



Malaysian Communications and Multimedia Commission

Guideline on Dominant Position

24 September 2014

This document is issued as a source of information to interested parties and the general public. The information in this document is intended as a guide only. For this reason it should not be relied on as legal advice or regarded as a substitute for legal advice in individual cases. The information contained in this document may be subjected to changes without notice.

Malaysian Communications and Multimedia Commission
Off Persiaran Multimedia, 63000 Cyberjaya, Selangor Darul Ehsan.
Tel: +60 3 86 88 80 00 Fax: +60 3 86 88 10 00
www.skmm.gov.my

Contents

Foreword	2
1 Introduction	3
2 The Commission's approach to the assessment of dominance	5
3 Market definition	7
4 Dominant position	23

Foreword

This Guideline has been prepared by the Malaysian Communications and Multimedia Commission (the **Commission**) in accordance with section 138 of the *Communications and Multimedia Act 1998* (the **CMA**). Section 138 gives the Commission the power to publish guidelines which clarify how the Commission will apply the test of “dominant position”.

This Guideline replaces the Guideline on Dominant Position in a Communications Market¹ published by the Commission in 2000.

This Guideline outlines the Commission’s general approach to the application of the “dominant position” test under section 137 of the CMA. It is not an exhaustive summary of all of the factors that the Commission may take into account when assessing whether a licensee is in a dominant position and does not bind or limit the Commission in any way.

This Guideline is intended as a guide only and should not be relied on as a substitute for the CMA or any regulations made under that Act, or as a substitute for legal advice.

This Guideline may be revised by the Commission from time to time.

¹ RG/DP/1/00(1).

Introduction

- 1.1 Under section 137 of the *Communications and Multimedia Act 1998* (the **CMA**), the Commission may determine that a licensee is in a dominant position in a communications market.
- 1.2 The determination that a licensee is in a dominant position is a pre-requisite to the exercise by the Commission of its powers under section 139(1) of the CMA (but not a pre-requisite to the examination of conduct as discussed below) to direct a licensee in a dominant position to cease conduct which has, or may have, the effect of substantially lessening competition.
- 1.3 This Guideline outlines the Commission's general approach to identifying those licensees that may be in a dominant position for the purposes of a determination under section 137. It provides a broad overview of the Commission's analytical framework and indicates some of the factors that may be relevant to a determination of whether a licensee is in a dominant position in a communications market.
- 1.4 This Guideline does not provide an exhaustive list of all of the matters that will be taken into account by the Commission in the exercise of its powers under section 137. 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. The Commission may determine that a licensee is dominant at any time.
- 1.5 In developing these Guidelines, the Commission has had regard to international best practice and the guidelines issued by overseas competition regulators.

The Legislation

- 1.6 Section 137 of the CMA provides that:

"The Commission may determine that a licensee is in a dominant position in a communications market."
- 1.7 The Commission's power to publish guidelines on the application of the dominant position test is contained in section 138 of the CMA, 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 relevant economic market;

- (b) global technology and commercial trends affecting market power;*
- (c) the market share of the licensee;*
- (d) the licensee's power to make independent rate setting decisions;*
- (e) the degree of product or service differentiation and sales promotion in the market; and*
- (f) any other matters which the Commission is satisfied are relevant."*

