competition commission

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Guidelines

CC5 - MERGERS

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1. Introduction

1.1. The provisions of the Competition Act ("the Act") that apply to mergers involve a number of different elements. The standard under which a merger or anticipated merger will be assessed is whether it has resulted in, or is likely to result in, a substantial lessening of competition ("SLC"). This guideline is focused on this assessment.

1.2. However, the assessment is just one part of a complete merger framework as set out primarily in sections 47, 48, 49, 50, 61 and 62. The main elements of a complete merger framework include:

- identifying whether a merger situation is or will be created,
- identifying the relevant markets affected by the merger situation,
- determining whether the market share threshold for review by the Competition Commission set out in Section 48 of the Act is met,
- determining whether the merger has resulted, or is likely to result, in a substantial lessening of competition,
- determining whether offsetting public benefits specified in Section 50 of the Act are present, and whether and how any such benefits, if present, should be taken into account in determining the remedial action to be taken,
- giving the remedial order including, potentially, desisting from implementing a merger. An interim order may also be given.

1.3. These guidelines should be read in conjunction with:

(a) *CC 2: Market Definition and the Assessment of Market Shares*, which is relevant particularly to the calculation of market shares for the purposes of assessing whether a merger situation exists, as well as to the assessment of the merger and

(b) *CC 6: Remedies and Penalties*, which sets out the Competition Commission's approach to determining remedies for mergers that it finds likely to result in an SLC.

Summary of Substantive Assessment framework

1.4. These guidelines indicate the manner in which the Competition Commission will interpret and give effect to the provisions of the Act when assessing whether a merger situation exists, whether it is reviewable by the Competition Commission, and the substantive assessment of whether a merger situation has resulted, or is likely to result, in a SLC.

1.5. Part 2 describes how the question of whether a merger situation exists and is reviewable by the Competition Commission will be determined. Part 3 describes how it will assess whether a merger situation has resulted, or is likely to result, in a SLC. The same facts may be used to address different analytical elements. The main elements of a substantive assessment generally include definition of the relevant market or markets (addressed in a different guideline), identifying the counter-factual (what would have happened without the merger), assessment of entry constraints, and identification and assessment of potential means by which competition is substantially lessened.

1.6. The SLC test is about effects of the merger, not motives. Mergers with no anti-competitive intent might nonetheless result in an SLC, in which case the Competition Commission would take action.

1.7. The principles in these guidelines should not be regarded as a mechanical framework for analysis. Different considerations may be given greater or less weight depending on the facts of a given case and, in many cases, it may not be necessary to consider all of the above factors.

1.8. These guidelines are not a substitute for the Act, the regulations and rules. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the Competition Commission. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how their commercial activities may be affected by the Act, may wish to seek legal advice.

1.9. For ease of reference, the term "merger situation" is used in these guidelines to refer to both mergers and anticipated mergers.

2. What is a merger?

Introduction

2.1 Section 47 of the Act provides that a merger situation occurs when 2 or more enterprises, of which one at least carries out its activities in Mauritius or through a company incorporated in Mauritius, are brought under common ownership or common control.

2.2 An 'enterprise' is defined in the Act:' "enterprise" means any person, firm, partnership, corporation, company, association or other juridical person, engaged in commercial activities for gain or reward, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.' The concepts of "to be brought under common control" and "to be brought under control" are also defined in the Act.

2.3 An enterprise that buys or proposes to buy a majority stake in another enterprise is the most obvious example of a merger. However, the transfer or pooling of assets may also give rise to a merger.

2.4 The determination of whether a merger exists for the purposes of the Act is based on both qualitative and quantitative criteria focusing on both the concept of control and market share.

2.5 Parties will be able to apply to the Commission for 'guidance' as to whether a transaction or proposed transaction meets the definition of merger or proposed merger. This, however, does not preclude the Commission from initiating an investigation as to whether sections 47 and 48 apply.

Common control

2.6 Section 47(2) defines 'common control' as a criterion for a merger to occur. According to section 47(2), 'common control' occurs where:

a) The enterprises to the merger are enterprises of interconnected bodies

b) One person has, or groups of persons have, control in enterprises which are carried on by 2 or more bodies corporate;

c) 2 distinct enterprises, one of which is a body corporate and the second one a person having control over the first body corporate.

Acquisition of control **[Amended 3rd August 2020]**

2.7 Section 47(3) of the Act provides that a person may bring an enterprise under his control where-

a) he becomes able to control or materially to influence the policy of the enterprise, but without having a controlling interest in it;

b) being already able to control or materially to influence the policy of the enterprise, he acquires a controlling interest in it; or

c) being already able materially to influence the policy of the enterprise, he becomes able to control that policy.

