

MALAYSIAN COMMUNICATIONS AND MULTIMEDIA COMMISSION

**GUIDELINE ON DOMINANT POSITION IN A
COMMUNICATIONS MARKET**

RG/DP/1/00(1)

Competition Guidelines

Pursuant to section 134 and section 138 of the Communications and Multimedia Act 1998 (the CMA), the Malaysian Communications & Multimedia Commission has published Guidelines on “Dominant Position in a Communications Market” and “Substantial Lessening of Competition in a Communications Market”.

These Guidelines went through a fifty day public consultation process commencing on 12 August 1999, whereby the public was invited to give their comments on the draft Guidelines. The draft Guidelines were made available in hard copy as well as on the Commission’s website.

A total of five written submissions were received from the following parties - Telekom Malaysia Berhad, Zaid Ibrahim & Co, Maxis Communications Bhd & DiGi Telecommunications Sdn Bhd (joint submission), TIME Telecommunications Sdn Bhd and AIMS Sdn Bhd (via email).

The responses received proved insightful and useful and the Commission appreciates the effort made and interest shown by the respondents.

It is the Commission’s intention to update these Guidelines from time to time following appropriate consultation with industry, and taking into account developments in the communications and multimedia sector as well as the Commission’s experience in enforcing the CMA.

GUIDELINE ON DOMINANT POSITION IN A COMMUNICATIONS MARKET

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GUIDELINE ON DOMINANT POSITION

1. Objective

The Malaysian Communications and Multimedia Commission (“the Commission”) has prepared this guideline under section 138 in order to clarify how it will apply the test of “dominant position in a communications market” to a licensee for the purposes of administering the *Communications and Multimedia Act 1998* (“the Act”). This guideline should be read in conjunction with the guideline published by the Commission concerning substantial lessening of competition.

2. Introduction

2.1 Section 138 of the *Communications and Multimedia Act 1998* (“the Act”) states that the Commission may publish guidelines which clarify how it will apply the test of “dominant position” to a licensee. It sets out the factors which the Commission considers will most generally be relevant to making a determination under section 137.

2.2 The object of this guideline is to provide an analytical tool to be used in the performance of the Commission’s functions under section 137. Section 137 of the Act states:-

“137. The Commission may determine that a licensee is in a dominant position in a communications market.”

The guideline is intended to provide insight to market participants on the Commission’s approach to exercising its powers and responsibilities concerning the determination of whether a licensee is in a dominant position.

2.3 Section 138 of the Act states:-

“138. (1) The Commission may publish guidelines which clarify how it will apply the test of “dominant position” to a licensee.

(2) The guidelines may specify the matters which the Commission may take into account, including: -

(a) the relevant economic market;

(b) global technology and commercial trends affecting market power;

(c) the market share of the licensee;

(d) the licensee’s power to make independent rate setting decisions;

(e) the degree of product or service differentiation and sales promotion in the market; and

- (f) *any other matters which the Commission is satisfied are relevant”.*

2.4 Section 138 does not require the Commission to present an exhaustive list of the factors which it will consider relevant, or of the approaches it will adopt in determining whether a licensee is in a dominant position in a communications market. In making such a determination, the Commission will form a view in good faith and on reasonable grounds. The Commission will have regard to this guideline, but will not be limited by it if the Commission forms the view that other factors may also be relevant to its determination.

3. Legislative Context

3.1 The test of “dominant position” is important because it is a precondition of the Commission’s power to take action under section 139. This section enables the Commission to direct a licensee to cease any conduct in a communications market which has the effect of substantially lessening competition.

3.2 This guideline deals with the analytical procedure for determining whether a licensee is in a dominant position in a communications market.

3.3 There is no basis in the Act for any presumption that any licensee is in a dominant position in any communications market. The Commission’s initial presumption when deciding to make a determination under section 138 is that a licensee shall not be considered in a dominant position unless otherwise demonstrated. This will be the case whether the Commission is deciding whether to make an original determination that a licensee is in a dominant position, or is deciding whether to revoke an earlier determination that a licensee is in a dominant position.