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

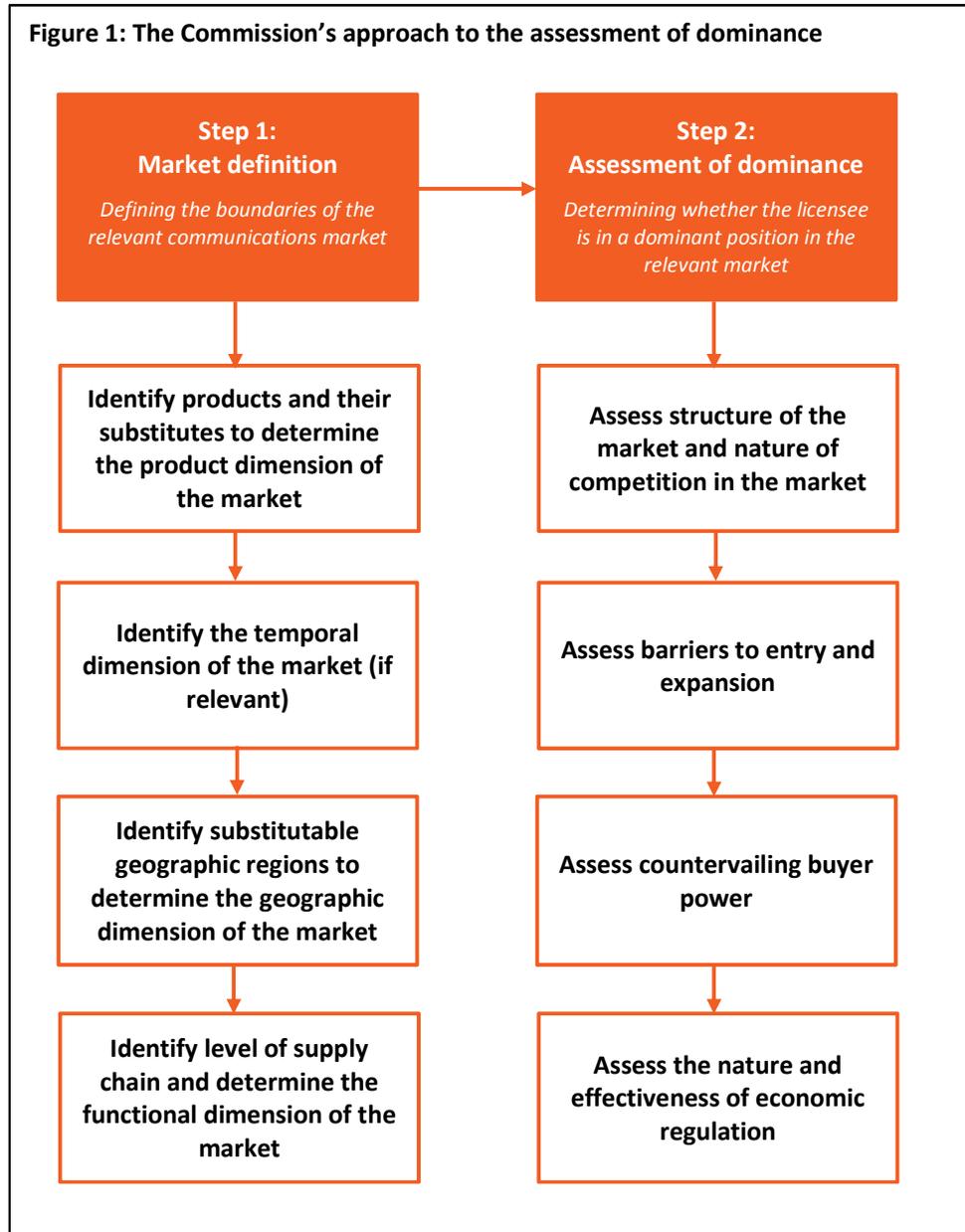
1.9 The determination that a licensee is in a dominant position is a pre-requisite for the exercise of the Commission's powers under section 139(1) of the CMA. However, it is not a pre-requisite to the Commission examining conduct, or determining as part of that examination, that a licensee is dominant and contemporaneously making a determination under section 139. Section 139(1) provides:

"The Commission may direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications 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 137 from time to time. In particular, the Commission may determine that a licensee, who has not previously been determined to be in a dominant position, is in a dominant position during the course of examining conduct under Chapter 2 of Part VI of the CMA, including under sections 133 or 139 of the CMA.

2 The Commission's approach to the assessment of dominance

2.1 Figure 1 below sets out the Commission's general approach to assessing whether a licensee is in a dominant position in a communications market for the purposes of a determination under section 137 of the CMA.



- 2.2 The Commission takes a flexible approach to determining which licensees are dominant for the purposes of section 137 of the CMA.
- 2.3 Communications markets are highly dynamic. Markets and licensees' power within those markets may change over time. While markets previously defined by the Commission will be of assistance to the Commission when assessing dominance for the purposes of section 137 of the CMA, the Commission will not be bound by prior market definitions when assessing conduct for the purposes of section 139 of the CMA.
- 2.4 The Commission may determine that a licensee that has not previously been determined as dominant is in a dominant position during the course of examining anti-competitive conduct. The Commission will not be bound to only examining the conduct under section 139 of licensees that have been determined to be dominant during a public inquiry. The Commission may examine the conduct of licensees under section 139 who have not, as yet, been determined to be dominant and the Commission may determine that a licensee is dominant under section 137 at any time during the course of examining that licensee's conduct.

