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COMPETITION GUIDELINES 2017

TELECOMMUNICATIONS ACT 2005

IN EXERCISE of the powers conferred by section 8(p) of the Telecommunications Act 2005, the Regulator makes the following guidelines:

PART I – PRELIMINARY

1 Introduction

(1) These Guidelines set out the Regulator's general position on, and approach to, the administration of Part VI of the *Telecommunications Act 2005* (the Act), specifically:

(a) the definition of relevant markets;

(b) the designation of dominant service providers within the meaning of section 26 of the Act;

(c) the *ex post* determination of activities or actions that constitute an abuse of a service provider's dominant position within the meaning of section 27 of the Act, for the purposes of section 29 of the Act;

(d) the *ex post* determination of activities or actions that constitute anti-competitive practices within the meaning of section 28 of the Act, for the purposes of section 29 of the Act; and

(e) the consideration for applications for approval of proposed transfers of control involving or likely to create a dominant service provider under section 31 of the Act.

(2) These Guidelines should be read in conjunction with the Act.

(3) These Guidelines do not legally bind the Regulator. Although these Guidelines set out the principles and approach that the Regulator intends to adopt in its administration of sections 27 and 28 of the Act, the Regulator may consider other factors not covered in these Guidelines where it considers it necessary or appropriate to do so. If the Regulator decides to depart from the approach outlined in these Guidelines, it will publish its reasons for doing so.

(4) Unless the context otherwise requires, terms used in these Guidelines have the same meaning as in the Act.

PART II – MARKET DEFINITION

2 Defining relevant markets for the purposes of the Act

(1) Section 25(c) of the Act empowers the Regulator to 'make orders defining markets and relevant markets for the purpose of this Act'. The process of defining a market and determining whether it is characterized by dominance for competition regulation purposes is usually referred to as "market analysis."

(2) Market analysis in this context refers to a formal analysis of the demand and supply and structural factors prevailing in a particular market for the purpose of determining whether or not that market is effectively competitive. Put in other words, market analysis examines whether one or more suppliers in that market has a substantial degree of power such that they may act in the market without the need to be unduly concerned about the response of competitors, customers or consumers.

(3) A number of points follow from this view of market analysis, including:

(a) Market analysis for competition law and regulatory purposes needs to be distinguished from the activities of marketing personnel in commercial firms, whose examination of markets is for the purpose of customer segmentation to improve commercial results – through increased sales and better product design aligned with user requirements. Clearly this form of analysis is not what the Regulator does in defining markets.

(b) Because market analysis in the sense that we are discussing involves analysis of market characteristics, including demand and supply patterns and other components of market structure, in a dynamically changing sector – telecommunications – it cannot be assumed that the results of market structure are valid for long periods. This means that market analyses need to be repeated to take account of changes in technologies, cost levels, cost relationships, demand patterns, and innovation in products and services.

(4) The Act is concerned with the circumstances under which the Regulator might justifiably intervene in a market. The Act makes it clear that the Regulator should intervene when there is dominance in a market and therefore when competition has or will fail to be effective. If a market is effectively competitive there is no reason or justification for the Regulator to intervene.

(5) How a market is defined might well determine the further question whether there is competition for the provision of services in that market or not. For example, if a small market has only one mobile operator and only one fixed operator, then it matters a great deal whether the market is defined as a single market covering both fixed and mobile services with two competitors, or whether there are two markets with each having only a single (effectively monopoly) service provider.

3 Effective competition in a market

(1) There is no single concept or benchmark that defines "effective competition" in economic theory. It describes the extent of competition, which is different to (and is the outcome of) the process of competition, and refers to the rivalrous behaviours of suppliers in a market that may affect the price or quality or conditions of sale of goods and services. Effective competition is generally taken to mean that firms in a market are subject to a reasonable

degree of competitive constraint from actual and potential competitors as well as from customers. In short, an effectively competitive market is one where outcomes are determined by market forces and not by individual competitors or by agreements or understandings between competitors.

(2) One famous formulation stems from the United States:

> 'The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements.'[1]

(3) In Australia, the Australian Competition and Consumer Commission (ACCC) considers[2] that effective competition:

(a) is more than the mere threat of competition—it requires that competitors be active in the market, holding a reasonably sustainable market position;

(b) requires that, over the long run, prices are determined by underlying costs rather than the existence of market power;

(c) requires that barriers to entry are sufficiently low and that the use of market power will be competed away in the long run, so that any degree of market power is only transitory;

(d) requires that there be independent rivalry in all dimensions of the price/product/service package; and

(e) does not preclude one party holding a degree of market power from time to time, but that power should pose no significant risk to present and future competition.

(4) This is quite consistent with the American commentary previously cited.

4 Defining a relevant market

(1) A market analysis process begins with the definition of a relevant market, that is, the field of rivalry in which competition is occurring. The scope or boundaries of any market, defined for competitive market analysis purposes, is determined by the limits of substitutability of supply and demand. In practice, substitutability may best be analysed in terms of three dimensions to the definition of a market for the purposes of a market analysis process: customer, product/service, and geography.

The customer dimension

(2) The customer dimension defines a market in terms of a group of consumers that have a common set of requirements that are satisfied by services/products. Distinct sub-sets of consumers may be identifiable because they have different service requirements, because they are served through different channels, or because price discrimination can be

[1] US Attorney General, Department of Justice, 1955, Report of the Attorney General's National Committee to Study the Anti-trust laws (1955), Report, Washington DC, US Government Printing Office

[2] Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2 (27 May 2009)

observed. It will typically be possible to distinguish between wholesale and retail customers for these reasons.

(3) As previously noted, it is important not to confuse the market analysis requirements in relation to customers with the segmentation processes that are used for the purposes of developing and implementing sales and marketing processes. Market analysis is about assessing markets for competition regulation, whereas segmentation is about achieving sales and marketing commercial outcomes. Sales and marketing professionals seek to segment the market for their products and services so that they can understand the characteristics of the population segment, their lifestyle and other preferences, and also how they might be effectively reached and communicated with.

(4) Market analysis is not about improving commercial effectiveness in the market place. It is about understanding the economics and structure of individual markets for the purposes of ex-ante regulation of market power and of ex-post competition regulation.

The Product/Service dimension

(5) The product/service dimension defines a market in terms of the products and/or services that are offered to satisfy those consumer objectives. This dimension consists of all the products/services that customers perceive as being substitutable for each another because they have equivalent characteristics, functionality, pricing or uses.

(6) For example, if customers perceive calls made from fixed telecommunications services as substitutable for calls made from mobile services, then that supports the conclusion that both types of calls are in the same market. As noted above, whether they are substitutes will depend not only on the physical characteristics of the call (volume, delay, interference, and so on) but also on the importance attached to the personal nature of mobile calling, the importance attached to being able to make and receive calls whilst moving, and the price relativities involved.