3.4 The concept of “dominant position” has many antecedents in other jurisdictions which may provide useful guidance. However, in applying the convergence market definition which underpins the Act and the national policy objectives, foreign experience will be useful, but cannot be regarded as definitive - particularly where it reflects a “pre-convergence” market definition confined to the telecommunications sector.

3.5 Malaysia’s convergence regulatory framework embodied in the Act is designed to encourage the merging of markets and to enable effective competition. The Commission will have due regard to that goal when making a determination on whether a licensee is in a dominant position. The issues raised by these considerations are addressed more fully below.

4. Policy Context

4.1 Policy objectives

The Act is designed to achieve certain policy objects which are set out in section 3. The Commission must have regard to these objects in the implementation of the Act. Section 3 states:-

- “3. (1) *The objects of this Act are -*
- (a) *to promote national policy objectives for the communications and multimedia industry;*
 - (b) *to establish a licensing and regulatory framework in support of national policy objectives for the communications and multimedia industry;*
 - (c) *to establish the powers and functions of the Malaysian Communications and Multimedia Commission; and*
 - (d) *to establish powers and procedures for the administration of this Act.*
- (2) *The national policy objectives for the communications and multimedia industry are -*
- (a) *to establish Malaysia as a major global centre and hub for communications and multimedia information and content services;*
 - (b) *to promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;*
 - (c) *to grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;*
 - (d) *to regulate for the long-term benefit of the end user;*
 - (e) *to promote a high level of consumer confidence in service delivery from the industry;*
 - (f) *to ensure an equitable provision of affordable services over ubiquitous national infrastructure;*
 - (g) *to create a robust applications environment for end users;*
 - (h) *to facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;*
 - (i) *to promote the development of capabilities and skills within Malaysia’s convergence industries; and*
 - (j) *to ensure information security and network reliability and integrity”.*

4.2 The Explanatory Statement to the Bill, sets out specific objectives for the economic regulation in Part VI. These objectives explicitly link the prohibitions of Part VI to the implementation of the objects of the Act, including the national policy objectives for the development of the communications and multimedia industry. These objectives are:-

- to promote consumer markets which offer choice, quality and affordability;
- to promote any-to-any connectivity for network services used for communications between end users;
- to promote competition in all communications markets; and
- to promote investment and innovation in network facilities, network services and applications services, and their efficient utilisation.

4.3 In addition, the Explanatory Statement sets out a number of goals for the administration of Chapter 2 of Part VI, including sections 137 to 139. These goals are:-

- to provide protection for smaller operators in the absence of a general competitive policy or trade practices regulatory regime;
- to provide a context for, and certainty about, the manner in which the general powers and procedures under the Act should be administered. This reinforces the regulatory intent of the national policy for the development of the communications and multimedia sector;
- to establish a framework and clear powers for the Commission to ensure that anti-competitive practices do not undermine the national policy.

5 Policy objectives for the determination of dominant position

5.1 The establishment and maintenance of competitive communications markets is closely related to many of the objectives above. The Commission's powers under the provisions of the Act (sections 137 to 139) which deal with a dominant position are potentially a powerful instrument for this purpose. These powers go beyond the general competition provisions of Sections 133 to 136 of Chapter 2 of Part VI of the Act. They are designed to address situations where the market power of licensees is so extensive that competitive processes are incapable of restraining their conduct in a communications market. In these cases intervention is necessary in order to achieve effective competition.

5.2 The Commission has adopted this view because the objectives of economic regulation, as set out in the Explanatory Statement, include the *promotion* of competition. The Commission's view is that this includes action to remove impediments to competition where market conditions such as the dominant position of a licensee in a communications market may prevent the natural development of competition.

5.3 Although the dominant position of a licensee is qualitatively different from the possession of market power, the two concepts are closely linked. A dominant position reflects a degree of market power so great that its possessor can operate largely independently of its competitors and customers. Market power alone does not necessarily confer this independence.

