DECISION

on approving the Regulation on establishing dominant position

on the market and assessing the abuse of dominant position no 16 as of 30.08.2013

Official Gazette no 206-211/1441 as of 20.09.2013

Under the art.10 para. (6), art.41 para. (1) let.c), art.46 para.(6) let.d) and art.94 let.a) from the Law on Competition no 183 as of 11 July 2012 (Official Gazette of the Republic of Moldova, 2012, no 193-197, art.667), the Plenum of the Competition Council

DECIDES:

1. Regulation on establishing dominant position on the market and assessing the abuse of dominant position (attached) is being approved.

2. This decision shall enter into force on the date of its publication in Official Gazette of the Republic of Moldova.

THE PRESIDENT OF THE PLENUM

OF THE COMPETITION COUNCIL **Viorica CĂRARE**

Chişinău, 30 August 2013.

No 16

Approved

By the Decision of the Plenum of

Competition Council

no 16 as of 30 August 2013

REGULATION

on establishing dominant position on the market and

assessing the abuse of dominant position

This regulation partially transposes the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02, published in the OJ of the UE no C 45/7 as of 24.2.2009.

I. GENERAL PROVISIONS

1. This Regulation sets out the principles which the Competition Council shall use while establishing the dominant position on the market.

2. This Regulation sets out the priorities that will guide the Competition Council in applying the art.11 from the Law on Competition no 183 as of 11 July 2012.

3. The provisions of this Regulation shall apply to legal relations arising in connection with the preliminary examination and investigation of cases of abusive practices prohibited by art.11 of the Law on Competition.

4. In the meaning of this Regulation, the notions used mean the following:

anti-competitive foreclosure – a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the anticompetitive conduct of the dominant undertaking;

fixed costs – costs which do not depend upon the production volume size;

suck costs – fixed costs which were engaged and can recovered. These costs are related to activities which require specialized assets which cannot easily be allocated to other uses;

variable costs– costs which vary depending on the production volume;

total costs – the amount of variable and fixed costs;

average variable costs– relationship between variable costs and production;

economies of density– saving which occur as a result of the cost advantage of a provider benefiting from the high density of customers;

economies of scope – situation when an undertaking reduces production costs increasing the variety (range) of sold products. It occurs as a result of the cost advantage of an undertaking selling two or more products using the same means, compared to that which sell one product;

economies of scales – situation when an undertaking reduces unit costs producing a bigger volume of products (when the average costs decrease, while the output increases).It occurs when the average total cost per product unit of an undertaking decreases while the sales increase as a result of fixed cost-sharing between a larger volume of products;

essential production factor – component required for manufacturing a product which cannot be duplicated or may be duplicated at a cost which is economically unviable for competitors;

upstream market – market at the previous stage of production or distribution chain;

downstream market –market position following the production or distribution chain;

excessive price – price not reasonably related to the economic value of the product;

cross-subsidization – using revenue from a market to finance losses in another market.

5. The notions which are not defined inp.4 have the meaning given in the Law on Competition.

II. ASSESSMENT OF THE DOMINANT POSITION

6. Art.11 from the Law on Competition shall apply to undertakings holding dominant position on one or more relevant markets. Such a position can be held by one undertaking, a group of undertakings (single dominance) or by two or more undertakings or two or more groups of undertakings (collective dominance).

7. The establishment of relevant market, followed by the assessment of the fact if one undertaking, group of undertakings, two or more undertakings or more groups of undertakings hold dominant position on the relevant market is the first stage in applying art.11 from the Law on Competition.

8. Dominance is a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers, which means that the undertaking's decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers.

9. The assessment of dominance will take into account the competitive structure of the market, and in particular the factors provided for in art.10 para.(3) from the Law on Competition:

1) constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors);

2) constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry);

3) constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).

Section 1

Market position of the dominant undertaking and its competitors

10. Market shares provide an important indication to establish the dominant positions, however, taken separately, it is not necessarily decisive. It is also necessary, if appropriate to take account of market shares of competing undertakings, tendency of evolution in time of the market shares the extent to which products are differentiated.

11. Chapter V from the Law on Competition and the provisions of this section provide for the establishment of relevant markets and calculation of market shares.