The Geographic Dimension

(7) The geographic dimension defines a market in terms of the common location in which exists both the consumers' objectives and the products/services intended to meet those objectives. Geographic considerations are important for determining the limits of substitutability of both supply and demand. Traditionally the value and the nature of the goods and services would significantly determine how far afield customers might go to source goods and services and how far afield firms might go to supply or deliver them. The geographic dimension of markets is significantly changing with electronic commerce and payment systems, particularly those accessed by the public internet. Within telecommunications regulation there is a general pre-disposition to define markets as national unless there are demonstrable regional variations in supply or demand.[3]

(8) When defining ICT service markets in Samoa, the Regulator should adopt the rebuttable presumption that all telecommunications markets are national in scope unless there is clear evidence to contrary, such as regional variations in pricing, the availability of particular products/services or barriers to entry.

[3] See for example the Explanatory Note accompanying the European Commission Recommendation on Relevant Product and Service Markets, SEC(2007) 1483, p. 12. That Note appeared at an earlier time in the development of electronic delivery and payment systems, and has been reinforced by further developments since then.

5 Market Boundaries and the Limits of Substitution

(1) The boundaries of a market are determined by identifying the constraints on the price-setting behaviour of competing suppliers. Those pricing constraints largely stem from the potential for one product/service to be substituted for another or for one source of supply to be substituted for another. Such substitution may occur on the demand-side or on the supply-side.

(2) Demand-side substitution considers the extent to which the prices of a particular product/service (or set) are constrained by the availability of other products/service that consumers may use as a substitute.

(3) Supply-side substitution considers the extent to which an actual or potential supplier may readily switch to the production of the relevant or a substitutable product/service in the short term in response to an increase in its price (without incurring significant additional costs or risk).

(4) For example, a mobile operator may have established a substantial transmission network connecting its various mobile network nodes (switches, base stations, base station controllers, gateways, points of interconnection, billing, and home location system. For example, a mobile operator may have established a substantial transmission network connecting its various mobile network nodes (switches, base stations, base station controllers, gateways, points of interconnection, billing, home location system, etc). If it has ample capacity on main routes it could readily enter the wholesale and possible retail transmission and leased line markets. This is so because integrated fixed and mobile network operators typically use common network platforms to support provision of fixed and mobile services. In this case, the mobile operator would only contribute to potential supply-side substitution if its licence conditions permitted.

6 Testing for Substitutability

(1) To determine the nature and extent of demand-side and supply-side substitution, a regulator should undertake quantitative and qualitative analysis, depending on the availability of data and of the resources/specialist capabilities needed to do so. This will be done using the framework of the hypothetical monopolist test (HMT, also known as the SSNIP test). The HMT begins by identifying a focal product—typically the most narrowly-defined product that is obviously in the named market—and then considers the potential behaviour of customers and suppliers if a hypothetical monopolist supplier of that focal product imposed a small but significant non-transitory increase in the price (SSNIP) of that focal product.

(2) If it is concluded that the SSNIP would be profitable for the hypothetical monopolist supplier—that is, it would not lose sales to such a degree as to make the exercise unprofitable—then this will be evidence of the absence of appropriate substitutes and the focal product or service can be considered to constitute its own separate market.

(3) For example, if the focal service is national calls from a fixed location, and the SSNIP would not be profitable because of migration of customers to calls from mobile services, then the substitution is sufficiently significant for mobile calls to be considered part of the market. If the SSNIP in this case was profitable, then the market could be defined as national calls from a fixed location.

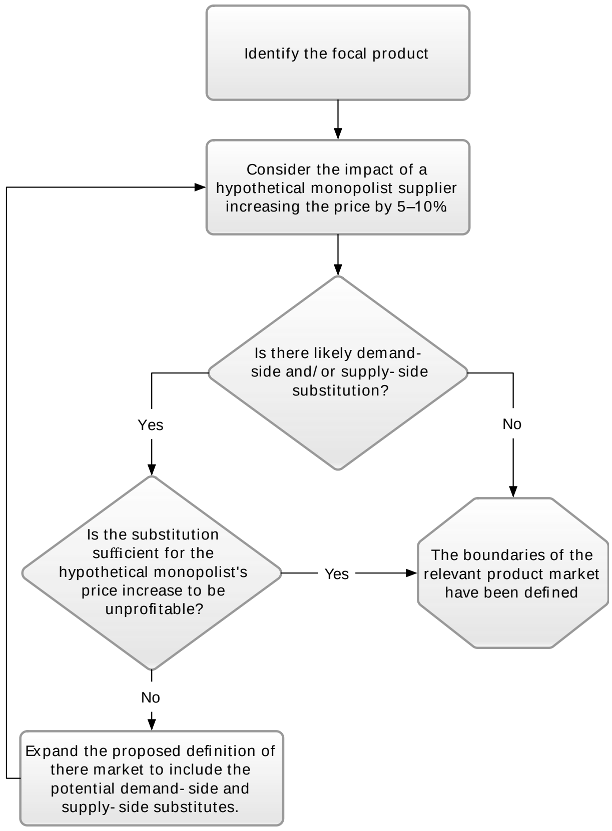
(4) Whether or not the SSNIP would be considered to be profitable will depend on the number of users of the focal product that move to a substitute product/service and/or the extent to which alternative suppliers are encouraged to enter the market. If it is concluded that the

SSNIP would be unprofitable because users of the focal product would switch to other products, and/or because suppliers of other products would begin to compete with the hypothetical monopolist, then the boundaries of the market will be expanded to include those substitute products.

(5) The exercise would then be repeated by imagining that a hypothetical monopolist supplier of the expanded set of products (i.e. the focal product and its identified substitutes) imposed a SSNIP for that expanded set of products. This process would continue to be repeated until the point is reached where it is concluded that a SSNIP would likely be profitable. At that point the potential for demand-side and supply-side substitution is exhausted and the range of products that comprise the market have been identified, thus defining the boundaries of the market.

(6) The process described is summarised in Figure 1 below:

Figure 1: Summary of the HMT process



(7) A SSNIP will be considered to be a price increase of between 5–10% that lasts for at least one year. At the same time, it will be assumed that all the terms and conditions of supply for the potential substitute products remain unchanged. Typically the potential for demand-side substitution will be examined before considering the potential for supply-side substitution.

(8) To determine whether, or the extent to which, a particular product/service is a demand-side substitute for another, the Regulator should consider (among other things):

(a) relative price levels and the extent to which users may choose one product/service over another in response to changes in these relative prices levels;

(b) the quality of service of the relevant products/services, including technical capabilities;

(c) the perception of customers, or potential customers, as to the degree of substitutability of the relevant products/services;

(d) historic and forecast trends in the demand (including penetration rates) of the relevant products/services;

(e) the contract duration, if any, of the relevant products/services;

(f) the switching costs relative to the value of the product/service under examination; and

(g) the effects of bundling, if any.

(9) To determine whether, or the extent to which, there is potential supply-side substitution, the Regulator should consider (among other things):

(a) whether another supplier (including a potential new entrant) would be able to switch to the production of the relevant product/service within a period of one year through the redeployment of existing capacity or through an expansion of its production (both of which could involve small levels of investment);

(b) whether that alterative supplier would incur significant sunk costs relative to the return that it would likely be able to earn; and

(c) evidence of previous entry into the relevant market by a new entrant.

