OF 2025 – G2 – Guidelines on URCO’s Assessment of Mergers

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Contents

1. INTRODUCTION

1.1 This advisory guidance ('**Guidance**') forms part of the advice and information published by the Utility Regulation and Competition Office ('**Office**') under section 6(2)(e) of the Utility Regulation and Competition Act (2024 Revision) (the '**Act**').[1] All references to legislation sections below are to the Act unless otherwise indicated. Further, unless the context dictates otherwise, references to "*merger*" and "*change of control*" are used interchangeable.

1.2 The change of control of a licensee may have both positive and negative implications for the economy, market growth, consumers and competition in the utility markets and sectors the Office has responsibility for (the '**Utility Sectors**').[2] For example, such mergers can bring benefits to the economy and help businesses and markets grow. However, some mergers can harm competition and result in, for example, higher prices, reduced quality or choice for consumers, or reduced innovation.

1.3 If the change of control takes place in a media business, it may impair the public's interest in the plurality of control of the media or the freedom of expression. A main aim of the Office's general merger assessment is to ensure that any changes do not substantially lessen competition and lead to worse outcomes for consumers, for example, through higher prices, lower quality or reduced choice, and in the media, guard the public interest.

1.4 This Guidance sets out "*advisory guideline*" as defined under section 2(1) of the Act and provides a general overview of the merger regime in the Utility Sectors in relation to:

(a) <u>Phase 1, The Screening Phase,</u> where the Office decides whether there is a "*significant prospect that the change of control is likely to have adverse effects, and the parties have not volunteered any proposals to eliminate the Office's concerns*" such that the merger should be referred for an In-depth Investigation;[3] and

(b) <u>Phase 2, In-depth Investigation,</u> where the Office must decide whether or not:

(i) the merger *would have, or be likely to have, the effect of substantially lessening competition* [SLC] *in the market in the Islands";*[4] and,

[1] https://www.ofreg.ky/viewPDF/documents/2024-04-08-09-29-02-Utility-Regulation-and-Competition-Act-2024-Revision.pdf
[2] See Schedule 1 of the Act.
[3] Section 54(2) of the Act.
[4] Section 49(a) of the Act.

(ii) in relation to media mergers, "*whether the change of control would have an effect, or would be likely to have an effect contrary to the public interest*";[5]

and, therefore, whether appropriate action should be taken by the merger parties to eliminate or avoid (remedy, mitigate or prevent) that identified concern.

Media Mergers – as defined at section 25A of the Information and Communications Technology Act (2019 Revision) ('**ICT Act**').[6]

1.5 This document also provides a source of general guidance on the options available to merger parties to provide undertakings in lieu of a Phase 2 Investigation or decision ' **UIL**').

1.6 The approach outlined in this document is informed by the UK Competition and Markets Authority's ('**CMA**') guidance on and experience of merger investigations, merger decisions published by the CMA (and its predecessors, the Office of Fair Trading ('**OFT**') and the Competition Commission ('**CC**') if relevant), judgments of the UK Competition Appeal Tribunal ('**CAT**') and the CMA's research into the outcomes of remedies.[7] That said, this Guidance takes into account the fact that the Cayman Islands is a 'microstate' (i.e., a very small jurisdiction with limited population and land area), and, in consequence, recognises that competition principles, including remedies, are to be applied appropriately and proportionately in that context.

1.7 This Guidance sets out the general views of the Office at the time of publication and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. They should not be taken as a statement of law, and they do not have binding legal effect. The Office reserves the right to consider other factors not covered in this Guidance, where necessary. If the Office decides to depart from this Guidance, the Office will inform the public of its reasons for doing so.

1.8 Where there is any difference in emphasis or detail between this Guidance and other guidance produced or adopted by the Office, the most recently published guidance will take precedence.

1.9 The Office concurrently has published more detailed guidance on the remedies

[5] Section 49(b) of the Act.
[6] https://www.ofreg.ky/viewPDF/documents/legislation/2021-04-15-01-39-56-Information-and-Communications-Technology-Law-2019-Revision.pdf
[7] See CMA, Understanding past merger remedies. Report on case study research, 6 April 2017.

that may be agreed or imposed when the change of control raises relevant identified concerns.

