



ECONOMIC CONCENTRATION REVIEW GUIDELINES

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Only the Arabic version of this document is authentic.

Section 1

Introduction

About these guidelines

These Guidelines contain clarifications provided by the General Authority for Competition to present its interpretation of the criteria for reporting economic concentrations, raising the level of transparency and enabling establishments and individuals to follow the best methods in understanding and applying the competition system issued by Royal Decree No. (M/75) dated 06/1440 /29 AH and its Implementing Regulations issued by the decision of the Board of Directors of the General Authority for Competition No. (337) dated 01/25/1441 AH.

The purpose of these guidelines:

- Raising the level of transparency and providing guidelines, to contribute to creating a competitive business environment that attracts investments, enhance the availability of high-quality commodities at diversified prices, and stimulate innovation and development to support economic growth.
- Helping stakeholders—including companies, government agencies, legal professionals, legal advisors, and the general public—to understand the rules of competition in screening and evaluating economic concentration deals.

These guidelines

These Guidelines form part of the advice and information published by the General Authority for Competition (the “**GAC**” or the “**Authority**”) of the Kingdom of Saudi Arabia (the “**Kingdom**” or the “**KSA**”) in its enforcement of the competition laws of the Kingdom.

The competition laws promote competition in markets for the long-term benefit of consumers in the Kingdom. One of the ways the laws do this is by controlling what types of mergers, acquisitions, and other similar transactions (“**economic concentrations**”) are allowed to take place. Many economic concentrations cause no competition concerns and can bring positive benefits to the Saudi economy by making it possible for firms to be more efficient and innovative. However, some economic concentrations may harm competition in ways that harms consumers, for instance by increasing the merged firm’s market power which could result in higher prices, reduced choice or quality for customers, or other types of harm.

Economic concentrations must in principle be notified to the GAC under the competition laws. The GAC is empowered to approve the economic concentration, block the economic concentration, or approve it subject to certain conditions, on the basis of the impact of the economic concentration on competition in a relevant market. The GAC will ordinarily clear a transaction if it is satisfied that the transaction would not be likely to substantially lessen competition in a market in the Kingdom. However, if the GAC has concerns that a transaction may substantially lessen competition in a market in the Kingdom, the GAC may block the transaction or require conditions for the transaction to proceed.

The Parties should note that any Approval or Conditional Approval is valid only for a limited period of one (1) calendar year. The period can be extended if the parties wish to do so, and they must provide justifications for the extension request.

These Guidelines are intended to assist stakeholders, including companies, other government agencies, legal practitioners, consultants, and the general public to understand the competition laws and how the GAC will apply them. They explain:

- How the GAC assesses whether an economic concentration must be notified to the GAC;
- How parties must notify economic concentrations; and
- How the GAC assesses whether an economic concentration would be likely to substantially lessen competition in a market.

The structure of these Guidelines

These Guidelines are structured as follows:

- Section 1 of these Guidelines contains the introduction;
- Section 2 of these Guidelines outline the relevant sources of law;
- Section 3 outlines the circumstances in which an economic concentration transaction must be notified to the GAC;
- Section 4 describes in detail the jurisdiction of the Law over economic concentrations for the purposes of determining whether a transaction falls within that jurisdiction and therefore may be notifiable;
- Section 5 describes in detail what is an economic concentration;
- Section 6 describes in detail the notification thresholds above which an economic concentration may be notifiable;
- Section 7 describes in detail the process the economic transaction parties should follow to notify a transaction when the transaction is notifiable;
- Section 8 describes the “competition test” that the GAC will apply in assessing whether or not an economic concentration may be anti-competitive and thereby in violation of the law;
- Section 9 describes the principles and process the GAC will follow in defining relevant markets for the purposes of its competition analysis;
- Section 10 describes the principles and process the GAC will follow in carrying out its competition assessment to determine whether the transaction may be anti-competitive; and
- Section 11 describes the principles and processes of determining competition remedies in individual cases where a transaction may raise competition concerns but appropriate remedies may allow the transaction to proceed subject to conditions rather than being blocked.

The Guidelines provide a number of hypothetical examples throughout. The GAC notes that these hypothetical examples are provided for illustrative purposes only and have no legally binding effect. The GAC’s analysis of each economic concentration will depend on the specific facts of the actual case.

Section 2

The Laws on Mergers

The legal framework

The GAC has the legal authority to review Economic Concentrations according to the laws of the Kingdom of Saudi Arabia.

The law governing the control of Economic Concentrations is the Competition Law, promulgated under Royal Decree No. (M/75) dated 29/06/1440H (the “**Law**”). Pursuant to Article 26 of the Law, this law replaced the previous competition law that had been promulgated under Royal Decree No. (M / 25) dated 4/5/1425H.

The Law is supplemented by the Implementing Regulations of the Competition Law (the “**Regulations**”), issued by the Board of Directors of the General Authority for Competition under its Resolution No. (337) dated 25/1/1441H approving the Implementing Regulations of the Competition Law, pursuant to Article 27 of the Law.

The following terms and expressions - wherever they are mentioned in these guidelines - shall have the meanings as defined in the Law and Regulations. For easy of reference these are repeated below. Note that the wording of some definitions is changed to increase clarity however without changing the meaning of the definitions originally provided in the Law or the Regulations.

Kingdom	The Kingdom of Saudi Arabia.
Law	The Competition Law. ^{[P] [SEP]}
Regulations	The Implementing Regulations of the Law.
Guidelines	Economic Concentration Review Guidelines
GAC	The General Authority for Competition.
The Authority	The General Authority for Competition.
Statute	GAC's Statute.
Board	GAC's Board of Directors. ^{[P] [SEP]}
Chairman	The Chairman of the Board.
Governor	GAC's Governor. ^{[P] [SEP]}
Commodity	Any product or service or a combination thereof.
Undertaking	Any natural or corporate person engaged in an economic activity.
Economic Activity	An activity involving production, distribution, purchase, or sale of Commodities. It includes any commercial, agricultural, industrial, service, or professional activity.
Entity	A corporate person; whether it consists of one firm or a number of firms that report to one management or have one owner.
Market	A place or means wherein a group of current and prospective buyers and sellers meet within a specified period of time.
Relevant Market	A market that comprises the following two elements: A. Relevant commodities that are interchangeable – for a particular purpose – with respect to the consumer; and ^{[P] [SEP]} B. A Geographic area where the conditions of competition are the same.



Dominant Position	A situation where a firm - or a group of firms - controls a certain percentage of the relevant market in which it operates or on which it has influence, or both.
Economic Concentration	Any action that results in a total or partial transfer of ownership of assets, rights, shares, or liabilities of a firm to another entity by way of merger, acquisition or the creation of a full function joint venture or any other form that leads to the control of a firm(s) including influencing its decision, the organization of its administrative structure, or its voting system.
Economic Concentration Parties	Firms engaged - or seeking to engage - in an economic concentration transaction, whether or not they have applied for approval to complete the economic concentration. ^[P] _[SEP]
Exemption	The power of the Board not to apply any of the provisions of Articles 5, 6, & 7 of the Law to a firm, in accordance with the Regulations and the procedures approved by the Board.

The key provisions applying to Economic Concentrations

The provisions of the Law and the Regulations most relevant to the GAC's review of Economic Concentrations include, but are not limited to, the following:

- Article 1 of the Law and Article 1 of the Regulations provide definitions of relevant terms. The terms relevant for Economic Concentrations include: Economic Concentration, Economic Concentration Parties, Undertaking, Market, Relevant Market, and Dominant Position. Dominance is further defined in Article 10 of the Regulations.
- Article 2 of the Law and Article 2 of the Regulations provide the objectives of the Law.
- Article 3 of the Law and Articles 3 and 5 of the Regulations provide for the jurisdiction of the Law over undertakings and practices.
- Article 3 of the Law and Article 4 of the Regulations provide for certain wholly State-owned establishments or companies which are solely authorized by the Government to provide a product or service (or any combination thereof) in a particular field to be exempt from the Law in relation to that field.
- Article 7 of the Law provides for the timing with which companies seeking to participate in an economic concentration transaction must notify the GAC in advance of completion if their total annual sales value exceeds certain thresholds. The notification thresholds are specified in Article 12 of the Regulations.
- Article 9 of the Law provides that the Regulation will specify the notification procedures for Economic Concentrations, and Articles 14 to 18 of the Regulations specify those notification procedures.
- Article 22 of the Regulations provides the objectives the GAC will pursue in assessing Economic Concentration Transactions and the factors the GAC will consider in its assessment.

- Article 10 of the Law provides for the decisions that the GAC may make in relation to a duly notified Economic Concentration transaction, and Articles outlines 23 to 25 of the Regulations provide the procedure to be followed in relation to GAC decisions.
- Article 11 provides that the undertakings participating in the Economic Concentration transaction may not complete the transaction unless notified by GAC of GAC's approval in writing, or if ninety (90) days have passed since notification without appropriate notification from the GAC.
- Article 8 of the Law and Article 26 of the Regulations provide for the circumstances in which the Board may, upon request of the undertaking and recommendation of a technical committee, the exempt an undertaking from the application of certain rules of the Law. Articles 27 to 31 of the Regulations provide the procedures to be followed in relation to an exemption application.
- Article 19 of the Law provides for the fines applying to certain violations of the Law, and Article 21 of the Law provides for other measures that the Board may take in case of a violation of the Law. Articles 22 to 25 of the Law and Articles 45 to 53 of the Regulations provide for additional considerations and procedures in the application of such penalties and measures.

The role of these guidelines:

These guidelines specify how the Authority will implement the rules governing the control of economic concentrations and the general approach to the Authority's control and its enforcement in accordance with the Law and Regulations. The instructions described in this manual are not a substitute for the rules and regulations, and therefore it is recommended that you read these instructions in addition to the rules and regulations

Section 3

When must an economic concentration be notified to the GAC?

The Competition Law and the Implementing Regulations

An economic concentration must be notified to the GAC if the transaction falls under Article 7 of the Competition Law, which provides that:

Undertakings seeking to participate in an economic concentration transaction must inform GAC at least ninety (90) days before completion if the total annual sales value of the undertakings seeking to participate in the economic concentration exceeds the amount determined by the Regulations.

Article 1 of the Competition Law defines an “Economic Concentration” as follows:

Economic Concentration: Any act that results in the total or partial transfer of ownership of assets, rights, equity, shares, or obligations of an undertaking to another, or the joining of two or more administrations in a joint administration, in accordance with the rules and standards set by the Regulations.

This definition is supplemented by Article 1 of the Implementing Regulations which further defines an “Economic Concentration” as follows”

Economic Concentration: Any action that results in a total or partial transfer of ownership of assets, rights, equity, stocks, shares, or liabilities of an undertaking to another by way of merger, acquisition, takeover, or the joining of two or more managements in a joint management, or any other form that leads to the control of an undertaking(s) including influencing its decision, the organization of its administrative structure, or its voting system.

Article 1 of the Competition Law defines an “Undertaking” as follows:

Undertaking: Any natural or corporate person engaged in an economic activity. Such activity includes: Business, agricultural, industrial and service activities as well as purchase and sale of goods and services.

Criteria for notification

Following from the Competition Law, an economic concentration transaction must generally be notified to the GAC if it meets the following criteria:

1. The transaction is an “economic concentration” within the meaning of the Competition Law;
2. The economic concentration has sufficient connection to the Kingdom so that the GAC has jurisdiction over the transaction; and
3. The total annual sales value of the undertakings seeking to participate exceeds the amount specified in the Implementing Regulations.
 - The Competition Law applies to all undertakings engaged in economic activity.
 - Section 5 of these Guidelines explains in detail what is meant by an “undertaking”.
 - Section 5 of these Guidelines explains in detail what is mean by “economic activity”.
 - The economic concentration provisions apply to an “economic concentration” as this is defined in the Competition Law.
 - An “economic concentration” takes place where there is both:
 - (1) Transfer of ownership of a type specified in the definition or a joining of two or more managements, and
 - (2) Change of control of one or more undertakings.

- Section 5 of these Guidelines explains in detail what is meant by an “economic concentration”.
- Section 5 of these Guidelines explains in detail what is meant by “control” and a “change of control”.
- Section 5 of these Guidelines explains in detail how the economic concentration provisions apply to certain joint ventures.
- The Competition Law applies to behavior, including economic transactions, which has a sufficient connection or “nexus” to the Kingdom.
- Section 4 of these Guidelines explains in detail the circumstances in which there is a sufficient nexus to the Kingdom.
- The Competition Law exempts behavior, including economic concentrations, from the law under certain circumstances.
- Section 4 of these Guidelines explains in detail the circumstances in which economic concentrations may be exempt from notification.
- An economic concentration that otherwise comes under the Competition Law must be notified if the total annual sales of the participating undertakings exceeds a certain threshold.
- Section 6 of these Guidelines explains in detail how the notification thresholds will be assessed.
- Section 3 provides a summary flow chart outlining how it will generally be determined whether a transaction is notifiable.

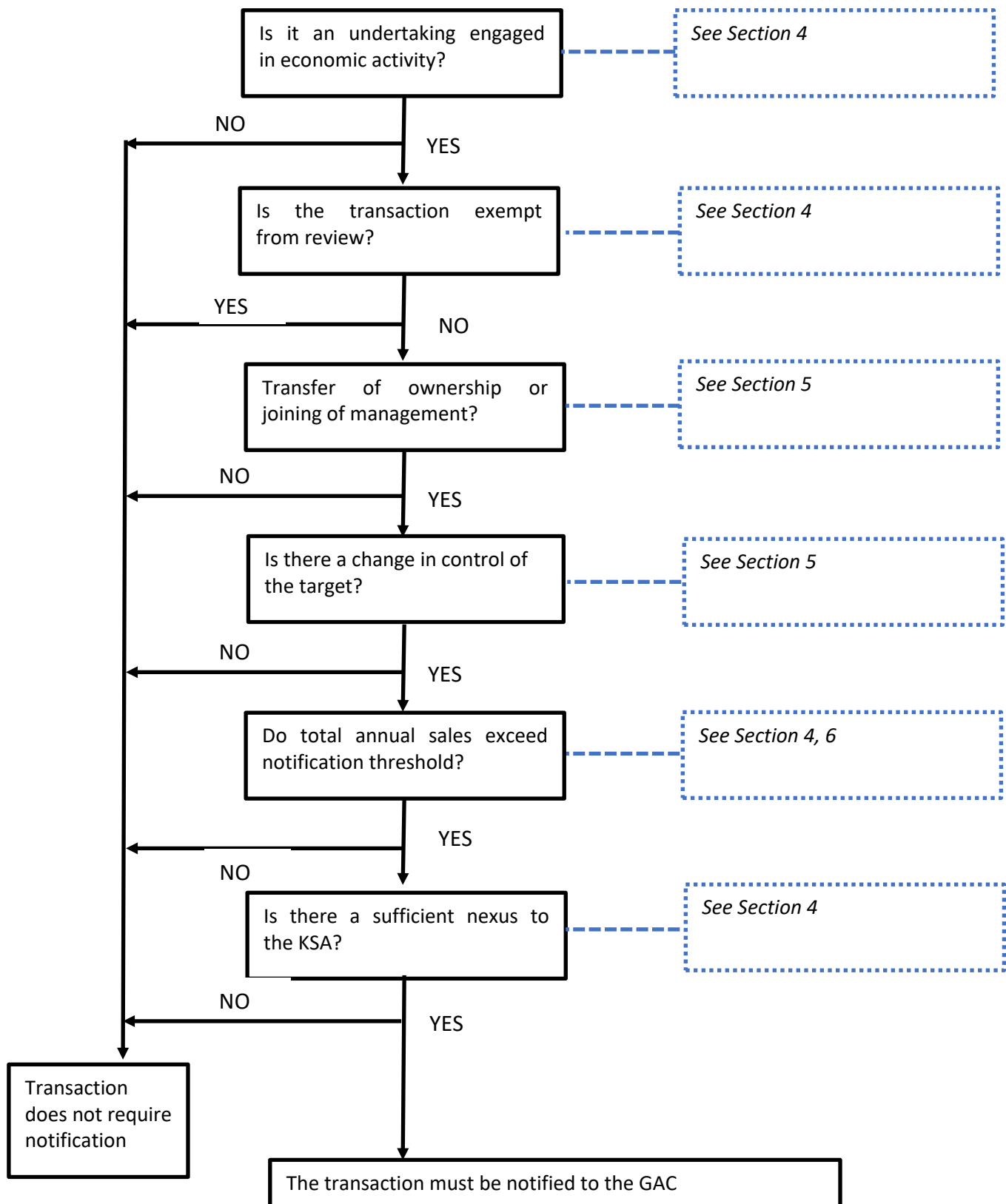
Notification is compulsory

The GAC must be notified of any economic concentration that meets the criteria in the Law and the Regulations, and explanations provided in the Guidelines.

Therefore, it is a violation of the Competition Law for the transaction that meets the criteria listed above to be completed unless the Economic Concentration Parties have received the GAC’s approval in writing or if ninety (90) days have passed since notification without appropriate notification from the GAC.

Article 19 of the Competition Law provides for the penalties that may be applicable in case of a violation of this rule.

Summary chart



Section 4

The Authority's jurisdiction over Economic Concentrations

The Competition Law and the Implementing Regulations

Article 3 of the Competition Law explains the jurisdiction of the GAC under the Competition Law as follows:

“Article 3:

1. Without prejudice to the provisions of other laws, the provisions of the Law shall apply to the following:
 - a. All undertakings within the Kingdom.
 - b. Practices occurring outside the Kingdom that have an adverse effect on fair competition within the Kingdom, in accordance with the provisions of the Law.
2. Public establishments and state-owned companies shall be excluded from paragraph (1) of this Article if such establishments or companies are solely authorized by the Government to provide goods or services in a particular field.
3. In the application of the provisions of the Law, GAC shall have inherent jurisdiction over any matters arising therefrom, which may be inconsistent or overlap with the jurisdictions of other governmental bodies.

The Regulations shall specify the controls to be observed in the application of this Article.”

Article 1 of the Competition Law defines an “undertaking” within the meaning of the Competition Law as follows:

“Undertaking: Any natural or corporate person engaged in an economic activity. Such activity includes: Business, agricultural, industrial and service activities as well as purchase and sale of goods and services.”

The jurisdiction of the GAC under the Competition Law is further explained in Articles 3 and 4 of the Implementing Regulations, which provide that:

“Article 3:

The provisions of the Law and the Regulations shall apply to:

1. all undertakings within the Kingdom, which include:
 - a. establishments and companies engaged in economic activities, whatever their legal forms, nationalities, and ownership; whether their license to practice the activity is still valid or otherwise; and whether they practice the licensed activity or a different one;
 - b. an individual engaged in economic activity whether or not he is licensed to practice his activity;
 - c. all forms of entities and groupings when engaged in economic activities; and
 - d. electronic platforms and application, whether or not they are licensed to practice its activity; and
2. behaviors and practices occurring outside the Kingdom when they have impact on domestic competition. In such cases, GAC may:
 - a. assess the impact on competition within the Kingdom, whether the impact is existent or potential;
 - b. take necessary measures and procedures or request the competent authorities to implement the same in order to stop or mitigate the impact of behaviors and practices occurring outside the Kingdom that have an adverse effect on competition within the Kingdom.

Article 4:

1. A wholly owned State establishment or company shall be exempted from the Law and the Regulations if it is solely authorized by the Government to provide a product or service in a particular field. Such exception shall be effective only by a royal order or decree, a Council of Ministers' resolution, or a high order exclusively authorizing such establishment or company thereto. The provisions of the Law and the Regulations shall apply in fields other than the one in which it is solely authorized to provide the product or service.
2. The exclusion indicated in paragraph (1) of this Article shall not preclude the enforcement of the provisions of the Law and the Regulations against an unexempted firm in cases where it participates with an exempted firm in violating the provisions of Article 5 of the Law.
3. The provisions for reporting an economic concentration contained in the Law and the Regulations shall not apply to the parties intending to engage therein in cases where the acquiring party – or the like – is excluded under paragraph 1 of this Article.

To which entities and persons does the law apply?

The Competition Law, including the rules regarding the control of economic concentrations, applies to any undertaking, regardless of its legal form or the way in which it is financed, engaged in economic activity. These Guidelines use the term “undertaking” to describe such economic entities in accordance with the definition contained in Article 1 of the Competition Law. In this way, the term “undertaking” as it used in these Guidelines is a broader concept than the term “company”, as it includes companies but also includes all other forms of entities engaged in economic activity. In particular, but without limitation, the Implementing Regulations provide that the Competition Law applies to:

- all establishments and companies engaged in economic activity, irrespective of their legal forms, nationalities (place of incorporation and/or residence), irrespective of the type of economic activity in which they are engaged, and irrespective of their licensing requirements and status;
- all individuals engaged in economic activity, irrespective of their licensing requirements and status;
- all forms of entities and groupings engaged in economic activity; and
- all electronic platforms and software applications, irrespective of their licensing requirements and status.

The Competition Law is therefore of very wide application. The application of the Competition Law does not depend on the formal legal structure of an undertaking, or whether a license is required or is held by the undertaking. The Competition Law applies to all undertakings engaged in economic activity, irrespective of their legal form.

Hypothetical Example 1

Mr. Mohammed and Mr. Hussain are both air conditioning specialists who work as sub-contractors on small housing construction projects in the same part of Jeddah. They are both very good at what they do and highly respected. They also compete with each other fiercely for new projects. Neither of the gentlemen has established a legal company or other entity: both work as sole traders, as natural persons under their own names.

One weekend, the two gentlemen meet at a coffee shop. Mr. Mohammed tells Mr. Hussain that they ought to increase their prices and stop competing so hard. Mr. Hussain mentions something about a new competition law, enforced on the 25th of September 2019, and says that it might be illegal for them to agree not to compete. Mr. Mohammed replies that they don't have to worry, as they don't have companies and so the law doesn't apply.

Mr. Mohammed is wrong and Mr. Hussain is correct. The Competition Law applies to all forms of undertakings (as defined widely under the Competition Law), irrespective of the legal form of the undertaking, and including individuals engaged in economic activity whether or not they are licensed to practice their economic activity. Both Mr. Mohammed and Mr. Hussain are engaged in economic activity, which means that their discussions about their business activities will generally fall under the Competition Law. Mr. Mohammed is suggesting an agreement between competitors that may be anti-competitive and thereby may be contrary to the law. The fact that they are both engaged in economic activity as natural persons, rather than as companies, does not alter the extent to which they are both subject to the Competition Law.

Engaged in “economic activities”

The key concept in determining whether or not the Competition Law applies is whether or not the undertaking is engaged in economic activity. The GAC considers that “economic activity” is a wide concept and refers to any activity consisting of offering products or services in a market. It is not necessary that the activity earn a profit or be intended to earn a profit; this means that charities or other not-for-profit entities offering products or services in a market are in principle subject to the Competition Law. It is also not necessary that the undertaking charges a price for the specific product or service being offered; this means that when a product or service is offered in a market, even it is offered for free (e.g. by a charity), the activity is in principle subject to the Competition Law.

An undertaking may be engaged in economic activities for certain of its activities, but not be engaged in economic activities for other of its activities. The undertaking is subject to the Competition Law in relation to all of its economic activities.

Hypothetical Example 2

Hyper Co is a supermarket in an area of Hail. The store manager has the long-standing practice of rewarding his regular customers by giving a free 24-pack of bottled water upon request to every customer who has had a store loyalty card for over 12 months. ^[LSEP] There is no suggestion that the store manager is doing anything contrary to the Competition Law by giving his regular

customers water. However, the fact that he is giving the water away for free does not mean that the practice is not subject to the Competition Law. There is a market for bottled water, because people routinely buy and sell bottled water. The store manager is offering bottled water into that market, even if he is giving it away for free on occasion. The store manager is therefore engaged in economic activities when giving away the water. There is no reason to believe that an anti-competitive effect would result in this case, but the mere fact that the store manager is giving away the water does not mean that the conduct is not covered by the Competition Law.

The GAC considers that an individual offering products or services as a supplier in a market is engaged in economic activities within the meaning of the Competition Law to the extent that the activities are material. The activities are material if the person structurally offers the products or services and if the person invests a significant amount of time, capital or other resources. For example, a person incidentally offering to bring a neighbor to a hospital against a small compensation covering fuel costs is not considered an undertaking. However, the GAC also considers that a final consumer acting in his or her capacity as a final consumer of goods or services is not engaged in economic activities and is therefore not subject to the Competition Law in relation to his or her activities as a final consumer. However, it should be noted that a final consumer may nevertheless file a complaint to the GAC about the conduct of a firm that may have committed a violation of the Competition Law.

Hypothetical Example 3

Mr. Mohammed is a builder of individual houses operating in the Hail region as a sole trader. During the day, he engages in a range of different activities, including construction work, buying building supplies, hiring contract workers to help him in with his construction projects, and obtaining payment from his clients. In the evening, on his way home to his family, he stops at the local hardware store to buy a new sink to install in the kitchen at his home. He then also stops at the supermarket to buy some meat and vegetables for his family's dinner. When Mr. Mohammed is working in his profession as a builder, he is offering his services in a market. He is therefore engaged in economic activities within the meaning of the Competition Law. All of his different activities undertaken in connection with these economic activities are therefore subject to the Competition Law.

However, when Mr. Mohammed goes shopping at the hardware store and supermarket, he is purchasing items for his and his family's use as final consumers. His personal shopping activities are not economic activities within the meaning of the Competition Law, and these personal shopping activities are therefore not subject to the Competition Law. The hardware store and supermarket where Mr. Mohammed stops on his way home are, however, offering goods and services in a market. The hardware store and supermarket therefore are engaged in economic activities and subject to the Competition Law, even if Mr. Mohammed is not when is shopping in those stores as a final consumer.

Exemption of certain public establishments and state-owned companies

This exemption only applies to a public establishment or state-owned company if that establishment or company has been granted sole authorization to supply a good or service in a particular field. The GAC considers that this exemption therefore only applies where the public establishment or state-owned company has a government-granted monopoly on the provision of the good or service.

Hypothetical Example 4

Sugarco is a retail supplier of sugar. It is wholly owned by the Government of the Kingdom. In reaction to certain developments in the international trading system, Sugarco becomes the sole authorized retailer of sugar in the Kingdom by royal order. As Sugarco is a company wholly owned by the State, and has been given the sole authorization to supply sugar in the Kingdom by royal order, Sugarco is exempt from the operations of the Competition Law in respect of its supply of sugar.

The Competition Law does not apply to Sugarco in relation to its economic activities in the sale of sugar.

Article 4 of the Implementing Regulations further explains that this exemption only applies to public establishments and state-owned companies (having been solely authorized by the Government to provide goods or services in a particular field) that are wholly owned by the State. The GAC considers that this means that this exemption cannot apply to public establishments and state-owned companies in which the Government has a less than 100% shareholding, or which the Government otherwise only partially controls.

Hypothetical Example 5

Subsequently, Sugarco takes a small step towards private ownership through the sale of 10% of the shares in Sugarco to private investors. Sugarco remains the sole authorized seller of sugar in the Kingdom. After the sale of shares, Sugarco is now 90% owned by the State. As a result, Sugarco is now no longer wholly owned by the State. This means that Sugarco can no longer benefit from the exemption for certain public establishments and state-owned companies, even though it remains the authorized monopoly seller of sugar.

Sugarco is now subject to the Competition Law in respect of its economic activities in the sale of sugar.

Article 4 of the Implementing Regulations clarifies that the exemption only applies where the granting of such an exclusive authorization or monopoly has been effected by a royal order or decree, a resolution of the Council of Ministers, or High Order.

Hypothetical Example 6

Saltco is a company wholly owned by the State. It is the only producer of salt for cooking and industrial purposes in the Kingdom. It is a very efficient producer of salt at its facility on the Red Sea. It also benefits from very favorable licensing treatment which means that no competing salt producer has ever been established or will likely be established in the future in the Kingdom. Moreover, because of very high government import tariffs on salt, there are currently no imports of salt into the Kingdom, and no imports are likely in the foreseeable future.

Saltco is a wholly-owned state-owned company. It is also the only producer of salt in the Kingdom, because of a combination of high productive efficiency and certain favorable government policies. However, there has never been a royal decree or other comparable government instrument granting Saltco the exclusive authorization to sell salt in the Kingdom. As a result, Saltco does not benefit from the exemption.

Saltco is subject to the Competition Law.

The exemption only applies in respect of those goods and services for which an exclusive right has been granted. It does not apply in respect of any of the establishment's or company's other activities for which no exclusive right has been granted.

Hypothetical Example 7

At the same time that Sugarco was initially granted its government-authorized monopoly on the sale of sugar, it was also instructed by royal decree to begin supplying other staple food items, in particular flour and cooking oil. However, Sugarco was not granted any form of exclusive authorization regarding these other goods, and it commenced supplying flour and cooking oil in competition with the previously existing, private sector suppliers of those staple food items.

Sugarco was granted exclusive sales authorization in respect of the sale of sugar. Sugarco is therefore exempted from the Competition Law in relation to its economic activities in the market for sugar.

However, Sugarco was not granted exclusive sales authorization in respect of any other goods or services, even though it was instructed by the Government to commence sales of those products (flour, cooking oil). As a result, Sugarco does not benefit from the exemption in relation to its activities in the markets for those other products.

Sugarco is not subject to the Competition Law in relation to its sales of sugar, but it is subject to the Competition Law in relation to its sales of flour and cooking oil.

In the case of an Economic Concentration, where the acquiring party is exempt from the Law under Article 3 of the Competition Law and Article 4 of the Implementing Regulations, the Law does not apply to the Economic Concentration. This means that the Economic Concentration does not need to be notified to the GAC.

Hypothetical Example 8

Sugarco sells sugar to retail and industrial consumers. It is wholly owned by the Government of the Kingdom, and has been given the sole authorization to supply sugar in the Kingdom by royal order. Sugarco is therefore exempt from the operations of the Competition Law in respect of the supply of sugar.