2.8 Based on the above provision, three levels of control can be identified, namely material influence, de facto control (referred as control above) and controlling interest. Material influence is the lowest level of control, followed by de facto control, while controlling interest is the highest level of control. An increase in the level of control will be considered to amount to a new control and may lead to a new merger situation. For instance, if enterprise A had material influence over enterprise B and now increases its shareholding in B such that it now has controlling interest, this may be considered as a merger situation.

2.9 The Act does not define material influence, de facto control and controlling interest, but they are well established in competition law.

Material influence

2.10 Section 47(3)(a) of the Act provides that a person may acquire control where "he becomes able to control or materially to influence the policy of the enterprise, but without having a controlling interest in it". Material influence is the lowest level of control which may be conferred upon a person. This level of control refers to the ability of the acquirer to influence to a material extent the policy of the target which affects the target's behaviour on the market. To determine whether material influence exists, the Competition Commission will consider whether material influence is capable of being exercised, rather than the actual exercise of such influence. It is important to note that for the purposes of assessing material influence, the test is whether the acquirer has the ability to influence and not whether it has the ability to determine the policy of the target.

2.11 To this end, the Competition Commission will conduct a case by case analysis focusing on the overall relationship between the acquirer and the target along with the acquirer's ability to exercise the influence to determine whether material influence exists.

2.12 The acquirer's ability to influence the target's policy can arise through the exercise of votes at shareholders' meetings, together with any additional supporting factors that might suggest that the acquirer exercises an influence disproportionate to its shareholding.

2.13 Generally, the Competition Commission will consider shareholdings which confer voting rights of 25% and above, which normally confer ability to veto special resolutions, as likely to confer material influence, unless evidence demonstrates otherwise. Shareholdings of below 25% together with other rights or circumstances may also confer material influence. This may happen for instance where, that shareholding confers upon the shareholder veto rights on certain strategic decisions or other rights as explained below.

2.14 A minority shareholding may confer material influence with regards to the activities of an enterprise, where the minority shareholding confers upon the person, rights which allow him to either take or veto decisions which relate to the commercial policy of the enterprise. This control is also known as negative control. Such rights include for instance, the right to veto or block special resolutions, the right to appoint directors on the Board and or the right to veto decisions which relate to budget, pricing, business plans, the introduction of a new product on the market, commencing a new line of business, marketing strategy, discontinuing any line of activity or other decisions which relate to the commercial policy of the enterprise on the market.

2.15 The right to appoint directors on the board of the target may in itself confer material influence. Another relevant factor which may confer material influence relates to the status and expertise of the acquirer in the field of commercial activities of the target and the corresponding level of influence he may exercise on the target.

2.16 It is recognized that material influence does not confer upon the acquirer the ability to control the policy of the target but to materially influence such policy. This is factored during assessment of the effect of such transactions on competition.

De facto control

2.17 Section 47(3)(a) provides that a person can obtain control where "he becomes able to control or materially to influence the policy of the enterprise, but without having a controlling interest in it". Section 47(3)(c) further provides that a person can obtain control where "being already able materially to influence the policy of the enterprise, he becomes able to control that policy".

2.18 "De facto" control is a control level which lies between material influence and controlling interest. It occurs where a person who despite holding a level of shareholding which confers 50% or lower voting rights, can control the target. This level of control means that the acquirer despite not having controlling interest becomes the controller of the company.

2.19 Similar to material influence, the Act poses no specific shareholding threshold to determine when a person will obtain de facto control. The Competition Commission will therefore conduct the assessment as to whether the person is able to control the policy of the target on a case-by-case basis considering the particular circumstances of the case.

2.20 In assessing whether a person has de facto control over an enterprise, the Competition Commission may also consider whether there exist any additional agreements which allow the person to control the enterprise's policies that affect its key strategic commercial behaviour. This may for instance include arrangements which confer the shareholder management of the target, or certain shareholder agreements conferring the person majority control over the target.

Controlling interest

2.21 Section 47(3)(b) establishes the highest level of control which may be gained on an enterprise. It provides that a person may bring an enterprise under his control where "being already able to control or materially to influence the policy of the enterprise, he acquires a controlling interest in it". This control is referred to as controlling interest or legal control. The acquisition of a shareholding exceeding 50% of voting rights generally confers controlling interest.

2.22 Having more than 50% shareholding, makes the person the majority shareholder and as such, typically, only one shareholder can have controlling interest in an enterprise.

Changes in control

2.23 Following provisions of Section 47(3) of the Act, any change in the level of control held by a person into a new one may create a new merger situation.