5.4 The Act provides for the Commission to direct a licensee in a dominant position in a communications market to cease conduct which has the effect of substantially lessening competition. This "effect" test sets a different trigger

for Commission intervention than the “purpose” test of section 133. The Commission therefore need not prove the intention of the dominant licensee. This test is needed to address the greater potential for a dominant licensee to inflict harm upon the extent of competition in the marketplace, even where such harm is unintentional.

- 5.5 In this situation, only direct regulatory intervention can protect the interests of end users and ensure the ultimate development of competitive markets. The Commission will exercise its power to determine the dominant position of a licensee in a market where it considers that such intervention is likely to facilitate the achievement of the objects of the Act, particularly the objective of competitive communications markets.
- 5.6 As a dominant position is eroded by the combination of regulatory intervention and competitive rivalry, it will be appropriate for the Commission to re-examine the relevance of a determination of a dominant position. This will occur by means of the revocation of the original determination of a dominant position under section 56 of the Act.

6. Proposed analytical process

The Commission proposes to adopt the following three-step approach in determining whether a licensee is in a dominant position in a communications market. This approach will provide clarity and transparency to the process of determination, and ensure consistency in the consideration of issues related to the dominant position of a licensee. It is to be noted that this process as defined is intended as a conceptual and analytical framework within which evidence can be organised. While it identifies areas of evidence which are relevant to the case in question, the Commission may be constrained by the extent of evidence available. The objectives and details of this process are illustrated in the Exhibit 1.

Exhibit 1: Proposed Analytical Framework For Determining Dominant Position

	Define the Context	Define the Market	Assessment of Dominant Position
Objective	Ensure that the Commission has appropriate powers to act.	Define the boundaries of the relevant communications market.	Determine whether the licensee is in a dominant position in the relevant market
Process	Identify the circumstances which initiated the assessment. Identify the licensee most likely to be in a dominant position Identify the key stakeholders in the process. Make initial assessment of the likelihood that the licensee is in a dominant position.	Identify all demand substitutes for the product or service. Identify all supply substitutes for the product or service. Determine the relevant product market. Determine the relevant geographical market. Determine the relevant temporal market.	Assess the behavioural features of the market as set out in the guideline for evidence of dominance. Assess the structural features of the market as set out in the guideline for evidence of dominance. Make final assessment of whether the licensee is in a dominant position.

6.1 Define the Context

- a. This step requires an initial assessment of the relevance of the “dominant position” criteria to the issue or situation at hand, prior to conducting a full assessment under section 137. The Commission will consider matters such as the purported importance of the issue or situation, the circumstances in which it has arisen (including whether a complaint has been made, and by whom), the likelihood that Commission intervention is required to address it, and the likelihood that the benefits of intervention will outweigh the costs.
- b. The determination of whether a licensee is dominant in a communications market arises only in the context of section 139, although a range of consequences may flow from such a determination in other sections.
- c. The matters that the Commission will consider when defining the context for a process of determining whether a licensee is dominant include:-
 - the initial likelihood that the licensee will be found to be in a dominant position;
 - whether any person has informed the Commission of any loss or damage allegedly due to conduct by a dominant licensee;
 - whether such conduct has ceased or is continuing, and whether the conduct is likely or unlikely to recur;
 - whether the relevant market is significant from the perspective of the objects of the Act;
 - whether the likely benefits of Commission intervention outweigh the likely costs of intervention; and
 - whether the licensee is willing to give an appropriate undertaking regarding its conduct in the market.
- d. The Commission may seek an undertaking from a licensee rather than proceed to a full determination of whether the licensee is in a dominant position in the relevant market. Any such undertaking will be proportionate to the nature and effects of the conduct under examination. The Commission will normally only consider such a course if it is satisfied that an undertaking can address the issues raised by the market power of the licensee. The lodgement of such an undertaking would not prevent the Commission from making a subsequent determination that the licensee was in a dominant position in the relevant market, but this would normally only occur where an undertaking had not been met or if new issues arose which the undertaking did not address.