12. Both sales values and the sales volume (number of customers, traffic volume, installed capacity, number of undertakings in market supply, aerospace fleet units or reserves held for certain sectors) represent useful information for calculating the total market size and the shares held. For homogeneous products preference shall be given to volume. For differentiated products the value of sales and the market share are deemed to reflect better the undertaking’s position on the market.

13. As a rule, low market shares are a good proxy for the absence of substantial market power. The dominant position is not likely if the undertaking's market share is below 40 % in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of the alleged dominant undertaking. The higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position.

14. It is presumed, unless proven otherwise, that one or more undertakings hold dominant position on a relevant market, if the cumulated share or shares on that market, recorded for the period subject to analysis, exceed 50%. If there are substantiated arguments, the dominant position assessment shall be continued through other factors provided for in art.10 para.(3) from the Law on Competition.

15. As a rule, on markets operating based on public purchase or bids organized by the private sector, the market shares shall be determined depending on the number of bids gained or lost. However, the market shares may not reflect the current position of undertakings, in particular where:

1) average value of bids is high compared to annual turnover of undertakings, and the bids are occasional;

2) products are relatively homogeneous and the market is not saturated.

16. In case of frequent bids and where the average value thereof is low compared to the annual turnover of undertakings, the market share represents a relevant indicator for market share.

Section 2

Expansion and entry on the market

17. Competition is a dynamic process and an assessment of the competitive constraints on an undertaking cannot be based solely on the existing market situation. The potential impact of expansion by actual competitors or entry by potential competitors, including the threat of such expansion or entry, is also relevant.

18. An undertaking can be deterred from behaving in an anticompetitive manner if expansion or entry is likely, timely and sufficient.

19. For the Competition Council to consider expansion or entry likely it must be sufficiently profitable for the competitor or entrant, taking into account factors such as the barriers to expansion or entry, the likely reactions of the allegedly dominant undertaking and other competitors, and the risks and costs of failure.

20. For expansion or entry to be considered timely, it must be sufficiently swift to deter or defeat the exercise of substantial market power. The opportunity of potential competitors to enter timely has deterrence effect for the existent undertaking. The adequate entry period depends upon the peculiarities and the dynamics of the relevant market and the specific capacities of potential competitors. The starting point is the period of time necessary to the undertakings already operating on the market to adapt the output. If the entry or expansion on the relevant market does not occur successfully within three years, this fact gives evidence on the existence of entry barriers. This represents the maximum time to entry and depending upon the peculiarities of the market it can be less than three years.

21. For expansion or entry to be considered sufficient, it cannot be simply small-scale entry, for example into some market niche, but must be of such a magnitude as to be able to deter any attempt to increase prices by the putatively dominant undertaking in the relevant market.

22. If the entry or expansion barriers are low and the entry or expansion is easy, than even the active undertakings with a high market share shall not be able to conduct in an anticompetitive manner.

23. If the entry or expansion barriers are high, the existent or potential competitors may be prevented from extending the market share or entering easily on the market. In such situation the expansion or entry shall not be able to deter the anticompetitive conduct of active undertakings with a high market share.

24. Barriers to expansion or entry can take various forms and are different for each relevant market. Specific circumstances of a case shall determine the extent to which certain barriers shall contribute more than others to occurrence or strengthening of dominant position. While assessing dominant position account shall be taken of only number or combination of barriers to entry or expansion.

25. While assessing barriers to entry or expansion, account shall be taken of the sector record (presence or absence of examples of frequent and successful entry on relevant market) and the stages of relevant market development.

26. Barriers to expansion or entry can: administrative and economic.

27. Administrative barriers tend to limit the number of undertakings active on the relevant market and to prevent the entry of new competitors, by limiting the number of undertakings allowed to operate on a certain relevant market, imposing sales shares or measures of price control or other similar measures on providers, protecting the undertakings operating on a potential entry on a relevant market. If appropriate, the administrative barriers are imposed by the legislation, other enactments or intellectual property rights, etc.

28. Administrative barriers imposed by granting exclusive rights are absolute and determine independently the dominant position on the relevant market to which these rights refer.

29. The legislation which sets objective criteria applying equally to all undertakings shall not constitute administrative barriers. The undertakings operating on the relevant market could enjoy standards (criteria/requirements) which are relatively easy to meet by them, but more difficult for a new entrant.

