

WORKING DRAFT FOR DISCUSSION PURPOSES ONLY

PROPOSED DRAFT REGULATION – REGULATION ON METHODOLOGICAL RULES FOR THE DEFINITION OF RELEVANT MARKETS AND MARKET ANALYSIS FOR THE PURPOSE OF EX ANTE REGULATION AND THE ASSESSMENT OF CONCENTRATIONS IN THE SECTOR OF ELECTRONIC COMMUNICATIONS

EXPLANATORY NOTES

This document contains a draft proposal of a regulation “On methodological rules for definition of relevant markets and market analysis for the purpose of ex ante regulation and for the assessment of concentrations of undertakings in the sector of electronic communications” (the “**Regulation**” or “**Methodology**”). The wording of the methodology is based on a proposal by the Georgian National Communications Commission (the “**GNCC**”) which has been further amended and modified to reflect EU best practices and the legislation harmonisation which is being prepared in parallel.

The Regulation is intended to apply in combination with the currently prepared harmonisation amendment of the Law of Georgia on Electronic Communications related to the transposition of the Framework Directive, Authorisation Directive, the Access Directive and the framework for assessment of concentrations of undertakings in the field of electronic communications. If the amendment is not adopted as proposed by us the Regulation shall be revised and adjusted in order to reflect the legal framework established by the law in place.

1. Introduction

1.1. Document purpose

The document ‘GEORGIA – ICT Development Market Analysis Report – November 2016’ includes among other things project plan related to the assessment of the existing and the development of the future framework for market analysis. This Regulation on methodological rules for the definition of relevant markets and market analysis for the purpose of ex ante regulation and the assessment of concentrations in the sector of electronic communications (hereinafter ‘the **Regulation**’) has been drafted based on the draft methodology provided by GNCC and is submitted in accordance with Phase 2 – „Market analysis methodology drafting” of the project plan. Draft Regulation represents an initial version of the Regulation and is based on the EU regulatory framework and relevant best practice applicable in the field of ex ante regulation and assessment of concentrations in the sector of electronic communications.

1.2. Scope of the document

This document is provided to and is capable of being relied on exclusively by GNCC and EBRD. The document may not be disclosed to, used by, or relied on by third parties without our explicit written consent, except as otherwise explicitly provided by us within the Project. Even if given, the consent will neither imply nor create any contractual relationship between third parties and us.

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We have drafted the Regulation under the EU law in the scope stipulated in the Project and based on the English translations of the relevant laws and/or other documents were provided to us by GNCC. We are not qualified to provide legal advice under Georgian law. Unless we state differently in the document, we did not take into account any other law and any other document than those provided to us by GNCC.

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2. Draft Regulation

Regulation on methodological rules for the definition of relevant markets and market analysis for the purpose of ex ante regulation and the assessment of concentrations in the sector of electronic communications

Chapter I

General Provisions

Article 1 Objectives and principles of the Regulation

1. This Regulation has been prepared in line with the Law of Georgia on Electronic Communications (hereinafter the “Electronic Communications Act”). The Regulation establishes transparent procedures and methodological rules for market definition and market analysis for the purpose of ex ante regulation and for the assessment of concentrations in the sector of electronic communications pursuant to Articles 21 – 24 and 25 - 27 of the Electronic Communications Act by the Georgian National Communications Commission (hereinafter the “Commission”).
2. When conducting the ex ante regulation and assessing concentrations, the Commission shall strive to achieve aims and objectives stipulated by the Electronic Communications Act.
3. When conducting ex ante regulation, the Commission follows these steps unless this Regulation stipulates otherwise:
 - Step 1: identification and definition of relevant retail market from product and geographical perspective and initial assessment of competitive conditions on that market with an aim to identify potential and existing competition problems; the Commission may skip this step in case of relevant markets identified in accordance with Article 3 paragraph 1 of this Regulation;
 - Step 2: identification and definition of relevant wholesale market(s) regulation of which would address the problems identified in step 1;
 - Step 3: assessment, using the three criteria test, whether the wholesale market defined in step 2 is susceptible to ex ante regulation; the Commission may skip this step pursuant to Article 3 paragraph 2 of this Regulation;
 - Step 4: market analysis and identification of authorised person/persons with significant market power;
 - Step 5: imposition of specific obligations on the authorised persons with individual or joint significant market power intended to remedy identified competition problems.

Article 2 Definition of Terms

1. Unless stipulated otherwise the terms used in this Regulation have the following meaning:
 - a) **Regulation** - this Regulation on methodological rules for determination of relevant markets and market analysis for the purpose of ex ante regulation and the assessment of concentrations¹ in the sector of electronic communications.
 - b) **Effective competition** – a situation in the relevant market where there is no authorised person which is alone or together with other authorised person or persons in a position of individual or joint significant market power.
 - c) **Ex ante regulation** – the regulation of the sector of electronic communications in accordance with the Electronic Communications Act, in particular with Articles 21 – 24. Ex ante regulation is carried out by the Commission.
 - d) **Assessment of concentrations** - the procedures carried out by the Commission in accordance Articles 25 – 27 of the Electronic Communications Act.

¹ As defined by article 25¹ of the Electronic Communications Act

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2. Unless stipulated otherwise, the terms used in this Regulation shall have the same meaning as they have in the Electronic Communications Act.

Chapter II

Identification and definition of a relevant market

Article 3 Identification of relevant markets for the purpose of ex ante regulation

1. The Commission shall issue a normative administrative act containing a list of relevant markets it identifies as potentially not effectively competitive and susceptible to ex ante regulation pursuant to Articles 21 – 24 of the Electronic Communications Act. When issuing such list, the Commission shall consider the relevant markets:
 - (i) that are subject to Commission's past ex ante regulation (i.e. relevant markets on which an authorised person with significant market power has been designated); and
 - (ii) that have been identified as susceptible to ex ante regulation in the European Union.
2. The relevant markets identified by the Commission in the list shall be defined in accordance with Article 4. Following the definition of the relevant markets included in the list, the Commission may, but is not obliged to, carry out the three criteria test on these markets in accordance with Article 5. If the Commission decides not to carry out the three criteria test on such relevant markets, these relevant markets shall be considered as susceptible to ex ante regulation and the Commission shall proceed with assessing and analysing these relevant markets in accordance with Chapter III.
3. If an authorised person or another state body request that the Commission amend the list of relevant markets, the Commission is not obliged to proceed pursuant to such request.

