

MALAYSIAN COMMUNICATIONS AND MULTIMEDIA COMMISSION

**GUIDELINE ON SUBSTANTIAL LESSENING OF
COMPETITION
RG/SLC/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.

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**GUIDELINE:
SUBSTANTIAL LESSENING OF COMPETITION IN A COMMUNICATIONS
MARKET**

1. Objective

The Malaysian Communications and Multimedia Commission (“the Commission”) has prepared this guideline in order to clarify how it will apply the test of “substantial lessening of competition” to a licensee in a communications market 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 market dominance.

2. Introduction

2.1 Section 134 of the *Communications and Multimedia Act 1998* (“the Act”) states that the Commission may publish guidelines which clarify the meaning of “substantial lessening of competition”. This document is the first such written clarification of the concept of “substantial lessening of competition” issued by the Commission.

2.2 This guideline sets out the considerations which will usually guide the Commission in any decision to take legal action against conduct by a licensee. The intention of the guideline is to provide insight into the Commission’s approach to the enforcement of sections 133 and 139, the kinds of conduct which the Commission may be compelled to act against, and the considerations which will be relevant when considering whether to authorise conduct under section 140.

2.3 Section 134 of the Act states:-

“134. (1) *The Commission may publish guidelines which clarify the meaning of ‘substantial lessening of competition’.*

(2) *The guidelines may include reference to -*

(a) *the relevant economic market;*

(b) *global trends in the relevant market;*

(c) *the impact of the conduct on the number of competitors in the market and their market shares;*

(d) *the impact of the conduct on barriers to entry into the market;*

(e) *the impact of the conduct on the range of services in the market;*

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- (f) *the impact of the conduct on the cost and profit structures in the market; and*
- (g) *any other matters that the Commission is satisfied are relevant.”*

2.4 Section 134 does not require the Commission to present an exhaustive or definitive list of the factors which it will consider relevant, or of the approaches it will adopt in forming a view whether a substantial lessening of competition has occurred. In considering issues related to lessening of competition, 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 decisions that it is required to make.

3. Legislative Context

3.1 The concept of “substantially lessening competition” is fundamental to the economic regulation of the communications industry. The concept arises in four contexts in the Act. Each of these contexts requires the Commission to make an assessment of whether conduct has had, is having, or will have, the purpose or effect of substantially lessening competition in a communications market:-

- a. Conduct by a licensee in a communications market which has the purpose of substantially lessening competition is expressly forbidden under section 133 of the Act.

In this case, the Commission may seek interim or interlocutory injunctions under section 142 or seek the imposition of fines under section 143 against a licensee engaging in any conduct prohibited under section 133. This requires the Commission to be satisfied that conduct has been engaged in with the purpose of substantially lessening competition in a communications market. Moreover, the Commission may direct a licensee under section 51 to cease such conduct to the extent that a contravention of section 133 is a breach of licence condition.

- b. Under section 139, the Commission may direct a licensee in a dominant position in a communications market to cease a conduct which has or may have the effect of substantially lessening competition. This requires the Commission to be satisfied that there is such an effect.
- c. The Commission may authorise conduct under section 140 which might otherwise be forbidden under sections 133 or 139, if it is satisfied that the conduct is in the national interest.

This will normally require the Commission to be satisfied that the national interest in the conduct outweighs the possible negative effects (if any) of substantially lessening competition in a communications market.

- d. The Minister may make rules under section 144 intended to prevent or mitigate conduct by foreign network facilities providers and/or foreign

network service providers which will or is likely to lead to a substantial lessening of competition in a communications market. The Commission is responsible for the enforcement of these rules.

- 3.2 The Commission recognises that the concept of “substantially lessening competition” is new in the Malaysian context. Nevertheless, the concept has antecedents in other jurisdictions which may provide useful guidance.

4. Policy Context

- 4.1 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;*

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- (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 also sets out a number of goals for the administration of Chapter 2 of Part VI, including sections 133, 139 and 140. 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.

4.4 The establishment and maintenance of competitive communications markets is closely related to many of these objectives. Competition of itself promotes several kinds of efficiency which are directly related to the objects of the Act such as technical or productive efficiency, allocative efficiency and dynamic efficiency. It is therefore a powerful instrument to improve industry performance.

