Unofficial translation

ANTIMONOPOLY COMMITTEE OF UKRAINE

RECOMMENDATORY CLARIFICATIONS
December 27, 2016, No. 49-pp

On the provision of Recommendatory Clarifications on the procedure for applying part one of article 25 of the Law of Ukraine "On Protection of Economic Competition" (regarding the assessment of horizontal concentrations)

In accordance to clause 13, part three, article 7 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine," and in compliance with clause 130 of the Action plan for the implementation of section IV "Trade and trade-related issues" of the Association agreement between Ukraine, on one side, and the European Union, the European atomic energy Community, and their member states, on the other side, for 2016–2019, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 217 dated February 18, 2016, the Antimonopoly Committee of Ukraine:

1. To approve the Recommendation Clarifications on the procedure for applying part one of article 25 of the Law of Ukraine "On Protection of Economic Competition" (regarding the assessment of horizontal concentrations), attached.

2. These Recommendatory Clarifications shall enter into force upon their publication on the official website of the Committee.

3. I retain control over the implementation of these Recommendatory Clarifications.

Chair of the AMCU **Y. Terentyev**

Appendix
to the Recommendation Clarifications
27.12.2016 No. 49-pp

RECOMMENDATORY CLARIFICATIONS
on the procedure for applying part one of article 25 of the Law of Ukraine "On Protection of Economic Competition" (regarding the assessment of horizontal concentrations)

I. General Provisions

1. These Recommendatory Clarifications are issued by the Antimonopoly Committee of Ukraine (hereinafter - the Committee) pursuant to the Law of Ukraine "On Protection of Economic Competition" (hereinafter - the Law) with the purpose of clarifying the application of the Law's provisions concerning the criteria for assessing concentrations of undertakings in cases where two or more participants in the concentration compete or may compete with each other in the same market (horizontal concentrations).

2. In accordance with part one of article 25 of the Law, the Antimonopoly Committee of Ukraine (hereinafter - the Committee) or an administrative board of the Antimonopoly Committee of Ukraine grants clearance for a concentration of undertakings if it does not result in monopolization or substantial restriction of competition in the entire market or a significant part thereof. Consequently, the Committee prohibits concentrations that result in any of the following outcomes:

- monopolization; or
- substantial restriction of competition in the entire market or a significant part thereof.

These Recommendatory Clarifications represent the analytical approach used by the Committee when assessing horizontal concentrations and do not detail all possible applications of this approach. The Committee applies the approach described in these Recommendatory Clarifications, taking into account the facts and circumstances of each individual case.

II. Definitions

3. The terms "economic competition (competition)", "monopolization", "Committee bodies", "goods", " commodity market" and "undertaking" as used in these Recommendatory Clarifications shall have the meanings provided in article 1 of the Law.

The term "monopoly (dominant) position of an undertaking" shall have the meaning provided in article 12 of the Law.

The term "concentration of undertakings" shall have the meaning provided in parts two and three of article 22 of the Law; the term "participants in a concentration" shall have the meaning provided in article 23 of the Law.

Other terms used in these Recommendatory Clarifications shall have the following meanings:

- horizontal concentration - a concentration in which the participants compete or may compete with each other in the same market;

- differentiated goods - goods that meet the same or related consumer needs but differ in physical characteristics, composition, methods of use, or consumer preferences;

- acquisition of monopoly (dominant) position - the acquisition of characteristics of a monopoly (dominant) position by an undertaking that did not previously have such characteristics;

- individual monopoly (dominant) position - as per article 12 of the Law, a monopoly (dominant) position held by a single undertaking;

- collective monopoly (dominant) position - as per article 12 of the Law, a monopoly (dominant) position jointly held by several (two or more) undertakings in the market;

- competitive constraints - restrictions on an undertaking's ability to independently set conditions for the circulation of goods in the market due to the activities of other market participants (competitors);

- homogeneous products - products with identical characteristics that are considered fully interchangeable from the consumer's perspective;

- strengthening of monopoly (dominant) position - the enhancement of an undertaking's ability, while holding a monopoly (dominant) position in a specific market, to act independently of other undertakings;

- potential competitor - an undertaking that, at the time of the concentration, is not engaged in economic activity in the relevant market but has the capability to enter that market;

- market share - the percentage of sales volume in physical or monetary terms of a particular undertaking's product (goods, works, or services) in the relevant commodity market relative to the total sales volume of such products in the relevant commodity market.