Sweetco is a privately-owned sugar retailer. Sugarco wishes to acquire Sweetco, and the shareholders of Sweetco agree.

Because Sugarco is the acquiring firm, and it is exempt from the Competition Law in relation to its activities in the market for sugar, the acquisition is not subject to the Competition Law. The acquisition does not need to be notified to the GAC.

Undertakings inside and outside the Kingdom

The Competition Law applies to all undertakings inside the Kingdom. It also applies to undertakings outside the Kingdom where those undertakings' activities, including an Economic Concentration, may have an effect on a market in the Kingdom.

Article 3 of the Competition Law and Article 3 of the Implementing Regulation together provide that the Competition law applies to all undertakings inside the Kingdom. As it was previously explained, this application does not depend on the legal form of the relevant undertaking. It is sufficient that the undertaking, regardless of its legal form, be engaged in economic activities.

Hypothetical Example 9

Alif Co is a manufacturer of chemical precursors incorporated in Saudi Arabia, with its main headquarters and manufacturing facilities in Dammam. Ba' Co is a manufacturer of complementary chemical precursors; it is also incorporated in Saudi Arabia, and has its main operations centered around Jeddah. Alif Co and Ba' Co now wish to merge.

Both companies are clearly undertakings inside the Kingdom within the meaning of the Competition Law. Their conduct is therefore subject to and within the jurisdiction of the Competition Law.

Alif Co and Ba' Co must notify their merger to the GAC if the other requirements for mandatory merger notification are fulfilled 90 days prior.

The Competition Law also applies to undertakings outside the Kingdom, where their conduct outside the Kingdom may have an effect on a market in the Kingdom. Article 3 of the Implementing Regulation further provides that the GAC may assess the effect, actual or potential, of such conduct outside the Kingdom on a market inside the Kingdom.

The GAC will require economic concentrations taking place outside the Kingdom to be notified where there is a sufficient nexus between the economic concentration and a market inside the Kingdom. Pursuant to the Competition Law and the Implementing Regulations, this nexus is established where the foreign conduct (including economic concentrations among foreign undertakings) may have an effect on a market inside the Kingdom. Such economic concentrations among foreign undertakings are subject to the Article 7 of the Competition Law and must therefore in general be notified if the other relevant criteria for required notification are also fulfilled.

The GAC will consider that there is sufficient effect on a market in the Kingdom where that potential effect is **direct, substantial and reasonably foreseeable**. The GAC will consider that there is sufficient effect on a market in the Kingdom where that potential effect is direct, substantial, and reasonably foreseeable. Any conduct that has such a direct, substantial, and reasonably foreseeable effect on a market in the Kingdom, including an economic concentration, is sufficient to establish the Kingdom's jurisdiction over the conduct in accordance with the Competition Law. In the interests of international comity, the GAC will in general not consider that there is sufficient effect on a market where the foreign conduct (including economic concentrations) does not meet these criteria.^[P. 10] For clarity, a direct effect is not limited to direct sales and may take place by way of indirect sales (e.g. sales by way of a distributor). The GAC will consider that a potential effect is direct, substantial and reasonably foreseeable if the cumulative conditions for the notification of economic concentrations are met.

The GAC will also look to whether the actual or potential effect on competition is substantial. This requires that the effect take place on a market in Saudi Arabia. The GAC considers that this test will generally mean that jurisdiction is established where the actual or potential effect of the conduct on a market inside the Kingdom is more than trivial. This test for substantiality is not the same as the competition test for determining whether an economic concentration is permissible under the Competition Law; in the general case, the threshold for establishing jurisdiction will be lower and require less evidence than the threshold for determining the permissibility of an economic concentration.

In general, the GAC will consider it to be sufficient to establish a nexus if one or more of the foreign undertakings has sales that in total exceed 40 million Saudi Riyals in the Kingdom. However, sales in the Kingdom are not necessary to establish a sufficient nexus to a market in the Kingdom. An economic concentration (or other conduct) among foreign undertakings may have an effect on competition in the Kingdom where those firms are active in Saudi Arabia, or may potentially be active in markets in Saudi Arabia, or are active (or may potentially be active) in foreign markets that are sufficiently closely connected to markets in Saudi Arabia. It will be sufficient for competitive outcomes inside the Kingdom, as seen through the impact on prices, quality, or other dimensions of competition, to be affected in a sufficiently proximate way.

The existence of a sufficient nexus to a market in the Kingdom in a particular case will be considered by the GAC on a case-by-case basis. Parties are encouraged to approach the GAC for discussions in cases of doubt.

Hypothetical Example 10

Alphaco is a Swiss manufacturer of turbines for electricity generation. Betaco is a Mexican manufacturer of turbines and other machinery associated with electricity generation and transmission. Neither Alphaco nor Betaco has an office, staff, or other indicators of any permanent business presence inside the Kingdom. However, Alphaco has previously sold turbines to a Saudi electricity generation company for 50 million Saudi Riyals, and Betaco has previously bid (unsuccessfully) to sell transmission wires to another Saudi electricity provider. Alphaco now wishes to acquire Betaco.

Neither Alphaco nor Betaco has any territorial or business presence connection with the Kingdom. As a result, neither company is inside the Kingdom within the meaning of the Competition Law. However, both companies have made sales into the Kingdom (in the case of Alphaco exceeding 40 million Saudi Riyals) or attempted to make sales into the Kingdom (in the case of Betaco). Their commercial activities therefore clearly indicate a potential direct effect on competition in the relevant markets in the Kingdom. In addition, even if the parties had not attempted to sell into the Kingdom, their merger would be likely to have a direct effect on the world-wide market for electricity generation and similar equipment, which may have a direct, causal effect on the prices for such equipment within the Kingdom. Moreover, the potential effect would clearly be appreciable and more than trivial. As a result, the economic concentration would have a sufficient connection to the Kingdom through an effect on a market in the Kingdom. Alphaco and Betaco must notify their merger to the GAC if the other requirements for mandatory merger notification are fulfilled.

Hypothetical Example 11

Dave's Produce and Mike's Market are the two largest grocery retailing operations in Augusta, Maine, USA. Both consist of a single large store; both have been family-run operations for generations, with no other subsidiaries or associated companies. Dave's Produce buys a very small quantity of dates from a small Saudi Arabian exporter once a year for 5 million Saudi Riyals, and Mike's Market sources nothing from any Saudi Arabian exporters. Neither store delivers or actively sells outside the town of Augusta.

Dave's Produce and Mike's Market now wish to merge. The United States Federal Trade Commission is investigating the merger as it may have an effect on local competition in their town in Maine. The companies' lawyers discuss with them whether the merger should also be notified in other jurisdictions outside the USA, including possibly in the Kingdom of Saudi Arabia.

The merger would be unlikely to have a direct impact on any market in the Kingdom. Neither grocery store sells into the Kingdom, or could be reasonably likely to commence sales into the Kingdom. Moreover, there does not appear to be a sufficient direct causal nexus between competitive outcomes in the local grocery retail market in Augusta and any market in the Kingdom. Dave's Market purchases a small amount of a Saudi Arabian product every year, but in quantities so small that a substantial effect on a Saudi market is unlikely.

As a result, there appears to be insufficient connection between the economic concentration and any market in the Kingdom for a nexus to be established. This means that the merger between Dave's Produce and Mike's Market does not come within the jurisdiction of the Competition Law. Dave's Produce and Mike's Market do not need to notify their transaction to the GAC.

Section 5

What is an economic concentration?

The Competition Law and the Implementing Regulations

The merger control provisions of the Competition Law apply whenever there is an “Economic Concentration”. The Law and the Implementing Regulations together define an Economic Concentration as any action that results in a total or partial transfer of ownership of assets, rights, equity, stocks, shares, or liabilities of an undertaking to another by way of merger, acquisition, takeover, or the joining of two or more managements in a joint management, or any other form that leads to the control of an undertaking including influencing its decision, the organization of its administrative structure, or its voting system.

The term “undertaking” in this context is not limited by the legal form of the relevant entities but in principle includes companies, other forms of private entities, public bodies, and natural persons.

What is control?

The concept of “control” is defined as “the ability of an entity to exert decisive influence over another entity, either individually or jointly, influencing its strategic or operational decisions, which may have a significant impact on the authority to make decisions regarding the entity’s strategic and business actions, including approving the budget, determining major investments, appointing senior management, etc.” Control can be expressed as the ability to block certain decisions (negative control) or the ability to impose decisions (positive control) regarding the entity’s strategic and business actions.

Control is the ability to control, not the actual exercise of control

Control is the ability to exercise such influence over an undertaking’s decisions; it is not necessary to show that the decisive influence is or will be actually exercised. However, the possibility of exercising that influence must be effective.

Hypothetical Example 1

BVI Holdings Ltd is an international conglomerate with ownership interests in many different sectors and its headquarters in the British Virgin Islands. BVI Holdings generally allows local management of its different subsidiaries to operate independently and without significant close oversight. ABC Pty Ltd is a Saudi Arabian telecommunications provider, operated by local management, which is appointed and overseen by a board consisting of 12 directors. BVI Holdings owns 67% of the voting shares in ABC and has the right to appoint 8 of the 12 directors on ABC’s board. The remaining 33% of the voting shares in ABC are owned by 4 Saudi investors in roughly equal proportions; each Saudi investor has the right to appoint 1 of the ABC directors. Since ABC commenced operations in 2010, BVI Holdings has always nominated independent Saudi investors to be its 8 directors and has permitted those directors complete freedom to make decisions within the overarching mandate of maximizing ABC’s returns to equity and enterprise value, and has never instructed those directors in respect of any specific operational or strategic decisions.



BVI Holdings nevertheless has control over ABC because BVI Holdings has the ability to exercise majority control over ABC through its majority shareholding and its control of the board of directors through its right to appoint the majority of the directors. Its control is not negated merely because it has never closely exercised its control; BVI Holdings could exert its effective control at any moment that it wishes to, even if it has not done so in the past. BVI Holdings therefore controls ABC within the meaning of the Competition Law.

Hypothetical Example 2

XYZ Manufacturing Ltd is a manufacturing company based in Riyadh with smaller branches throughout the Kingdom. It is wholly owned by three undertakings: Panco Holdings Ltd, a Panamanian company, which owns 40% of the voting shares in XYZ Manufacturing; Mexco Holdings Ltd, a Mexican company, which owns 40% of the voting shares in XYZ Manufacturing; and AS Family Ltd, the family company of the founder of XYZ Manufacturing, which owns 20% of the voting shares. The board of directors of XYZ Manufacturing has 5 directors, with Panco entitled to appoint 2 directors, Mexco entitled to appoint 2 directors, and AS Family entitled to appoint 1 director.

The company constitution of XYZ Manufacturing provides that company decisions must be made by a majority of 4 out of 5 directors of the company – meaning that if 2 directors vote against a decision, the decision cannot be passed. Due to these company rules and the director appointment rights of the company's shareholders, a company decision can therefore only be made if the directors appointed by both Panco Holdings and Mexco Holdings vote in favor of the decision; if either the 2 Panco Holdings or the 2 Mexco Holdings directors vote against a decision, the decision cannot be passed. However, if the AS Family director votes against a decision, but all other directors vote in favor of the decision, the decision can be passed.

As a result of these company rules and the director voting rights flowing from the shareholdings, both Panco Holdings and Mexco Holdings (through their appointed directors) have the power to veto or block any company decisions of XYZ Manufacturing, but AS Family does not have the power to block any of the company's decisions. As a result, within the meaning of the Competition Law, Panco Holdings controls XYZ Manufacturing, Mexco Holdings controls XYZ Manufacturing, but AS Family does not control XYZ Manufacturing.

Control is determined on the facts of each case

Control in each case is a question of fact. The ability of one undertaking to control another undertaking must be determined considering all the circumstances. Each undertaking's circumstances and structure are different and must be considered on their own merit; accordingly, there is no clear "bright line" rule to determine the existence of control in all the circumstances. The central question that must be determined in each case is whether a person or an undertaking has the ability to control or exert decisive influence over another undertaking's decisions in the light of the relevant circumstances. The determination of whether there is control is made on the basis of legal documents or on the basis of de facto circumstances.

Control may be exercised by someone other than the legal holder of rights

Control will often be attributed to the undertakings or persons which are the legal holders of rights or entitled to the rights that confer control under the relevant arrangements or contracts. However, in some circumstances, the formal holder of control rights is different to the undertaking or person which in fact has the real power to exercise those control rights. This may be the case, for example, where the undertaking or person that has the real power to exercise the control rights uses a vehicle (which may be another undertaking) to formally hold the control rights, but only as a vehicle. In such a case, the GAC will attribute the control rights to the undertaking that in fact has the real power to exercise the control rights, even though the real control rights are only held indirectly. This will be determined on a case by case basis taking into account all the relevant facts, which may include factors such as shareholdings, contractual relations, sources of financing, conditions attached to financing, or family or other social relations.

Minority rights

Regarding the natural minority rights of shareholders in decisions regarding changes to the articles of association, increase or decrease of capital or liquidation. Often it is not a decision-making power; a veto that does not relate to strategic business policy, the appointment of senior management, the budget or the business plan is not considered to give control to its owner.

In the case of a veto over investments, the importance of this right depends on the value of the investments subject to the approval of the shareholders; when the level of investments requiring the approval of all shareholders is very high, this veto may be closer to a natural protection of the interests of minority shareholders than to a right that grants the power to participate in determining business policy.

How is control exercised?

The ability of one undertaking or person to control another undertaking can arise through different means. The question of whether the circumstances mean that one undertaking or person controls another undertaking therefore depends on a number of legal and factual elements. As a general principle, control will be regarded as existing if an undertaking or person can (solely or jointly) exercise decisive influence over another undertaking, whether this decisive influence is exercised by reason of rights (ownership or other rights), contract, or any other means, or any combination of rights, contracts and other means.

In many cases, one undertaking or person can control another undertaking through ownership of sufficient voting shares in the undertaking, ownership of management rights, the right to appoint members of the undertaking's board of directors, and similar means of being able to exercise control over the undertaking. The means of control can therefore include one or more of the following:

- Where an undertaking or person owns, directly or indirectly, more than half of the capital or business assets of another undertaking. Likewise, if the ownership of an undertaking reaches 50% or more of the shares of another undertaking.

- Where an undertaking or person has the power to exercise more than half the voting rights in another undertaking, or two or more undertakings operating together in a coordinated manner jointly have the power to exercise more than half the voting rights in another undertaking. Control through shareholdings may also take place combined with a shareholders' agreement in cases of joint control.
- Where an undertaking or person has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing another undertaking. This may be the case through the shareholders' agreement or other means.
- Where an undertaking or person has the right to manage another undertaking's affairs, whether by way of ownership rights or by contract. For control to take place through contractual means, the contract must generally lead to control of the management and the resources of the controlled undertaking. Moreover, in order to create lasting control, the contracts must generally be of a very long duration, and generally without right of early termination for the party granting the contractual control rights. Similarly, control rights may be established by contractual rights to use the assets of the undertaking. Such contracts may also lead to joint control of the contractual provisions grant both the owner of the assets and the undertaking being granted control of the management the right to veto strategic business decisions. However, such contractual arrangements are generally only capable of giving rise to control if they create control over a undertaking's management and its resources – by contrast, contracts that do not ordinarily generate such control over the management and its resources, such as franchise agreements and some purely financial agreements, will therefore generally not constitute a concentration.
- Where an undertaking or person has the de facto ability to exercise decisive influence over another undertaking through structural or other links, including where one undertaking is dependent on another undertaking for necessary financing, strong family links between individuals who exercise control over separate undertakings, or other similar links.
- In certain circumstances, purely economic relationships creating a situation of extensive economic dependence, such as very important long-term supply agreements coupled with structural or other extensive links, may generate control on a lasting basis. While such economic dependence will only generate control in limited circumstances, where appropriate the GAC will carefully analyze the economic and other links in the totality of the relevant circumstances.

An Economic Concentration takes place where there is a change of control

An Economic Concentration takes place where there is a change in control or decisive influence over a relevant undertaking on a lasting basis. Such control may be acquired by one undertaking acting alone or by several undertakings acting jointly.

Such a change in control or decisive influence can take place through different means and can take many different forms. The change in control can take place through various means, including but not limited to the following:

- A merger, when, for example, two or more previously independent undertakings amalgamate into a new undertaking, and the previously independent undertakings cease to exist as separate legal undertakings;
- An acquisition or takeover, when, for example one previously independent undertaking acquires and absorbs another previously independent undertaking;
- An economic or management amalgamation of two different undertakings into a single undertaking, when, for example, the previously independent undertakings continue to exist as separate legal undertakings, but they are factually amalgamated into a single undertaking.
- One of more undertakings acquires direct or indirect control of the whole or part of one of more undertakings; or
- Other arrangements that bring the previously independent undertakings together under common or joint control.

An Economic Concentration takes place where there is a relevant change of control concerning an undertaking engaged in economic activity. Where the transaction involves the sale (or similar) of a mere asset, without there being a change of control concerning an undertaking engaged in economic activity, the transaction is in general not notifiable. In general, a change in control is considered a reportable economic concentration in the following cases:

1) A party that has no control acquires negative control.

2) A party that has no control acquires positive control.

3) One of the parties that has negative control acquires positive control. (If there is only one party with negative control in the situation before the proposed economic concentration and the same single party obtain positive control in the situation after the proposed economic concentration, this is not considered a relevant change of control. This is because the unique position of this party – its agreement being crucial in for taking any strategic decision – does not change. However, if there are multiple shareholders with negative control in the situation before the proposed economic concentration and only one shareholder with positive control in the situation after the proposed economic concentration, this implies that there is no more need for these shareholders to agree on strategic decisions.)

Hypothetical Example 3

ABC Pty Ltd is a Saudi Arabian telecommunications company headquartered in Riyadh. DEF Pty Ltd is a small start-up provider of an innovative messaging technology, incorporated in Saudi Arabia and also headquartered in Riyadh. DEF is owned in equal shares by the four (4) school friends who founded the company and developed its technology.

ABC and DEF agree that ABC will acquire all the shares in DEF from its founders, in exchange for the DEF owners receiving a mixture of cash and shares (5% each) in ABC. The acquisition results in a change of control over DEF Pty Ltd through a transfer of ownership of the shares in DEF. Previously, the 4 founders of DEF jointly controlled DEF; after the transaction, ABC Pty Ltd controls DEF. There is therefore a change of control within the meaning of the Competition Law.

Hypothetical Example 4

Beta Tech Pty Ltd is a start-up provider of telecommunications technology, incorporated in Saudi Arabia and headquartered in Jeddah. Beta Tech is owned by two undertakings.

80% of the shares in Beta Tech are owned by the founder's family company, which the founder controls entirely.

20% of the shares in Beta Tech are owned by a private equity fund, CKM Capital, which is headquartered in Vanuatu.

All of the shares have equal voting power. Decisions are taken by either a normal (50% + 1) or a qualified majority (66.6%) of the votes.

The new technology developed by Beta Tech has become sufficiently commercially marketable that the founder now wishes to "cash out" part of this equity and enjoy the good life. The founder and CKM Capital agree that CKM Capital will acquire 60% of the shares in Beta Tech from the founder for a large amount of cash. As a result, after the transaction CKM Capital will own 80% of the shares in Beta Tech and the founder will own 20% of the shares in Beta Tech.

Prior to the transaction, the founder had positive (sole) control over Beta Tech through her ownership of the majority of the voting rights in the company. The shareholding majority was sufficient that the founder could exercise full decisive influence over the company at any time. After the transaction, CKM Capital obtained full decisive influence over Beta Tech.

There was therefore a change of control within the meaning of the Competition Law.

Hypothetical Example 5

ABC Limited is a Saudi contracting company based in Jeddah, owned by three shareholders: Shareholder E owns 75% of the company's shares, while the remaining 25% of the shares are divided equally between Shareholders B and C (12.5% each). The company's voting procedures require a simple majority (50% + 1) of the votes.

Shareholder E has agreed to sell 25% of its shares in the company to Shareholder B, leaving Shareholder E's ownership of the company at 50%, Shareholder B at 37.5%, and Shareholder C at 12.5%.

Prior to the transaction, Shareholder E has positive control over ABC and can make company decisions without the consent of the other two shareholders; they cannot block any decisions based on their shareholding and voting procedures. Accordingly, they have no control.

However, after the transaction, Shareholder (E) needs the cooperation of the other two shareholders to obtain the required votes of 50% + 1; as he no longer has positive control. However, (E) retains enough votes to block any proposal supported by both the other two shareholders (B) and (C). Therefore, he now has negative control. In contrast, Shareholder (B) is still unable to influence the company's decisions or stop decisions or proposals supported by the other two shareholders. Despite the loss of control after the sale, there is no change in obtaining positive or negative control to influence the company's decisions by any party, which does not require reporting as stipulated in the Competition Law.

Joint Control

It is possible for more than one person or entity to have control over another entity. In this case, these persons or entities have joint control. The situation of joint control may arise because of a contractual arrangement between these entities or persons about how voting rights are exercised. It should be noted that the definition of economic concentration requires that the change be structural, and therefore the arrangement must also be structural. A common interest as financial investors (or creditors) of a company in obtaining a return on investment does not constitute a structural similarity of interests that leads to the exercise of effective joint control.

Hypothetical Example 6

ABC Limited is a Saudi contracting company based in Jeddah, owned by three shareholders: Shareholder (E) owns 75% of the company's shares, while the remaining 25% of the shares are divided equally between Shareholders (B) and (C) (12.5% each). The company's voting procedures require a simple majority (50% + 1) of the votes.

Shareholders (E) and (B) have agreed that (E) will sell 25% of his shares in the company to Shareholder (B), so that Shareholder (E) will own 50% of the company, Shareholder (B) 37.5%, and Shareholder (C) 12.5%.

B and (C) together own 50% of the votes equally, but neither of them has negative control alone. However, if there is an agreement (or other structural links of similar effect) between them, the transfer of shares will result in joint negative control by them. For example: If (B) and (C) were father and son respectively, this would lead to the assumption that there were structural ties between them that would make it very likely that they would vote similarly. Therefore, if the other conditions were met, the transfer of shares from (E) to (B) would require the approval of the Authority.

Hypothetical example 7

The firm ABCD is engaged in the production of flat steel for the construction industry and is owned by four shareholders:

- Shareholder E has 33% of the shares and votes
- Shareholder B has 33% of the shares and votes
- Shareholder C has 17% of the shares and votes
- Shareholder D has 17% of the shares and votes

Since all decisions are taken by a simple majority (50% + 1) of the votes, no shareholder can unilaterally impose the result of the vote and thus no shareholder has positive control. Similarly, no shareholder can block a decision concerning the firm alone and thus no shareholder has negative control.

Case 1

Shareholders E and B agree that they will always vote together. Since E and B together have 66% of the votes, they can impose all decisions. With E and B having joint positive control, other conditions being met, the agreement between E and B is a reportable concentration.

Case 2

Shareholders E and C agree that they will always vote together. Since E and C together have 50% of the votes, they can block all decisions. With E and C having joint negative control, other conditions being met, the agreement between E and C is a concentration that requires approval by the board.

Case 3

Shareholders C and D agree that they will always vote together. Since C and D together have 34% of the votes, they cannot block any decision even if they vote together. Therefore, there is no change in control and the agreement between C and D is not a concentration.

Control and the “single economic entity” doctrine

The concept of control is central to the determination of the identities of the Economic Concentration Parties, such as the buyer, the target, and the seller in a transaction. Correctly determining the identities of the Economic Concentration Parties is necessary for several reasons during the analysis of an Economic Concentration, including:

- To determine the total sales of all the participating entities for the purposes of determining whether the Economic Concentration must be notified.
- To determine the total sales of all the participating entities for the purposes of determining the correct filing fee for an Economic Concentration that must be notified.
- To determine the appropriate analysis of the potential competition effects of the Economic Concentration.

To determine the identity of the Economic Concentration Parties, the GAC is guided by common international competition law practice, including practice in the European Union and its Member States, and employs the doctrine of the “single economic entity”.

A single economic entity is the undertaking or undertakings which, as a matter of economic fact and reality, form a common economic unit under the umbrella of common control. A single economic entity may comprise several undertakings, where those different undertakings are commonly controlled. For instance, if a parent undertaking wholly owns (and thereby controls) two subsidiaries, the parent undertaking and the two subsidiaries together will comprise a single economic entity. While the subsidiaries may be separate legal undertakings, in terms of their control and economic reality they are part of the larger group

of undertakings (comprising the parent undertaking and the controlled subsidiaries) and therefore are part of the larger single economic entity.

The purpose of the single economic entity doctrine is therefore to look beyond legal personalities and instead to capture the economic realities of groups of undertakings that, for the purposes of competition law analysis, are to be treated as so closely related in decision-making powers that they are to be treated as a single economic entity under the umbrella of common control of those decision-making powers.

Hypothetical example 8

Language Schools Limited is a successful operator of language schools and franchises throughout the Kingdom. The company is wholly owned by its founder, a gentleman who wishes to retire and has agreed to sell the company to an investment fund, Educo Limited. The gentleman owns no other material assets.

In order to make the acquisition, Educo has established a new legal undertaking, Bidco Limited, which has no assets or income and has been set up solely for the purposes of buying Language Schools. Bidco is wholly owned by Educo. Educo also wholly owns another subsidiary, Bahrainco Limited, which owns a series of schools in Bahrain.

The target undertaking is Language Schools Limited. The seller is the gentleman who founded Language Schools. The buyer is Bidco. However, as Bidco is wholly owned and therefore controlled by Educo, the Educo must also be considered to be a part of the single economic entity that is buying Language Schools. Moreover, as Educo also wholly owns and controls Bahrainco, Bahrainco must also be considered to be a part of the single buying undertaking on the buyer side.

Within the meaning of the Competition Law, including for the evaluation of the notification thresholds and for the analysis of the potential competition effects, the buying undertaking therefore includes all of Bidco, Educo, and Bahrainco as one single economic entity.

Hypothetical example 9

Chemco Limited is a Saudi Arabian manufacturer of precursor chemicals with manufacturing facilities located in Dammam. Chemco is owned by two parent companies. Majco Limited owns 80% of the voting shares in Chemco and is entitled to appoint the majority of directors to the Chemco board. Minco owns the other 20% of the voting shares in Chemco and is entitled to appoint a commensurate number of directors to the Chemco board. Company decisions by Chemco are taken by a simple majority vote of the shares or directors (as the case may be).

This means that Majco controls Chemco, as Majco can exercise decisive influence over Chemco's decision-making, while Minco does not control Chemco, as Minco cannot exercise decisive influence on (i.e. positive or negative control over) block Chemco's decision-making.

Chemco would now like to acquire Inventco Limited, a research and development company started and wholly owned by AB University a leading public university in Riyadh. Inventco takes primary research developed by the science departments of AB University and commercializes this. Inventco has no subsidiaries or other owners. AB University has no other subsidiaries.

The target undertaking is Inventco. The seller is AB University. The immediate buyer is Chemco. However, the ownership structure of Chemco means that Majco controls Chemco. This means that the relevant single economic entity that is the buyer also includes Majco. Because Minco does not control Chemco, the relevant buying single economic entity does not include Minco.

Within the meaning of the Competition Law, including for the evaluation of the notification thresholds and filing fees and for the analysis of the potential competition effects, the buying undertaking therefore includes Chemco and Majco.

Liquidation and insolvency proceedings

There is no change of control, and therefore hence no Economic Concentration within the meaning of the Competition Law, where control is temporarily controlled by a trustee (appointed by the Saudi Commercial Court) according to Saudi Bankruptcy Law and the Saudi Commercial Courts Law relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings.

Joint ventures – when are they an “Economic Concentration” under the mergers rule?

The GAC considers that the creation of a joint venture will ordinarily constitute an Economic Concentration when the joint venture forms an autonomous economic undertaking, or performs the economic functions of an autonomous economic undertaking, on a lasting basis. Such a joint venture may be termed a “full-function” joint venture. A full-function joint venture that is an autonomous economic undertaking on a long-lasting basis is capable of bringing about a lasting change in the structure of the undertakings concerned and in the relevant market, and will therefore be considered to be an Economic Concentration falling under the merger control rule of the Competition Law.

Whether or not a joint venture is a full-function joint venture will be considered by the GAC in light of the totality of the facts and circumstances. Generally, a full-function joint venture performing all the functions of an autonomous economic undertaking means that the joint venture must operate in a market and perform the functions normally carried out by a commercial undertaking operating in that market. In order to do so, the joint venture must ordinarily have a management dedicated to its day-to-day operations and access to sufficient resources, including finance, staff and assets (tangible and intangible), in order to conduct on a lasting basis its business activities within the area provided for in the joint venture agreement.

A full-function joint venture must be intended to operate for a sufficiently long period to bring about a lasting change in the structure of the undertakings concerned. If the parent undertakings commit sufficient resources to the joint venture to enable the joint venture to operate as an autonomous economic undertaking normally demonstrates that this is the case. In addition, a full-function joint venture will ordinarily have sufficient autonomy from its parent undertakings in terms of its operational decision-making to be considered a full-function joint venture. Moreover, the fact that the parent undertakings retain overall strategic control over the joint venture, and retain control for other purposes of the

Competition Law, does not prevent the joint venture from being considered a full-function joint venture. Moreover, the fact that the parent undertakings retain overall strategic control over the joint venture, and retain control for other purposes of the Competition Law, does not prevent the joint venture.

A full-function joint venture may be distinguished from other joint ventures that only play a limited role, or for a confined period of time, or without any economic autonomy. Such limited-function joint ventures will ordinarily not be considered to constitute an Economic Concentration within the meaning of the Competition Law. Specifically, a joint venture does not perform all the functions of an autonomous economic undertaking if it only takes over one specific function within the parent undertakings' business activities without access to or presence in a market. This is the case, for example, for joint ventures limited to research and development or production. Such joint ventures may be considered to be auxiliary to their parent undertakings' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent undertakings normally will not disqualify it from being considered as performing all the functions of an autonomous economic undertaking, as long as the parent undertakings are acting only as agents of the joint venture.