(10) It is likely that much of the Regulator's analysis within the framework of the HMT will be qualitative rather than quantitative. This is because most regulators and operators do not have key quantitative data, such as price elasticity of demand at current price levels. However in such circumstances regulators will typically seek to obtain proxy or next best information in order to better understand where the boundaries of profitable substitution might be in specific cases.

(11) Where products/services are supplied in a bundle, regulators may find that the bundle constitutes a product or service in its own right even though the individual products/services that make up the bundle may not be substitutes for one another. In such circumstances regulators take account of the demand-side and supply-side substitutability of both the bundle as a whole and its individual components.

(12) An example would be a retail mobile service bundled offering that included voice minutes, data capacity and messaging (SMS/MMS). Within this bundled offering, messaging applications may be a part-substitute for voice under certain conditions. It is probably more accurate to characterise messaging as a complementary service to voice. With that partial exception the three components of the bundle are not substitutes for each other. However they are conveniently provided using the same network platform.

7 Market definitions change over time

(1) As already noted, the definitions (i.e. the boundaries of supply and demand substitution) of a market may change over time as substitution changes and evolves as a result of, for example, changes in technology or user expectations or requirements. These changes are sometimes the result of convergence at many levels, as in ICT markets generally.

(2) Consequentially, regulators are typically not disposed to rely on market definitions that are more than two or three years old without explicitly re-examining the assumptions

underlying the definitions in question. ICT markets are particularly dynamic and changing because of, amongst other factors, changes in the underlying technologies which are rapidly evolving; globalisation; changing costs levels and relationships; changing patterns of demand; innovation and creativity in the development of new services; and changing value and supply chains resulting in the emergence of new participants in markets. In any case, regulators should review their market definitions (and the conclusions based on them) regularly.

PART III – DESIGNATION OF DOMINANT SERVICE PROVIDERS

8 The meaning of dominance

(1) The Act does not define "dominance" or "dominant service provider". Elsewhere the meaning of dominance in a market was famously and authoritatively clarified in the *United Brands Case*[4] in which the European Court of Justice held that:

> 'the dominant position referred to in this Article [102 of the European Treaty] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.'

(2) There are two ways of achieving a designation of dominance under the Act, in Sections 26(1) and 26(2) respectively.

(3) In the original 2005 version Section 26(1) stated:

> 'Every service provider whose gross revenues in a specific telecommunications market constitutes forty per cent (40%) or more of the total gross revenues of all service providers in that market, shall be designated a dominant service provider in that market, unless and until the Regulator specifies otherwise in an order.'

(4) In Section 11 of the Telecommunications Amendment Act 2007, the words 'is deemed to be designated' were substituted for the words 'shall be designated'.

(5) In terms of economic theory and the definition of dominance in *United Brands*, Section 26(1) has major potential problems. It is possible in a two-competitor market, such as the retail mobile services market in Samoa, for both firms to have similar market shares. If the market share of each firm exceeds 40% then they will both be deemed to be dominant. But, dominant means the power to act independently of competitors (because they are weak) and of customers and consumers (because they have little choice) in terms of setting prices and determining output. If both firms have over 40% they will definitely not act on price or output independently and without undue regard for competitor and user reactions. They will be looking over their shoulders at every turn.

(6) The same problem would arise even if one of the market shares was over 40% and the other just under. Both would be substantial operators and they would both have to have regard to potential responses from the other to any initiative they each took. And yet one would be deemed to be dominant and the other not. Note that in all of the cases above we are talking of individual dominance. The situation may make more sense if we talk of collective dominance, where two or more service providers cooperate rather than compete in a market.

[4] *United Brands Company and United Brands Continental BV v Commission of the European Communities* [1978] ECR 207

(7) Section 26(1) does provide for the Regulator to intervene and potentially to reverse the illogical consequences that can result from a deemed designation of dominance based on a market share threshold. However, in practice, few regulators would undertake such a review, and the Regulator in Samoa has been no different.

(8) On the positive side, the 40% threshold places with the Regulatory control over large (in terms of market share) operators, albeit for a reason that might not apply. The Regulatory can use this control to impose light or heavy obligations on the operator. However, because the legislation deems the control to be required to constrain the abuse of dominance in a market, the Regulator may be encouraged to adopt a heavy-handed approach irrespective of the actual economic situation and risks for competition.

(9) Section 26(2) enables the Regulator to designate a service provider with less than 40% market share by gross revenue as dominant within a market. The alternative power has not been expressed as clearly (that is, that the Regulator can change a deemed designation of a service provider with 40% or more market share by revenue as non-dominant) but that would appear to be covered in the last 10 words of Section 26(1).

(10) Section 26(2) effectively adopts the words from *United Brands* when it allows states that the Regulator may designate as dominant a service provider with less than 40% market share "if, either individually or acting together with others, the service provider enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors or customers".

(11) The Act does not set out any further guidance on how the Regulator might apply this test, or the criteria and other considerations that might be taken into account.

9 Criteria for Dominance

(1) Dominance is a position of economic strength in a market. To determine whether a service provider, either individually or collectively, might have such a position it is necessary to consider the structure of the market and to assess factors that may facilitate the emergence or maintenance of such a position. The factors or criteria may differ depending on whether the dominance may be individual or whether it may be collective.

(2) The sets of factors to be considered are set out below – the table relating to individual dominance, followed by criteria relevant to collective dominance.

Single firm dominance in a market

Criterion	Implication for assessment of market dominance
1. Market share	Market shares, taken alone, are not conclusive of dominance in a market, unless deemed so by legislation.[5] A high market share, especially in relation to the individual and combined shares of other market participants, is an important indicator that a licensee may have a substantial degree of power. Where markets are emergent or growing more quickly, high market shares are less indicative of market power than in more mature or slow-growth markets. Fluctuations in market shares may also indicate a lack of substantial market power and may be evidence that competitive forces are in play. Market shares may be assessed either on the basis of subscribers, sales volume or value of sales. Usually share of revenue (value of sales) is preferred[6] because subscribers are not of equal value or equal potential and most markets are multi-product with value being the only common measure that can be applied.

[5] As in the case of Section 26(1) of the Act.
[6] As in the case of Section 26(1) of the Act.

