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ANTIMONOPOLY COMMITTEE OF UKRAINE

RECOMMENDATORY CLARIFICATIONS

March 16, 2018 Kyiv No. 13-pp

On providing 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 non-horizontal concentrations)

In accordance with clause 13 of part three of article 7 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine", the Antimonopoly Committee of Ukraine:

1. To provide the 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 non-horizontal concentrations), as attached.

2. These Recommendatory Clarifications shall take effect 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 Recommendatory Clarifications
of the Antimonopoly Committee of Ukraine
dated March 16, 2018, No. 13-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 non-horizontal concentrations)

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I. General provisions

1. These Recommendatory Clarifications (hereinafter - the Clarifications) are provided by the Antimonopoly Committee of Ukraine (hereinafter - the Committee) pursuant to part six of article 4 of the Law of Ukraine "On Protection of Economic Competition" (hereinafter - the Law) to ensure uniform application of the provisions of article 25 of the Law regarding the criteria for granting authorization for concentration of undertakings (hereinafter - concentration) in cases where the participants in the concentration do not compete with each other in any relevant product market.

2. Pursuant to part one of article 25 of the Law, the Committee or its administrative panel grants authorization for concentration if it does not lead to monopolization or a substantial restriction of competition in the market. Therefore, the Committee's authorization for a concentration cannot be granted if such a decision leads to any of the following consequences:

monopolization of a commodity market;

substantial restriction of competition in the product market.

3. For the purposes of these Clarifications, the terms are used with the following meanings:

non-horizontal concentration - vertical or conglomerate concentration;

vertical concentration - a concentration where the participants operate at different levels of the production or distribution chain and are or may be in a "seller-buyer" relationship;

conglomerate concentration - a concentration where the participants do not compete with each other in any product market and are not and cannot be in a "seller-buyer" relationship;

upstream related market - a market for goods required for the production and/or distribution of goods traded in the corresponding downstream related market;

downstream related market - a market for goods whose production and/or distribution requires goods traded in the corresponding upstream related market;

price increase - an increase in price levels, as well as price stability in cases where prices would have decreased had the concentration not occurred; a smaller price decrease or a greater price increase than would have occurred had the concentration not taken place.

Other terms used in these Clarifications have the meanings defined in the Law of Ukraine "On Protection of Economic Competition," the Regulation on the procedure for filing and reviewing applications for preliminary authorization by the Antimonopoly Committee of Ukraine for concentration of undertakings, approved by the Committee's Resolution No. 33-pp of February 19, 2002 (as amended by the Committee's Resolution No. 14-рп of June 21, 2016, with further amendments), and in the Recommendation Clarifications on the Application of part one of article 25 of the Law of Ukraine "On Protection of Economic Competition" (regarding the assessment of horizontal concentrations), approved by the Committee's Decision No. 49-pp of December 27, 2016.

II. Main components of the assessment of non-horizontal concentrations

1. These Clarifications apply to vertical and conglomerate concentrations.

If participants in a vertical or conglomerate concentration are actual or potential competitors in the relevant markets of the concentration or in other markets, the Committee conducts an assessment of horizontal concentrations in accordance with the Recommendation Clarifications approved by the Committee's Decision No. 49-pp of December 27, 2016.

2. The components of the Committee's assessment of concentrations include:

1) defining the relevant commodity and geographic markets;

2) assessing the impact of the concentration on competition.

3. When assessing the impact of a concentration on competition, the Committee examines the following groups of factors, among others:

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

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

3) the possibility that buyer power will act as a counterbalance to the anti-competitive effects of the concentration;

4) the possibility that new market entry will counterbalance the anti-competitive effects of the concentration;

5) the risk of bankruptcy.

4. Analyzing all the factors mentioned above is not mandatory in every case. The selection of factors to be examined depends on the specific circumstances of the concentration.

5. Determination of the market shares of concentration participants and concentration levels in the relevant commodity markets may not be conducted for concentrations already implemented if there is direct evidence of anti-competitive effects.

6. The analysis of factors from groups 2) – 5) listed in clause 3 of section II of these Clarifications is generally not conducted if the Committee decides to review the concentration application under the simplified procedure, in accordance with the seventh paragraph of part one of article 27 of the Law. In such cases, the Committee analyzes the factors outlined in sub-clause 2 of clause 3 of section II and, if necessary, the factors outlined in sub-clauses 3) – 5), if the specifics and circumstances of a particular concentration require such an analysis or if there are reasonable submissions from undertakings, government authorities, or consumers concerning the potential negative impact of the declared concentration on competition.

