REPUBLIC OF ALBANIA
-THE COMPETITION AUTHORITY-
The Competition Commission

No._____ Prot. **Dated 07.12.2009**

DECISION

No. 131, dated 07.12.2009

"On the evaluation of horizontal agreements"

The Competition Commission, at its meeting held on 07/12/ 2009, with the participation of:

Mrs.	Lindita	MILO (LATI)	Chairwoman
Mrs.	Servete	GRUDA	Member
Mr.	Koço	BROKA	Member
Mrs.	Rezana	KONOMI	Member

Addressed the following issue:
Subject:
The approval of the Guideline "On the evaluation of horizontal agreements", on the basis of Law No. 9121, dated 28.07.2003, titled "On the protection of competition", as amended;
Legal basis:
Law No. 9121, dated 28.07.2003, titled "On the protection of competition", as amended, Article 24, letters "d" and "dh".

The Competition Commission, upon reviewing the draft-Guideline "On the evaluation of horizontal agreements",

DECIDED:

1. To adopt the Guideline "On the evaluation of horizontal agreements", which is meant for internal use, and enclosed to this decision.

This decision enters into effect immediately.

THE COMPETITION COMMISSION

Servete Gruda	**Koço Broka**	**Rezana Konomi**
(__________)	(__________)	(__________)
Member	**Member**	**Member**

Lindita Milo (Lati)
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CHAIRWOMAN

GUIDELINE ON
THE EVALUATION OF HORIZONTAL AGREEMENTS

I. Introduction

1. The Competition Authority evaluates all those concentrations that are in compliance with the object of (hereinafter refererred as the Law) and the Regulation "On the implementation of procedures of concentration of undertakings". In this context, the Authority evaluates whether a concentration inhibits or not effective competition, in particular if that comes as a consequence of the creation or strengthening of a dominant position in the internal market, or a significant part of it.
2. The purpose of this Guideline is to explain how the Competition Authority evaluates a concentration in the cases when the participating undertakings are effective or potential competitors in the same relevant market. The Guideline is based on the analytical framework for the evaluation of horizontal agreements, provided by the European Commission.

II. General considerations

3. In assessing the competitive effects of a concentration in the relevant market, the Authority compares the conditions that would result from the authorization of a concentration, with conditions that would exist in that concentration would not be realized. In certain cases, the Competition Authority may consider future changes in the market, which may be predictable. In particular, the Competition Authority may consider the possibility of market entry and exit of enterprises, if the concentration will not be realized.

4. Analysis of reported cases of concentrations starts with:
   a) determining the relevant product and geographic market;
   b) assessing the impact on market competition, caused by a concentration.

The main purpose of the market definition is to identify in a systematic way the immediate competition restrictions which will face the concentrated unit.

5. To evaluate the effects on competition that causes a concentration in relevant markets, the Authority examines possible effects of anti competitive and countervailing factors such as the countervailing power of buyers, the extent of barriers to entry and possible efficiency presented by the parties. Analysis of competition in specific cases are based on general assessment of the anticipated impact of a concentration, in the context of relevant elements and conditions. In special cases the Authority assesses whether are met the conditions to protect a company from bankruptcy . But not all of the above elements are suitable for any occasion of a horizontal concentration and is not necessary to analyze in detail all elements.

6. In this context, the Competition Authority determines, in compliance with Article 13 of the Lw, if a concentration has a signicifant effect on effective competition, and if

that particularly results from a strengthening or creation of sominant position, intervenes by prohibiting that.

III. MARKET SHARE AND LEVELS OF CONCENTRATION

7. The market share and levels of concentration are the first and most used indicators of market structure and the importance of competition for the participating parties, to the concentration, as well as for their competitors.

8. Normally, the Competition Authority uses current market shares data in making the analysis. However, these market shares can be adapted to reflect some reasonable changes in the future, such as in the form of entries e.g. outflows or expanding market. The market share after concentration are calculated by assuming that the combined market share of the parties involved after concentration, is the sum of their parts before market concentration. The historical data may serve to show whether parts of the market have been unstable, e.g when the market is characterized by strong bidders, or if large companies have won or lost market share.

9. The overall concentration level in a market can provide useful information about the situation of competition. In order to measure levels of concentration, the Authority applies Herfindahl-Hirschman Index (HHI). HHI is calculated as the sum of squares of individual market shares of all companies in the market. HHI gives proportionately more weight to market parts that occupy large enterprises. Although it is good that all companies are included in the calculation, lack of information about many small enterprises is not so important, because such companies do not significantly affect the HHI index. Absolute level of HHI index gives us an initial indication of the pressure of competition in the market after the concentration. Change of the HHI (known as "delta") is a necessary data to assess the direct changes caused by market concentration.

