COMPETITION ACT, 2007
(NO.4 OF 2007)

COMPETITION COMMISSION (ECONOMIC AND LEGAL ANALYSIS OF CASES) GUIDELINES, 2008

ARRANGEMENTS OF SECTIONS

Section

COMPETITION ACT, 2007
(NO. 4 OF 2007)

COMPETITION COMMISSION (ECONOMIC AND LEGAL ANALYSIS OF CASES) GUIDELINES, 2008

IN EXERCISE of the powers conferred on the Competition Commission under section 18 (1) (a) of the Competition Act, 2007, these Guidelines are hereby issued.

PART I- PRELIMINARY

Citation

1. These Guidelines may be cited as the Competition Commission (Economic and Legal Analysis of Cases) Guidelines, 2008

Interpretation

2. In these Guidelines, except the context otherwise requires-

"Act" means the Competition Act, 2007

"Commission" means the Competition Commission established under the Act;

"Procedural Rules" means the Competition Commission Procedural Rules made by the Commission under section 18 (1) (b) of the Act.

Obligation of the Commission to publish Guidelines

3. (1) Section 18 of the Act requires the Commission to publish guidelines and procedural rules. These Guidelines are to explain the economic and legal analysis to be used by the Commission in determining cases. The procedural rules are to explain the procedures the Commission intends to follow in carrying out its functions. The two documents are closely related and should be read together.

(2) These Guideline constitute the initial set of guidelines that the Commission will apply in its assessment of cases. Section 18 (2) of the Act explicitly permits the Commission to revise the guideline, from time to time. The Commission expects to learn by experience and to reflect what it has learned in future revisions.

(3) These Guidelines do not cover the analysis of merger cases. The Government's intention has been that the merger control part of the Act should not be brought into active use until the Commission has established itself and gained experience in performing its other functions under the Act. The Commission will therefore wait until the Secretary of State makes regulations on merger control under section 33 of the Act. Meanwhile, if a merger creates or enhances a monopoly situation under section31 of the Act, the Commission may be able to tackle any adverse effects by initiating an investigation under that section.

(4) These Guideline explain the economic and legal analysis the Commission expects to make in order to-

(a) make determinations on restrictive agreements subject to prohibition;

(b) decide on financial penalties and other remedies to bring prohibited agreements to an end;

(c) decide whether to open an investigation of non-collusive agreements or of monopoly situations;

(d) reach determinations, after investigation, on non-collusive agreements or on monopoly situations;

(e) consider, in cases where the Commission finds that there are a adverse effects, whether there are offsetting public benefits; and

(f) Make directions or accept undertakings to remedy any adverse effects on Competition.

The aims of Competition law

(4) (1) Competition law aims to safeguard the process of Competition between enterprises in markets that are open to Competition. Its essential purpose is to ensure that enterprises do not frustrate Competition by erecting private barriers to the operation of markets, thereby denying customers the benefits, in terms of price, quality and variety that freely-functioning markets should provide. From the consumer perspective, Competition law complements consumer protection law, which sageguards the rights of consumers in their individual dealings with suppliers.

(2) Competition law cannot create Competition where other laws or government regulations prevent it. However, the Act gives the Commission the function of advising on any public sector action which may affect Competition adversely and the Commission intends to be vigorous in exercising this function.

Overview of the Act

5. (1) The Act makes a distinction between two broad categories of restrictive business practice.

(2) The first category consists of collusive agreements through which enterprises, who would otherwise be direct competitors, fix prices or share markets between themselves. Bid rigging is a specific instance of this. Such cartels are universally held to be one of the most serious forms of anti-competitive practice. In the Gambia, agreements which restrict or distort competition in this way will be subject to prohibition, because they are inherently damaging and bring no offsetting benefits. A prohibited agreement is automatically void. The Commission merely has to demonstrate that there is an agreement falling within the definition of the Act. These Guidelines explain how the Commission will go about doing this.

(3) The second category contains other forms of restrictive business practice, notably non-collusive agreements and monopoly situations. These are capable in some circumstances of preventing, restricting or distorting competition. There may also simply be exploitation of a monopoly situation, for example by charging excessively high prices. But such practices are not inherently anti-competitive. All depends on a study of the facts of each case. These practices are therefore treated in the Act as being subject to investigation on a case by basis. The techniques of assessment and analysis that the Commission will use during such an investigation are set out in these Guidelines. If the Commission finds that a particular practice has anti-competitive effects, it can impose a remedy designed to eliminate those effects.

(4) In relation to the second category, the term "anti-competitive effects" is used throughout these Guidelines as a matter of convenience to refer to the effects that a restrictive business practice may have of preventing, restricting or distorting competition or exploiting a monopoly situation. The central question for the Guidelines is how to determine that a restrictive business practice has such effects. The Commission takes the view that, as a rule, and setting aside price-fixing or bid-rigging agreements, business practices will be anti-competitive in their effect only if the enterprise or enterprises concerned have market power in the relevant market. An enterprise has market power if its behaviour is not effectively constrained by its competitors. It can be thought of most simply as the ability to charge prices higher than competitive levels (or to offer quality lower than competitive levels).