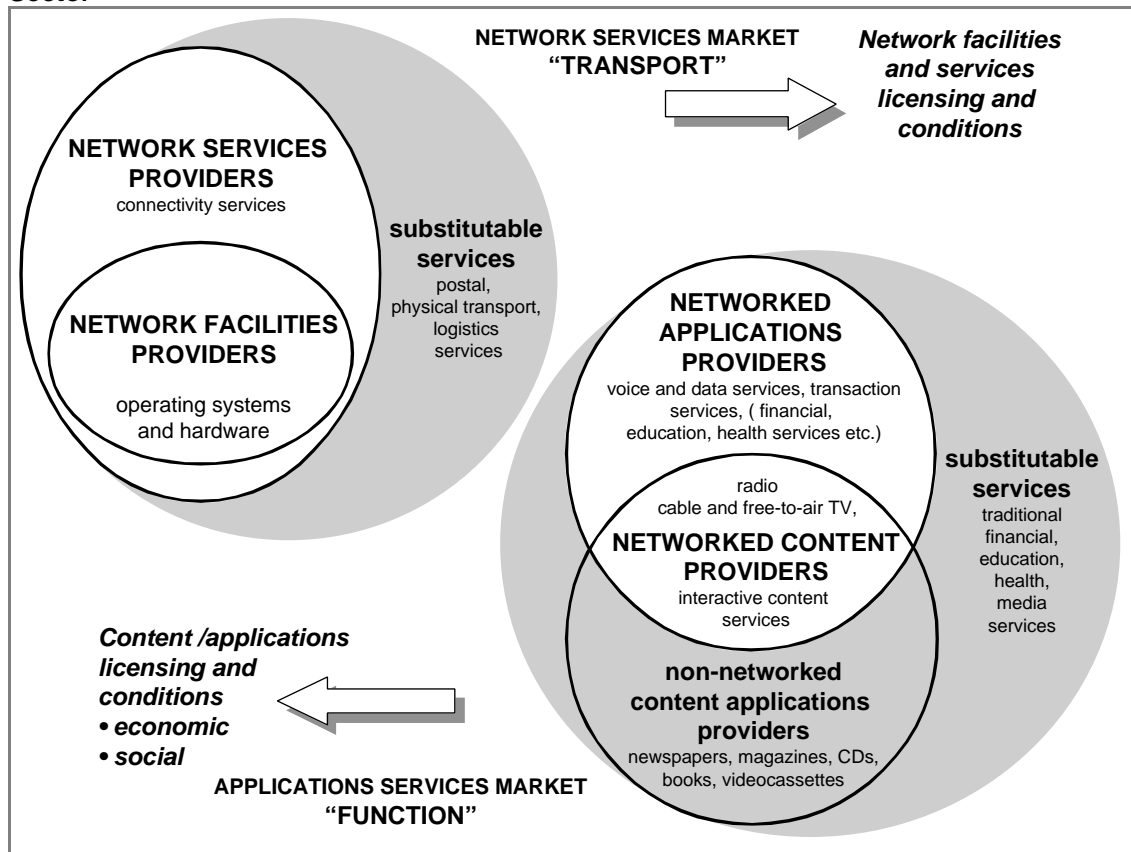
6.2 Communications market definition

- a. Assessing whether a licensee is dominant in a communications market crucially depends on the definition of the relevant market. As a basis for market definition, the Commission will carefully identify the

relevant services which are exchanged in that market. This identification will include consideration of factors such as service functionality, quality, price, inputs, costs, and principal customer groups, all in the light of the purpose to which the service is being put by customers.

- b. The Commission's criteria for identification of a communications market have been extensively discussed in the Commission's Guideline on Substantial Lessening of Competition. The Commission will have regard to the view it developed in that Guideline in identifying markets for the purpose of determining whether a licensee is in a dominant position.
- c. The Commission notes that the Act defines a communications market to be an economic market for:-
 - a network service;
 - an applications service;
 - goods or services used in conjunction with a network service or an applications service (eg., television and telephone equipment, or billing services); or
 - access to facilities used in conjunction with a network service or an applications service.
- d. A market definition within this framework reflects the emergence of network facilities, connectivity and applications markets. Determination of market boundaries involves the use of the economic concept of "substitutability" as the basis for market definition within the definitional framework of the Act.
- e. The Commission shall have regard to the wider market for services which are substitutable (or potentially substitutable) with networked services (e.g., postal services). The relationship between the activities under the Commission's jurisdiction (and therefore potentially subject to licensing) and the wider services markets which it shall have regard to, is illustrated in the Exhibit 2:-