Criterion	Implication for assessment of market dominance
	Comparison of market shares measured by subscribers, sales volume and sales value often provides useful analytical insights. In the case of a fairly homogenous product or service, an operator that has a higher market share by value than by volume might be an indication that that operator can price above rivals and make super normal profits, which might be a sign of a substantial degree of power in a market. When considering market shares, a regulator may assess the level of market concentration using the Herfindahl-Hirschman Index (HHI), which is calculated by squaring the market share of each competitor in a market and then summing the resulting numbers[7]. The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. In a monopoly the HHI is 10,000—the maximum index figure. The HHI increases both as the number of firms in the market decreases and as the disparity between the market shares of those firms increases. Although a HHI measure of 1,800 is commonly interpreted internationally as an indication of a highly concentrated oligopoly market structure, it is a value that derives from manufacturing industries in the United States and most regulators would consider it to be an inappropriately low threshold for telecommunications markets, which tend toward oligopoly.
2. Control of infrastructure not easily duplicated	This indicator refers to a situation in which the availability of a certain infrastructure is necessary to produce a particular product or service; the required infrastructure is exclusively or overwhelmingly under control of a particular operator; and there are high and non-transitory barriers to duplicating or substituting for the infrastructure in question. In such a situation, the control of infrastructure not easily duplicated can make it feasible for the operator in question to behave independently from other suppliers and to exercise market power (in absence of significant countervailing power), as there is almost no actual or potential competition. One example is control/ownership of a large network that a competitor would find costly to build in order to provide the service in question. This would be exacerbated where the minimum capacity from the infrastructure exceeds the requirement of the competitor and would be commercially unjustified in the short to medium term. Such control may hence represent a significant barrier to entry. In addition it might be possible for the supplier to lever its market power horizontally (to adjacent markets) or vertically (to downstream markets).
3. Technological advantages or superiority	Technological advantages may represent a barrier to entry as well as an advantage over existing competitors due to lower production costs or product differentiation. However, some technological advantages might only be temporary and may therefore not be a permanent source of market dominance.
4. Absence of or low countervailing buying power	The existence of customers with a strong negotiating position, which is exercised to produce a significant impact on competition, will tend to restrict the ability of providers to act independently of their customers. Such countervailing buying power is more likely where a customer accounts for a large proportion of the producer's total output, is well informed about alternative sources of supply, is able to switch to other suppliers readily at little cost to itself, and where it may even be able to begin producing the relevant product itself.
5. Easy or privileged access to capital	Easy or privileged access to capital markets may represent a barrier to entry as well as an advantage over existing competitors. Aside from internal sources (e.g. as indicated by cash flow or revenue) the ability to procure outside capital, a firm's

[7] The HHI is a measure of concentration and provides a result that is proportional to the average market share, weighted by market share. The logic of the squaring of individual shares is to provide a suitable weighting.

Criterion	Implication for assessment of market dominance
markets/financial resources	capital structure, and its ability to increase equity capital (e.g. structure of shareholders) or debt might be considered. Further, access to capital might be influenced if a firm has links with other companies (e.g. affiliated companies belonging to the same group) that are favourable for its activities in the market in question.
6. Product/service diversification	Diversification is where an operator produces a range of products and/or services (which may or may not be in separate markets). When those products/services are bundled, it may make competitive entry into the supply of one or more of the products/services potentially more difficult.
7. Economies of scale	Economies of scale arise when increasing production causes average costs (per unit of output) to fall. Economies of scale are common where the production process involves high fixed costs. One other way in which increasing scale can lower unit costs is by allowing greater specialisation, and in turn higher productivity. Economies of scale on their own do not create entry barriers—given a certain level of demand, technology and cost function, competitors can exhaust the same economies if they are able to produce the same volumes. However, economies of scale can de-facto amount to an entry barrier if further factors—such as sunk costs and switching costs—exist so that economies of scale create an asymmetry between one operator and its competitors. If this is the case, economies of scale can act as a barrier to entry as well as an advantage over existing competitors.
8. Economies of scope	Economies of scope exist where average costs for one product are lower as a result of it being produced jointly with other products by the same operator. Cost savings may be made where common processes are used in production. Economies of scope are common where networks exist, as the capacity of the network can be shared across multiple products. Similar to economies of scale, economies of scope can be a barrier to entry as well as an advantage over existing competitors. For example, if the existence of economies of scope requires entrants to enter in more than one market simultaneously, this may require additional expertise and more capital, which may in turn mean that costs are higher to enter the market.
9. Vertical integration	Vertical integration means that a firm is operating at both the wholesale and retail levels in a sector or in related markets, and this may give an advantage to the integrated firm over its competitors because control of the upstream or downstream markets may make new market entry more difficult. Vertical integration potentially creates conditions for leverage of market power from an upstream market to a downstream market due to both the incentive and ability for vertically integrated firms to limit entry into downstream markets. Further, vertically integrated multi-product operators may also have a competitive advantage over their competitors if they are in a position to bundle products in way that may either not be able to be replicated by competitors due to a lack of corresponding wholesale products, which in turn might increase the cost of entry.
10. Overall size of the firm	This refers to the potential advantages, and the sustainability of those advantages, that may arise from the large size of one operator relative to its competitors. Areas where such advantages may exist include economies of scale, finance, purchasing, production capacities, and distribution and marketing. Such advantages may accrue in part due to other activities of the operator beyond the relevant market.

Criterion	Implication for assessment of market dominance
11. A highly developed distribution and sales network	Well-developed distribution systems are costly to replicate and maintain, and may even be incapable of duplication. They may represent a barrier to entry as well as an advantage over existing competitors. This criterion is usually most important where the sales and distribution network is exclusive to a firm, and sales and distribution agents are not free to offer competing services.
12. Barriers to expansion	There may be more active competition where there are lower barriers to growth and expansion. While growth and expansion is generally easier to achieve (particularly for new entrants) in growing markets, it might be inhibited in mature, saturated markets, where customers are already locked in with a certain supplier and have to be induced to switch.
13. Ease of market entry	The threat of potential entry may prevent firms from raising prices above competitive levels, leading thereby to a situation in which no market power is exercised. However, if there are significant barriers to entry, this threat may be weak or absent. Operators may then be able to raise prices and make persistent excess profits without attracting additional competition that would reduce them again. The impact of entry barriers is likely to be greater where the market is growing slowly and is initially dominated by one large supplier, as entrants will be able to grow only by attracting customers from the dominant firm. However, barriers to entry may become less relevant where markets are associated with ongoing technological change and innovation.
14. Absence of potential competition	This refers to the prospect of new competitors that are in the position to switch or extend their line of production entering the market (e.g. in response to a hypothetical price increase) within the timeframe considered by the market review. The record of past entry is one factor that can be looked at, as well as potential barriers to entry.
15. Switching barriers	When considering a switch to new services in place of existing services, there are three possible cases. First, consumers will remain with current services if satisfied. Second, if not satisfied after a comparison of information, they will substitute the services in question for new services unless significant barriers exist (such as uncertainty about the quality of service and reputation of alternative suppliers). If consumers already have a considerable investment in equipment necessary for the services, are locked into long-term contracts or are concerned about disruptions and inconveniences in so doing, they will stick to current services and show inertia in the choice of services and operators. Consumers' reluctance to switch suppliers can subsequently work as a potential barrier to entry and/or expansion. It is not practicable to measure switching costs directly as they are largely consumer-specific, reflecting the level of effort required by an individual and thus unable to be calculated from any data. One of the proxies for measuring switching costs in other economies is the percentage of actual switching to new service providers after receiving relevant information. If the level of consumer satisfaction drops over time but the rate of switching service providers stays relatively low, this implies a high level of switching barriers exists in the relevant market. Specific arrangements to facilitate switching need also to be considered in this context, such as number portability in telecommunications service markets.
16. Excessive pricing and profitability	This refers to the ability to price at a level that keeps profits persistently and significantly above the competitive level. In a competitive market, individual firms are typically not able to maintain prices above economic costs and sustain excess profits for any appreciable time. As costs fall, prices may be expected to fall too, if competition is effective. Although the existence of prices at a level that keeps profits persistently and significantly above the competitive level is an important indicator for the existence of a substantial degree of power in a market, it is not a necessary condition for such a finding. Excessive prices can be detected by an analysis of Price Cost Margins (PCM) which measure directly the deviation of prices from costs. However, although