Levels of market share

10. Large parts of the market, 50% and more, in itself constitute evidence of the existence of a dominant position in the market. However even the smaller competitors operate by significantly limiting influence, if they have the ability e.g. to increase their supplies. A concentration that includes a company, which market share will remain under 50%, after concentration may create problems for competition in terms of factors such as empowerment, the number of competitors, the presence of capacity constraints or what extent products of parties involved in concentration are close substitutes.

Levels of (HHI)[1] index

[1] The definition of Herfindal-Hirschmann Index (HHI) is found on page 20 of the Vocabulatory of Terms of Competition.

11. When HHI Index is below 1000, the concentration does not jeopardize competition in the market and in that case, the Authority does not make any detailed analyses.

12. The Authority also can not identify problems related to competition at the horizontal level, in those concentrations where the value of HHI index after the concentration is between 1000 and 2000 and one delta below 250, or with a concentration where the value of HHI index after the concentration is between is over 2000 and a delta under 150. In these cases, a detailed analysis can be made by the Authority when there one or more of the following factor apply:

a. A concentration includes a potential entry, or a last entry with a small market share;

b. One or more parties participating in concentration are important inventors that do not reflect in the market share;

c. There are between parties involved in concentration significant overlapping of market shares owned by shareholders;

d. One of the companies participating in the concentration is a "maverick"[2] company that has a big opportunity for disruption of coordinated behaviour.

e. Indicators of coordination of past or current time are detectable.

III. Potential anti-competition efefcts of horizontal agreements

13. There are two main ways in which horizontal concentrations can significantly impede effective competition, in particular by creating or strengthening a dominant position:

by eliminating important competitive constraints on one or more undertakings, which consequently have increased market power, without using the coordinated behavior (these are uncoordinated effects);

b. By changing the nature of competition in such a way that companies that previously had not coordinated their behavior, now have more opportunities to coordinate and raise prices or harm effective competition. A concentration makes coordination easier, more stable or more effective for companies that coordinate their behavior before concentration (these are coordinated effects);

Uncoorditaed effects

[2] The greater the number of enterprises in the market, the greater the probability that one of them is a so-called "maverick", which is characterized by the tendency to pursue, independently, aggressive practice in pricing strategy. See http://en.wikipedia.org/wiki/Cartel#Number_of_firms_in_industry)

14. A concentration may significantly restrict effective competition in the market by removing important competitive constraints on one or more vendors, who consequently have increased market power. The most direct impact produced by a concentration would be a loss of effective competition between enterprises participating in concentration. E.g. if before concentration, one of the participating companies had increased their prices, it would lose in sales (sales volume) to other companies participating in the concentration. In this case, the concentration removes this particular restriction. Even companies that are not participating in the concentration, but operating in the same market, can benefit by reducing the competitive pressure resulting from the concentration, as long as the price increase by the companies of participating in the concentration can shift a part of the demand to rival companies, and as a result, the non-participating companies see as very advantageous to increase their prices. Reduction of these restrictions of competition can lead to a significant rise in price in the relevant market.

15. In general, the concentration that causes effects such coordination may significantly restrict effective competition by creating or strengthening a dominant position of a single enterprise, which typically holds a market share greater than its closest competitor (the largest competitor left in the market after the concentration). Concentrations in oligopoly markets include the elimination of important competitive constraints, that the parties participating in the concentration exercised towards each-other before the concentration. These restrictions, together with the reduction of competitive pressure on the remaining competitors in cases where there is a small possibility of coordination between members of the oligopoly, cause a significant obstacle to competition. All concentrations that cause effects without coordination will be declared as not compatible with the legislation in the field of competition.

Undertakings participating in the competition own large market shares

16. The greater the market share as more likely for a company to have market power. The greater is the added part of the already existing market share, the more likely is for the concentration to cause an increase of market power significantly. The greater the increase in sales, on the basis of which are obtained higher margins after price increases, the more likely that companies participating in the concentration would view these prices as profitable, despite the lowering of production that accompanies these price increases. Regardless of the fact that the market share and the added market share are the initial indicators of market power and growth of market power, they are the most important factors to evaluate a concentration.