1.10 The Act requires merger parties to give written notice to the Office of their intention to effect a change of control, and seek the Office's consent to do so. The form that is to be used to give such notice to the Office includes guidance notes (the '**Merger Notice**'). Also, If the merger is likely to change aspects of the operating licence or permit, the information in the sectoral legislation required for a new licence or permit should also be submitted by the merger parties.

1.11 For further legislative background, see in particular sections 46 to 54 of the Act, sections 23 and 25 of the Electricity Sector Regulation Act (2019 Revision),[8] section 5 of the Fuel Market Regulation Act, 2017,[9] sections 25 and 25A of the ICT Act, and The Dangerous Substances Regulations (2017 Revision).[10]

Table of Abbreviations

Act	Utility Regulation and Competition Act (as revised)
CAT	Competition Appeal Tribunal
CC	Competition Commission (UK)
CMA	Competition & Markets Authority
ICT Act	Information and Communications Technology Act (as revised)
Office	Utility Regulation and Competition Office
OFT	Office of Fair Trading
RCB	relevant customer benefits
SLC	substantial lessening of competition
UIL	undertakings in lieu of reference
Utility Sector	Schedule 1 of the Act

8 https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/2005/2005-0010/2005-0010_2019%20Revision.pdf?zoom_highlight=electricity+sector+regulation+law#search=%22electricity%20sector%20regulation%20law%22

9 https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/2017/2017-0020/2017-0020_Act%2020%20of%202017.pdf?zoom_highlight=fuel+market+regulation+act#search=%22fuel%20market%20regulation%20act%22

10 https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/2003/2003-0021/2003-0021_2017%20Revision.pdf?zoom_highlight=dangerous+substances+law#search=%22dangerous%20substances%20law%22

2. MERGER REVIEW IN THE UTILITY SECTOR

Who is responsible for merger review in the Cayman Islands?

2.1 Merger review in the Utility Sector in the Cayman Islands is the responsibility of the Office, which is an independent statutory authority.

What mergers may the Office review?

2.2 The Office has the jurisdiction to examine a change of control, which includes certain share and other acquisitions, mergers and joint ventures, where:

(a) at least one of the parties is a licensee;[11] or,

(b) if the transaction involves the media public interest at least one of the parties involved in the transaction is a media enterprise;[12]

which (a) and (b) are collectively referred to in this Guidance, including the acquirer, as a 'merger party or parties' as the context provides.

Requirement to obtain the prior written approval of the Office

2.3 The Act sets out at sections 46(1) and 47(1) of the Act, and sections 25 and 25A of the ICTA, that certain changes in control are not to be effected without the prior written approval of the Office.

2.4 In particular, section 46(1) of the Act sets out that:

A licensee that is a company (other than a company referred to in subsection (5)) shall not issue shares, and a person owning or having an interest in shares in the licensee shall not transfer, otherwise dispose of or deal in those shares or that interest where the issuance, transfer, disposal or dealing would thereby result in a total shareholding or total voting rights, by the person acquiring the shares or voting rights by the issuance, transfer, disposal or dealing, of more than ten per cent of the issued share capital or total voting rights of the licensee, without the prior written consent of the Office whose consent shall not be unreasonably withheld; but the Office may refuse to give its consent where, among other things, it considers that the giving of the consent may result in a lessening of competition in the operation of networks or the provision of utility services. [13]

2.5 Section 46(5) of the Act and section 25(5) of the ICT Act set out (i) that the Office may, in respect of a licensee whose shares are publicly traded on a stock

[11] Section 48 of the Act.

[12] See section 25A(2) ICT Act, defining a "*media enterprise*" as an enterprise involving either or both of – (a) broadcasting; and (b) publishing newspapers. The office does not consider that "*newspaper*" includes in this context advertising circulars or flyers or club bulletins.

[13] The Office notes that the Act, at section 46(1), provides that the Office may refuse to give its consent where the giving of the consent may result in a *"lessening of competition"* in the operation of networks or the provision of utility services, rather than in that context an SLC. However, in the context of the Cayman Islands, the distinction between "*lessening of competition*" and an SLC may be too fine to measure or articulate. Therefore, and noting in any event that the Office must act proportionately when exercising its functions, the Office will consider whether the referenced "*lessening of competition*" at section 46(1) is sufficiently substantive such that the Office may refuse its consent.

exchange recognised by the Cayman Islands Monetary Authority, waive the obligation to obtain such consent, and (ii) the conditions which such a waiver shall be subject to. Those conditions set out a different threshold where if met and include that the change of control shall be subject to such terms and other conditions as the Office may deem necessary.