Criterion	Implication for assessment of market dominance
	valuable from a theoretic perspective, in many cases necessary data to calculate PCM are not available at a disaggregated product or market level. In addition, the fact that in communication markets usually there are multi-product undertakings with high joint and common costs that have to be attributed to certain services may make the calculation of PCM even more difficult.
17. Network effects	Network effects describe the dependence of consumer willingness to pay for a given product or service on the number of users of that product or service (i.e. on the size of the network). A product or service exhibits network effects when the utility of a user increases with the number of other users consuming it. The presence of network effects can therefore confer market power on firms with high market shares. With network effects, the value of joining a particular mobile network for a new subscriber depends in part on the number of people who are already part of that network. Similarly the value of the mobile network increases for all subscribers the more people who are connected to it. This can be a source of enduring competitive advantage for larger MNOs and create the risk of markets "tipping" in their favour, particularly when there are factors that deter switching between service providers, and if on-net call prices are well below off-net call prices. In telecommunications markets the requirement for operators to interconnect serves to ensure that network effects work to the betterment of all customers, irrespective of the network to which they have subscribed, rather than to the operators of the largest networks and their shareholders.
18. Lack of active competition on non-price factors	There are other strategic competition parameters besides pricing. For example, such non-price factors may include marketing, service quality, service range, innovation, or geographic coverage. However, for some services, these considerations are effectively non-existent, leaving competition to be expressed in price terms or not at all. The reverse also applies – even in the absence of price competition there may be robust competition on other dimensions of service, such as service quality and reliability or service availability (coverage).
19. Customers' ability to access and use information	Limited customer access to and use of reliable information on prices and other aspects of the services can dampen competition by reducing the degree to which customers act upon differences between competitors. As a result, operators are better able to act independently of customers.
20. The number of buyers and sellers in a market	This criterion relates to concentration within a market. It may be relevant in determining whether there is any licensee with a substantial degree of power in a market. In general terms the more participants in a market, and the less concentrated it is, the less chance there is that the structure will sustain dominance.
21. The dynamic characteristics of the market, including growth, innovation and product differentiation	In general terms, fast growing markets allow opportunities for other competitors to gain traction in markets and to develop specialisations and advantages. Innovation in terms of products and process will change the fundamental terms of a market and may provide greater opportunities for smaller or new competitors to compete effectively compared to the circumstances and opportunities in a more stable market environment. Product differentiation generally means that direct substitution is more difficult and this may also favour smaller, more agile and more creative competitors. The corollary is that stable markets with slower growth and development, and where products and services are more fungible and less differentiated, may be more prone to dominance by one or more competitors. This proposition must be treated with caution and carefully tested against the factual circumstances of particular markets being analysed, because exceptions abound in economic and legal literature.

Collective dominance

(3) Collective dominance occurs where two or more firms have a collective position of strength in a market such that they may pursue a common policy in a market without particular regard to the responses of other firms or of customers and consumers. If the pursuit of a common policy in the market is the result of agreement or an understanding then that is unlawful collusive behaviour and may attract criminal as well as regulatory sanctions. If the pursuit of a common policy is the result of conscious parallel behaviour, without explicit agreement between the parties, it may yet be collective dominance.

(4) This is a contentious area of the law in most countries and regulators should proceed with exceptional caution if allegations of abuse of collective dominance are raised. However, circumstances may arise where market structure creates a high risk of collective dominance that may be alleviated or otherwise addressed by ex-ante intervention by the regulator. When considering the possibility of collective dominance the Regulator will consider the following criteria:

(a) Transparency in the market sufficient to give competitors visibility of each other's behaviour and facilitating the development of common policies that lead to collaboration and cooperation rather than to competition between them.

(b) Typically a small number of competitors, which will facilitate cooperation and collaboration. Generally the larger the number of competitors the more difficult it will be to establish and sustain a common purpose.

(c) Market characteristics that provide incentive for collaboration or cooperation rather than competition, such as:

- Similar cost structures, offering no cost advantage to any competitor;
- Low market growth, including market saturation, suggesting that competing on lower prices will not be offset by new customers and demand; and
- Little technological change resulting in stable cost levels, stable cost relativities, low levels product and service innovation, and settled demand patterns.

(d) Other factors already mentioned in relation to single dominance that might also facilitate or impede collective dominance in a market, such as:

- Control of infrastructure not easily duplicated, particularly associated with refusal of access to third party operators;
- Technological advantages or superiority, not available to third party competitors;
- Absence of or low countervailing buying power, which might otherwise disrupt cooperative arrangements between providers;
- A highly developed distribution and sales network, particularly if not available to or replicable by third party competitors;
- Ease of market entry;
- Absence of potential competition;
- switching barriers;
- Excessive pricing and profitability, including the history of price competition in the relevant market;
- Network effects;
- Lack of active competition on non-price factors.

(e) The existence of sanctions that could be imposed on a service provider that deviates from the common purpose and that are likely to be sufficient to dissuade the operator from such deviation.

(5) A detailed market assessment is required to determine whether the market is likely to facilitate collective dominance. The factors set out in (a), (b), (c) and (e) will generally, but not always, facilitate collective dominance. The factors in (d) will need to be individually considered to determine their impact but generally the impact would be the same as for single dominance.

PART IV – ABUSE OF A DOMINANT POSITION

10 General

(1) Section 27 of the Act prohibits a dominant service provider from undertaking activities or actions that abuse the service provider's dominant position. It goes onto to identify various types of actions and activities as being an abuse of dominant position for the purposes of section 27 of the Act.

(2) The burden of proof in relation to allegations of abuse of a dominant position generally is on the party making the allegation, which will be the Regulator when the Regulator is conducting an investigation, notwithstanding the likely difficulty involved in obtaining and presenting relevant evidence of such behaviour from complainants and/or the service provider alleged to have abused a dominant position. (However, in some circumstances the burden may shift and the onus may be on the dominant service provider that is alleged to have abused its dominant position to establish that its conduct did not have anticompetitive purposes or effects.) The standard of proof is the standard of proof applying in civil proceedings.

(3) Where necessary the Regulator will use its information gathering powers under section 77 of the Act to gather information necessary to enable it to investigate conduct that may be an abuse of a dominant position. The Regulator will use information on the actual costs of the relevant service provider when necessary and if the information is available. However, if reliable or sufficient information about those costs is not available, the Regulator may instead decide to use the cost data of a competitor or other comparable reliable data as a proxy to inform its decision-making.

11 Failing to supply essential facilities to a competitor

(1) Subsection 27(a) of the Act considers a failure by a dominant service provider to supply essential facilities to a competitor within a reasonable time after a request and on reasonable conditions, or discriminating in the provision of interconnection to other telecommunications service providers—except under circumstances that are objectively justified based on differences in supply conditions, including different costs or a shortage of available facilities or resources—to constitute an abuse of a dominant position.