2.24 For instance, a change from material influence to de facto control may be considered a new acquisition of control and may lead to a new merger situation. Similarly, a change from de facto control or material influence to controlling interest may be considered as a new acquisition of control. The Competition Commission will for that purpose conduct a case to case assessment to determine if there has been a change in the quality of control and subject to the three control thresholds.

2.25 The Act also provides for consideration of control by a group of persons. Therefore, for the purposes of assessing control over an enterprise, the Competition Commission can give consideration to control held by a group of persons.

[Paragraphs 2.7 to 2.25 Amended on 3rd August 2020]

Mergers subject to review by the Commission

2.26 Only those mergers shall be subject to review by the Competition Commission where:

(a) All the parties together, after a merger, shall acquire or supply more than 30% or more of goods and services (which they were providing before) on a relevant market; OR

(b) One of the parties to the merger alone supplies or acquires prior to the merger 30% or more of goods or services on a relevant market; AND

(c) The Commission has reasonable grounds to believe that the merger situation has resulted in or is likely to result in a substantial lessening of competition within any market for goods and services.

2.27 The calculation of market shares for the purpose of determining whether these thresholds are met is described in *CC 2: Market Definition and the Calculation of Market Shares*.

3. The Substantial Lessening of Competition test

3.1 This Part explains the approach the Competition Commission will take in determining whether a merger has resulted in, or is likely to result in, a substantial lessening of competition (SLC).

Substantial Lessening of Competition

3.2 Competition is a process of rivalry between enterprises seeking to win a customer's business. This process of rivalry, where it is effective, impels enterprises to deliver benefits to customers in terms of price, quality and choice. When levels of rivalry are reduced (for example, because of coordinated behaviour between enterprises), the effectiveness of this process may diminish, to the likely detriment of customers.

3.3 Not all mergers give rise to competition issues. The Competition Commission believes that many mergers are either pro-competitive (because they positively enhance the level of rivalry) or are competitively neutral. Some mergers may lessen competition but not substantially, because sufficient post-merger competitive constraints exist to ensure that competition (or the process of rivalry) continues to discipline the commercial behaviour of the merged entity.

3.4 Only mergers that substantially, or are likely to substantially, lessen competition will be subject to remedy under the Act. The focus of the competition Commission is therefore solely on the effects of a merger on competition. Other effects, such as on the efficiency of the emerged enterprise, technological progress, employment or social effects are not considered at this stage. A simple change of ownership, which does not bring together related products under common control, will normally be considered to have no competitive effects and would therefore be allowed. There is no provision in the Act for the Commission to block a merger with no competitive effects, and it cannot for example prevent a takeover by a foreign investor merely because of concerns about the acquiring individual or company's identity. The only criterion is whether there will be a loss of rivalry: an SLC.

Types of mergers

3.5 There are three types of mergers, each of which may affect competition in a different way.

Horizontal Mergers:

3.6 These are mergers between enterprises that operate in the same relevant market(s). Horizontal mergers can substantially lessen competition in two, not mutually exclusive, ways. First, it can make it profitable for the merged entity to unilaterally raise price or reduce output post-merger. Second, it can make it more likely, or easier, for the enterprises remaining in the market to coordinate, either tacitly or explicitly.

Non-Horizontal Mergers: Vertical mergers

3.7 These are mergers between enterprises which operate at different levels of the production or supply chain of an industry. Although vertical mergers are often pro-competitive, they may in some circumstances reduce the competitive constraints faced by the merged entity by foreclosing a substantial part of the market to competitors or by increasing the likelihood of post-merger collusion. This risk is, however, unlikely to arise except in the presence of existing market power at one level in the production or supply chain at least, or in markets where there is already significant vertical integration or restraints.

Non-horizontal mergers: Conglomerate mergers

3.8 These are mergers between undertakings in markets that are not different levels of the same production or supply chain. Conglomerate merger will rarely lessen competition substantially, but might, in some cases, reduce competition, for example through the exercise of portfolio power.

Competitive effects of mergers - overview

3.9 In establishing whether an SLC has occurred, or is likely to do so, the Competition Commission will carry out a structured analysis and will report on this analysis when giving reasons to the merging parties and in public for its decision. The Commission will explain how and why it expects the merger to give rise to an SLC, if that is its decision, by reference to the concepts in this section.

The assessment of competitive effects goes through four stages (not necessarily in sequence):

(a) Market definition

(b) Counter-factual (what would have happened without the merger)

(c) Assessment of entry constraints

(d) Theory of harm and effects.

3.10 In assessing the competitive effects of a merger, the Commission will consider the foreseeable future. For most industries, this might involve a period of two to five years. If any anticompetitive effects are expected to last less than two years, the Commission will normally allow the merger to proceed, although if the effects are significant it might reach an SLC finding and impose temporary remedies. In some cases, such as industries involving long lead times and long-term contracts, the foreseeable future might be longer than five years.

