Notifying Parties:

- Give employees and/or their representatives' meaningful and correct information concerning how the merger will impact their jobs in a timely manner.
- Provide detailed information on the likely impact (whether positive or negative) of the proposed merger on jobs, small and medium-sized businesses, region, technology and international competitiveness.
- Provide reasonable and acceptable methods to quantify the impact of the proposed merger on the public interest criteria.
- Provide documents and testimonies to support their claims.
- Provide evidence of their engagements with affected parties, e.g., employee representatives, SMEs, etc., to ensure that they have been treated fairly.
- Provide measures and/or commitment aimed at ameliorating negative impacts on the public interest concerns.

Requirements from Third Parties²:

² Those stakeholders directly or indirectly affected by the proposed merger.

- Provide evidence of impact (whether positive or negative) on the public interest criteria that is merger specific.
- Engage in good faith with the notifying parties in reaching measures that are aimed at addressing the public interest concerns resulting from the merger.
- Propose remedies that are appropriate, proportional and capable of enforcement.
- Engage in good faith with the Authority in dealing with public interest concerns.

Section 5 - Guidance for Remedies in Merger Review

ASSESSMENT OF REMEDIES

227. The Authority seeks to prescribe conditions so that a merger that poses competition and/or public interest concerns can become compatible with Kenya's goals for its competition policy.
228. Having regard to the fact that the conditions that may be prescribed by the Authority may effectively alter components of the transaction, for example the value of the transaction, the Authority will consider any proposed conditions for remedying a merger deemed to be potentially anticompetitive or against any of issues of public interest concern.
229. During a merger review the Authority's objective is to seek out solutions that can restore or maintain competition while allowing for the realisation of merger specific efficiencies and benefits. The Authority will communicate competition concerns in its notice of determination which will be sent to the merging undertakings for their written response. Where the Authority intends to decline or approve a transaction with conditions the parties shall be informed of the competition concerns raised by the authority and to submit counter arguments, if any. Undertakings involved in a merger can therefore propose effective remedies in a timely manner in their responses.
230. The Authority will also engage in consultations on remedies, measures and conditions and the Authority reserves the right and power to take a final decision on what conditions are accepted and how they will be implemented.
231. The outcome of those consultations will have put the Authority in a position to effectively devise a package of conditions and to assess the remedial effectiveness of the conditions together. In assessing a remedy package, the Authority will have regard to, among other things:
- Comprehensive Impact: the Authority considers that the package should seek to deal with all the identified serious competition concerns resulting from the merger.
 - Acceptable Risk: there should be low levels of risk of not adequately addressing the identified competition concerns.
 - Practicality: the package should be capable of practical implementation, monitoring and enforcement within Kenya.
 - Appropriate Duration and Timing: the Authority considers that it is important that remedies are capable of addressing the competition concerns over a specified period of time. The Authority will prefer to use remedies that quickly address the identified

serious competition concerns rather than those that will take a long time to address the concerns.

232. The Authority considers that prescribing effective conditions to remedy a merger is primarily done by (i) assessing the competitive or public interest detriments and (ii) devised solutions to address or counteract those detriments.

APPLYING CONDITIONS TO MERGERS WITH ANTICOMPETITIVE EFFECTS

233. A mix of structural and behavioural conditions may be prescribed by the Authority to address any detriments posed by a merger that is likely to substantially lessen competition in the post-merger market in Kenya. Structural remedies may be employed which in principle strengthens the position of the merged entities in the post-merger market but the Authority considers that this is done to restrain the merged undertaking's position of dominance in the post-merger market.

Structural Remedies

234. The Authority considers that a structural remedy may be appropriate to address any changes to market structure that will follow as from the substantial lessening of competition in the post-merger market. If this type of remedial approach is employed by the Authority, in prescribing structural conditions, the Authority may impose any combination, not limited to, the following requirements on the merging undertakings:

- Within a specified time period and with the approval of the Authority, the sale of one of the overlapping businesses that have led to the competition concern. The Authority may also direct that there is to be an appointment of an independent trustee which shall be hired at the expense of the owner of the business and may also direct that the seller consider reasonable alternative and commercially reasonable prices even if those may be lower than the original acquiring price;
- Divestment of the whole or part of the buyer's existing business;
- Sale of appropriate equipment or other assets that fits with a divestiture package devised to a new market player or player otherwise independent of the merged undertaking;
- An amendment to intellectual property rights, for example, a mandated order to license an IPR;
- The immediate transfer of contract rights;
- Mandated conditions prescribing the circumstances under which the package can be revoked if certain ownership interests or market circumstances change;

- Requiring the merged entity to comply with a stipulated timeline to implement any prescribed conditions;
- Appointment of divestiture trustees to ensure that a suitable purchaser buys the divested business unit or assets where the merging parties have failed to secure a suitable buyer within the agreed divestment time period.