Article 4 Definition of relevant markets

1. Without prejudice to the identification of relevant markets pursuant to Article 3, definition of relevant market represents the first step in the process of market assessment for the purpose of ex ante regulation because an effective competition can only be assessed by reference to a defined relevant market.
2. When defining a relevant market, the Commission sets the boundaries of the market from the product and geographical point of view. When defining the product market, the Commission analyses which products and services belong to the relevant market. When defining the geographic scope of the market the Commission analyses an area in which the authorised persons concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different².
3. Relevant market should be defined on a forward-looking basis.
4. Relevant market from the product point of view shall comprise of those products and services that are sufficiently interchangeable or substitutable in terms of their objective characteristics (characteristics which make them suitable to satisfy consumers' needs, such as price, intended use, type, functionality or other characteristics) but also in terms of the conditions of competition and/or the structure of supply and demand on the market.
5. There are two main categories of markets that should be taken into consideration when defining a relevant market:
 - (i) retail market - comprises of services and facilities provided to end-users and
 - (ii) wholesale market – comprises of services and facilities provided to authorised persons who use such services or facilities to provide services to their end-users.
6. In order to reflect different needs of different end-user groups the downstream retail market(s) can be further split into market segments, such as for example market segments for residential end-users and market segment for business end-users. When justified, the Commission can

² Paragraph 56 of European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03)

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- use more granular split of the market taking into account specific needs of different types of users (for example small, medium and large enterprises). In such case, each shall be the relevant market.
7. When assessing product substitutability on a wholesale relevant market the Commission shall take into account
 - (i) substitutability of products and services on the downstream retail market(s), which comprises of products and services provided to end-users and
 - (ii) substitutability of products and services on the upstream wholesale market(s).
 8. Demand side substitutability is used to assess the extent to which customers are willing to replace the service/product in question by another service/product. Sufficient demand side substitutability may occur also between products/services of different prices and quality.
 9. When assessing the supply side substitutability the Commission shall assess whether service/product suppliers other than those currently offering the service/product in question would be able to offer the product/service in question immediately or in a short time without incurring significant additional costs. Existing legal, contractual or regulatory requirements that might postpone the market entry should also be considered.
 10. The most common tool used for assessment of the demand and supply side substitutability is the so-called 'hypothetical monopolist test' or 'SSNIP test'. Under this test the Commission assumes what would happen if there were small but significant non-transitory increase in price of the service/product (10%) above the competitive level while prices of other services/products remain unchanged. Based on expected response of consumers and suppliers the Commission determines whether substitutes for the service/product in question exist. The test analyses the consequences of the increase in price for a hypothetical monopolist who produces/supplies the service/product in question. If the increase in price of the service/product would be profitable for the hypothetical monopolist, it would mean that not enough consumers would switch to other products and/or not enough suppliers would begin to compete with the hypothetical monopolist and such product/service should be considered as not having substitutes and thus it shall constitute a separate relevant product/service market. If the increase in price would be unprofitable for the hypothetical monopolist (the profit generated by price increase would be overweight by the loss of consumer base), the market definition should be expanded to include the substitute products/services. The SSNIP test is a theoretical, conceptual instrument, which the Commission may use for the purposes of definition of relevant markets.
 11. When carrying out the SSNIP test the Commission will establish a focal product/service. Other products and services will be than tested compared to this focal product. The Commission should establish the focal product/service as the product/service in a given geographical area which has characteristics of insufficient competition. In practise, when establishing the focal product/service the Commission shall take into account the focal products considered by the European Commission as well as take into account specific situation in Georgia, for example the product or service with the highest number of subscribers or highest total revenue generated by such product. Then the Commission shall, pursuant to the results of the SSNIP test, add those additional products or areas which might represent a constraint to the price of the focal product.
 12. When defining a relevant market, the Commission may take into account switching costs; the costs that consumers would need to incur in case of switching from one product/service to its substitute. If such costs are significant to the extent that they may decrease or eliminate the demand side substitutability the analysed products shall not be included in the same relevant market. The switching costs might be related to high costs of terminal equipment or penalties imposed in case of breaking a contract with an existing provider of service/product.
 13. When determining the relevant product/service market the Commission will also consider complex issues such as:
 - (i) Bundling when the analysed products/services are supplied in bundles. In such cases, the bundled products may be considered as belonging to one relevant market although they are not substitutable among each other. The Commission analyses whether customers buy the bundles because of all or only particular products in the bundle; whether individual products are available only in bundles or also separately and what are their prices. The Commission also analyses whether increase in price of a bundle would

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- lead to switching of customers to individually supplied products in spite of demand for the whole bundle.
- (ii) Chain of substitution when two products A and B (A being the focal product) are not closely substitutable, but they may be substitutable and belong to the same market due to a third product C substitutable with both A and B³.
 - (iii) Emerging markets characterised by instability, uncertainty of supply and demand and fluctuations in market shares. In order to promote competition and innovation the Commission shall not regulate new and emerging markets. However, the Commission shall ensure that foreclosure of such markets by the leading authorised person is prevented.
 - (iv) Indirect competitive constraints which occur by the availability of platforms competing with the focal product or service⁴ on a retail level. Competing platforms will only be included in the wholesale markets if the following conditions are met: (i) access seekers would be forced to pass a hypothetical wholesale price increase onto their consumers at the retail level based on the wholesale/retail price ratio; (ii) there would be sufficient demand substitution at the retail level based on indirect constraints such as to render the wholesale price increase unprofitable; and (iii) the customers of the access seekers would not switch to a significant extent to the retail arm of the integrated hypothetical monopolist, in particular if the latter does not raise its own retail prices. When the above-mentioned criteria are fulfilled, constraints should be deemed to be strong enough so that the platform concerned is included in the market⁵. When indirect constraints are found to exist but are not strong enough to constrain the price of analysed wholesale product or the Commission does not have sufficient prove based on a qualitative and a quantitative assessment of factors including the effective pass-through from wholesale to retail prices (including an assessment of the wholesale/retail price ratio), the (in)capacity of operators to absorb wholesale price increases depending on competitive conditions at retail level, as well as the effective willingness of retail consumers to switch their operator in response to the price increase, the Commission should take indirect competitive constraints into account when assessing whether the authorised person has significant market power on the relevant market, as well as alternatively in the assessment of the appropriate specific obligations.
 - (v) Self-supply which should be considered if in the case of wholesale market defined the merchant market does not exist⁶. In such case the Commission shall analyse the wholesale market taking into account the theoretical self-supply of the relevant product that authorised person's potentially in a position of significant market power wholesale arm provides to its downstream retail arm. When considering the self-supply of authorised person's competitors, the Commission shall take into account their limitations related to network capacity, network coverage and ability to enter the wholesale market.
14. After the relevant product market has been defined the Commission shall define a geographical scope of the market in order to be able to assess whether the market is effectively competitive. Market geographic boundaries are determined by identifying constraints on behaviour (in particular on price setting) of authorised persons active on such market(s). Demand side and supply side substitution are the two main competitive constraints that should be considered when assessing the extent to which the provision of a service or the supply of a product in the given geographical area constitutes a separate geographically determined relevant market. Geographic market represents a geographic area where the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different, having particular regard to the question whether the authorised person potentially in a position of significant market

³ For example, if leased lines are considered a substitute to fixed broadband connection then frame relay service, which might be considered as a substitute to leased lines service could be considered a substitute to fixed broadband connection.

⁴ For example in case of broadband retail service provided via copper or fibre network the competing platform could be cable network providing high speed internet.

⁵ Commission Decision concerning Case UK/2014/1606: Wholesale local access market and Case UK/2014/1608: Wholesale broadband access market (Comments pursuant to Article 7(3) of Directive 2002/21/EC)

⁶ In the absence of the market regulation in the past.