III. The main components

4. To make a decision on granting or denying authorization for a concentration of undertakings, the Committee compares the competitive conditions that would result from the concentration with those that would exist without it. To this end, the Committee conducts a general assessment of the anticipated impact of the concentration on competition to determine whether it will lead to monopolization (dominance) or significant restriction of competition in the entire market or a substantial part thereof. Under certain circumstances, foreseeable future market changes may also be considered.

5. The Committee's assessment of a concentration typically includes:

(a) defining the relevant product boundaries of a market product and geographic market boundaries;

(b) evaluating the impact of the concentration on competition.

6. When assessing the impact of a concentration on competition, the Committee examines the following groups of factors in particular:

(a) market shares of the participants in the concentration and concentration levels in the relevant commodity markets;

(b) potential anti-competitive effects in the relevant commodity markets;

(c) the possibility that buyer power will act as a countervailing factor to the anti-competitive effects of the concentration;

(d) the possibility that market entry by new participants will act as a countervailing factor to the anti-competitive effects of the concentration;

(e) the risk of bankruptcy.

It should be emphasized that these factors are not a "checklist" to be applied mechanically in each case. Instead, the competitive analysis in a specific case will be based on a general assessment of the anticipated impact of the merger, considering the relevant factors and circumstances. Not all factors will always be relevant for every horizontal merger, and it may not be necessary to analyze every element in each case.

7. If a concentration leads to market monopolization or a significant restriction of competition, the Committee will issue a decision prohibiting the concentration.

Based on the evaluation of the factors outlined in clause 6 of these Clarifications, the Committee may conclude that the concentration may result in adverse effects (e.g., price increases, reductions in production volumes or product range, or a decline in the quality of goods and services) that are simultaneously counterbalanced by pro-competitive effects.

In making a final decision, the Committee considers pro-competitive effects if:

- they cannot be achieved without the concentration (are directly dependent on the concentration);

- they are beneficial and timely for consumers.

8. The Committee generally begins its analysis by assessing the scope of the relevant market, determining the market shares of the participants in the concentration, and evaluating the overall level of concentration in the relevant commodity markets. However, in cases of concentrations that have already been implemented, there may be direct evidence of anti-competitive effects, making it unnecessary to analyze market shares. Depending on the study's findings, cases are categorized into three groups:

(1) An analysis of the factors in groups (b)–(d) listed in clause 6 of these Clarifications is not conducted if the Committee decides to consider the concentration application under a simplified procedure in accordance with indent six of part one of Article 27 of the Law.

(2) The Committee conducts an analysis of the factors listed in (b) and, if necessary, the factors in (c)–(d), if, considering the specifics and circumstances of a particular concentration, such analysis is necessary or if substantiated submissions are made by undertakings, public authorities, or consumers concerning the potential adverse impact of the declared concentration on competition; and in cases where:

(a) the combined market share of two or more participants in the concentration exceeds 15% but is less than 35%; or

(b) the combined market share of no more than three undertakings, including the entity to be formed as a result of the concentration, holding the largest shares in the market, exceeds 15% but does not reach 50%; or

(c) the combined market share of no more than five undertakings, including the entity to be formed as a result of the concentration, holding the largest shares in the market, exceeds 15% but does not exceed 70%.

(3) The Committee must always analyze the factors in (b) and, if necessary, the factors in (c)–(d) in cases where:

(a) the combined market share of two or more participants in the concentration exceeds 35%; or

(b) the combined market share of no more than three undertakings, including the entity to be formed as a result of the concentration, holding the largest shares in the market, exceeds 50%; or

(c) the combined market share of no more than five undertakings, including the entity to be formed as a result of the concentration, holding the largest shares in the market, exceeds 70%.