5. Implications of Policy Objectives

5.1 The objects of the Act have different significance for sections 133, 139 and 140. These are addressed in turn.

5.2 The section 133 prohibition of conduct with the purpose of substantially lessening competition is clear and unqualified.

- 5.3 The objects of the Act nevertheless play an important role in the enforcement of section 133. The Commission's view of what constitutes conduct which is intended to "substantially" lessen competition will be based on the objects of the Act, including the national policy objectives. Decisions regarding action under section 133 will be considered in the light of the impact of licensee conduct on the achievement of these policy objectives. To put it another way, the Commission will make an assessment of the likely outcome of the conduct, make an assessment of the likely outcome in the absence of the conduct, and make a judgement on whether the difference can be called "substantial".
- 5.4 A different approach will be adopted in relation to sections 139 and 140. Section 139 provides that the Commission may direct a licensee in a dominant position, but leaves the Commission a wide discretion subject only to the objects of the Act and any relevant Ministerial directions. Section 140 requires the Commission to make an assessment of the "national interest" when deciding whether to authorise conduct which might otherwise be regarded as in breach of the Act, particularly of section 133 or section 139, but provides no guidance on how to define the national interest.
- 5.5 The view of the Commission is that the national policy objectives provide the best guide for action in these contexts. In other words, the Commission will use the national policy objectives as the criteria for deciding whether a particular conduct should be subject to direction (in the case of section 139) or is in the national interest (in the case of section 140).
- 5.6 In contrast to the approach to section 133, this approach to sections 139 and 140 clearly contemplates the possibility that the objective of promoting competition may be traded off against other objectives. The Commission's view is that this would only be justified when the benefits of such a course clearly outweigh the direct and attendant benefits of competition which would otherwise ensue.
- 5.7 The Minister's rule-making power under section 144 requires the Minister to make a judgement about whether certain types of conduct will or are likely to lead to a substantial lessening of competition in a communications market. The Commission's role is to enforce that judgement after it has been embodied in the rules, not to make the judgement as such. Nevertheless, the Commission believes that this guideline will provide a useful input to the Minister's deliberations on rule-making for international markets.

6. Conduct, Purpose, and Effect

The concept of "substantially lessening competition" occurs in the context of considerations of conduct, and its purpose and effect. For this reason, this section addresses the issues surrounding "conduct", "purpose", and "effect" as used in the legislation. These concepts form an important part of the framework within which the concept of "substantially lessening competition" is located and gains much of its relevance.

6.1 "Conduct"

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- a. Conduct in its broadest sense encompasses any or all commercial activity in which a licensee could engage. This includes, but is not limited to:-
- decisions to supply or not supply certain goods or services;
 - decisions on price setting;
 - decisions on the quality of goods or services offered;
 - either making or giving effect to an agreement or understanding, written or otherwise;
 - requiring others to make or give effect to an agreement or understanding, written or otherwise; and
 - making known that an agreement or understanding, written or otherwise, is sought.
- b. For the purposes of this guideline, the Commission's view is that the relevant "conduct" means any action, or a lack of action, which can either actually or potentially affect the level of competition in a market. That is, the Commission is concerned with kinds of conduct which may have a potential negative effect on competition. Examples of certain conduct which would concern the Commission include but are not limited to:-
- Predatory pricing, where prices are set below production costs in the short term in order to eliminate competitors and increase long term profits.
 - Foreclosure, where the customer is forced to enter into a long term supply arrangement with a particular supplier, limiting competition in the market through customer choice restriction. Often these agreements will include customer penalties for early termination of the agreement.
 - Refusal to supply to actual or potential rivals goods or services which are necessary for market participation.
 - Bundling, which involves a refusal to supply a good or service separately from another good or service forcing consumers to purchase the bundle rather than just the service they want.
 - Parallel pricing, where there is collusion between rivals to vary prices in step.
 - Other pricing and supply behaviour described under the Guideline on Dominant Position.
- c. The Commission does not contend that the above examples of conduct will necessarily result in a substantial lessening of competition *per se*. The Commission will however closely monitor the market impact of such conduct.
- d. It should be noted that some of the above examples are also directly addressed by specific provisions of the Act. In particular, sections 135 and 136 place prohibitions on certain practices. The Commission is

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not bound to intervene against a certain form of conduct under any particular provision of the Act, but reserves the right to take action under any relevant provision.