2.6 Further, the Act sets out at section 50(1) that in determining whether to give its consent, the Office shall take into account in particular:

(a) the promotion of sustainable competition in the Utility Sectors in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the Islands; and,

(b) the market position of the licensees concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2.7 The Act also provides at section 50(2) that, to the extent that the creation of a joint venture or arrangement involving one or more licensees has as its object or effect the coordination of the competitive behaviour of licensees that remain independent, the creation of such joint venture shall be considered as though it were a change of control.

2.8 In making this appraisal, the Office shall take into account in particular[14]:

(a) whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market; and,

(b) whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

[14] Section 50(2) (a) and (b) of the Act.

How may the Office come to review a Change of Control?

2.9 There are two routes by which the Office may come to review a proposed merger or merger:

(a) <u>Notification.</u> Merger parties are obliged to notify the Office of the proposed change of control.

The Merger Notice sets out the categories of information required by the Office, together with guidance notes to assist merger parties in identifying the specific nature and extent of information required in their case.

Before submitting a Merger Notice, businesses are encouraged to approach the Office to discuss their transaction on a confidential basis.

(b) <u>Office's own-initiative investigation.</u> The Office has a broad remit in relation to consumer protection[15] and may keep relevant mergers under review; and can investigate such mergers that have not been notified to it.

The Office obtains information about anticipated and completed changes of control from a range of sources, including from third parties. Where the Office learns of a proposed change of control, the Office can open an investigation as to whether or not to grant its consent.

2.10 That said, where merger parties have a statutory obligation to obtain the prior approval of the Office prior to effecting a change of control, the Office may refer the failure to notify the Office of an intended change of control to the Director of Public Prosecutions for prosecution[16] or begin the administrative fines process.[17]

What is the threshold to be considered and how long does the Office's merger review take for each Phase?

2.11 At Phase 1, the screening process, the Office determines whether it considers that the change of control would or would likely result in a realistic prospect of an SLC. or media public interest concerns. If so, the Office may launch an In-depth Investigation (Phase 2), although the merger parties may offer to modify aspects of the transaction to 'remedy' any competition concerns identified at Phase 1, (known as UILs), thereby obtaining a resolution at Phase 1 conditional on acceptance of the offered remedies.

[15] Section 6(2)(q) of the Act.
[16] Section 97 of the Act.
[17] Section 91 of the Act.

2.12 The Office has a statutory deadline of *within 30 days* in which to complete the initial stage of its merger review process (Phase 1). That statutory period starts on the first working day after the Office confirms that it has received a satisfactory Merger Notice, Satisfactory Notification, containing all the information it requires for its review. If the Office does not receive all the information it requires, the Office will send the Merger Notice back setting out to the relevant party generally what information is missing.

2.13 In the case of an investigation started on the Office's initiative, provided that it has received sufficient information to enable it to begin its investigation, the Office's internal policy is to complete that review also *within 30 days*. However, the Office may 'stop the clock' in certain circumstances, in particular where any information the Office has formally requested as part of that investigation remains outstanding.[18]

2.14 If the Office moves to a Phase 2 In-depth investigation, it shall issue its decision *within ninety days*.[19] However, again, the Office may 'stop the clock' in certain circumstances, in particular where information the Office has formally requested as part of that investigation remains outstanding.

2.15 At Phase 2, the Office assesses if the identified concern would have or be likely to have the effect of SLC or, in the case of a media public interest, an effect contrary to the public interest (per section 49 of the Act). If such an identified concern is expected, the Office decides upon the remedies required. Such remedies may include prohibiting the change of control or requiring the divestiture (sale) of parts of the business or undertaking to modify the future conduct of the business. The parties may continue to offer solutions and UIL.

Do businesses have to pay a fee for the Office's merger review?

2.16 Not directly through a fee, though the notifying merger parties must bear the cost of organising and presenting information and expert analysis to the Office.

Do businesses have to tell the Office that an intended change of control is planned?

2.17 Yes, licensees and media enterprises must provide a Merger Notice to the Office of an intended change of control. Where there is a question of the need to give such a notice, the Office will engage in written discussion with any of the merger parties.

[18] Section 54(1) of the Act.
[19] Section 54(3) of the Act.

What if a change of control is obtained in stages or for a temporary period?