PART II – ECONOMIC AND LEGAL ANALYSIS: GENERAL

Market definition, market share and market power

6. (1) This section of these Guidelines sets out the Commission's approach to Competition analysis. It is aimed at the analysis of practices subject to investigation under the Act and it is relevant to agreements subject to prohibition only in rare cases where market definition may be a factor in determining whether there is a collusive agreement.

(2) The provisions of this part of these Guidelines make it clear at several points that the Commission needs to define the market or markets that are relevant to a particular case. The definition of the relevant market, that is the market relevant to the assessment of the practice in question, is not an end in itself but an essential preliminary to considering whether an enterprise has market power and the ability to engage successfully in anti-competitive conduct.

(3) To put it at its simplest: if the market is defined in a broad way, for example, food retailing services throughout the Gambia, individual suppliers will have a relatively low market share of a large market, and it may appear relatively unlikely that any one supplier will have market power. On the other hand, if a narrow market definition is chosen, for example the retail supply of tomatoes in the Banjul area, individual suppliers are likely to have relatively high share of the market, and they may appear to be in a better position to exercise market power.

(4) There is no singly correct way to define the market and the Commission will use whichever approach is most suitable in the circumstances of the case. However, it is possible to set out the conceptual steps which it is generally accepted should be follow-ed in good competition analysis.

(5) Usually, the Commission will be presented with a complaint about a particular product or group of products supplied in a particular geographical area (which may or may not be the whole of the country). The Commission will consider whether the products directly concerned form a separate market or whether the market should be more widely defined to include substitute products, and whether the identified geographical area represents a properly defined geographical market.

(6) To do this, the Commission will follow the standard practice of applying the "hypothetical monopolist test". The objective of this test is to identify the narrowest possible market that can be considered as a separate market. The Commission defies a separate market as a market in which a monopolist holding one hundred per of the market could raise and sustain prices significantly above the competitive level, say five to ten per cent, depending on the product, and increase its profits by so doing.

(7) So, starting with the product which is the focus of complaint (the “focal” product or products), the Commission will ask: could a hypothetical one hundred per cent monopolists in the product raise and sustain prices significantly and increase its profits by doing so? If it could, then the market can be defined as the market for the product. If the Commission considers that it could not, because such a price increase would provoke customers to switch to a close substitute, the test is repeated but including in the market definition both the focal product and the close substitute. Again, if a price increase is judged to be possible for a one hundred per cent monopolist in that wider range of products, the Commission concludes that the enlarged market is a separate market and should be taken as the relevant market for investigation. If not, the process is repeated as many times as necessary until a market is identified in which a hypothetical monopolist could profitably raise and sustain its prices.

(8) If the process has had to be repeated several times, the market defined as a result will include a wide range of different products which are reasonably good, but not necessarily perfect, substitutes for the focal product. Customers can be expected to switch their purchases to the substitutes in response to a significant increase in the price of the original products.

(9) A problem to beware of in this exercise is that if an actual firm with market power is taken as the “hypothetical monopolist”, and if that enterprise is already successfully charging prices above the competitive level, the competition analyst may find that the firm would be unable to raise prices further because customers would then switch to alternative products. The result would be to define the market too widely, and to estimate market shares at too low a level. The practical lesson from this is that tests of this kind cannot be applied mechanically. The Commission will there-fore take great care over the interpretation of such exercises.

(10) Substitutes may be physically similar products but they do not have to be. Plastic buckets and metal buckets are relatively similar and seem likely to be close substitutes. Matches and disposable cigarette lighters, on the other hand, are physically quite different but have similar uses and have been treated as being in the same market by the competition authorities in the United Kingdom.

(11) The date to apply the “hypothetical monopolist” approach directly will usually not be immediately available. Analytical work is needed to decide what products might be substitutes for the focal product. The Commission will want to consider evidence on switching between the products in the past, any associated patterns In prices in the focal products and the substitutes, the extent to which undertakings themselves appear to treat substitutes as potential competitor products, the costs to customers of switching to the substitute, the views of major customers and so on.

(12) The Commission's analysis will also include substitution on the supply side, that is, the possibility that, in response to a hypothetical monopolist's price increase, potential competitor suppliers are drawn into the relevant market, undermining the price increase. This is considered under subsection (24) of this section, in the discussion of barriers to entry into the market.

(13)The Commission will also wish to consider the geographical definition of the market. The same approach based on the hypothetical monopolist will in principle, be used though the information needed to apply approach in practice may be difficult to gather and to interpret. The Commission will nevertheless attempt to use it as far as possible. It should at least be possible to distinguish between cases where the market-

(a) is effectively international, including the entire market of the Gambia;

(b) is the Gambian national market alone; or

(c) is a limited part of The Gambia

(14) Having decided on market definition, the Commission next needs to consider whether the enterprise or enterprises concerned (acting alone or together) have market power in that market. The Commission defines an enterprise as having market power if it is able to raise its prices significantly above the competitive level and thereby increase its profits.

(15) In practice, exploitation of market power may take place not only through monopolistic pricing but also through offering poor quality, poor service, and poor responsiveness to changing customer demands and poor terms and conditions in general. The point is that the monopolist can exploit his or her market power by offering to the customer a significantly less favourable deal all round than he or she would have done under fully competitive conditions.

