Malaysian Communications and Multimedia Commission

Guidelines on Dominant Position (Postal Services Industry)

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Foreword

These Guidelines have been prepared by the Malaysian Communications and Multimedia Commission ("**Commission**") in accordance with section 43 of the Postal Services Act 2012 ("**PSA 2012**"). Section 43 of the PSA 2012 gives the Commission the power to publish guidelines which clarify how the Commission will apply the test of dominant position to a licensee (as defined in these Guidelines).

These Guidelines outline the Commission's general approach to the application of the dominant position test under section 42 of the PSA 2012. It addresses the factors that the Commission may take into account when assessing whether a licensee is in a dominant position or otherwise. Nevertheless, the said factors are not exhaustive.

These Guidelines do not bind or limit the Commission's powers and functions regarding competition matters in the postal services industry in any way. These Guidelines should not be relied on as a substitute for the PSA 2012, or any regulations made under that PSA 2012, or as a substitute for legal advice.

These Guidelines may be revised by the Commission from time to time.

Abbreviation and Glossary

Commission	Malaysian Communications and Multimedia Commission
e-mails	Electronic mails
EU	European Union
HHI	Herfindahl Hirschman Index
kg	Kilograms
Licensee	Means a company incorporated under the Companies Act 1965 [Act 125] that has been granted a licence under the PSA 2012 to provide postal services
NUSL	Non-Universal Service Licence
OECD	Organisation for Economic Co-operation and Development
PMB	Pos Malaysia Berhad
Postal Article	Means a letter, a package, a parcel, a wrapper or a container that can be collected, transmitted and delivered through the postal network of a licensee
Postal Network Facilities	Means any facilities and equipment used by a licensee as part of its postal network and in the case of a universal service licensee includes a post office, posting box, relay box and postal vehicle
Postal Network	Means the system of organization and resources in any form or manner used by a licensee in carrying out its operations including the aspects of the system used for – (a) collecting postal articles from the access points; (b) handling and transporting postal articles from the access points to the distribution centre; (c) processing the postal articles; and (d) distributing the postal articles to the addressee
PSA 2012	Postal Services Act 2012
SSNIP	Small but significant non-transitory increase in price
USL	Universal Service Licence

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1 Background

Introduction

1.1 Postal services refer to the collection, transmission and delivery of any postal articles using the postal network of a licensee. Postal services are distinguished from other forms of physical delivery services based on volume and types of postal articles delivered through the postal network.

1.2 These Guidelines outline the Commission's general approach in identifying licensees that may be in a dominant position, under section 42 of the PSA 2012. It provides a broad overview of the Commission's analytical framework and indicates some of the relevant factors that may be taken into consideration to determine whether a licensee is in a dominant position in the postal market.

1.3 These Guidelines do not provide an exhaustive list of all the matters that will be taken into account by the Commission in the exercise of its powers under section 42 of the PSA 2012. The Commission will take a flexible approach to determining whether a licensee is in a dominant position and may have regard to other factors where relevant.

1.4 In developing these Guidelines, the Commission has had regard to its powers under the PSA 2012 as well as international best practices by other competition regulators.

1.5 These Guidelines are applicable to a "**Licensee**" which means a company incorporated under the Companies Act 1965 [Act 125] that has been granted a licence under the PSA 2012 to provide postal services. A "licence" means a Universal Service Licence ("**USL**") or Non-Universal Service Licence ("**NUSL**") granted under subsection 13(2) of the PSA 2012.

The Legislation

1.6 Section 42 of the PSA 2012 provides that:

"The Commission may determine that a licensee is in a dominant position in the postal market."

1.7 The Commission's power to publish guidelines on the application of the dominant position test is contained in section 43 of the PSA 2012, which provides that:

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

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

- *(a)* *the promotion of competition against the provisions of quality of services throughout Malaysia;*
- *(b)* *the postal market;*
- *(c)* *global technology and commercial trends affecting market power;*
- *(d)* *the market share of the licensee;*
- *(e)* *the power to make independent rate setting decisions by the licensee;*
- *(f)* *the degree of product or service differentiation and sales promotion in the postal market; and*
- *(g)* *any other matters which the Commission is satisfied are relevant."*

1.8 The matters that may be specified by the Commission in these Guidelines are not exhaustive.

1.9 The determination that a Licensee is in a dominant position is a pre-requisite for the exercise of the Commission's powers under section 44 of the PSA 2012. When the Commission examines a conduct, the Commission can determine as part of that examination, that a Licensee is dominant, and contemporaneously make a direction under section 44. Section 44 provides that:

> *"The Commission may direct a licensee in a dominant position in the postal market to cease conduct in that postal market which has, or may have, the effect of substantially lessening competition in any postal market, and to implement appropriate remedies."*

1.10 The Commission may undertake an assessment of whether a Licensee is in a dominant position for the purposes of section 42 of the PSA 2012 at any time during the course of examining a conduct under Chapter IX of the PSA.

2 Licence and Regulations under the PSA 2012

2.1 The Commission's postal licensing framework provides for USL and NUSL to offer a broad range of postal services.

2.2 The USL has been granted to Pos Malaysia Berhad ("**PMB**") and is valid for a period of twenty (20) years from 1 October 2016 to 30 September 2036.[1]

2.3 For NUSL, there are three (3) licence categories as shown in **Table 1** below. The NUSL is valid for a period of three (3) years. The NUSL's primary area of focus is to provide courier services for the delivery of postal articles.[2] As of August 2024, the Commission had issued thirty-nine (39) licences in category A, forty-six (46) licences in category B, and nineteen (19) licences in category C.[3]

Table 1: Category of licence for the NUSL

Category	Services
A	(i) International inbound and outbound courier service; and (ii) Domestic courier service in Malaysia
B	(i) International inbound courier service; and (ii) Domestic courier services in Malaysia
C	Intra-state domestic courier service in Malaysia

2.4 Subsection 12(1) of the PSA 2012 provides that the licensing requirement under the PSA 2012 shall not apply to the categories specified in the First Schedule of the PSA 2012. In particular, **postal articles exceeding two (2) kilograms ("kg") in weight per postal article are not licensable** under the PSA 2012.

2.5 In addition, the Commission has the following regulations imposed on the Licensees:

(a) **Postal Services (Universal Service) Regulations 2015**;[4]

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[1] https://www.mcmc.gov.my/skmmgovmy/media/General/pdf2/Universal-Services-Licensee.pdf

[2] Regulation 2 of the Postal Services (Licensing) Regulations 2015 defined *'courier service'* as 'postal services provided in an expedited manner with track and trace service' https://www.mcmc.gov.my/en/legal/acts/postal-services-act-2012-act-741/postal-services-licensing-regulations-2015

[3] https://www.mcmc.gov.my/skmmgovmy/media/General/pdf2/List-of-Non-Universal-Service-Licensees.pdf

[4] https://www.mcmc.gov.my/en/legal/acts/postal-services-act-2012-act-741/postal-services-universal-service-regulations-20

The USL's obligation to provide postal services is stipulated under these regulations. To date, there is only one USL, i.e. PMB.