6.2 “Purpose” and “Effect”

- a. The concepts of “Purpose” and “Effect” are relevant to sections 133 and 139 of the Act respectively. Applying these two tests imposes different requirements on the Commission.
- b. The issue of the purpose of conduct is particularly relevant to the implementation of section 133. Only conduct with the *purpose* of substantially lessening of competition is prohibited under the section. Such conduct is prohibited irrespective of its effects, although the Commission expects that conduct without an effect of substantially lessening competition is unlikely to come to its attention in any case.
- c. In contrast, section 139 gives the Commission the power to direct a licensee which is in a dominant position in a communications market, and engaging in conduct with the *effect* of substantially lessening competition in that market. This power is available to the Commission irrespective of the purpose of such conduct. Similarly, section 144 provides for the Minister to make rules to deal with conduct which will or is likely to lead to substantial lessening of competition in a communications market, irrespective of the purpose of that conduct.
- d. Determining the purpose of conduct is often difficult. The broader principles that the Commission will apply in order to infer purpose will include:-
 - the nature of the conduct, including its scope to affect rivals in the market;
 - the circumstances of the conduct, including the process of decision-making which led up to the conduct; and
 - the likely effect of the conduct, where likely refers to reasonable possibility rather than probability.
- e. It is possible for conduct to have more than one purpose. A licensee will be deemed to have engaged in conduct with a particular “Purpose” if that purpose is or was a substantial purpose of the conduct. This means that the particular purpose should be one of the purposes of the conduct and have been material to the decision to engage in the Conduct.
- f. The Commission has extensive powers of inquiry and investigation which it can employ to determine whether any or all of these conditions are met. The Commission will use such powers if it has reason to believe that a breach of the Act has occurred.
- g. In contrast, determining the effect of conduct is a matter of fact which can be determined by “examination of the results”. In the particular case of section 139, the issue is whether the conduct of a licensee has led to or may lead to substantial lessening of competition in a market where that licensee is in a dominant position. In this case, the issue of purpose is irrelevant, and only the assessment of whether

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substantial lessening of competition has occurred or may occur is necessary in order to activate the provisions of section 139.

7. Proposed analytical process

The Commission proposes to adopt the following three-step approach in determining matters concerning the substantial lessening of competition. This approach will provide clarity and transparency to the process of determination and will ensure consistent consideration of economic regulation issues. . 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. This process is set out in Exhibit 1:-

Exhibit 1 Proposed Analytical Framework For Substantial Lessening Of Competition

	Define the Context	Define the Market	Assessment of Conduct
Objective	Ensure that the Commission has appropriate powers to act	Define the boundaries of the relevant market.	Determine whether there is (or may be) a substantial lessening of competition within the relevant market.
Process	<p>Consider which section of the Act the assessment is being made under.</p> <p>Identify the circumstances which initiated the assessment.</p> <p>Identify the key stakeholders in the process.</p>	<p>Identify all demand substitutes for the service.</p> <p>Identify all supply substitutes for the service.</p> <p>Determine the relevant product market.</p> <p>Determine the relevant geographical market.</p> <p>Determine the relevant temporal market.</p>	<p>Assess the likely changes in the degree of competitive rivalry in the absence of Commission intervention in the light of test criteria.</p> <p>Assess the likely changes in the degree of competitive rivalry in the case of Commission intervention in the light of test criteria.</p> <p>Assess the difference in the level of rivalry between the two cases.</p> <p>Assess whether the difference is substantial in the light of the objects of the Act and national policy objectives.</p>

7.1 Review the Context

- a. This step requires an initial assessment of the issue, particularly whether section 133, section 139 or section 140 is relevant, prior to conducting a full assessment. The Commission will consider the purported importance of the issue or situation, including the circumstances in which it has arisen (including whether a complaint has been made, and by whom), the likelihood that Commission intervention is necessary to address it, and the likelihood that the benefits of intervention will outweigh the costs.
- b. The Commission will make an initial judgement on whether the circumstances of any issue related to an actual or alleged substantial

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lessening of competition justify proceeding to a full investigation. The assessment of whether substantial lessening of competition has or may occur is relevant to the implementation of sections 133, 139 or 140. However, the procedures associated with each section are different.