9. If, based on the analysis of the factors in sub-clauses (a) and (b) of clause 6, the Committee concludes that there are no consequences of the concentration in the form of monopolization or significant restriction of competition, it grants authorization for the concentration.

10. If, based on the combined analysis of the factors in sub-clauses (a) and (b) of clause 6, the Committee concludes that there are consequences in the form of monopolization or significant restriction of competition due to the concentration, it proceeds to analyze the factors in subparagraphs (c)–(d) of clause 6.

11. If the analysis of the factors in sub-clauses (a)–(d) of clause 6 indicates that the concentration will result in monopolization or significant restriction of competition in the entire market or a substantial part thereof:

(a) authorization for the concentration may be granted if the negative consequences are mitigated by the participants fulfilling specific requirements and obligations in accordance with article 31 of the Law;

(b) the concentration is subject to prohibition if the negative consequences cannot be mitigated through the fulfillment of requirements and obligations by the participants in accordance with article 31 of the Law.

The Committee evaluates the potential effects of the proposed requirements and obligations using the competitive analysis outlined in these Clarifications.

IV. Market shares and levels of concentration

12. Any analysis of a proposed concentration of undertakings begins with the calculation and assessment of the market shares of the concentration participants, their competitors, and the overall level of market concentration (market structure).

IV.1. Calculation and assessment of market shares

13. Generally, the analysis is based on current market shares at the time the concentration application is reviewed. However, current market shares may be adjusted to objectively reflect certain future changes, such as market entries or exits of undertakings or expansion of their business activities.

14. Market shares following the concentration are calculated on the assumption that the combined market share of the concentration participants equals the sum of their respective market shares prior to the concentration. In cases where the market shares of undertakings on the relevant market fluctuate consistently, such as markets characterized by large wholesale orders,

historical data on market structure may also be considered. In such cases, past changes in market shares are taken into account to assess the state of competition and the potential importance of various competitors in the future, for example, by determining whether undertakings have been gaining or losing market share.

15. Based on article 12 of the Law, the Committee concludes that structural prerequisites for a monopolistic (dominant) position exist if, before and after the concentration:

(a) the combined market share of the concentration participants exceeds 35%; or

(b) the combined market share of the concentration participants equals or is less than 35%, and competitors have relatively small market shares;

(c) the combined market share, along with the two other largest market participants, exceeds 50%;

(d) the combined market share, along with the four other largest market participants, exceeds 70%.

IV.2. Assessment of levels of market concentration

16. The Committee uses the Herfindahl-Hirschman Index (HHI) as an indicator of overall market concentration. The HHI is calculated by summing the squares of the individual market shares of all undertakings operating in the market:

$$HHI = \sum_{i=1}^{n} (Pi)^2$$

where, No - number of undertakings;

Pi - market share of the undertaking (in percent).

Whenever possible, the calculations should include the market shares of all undertakings active in the relevant market. However, the absence of information about undertakings whose combined market share is less than 5% may not be significant.

The Committee will consider a market with an HHI of less than 1,000 after the merger as "unconcentrated," between 1,000 and 2,000 as "moderately concentrated," and over 2,000 as "highly concentrated."

17. If the HHI value after the concentration is less than 1,000, it is concluded that substantial competition restrictions are unlikely.

18. Competition restrictions are unlikely if, after the concentration, the HHI value is between 1,000 and 2,000, and the difference between the pre- and post-concentration HHI is less than 250, or if the post-concentration HHI value exceeds 2,000 and the difference is less than 150, except in special circumstances such as:

(a) the concentration involves the acquisition of an undertaking that could potentially enter or has recently entered the market;

(b) one or more of the undertakings involved in the concentration are significant holders of innovative technologies not reflected in their market shares;

(c) there is significant cross-ownership of shares (stakes) among market participants;

(d) one of the concentration participants is an undertaking pursuing a strategy independent of other market participants and is likely to disrupt coordinated behavior;

(e) the undertakings involved in the concentration are each other's closest competitors in a differentiated market (detailed further in section V.1.2 of these Clarifications);

(f) there is evidence of past or ongoing coordinated behavior between the concentration participants and competitors;

(g) one of the concentration participants holds a market share of 35% or more before the concentration.