(16) Market power is a matter of degree and very often there is no simple yes or no answer to the question whether an enterprise has it. Analysis is needed of-

(a) the structure of the market, including both sellers and buyers; and

(b) Conditions affecting the likelihood of new entry into the market.

(17) The starting-point is to consider the structure of the industry, starting with the number of competitor suppliers and their market shares. For many markets, "suppliers" of course includes Gambian and non-Gambian suppliers and imports need to be counted alongside domestic products. A convenient way to summarise the data for the purpose of competition analysis is to look at concentration ratios, that is, the percentage of sales attributable to the top suppliers, for example, the three, five or other number of enterprises. The

greater the percentage of the market held by, say the top three firms, the more concentrated is the market. Another more sophisticated measure used by competition authorities else-where, which aims to summarise the degree of concentration in a market, taking into account the shares of not the large suppliers but also of the medium and smaller suppliers, is the Herfindahl-Hirschman index (HHI) [1].

(18) The Commission will use indicators of this kind where they are helpful in assessing industry concentration and in particular the concentration of one industry relative to another. However, market share and concentration data on their own are not a satisfactory measure of market power and need to be looked at alongside other indicators.

(19) In considering whether an enterprise has market power, it is not necessary that is should have a high market share. Even with a market share of, say, thirty to forty percent, in the right conditions, an enterprise may be able to raise prices successfully above competitive levels. On the other hand, an enterprise with a very high market share, even up to one hundred percent, will not necessarily hold significant market power if there is a real threat that competitors will enter the market. Further analysis of the market will usually be necessary, in terms of the market structure as whole.

(20) For example, a market with a concentration ratio of ninety percent at the three-firm level may include three major suppliers each having a similar share, and this market may turn out to be fiercely competitive. But the same concentration ratio may represent a market with a single dominant supplier, with eighty-five percent of the market, with a long tail of much smaller competitors. The dominant supplier in this case is more likely to have market power. Use of the HHI will give better summary pictures of relative concentrations.

(21) The next feature to consider is to buyer side of the market. A high concentration of sellers may be matched or exceeded by a high concentration of buyers, for example, in retailing. The countervailing power of buyers may have the effect of creating highly competitive conditions because no seller, even with a high market share, will be content to lose the custom of a dominant buyer. The Commission will therefore want to look at the buyer side of the market in each case and reach a balance judgement on how far any buyer power will prove an effective brake on sellers' market power.

---

[1] $HHI = s1^2 + s2^2 + s3^2 + \ldots sn^2$, when Sn is the percentage market share on the nth firm. So in a market with a single 100% monopolist $HHI^2 = 10{,}000$, while in a market with a hundred firms each having a 1% share of the market HHI = 100. The index takes into account all firms but gives greater weigh to the larger of them by using squares of market shares

(22) In analyzing the structure of the market along these lines, the Commission will consider not just a snap-shot of the market structure at the time of the analysis but an evolving picture. Market shares may change, under the pressure of changing market conditions of all kinds (changes in tastes, technology, regulation, trade policy, entrepreneurial talent). An enterprise may appear to have a strong market position at one moment but lose it the next. The Commission is interested in identifying market power that lasts for a significant period of time. Fleeting signs of power that are rapidly competed away are symptoms of healthy competition.

(23) The dynamics of the market are also a key element in assessing market entry conditions, which are at the centre of competition analysis. If the barriers to potential new competition are low, attempts by existing suppliers –even total monopolist – to raise price above competitive levels are likely to provoke new entry. Barriers to entry come in various forms but the factors underlying entry barriers include the following-

Sunk costs: these are the costs of entry into a market which are not recoverable on leaving the market, such as the advertising costs of establishing a new brand. If the existing enterprise has already incurred such costs but a potential new entrant has not, new entry may not be profitable, even at the price that gives the existing operator above-normal profits.

Access to inputs and distribution outlets: at the extreme, there will be a high barrier to entry if the existing enterprises totally control access to inputs or facilities, such as, port capacity, or totally control all plausible distribution networks for the product in question, and there is no other way of creating the means to provide these services within a reasonable timescale. However, serious barriers of this kind are generally thought to be rare.

Regulation and state controls: some potential new entry may be blocked altogether or made more difficult by regulatory requirements and by trade barriers.

Economies of scale: new entrants many find it difficult, at least in the short term, to reach an economic scale of operations and to sell the necessary volume of product. Unless and until it does so, it will face higher costs than existing enterprises.

Exclusionary behaviour: This includes a variety of practices by existing enterprises which aim to make entry more difficult. Example are: predatory pricing, in which the exist-ing firm lowers its prices to below the profitable level to undermine the new entrant's sales, and vertical restraints, for example, agreements with networks of distributors designed to make it difficult for a new entrant to get distributors to sell its product.

(24) Some entry barriers may be easier to overcome by producers in related industries who may be able quickly to switch productive resources into the focal product if an existing dominant supplier tries to raise prices above competitive level.

(25)The Commission will to gather information on these points in order to reach a judgement to ease of market entry. It will work on the rule of thumb that, if new entry is to be effective, it must be feasible to establish a sustainable new business in the market within one year.