7. If, based on the analysis of the factors outlined in sub-clauses 1) and 2) of clause 3 of section II of these Clarifications, the Committee concludes that the concentration will not result in monopolization or a substantial restriction of competition, the Committee grants authorization for the concentration.

8. If, based on a comprehensive analysis of the factors outlined in sub-clauses 1) and 2) of clause 3 of section II of these Clarifications, the Committee concludes that the concentration will lead to monopolization or a substantial restriction of competition, the Committee conducts an analysis of the factors outlined in sub-clauses 3) – 5) of clause 3 of section II.

9. If, based on the analysis of the factors outlined in sub-clauses 1) – 5) of clause 3 of section II of these Clarifications, the Committee concludes that the concentration will result in monopolization or a substantial restriction of competition:

1) authorization for the respective concentration is granted if the negative effects can be mitigated by the participants fulfilling certain requirements and obligations in accordance with article 31 of the Law, as specified by these requirements and obligations;

2) the concentration is prohibited if these negative effects cannot be mitigated through compliance with requirements and obligations set forth under article 31 of the Law.

The Committee evaluates the potential outcomes of proposed requirements and obligations by applying the competition impact analysis outlined in these Clarifications.

III. Market shares and concentration levels

1. The possibility of negative effects on competition caused by non-horizontal concentrations is low if the resulting undertaking does not possess significant market power in at least one of the relevant markets. A significant market share held by one or all participants prior to the concentration, as well as exceeding the Herfindahl-Hirschman Index (HHI) threshold indicated in clause 5 of section III of these Clarifications, may indicate a risk that the concentration will result in anti-competitive effects.

2. Typically, current market shares at the time of the concentration application review are analyzed. However, these shares may be adjusted to objectively reflect certain changes, such as market entry or exit of undertakings or an expansion of economic activity by the participants, supported by factual circumstances.

3. Post-concentration market shares are calculated based on the assumption that the combined market share of the participants equals the sum of their individual market shares prior to the concentration. If the market shares of undertakings in the relevant market fluctuate regularly, for instance, in markets characterized by large wholesale orders, historical market data 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 significance of various competitors in the future, for example, by determining whether participants' market shares have been increasing or decreasing.

4. The Committee uses the HHI as an indicator of the overall level of market concentration. The HHI is calculated by summing the squares of the individual market shares of all undertakings active in the market:

$$HHI = \sum_{i=0}^{n} (Pi)^2$$

where: n - the number of undertakings;

Pi - the market share of the undertaking (as a percentage).

Where possible, the calculation should include the market shares of all undertakings active in the relevant market. The absence of information on undertakings whose combined market share is less than 5% may not significantly affect the outcome.

5. If the market share of the resulting undertaking in each relevant market does not exceed 30% and the HHI after the concentration is less than 2,000, it is concluded that significant restrictions on competition due to the non-horizontal concentration are unlikely, except in specific circumstances, such as:

1) significant cross-ownership of shares or cross-control among market participants;

2) one of the concentration participants is an undertaking likely to engage in coordinated behavior;

3) evidence of past or current coordination (collusion) between the participants and competitors;

4) one of the participants is an undertaking likely to significantly expand its operations in the near future, for example, through the introduction of innovative technologies.

6. Exceeding the market share and HHI thresholds specified in clause 5 of section III of these Clarifications in at least one relevant market is a necessary but insufficient condition for a negative impact on competition. Therefore, in every case where such thresholds are exceeded, possible anti-competitive effects of the concentration should be analyzed.

IV. Analysis of potential anticompetitive effects of non-horizontal concentrations

1. Vertical concentrations

1.1. Vertical concentrations may lead to a significant restriction of competition in the commodity market if there is at least one of the following anticompetitive effects:

1) unilateral effects:

restriction of access to important factors of production;

restriction of access to customers;

2) coordinating effects that may have a significant negative impact on competition.

Unilateral effects

1.2. A concentration restricts access when it hinders or removes the ability of actual or potential competitors to reach suppliers or customers, reducing their capacity and/or motivation to compete. Such restrictions may occur without forcing competitors to exit the market; it is enough that certain competitors face unfavorable conditions, reducing their competitive effectiveness. Restricting access significantly limits competition if it enables the integrated undertaking (and potentially others) to raise consumer prices profitably.