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- power acts uniformly across its network area or whether it faces appreciably different conditions of competition to a degree that its activities are constrained in some areas but not in others⁷.
15. The Commission's assessment of different geographical areas shall be based on criteria such as number and size of competitors, distribution of market shares, price difference or price variations in different geographical areas, nature of demand, differences in commercial offers or marketing strategies.
 16. When defining geographic scope of the relevant market the Commission should ensure that markets are:
 - (i) of an appropriate size, i.e. small enough to avoid significant variations of competitive conditions within each unit but yet big enough to avoid a resource intensive and burdensome micro-analysis that could lead to a fragmentation of markets;
 - (ii) able to reflect the network structure of all relevant operators and
 - (iii) have clear and stable boundaries over time⁸.
 17. Unless the Commission is able to properly define geographic markets reflecting the principles described in the paragraphs of this Article, the Commission shall define the geographic scope of the relevant market as national and tackle the differences in competitive constraints in the stage of imposing geographically differentiated specific obligations on authorised person with significant market power.
 18. The starting point in the ex ante market analysis process is identification of relevant retail market using the approach defined in the previous paragraphs.
 19. After the relevant retail market has been defined the Commission shall conduct assessment of that market in order to identify whether the market is effectively competitive and whether any existing or potential competitive problems exist on that market. The assessment of the relevant retail market shall be based on criteria such as market shares of authorised persons active on the market and level of the products'/services' retail prices and quality and their evolution in time. The assessment according to this paragraph shall not entail the full market analysis in accordance with Article 6.
 20. The aim of assessment of the retail market is to identify whether the market is effectively competitive from a forward-looking perspective in the absence of regulation imposed based on finding of significant market power while taking into account the impact of regulation stemming from other types of regulation.
 21. If, based on the assessment in accordance with paragraph 19, the Commission comes to the conclusion that the relevant retail market is not effectively competitive the corresponding wholesale markets susceptible to ex ante regulation should be identified, defined and assessed. The wholesale market to be identified and analysed first is the one that is most upstream from the retail market in question in the vertical supply chain⁹ i.e. the wholesale market regulation of which would most significantly influence the development of effective competition in the relevant retail market. When identifying wholesale markets susceptible to ex ante regulation the Commission shall take into account the ladder of investment principle. When identifying wholesale markets, the Commission shall take into account the fact that some retail markets can be considered as downstream markets in relation to more than one wholesale market.
 22. If, based on the assessment in accordance with paragraph 19, the Commission comes to the conclusion that the relevant retail market is effectively competitive (in the absence of ex ante regulation of the corresponding wholesale relevant market or markets), this should lead the Commission to conclude (i) that regulation is no longer needed at wholesale level and that the

⁷ Point (7) of the Commission recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

⁸ Explanatory note dated 9 October 2014 accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

⁹ For example wholesale local access market defined by the Commission recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (hereinafter '2014 Commission recommendation') is upstream from the wholesale central access market defined by 2014 Commission recommendation and both of these markets are upstream from the retail internet access market. Termination markets are upstream of the retail mobile and fixed call markets.

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upstream wholesale relevant market or markets shall be viewed as effectively competitive, and/or (ii) that it shall not impose obligations in case the upstream wholesale market is currently not regulated.

Article 5 Three-criteria test

1. After the relevant market susceptible to ex ante regulation has been defined, the Commission shall apply the following three cumulative criteria in order to assess whether the relevant market should be subject to ex ante regulation:
 - (i) the presence of high and non-transitory structural, legal or regulatory barriers to entry – in assessing this criterion the Commission shall examine whether potential new entries will happen within sufficiently short time, whether they will be stable in time and sufficient taking into account the size of the market;
 - (ii) the market structure's tendency towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry – in assessing this criterion the Commission shall examine whether, despite the existence of entry barriers, the market tends towards effective competition thanks to presence of alternative infrastructure, innovation or excess capacity; and
 - (iii) sufficiency of competition Electronic Communications Act alone to adequately address the identified market failure(s) - in assessing this criterion the Commission shall examine whether the competition law itself is able to remedy market failure identified in the market analysis, in the absence of ex ante regulation.
2. A structural barrier to entry exists when the state of the technology and the nature of the network, with its associated cost structure, and/or the level of demand, are such that they create asymmetric conditions between operators, preventing market entry or expansion of competitors¹⁰. Structural barriers are typical in the markets characterised by absolute cost advantages, substantial economies of scale and/or scope, capacity constraints and high sunk costs. Other factors such as the minimum efficient scale of output and the proportion of sunk costs shall be taken into account. Legal or regulatory barriers such as construction permits stem from legislative or regulatory state measures that directly impact entry of potential competitors to the relevant market.
3. Markets with high entry barriers can tend towards effective competition if there is sufficient number of competing authorised persons providing or able to provide services/products that are, from customers' perspective, substitutes. A tendency towards effective competition does mean that market will become competitive within the timeframe of the market review. However, if the effective competition in the market is expected in the timeframe exceeding the market review such expectation should be based on substantiated evidence such as business plans or investments made already. The further in the future the effective competition is expected to occur the more likely it is that the market under consideration fulfils the criterion of not tending towards an effective competition.
4. While remedies stemming from competition law have generic character and are aimed to remedy a situation which occurs as a consequence of anti-competitive behaviour of an entity, remedies imposed on the basis of ex ante analysis are specifically designed to remedy competition problems that occur in the sector of electronic communications. In addition to that, market reviews conducted for the purpose of assessment by a competition law have non-recurring character while market reviews for the purpose of ex ante regulation are conducted periodically.
5. Although the three criteria test use similar indicators as used for market analysis its focus is on an overall market characteristics and structure. Finding that the relevant market fulfils the three criteria test is not sufficient to conclude whether the market is competitive or not.

¹⁰ Explanatory note dated 9 October 2014 accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

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6. A relevant market that does not meet any of the above mentioned criteria shall not be considered as susceptible to ex ante regulation. The Commission shall not designate any authorised person as having significant market power on such relevant market.
7. Wholesale market which passed the three criteria test shall be further assessed in order to identify substitutable wholesale products and its geographic scope. The result of such assessment is definition of wholesale relevant market that shall be further analysed in accordance with Chapter III.