2.18 In the situation where a change of control is to be completed over a period of years, the Office will review the change of control by grouping together the changes over a period of two years. If the change of control is expected to be temporary in nature, and no more than one year, informal notice must still be given but there will be no expectation of a formal notice being needed unless otherwise indicated.

2.19 **Not telling the Office about a merger does not mean that it cannot or will not review it.** As explained above, the Office has a responsibility to keep merger activity under review and may investigate, on its own initiative, mergers that have not been notified and may in such circumstances open up on own investigation into the merger.

2.20 Completing a relevant change of control without notifying the Office before doing so can also result in significant additional costs for merger parties, including:

(a) the Office may engage the Director of Public Prosecutions with a view to prosecution for non-compliance with a regulatory requirement, and/or itself commence the Office's administrative fine process;

(b) costs can arise from having to dispose of the shares or merged business if the transfer or merger is prohibited; and,

(c) the conduct may negatively impact the reputation of the directors for this case, and restrict their opportunities to serve with other licensed entities or in other sectors.

Does the Office always launch a Phase 2 investigation into a potentially problematic change of control?

2.21 If the Office considers that the merger would result in a significant prospect that the change of control is likely to have adverse effects in the sectors regulated as referenced in paras. 2.11 *et seq.* above, it may launch a more detailed Phase 2 assessment.

2.22 However, the Office may decide not to launch a Phase 2 investigation where the merging businesses have offered UILs (e.g. offers to sell Businesses or assets or modify the conduct of the business) that remedy *in a clear cut manner* the identified SLC/effect contrary to the public interest concerns that the Office considers would have or would likely occur. In this regard:

(a) merger parties should consider and discuss with the Office possible UILs at the same time as the Office is considering the Merger Notice.

In cases where the merger parties accept at an early stage that there is sufficient evidence of adverse effects, they may request that the discussion be limited to consideration of UILs.

The fact that a merger party wants to discuss possible UILs with the Office will not increase the likelihood that the Office will decide there is reason for In-depth Investigation or a refusal of consent.

(b) The Office may decide that the UILs offered by a merger party(ies) must include a commitment that, before the Office formally accepts the undertakings, the merger parties will enter into a sale agreement with an 'upfront buyer' for the business or assets that it is offering to sell. Merger parties should consider this when deciding what to include in any offer of UILs at Phase 1.

2.23 The Office also has the discretion not to launch a Phase 2 investigation if it considers that:

(a) any substantiated and likely efficiencies put forward by the acquirer or the licensee are necessary and outweigh any potential harm to consumers and citizens;[20]

(b) there are benefits to customers arising from the merger that outweigh the effect of the SLC or media public interest concerns; or,

(c) the anticipated change of control is not sufficiently advanced or likely to proceed to justify a Phase 2 investigation.

How does Office undertake its review?

2.24 The notifying parties will deal primarily with the Office's case team in Phase 1/UIL considerations.

2.25 The Office uses the same overall analytical approach in Phase 1 and Phase 2 when assessing the potential effects of a change of control on identified concerns.

2.26 However, the Office applies different thresholds as to the likelihood of an adverse effect at each phase. In broad summary, at Phase 1, the Office

[20] Section 52(1)(b)(iii) of the Act.

considers whether there is a "*significant prospect*" of an adverse effect; whereas at Phase 2 the Office decides whether the change of control would have or be likely to have (on the 'balance of probabilities'), the effect of SLC in Utility market or, in relation to a change of control involving a media public interest, an effect contrary to the public interest.

2.27 Phase 2 is the final phase of the Office's investigation and so the actions that it may take at the end of that Phase are different from those at the end of Phase 1.

2.28 Where the Office finds at Phase 2 that the proposed change of control would have adverse effects, it will decide what action should be taken to remedy, mitigate, or prevent that adverse effect, and can impose remedies by order if it is not able to agree them with the merger parties, including prohibiting the merger by refusing to give its consent. In any event, it will provide a reasoned decision.

2.29 Dissatisfied parties may appeal the Office's decision to the Grand Court by way of Judicial Review.[21]

[21] Section 92 of the Act.

3. CHANGE OF CONTROL ASSESSMENT AND ADVERSE EFFECTS

What is a substantial lessening of competition (SLC)?

3.1 In broad summary, competition is the process of rivalry over time between businesses seeking to win customers' business over time by offering them a better deal (such as better-quality product or a product that better suits the taste of the customer).