30. Economic barriers include entry sunk costs, economies of scales, density and scope, privileged access to essential production factors or natural resources, important resources, network effect, increased transfer costs to another provider, transfer deterrence strategies practiced by the undertaking alleged dominant, vertical entry, practicing some cross-subsidies between products, etc.

Section 3

Countervailing buyer power

31. Competitive constraints may be exerted not only by actual or potential competitors but also by customers. Even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength.

32. Such countervailing buying power may result from the customers' size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or to vertically integrate, and to credibly threaten to do so.

33. If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to behave in an anticompetitive manner provided for in art. 11 from the Law on Competition. Buyer power may not, however, be considered a sufficiently effective constraint if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking.

Section 4

Collective dominance

34. In addition to establishment of collective dominance, the Competition Council shall apply provisions stipulated in this section.

35. Two or more undertakings may hold together a dominant position (collective dominance) where, even in the absence of any structural relationship or of other character, these operate on a market whose structure is deemed appropriate for producing coordinated effects.

36. In order to demonstrate that two or more undertakings hold collective dominance, it is necessary to analyze that the undertaking at issue, constitute together a collective entity in relation to customers, providers and competitors on a certain market. This could be the case where the following conditions are cumulatively fulfilled:

1) there is no effective competition between undertakings at issue on the market;

2) the undertakings mentioned adopt an uniform conduct and a common policy on a relevant market.

37. Only if the conditions mentioned in p.36 are fulfilled, there shall be examined whether the collective entity holds dominance on the relevant market.

38. The existence of an agreement, decision, concerted practice implemented, prohibited by the Law on Competition, may serve as the basis for finding the existence of a link between undertakings insofar their conduct on a certain market on which they are active results in their perception as collective entity in relation to competitors, suppliers and their customers. However, the fact that the undertakings are linked by such agreement, decision or concerted practice, shall not solely constitute a necessary condition for such finding.

39. In preventive assessing of the probability of existence or occurrence of a market which is or may become favorable to the occurrence of collective dominance in the form of tacit coordination the Competition Council shall cumulatively analyze:

1) if there are market characteristics to foster a tacit agreement between two or more undertakings;

2) If such coordination is viable, by the fact that:

a) none of the participants is capable or motivated to address a divergent conduct, taking account the fact that other participants are capable and motivated to apply counter measures, and

b) competitors, potential competitors and customers, are not capable or motivated to oppose the outcome of this coordination.

40. Main criteria applied for establishing collective dominance on relevant market are as follows:

1) *market concentration*. Even if a market is highly concentrated, it shall not guarantee to establish collective dominance in the form of tacit agreement;

2) *transparency*. Collective dominance may occur where the undertakings may easily obtain information about the price and customers of competitors;

3) *lack of technical innovation, technology maturity*. The higher the technology maturity, the lower the competition through technological competition;

4) *stagnant or moderate growth of demand*. The rapid demand increase stimulates the competition on relevant market, undertaking having the possibility to increase market share and profits;

5) *low elasticity of demand*. If the demand does not change considerably in response to changes in price, there is a low motivation of undertakings to reduce prices for purpose of their market share increase;

6) *lack of customers' countervailing power*. A high countervailing power may prevent the occurrence of collective dominance on a relevant market;

7) *market maturity*. A higher maturity degree of the relevant market hampers entry on the market and attraction of new customers;

8) *product homogeneity*. The higher the products homogeneity or perceived in such a way by customers, the higher undertakings' motivation to assume a similar conduct on market, for the purpose of avoiding price competition and decrease of profits;

9) *similar costs structure*. For a given price, the similar costs structure shall determine a similar level or profits, being able to lead to agreements on price between undertakings;

10) *similar market share*. Adoption of a similar conduct by the undertakings may be facilitated by the existence of some similar market shares;

11) high entry barriers. The collective dominance on the relevant market is facilitated by high entry barriers;

12) *lack of excess capacities*. Excess capacities may hinder the occurrence and maintenance of agreements between undertakings, these being stimulated to use additional capacities for the purpose of profit increase;

13) *lack of potential competitors*. The perspective of entry on a relevant market of new competitors restricts the occurrence of collective dominance on that market;

14) *various types of informal links or of other character between undertakings susceptible of collecting dominance*. Although the establishment of informal links between undertakings may have the legal purpose to settle common problems related to activities thereof, the existence of such links may show a concerted action on the market;

15) *existence of counter mechanisms*. The undertakings shall be encouraged to maintain agreements on the market, including the tacit ones, if they can expect the application of some counter measures from competitors in case of infringing these agreements;

16) *lack of competition or reduced competition degree at price level*. If the undertakings anticipate a strong competition at price level, they may attempt to avoid effective competition between them through agreements on market prices. This type of agreements may be shown by the stability or reduced fluctuation of prices in time.