- c. When considering action under section 133, the Commission expects that it will have been alerted in some fashion to conduct in a market which appears to have the purpose of substantially lessening competition. Possible actions open to the Commission are to seek interim injunctions or fines against the conduct.
- d. When considering action under section 139, the Commission expects that it will have been alerted to conduct in a market which appears to have the effect of substantially lessening competition. Having determined that a licensee is in fact in a dominant position in the relevant market, the Commission may then direct the licensee to cease the conduct and to implement appropriate remedies.
- e. When considering action under section 140, the Commission will have received an application for authorisation of conduct. Possible actions open to the Commission are to issue an authorisation of the conduct, or to refuse the application on the grounds that the authorisation would not be in the national interest. The Commission will have regard to any benefits claimed in the application for authorisation in making its assessment.
- f. In all cases, the Commission will make an initial assessment of the impact of the conduct or proposed conduct on the level of competition. In judging whether a conduct requires the Commission to proceed to a full investigation of that conduct, the Commission will have regard to the following criteria which it will apply as appropriate on a case-by-case basis:-
 - the likelihood that continuation of the conduct will encourage other licensees to engage in the same or similar conduct;
 - whether any person has informed the Commission of any loss or damage as a result of the conduct;
 - whether the conduct has already ceased or not;
 - whether Commission action would clarify the nature of the conduct;
 - whether the conduct is likely to have adverse impact on end-users;
 - whether Commission action would serve to alert end-users to the adverse impacts of the conduct;
 - whether the costs of Commission action would outweigh the benefits of the action; and
 - the likelihood that another licensee might take its own action over the conduct.