Undertakings participating in the competition are close competitors

17. Within the relevant market, products can be differentiated, so that some products are closer substitutes than others. The greater the degree of substitutability among the products of companies participating in concentration, the greater is the possibility that companies participating in the concentration increase the price significantly. For example, a concentration between two manufacturers that offer products which are first and second choice for a

substantial number of customers can generate a significant price increase. Thus, the fact that rivalry between parties has been an important source of competition in the market, can be a crucial factor in the analysis. Additional benefits before concentration can cause a significant rise in prices. The incentive for enterprises participating in the concentration to increase the price, is likely to become mandatory, if rival companies are producing close substitute products with companies participating in concentration, than when they offer less close substitute. Consequently, there is little opportunity for the concentration to significantly limit effective competition, in particular through the creation or strengthening of a dominant position, if there is a high degree of substitutability between products and enterprises participating in the concentration and those offered by rival manufacturers.

18. The rate of substitutability can be estimated through a survey on customer preferences, analysis of samples purchased, cross-assessment of price elasticity of products involved.

19. In some markets may be relatively easy and not expensive for new active companies to position their products or to expand the variety of products. In this case the Authority considers whether this new deployment or expansion of product lines by competitors or the parties to the concentration, can influence the promotion of the concentrated unit to increase the price after concentration. In any case, the new deployment or expansion of product lines are often accompanied by risks and high, irreversible cost and thus may be less profitable than current product lines.

Clients have limited opportunities to change suppliers

20. Clients of the parties involved in the concentration may have difficulties to switch to other providers (provider changed) because:

- There are few alternative providers,
- Exchange is associated with significant cost.

Such clients are particularly exposed to price hikes. Concentration can affect the ability of this category of clients to protect themselves against price hikes. In particular this may be the case of the clients who used as the source of supply both companies participating in the concentration as a tool to benefit competitive prices.

Competitors may not be able to rise the supply if price increases

21. When market conditions are such that competitors of parties involved in a concentration are unable to significantly increase their bid, if prices rise, the companies participating in the concentration can be encouraged to reduce production under the combined levels before concentration, thereby increasing market prices. The concentration incentivizes reduction of production, giving an undertaking participating in concentration a much larger base of sales for which it will benefit the highest marginal results coming from a price increase as a result of reduction of production.

22. On the other hand, when market conditions are such that rival companies have sufficient capacity and look to gain significantly if they expand production, the Competition Authority is unable to conclude whether the concentration creates or strengthens a dominant position, or if effective competition significantly limited. In particular, such an expansion of production is impossible if:

a) competitors manage production capacity constraints and enhancement of these capacities has high cost, or
b) existing excess capacities are significantly more costly to be put in use than the current capacity.

Capacity constraints are important in cases where products are relatively homogeneous, as well as in cases when companies offer differentiated products.

The concentrated unit is expected to impede expansion of the number of competitors

23. Some of the proposed concentrations, if allowed to become, significantly threaten effective competition, by placing the concentrated company in such a position that gives it opportunities and incentives to make very difficult for smaller companies and potential competitors to expand, or to limit the ability of rival companies to compete. In such a case, competitors can not, neither individually, nor united force the concentrated unit not raise prices or take other actions that harm competition. For example, the concentrated unit may have such a degree of control or influence over the supply of raw materials or distribution opportunities that make expansion or entry of rival companies more expensive. Similarly, the degree of control that the concentrated unit can have on patents or other types of intellectual property (e.g. brands) make expansion or market entry of rivals very difficult. In markets where the ability of combining the various infrastructures or platforms is important, the concentration can create to the concentrated unit the opportunities and encouragement to increase costs or reduce service quality to its rivals. The Competition Authority, in order to make the assessment of this concentration, among other must take into account the financial strength of the concentrated unit in relation to its rivals.

Concentration eliminates an important strength of competition

24. Some companies have more influence on the competitive process in comparison with parts of the market that they possess or other similar elements. A concentration that includes such companies may change the dynamics of competition significantly towards anti-competitive phenomena. This happens especially when the market has a high level of concentration. For example a company may be the last entry, and is expected to exert significant competitive pressure on other companies in the market in the future.

25. In those markets, where innovation is an important force for competition, concentration can increase the capacity and initiative of companies to bring new innovations to the market and competitive pressure on rivals due to innovation in that market. Alternatively, effective competition may be hindered significantly

when the parties participating in a concentration are very important inventors of the same product.