Exhibit 2 Market And Service Structures In The Convergence Sector



- f. This structural approach to market definition is characteristic of the Malaysian "convergence" regulatory system. As a consequence, precedents drawn from "dominance" regimes in other jurisdictions must be used with care. While the concept of a dominant position is generally understood, it must now be applied across a new set of market definitions. Licensees who might be regarded as dominant in a narrowly defined market may face significant competitive threats, now or in the foreseeable future, as convergence enlarges markets and brings traditionally separate industry operators into competition.

6.3 Assessment of a "Dominant Position"

Once the market has been defined, the Commission will determine whether a particular licensee is in a dominant position in that market.

7. Assessment of a Dominant Position

7.1 "Position"

- a. Section 137 refers to a licensee "in a dominant position in a communications market". This is not the same as saying that a licensee "is dominant" in a communications market. The word

“position” is designed to convey the possibility of certain kinds of conduct, as well as actual conduct. The Commission is therefore of the view that the term “position” means “actual or potential position”. A licensee need not be actually dominating a market or exercising its dominant position in order to be subject to section 139. It need only have the ability to take a dominant position for the provisions of the Act relating to a dominant position to be applicable.

- b. The Australian Telecommunications Authority (AUSTEL) - the former telecommunications regulator adopted the same approach in its Market Dominance Guidelines¹:

“AUSTEL considers that ‘in a position to’ should be ascribed the meaning of either ‘currently able to’ or ‘potentially able to’. A carrier therefore does not need to be actually dominating a market currently or taking advantage of its dominant position. If the carrier has the ability, either currently or potentially, to dominate the market, the provisions of the Telecommunications Act 1991 apply irrespective of the present actions of the carrier”.

- c. An example of this might be where a licensee has a monopoly in an important input market to a communications market, and has the potential to exercise its monopoly power in that input market to take a dominant position in the communications market by virtue of vertical integration of its operations in both markets. In this case, the licensee might be judged to be in a dominant position in the communications market, irrespective of its actual market share or actual independence of action in that market. Such a judgment by the Commission does not remove the requirement for the Commission to identify “conduct with the effect of substantial lessening of competition in a communications market”, as required under Section 137.

7.2 The nature of a “Dominant Position”

- a. The primary characteristic of a firm in a dominant position in a market is its ability to undertake conduct to a significant extent independently of its competitive rivals and its customers (whether consumers or intermediate industry participants), and the pressures they would exert on the firm in a competitive market. This independence generally manifests itself as the ability to independently fix prices, although it extends to the ability to fix levels of output or the quality of output with similar disregard for the responses of rivals and customers in the market.
- b. This view of “dominant position” is generally accepted in other jurisdictions. For example, Hong Kong’s approach to the definition of a dominant position is set out in the competition provisions of the FTNS licence as follows:-

“A licensee is in a dominant position when, in the opinion of the Authority, it is able to act without significant competitive

¹ Australian Telecommunications Authority, *AUSTEL’s Market Dominance Guidelines*, 1993.

restraint from its competitors and customers. In considering whether a licensee is dominant, the Authority will take into account the market share of the licensee, its power to make pricing and other decisions, the height of barriers to entry, the degree of product differentiation, and sales promotion, and other such relevant matters which are or may be contained in guidelines to be issued by the Authority”.

- c. In its March 1997 Guidelines on the Operation of the Fair Trading Condition, the UK regulator OFTEL stated that:-

“The standard test of whether a firm is dominant is whether it has the power to behave to an appreciable extent independently of its competitors and customers in terms of pricing and other decisions”.

- d. Apart from the ability to act independently of rivals and customers, other characteristics of market behaviour which have been associated with dominant position include:-

- the ability to prevent effective competition (either now or in the future); and
- the ability to force rivals to act in ways they would not have independently chosen.