In addition, joint ventures for a short finite duration are unlikely to be considered as creating such a lasting change. For example, a joint venture established for a specific project which does not include ongoing operational activities is unlikely to be viewed as an Economic Concentration within the meaning of the Competition Law. In addition, where a joint venture's core activities depend on a third party's decision which at the time of establishment remains outstanding (e.g. a tender award, the grant of a license, etc.), it remains unclear whether the joint venture would become operational at all. Thus, at that stage the joint venture cannot be considered to perform autonomous economic functions on a lasting basis, and would therefore not be considered to be a full-function joint venture.

The GAC will also consider the presence of the joint venture's parent undertakings in upstream or downstream markets. Where a substantial proportion of sales or purchases between the parent undertakings and the joint venture are likely for a lengthy period and are not on an arm's length basis, the joint venture is likely to be viewed as lacking sufficient economic autonomy in its operational activities and will therefore generally not be considered to be a full-function joint venture.

A joint venture may change in nature during the course of its life due to a change in its activities, structure, or other material changes in its circumstances. Where a joint venture begins its life as a non-full function joint venture, but subsequently becomes a full-function joint venture, it will at that time be considered as a new Economic Concentration requiring notification. Such a change in the nature of the joint venture can include:

- The parent undertakings enlarge the scope of the joint venture's activities during its lifetime, such as commencement of commercial sales to third parties in an open market.
- Enlargement of the joint venture, such as through acquisition by the joint venture of the whole or part of another undertaking from the parent undertakings.

- The parent undertakings transfer significant additional assets, contracts, know-how, or other rights to the joint venture, where this transfer would constitute or enable an extension of the joint venture's activities, products, or geographic markets that were not the object of the original joint venture.
- A change in the organizational structure of the joint venture.

Such changes will be considered to have occurred when the shareholders or the joint venture's management take the relevant decision leading to the joint venture becoming a full-function joint venture, or the relevant activity commences.

Hypothetical example 10

ABC is a consumer electronics developer and manufacturer headquartered in Riyadh. DEF is a specialist security communications equipment manufacturer headquartered in Jeddah. Each of the undertakings requires certain types of electronic wiring for their manufacturing operations.

ABC and DEF agree to join forces in a purchasing joint venture for one year solely in respect of their wiring purchasing activities from international suppliers; they do not coordinate or cooperate on any other activities. The resulting purchasing joint venture exists solely to meet the needs of the parent undertakings ABC and DEF: it has no assets of its own, no management or other staff of its own, and no operational or strategic autonomy. As a result of this very limited scope serving only the parent undertakings for a limited duration, the purchasing joint venture is not a full-function joint venture and is therefore not an Economic Concentration within the meaning of the Competition Law. However, the cooperation is still subject to other provisions of the Competition Law.

However, one year later, when ABC and DEF discuss their arrangements, they both agree that the cooperation has been a great success and they would like to expand the scope of the joint venture. The joint venture will develop its own wiring technology and sell it on the market to third party customers. Moreover, the joint venture will be given substantial operational autonomy, independent financing, substantial staff of its own, and with the intention that the joint venture continue indefinitely (rather than being limited to one year as originally planned). As a result, the joint venture now has the characteristics of an autonomous economic entity. This means that the joint venture will now be considered to be a full-function joint venture. As a consequence, when it changes its nature and scope, the joint venture will be considered to be an Economic Concentration within the meaning of the Competition Law and must be notified to the GAC if the other notification criteria are also met.

Joint Ventures in New Products and Markets

Entities may wish to work together to develop new goods or markets, and if this results in the establishment of a stand-alone joint venture that meets other reporting thresholds, the establishment of the joint venture is subject to review and assessment by the Authority due to the possibility that such a joint venture may lead to negative effects on competition. In contrast, the establishment of joint ventures in the Kingdom in cooperation with foreign companies can achieve significant economic benefits without negative effects on competition; joint ventures can contribute to attracting foreign investment, localizing industries and transferring knowledge.

The GAC will generally don't consider this type of transaction as a notifiable economic concentration if it meets certain criteria based on the nature of the transaction, including:

1. The joint venture relates to the manufacture of a product that is not currently produced in the Kingdom, or when the product is manufactured in the Kingdom but can only be distributed to a limited part of the Kingdom for technical reasons inherent in the nature of the product.
2. The joint venture consists of partners who are not, individually or together, current or potential competitors of the product.

Hypothetical Example 11

Good X is imported and directly and indirectly sold to consumers and commercial customers in the Kingdom by four suppliers. According to the definition of the relevant market, the product is not produced in the Kingdom. A local entrepreneur with local knowledge of the market but without the knowledge to produce the product and a foreign producer of product X intend to establish a stand-alone joint venture to produce the product in the Kingdom. Although the revenue-based notification criteria apply, given that the product is not currently produced in the Kingdom (1st condition) and that there is only one local partner that is not a competitor to the foreign producer (2nd condition), the proposed economic concentration does not need to be notified.

When do investment funds represent "economic concentration"?

Investment fund acquisitions are considered a reportable economic concentration if they meet the criteria set out in the Competition Law, its Implementing Regulations and these Guidelines. There are some transactions that result in a change in control of the target entity, but where this change does not have a tangible result on competition in any relevant market in the Kingdom because the person or entity that has negative or positive control does not intend to exercise its control other than for preserving the value and diversity of investments. This is, for example, the case where control is obtained by a pension fund that has no intention to affect the commercial behavior of the target company at any point in the period during which the acquirer has control.

No fundamental competition concerns arise when it comes to acquisitions by investment funds or similar financial investment companies that acquire shares in several entities and whose sole objective is to obtain shares in other entities in the expectation of e.g. obtained dividends from these shares or to obtain a well-balanced investment portfolio. The acquisition of control is not a deciding factor for the acquisition and there is no intention to exercise control by e.g. involving themselves directly or indirectly in the management of those undertakings.

The GAC may not consider this type of transaction as an economic concentration requiring notification. When evaluating such transactions, the authority takes the following criteria into account:

1. The sole objective of the acquisition is to obtain shares without intervening directly or indirectly in the management of those entities, and therefore control will not be used to influence the entity's behavior in the market, but only to maintain the value and diversity of the investment. The objective of the investment should be determined objectively; the intention should be not to exercise control and influence in the management of the entity, and this should be clearly established.
2. The investment fund does not own a controlling stake in any companies competing with the target company according to the definition of the relevant market.

Hypothetical Example 12

(BB) is an investment fund controlled by a pension fund. The primary objective of the fund is to provide a balanced portfolio of investments across different sectors in multiple countries to balance overall investment returns with risk. All of its investments are “passive” meaning that the fund does not interfere in the management of the investee companies. If the fund is not satisfied with the rate of return on investment, it reduces its investments rather than trying to interfere in the management of the investee companies.

Assuming that the investment fund (BB) intends to acquire ownership and control of the (HH) Hotel in Riyadh. The fund currently controls another hotel in Dammam. All the criteria for reporting economic concentration operations are met here, but since the investment fund will not use control to influence competition in the market and only to maintain the value and diversity of investments, and since the investment fund does not own any other hotels within the definition of the relevant market, which includes the product or service and geographical dimensions, the parties do not have to report concentration.

Hypothetical Example 13

Company (X) is engaged in the exploration and exploitation of mineral resources from its facilities in the Kingdom of Saudi Arabia. The company established the pension fund (Y) for its employees, for the purpose of investing in shares of companies that provide an ideal rate of return for employees after retirement. The fund’s articles of association stipulate that at least 20% of its value must be invested in shares of company (X), and 80% in shares of other companies. Company (X) owns 100% of the fund’s shares. The pension fund (Y) wishes to obtain a controlling stake in company (Z), which is active in exploiting mineral resources in Oman. The deal meets the revenue-based reporting criteria, and the criteria for non-reportable investment funds do not apply to it. On the basis of the single economic entity doctrine, the acquiring undertaking is Company X including Pension Fund Y which it controls. Therefore, the acquiring undertaking is not solely active in managing shareholdings in other undertakings without involving themselves directly or indirectly in the management of those undertakings. For this reason, the first condition of the exclusion is not applicable.

The GAC reminds that where competing undertakings cooperate without forming an economic concentration, such as may be the case in some bidding consortia, the parties remain subject to the other provisions of the Competition Law, including the prohibition under Article 5 against anti-competitive agreements.

Section 6

Notification thresholds for reporting concentrations

The Law and Regulations

- Article 7 of the Competition Law provides that the entities involved in the economic concentration must notify the concentration to the GAC if the total annual sales value of the entities seeking to participate in the economic concentration exceeds the amount determined by the Regulations.
- Article 12(1) of the Implementing Regulations specifies that the concentration must be notified to the GAC if the total annual sales value of all entities intending to participate in the economic concentration exceeds SAR 200,000,000.
- Article 12(2) of the Implementing Regulations also provides that where it is impossible to estimate the annual sales value of the entities, or where the entities' business activities do not extend for a full fiscal year, then the annual sales value for the whole year shall be estimated based on the firms' activity, as the case may be.
- Article 12(3) further provides that the Board of the GAC may set criteria for reporting economic concentration transactions in cases where it is impossible to determine or verify the total annual sales value, provided that the Board's decision be made available to the public at least 30 days before its entry into force.

Additional turnover criteria for notification

In some cases, economic concentration is unlikely to have a significant negative effect on competition, such as when the acquired entity is small or the influence of Economic Concentration Parties on local markets is limited. The GAC must be notified of any economic concentration that meets the criteria in the Competition Law and the additional notifying criteria as follows:

- A. The total worldwide annual sales value of Economic Concentration Parties exceeds 200 million Saudi Riyals, and
- B. the total worldwide annual sales value of the target establishment exceeds 40 million Saudi Riyals, and
- C. the total annual sales value in the Kingdom of all Economic Concentration Parties exceeds 40 million Saudi Riyals.

The second notification thresholds should be interpreted as follows:

In relation to acquisitions, the relevant Economic Concentration Parties are the Buyer(s) and the Target(s) for determining whether the notification thresholds are met. If only the Buyer has turnover in the Kingdom, it is considered very unlikely that this would result in material negative effects on competition in the Kingdom.

In relation to the mergers, the relevant Economic Concentration Parties are the undertakings that are merging. The second criterion should be interpreted so that mergers involving one larger undertaking in terms of sales (similar to the Buyer in acquisitions) and one smaller undertaking in terms of sales (similar to the Target in acquisitions) should not be captured if the smaller undertaking has total worldwide annual sales of 40 million SAR or less. In other words, in relation to mergers the second criterion should be interpreted so

that mergers should not be captured unless at least two shareholders each have total worldwide annual sales that exceed 40 million SAR.

In relation to joint ventures, the relevant Economic Concentration Parties are the undertakings that will become the shareholders of the joint venture. In relation to full function joint ventures, the second criterion should be interpreted so that joint ventures should not be captured unless at least two shareholders each have total worldwide annual sales that exceed 40 million SAR.

The third notification criterion should be interpreted as follows:

The sales value is calculated considering both direct and indirect sales. The GAC will rely on the best information that is available. If a company offers its products to customers in the KSA using both direct and indirect sales channels, all of these sales need to be considered.

In summary, the additional notifying criteria will apply based on the different forms of change in control, whether acquisition, merger or joint venture, as explained below:

Application of Economic Concentration Thresholds to various forms of Economic Concentrations		
Acquisitions	Mergers	Joint venture
<p>A. The total worldwide annual sales value of the Economic Concentration Parties exceeds 200 million SAR, and</p> <p>B. The total worldwide annual sales value of the target exceeds 40 million SAR, and</p> <p>C. The total annual sales value in the Kingdom of all Parties exceeds 40 million SAR and the Target contributes to this.</p>	<p>A. The total worldwide annual sales value of the Economic Concentration Parties exceeds 200 million SAR, and</p> <p>B. The total worldwide annual sales value for at least two of the Parties exceeds 40 million SAR, and</p> <p>C. The total annual sales value in the Kingdom of all Parties exceeds 40 million SAR.</p>	<p>A. The total worldwide annual sales value of the Economic Concentration Parties exceeds 200 million SAR, and</p> <p>B. The total worldwide annual sales value for at least two of the Parties exceeds 40 million SAR, and</p> <p>C. The total annual sales value in the Kingdom of all Parties exceeds 40 million SAR.</p>

What entities must be considered?

The Competition Law states that the notification threshold applies to “the total annual sales value of the entities seeking to participate in the economic concentration”. The Competition

Law therefore clearly specifies all the entities participating in the concentration and does not distinguish between acquiring and selling entity or between mergers and acquisitions. The Competition Law therefore requires that the notification threshold consider the total sales of all entities participating in the concentration without distinction or exclusion.

The GAC considers that the entities “participating” in the concentration are all those that form part of the newly concentrated entity after the economic concentration transaction has been completed. This means that:

- Where two or more entities merge, the relevant entities are the merging entities in their entirety.
- Where one entity acquires another entity, the relevant concentrated entities are the entire entity which is acquiring the other entity, and the entity being acquired, but not the entity which is selling the entity being acquired.
- Where one entity acquires a part of another entity’s operations, for example through purchasing a subsidiary or operational division, the relevant entities are: (1) the entire entity which is acquiring the operations or division, (2) the operations or division it is acquiring, but not the entity which is selling the operations or division. This is because the acquiring entity and the target operations or division generally form part of (and are therefore participating in) the economic concentration, but the selling entity generally does not form part of the economic concentration.
- Where two or more entities together participate in a full-function joint venture, the relevant entities for the notification threshold are all the entities acquiring joint control of the joint venture in addition to the joint venture itself. This principle applies both to newly-formed joint ventures and to the acquisition of joint control of pre-existing entities.

Hypothetical Example 1: ABC Constructions is a Riyadh-based construction company. XYZ Cement is a cement producer whose main factory is right next to the ABC Constructions office. After long, friendly discussions about the clear synergies between them, the two companies decide to merge fully, with shares in the new entity being allocated to shareholders of ABC and XYZ in proportion to their value.

Both ABC and XYZ will be fully participating in the merger. The total sales value of both companies must therefore be counted fully when calculating the total sales value of the participating entities for the purposes of the notification threshold.

Hypothetical Example 2: DEF Constructions is another Riyadh-based construction company. UVW Materials is a diversified materials producer that sells cement, and also other construction materials, agricultural equipment, electronic equipment for power stations, and other materials. DEF Constructions wishes to purchase UVW’s cement production division only; after this acquisition, the remainder of UVW will continue independent operations as before.

The participating entities are DEF Constructions, which as the buying entity will form part of the economic concentration, and the UVW Materials cement division which DEF Constructions is acquiring. The remainder of UVW will remain independent after the transaction and will not form part of the economic concentration. The total sales of the participating entities therefore include the total sales of DEF Constructions and the total sales of UVW’s cement division, but not the sales of UVW’s other divisions.

What are the entities' annual sales?

The Competition Law and the Implementing Regulations define the notification threshold according to the “the total annual sales value of all entities” intending to participate in the concentration.

In most cases, the “total annual sales value” will be the total gross revenues of the relevant entity. These are the amounts obtained by the entity from the sale of products and services falling within the entities' ordinary business and related activities. For most entities that have financial statements prepared under the standards of the Saudi Organization for Certified Public Accountants (“SOCPA”) or the equivalent prevailing accounting standards in the relevant entity's place of incorporation, the annual sales will be the entity's revenue appearing in the entity's Income Statement, as reflected in the entity's most recent audited financial statement. Where the entity is not required to produce audited financial statements, the annual sales will be the entity's revenue appearing in its most recent annual statement of income and expense regularly prepared in accordance with the SOCPA standards or the equivalent accounting principles adopted by the entity, as the case may be. This means that in the general case the entity's “annual sales” captures the revenue amounts obtained from the entity's ordinary business activities.

Where the relevant undertaking is an individual or a natural person, the GAC will in general apply the same general principles to determining the relevant “annual sales” of the individual. The individual's “annual sales” will generally be their annual revenue amounts obtained from their ordinary business activities. The GAC will determine this on a case by case basis within the context of these general principles.

However, where the entity's total sales incorporate sales rebates subsequently provided to its customers, the value of the sales rebates may be deducted from the gross sales figures to calculate the entity's total sales for the purposes of the notification threshold. In addition, where the entity's total sales revenues incorporate the value of value added taxes and other taxes directly related to sales, the value of such taxes may be deducted from the gross sales figures to calculate the entity's total sales for the purposes of the notification threshold.

If the entity's financial statements are presented in a foreign currency, then the annual gross revenues should be converted to values in Saudi Arabian Riyals according to the average over the relevant financial year of the foreign exchange rate quoted by the Saudi Central Bank.

These principles apply in the general case where total revenues appropriately reflect the sales that an entity has made during the course of ordinary business. However, for certain types of entities engaged in the provision of financial services, the gross revenues figures in their income statement may not accurately reflect the “sales” which the Competition Law addresses. For such entities, the GAC will consider that “sales” are best expressed by the following measures:

- For banks, credit institutions, and other similar financial institutions, “sales” will be the sum of the following income items after deducting value added tax and other taxes (if any) directly related to those items: (1) interest income and similar income; (2) income from securities including income from shares and other variable yield securities, participating interests, and affiliated entities; (3) commissions received and receivable; (4) net profit on financial operations; and (5) other operating income.
- For insurance providers, “sales” will be the value of gross premiums written including all amounts received and receivable arising from insurance contracts issued by or on behalf of the insurance

entities, including (without limitation) outgoing insurance premiums, after deducting taxes and similar government levies charged by reference to the amounts of individual premiums.

Hypothetical Example 3: XYZ Cables Limited is a Riyadh-based seller of various types of electrical cabling and wiring used primarily in the construction of high-rise residential and office buildings. GHJ Wires Limited is a Jeddah-based seller of similar electrical cables. The two companies now wish to merge.

Each company has the invoicing practice of issuing invoices to its customers reflecting the list price of the items purchased, including applicable value added tax. Each company also has the practice of issuing sales rebates to its customers at the end of each month, depending on the volumes purchased by each customer in a month. The full invoice price is recognized as company revenue according to each company's accounting policies.

The total sales for the purposes of the notification threshold are an entity's total sales, deducting the value of any sales rebates passed to customers, and deducting the value of any value added tax and other taxes directly related to sales. This means that when XYZ Cables and GHJ Wires are calculating their total sales figures for the purposes of the notification threshold, they should calculate their total sales values minus the value of the sales rebates and value added taxes included in their total revenues.

What if the entities belong to groups of companies?

The sales thresholds in the Competition Law are concerned with the total sales of entities. Two or more legal entities will be considered to form part of the same economic entity if they constitute a "single economic entity". This concept of the "single economic entity" is the same concept which the GAC uses in other aspects of its concentration analysis. The central criterion in determining whether different legal entities form part of a single economic entity is "control". If one legal entity controls other legal entities (such as subsidiaries), either directly or indirectly, then for the purposes of determining the total annual sales values of the entity, the relevant single economic entity will include the controlling entity and all of the entities it controls.

If a single economic entity consists of two or more legal entities, and each of those legal entities prepares accounts, then the total sales of the single economic entity for the purposes of calculating the notification thresholds are the total combined gross sales revenues of all of the entities. A group will therefore include all companies that have direct or indirect control-based links with the entity concerned, including its subsidiaries, but also including its parent company(-ies) and any other companies within the parent company's group.

There is one important exception to this general principle. The single economic entity's revenues will exclude revenues resulting from transactions between the different legal entities within the group. Such intra-group transactions are not considered to be sales of the single economic entity. Under common accounting principles including the SOCPA standards, company groups often report revenue on a consolidated basis: such consolidated accounts report the total sales revenue of the group including all entities controlled by that group, but excluding revenue flows between companies in the group. Where a group of companies reports its total revenues on such a consolidated basis, then in most cases the consolidated revenue of the company group as it appears in the consolidated Income Statement is the appropriate measure of the single economic entity's annual sales. However, the entities

concerned should verify that the consolidated accounts include all of the entities controlled within that group of companies and therefore belonging to the relevant single economic entity, and the GAC will similarly verify this where appropriate.

Hypothetical Example 4: Company group ABC consists of a parent company ABC Limited and five wholly-owned subsidiaries that produce and import different construction materials to supply to construction companies in the Kingdom. The companies are closely interrelated and provide services and materials to each other. The ABC Group produces consolidated accounts for the whole company group in addition to producing separate accounts for each of the group's subsidiaries.

One of the ABC Group subsidiaries, DEF Cement, now intends to acquire XYZ Gypsum, another company that also sells construction materials in the Kingdom. XYZ Gypsum does not have a parent company or subsidiaries.

XYZ Gypsum's most recent accounts reported annual sales of SAR 40,000,000. DEF Cement's most recent accounts reported annual sales of SAR 35,000,000. The ABC Group's most recent consolidated accounts reported annual sales of SAR 165,000,000 for the whole company group.

Because ABC Limited controls the five subsidiaries, the whole ABC Group including the subsidiaries will be considered to be a single economic entity. The entities participating in the economic concentration will therefore be the whole ABC Group and XYZ Gypsum. The total annual sales value of all entities participating in the concentration will therefore be the total annual sales of the ABC Group plus the total annual sales of XYZ Gypsum, which adds to SAR 205,000,000. This is more than the SAR 200,000,000 notification threshold.

Accordingly, the entities must notify their intended concentration to the GAC.

Hypothetical Example 5: Panama Holdings Limited is an offshore holding company. It currently owns and controls 123 Media, a Saudi media production company, but owns no other companies. BVI Holdings, another offshore holding company, owns and controls Riyadh Films, another Saudi media production company, but owns no other companies. Panama Holdings wishes to purchase BVI Holdings Limited and its subsidiary companies.

Panama Holdings (the acquiring entity) and BVI Holdings (the target entity) each report zero revenues in the most recent financial year. However, Panama Holdings's subsidiary 123 Media reports SAR 90,000,000 in annual sales in the most recent financial year, and BVI Holdings's subsidiary Riyadh Films reports SAR 130,000,000 in annual sales.

As they are controlled subsidiaries, 123 Media must be counted as part of the Panama Holdings single economic entity, and Riyadh Films must be counted as part of the BVI Holdings single economic entity. As a result, the Panama Holdings single economic entity has SAR 90,000,000 in annual sales, and the BVI Holdings single economic entity has SAR 130,000,000 in annual sales. The total annual sales value of all entities participating in the concentration will therefore be the total annual sales of the Panama Holdings group plus the total annual sales of the BVI Holdings group, which adds to SAR 220,000,000. This is more than the SAR 200,000,000 notification threshold.

Accordingly, the entities must notify their intended concentration to the GAC.

Sales in the Kingdom, or world-wide sales?

The Competition Law requires concentrations to be reported if the total value of annual sales of all participating entities exceeds 200,000,000. The Competition Law does not distinguish between sales taking place within the Kingdom and those taking place outside the Kingdom. Accordingly, the GAC will consider the relevant annual sales figures to be the combined aggregate group-wide and world-wide sales figures of all the relevant entities.

This Guide clarifies the additional reporting limits related to the target establishment's sales and local affiliation, as the target establishment's sales must exceed (40 million Saudi riyals). The total sales (within the Kingdom) of the parties participating in the economic concentration transaction together must exceed 40 million Saudi riyals. It should be noted that all these limits must be met to inform the Authority of the concentration transaction.

Hypothetical Example 6

ABC Limited is a large supermarket chain with operations mainly in Europe but with ambitions to be the largest chain in all regions of the world. It currently operates only one store in Saudi Arabia through its wholly-owned local subsidiary ABC-KSA, but it wishes to expand substantially by acquiring the large Saudi Arabian supermarket group DEF-Mart Limited through the ABC-KSA entity. DEF-Mart is currently owned by a wealthy man who has no other business interests.

ABC Limited's world-wide sales figures last financial year were SAR 8,500,000,000 but sales at its single Saudi store were only SAR 3,000,000. The total sales for DEF-Mart in its last financial year were SAR 55,000,000.

ABC-KSA is a wholly owned (and therefore controlled) subsidiary, which means that ABC-KSA is part of the world-wide ABC Limited single economic entity for the purposes of the Competition Law. The relevant total sales figures for the acquiring entity are therefore the sales of the world-wide ABC Limited group, even though ABC-KSA will be the legal entity making the acquisition. The relevant entity being acquired and participating in the economic concentration is DEF-Mart. The relevant total sales figures for the target entity are therefore the sales of DEF-Mart and any other sales of the seller of DEF-Mart, although the seller here has no other business interests. The total annual sales value of all entities participating in the concentration will therefore be the total world-wide annual sales of ABC Limited plus the total annual sales of DEF-Mart, which adds to SAR 8,555,000,000. This is more than the SAR 200,000,000 notification threshold. In addition, the sales of the target entity (DEF-Mart) exceeded 40 million Saudi riyals, and it is noted that the limit related to local connection has been met due to the sales of parties in the Saudi market exceeding 40 million Saudi riyals. Accordingly, the entities must notify their intended concentration to the GAC.

Hypothetical example 7

ABC Company Limited - the merged company - is a large Saudi supermarket chain that operates primarily in the western and central regions and owns branches in other countries. Its sales amounted to 500 million Saudi riyals. The establishment wants to expand significantly in the Eastern Province by merging with the Saudi (Agthia Mart Limited), with total sales of

10 million Saudi riyals, and which is wholly owned by the (Mart International) group, with sales of 150 million Saudi riyals.

From the above it becomes clear that the sales of the merged entity do not exceed 40 million Saudi riyals, but by referring to the entity that owns it (Mart International), we find that its sales exceed 40 million Saudi riyals, where the sales of (Mart International) were taken into account because the merged entity is part of a single economic entity affiliated with it.

Accordingly, the transaction is reportable because it meets all reporting limits for economic concentrations.

What accounting period should be used to work out the entities' annual sales?

The threshold is based on "annual" sales. Different entities use different financial years in their accounts, and some entities use the ordinary calendar year.

The relevant sales period will ordinarily be assessed by reference to the relevant entity's financial year as according to the entity's audited accounts, or a calendar year, as applicable. Where the entity's uses a particular financial year in its ordinary accounts, then the relevant financial year for evaluating the entity's total sales will be the most recent full financial year for which audited accounts are available at the time of notification of the economic concentration. Where the entity does not use a particular financial year differing from ordinary calendar years in its ordinary accounts, or does not have a financial year, then the relevant financial year for evaluating the entity's total sales will be the most recent full calendar year for which audited accounts are available at the time of notification of the economic concentration.

This means that in most cases, for each entity concerned, the entire group-wide sales (excluding intra-group sales) for the last financial year for which audited accounts are available is taken into account.

Hypothetical Example 8

Three companies, ABC Limited, XYZ Limited and 123 Limited make an agreement to merge during 2020. Each entity is a stand-alone company owned by its individual shareholders and has no subsidiaries. All entities use the ordinary calendar year as their financial years.

A review of their Income Statements for the financial year ended 31 December 2019 shows that ABC reported revenue of SAR 29,000,000, XYZ reported revenue of SAR 57,000,000, and 123 reported revenue of SAR 78,000,000 during that financial year. This means that the total annual sales of all the entities participating in the economic concentration was SAR 164,000,000. This is less than the SAR 200,000,000 notification threshold.

Accordingly, the entities are not required to notify their intended concentration to the GAC.

Hypothetical Example 9

Three companies, DEF Limited, WXY Limited and 789 Limited make an agreement to merge during March of 2020. Each entity is a stand-alone company owned by its individual shareholders and has no subsidiaries. DEF uses a financial year ending on 30 June in each year, WXY uses a financial year ending on 31 March in each year, and 789 uses the ordinary calendar year as a financial year.



The most recent set of audited accounts available for each entity are the FY 2018/19 accounts for DEF, the FY 2018/19 accounts for WXY, and the FY 2019 accounts for 789. A review of their Income Statements in these accounts shows that DEF reported revenue of SAR 79,000,000, WXY reported revenue of SAR 107,000,000, and 789 reported revenue of SAR 20,000,000 during that financial year. This means that the total annual sales of all the entities participating in the economic concentration was SAR 206,000,000. This is more than the SAR 200,000,000 notification threshold.

Accordingly, the entities must notify their intended concentration to the GAC.

Where the relevant entity's business activities do not extend for a full financial year, then the equivalent annual sales value may be estimated based on the entities' commercial activities. In many circumstances, it may be appropriate to estimate the full year equivalent sales value using a simple pro rata approach, based on the sales values during the part of the financial year during which the entity was engaging in business activities. However, the underlying objective of this estimation is to obtain an estimate of annual sales that reflects the underlying economic realities of the entities, which means that such a mechanical approach may not be appropriate in other circumstances. Entities that have only commercially operated for a part of the financial year should consider what estimate of full year sales most accurately reflects the underlying commercial realities of their ordinary business operations. Such entities may be advised to seek preliminary guidance from the GAC regarding the appropriateness of their proposed approach to estimating their total sales values for the purposes of assessment under the Competition Law.

In cases where it is impossible to verify the annual sales values of the relevant entities, it will be necessary to estimate the annual sales values according to the specific circumstances on a case by case basis. Entities in such circumstances who are required to estimate their annual sales values may be advised to seek preliminary guidance from the GAC regarding the appropriateness of their proposed approach to estimating their total sales values for the purposes of assessment under the Competition Law. Pursuant to Article 12(3) of the Implementing Regulations, the GAC may in due course determine and publish criteria for economic concentration cases where it is impossible to determine or verify the total annual sales value of the participating entities.

What if the entities involved are not companies?

The Competition Law is not limited to legally incorporated companies; it applies to all entities engaging in commercial activity, irrespective of the specific legal structure of the entities concerned. As a result, the Competition Law applies to companies, partnerships, sole traders, and other such entities, and individuals.