Market share and share of supply

7. (1) in those sections in which agreements and situations subject to investigation are defined, the Act uses the language of certain percentages of “goods or services of any description”. For example, a thirty percent share by one enterprise, or a seventy per cent share by three of fewer enterprises, is required for any investigation into a monopoly situation. Section 34 of the Act gives the Commission a wide discretion in deciding what descriptions of goods and services it many use for this purpose. It is important to understand that this does not mean that all or most cases of such shares of supply are by that fact along likely to merit actual investigation by the Commission. The share of supply criterion is one criterion, alongside other criteria, including likely anti-competitive effect, which defines which cases are “subject to investigation”.

(2) The Commission must therefore establish at an early stage, in any case which may be under consideration for investigation, whether the share of supply thresholds for investigation are met. The share of supply test is, strictly speaking, not a market share test, since the product identified in the share of supply figure does not necessarily represent a well-defined market. But the Commission will want as, far as possible, to do the calculation on the basis of a market definition reached in the way set out above, which will facilitate the analysis of market power and of potential anti-competitive effects. In some cases, however, the lack of available data, particularly before an investigation has been carried out, may make this difficult and the Commission will, where necessary/rely on whatever appropriate share of supply data is available.

(3) Whether it is market share or share of supply, in some cases there may be read-made data from the Gambia Bureau of Statistics or from the private sector, from trade associations or from individual market participants. In other cases, there may be no readily available data. In those circumstances, the Commission will take a robust view. It does not always need exact data, but just enough information to reach a defensible view on whether the thirty per cent (or seventy per cent) threshold is met. In some cases, the answer may be obvious from

simple observation, for example, where there are only three significant suppliers so that at least one must have a share of more than thirty per cent. In other cases, the Commission (or the investigating body to whom the case is delegated) may need to collect some statistics itself.

(4) The remainder of these Guideline is mainly devoted to the analysis of each type of case under the Act. It is helpful to bear in mind throughout (except in the case of prohibited agreements) that in the analysis of actual case the key questions are: what is the market concerned in this case? What market power do the enterprise or enterprises concerned have in that market? What anti-competitive action have they taken to exploit, protect or enhance their market power?

PARTIII – ECONIMIC AND LEGAL ANALYSIS: RESTRICTIVE AGREEMENTS SUBJECT TO PROHIBITION (SECTIONS 25-28 TO THE ACT)

Establishing breach: evidence, tests, etc.

8. (1) The absolute character of the prohibition makes extensive economic analysis unnecessary in the case of collusive and bid-rigging agreements. As the Act makes clear under section 35(1) of the Act, the Commission's task is simply to establish whether, on the facts of the case, parties have breached the prohibition'.

(2) To establish breach of the probation may nevertheless be a difficult and complex task, requiring energetic investigation. The Act requires the Commission to establish that-

(a) there is an agreement (strictly, an agreement the parties to which are not all interconnected bodies);

(b) the agreement is horizontal; and

(c) the agreement is anti-competitive by, in some way, fixing prices or sharing markets or sources of supply.

(3) It is important to note that an "agreement" need not be written as section 2(1) of the Act provides that it may be oral and it may include a "concerted practice", that is, "a practice involving contacts or communications between competitors falling short of an actual agreement but nonetheless restricting competition between them".

(4) The Commission must consider whether sufficient evidence has been gathered to show that there is or has been a prohibited agreement. Typically, the parties will have tried to conceal the existence of the agreement and gathering sufficient evidence will be a major task.

(5) There may be evidence of an agreement in the form of written records of meetings, conversations and phone calls between the parties. The Commission, or its delegated investigators, may sometimes be able to obtain access to this kind of evidence by use of its powers of entry and search under section 41 of the Act. The procedure for use of those power is discussed in rule 7 (3) and 7 (4) of the Commission's "Procedural Rules". But parties who are aware of the illegality of their behaviour naturally try to avoid leaving evidence of this kind.

(6) More often, the key evidence will come from the parties' competitors, customers and suppliers, and occasionally from aggrieved employees or ex-employees. The Commission will welcome information from such sources. While such information may not be sufficient no its own to prove the existence of a prohibited agreement, it may well be enough to justify opening an investigation. All evidence will be subjected to critical scrutiny by the Commission.

(7) Where the Commission has evidence of an agreement between the parties but lacks clear evidence that it is collusive, it will also consider evidence from the behaviour of the market, though on its own this would not be sufficient to establish the existence of a prohibited agreement. For example:

(a) where a price agreement is suspected, the evidence may be a close parallelism between the parties' pricing behaviour or their setting other commercial terms which may indirectly fix prices, such as terms and condition conditions of supply, discounts, credit terms and terms of guarantees;

(b) evidence of a market-sharing agreement might be found in a fixed pattern of trading in the market, with little or no movement of customers between suppliers;

(c) Agreements to limit production or investment might result in evidence that the parties are working below capacity, or that customers cannot obtain the quantity of supplies they want.

Where evidence of this kind cannot be used to establish that there is a collusive agreement, it may be appropriate to use it in an investigation of a monopoly situation (see sections 13 (1) to 13 (7) of these Guidelines).

(8) Section 26 of the Act specifically prohibits bid-rigging agreements. Here, it is sufficient that there is an agreement and that it meets the self-explanatory tests set out in the section. The Commission will merely need to satisfy itself that these tests are met. In practice, bid-rigging agreements are always secret and the task for the Commission will be to gather evidence of the agreement's existence.