- e. This independence of conduct generally springs from structural features of the market which prevent the emergence of significant rivals. These structural features may have a range of effects which include:-

- they may directly constrain the ability of rivals to enter the market, even in the absence of any conduct by the licensee;
- they may provide the licensee with opportunities to drive rivals out of the market; or
- they may provide the licensee with opportunities to influence or even control the conduct of its rivals in the market.

- f. An examination of these structural features of the market can provide insights into whether a licensee is in a dominant position in that market. However, structural features alone cannot provide conclusive evidence. As Wilcox J found in *Trade Practices Commission v Australian Meat Holdings*²:

“... dominance, unlike control, is not primarily concerned with the formal relationship between entities, but rather with their conduct towards each other within a particular market environment. If the size or strength of a particular entity is such that, in practice, other entities are unable or unwilling actively to compete with it in a particular market, that entity is dominant in that market”.

² *Trades Practices Act v Australian Meat Holdings* (1998), ATPR 40-876 at 49,496.

- g. A dominant position, therefore, is not primarily a matter of the formal structure of the market, but of the conduct of actual or potential competitive rivals within it. For example, it is possible to envision a situation where a licensee holds the bulk of market share, but is forced to restrain its prices in order to maintain that market share. In such a case the condition of independence is not met, and it is highly unlikely that the licensee is in a dominant position. In principle this observation could extend to a monopoly, provided that the prospect of new rivals entering the market was real enough to constrain the conduct of the incumbent. Conversely, it is possible to envision a situation where a licensee holds only modest market share, but is in a position to exercise dominant position by virtue of structural features such as vertical integration into upstream or downstream markets.
- h. Nevertheless, it is necessary to consider the structural features of the market which might create the conditions for independence when assessing the independence of conduct of a particular licensee in a communications market. Consideration of these structural features alone cannot result in a determination that a licensee is dominant in the relevant market, but they can be used to rule out the possibility of a dominant position if there are no structural impediments to competitive rivalry.
- i. For this reason, some jurisdictions require that regulators take account of structural factors in their consideration of the fact or otherwise of a dominant position. In Hong Kong, for instance, the competition provisions of the FTNS licence require the regulator to take into account a range of structural factors, but they do not require the regulator to treat these factors alone as decisive.
- j. The concept of dominant position differs from the concept of market power. Market power is a condition similar to being in a dominant position, but with a lower threshold. A firm might possess market power, but it will not be in a dominant position in that market if it can be restrained in its conduct by rivals with comparable levels of market power.

7.3 Behavioural criteria associated with a Dominant Position

The Commission regards the pricing and supply-related behaviour of licensees as relevant factors in assessing a dominant position in a communications market. These behaviours, which are indicative of a position of dominance, are addressed below:

Pricing behaviour

- a. Price structures and movements in prices in a market can provide insight into the independence of pricing decisions. An analysis of prices can determine whether pricing in a market is best described as genuine rivalry or as the price leadership of a particular market participant. Examples of pricing behaviour which could be relevant to the consideration of dominant position include: -

- *Excessive pricing.* It is possible that high prices relative to costs in either wholesale or retail markets could result from a dominant position in one of those markets. There are no general rules about the level at which prices should be regarded as “too high”, but industry cost structures and pricing patterns over time will be important considerations. Sustained high levels of profitability could also reflect a lack of competitive rivalry.
 - *Price discrimination.* Price discrimination is not regarded as intrinsically a feature of dominant behaviour, or even anti-competitive behaviour, in most jurisdictions. It may simply be an efficient means of recovering common costs. The Commission will retain the flexibility to examine price discrimination when determining whether a licensee is in a dominant position in a market, but it will be primarily concerned with the impact of actual or potential competitive rivalry on the licensee’s ability to maintain such discrimination.
 - *Parallel pricing.* When competitors implement similar price variations simultaneously, it is possible that they are doing so in line with a dominant competitor. The Commission will adopt a presumption that parallel pricing does not demonstrate a dominant position as long as there is a rational and defensible alternative explanation of price movements.
 - *Excessive discounting.* Discounting can be a sign of normal competition, particularly when linked to volume discounts which are applied without discrimination. It can also be a means of raising barriers to entry in order to maintain a dominant position. The Commission will have particular regard to discounting which raises barriers to entry by discouraging the use by customers of competitor’s services, or which discourages market entry by targeting those customers able to move to actual or potential alternative suppliers.
- b. Government price controls can restrict a licensee’s ability to freely price goods or services. In cases where the Commission is satisfied that conduct is the result of such controls, it will treat those controls as a mitigating factor in any investigation of the effect of pricing conduct.
- c. In general the Commission will give a high weightage to evidence relating to pricing behaviour and the ability to set prices independently when arriving at a conclusion on whether a licensee is in a dominant position in a communications market. The actual weightage will depend on the circumstances of each determination.