(b) **Postal Services (Licensing) Regulations 2015**;[5]
The licensing framework for USL and NUSL

(c) **Postal Services (Postage Rates) Regulations 2020**;[6]
The USL's obligation to comply with the postage rates under these regulations; and

(d) **Notice dated 15 December 2014 for NUSL to charge a minimum price of RM5, excluding taxes for letters below 500 grams, with effect from 1 January 2015.**[7]

[5] https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Postal-Services-Licensing-Regulation-2015.pdf
[6] https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/POSTAL-SERVICES-POSTAGE-RATES-REGULATIONS-2020-PU-A-44-2020.pdf
[7] https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Notis-Harga-Minimum-500g.pdf

3 Dominance Framework for the Postal Services Industry

3.1 The PSA 2012 contains competition provisions under Part IX—General Competition Practices, and the Commission will have jurisdiction over any anti-competitive conduct engaged by the Licensees.

3.2 These Guidelines are only intended to cover the assessment of dominant position in respect of sections 42 and 43 of the PSA 2012. Section 43 of the PSA 2012 gives the Commission the power to publish guidelines which clarify how the Commission will apply the test of dominant position to a Licensee. Section 42 of the PSA 2012 gives the Commission the power to determine that a Licensee is in a dominant position in the postal market.

3.3 These Guidelines provide a broad overview of the Commission's analytical framework and the factors that may be relevant in its assessment of dominant position. However, it is not an exhaustive list of all the factors that the Commission may consider when assessing whether a Licensee is in a dominant position in the postal market.

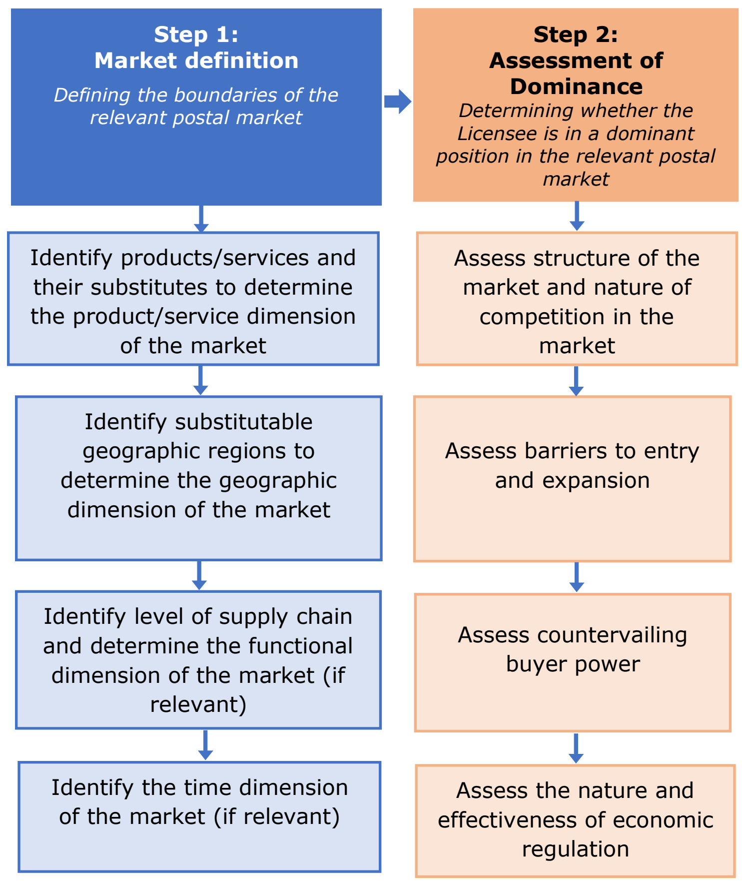
3.4 Being a dominant Licensee in the postal market is not in itself a breach of competition provisions under the PSA 2012. It is the abuse of a dominant position that is prohibited under the PSA 2012.

4 The Commission's Approach to the Assessment of Dominance

4.1 Determining whether a Licensee is in a dominant position in the postal market involves a two-step process.

4.2 **Figure 1** below sets out the Commission's general approach to assessing whether a Licensee is in a dominant position in the postal market for under section 42 of the PSA 2012.

Figure 1: The Commission's Approach to the Assessment of Dominance



4.3 The Commission takes a dynamic approach to defining markets given that the postal markets are evolving and Licensees' market power within the market may change over time.

4.4 The Commission may determine that a Licensee which is dominant in a particular market during the course of examining an anti-competitive conduct under sections 38 and 44 of the PSA 2012.

5 Step 1: Market Definition

5.1 Market definition is an economic tool used by competition regulators around the world to help identify the products or services and firms that compete with each other for the purposes of applying competition policy. Defining the relevant 'postal market' is of central importance in exercising the Commission's powers under section 42 of the PSA 2012 and is the first step undertaken by the Commission in the assessment of whether a Licensee is in a dominant position.

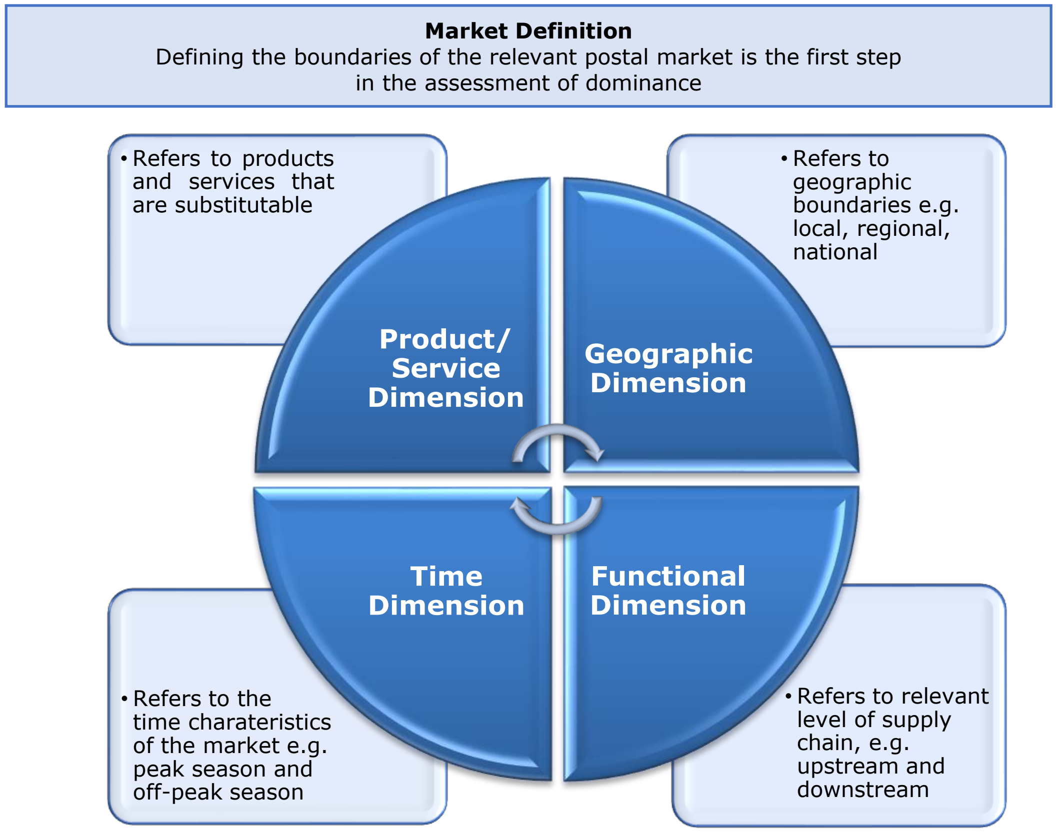
5.2 As a prerequisite of the Commission's approach in applying the test of dominant position under section 43 of the PSA 2012, it is necessary for the Commission to define the postal market and its relevant boundaries.