41. The criteria provided for in p.40 are neither exhaustive, nor cumulative.

42. Structural link or of other character (formal) consist of: direct and/or indirect links between auctioneers and founders of undertakings, agreements, legal obligations, concerted practices, license agreements, etc.

Section 5

Assessment of dominance on secondary markets

43. An undertaking holding dominant position on a specific relevant market may be deemed as being dominant on a market closely linked with the first, if the link between the two markets allows that the market power held on a market be exerted on the other market. Such an undertaking holds a position comparable to the dominant on the markets at issue taken as a whole. Due to its dominance on the first market and its presence on the related secondary market, the dominant undertaking may exert market power it possesses on the first market in order to conduct independently of customers on the last market.

44. If the undertaking holds dominance on primary market and commits an abuse on the secondary market, it is not necessary to establish its dominance on the secondary market.

III. ASSESSMENT OF THE ABUSE OF DOMINANCE

45. The Competition Council shall intervene pursuant to art.11 from the Law on Competition on the basis of cogent and convincing evidence, if it is likely that the allegedly abusive conduct is likely to lead to anti-competitive foreclosure.

46. The Competition Council shall deem particularly the following factors as being relevant for assessing the abusive practices:

1) share of the dominant undertaking: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure;

2) share of the dominant undertaking's competitors: this includes the importance of competitors for the maintenance of effective competition. A specific competitor may play a significant competitive role even if it only holds a small market share compared to other competitors as for example, the closest competitor to the dominant undertaking may be a particularly innovative competitor, or have the reputation of systematically cutting prices.

3) the conditions on the relevant market: this includes the conditions of entry and expansion;

4) the position of the customers or input suppliers: this may include consideration of the possible selectivity of the conduct in question. The dominant undertaking may apply the practice only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors. In case of customers, they may, for example, be the ones most likely to respond to offers from alternative suppliers, they may represent a particular means of distributing the product that would be suitable for a new entrant, they may be situated in a geographic area well suited to new entry or they may be likely to influence the behavior of other customers. In case of input suppliers, those with whom the dominant undertaking has concluded exclusive supply arrangements may be the ones most likely to respond to requests by customers who are competitors of the dominant undertaking in a downstream market, or may produce a grade of the product — or produce at a location — particularly suitable for a new entrant. Any strategies at the disposal of the customers or input suppliers which could help to counter the conduct of the dominant undertaking will also be considered;

5) the extent of the allegedly abusive conduct: in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect;

6) possible evidence of actual foreclosure or exploitation: if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure, such as: the market share of the dominant undertaking may have risen or a decline in market share may have been slowed, actual competitors may have been marginalized or may have exited, or potential competitors may have tried to enter and failed;

7) evidence of any exclusionary strategy: this includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to prevent the emergence of a market, or evidence of concrete threats of exclusionary action.

47. The Competition Council will develop the analysis of the general factors mentioned in p.46, together with the more specific factors described in the sections dealing with certain types of exclusionary conduct, and any other factors which it may consider to be appropriate, taking account of the peculiarities of the affected market. Where reffering to regulated markets, the Competition Council shall consider the specific regulating framework while carrying out the assessment.

48. In applying art.11 from the Competition Law, the Competition Council shall examine also the agruments put forward by the dominant undertaking, stipulating that its practices are justified, being necessary objectively or significantly increasing the efficiency, which compensate any anticompetitive effects on consumers, on condition that the practices in question are indispensable and proportionate with the alleged purpose pursued by the dominant undertaking.

49. The dominant undertaking is obliged to submit all the necessary evidence in order to demonstrate that its practices are justified (being necessary objectively or significantly increasing the efficiency), fulfilling the conditions provided for in art.11 para.(6) and (7) from the Law on Competition.