1.3. There are two forms of access restriction:

1) Restricting access to essential production inputs - when concentration raises competitors’ costs in downstream markets by limiting access to critical inputs in upstream markets.

2) Restricting access to customers - when concentration likely obstructs competitors' activities in upstream markets by limiting access to a significant pool of customers in downstream markets.

Access restrictions to production inputs

1.4. When an undertaking acquires a main supplier of essential production inputs, this may lead to restricted access to such inputs. A vertically integrated undertaking may hinder access for competitors operating in the downstream market by: raising prices, lowering quality, imposing less favorable supply conditions, choosing specific technologies incompatible with those used by competitors, delaying supply significantly, or refusing to supply altogether.

1.5. When assessing the possibility of anticompetitive effects in the form of restrictions on access to inputs, the following is considered:

1) whether the integrated entity can significantly restrict access.

2) whether it is motivated to do so, and

3) whether the restriction strategy would substantially harm competition in the downstream market.

If it is established that the newly formed undertaking does not have the ability to restrict access, the motivation and effect on competition are not investigated.

If it is established that there is no motivation to restrict access, the existence of an adverse effect on competition is not investigated.

Ability to restrict access to production factors

1.6. The ability to restrict access to production factors is generally determined by two circumstances:

1) the importance of production factors for the manufacturing and/or marketing of goods in the downstream related market; and

2) competitors' ability to switch to alternative suppliers.

1.7. Restricting access to production factors can significantly impede competition if it concerns essential production factors for goods traded in the downstream related market. This occurs, for instance, when:

production factors significantly impact costs that determine the prices of goods in the downstream related market;

without these factors, manufacturing or efficient marketing of goods in the downstream related market becomes entirely impossible;

these factors may substantially affect the homogeneity/heterogeneity of goods in the downstream related market;

the costs of switching to alternative production factors are relatively high.

1.8. The undertaking formed as a result of the concentration may exert a significant adverse effect on the availability of production factors, particularly if there are exclusive supply agreements between the formed undertaking and independent suppliers of production factors, or if the remaining suppliers offer less favorable alternatives, or are unable to expand production in response to supply restrictions, for instance, due to capacity constraints.

1.9. When assessing a concentration, consideration should be given to whether counter-strategies by competitors could be effective and timely. Such strategies include the possibility of modifying the production process to reduce its dependency on the relevant production factors or facilitating the entry of a new supplier into the upstream related market.

Motivation to restrict access to production factors

1.10. The motivation to restrict access to production factors depends on the degree of profitability of such behavior. If a vertically integrated undertaking in the upstream related market reduces sales to customers with whom it competes in the downstream related market, this may result in a decrease in its total profit in the upstream related market. On the other hand, its sales and profits in the downstream related market may increase at the expense of competitors in that market. A strategy of restricting access is beneficial if the increase in profit in the downstream related market outweighs the loss in profit in the upstream related market.

1.11. Generally, the lower the profitability in the upstream related market, the lower the losses from restricting the sale of production factors in that market. Similarly, the higher the profitability in the downstream related market, the greater the profit derived from increasing market share in that market by restricting access for competitors.

1.12. The motivation to restrict access also depends on the ability to redistribute demand in the downstream related market in favor of the integrated undertaking's segment operating in that market, at the expense of competitors whose access to production factors has been restricted, and the portion of that diverted demand that the integrated undertaking can capture. The greater this potential share, the stronger the motivation to restrict access.

1.13. The motivation to restrict access for actual or potential competitors may also depend on the expected benefits of raising prices in the downstream related market, which the segment of the integrated undertaking operating in that market may achieve as a result of a strategy aimed at increasing competitors' costs. The larger the share of the downstream related market held by the integrated undertaking, the greater the volume of sales from which it can benefit due to increased profitability, and therefore, the stronger the motivation to restrict access.

1.14. An undertaking that already holds a monopoly (dominant) position in the upstream related market and is therefore capable of realizing all available benefits in vertically integrated markets may have no incentive to restrict access for competitors after completing a vertical concentration. However, if it is unable to realize all potential benefits, motivation to restrict access may still exist.

Likely overall impact on competition

1.15. A concentration has a negative impact on competition due to the restriction of access to production factors if this results in, or is highly likely to result in, price increases in the downstream related market, thereby significantly impeding effective competition.

1.16. The anticompetitive effect of restricting access may occur when the concentration enables the vertically integrated undertaking to increase the costs of competitors operating in the downstream related market, thereby exerting pressure on their sales prices. The more competitors in the downstream related market are restricted from accessing production factors, the greater the possibility that the concentration will lead to a significant increase in prices in that market.