3.11 Merger analysis is inherently forward-looking (even for completed mergers) and necessarily involves predictions to be made about the future. The Competition Commission will form an expectation using all the available relevant evidence it can reasonably obtain. Parties to the Commission's investigation are welcome to submit evidence, but should be prepared to demonstrate the truth of any assertions they make about market conditions, in the form of evidence of actual behaviour in the market. Assertions that, for example, the market is highly competitive will have little evidential weight unless supported by documented examples.

Market definition

3.12 Market definition is an activity common to all the Commission's investigations, not just mergers. These Guidelines will simply note some specific applications of market definition to mergers. These guidelines should be read in conjunction with the Guidelines on market definition and the calculation of market shares.

3.13 There may be multiple product and geographic markets affected by any given merger. For example, a merger between two competing enterprises making a range of different goods will often involve separate markets for each of those goods. It may be the case that a merger results in an SLC in some markets but not others. In these cases, the Commission will identify which markets are affected. It might, for example, be appropriate to seek a remedy which deals only with those affected markets, such as allowing a merger of some business units but not others.

3.14 Where conditions of competition are obviously very similar in a range of different relevant markets, the Commission will not always discuss each market separately, or analyse them in detail. More generally, where distinctions between possible market definitions do not affect the competitive analysis, the Commission will not analyse which of a range of market definitions is more correct.

Counterfactual

3.15 The concept of a substantial lessening of competition implies a reduction, a change compared to something else. This something else is the state of competition if the merger does not take place (or had the merger not taken place, for a completed merger). An SLC occurs when it is expected there will be substantially less competition following the merger than would have occurred without the merger.

3.16 If nothing else is changing, the 'counterfactual' can be considered to be the state of competition before the merger. Thus, an SLC would be assessed by considering how competitive the market was/is before the merger, and what is likely to happen after the merger. In practice, this will normally be the Commission's approach.

3.17 However, in some cases other things will be changing so that this comparison does not accurately isolate the effects of a merger. For example, suppose two enterprises (A and B) are merging to one, when it is known that a third enterprise C is about to enter the market, for reasons unrelated to the merger. There were two enterprises in the market before the merger (A & B) and there will be two after (the combined AB and C). This might be held to imply that there is no loss of competition. However, the relevant comparison is the market after the merger (two enterprises: AB and C) compared to a counterfactual in which the merger did not take place (three enterprises: A, B and C). This may well result in an SLC, if the Commission takes the view that there would be more competition with three enterprises in the market.

3.18 In assessing the counterfactual, the Commission will consider the most likely course of events had the merger not taken place. However, if the most likely alternative to the merger would be another merger that the Commission would probably seek to prevent, the Commission would discard this possibility as the counterfactual and consider the next most likely outcome.

A special case of the counterfactual: failing firms

3.19 The counterfactual will be particularly important if one of the enterprises is held to be 'failing'. If an enterprise is going out of business anyway, then subject to certain conditions as explained in paragraph 3.20, there is the possibility that there will be no loss of competition as a result of it being taken over, even by a close competitor. As with any merger, the Commission will clear such a merger, if it believes that there is no loss of competition compared to what would otherwise have happened. **[Amended 3rd August 2020]**

3.20 In order to conclude that there is no effect on competition because an enterprise is failing, the Commission will need to satisfy itself of the following things:

(a) The competitive constraint represented by the 'failing firm' would certainly be eliminated even without the merger, within the foreseeable future. This normally requires that the enterprise would be unable to carry on profitably, under any ownership. 'Profitability' in this criterion relates to carrying on as opposed to abandoning the market: whether revenues cover short-run avoidable costs. No return on assets is implied. An enterprise which cannot meet the interest payments on its debt may not satisfy this criterion, even if it is going bankrupt (because assets could be bought from the bankrupt enterprise and continue to be used to supply the market, as long as revenues cover the avoidable costs of doing so).

(b) No more competitive outcome is possible than sale to the acquiring enterprise. This requires, firstly, that purchase by no other potential buyer would provide any more competitive an outcome than would exist after the merger. For example, the sale of an enterprise to another in the same market might be expected to be less competitive than a sale to a company in a completely different business. A sale to the leading enterprise in the market might be less competitive than sale to a smaller player. Secondly, the Commission will consider whether competition would be better preserved by allowing the assets to leave the market or be scrapped than to allow them to be taken over by a competitor, if that competitor's market power would thereby be enhanced.