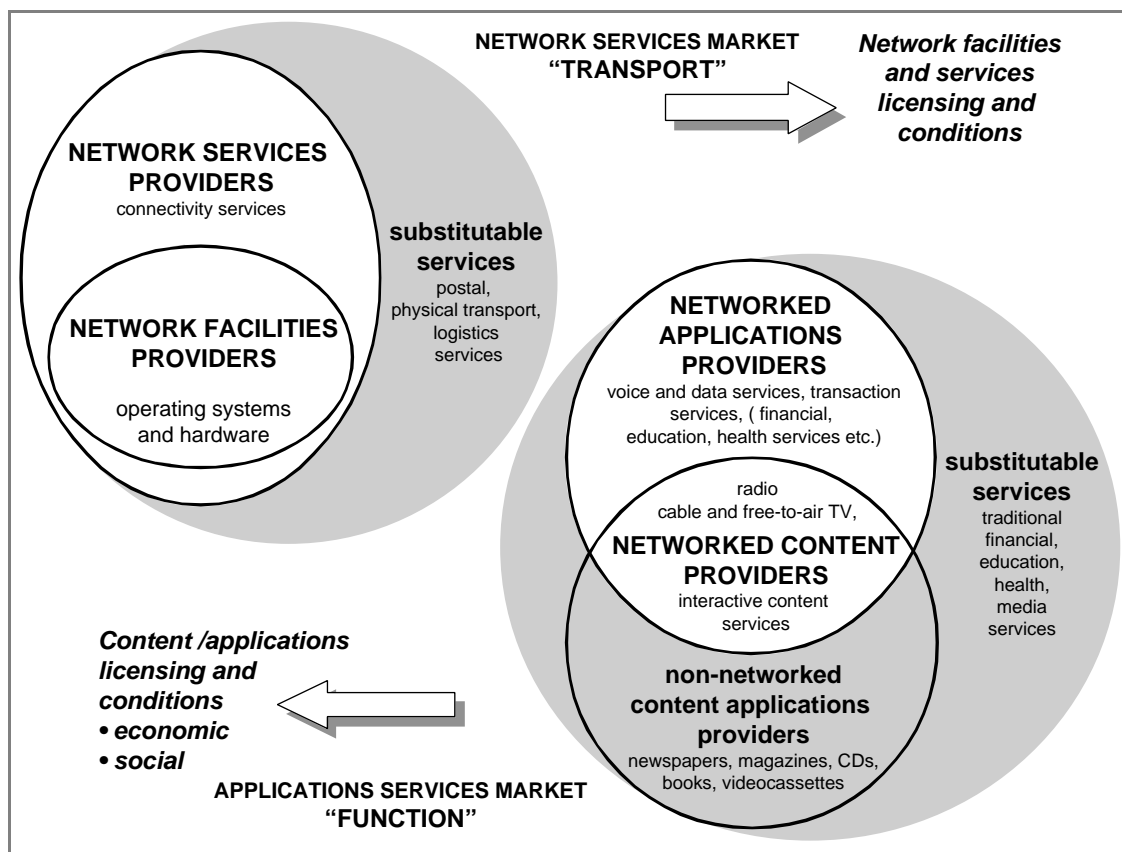
7.2 Define the Communications Market

The Malaysian context

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- a. The Malaysian regulatory regime is not confined to the telecommunications sector alone. It must have regard to all sources of actual or potential competition in a communications market. This includes the use of mobile and other wireless access technologies (including, for example digital broadcasting and datacasting). It is for this reason that the Act specifically defines a “Communications Market” as 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.
- b. It is important to recognise that these market definitions do not correspond to traditional telecommunications markets. These definitions are underpinned by a “convergence” model of communications industry activity which recognises the trend for traditionally separate service markets to merge as technological change generates new opportunities for competitive rivalry. A communications market is generally larger and more competitive than a telecommunications or broadcasting market.

Exhibit 2 Market And Services Structures In The Convergence Sector



"Economic Market"

- c. Reference to a "market" should be taken as reference to a communications market for the purposes of reading this guideline. In the exercise of its powers in the Act, the Commission has decided to adopt a definition of "market" based on the economic concept of "substitutability". Two goods or services will be treated as being in the same market if, and only if, they are substitutable for a purpose. Within the bounds of a market, substitution between goods and services occur in response to changing prices. It is these possibilities of substitution which prevent a firm from changing its prices without provoking a response from other suppliers in the market.
- d. This approach is consistent with the approach adopted in a wide range of jurisdictions. In OFTEL's Guidelines on the Operation of the Fair Trading Condition, the UK telecommunications regulator stated that:-

"The approach to market definition ... focuses on the existence of constraints on the price-setting behaviour of firms ... A main consideration is the ease with which it is possible to substitute relevant services is response to movements in prices. There are two main aspects to consider: how far it is possible for customers to substitute other services or products for those in question, and how far suppliers not presently providing the products and services in question can readily do so ..."

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- e. In Hong Kong, in the Office of the Telecommunications Authority (OFTA)'s Guidelines to Assist the Interpretation and Application of the Competition Provisions of the FTNS Licence, the following approach has been adopted:-

“... the TA will adopt the economic concept of a ‘market’ as it has been applied in antitrust law. That is, the TA will use the generally accepted test of ‘substitutability’ or ‘cross-elasticity’ in both demand and supply. Essentially, a market is an area of close competition or potential competition, and defining a market involves assessing which products are close enough substitutes to be said to be competing in the same market”.

- f. The Australian courts have developed a similar interpretation of Australian trade practices legislation. In a decision by the Australian Trade Practices Tribunal, it was stated that:-

“A market is the area of close competition between firms, or putting it a little differently, the field of rivalry between them ... Within the bounds of a market there is substitution: substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, given a sufficient price incentive ... Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance and cost of price incentives. ... in determining the outer boundaries of the market we ask a simple but quite fundamental question: if the firm were to ‘give less and charge more’, would there be, to put the matter colloquially, much of a reaction?” (Queensland Co-op Milling Association Ltd v Defiance Holdings Ltd)

- g. Substitutability, therefore, has both a demand-side and a supply-side dimension. The main considerations are the ease with which purchasers are able to replace particular goods or services used for a purpose with substitutes, and the ease with which suppliers currently producing substitutes for a purpose can produce the particular goods or services in question. Purchasers and suppliers who are able to make these substitutions are operating in the same market.
- h. The demand side form of substitution is dependant on how easily customers can substitute the products in question for those of a similar nature, which can be referred to as the cross-elasticity of substitution between products. It is essential that the transfer between the products can be undertaken by the consumer with relative ease, the costs and effort must be minimal. Note that it is not required that the products be perfect substitutes, but must fulfil the purpose of the original product. The existence of such products may restrict the price setting behaviour of the firms in the market to a certain extent, but again, this is dependent on the factors mentioned in the above discussion.
- i. On the supply side, substitutability is dependent on the ability of other firms not already providing the goods and services in question to do

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so. This is known as the cross-elasticity of supply. In order for there to be a high degree of substitution in this case, other firms must be able to begin supply with relative ease. Hence, the market boundaries on both supply and demand sides are defined by the other products available that can act as substitutes for the product. Such products provide direct competition.