Prohibited agreement: penalties and directions

9 (1) The Commission's aim will be to ensure that the agreement is terminated and that no similar agreement is put in its place. This may be achieved by giving directions to the parties (section 49 (2) of the Act), by imposing financial penalties large enough to deter a repeat offence, or both.

(2) In determining the appropriate level of the penalty in any particular case, the Commission will first calculate what the maximum penalty would be. It will then determine what proportion of the maximum penalty should be imposed on the enterprise concerned having regard to the facts of the case and the factors described below.

(3) The Commission will consider, in particular-

(a) the seriousness of the infringement in the context of competition in the relevant market or in the Gambia market as a whole;

(b) the need for the penalty to be set at level which will both deter the penalized enterprise from committing a second infringement and deter all other enterprises from breaching the relevant prohibition;

(c) the extent to which one enterprise has acted as a "ring-leader" in inducing another enterprise to participate in the infringement; and

(d) The length of the period during which the infringement occurred.

(4)The Commission is not required to demonstrate that an agreement which infringes either of the prohibitions has had anti-competitive effects. The prohibition is per se, that is the very fact that the parties have entered into the agreement constitutes the offence. (Only agreements between companies each of which has a turnover beneath the threshold level set out in paragraph 8 of Schedule 1 to the Act will not be caught.) However, in determining the level of the penalty, the Commission will make a judgement as to the impact that the agreement may have had not merely in terms of the benefit accruing to the participants but also in terms of its wider effects on the market.

(5) Infringements that are short-lived and the result of negligence are likely to attract a financial penalty well below the maximum permitted level (although ignorance of the Act will not in itself be accepted as evidence that the breach was unintentional). However, prolonged and intentional price-fixing agreements are among the most serious anti-competitive practices and the participants can expect to face a financial penalty set at or near to the maximum level. The same will be true in the case of an enterprise that breaches one of the prohibitions for a second time.

(6) Depending on the detail of the case, the Commission will consider directions to the parties to the agreement requiring each to-

(a) cases giving effect to the agreement or to any similar agreement;

(b) provide the Commission with regular data on its prices and its pricing policies in the relevant market;

(c) establish internal compliance procedures to ensure that it does not re-offend through negligence; and

(d) Comply with any other requirement the Commission considers appropriate.

PART IV – ECONOMIC AND LEGAL ANALYSIS: RESTRICTIVE AGREEMENTS AND MONOPOLY SITUATIONS SUBJECT TO INVESTIGATION (SECTIONS 29-31 OF THE ACT)

Powers of the Commission to investigation, etc

10 (1) the aim of the Act here is to enable the Commission to deal with non-collusive agreements, and anti-competitive conduct by individual enterprises or groups of enterprises, by investigating them on a case by case basis where the share of supply thresholds are met. The rationale for this is that there is no reason to expect non-collusive agreements in general to be anti-competitive; but some are, and the Act gives the Commission the power to put in train the investigation of those which it thinks might be, with power to impose remedies where anti-competitive effects are found (section 50 of the Act). Similarly, there is no reason to expect that enterprises in monopoly situations (as defined in section 31 (1) of the Act) will behave anti-competitive but some do and the Act gives the Commission the opportunity to initiate investigations of particular cases where there are grounds for concern.

(2) For all three types of case subject to investigation (horizontal-non-collusive agreements, vertical agreements and monopoly situations), the Commission is faced with a different type of decision at different stages of the process. First there is the decision whether to open an investigation. For this, the Commission has to have “reasonable grounds to believe” that the agreement or behaviour in question may be anti-competitive. At the end of the investigation, the Commission needs to determine whether or not it is in fact anti-competitive.

(3) The “reasonable grounds to believe” requirement is designed to allow the Commission to make its decision on opening an investigation without the fuller knowledge it may be able to obtain as a result of the investigation. The requirement is nevertheless a real constraint on the Commission. To use its

power to obtain information in relation to prohibited agreements, the Commission needs merely “reasonable grounds to suspect”. Its interpretation of the requirement to have “reasonable grounds to believe” is that a mere suspicion, perhaps on the basis of unsubstantiated complaints from those with a commercial interest to pursue in the case, is not sufficient to give it “reasonable grounds to believe:. The Commission will need sufficient evidence, based on specific information from complainants (including consumers) or from other sources, to satisfy itself than an allegation of anti-competitive practice merits investigation. But it does not need to be confident at the moment of opening the investigation that there are in fact anti-competitive effects.

(4) The Commission expects that the principal means of conducting the investigation will be through the Notice issued under section 39 (2) of the Act (see rule 8 of the Procedural Rules), through subsequent discussion with the parties, and through hearings. Visits the parties’ premises under section 40 of the Act (see rule 7 (1) of the Procedural Rules) will not normally be used unless an enterprise fails to provide information.

(5) At the end of an investigation, the Commission will make a determination. It needs to ensure that the investigations give it information necessary to support conclusions.

(6) In the following sections of these Guidelines, the Commission discusses its approach to each type of case subject to investigation. These Guidelines do not repeatedly mention the need for “reasonable grounds” at the start of an investigation and for firm conclusions at the end, but they need to be read with that distinction in mind.