This wide definition of the "entities" is consistent with the competition law definition that the GAC also uses in other aspects of its concentration analysis. For entities that are not companies, the entities' total annual sales value will generally be the entity's annual sales or revenue obtained from the entity's ordinary business activities, as determined in accordance with the SOCPA standards or the equivalent prevailing accounting standards in the relevant entity's place of incorporation, as the case may be.

Partnerships normally operate as single economic entities and the relevant sales will therefore generally be the partnership's sales as a whole, not the revenues of the individual

partners. Where the partnership has partnership accounts, the partnership revenue in the most recent partnership accounts will ordinarily be the relevant total annual sales for the entity.

Hypothetical Example 10: Mr. Ahmed is a builder operating as a sole trader in his own name; he has not formed a company. He is extremely successful and his total sales revenue from providing building services last year was SAR 45,000,000. (ABC) Limited, a construction company, wishes to buy Mr. Ahmed's whole business including his contracts, contacts, and trading name. Last year, (ABC) had sales of SAR 160,000,000. (ABC) has no parent company or subsidiary.

The total annual sales value of all entities participating in the concentration will therefore be the total annual sales of Mr. Ahmed plus the total annual sales of (ABC), which adds to SAR 205,000,000. This is more than the SAR 200,000,000 notification threshold.

Accordingly, (ABC) and Mr. Ahmed must notify their intended concentration to the GAC.

Section 7

Requirements and procedures for notifying economic concentration transactions

This Section describes in detail the process the Economic Transaction Parties should follow to notify a transaction when the transaction is notifiable.

Procedures for notification of an economic concentration transaction

Who should notify the economic concentration?

Where an Economic Concentration must be notified to the GAC, the Parties intending to participate in the Economic Concentration transaction must notify the GAC of the transaction in accordance with the Law and the Regulations. The transaction may be notified by the Parties' legal representative on behalf of the Parties.

The GAC notes that a failure by the concentration parties to submit a notification does not preclude the GAC from initiating a review and assessment of economic concentration either prior to or after the completion of the transaction.

The GAC further notes that even prior to completion of the economic concentration the parties remain subject to the other provisions of the Competition Law, including the prohibition under Article 5 against anti-competitive agreements, which may include the sharing of competitively sensitive information sharing among competitors where this may have an anti-competitive effect.

When should the economic concentration transaction be notified?

The Economic Concentration must be notified to the GAC at least ninety days prior to the completion of the Economic Concentration. This requirement is outlined in more detail in this section 7.

How the economic concentration should be notified?

The notification must be made using the prescribed form and must include all the required information before the notification will be considered to be valid and legally effective. The notification should in general be completed in the Arabic language. Notifying parties may choose to complete the forms in the English language but this must be accompanied by a translation into Arabic.

The prescribed notification form is the form that is published on the GAC's official website. This form includes a declaration, which the applicant must complete, declaring that the statements and attachments contained in the notification are valid and accurate.

When submitting the notification, the applicant should submit all information and documents required for valid notification, including the following:

1. The duly completed notification Form, including the declaration as to the validity and accuracy of the information contained in the notification;
2. Relevant identification documents of the person submitting the notification;
3. Attach the required parties' documents (which will be explained in the table below).
4. Proof of payment of the prescribed fees for examining the economic concentration, in accordance with the Regulations and as outlined in this section 7 of these Guidelines;
5. The finalized, duly executed agreement to carry out the economic concentration, stating the nature of the transaction and a description of the share, equity, assets, rights, or obligations to be purchased or transferred, or managements are to be joined, between the relevant entities;
6. A report that describes the economic impact of the transaction on the relevant markets ("**Economic Report**") , where this report should include a detailed description of the following items: (a) the economic concentration transaction and the participating parties; (b) the relevant sectors and markets on which the economic concentration may have an effect; (c) the key

customers of the participating parties in those sectors and markets; (d) the key competitors of the participating parties in those sectors and markets; and (e) the potential impact of the economic concentration transaction on competition in those sectors and markets. The GAC can discuss with the notifying parties the contents of such an Economic Report, and provide a brief template, upon request;

7. Any other data, information, or documents required by GAC to review the economic concentration; and
8. A full explanation of the submitted documents.

The table below shows the documents required to apply for economic concentration:

For the acquiring entity/merging entity/first partner in the JV	For the target entity/merged entity/second partner in the JV
Validated POA by the Ministry of Justice/Saudi Embassy/Saudi Consulate/ or Apostille certificate	Validated POA by the Ministry of Justice/Saudi Embassy/Saudi Consulate / or Apostille certificate
Articles of Association	Articles of Association
Commercial register	Commercial register
Financial statements for LFY	Financial statements for LFY

The GAC may from time to time update the list of required documents and if it does so will post a notice with the current document requirements on the GAC's official website.

The GAC notes that these are the documents required for valid notification. If notification is made without the all the requisite documents being provided, the GAC reserves the right to close the notification file. When the GAC commences its review of the notified transaction, the GAC may determine that it requires additional documents, data, or other information in order to carry out its review of the economic concentration transaction on a case-by-case basis.

The applicant should ensure that the official contact persons for the economic concentration parties and any relevant third parties are specified in the submission, and the GAC will ensure that this information is provided before accepting a notification as being complete.

The notification fee

The fee to be paid for examining the Economic Concentration (the “**Notification Fee**”) is 0.0002 times (0.02% of) the total annual sales value of undertakings intending to participate in the Economic Concentration, with an upper limit of 250,000 Riyals. Section 6 of these Guidelines provides further clarification of how the total annual sales value of the relevant undertakings will be evaluated.

The Parties must pay the Notification Fee before submission of the notification, and must submit proof of payment of the Notification Fee along with the other notification documents and information. The GAC will require this proof of payment before the notification will be considered to be complete.

For example: Notification Fee = (Merging/Acquiring entity revenues + Merged/Acquired entity revenues) x 0.0002

The GAC will provide an invoice specifying the correct payment processing details.

The total annual sales value of the undertakings intending to participate in the Economic Concentration is determined in the same way that the corresponding figure is determined when assessing the total annual sales value of the participating undertakings for the purposes of determining whether this total sales value exceeds the notification threshold. This process is outlined in detail in Section 6 of these Guidelines.

Hypothetical 1

ABC Electronics is a consumer electronics importer and wholesaler serving the Eastern and Central regions of the Kingdom. ABC Electronics is wholly owned by a family which owns no other businesses. DEF Electronics is a consumer electronics importer and wholesaler serving the Southern and Western regions. DEF Electronics is wholly owned by a different family which owns no other businesses.

The families have decided to merge their businesses and to take a 50-50 ownership of the resulting merged undertaking. In the last fiscal year, the total annual sales of ABC Electronics were 150 million Riyals, and the total annual sales of DEF Electronics was 200 million Riyals.

The total annual sales value of the participating undertakings is 350 million Riyals. This amount is over the notification threshold for the notification of Economic Concentrations. Accordingly, the transaction must be notified to the GAC.

0.02% of the total annual sales value of the participating undertakings is 70,000 Riyals. Accordingly, the participating undertakings must pay a notification fee of 70,000 Riyals for the notification to be considered complete and for the Economic Concentration to be reviewed by the GAC.

Hypothetical 2

Mr. Mohammed is the sole owner of a small construction services company, Mohammed Services, located in Riyadh. Mr. Mohammed owns no other businesses.

He has decided to sell his company to another small construction services company, Ibrahim Services. Ibrahim Services is solely owned by Mr. Ibrahim of Dammam, owns no other businesses.

In the last fiscal year, Mohammed Services had total annual sales of 15 million Riyals, and Ibrahim Services had total annual sales of 20 million Riyals.

The total annual sales of the participating undertakings are therefore 35 million Riyals. This amount is under the notification threshold for notification of Economic Concentrations. Accordingly, the transaction does not need to be notified to the GAC, and the participating undertakings do not need to pay a notification fee.



Hypothetical 3

ABC Metals is a metals-processing company with its main operations in the Jeddah area. It is a wholly owned subsidiary of the Mega Group, a multinational company with different operations and subsidiaries around the globe and its headquarters in the Asia region.

Investco is an investment company with its headquarters in a GCC country. It owns as subsidiaries and operates a wide variety of different businesses in different industries.

Mega Group and Investco have agreed that Investco will wholly acquire ABC Metals from Mega Group. Investco will structure the transaction by establishing a special purpose vehicle, SPV Limited. SPV Limited will be the entity directly acquiring ABC Metals. SPV Limited will be wholly owned by Investco.

ABC Metals is the target company in the acquisition. The acquiring entity will be the Investco group, including SPV Limited, Investco as the company controlling SPV Limited, and all other undertakings controlled within the same group including any other subsidiaries controlled by Investco. The selling entity will be the Mega Group, including all undertakings controlled within the same group including any other subsidiaries.

In the last fiscal year, the target undertaking ABC Metals has total annual sales of 200 million Riyals. The selling undertaking Mega Group (including all entities controlled within the same group, but excluding ABC Metals) had total annual sales of 15 billion Riyals (excluding the sales of its ABC Metals subsidiary). The buying undertaking Investco (including all entities controlled within the same group) had total annual sales of 20 billion Riyals.

The total annual sales of the buyer and the target (the undertakings participating in the economic concentration) are therefore 20.2 billion Riyals. This amount exceeds the notification limit for the notification of Economic Concentrations. Accordingly, the transaction must be notified to the GAC.

0.02% of the total annual sales value of the participating undertakings is 4.04 million Riyals. This amount is over the maximum amount of 250,000 Riyals of the notification fee. Accordingly, the participating undertakings must pay the maximum amount of 250,000 Riyals as the notification fee for the notification to be considered complete and for the Economic Concentration to be reviewed by the GAC.

The regulatory review period

The Economic Concentration must be notified to the GAC at least ninety days prior to the completion of the Economic Concentration. The completion of an Economic Concentration starts with the first act of implementation. Notifications should be made on official working days during official working hours, and when a notification is submitted outside of these official working times, the GAC will consider that it has been submitted during the next working day thereafter.

The applicant's notification submission will be considered to be complete when the applicant has satisfied the required conditions for notification including providing the required information and documents required for complete notification.

The ninety-day regulatory review period will begin on the date on which the GAC notifies the applicant that the applicant's notification submission is complete. If the last day of this regulatory review period corresponds to an official holiday, the next working day thereafter shall be considered the last day of this regulatory review period.

The regulatory review period may be suspended under certain circumstances:

- When the GAC requests any information or documents from the applicants, the GAC may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents.
- When the GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

Where the regulatory review period is suspended, the days during which it is suspended are not counted as part of the ninety-day regulatory review period.

Pre-notification

The GAC is generally available for discussions with parties or their representatives prior to the formal notification of an economic concentration transaction (“**pre-notification**” discussions).

The main purpose of pre-notification discussions is to:

- (i) assist parties in deciding whether a proposed transaction is likely to be notifiable by providing initial information on the transaction;
- (ii) assist parties in preparing the notification form through non-binding discussion regarding the specific information needed for the notification; and
- (iii) give parties the opportunity to provide preliminary information to the GAC about the nature of competition and any potential competition issues in the markets, industries or sectors concerned.

Pre-notification discussions are entirely voluntary and at the parties’ discretion.

The GAC will not conduct pre-notification discussions on a hypothetical basis or without knowing the identities of the parties and markets at issue. To request a pre-notification discussion, the parties or their representatives should provide the following information to the GAC:

- (i) The names and contact information of the economic concentration parties, and their representatives (if any);
- (ii) The type of transaction;
- (iii) The markets or goods and services affected by the proposed transaction; and
- (iv) The possible impact of the transaction on competition in general terms.

It is generally recommended that this information be provided in the form of a brief confidential memorandum to the GAC as this will assist the efficiency of the pre-notification process.

It is the GAC’s experience that the pre-notification phase of the procedure can play an important part in the whole review process. The GAC generally finds it useful to have pre-notification contacts and discussions with notifying parties even in cases that may not raise competition concerns. The GAC will therefore generally encourage notifying parties and other involved parties the opportunity to discuss an intended concentration informally and in confidence prior to notification. Pre-notification contacts may enable the GAC and the notifying parties to discuss the following prior to notification at an early stage:

- (i) Jurisdictional and other legal issues;
- (ii) The scope of the information to be submitted;
- (iii) The possible market definitions; and
- (iv) The possible competition concerns and theories of harm.

Early discussions can also assist in ensuring that notification forms are complete, thereby preventing delays due to incompleteness of the notification forms.

A productive pre-notification phase is most likely to occur if discussions are held in an open and co-operative atmosphere, where all potential issues are addressed in a constructive way. For this reason, it is generally preferable that business representatives who have a good understanding of the relevant markets are available for pre-notification discussions with the Case Team, as this normally results in more informed discussions on the business rationale for the transaction and the functioning of the markets in question.

The GAC will treat pre-notification discussions in strict confidence.

The recommended time for the parties to initiate pre-notification contacts prior to the intended notification will depend on the complexity of the individual transaction. It is generally recommended that pre-notification contacts should be initiated at least two weeks before the intended notification date, but where a case is likely to be more complex, a longer pre-notification period may be advisable. In all cases, it is advisable to contact the GAC as soon as possible as this will facilitate planning of the case. In some cases, the parties may choose to submit a draft notification form which includes this information as a basis for further discussions with the GAC.

This memorandum or draft notification form will generally form the basis for the first pre-notification meeting. Subsequent pre-notification meetings may cover additional information submitted or outstanding issues.

The memorandum or draft notification form should be provided long enough before meetings to allow for well prepared and fruitful discussions, and it is generally recommended that they be filed several working days before any meeting (or longer in some cases of large and complex submissions) unless agreed otherwise with the Case Team.

Notifying parties are encouraged fully and frankly to disclose information relating to all potentially affected markets and possible competition concerns. This is the case even if the parties have a belief that competition would not be affected and notwithstanding that they may take a particular view in relation to, for example, the issue of market definition. This will allow for an early consideration and discussion of alternative market definitions and/or the notifying parties' position on the market/s in question. Such full and frank early discussion in a spirit of openness and cooperation can minimize unnecessary delays later in the process, avoid requests for additional information from the notifying parties at a late stage in the procedure, and avoid risks that the notification documents are incomplete.

Notifying parties are also recommended to submit as early as possible in the pre-notification phase relevant documents such internal documents, board presentations, surveys, analyses, reports, and studies discussing the proposed concentration, the economic rationale for the concentration and competitive significance or the market context in which it takes place. Such documents provide the GAC with an early and informed view of the transaction and its potential competitive impact and can thus allow for a productive discussion and finalization of the notification form.

The GAC's assessment procedure

The GAC will appoint a Case Team of specified personnel tasked with reviewing the economic concentration transaction.

The Case Team will gather all the evidence it requires for its review of the economic concentration transaction, in light of the potential competition concerns raised by the transaction. The review will be carried out on a case by case basis in order to identify what (if any) competition concerns each specific transaction may raise.

Depending on the complexity of the case and the potential competition concerns raised by each case, the Case Team's review may typically include an in-depth analysis of the markets in question, the transaction, the potential mechanisms or theories of competition harm raised by the transaction, and the evidence that enables the Case Team to decide on the likely competition impact of the transaction. The Case Team will generally take into account the following considerations during its review:

1. Identification of the potential concerns for competition raised by the intended economic concentration, including identification of the theories of competition harm potentially arising from the economic concentration; and
2. The information required for further detailed investigation of the transaction and the theories of harm, and the potential sources of that information.

In its review, the Case Team will determine the types of information, requests, documents, and studies necessary to obtain the information required to test the theories of harm, and select the best ways to obtain this information. The Case Team will be guided by the facts in deciding whether specific theories of harm can be substantiated or dismissed in specific cases. The Case Team will meet as frequently as the case requires. As a part of this process, the Case Team may use economic and standard analytical tools and secondary information technology tools to review the economic concentration transaction.

Information gathering by the GAC

In order to carry out its duties under the Law and the Regulations, the GAC may require the Economic Concentration parties and other undertakings to provide information. The GAC is empowered to require all information that it requires for its review of the Economic Concentration transaction.

Information provided with the notification

Certain types of information and documents should be provided to the GAC at the moment of notification for the notification to be considered complete: this section 7 of these Guidelines outlines those documents and other types of information.

Information required after the notification

In addition to the information submitted with the notification, the GAC may subsequently request additional information from the Economic Concentration parties during the course of the GAC's review of the transaction. The information requested may include documents, records, data, files, specific written information, and other information that the GAC considers relevant for its review of the transaction.

The GAC may also request such information from other parties, including from competitors, other stakeholders, and the general public. The GAC may similarly accept information that has been offered voluntarily by other parties.

The GAC may require any of the economic concentration parties or other parties to provide it with market information to evaluate the effects of economic concentration on competition. None of the parties may withhold information, mislead the GAC, or delay supplying the GAC with the required information within the review period of the application after receiving the request for information. Information required by the GAC to evaluate the economic concentration may not be withheld for claimed reasons of confidentiality or for any other reason. Where an economic concentration party provides incorrect information to the GAC, or refuses to provide required information to the GAC, the GAC may reject the economic concentration. A party is deemed to have refused to provide information where 15 days have passed from the date on which the GAC requested the relevant information and the party has not provided the requested information or provided justifications acceptable to the Board.

Written requests for information

A request for information will ordinarily take place by way of a written request for information addressed to the relevant parties or their nominated representatives. The written request for information will state the purpose of the request, specify what information is required, and specify the time limit within which the information is to be provided. A written request for information may cover all types of information helpful to the Case Team in assessing the transaction, including but not limited to written responses to specific questions, data and statistics, economic studies and market surveys, the parties' internal documents such as strategic plans, strategic analyses of corporate markets, pricing policies, business plans, marketing plans, long- and short-term forecasts, a list of major customers, information about competitors, marketing and sales reports, sales and bidding data, excess capacities data, production costs, and any other documents and data that the GAC deems to be necessary for its assessment of the intended economic concentration.

Meetings and interviews

The GAC may also gather information by holding meetings and direct interviews with the concentration parties or third parties. The GAC may communicate by phone with any of the representatives or affiliates of the concentration parties for discussion and request any information required for the review of economic concentrations at any stage of the review process, when necessary. At the beginning of the interview, which may be conducted by telephone or other electronic means, the GAC will state the purpose of the interview. Information that may be sought by way of phone communications or meetings may include the following:

1. Basic or summary information that is required without delay;
2. Verification of specific claims submitted by one of the concentration parties or third parties;
3. Identification of specific individuals who can provide evidence; and
4. Any other information that may appropriately be sought in this way.

The GAC will generally specify a time limit within which the information requested should be provided to the GAC.

Site visits and inspections

The Case Team also may visit undertakings operating in the relevant market, including undertakings not participating in the concentration and other third parties, and record their statements or those of their representatives, for the purposes of evaluating relevant technical aspects of the market, activity in the market, and the degree of competition in the market.

The Case Team may also seek information by carrying out unannounced inspections of any of the concentration parties or third parties in their premises during the ordinary working hours

in order to obtain the necessary documents, files, and instruments, including electronic data. Unannounced inspections may be carried out by the Case Team when it has been authorized to do so by the Board, or by the Chairman or the Governor when the Board has delegated the power to authorize unannounced inspection to them.

Procedures and principles the case team will follow in requesting and assessing information

When requesting information, whether by written or oral means, the Case Team will observe the following procedures and principles:

- The Case Team will verify the function, position, and responsibility within the undertaking of the person providing the evidence or responding to the enquiries, and his level of responsibility in the firm;
- The Case Team will seek where possible to rely on responses supported by detailed data and opinions, and while relying less on conclusions derived from the general context of such evidence and information;
- The Case Team will seek to verify the accuracy of descriptive evidence;
- The Case Team seek to obtain relevant information from a substantial proportion of the undertakings operating in the relevant market;
- The Case Team will seek to be accurate in determining its review priorities so as to limit the burdens of information requests on the economic concentration parties, within the context of the Case Team's requirements for the complete assessment of the transaction;
- Persons providing evidence and making relevant statements should in all cases support their statements and responses with relevant documents as far as possible; and
- The Case Team will evaluate the reliability of evidence being produced and statements being made and will seek to verify the objectivity and impartiality of evidence and statements submitted by all parties, including by third parties. Where there is doubt or uncertainty regarding the reliability of evidence or statements, the Case Team may require the evidence or statements to be accompanied by a signed statement of commitment to the validity thereof.

When assessing the information provided including documentary evidence, the Case Team will observe the following procedures and principles:

- The Case Team will assess the reliability of the evidence provided for the purposes of conducting an accurate assessment of the intended economic concentration;
- The Case Team will conduct a complete assessment of the intended economic concentration using all relevant information, and will not rely only submissions from the economic concentration parties;
- The Case Team may decline to rely on documentary evidence or information unless it is supported by data, programs, models, methodologies, or other supporting evidence;
- The Case Team will seek wherever possible to obtain independent verification of statements and data contained in the documents, studies, and other information submitted by the concentration parties, particularly the evidence or information provided in support of the parties' request for approval;
- The Case Team may design and conduct surveys and other questionnaires to obtain further information from the concentration parties, third parties, or other market participants; and
- The GAC will preserve the integrity and confidentiality of documentary evidence and other information and documents.

The ninety-day regulatory review period may be suspended under certain circumstances:

- When the GAC requests any information or documents from the applicants, the GAC may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents.
- When the GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

Where an economic concentration party provides incorrect information to the GAC, or refuses to provide required information to the GAC, the GAC may reject the economic concentration. A party is deemed to have refused to provide information where 15 days have passed from the date on which the GAC requested the relevant information and the party has not provided the requested information or provided justifications acceptable to the Board.

Interim consultations

The Case Team may discuss its interim assessment with the economic concentration parties and with third parties in order to identify and to seek to resolve any unresolved issues of any kind.

The Case Team may present its interim assessment or part thereof to third parties for their opinions, while taking account of the need to obtain objective, impartial and substantiated opinions.

The economic concentration parties' and third parties' interests in confidentiality will be preserved throughout this process. No documents of the economic concentration parties and third parties will be shared with others, except pursuant to the procedures outlined in this Section 7 of these Guidelines. Where a GAC document to be released during interim consultations contains information that is confidential to an economic concentration party or a third party, the GAC will prepare a public version of that document which redacts any such confidential information. The parties whose confidential information is to be redacted will be given an opportunity to comment on this redaction, with the Board's decision according to the procedures outlined in this Section 7 of these Guidelines being final.

Public consultations

The GAC may invite the general public to express opinions on the economic concentration transaction through publication on the website or in any appropriate media outlet.

The economic concentration parties' and third parties' interests in confidentiality will be preserved throughout this process, in line with the procedures outlined in this Section 7 of these Guidelines.

The Board's decision procedure

When the Case Team has completed its review of the intended economic concentration transaction, it will submit a detailed note outlining its opinion regarding the intended economic concentration, for the Board's decision in accordance with its powers set out in the Competition Law and Implementing Regulations. The Board will evaluate the Case Team's

opinion on the economic concentration transaction, taking into account all relevant factors, including the following:

1. The level of competition in the market;
2. The accessibility of new firms to the market, including any regulatory or factual barriers to entry for new competitors to enter the market;
3. The potential effect of the transaction on the price of the relevant goods or services;
4. The level and historical trends of the anticompetitive practices in the market;
5. Potential increases in market power in the relevant market resulting from the economic concentration;
6. Other relevant characteristics of the market, including growth and innovation; and
7. The opinions of other interested parties, including third parties and the public.

The Board will evaluate the potential impact of the economic concentration transaction, taking into consideration the following objectives:

1. Maintaining and promoting the effective competition among producers and distributors of goods and services in the market;
2. Enhancing the interests of the consumers with regard to quality and price; and
3. Promoting, through competition, cost reduction, improving new goods and services, and facilitating the entry of new competitors to the market.

If the Board, after evaluating the Case Team's opinion on the economic concentration application, determines that the economic concentration is likely to have a negative impact on competition, the Board shall, before refusing the application, investigate the positive effects that may result from the concentration, in case such positive effects may outweigh the negative effect on competition or otherwise achieve a positive outcome in the public interest.

If the Board, after evaluating the Case Team's opinion on the economic concentration application, concludes that the economic concentration will substantially lessen competition, it may decide one or more of the following:

1. That the intended economic concentration is contrary to the Competition Law.
2. That the economic concentration parties and any of their related parties may not acquire some or all of the undertakings or assets concerned.
3. That any person who has a share in the transaction or is otherwise a party to it must undertake procedures for dissolving a relevant firm or terminating a relevant partnership.
4. That any person mentioned in the decision must comply with any relevant controls and restrictions determined by the Board, in a manner directed by Board.
5. Taking any necessary precautions to terminate or prevent the economic concentration or mitigate effects thereof, at the discretion of the Board.

The Board may also require the applicant or any other concerned party to produce any information or documents that the Board deems to be important for its assessment of the economic concentration application. Where the Board makes such a request for information, the concerned party must respond to the GAC within 15 days of the date of the Board's request.

The Board may consider statements and opinions of those related to the economic concentration application. The Board has the discretion not take into consideration any opinions that are not supported by reasons, do not clarify the anticompetitive impact of the concentration, or do not including the full particulars about the provider of the statement of opinion.

The Board's decision

The Board will issue a decision on the intended economic transaction in any of the following forms:

1. Approval of the economic concentration application.
2. Refusal of the economic concentration application, where such decision will be accompanied by a statement of reasons.
3. Approval of the economic concentration subject to conditions determined by the Board, where such decision will be accompanied by a statement of reasons.

The GAC has the right to announce the decision via any media platform.

The Board may delegate some or all of its decision-making powers in relation to making decisions regarding economic concentrations transactions to the Governor, provided that such delegation is carried out pursuant to a written decision and for a specific period.

Protection of confidential information

The Law provides that the Members of the Board and the employees of the GAC must maintain the confidentiality of information, records, data, files, and documents (together, “**information**”) obtained from the Economic Concentration Parties or other entities in the course of collecting evidence or investigations. Such information may not be passed to other parties except with the approval of the Board, where the Board's approval has been recorded in the meeting minutes, or with the approval of the Governor in the following cases:

1. With the consent of the party providing the information;
2. For submission of the information to judicial and quasi-judicial bodies; or
3. For the purposes of the exchange of views and opinions with international competition authorities concerned with the review process, where the Economic Concentration Parties have been notified of the GAC's intention to disclose the information, and provided that the international competition authority receiving the information shall take the necessary legal measures for the protection of the confidentiality of the information.

Section 8

The competitive evaluation of the economic concentration application

The Competition Law and the Implementing Regulations

Article 2 of the Competition Law explains that the objectives of the Competition Law are as follows:

“Article 2:

The Law aims to protect and encourage fair competition and to combat and prevent monopolistic practices that affect lawful competition or consumer interest; leading to improved market environment and economic development.”

Article 2 of the Implementing Regulations similarly explains that its objectives are as follows:

“Article 2:

The Regulations aim to improve the efficiency of the markets and create a competitive business environment within a framework of justice and transparency through:

1. Protecting and encouraging fair competition;
2. Combating and preventing monopolistic practices affecting lawful competition and consumers’ interests;
3. Promoting the availability of commodities with high quality and varied prices; and
4. Stimulating innovation and investment to support economic growth.”

A primary objective of the Competition Law and the Implementing Regulations is therefore to protect and to encourage competition and to prevent practices that would decrease competition in contravention of the Competition Law. Accordingly, when assessing an economic concentration for its compatibility with the Competition Law, the GAC’s primary consideration will be to assess the impact that the economic concentration has on the degree of competition in the relevant market.

This consideration is outlined clearly in Article 22 of the Implementing Regulations, which explains that “[w]hen examining and reviewing economic concentration transactions, GAC seeks to maintain and encourage the effectiveness of fair competition in the Kingdom’s markets.” Article 22 further explains that in undertaking such an assessment of an economic concentration, the GAC may assess one or more of the following factors:

- “1. Structures of relevant markets and the level of actual or potential competition between undertakings inside the Kingdom or abroad, in cases where it has an impact on local markets.
2. Financial positions of the parties to an economic concentration.
3. Product or service alternatives that are available to consumers, vendors, and clients and how accessible such alternatives are.
4. Level of product differentiation.
5. Consumer interests and welfare.
6. Potential impact of the economic concentration on prices, quality, diversification, innovation, or development in a relevant market.
7. Actual or potential harm or benefits to competition from the economic concentration transaction.
8. Supply and demand growth and trends in the relevant market and commodities.
9. Barriers to entry or exit of new undertakings into a relevant market, their continuation therein, or expansion, including regulatory barriers.

10. The extent to which an economic concentration may create or strengthen a significant market power or a dominant position of an undertaking - or group of undertakings - in any relevant market.
11. The level and historical trends of anti-competitive practices in a relevant market, either for the parties to an economic concentration or the undertakings influential in such market.
12. Views of the public, economic concentration-related parties, and sector regulators.”

The Competition Test

The factors listed in Article 22 of the Implementing Regulations are relevant factors in answering one fundamental question:

What will be the effect or likely effect of the economic concentration on the degree of competition in the relevant market?

This question may be restated as follows:

Will the economic concentration have the effect or likely effect of substantially lessening competition in a relevant market?

This question is the “competition test” that will in general be the fundamental issue that the GAC will assess when assessing economic concentrations under the Competition Law.

What is “competition”?

Competition is a process. It is the state of ongoing rivalry between undertakings in a market. Undertakings compete with other undertakings for customers in terms of those considerations that are important to customers – they compete in terms of price, service, technology, quality, and other dimensions of competition that are important to customers when customers make their purchasing decisions. This process of ongoing rivalry places constraints on market participants in terms of their pricing, their output, and related commercial decisions, because of the activity of other market participants (or potential market participants). The greater the degree of the competition in the market, the greater are the constraints from competition on market participants market behavior, and the less is market power each market participant possesses.