Chapter III

Market analysis

Article 6 Market analysis

1. The purpose of market analysis is to assess whether the relevant market identified and defined in accordance with Chapter II is effectively competitive e.g. whether there are one or more authorised persons in a position of significant market power or joint significant market power.
2. In order to properly assess wholesale market included in the list of markets mentioned in Article 3 paragraph 1 on the basis of the list of markets identified by the European Commission, the Commission shall identify corresponding relevant retail market or markets targeted by regulation of the wholesale market in question.
3. When assessing significant market power, the Commission shall use combination of the following criteria:
 - (i) **market share and overall size of an authorised person** – the best indicator for assessment of the overall size of an authorised person is its market share expressed considering the revenue generated by the service/product in question and/or by number of subscribers, units of production or size of network or number of relevant network elements. In case the market share of an authorised person amounts to 50 % on the defined relevant market, the Commission shall consider the authorised person as most likely having a significant market power. In case the market share of an authorised person amounts to less than 25 %, the Commission shall consider the authorised person as most likely not having a significant market power. Beside the market share of the authorised person potentially holding a position of significant market power, the Commission shall take into account market shares of other authorised persons active in that relevant market. Evolution of market shares in time is an important indicator whether the market tends towards effective competition. Although market share represents a significant indicator when assessing presence of a significant market power the Commission shall not use it as a sole criterion.
 - (ii) **control of infrastructure not easily duplicated** – the fact that certain authorised persons have been present in the market for significantly longer period (co called ‘incumbents’) than other authorised persons or the limited availability of frequency spectrum that can be assigned only to a very few authorised persons provide these authorised persons with a competitive advantage of having extensive or even ubiquitous infrastructure available to all inhabitants or to their significant proportion. Duplication of such infrastructure is possible only in relatively long time horizon or can be duplicated only in a limited geographic scope. The Commission shall assess whether in the specific case such infrastructure can be identified and assess importance of such infrastructure for the existence of significant market power.
 - (iii) **technological advantages or superiority** – some technological advantages were achieved as a consequence of the past or present oligopolistic or even monopolistic situation. The Commission shall assess whether such advantages are present and their significance for the existence of significant market power.
 - (iv) **absence of or low countervailing buying power** – the fact that existing or potential customers do not have sufficient strength to influence a price or other parameters of the product/service in question or are not able, in the absence of regulation, to force an authorised person with potential significant market power to provide a service which is relevant for achievement of competition, represent an important factor that Commission shall take into account when assessing the competition in the market. Countervailing

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buying power is determined also by the number of suppliers providing or able to provide the product/service in question.

- (v) **easy or privileged access to capital markets/financial resources** – some authorised persons might have due to their size, type of ownership or affiliation to international group, easier access to capital (either internal or external) required for conducting necessary investments related to network upgrades or enlargement.
- (vi) **product/service diversification** – authorised persons with diversified product/service portfolio are better positioned to provide attractive product bundles that might have positive impact on their market share, might be able to leverage their market power from one market to the other or might be able to compensate losses generated in one (usually competitive) market with profits generated in other (monopolistic or oligopolistic) market.
- (vii) **economies of scale** – authorised persons providing product/service in large scales are able to achieve economies of scale as the cost of additional production unit decreases as a consequence of product related fixed costs being distributed among larger number of production units.
- (viii) **economies of scope** – have similar effect as economies of scale but the cost reduction is achieved as a consequence of fixed costs being distributed among various types of services provided over the same infrastructure or sharing the same overhead activities.
- (ix) **vertical integration** – vertically integrated authorised persons (owning their own network and providing retail services via such network) are in better position as they are independent in the provision of their services, to the extent that they are able to control the provision of services and are able to react to potential market changes.
- (x) **highly developed distribution and sales network** – authorised persons with developed distribution and sales network are in better position as they are easily accessible by their existing and potential customers. This criterion is more important in cases of retail markets assessment.
- (xi) **absence of potential competition** – compared to supply side substitution the potential competition represents those competitors who are not currently present in the relevant market but might modify their existing products, extend their product portfolio or extend geographical scope of their presence in case of small but significant non-transitory increase of price in the relevant market.
- (xii) **barriers to expansion** – highly saturated market that does not provide room for growth in the sense of customers or revenues has dissuasive effect on potential competitors and might lead to a conservation of the existing competitive situation (existing number of competitors) or might even lead to a market consolidation and deteriorate existing competitive situation.

The Commission shall use a combination of at least two criteria which are the most relevant for assessment of the competitive situation in the specific relevant market.

4. Only an authorised person may be designated by the Commission as individually holding a significant market power. The Commission may designate multiple authorised persons as having joint significant market power in accordance with the following paragraphs of this Article.
5. As per the definition of significant market power such position can be held individually or jointly. While for identification of individual significant market power it is sufficient when the Commission undertakes market analysis using the criteria stipulated by paragraph 3 of this Article, proof of joint significant market power requires more complex approach.
6. Joint significant market power can be found in the market where structural links exist between authorised persons involved. In such case the finding of joint significant market power could be based on the existence of structural links between authorised persons and assessment of any of the criteria stipulated in paragraph 3.
7. In the absence of structural or other links between authorised persons the Commission can find two or more authorised persons in a position of joint significant market power if, they operate in a market which is characterised by lack of effective competition and in which no single authorised person has significant market power. This is likely to be the case where the market is concentrated and cumulatively fulfilling all the following criteria:
 - (i) there is a possibility of reaching terms of coordination; in order to assess this criterion, the Commission shall look at the factors like

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- (a) existence of a clear focal point such as price, denial of access, service quality, market share or network investment;
 - (b) symmetry expressed by similar market shares, cost structures, capacity constraints, homogeneity of the products and vertical integration;
 - (c) no destabilizing developments identified in the form of limited growth, established authorised persons with high barriers to entry and stable market shares, as well as limited innovation;
 - (d) short term vs long term approach characterised by stable pricing in the long term.
- (ii) market participants are able to monitor deviations; in order to assess this criterion, the Commission shall look at the factors like transparency, complexity, stability and heterogeneity of market or product respectively and links (both formal and informal) between market participants
 - (iii) there is an effective deterrent mechanism in place; in order to assess this criterion, the Commission shall look at the factors like symmetry of market participants' ability to deviate from the coordinated outcome and their ability to punish the other firm(s) in case of a deviation, long term benefits of market participant achieved via deterioration from coordinated approach, time required between detection of deterioration and reaction and nature of the focal point (ability of market participants to monitor and react to the changes of the focal point), and if
 - (iv) there are insufficient reactions of outsiders; in order to assess this criterion, the Commission shall look at the factors like entry barriers, countervailing buyer power and potential competitors.
8. The Commission shall carry out market analysis on a regular basis at least within three years from the previous market analysis or in the shorter period if it has come to the Commission's knowledge that the market conditions had changed to such an extent that new market analysis is required.