50. The Competition Council shall assess whether the practices in question are objectively necessary, on the grounds of balancing the seemingly anticompetitive effects and the efficiency increases submitted and tested, and if these are likely to bring prejudice to consumers.

IV. SOME SPECIFIC FORMS OF ABUSE

Section 1

Excessive pricing

51. Excessive pricing is the action prohibited by the art.11 para.(2) let.e) from the Law on Competition.

52. In order to demonstrate charging of excessive prices, the Competition Council, if appropriate, shall compare production or purchasing costs with the price alleged excessive and/or compares production or purchasing costs with the similar product (s) price on a comparable competitive market, including from other countries.

53. In order to demonstrate if the price is excessive, the following cumulative conditions shall be fulfilled:

1) the difference between de facto product costs incurred and de facto price charged shall not be excessive; and

2) if this difference is excessive, this price shall not be inequitable itself or when compared to competing products.

54. The high profitability showing the excessive difference between the product costs incurred and the price charged, is not sufficient for stating that the price is excessive. The economic value shall be determined taking account of specific circumstances of the case and also the factors not related to costs, such as the demand for the product or service. In some cases, the economic value may exceed the delivery cost, in particular if there are additional benefits not reflected in the delivery cost. In order to verify the existence of the second condition, it is necessary to try to establish whether there is a legitimate cause of the high profitability, stated at the verification of the first condition. The analysis of demand related issues aim at identifying the specific peculiarities of the product of service in question, which offer an “advantage” to the buyer without being de facto included in the production cost and which therefore may be a valid justification for higher prices, since the product may have specific aspects which are not taken into account for costs.

55. If appropriate, the Competition Council may apply other methodologies.

Section 2

Tying and bundling

56. The abusive practice prohibited under art.11 para.(2) let.d) from the Law on Competition may be manifested tying and bundling.

57. Tying" usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product).

58. Tying can take place on a technical or contractual basis. Technical tying occurs when the tying product is designed in such a way that it works properly only with the tied product (not with the alternative products offered by competitors), Contractual tying occurs when the customer buying the tying products engages to buy the tied product (not the alternative products offered by competitors).

59. Bundling usually refers to the way products are offered and priced by the dominant undertaking.

60. Bundling can be:

1) pure , when the products are only sold jointly in fixed proportions;

2) mixed (multi-product rebate) ,where the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price.

61. Tying and bundling are not illegal per se, being common practices intended to provide customers with better products or offerings in more cost effective ways. However, an undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market. Tying and bundling are infringements provided for in art.11 para.(2) let.d) when the following conditions are cumulatively fulfilled:

1) The undertaking should be dominant in the tying market, though not necessarily in the tied market. In bundling cases, the undertaking needs to be dominant in one of the bundled markets. In the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied after-market;

2) the tying and tied products are distinct products, and

3) the tying practice is likely to lead to anti-competitive foreclosure.

62. Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialized in the manufacture or sale of the tied product without the tying product or of each of the products bundled by the dominant undertaking, or evidence indicating that undertakings with little market power, particularly in competitive markets, tend not to tie or not to bundle such products.

63. Tying or bundling may lead to anti-competitive effects in the tied market, the tying market, or both at the same time. However, even when the aim of the tying or bundling is to protect the dominant undertaking's position in the tying market, this is done indirectly through foreclosing the tied market.

64. The risk of anti-competitive foreclosure is expected to be greater where the dominant undertaking makes its tying or bundling strategy a lasting one, for example through technical tying which is costly to reverse. Technical tying also reduces the opportunities for resale of individual components.

65. In the case of bundling, the undertaking may have a dominant position for more than one of the products in the bundle. The greater the number of such products in the bundle, the stronger the likely anti-competitive foreclosure. This is particularly true if the bundle is difficult for a competitor to replicate, either on its own or in combination with others.

66. A multi-product rebate may be anti-competitive on the tied or the tying market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.

67. If the marginal price that customers pay for each of the dominant undertaking's products in the bundle remains above the average variable cost of the dominant undertaking from including that product in the bundle, the Competition Council will normally not intervene since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle. Enforcement action may, however, be warranted if the marginal price is below the average variable cost, because in such a case even an equally efficient competitor may be prevented from expanding or entering on a market. In principle, the average variable cost benchmark is relevant here as long as competitors are not able to also sell bundles.