5.3 Market definition is not an end in itself. The output of market definition, that is the identification of the products or services sold and geographic regions in which those products or services are sold, assists with understanding the competitive constraints that exist in that market, including the nature and degree of existing and potential competition in the market.

5.4 The degree of these competitive constraints on one or more Licensee in a market determines whether one or more of these Licensees are in a dominant position in that market.

5.5 **Figure 2** below sets out the Commission's approach in defining the relevant boundaries of the postal market.

Figure 2: Defining the Boundaries of the Postal Market



Identification of market

5.6 The first step in assessing dominance or anti-competitive conduct is to define the boundaries of the relevant postal market through market definition. Under the PSA 2012, 'postal article' means a letter, a package, a parcel, a wrapper or a container that can be collected, transmitted and delivered through the postal network of a Licensee. There is currently only one (1) universal service provider which is PMB and one hundred and four (104) non-universal service providers as of August 2024.

5.7 A relevant market is typically defined by reference to the following dimensions:

(a) a **product or service dimension**, which refers to the collection of products or services that are considered interchangeable or substitutable, by reason of the products and service differentiation, their prices and their intended use; and

(b) a **geographic dimension**, which refers to the geographic area in which the goods or services identified in the product/service dimension are substitutable.

5.8 In addition, the following dimensions may also be considered by the Commission where applicable in defining the postal market:

(a) a **functional dimension**, which refers to the level of the supply chain at which products and services are supplied, for example, upstream and downstream activities of the supply chain; and

(b) a **time dimension**, which refers to time characteristics of the market, such as cyclical patterns of demand

5.9 The postal market consists of postal services, which include courier services. The Commission's approach in defining the relevant postal market for the purposes of assessment of dominance will focus on the product/service and geographic dimensions of the postal market. As for the functional and time dimensions, the Commission will consider these dimensions if relevant as part of its identification of the relevant product/service dimension.

5.10 It is often difficult to define the boundaries of a relevant market with precision. While the analytical tools for defining markets set out in these Guidelines provide a general guide as to the framework that will be used by the Commission for defining markets, the process of defining the postal market involves value judgments and a balancing of the available evidence.

Substitutability

5.11 The central concept in the Commission's approach to market definition is the concept of substitutability.

5.12 Substitutability refers to the ability for a consumer or supplier to switch from one product or service to an alternative in response to a change in the relative price, service or quality of the first product or service. In general, a product or service is considered by the Commission to be 'substitutable' for another product or service if it is a close alternative to that product or service.

5.13 The importance of the concept of substitutability in market definition is highlighted in section 2 of the Competition Act 2010 which provides that:

"a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services."

5.14 While the Competition Act 2010 does not govern the exercise by the Commission of its powers under the PSA 2012, the Commission considers that the definition of a market under the Competition Act 2010[8] provides useful guidance in defining the postal market for the purposes of the PSA 2012.

5.15 There are two types of competitive constraint that will be considered in a market definition exercise:

(a) **demand-side substitution**, which refers to the willingness of consumer to switch from one product/service or geographic region to an alternative product/service or geographic region. The central concept of substitutability of the demand-side is further set out in paragraphs 5.18 to 5.24 below; and

(b) **supply-side substitution**, which refers to the ability of suppliers to switch from supplying one product/service or geographic region to another. The central concept of substitutability of the supply-side is further set out in paragraphs 5.25 to 5.28 below.

5.16 Analysis of both demand-side substitution and supply-side substitution is required in order to define the relevant product/service and geographic dimensions of the market.[9] However, for two or more products or services to be regarded as part of the same market, the Commission considers that it is not necessary for those products/services to be substitutable on both the demand and supply sides.[10] A market can exist where there is a sufficient degree of substitutability on only one of the demand-side or the supply-side of the market.

5.17 In determining the relevant postal market, the Commission will first consider substitutability from the demand-side. If there is no, or limited, demand-side substitutability between products/services or geographic regions, then the extent to which supply-side substitutability may exist will be explored.

Demand-side substitution

5.18 Demand-side substitution refers to the willingness of consumers to switch from one product/service or geographic source of supply to an alternative product/service or geographic source of supply in response to an increase in price, or decrease in the service or quality, of the product/service in question.

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[8] Markets under the Competition Act 2010 means a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.
[9] *Case 6/72 Europemballage Corp and Continental Can Inc v Commission* [1973] ECR 215 at [14], pg.217
[10] *Auskay International Marketing and Trade Pty Ltd v Qantas Airways Limited* [2010] FCAFC 96 at [42], pg.21 - pg.22 See for example the EC decision to define a market in terms of supply-side substitution in Case IV/M166 Torras/Sarrio OJ [1992] C58/00, [1992] 4 CMLR 341 at [17–20], pg.4

The more willing a consumer is to switch from one product/service to an alternative product/service or switch from a product/service supplied in one location to the same product/service supplied in another location, in the event of a price increase or change in quality, the more likely it is that those products/services or locations will be considered to be part of the same market.

5.19 The focus of demand-side substitution is on consumer preferences. Accordingly, factors such as the functions or characteristics of the product/service in question, the location of the product or service, price and switching costs will be of particular importance in the assessment of demand-side substitutability.

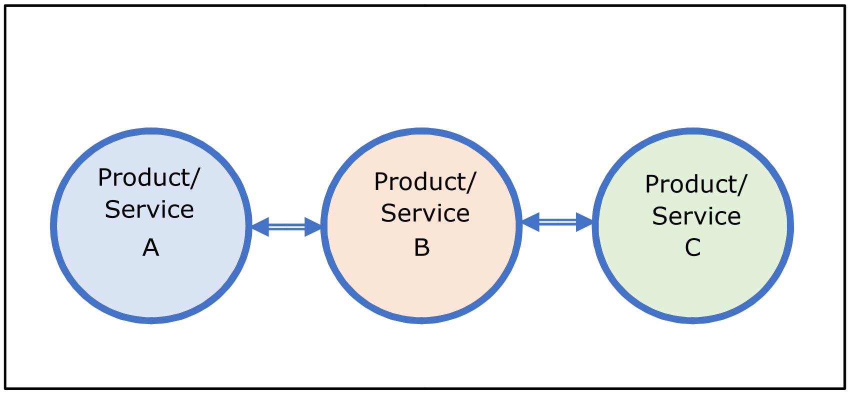
5.20 The extent to which products/service or geographic regions will be considered substitutable for the purposes of a market definition exercise is a question of degree. The fact that, on some occasions, a small number of consumers may switch from one product/service to another in the event of a price increase or change in service quality, does not necessarily mean that those products/services are part of the same market. On the other hand, even though some consumers may not consider switching from one product/service to another in the event of price increase or change in service quality, this does not necessarily mean that those products/services are not within the same market.