3 Market definition

The purpose of market definition in the assessment of dominance

- 3.1 Market definition is an economic tool used by regulators and courts around the world to help identify the products and firms that compete with each other for the purposes of applying competition policy.
- 3.2 Defining the relevant 'communications market' is of central importance to the exercise of the Commission's powers under section 137 and is the first step undertaken by the Commission in the assessment of whether a licensee is in a dominant position.
- 3.3 Market definition is not an end in itself. The output of market definition, that is the identification of the products sold and geographic regions in which those products 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.
- 3.4 The degree of these competitive constraints on one or more licensees in a market determines whether one or more of these licensees are in a dominant position in that market.

The concept of a market

- 3.5 The term 'communications market' is defined in section 6 of the CMA to mean:

"an economic market for a network service, or an applications service, or for goods or services used in conjunction with a network service or applications service, or for access to facilities used in conjunction with a network service or an applications service."
- 3.6 A relevant market is typically defined by reference to the following dimensions:
 - (a) a **product** dimension, which refers to the collection of products or services that are considered interchangeable or substitutable, by reason of the products' characteristics, 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 dimension are substitutable.
- 3.7 However, in some communications markets the Commission may also closely consider the following additional dimensions, either as separate dimensions or part of the analysis of the relevant product dimension:

- (a) a **functional** dimension, which refers to the level of the supply chain at which products and services are supplied (for example, the wholesale or retail levels of the supply chain); and
 - (b) a **time** dimension, which refers to time characteristics of the market, such as cyclical patterns of demand or innovation/inter-generational products.
- 3.8 The Commission's approach to defining the product, geographic, functional and temporal markets are set out further below.
- 3.9 It is often difficult to define the boundaries of a relevant market with precision. While the analytical tools for defining markets set out in this Guideline provide a general guide as to the framework that will be used by the Commission for defining markets, generally the process of defining communications markets involves value judgments and a balancing of the available evidence.

Substitutability

- 3.10 The central concept in the Commission's approach to market definition is the concept of substitutability.
- 3.11 Substitutability refers to the ability for a customer 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.
- 3.12 The importance of the concept of substitutability in market definition is highlighted by 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."*
- 3.13 While the Competition Act does not govern the exercise by the Commissions of its powers under the CMA, the Commission considers that the definition of a market under that Act provides useful guidance in defining communications markets for the purposes of the CMA.
- 3.14 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 customers to switch from one product or geographic region to an alternative product or geographic region; and

(b) **supply-side substitution**, which refers to the ability of suppliers to switch from supplying one product or geographic region to another.

3.15 Analysis of both demand-side and supply-side substitution is required in order to define the relevant product and geographic dimensions of the market.² 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 to be substitutable on both the demand and supply sides.³ 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.

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

Demand-side substitution

3.17 Demand-side substitution refers to the willingness of customers to switch from one product or geographic source of supply to an alternative product or geographic source of supply in response to an increase in price, or decrease in the service or quality, of the product in question. The more willing a customer is to switch from one product to an alternative product, or switch from a product supplied in one location to the same product supplied in another location, in the event of a price increase or change in quality, the more likely it is that those products or locations will be considered to be part of the same market.

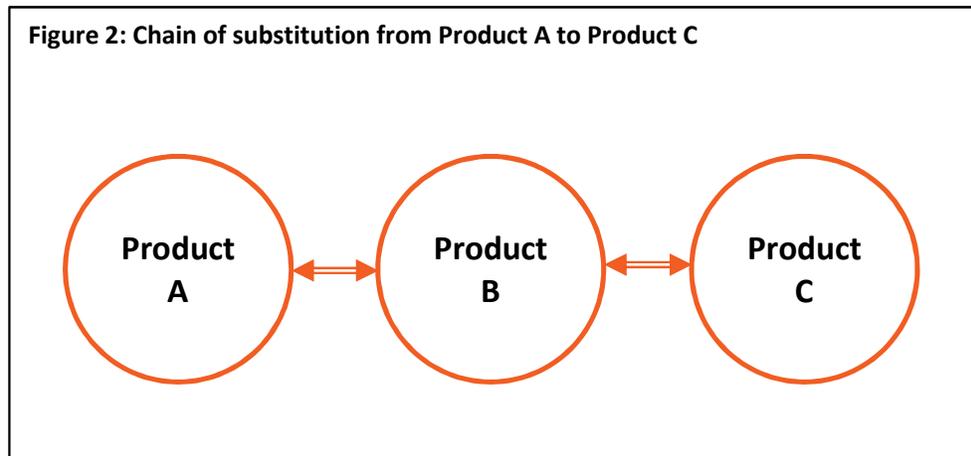
3.18 The focus of demand-side substitution is on customer preferences. Accordingly, factors such as the functions or characteristics of the product in question, the location of the product or service, price and switching costs will be of particular importance in the assessment of demand-side substitutability.