68. If the evidence suggests that competitors of the dominant undertaking are selling identical bundles, or could do so in a timely way without being deterred by possible additional costs, the Competition Council will generally regard this as a bundle competing against a bundle, in which case the relevant question is not whether price of the bundle as a whole is predatory.

Section 3

Refusal to supply

69. Refusal to supply is an action prohibited by art.11 para.(2) let.f) and g) from the Law on Competition.

70. The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers, refusal to license intellectual property rights (under extraordinary circumstances), including when the license is necessary to provide interface information, or refusal to grant access to an essential facility or a network.

71. In order to ensure the right to freedom of contract of the dominant undertaking, not any refusal to supply shall be deemed infringement of the competition legislation.

72. Refusal to supply shall be deemed infringement of the competition legislation when the dominant undertaking competes on the "downstream" market with the undertaking that it refuses to supply. The term "downstream market" is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service.

73. It is not necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified. Likewise, it is not necessary for there to be actual refusal on the part of a dominant undertaking; "constructive refusal" is sufficient. Constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply.

74. Infringement of the art. 11 para (2) let.f) from the Law on Competition shall be deemed the situation in which a dominant undertaking charges a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called "margin squeeze" or "scissors effect"), including a situation in which an integrated undertaking that sells a "system" of complementary products refuses to sell one of the complementary products on an unbundled basis to a competitor that produces the other complementary product. In margin squeeze cases the benchmark which the Competition Council will generally rely on to determine the costs of an equally efficient competitor is the average variable cost of the downstream division of the integrated dominant undertaking. However, in some cases, average variable cost of a non-integrated competitor downstream might be used as the benchmark, for example when it is not possible to clearly allocate the dominant undertaking's costs to downstream and upstream operations.

75. The refusal to supply will be deemed infringement if the following cumulative conditions are fulfilled:

1) the refusal relates to a product that is objectively necessary to be able to compete effectively on a downstream market. This condition will be deemed fulfilled if the refused product (factor of production) is indispensable, that is there is no current or potential substituent on which competitors on a downstream market could rely to compete;

2) the refusal is likely to lead to the elimination of effective competition on the downstream market, and

3) the refusal is likely to lead to consumer harm.

76. In examining whether a refusal to supply deserves its priority attention, the Competition Council will consider whether the supply of the refused input is objectively necessary for operators to be able to compete effectively on the market. This does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market. Rather, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter — at least in the long-term — the negative consequences of the refusal. In this regard, the Competition Council will normally make an assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future. The notion of duplication means the creation of an alternative source of efficient supply that is capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market. In general, an input is likely to be impossible to replicate when it involves a natural monopoly due to scale or scope economies, where there are strong network effects or when it concerns so-called "single source" information. However, in all cases account should be taken of the dynamic nature of the industry and, in particular whether or not market power can rapidly dissipate.

77. The criteria set out in p.75 shall apply both to cases of disruption of previous supply, and to refusals to supply a good or service which the dominant company has not previously supplied to others (de novo refusals to supply).

78. If the requirements set out in p. 76 and 77 are fulfilled, the Competition Council considers that a dominant undertaking's refusal to supply is generally liable to eliminate, immediately or over time, effective competition in the downstream market. The likelihood of effective competition being eliminated is generally greater the higher the market share of the dominant undertaking in the downstream market.

79. The less capacity-constrained the dominant undertaking is relative to competitors in the downstream market, the closer the substitutability between the dominant undertaking's output and that of its competitors in the downstream market. The greater the proportion of competitors in the downstream market that are affected, the more likely it is that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking.

80. In examining the likely impact of a refusal to supply on consumer welfare, the Competition Council will examine whether, for consumers, the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply. If they do, the Competition Council will normally pursue the case.

81. Consumer harm may, for instance, arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled. This may be particularly the case if the undertaking which requests supply does not intend to limit itself essentially to duplicating the goods or services already offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which there is a potential consumer demand or is likely to contribute to technical development.