Coordinated effects

26. Structure in some markets may be such that companies consider it possible, economically reasonable and preferable to adjust on a stable base their policy and action in the market, aiming to increase selling prices. A concentration in a concentrated market may significantly impede effective competition through creation or strengthening of a collective dominant position, because it increases the ability to have companies to coordinate their behavior in terms of raising prices without feeling the need that the latter enter into an agreement or to use a coordinated practice in terms of Article 4 of the Law. A concentration may make coordination easier, more stable and more effective for companies that were already coordinating their behavior before the concentration. Also, a concentration can make coordinating more powerful, allowing companies to coordinate prices and raise them at even higher levels.

27. Coordination of behavior may be under different forms. In some markets, the most probable coordination may include keeping prices above the level of competition. In other markets, coordination can be aimed at limiting production or quantity of a new capacity launched. Enterprises can be coordinated on the basis of market division, e.g. the geographical area or other characteristics of customers, or through distribution of contracts to supply markets, as in the case of procurement.

28. Coordination is more likely to occur in markets where it is relatively easy to achieve a common understanding on the terms of coordination. For coordination to be sustainable three conditions must be met:

1. Coordinating enterprises are able to monitor on a significant scale sensitive, if terms of coordination are observed;
2. Discipline requires the existence of some forms of support mechanisms, reliable and that can act if deviation is detected;
3. Response of third persons such as current or future competitors, which are not part of coordination, as well as customers that are not jeopardized by the alleged impact of the coordination.

29. In assessing a concentration, the Competition Authority takes into account the changes brought about by the concentration. Reducing the number of enterprises in a market can constitute in itself a factor that facilitates coordination. However, a concentration may increase the possibility or the importance of coordination effects in other ways. For example, a concentration may include a “maverick” undertaking that has a history of preventing or breach of coordination, that may have resulted, for example, by the inability to increase prices of its competitors, or has characteristics that give it incentives to use strategic choices different from those that coordinated competitors would prefer. If the companies merge or acquire control, they have adopted strategies similar to those of other competitors; companies that have remained outside the

concentration can make easier coordination and the concentration will increase the ability, stability or effectiveness of coordination.

30. In assessing the possible effects of co-ordination the Competition Authority takes into account all relevant, available information on the characteristics of the markets concerned, including both structural features as well as the previous behavior of enterprises. Evidence on previous coordination is important if the relevant market characteristics have not changed so distinctly, or are not likely to change in a near future. Data on coordination in similar markets are also considered a useful information.

Achieving coordination conditions

31. Coordination is more likely to occur if competitors can easily reach a common perception on how they should coordinate their work. Coordinating enterprises should have a similar view regarding actions that are considered to be or not in accordance with custom behavior.

32. Generally, in an economic environment less complex and more stable, for companies is easier to reach a common understanding regarding the terms of coordination. For example, it is easier to coordinate actions in a market where are few players compared to a market with many players. Also, it is easier to coordinate the price of a single product, homogeneous than the coordination of hundreds of prices in a market with more differentiated products. Similarly, coordination is easier for a price, when supply and demand conditions are relatively stable than when they are in constant change. In this context volatile demand, increased by some companies in the market, or frequent entry by new companies shows that the current situation is not sufficiently stable to realize coordination. In markets where the patent is important, coordination becomes more difficult, while inventions, especially the most important, can allow a company to gain greater advantage over its rivals.

33. Coordination seen under the view of the market division, would be easier if:

- **a.** si dhe clients have simple features that allows coordinating companies to easily identify them. Such features can be based on geography, on the type of customers or simply the existence of consumers who buy from a specific company; and
- **b.** it is easy to identify the provider of each client by using as a coordinating mean the allocation of existing customers to existing providers (previous).

34. However, coordinating companies can find other, less complex ways to overcome problems stemming from insufficient economic environments, and division of the market. For example, they can apply simple rules in their pricing policy, in order to reduce the complexity of coordination for a wide range of prices. Or, for example, companies decide to maintain a fixed relationship between some basic prices and a number of other prices, so that basic prices move in parallel basis. Relevant information publicly available, the exchange of information through trade associations, or information obtained through the overlapping of shareholders who own shares or participation in joint venture can

help companies reach terms of coordination. The more complex is the market situation, the more transparency or communication is required in order to achieve a common understanding in terms of coordination.

35. Companies may have easier to reach a common understanding in terms of coordination if they are relatively symmetrical, particularly in terms of cost structure, market shares, capacity levels and levels of vertical integration. Structural links such as cross shareholders or joint venture participation helps to channel coordination incentives between enterprises.