How may economic concentrations affect the degree of competition?

Economic concentrations such as mergers can change the level of competition in a market by changing the structure of the market and changing the way competitors compete with each other in the market.

Many economic concentrations do not affect the level of competition. In some circumstances, this may be because the market after the economic concentration remains as competitive as it would have been without the economic concentration, and in some circumstances, an economic concentration may lead to even more intense competition in the relevant market(s). However, some economic concentrations lessen competition by reducing or weakening the competitive constraints or reducing the incentives for competitive rivalry

among the remaining market participants. Economic concentrations which lessen competition may be of concern to the GAC.

What is a lessening of competition?

Economic concentrations that lessen competition by increasing the market power of one or more market participants may be detrimental to consumers because they may lead to an increase in price, or deterioration in some other aspect of the undertaking's service offering. The most obvious and direct manifestation of an increase in market power resulting from an economic concentration is the ability of one or more undertaking to profitably raise their prices post-concentration for a sustained period. Market power can, however, be exercised in other ways. For example, a firm with market power may:

- Lower the quality of its products without a compensating reduction in price;
- Reduce the range or variety of its products;
- Lower customer service standards; and/or
- Change any other parameter relevant to how it competes in the market.

The exact nature of competitive detriment caused by increased market power due to an economic concentration will vary depending on the particular circumstances of the matter; a reference in these Guidelines to "raising prices" or similar should be understood a change in any of the relevant parameters of competition (price, quality, range/variety, etc.) in a way that is detrimental to customers.

Hypothetical Example 1

Aleph Airways and Beit Airlines are airlines servicing the MENA air travel market and other longer-haul destinations. Both Aleph Airways and Beit Airlines have frequent flyer programs that are highly valued by large proportions of their regular passengers, and are an important reason for these passengers to choose Aleph Airways and/or Beit Airlines rather than any of the other alternative airlines. The frequent flyer programs are therefore an important parameter of choice for customers, and an important parameter of competition between the airlines.

Aleph Airways and Beit Airlines have agreed to merge. Although they are both headquartered in other MENA countries, they both service routes into and within the Kingdom of Saudi Arabia; the economic concentration is therefore subject to the jurisdiction of the Competition Law and the assessment of the GAC.

Based on the specific evidence in this case, it is considered unlikely that either airline will be able to materially change its prices after the completion of the economic concentrations. However, there is substantial evidence that both airlines will be able to, and will, substantially deteriorate the value to their customers of their frequent flyer programs as a result of the merger, by substantially reducing the value of previously accrued air miles for the purposes of buying mileage air travel tickets, and by making other changes that deteriorate the usefulness of the frequent flyer programs to their passengers.

The frequent flyer programs are an important parameter of competition among Aleph Airways and Beit Airlines and their competitors. The ability of Aleph Airways and Beit Airlines to deteriorate the value of the frequent flyer programs to their customers as a result of the economic concentration is therefore an indication of an increase in those airlines' market power post-concentration.

The GAC would consider the post-concentration deterioration of the frequent flyer programs as a possible indication of a lessening of competition due to the economic concentration, in the same way as it would consider a likely increase in prices post-concentration as possible indication of a lessening of competition due to the economic concentration.

In many cases where an economic concentration results in a lessening in competition, the increased market power will accrue to sellers in a relevant market. However, an economic concentration can also lead to a substantial lessening of competition among buyers in a market, by increasing the market power of a buyer or buyers.

The analysis that the GAC will undertake in assessing the likely effect of competition of an economic concentration is explained in more detail in Section 10 of these Guidelines.

What is a “substantial” lessening of competition?

The GAC considers that an economic concentration will contravene the Competition Law if the economic concentration results in a substantial lessening of competition. This means that the GAC will consider intervening in economic concentrations if their impact on competition is substantial, rather than merely trivial or non-consequential. Some economic concentrations will lessen competition but not substantially so, because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behavior of the undertakings after the concentration.

The precise threshold of what constitutes a “substantial” lessening of competition will depend on the particular facts of the economic concentration under consideration. An economic concentration merger gives rise to a substantial lessening of competition when it has a significant effect on rivalry over time, and therefore on the competitive pressure on undertaking to improve their offer to customers or become more efficient or innovative. An economic concentration that gives rise to a substantial lessening of competition will be expected to lead to an adverse effect for customers. In general, the GAC will therefore consider a lessening of competition to be substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, an economic concentration will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices.

The level at which an increase in market power is likely to become significant and sustainable will vary from concentration to concentration. For example, an increase in price that is small in magnitude may nevertheless be significant if it has a material impact on customers. The GAC will therefore place significant emphasis on evidence regarding likely adverse effects in assessing economic concentrations.

The competition test in economic concentration analysis is forward-looking

Undertakings most generally notify economic concentrations to the GAC for the GAC’s assessment before the economic concentration takes place. This means that in the general case, the GAC’s assessment of the economic concentration will be forward-looking. In other words, the GAC will assess what the future effect or likely effect of the economic

concentration on the market is likely to be, before the impact of the economic concentration on competition can be observed. after the economic concentration takes place. The GAC therefore focuses on the foreseeable future when undertaking its assessment of the economic concentration.

The period of the foreseeable future that the GAC will consider will vary from case to case. In many cases, the foreseeable future will consist of the likely effects within one to two years following the transaction. However, in some cases, the GAC will consider a longer or shorter period for the appropriate foreseeable future for its assessment.

The GAC will assess the effects or likely effects of the economic concentration after the transaction has taken place and become effective. The GAC considers that an effect of a concentration, such as a substantial lessening of competition, is “likely” if it is more probable than speculation or a mere possibility, or if there is a real chance that the effect will occur. The threshold that an effect is “likely” does not require that the effect be certain. The determination of whether a substantial lessening of competition is likely to take place will depend on the facts of the particular matter.

The counterfactual in the analysis

The GAC’s assessment of economic concentrations requires comparing two likely future states:

1. The future with the economic concentration; and
2. The future without the economic concentration.

The GAC will compare the degree of competition in these two future states in order to assess whether the economic concentration will be likely to result in a substantial lessening of competition compared to the alternative future state without the economic concentration. This comparison isolates the impact of the economic concentration on competition. For this reason, the competition test may be referred to as a future ‘with and without’ test.

The likely future state without the merger is also called the “counterfactual” state. In most cases, the counterfactual state will be similar to the current state actually existing at the time of the economic concentration. This means that in most cases, the GAC will generally compare the state of competition in the future state “with” the economic concentration with the current pre-concentration state of competition.

However, in some cases, the likely future state without the economic concentration (the counterfactual) will be different to the current state, because of some other development that is unrelated to the economic concentration and is likely to occur regardless of the economic concentration. In such cases, the GAC will use information about the state of competition prevailing at the time of the economic concentration to inform its entire assessment of the likely future state of competition without the economic concentration. This will include the GAC’s assessment of relevant market definitions, and the GAC’s assessment of the likely competitive situation without the merger, and may include situations where undertakings are likely to be more competitive in the future regardless of whether or not the economic concentration takes place, and the situations involving failing firms. However, the GAC will only consider counterfactuals that accurately reflect the situation that would prevail without the economic concentration, and will not consider counterfactuals it considers to have been manipulated for the purposes of unduly influencing the GAC’s assessment of the economic concentrations.

Hypothetical Example 2

ABC Limited and DEF Limited are both companies incorporated in the Kingdom of Saudi Arabia with headquarters in Riyadh. Currently, ABC Limited makes gardening equipment such as shovels and garden hoses, and DEF Limited manufactures high-end semi-conductors used primarily in mobile telephones and other telecommunications equipment.

There is therefore no overlap in the products currently produced by the two undertakings. However, an exceptionally bright young engineer working for ABC Limited has just invented a ground-breaking new development in the production of semi-conductors; she invented it while working for ABC Limited, so that ABC Limited owns the patent to the invention. ABC Limited has just invested in a factory for producing semi-conductors using this new invention, which will start producing leading-edge semi-conductors in around 10 months.

ABC Limited and DEF Limited have agreed to merge, with the merger to be completed as soon as possible.

Based on the current, actual state of competition between ABC Limited and DEF Limited, there is no appreciable competition between the two undertakings. However, because of ABC Limited's new invention and investments in the manufacture of semi-conductors, the likely future state of competition without the economic concentration is that both ABC Limited and DEF Limited will compete with each other in the supply of high-end semi-conductors. As this future state without the economic concentration (the counterfactual) is likely, in this case the GAC will analyze the likely effect of the economic concentration by comparing it to the state where ABC Limited and DEF Limited compete in the manufacture of semi-conductors, even though ABC Limited currently only supplies gardening equipment.

Applying the competition test

The GAC's assessment of economic concentrations normally entails:

1. Definition of the relevant product and geographic markets; and
2. Assessment of the competitive effects of the economic concentration on the relevant markets.

The GAC's approach to defining the relevant markets is outlined in Section 9 of these Guidelines. The GAC's approach to assessing the competitive effects of the economic concentration is outlined in Section 10 of these Guidelines.

Section 9

Market definition

The Competition Law and the Implementing Regulations

Article 1 of the Law and Article 1 of the Implementing Regulations define a “Market” as being “A place or means where a group of current and prospective buyers and sellers meet within a specified period of time”.

Article 1 of the Implementing Regulations further define a “Relevant Market” in the following terms:

Relevant Market: A market that comprises the following two elements:

A. Relevant commodities that are interchangeable – for a particular purpose – with respect to the consumer; and

B. A Geographic area where the conditions of competition are the same.

Accordingly, the GAC will define the relevant market(s) for the purposes of assessing an economic concentration on the market’s product and geographic dimensions, in line with standard international practice.

The role of market definition in competition assessment

In assessing whether an economic concentration substantially lessens competition, the GAC will examine the competitive impact of the transaction in the context of the markets relevant to the economic concentration. This section explains the concept of a relevant market and the GAC’s approach to identifying and defining the scope of relevant markets that are relevant to assessing economic concentrations.

Market definition is an analytical tool to identify and define the boundaries of competition between undertakings. The main purpose of market definition is therefore to identify in a systematic way the competitive constraints that the undertakings involved face when operating in a market, by enabling the GAC to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behavior, and those participants, including customers, that may be affected if the economic concentration lessens competition. In other words, market definition helps to establish the relevant “field of inquiry” for the analysis of economic concentrations.

Basic principles of market definition

A market is the product and geographic space in which rivalry and competition take place. Markets are therefore defined in both their product and geographic dimension.

A market includes those goods or services and their geographic locations that are substitutable for, or otherwise competitive with, the goods or services under analysis. Accordingly, the degree of substitution by consumers and suppliers is a central concept in market definition.

In defining markets in their product and geographic dimensions, the GAC focuses on two key dimensions of substitution:

- **The product dimension:** Substitution between products is a central concept in defining the product dimension of markets. The GAC notes that “product” in this context includes goods, services, and other equivalent economic outputs.

- **The geographic dimension:** Substitution between different locations of the relevant goods or services is a central concept in defining the geographic dimension of markets. The GAC notes that the “geographic dimension” in this context may be local, regional, national, or wider including world-wide.

In addition to the product and geographic dimensions, in some cases market definition requires clear consideration of different functional levels of a supply chain that are relevant to an economic concentration. As an example, in some cases it may be appropriate to define separate markets at a wholesale/bulk functional level and at a retail functional level if these are sufficiently separate “products”. In other cases, the time period over which substitution possibilities take place needs to be considered carefully, and the GAC notes that it generally focuses on the foreseeable future when considering the time aspects of market definitions. However, in most cases these considerations will form part of the analysis of the main product and geographic dimensions.

A market definition must be considered in the context of the broader competition analysis of which it forms a part, in the context of the market and the time at which is done. Market definition always depends on the specific facts and circumstances of an economic concentration, and current evidence from market participants will often be important in determining the market definition. This means that definition of a relevant market cannot be separated from the particular economic concentration under investigation, and that decisions relating to market definition in previous (even if somewhat similar) economic concentration inquiries will provide only limited guidance and cannot be taken to offer precedent value.

Closely related to this is that market definition makes it possible to calculate market shares that can serve as important information in the assessment of market power and the changes in market shares that would result from an economic concentration.

The GAC notes that the concept of a “relevant market” in competition analysis has a technical meaning and may be different from other definitions of market often used in other contexts, such as how businesses may think of a market in their own management deliberations.

The GAC’s approach in defining markets

When defining markets, the GAC will in most cases follow the following general approach:

1. First, the products and geographic regions actually or potentially supplied by the economic concentration parties will be identified. This is the first step in identifying the markets that may be relevant in the analysis of the economic concentration. In this way, the GAC begins by considering those areas of activity where competitive harm may occur, by considering in each case the products and geographic regions where there may be an overlap between the activity of the economic concentration parties, or some other meaningful economic relationship such as an actual or potential vertical relationship. This is done on a case by case basis. In many cases, more than one potential market may be identified.
2. The GAC then considers the boundaries of those potential markets in their product and geographic dimensions. A properly defined relevant market includes all those products and geographic regions that are sufficiently close substitutes of the products and geographic regions first considered.

The GAC notes that, at the market definition stage, markets are defined according to the product and geographic dimensions, not by reference to the firms actually supplying those products or regions at the time of the economic concentration.

- **The Product Market:** The process of defining the relevant product market will often start by looking at a relatively narrow potential product market definition. This would normally be one (or more) of the products which are offered by the economic concentration parties. The potential product market is then expanded to include those substitute products to which buyers would turn in the face of a price increase above the competitive price. The objective of this analysis will therefore be to identify all those products among which buyers would be able or willing to substitute for the products under examination, where “product” in this context includes goods, services, and other equivalent economic outputs.
- **The Geographic Market:** The relevant geographic market can be defined using the same general process as that used to define the relevant product market. The process of defining the relevant geographic market will often start by looking at a relatively narrow potential geographic market definition. This would normally be one (or more) of the geographic areas in which products are offered by the economic concentration parties. The potential geographic market is then expanded to include those substitute geographic areas to which buyers would turn in the face of a price increase above the competitive price. The objective of this analysis will therefore be to identify all those geographic areas where buyers would be able or willing to find substitutes for the products under examination. The relevant geographic market may therefore be local, regional, national, or wider than national.

When defining the relevant market, the GAC will look at evidence that is available and relevant to the case at hand. The GAC will follow the general analytical framework explained in these Guidelines but will adjust this framework as required by the circumstances of each specific case.

The GAC will define the boundaries of the relevant market as precisely as required by the circumstances of the case. Where appropriate, the GAC may conduct its competition assessment on the basis of alternative market definitions. Where it is apparent that the economic concentration being investigated is unlikely to have an adverse effect on competition, or that the undertaking under investigation does not possess a substantial degree of market power on the basis of any reasonable market definition, the question of the most appropriate market definition can be left open in specific cases.

Substitution

As outlined above, identifying relevant substitutes is the most important aspect of defining a relevant market for competition law analysis. Substitution involves switching from one product to another in response to a change in the relative price, service or quality of two products (holding unchanged all other relevant factors, such as income, advertising or prices of third products). Market definition begins by selecting a product supplied by one or both of the merger parties in a particular geographic area and incrementally broadening the market to include the next closest substitute until all close substitutes for the initial product are included.

There are two types of substitution:

- Demand-side substitution, which involves customer-switching; and
- Supply-side substitution, which involves supplier-switching.

Demand-side substitution

Demand-side substitution refers to switching between products and geographic regions by customers in a market. A defined relevant market will include all those products and

geographic regions among which customers (the “demand-side” in a market) will readily substitute. Customers’ readiness to switch among these products and geographic regions means that these products and geographic regions place competitive constraints on one another.

A central activity of market definition is therefore to assess the degree to which customers will readily switch among potential alternative products and regions. Whether or not a product or region is a close substitute for a product supplied by one or more of the economic concentration parties, depends on likely switching behavior in response to an increase in the price, or decrease in the service or quality of that product.

The GAC will generally assess the likelihood that a product (or group of products) will be a demand-side substitute for a product of one of the economic concentration parties according to:

- **The characteristics or functions of the product.** The GAC notes that comparable product characteristics and functionality will often be indicative but are not sufficient to determine whether products are demand-side substitutes. Demand-side substitution depends on the willingness of customers to switch from one product to another in response to a price increase – the characteristics or functions of the product will often influence customers’ willingness to switch to alternatives, but it is the customers’ switching behavior rather than the characteristics or functions of the product that are ultimately determinative of the market definition.
- **The availability of the product for purchase or use at the relevant location.** The availability of the product for purchase, and use, at the present location of the merger party’s customers, or within a wider geographic area (the geographic dimension of a market). Demand-side substitution depends on the willingness of customers to switch from a product supplied in one location to the same product supplied in another location in response to a price increase.

The degree of substitutability required for a product (or geographic region) to be in the same defined market is that products (or geographic regions) are sufficiently close substitutes that customers would readily switch among them, for example in response to a small price increase in one of the products.

- It is not sufficient that there is a theoretical possibility that customers might switch to the alternative, or that there are circumstances where some customers might view potential alternatives as substitutes under some circumstances. It will often be possible on the demand-side to some degree among a wide variety of products in various geographic regions. However, only those products among which consumers can switch readily and without too much difficulty or reluctance will generally be defined as being in the same product market.
- On the other hand, substitution does not have to be complete or instantaneous for products to be in the same market. Products can be included in the same defined market even if they are not perfect substitutes. The decisive factor in the general case is whether customers view the alternative products as sufficiently close substitutes that they will switch readily between them.

A useful conceptual framework for the analysis of closeness of substitution for the purpose of market definition, particularly in relation to demand-side substitution, is the hypothetical monopolist test (HMT) to define the relevant markets. The GAC will employ the HMT conceptual framework in defining markets in cases where this assists the analysis.

Hypothetical Example 1

K Co is the manufacturer of a popular brand of ready-to-drink coffee-based beverages sold in convenience stores.

K Co decides to increase the price of its product by 5% above the competitive level. As a result, a substantial percentage of K Co's customers switch to a ready-to-drink tea-based beverage produced by Tea Co. K Co loses so many sales to Tea Co's tea-based beverages that the price increase is unprofitable, and K Co is forced to lower its price to the original level.

This suggests that the relevant product market in this scenario would include at least both the coffee-based beverages and the tea-based beverages being considered.

Hypothetical Example 2

B Co is the only shop selling a particular type of specialty paint in a residential area of Jeddah. B Co decides to increase the price it charges for the specialty paint by 5%. After this price increase, a number of customers of the shop decide to purchase a substitute product from specialty paint shops in a different residential area of Jeddah. Enough customers of the B Co switch to shops in the different residential area that the B Co shop is not able profitably to maintain its price increase.

These facts suggest that the relevant geographic market in which the B Co shop competes includes both the residential area where it is located and the alternative residential areas to which customers switch in response to the price rise.

The hypothetical monopolist test

The HMT is a conceptual framework to assist in determining the boundaries of relevant product and geographic market.

The essential hypothetical question asked by the HMT is the following: if there was a monopolist in the product (or geographic region) in question, and that monopolist increased its price by a small but appreciable amount, to what other products (and geographic regions) would customers readily switch? Any products (and geographic regions) to which customers would switch readily should be considered to be part of the same defined market. Any other products (and geographic regions) to which customers would not switch readily should not be considered to be part of the same defined market.

Such a small but appreciable, permanent price increase is known as a small but significant and non-transitory increase in price ("**SSNIP**") above the prevailing market price level without the economic concentration. In the general case, a SSNIP price increase in the range of 5% to 10% above the price level that would prevail without the economic concentration is considered appropriate to conduct a HMT analysis. The analysis then considers if customers will react sufficiently by switching away to alternative products (and/or geographic regions) to make the SSNIP price increase unprofitable because of the resulting loss of sales. Alternative products and geographic that receive sufficiently strong switching in response to a SSNIP price increase would then be included in the same defined relevant market. This analytical process is then continued until the set of products and geographical areas is such that any further SSNIP price increases would be profitable, because one has reached the outer boundaries of the set of products and geographic regions among which there is ready substitution. In this way, the HMT determines the smallest area in product and geographic space within which a

hypothetical current and future profit-maximizing monopolist could effectively exercise market power.

The GAC notes that the HMT is a useful tool for analysis that can be applied in different ways, including by taking a quantitative approach where sufficient information is available, and by taking a qualitative approach to market definition but using the HMT was an intellectual framework to focus the analysis.

Hypothetical Example 3

The GAC has been notified of a planned merger of two companies that principally bottle soft drinks at different plants throughout the Kingdom. There are soft drinks of many different flavors commonly on sale throughout the Kingdom, and both merger parties bottle all of the most commonly sold flavors.

An issue to examine in this case would be whether the different flavors of soft drinks belong to the same market (the market for “soft drinks” generally), or whether a different market should be defined for different flavors (one market for “cola drinks”, another market for “lemon flavored drinks”, and so on).

In order to delineate the market boundaries, a key question is to understand consumers’ behavior, specifically how readily and easily consumers switch and substitute between the different flavors. If consumers substitute readily between the different flavors, then it is likely that there is a single market for all soft drinks; if they don’t substitute easily (for example, if most cola drinkers will not happily switch to an orange flavored drink), then it is likely that there are separate markets for the different flavors.

The hypothetical monopolist test asks: if consumers of flavor A (e.g. cola) are confronted with a permanent price increase for flavor A (e.g. in cola drinks) of 5% to 10%, would enough of them switch to other flavors (e.g. flavor B or lemon drinks) for the price increase in flavor A to be non-profitable due to the resulting loss of sales by flavor A? If there would be such strong switching from A (cola) to B (lemon), then both A and B would be said to be in the same product market.

The analysis would then also be conducted in respect of all other flavor categories. For instance, if flavors A and B are in the same market, the analysis would then consider switching to flavor C (e.g. orange flavored drinks): if there is a permanent price increase in flavor A and B drinks of 5% to 10%, would enough of the people who drink flavors A and B switch to flavor C drinks? If they do, then C is also in the same market. This would be repeated for all other flavors until the outer bounds of the defined product market are identified.

Supply-side substitution

When defining the product and geographic dimensions of the market, the GAC will also consider supply-side substitutes in addition to demand-side substitutes. Supply-side substitution refers to switching between products and geographic regions by suppliers in a market. On the product dimension of a market, a product (or group of products) may be a supply-side substitute for another product if, in response to an increase in the price of the product, suppliers can readily switch to supplying the alternative product. Similarly, on the geographic dimension of a market, a geographic area may be a supply-side substitute for another geographic area if, in response to an increase in the price of the product in that geographic area, suppliers can readily switch to supplying the alternative geographic area.

If such supply-side substitution is sufficient, then the alternative products or geographic regions may also be defined within the same relevant market. The GAC notes that this may be the case even if there is no (or insufficient) demand-side substitution for the alternative products and geographic areas to be included in the same defined market. Demand-side and supply-side substitution are separate processes, each of which may be sufficient to lead to the inclusion of alternative products and/or geographic areas within the same relevant market.

The GAC will be guided by the following criteria in evaluating in each case whether supply-side substitution is sufficient for the expansion of the defined market to include the alternative products or geographic areas under consideration:

- On the product dimension of the market, supply-side switching will generally be considered sufficient to expand the defined market if the production facilities and marketing efforts used for that product can be switched quickly and without significant investment to supply a demand-side substitute for the product of the economic concentration parties.
- On the geographic dimension of the market, supply-side switching will generally be considered sufficient to expand the defined market if the distribution network used by the product can be modified quickly and without significant investment to supply the merger party's customers at their present location or within a distance they would likely travel.
- In both case, the market may be expanded accordingly if it would be profitable for the current suppliers of the product to make these changes. This means that the profits earned on the assets in their current use would be less than if they were switched to the alternative supply-side use.

A distinction is made between supply-side substitution and new entry for market definition purposes. However, for the purposes of establishing a substantial lessening of competition, the relevant consideration is the degree of competitive constraint imposed on the economic concentration parties, either by undertakings already in the market or by new entrants.

Hypothetical Example 4

ABC Paper and CBS Paper are two manufacturers of paper both based in Riyadh. Paper is usually supplied in a range of different grades or qualities, from newsprint paper, to standard writing paper, to different grades of high quality to be used in high quality printing of, for example, art books.

Both ABC Paper and CBS Paper make a broad range of different grades of paper. ABC and CBS Paper have decided to merge and have approached the GAC to notify the merger and to seek clearance for it.

One issue for the GAC to determine would be whether to define one product market for paper as a whole, or to define different product markets for different grades of paper. The central question in product market definition is whether there is sufficient substitution between alternatives for them to be defined as part of the same market, or whether substitution is insufficient which means the alternatives should be defined as being in separate markets.

In the case of paper, from the perspective of demand-side (customer) substitution, there is evidence that different grades of paper are not readily substituted for each other by customers, because different qualities of paper cannot be used for any given use, but rather the correct grade of paper is often required for each specific use. Customers therefore do not readily switch between different grades of paper, even in response to a SSNIP price rise of a

particular grade of paper. As a result, from the demand-side perspective, the lack of substitution would suggest separate markets for each grade of paper.

However, the GAC will also consider whether supply-side substitution may be sufficient to merit defining a single market for “paper”, despite the insufficient demand-side substitution. In the case of paper, there is some evidence that many paper plants are able to (and do) manufacture different qualities of paper, and that production can be adjusted between different grades with negligible costs and in a short time-frame. This would suggest that there is sufficient supply-side substitutability as between the different grades of paper.

The GAC would consider the facts of the specific case, including whether ABC Paper, CBS Paper, and competing paper manufacturers in fact can substitute readily without substantial costs between different grades of paper. The GAC would also analyze whether there are any other impediments to ready supply-side switching, such as any particular difficulties in distribution, any requirements for switching production of grades of paper such as spare parts or other inputs requirements, or other impediments.

Potential competition

An additional source of competitive constraint is potential competition from potential new entrants. This source of competitive constraint is not considered when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. Rather, the competitive constraint from potential entry, and related considerations such as the existence and height of barriers to entry, are considered at the stage of considering competitive constraints, as is outlined in the following Section 10.

Useful information in identifying demand-side and supply-side substitutes

The GAC will rely on quantitative and qualitative information requested from and provided by the economic concentration parties and other stakeholders (other market participants and other third parties) to identify and assess the strength of substitution possibilities.

The range of information required will be determined on a case by case basis, by reference to relevant factors including the type and nature of the industries concerned, the types of information available, the potential competition concerns raised, and the relative complexity of the case. In some cases, including non-controversial cases, it may be sufficient for the parties to provide a base level of information in order for the GAC to have sufficient information to draw clear conclusions. In other cases, the GAC will require a wider range of information. In all cases, the GAC will determine what information it requires in order to draw clear conclusions regarding the case.

The product dimension: Identifying products that may be close substitutes

The following are examples of the types of information the GAC may require from the economic concentration parties and other stakeholders to identify close substitutes of the relevant product:

- The function or end use of the product;
- The physical and technical characteristics of the product;
- The costs of switching purchases between the product and potential substitutes

- Views and past behavior of buyers regarding the likelihood of substitution between products;
- Evidence of buyers switching to other products in response to price increases in the recent past, or switching to products in other areas;
- Evidence of producers redeploying their production capacity in response to price increases in the recent past;
- Evidence of consumer preferences as between alternative products, from sources such as marketing studies and surveys;
- Costs of switching production and distribution systems from another product line to a product that is closely substitutable with the relevant product;
- Views, business records and past behavior of suppliers of the relevant products regarding the impact of price and marketing decisions by suppliers of potential substitute products on their own pricing and marketing decisions;
- Relative price levels and price movements of the product compared to potential substitutes; and
- Other information relevant to understanding the closeness of substitution between products.

The geographic dimension: Identifying geographic regions that may be close substitutes

The following are examples of the types of information the GAC may require from the economic concentration parties and other stakeholders to identify close substitutes of the relevant geographic region:

- The portability of the relevant product, which may be influenced by factors including its perishability, weight, and other similar factors;
- The transportation costs required to move the relevant product between regions, including the transportation costs as a proportion of total value of the product);
- Other costs to customers of obtaining supply from alternative regions;
- Any limitations on the ability of customers to access alternative sources of supply in alternative regions, including regulatory and other practical limitations;
- The costs to businesses of extending or switching their production and distribution systems to supply customers in other regions;
- Any regulatory or other practical constraints on suppliers selling to alternative regions;
- Records relating to trade flows and the actual movement of customers and/or suppliers between geographic regions;
- Records regarding relative prices and changes in relative prices across regions in the recent past;
- Views and business records of buyers and suppliers regarding the likelihood of switching between geographic sources of supply;
- The relative price levels and price movements of different geographic sources of supply; and
- Other information relevant to understanding the closeness of substitution between geographic regions.

Specific characteristics of particular types of markets

Some markets have may specific characteristics which may give rise to particular issues in market definition. The relevance of these specific characteristics will depend on the issue being considered in the context of each specific case.

Aftermarkets

An aftermarket is a market for a secondary product, which is a product which is purchased only as a result of buying a primary product. A common situation in which there is an aftermarket is where the primary product and the secondary product are complementary. For example, a customer might purchase spare parts (the secondary products) for use with a particular machine (the primary product). The appropriate market definition in the case of aftermarkets will depend on the facts of the case. Depending on the circumstances, it might be appropriate to define, for example:

- (a) A single system market comprising both the primary product and the secondary product, for example where machine A and its spare parts (system A) competes with machine B and its spare parts (system B)); or
- (b) Dual or multiple markets where there is a market for the primary product and either (i) a separate market comprising all secondary products or (ii) separate secondary markets for each different primary product.

Multi-sided markets

A multi-sided market is a market where undertakings compete simultaneously for multiple groups of customers whose demands are inter-related and may therefore be connected by a platform or similar mechanism. Multi-sided markets may be two-sided markets, where undertakings compete simultaneously for two groups of customers with inter-related demand. In multi-sided markets, undertakings commonly use a multi-sided platform to sell simultaneously to the two different groups of buyers by way of the platform or similar mechanism that connects that different groups of buyers.