Chapter IV

Identification of authorised person/persons with significant market power and imposition of specific obligations

Article 7 Designation of significant market power and imposition of specific obligations

1. If, based on market analysis according to Article 6, the Commission comes to the conclusion that the relevant market is effectively competitive i.e. no authorised person holding individually or jointly with others position of significant market power could be identified the Commission shall not impose any specific obligations and in case where specific obligations were imposed on the basis of previous market analysis, such specific obligations shall be withdrawn.
2. If, based on market analysis, the Commission comes to the conclusion that the relevant market is not effectively competitive the Commission shall designate an authorised person/persons holding individually or jointly with others position of significant market power and impose specific obligations. When multiple authorised persons are found to have significant market power, the Commission shall impose specific obligations on all such authorised persons; the type, degree and conditions of specific obligations imposed may vary according to the role and impact of the authorised person in question.
3. The Commission shall issue a normative act with results of its assessment which includes (i) definition of the relevant market, (ii) analysis of the relevant market, (iii) designation of an authorised person or persons with significant market power, if applicable, and (iv) a proposal of specific obligations. Such normative act shall be subject to public consultation pursuant to Article 9 of the Electronic Communications Act. Based on the normative act, the Commission shall issue a decision in which it imposes specific obligation(s) on the authorised person(s) with significant market power under the conditions stipulated hereunder. The Commission shall impose specific obligations in accordance with the results of the market analysis.
4. The Commission shall consider which of the following specific obligations or their combination shall be imposed in an individual case:
 - (i) transparency;

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- (ii) non-discrimination including technical¹¹ and economic¹² replicability;
 - (iii) accounting separation;
 - (iv) access to, and use of, specific network facilities;
 - (v) price control and cost accounting obligations and
 - (vi) functional separation.
5. When imposing specific obligations, the Commission shall take into account the goal and scope of the specific obligations in accordance with the Electronic Communications Act and respect the following principles:
- (i) specific obligations shall be preferably imposed on wholesale markets and only in those markets which are not effectively competitive;
 - (ii) specific obligations shall be imposed with the aim to remedy the existing or potential competition problem identified¹³;
 - (iii) specific obligations shall be proportionate to the competition problem identified¹⁴, justified and technically feasible;
 - (iv) specific obligations shall be imposed taking into account their interdependency¹⁵;
 - (v) specific obligations on retail markets shall be imposed only in cases where specific obligations imposed on wholesale markets do not result in effective competition on retail market.
6. For each of the specific obligations imposed the Commission shall specify the details necessary for their implementation and the timeframe within which the authorised person designated as having significant market power shall put the specific obligations in place. The timeframe shall reflect the balance between the necessity to establish the competitive environment in the relevant market and ability of the designated authorised person to adopt specific obligations imposed.
7. Following the imposition of specific obligations on authorised person with significant market power the Commission shall review whether the designated authorised person adopted the specific obligations imposed and whether they were adopted in the form and within the timeframe specified by the Commission.
8. When conducting repeated analysis of a relevant market the Commission shall assess the impact of the specific obligations imposed on the basis of previous market analysis on the competitive situation in the downstream retail market. When, based on the repeated market analysis, the Commission comes to the conclusion that the specific obligations imposed in the past did not lead to establishment of the competitive environment or the competition is not sufficient it shall analyse the reasons for such situation and where appropriate extend the scope of the specific obligations imposed.
9. A relevant market identified in accordance with Chapter II shall be subject to the Commission's regular market analysis in accordance with Chapter III unless the Commission proves that the relevant market does not comply with the three criteria test or the competition problems targeted by the previous regulation of that relevant market are tackled by regulation of different relevant market or markets identified in accordance with Chapter II.

¹¹ Technical replicability represents a tool that allows access seekers to effectively replicate new retail offers of the downstream retail arm of the SMP operator. Under this obligation SMP operator's retail arm and access seekers have access to the same technical and commercial information regarding the relevant regulated wholesale input and corresponding service level agreements, key performance indicators and service level guarantees are available.

¹² Economic replicability test assesses whether the margin between the retail price of the relevant retail products and the price of the relevant regulated wholesale access inputs covers the incremental downstream costs and a reasonable percentage of common costs.

¹³ Annex I provides non-exhaustive list of competition problems and corresponding specific obligations addressing these problems.

¹⁴ In cases where, based on the assessment of competition problem identified, the Commission comes to a conclusion that competition problem could be remedied by less intrusive specific obligations such as transparency and non-discrimination, use of such specific obligations shall have priority before accounting separation, price regulation, cost accounting and definitely functional separation. On the other side, when imposing the obligation of access to, and use of, specific network facilities the Commission shall take into account whether such obligation would remedy the competition problem identified without being accompanied with the obligation of price regulation or cost accounting obligation.

¹⁵ For example, obligation of non-discrimination should be accompanied by the obligation of accounting separation in order to make wholesale and internal transfer prices transparent. Similarly, obligation of non-discrimination should be accompanied by obligation of transparency in order to give wholesale customers certainty that an authorised person with significant market power does not apply inappropriate contract condition differentiation.

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Chapter V

Assessment of concentrations

Article 8 Objectives and principles specific to assessment of concentrations

1. When assessing a concentration the Commission follows these steps:
 - Step 1: assessment whether the concentration is subject to the Electronic Communications Act in accordance with Article 25¹ and Article 25² of the Electronic Communications Act;
 - Step 2: identification and definition of the relevant product and geographic market or markets affected by the concentration;
 - Step 3: assessment of market shares and concentration levels on the identified market(s);
 - Step 4: identification of the category of a concentration;
 - Step 5: assessment of impacts of the concentration on effective competition and identification of its potential anticompetitive effects;
 - Step 6: if applicable, assessment of proposals of undertakings concerned intended to eliminate concentration's significant impediment to competition (commitments).
 - Step 7: decision on the concentration (consenting, consenting with commitments or prohibiting the concentration).
2. When assessing the concentration the Commission assesses whether the proposed concentration would significantly impede effective competition in the relevant market or relevant markets affected by the concentration in the sector of electronic communications by creating or strengthening a dominant position of one or more undertakings in any relevant market.
3. Dominant position represents a position of strength affording an authorised person the power to behave to an appreciable extent independently of competitors, users and ultimately end-users.
4. When assessing concentrations the Commission aims to establish whether the concentration falls under one of the following categories or their combination:
 - (i) horizontal concentration – where undertakings concerned by the concentration are competitors, i.e. the undertakings are active in the same relevant market and/or markets,
 - (ii) vertical concentration – where undertakings concerned by the concentration are active at the different levels of supply chain of the same service/product, i.e. one undertaking provides or is able to provide a wholesale upstream product necessary for provision of other undertaking's downstream retail service/product,
 - (iii) conglomerate concentration – where relationship of undertakings concerned by the concentration is neither horizontal nor vertical, i.e. the undertakings are active in non-related relevant markets in the sector of electronic communications or one of the undertakings concerned is not an authorised person.
5. In case of a concentration that falls under more than one of the categories stipulated by paragraph 3 the Commission shall assess all potential effects (horizontal, vertical and/or conglomerate) of such concentration.
6. When assessing the effect that the concentration would have on effective competition the Commission compares the competitive conditions that are likely to occur after the concentration with the competitive conditions that are likely to occur without the concentration (competitive conditions existing at the time of the concentration). In justified cases the Commission may take into account reasonably predictable future changes to the market, such as likely entry or exit of competitors if the concentration did not take place.

Article 9 Identification and definition of relevant markets affected by a concentration

1. Identification and definition of a relevant market represents the first step in the process of a concentration assessment because competitive constraints prior to and after the concentration can only be assessed by reference to a defined relevant market(s).

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2. When identifying and defining a relevant market or relevant markets affected by the concentration the Commission identifies, beside markets subject to ex ante regulation, other relevant markets using the approach described in Article 4 paragraph 2, paragraphs 4 to 12, paragraph 13 points (i), (ii), (iv) and (v) and paragraphs 14 to 17.