(2) The Regulator considers an essential facility to be a telecommunications facility (as per the definition of that term in the Act) that:

(a) is controlled exclusively or predominantly by a single service provider or a limited number of service providers;

(b) is required by other service providers in order to supply a telecommunications service or to compete; and

(c) cannot practically be substituted by competitors for economic or technical reasons.

(3) Undue delay or tardiness in fulfilling a request for supply of access to an essential facility (for example, as a result of ignored requests, lengthy negotiations or imagined technical problems) may constitute a failure to supply depending on the circumstances.

12 Tying and related discrimination

(1) Subsections 27(b)–(c) of the Act considers it an abuse of a dominant position for a dominant service provider to supply a telecommunications service to a competitor (or to offer to supply on favourable terms not justified by cost differences) on the condition that competitor also purchase or acquire some other telecommunications service that it does not actually require.

(2) For the Regulator to find such conduct to be an abuse of a dominant position, the tying product and the tied product would need to exist in separate markets, and the dominant service provider would need to be dominant in the market for the tying product.

13 Hoarding scarce facilities or resources

(1) Subsection 27(d) of the Act considers it an abuse of a dominant position for a dominant service to pre-emptively acquire or secure scarce facilities or resources, including but not limited to rights of way, required by another service provider for the operation of that service provider's business, with the effect of denying the use of the facilities or resources to such service provider.

(2) This behaviour has been reported overseas in relation to spectrum and service numbers. The Regulator considers that spectrum and number management should include provisions to address problems of hoarding of those resources if they occur. No issue has arisen in Samoa to date.

14 Predatory pricing

(1) Section 27(e) of the Act considers it an abuse of a dominant position for a dominant service provider to supply telecommunications services at prices below long run average incremental costs or such other cost standard as may be established by the Regulator.

(2) Prices in this context will be assessed by the Regulator by dividing service revenue by the number of relevant service units (for example, the number of call minutes). The relevant time period over which the Regulator will measure revenues (and costs) will typically be either the time over which the alleged predatory price(s) prevailed or could reasonably be expected to prevail. However, the Regulator may also look at shorter time periods in cases where pricing was short term but particularly aggressive.

(3) Pricing that is equal to or above Total Service Long Run Incremental Cost (TSLRIC) will not be considered to be predatory.

(4) The Regulator will consider pricing to be predatory where a dominant service provider charges prices over a sustained period that are equal to, or below, Average Avoidable Costs (AAC), and the onus for showing otherwise then moves to the licensee whose behaviour is in question.

(5) If a dominant service provider charges prices over a sustained period that are below TSLRIC but above AAC then the Regulator will presume the pricing is not predatory unless the market structure is one that would enable predation and there is evidence of an intent to achieve predatory pricing outcomes.

(6) In assessing whether a dominant service provider had an intention to achieve predatory pricing outcomes, the Regulator will consider:

(a) documentary evidence, if any, of a intentionally anti-competitive policy within the service provider's decision-making hierarchy;

(b) whether the conduct makes any commercial sense other than causing harm to competition (including consideration of whether there are other strategies available to the service provider that would have met commercial purposes and been less likely to harm competition)—in other words whether the behaviour may be explained in terms of normal commercial rivalrous behaviour and have an acceptable business justification; and

(c) any other behavioural and contextual evidence, such as other potentially anti-competitive practices that may have been employed to reinforce the effects of the predatory strategy.

(7) The feasibility of the alleged predator recouping the losses it may incur from predatory pricing from the subsequent excessive profits it would be able to earn following the removal or chastening of a competitor is not considered to be a necessary element to sustain a claim of predatory pricing under subsection 27(e) of the Act.

(8) Promotional pricing that involves below-cost sales for a short transitory period will be presumed not to be predatory as it can be a rational and efficient strategy. However, promotional pricing may still be investigated for potential predation and may be found to be predatory in appropriate circumstances.

15 Anti-competitive cross-subsidisation

(1) Section 27(f) of the Act considers it an abuse of a dominant position for a dominant service provider to cross-subsidise the price of a telecommunications service it supplies in another market in which it may not be dominant (except where such cross-subsidy is specifically approved by the Regulator).

(2) For the Regulator to find such conduct to be an abuse of a dominant position, the dominant service provider's pricing in the market in which it may not be dominant would need to be below TSLRIC. This is generally considered harmful to competition because a competitor without a similar ability to cross-subsidise will likely be unable to match the below-cost prices, thereby foreclosing the market to competition. Even if below-cost prices can be matched, they will be commercially non-sustainable and will serve, while they continue to be offered, to deter new entry to the market.

16 Other behaviour

(1) Subsection 27(h) of the Act considers it an abuse of a dominant position for a dominant service provider to engage in particular types of behaviour that have the effect of impeding or preventing a competitor's entry into, or expansion in, a market.

(2) To assess the effect of such behaviours, the Regulator will consider:

(a) the observable results, for example and without limitation, on market shares, on the barriers to market entry, and on the cost and profit structures in the market; and/or

(b) the likely effect on the conduct of other service providers in the market and on customers (where likely refers to reasonable possibility rather than probability) based on the economic literature and past experience in Samoa and other countries.

Margin squeeze

(1) Subsection 27(h)(i) of the Act considers it an abuse of a dominant position for a dominant service provider to impose a margin squeeze on a competitor that has the effect of impeding or preventing that competitor's entry into, or expansion in, a market

(2) The margin of profit will be quantified and its reasonableness assessed based on the application of the following imputation test:

$P - WC \geq RC$

Where

P = the retail price charged by the dominant service provider;

WC = the wholesale costs of the dominant service provider;

RC = the retails costs of either the dominant service provider or alternatively a hypothetical efficient operator.

(3) The relevant retail price(s) may be analysed on the basis of weighted averages (such as average revenue per user or effective price per call minute) if the product in question is supplied at differentiated prices, for example as a result of the use of promotional pricing or market segmentation.

(4) Where service bundles are involved, relevant retail price(s) may be analysed by revenues (and costs) being apportioned across the products and services in the bundle on the basis of a weighted averaging of the use of each product or service in the bundle.

(5) The wholesale costs of the dominant service provider may comprise any regulated price(s) for the relevant wholesale service and any additional costs associated with the supply of the wholesale service. In the absence of actual or modelled information on the wholesale costs of the dominant service provider, the Regulator may estimate those costs based on other cost studies relevant to Samoa, benchmarks of comparable countries or regions, information from equipment vendors, and/or the dissection of aggregated costs on logical principles.

(6) The relevant retail costs will, where practicable, be based on those of the dominant service provider. This reflects the so-called equally efficient operator (EEO) standard of efficiency, which the Regulator considers is the more appropriate standard in an ex post assessment of an alleged margin squeeze where the principal concern is to ensure competition is not harmed rather than the active promotion of competition. However, the retail costs of a hypothetical reasonably efficient operator (REO) may be used instead if the Regulator considers that that would be the more appropriate standard of efficiency in the circumstances.

(7) The relevant retail costs include the relevant costs of:

(a) selling, including the sales payroll, vehicles and accommodation;

(b) marketing and corporate advertising costs;

(c) customer retention;

(d) customer care;

(e) retail billing and collection; and

(f) retail bad debts.