Examples of markets that may be multi-sided include: online auction platforms, where the platform provider must attract both parties wishing to sell products through the platform and parties wishing to buy those products; video game console markets, where the video game manufacturer must attract demand from both video game developers and video game buyers; and newspapers, which must attract both readers and advertisers.

The multi-sided nature of such markets, combined with the interaction between different groups of buyers, means that market definition in these cases can be more complex than in one-sided markets. Moreover, when assessing market power in a two-sided market, competitive constraints on both sides of the market must be considered.

Bidding markets

A bidding market is one in which firms typically compete by submitting bids in response to tenders organized by buyers. To identify the competitive constraints a particular market participant faces, consideration must be placed on identifying the (potential) market participants, that is, on those suppliers that have the capacity to compete for the contract and participate in future bidding competitions. In bidding markets, the relevant market will commonly include all undertakings that can be viewed as credible bidders for the product at issue in the geographic area where they can place a credible bid.

Other considerations and issues in market definition

Market definition does not itself determine the competitive effect

While market definition is a useful tool for economic concentration analysis, it does not by itself determine the impact of an economic concentration on competition. The competition analysis considers a wide range of other factors that are outlined in the next Section 10 of

these Guidelines. Factors relevant to analyzing competition are often present outside the defined relevant markets, and there is no presumption that other undertaking within a relevant market necessarily provide an effective competitive constraint on the economic concentration parties.

It is not always necessary to define markets precisely

It will not always be necessary to define clear market boundaries in order for the GAC to reach a conclusion regarding the likely effect on competition of an economic concentration. For example, if the economic concentration is unlikely to substantially lessen competition in a narrow product and geographic area, then in many cases it is also unlikely to do so in a more broadly defined product and geographic area in which there is a wider range of competitive constraints – and as a result, it may not be necessary to reach a conclusive view on the precise boundaries of the relevant market.

There may be a defined relevant market even if there is no trade

It is not strictly necessary for there to be active, observable trade in a product for a defined relevant market to exist. It may be sufficient for there to be the potential for trade in the product.

Substitution may be asymmetric

Substitution possibilities are not necessarily symmetric.

- Asymmetric demand-side substitution occurs when substitution between two products only occurs in one direction. For example, buyers of luxury cars may substitute to more “standard” cars in response to an increase in the price of luxury cars, but the opposite may not be the case.
- Asymmetric supply-side substitution may occur when one group of suppliers has the same production facilities as another group of suppliers, but also has additional facilities for supplying a slightly different product. For example, suppliers of scheduled travel services might be able to redeploy their facilities to provide charter travel services, but suppliers of charter travel services may not be similarly free to switch to supplying scheduled travel services because they would face significant investment or other obstacles in making such a switch.

Product differentiation

Market definition establishes the boundaries of markets for the purposes of competitive analysis. However, even within those boundaries the degree of substitution can vary. In most markets, there is some degree of product differentiation between different alternative products (and geographic areas) within those defined markets, and there is not complete uniformity of substitution between all products and regions within a relevant market. In other words, products that serve similar functions may be differentiated rather than homogenous – for example, fiction books may be in the same defined market, even though every book is different. Product differentiation often limits substitution at the margins because certain customers do not view differentiated products as sufficiently comparable to substitute readily between them. For example, brand loyalty may limit the extent of both demand- and supply-side substitution. However, differentiated products may still be part of the same market. The extent to which product differentiation affects the constraint provided by actual or potential competitors in the market is considered as part of the analysis of the competitive effects of an economic concentration, as outlined in the next Section 10 of these Guidelines.

Captive customers and discrimination between different customer groups

In certain cases, where substitution possibilities are not uniform across consumer groups, it may be appropriate to define separate markets for different consumer groups. For example, some consumers may view two products to be highly substitutable while other consumers

may consider the products to be only weak substitutes or not substitutes at all. In such situations, in determining whether it is appropriate to define separate markets for the different customer groups, the GAC will generally consider the relative number and importance of each customer class, and the ability of suppliers (including the economic concentration parties) to discriminate between the customer groups.

The ability of suppliers to discriminate between customer classes will depend on the suppliers' ability to:

- Distinguish between those customers that have the option of substitution and those who lack that option; and
- Prevent resale or trading of the relevant product between the customer groups.

If suppliers are able to discriminate in this way, then a customer who has limited substitution possibilities may receive different terms and conditions (such as prices) from suppliers to the terms and conditions received by a customer who has strong substitution possibilities. In this situation, it may be appropriate to consider two separate markets for economic concentration analysis. One market would include the relevant product and the alternative product, and would focus on those consumers who have the option of substitution. The second market would not include the alternative product and would focus on those consumers who are "captive" because they do not have the option of substitution.

By contrast, if suppliers are unable to discriminate in this way between customer classes, then there would be unlikely to be separate markets based on different customer classes.

Indirect substitution and chains of substitution

In certain circumstances, a relevant market may include products that are only indirect substitutes for a product of one of the economic concentration parties. An indirect substitute is where one product is a substitute for a substitute of the relevant product. Such indirect substitution may take place by way of a "chain of substitution", which occurs where there is a "chain" of substitute products in the product dimension or a "chain" of substitute regions in the geographic dimension. An example would be that if product A directly constrains product B, and product B directly constrains product C, then product A may be said to constrain product C indirectly by a chain of substitution, even if product A and product C do not constrain each other directly – and accordingly products A, B, and C might all be in the same defined market, even if products A and C do not competitively constrain one another directly. However, the GAC will only consider such chains of substitution for the purposes of market definition where it is corroborated by compelling evidence that the indirect substitution by way of the "chain" sufficiently constrains competitive behavior to merit inclusion in the market definition, such as evidence of price interdependence at the extremes of the chain of substitution.

Hypothetical Example 5

AAA is a company that makes gravel for use in construction at a plant in Riyadh. BBB is a company that makes gravel at a plant in Jeddah. CCC is a company that makes gravel at a plant in Dammam. There are a number of other gravel makers in other locations around the Kingdom.

The three companies AAA, BBB, and CCC have agreed to merge and have approached the GAC for clearance of the proposed merger.

One issue for the GAC to determine would be the geographic market definition to be applied to the analysis. Gravel is a bulky, heavy commodity with relatively high transportation costs



relative to its price. This may suggest that deliveries from a given gravel plant are limited to a certain area around each plant by the impact of transport costs and that transporting gravel from one end of the Kingdom to the other may not occur readily. This in turn suggests that geographic markets may be defined within a certain radius of gravel factories over which truck transportation of gravel is economically feasible and likely, rather than defining a national market for gravel.

The economic concentration parties propose to the GAC that it is possible to define a national market on the basis of chains of substitution between gravel produced in different locations throughout the Kingdom, and that all gravel produced throughout the Kingdom thereby competitively constrains each other, indirectly if not directly, thereby resulting in a national market.

The GAC would consider that, in certain cases, the existence of chains of substitution might lead to the definition of a relevant market even where products or areas at the extreme of the market are not directly substitutable. In principle, such an area could constitute the relevant geographic market. However, the GAC would generally consider the actual distribution of gravel plants around the Kingdom and would analyze whether there are sufficient and continuous overlaps between the areas served by different gravel plants so that a continuous, unbroken geographic chain of substitution may be said to exist. The GAC would also consider if there is sufficient evidence of actual and sufficiently uniform competitive constraint across the Kingdom by considering whether prices at different points on the chain of substitution are commensurate with a single, unbroken chain of substitution. Without clear evidence to this effect, the GAC would be unlikely to conclude that there is a chain of substitution for the purposes of market definition.

Markets characterized by frequent innovation

Some industries are characterized by rapid technological change. For example, new products may be developed, formerly separate functionalities may be integrated in a new product, and process innovations may lead to the entry of undertakings into the market, thereby increasing the competitive pressure on incumbent undertakings. Such innovation processes can lead to the emergence of new markets or to the convergence of formerly separate markets. These processes can often be unpredictable, and may result in market boundaries shifting rapidly. Such considerations will generally be taken into account when defining the relevant market in the context of a particular economic concentration. One consequence may be that market shares at a given point in time might be less indicative of market power, depending on the facts of the case.

Captive production

Where a particular market includes vertically integrated firms, it may be necessary to consider whether:

- (a) Production of a product consumed internally by a vertically integrated firm (“captive production”) should be considered in the product market; or
- (b) Only production sold externally to the “merchant market” should be included.

The GAC will consider these issues on a case by case basis. In many cases, the GAC will not consider captive production to be within the relevant product market, but will instead assess whether captive production imposes a competitive constraint in terms of potential competition. Potential competition is discussed below in this Section 9 of these Guidelines, and also in Section 10 of these Guidelines in the context of potential entry or expansion.

Temporal markets

Time may be relevant in some markets. For example, when defining relevant markets it may be relevant in certain contexts to consider peak and off-peak services, if some buyers do not view peak and off-peak services as substitutable. Another example is seasonal markets, if it may be appropriate to refer to the season (the time of year) for seasonal products where there are not strong substitution possibilities in consumption between different seasons. Where a time dimension is relevant to analyzing customer substitution behavior in this way, it may be considered as an aspect of the relevant product market definition.

Section 10

How the authority will analyze the competitive effects of concentrations

Factors the Authority may consider under the Competition Law

Article 22 of the Implementing Regulations outlines that when the GAC assesses economic concentration transactions, the GAC may assess the following factors within its overall objectives of protecting and promoting competition within markets:

“Article 22:

When examining and reviewing economic concentration transactions, GAC seeks to maintain and encourage the effectiveness of fair competition in the Kingdom's markets. To that end, it may undertake assessment of one or more of the following factors:

1. Structures of relevant markets and the level of actual or potential competition between undertakings inside the Kingdom or abroad, in cases where it has an impact on local markets.
2. Financial positions of the parties to an economic concentration.
3. Product or service alternatives that are available to consumers, vendors, and clients and how accessible such alternatives are.
4. Level of product differentiation.
5. Consumer interests and welfare.
6. Potential impact of the economic concentration on prices, quality, diversification, innovation, or development in a relevant market.
7. Actual or potential harm or benefits to competition from the economic concentration transaction.
8. Supply and demand growth and trends in the relevant market and commodities.
9. Barriers to entry or exit of new undertakings into a relevant market, their continuation therein, or expansion, including regulatory barriers.
10. The extent to which an economic concentration may create or strengthen a significant market power or a dominant position of an undertaking - or group of undertakings - in any relevant market.
11. The level and historical trends of anti-competitive practices in a relevant market, either for the parties to an economic concentration or the undertakings influential in such market.
12. Views of the public, economic concentration-related parties, and sector regulators.”

Article 10 of the Implementing Regulations explains that dominance in a relevant market can be demonstrated as follows:

“Article 10:

Dominance in the relevant market is achieved by meeting one or both of the following criteria:

1. A market share of 40% or more of the relevant market; whether it is the share of a single firm or a group of firms - whenever that group acts with a common will in committing the violation or causing the effect.
2. Ability to influence a relevant market such as controlling prices, production, or demand; whether it is the ability of a single firm or a group of firms - whenever that group acts with a common will in committing the violation or causing the effect. GAC may, in case of adopting this criterion, examine one or more of the assessment factors, including:

- a. market share of a firm - or group of firms - and the market shares of competitors;
- b. the actual or potential competition;
- c. the growth in the supply and demand for the product or service;
- d. the obstacles that limit or prevent competitors from entry, continuity, or expansion in the market;
- e. the bargaining power of the client, including its purchasing power;
- f. the accessibility of production inputs;
- g. the financial and non-financial resources of the firm and its competitors;
- h. economies of size and capacity available to the firm; and/or
- i. level of product differentiation.”

The objectives of the Authority’s competition analysis

As is outlined in Section 8 of these Guidelines, the GAC will assess economic concentrations using an overall test of whether the economic concentration is likely to substantially lessen competition. In general, the GAC will seek to intervene in economic concentrations that may have a substantial adverse effect on competition, while clearing mergers that do not result in substantial anti-competitive harm, or are pro-competitive by increasing the intensity of competition.

Types of economic concentrations

The Competition Law applies to a wide variety of economic concentration transactions, including mergers, acquisitions, certain joint ventures, and others. Section 5 of these Guidelines outline in substantial detail how the GAC will analyze whether an Economic Concentration has taken place. Generally, when assessing its impact on competition, there is little consequence from whether an economic concentration is a ‘merger’, an ‘acquisition’, or other classification.

There is, however, a substantial impact on the analysis according to how the undertakings involved in the economic concentration relate to each other as market participants. For instance, the competition analysis of the economic concentration will generally differ depending on whether or not the undertakings involved are competitors (actual or potential) before the transaction. Accordingly, the GAC will broadly consider the following three different categories of economic concentration:

1. Horizontal concentrations. These involve concentrations of (actual or potential) suppliers of substitutable goods or services, typically operating on the same or a comparable functional level of the supply chain, and therefore commonly a concentration of competitors in the same market.
2. Vertical concentrations. These involve undertakings operating (or potentially operating) at different functional levels of the same vertical supply chain, commonly where the output in one market is an input into production in the other market, and are therefore commonly not in direct competition with each other in any market.
3. Conglomerate concentrations. These involve undertakings that operate (or potentially operate) in different markets and without being in the same vertical supply chain, but supplying goods or

services that are in some way related to each other, for example products that are complements for consumers or in production.

The GAC notes that in some more complex transactions, different types of economic concentrations may take place at the same time.

Each of these types of concentrations has the potential to affect competition in a different way and will therefore be analyzed differently. The general analytical considerations that the GAC will adopt for the different types of economic concentrations are outlined in subsequent sections of this section. However, the GAC notes that it will consider the most appropriate analysis for each concentration in light of the market structure and other considerations relevant to the particular nature of each concentration.

Hypothetical Example 1

Aleph Dairy is a company headquartered near Riyadh that produces yogurt and milk for sale to household consumers by way of supermarkets. Beit Dairy is a company headquartered near Dammam that also produces yogurt and milk for sale to household consumers by way of supermarkets.

Aleph Dairy and Beit Dairy wish to merge and have notified the intended transaction to the GAC.

Based on the information available, the GAC would consider the proposed concentration to be a horizontal concentration and would analyze it accordingly. This is because both undertakings produce products that are substitutable with each other (yogurt and milk), at the same level of the production chain, and for sale to the same group of consumers.

Hypothetical Example 2

Gamma Feeds is a company headquartered in Jeddah that imports and produces animal feed for bulk sale to farms and other agricultural operations. Delta Dairy is a dairy farm near Jeddah; it buys bulk animal feed from Gamma Feeds and other similar suppliers, and produces dairy products for sale to household consumers by way of supermarkets.

Gamma Feeds wishes to acquire Delta Dairy and has notified the intended transaction to the GAC.

Based on the information available, the GAC would consider the proposed concentration to be a vertical concentration and would analyze it accordingly. Gamma Feeds and Delta Dairy are not in direct competition with each other. Instead, the undertakings operate at different levels of a related vertical production chain, as Gamma Feeds supplies animal feeds, which are purchased and used as an input by Delta Dairy.

Market Share and Concentration Levels

Market share refers to the share of sales in a market by a particular market participant. Market concentration refers to the number and size of participants in the market taken as a whole.

Market shares and concentration levels as a first indication

The GAC considers that market shares and concentration levels provide useful first indications of the market structure and of the importance to competition in the affected markets of the

parties to the concentration and the other market participants. The GAC will generally consider both the market shares and concentration levels after the concentration has been completed, and changes in market shares and concentration levels that occur due to the concentration, in its assessment.

Market concentration and market share measures can provide an informative indication of the market structure at any particular point in time. A high degree of concentration and high market shares can be indicative of a high degree of market power commanded by those undertakings with high market shares. Moreover, an analysis of changes in market concentration can provide insights into the frequency of new entry and provide insight into the ability of new entrants and smaller competitors to attract custom and expand in a market. However, while market concentration can provide useful first indications of the competitive analysis, it may not be determinative in itself. High market shares may be indicative of a non-competitive market, or they may reflect that some undertakings have gained market share by adopting more efficient technology, lowering costs and reducing prices through a competitive process. The GAC will therefore consider market shares and market concentration in the context of the other relevant factors which it may consider in order to reach a final conclusion; said other factors are enumerated under the Implementing Regulations and outlined in subsequent sections of this section.

Measuring market shares and market concentration

The GAC typically measures market concentration using market shares, market concentration ratios, and the Herfindahl-Hirschman Index (**HHI**).

Market shares are a key input when determining concentration. The GAC will generally calculate market shares according to market participants' sales, production volumes, and/or production capacity, as is appropriate in the context of the relevant markets under consideration.

In many cases, the GAC uses current market shares in its competitive analysis. However, consistent with the forward-looking nature of the competition test, the GAC considers the extent to which current market shares are likely to accurately reflect future market share patterns. Accordingly, current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion. For example, there may be evidence that substantial new production capacity is due to commence in a manufactured product market, new licenses are about to be issued in a broadcasting industry, or undertakings are running short of reserves in a primary product market. Where such considerations apply, the GAC will adapt current market shares accordingly.

The GAC will generally require information from the economic concentration parties to calculate market shares based on the most appropriate measure. Market share information supplied by the economic concentration parties should be supported by details of how the data was compiled, the source of the estimates and any assumptions used. Where actual figures are not available, best estimates will be considered — for example, where there are a number of smaller firms in the market, an approximation may be appropriate. In markets where actual or potential imports are relevant, these should be clearly identified (indicating whether these imports are independent of the economic concentration parties) and included in the market share and concentration metric calculations. Similarly, supply-side substitutes should be included in these calculations.

The GAC may request historic market share data where this assists the GAC in its analysis. The GAC will determine the need for historic market share data on a case by case basis, which may be the case where market shares have been volatile, when the market is characterized by large, lumpy orders, and other circumstances. Moreover, changes in historic market shares may provide the GAC with helpful information about the competitive process and the likely future importance of the various competitors, for instance, by indicating whether undertakings have been gaining or losing market shares. The GAC will generally analyze market shares in the light of likely market conditions, such as if the market is highly dynamic in character and if the market structure is unstable due to innovation or growth.

The GAC will generally calculate post-concentration market shares based on the assumption that the post-concentration combined market share of the economic concentration parties is the sum of their pre-concentration market shares.

The overall concentration level in a market may also provide useful information about the competitive situation. In assessing market concentration, the GAC takes into account the pre- and post-concentration market shares of the merged undertaking and its rivals and the actual increase in concentration, as well as the level of symmetry between rival firms' market shares. Concentration metrics such as the HHI and the x-firm concentration ratio (CRx) may provide useful summary statistics by combining some or all of the market share data for individual firms. Different concentration metrics may highlight different aspects of the market share data.

The CRx concentration ratio is calculated by adding the market shares of the x largest (by market share) undertakings in the relevant market. For instance, the CR3 concentration ratio is calculated by adding the market shares of the 3 largest undertakings in the relevant market. The CRx concentration ratio therefore requires the market shares, or estimates of them, for the x largest participants in the relevant market.

The HHI is calculated by adding the sum of the squares of the post-merger market share of the merged firm and each rival firm in the relevant market, thereby giving greater weight to the market shares of the larger firms. The HHI therefore requires the market shares, or estimates of them, for all the participants in the relevant market. In most cases, the GAC will consider the following two numbers related to the HHI:

1. The absolute level of the HHI post-concentration, as an initial indication of the concentration level of the market post-concentration; and
2. The change (or "delta") in the HHI resulting from the concentration, by calculating the post-concentration HHI value minus the pre-concentration HHI value, as an initial indication of the change in market concentration brought about by the economic concentration.

Market concentration as a preliminary method of assessment

The GAC will generally use the following HHI thresholds to undertake a preliminary assessment of the potential competition effects of an economic concentration:

- The GAC is unlikely to identify horizontal competition concerns in an economic concentration in a market with a post-concentration HHI below 1,000. Such an economic concentration generally does not require extensive further analysis.
- The GAC is unlikely to identify horizontal competition concerns in an economic concentration with a post-concentration HHI between 1,000 and 2,000 and an HHI delta below 250, or an economic concentration with a post-concentration HHI above 2,000 and an HHI delta below

150, except where special circumstances that require additional competition analysis are present.

These HHI thresholds provide a useful preliminary indication of the economic concentration, but they are not determinative, and economic concentration parties should not consider that these HHI levels create any presumption of the existence or absence of competition concerns. A conclusion regarding potential competition effects can only be reached by considering the totality of the required analysis in light of the factors specified in the Implementing Regulations. For instance, and in particular, an economic concentration that falls below the indicative HHI thresholds may still raise competition concerns in circumstances including (but not limited to) the following:

- A concentration involves a potential market entrant or a recent market entrant with a small market share;
- One or more of the economic concentration parties has shown a recent rapid increase in market share;
- One or more of the economic concentration parties are important innovators in ways not reflected in market shares;
- There are significant cross-shareholdings among the market participants;
- there are indications that of the merging undertakings is a maverick firm with a high likelihood of disrupting coordinated conduct (for example, the undertaking has tended to charge lower prices than its competitors or has tended to start prices wars with its competitors);
- There are indications of past or ongoing coordination, or facilitating practices, are present;
- One of the economic concentration parties has a pre-concentration market share of 50 % or more;
- A substantial number of customers consider the products of the economic concentration parties to be particularly close substitutes (for example, the products of the economic concentration parties represent the customers' first and second choices); and

The GAC also notes that these indicative HHI thresholds have no bearing whatsoever on the issue of whether an economic concentration transaction must be notified to the GAC. Economic concentrations that meet the notification thresholds discussed in Section 6 and the other notification requirements should be notified to the GAC regardless of the specific HHI and delta.

Hypothetical Example 3

The market for breakfast cereals in the Kingdom of Saudi Arabia is served by eight different companies with closely competing products. Companies A1, B2, C3, and D4 each have a market share of 15% of the market, and companies E5, F6, G7, and H8 each have a market share of 10% of the market.

Companies G7 and H8 have decided to merge and have notified the GAC accordingly.

The GAC evaluates the post-concentration HHI and the HHI delta as follows:

The combined post-concentration market share of the merged G7 and H8 is estimated at 10% + 10% = 20%.

Pre-concentration $HHI = 15^2 + 15^2 + 15^2 + 15^2 + 10^2 + 10^2 + 10^2 + 10^2 = 1,300$

Post-concentration $HHI = 15^2 + 15^2 + 15^2 + 15^2 + 10^2 + 10^2 + 20^2 = 1,500$

Delta $HHI = 1,500 - 1,300 = 200$

The economic concentration will therefore have a post-concentration HHI between 1,000 and 2,000 and an HHI delta below 250.

Accordingly, unless other factors suggest potential competition issues, the GAC would be unlikely to identify horizontal competition concerns in this transaction. However, as discussed, this analysis is preliminary and does not give rise to any presumptions regarding the final conclusions of the competition analysis, and the economic concentration parties should not rely on any such presumptions.

Hypothetical Example 4

In the market for breakfast cereals described in Hypothetical Example 10.2, the intended merger between companies G7 and H8 fails because of the personal clash between the owners of the two companies.

Companies A1 and B2 see their chance for consolidation and decide to merge and notify the GAC accordingly.

The GAC evaluates the post-concentration HHI and the HHI delta as follows:

The combined post-concentration market share of the merged A1 and B2 is estimated at 15% + 15% = 30%.

Pre-concentration $HHI = 15^2 + 15^2 + 15^2 + 15^2 + 10^2 + 10^2 + 10^2 + 10^2 = 1,300$

Post-concentration $HHI = 30^2 + 15^2 + 15^2 + 10^2 + 10^2 + 10^2 + 10^2 = 1,750$

Delta $HHI = 1,750 - 1,300 = 450$

The economic concentration will therefore have a post-concentration HHI between 1,000 and 2,000, but it will have an HHI delta significantly above 250.

Accordingly, the GAC would not conclude that horizontal competition concerns are unlikely in this transaction, and would instead be likely to proceed to a more detailed analysis of this transaction. As above, it is noted that this analysis is preliminary and does not give rise to any presumptions regarding the final conclusions of the competition analysis.

Competition Assessment of Horizontal Economic Concentrations

There are two main ways in which horizontal economic concentrations may cause substantial competition harm:

1. By eliminating important competitive constraints on one or more undertakings, which consequently would have increased market power – these are known as unilateral effects; and
2. By changing the way undertakings compete with each other in such a way that undertakings that previously were not coordinating their behavior, are now significantly more likely to coordinate and raise prices or otherwise harm competition, or by making coordination easier, more stable or more effective for undertaking which were coordinating prior to the merger – these are known as coordinated effects.

As is outlined in Section 8 of these Guidelines, the GAC will assess whether the changes brought about by the merger would result in any of these competition effects.

Creation or strengthening of a dominant position

Article 22 of the Implementing Regulations outlines the factors that the GAC may consider it assesses economic concentration transactions, including “[t]he extent to which an economic

concentration may create or strengthen a significant market power or a dominant position of an undertaking - or group of undertakings - in any relevant market.”

Article 10 of the Implementing Regulations explains that dominance in a relevant market can be demonstrated when an undertaking, or group of undertakings acting with a common will, achieves a market share of 40% or more of the relevant market, or otherwise demonstrates and ability to influence a relevant market by controlling market parameters such as prices, production, or demand.

Accordingly, if the economic concentration parties are likely together to have a post-concentration market share of 40% or more, and thereby are likely to create or strengthen a position of having significant market power or a dominant position, then this may be a factor to which the GAC will give considerable weight when the assessing the economic concentration transaction. However, the GAC notes that it will consider a wide range of factors as enumerated in the Implementing Regulations when assessing the likely competition effects of an economic concentration. Accordingly, while a finding of the creation of a dominant position will generally be an important factor in the analysis, it will not of itself necessarily be conclusive, for instance in circumstances where an analysis of the other relevant factors demonstrates that competition in the market will be unaffected by an economic concentration despite high market shares post-concentration.

Unilateral horizontal effects

An economic concentration may substantially lessen competition in a market by removing or weakening competitive constraints on one or more sellers, in such a way that the post-concentration undertaking consequently has increased market power. The most direct effect of the economic concentration will be the loss of competition between the economic concentration parties. For example, if prior to the economic concentration one of the merging undertakings had raised its price, it would have lost some sales to the other merging firm, but the economic concentration removes this particular constraint. This may mean that, as a result of the economic concentration the post-concentration undertaking finds it profitable to raise prices, reduce output or otherwise exercise market power it has gained, and can do so, even given the expected response of other market participants to the resulting change in market conditions. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the economic concentration, since the economic concentration parties’ price increase may switch some demand to the rival undertakings, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market. The resulting effect is known as a unilateral horizontal effect.

Where unilateral effects occur, other market participants’ responses may vary. In some situations, other market participants may respond in a pro-competitive way and (at least partially) attempt to offset the merged firm’s behavior. Alternatively, it may be more profitable for other market participants to simply support the post-concentration undertaking’s conduct — for example, if a merged firm exercises unilateral market power by raising the price of its products, other firms supplying substitutes may respond by also raising their prices, thereby exacerbating the competitive impact of the unilateral exercise of market power. As this example illustrates, a unilateral exercise of market power may make it profitable for both the merged firm and its competitors to raise prices.

Generally, a merger giving rise to such unilateral effects would substantially lessen competition by creating or strengthening a position of market power or a dominant position of a single undertaking. Unilateral effects may arise in different ways depending on the characteristics of the market. A clear example is where no rivals after the economic concentration, that is, there has been a merger to monopoly. In this situation, where there are no remaining effective competitive constraints from other sources, such as future entrants, imports or countervailing power, an economic concentration that leaves no rivals to the economic concentration parties will likely result in unilateral effects amounting to a substantial lessening of competition. Furthermore, economic concentrations in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a substantial lessening of competition. In determining whether unilateral effects arise and whether they are likely to result in a substantial lessening of competition, the GAC considers all of the factors contained in Article 22 of the Implementing Regulations and any other relevant factors. In particular, it considers whether the broader actual and potential competitive constraints — such as new entrants, imports or countervailing power — will limit any increase in the unilateral market power of each remaining market participant. The specific factors that may be relevant to the GAC's assessment of whether there is likely to be a substantial lessening of competition arising from the economic concentration may include the following factors. The GAC notes that not all of these factors need to be present for an adverse competition effect to be likely, and that other factors not listed here may also be relevant.

1. **The economic concentration parties have large market shares.** In general, a larger market share may lead to an undertaking having more market power. Similarly, a larger addition to market share resulting from the economic concentration may lead to a larger increase in market power due to the economic concentration. This is because a larger increase in the sales base on which to enjoy higher margins after a price increase can make it more likely that the economic concentration parties will find such a price increase profitable despite the accompanying reduction in output. Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the assessment.
2. **The economic concentration parties are close competitors.** In some markets, there is some differentiation between products in that market and some products are closer substitutes to each other than other products. In such circumstances, closer substitutes generally exercise more competitive constraints on each other than other products that are not as close substitutes. This is relevant for the assessment of the loss of competitive constraint that may take place because of an economic concentration — the closer is the competition between the products of the economic concentration parties, the more likely it is that the economic concentration may result in a loss of competition, and that the economic concentration parties will be able to raise prices post-concentration. Therefore, a situation where there has previously been strong rivalry between the economic concentration parties, and this has been an important source of competition on the market, may be an important factor in the analysis.
3. **Where the economic concentration parties have high margins pre-concentration,** this may also increase the likelihood of price increases post-concentration. By contrast, where rival undertakings produce close substitutes, the economic concentration parties' ability or incentive to raise prices is likely to be more constrained, and a substantial increase in competition less

likely. The GAC will seek to analyze the degree of substitutability between different products in a relevant market by a variety of methods for which data are available, including (but not limited to) customer preference surveys, analysis of purchasing patterns, estimation of the cross-price elasticities of the products involved, diversion ratios between different products, or analysis of bidding patterns in bidding markets.