1.17. Negative effects on competition may also arise from the acquisition of a competitor with a relatively small market share, particularly if that competitor is a close rival of the vertically integrated undertaking or an aggressive competitor.

1.18. Competition can be significantly impeded by the creation or strengthening of barriers to entry for potential competitors in the downstream related market. This is especially true if the formed undertaking is unlikely to supply potential new entrants to this market or would supply them on less favorable terms than would have been the case in the absence of the concentration. Competition in the downstream related market may be significantly restricted if access limitations compel such potential competitors to enter both the downstream and upstream related markets to compete effectively in each.

1.19. If there are competitors in the downstream related market whose costs are unlikely to be increased, for instance, because they are vertically integrated themselves or capable of switching to alternative production factors, the competition provided by such undertakings may exert sufficient pressure on the formed undertaking, thereby preventing price increases above the pre-concentration levels.

1.20. The impact on competition in the downstream related market must also be assessed in light of balancing factors, such as the presence of buyer power, the possibility that new entry into the upstream related market could sustain effective competition, and the risk of bankruptcy (see the explanatory recommendations approved by the Committee's decision No. 49-pp of December 27, 2016).

Restriction of access to buyers

1.21. Restrictions on access to buyers may arise when a manufacturer acquires a significant buyer of its goods or gains control over an important distribution channel as a result of concentration.

1.22. Restrictions on access to buyers can take various forms. For instance, the newly formed undertaking may procure all necessary goods and services from its own entity operating in the upstream related market and, as a result, cease purchasing them from competitors in that market. It may also either reduce the volume of its purchases from competitors operating in the upstream related market or procure goods from competitors on less favorable terms than would have been the case in the absence of the concentration.

1.23. When assessing the possibility of restrictions on access to buyers, the following factors are analyzed:

1) whether the newly formed undertaking will have the ability to restrict access to downstream related markets by reducing its purchases from competitors in the upstream related market;

2) whether it will have the incentive to reduce its purchase volumes in the upstream related market;

3) whether the strategy of restricting access will have a significant negative impact on buyers in the downstream related market.

If it is determined that the newly formed undertaking does not have the ability to restrict access, the incentive and impact on competition are not further analyzed.

If it is determined that the newly formed undertaking does not have the incentive to restrict access, the impact on competition is not further analyzed.

Ability to restrict access to buyers

1.24. The ability of the newly formed undertaking to restrict access to buyers depends, among other factors, on:

the ability of competitors to switch to alternative buyers;

the extent to which competitors' sales could be reduced as a result of the access restriction strategy;

the impact on competitors' costs.

1.25. Competitors' ability to switch to alternative buyers is more limited when the entity involved in the concentration already holds significant market power in the downstream related market. If there is a sufficiently large pool of buyers, either currently or in the future, that are likely to switch to other suppliers, it is unlikely that the concentration will have a negative impact on competition in this regard.

1.26. If competitors operating in the upstream related market face restricted access to the downstream related market, the supplier in the upstream related market may lose effective sales volumes and incur higher costs in other markets.

Motivation to restrict access to buyers

1.27. Motivation to restrict access to buyers arises when the costs incurred by the newly formed undertaking in purchasing goods from competitors in the upstream related market are lower than the potential benefits of such actions. These benefits may include, for example, an increase in prices in the upstream or downstream related markets resulting from such restrictions.

1.28. The motivation to restrict access to buyers is stronger, particularly when the market share of the newly formed undertaking in the downstream related market is larger. A greater market share translates into a higher volume of sales from which increased profitability can be derived.

Potential overall impact on competition

1.29. Restricting access to a significant portion of buyers for the goods of competitors with which the newly formed undertaking competes in the upstream related market may lead to increased costs for competitors in the downstream related market for acquiring production inputs. This, in turn, could enable the newly formed undertaking to profitably raise prices or reduce the volume of sales in the downstream related market.

1.30. If a sufficient number of competitors remain in the upstream related market, unaffected by the concentration, competition from these entities may prevent price increases in the upstream related market and, consequently, avoid negative impacts on the downstream related market. However, significant competition from such entities requires the absence of barriers to expanding sales, such as capacity constraints or product differentiation. If a weakening of competition in the upstream related market affects a substantial portion of inputs for the downstream related market, the concentration is likely to result in a significant price increase in the downstream related market, similar to cases of restricted access to production inputs.