Monitoring of avoidance

36. Coordinating companies tend to increase of their market shares, by avoiding the terms of coordination, for example, by lowering prices, by the secret provision of deductions, by increasing the quality and capacity of the products, or trying to win new clients. Only a credible threat by rivals, may constrain companies to avoid the limits of the above elements. For this reason, it is necessary that markets have sufficient transparency that allows coordinating companies to monitor to a sufficient extent if other companies have avoided, and when they will retaliate.

37. Transparency in the market is higher in proportion to how lower is the number of active participants in it. The level of transparency often depends on how transactions are realized in a particular market. For example. transparency is higher in a market where transactions are implemented by public exchange or through an open auction. On the other hand, transparency may be lower in a market where transactions are negotiated on a confidential basis between buyers and sellers bilaterally. When you evaluate the level of transparency in the market, a key element of information available is to identify whether companies can conclude about the actions of other companies. Coordinating enterprises should be able to foresee with a degree of accuracy if the unusual behavior is the result of avoiding the terms of coordination. For example, in an unstable environment may be difficult for a company to know if its loss from sales in general is due to the low level of demand or because a competitor offers particularly depressed prices. In similarity with this, when conditions of demand or supply dwindle, it is difficult to interpret if a competitor is lowering its prices because he expects coordinated prices to fall, or because he is avoiding.

38. In some markets, where general conditions seem to make monitoring more difficult to avoid, enterprises can engage in practices which have as effect to facilitate the monitoring of issues, even when those practices are not necessary to be used for such purposes. These practices, such as making provisions that are more favorable for clients, intentionally published information, notifications, or exchange of information between trade associations, could help increase transparency or help competitors to interpret the choice made. The change of the management direction, participation in joint ventures and similar arrangements facilitate the monitoring.

Inhibitory mechanisms

39. Coordination is not sustainable if the consequences of avoidance are very severe to convince coordinating enterprises, which is in their best interest to adhere to the terms of coordination. This is the way that makes the coordination sustainable and protects it from the threat of retaliation in the future.

40. If revenge is realized after some time or is not sure that it will happen, the potential to avoid gains from avoidance is insufficient. For example, if a market is characterized by infrequent demand and high volume and for as long as the benefit from avoidance in a given moment can be great, safe and immediate, while the losses from punishment may be small, insecure and feasible only after some time, establishing a very strict inhibitory mechanism can be difficult to deploy. The speed with which support mechanisms can be implemented relates to the issue of transparency. If companies have the ability to monitor the actions of their competitors, after a significant period of time, even if revenge is complete, will be delayed and this may contribute to curb avoidance.

41. Reliability of inhibitory mechanisms depends on whether other coordinating companies are encouraged to avenge. Inhibitory mechanisms such as punishment of the avoider or significant growth of production, facilitates short-term economic loss to companies that perform vengeance. This does not eliminate the incentive for revenge while short-term loss can be lower than long-term benefit of revenge, resulting from the return of the coordination regime.

42. Revenge is not placed in a market aberration. If the coordinating companies have trade relations in other markets, they offer different methods of revenge. Revenge is realized in several forms, including extinguishing joint venture or other forms of cooperation, or sale of shares in companies with common ownership.

The reaction of third parties (stakeholders)

43. In order for a coordination to be successful, the actions of non- coordinated companies, competitors and potential clients, should not be possible to jeopardize the expected outcome of coordination. For example, if coordination aimed at reducing the overall capacity in the market, and if non- coordinated companies have no possibility or no incentive to react by increasing their capacity significantly to offset net capacity reduction, or at least to do that non-profitable, this will only hurt consumers.

44. Effects of entry and response to customers purchasing power provide a potential impact on the stability of coordination. For example, in a concentration situation, a strong buyer may make coordination unstable, because of concentration in a large measure of its orders with a provider, or by providing long-term agreements.

45. Concentrations, where an enterprise that operates in a relevant market, or joins in, or acquires control with a potential competitor in this market, may have the same anti competitive effects as with concentrations between two companies

that are active in the same relevant market, significantly hampering effective competition, in particular the creation or strengthening of a dominant position.

46. The merger or the acquisition of control with a potential competitor generates coordinated anti competitive effects, if the potential competitor significantly restricts the behavior of companies operating in the market. This is the case, if a potential competitor owns assets that can easily be used for entry into the market without causing irreversible cost. Anti competitive effects can occur even when a party participating in the concentration has large possibilities to cause irreversible costs for market entry in a relatively short period of time, after which the company restricts the behavior of enterprises currently operating in the market.