3.19 The extent to which products 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 customers may switch from one product to another in the event of a price increase or change in quality, does not necessarily mean that those products are part of the same market. On the other hand, even though some customers may not consider a high speed broadband service to be substitutable for a low speed broadband service, this does not necessarily mean that those services are not within the same market.

² Case 6/72 *Europemballage Corp and Continental Can Inc v Commission* [1973] ECR 215.

³ *Auskay International Marketing and Trade Pty Ltd v Qantas Airways Limited* [2010] FCAFC 96 at [42]. See for example the EC decision to define a market in terms of supply-side substitution in Case IV/M166 *Torrás/Sarrio OJ* [1992] C58/00, [1992] 4 CMLR 341.

- 3.20 In order to be considered part of a single market, the products or geographic regions must be 'close substitutes'. Two products (or a group of products) will be close demand-side substitutes if a significant proportion of customers are likely to switch from one product 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.
- 3.21 Similarly, a geographic region will be considered a close demand-side substitute for another geographic region if a significant proportion of customers are likely to switch from acquiring a product in the first region to acquiring the same product in another geographic region in response to a small but significant increase in price or a significant change in quality.
- 3.22 In some circumstances, two products that are not direct substitutes may be included in the same product market. This can occur where there are "chains of substitution" between a series of products or services. For example, if product A is a close substitute for product B, and product B is a close substitute for product C, all three products may form part of the same product market even if product A and product C are not close substitutes.



- 3.23 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 in the chain in relation to which a hypothetical monopolist supplier could profitably impose a small but significant non-transitory increase in price, such that all of the products in the chain do not form part of the same market.

Supply side substitution

- 3.24 Supply-side substitution refers to the ability of suppliers to switch from supplying one product or geographic region to another in response to an

increase in price. A product or geographic area may be considered substitutable for another product or geographic area on the supply side if, in response to an increase in the price of the first product, a supplier of a second product can switch its production or distribution quickly and without significant investment or incurring significant additional risk to supply the first product or geographic region.

- 3.25 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 advertising and marketing costs) will be of particular importance in the Commission's assessment of supply-side substitutability.
- 3.26 While there is some overlap between the two concepts, the concept of supply-side substitutability is to be distinguished from potential competition. A product or geographic region will be considered substitutable on the supply side if suppliers are able to respond quickly (such as in less than one year⁴) and without incurring significant additional costs in the event of a price increase. Potential entry, on the other hand, usually occurs over a longer period of time at significant cost, and is considered as part of the Commission's assessment of dominance.
- 3.27 For the purposes of defining relevant communications markets, the Commission will consider a product or geographic region to be substitutable on the supply side if there is strong evidence that suppliers readily switch to alternative products or change their distribution networks to supply alternative geographic regions in response to changes in price or quality.