Horizontal; agreements subject to investigation

11 (1) Second 29 of the Act governs the Commission’s handing of non-collusive horizontal agreements. Such agreements are subject to investigation only if two conditions are met-

(a) The parties to the agreement together supply thirty per cent or more, or acquire thirty per cent or more, or goods and services description; and

(b) The Commission has reasonable grounds to believe that the agreement has the object or effect of preventing, re-stricting or distortion competition.

(2) As discussed under section 6 (1) of these Guidelines, it is important to understand that the thirty per cent share of supply condition is not based on a belief that, where the parties together hold a thirty per cent share or more, an agreements is likely to be anti-competitive or to need investigation under the Act. The share of supply condition merely determines which agreements are subject to investigation, that is, those where the parties have at least a thirty per cent

share, which many therefore be considered for investigation. It may be the only a small proportion of agreements meeting the share of share of supply condition will actually be investigated.

(3) This is because an agreement can only investigated if both conditions are met. The second condition requires that the Commission must have reasonable grounds for believing that the agreement is anti-competitive. Many horizontal agreements will be anti-competitive because they have the effect of limiting competition in relation to the terms of business offered to customers, while falling short of being outright price fixing agreements. An example might be an agreement competing retail, enterprises to restrict shop opening hours. On the other hand, several types of horizontal agreement are usually not considered to be anti-competitive, and indeed can enhance competition and economic efficiency, particularly where they facilitate innovation and the development of new markets, and provided that they contain no hidden anti-competitive elements. It is not possible to provide an exhaustive list because there is no limit to the types of agreement that can be found, detailed case-by-case analysis is unavoidable. But the Commission will start from the presumption that, in the absence of clear provisions restricting the parties' freedom to compete through the terms it offers its customers, the following types of horizontal agreement are not anti-competitive-

(a) research and development agreements;

(b) technology-sharing agreements;

(c) agreements to co-operate in developing common technical standards;

(d) some kinds of information-sharing agreements (those which do not provide a means of covert collusion); and

(e) agreements to participate in the normal activities of a trade association, including, for example, providing historic market data to share within the industry, and co-operation in generic product promotion, for example, an agreement on joint tourism promotion.

(4) Some types of agreement may appear at first sight to be clearly anti-competitive but turn out usually not to be so. The classic example is the restrictive covenant in a property sale, where the private owner of a small retail business, for example, a restaurant, is bought out under a contract which required the seller not to compete against the restaurant under its new ownership that is not to set up a similar business close by. This is reasonable from a commercial point of view: the buyer has paid for the goodwill of the business and needs some protection against losing it. But the agreement clearly restricts competition between two potential competitors. Similarly, a joint venture agreement will often contain restrictions preventing the parties from competing in

the line of business development in the joint venture. However, the Commission will often not wish to take action against such agreements, because under the contract or joint venture there may be as much competition as there would have been without it; and it would be undesirable from a wider competition policy perspective to prevent such business from changing hands or to stand in the way of successful joint ventures.

(5) This does not mean that the Commission will ignore such agreements. There may be complaints or other unforeseen reasons for concern about them and the Commission retains the option of formal investigation, where appropriate and where it has reasonable grounds for believing that there are anti-competitive effects. The Commission will clearly need to take particular care where agreements explicitly or implicitly require the parties to avoid competing in any part of their activities.

(6) To sum up on horizontal non-collusive agreements, there are some clear general principles that the Commission will follow, as set out in this section. But each case is different and, in considering how to respond to complaints, the Commission will therefore wish to take each case on its merits. Unless the available evidence suggests that the agreement leads to a specifically identifiable anti-competitive effect, the second condition of section 29 of the Act will not be met Commission will not launch an investigation.

Vertical agreements subject to investigation

12 (1) Section 2 of the Act defines a vertical agreement as-

> "an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which parties may purchase, sell or resell certain goods and services".

(2) Section 30 of the Act provides for vertical agreement to be subject to investigation-

> "if the Commission has reasonable grounds to believe that one or more of the parties to the agreement is or are in a monopoly situation that is liable to investigation by virtue of section 31 (2)".

(3) Monopoly situations are discussed in sections 13 (1) to 13 (6) of these Guidelines. For discussion of vertical agreements, the key points are that if the agreement is to be subject to investigation:

(a) one or more of the parties to the agreement must meet certain share of supply criteria (one party has thirty per cent or more; three or fewer parties have seventy per cent or more); and

(b) The Commission must have reasonable grounds to be-lieve that the enterprise or enterprises that meet those share of supply criteria are engaging in conduct that is anti-competitive.

In other words, vertical agreement are subject to investigation if the shares of the parties meet the relevant levels and if the Commission has reason to think that the relevant parties are behaving anti-competitively.

(4) Vertical agreements are by definition between enterprises at different stages of the production and distribution process. Typically, they involve networks of agreements between producers and distributors, in which the distributors are given incentives aimed at encouraging them to invest in selling the product, for example, by giving them an exclusive dealership for a geographical area but restricting them from selling outside their area. Such agreements may restrict competition between retailers in selling the goods of one manufacturer or importer ("intra-brand competition") while enhancing competition between the products of competing manufacturers or importers ("inter-brand competition").