5.21 In order to be considered part of a single market, the products/services or geographic regions must be close substitutes. Two products/services (or a group of products/services) will be close demand-side substitutes if a significant proportion of consumers are likely to switch from one product/service to the other in response to a small but significant increase in the price or a significant change in the quality of the first product, quickly and without incurring significant switching costs.

5.22 Similarly, a geographic region will be considered a close demand-side substitute for another geographic region if a significant proportion of consumers are likely to switch from acquiring a product/service in the first region to acquiring the same product/service in another geographic region in response to a small but significant increase in price or a significant change in quality.

5.23 In some circumstances, two products/services that are not direct substitutes may be included in the same product/service market. This can occur where there are 'chains of substitution' between a series of products or services. For example, if product/service A is a close substitute for product/service B, and product/service B is a close substitute for product/service C, all three products/services may form part of the same product/service market even if product/service A and product/service C are not close substitutes.

Figure 3: Chain of Substitution from Product/Service A to Product/Service C



5.24 Based on **Figure 3** above, chains of substitution will be considered closely by the Commission to determine whether there is a 'break' in the chain or a subset of products/services in the chain in relation to which a hypothetical monopolist supplier could profitably impose a small but significant non-transitory increase in price ("**SSNIP**"), such that all of the products/services in the chain do not form part of the same market.

Supply side substitution

5.25 Supply-side substitution refers to the ability of suppliers to switch from supplying one product/service to another product/service or to switch supply in a geographic region to another in response to an increase in price. A product/service or geographic area may be considered substitutable for another product/service or geographic area on the supply side if, in response to an increase in the price of the first product/service, a supplier of a second product/service can switch its production or distribution quickly and without significant investment or incurring significant additional risk to supply the first product/service or to another geographic region.

5.26 The focus of the assessment of supply-side substitutability is on whether a supplier is both willing and able to switch production or distribution in a short period of time in the event of a price increase. Accordingly, factors such as the technical ability to switch production or distribution, regulatory and other barriers to entry, the profitability of the switch and other costs associated with switching (such as infrastructure costs) will be of particular importance in the Commission's assessment of supply-side substitutability.

5.27 While there is some overlap between the two concepts, the concept of supply-side substitutability is to be distinguished from potential entry. A product/service or geographic region will be considered substitutable on the supply side if suppliers are able to respond quickly (such as in less than one year[11]) and without incurring significant additional costs in the event of a price increase. Potential entry on the other hand, usually involves a commitment of time, resources and significant cost and is considered as part of the Commission's assessment of dominance.

5.28 For the purposes of defining the relevant postal market, the Commission will consider a product/service or geographic region to be substitutable on the supply side if there is strong evidence that suppliers can readily switch to alternative products/services or change their distribution networks to supply in alternative geographic regions in response to a change in price or quality.

Hypothetical monopolist test

5.29 The standard analytical tool used by competition regulators to identify and evaluate substitution possibilities is the "the hypothetical monopolist test". This test is also known as the "SSNIP test".

5.30 The SSNIP test starts with identifying the narrowest possible set of products/services and/or a particular geographic region and then asks whether a hypothetical monopolist supplier could profitably impose a SSNIP (usually between 5% and 10%).[12] If substitution by consumers or suppliers would make the increase in price unprofitable, the product/service or geographic region to which consumers or suppliers are likely to switch is included in the relevant market. The test is then repeated until a set of products/services and geographic regions are identified over which a hypothetical monopolist could profitably impose an increase in price. The smallest area in terms of products/services and geographic region over which the hypothetical monopolist can profitably impose the increase indicates the relevant boundaries of the market. **Figure 4** below shows the hypothetical monopolist test.

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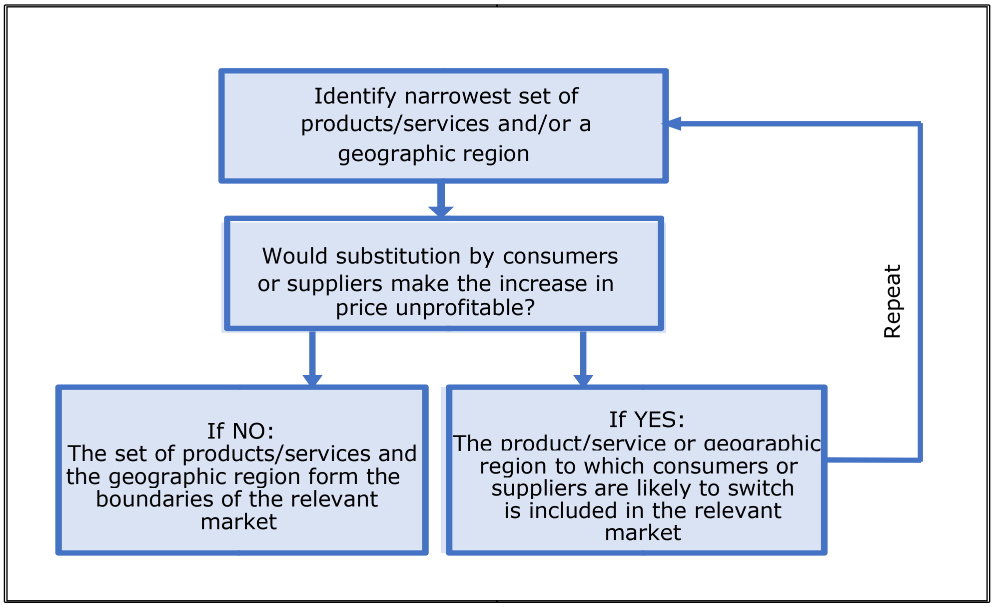
[11] For a product/service or geographic region to be considered substitutable on the supply-side, a supplier must be able to switch to that product/service or geographic region quickly. The Commission uses a period of one year in the assessment of supply-side substitutability.

[12] *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [247], pg.67

Figure 4: The Hypothetical Monopolist Test



5.31 A strict application of the SSNIP test involves a quantitative assessment of the impact of a change in price on demand. However, this requires substantial data on a range of variables including costs, prices, and revenue over a substantial period of time, which is rarely available in practice.