82. A refusal to supply may lead to consumer harm where the price in the upstream input market is regulated, the price in the downstream market is not regulated and the dominant undertaking, by excluding competitors on the downstream market through a refusal to supply, is able to extract more profits in the unregulated downstream market than it would otherwise do.

Section 4

Predation for the purpose of eliminating competitors

83. Predation for the purpose of eliminating competitors is an action prohibited by art.11 para. (2) let. e) from the Law on Competition.

84. The Competition Council shall intervene where the price exclusion practices hampered or may hamper competition from competitors considered as efficient as the dominant undertaking, in some circumstances, from hypothetical competitors, as efficient as the dominant undertaking.

85. In certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. The constraint shall be dynamically viewed, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency.

86. In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Competition Council will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below average variable cost pricing.

87. The Competition Council shall use information regarding the dominant undertaking's costs, and if such information is not available, it shall use data regarding the costs of competitors or other comparable reliable data.

88. If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Competition Council will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene. If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Competition Council will integrate this in the general assessment of anti-competitive foreclosure carried out under Chapter III taking into account other relevant quantitative and/or qualitative evidence.

89. The Competition Council will generally intervene when there is evidence showing that a dominant undertaking applies practices of eliminating the competition, deliberately supporting losses (hereinafter "sacrifice"), insofar to exclude or be able to exclude one or more of its current or potential competitors in view of strengthening or maintaining its market power and bringing prejudice to consumers.

90. The Competition Council may also pursue predatory practices by dominant undertakings on secondary markets on which they are not yet dominant. In particular, the Competition Council will be more likely to find such an abuse in sectors where activities are protected by a legal monopoly. While the dominant undertaking does not need to engage in predatory conduct to protect its dominant position in the market protected by legal monopoly, it may use the profits gained in the monopoly market to cross-subsidize its activities in another market and thereby threaten to eliminate effective competition in that other market.

91. Some practices will be viewed by the Competition Council as entailing a sacrifice if, by charging a lower price for all or a particular part of its output over the relevant time period, or by expanding its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided. The Competition Council will take average variable cost as the appropriate starting point for assessing whether the dominant undertaking incurred or is incurring avoidable losses. If a dominant undertaking charges a price below the average variable cost for all or part of its output, it is not recovering the variable costs: it is incurring a loss that could have been avoided. Pricing below average variable cost will thus in most cases be viewed by the Competition Council as a clear indication of sacrifice.

92. The undertakings should not be penalized for incurring ex post losses where the ex-ante decision to engage in the conduct was taken in good faith, that is to say, if they can provide conclusive evidence that they could reasonably expect that the activity would be profitable.

93. In some cases the Competition Council will rely upon direct evidence consisting of documents from the dominant undertaking which clearly show a predatory strategy, such as a detailed plan to sacrifice in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action.

94. If sufficient reliable data are available, the Competition Council will apply the equally efficient competitor analysis, described in p. 86-88, to determine whether the conduct is capable of harming consumers. Normally only pricing below average variable costs is capable of foreclosing as efficient competitors from the market.

95. It is not necessary to show that competitors have exited the market in order to show that there has been anti-competitive foreclosure. The possibility cannot be excluded that the dominant undertaking may prefer to prevent the competitor from competing vigorously and have it follow the dominant undertaking's pricing, rather than eliminate it from the market altogether. Such disciplining avoids the risk inherent in eliminating competitors, in particular the risk that the assets of the competitor are sold at a low price and stay in the market, creating a new low cost entrant with low costs.

96. It can be easier for the dominant undertaking to apply predatory practices if it is related selectively to certain customers with low prices, fact that would allow limiting the losses.

97. It is unlikely that the dominant undertaking will apply predatory practices if these are related to prices charged generally during a long period of time.

Section 5

Exclusive dealing

98. Exclusive dealing is an action prohibited by art.11 para. (2) let. a) from the Law on Competition.

99. A dominant undertaking may try to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates, together referred to as exclusive dealing.

100. The notion of exclusive dealing includes also the obligation of exclusive purchasing or incentives having the same effect by which the dominant undertaking tries to eliminate competitors, hindering them from supplying from providers. It is deemed that the obligation of exclusive purchasing may lead to anticompetitive foreclosure if it binds the majority of efficient suppliers to production factors and if the undertaking customers which are competitors to dominant undertakings, are not capably of finding efficient alternative supply sources with production factors.