Assessment of entry

3.21 Effective competitive markets are dynamic: companies rise and fall, competitors come and go. Higher prices make it more attractive to enter the market. Even if a merger would result in one or more suppliers having the ability to raise prices, a merger might still be allowed if the Commission believes that entry is sufficiently timely, likely and effective that no long-term damage to competition will result.

3.22 In considering whether new entry is likely to prevent or reverse an SLC in this way, the Commission will normally consider a timeframe of two years. If it believes that entry sufficient to correct any anticompetitive effects is likely within this time, then any SLC will be temporary in its effects. If it expects those temporary effects to be minor, the Competition Commission will normally clear the merger. If it expects those temporary effects to be significant, it will reach an SLC finding but may consider the temporary nature of the problem in determining remedies.

3.23 To prevent or reverse an SLC, entry needs to be sufficiently effective to restore whatever rivalry was lost as a result of the merger. The loss of a large, effective competitor might not be fully compensated by the appearance of a small new entrant. It is not enough for a new enterprise to appear in the market; it must be expected to grow to represent at least as significant a competitor as the enterprise that was eliminated by the merger. Furthermore, the merger must not have resulted in irreparable harm to competition, for example by locking customers into long-term deals.

3.24 Economists studying entry have found it to be a highly unpredictable, rather random process. It is hard to predict whether new entrants will emerge and still harder to predict whether they will successfully reach a sustainable scale. The Commission will have to satisfy itself that entry is likely before clearing a merger on these grounds. It will not be sufficient simply to demonstrate that there are no legal or other impediments to entering the market: the Commission must expect that entry will occur in the event of any price rises as a result of the merger.

3.25 In assessing the likelihood of sufficient and timely entry, the Commission will consider, among other things:

(a) The presence of any legal barriers to entry, such as licensing requirements;

(b) The minimum efficient scale for an entrant to present a sustainable competitive threat to the merged company, and the need for up-front investments (such as, for example, establishing a distribution network and advertising);

(c) Barriers to entry arising from customer loyalty to existing brands or from switching costs;

(d) Barriers to entry or expansion by incumbents arising from constraints on the availability of key assets (such as land ready for development in the right location) or from the incentives for a vertically integrated enterprise to withhold inputs from an unintegrated rival;

(e) Whether entry or product repositioning by an incumbent is likely to provide a competitive response in reaction to the merger, notably in markets where products are differentiated;

(f) The history of entry in this industry, in Mauritius or in other jurisdictions if parallels can reasonably be drawn;

(g) The potential for large buyers to sponsors new entry, perhaps by providing a guaranteed market for the start-up period; and

(h) Stated intentions of potential entrants if they can be ascertained

Theory of harm and effects

3.26 The core analysis in most merger cases will be of the effects of the merger in the relevant market or markets. In some cases, this analysis might be unnecessary. If the counterfactual analysis clearly demonstrates that, no matter what the situation post-merger, it would be the same had the merger not happened, then the Commission need not expend significant time and effort on assessing the effects, as no SLC can occur in any event. Similarly, if the entry analysis demonstrates that any anti-competitive effect is likely to quickly be removed by new entry, then detailed analysis of those competitive effects might not be necessary. In most cases, however, the Commission's decision will be strongly influenced by its assessment of the merger's effects on competition post-merger.

3.27 These falls into three main categories, two of which apply principally to horizontal mergers, one to vertical or conglomerate mergers:

(a) Unilateral effects (horizontal mergers, mainly): the merger creates a supplier with sufficient monopoly power that it faces weaker competitive constraints than before the merger;

(b) Co-ordinated effects (horizontal mergers, mainly, but also vertical mergers): the merger results in a market in which it is more likely that suppliers co-operate, explicitly or implicitly, to raise prices;

(c) Foreclosure (vertical and conglomerate mergers, mainly): the merger creates a supplier whose market position is such that it has a stronger ability or incentive to restrict, prevent or distort competition, for example by giving it the ability to control inputs to its competitors' production.

Unilateral effects

3.28 Unilateral effects are the simplest and most obvious form of anticompetitive effect arising from a horizontal merger. Two enterprises that were previously competing merge and there is therefore a reduced competitive constraint on each than there was before. The Commission will investigate to determine the likely scale and duration of this reduction in the competitive constraint. If it finds that the merged enterprise is likely to face reduced competitive constraints as a result of the merger and could therefore increase profits by exploitative behaviour such as price rises, the Commission will assume that the merged enterprise will do so.

3.29 Products within a relevant market may be homogeneous, or almost identical, or they may be heterogeneous—that is, different—although still sufficiently good substitutes to be considered to be in the same relevant market. If products are heterogeneous, then there is more likely to be a SLC if the merging parties' products are particularly close substitutes. If products are homogeneous, then there is likely to be a SLC if no rival could increase sales sufficiently to replace the output reduction by the merged entity (for example because of capacity constraints). In both cases, the main competitive constraint pre-merger was the other merging party. When this is removed by the merger, it is profitable for the merged entity to raise prices unilaterally.