19. The calculation of the HHI is only one aspect of the analysis. In each specific case, the HHI value, in combination with the relevant deltas, may be used to assess potential adverse effects on competition.

V. Analysis of potential anticompetitive effects of concentrations

20. Horizontal concentrations may result in the following anticompetitive effects:

unilateral effects – these are impacts that occur without coordination of competitive behavior. Unilateral effects may arise as a result of eliminating existing or potential competitive constraints on one or more undertakings.

coordinated effects – these involve a reduction in competition that may result solely from tacit or explicit coordination. A concentration may increase the possibility of coordination among undertakings that did not coordinate prior to the concentration, thereby substantially restricting competition. Furthermore, a concentration may facilitate coordination, making it more stable or more effective for undertakings that coordinated their behavior before the concentration.

V.1. Unilateral anticompetitive effects

21. A concentration may lead to significant anticompetitive effects in the market by removing important existing or potential competitive constraints on one or more undertakings. In particular, the concentration results in the elimination of competition between the undertakings participating in the concentration. It may also remove or reduce significant competitive pressure on other competitors, thereby significantly restricting competition.

The following is an overview of some factors that may cause significant unilateral effects resulting from a concentration. This overview is not an exhaustive list of all such factors.

V.1.1. Capacity constraints

22. In markets for homogeneous goods, undertakings may increase profits by raising prices and reducing production and/or sales volumes. A reduction in production may occur, in particular, through:

(a) leaving part of the production capacity unused;

(b) refraining from constructing new capacity; or

(c) redirecting capacity from one market to another.

23. A production reduction is more likely in a concentration where one participant has a significant share of the relevant product market, and another participant holds substantial surplus production capacity for such products.

24. The possibility of anticompetitive effects due to production reduction and price increases is greater if competitors have limited ability to expand production in response. These anticompetitive effects are more probable if competitors would require significant time or find it practically infeasible to expand production on a sufficient scale.

When assessing the ability of competitors to increase production, consideration should be given to (a) the availability of relevant production capacity and (b) the costs necessary to acquire such capacity or activate unused capacity.

V.1.2. Effects on markets for differentiated products

25. Some products in the market may be closer substitutes than others (differentiated products). In evaluating a concentration in such a market, factors such as consumer preferences and switching costs should be considered. The possibility of adverse effects of a concentration on competition increases when the differentiated products of the participants are closer substitutes from the perspective of consumer preferences.

26. The greater the number of consumers who view the products of the concentration participants as close substitutes, the more likely a price increase will result from the concentration. For instance, a concentration involving two undertakings offering products that a significant number of consumers consider their first and second choices may lead to a significant price increase.

27. Concentrations of close substitutes are more likely to have anticompetitive effects when consumer preferences are stable. Consumer preferences may be tied to trademarks, strategies ensuring customer loyalty, or factors reducing motivation to switch suppliers in response to a price increase.

28. Where data is available, the degree of substitutability may be assessed based on consumer preference surveys, purchasing behavior patterns, estimates of cross-price elasticities of the relevant products, or diversion ratios. In markets using competitive procurement procedures, it is possible to analyze whether one participant's price offers were preferred over another's in the past.

29. Consumers of products provided by concentration participants may not choose alternative suppliers due to significant switching costs.

Switching costs arise, for instance, when searching for and negotiating with a new supplier requires considerable time and effort. Training costs may also form part of switching costs (e.g., when installing new software or using a different type of equipment). Switching costs may also result from supplier strategies (e.g., termination fees for contracts or consumer lock-ins via loyalty programs).

30. Switching to another supplier may also be complicated if there are a limited number of alternative suppliers or if consumers rely on dual sourcing strategies involving both concentration participants. In such situations, consumers' ability to switch suppliers (e.g., in response to a price increase) may already be limited before the concentration. If the concentration further reduces supplier choices, this may significantly impair consumers’ ability to mitigate adverse effects.