- j. The identification of the relevant purpose is fundamental to the definition of the market. Goods or services which are substitutable for one purpose may not be substitutable for another purpose. The identification of the relevant purpose must be performed in the light of the conduct being examined, the scope of the impacts which the conduct may have, and the importance of the purpose in question in the light of the policy goals set out in this guideline.
- k. An example is whether conduct by a supplier of apples should be regarded as conduct within the market for apples, or the market for fruit, or the market for food. Any or all of these market definitions may be relevant, depending on the impacts the conduct has in each market and the significance of those impacts.

Factors affecting substitutability and market definition

- l. Substitutability may be limited by a large number of factors. Amongst the most important are:-
 - that two goods or services may not be substitutable for a particular purpose (although this does not rule out the possibility that they may be substitutable for some other purpose). In this case the two goods or services are in different product markets;
 - that two goods or services may be geographically separated, and hence unavailable for substitution. In this case the two goods or services are in different geographical markets; and
 - that two goods or services may not be available at the same time, and hence unavailable for substitution.
- m. These three factors of substitutability correspond to the three most important aspects of market definition:-
 - the *product* dimension, which requires the identification of the bundle of goods or services supplied by the firm and by actual or potential sources of alternative supply.
 - the *geographic* dimension, which involves the identification of the area or areas over which a firm and its rivals are able to compete, and to which customers can practically turn given a sufficient price incentive. This price incentive may result in a customer switch to an actual rival, or may encourage entry by a potential rival.
 - the *time* dimension, which involves the identification of the period over which substitution possibilities should be considered. Generally the Commission will consider

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substitution possibilities over the long term, but foreseeable, future.

- n. When determining markets for the purpose of examining the level of competition, it is necessary to identify the conduct supposed to affect the level of competition, and determine markets in a way which provides insight into the impact of that conduct. A too-narrow determination can suggest substantial lessening of competition where there is none, and a too-wide definition can suggest that there is no substantial lessening of competition when there actually is.
- o. In many cases, the Commission expects that the best evidence for determination of markets will come from suppliers and purchasers themselves, who are best placed to be aware of their rivals and their supply choices respectively. From time to time the Commission may use its powers of inquiry and investigation to gather such evidence for the purposes of determining a communications market.

7.3 Assessment of Conduct

- a. Once the market has been defined, the Commission will determine whether the situation justifies action under the Act. In the case of conduct purported to have the purpose of substantially lessening competition, the Commission will be required to apply “test” criteria developed in paragraphs (c) to (r) below.
- b. In the case of an application for authorisation under section 140, this will require the Commission to make a forward-looking assessment both of whether the proposed conduct will or may substantially lessen competition, applying the criteria of section 6, and of the benefits of the conduct in the light of the national policy objectives. An assessment of the net benefits of the conduct will then be made.

The Meaning of “Competition”

- c. OFTA has defined competition in its Guidelines to Assist the Interpretation and Application of the Competition Provisions of the FTNS Licence as follows:-

“The TA ... takes as its starting point that competition is a process whereby there is rivalry in a market between suppliers in relation to certain types of goods or services provided to consumers, the prices at which they are supplied and the additional services which are offered or supplied”.

- d. The close relation between “competition” and “market” definitions is apparent from this definition. In particular, the concept of rivalry between firms underpins both concepts.
- e. The definitions of market quoted earlier all included potential rivalry, in addition to actual rivalry, as a source of substitutes. In these jurisdictions, the availability of potential substitutes is regarded as an important source of rivalry and hence competition. The Commission adopts a similar view. Both actual and potential rivalry are important

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constraints on firm behaviour in a competitive market, although one or other factor may be more important, depending on the circumstances.

- f. Competition is the process of actual or potential rivalry between firms in a market. The level of competition in a market is simply the level of this rivalry. "Lessening competition" therefore means a reduction in the level of actual or potential rivalry between firms in a market.
- g. The Commission's view is that its role is to protect competition, namely the process of rivalry between firms. It is not the role of the Commission to protect any particular participant in that rivalry.

Actual rivalry

- h. Factors which the Commission will normally regard as indicators of the actual level of competitive rivalry in a market include:

- The number of independent suppliers

The greater the number and independence of suppliers in a market, the more likely suppliers are to be direct rivals and the higher the level of competition is likely to be.