(8) The relevant retail costs will be calculated using either an avoidable or an incremental cost standard that excludes all common and joint downstream costs (both fixed and variable). Avoidable costs refer to those costs that would be avoided if the dominant service provider withdrew from the retail market while continuing to supply the essential wholesale input. Conversely the incremental costs are those costs that the dominant service provider has to incur to supply the retail market. Both approaches should lead to a similar or the same result.

(9) In the absence of sufficient actual or modelled information or other evidence submitted by service providers of the relevant retail costs, the Regulator will estimate retail costs based on an incremental mark-up equal to 20% of the wholesale cost (WC). (The Regulator remains open to receiving evidence that supports a higher rate in any specific case.) Any specific customer acquisition costs (which exclude branding related promotion and advertising, which is a joint and common cost) will be treated as additional and distributed across the active life of the subscription or product/offer.

(10) A negative margin would, in the Regulator's opinion, constitute a breach of subsection 27(h)(i) of the Act in the absence of compelling justification to the contrary. The onus for producing such justification would be on the dominant service provider.

(11) Promotional pricing that involves below-cost sales for a short transitory period will be presumed not to be an anti-competitive margin squeeze as it can be considered to be a rational and efficient strategy. However, promotional pricing may still be investigated for potential margin squeeze, if protracted, and may be found to be an abuse of a dominant position in appropriate circumstances.

Exclusionary conduct

(1) Subsection 27(h)(ii) of the Act considers it an abuse of a dominant position for a dominant service provider to require or induce a supplier to refrain from selling to a competitor.

(2) This is a very specific form of anti-competitive behaviour and occurs when two or more suppliers agree to manage or share the market. This is one form of the general problem of collusion which occurs when competitors agree to cooperate rather than to compete. In the specific circumstances envisaged in Subsection 27(h)(ii) of the Act, one of the service providers will have used its dominant position in the market to secure the agreement.

(3) The evidence of abuse of a dominant position in these circumstances that the Regulator will seek includes:

(a) Correspondence between or within the service provider organisations involved;

(b) Evidence of market behaviour, especially by the non-dominant service provider, that it has withdrawn from or reduced its operations in a market in circumstances that cannot be otherwise explained by rational commercial decision-making; and

(c) Evidence of market share variations relating to market participation.

(4) No one type of evidence need be determinative in these cases. Often the circumstances will suggest that other types of anti-competitive behaviour are also involved. For example, if the behaviour involves persuading independent retail outlets not to deal with or be agents for another service provider, that could result in this provision being infringed, as well as involving other forms of exclusive dealing.

(5) Section 27(h)(iii) of the Act considers it an abuse of a dominant position for a dominant service provider to adopt technical specifications for networks or systems to deliberately prevent interoperability with a network or system of a competitor.

(6) Interoperability of networks is provided for by the adoption of ITU or ETSI specifications by international equipment and system vendors. In most cases specific additional actions will be necessary to undermine interoperability. The Regulator will regard the adoption of any such standards or systems and equipment incorporating variations that prevent or diminish interoperability as deliberate. The onus will therefore be on the dominant service provider to show otherwise and to make equipment changes at its own cost to ensure that its networks are interoperable with others.

(7) A dominant service provider is not responsible if the cause of the interoperability results from the decision of a non-dominant service provider to incorporate non-standard equipment in the latter's network. The Regulator does not consider that the legislation requires a dominant service provider to ensure interoperability with all other networks irrespective of the equipment and standards deployed in those networks.

Failing to supply timely technical information

(1) Subsection 27(h)(iv) of the Act considers it an abuse of a dominant position for a dominant service provider to fail to make available to other service providers on a timely basis technical specifications or other essential information that is required in order to supply a telecommunication service and which is not available from other sources.

(2) This type of conduct is most likely to arise (if at all) in the context of access and interconnection. As interconnected networks must be technically compatible, it is necessary for licensees that intend or are required to interconnect telecommunications facilities or telecommunications networks—including as part of the supply of a wholesale access service—to share technical information about their respective networks. Such technical information may include details of the types of switching, routing and transmission equipment, signally protocols, the number of circuits, and projected traffic volumes. Such information may need to be exchanged or updated on a regular basis, for example to accommodate changes to a network or new traffic forecasts.

(3) Whether or not a request to the dominant service provider to provide particular technical information is relevant and has been fulfilled in a timely manner will be determined on a case-by-case basis. However, the Regulator would expect that any such request should be able to be met promptly and generally within a period of approximately 2–4 weeks, unless the information needs to be obtained or verified with a third party, such as an equipment vendor, who may not have a permanent presence in Samoa. In such a case the Regulator may take into account whether the delay caused by contacting a third party has been advised by the dominant service to the party requesting the information. If

additional time is required to supply some of the requested information then the Regulator would expect that the dominant service provider from which it was requested would fulfil it progressively to minimise the effect of any delays.

(4) Should the dominant service provider require that the party requesting information formally undertake to respect its commercial value by entering into a non-disclosure or similar agreement, then that process should not be allowed to cause undue additional time to fulfil the information request.

Misuse of information about competitors

(1) Subsection 27(h)(v) of the Act considers it an abuse of a dominant position for a dominant service provider to misuse information obtained from a competitor for purposes related to interconnection.

(2) When two service providers are interconnecting with one another, they will typically be privy to certain information that may be commercially sensitive. Such information may include network or traffic data, traffic profiles, details of prospective or actual customers, or planned services or expansions. The use of such information for a purpose unrelated to the supply of interconnection services may, according to the circumstances, contravene subsection 27(h)(v) of the Act.

(3) An example of misuse of information about a competitor would be if a dominant service provider supplied its downstream retail operations with information about the end-users of a wholesale customer that competed in the downstream retail market, thereby enabling the retail arm of the dominant service provider to target its competitors' customers with tailor-made offers and thereby restrict its competitors' sales and/or raise its competitor's costs.

(4) In determining whether there has been a misuse of information that has been provided by one service provider to another the Regulator will seek to answer the question whether the information was used for the purpose that the service providers had in reasonable contemplation when the information was sought by one and provided by the other.

Other action or activities

(1) Subsection 27(a)–(h) of the Act (and these Guidelines) cover only some of the different ways in which a dominant service provider may abuse its dominant position with the effect, or likely effect, of materially restricting or distorting competition in a telecommunications market. Subsection 27(a)–(h) of the Act and these Guidelines thus do not preclude the Regulator from identifying or investigating other types of behaviour or conduct that may constitute an abuse of a dominant position in contravention of section 27 of the Act.

(2) To assess the actual or likely effect of a service provider's conduct, the Regulator will consider:

(a) the observable results, for example and without limitation, on market shares, on the barriers to market entry, and on the cost and profit structures in the market; and/or

(b) the likely effect on the conduct of other service providers in the market and on customers (where likely refers to reasonable possibility rather than probability) based on the economic literature and past experience in Samoa and other countries.

PART IV – OTHER ANTI-COMPETITIVE PRACTICES

17 Other anti-competitive practices

(1) Section 28 of the Act prohibits any service provider (regardless of whether or not they are in a position of dominance) from engaging in practices that restrict or distort competition in a telecommunications market.