V.1.3. Effects on competitors' ability to compete

31. In certain cases, a concentration may create an undertaking that has both the ability and incentive to restrict competitors' ability to compete. Restrictions may be implemented by (a) increasing competitors' costs, (b) hindering their ability to acquire necessary products, or (c) impeding competitors' access to consumers.

Such abilities and incentives may arise, in particular, when the relevant concentration participants gain control over the supply and distribution of goods.

32. Control over patents or other forms of intellectual property rights (e.g., trademarks) essential for the sale of goods in the market may also create barriers to entry for new competitors or expansion for existing competitors.

V.2. Coordinating effects

33. A concentration may significantly restrict competition if it increases the possibility that undertakings will be capable of coordinating their behavior through concerted practices within the meaning of article 6 of the Law of Ukraine "On the Protection of Economic Competition." Concentrations may significantly restrict competition if they provide participants with the ability and incentive to coordinate their (future) market behavior or if they facilitate existing coordination or make it more stable.

34. Coordinated interaction implies a relationship among participants where each of them can achieve profit only with the cooperation of others.

Such coordinated interaction can take various forms, including maintaining prices above a competitive level, limiting production, or restricting the capacity expansion used for production. Undertakings may also coordinate their behavior by dividing the market, for example, based on geographic areas, consumer characteristics, or by allocating contracts in markets where competitive procurement procedures apply.

35. Coordinated interaction among competitors may lead to a significant restriction of competition when:

competitors are sufficiently able to monitor each other's market behavior;

competitors can respond to such behavior (either by replicating it or imposing punitive measures); and

the collective response is sufficient to influence the overall market trading conditions.

36. Consequently, when assessing coordinated effects, the Committee examines at least two aspects:

(1) whether achieving coordination will be possible; and

(2) whether the coordination is likely to be sustainable.

37. In assessing the possibility of coordinated effects, the Committee considers all available relevant information about the characteristics of the involved markets, including both structural features and the past behavior of undertakings.

Evidence of past coordination is significant if the relevant market characteristics have not undergone or are unlikely to undergo substantial changes soon.

38. It should be noted that in each case, individual factors may carry different weight depending on their importance in the relevant market. Depending on prevailing conditions, some factors may be irrelevant for one market but decisive for assessing another.

V.2.1. Assessment of the possibility of achieving coordination

39. Coordination is more likely to occur in markets where it is relatively easy to reach a mutual understanding regarding the conditions of coordination.

The simpler and more stable the market characteristics, the easier it is for undertakings to reach a mutual understanding about the terms of coordination. For instance, coordination is simpler among a limited number of participants compared to a large group. Coordinated interaction is also more likely for a single homogeneous product than in a market with many differentiated products.

40. Stable market conditions typically make markets more prone to coordination. It is easier to coordinate prices when supply and demand are relatively steady rather than constantly fluctuating.

For this reason, it is also important to consider the stage of market development. Coordination is less likely in the early stages of market development, where market volumes are dynamically growing. Mature markets, where constant innovations are no longer introduced, are more prone to coordination than dynamic markets driven by innovation.

41. Significant similarity among undertakings coordinating their behavior facilitates mutual understanding of the coordination conditions due to shared interests and goals. This similarity may particularly relate to cost structures, market shares, production capacities, and levels of vertical integration.

42. Connections among undertakings coordinating their behavior may also enhance the possibility of achieving coordination. These may include cross-shareholding, participation in joint ventures, strategic alliances, or other forms of contractual cooperation.

43. Coordination through market division is simpler if consumer characteristics allow undertakings coordinating their behavior to easily divide them. Such characteristics may include (a) geographic location, (b) type of consumer, or (c) the existence of consumers who typically purchase from a specific undertaking. Market division may be relatively straightforward if it is easy to identify each consumer's supplier and coordination mechanisms involve retaining existing consumers with their current suppliers.