3.2 Therefore, both price and non-price aspects of competition are important parts of the competitive process. Indeed, in some cases, non-price competition may be the primary focus: for example, where customers do not pay a monetary price for consuming digital services or content, where firms compete mainly by innovating, or where prices are regulated.

3.3 The Office will consider any change of control in terms of its effect on this rivalry/competing over time in the market or markets affected by it. When levels of rivalry are reduced, firms' competitive incentives may be dulled to the detriment of customers.

3.4 Some mergers will lessen competition but not substantially, because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. However, some mergers lead to a lessening of competition that is substantial.

3.5 The Office does not apply any thresholds to market share, number of remaining competitors or on any other measure to determine whether a loss of competition is substantial and considers each proposed change of control on its particular facts.

3.6 Based on the evidence before it, the Office will normally consider whether a change of control would lead to:

(a) the merged entity being able profitably and unilaterally to raise its prices, worsen its quality or service and non-price factors of competition, or reduce innovation efforts at one or more of the pre-merger parties;

(b) coordination occurring between some remaining suppliers or becoming more stable as a result of the merger; or

(c) the foreclosure of rivals when the merger is between parties at different levels of a supply chain or when the merger is between parties in different markets which are nevertheless related.

3.7 These are the Office's three main theories of harm which are discussed in general further below but are not definitive.

What is the Media Public Interest Test ('PIT')?

3.8 Media plurality goes to the heart of the democratic process and is protected by the law.

3.9 In determining whether a proposed change of control would be contrary to the public interest, the Office considers:[22]

(a) the need for the accurate presentation of news and the free expression of opinion in media;

(b) the need, in relation to every different audience in the Islands, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;

(c) the need for the availability throughout the Islands of a wide range of content services, which (taken as a whole) are both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(d) the need for persons carrying on media enterprises, and for those with control of such enterprises to have a genuine commitment to the attainment of the information and communications technologies policy objectives.

3.10 Therefore, in brief, the public interest is the need for: accurate presentation of the news, free expression of opinion in the broadcast and print media; plurality of media ownership; high varied and high quality broadcasting; with media owners commitment to attaining high broadcasting standards.

3.11 As recognised by the UK's communications regulator, Ofcom, media plurality is not a goal in itself but a means to an end, contributing to a well-functioning democratic society through informed citizens able to access and consumer a wide range of viewpoints across a variety of platforms and media owners, and preventing any one media owner having too much influence over the political process.[23]

[22] Section 25A(3) ICT Act.

[23] Paragraphs 2.1 and 2.2, Ofcom's *Measurement framework for media plurality*, https://www.ofcom.org.uk/__data/assets/pdf_file/0024/84174/measurement_framework_for_media_plurality_

3.12 Many of the divestiture and behavioural remedies, and implementation policies, can be applied in this context.

How does the Office determine whether there is an SLC/PIT?

A Examining the effects on competition

Horizontal unilateral effects

3.13 One way a horizontal merger (that is a merger involving two competitors at the same level of the supply chain who compete to supply products that are substitutable for each other) can harm competition is if it removes an important competitive constraint on one or both merger firms, allowing the merged business profitably to raise prices or degrade non-price aspects of its competitive offerings including dampening its innovation efforts. This is known as a 'unilateral horizontal effect' and is the competitive effect that the Office considers most frequently. The competitive constraint eliminated by a merger may be an existing constraint, or a potential or future constraint.

3.14 Unilateral effects are more likely if:

(a) the merging businesses' products are close substitutes;

(b) the merging firms compete in innovating to develop and improve new products and services;

(c) customers will have little choice of alternative supplier after the merger, for example because the costs to them of switching from one to another are high or the merger will leave them with too few alternatives;

(d) competing firms facing capacity constraints may not be able to serve customers switching away from rivals and therefore may provide a less effective constraint after the merger;

(e) the merger eliminates an important competitive force in the market, for example a business with a novel commercial model; or

(f) there are already few significant businesses in the market.

Potential competition

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3.15 Unilateral horizontal effects may also arise from the elimination of potential or dynamic competition. Potential competition is where, absent the merger, entry or expansion by either or both merger firms may have resulted in new or increased competition between them.

3.16 In some sectors, an important aspect of how businesses compete involves efforts or investments aimed at protecting or expanding their profits in the future. This includes efforts that may give businesses the ability to compete in entirely new areas (i.e., to enter a market), or the ability to compete more effectively in areas where they are already active (i.e., to expand their market share).