3.30 In making its assessment, the Commission may take into account, among other things, the following.

Market shares, the number of suppliers and other measures of concentration.

3.31 Other things being equal, unilateral market power is more likely the fewer suppliers there are in a market. Mergers that result in very high market shares are more likely to lead to market power, and so are large increases in market share. The Commission will therefore consider the number of enterprises in the market(s), and the market shares of companies involved in the merger. It might also consider measures that summarise the distribution of market shares, such as the share of the largest 3 or 4 enterprises combined or the Herfindahl-Hirschman Index (HHI)[1]. In calculating all measures based on market share, the Commission will assume that the post-merger market share of the merged entity is equal to the sum of the market shares of the two separate entities before the merger, unless there is specific evidence that it will differ from this.

3.32 Assessment of market shares and related indices of concentration is not based in fixed thresholds. The importance of these measures will vary from industry to industry, depending on product and market characteristics. In an industry in which customers can very easily switch to essentially identical products from alternative suppliers, even a small number of competitors might be enough to prevent the emergence of unilateral market power, and a competitor with a small market share might be just as effective a competitive constraint as one with a large share. Mergers in such industries to create large market shares might be allowed.

3.33 At the other extreme, when products are quite differentiated (e.g. different brands of soft drink), the merger of two particularly similar suppliers could cause competition problems even if there remain many suppliers of slightly less similar products. In these circumstances, mergers combining relatively small market shares might result in an SLC.

3.34 The Commission does not provide for any ‘safe harbours’ as these are already specified in the Act. Although there are no fixed rules, the Commission will normally regard mergers that create or increase market shares over 50% as particularly likely to result in unilateral market power. This does not imply that mergers below this limit will be allowed.

[1] The cumulative share of the three enterprises with the largest market shares is called C3, or CR3. C4 is defined correspondingly. The Herfindahl-Hirschman Index is the sum of the squares of the market shares of all suppliers to a market, where their shares are expressed as percentages. If, for example, a market were supplied by enterprises with market shares of, respectively, 40, 30, 15, 10 and 5 percent, then C3 equals 85, C4 equals 95, and HHI equals 2850, or 1600+900+225+100+25.

Customer behaviour

3.35 If customers find it hard, or are reluctant, to switch suppliers even if an alternative supplier offers a better deal, then a supplier with a large market share will find it easier to put up prices or otherwise damage customers' interests. The merger of two brands may be particularly problematic in a market in which brand loyalty is strong. On the other hand, if customers actively search for bargains and are likely to abandon their existing supplier if he raises prices, then unilateral market power is less likely to exist post-merger.

Buyer power

3.36 In some cases, customers may be able to exert pressure on suppliers to lower prices by threatening to switch to rivals, simply not to buy or even sponsor a new entrant into the market. Very large customers who account for a large share of a supplier's business might have this sort of power, but in some cases a smaller customer might have similar abilities, particularly if the economics of supply are such that the supplier needs to fill his capacity. This ability is termed 'countervailing buyer power'. A customer with buyer power might be protected from any market power resulting from the merger (although the Commission would want to satisfy itself that the balance of negotiating power has not shifted significantly as a result of the merger). In some cases, in which it is impossible to charge different customers different prices (perhaps because resale is easy), one or more customers with buyer power can 'protect' the entire market. In others, the Commission might find that some customers will be protected but others would be adversely affected by a merger. In such circumstances, it would normally reach an SLC finding but take account of the limited effect in determining remedies.

Reaction of rivals

3.37 The Commission will consider whether the remaining rivals to the merged entity can and will provide such a competitive constraint on the merged enterprise that there is no SLC. All of the factors above will affect this assessment, but the circumstances and history of the behaviour of rivals will also be considered. In industries in which capacity limits are fixed, or variable costs increase rapidly if output increases fast, rivals may be less able to constrain the behaviour of the merged entity, because even if they are willing to undercut its prices, they would not thereby be able to increase sales. In assessing the likelihood of competitive responses by rivals, the Commission will consider their incentives to do so, and the history of rivalry in the industry. To allow a merger on the grounds that a smaller rival would rapidly increase its output were the merged entity to increase prices, the Commission would have to be satisfied that this rival is likely to do so.