5.32 The onerous data requirements of the SSNIP test means that it is rare that the Commission will have sufficient data available to apply the test as a quantitative analysis when defining the postal market. The test will therefore be used as an 'intellectual aid to focus the exercise' as part of a qualitative assessment of the product/service and geographic dimensions of the market.[13]

5.33 While quantitative analysis can be difficult, the SSNIP test attempts, by definition, to predict consumer and supplier reactions to an increase in price. The Commission may request historical and current pricing information from Licensees which may reveal pricing patterns that would be of assistance in the assessment of substitutability.

Product or service dimension

5.34 A product or service dimension is a collection of all of the products or services that are regarded as substitutable by reason of the products or services differentiation, their prices and their intended use. Definition of the product/service dimension involves the following two-step process:

[13] *Seven Network Limited v News Limited* [2007] FCA 1062 at [1786], pg.182

(a) identification of relevant products and services; and

(b) identification of the closest substitutes to those products or services.

5.35 The first step in identifying close substitutes will involve an investigation of the demand-side substitutability of various products and services. Where there is sufficient demand-side substitutability between the products or services, the products or services will be found to be part of the same market.

5.36 If there is no, or insufficient, demand-side substitutability, the second step will involve an investigation of whether supply-side substitutability between various products/services exists.

5.37 For example, from a demand-side perspective, the demand for universal services is not substitutable with non-universal services as the characteristics of universal services and non-universal services are inherently different.

5.38 The USL is bound by the PSA 2012, particularly the principles under section 5 of the PSA 2012, its licensing requirements, and Postal Services (Universal Service) Regulations 2015. PMB as the USL is required to provide basic services, as follows:

(a) collection, transmission and delivery of letters and postcards less than 2kg in weight per letter and per postcard, by ordinary post within Malaysia;
(b) collection and transmission of letters and postcards by ordinary post to any places outside Malaysia; and
(c) collection, transmission and delivery of letters by registered post.

5.39 In addition, the USL has the exclusive rights to collect, transmit and deliver letters less than 500 grams with a charge less than RM5 per letter excluding tax by ordinary post within and outside Malaysia.[14]

5.40 NUSLs provide courier services and are bound by the PSA 2012 and licensing requirements. They collect, transmit and deliver postal articles to consumers at rates other than the prescribed rate for the universal service and their services are provided in an expedited manner with a track and trace service.[15]

5.41 There is also a significant difference in terms of pricing between postal and courier services. Postal services are priced in terms of weight, type of mail i.e. postcard, standard mail, non-standard mail, registered mail, international

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[14] Regulation 9 (a) and (b) Postal Services (Universal Service) Regulation 2015 https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/postal_regulation2015_1.pdf

[15] Regulation 2 of the Postal Services (Licensing) Regulations 2015 defined 'courier service' as 'postal services provided in an expedited manner with track and trace service https://www.mcmc.gov.my/en/legal/acts/postal-services-act-2012-act-741/postal-services-licensing-regulations-2015

destinations and commercial vs non-commercial consumers and the rates are regulated for transmission within Malaysia. However, courier services are priced according to its weight, size and delivery zones, where the delivery zones could be within Klang Valley; inter-state; intra-states; between East Malaysia (Sabah and Sarawak) and West Malaysia and the prices differ between the different zones.

5.42 From a supply-side perspective, NUSLs are not able to switch easily from supplying non-universal services to universal services within short term. Although postal and courier services markets can easily leverage on the same postal network, they are not easily substitutable due to the licensing requirement and regulations as highlighted in section 2 above. As there is only one USL for postal services, the market is not competitive. Hence, it is regulated by stringent requirements. It is also given the exclusive rights to collect, transmit and deliver letters below 500 grams with a charge less than RM5 per letter, excluding tax. The courier services market comprising of 104 NUSLs. The NUSL market is competitive, and providers are encouraged to adhere to the minimum price of RM5 for letters weighing less than 500 grams.[16]

5.43 The following factors may be considered by the Commission as part of its investigation of the demand-side and supply-side substitution possibilities for the purposes of defining relevant postal markets:

(a) Switching cost
If the cost (monetary or non-monetary) to a consumer or supplier of switching between products or services are high relative to the value of the product, this will reduce the likelihood that those products or services will be considered substitutable.

(b) The function or end use of the products or services
A product or service may be considered substitutable for another product or service by a consumer if it has the same end use. However, not all products/services that have the same end use may be substitutable. For example, a consumer sending a document via express mail, may not view standard mail as substitutable as the consumer is willing to pay more for the express mail service to ensure a faster delivery.

(c) Pricing and pricing trends
A comparison of prices and pricing trends between two products/services can be a useful indicator of substitutability. For example, if the pricing of product/service A shows a decreasing price trend, but the pricing data for product/service B shows an increasing price trend over a sustained period,

[16] Pelaksanaan Harga Minimum bagi Perkhidmatan Penghantaran Surat di bawah 500 gram https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Notis-Harga-Minimum-500g.pdf

this may suggest that the products/services are not substitutable. On the other hand, the same pattern of pricing between two products/services may suggest that those products/services being considered close substitutes.

(d) Past behaviour of buyers and suppliers
Evidence of switching by suppliers or consumers between products/services in response to a price increase may indicate substitutability.

(e) Licensee's view as to the substitutability of products or services
While not determinative, the views of Licensees on products or services that are considered to be within the same market will be considered by the Commission.

(f) Pricing and marketing practices
Evidence that suppliers consider the pricing and/or marketing practices of suppliers of other products or services when setting the prices of their own products/services may suggest that the products/services are considered to be substitutable.

(g) Price discrimination based on consumer segmentation
A supplier may engage in price discrimination when it has the ability to identify consumers that have substitution possibilities in relation to the products and services as compared to those who do not have such substitution possibilities. If a supplier is able to readily identify those consumers and engage in price discrimination in relation to those consumers, this may suggest that the services supplied to those consumers are in a separate market to services supplied to other consumers.

Geographic dimension

5.44 The geographic dimension of a market refers to the geographic area in which the goods or services identified in the geographic dimension are substitutable. The geographic boundaries of a market may be local, regional, national or even global.

5.45 Similar to the analysis of the relevant product/service dimension, the process of defining the relevant geographic dimension also involves the concept of substitutability. In particular, it involves considering whether a product or service supplied in one geographic region is substitutable for a product or service supplied in another geographic region. In general, the more the conditions of supply in neighbouring geographic regions diverge, the less likely it is that the products or services supplied in those geographic regions will be considered substitutable by the Commission.

5.46 The purpose of defining the relevant geographic market is to determine the collection of geographic areas that are likely to fall within the same market.

5.47 Demand-side substitution typically exist over a very narrow geographic area as consumers are typically only willing to consume postal services at a given location closest to their home or workplace.

5.48 Supply-side substitution exists where a supplier is able to quickly and without significant investment commence supply in an alternative geographic region in response to an increase in price. The ability of the supplier to move between geographic areas is likely to depend on how extensive its postal network is as well as its category of licence. For example, the USL has an extensive nationwide network. On the other hand, the NUSL's boundaries of supply may be limited to international inbound and outbound, international inbound only, nationwide domestic as well as intra-state domestic [17] depending on the category of licence of the NUSL and this may in some instance, limit the supply-side substitution.