3.17 Mergers involving a potential entrant can lessen competition in different ways.

(a) First, a merger involving a potential entrant may imply a loss of the future competition between the merger firms after the potential entrant would have entered or expanded.

(b) Second, existing businesses and potential competitors can interact in an ongoing dynamic competitive process, and a merger could lead to a loss of dynamic competition.

For example, businesses that are making efforts or investments that may eventually lead to their entry or expansion might result in incumbent businesses making efforts to improve their own competitive offering to mitigate the risk of losing future profits to potential entrants.

A merger may reduce the incentives of dynamic competitors to continue with efforts to enter or expand, or to mitigate the threat of future rival entry or expansion. The impact of such a reduction in efforts would affect customers in the present, rather than solely from the future point in time when entry or expansion has occurred.

Coordinated effects

3.18 A horizontal merger may also lessen competition by enabling or encouraging post-merger coordinated interaction amongst businesses in the market, that harms customers.

3.19 Coordination may arise when businesses operating in the same market recognise that they can reach a more profitable outcome if they limit the extent to which they compete against each other.

3.20 Such coordination need not be explicit (collusion) but might emerge through implicit understandings and can take a number of forms. Businesses may be able to keep prices higher than they would otherwise be, if there is an implicit understanding between those businesses that they will not compete strongly against each other, for example, by dividing the market(s) up between them or allocating contracts amongst themselves in bidding competitions. For coordination to be effective:

(a) businesses need to be able to reach a common understanding and monitor compliance with such an understanding; and,

(b) businesses must have the incentive to stick to the coordinated outcome; and,

(c) there must be little chance of such an understanding being disrupted by other factors, such as entry or expansion by other businesses.

Vertical and conglomerate mergers

3.21 Mergers are not always between rivals. Vertical and conglomerate mergers bring products together that do not themselves compete but may be related. In a vertical or conglomerate merger, the merging businesses may benefit from efficiencies that give them a greater incentive to compete (and therefore, for example, to lower prices).

3.22 Vertical mergers are those between businesses active at different levels in the same industry (i.e. an upstream firm and a downstream firm), so competition in one market could be directly affected by outcomes in the other. Vertical mergers may damage competition if the merged business restricts downstream competitors' access to a key input or restricts upstream competitors from a key 'route to market'. Another possible concern is that the merged entity may gain access to commercially sensitive information of its rivals through its role as their supplier or customer.

3.23 Conglomerate mergers are those between businesses that are not active within the same supply chain, and so cannot directly affect each other's markets, but which are nevertheless related in some way. For example, this may be because their products target similar customers or may be purchased alongside each other. These mergers raise the possibility that competition in one market may be indirectly affected by actions in the other. Conglomerate mergers may damage competition if the merged business can employ selling practices that link the products in the separate markets together (for example, through bundling the separate products).

3.24 These harmful effects of vertical or conglomerate mergers on competition will only arise if the merged business would have the ability and incentive to act this way and such a strategy results in harm to overall competition.

B *Assessing countervailing factors*

3.25 In some cases, the Office will also consider any factors that might prevent or significantly reduce any harmful impact of the merger. There are two main factors: (i) efficiencies, and (ii) entry and expansion in the market.

Efficiencies

3.26 While mergers can harm competition, they can also give rise to efficiencies that make the merged business a more effective competitor. [24] Merger efficiencies broadly fall into two main categories:

(a) Rivalry-enhancing efficiencies: Efficiencies that change the incentives of the merger firms and induce them to act as stronger competitors to their rivals: for example, by reducing their marginal costs and thus giving them the incentive to provide lower prices or a better quality, range or service.

(b) Relevant customer benefits: Benefits to customers resulting from a merger, other than through improved competition in the market related to the SLC finding: for example, greater levels of innovation or reduced carbon emissions (to the extent firms do not normally compete on sustainability).

3.27 Rivalry-enhancing efficiencies may prevent an SLC by offsetting any anticompetitive effects.

3.28 While relevant customer benefits do not prevent an SLC or indeed any media public interest concerns, they may outweigh an SLC/ media public interest concern and any consequent adverse effects. Relevant customer benefits may also be taken into account when the Office considers options to remedy competition concerns and whether any of the remedy options would result in relevant customer benefits being unrealised.