Article 10 Competitive assessment of a concentration

1. When determining whether the concentration would significantly impede effective competition the Commission's analysis shall be based on an overall assessment of foreseeable impact that the concentration might have on the relevant markets identified and defined in accordance with Article 9, taking into account the following factors:
 - (i) market share,
 - (ii) concentration level,
 - (iii) possible anti-competitive effects of concentration,
 - (iv) countervailing buyer power,
 - (v) efficiencies, and
 - (vi) failing firm.

Chapter VI

Market share

Article 11 Market share

1. When assessing market shares the Commission shall use the current market shares.
2. In justified cases the market shares may be adjusted reflecting the expected entry, exit or expansion of undertakings.
3. When calculating post-concentration market shares, the pre-concentration market shares of the undertakings concerned by the concentration shall be used. Historical data on market shares' evolution provide an important input for the assessment.
4. Market share equal or higher than 50 % indicate that the existence of a dominant position is the most likely. However, even lower market shares may indicate existence of a dominant position, taking into account factors such as number of competitors, their size and ability to compete with the dominant undertaking. Under standard circumstances, market shares not exceeding 25 % indicate that the undertaking is the most likely not to be in a dominant position.

Chapter VII

Concentration level

Article 12 Concentration level

1. The concentration level and its post-concentration change provide an important indication of the competitive situation in the relevant market.
2. When assessing the concentration level the Commission uses Herfindahl-Hirshman Index (HHI)¹⁶ and its post-concentration change (delta)¹⁷ respectively.
3. In case of horizontal concentrations, under standard circumstances the following post-concentration HHI and deltas respectively do not raise competition concerns:
 - (i) HHI below 1000;
 - (ii) HHI between 1000 and 2000 with delta below 250 and
 - (iii) HHI above 2000 and delta below 150 except for the following situations:
 - (a) a concentration involves a potential entrant or a recent entrant with a small market share;
 - (b) one or more undertakings concerned by the concentration are important innovators but their innovativeness is not reflected in market shares;
 - (c) significant cross-shareholding exists among market participants;

¹⁶ HHI is calculated as a sum of squares of market shares of all competitors active in the relevant market.

¹⁷ Delta provides an information on the change of the market concentration caused directly by the concentration.

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- (d) one of the undertakings concerned by the concentration is a company with a high likelihood of disrupting coordinated conduct (a maverick firm);
 - (e) there are indications of past or ongoing coordination among market players;
 - (f) one of the undertakings concerned by the concentration has a pre-merger market share equal or higher than 50%.
4. In case of vertical and conglomerate concentrations (hereinafter “non-horizontal concentrations”), under standard circumstances it is unlikely that the concentration will raise competition concerns if post-concentration market share in each of the relevant markets affected by the concentration is below 30% and the post-concentration HHI is below 2000 unless the following factors can be identified:
- (i) a concentration involves a company that is likely to expand significantly in the near future (for example thanks to a recent innovation);
 - (ii) significant cross-shareholding or cross-directorship exist among market participants;
 - (iii) one of the undertakings concerned by the concentration is a company with a high likelihood of disrupting coordinated conduct (a maverick firm);
 - (iv) there are indications of past or ongoing coordination among market players.
5. While HHI and delta provide useful initial indication of potential competition concerns they do not, on a standalone basis, serve as a conclusive evidence of existence or absence of competition problems.

Chapter VIII

Possible anti-competitive effects of a concentration

Article 13 Possible anti-competitive effects of a concentration

1. Possible anti-competitive effects of a concentration might have a form of non-coordinated effects, coordinated effects, elimination of potential competitor(s) and creation or strengthening of the buyer power in upstream markets.
2. A horizontal concentration has a direct impact on the intensity of competition as it eliminates competition between undertakings concerned by the concentration and strengthens the market power of competing undertakings by reducing the total number of potential competitors in the relevant market (non-coordinated effects).
3. Non-horizontal concentrations do not eliminate direct competition between the undertakings concerned by the concentration in the same relevant market and any potential non-coordinated effects are likely to be related to a foreclosure or to an access to commercially sensitive information regarding rival's upstream or downstream activities.
4. Although conglomerate concentrations are less likely to significantly impact competition, they may have such an effect in specific circumstances. A conglomerate concentration may have for instance a non-coordinated effect of foreclosure through ability of the undertakings concerned by the concentration to leverage market position from one relevant market to another relevant market through tying, bundling or other exclusionary practices.

Article 14 Non-coordinated effects of a horizontal concentration

1. When assessing the potential non-coordinated effects of a horizontal concentration the Commission should assess a combination of factors such as:
 - (i) large market shares of undertakings concerned by the concentration – the larger are the market shares and post-merger market shares’ additions the higher is the probability that the concentration will lead to an increase in market power;
 - (ii) competition between undertakings concerned by the concentration – the higher is the level of substitution between the services/products produced by the undertakings concerned by the concentration and the lower is the level of substitution between the services/products of undertakings concerned by the concentration and their rivals, the higher is the probability that the concentration will significantly impede effective competition;
 - (iii) customers’ ability of switching suppliers – the lower is customers’ ability of switching a supplier either due to limited choice of alternative supplier or due to high switching costs

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- the higher is the probability that the concentration will significantly impede effective competition;
- (iv) likelihood of competitors to increase their output such as to extend their network coverage or increase capacity or improve quality of their network in case of a price increase – the lower is the competitors' ability to increase such output in the case of price increase the higher is the probability that the concentration will significantly impede effective competition;
 - (v) ability of undertakings concerned by the concentration to hinder competitors' expansion – undertakings concerned by the concentration who have control over important inputs necessary for the provision of a relevant product/service might be able to hinder expansion of existing competitors or entry of new competitors by increasing the price of the input or decreasing its quality, which in turn might impede effective competition;
 - (vi) important competitive force eliminated by concentration – a concentration may eliminate important competitive force in a concentrated market in cases where at least one undertaking concerned by the concentration is expected to exert significant competitive pressure on its rivals in the future due to its significant innovative potential or attractive product/service.

Article 15 Foreclosure effects of a vertical concentration

1. In case of a vertical concentration, the Commission should assess whether input or customer foreclosure can arise as a consequence of the concentration.
2. A vertical concentration may lead to an input foreclosure in cases where post-concentration entity would be likely to restrict access to important inputs provided to its downstream rivals by denying to provide inputs, restriction of supplies, raising prices, making conditions of supply less favourable, switching to a technology that is not compatible with the technology required by downstream rivals or degradation of quality of supplied inputs. Such input foreclosure does not need necessarily lead to forcing a rival company out of the market but might lead to increase of consumer prices.
3. When assessing the potential of an undertaking to foreclose the input the Commission should assess:
 - (i) ability to substantially foreclose access to inputs i. e. whether the undertaking's position in the supply market is significant to such an extent that by reducing access to its upstream products/services it could negatively affect the overall availability of inputs in terms of price and quality;
 - (ii) incentive to foreclose access to inputs which depend on the degree to which foreclosure would be profitable i. e. whether the impact that the foreclosure would have on the undertaking's profit generated upstream (reduction of upstream sales would result in reduction of a profit generated upstream) and profit generated by its consumers (as a result of expanding the capacity of retail sales or increased retail prices). The incentive to foreclose access to inputs depends on the extent to which downstream demand would be diverted from foreclosed rivals to the foreclosing undertaking and its ability to satisfy such increased demand, the extent to which a downstream division of the foreclosing undertaking can benefit from downstream product/service price increase caused by increase of rival undertakings' input costs and the factors that deteriorate an undertaking's incentive to anti-competitively foreclose access (such as penalties in case where a foreclosure has unlawful character); and
 - (iii) whether the foreclosure of access to inputs would have significant detrimental effect on competition downstream i. e. whether the foreclosure would lead to increased prices in the downstream market. The foreclosure would have detrimental impact on competition if the foreclosing undertaking is able to increase costs to its downstream rivals to an extent that such increase would lead to an increase of downstream rivals' retail prices or would be likely to raise barriers to entry to potential competitors. When assessing the potential detrimental effects on competition the Commission takes into account countervailing factors such as existence of buyer power, likelihood of upstream entry or existence of sufficient credible competitors who will not be affected by foreclosure of access because they do not depend on inputs provided by the foreclosing undertaking.