V.2.2. Analysis of preconditions for sustainable coordination

44. For coordination to be sustainable, three conditions are necessary:

(1) undertakings coordinating their behavior must be sufficiently able to monitor adherence to the coordination conditions by all participants;

(2) there must be some form of reliable deterrent mechanism (disciplinary measures); and

(3) the reaction of external parties (such as existing or potential competitors not involved in the coordination and consumers) must not jeopardize the expected outcomes of the coordination.

V.2.2.1. Assessment of monitoring capabilities for deviations from coordination

45. Markets where coordinated interaction is more likely must be sufficiently transparent to allow undertakings coordinating their behavior to monitor, to a sufficient degree, whether others are deviating from the coordination conditions.

A key element in assessing market transparency is determining what conclusions undertakings can draw about others' actions based on available information. Undertakings coordinating their behavior must be able to interpret unpredictable actions as potential deviations from the agreed terms of coordination with some confidence.

Full market transparency is not mandatory. It is sufficient that the risk of detecting potential deviations from coordinated behavior exists.

46. Certain market characteristics contribute to transparency, such as:

(1) Transparency often increases as the number of active market participants decreases.

(2) Markets with homogeneous products tend to exhibit higher transparency because fewer competitive parameters need monitoring.

(3) Transparency is generally higher in markets where transactions occur on open exchanges or through tender procedures. Conversely, it may be lower in markets where transactions are confidentially negotiated bilaterally between buyers and sellers.

(4) Stable market conditions simplify detecting and correctly interpreting changes, while significant fluctuations in market demand or supply make it harder to detect and assess shifts in competitors' market behavior.

V.2.2.2. Assessment of the possibility of deterrence mechanisms

48. The stability of coordination is ensured, in particular, by the real possibility of adverse consequences for participants in coordinated interaction who violate its conditions. The mere fact of implementing deterrence measures in the market in the past proves that mechanisms for imposing adverse consequences on participants who violate the conditions of coordination are possible.

At the same time, it is sufficient to demonstrate that the adverse consequences of deviating from the conditions of coordination are practically enforceable and that their application is probable.

49. The existence of an effective deterrence mechanism is less likely in a market characterized by infrequent, large-volume orders, as the benefit from deviation at the right moment may be significant, undeniable, and immediate, whereas the losses from penalties may be small, uncertain, and only materialize after some time. Conversely, undertakings coordinating their behavior may promptly detect and respond to deviations when transactions occur frequently and each transaction involves a typical volume, constituting a relatively small proportion of the overall market volume.

50. The speed at which a deterrence mechanism can be activated is related to the issue of transparency. If undertakings can observe the actions of their competitors only after a significant delay, the imposition of adverse consequences for violators will also be significantly postponed, which may influence the possibility of deviations or adherence to agreements.

51. The imposition of adverse consequences on violators (participants deviating from the agreed behavior) becomes less likely in rapidly changing market conditions, such as in high-tech industries with short product life cycles. In such cases, adverse consequences under previous market conditions may lose their effectiveness or become unenforceable due to changes. Additionally, participants in such markets often have incentives to innovate to gain competitive advantages.

52. Implementing deterrence measures may be simpler in markets for homogeneous products. Conversely, in the case of differentiated products, stable consumer preferences may limit the effectiveness of deterrence measures.

53. The potential for deterrence measures may be enhanced by structural relationships between undertakings operating in the relevant market. For example, if undertakings coordinating their behavior are linked through a joint venture, they may respond to deviations from agreements by reducing investment in the joint venture or disregarding the interests of the deviating company when making decisions for the joint venture.

54. Deterrence measures do not necessarily have to be applied in the same market where the deviation from agreements occurs. If undertakings operating in the relevant market engage in commercial interactions in other markets, this may provide various ways to ensure the imposition of adverse consequences. Deterrence measures may take many forms, including the termination of joint ventures or other forms of cooperation.

The imposition of adverse consequences is more likely in markets where the activities of undertakings are similar.