4. **Customers have limited possibilities of switching suppliers.** Where customers of the economic concentration parties find it difficult to switch suppliers, the economic concentration parties may find it easier to increase prices post-concentration. Customer may find it difficult to switch suppliers for a range of reasons, including if there are few alternative suppliers, or because they face substantial switching costs. Evidence of past customer switching patterns and reactions to price changes may provide important information in this respect.
5. **Competitors are unlikely to increase supply if prices increase.** For customers to be able to switch to alternative suppliers generally requires that those alternative suppliers can meet the diverted demand due to customer switching. However, when market conditions mean that the competitors of the economic concentration parties are unlikely to increase their supply substantially if prices increase, or are unable to do so, then this increases the likelihood that the economic concentration parties will have the incentive to raise their prices. Such limitation on competitors expanding their output may occur in different circumstances, for example where the competitors face binding constraints on their productive capacity and capacity expansion involves high costs. By contrast, when market conditions are such that competitors have enough capacity and find it profitable to expand output sufficiently, it is less likely that the economic concentration would result in a substantial lessening of competition.
6. **Merged economic concentration parties are able to hinder entry or expansion by competitors.** An economic concentration may allow the post-concentration undertaking to make it more difficult for smaller competitors to expand and potential competitors to enter the relevant market, or otherwise restrict the ability of competitors to compete effectively, thereby potentially substantially lessening competition. Such an ability to restrain competitors may arise if the post-concentration undertaking has significant control or influence over important inputs or distribution possibilities, and can thereby make expansion or entry by rival undertakings more costly or otherwise more difficult; this may include where the post-concentration undertaking has control over important types of intellectual property such as patents, brands, or control over elements required for interoperability between different infrastructures or platforms. The GAC may also consider the financial strength of the economic concentration parties relative to their rivals in making this assessment.
7. **Economic concentration eliminates an important competitive force in the market.** Some undertakings have a greater influence on the competitive process than their market shares or similar measures would suggest. The elimination of such an undertaking through an economic concentration may therefore change the competitive process in a substantial way, in particular where the market is already concentrated. For example, this may be the case where the undertaking concerned is a recent entrant that is expected to exert significant competitive pressure in the future on the other undertakings in the market. This may also be the case in markets where innovation is an important part of the competitive process, and the economic concentration removes an independent innovative undertaking from the market, with the potential result of reducing the competitive pressure on other undertakings to innovate in that market. For example, an undertaking with a relatively small market share may nevertheless be an important part of the competitive process if it has important innovations leading to promising pipeline products.

Coordinated effects

In addition to unilateral effects, economic concentrations can lessen competition through coordinated effects. Economic concentrations can have coordinated effects when they assist firms in the market in implicitly or explicitly coordinating their pricing, output or related commercial decisions. An economic concentration may do so simply by reducing the number of firms among which to coordinate, by removing or weakening competitive constraints or by altering certain market conditions that make coordination more likely. Coordinated effects may occur in addition to unilateral effects so that the merged firm is able to achieve even higher prices than it would be able to do on its own. In some cases, coordinated effects, either alone or in conjunction with unilateral effects, may amount to a substantial lessening of competition.

Economic concentrations may have coordinated effects when they alter the nature of interdependence between competitors such that coordinated conduct is more likely, more complete or more sustainable. Such interdependence between competitors can arise when a market is characterized by a small number of undertakings (an oligopoly or a duopoly), so that each undertaking anticipates the response of the other undertakings and devises its commercial strategies accordingly. If the oligopolistic structure of a market persists over time (for instance, because barriers to entry and expansion shield incumbents from new competitors) the repeated nature of the competitive interaction can result in a range of coordinated conduct, from muted competition through to tacit or explicit agreement between firms not to compete. Although undertakings may have the ability to engage in more vigorous competition, they may not have the incentive to do so if they recognize that any short-term benefits from competing will likely be eroded by lost sales once other undertakings respond. For instance, an undertaking may benefit by increasing its profits in the short run by commencing a price war against its competitors, but if it anticipates that its competitors will retaliate over an extended period of time, it may assess that it is more profitable over the longer run not to start the price war and instead to maintain a more comfortable co-existence with its rivals.

In some cases, a change in the nature of the interdependence among competitors may lead to an implicit understanding among them to refrain from competing too hard, for example, an implicit understanding not to start price wars. This behavior is sometimes referred to as “tacit coordination” (unspoken coordination), since it involves active coordination but no explicit agreement between undertakings. Undertakings may signal to each other that they will not compete on price, output, customer allocation or indeed any other parameter of competition. In markets where the products are relatively homogenous, such tacit coordination is more likely to be based on price or output in markets, and in markets where the products are more differentiated, such tacit coordination may be seen by way of implicit division of a market by customer type or region. In certain circumstances, such strategic interdependence between competitors may also result in explicit collusion between firms, whereby firms explicitly agree to refrain from competing, such as in a cartel

Coordinated effects in an economic concentration take place where the economic concentration makes it more likely that coordinated conduct will take place post-concentration compared to pre-concentration, or it results in more complete or sustainable coordination post-concentration. An economic concentration may do this by reducing the number of firms among which to coordinate (thereby reducing the likelihood of deviation from the consensus), by removing or weakening competitive constraints, or by altering certain market conditions that make coordination more likely.

In assessing whether an economic concentration is likely to give rise to coordinated effects, the GAC will analyze whether conditions in the relevant market are likely to be conducive to coordinated conduct. The GAC will then analyze whether the economic concentration will likely result in a change in conditions in the relevant market that make coordinated conduct more likely post-concentration compared to pre-concentration.

Generally, the market conditions that increase the potential for sustainable coordination among competitors are the following:

1. **Undertakings have the ability and incentive to reach mutually beneficial and profitable terms.** For example, they can reach a “comfortable” price level appreciably higher than a highly competitive price level. This is generally easiest to achieve by explicit discussion (in the form of a cartel), but may be achieved through repeated interaction among the competitors even without direct communication between the competitors. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination.
2. **Firms can monitor each other and can detect deviations from the consensus.** Coordinated conduct is generally made easier if the undertakings are aware of and can monitor each other’s behavior. This is easiest when the number of undertakings in the market is small and undertakings can quickly and readily observe other undertakings’ activities and general market conditions. Such observation may take place if, for example, undertakings actively publish their prices to consumers, undertakings hold cross-shareholdings in each other, or trade associations collate and publish current market information. Markets need not be fully transparent for coordinated conduct to arise, but undertakings must generally have some mechanism for detecting the behavior of their competitors. Monitoring of competitors is generally easier in stable market conditions; by contrast, in markets where product innovation or fluctuations in costs or demand are common, it may be more difficult for undertakings to know whether a change in their rivals’ pricing arises from such a fluctuation or constitutes a deviation from the settled terms.
3. **Retaliation for deviations can be deterred.** Where a firm deviates from the “consensus”, for example by starting a price war, the threat of retaliation from other firms involved is sufficiently costly to act as a deterrent to deviation. Coordinated effects are generally more likely when firms are likely to interact regularly in the future, either in the relevant market where coordination could occur or in other separate markets, and for a considerable period. The prospect of repeated interaction in the future generally creates the possibility of future retaliation or “punishment” for deviation, and thereby discourages undertakings from pursuing more competitive strategies. This is because undertakings in a market may have an incentive to deviate from the consensus unless they fear punishment that would outweigh the potential short-term gains from deviating from the terms of coordination. Punishment may simply involve a return to competitive conditions, a price war, or other outcomes that are less favorable to the undertakings than the coordinated consensus. The credible threat of effective punishment alone may be sufficient to deter cheating. The incentive to deviate is increased if the imposition of punishment is likely to be significantly delayed (for example, because market transactions are infrequent). The ability of coordinating undertakings to punish deviations is often increased where:
 - (1) firms have similar cost structures, whereas low-cost firms may not fear retaliation by higher cost firms;
 - (2) firms compete against each other in more than one market, because this provides additional markets in which to punish deviating firms; and

(3) some firms have excess capacity, because this enables them to increase output and reduce prices in response to a deviation from the terms of coordination. Interdependence and coordination may therefore be facilitated by a merger that creates firms with similar market shares, cost structures, production capacities and levels of vertical integration. Where there is firm asymmetry, smaller firms or firms with lower cost structures may have more to gain from competing rather than refraining from competition. In this regard, a vigorous and effective competitor may be instrumental in disrupting interdependence and ensuring effective competition (see also immediately below).

4. **No other competitive constraints that undermine the consensus.** For coordination to be successful, the actions of non-coordinating firms and potential competitors, as well as customers, should not be able to jeopardize the outcome expected from coordination; similarly, the coordinated outcome should not be undermined by other competitive constraints in the market. For example, coordination is unlikely to be sustained if it induces new entry or expansion by firms in the relevant market that are not engaging in coordination; by contrast, high barriers to entry or expansion are generally conducive to coordinated outcomes.

The GAC notes that the non-existence of one or more of these conditions may not necessarily make coordinated effects less likely and there may be other factors not discussed here which are relevant.

The GAC will generally assess whether an economic concentration is likely to give rise to coordinated effects by a close examination of the conditions prevailing in the relevant market and the likely effect of the merger on these conditions. The GAC will generally undertake a detailed qualitative assessment of the relevant factors. Other relevant factors may include any evidence of prior coordinated conduct between undertakings in the relevant market.

Economic concentration with a potential competitor

Economic concentrations where an undertaking already active in a relevant market merges with a potential competitor in this market can have similar anti-competitive effects to mergers between two undertakings already active in the same relevant market and can therefore give rise to a substantial lessening of competition, including through the creation or the strengthening of a dominant position.

An economic concentration merger with a potential competitor can generate horizontal unilateral or coordinated anti-competitive effects if the potential competitor significantly constrains the behavior of the firms active in the market. This may be particularly the case if the potential competitor is in a position to make a timely, likely, and sufficient entry into the relevant market. This may be the case where, for example, the potential competitor possesses assets that could easily be used to enter the market without incurring significant sunk costs, or is very likely to incur the necessary sunk costs to enter the market and provide a competitive constraint in a relatively short period of time.

The GAC considers that for a merger with a potential competitor to have significant anti-competitive effects, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. The GAC will consider if there is sufficient evidence to reach such a conclusion, for example because there is evidence that a potential competitor has plans to enter a market in a significant way.

Competition Assessment of Non-Horizontal Economic Concentrations

Non-horizontal economic concentrations include vertical economic concentrations and conglomerate economic concentrations.

Vertical economic concentrations generally involve combining undertakings that operate at different stages of a single vertical supply chain, where the upstream firm is an actual or potential supplier of an input into the production process of the downstream firm — for example, a merger between an “upstream” firm (such as a manufacturer) and a “downstream” firm (such as a distributor or retailer). Vertical economic concentrations therefore generally do not involve the combination of direct competitors.

Conglomerate economic concentrations (which are also known as “diagonal mergers”) involve undertakings that interact across several separate markets and supply products that are typically in some way related to each other — for example, products that are in neighboring markets or products that are complementary in either demand or supply, such as cars and car tires, or razors and shaving foam.

In the majority of cases, non-horizontal mergers will raise no competition concerns. It is often the case that vertical economic concentrations will promote efficiency by combining complementary assets/services which may benefit consumers, and many conglomerate economic concentrations will allow undertakings to achieve efficiencies and result in better integration, increased convenience and reduced transaction costs.

However, in certain cases, vertical and conglomerate economic concentrations may result in anti-competitive effects. In particular, where insufficient competitive constraints remain in the relevant market post-concentration, some non-horizontal mergers will raise competition concerns when the post-concentration undertaking is able to increase its unilateral market power. One way in which this can occur is through the post-concentration undertakings “foreclosing” (completely or partially) its rivals. Non-horizontal mergers can also increase unilateral market power in other ways. In some cases, a non-horizontal transaction, either alone or in conjunction with a horizontal transaction, may amount to a substantial lessening of competition in a market.

In the majority of cases involving non-horizontal economic concentrations, the GAC will be primarily concerned with non-horizontal economic concentrations where the post-concentration undertaking firm has the ability and incentive to use its position in one market to anti-competitively foreclose rivals in another market in a way that lessens competition. In assessing whether anti-competitive foreclosure is likely to increase the unilateral market power of the post-concentration undertaking, the GAC will consider the following three issues: (1) the post-concentration undertaking’s ability to bring about foreclosure; (2) the post-concentration undertaking’s incentive to bring about foreclosure; and (3) the likely effect on competition in a relevant market, or in other words, whether the foreclosure would be anti-competitive.

Assessment of vertical economic concentrations

The GAC will consider the following considerations when assessing vertical economic concentrations:

1. **What are the potential anti-competitive foreclosure strategies?** The particular anti-competitive foreclosure strategies that a vertically integrated merged firm might adopt will depend on the circumstances of each case, but some examples may include:

- Charging a higher price for an important input into the production processes of downstream (non-integrated) rivals;
 - Limiting, or denying access by, downstream (non-integrated) rivals to important inputs – thereby forcing them, for example, to use more expensive or inferior quality alternatives;
 - Limiting, or denying access by, upstream (non-integrated) rivals to a sufficient customer base; and
 - Raising the cost of access by upstream (non-integrated) rivals to a sufficient customer base.
2. **Does the post-concentration undertaking have the ability to bring about foreclosure?** A vertically integrated or conglomerate undertaking will generally only be able to engage in foreclosure if it has sufficient market power at one or more functional levels within the vertical supply chain, or in one or more of the related markets post-acquisition. The GAC will assess whether the vertically integrated or conglomerate undertaking has market power in the relevant markets by assessing whether there are effective competitive constraints. A vertically integrated undertaking would only be able to engage in foreclosure strategies against rival downstream undertakings if it had sufficient market power in the upstream market — that is, where its downstream rivals faced insufficient viable supply alternatives. This might occur for a variety of reasons including capacity constraints faced by rival upstream suppliers, barriers to entry, or product differentiation between the products and/or services offered by the vertically integrated undertaking and its rivals. Similarly, a vertically integrated undertaking would only be able to engage in foreclosure strategies against rival upstream undertakings if it had sufficient market power in the downstream market — that is, where its upstream rivals lacked sufficient actual or potential economic alternatives in the downstream market to sell their output. The ability of upstream rivals to sell their output is especially likely to be prevented or impeded where the downstream division of the vertically integrated undertaking is an important customer in that market and where there are significant economies of scale or scope in the input market.
3. **Does the post-concentration undertaking have the incentive to bring about foreclosure?** While possession of market power by the post-concentration undertaking in one or more of the relevant markets is a necessary consideration, it is not determinative in itself. Even if a vertically integrated undertaking has the ability, it may not have the economic incentive to foreclose rivals. An undertaking is unlikely to exercise its ability to foreclose unless it is profitable to do so, which will depend on the nature of competition in each of the relevant markets and the particular means available to the undertaking to foreclose rivals. A vertically integrated undertaking will only have an incentive to engage in foreclosure strategies with rivals if the benefit it receives from doing so outweighs potential lost sales resulting from the foreclosure. In assessing whether the post-concentration undertaking has the incentive to engage in foreclosure, the GAC will weigh likely short-term costs against likely gains and the relative size and importance of each market to the post-concentration undertaking. For example, in vertical economic concentrations, foreclosing independent downstream rivals may simply close off a good source of upstream revenue without providing any significant addition to the vertically integrated undertaking's own downstream sales or other benefits. Similarly, a vertically integrated undertaking will only have an incentive to limit the downstream sales of its non-integrated upstream rivals if it receives sufficient benefits to offset any increased costs or decreased custom associated with the foreclosure. In assessing the post-concentration

undertaking's likely incentives, the GAC will consider a range of quantitative and qualitative information.

4. **Will the foreclosure have a likely adverse effect on competition?** The ability and incentive of the merged undertaking to foreclose rivals may not of itself increase the merged undertaking's unilateral market power to the extent that there is a substantial lessening of competition. Consideration must also be given to the effect of foreclosure on competition in the relevant market(s). Foreclosure need not result in rivals being forced to exit the market to have a detrimental effect on competition: actual rivals may be forced to use more expensive alternatives to those offered by the post-concentration undertaking (thereby raising their costs) or may be discouraged from expanding their operations, and potential rivals may be discouraged from entering the market. Foreclosure lessens competition when the post-concentration undertaking (and/or its rivals) finds it profitable to increase the price charged to intermediate and end consumers or decrease the price paid to upstream suppliers below competitive levels. The GAC will consider all relevant economic concentration factors in determining whether or not the post-concentration undertaking's unilateral market power is likely to increase to the extent that there is likely to be a substantial lessening of competition due to the vertical economic concentration, including the following:
 - The proportion and significance of the undertakings that are foreclosed as a result of the vertical economic concentration;
 - The proportion and significance of other undertakings still able to provide a constraint over the post-concentration undertaking;
 - The potential for the vertical economic concentration to raise barriers to entry by foreclosure or the threat of foreclosure to rivals in related markets;
 - The significance of the input to the production process of downstream rivals; and
 - The presence of countervailing power, particularly the ability of firms to integrate to avoid foreclosure.
5. In the case of conglomerate mergers, the proportion of customers likely to purchase the relevant products from the merged firm, which must generally be sufficiently large to cause independent rivals to face a significant decline in sales, resulting in increased costs. The level of competitive constraint imposed by rivals may be detrimentally affected where economies of scale or network effects are important features of the relevant markets, since foreclosure may prevent the merged firm's rivals from achieving minimum efficient scale. However, where a significant proportion of customers continue to purchase products from independent rivals, a conglomerate undertaking is likely to continue to be constrained post-concentration. If rivals are able to avoid foreclosure by supplying a competitive bundle, a conglomerate economic concentration is unlikely to substantially lessen competition.

Assessment of conglomerate economic concentrations

Similarly, the GAC will consider the following considerations when assessing conglomerate economic concentrations:

1. **What are the potential anti-competitive foreclosure strategies?** Conglomerate economic concentrations may provide a post-concentration undertaking with the opportunity to bundle or tie products in related or independent markets. The practice of bundling or tying product offerings is common and is undertaken by firms for a variety reasons, often with no anti-competitive consequences. However, in some cases conglomerate economic concentrations can raise competition concerns where they enable the merged firm to alter its operations or

product offerings in a way that forecloses the post-concentration undertaking's rivals and ultimately reduces the competitive constraint they provide. For example, the post-concentration undertaking's rivals may be foreclosed if the post-concentration undertaking chooses to bundle or tie complementary products in a way that can limit or raise the cost of rival undertakings' access to a sufficient customer base and in some circumstances deny rival firms access to customers altogether, such as by:

- No product can be purchased or used separately;
 - At least one product cannot be purchased or used separately; or
 - Customers receive additional benefits when they purchase or use the post-concentration undertaking's products together (for example, due to discounts, rebates or design features).
2. **Does the post-concentration undertaking have the ability to bring about foreclosure?** In the context of conglomerate economic concentrations, market power may arise where products are considered by customers to be especially important because of factors such as superior functionality or brand loyalty. Where the post-concentration undertaking supplies customers that on-sell its products to end customers, the market power of the post-concentration undertaking may be reflected in its ability to influence the product-stocking decisions of its customers.
 3. **Does the post-concentration undertaking have the incentive to bring about foreclosure?** While possession of market power by the post-concentration undertaking in one or more of the relevant markets is a necessary consideration, it is not determinative in itself. Even if a vertically integrated or conglomerate undertaking has the ability, it may not have the economic incentive to foreclose rivals. An undertaking is unlikely to exercise its ability to foreclose unless it is profitable to do so, which will depend on the nature of competition in each of the relevant markets and the particular means available to the undertaking to foreclose rivals. A vertically integrated or conglomerate undertaking will only have an incentive to engage in foreclosure strategies with rivals if the benefit it receives from doing so outweighs potential lost sales resulting from the foreclosure. In assessing whether the post-concentration undertaking has the incentive to engage in foreclosure, the GAC will weigh likely short-term costs against likely gains and the relative size and importance of each market to the post-concentration undertaking. For example, in conglomerate economic concentrations, the post-concentration undertaking may be able to take advantage of economies of scale in a market by increasing sales in that market and, where there is commonality in operations (such as in manufacturing and/or distribution), may also be able to gain economies in a related market. In assessing the post-concentration undertaking's likely incentives, the GAC will consider a range of quantitative and qualitative information.
 4. **Will the foreclosure have a likely adverse effect on competition?** The ability and incentive of the post-concentration undertaking to foreclose rivals may not of itself increase the merged undertaking's unilateral market power to the extent that there is a substantial lessening of competition. Consideration must also be given to the effect of foreclosure on competition in the relevant market(s). Foreclosure need not result in rivals being forced to exit the market to have a detrimental effect on competition: actual rivals may be forced to use more expensive alternatives to those offered by the post-concentration undertaking (thereby raising their costs) or may be discouraged from expanding their operations, and potential rivals may be discouraged from entering the market. Foreclosure lessens competition when the post-concentration undertaking (and/or its rivals) finds it profitable to increase the price charged to intermediate and end consumers or decrease the price paid to upstream suppliers below

competitive levels. The GAC will consider all relevant economic concentration factors in determining whether or not the post-concentration undertaking's unilateral market power is likely to increase to the extent that there is likely to be a substantial lessening of competition due to the economic concentration, including the following:

- The proportion and significance of the undertakings that are foreclosed as a result of the merger;
- The proportion and significance of other undertakings still able to provide a constraint over the post-concentration undertaking;
- The potential for the economic concentration to raise barriers to entry by foreclosure or the threat of foreclosure to rivals in related markets; and
- In the case of conglomerate economic concentrations, the proportion of customers likely to purchase the relevant products from the post-concentration undertaking, which must generally be sufficiently large to cause independent rivals to face a significant decline in sales, resulting in increased costs. The level of competitive constraint imposed by rivals may be detrimentally affected where economies of scale or network effects are important features of the relevant markets, since foreclosure may prevent the merged firm's rivals from achieving minimum efficient scale. However, where a significant proportion of customers continue to purchase products from independent rivals, a conglomerate undertaking is likely to continue to be constrained post-concentration. If rivals are able to avoid foreclosure by supplying a competitive bundle, a conglomerate economic concentration is unlikely to substantially lessen competition.

Other unilateral effects in non-horizontal economic concentrations

Other unilateral effects that may arise from vertical economic concentrations and conglomerate mergers include raising structural and/or strategic barriers to entry, and access to commercially sensitive information.

- **Raising barriers to entry in vertical economic concentrations:** A vertical economic concentration may raise barriers to entry if, as a result of the economic concentration, new entrants would have to enter at multiple stages of the vertical supply chain instead of just one. In some cases, the increase in unilateral market power accruing to the post-concentration economic concentration as a result of increased barriers to entry may constitute a substantial lessening of competition.
- **Raising barriers to entry in conglomerate economic concentrations:** In the case of conglomerate economic concentrations, by creating strategic links between related products, a conglomerate economic concentration may result in formerly separate markets becoming part of one integrated market in which suppliers must offer the full range of complementary products to compete. Future entry may therefore require an offering of the full range of products, potentially increasing the sunk costs associated with entry or exit.
- **Access to commercially sensitive information:** A vertical economic concentration may also result in unilateral effects if the vertically integrated post-concentration undertaking would, through its supply of an input or distribution services to firms that are otherwise rivals, obtain competitively sensitive information such as costs or planned product launches; this may distort the dynamics of competition.

Barriers to entry and expansion

Barriers to entry and expansion are a critical element in competition analysis as the entry of new undertakings into a market, or the expansion of existing undertakings within a market, can provide an important source of competitive constraint on incumbents. If new entrants or expanding existing undertakings are able to offer customers an appropriate alternative source of supply at the right time, any attempt by incumbents to exercise market power may be unsustainable since their customers will simply switch to the new entrants. A credible threat of new entry or expansion alone may prevent any attempt to exercise market power in the first place. As a consequence, if there is a high likelihood of timely and sufficient entry or expansion in all relevant markets after the economic concentration, the post-concentration undertaking may be less likely to have market power either pre- or post-concentration, which may mean that the economic concentration is less likely to result in a substantial lessening of competition. By contrast, in markets where there are high barriers to entry or expansion that either prevent undertakings from entering the market, or delay and impede their entry to a significant degree, the post-concentration undertaking may be sheltered from competitive constraint for a significant period.

A barrier to entry or expansion is any factor that prevents or hinders effective new entry or expansion that would otherwise be capable of defeating a price increase caused by a merger. In assessing the potential for entry or expansion to act as a competitive constraint, and for barriers to entry to prevent such potential entry or expansion, the GAC will consider different types of barriers to entry or expansion, including the following categories:

1. **Legal or regulatory barriers to entry or expansion.** These include but are not limited to the following:
 - Government and regulatory licensing conditions;
 - Tariffs;
 - Explicit restrictions on the number of market participants;
 - Other comparable government regulations;
 - Legally enforceable intellectual property rights; and
 - Environmental regulations that raise the costs of entry or limit the ability for customers to switch suppliers.
2. **Structural or technological barriers to entry or expansion.** These include but are not limited to the following:
 - The existence of sunk costs, which increase the risks of, and costs associated with, failed entry, which may deter new entry. These include factors such as product development, advertising, promotion to establish a sufficient reputation in the market, and construction of specialized facilities;
 - Substantial economies of scale in production, which may limit the viability of entry below a certain minimum efficient scale;
 - High customer switching costs, such as search costs, transaction costs, and market specific behavior such as customer inertia to switching suppliers;
 - Mature markets or markets with declining levels of demand growth;
 - Access to key production or supply assets is required to be able to operate in the market;
 - Access to important technologies or distribution channels is required to be able to operate in the market; and
 - The existence of significant network effects.

3. **Strategic barriers to entry or expansion.** These are barriers to entry that arise because of actions or threatened actions by incumbents to deter new entry or expansion, including but not limited to:
- The risk of retaliatory action by incumbents against new entry, such as price wars or temporarily pricing below cost;
 - The creation and maintenance of excess capacity by incumbents that can be deployed against new entry;
 - The creation of strategic customer switching costs through contracting, such as exclusive long-term contracts and termination fees; and
 - Brand proliferation by incumbents, which may crowd out the product space leaving insufficient opportunities for new firms to recover any sunk entry costs.

When assessing the height of barriers to entry, the GAC will take into account the information relevant to each specific economic concentration and market, which may include the following information:

1. The ability of producers that are not current competitors to switch production to competing products or services;
2. The market conditions that may affect the ability of existing undertakings to expand;
3. The size and extent of any investment, particularly sunk investment, that producers would need to make to either enter the relevant market or to expand production significantly in this market;
4. The extent of brand loyalty in the relevant market;
5. The existence and nature of any long-term supply contracts in the relevant market;
6. Any relevant 'switching costs' (for example, product compatibility issues, product bundling, or contract termination charges) that may prevent buyers in the relevant market from changing suppliers, or prevent sellers in the relevant market from changing buyers, in the short to medium term; and
7. Evidence of any growth or decline in the relevant market.

In order to be effective in preventing the exercise of market power by existing market participants, entry or expansion must be timely, likely and sufficient in scope and nature.

1. **Entry or expansion must be timely.** The GAC will assess the time it would take a new undertaking to enter the relevant market and offer customers a competitive alternative to the post-concentration undertaking, when considering the degree of competitive constraint provided by new entry. The evaluation of whether entry will be timely will be assessed on a case by case basis in light of the facts of each specific economic concentration and the dynamics of the market. As a general principle, entry will provide an effective competitive constraint after the economic concentration if actual or threatened entry would occur in an appropriate time to deter or defeat any ongoing exercise of increased market power by the post-concentration undertaking. In many cases, the appropriate timeframe for timely entry will be entry within one to two years, but this will depend on the circumstances of the market in each specific case, taking into account factors including the nature and type of the barrier to entry, the frequency of transactions, the nature and duration of contracts between buyers and sellers, lead times for production, and the time required to for new entrants to achieve the necessary scale of production.
2. **Entry or expansion must be likely.** The GAC will need to be satisfied that actual or threatened entry after the economic concentration is not just possible but likely in response to an attempted exercise of market power by the post-concentration undertaking. In general, the likelihood of entry generally depends on the profitability of entering the market. The GAC may assess whether a new entrant could expect to make a commercial return on its investment in

the post-concentration market, including considering the likely prevailing prices, the likely responses of the incumbent firms, and other costs/risks associated with entry. Other relevant factors may include the nature and type of the barrier to entry, any evidence of the past success or failure of new entrants in establishing themselves as effective competitors in the relevant market, and whether potential new entrants or likely categories of entrants that may potentially enter can be identified.

3. **Entry or expansion must be sufficient.** The GAC will generally need to be satisfied that entry would be of sufficient scale and with a sufficient range of products to provide an effective competitive constraint. In the case of differentiated product markets, this will generally mean that the entry must be of sufficiently close substitutes to the products of the post-concentration undertaking to exercise a close competitive constraint on it; by contrast, entry at the fringe of a market is less likely to constrain any attempted exercise of market power by existing undertakings if the existing undertakings are unlikely to lose significant sales to those fringe entrants. In other words, individual entry that is small-scale, localized or targeted at niche segments may be unlikely to be an effective constraint post-merger. The GAC notes that sufficient entry does not necessarily require that one new entrant alone duplicates the scale and all the relevant activities of the merged firm; rather, timely entry by multiple undertakings may be sufficient if the combined effect of their entry would defeat or deter the exercise of increased market power by the post-concentration undertaking.

This test will be based on an assessment of the height of barriers to entry taking into account whether actual or threatened entry post-merger is both possible and likely in response to an attempted exercise of market power by the merged firm — this will generally depend on the profitability of entering the market. The GAC's evaluation of the timeliness, likelihood and sufficiency of entry will depend on the circumstances of each particular merger under consideration. However, in line with the overall competition test of economic concentration assessment, the underlying test regarding barriers to entry will always be whether the potential for entry provides an effective competitive constraint that would prevent a significant and sustainable increase in the market power of market participants after the economic concentration has taken place.