(5) If a supplier introduces such agreement in order to increase the efficiency and vigour with his or her product is market-ed and if neither the supplier nor the distributors have significant market power, it would generally be accepted, that such agreement are not damaging to competition as a whole, even if they include requirements which clearly restrict competition between distributors. Indeed they are likely to be pro-competitive.

(6)However, where there is market power, most typically in the hands of the manufacturer or importer but also sometimes in the hands of a dominant distributor, vertical agreement may enhance that power. For example, they may raise the cost of entry for new manufacturers or importers if they include restriction on distributors' selling other brands, by making it more difficult for them to build up an adequate distribution network.

(7) May such agreement may have mixed effects, enhancing competition by strengthening distributors' performance but at the same time weakening competition by bolstering the market power of a strong manufacturer or importer. In such cases, the Commission will have no alternative but to attempt a balancing of both the benefits and the detriments to competition and an assessment of the net effect of the agreement or agreements.

(8) Networks of vertical agreements, which in some cases may extend across a major industry, may need to be examined more closely. Networks may, for example, foreclose new entrant access to a sophisticated and well-developed distribution net-work and considerably hamper new entry. They may be particularly harmful if there is a group of dominant oligopolists in the manufacturer or importer industry.

(9) One special case of a vertical agreement is resale price maintenance, where the manufacturer or importer requires the retailer to charge a given minimum price. The Act does not prohibit or make special provision for resale price maintenance. The view has been taken that, that vertical restrictions on price are no different from vertical restrictions on other aspects of retailer behaviour and that, in the absence of market power, there is no reason to treat resale price maintenance agreements differently from other vertical agreements.

Monopoly situations subject to investigation (section 31 of the Act)

13. (1) The Commission will approach the share of supply tests (thirty per cent by one enterprise or seventy per cent by three or fewer enterprises) here in the same way as elsewhere in the Act. Usually, the relevant shares will be calculated on the basis of the market defined in the way set out in sections 6 (3) to 6 (13) of these Guidelines. But there may be occasions on which the Commission will choose to focus in “goods of a particular description” where the description does not align precisely with the preferred economic definition of the relevant market.

(2) As elsewhere, it is important to understand the significance of the share of supply tests. There is no presumption that wherever the tests are met there should be an investigation. The tests simply define the circumstances in which an investigation may be considered. In many markets, shares of supply may be above the levels set by section 31 of the Act but competition may be vigorous, or potential competition by new entrants into the market may be sufficient to deter any anti-competitive behaviour by those holding large market shares. An investigation is an option only if the share tests are met and the Commission has reasonable grounds to believe that the enterprise or enterprises are engaged in anti-competitive conduct.

(3) A monopoly situation subject to investigation may arise where three or fewer enterprises together hold a seventy per cent or greater share of supply. This provision is designed to enable the Commission to tackle problems arising in oligopolistic markets where a small number of firms between them account for a large percentage of supply. Taken together, the behaviour of oligopolists may well have anti-competitive effects even though, considered separately, they may not be behaving anti-competitively and even though they may not be involved in anti-competitive agreements and concerted practices. The particular feature most distinctive of oligopolitic markets is mutual interdependence which can draw the oligopolists into a cautious lack of competitive spirit which is sometimes seen as tacit collusion. Examples where oligopolists may exploit market through higher than competitive prices are price, leadership and price parallelism, where the main enterprises’ prices tend to move closely together, whether in response to price changes by a leading firm or by parallel movements. Oligopolists, like single monopolists, may also engage in exclusionary practices, whether or not in

strict parallel, for example, by setting up exclusive distribution net-works which, taken together, may seriously limit distribution opportunities for new entrants.

(4) In some cases, there may be evidence of contacts between the oligopolists, sufficient to show that they have engaged in concerted practices, which the Act treats as agreements. In those cases, the Commission may choose to tackle the problem through the investigation of the agreement, particularly if there is evidence of a prohibited agreement. But if three or fewer enterprises account for seventy per cent of supply, and there is insufficient evidence of an agreement, the Commission has the useful additional option an investigation of a monopoly situation.

(5) If appears, following an analysis along the lines discussed in sections 6 (12) to 6(25) of these Guidelines, that the enterprise (as a single monopolist) or enterprises (as oligopolists) may have market power, then the Commission will need to consider whether they have attempted to use if for anti-competitive purposes. This will involve reviewing their market behaviour in the round, for signs of exploitative or exclusionary behaviour. on the former, the Commission may wish to look, for example, at recent pricing behaviour by the enterprise and others in the market, and the enterprise's recent profitability compared to that of similar enterprises in other competitive markets. On the latter, there is a very great variety of exclusionary behaviour which can be caught by section 31 of the Act, and list will ever be complete. But some well-known examples which the Commission will consider are-

(a) predatory pricing (or other predatory behaviour): where an enterprise with a strong market position attempts to undermine the commercial prospects of new market entrants, and to deter potential new entrants, by temporarily charging loss-making prices, to customers to whom the new entrants are aiming to sell;

(b) price discrimination: where an enterprise varies its price to customers in ways that have nothing to do with costs but which are aimed at charging the highest possible price to each customer while retaining his custom. So where the threat of competition is weakest, the price discriminator will charge the highest price, while where it is strongest it will charge the lowest;

(c) tie-in sales and bunding: where an enterprise refuses to supply, other than in groups of products (goods and goods delivery, goods and insurance, equipment and servicing contracts, finance deals and insurance). None of these are objectionable if the enterprise has no market power in the primary product market or in the 'tied-in' product market. But if it has market power, tie-ins can be used to consolidate that power and help establish a new position of market power in the tied-in market;

(d) Foreclosure: where an enterprise with market power makes a large long-term purchasing contract, going beyond normal commercial terms, for the supply of an essential input, or long-term exclusive deals with distributors, with a view to depriving its competitors of the input or raising its price to them.