5.49 For the purpose of these Guidelines, the relevant geographic dimensions comprise of the areas covered by the postal network where the Licensees are involved in the supply of the relevant postal services. The postal market is a national market as the service is available nationwide and is priced on a national basis, without material regional disparity. The prices only differ in terms of weight, type of mail i.e. postcard, standard mail, non-standard mail, registered mail, international destinations and commercial vs non-commercial consumers. However, for courier services, there is likely to be material regional disparity in pricing and therefore markets could be local, or state based. For example, the markets could be within Klang Valley; inter-state; intra-states; between East Malaysia (Sabah and Sarawak) and West Malaysia and the prices could differ between the different zones. If a Licensee has the ability to offer different prices in different geographic areas, this may require further assessment to determine if separate geographic markets exit.

5.50 The following factors may be considered by the Commission when defining the relevant geographic dimension of the postal market:

(a) The geographic area in which the relevant products or services are currently supplied. A Licensee cannot supply postal services beyond the current reach of its postal network unless it expands its network reach;

(b) The cost of supplying products or services to other geographic areas or the difference in cost of supplying products or services in a particular geographic area. If a supplier faces significantly higher cost in a particular

[17] Each licence category is defined in Table 1 above.

geographic area, this may suggest there is limited supply-side substitutability and therefore defining a separate geographic market may be appropriate;

(c) Cost to consumers of purchasing services from other geographic areas. If prices are significantly more expensive, this may suggest the existence of distinct markets;

(d) Difference in pricing or price discrimination between geographic areas, may suggest separate geographic markets; and

(e) The existence of legal or other regulatory instruments that impact the area in which products or services can be supplied or acquired, for example the type of licence category.

Functional dimension

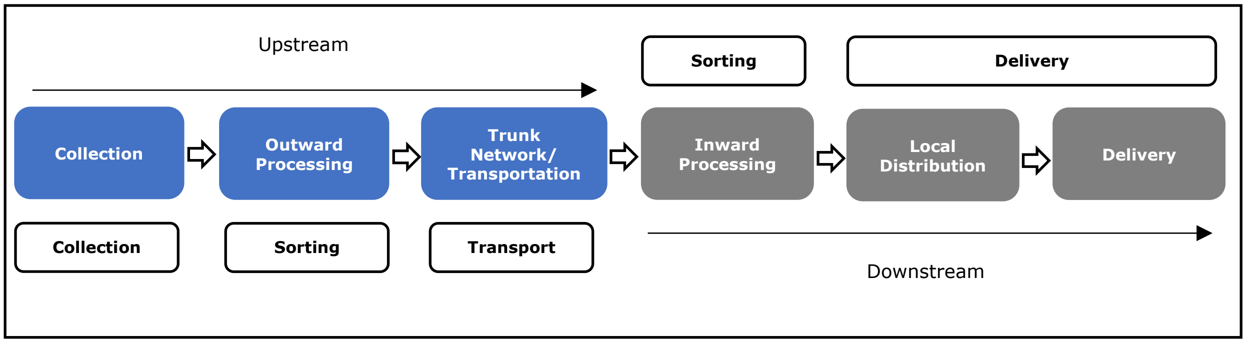
5.51 Defining the functional dimension of the market involves identifying the relevant supply chain for a particular product or service, which comprise the area of close competition between firms. The purpose of defining the functional dimension of the market is to consider whether products/services or sold at multiple levels of the supply chain should be included in the same relevant market because a firm supplying products or services at one level of the supply chain is constrained by firms or other competitive factors operating at another level.

5.52 In general, each level of the supply chain will be defined as a separate functional dimension of the market (upstream and downstream). However, in circumstances where there is a significant level of integration in the market, or demand from one relevant level of the supply chain affects demand at another level, two or more levels of the supply chain may be considered part of the same functional market.

5.53 The postal supply chain is built around four (4) core activities: collection, transport, sorting and delivery.[18] The functional level of the postal market comprises of upstream and downstream activities as shown in **Figure 5** below. Upstream supply chain include collection, outward processing, trunk network/transportation while the downstream may include inward processing, local distribution and delivery, etc.

[18] See Kollara, N.H. (2017) Digital transformation, business models and the postal industry, École Polytechnique Fédérale De Lausanne, pg.13 https://infoscience.epfl.ch/record/226176/files/EPFL_TH7560.pdf

Figure 5: The Postal Supply Chain[19]



(a) **Collection**: This is an upstream activity. The postal articles are collected from post boxes, post offices (over-the-counter) or the consumer's premise. The postal article is then sent to the sorting centres.

(b) **Sorting**: This is a key process in the postal supply chain that involves both upstream and downstream activities namely outward and inward processing, which involves sorting of the postal articles and segregation based on the type and destination.

(c) **Transportation**: Transportation is a service that is used to carry postal articles between sorting centres. Transportation costs vary based on geography and available infrastructure. The Licensees can choose to have few larger sorting centres (centralised transportation network) or many smaller sorting centres (decentralised transportation network).

(d) **Delivery**: This is a downstream activity. After inward sorting, the postal articles will be delivered to its final destination. This is the most labour-intensive part of the postal supply chain and forms the most significant proportion of the total costs for Licensees. Various modes of transportation such as motorcycles, vans, cars, boats, etc. are used to deliver to residential and business addresses.

5.54 The Commission will consider functional dimension if there is evidence that postal Licensees are relying on upstream access to operate in the downstream market.

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[19] European Regulators Group for Postal Services (ERGP) report on "access" to the postal network and elements of postal infrastructure, pg.9 – pg.13 https://ec.europa.eu/docsroom/documents/14286/attachments/3/translations/en/renditions/native

Time dimension

5.55 The time dimension of the postal market refers to the temporal characteristics of the market such as cyclical patterns of demand.

5.56 For example, if the postal services have differences in the level of demand during certain peak periods such as festivals, it may be necessary to consider whether the postal services supplied during such peak periods are in a separate market to the postal services supplied during off-peak period.

5.57 In determining the relevant time dimension of the postal market, the key issue for consideration is whether it is possible for consumers to defer purchase decisions between time periods, the difference in pricing between time periods as well as the characteristics of the postal services supplied in the different time periods.

5.58 Time dimension will be of particular relevance in markets characterised by rapid innovation and technological change.

6 Step 2: Assessment of Dominance

Meaning of Dominant Position

6.1 A dominant position has been defined by the European Court of Justice as:

> *"… 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, consumers and ultimately of its consumers."*[20]

6.2 The ability to act independently is related to the level of competitive constraints faced by the Licensee in question. A Licensee will be in a dominant position if it is not subject to effective competitive constraints in the postal market and has the ability to exercise substantial market power in that market.