1.31. Competition in the upstream related market may also be hindered by increased barriers to entry for potential competitors. This could occur if restricted access to buyers forces potential competitors to simultaneously enter both the downstream and upstream related markets to compete effectively in each. The issue of entry barriers requires particular attention in industries where markets are competitive or are likely to become competitive in the near future.

1.32. The impact on competition should be assessed while considering balancing factors, such as the presence of countervailing buyer power, the possibility of a new market entrant maintaining effective competition in the downstream or upstream related market, and the risk of bankruptcy. For further details, refer to the explanatory recommendations approved by the Committee’s decision of December 27, 2016, No. 49-pp.

Coordinating effects

1.33. A concentration may result in an increased possibility of coordination among undertakings that did not coordinate their behavior prior to the concentration. Additionally, a concentration may facilitate coordination, making it more stable or more effective for undertakings that were already coordinating their behavior before the concentration.

In general, the coordinated effects of vertical concentrations do not lead to a significant restriction of competition in the market. However, they can substantially amplify the negative impact on competition caused by the unilateral effects of the concentration.

Therefore, the analysis of coordinated effects is advisable in cases where the unilateral effects of the concentration negatively impact competition, but such effects alone are insufficient to conclude that competition in the market is significantly restricted.

1.34. For coordination to be stable, the following three conditions must be met:

1) the undertakings coordinating their behavior must be able to sufficiently monitor whether the terms of coordination are being followed;

2) certain forms of deterrence mechanisms must exist to address deviations from coordinated behavior;

3) the response of third parties, such as existing or potential competitors refusing to participate in the coordination, or buyers, must not threaten the expected outcomes of the coordination.

Impact on achieving coordination conditions

1.35. If vertical concentration restricts access to a relevant market, it reduces the number of competitors in the market, which in turn facilitates coordination among the remaining market participants.

1.36. Vertical concentrations may also increase the uniformity (similarity) of market participants. This can enhance the possibility of coordination by simplifying the process of reaching mutual understanding on the terms of coordination. Likewise, vertical integration may increase market transparency, facilitating coordination among the remaining market participants.

1.37. A concentration may result in the removal of a market participant whose behavior deviates from the norm in the market. Such a participant could be a supplier that, for its own reasons, refuses to participate in coordination, thereby sustaining aggressive competition. Vertical integration of such a market participant may alter its motivation to the extent that barriers to coordinating business behavior are eliminated.

Impact on monitoring deviations from coordinated behavior

1.38. Vertical integration may facilitate coordination by increasing market transparency through access to competitors' confidential information or by simplifying the monitoring of prices. For instance, this may occur if price transparency is higher in the downstream related market than in the upstream market. This situation can also arise if end-consumer prices are publicly known while transactions in the intermediary market remain confidential. Vertical integration may enable producers operating in the upstream related market to set prices in the downstream related market, thereby more effectively monitoring deviations from coordinated behavior.

1.39. Vertical concentration, when resulting in restricted access, may also reduce the number of effective competitors in the market. A smaller number of market participants can make it easier for them to monitor each other's behavior.

Impact on deterrence mechanisms

1.40. A vertically integrated undertaking may be able to more effectively impose adverse consequences on other undertakings that deviate from the terms of coordination, as it may be either a significant buyer or supplier to those entities.

Impact on third-party responses

1.41. Vertical concentrations may reduce the ability of third parties to destabilize coordination by increasing barriers to market entry or limiting their ability to compete.

1.42. If entities operating in the upstream related market view sales to a particular buyer as critical, they may have an incentive to deviate from the terms of coordination. Acquiring such a buyer may increase the risk of market coordination.

2. Conglomerate concentrations

2.1. Conglomerate concentrations may negatively impact competition, especially if the entities involved in the concentration, while not operating in a seller-buyer relationship, are active in markets for related products. Such effects are observed in cases of concentrations between suppliers of complementary products or products that belong to the same category typically purchased by the same group of buyers for a common final application. Products are considered complementary if their combined use provides additional benefits to buyers.

Conglomerate concentrations can amplify the negative effects of horizontal and vertical concentrations when the participants of such concentrations operate in multiple markets, including those for related products.

Unilateral effects

2.2. To assess the possibility of negative effects on competition resulting from a conglomerate concentration, the following aspects are analyzed:

1) whether the resulting undertaking will have the ability to restrict access for its competitors;

2) whether the resulting undertaking will have the incentive to act in this way;

3) whether the strategy of restricting access will result in a significant negative impact on competition.