Behavioral Remedies

235. Behavioural remedies will be used to curtail the potential for the merged undertaking to behave anti-competitively in the post-merger market. If a structural remedy is not commercially practical or not appropriate in the case at hand or cannot be accomplished within a specified time, the Authority may employ a behavioural remedy. Behavioural remedies are considered by the Authority to also be enabling remedies which allow effective competition to be preserved in the post-merger market.

236. The Authority may impose any combination of structural and behavioural remedies, including, but not limited to, the following behavioural remedies:

- A requirement that the merged undertaking not approach the customers of any part of the business that has been sold or otherwise divested;
- An order mandating the supply of products or services to a customer segment, geographic region, etc.;
- The periodic provision of information to the Authority;
- Commitments on price caps from the merged undertaking if those commitments can effectively address any overpricing or price exploitation concerns;
- Commitments on grant of access to critical technology, interconnection and interoperability;
- Commitments on non-discriminatory pricing, supply or grant of access to customers;
- Restrictions expansions or on opening of new or related aspects of the business of the merged undertaking, such as other outlets;
- Commitments to output restrictions curtailing the possibility of enlarged market share of the merged entity;
- Termination of current exclusive agreements;

- The appointment of a monitoring trustee to monitor compliance and effectiveness of any imposed conditions;
- Requiring the merged entity to comply with a stipulated timeline to implement any prescribed conditions.

237. The Authority considers that a proposal of “declaration of intent not to abuse a dominant position” is not in itself an acceptable behavioural remedy.

Potential Remedies in Cases that Raise Public Interest Concerns

238. The Authority will focus on stability of individual industrial sectors. Therefore, a merger involving an undertaking acquiring another, especially where dominance is evident, and there exists no other plausible acquirer, may be approved on condition that they continue manufacturing the products of the party acquired for a period to be based on the time which new entry in the said market is feasible.

239. The Authority may approve the merger with conditions to achieve all the commitments the undertakings presented in their merger application, especially the ones detailing capacity and products expansion in the sector.

240. As an initiative to encourage plurality, diversity and local production, the Authority shall consider whether any intended merger, over and above the SLC test, affects, (in the example of media business):

- The strength and competitiveness of media business indigenous to Kenya.
- The extent to which ownership or control of media businesses in Kenya is spread amongst individuals and other undertakings.
- The extent to which the diversity of the local content is reflected through the activities of the various media business. This is aimed at supporting local production, hence increased employment, especially for the youth.

241. Mergers aimed at exports will be under relatively less competition scrutiny so long as they do not have buyer-power to distort competition to the detriment of their suppliers, especially the local ones.

242. Mergers involving a failing undertaking a dormant undertaking and also an undertaking under receivership will be fast-tracked, with the aim of saving jobs and choice for consumers.

243. The Authority shall consider any mergers involving utilities companies with utmost scrutiny under both the competition and public interest assessments.

244. The Authority, nonetheless, will always determine remedies in regard to public interest on a case-by-case basis and shall apply, if need be, conditions that are rational, proportionate and enforceable.

245. Depending on the case, Authority can use any of or a combination of remedies including the following:

- Requiring the merged undertaking to set up a development fund to ensure that a particular industry or local sector continue to be competitive;
- Requiring the merged undertaking to supply a key input or technology over a defined period of time;
- Imposing a moratorium on job losses for a defined period of time;
- Requiring the redeployment of staff;
- Re-skilling and training staff for alternative employment;
- Maintaining contracts with suppliers for a prescribed period.
- Putting a limit on imports;
- Requiring the merged undertaking to comply with existing labour agreement, acknowledge existing unions and formulate new agreements that protect the interests of employees;
- Requiring the merged undertaking to comply with a stipulated timeline to implement any prescribed conditions.

Ultimate Choice of Appropriate Remedy

246. The object of any choice of remedy prescribed by the Authority will be to provide practical and effective solutions to avert any substantial prevention or lessening of competition or cause for public interest concern, taking into account what conditions must be prescribed in order to adequately restore, prevent, mitigate or comprehensively remedy structural market changes or adverse/ negative public interest concerns are likely to be caused by the merger. In some cases the substantial prevention or lessening of competition may only occur for a specified period owing to the expiration of an intellectual property right held by the merged undertaking. The choice of prescribing structural versus

behavioural conditions or a mix of both may depend on the extent of the substantial lessening of competition. The Authority strives to ensure that there is a rational link between the issues of concern and the prescribed conditions. The Authority also recognises that certain remedies may be costly to impose, implement and/or monitor. Remedies are therefore considered on a case-by-case basis.