In order for a concentration with a potential competitor to have tangible anti competitive effects, two basic conditions must be met:

1. The potential competitor either should actually exercise a significant binding influence, or it has great chances to increase the power of effective competition. Evidence, that a potential competitor is scheduled for market entry significantly helps the Competition Authority to reach such a conclusion.
2. There should not be a sufficient number of other potential competitors, who will keep (guard) competitive pressure significantly after concentration.

Concentrations that create or strengthen purchasing power in upstream markets

48. The Competition Authority also analyzes to what extent a concentration will increase its purchasing power in upstream markets. On the one hand, a concentration which creates or strengthens the market power of a buyer can significantly restrict competition, in particular through the creation or strengthening of dominant position. Companies that merge or acquire control may have a position that enables them to set lower prices by reducing purchases of raw materials. This could entail a lower level of products in the final product market, thus harming consumer welfare. Such effects are particularly acute when upstream vendors are relatively segmented. Competition in downstream markets is badly affected if the concentrated unit has the ability to use its purchasing power in the face of their providers, to exclude its rivals.

49. On the other hand, increased purchasing power brings even benefits to competition. If the increased purchasing power reduces the cost of raw materials, without limiting competition in the downstream market or in total production, then a part of these reduced costs may be transferred to consumers in the form of lower prices.

50. To assess whether a concentration limits competition significantly by the creation or strengthening of a dominant position, it is necessary to analyze the conditions of competition in upstream markets and assess positive and negative effects (pro and anti competitive effects) as listed above.

IV. REACTION OF COERCIVE PURCHASING POWER

51. Competitive pressure on a provider is exercised not only by his competitors, but also by his clients. Even those companies that possess large market (significant) shares, after concentration, may not any longer hold a position that significantly limits effective competition, in particular by acting in a considerable extent independently of its clients, if the latter possess countervailing buying power. In this context, adverse (reaction) of purchasing power must be understood as a negotiating force that the buyer, as a result of its size, its commercial importance and its ability to switch to alternative providers, displays in trade negotiations to vendors.

52. When necessary, the Authority assesses how and to what extent, it is appropriate that customers maintain a position to oppose the increase of market power created by a concentration. Will be considered as a source of purchasing power response, a client who convincingly threatens to move to alternative sources of supply within a reasonable time frame, if the provider decides to raise prices, undermine the quality or delivery conditions. This should be the case, if the buyer passes immediately to other bidders, threatens convincingly for vertical integration in upstream markets or will support the expansion or upstream entry, for example, by convincing a potential entry to effectively enter the market by promising that it will direct a large share of purchases to this company. There are many opportunities that large and sophisticated clients would possess in a greater extent this type of purchasing power reaction, more than smaller companies to a segmented industry. Even a buyer can exert adverse effect by refusing to buy other products produced by the provider, particularly in the case of resistant products, or delayed purchases.

53. In some cases it is important to attract the attention of the drivers of purchases, on order to use their power. For example, a firm in the downstream market would not want to make an investment to support a new entry, if the benefits from such an entry, in terms of lower costs of raw materials would go in favor of its competitors.

54. The countervailing response of purchasing power can not be a sufficient argument to avoid possible negative effects of a concentration, provided that if a particular segment of customers, which has power to enter into negotiations, is protected by much prices higher or deformed conditions occurring after concentration. Also, it is not enough that existing purchasing power before concentration, necessarily must exist and remain effective even after concentration. This is because a concentration of two providers can reduce purchasing power, if in so doing is disposed of another credible alternative.

VI. Market entry

55. When market entry is very easy, then the concentration can not cause a significant anti competitive risk, so the analysis of entry constitutes an important element of assessing the overall competition. For the entry be considered as a sufficient restriction of competition, parties participating in the concentration

must always and clearly show the ability to deform or eliminate any possible anti competitive effect caused by the concentration.

Entry opportunities

56. To analyze whether the entry or potential entry into a particular market is likely to cause restriction in the behaviour of existing companies in that market, the Competition Authority takes into consideration the behavior after concentration. In order for the entry to occur, it necessarily must keep in mind that benefits resulting from the price effects of additional products introduced into the market, as well as possible reactions of existing companies have both to be significant. On the other hand, the entry becomes more difficult when existing companies are able to protect parts of their market by offering long-term deal or price reductions to those customers who the new entry is trying to win over. The high risk and costs of failure to enter, reduce entry opportunities. Costs in case of failure to enter the market will be higher in proportion to the level of costs to be associated with irreversible market entry.