Evidence of links between market structure and market power

3.38 In addition to assessing the market conditions described above, the Commission will, where possible, also seek to obtain evidence directly on the relationship between market structure and prices (or other such variables). For example, if a new supplier recently entered the market and prices fell significantly, that might be an indication that, conversely, a merger resulting in a reduction of the number of independent suppliers will cause prices to increase. Of course, there could be other explanations for such historical patterns and the Commission will seek to understand the details.

Co-ordinated effects

3.39 Mergers might also result in an SLC by reducing the intensity of rivalry between the remaining suppliers in the market. This is termed coordinated effects. This describes a situation in which suppliers choose to compete less fiercely against one another, for example by not reducing prices even though they could profitably increase sales by doing so, because they are aware that their rivals might respond to the price reduction. Collusive agreements prohibited under Sections 41-43 of the Act provide one mechanism to co-ordinate. However, co-ordination can occur without explicit agreement, and can result in high prices (or other damage to consumers' interests) even without an infringement of Sections 41-43, simply through mutual awareness of shared interests between enterprises in the industry (this form of co-ordination is sometimes termed 'tacit collusion').

3.40 Coordination entails actions by a group of enterprises that are profitable for each of them only as a result of accommodating actions by the others. For co-ordination to be sustained, all three of the following conditions must be present in the market:

(a) It must be possible for enterprises engaged in co-ordination to reach an implicit agreement about the price level, and to monitor compliance, becoming aware if any among them undercut it;

(b) It must be in each of the participating enterprises' interests to maintain the coordination, for example through credible threats to launch a price war if one of the enterprises undercuts the collusive price; and

(c) Constraints from rivals outside the coordinating group (e.g. fringe players or new entrants) must be weak.

3.41 Most mergers will have no effect on the likelihood of co-ordination, while other mergers might make co-ordination *less* likely. However, horizontal mergers, by reducing the number of suppliers in the market, might make it easier to monitor compliance, or make it more profitable for the remaining enterprises to co-ordinate[2]. Vertical mergers might result in more information being available, again making it easier to co-ordinate.

3.42 However, many other factors must be taken into account in the assessment of whether coordinated effects are likely to occur (and made more likely as a result of the merger) including:

(a) The degree to which enterprises can observe one another's behaviour in the market. If they can observe one another's prices, or infer them from sales data, it will be easier to coordinate. Industry associations or industry-wide agreements might assist such transparency, as will common membership of Boards of Directors.

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[2] Mergers reducing the number of suppliers to two are particularly likely to lead to co-ordinated effects because it is very easy for an enterprise facing just one rival to determine what that rival is doing: every sale lost to a competitor must have gone to that rival.

(b) Whether products are differentiated or not – co-ordination is often held to be more likely if products are relatively similar (such as commodities).

(c) The market structure – a small number of enterprises of similar size is often believed to be more likely to lead to co-ordination than a very uneven distribution of small and large enterprises (although industries with one very large supplier may exhibit 'price leadership' by that supplier).

(d) Stability of the market: markets in which demand is fairly stable and the introduction of new technology is infrequent may be more susceptible to co-ordination than unstable, dynamic markets.

(e) Multi-market contact: enterprises which are rivals in several markets may face particularly strong incentives not to compete too vigorously against one another.

3.43 In addition to this evidence on whether the market conditions exist for co-ordination, the Commission will also consider historical evidence on whether co-ordination is already occurring or has occurred in the past, including:

(a) Evidence that prices charged by different suppliers move in similar ways, in a manner not explicable through normal competition;

(b) Stability of market shares or customers over time;

(c) Past findings of collusive behaviour under the Competition Act; or

(d) Customer complaints or other evidence that co-ordination is occurring.

3.44 Economists have not established a clear set of rules for what market conditions are likely to lead to co-ordination and what conditions are not. Evidence from studies of formal cartels suggests that non-economic factors, which may be very difficult to analyse or predict, will influence the likelihood of collusion through explicit agreements. Coordination without explicit agreements, through a 'shared understanding' may be still harder to predict. Consequently, in forming its expectation about whether coordinated effects are likely as a result of a merger, the Commission must exercise its judgment.

3.45 If it finds that co-ordination is already present in the market, the Commission will go on to consider whether the merger is likely to strengthen that co-ordination. If it does not find evidence of pre-existing co-ordination, the Commission will consider whether the market is likely to 'flip' into a coordinated state as a result of the merger.

3.46 In making its assessment of whether a merger is likely to create the conditions for co-ordination to occur, the Commission will consider the effects of the merger on the three necessary conditions for co-ordination to occur, set out at paragraph 3.40 above. For example, parties may have significantly better information about the market following the merger, or may have stronger incentives to coordinate because they have larger market shares. In some cases, the merger might eliminate a particularly vigorous competitor (sometimes termed a 'maverick') which was preventing co-ordination occurring. Evidence from other markets and other jurisdictions may be relevant to this assessment, but it will inevitably be a matter for the Commission's discretion as there will be little direct evidence on this issue.