(6) If the enterprise has no significant market power, attempts to gain sustained market advantage by anti-competitive conduct are unlikely to be successful. For example, an enterprise without market power may try to raise its prices above competitive levels but unless it has the necessary market power, it will simply lose custom to its competitors, or such an enterprise may require exclusive distribution of its products but no harm arise, some distributors may decide to accept exclusivity but others will not and will stock competing products.

(7) However, analysis of market power is an uncertain and imprecise procedure. If the Commission receives evidence that enterprises without apparent market power, or whose power is uncertain, are engaging in typical anti-competitive behaviour and are doing so successfully, this may be a sign that its analysis of market power is incorrect. Another possibility is that the Commission simply lacks the knowledge, in a particular case, to make a good analysis of market power. It will not on that account decline to consider complaints. It will proceed pragmatically and will be ready to consider the case with an open mind.

Offsetting public benefits

(14) (1) Section 35 of the Act requires the Commission, in cases subject to investigation where it finds that there are anti-competitive effects, to consider whether there are offsetting public benefits arising from the restrictions on competition and whether any such benefits should be taken into account in determining remedial action. Section 35 of the Act goes on to give guidance on the benefits eligible to be considered. Some kinds of potential; benefits, for example, “maintaining lower prices, higher quality or greater choice for users and consumer” will have been taken into account in our analysis of competition effects, for example, of vertical agreements.

(2) The Commission will consider the possibility of offsetting public benefits as the Act requires. The parties may naturally hope to persuade the Commission to permit their potentially anti-competitive actions by claims of offsetting benefits. The Commission will examine any such claims critically. It will accept them only if it can be shown specifically how the claimed benefits come about and that the benefits are obtainable only through the anti-competitive practice. Claims that an anti-competitive practice. Claims that an anti-competitive agreement or anti-competitive conduct will strengthen the party in question and therefore bring benefits to the national economy will not be sufficient on their own. Further, the

analysis will need to show that the possible benefits are at least as likely to come about in practice as the expected or actual anti-competitive effects.

Remedies after investigation

15 (1) Sections 50 to 55 of the Act give the Commission powers to impose and enforce remedies in cases where it has found, after investigation, that there has been an anti-competitive effect. (In certain circumstances the Commission may also take interim measures before the completion of an investigation.) The Act gives a non-exhaustive list of the kinds of requirement that the Commission may impose, that is, requirements to-

(a) terminate or amend an agreement;

(b) cease or amend a practice or course of conduct, including conduct in relation to prices;

(c) supply goods or services, or grant access to facilities;

(d) separate or divest itself of any enterprise or assets;

(e) Provide the Commission with specified information on a continuing basis.

The above list does not include financial penalties. The Commission has the option of imposing financial penalties only on parties to prohibited agreements.

(2) Remedies may be imposed by directions given to the parties by the Commission or by statutory undertaking offered by the parties to the Commission. Both directions and undertakings can be enforced through the Court.

(3) The legal and economic analysis required to determine remedies will of course depend on the facts of the case and the nature of the anti-competitive effect to be remedied. It is not possible to generalize the analysis. However, the Commission can give some guidance on its likely approach.

(4) The Commission's first objective in devising remedies is to put an end to the anti-competitive effects of the practices identified in the investigation. A second and more ambitious objective is to ensure that the enterprises concerned do not adopt new practices with the same or similar anti-competitive effects. Since market power is at the root of most anti-competitive behaviour, an attractive strategy in principle is to try to reduce or remove the enterprises' market power, whether by structural remedies. The Commission will consider both structural and behavioural remedies.

(5) Examples of structural remedies include requiring enterprises to divest themselves of businesses or other assets. Some such remedies may require only small changes, for example the divestment of one or two hotels from a large chain. Others may require radical structural change of a whole industry – an ambitious target only appropriate in the most serious of cases.

(6) All but one of the Act's list of examples in paragraph 4.31 above are behavioural remedies. It is difficult but not impossible to tackle the underlying problem of market power through behavioural remedies. The Commission's aim will be to design remedies as far as possible so that they both put a stop to the specific behaviour that has been found anti-competitive and prevent the enterprise concerned from achieving a similar result by other means. It may, for example, be possible to devise the direction or undertaking not only in terms of specific actions to be taken or stopped but also in terms of behaviour that the enterprise must avoid. Where that is not possible and there seems a danger that enterprises will find new ways of achieving the anti-competitive effects that they seek, the Commission will consider imposing reporting requirements, so that it can better monitor the enterprise's behaviour.

April 2008