3.29 The Office criteria it will normally use when assessing whether merger efficiencies mean that the merger does not result in an SLC/media public interest concerns include whether the merger will:

(a) enhance rivalry in the supply of those products where an SLC/

[24] Section 52(1)(b)(iii) of the Act.

media public interest concerns may otherwise arise;

(b) be timely, likely and sufficient to prevent an SLC/media public interest concerns from arising;

(c) be merger-specific; and

(d) benefit customers in the Islands;

noting that the Cayman Islands is a 'microstate' jurisdiction.

3.30 Most of the information relating to the synergies and cost reductions resulting from a merger is held by the merger firms. Merger firms who wish to make efficiency claims are encouraged to provide verifiable evidence to support their claims early in the Office's merger review process.

Entry and expansion

3.31 In its competitive assessment, the Office may take into account entry and/or expansion plans of rivals who will enter or expand irrespective of whether the merger proceeds. However, any analysis of a possible SLC /media public interest concern includes consideration of the direct responses to the merger by rivals, potential rivals and customers. If effective entry and/or expansion occurs as a result of the merger and any consequent adverse effect (for example, a price rise), the effect of the merger on competition may be mitigated. In these situations, the Office might conclude that no SLC/media public interest concern arises as a result of the merger.

3.32 The Office will generally use the following framework to determine whether entry or expansion would prevent an SLC/media public interest concern. The entry or expansion must be:

(a) timely;

(b) likely; and,

(c) sufficient to prevent an SLC/PIT.

These conditions are cumulative and must be satisfied simultaneously.

3.33 Potential or actual competitors may encounter barriers which reduce or even severely hamper their ability to enter or expand in the market. Barriers to entry and expansion are specific features of the market that give incumbent firms advantages over potential competitors. Barriers to entry and expansion hinder the ability of potential entrants or firms looking to expand to constrain the exercise of market power by incumbents. The Office will therefore identify barriers to entry and/or expansion in its analysis. Where barriers are low, and the costs of entry or expansion are not substantial relative to the profits that are available, entry and/or expansion might be expected to occur in order to capture sales from the merged entity if it were to increase prices and/or worsen non-price factors of competition. Conversely, this is less likely where barriers are substantial relative to available profits.

C. Identifying the relevant markets

3.34 Where the Office is to make an SLC/PIT finding, the Office needs to identify the market in which that SLC/PIT arises. The assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.

3.35 Market definition involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the most immediate sources of competition to the merger firms. As such, the evidence gathered and developed for market definition will often be relevant for the Office's competitive assessment.[25]

3.36 The Office will generally not need to come to finely balanced judgements on what is 'inside' or 'outside' the market. Not every business 'in' a market will be equal and the Office will assess how closely two merger parties compete. The constraint posed by businesses 'outside' the market will also be carefully considered in the Office's competitive assessment.

3.37 Market definition involves product markets and geographic markets. Product market definition starts with the relevant products of the merger firms. In identifying what other significant competitive alternatives should be included in the relevant market, the Office will pay particular regard to demand-side factors (the behaviour of customers). The Office may also consider supply-side factors. As with product markets, the Office's focus in defining geographic markets is on demand-side factors and identifying the most important competitive alternatives to the merger parties.

What remedies can the Office apply at Phase 2?

3.38 If, following a Phase 2 assessment, the Office decides that a merger gives rise to adverse effects, it will take steps to remedy those identified effects. For an

[25] See in this context, the Office's market definition guidelines.

anticipated change of control this will often mean that the transfer is prohibited, although it could be allowed to proceed subject to suitable conditions, for example a divestiture (sale) of part of the business to be acquired, or a commitment to adopt behaviours which are specific (e.g. agree that the independent board members select the editor of the newspaper).

3.39 For a completed change of control, such change of control having completed without the Office's prior written consent, the Office will normally seek to divest where appropriate all or part of the acquired business to a suitable purchaser who can provide effective competition. Undertakings as to future behaviour may be accepted in addition to, or instead of, divestiture but no guarantee is given as to such undertakings being offered by the Office in such circumstances.

3.40 The combination of the merger provisions, along with the general licensing provisions in the sectoral legislation, include within the analysis the discussion on whether the parties' senior executives are 'fit and proper persons'. Such a concern may be addressed for example by preventing identified senior executives from acting for the newly merged party.

[End of Document]