V.2.2.3. Assessment of the possible reaction of third parties

55. Coordinated interaction is less likely in markets where the actions of undertakings not coordinating their behavior, potential competitors, or consumers are capable of jeopardizing the outcomes expected from coordination.

56. Competitive constraints on undertakings participating in a concentration by third parties are assessed using the same methodology as for the assessment of unilateral effects.

V.III. Effects that may be both unilateral and coordinated

V.3.1. Elimination of significant competitive pressure

57. In certain cases, an undertaking operating in the market may exert greater competitive pressure than is evident from its market share. A concentration involving such an undertaking may negatively impact competitive dynamics, particularly when the market is already concentrated. Such market participants may include:

(a) undertakings that pursued an aggressive market strategy before the concentration, which would likely have continued without the concentration, or

(b) undertakings that have recently entered the market and are expected to exert significant competitive pressure on other undertakings in the future.

58. In markets where innovation represents an important competitive force, a concentration may eliminate a potential source of future innovation or reduce the motivation of remaining undertakings to innovate.

V.3.2. Concentration with a potential competitor

59. Cases where an existing market participant undertakes a concentration with a potential competitor in that market may have anti-competitive effects similar to those resulting from a concentration involving two existing competitors.

60. A concentration with a potential competitor may result in horizontal anti-competitive effects if the potential competitor significantly restricts the behavior of undertakings already

operating in the market. This occurs when the potential competitor possesses assets that can be used to enter the market without significant irreversible costs. Anti-competitive effects may also arise when the other participant in the concentration is highly likely to incur the necessary irreversible costs for market entry within a relatively short time, thereby restraining the behavior of existing market participants.

61. A concentration with a potential competitor typically results in anti-competitive effects under two basic conditions:

(1) the potential competitor must exert significant competitive pressure or there must be a substantial possibility of such pressure being exerted in the future. Evidence of plans by the potential competitor to enter the market can significantly support such a conclusion.

(2) there must not be a sufficient number of other existing or potential competitors capable of maintaining equivalent competitive pressure after the concentration.

VI. Balancing factors

VI.1. General provisions

62. If the Committee determines, based on the results of its concentration analysis, that the concentration will have anticompetitive effects as outlined in section V of these Clarifications, it will analyze whether balancing factors offset the potential negative impact of the concentration.

63. As potential balancing factors, the Committee considers countervailing buyer power, market entry, and the risk of insolvency of an undertaking.

64. Evidence regarding the presence of balancing factors must be provided by the parties to the concentration. However, the Committee retains the authority to analyze all factors relevant to the assessment of balancing factors.

If such balancing factors exist and are capable of neutralizing the anticompetitive effects of the concentration, the concentration will be approved. If balancing factors are absent or insufficient to prevent and/or eliminate the anticompetitive effects of the concentration, the concentration will be prohibited unless the anticompetitive effects can be mitigated through appropriate remedies and commitments imposed on the parties to the concentration.

VI.2. Countervailing buyer power

65. Competitive pressure on a supplier is exerted not only by competitors but also by consumers. Countervailing buyer power is understood as the strength of a buyer's position and their ability to influence the supplier during business negotiations due to the buyer’s size, commercial significance, and capacity to switch to alternative suppliers.

66. The Committee assesses, as necessary, the extent to which consumers will be able to resist any increase in market power resulting from the concentration.

67. A buyer may prevent a supplier from increasing prices or otherwise deteriorating the quality or terms of supply if the buyer can (a) easily switch to other sources of supply within a reasonable time, (b) vertically integrate into the relevant market, or (c) facilitate the expansion of suppliers’ presence in the market or the entry of new suppliers, including by encouraging and enabling large orders from a potential competitor.

68. In certain cases, a buyer may also exercise countervailing power by refusing to purchase other products produced by the supplier or, particularly in the case of durable goods, by delaying purchases.

69. Generally, a buyer has no incentive to use its power if it can pass on potential cost increases to its own customers (e.g., due to its market power in downstream markets). Conversely, the ability to exercise buyer power may be highly attractive to the buyer if it cannot recoup potentially higher procurement costs in downstream markets.