101. An exclusive purchasing obligation requires a customer on a particular market to purchase exclusively or to a large extent only from the dominant undertaking. Other obligations, such as stocking requirements, which appear to fall short of requiring exclusive purchasing, may in practice lead to the same effect.

102. Generally the Competition Council will intervene if there are many customers and the exclusive purchasing obligations of the dominant undertaking, taken together, have the effect of preventing the entry or expansion of competing undertakings.

103. The capacity for exclusive purchasing obligations to result in anti-competitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors who either are not yet present in the market at the time the obligations are concluded, or who are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand because the dominant undertaking is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a "must stock item" preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier. If competitors can compete on equal terms for each individual customer's entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration of the exclusive purchasing obligation. Generally the longer the duration of the obligation, the greater the likely foreclosure effect. However, if the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anti-competitive foreclosure.

104. Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behavior.

105. The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates).

106. Conditional rebates are not an uncommon practice. Undertakings may offer such rebates in order to attract more demand, and as such they may stimulate demand and benefit consumers. However, such rebates — when granted by a dominant undertaking — can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking. From this point of view, the assessment of conditional rebates differs from that of predation, which always implies a sacrifice.

107. As with exclusive purchasing obligations, the likelihood of anti-competitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer. A conditional rebate granted by a dominant undertaking may enable it to use the "non contestable" portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the "contestable" portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitutes).

108. In general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to loss of the retroactive rebates. The potential foreclosing effect of retroactive rebates is in principle strongest on the last purchased unit of the product before the threshold is exceeded. However, what is relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit, but the foreclosing effect of the rebate system on (actual or potential) competitors of the dominant supplier.

109. The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors.

110. In order to investigate to the extent that the data are available and reliable, whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient by making it more difficult for them to supply part of the requirements of customers, the Competition Council will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand ("the relevant range") away from the dominant undertaking. The effective price that the competitor will have to match is the normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time.

111. The relevant range over which to calculate the effective price in a particular case depends on the specific facts of each case and on whether the rebate is incremental or retroactive. For incremental rebates, the relevant range is normally the incremental purchases that are being considered. For retroactive rebates, it will generally be relevant to assess in the specific market context how much of a customer's purchase requirements can realistically be switched to a competitor (the "contestable share" or "contestable portion"). If it is likely that customers would be willing and able to switch large amounts of demand to a (potential) competitor relatively quickly, the relevant range is likely to be relatively large. If, on the other hand, it is likely that customers would only be willing or able to switch small amounts incrementally, then the relevant range will be relatively small. For existing competitors their capacity to expand sales to customers and the fluctuations in those sales over time may also provide an indication of the relevant range. For potential competitors, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken, where possible. It may be possible to take the historical growth pattern of new entrants in the same or in similar markets as an indication of a realistic market share of a new entrant. The relevant range will be estimated on the basis of data which may have varying degrees of precision. The Competition Council will take this into account in drawing any conclusions regarding the dominant undertaking's ability to foreclose equally efficient competitors. It may also be useful to calculate how big a share of customers' requirements on average the entrant should capture as a minimum so that the effective price is at least as high as the average variable cost of the dominant company. In a number of cases the size of this share, when compared with the actual market shares of competitors and their shares of the customers' requirements, may make it clear whether the rebate scheme is capable to have an anti-competitive foreclosure effect.

112. The lower the estimated effective price over the relevant range is compared to the average price of the dominant supplier, the stronger the loyalty-enhancing effect. However, as long as the effective price remains consistently above the average variable cost of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate. In those circumstances the rebate is normally not capable of foreclosing in an anti-competitive way. Where the effective price is below average variable price, as a general rule the rebate scheme is capable of foreclosing even equally efficient competitors.

113. Generally, it is important to consider whether the rebate scheme is applied based on an individualized or standard threshold.

114. An individualized threshold, based on a percentage of the total requirements of the customer or an individualized volume target, allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect.

115. A standardized volume threshold — where the threshold is the same for all or a group of customers — may be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect. If, however, it can be established that a standardized volume threshold approximates the requirements of an appreciable proportion of customers, it is likely to consider that such a standardized system of rebates may produce anti-competitive foreclosure.