57. Potential entries may encounter entry barriers that determine the risk and cost of entry and that have an impact on the convenience of making the entry. Entry barriers are termed as market specifics, which give priority to existing companies towards potential competitors. When entry barriers are small, then the parties participating in the concentration have more chances to be restricted by the entries. On the other hand when entry barriers are high, the price increases coming from the companies participating to the concentration will not be significantly limited by the market entry.

58. Market entry barriers may take several forms:

b) Legal barriers arise when regulatory arrangements limit the number of licenses, etc. Here are included commercial tariff and no-tariff related limits.

c) Companies already in the market may have technical advantage, such as: preferential entry to essential facilities, natural resources, inventions, R&D activities, or intellectual property rights, which make it difficult to compete effectively for a new company that wants to enter the market. For example, in some industries maybe difficult to obtain main raw materials or patents that protect products and processes. Other factors such as economies of scale and scope, sales and distribution networks, entry rights for important technologies constitute impedments for market entry.

ç) Barriers to entry come as a result of the market position of the existing company. This makes it more difficult to entry in a particular industry because the experience, or reputation are seen as necessary to compete effectively and both together are difficult to be owned by a new entry. Factors such as consumer allegiance to a particular brand, proximity of relationship between providers and clients, the importance of promoting or advertising, or other priorities related to reputation should be

considered in this context. Barriers to entry determine previous situations where companies are engaged in the market to build a much larger capacity, or when the costs borne by customers in exchange for a new provider prevent entry into the market.

59. In the expected market development, should be taken into consideration the assessment of entry if it is profitable or not. Entry is more likely to produce benefit in a market that is expected to develop in the future, rather than in a market that has reached maturity or expected to have declined. Economies of scale or network effects make an entry inconvenient, except in cases when the new entry can obtain a very large market share.

60. Market entry becomes especially easier if providers in other markets own production lines that can be used to enter the market in question, thereby reducing fixed entry costs. The smaller is the difference in profitability between entry and no entry before a concentration, the more likely is the redistribution of production lines.

Unspecified deadlines for entry

61. The Competition Authority considers whether entry would be sufficient and stable to curb or eliminate the exercise of market power. What constitutes an appropriate time period for entry will depend on the characteristics and dynamics of the market and the specific skills of potential entries. However, market entry is considered on time if it occurs within two years.

Sufficiency

62. Market entry must be of a purpose and size sufficient to contain and prevent anti competitive effects of a concentration. Entry into a small scale in some corner markets ("niche") can not be considered sufficient.

EFFICIENCIES

63. Corporations organized in the form of concentration may be in line with the requirements of dynamic competition and are able to increase competitiveness in the industry, improving the conditions of development and raising living standards in the market. It is possible that efficiencies that are produced by a concentration cause repercussions in competition and in particular the possible damage to consumers. Given the goal to assess whether a concentration significantly impedes effective competition, in particular through the creation or strengthening of dominant position, within the meaning of Article 13 of the Law, the Commission based on the analysis conducted by the Secretariat, makes an assessment of overall concentration. In conducting this assessment, the Commission takes into account the factors mentioned in this article, including technical development and economic progress, provided that this development creates advantages for consumers and poses no obstacle to competition.

64. The Commission, in the general assessment of a concentration takes into consideration all relevant claims based on efficiency. He may decide that as a result of efficiencies that causes a concentration, there is no reason to declare it incompatible with the provisions of the Law. This will be the case when the Commission on the basis of sufficient evidence that owns and analysis made by the Secretariat, is able to conclude that the efficiency created by the concentration increase the capacity and incentivize the concentrated entity to act in favour of competition, to the benefit of customers, thus balancing the anti competitive effects that can cause the concentration itself.

65. In order to enable the Commission to consider efficiency claims, in assessing the overall concentration and to be able to reach a conclusion, that as a result of efficiencies, there is no reason to declare the concentration incompatible with the market, it is necessary that these efficiencies meet the following cumulative conditions:

i. bring benefits to consumers, and
ii. ii. be specific and
iii. iii. be verifiable.

Benefits to consumers

66. Relevant criteria in assessing efficiency claims is that as a result of concentration, consumers will not be worse off. For this purpose, efficiencies should produce their effects in a timely fashion, and in principle, should bring benefits for consumers even in those relevant markets where competition problems arise differently.