Supply behaviour

- d. The ability of a licensee to refuse to supply prospective customers (including other carriers), or reduce the quality of supply, *with little*

long term impact on market share may constitute evidence that the licensee is in a dominant position in the relevant market. Examples of supply behaviour which could be relevant to a consideration of dominant position include:-

- *Refusal to supply network information.* This could indicate that a licensee is in a dominant position in markets for services which require such information if it prevents alternative service providers from entering the market for services based on the information. At the same time, the Commission recognises that some information is legitimately commercially confidential, and that significant competition issues only arise where such refusal has the effect of substantially lessening competitive rivalry.
 - *Refusal to supply new services.* This could indicate that the licensee is in a dominant position for the new service, or services based upon it, if it is able to maintain a pre-eminent position in a market by virtue of its refusal to supply. In considering this form of behaviour, the Commission will also have regard to the possibility that the behaviour could be a legitimate commercial attempt to provide a differentiated service or to reap the benefits of innovation.
 - *Refusal to supply a service essential to any-to-any connectivity.* This would constitute evidence of a dominant position where this behaviour had the effect of preventing new entry to a service market.
 - *Refusal to share scarce physical resources.* Such resources might include floor space in exchanges or space in ducts, but only where such resources are difficult or impossible to reproduce.
 - *Reduction in the quality of supply.* If a licensee is able to reduce the quality of supply without a corresponding reduction in price, this may constitute evidence of an ability to act independently in the market and hence of a dominant position in the relevant market.
- e. The Commission will generally give a moderate weightage to evidence of supply decisions made independently of competitors and customers. The actual weighting will depend on the nature and circumstances of the supply decision, and its potential to affect the emergence of or behaviour of competitive rivals in the relevant communications market.

Importance of independence

- f. None of these behaviours constitute direct evidence of a dominant position unless they are being pursued independently, that is without significant likelihood of long term impact on market share.

7.4 Structural criteria associated with a Dominant Position

The distribution of market share and the level of market concentration.

- a. Market shares and market concentration are important structural indicators of a dominant position. Alone they do not prove a dominant position, but it is unlikely that a licensee will be in a dominant position if it has a relatively small market share. The Commission does not assume that any particular level of market share demonstrates either a dominant position or its absence.
- b. Market share will be regarded as particularly relevant where economies of scale are particularly strong, or where there are significant barriers to entry which restrict the level of potential competition. Market share can be measured in a number of ways, depending on the requirements of the particular situation under consideration:-
 - *Share of units sold in the market*, expressed as a percentage of the total units sold by all market participants, for example total volume of data transferred or total number of viewer minutes supplied. This measure does not account for relative pricing of services.
 - *Share of total market revenue*, expressed as a percentage of the total revenue generated by all market participants. This measure is useful where there are significant price differences between competitors, or between peak and off-peak rates.
 - *Share based on available capacity*, expressed as a percentage of the total units potentially sold by all market participants. This measure is useful when capacity constraints restrict the ability of competitive rivals to respond to conduct in the relevant market.
- c. In all cases, both static and dynamic market shares will be used to provide insights into the evolution of market share in response to competitive rivalry.
- d. The Commission will generally give a high weightage to market share measures when determining whether a licensee is in a dominant position in a communications market. The actual weightage will depend on the Commission's assessment of the licensee's ability to translate market share into independence of action, and the quality of available market share data.