6.3 The assessment of dominance requires the identification of the competitive constrains faced by the Licensee in the postal market and the effectiveness of those constrains at limiting a Licensee's power in that market. The key source of competitive constrains are existing competition, potential competition and consumers. Regulations may sometimes also operate as a further source of constraint in some markets, for example price regulation.

The Commission's approach in respect of the assessment of dominance

6.4 As depicted in Figure 1 above, the first step to determine that a Licensee is in a dominant position is to define the relevant postal market and its boundaries. The second step is the assessment of dominance.

6.5 In assessing whether a Licensee is in a dominant position for the purpose of section 42 of the PSA 2012, the Commission will consider the following key factors:

(a) the structure of the market and the nature of competition in that market, including market shares;

(b) existing and potential competition;

(c) countervailing buyer power; and

(d) the nature and effectiveness of other regulations, such as price regulation.

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[20] *United Brands Company and United Brands Continental v Commission* [1978] ECR 207 at [65], pg.277

6.6 The Commission may determine the existence of a dominant position from either a single factor or from a number of factors that are not of themselves determinative. The factors listed above are not intended to be exhaustive. Where other factors that are relevant to the assessment of dominance exist in a particular market, the Commission will take these into account.

Market structure and the nature of competition

6.7 The nature and degree of actual competition in the postal market is an important factor in the assessment of dominance. In general terms, the more competitive a market is, the less likely it is that a Licensee will be found to be dominant in that market.

6.8 When analysing the nature and degree of actual competition in the postal market for the purposes of assessing dominance, the Commission will consider the following factors:

(a) the relative market share of each participant in the market;

(b) the competitive dynamics in the market; and

(c) any other factors that would increase or decrease the ability of a Licensee to carry out anti-competitive conduct.

Market share

6.9 Market share is a useful first indicator of dominance. It provides the Commission with an initial indication of the market structure and of the relative importance of the various participants in the market. The changes in market share (where such information is available) is also an important indicator of dominance. Where possible, the Commission will consider changes in the market share over time for the purposes of assessing dominance.

6.10 In general terms, a high market share may indicate that a Licensee is dominant in a market if it has held that market share for a significant period of time.[21] Conversely, if a Licensee has a relatively low market share, or its market share has been eroded significantly over time while its competitors' shares have increased, this may indicate that the Licensee is not dominant in the market.

6.11 The Commission recognises that market share can be an imperfect indicator for dominance. While a high market share often indicates a dominant position, a

[21] *Hoffmann-La Roche & Co. AG v Commission (C-85/76)* [1979] ECR 461 at [41], pg.521

Licensee with a significant market share may still be found not to be in a dominant position in that market due to other factors such as low barriers to entry or regulation. For example, a Licensee that gains a significant market share by using innovative sales and marketing techniques may not be in a dominant position where potential competition exists from existing and new competitors. On the other hand, a Licensee with a relatively low market share but is faced with less competition due to its product innovation or branding, and where barriers to entry are high, may be in a dominant position. Therefore, a high market share alone is not sufficient to conclude that a Licensee is in a dominant position.

6.12 However, a market share that exceeds a certain threshold over a period may give rise to the Licensee being in a dominant position in the market.[22] The European Courts considers very large market shares of 50%[23] are in themselves evidence of the existence of a dominant position, save in exceptional circumstances. On the other hand, the Organisation for Economic Co-operation and Development ("**OECD**") defines a dominant firm as a firm which account for a significant share of a given market and has a significantly larger market share than its next largest rival. Dominant firms are typically considered to have market shares of 40% or more.[24]

6.13 The relative distribution of market share in the market is also an important consideration when making an assessment of dominance. This is particularly the case where the market is characterised by high levels of concentration.

6.14 When analysing market share data, the Commission will consider:

(a) **The current market share of the Licensee as against the market shares of its competitors in the market**. The higher the market share held by a particular Licensee in the postal market, the more likely that Licensee will be found to be in a dominant position, particularly if the Licensee's market share is significantly higher than that of its competitors.[25] The Commission considers a 'high' market share to be a market share of more than 40% in the postal market, however, this does not preclude a Licensee with a market share of less than 40% being found

[22] *AKZO Chemie BV v Commission of the European Communities (Case C-62/86),* pg. I-3371. The presumption established according to which a market share of more than 50% which was held over a period of time would usually be sufficient to establish dominance
[23] Ibid
[24] Dominant firm - United Nations Economic and Social Commission for Western Asia (unescwa.org) https://www.unescwa.org/sd-glossary/dominant-firm
[25] The Commission notes that, in relation to the general market, the Malaysia Competition Commission has adopted a market share threshold of 60% as an indicator that an enterprise is dominant. Given the highly concentrated nature of postal market in Malaysia, the Commission considers that a lower market share may indicate dominance in this market https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Chapter%202%20prohibition.pdf

to be in a dominant position, if it is not subject to effective competitive constraints.

(b) **The changes in the Licensees' market shares over time (where such information is available)**. Where a Licensee has maintained a high market share for a sustained period of time, this will be considered evidence that the Licensee occupies a dominant position in the market. Conversely, if a Licensee's market share has fluctuated significantly over time, this may indicate that the Licensee is not in a dominant position.

6.15 In assessing market share, the Commission may also have regard to accepted measures of concentration, such as the Herfindahl Hirschman Index ("**HHI**").[26]

6.16 In general, market shares will be calculated by reference to Licensees' revenue or subscription figures. However, there may be other appropriate measures of market share, for example letter or parcel volume. The most appropriate method of measuring market share will be determined by the Commission on a case-by-case basis with reference to the characteristics of the market under investigation and the availability of data.

Competitive Dynamics

6.17 While market share figures may provide an initial indicator of the competitive dynamics in the postal market, the level of competitive constraint faced by a Licensee in that market may not be revealed by an analysis of market share alone.

6.18 Accordingly, the Commission will also consider the following factors (where relevant) as part of its assessment of whether a Licensee is in a dominant position in that market:

(a) **Indirect constraints**. A Licensee that has a significant share of a market may be constrained from increasing prices or reducing output as a result of new entry in the market and consumers being able to switch to alternative Licensees.

(b) **Pricing behaviour**. The pricing behaviour of participants in a market and pricing trends over time may reveal the competitiveness of a market. In particular, if a Licensee's pricing has remained unchanged over a substantial period of time, this could suggest a dominant position if there has been new entry during that time.

[26] The Herfindahl Hirschman Index (HHI) is a measure of market concentration which is calculated by adding the sum of the squares of market share of the firms in the relevant market, thereby giving the greater weight to the market shares of larger firms.

(c) **Existence of a vigorous and effective competitor**. Vigorous competitors can have a significant impact on the state of competition in the market. The presence of a vigorous competitor, even if that competitor has a relatively low market share, may act as an effective constraint on the ability of a Licensee to increase prices or reduce output.

(d) **Innovation**. A market characterised by innovation and digitalisation may result in dominance being short lived.