67. Concentrations can lead to various forms of efficiency gains, leading to lower prices or other benefits for consumers. For example, the reduction in costs of production or distribution, may create to the concentrated unit skills and incentives to set lower prices after concentration. Apart from the need to assess whether the efficiencies lead to net benefits (clean) for customers, it is necessary to evaluate the efficiencies coming from cost reductions, both variable and marginal costs, which are more appropriate for assessing efficiencies than reduction in fixed costs. In principle, variable and marginal costs have more opportunities to bring lower prices for consumers.

68. Customers can benefit from new or improved products or services, for example, those resulting from efficient benefits in the field of research & development and inventions. A joint company created in order to develop a new product can bring these kinds of efficiencies that should be taken into consideration during evaluation.

69. In the context of coordinated effects, efficiencies may increase the incentive of the coordinated entity to increase production and reduce prices and thereby reduce the need for coordinated behavior with other companies in the market. Efficiencies bring about risk reduction of coordinated effects in the relevant market.

70. Overall, the later in time that efficiencies are expected to materialize, the less importance will be given to them by the Competition Authority. This means that efficiency should be assessed on time, in order to be considered as a countervailing factor.

71. The incentive of the concentrated unit to pass the efficiency gains onto the customers, is often associated with the existence of competitive pressure from the remaining companies in the market and from potential entry. The largest the negative effects are possible in the relevant market competition, the more the Commission must be sure that the alleged efficiencies are essential, possible to be realized and passed to a sufficient extent to the customers. It is impossible that a concentration leading to a market position that approaches that of a monopoly, or which leads to a similar level of market power, may be declared by the Commission in accordance with the Law, based on grounds that the efficiency gains are sufficient to offset adverse effects of possible anti competitive impacts.

The specifics of concentration

72. Efficiencies are appropriate for assessing the competition, if they are a direct consequence of a notified concentration and can not be achieved in a similar extent by less anti competitive alternatives. In these circumstances, it is concluded that efficiencies are caused by concentration and per consequence are specific of this concentration. For this reason, the parties that merge or acquire control should in time provide all relevant information, necessary to demonstrate that there is no less anti competitive, alternative that is realistic and achievable (e.g. license agreements or joint ventures, cooperatives, or concentration structured differently) than the reported concentration, which protects the alleged efficiency. The Commission, in assessing the overall concentration, estimates only alternatives that are practically justified on economic ground, and which are covered by the parties participating in concentration, in connection with the strengthening of economic activity practices in the industry in question.

Verifiability of efficiencies

73. Efficiencies must be verifiable so that the Commission can be sure that they will materialize and will be sufficient to offset the possible damage that the concentration can bring to the consumers. The more accurate and compelling are the claims to the efficiencies, the better the Commission will assess them. Whenever is possible, should be assessed the measure of efficiencies resulting benefits for consumers. When the necessary data are not sufficient to allow an accurate quantitative analysis should be possible to predict a clear identification of the positive impact on consumers, not only the marginal one. In general, the more distant is the time to start assessing the impact of efficiencies for the future, the smaller is the possibility that the Commission is able to determine the current efficiency.

74. Most of the information, owned by the parties participating in the concentration must be made available to the Competition Authority in order to enable it to clarify and assess whether this focus will bring these kind of efficiencies. The existing companies are obliged to provide in a timely manner all the appropriate

information necessary to demonstrate that the alleged specific efficiencies are specific to the concentration and possible to be realized. Similarly, the notifying parties must indicate to what extent are these efficiencies possible to react to any anti competitive effect resulting from a concentration, as well as consumer benefits.

75. Evidence relevant to assessing efficiency claims include in particular, internal documents that were used by management to decide on a concentration, management statements regarding owners and reaction of financial markets on the expected efficiencies, historical examples of efficiencies and benefits of customers, expert studies before concentration on the types and sizes of efficiencies gains and the measure at which customers are able to benefit.

VIII. ENTERPRISES AT THE VERGE OF BANKRUPTCY

76. In evaluating a problematic concentration, the Commission will assess whether it is line with market, when one of the parties participating in it is on the verge of bankruptcy. The Commission considers as very important the criteria defined in Article 13, paragraph 2 of the Law in this case. Basic requirement is that the deterioration of the competitive structure that follows the concentration can not be considered as caused by the concentration. This is said when the competitive market structure would be exacerbated at least in the same measure in the absence of concentration.