The level of vertical integration in the market

- e. As discussed above, vertical integration can place a licensee in a dominant position in a market, even in the absence of a large market share, if the licensee is in a dominant position in an important input or output market. Examples might include a licensee who held a monopoly in a content market, and was therefore dominant in a

market for content applications, or a licensee who held a monopoly for a particular network service, and was therefore dominant in the supply of particular applications service.

- f. Such a position might be exploited by service cross-subsidisation or by refusal to supply competitors in upstream or downstream markets. The Commission will therefore have regard to such vertical relationships in determining whether a licensee is in a dominant position.
- g. This factor depends on a range of circumstances, including:-
- the parts of the production process which are part of the licensee's operations;
 - the extent of financial or structural separation of those operations;
 - the structure of intermediate markets; and
 - the extent to which the financial or corporate structure of the licensee's operations protect it from market pressures.

The extent of barriers to entry

- h. The Commission defines a barrier to entry as any structural feature of a market which places a new entrant at a significant disadvantage compared to a market incumbent. This can discourage rivals from entering a market, allowing a licensee to maintain a dominant position indefinitely and allowing it to act independently of actual or potential rivals. Forms of barriers to entry which the Commission will have regard to include:-
- *Blocked access to bottleneck facilities.* Sole access to facilities which are both essential to the supply of services and difficult to reproduce economically can provide the structural preconditions for a dominant position.
 - *Scale and scope economies.* Scale economies arise from the greater efficiency of large-scale production of products or services, while scope economies arise from the ability to offer a wider range of products or services or to link sales of one product or service to another. Scale and scope economies are not themselves a problem. All things being equal, they are to be encouraged. However, if they are of such extent as to discourage new entry, they might provide the preconditions for a dominant position.
 - *Absolute cost barriers.* The absolute cost of entry to a market may constitute a barrier to entry if the potential returns to investment are not sufficient to justify the cost of capital, including the associated financial risks of competing with an entrenched incumbent.
 - *Regulatory barriers.* The use of individual licensing can itself constitute a barrier to entry if new licences are not being issued in certain markets. The fact that the issue of

licences is a policy decision does not relieve the Commission of the responsibility to address the issues related to a dominant position. The Commission will therefore take into account the number of licensees in a market and the likelihood of new licences being issued when assessing the structural barriers to entry to a particular market.

- *Strategic barriers.* An incumbent licensee may utilise certain commercial arrangements such as long term supply agreements, exclusive supply agreements, or predatory conduct in order to create barriers to entry. Such arrangements or practices can be used to protect and perpetuate a dominant position.

Global technology and commercial trends

- i. In addition, the Commission will consider the prospects for new entry to the relevant market, having regard to global technology and commercial trends.
- j. The pace of technological and commercial change in the communications industry has significantly increased the prospects for alternative means of entering markets where cost and other barriers have traditionally been high. The importance of this factor will depend on the state of technological and commercial development of the industry. Where there are likely prospects for such alternatives in the foreseeable future, the Commission will be significantly less likely to conclude that a licensee is in a dominant position in the relevant market.

The degree of product or service differentiation and sales promotion

- k. Consumers often perceive differences between the services offered by one firm and another. These differences may be perceived, for example, in terms of quality or functionality. Sales promotion is often designed to reinforce and exploit these perceptions of difference, either by providing information about a product or service, or by providing non-informative advertising designed to generate customer loyalty.
- l. Where customers are captured by a particularly strong “brand identification”, a licensee may enjoy high recognition and loyalty to a service or product. In such cases, a new entrant may be discouraged from competing by the high costs of achieving comparable recognition and loyalty, and this may allow a licensee to determine its prices independently of actual or potential rivals.
- m. Relevant factors in determining the level of product or service differentiation may include the level of customer “churn”, the level and type of sales promotion engaged in by market participants, and the level of customer satisfaction with the licensee’s products or services.

- 7.5 This Guideline comes into effect on February 1st 2000 and TRD 008/98 (ANTI-COMPETITIVE BEHAVIOUR IN THE TELECOMMUNICATION INDUSTRY) will cease to have effect from the same date.

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