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4. A vertical concentration may lead to a customer foreclosure when undertakings concerned by the concentration are a supplier on an upstream market and an important customer on a downstream market. In such situation the rival in the upstream market might lose an important customer which might lead to significant reduction of product/service quantity. A reduction of a product/service quantity can materialise in higher costs of upstream input which in turn transforms into higher downstream prices of downstream rivals and consequently allows post-concentration undertaking to increase its downstream prices. It is therefore relevant to assess whether the increased input cost would lead to higher consumer prices.
5. When assessing the potential of anticompetitive customer foreclosure the Commission should assess:
 - (i) ability to foreclose access to downstream market by reducing purchases from upstream rivals which depends on economic alternatives in the downstream market for the upstream rivals to sell their products/services and on the fact whether the vertical concentration involves an undertaking with significant degree of market power in the downstream market. The negative effect of customer foreclosure increases in case of a production of upstream product for which economies of scale or scope or network effects are typical.
 - (ii) incentive to reduce purchases upstream which depends on the degree of foreclosure profitability. The costs of customer foreclosure are higher if a foreclosed rival is more efficient than the foreclosing undertaking, when a foreclosing undertaking production capacity is constrained or rival's products are more attractive. The incentive increases in situations where upstream division of foreclosing undertaking can benefit from upstream product/service price increased by foreclosed undertakings or where the foreclosure strategy would result in increased downstream prices; and
 - (iii) whether the foreclosure would have significant detrimental effect on consumers in the downstream market i. e. whether the foreclosure would lead to increased prices in the downstream market. The foreclosure would have detrimental impact on competition if it leads to increase of downstream rivals' costs to an extent that such increase would lead to an increase of downstream rivals' retail prices or would be likely to raise barriers to entry to potential competitors. This would be the case where significantly large proportion of upstream input is negatively affected by the concentration. When assessing the potential detrimental effects on competition the Commission should take into account countervailing factors such as existence of buyer power and likelihood of upstream or downstream entry.

Article 16 Foreclosure effects of a conglomerate concentration

1. In case of a conglomerate concentration when assessing the potential of an undertaking to conduct anticompetitive foreclosure the Commission should assess:
 - (i) ability to foreclose rivals using market power in one market to foreclose competitors in another market by linking products in the separate markets together (tying¹⁸ or bundling¹⁹). Undertaking's significant degree of market power in one market, perception of a specific product by many customers as particularly important, large common pool of customers and complementarity of the individual products concerned are essential prerequisites of ability to foreclose competitors. Under such circumstances decision of an undertaking with significant degree of market power in one product market (product A) to bundle or tie the complementary products (A and B) has an adverse effect on suppliers of complementary product B. Additionally, such behaviour might have deteriorative effect on potential competitors. When assessing negative effects of a concentration on the competition the Commission should take into account countervailing factors such as ability of rivals to supply a single product/service combining features of the bundled or tied products/services or ability of rivals to purchase bundled products and profitably resell them unbundled.
 - (ii) economic incentive to foreclose depends on the degree to which such strategy is profitable. On one side bundling and tying might lead to leverage of market position and increase of profit but on the other hand it might result in loss of sales in cases where customers decide

¹⁸ Tying refers to situations where customers purchasing one good are required to purchase another good from the same producer. Tying can have a form of technical tying or contractual tying.

¹⁹ Bundling refers to a way the products are offered and priced. Bundling can have a form of pure bundling and mixed bundling.

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to switch their demand to products with similar characteristics sold individually by rival undertakings; and

- (iii) whether the foreclosure would have significant detrimental effect on competition in a form of creating or maintaining a market power. Foreclosure that affects large proportion of the market deters entry of potential competitors either by reducing sales prospects or making their entry more costly as an efficient competitor would need to enter both markets affected by bundling or tying at the same time. When considering anti-competitive effects of a concentration the Commission should assess whether there are effective single-product players in both markets and take into account countervailing factors such as countervailing buyer power or potential market entry.

Article 17 Coordinated effects of concentrations

1. Potential anti-competitive effect of concentrations may have form of coordinated effect i. e. an increased likelihood of coordination between competitors without entering into an agreement or conducting a concerted practice (coordinated effects).
2. When assessing the potential increased likelihood of coordination effects of the concentration the Commission should assess the changes caused by the concentration and the impact of those changes on the ability of market participants to coordinate their behaviour.
3. For a concentration to increase likelihood of coordination between market participants, the conditions stipulated by Article 5 paragraph 7 of this Regulation shall be assessed in the relevant market.

Article 18 Concentration with a potential competitor

1. A horizontal concentration with a potential competitor might have significant anti-competitive effects if the following two conditions are fulfilled:
 - (i) the potential competitor already exerts a significant constraining influence or it is very likely that the potential competitor would become an effective competitive force; and
 - (ii) there is not sufficient number of other potential competitors able to exert sufficient competitive pressure after the merger.

Article 19 Creation or strengthening buyer power in upstream markets

1. A horizontal concentration might have significant anticompetitive effects if it leads to creation or strengthening of buyer power in the upstream market.
2. Anticompetitive effects of strengthened buyer power might have a form of:
 - (i) reduced output such as service speed reduction or reduction of number of bundled minutes, SMS or data in cases where a post-concentration undertaking obtains lower input prices by reducing its purchase of inputs (this is likely in cases where supply market is fragmented); and/or
 - (ii) the foreclosure of rival companies when buyer power is used towards suppliers.
3. The potential of strengthening of buyer power depends on the competitive situation in the upstream markets.

Chapter IX

Article 20 Countervailing buyer power

1. Countervailing buyer power shall be also taken into account when assessing the potential of a concentration to significantly impede effective competition.
2. Countervailing buyer power has a potential to eliminate the anticompetitive impact of a concentration if:
 - (i) a customer is able to switch from one supplier to another one within a reasonable time period;
 - (ii) an authorised person (acting as a customer), is able to vertically integrate into the upstream market;

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- (iii) a customer is strong enough that it would be able to persuade a potential competitor to enter the relevant market and provide supplies to that customer;
 - (iv) a customer would refuse to buy other products from the supplier; and/or
 - (v) in case of products with long lifetime a customer would delay a purchase of the products.
3. When assessing the countervailing buyer power the Commission also needs to consider whether the countervailing buyer power remains effective after the concentration and is not limited only to a particular segment of customers.