Foreclosure: vertical and conglomerate mergers

3.47 Vertical mergers are defined as those which bring together production at different points in the supply chain. If a supermarket buys a farm, or a textile manufacturer merges with a clothes designer, those are both vertical mergers. A conglomerate merger occurs when two producers of unrelated goods come together. Such mergers do not directly result in the lessening of a competitive constraint, as the products in question were not competing with one another prior to the merger. In general, vertical and conglomerate mergers are mostly either beneficial for competition and efficiency, or at worst neutral.

3.48 However, in some cases vertical mergers and conglomerate mergers between makers of complementary goods may give rise to concerns about foreclosure. Foreclosure is discussed in detail in the Competition Commission Guidelines on abuse of monopoly. Briefly, it is the abuse of a strong market position in one market to restrict, distort or prevent competition in another market, eliminating or weakening rivals and thereby damaging consumers' interests in the long run.

3.49 A vertical or conglomerate merger might create a market structure in which such foreclosure is likely, where it was not before. For example, by controlling downstream re-sellers, an upstream enterprise might be able to deny access to the market for its rivals and eliminate competition. In a conglomerate merger, the merged enterprise might 'bundle' together two products so that customers must (or face a considerable advantage if they) buy both at the same time. If one of these products is a monopoly and the other faces competition and has scale economies, this can result in 'leverage' of monopoly power to eliminate rivals in another market. If it expects a merger to create a profitable opportunity for anti-competitive foreclosure, the Commission will reach an SLC finding.

3.50 As is set out in the Guidelines on abuse of monopoly, anti-competitive foreclosure does not occur every time a business refuses to deal with another or reaches an exclusive arrangement with a trading partner. Nor is damage to competitors sufficient to demonstrate that anticompetitive foreclosure has occurred. Such behaviour can be part of the normal process of competition. To reach a finding of anticompetitive foreclosure, the damage to the process of competition must be sufficiently great, and sufficiently irreversible, that consumers or the economy as a whole suffer as a result of a less competitive market structure in the future.

3.51 Similarly, with vertical mergers, it will not be sufficient for a business to complain that it will no longer be able to access a supplier or a customer because the merger will lead to exclusive dealing between the vertically-integrated businesses. To reach an SLC finding on the grounds of foreclosure, the Commission must expect that competition itself will be damaged, to the detriment of consumers or the economy, not simply that rival businesses will be harmed.

3.52 Note that vertical and conglomerate mergers can often lead to considerable efficiencies, of production, marketing or pricing. If the Commission reaches an SLC finding, it will consider submissions relating to these efficiencies when considering 'off-setting benefits' at the remedies stage.

Market power on the buyer side

3.53 The Commission's main focus in merger control is on mergers of suppliers giving rise to a lessening of competition on the supply side, to damage consumers or the economy of Mauritius. In some circumstances, a merger can bring together purchasers to create market power on the buyer side (buyer power or, in the extreme, monopsony). For example, two merged supermarket chains might have considerable power to extract better terms from their suppliers.

3.54 In general, buyer power of this sort is pro-competitive. By forcing their suppliers to compete more effectively on price, large buyers can safeguard consumer interests and contribute to the development of the economy more generally. The Commission will not intervene just because suppliers' interests may be harmed by a merger. The Commission will reach an SLC finding on buyer power grounds only if it believed that buyer power would be exercised in a manner likely to lead to damage to competition and market structure in the long run, for example by eliminating competition in Mauritius at an upstream level.

Creation of a more efficient competitor

3.55 A merger may be against the interests of the competitors to the merging parties. In competitive markets, enterprises seek efficiencies to allow them to compete more effectively against their rivals – including seeking efficiencies through merger. The interests of any rivals harmed as a result are not relevant to the Commission's assessment.

3.56 It could be argued that the creation of a highly efficient supplier through merger runs the risk of creating less competition, by eliminating rivals. The Commission will treat any such claims with scepticism. It is theoretically possible for a merger to result in such an efficient operator that it drives out competitors, ultimately creating market power and allowing it to raise prices. However, the Commission is of the view that the risk of blocking the most efficient mergers exceeds the risk of occasionally allowing a merger that might have such effects. In common with authorities in other jurisdictions, it will not give much credence to claims of an 'efficiency offence'.

Competition Commission

10th Floor, Hennessy Court
Pope Hennessy Street, Port Louis
Republic of Mauritius
Tel: (230) 211 2005
Fax: (230) 211 3107
Inquiries: info@competitioncommission.mu
www.competitioncommission.mu