The GAC notes that it is not necessary for an economic concentration to increase barriers to entry for it to be anticompetitive, but merely that significant barriers exist and provide the post-concentration undertaking with sufficient shelter from competitive pressures over its pricing and other conduct. If the merger in fact also increases barriers to entry, then the effect on competition would be likely to be more significant because it would increase the likelihood of new entry to be prevented post-concentration.

Countervailing power

The competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even undertakings with very high market shares may not be in a position after an economic concentration to substantially lessen competition, if their customers possess countervailing (or offsetting) buyer power. Countervailing buyer power in this context is the bargaining strength that a buyer has when faced with the seller in commercial negotiations that enable the buyers to credibly threaten to bypass the sellers (including the post-concentration undertaking) by strategies such as by vertically integrating into the upstream market, establishing import operations, or sponsoring new entry upstream.

Countervailing power exists when the specific characteristics of a buyer, such as its size, its commercial significance to suppliers, and its ability to switch to alternative suppliers, provide the buyer with additional negotiating leverage. In some cases, a buyer may have countervailing power because they have market power. The GAC notes that the size and commercial significance of customers (sometimes referred to as ‘buyer power’) is generally not sufficient to constitute countervailing power; countervailing power typically arises from a buyer having sufficient alternatives (for example, the credible ability to bypass a supplier) to defeat any attempted increase in market power in the hands of the supplier.

In assessing the competitive impact of economic concentrations, and in addition to considering the other relevant factors, the GAC therefore considers whether one or more buyers would have sufficient countervailing power to constrain any attempted increase in market power by a supplier. In conducting this assessment, the GAC will consider factors including (but not limited to) the following:

- Whether a threat to bypass a supplier is credible on commercial grounds, with reference to evidence that may include the size of the buyer’s purchases and the efficient scale of production of the product;
- Whether a threat to sponsor competing entry is commercially viable, with reference to evidence that may include whether the entrant will be able operate at an efficient scale of production, either by the purchases of the sponsoring firm, or by other likely sales in the relevant market;
- Whether the buyer is likely to bypass the supplier, with reference to evidence that may include documents suggesting such a strategy is commercially viable and part of the firm’s business model;
- The proportion of the downstream market able credibly to bypass the supplier and thereby defeat a substantial lessening of competition in the relevant market/s;
- The relative strength of bargaining power possessed by customers of the products in the relevant market/s; and
- The extent to which it is possible for customers to bypass the economic concentration parties by importing or producing the product themselves, vertically integrating, or using an alternative supplier.

Failing firms

As is outlined in Section 8 of these Guidelines, the GAC will assess the competition effects of economic concentrations by comparing the likely future state of the relevant markets with the economic concentration with the likely future without the economic concentration (the “counterfactual”). While in most cases the likely future without the economic concentration will be similar to the current state actually existing at the time before the economic concentration, in some cases the likely future state without the economic concentration will be different to the current state. One such case is where one of the economic concentration parties (typically the undertaking being acquired) is a “failing firm”.

Where one of the economic concentration parties is a failing firm, the GAC may decide that an economic concentration which would otherwise cause competition problems may nonetheless be approved if the failing firm would be likely to exit the market even if the economic concentration does not take place. This will typically be because of some other development that is unrelated to the economic concentration and is likely to occur regardless

of the economic concentration, where this would mean that the failing firm would not be present in the market in the future even if the economic concentration does not take place. The basic requirement for a “failing firm defense” is that the deterioration of the competitive structure that follows the economic concentration would take place with or without the economic concentration and therefore cannot be said to be caused by economic concentration. This will occur if the competitive structure of the market would deteriorate to at least the same extent in the absence of the economic concentration.

The GAC will generally only consider a “failing firm defense” to be appropriate if the economic concentration parties can demonstrate all three of the following criteria. First, which it is highly likely or inevitable that the allegedly failing undertaking would in the near future be forced to exit the market because of financial difficulties if it is not taken over by another undertaking. Second, that the assets of the failing firm would also be highly likely or inevitable to exit the market if they do not participate in an economic concentration. Third, that there is no less anti-competitive alternative purchase or other alternative to the notified economic concentration.

The onus is on the economic concentration parties to raise a “failing firm defense” and to provide the GAC, in due time, with all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the economic concentration is not caused by the economic concentration.

Efficiencies

In order to assess whether a merger would substantially lessen competition, the GAC performs an overall assessment of the competitive effect of the merger. A common motivation for economic concentrations is the potential for improved efficiency for the transaction parties. It is possible in some cases that efficiencies brought about by an economic concentration counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have. This may be the case when the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, to a degree sufficient to counteract the adverse effects on competition which the merger might otherwise have.

The GAC assesses the effect of economic concentrations on competition, competitive constraints, and the efficiency of markets, rather than on the efficiency of individual firms. An economic concentration that removes or weakens competitive constraints to the extent that a substantial lessening of competition results, will contravene the Competition Law, even if the economic concentration results in a more efficient firm with a lower cost structure. The consideration of efficiencies is therefore relevant to the competition assessment if, and only if, the efficiencies are likely to result in lower (or not significantly higher) prices, increased output and/or higher quality goods or services – in which case the conclusion may be that the economic concentration may not substantially lessen competition.

In making its assessment of the transaction, the GAC may consider any efficiency substantiated on the basis of sufficient evidence in its overall assessment of the merger. For the GAC to take account of efficiency claims in its assessment of an economic concentration and to be in a position to reach the conclusion that, as a consequence of efficiencies, the economic concentration is unlikely to substantially lessen competition, the efficiencies have to (1) benefit consumers, (2) be specific to the economic concentration, and (3) be verifiable.

All of these conditions must be satisfied for the GAC to consider efficiencies in the context of its competitive assessment of economic concentrations.

The efficiencies must benefit consumers:

- Efficiencies claims should be sufficient to ensure that consumers will not be worse off as a result of the economic concentration. This means that efficiencies should be substantial, timely, and generally benefit consumers in those relevant markets where competition concerns may otherwise occur. The GAC may also consider efficiencies and benefits to other consumers and the general public.
- There are a number of different types of potential efficiencies from economic concentrations that can lead to lower prices or other benefits to consumers. These may include cost savings that give the economic concentration parties the ability and incentives to charge lower prices following the economic concentration. Such cost savings may take place in different parts of the production chain including production and distribution. Mechanisms for cost savings may include economies of scale and economies of scope from combining production, efficiencies in distribution and marketing activities, efficiencies in innovation activities from combining investment in research and development, and reduced transaction costs.
- In particular, where efficiencies resulting from the economic concentration reduce costs in the post-concentration undertaking, this may increase the degree of competitive tension by reducing prices at which the post-concentration undertaking is able to be competitive in the market. In line with the need to ascertain whether efficiencies will lead to a net benefit to consumers, cost efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs because reduced variable or marginal costs are generally more likely to be passed on to consumers in the form of lower prices.
- Efficiency gains may also take place through research and development and innovation, where as a result, consumers may benefit from new or improved products or services.
- Efficiencies must generally materialize in a timely way for the GAC to be able to consider them. The later the efficiencies are expected to materialize in the future, the less weight the GAC can assign to them.
- The incentive on the part of the economic concentration parties to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining undertakings in the market and from potential entry. The greater the possible negative effects on competition, the more the GAC has to be sure that the claimed efficiencies are substantial, likely to be realized, and to be passed on to a sufficient degree to the consumer. It is therefore highly unlikely that an economic concentration leading to a market position with a very high degree of market power (including leading to a monopoly) would maintain sufficient competitive pressure in the market after the economic concentration for the efficiency gains to be passed on to consumers to a sufficient degree.
- Cost reductions that merely result from anti-competitive reductions in output cannot be considered as efficiencies benefiting consumers.
- It is for the economic concentration parties to provide in due time all the relevant information necessary to demonstrate to the GAC that the efficiencies are likely to benefit consumers and to do so to a sufficient degree to offset any potential anti-competitive effects resulting from the economic concentration.

The efficiencies must be specific to the economic concentration

- Efficiencies may potentially offset anti-competitive effects resulting from the economic concentration. The GAC will therefore only consider efficiencies in this context if the efficiencies also directly result from the economic concentration.
- Similarly, the GAC will only consider efficiencies if the economic concentration is required for the efficiencies to be achieved. The GAC will not consider efficiencies that could also have been achieved to a similar extent by less anti-competitive alternatives other than through the economic concentration. Realistic and attainable alternatives that the GAC may consider may include alternatives that do not involve an economic concentration (for example, a licensing agreement or a cooperative joint venture) or alternatives that involve a different type of economic concentration (e.g. a full-function structural joint venture, or a differently structured economic concentration). The GAC notes that it will only consider alternatives that are reasonably practical in the business situation faced by the economic concentration parties with consideration for established business practices in the industry concerned.
- It is only where the economic concentration is necessary to achieve the efficiencies, and there are no realistic and attainable alternatives to achieving the efficiencies, that the GAC will deem the efficiencies to have been caused by the economic concentration, and therefore to be specific to the economic concentration.
- It is for the economic concentration parties to provide in due time all the relevant information necessary to demonstrate that the economic concentration is necessary to achieve the efficiencies and that there are no other realistic and attainable alternatives to achieving the efficiencies than the notified economic concentration.

The efficiencies must be verifiable

- The GAC will only consider efficiencies claims where the claimed efficiencies can be verifiable on the basis of sufficient objective evidence. Efficiencies claims are generally made by the economic concentration parties to their benefit. Moreover, in most cases most of the information that would allow the GAC to assess whether the claimed efficiencies are likely to result from the economic concentration and will be of a nature that would the GAC to take the claimed efficiencies into account in its competitive analysis, is solely in the possession of the economic concentration parties. The onus is therefore entirely on the economic concentration parties to provide in due time all the relevant information necessary for the GAC to be able to assess the nature of the efficiencies, the extent of the efficiencies, the likelihood that the efficiencies will materialize, the extent to which the efficiencies will counteract any adverse effects on competition that might otherwise result from the economic concentration, the extent to which the efficiencies will likely benefit consumers, whether the efficiencies are specific to the notified economic concentration, and whether will the claimed efficiencies will likely be substantial enough to counteract a merger's potential harm to consumers.
- The more precise and convincing the efficiency claims are, the better the GAC can evaluate the claims. Where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be quantified. When the necessary data are not available to allow for a precise quantitative analysis, it must nevertheless be possible to foresee a clearly identifiable positive and substantial impact on consumers. Mere assertions of expected efficiencies without substantiated supporting evidence will generally not be adequate to meet the GAC's requirements of verifiability.
- The evidence required for the economic concentration parties to demonstrate the claimed efficiencies will vary from case to case. In general, such evidence may include, in particular,

internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and resulting consumer benefit, and pre-merger external experts' studies on the type and size of expected efficiency gains and on the extent to which consumers are likely to benefit.

- In general, the longer that the start of the efficiencies goes into the future, the lower will be the certainty that the GAC may be able to assign to the efficiencies actually being brought about.

In general, efficiencies will need to be maintained after the economic concentration has been completed in order for the GAC to be able to consider them, and it is for the economic concentration parties to provide evidence supporting the maintenance over time of the efficiencies.

Aspects of Efficiency Considered Under the Exemption Mechanism Detailed in the System

Aspects of efficiency can be considered as part of the comprehensive competitive assessment, as mentioned in the previous section. Additionally, efficiency aspects may also be considered separately under Article 8 of the Law, which states:

" The Board may, upon a recommendation of a technical committee, approve the request of a firm to be exempted from any of the provisions of Articles 5, 6, & 7 of the Law if the exemption would leads to improving the market or firms' performance in terms of quality, diversification, technological development, or innovative efficiency, or all of these, provided that the benefits to consumers outweigh the effects of limiting competition, in accordance with the conditions and regulations specified by the Implementing Regulations."

This means that parties involved in economic concentration may request an exemption separately, specifically under the exemption mechanism from the provisions and requirements of economic concentration outlined in Article 7 of the Law. The Implementing Regulations clarify this mechanism as follows:

A specific request for exemption must be submitted under this mechanism, and it will only be considered by the GAC if it: (1) Is submitted in the required format and with proper justification; (2) Includes sufficient evidence of the anticipated positive outcomes of the economic concentration; (3) Provides supporting documents and any additional information requested by the GAC.

GAC shall, on a case-by-case basis, determine the time period required to review the request for exemption. Such period shall start upon completing the request and notifying the applicant thereof. If the ending date of the review period coincides with an official holiday, the first working day thereafter shall be deemed the last day of that period.

The Board shall form a technical committee to review the request for exemption. To this end, the committee may conduct studies, collect information and data necessary for reviewing the exemption request, and interview parties and firms that may be affected by the exemption or those with potential interest therein, enable them to express their views, and review the documents submitted thereby; and announce the request for exemption and its basic information for public consultation, which shall be received in writing within a specified period. Any governmental agency may express an opinion to GAC

with regard to exemption requests at any stage during examination of the application and attach the necessary documents therefor. The technical committee shall then submit its recommendation regarding the exemption request to the Board.

The Board may, upon a recommendation of a technical committee, approve the request of a firm to be exempted from any of the provisions of Articles 5, 6, & 7 of the Law if the exemption would lead to improving the market or firms' performance in terms of quality, diversification, technological development, or innovative efficiency, or all of these, provided that the benefits to consumers outweigh the effects of limiting competition, in accordance with the conditions and regulations specified by the Implementing Regulations

The Board may, upon a recommendation of the technical committee, approve the request if the exemption (1) leads to an improvement in market or firm performance in terms of quality, diversification, technological development, or innovative efficiency; (2) Provides benefits to consumers that outweigh the negative effects of restricting competition; and (3) Does not allow the exempted firm(s) to restrict competition or exclude competitors from any market. In addition to these conditions, the Board may also consider any other relevant factors in assessing the competition restriction resulting from the exemption and the benefits arising from the exemption.

The Board shall issue its decisions concerning exemption requests indicating: a. approval; b. conditional approval; and/or c. rejection; within the period determined by GAC upon notifying the applicant of the completion of his request. In this case, the decision on conditional approval or approval must be reasoned. If the last day of the exemption request examination period coincides with an official holiday, the first working day following the holiday shall be considered the last day of that period. The Board shall, in the exemption decision, determine the exemption duration, conditions (if any), date of commencement and expiry thereof, geographical scope, if need be. The Board may announce it to the public.

The Board may extend the exemption prior to expiry thereof pursuant to a reasoned written request by the exemption applicant or by interested parties, or at the Board's own initiative, provided it has justifications to be set out in its decision. The procedures set out in Article 30 of the Regulations shall apply to the exemption extension decision, with the exception of the provisions related to the request examination period.

The Board may revoke the exemption by reasoned decision in some cases, including:

- a. a firm's breach of its obligations or undertakings provided for in the exemption decision;
- b. fulfillment of the purpose of exemption;
- c. change of market conditions and the level of competition therein; or
- d. the presence of negative impact on competition, resulting from the practices of the exempted firms, that exceeds the positive effects expected therefrom.

Section 11

Remedies

Decisions on economic concentration

Article 10 of the law states that:

“The Board shall issue a resolution concerning the economic concentration notices in one of the following forms:

1. Approval.
2. Conditional approval.
3. Refusal.

The resolution of conditional approval or refusal must be reasoned.”

The Parties should note that any Approval or Conditional Approval is valid only for a limited period of one (1) calendar year. The period can be extended if the parties wish to do so, and they must provide justifications for the extension request.

During the course of its competition assessment, the GAC may identify competition concerns that support a conclusion that an economic concentration is likely to substantially lessen competition in a relevant market. Where the GAC identifies such concerns that prevent the economic concentration from being approved unconditionally, the GAC may refuse the application outright, or it may approve the economic concentration but subject to conditions. Such conditions are also known as “remedies”. They will generally take the form of measures that are intended to alleviate or “cure” the competition concerns arising from the transaction. If the GAC is satisfied that the proposed remedies will address the competition concerns identified, it may accept the remedies as being sufficient and allow the economic concentration to proceed subject to those conditions.

As a general principle, appropriate remedies are measures that prevent the competitive detriment that would otherwise result from the economic concentration, while at the same time allowing any benefits arising from the transaction, such as efficiencies, to be realized. Because remedies may allow the benefits of a concentration while at the same time preventing the competitive harm, the GAC may see them as a preferable and more flexible alternative to simply blocking a transaction.

Remedies suggested by the economic concentration parties

In most cases, remedies are proposed by the economic concentration parties, at their discretion, as a means of permitting a transaction to be approved subject to conditions rather than the transaction being blocked altogether. In principle, the structure and content of the remedies offered to the GAC will therefore be a matter for the party offering the remedies. However, the GAC will only accept remedies as conditions if it is satisfied that they address the GAC’s competition concerns to a degree sufficient to allow the GAC to approve the transaction subject to those conditions. The GAC will generally provide detailed feedback on the form and content of remedies proposed by the parties, including regarding whether the GAC would be satisfied that they would alleviate the competition concerns sufficiently, and if not, what amendments to the proposed remedies would be required for the GAC to accept them. The GAC therefore encourages the economic transaction parties to carefully consider GAC feedback on proposed remedies.

Economic concentration parties therefore have strong incentives to propose effective and enforceable remedies to the GAC alleviate the identified competition concerns.

General principles of effective remedies

The remedies aim to ensure that competitive market structures continue to exist, and that economic concentrations do not harm competition.

An appropriate remedy in each case will depend on the specific facts and competition concerns of each case. It must cure the competition concerns raised by the specific case. However, it is nevertheless possible to identify certain general principles that underpin effective remedies.

An acceptable remedy must adequately address and alleviate the potential competition harm created by the specific economic concentration. In accepting a remedy, the GAC will not generally seek to improve competition beyond the pre-concentration level of competition, but it will not generally accept proposed remedies that do not maintain competition at the pre-concentration level. In some cases, there are no remedies which are adequate to maintain the pre-concentration level of competition, and in those cases only an outright rejection of the economic concentration can address the GAC's competition concerns.

To determine whether the proposed remedy is acceptable, the GAC will consider a range of factors, including:

- Whether the remedy is likely to be effective in addressing the GAC's competition concerns in that case;
- Whether the remedy is proportionate to the competition harm being alleviated in that case;
- How difficult the remedy will be to administer;
- Whether the economic concentration parties will be able to meet their commitments under the remedies;
- Monitoring and compliance costs; and
- Any risk to competition associated with the implementation of the remedy (or failure to do so).

Before accepting a remedy, the GAC will therefore need to be satisfied that:

- the proposed remedy is suitably designed and customized to the particular facts of the relevant economic concentration, the competition concerns raised, and the industry or industries involved;
- The main obligations in the proposed remedy specifically, comprehensively, and effectively address the GAC's competition concerns;
- the proposed remedy would impose clear and unambiguous obligations on the party proposing the remedy, including clear delineation of assets and businesses covered by the remedy, the terms under which the remedy is to be carried out, timeframes for actions to be completed, and the consequences of non-performance within those timeframes;
- The party offering the remedy is able to meet its obligations as set out in the commitment, and the remedy cannot be frustrated by the actions (or inaction) of third parties (for example, minority shareholders); and
- For international mergers involving firms operating in jurisdictions other than the Kingdom, any remedies provided to the GAC are capable of being enforced by the GAC and coordinated with any of the other relevant jurisdictions involved.

The GAC will generally be unlikely to accept a remedy when it assesses that:

- There are risks that the remedy will not be effective in preventing a substantial lessening of competition as a result of the economic concentration; and/or
- There are risks that the remedy cannot be implemented in practice and cannot be properly monitored and/or enforced.

Types of remedies:

Remedies are conventionally classified as either “structural” or “behavioral” remedies.

Structural remedies generally change the structure of the economic concentration parties and/or the market. This can commonly take place through divestitures of parts or all of a business but can also take other comparable formats. The general purpose of a structural remedy is to alter the structure of the market post-concentration so as to restore or maintain the level of competition prevailing before the acquisition. Obligations under a structural remedy is generally satisfied once the structural adjustment (e.g. the divestiture) is completed, although there may be ongoing obligations to ensure that the market structure is maintained.

Behavioral remedies generally change the behavior of the economic concentration parties after the economic concentration takes place. Behavioral remedies are commonly designed to modify or constrain the ongoing behavior of the economic concentration parties by requiring them to do something, or to refrain from doing something, such as by mandating the price, quality, or output of the economic concentration parties’ goods or services, or by otherwise modifying their dealings with other undertakings. Obligations under a behavioral remedy are ongoing, commonly for a defined period of time, such as a defined number of years after the completion of the economic concentration transaction.

An appropriate remedy in each case will depend on the specific facts and competition concerns of each case, and the GAC will be guided by the specific facts in each case. However, as a general principle, the GAC prefers structural remedies to address competition concerns. This is because structural remedies often provide an enduring remedy to competition concerns with relatively low monitoring and compliance costs. Nevertheless, behavioral remedies may be appropriate in specific cases, either as the primary remedy or as an adjunct to a structural remedy.

Structural remedies — divestitures

The most common form of structural remedy likely to be accepted by the GAC is divestiture. The general purpose in a specific case is to remedy the competitive detriments of an economic concentration by:

- creating a new source of competition through the disposal of shares, interests, a business or a set of assets to a new, competitive market participant; or
- Strengthening an existing source of competition through disposal to an existing market participant independent of the economic concentration parties.

Generally, divestiture remedies aim to ensure that the ultimate purchaser of the divestiture assets will be a viable, long-term, independent and effective competitor to the economic concentration parties, in a way that addresses the GAC’s competition concerns with the economic concentration.

A divestiture remedy will normally specify the following key elements:

- The scope of the divestiture package, such as the assets or businesses (or parts of businesses) to be disposed;

- The process for selecting a purchaser; and
- The process for the disposal, including the required timeline for the disposal.

In respect of each of these elements, the GAC will carefully consider what is required in each specific case to achieve a successful remedy. Generally, for a structural remedy to be acceptable to the GAC, all of the following requirements should be satisfied:

- The divestiture remedy should be proportionate to the competition concerns in that specific case and should be effective in restoring or maintaining competition;
- The businesses to be divested must be sold to a suitable purchaser. A suitable purchaser must generally be a viable, effective and long-term competitor, so that an independent and effective long-term competitor in the market will be created or maintained on a lasting basis and as a going concern. There should be no need for any continuing arrangements (such as continuing supply arrangements) between the economic concentration parties and the purchaser of the divested assets or business;
- There must be procedures for the GAC to approve the suitable purchaser once the purchaser has been identified or selected. In general, the purchaser should be independent of the economic concentration parties, should possess the necessary expertise, experience and resources to be an effective long-term competitor in the market, and the purchaser's acquisition of the divestiture assets or business should not itself raise competition concerns in any market;
- The procedures must ensure that the economic value and business integrity of the divested assets or business is preserved and independently maintained and operated as a going concern during the period leading up to divestiture. In many cases, this will mean that the divestiture should occur on or before the completion date of the economic concentration transaction, including in cases where there are risks in identifying a (suitable) purchaser or asset- deterioration risks. The GAC notes that in some specific circumstances where the remedy cannot be implemented on or before completion of the main economic concentration transaction, then no remedy will be acceptable to the GAC;
- There should be provision for an appropriate mechanism should the economic concentration parties fail in their core divestment obligations under the remedy. The specific measures and provisions needed to achieve these requirements (and any other appropriate requirements) will generally differ with the circumstances of each case.

The GAC will take into careful account that a divestiture remedy will be most likely to be successful where the divested assets or business become an effective competitor post-divestment, but that the economic concentration parties may conflicting incentives because they may prefer the divested assets or business not to become effective competitors. Accordingly, the GAC will closely examine the nature and extent of divestment remedies offered and will take particular account of the following risks:

- Composition risks: the risks that a divestiture package may not be composed of the appropriate (or sufficiently wide) assets or businesses to attract a suitable purchaser or allow a suitable purchaser to operate effectively;
- Purchaser risks: the risks that a suitable purchaser may not be available, or that the economic concentration parties may attempt to dispose of assets to a weak or otherwise inappropriate purchaser; and
- Asset risks: the risks that the competitive capability or position of the divested assets or business may deteriorate significantly in the time between when the remedy is agreed and the divestment is completed, for example through the loss of customers or key members of

staff, or through some other impediment to sale such as third party or minority shareholder approvals.

Behavioral remedies

Behavioral remedies generally change the behavior of the economic concentration parties by requiring them to do something, or to refrain from doing something, in an ongoing way and for a defined period of time after the completion of the economic concentration transaction. The nature of effective behavioral remedies will depend on the specific facts of each particular case, in particular on the specific competition concerns they seek to address in each case, and on the likely future state of competition in the relevant markets.

The GAC will ordinarily only be satisfied that behavioral remedies address the GAC's competition concerns if the remedies foster the development or maintenance of enduring and effective competitive constraints within a sufficiently short and pre-specified period of time. The GAC would not generally accept behavioral remedies that apply on a permanent basis.

An effective behavioral remedy must contain an effective mechanism for ongoing monitoring that the relevant parties are complying with their obligations under the remedy, and investigation of suspected breaches of the remedy.

In some cases, a monitoring trustee is assigned by GAC to monitor the economic concentration parties' compliance with the agreed remedies and report to GAC in case they breach.

Process

When an economic concentration raises competition issues at the outset or during a review, the economic concentration parties may decide to offer remedies to the GAC. If the GAC accepts that the remedies are sufficient to address the competition concerns in that case, the GAC may decide to approve the economic concentration subject to the conditions that the remedies be implemented, rather than blocking the economic concentration.

Timing of discussions

Economic concentration parties are free to propose remedies to the GAC at any time throughout the transaction review process, including at the outset of the review, the pre-notification phase, the moment of first notification, and after the economic concentration parties have been advised of potential competition concerns during a review. In general, economic concentration parties are encouraged to begin discussions with the GAC as early in the process as possible.

The economic concentration parties are encouraged to discuss the proposed form and content of a proposed remedy with the GAC. The GAC's approach to the substance of an undertaking will depend on the circumstances of each matter. It is for the notifying parties to formulate suitable remedies proposals. However, in many cases the GAC can provide the economic concentration parties with guidance on the content and form of a remedy that may be suitable to the specific circumstances of a transaction, and on any draft proposals by the parties in advance of submission.

Substance of proposed remedies

Any proposed remedy should be described and documented comprehensively to ensure that it clearly and effectively addresses all competition issues raised by the economic concentration to the GAC's satisfaction.

The GAC will generally provide feedback on draft remedies documentation, including on whether the proposed remedy resolves the GAC's concerns. An iterative process of providing proposed remedies to the GAC which are unlikely to resolve the GAC's concerns will normally cause unnecessary delays in the review process.

Public consultation after a proposed remedy is offered

In some cases, the GAC may conduct market inquiries with interested outside parties and stakeholders on a proposed remedy. This would generally only take place once the proposed remedy is sufficiently comprehensive, has the potential to address the competition concerns arising from the economic concentration in an enforceable way, and is in a form that meets the GAC's requirements. In other situations, the GAC may not consult on a proposed remedy, such as where issues relevant to the proposed remedy have already been subject to market enquiries or consultation.

The format of any public consultation will differ from case to case and may include the remedy being published on the GAC's website as a means of seeking comments from outside parties and stakeholders. The GAC will consider any relevant comments received from interested parties in deciding whether to accept a proposed remedy. Any consultation process would generally affect the timeline of the wider process.

International mergers involving remedies - liaison with foreign competition authorities

Where an economic concentration is also being reviewed by competition authorities in other countries, including in cases where the possibility of remedies has also been raised in those other countries, the GAC will seek where possible and reasonable to consult and coordinate with those foreign competition authorities. This consultation and coordination is for the purpose of seeking consistency where this is feasible and appropriate, including in relation to remedies.

Where appropriate, the GAC will seek confidentiality waivers from economic concentration parties that allow the GAC to exchange confidential information relating to the economic concentration with the relevant overseas competition authorities. The GAC expects economic concentration parties to give the GAC the same notice of economic concentrations and any potential remedies offered as the parties give to the overseas competition authorities, and normally requires simultaneous lodgment of submissions with the GAC and overseas competition authorities.

Post the agreement to remedies

The GAC therefore has an ongoing role in relation to remedies and conditions accepted in relation to economic concentration, including:

- Monitoring parties' compliance with commitments.
- Investigating suspected breaches and enforcing remedies and conditions, including by legal action where appropriate.

Legal enforcement where conditions are breached

The GAC carefully monitors compliance with all remedies it accepts and will investigate if it identifies any potential non-compliance. Non-compliance or breach of an agreed remedy is a violation of the Competition Law. The GAC will not hesitate to take enforcement action if it considers that a remedy has been breached and a violation of the Competition Law has been committed.

The GAC generally preserves all its rights to take legal action in relation to remedies, including in cases where a remedy has not been properly implemented or the GAC's decision to accept a remedy was based on inaccurate information.

Where the economic concentration parties commit a breach of an obligation under the conditions, the GAC may revoke its approval decision. In some cases, such as where a required divestiture is not made within the required timeframe, the GAC's decision to approve the economic concentration subject to the conditions may lapse on the basis that the required condition was not fulfilled. This, and comparable breaches of the conditions, may subject the economic concentration parties to fines under Article 19 of the Competition Law.

The economic concentration parties may also be subject to fines under Article 20 of the Competition Law, and other measures under Article 21 of the Competition Law, where such measures may include requiring the economic concentration parties to unwind the economic concentration. Furthermore, the GAC will also consider all other relevant provisions of the Competition Law and the Implementing Regulations in setting fines and other measures, including but not limited to Article 22 of the Competition Law and Chapter 7 of the Implementing Regulations.

End of the Guidelines

We welcome your comments and inquiries via email

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This guide is for guidance purposes, does not represent a commitment by the General Authority for Competition to implement or interpret the provisions of the Competition Law and its Implementing Regulations, and is subject to review and amendment at any time.