Other factors

6.19 In addition to the above factors, the Commission will also consider if vertical integration is present in the postal market in its assessment of dominance. This is because vertical integration may contribute to a dominant position in a market if a vertically integrated Licensee controls access to a key input into a downstream market or provides a Licensee with benefits such as advantageous supply terms for key inputs that are not available to other competitors in the market.

Existing and Potential Competition

6.20 The effectiveness of potential competition as a constraint on the ability of a Licensee to increase prices or limit output is dependent on the ease with which potential entrants or existing competitors can enter or expand operations in the postal market. A Licensee is likely to be constrained by potential competition if entry or expansion is likely, timely and of a sufficient scale and scope.

6.21 An assessment of whether entry or expansion is likely to constrain a Licensee requires consideration of the barriers to entry or expansion in the market. Where there are low barriers to entry, a Licensee is unlikely to be in a position to increase prices or reduce output due to the threat that other firms may enter the market or expand their operations and take its market share.

6.22 Barriers to entry and expansion come in many forms. Some barriers may be inherent feature of a particular market. This could include resources necessary for the operation of postal services.

6.23 Where barriers to entry are high, the threat of potential competition is likely to be weak or absent. This is because barriers to entry serve as obstacles to new competition, thus affording power to the dominant Licensee to behave to an appreciable extent independently of competitors and consumers. Ultimately, high barriers to entry increase the ability of a dominant Licensee to retain market power and to charge prices that do not equate to equilibrium prices under a competitive scenario, at the expense of consumers.

6.24 In analysing whether a Licensee is in a dominant in the postal market, the Commission will consider whether the following factors are likely to give rise to barriers to entry or expansion:

(a) **Cost of entry/expansion**. The postal market is generally not characterised by high sunk cost. Nevertheless, it may be difficult for new entrants to replicate the postal network in the short to medium term. This is because new participants not only need to compete in terms of reputation and branding but would also need to build a network comprising of collection, sorting and distribution hubs which may include infrastructure such as access points (post boxes), post offices, sub-post agents, sorting hubs, transportation facilities and considerable number of employees for the delivery of postal articles to the intended addressee. For outbound post, the Licensee would need to extend its network internationally by negotiating bilateral/multilateral agreements with foreign operators or counterparts. The Commission will consider if these factors serve as a barrier to entry or expansion for competitors.

(b) **Access to facilities and inputs**. The postal services industry may be dependent on access to key resources such as access points for collection and delivery. In such circumstance, the potential difficulties associated with accessing these inputs may deter new entrants or existing Licensees from expanding their operations.

(c) **Regulatory and legal requirements**. The Commission will consider the extent to which regulatory and legal constraints such as onerous reporting obligations, obtaining licence to operate and complying with licence conditions may deter new entrants or impose additional burden on existing participants looking to expand their operations.

(d) **Contractual restrictions**. The existence of long-term contracts in a market can constitute a barrier to entry if it prevents or restricts potential entrants from accessing key inputs or consumers. Preferential terms may also constitute a barrier to entry if those terms of supply are not offered to new entrants or competitors.

(e) **Economies of scale and/or scope**. Significant economies of scale and/or scope in a market may constitute a barrier to entry. Economies of scale result from the ability to spread fixed costs over a broader consumer base, whereas economies of scope result from the ability to spread fixed costs over a broader set of products or services. Economies of scale and/or scope is enjoyed when where there is high fixed cost and low marginal cost to supply products and services.

(f) **Conduct by incumbents**. Incumbents can respond to new entrants by competing aggressively on price and may utilise anti-competitive strategies such as predatory pricing.

Countervailing buyer power

6.25 Countervailing buyer power exists where there are one or more consumers in the market who are able to constrain the independence of the relevant Licensee, particularly its ability to set prices or terms of supply. The countervailing buyer power can function as a competitive constraint on a Licensee, preventing it from behaving independently and from setting prices above the competitive level.

6.26 An assessment of countervailing buyer power would look at the possibility of the consumers exerting pressure on the pricing behaviour of the Licensees. Consumers may also have sufficient power, such as in the case of big business clients, to put pressure on the Licensees to offer a better service.

6.27 In fact, consumers with a strong negotiating position may significantly shape the level of competition in the postal market as this will tend to restrict the Licensees' ability to exercise market power and to act independently in its service quality and pricing behaviour. However, the existence of countervailing buyer power will depend on whether the extent to which consumers could, at the outset, choose to discontinue using the service being provided by a particular Licensee and switch to alternative Licensees, within a short period of time.

6.28 Notwithstanding the fact that electronic substitution has happened and will continue to happen in the future, the majority of households and businesses today still use postal services. These amongst others include postage of documents, contracts, credit cards and their corresponding personal identification numbers, postcards, wedding cards, etc. In addition, postal services will continue to serve those who either do not have access to the Internet or lack the basic computer literacy to use non-postal alternatives for communication. Nevertheless, countervailing buyer power must be assessed within the context of consumers having a choice between alternative Licensees, to constrain the ability of a Licensee to raise prices or impose unfavourable terms.

6.29 The Commission will consider the following factors to determine whether there is countervailing buyer power in the postal market:

(a) **The number and size of consumers in the market**. Where there is a high degree of concentration amongst buyers compared to suppliers, buyers are more likely to be in a position to constrain the activities of suppliers;

(b) **The ability for consumers to bypass the supplier by acquiring the products or services from another supplier**. This would include consideration on the cost of switching suppliers; and

(c) **The ability for consumers to bypass the supplier by 'sponsoring' market entry**. A consumer with significant financial resources may wield significant countervailing power in a market if it can 'sponsor' a new entrant to enter the market.

Other Regulation

6.30 The existence of any other postal regulation will not prevent a Licensee from being determined to be in a dominant position if the regulation does not provide an effective constraint on the ability of a Licensee to act independently in the postal market.

6.31 These regulations may only constrain the activities of the Licensees in relation to a particular product or services supplied in the postal market, for example, in terms of price regulations, exclusive rights of the USL, etc.

Joint or collective dominance

6.32 The concept of 'joint' or 'collective' dominance refers to a situation in which two or more firms together or collectively possess a dominant position in a market.

6.33 The PSA 2012 does not directly contemplate the existence of joint or collective dominance in the postal market. However, the Commission may determine that a Licensee is dominant in the postal market if the market exhibits oligopolistic characteristics.

6.34 Finally, co-ordination between Licensees in the form of an 'understanding, agreement or arrangement' which provides for rate fixing, market sharing, and boycott of another competitor is absolutely prohibited under section 40 of the PSA 2012.

Corporate groups

6.35 In determining whether a Licensee is in a dominant position pursuant to section 42 of the PSA 2012, the Commission takes the view that where there are multiple Licensees within a corporate group, the Commission may assess the relationship between the Licensees. In particular, the Commission may assess if any of the Licensees have a decisive influence over other Licensees within the corporate group.

6.36 If the Commission has established that a Licensee has decisive influence over the other Licensee(s) within the corporate group, the Commission may consider all of the Licensees (within the same corporate group) for the purposes of determining dominance under section 42 of the PSA 2012.