Chapter X

Article 21 Entry

1. Potential of a concentration to significantly impede effective competition is lower where barriers to enter the relevant market are low.
2. Barriers to entry include legal or regulatory barriers, technical advantages, structural barriers (economies of scale and scope, access to distribution and sales network) and technological barriers (access to important technologies).
3. The probability of market entry is higher in the markets where significant growth is expected or in the markets where an entry from a related market might be expected.
4. When assessing the probability of entry, the Commission shall take into account also the timeliness (usually an entry that is expected in no more than two year period should be considered timely) and scope and magnitude of the entry.

Chapter XI

Article 22 Efficiencies

1. Potential negative effects of a concentration can be compensated by efficiencies brought about by the concentration.
2. Efficiencies can be taken into account as compensating the negative effects of a concentration if the following cumulative conditions are met and evidenced by the undertakings involved in the concentration:
 - (i) efficiencies bring benefits to end users – benefits to end users can have a form of a reduced price or of new or improved products/services. The benefits should be substantial and timely and should benefit end users on those relevant markets where it is otherwise likely that competition concerns would arise;
 - (ii) efficiencies are concentration specific – efficiencies should be a direct consequence of a concentration and it is not possible that they can be achieved by less anti-competitive alternative to the concentration; and
 - (iii) efficiencies are verifiable – the undertakings concerned by the concentration shall provide sufficient evidence that the efficiencies are likely to materialise and are sufficiently substantial to counteract a concentration's potential harm to consumers.

Chapter XI

Article 23 Failing firm

1. The Commission may decide to approve a problematic concentration if one of the undertakings concerned by the concentration is a failing authorised person. Such concentration can be approved if the competitive structure of the market would deteriorate to at least the same extent in the absence of the concentration.
2. For the failing firm principle assessment of the following three criteria is relevant:
 - (i) the failing authorised person concerned by the concentration would be forced out of the market due to financial difficulties if not acquired by another undertaking;
 - (ii) no less anti-competitive purchase alternative exists except for the concentration,
 - (iii) in the absence of a concentration the assets of the failing authorised person would inevitably exit the market.

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Chapter XII

Article 24 Remedies

1. The purpose of the remedies is to prevent a concentration from causing significant impediments to effective competition identified by the Commission.
2. The Commission may accept only commitments that will prevent a concentration from causing a significant impediment of effective competition. The commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.
3. The remedies intended to eliminate a significant impediment of effective competition caused by a concentration and suggested time-period for their implementation shall be proposed by the undertakings concerned in a form of commitments.
4. In order to provide undertakings concerned with an opportunity to propose appropriate and corresponding remedies the Commission shall inform them about the substantiated findings related to potential anticompetitive effects of the concentration and identified within the assessment of the concentration by the Commission.
5. The commitments shall be accompanied by all relevant information allowing the Commission to assess whether the proposed commitments would entirely eliminate the competition concerns communicated by the Commission's. The relevant information shall include the content of the commitments offered, the conditions for their implementation and evidence of their suitability to remove any significant impediment of effective competition.
6. When the Commission issues a decision consenting to the concentration based on the commitments proposed by the undertakings it may, if applicable, establish an effective mechanism for monitoring the compliance with the commitments proposed by undertakings.
7. The Commission may reject remedies that are complex and comprehensive to the extent that it is impossible for the Commission to assess whether the remedies will be fully implemented in the required time period and whether they are capable of maintaining effective competition in the market.
8. To prevent a concentration from causing significant impediments to effective competition undertakings concerned can suggest the following remedies:
 - (i) Divestiture of a business to a suitable purchaser with an aim to create conditions for emergence of the new competitor or strengthening the position of the existing competitors. The divested activity must be able to act independently from the merged entity as its efficient competitor;
 - (ii) Removal of links with competitors that might have a form of divestiture of shareholding in other competitors or termination of agreements with companies active in the same market(s).
 - (iii) Other remedies; these can be accepted by the Commission only if they have at least the effects similar to divestiture. Such remedies can have a form of, e.g.:
 - (a) Access remedies – granting an access to essential network facilities, technology or intellectual property rights under non-discriminatory and transparent conditions;
 - (b) Change of long-term exclusive contracts – change of contracts' conditions that might prevent competitors from getting access to consumers or suppliers (minimum contract durations with subscribers exceeding 24 months or exclusive contracts with equipment vendors);
 - (c) Other remedies such as promise to refrain from certain behaviour – these should be assessed mainly from the perspective of the Commission's ability to monitor compliance with such remedy.

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Annex I

List of competition problems and potentially suitable specific obligations to remedy these problems

Potential competition problem identified	Specific obligation intended to remedy the competition problem
Denial of access	Access obligation Non-discrimination
Denial to negotiate	Transparency such as obligation to publish reference interconnection offer Access obligation
Discriminatory access to information	Transparency such as obligation to publish reference interconnection offer Non-discrimination
Delaying tactics	Transparency such as obligation to publish reference interconnection offer Access obligation Clearly set timeframes for: <ul style="list-style-type: none"> • publication of information • reaction to other authorised persons' request for negotiation • submission of the dispute to the Commission
Unreasonable bundling of products	Obligation of access to unbundled products Accounting separation
Disproportional conditions	Non-discrimination Accounting separation
Price discrimination	Non-discrimination Transparency Accounting separation
Cross subsidisation	Non-discrimination Accounting separation
Predatory pricing	Non-discrimination Transparency Accounting separation Cost orientation and cost accounting Price control
Excessive pricing	Non-discrimination Transparency Accounting separation Cost orientation and cost accounting Price control

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The following sources have been used for the purpose of drafting this Regulation:

- *Directive 2002/19/EC of the European parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) as amended by Directive 2009/140/EC*
- *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03);*
- *Commission recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (notified under document number C(2007) 5406) (2007/879/EC);*
- *Explanatory note dated 13 November 2007 accompanying the document Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (C(2007) 5406);*
- *Commission recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2014/710/EU);*
- *Explanatory note dated 9 October 2014 accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services;*
- *BEREC Common Position on geographical aspects of market analysis (definition and remedies) BoR (14) 73 issued 5 June 2014;*
- *BEREC Report on Oligopoly analysis and regulation BoR (15) 195 issued in December 2015*
- *Report on Future electronic communications markets subject to ex ante regulation dated 18 September 2013;*
- *European commission decisions pursuant to Article 7 and Article 7a of the [Electronic Communications Framework Directive - 2002/21/EC](#) concerning the following cases:*
 - *UK-2014-1606_1608,*
 - *AT-2013-1475-1476,*
 - *UK-2016-1913*
 - *[SK/2016/1906-1907-1908.](#)*
- *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C31/03);*
- *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C265/07);*
- *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C267/01).*

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