- The degree of market concentration

The lower the degree of market concentration, the less the relative market share of competitive rivals. In these circumstances it is more likely that rivals will be forced to respond independently to price signals and that levels of actual competition will be higher.

- The level of product or service differentiation

The less the level of product or service differentiation, the greater the ease of substitutability and the greater the number of rival sources of supply. This generally results in a higher level of competition.

- The extent of vertical integration with firms in upstream and downstream markets

Vertical integration can provide opportunities for an integrated firm to extend market power in one market into the market in question. This might include conduct which impacts on the independence its rivals, for example by manipulating prices in intermediate markets or by imposing conditions in intermediate markets. This could lead to lower levels of rivalry and competition.

- The nature and enforceability of any arrangements between firms in the market which restrict their independence of action

Agreements between rivals to cooperate on certain matters can reduce the level of rivalry and hence of competition in the market. Such agreements can only have these impacts when participants cannot readily defect from them.

Potential rivalry

- i. Actual factors are not the only ones which must be considered. Potential sources of rivalry can also play an important role in influencing the behaviour of market participants. The knowledge that raising prices might attract new firms to a market can constrain pricing, even in the absence of actual competitors.
- j. This point is particularly important in a developing market such as Malaysia, where a significant proportion of the addressable market does not yet have access to communications services. All things being equal, the barriers to entry in such markets are lower than they would be if Malaysia enjoyed ubiquitous infrastructure.
- k. Factors which are indicators of the potential level of competitive rivalry in a market include:-

- The height of barriers to market entry and exit

Lower barriers to entry and exit will generally mean a higher propensity for potential rivals to enter the market in response to the commercial opportunities created by the actual rivals' conduct in the market. Both barriers to entry and exit are relevant. An inability to exit a market can discourage potential investors just as effectively as a barrier to entry if it exposes the investor to the risk of financial loss.

- The presence or absence of technology and market developments which are leading or are likely to lead to substitutes.

The circumstance of rapid technological change in a market suggests that substitutes for a particular purpose may be more readily available in either the short or the long run. This factor will be particularly persuasive where such substitutes are actually available.

“Substantially”

- i. The term “substantially” has antecedents in Australian trades practices law. In *Cool & Sons Pty Ltd v O'Brien Glass Industries Ltd*, the Australian Federal Court described “substantially” in “substantially lessening competition” in the following terms:-

“It must be capable of being fairly described as a lessening of competition that is real, or of substance as distinct from a lessening that is insubstantial, insignificant or minimal.”

- m. In the Explanatory Memorandum to the *Trade Practices Revision Bill 1986*, it was stated that:-

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“... in the context of section 46 [which refers to ‘substantial lessening of competition’], ‘substantial is intended to signify ‘large or weighty’, or ‘considerable, solid or big’ ”.

- n. In one of the most considered comments on this issue, Smithers J outlined the following approach to the degree of lessening of competition required to constitute a substantial lessening:-

“To my mind, one must look at the relevant significant portion of the market, ask oneself how and to what extent there would have been competition therein but for the conduct, assess what is left, and determine whether what has been lost in relation to what would have been is seen as a substantial lessening of competition. ... it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening of competition in a market”. (Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd, 1982 ATPR sec 40-315)

- o. In the Malaysian context, the significance of any reduction in the level of competition will be determined in the context of the objects of the Act and the national policy objectives set out in the Act. Where the conduct has a significant negative impact on those policy objectives and goals, it will be judged a significant lessening of competition for the purposes of section 133.
- p. A reduction of the number of suppliers in a market does not, of itself, constitute a substantial lessening of competition, or even necessarily a lessening of competition. A judgement about the impact of a reduction in the number of suppliers can only be made in the light of its impact on the level of rivalry in the relevant market or markets.
- q. Further, the reference to “consumer choice” in the Explanatory Statement necessarily cannot mean that a certain number of suppliers must be maintained, since that is impossible to guarantee in the normal course of events in any case. The Commission’s view is that “choice” in this context refers to the potential to choose between suppliers, rather than having access to a certain fixed number of suppliers.
- r. Conduct which appears to have little short run impact can have significant long run impact and the Commission will usually only have regard to purposeful conduct with long run impact. However, short run impact will be considered where they are likely to have long run consequences for the level of competition in a communications market.

- 7.4 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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