70. However, if only a specific segment of consumers can exercise countervailing buyer power, such power is not sufficient to offset the potential negative consequences of the concentration. Furthermore, it is not enough that buyer power exists prior to the concentration; it must also remain effective after the concentration.

VI.3. Market entry

71. Monopolization of the market or significant restriction of competition resulting from a concentration is unlikely if market entry for new competitors is sufficiently easy. This applies to situations where market entry is likely, timely, and sufficient to prevent any potential adverse effects of the concentration. The analysis should also consider past market entries.

VI.3.1. Possibility of market entry

72. Market entry is likely if it is sufficiently profitable, considering the impact on prices due to the introduction of additional goods to the market and the potential reaction of existing market participants, as well as the required assets, opportunities, and risks associated with entry (including fixed costs). Market entry is usually more profitable in a growing market than in a mature or declining market. To assess the likelihood of market entry, the profitability of investments necessary for entry must be compared with the profitability of alternative uses of the same capital.

73. Profitability depends on factors such as:

the volume of production and/or sales achievable by the undertaking considering market entry barriers;

the price the undertaking can set in the market, accounting for the impact of its entry on prices;

the cost of production achievable by the undertaking given economies of scale.

74. Market entry is less likely if its economic viability depends on large-scale operations, resulting in significant price undercutting. Entry will also be more challenging if existing market participants can defend their shares and hinder the new entrant from achieving sufficient scale by offering long-term contracts or discounts to customers targeted by the new entrant.

75. Potential market entrants may face barriers that define the risks and costs of entry, which impact the profitability of entry. Entry barriers can include specific market characteristics that give existing participants advantages over potential competitors.

76. Entry barriers may take various forms, including:

(a) regulatory barriers limiting the number of market participants, such as licensing restrictions, tariff and non-tariff trade barriers, etc.;

(b) technical and technological advantages of existing market participants, such as privileged access to necessary infrastructure, natural resources, intellectual property rights, or innovations and R&D capabilities, which hinder any undertaking from competing successfully;

(c) the stable position of existing participants in the market. For example, market entry may be complicated by the need for experience or reputation to compete effectively. In this context, factors such as consumer loyalty to certain brands, close relationships between suppliers and consumers, or other reputation-related advantages are considered. Large excess capacities of existing market participants and switching costs for consumers may also hinder market entry.

VI.3.2. Timeliness of market entry

77. To prevent adverse competitive effects of a concentration, market entry must occur promptly. The timeliness of entry depends on the characteristics and dynamics of the specific markets involved in each case. The typical duration of consumer contracts can serve as a benchmark for this assessment. However, market entry is generally considered timely only if it occurs within two years.

VI.3.3. Sufficiency of market entry

78. Even if market entry is likely and timely, it may still be insufficient to prevent or eliminate risks of adverse effects on competition. Market entry must be substantial enough to avert or remedy the anticompetitive effects of the concentration. This typically means that new market participants must be capable of supplying products of sufficient quality and at prices competitive enough to constitute a constraint equivalent to or greater than the constraint removed by the concentration. Entry on a small scale cannot be deemed sufficient.

IX. Risk of insolvency

79. The Committee may decide to approve a concentration if one of the parties involved is an insolvent undertaking facing the risk of bankruptcy, and the concentration ensures the preservation of competitive conditions. The fundamental requirement is that any deterioration in competition following the concentration should not result from the concentration itself. Such conditions arise when the competitive environment would have deteriorated to at least the same extent in the absence of the concentration.

80. The Committee considers the following three criteria particularly important when applying the balancing factor of insolvency risk. First, the undertaking claiming insolvency will be imminently forced out of the relevant market due to financial difficulties unless acquired by another undertaking. Second, there is no less anticompetitive alternative to the proposed concentration. Third, in the absence of the concentration, the insolvent undertaking's assets will inevitably be withdrawn from the relevant market.

81. It is the responsibility of the notifying parties to provide sufficient evidence demonstrating that the deterioration in the competitive structure is not caused by the concentration.