(2) Section 28 of the Act specifically identifies the following types of 'arrangements' between two or more service providers as (non-exhaustive) examples of such anti-competitive practices:

(a) arrangements that directly or indirectly fix the prices or other terms or conditions of telecommunications services in a telecommunications market;

(b) arrangements that directly or indirectly determine which person will win a contract or business opportunity in a telecommunications market; and

(c) arrangements to apportion, share or allocate telecommunications markets among themselves or other service providers.

(3) An 'arrangement' in this context has a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral. It also includes so-called gentlemen's agreements. It may be a horizontal or a vertical agreement. An arrangement may be reached via a physical meeting of the parties or through an exchange of letters or telephone calls, or by any other means—all that is required is that the parties arrive at a consensus on the actions each party will or will not take.

(4) In assessing whether such an arrangement restricts or distorts competition in a telecommunications market, the Regulator will take into account:

(a) the economic context in which the parties to the arrangement operate;

(b) the structure of the market; and

(c) whether or not the alleged effects are appreciable.

(5) Where it is necessary to determine the actual or likely effect of particular conduct, the Regulator will base its decision on:

(a) the observable results, for example and without limitation, on market shares, on the barriers to market entry, and on the cost and profit structures in the market; and/or

(b) the likely effect on the conduct of other service providers in the market and on customers (where likely refers to reasonable possibility rather than probability) based on the economic literature and past experience in Tonga and other countries.

(6) The burden of proof in relation to allegations of anti-competitive conduct generally is on the party making the allegation, which will be the Regulator when the Regulator is conducting an investigation, notwithstanding the likely difficulty involved in obtaining and presenting relevant evidence of such behaviour from complainants and/or the service provider alleged to have behaved anti-competitively. (However, in some circumstances the burden may shift and the onus may be on the dominant service provider that is alleged to have engaged in anti-competitive conduct to establish that its conduct did not have

anticompetitive purposes or effects.) The standard of proof is the standard of proof applying in civil proceedings.

(7) Where necessary the Regulator will use its information gathering powers under section 77 of the Act to gather information necessary to enable it to investigate conduct that is alleged to be an anti-competitive practice within the meaning of section 28 of the Act. Where necessary and available, the Regulator will use information on the actual costs of the relevant service provider. However, if reliable or sufficient information about those costs is not available, the Regulator may instead decide to use the cost data of a competitor or other comparable reliable data as a proxy to inform its decision-making.

PART IV – TRANSFERS OF CONTROL

18 General

(1) Section 31 of the Act requires the Regulator to consent to a transfer of control of a service provider where:

(a) a dominant service provider or an affiliate of a dominant service provider is:

- the person ultimately acquiring control of the service provider; or
- the person whose control is being transferred; or

(b) as a result of the transfer, a person, alone or with affiliates, would control service providers whose gross revenues in a specific telecommunications market constitutes 40% or more of the total gross revenues of all service providers in that market.

(2) However, the Regulator may only deny such a transfer of control or attach conditions to a transfer of control if the Regulator determines that the transfer would have serious anti-competitive effects that would outweigh any positive effects for telecommunications customers.

(3) Generally, the Regulator would be inclined to consider that a proposed transfer of control would have serious anti-competitive effects (that would outweigh any positive effects) if the transfer conferred an increase in market power on one of the parties to the proposed transfer transaction that is significant and sustainable. For example, a consolidation would likely be found to have serious anti-competitive effects (that would outweigh any positive effects) if it would (or be materially likely to):

(a) lessen competition by materially reducing or weakening the competitive constraints remaining in the relevant market or reducing the incentives for competitive rivalry in that market; or

(b) increase the market power of the consolidated entity such that it is able to:

- significantly and sustainably increase prices;
- lower the quality of its products or services without a compensating reduction in price;
- reduce the range or variety of its products or services;
- lower customer service standards, and/or
- change any other parameter relevant to how it competes in the market.

(4) The serious anti-competitive effects must also be more than speculation or a mere possibility; the Regulator considers the 'would have' threshold to mean that the anti-

competitive effects are materially likely. However, it does not need to be a certainty or even more probable than not; there simply must be a realistic chance that serious anti-competitive effects (that would outweigh any positive effects) will occur based on an analysis of the ways that outcome could occur.

(5) The Regulator will consider and determine these matters based on its comparison of two likely future states, namely the future state of competition in the relevant market *with* the proposed transfer transaction and the future state of competition in the relevant market *without* the proposed transfer transaction. This is referred to as the "with/without test".

(6) The likely future state of competition *without* the proposed transfer transaction (that is, the counterfactual) may be similar to the state of competition prevailing at the time of the Regulator's receipt of the application for approval of the transfer of control but with adjustments to allow for:

(a) developments which are likely to occur regardless of the proposed transfer transaction; and/or

(b) the dynamic characteristics of the market (for example, arising from market growth, innovation or technological changes); and/or

(c) the likelihood of the service provider in which control is to be transferred failing or withdrawing from the market.

(7) The Regulator will not take into account factors that appear to have been manipulated in order to make the counterfactual less appealing and thus consent to the proposed transfer transaction more likely. For example:

(a) changes in the policies or intentions of the parties to the transaction that are announced or occur after the proposed transfer transaction has been proposed only for the purpose of bolstering the application for approval; or

(b) any course of action by the parties to the transaction that cannot be demonstrated to be profit maximising and/or in the interests of shareholders.

(8) In assessing the future states of competition the Regulator will likely consider the following factors among others that may be identified as being relevant (although the significance and weight given to each factor will depend on the particular case under consideration):

(a) market shares according to subscribers, revenue, traffic and capacity;

(b) the degree of market concentration with reference to concentration ratios and the Herfindahl-Hirschman Index (HHI);

(c) the height of the barriers to market entry and the likelihood, timing and sufficiency of any potential competition (bearing in mind that the transaction need not increase barriers to entry for it to be anti-competitive, only that significant barriers exist and would provide the one or more parties to the proposed transfer transaction with discretion over its pricing and other conduct);

(d) the height and nature of any barriers to market expansion;

(e) the extent to which substitutes are available in the market or are likely to be available in the market;

(f) the degree of countervailing buyer power in the market;

(g) the likelihood that the proposed transfer transaction would result in a consolidated service provider that is able to significantly and sustainably increase prices or profit margins; and

(h) the likelihood that the transaction would result in the removal from the market of a vigorous and effective competitor.

(9) As the purpose of Regulator's analysis of the factors mentioned in subsection 18(8) of these Guidelines is to determine whether a proposed transfer of control would have serious anti-competitive effects (that would outweigh any positive or pro-competitive effects), a continuation of an existing level of market power—that would not be shorn up or increased by the transfer—would not of itself result in the Regulator disallowing the proposed transfer of control.

(10) The burden of proof to demonstrate to the Regulator's satisfaction that a proposed transfer of control would not result in serious anti-competitive effects (that would outweigh any positive effects) ultimately rests with the parties to the proposed transfer transaction.

Made at Apia this 24th day of August 2017.

Lefaoali'i Unutoa Auelua-Fonoti
Regulator