Procedures of the Authority when Contemplating Remedies to be Prescribed

247. The Authority carries out the following process in determining the conditions to be prescribed.

- The Authority identifies competition concerns that are likely to influence the final decision and clearly communicates those to merging parties and requests them to respond to the competition issues raised.
- Alternatively, the merging parties identify certain competition concerns either at the time of filing or during the review of the merger. This will not distract the Authority from reviewing the merger and identifying all the potential competition and public interest concerns.
- The Authority enters into discussion with the merging parties to identify measures or remedies that will effectively address all the identified serious competition concerns.
- The merging parties make proposals on remedies to the Authority.
- The Authority assesses whether the proposed remedies meet the requirements specified in the law or merger regulation.
- If the Authority is satisfied that the proposed remedies can potentially address the competition and/or public interest issues raised, it may market test them having regard to confidentiality claims by seeking the views of market participant on the effectiveness of the remedies in addressing the competition or public interest concerns. The Authority may require a minimum of 10 working days to carry out the market test of a remedy package. Following market testing of the proposed remedies, the Authority will communicate its findings to the merging parties.
- If market participants have convinced the Authority that the proposed remedies are effective to address the competition issues raised, the Authority will proceed to making those proposals commitments or conditions on which the merger is approved.

- If market participants raised serious concerns about the effectiveness of the remedies, the Authority will engage with the merging parties to address those concerns.
- The Authority will include measures in the remedy package that will ensure that the package is effectively implemented.
- Where there are serious competition issues that will result in substantial lessening of competition and significant public interest concerns and there are no effective measures to address them, the Authority will only remedy the merger by declining approval or prohibiting the whole or part of the notified merger.

Section 6 - Glossary of Terms

Assets: means the value of the assets of the merging parties, including their audited accounts and those of subsidiaries and holding companies for the preceding year, and the value of assets shall be considered in lieu of turnover.

Associated exploration or production assets: means equipment, machinery, fixtures and other assets that are integral and exclusive to current or future exploration or production where the merging parties carry out activities associated with carbon-based mineral reserves.

Carbon-based minerals: means oil, natural gas or coal, but does not include downstream retailing of these products.

Excluded sector: means carbon based mineral exploration and prospecting.

Healthcare includes hospitals, hospital management undertakings and health maintenance organizations.

Joint Control: the Authority considers joint control to be where the shareholders of an undertaking has equal voting rights with respect to taking strategic commercial decisions and appointments of directors to the Board. Joint control, as with other control, emanates from the rights attributable to the shares being voted and therefore the acquisition of less than 25% to 50 % of the voting shares can constitute “indirect” joint control or result in the acquisition of “indirect” joint control.

Party can refer to merging undertakings, undertakings who have filed the merger or third party undertakings.

Proposed Merger means a transaction that is in progress or in contemplation, which if carried into effect will result in the occurrence of a merger within the meaning of Section 41(1) of the Act.

Sole Control: the Authority considers sole control to be where one undertaking takes the majority of the decisions on the strategic commercial direction of a business and has the ability to appoint a majority of the directors.

APPENDIX 1: MEASURES OF CONCENTRATION

Market concentration can be measured using various instruments but the most commonly used instruments are Concentration Ratio and Herfindahl-Hirschman Index (HHI).

CONCENTRATION RATIO

A concentration ratio (CR) is the percentage of industry output that a specific number of the largest undertakings have. The concentration ratio for the k largest undertakings in an industry is calculated simply by adding up the market shares of these k undertakings. This can be represented as $CR_k = S_1 + S_2 + S_3 + S_4 + S_5 + \dots + S_k$. A very commonly used concentration ratio is the four-undertaking concentration ratio or CR4. The CR4 is the total market share held by the top four undertakings in an industry, and it is calculated as $CR_4 = S_1 + S_2 + S_3 + S_4$.

Table 1 below is a general guide for classifying industries using CR4. The table is only a rule of thumb, there is no consensus among economists on using the CR4. Additionally, concentration is only one objective factor in classifying market structure. There are many more factors, both objective and subjective, that a researcher must take into account.

Table 1: Classifying Industries using CR4

CR4	INTERPRETATION OF MARKET STRUCTURE
CR4 = 0	Perfect Competition
0 < CR4 < 40	Effective Competition or Monopolistic Competition
40 ≤ CR4 < 60	Loose Oligopoly or Monopolistic Competition
60 ≤ CR4	Tight Oligopoly or Dominant Undertaking with a Competitive Fringe
90 ≤ CR4	Effective Monopoly (near Monopoly) or Dominant Undertaking with a Competitive Fringe

A limitation of this approach is that it does not allow for the relative importance of other undertakings.

HERFINDAHL-HIRSCHMAN INDEX (HHI)

The HHI is calculated by summing the squares of the individual market shares of all the undertakings in an industry. This is represented as $HHI = S_1^2 + S_2^2 + S_3^2 + S_4^2 + S_5^2 + \dots + S_n^2$. The level of market concentration using HHI is categorized as follows:

- a) An HHI of less than 1000 is low, and there are no concerns of market concentration and the merger is unlikely to raise serious competition concerns.
- b) An HHI of between 1000 and 1800 is moderate, and competition concerns are not considered likely, unless there are high barriers to entry.

- c) An HHI above 2000 is high, and these mergers are likely to raise serious competition concerns.

The HHI reflects both the distribution of all undertakings in the market shares. However, HHI use may be disadvantageous in cases where there are numerous undertakings in the market; it becomes difficult to get the market share of each undertaking.