In this context, incentive and consequences are not analyzed if the ability to restrict access is absent, and consequences are not analyzed if the incentive is absent.

Ability to restrict access

2.3. Restricting competitors' access to a specific market as a result of a conglomerate concentration requires at least two conditions:

the presence of market power, including monopoly (dominant) status, by one of the participants in the concentration in one of the affected markets;

the organization of product sales in a way that combines products from different markets. This can be achieved through tying or bundling.

2.4. Tying refers to a sales method where buyers of one product (the tying product) are required to also purchase another product (the tied product) from the same supplier. Tying can occur on a technical or contractual basis. Technical tying arises when the tying product is designed to function exclusively with the tied product and is incompatible with alternatives offered by competitors. Contractual tying occurs when buyers of the tying product are contractually obligated to purchase only the tied product, excluding alternatives offered by competitors.

2.5. Bundling may take the form of either simple or mixed bundling. In simple bundling, products are sold together in fixed proportions. In mixed bundling, products are also available for individual purchase, but the price for individual items is higher than the price for the bundled set.

2.6. The specific characteristics of the products can play a significant role in determining whether any of these methods of combining sales across markets are feasible for the resulting undertaking. For example, simple bundling is highly unlikely if the products are not typically purchased simultaneously or by the same buyers.

2.7. Alongside the dominant position of participants in one of the affected markets, the negative impact of bundling or tying on competition may be significant if at least one of the participants' products is considered particularly important by many buyers and if there are few alternatives for that product, for instance, due to product differentiation or limited capacity of competitors.

2.8. The ability to restrict access through conglomerate concentration diminishes if the participants cannot make their tying or bundling strategies sustainable, such as through technical tying or bundling arrangements, whose alteration would result in significant costs.

2.9. Tying or bundling may deter potential competitors from entering the market. The effectiveness of such a strategy depends, in particular, on whether potential competitors can enter both product markets.

Motivation to restrict access

2.10. The motivation to engage in tying or bundling depends on the profitability of such sales strategies. If a significant number of buyers refrain from purchasing the bundle, this could lead to revenue and profit losses. If the resulting undertaking lowers the price of the bundle to counteract such outcomes, its revenues and profits may also decline. Whether costs outweigh additional profits from tying or bundling depends on the sales volumes and profitability of the affected products. It is unlikely that the resulting entity would be motivated to sacrifice sales in a highly profitable market to increase market shares in another market where turnover is relatively low, and profitability is limited.

2.11. Motivation for bundling may also arise due to network effects or economies of scale in the market for the bundled product.

Potential overall impact of conglomerate concentrations on competition

2.12. Bundling or tying may significantly reduce sales opportunities for competitors capable of selling only one product. If such reductions are substantial, this may decrease the ability or motivation of competitors to compete, which, in turn, could allow the resulting entity to gain or maintain market power in the markets for tied or bundled products.

2.13. A conglomerate concentration is likely to have a significant negative impact on competition only if the access restrictions caused by such a concentration affect a substantial share of the market turnover.

2.14. It is unlikely that competition will weaken as a result of a conglomerate concentration if:

entities that supply only one product and are effective competitors remain in the market, or if there are only a few such competitors, they still have the capacity and motivation to expand their production volumes;

competitors or a new market entrant can provide competing bundles and thereby constrain the behavior of the resulting entity.

2.15. The impact on competition should be assessed taking into account counterbalancing factors, such as the presence of buyer countervailing power, the possibility of a new market entrant sustaining effective competition in the upstream or downstream related market, and the risk of bankruptcy (refer to the explanatory guidelines approved by the Committee's decision No. 49-pp of December 27, 2016).

Coordinating effects

2.16. Coordinating effects resulting from conglomerate concentrations typically do not and cannot lead to a significant restriction of competition. However, they may amplify the negative impact of unilateral effects on competition and should, therefore, be considered in conjunction with such effects when they are present.

2.17. One way in which a conglomerate concentration may influence the possibility of coordination in a particular market is by reducing the number of effective competitors to the point where tacit coordination becomes feasible. Moreover, even if competitors remain in the market, they may find themselves in a more vulnerable position. As a result, such competitors may be motivated to align their competitive behavior and engage in coordinated price increases.

2.18. A conglomerate concentration may expand the scope and significance of simultaneous competition across multiple markets. The existence of concurrent competitive relationships in several markets may enhance the capacity and effectiveness of enforcement mechanisms aimed at ensuring adherence to coordination conditions.