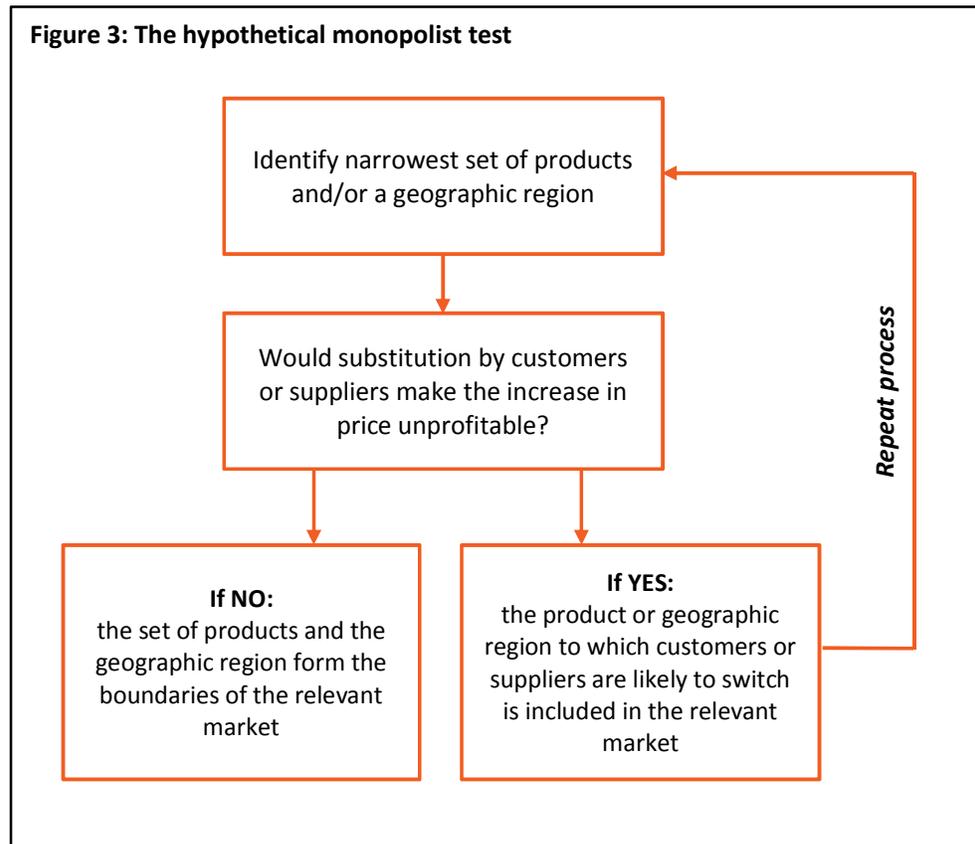
Hypothetical monopolist test

- 3.28 The standard analytical tool used by antitrust regulators and the courts to identify and evaluate substitution possibilities is the "the hypothetical monopolist test". This test is also known as the "SSNIP test" which means a "small but significant non-transitory increase in price".
- 3.29 The SSNIP test starts with identifying the narrowest possible set of products and/or a particular geographic region and then asks whether a hypothetical monopolist supplier could profitably impose a small but significant non-transitory increase in price (usually between 5 and 10%)⁵. If substitution by customers or suppliers would make the increase in price unprofitable, the product or geographic region to which customers or

⁴ For a product or geographic region to be considered substitutable on the supply-side, a supplier must be able to switch to that product or geographic region quickly. The Commission uses a period of one year in the assessment of supply-side substitutability.

⁵ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [247].

suppliers are likely to switch is included in the relevant market. The test is then repeated until a set of products and geographic regions are identified over which a hypothetical monopolist could profitably impose an increase in price. The smallest area in terms of products and geographic region over which the hypothetical monopolist can profitably impose the increase indicates the relevant boundaries of the market.



- 3.30 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, revenue and sales over a substantial period of time, which is rarely available in practice.
- 3.31 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 relevant communications markets. The test will therefore be used as an 'intellectual aid to focus the exercise'

as part of a qualitative assessment of the product and geographic dimensions of the market.⁶

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

The Commission's approach to defining communications markets

- 3.33 The Commission's approach to defining relevant communications markets for the purposes of the assessment of dominance will focus on the identification of the product, geographic and functional dimensions of the market.
- 3.34 The definition of a communications market may also require consideration of a time dimension, however, where relevant, the Commission will usually consider the time dimension as part of its identification of the relevant product market.

Product dimension

- 3.35 A product market is a collection of all of the products or services that are regarded as substitutable. Therefore not every communications product or service will sit within its own market, nor will all communications products and services fall within a general communications product market.
- 3.36 Definition of the product dimension involves the following two-step process:
- (a) identification of relevant products and services; and
 - (b) identification of the closest substitutes to those products or services.
- 3.37 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 communications market.
- 3.38 If there is no, or insufficient, demand-side substitutability, the second step will involve an investigation of whether supply-side substitutability between various products exists.
- 3.39 The following factors and evidence, where available and relevant, may be considered by the Commission as part of its investigation of the demand

⁶ See *Seven Network Limited v News Limited* [2007] FCA 1062 at [1786].

and supply side substitution possibilities for the purposes of defining relevant communications markets:

- (a) **Costs of switching (or any other barriers or disincentives to switching) between the product or service and potential substitutes.** If the costs (monetary or non-monetary) to a customer 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. For example, switching costs or disincentives may include: early termination charges, connection charges, the ability to port pre-existing telephone numbers to new providers, interrupted services while transitioning to new providers and the collateral loss of other bundled services.
- (b) **The function or end use of the product or service.** A product or service may be considered substitutable for another product or service by a customer if it has the same end use. For example, a customer may view a Pay TV service delivered over cable to be substitutable for a Pay TV service delivered over satellite as the two services have the same end use: the ability to enjoy Pay TV channels. However, it should be noted that just because two products have the same end use, does not necessarily mean that a customer would consider those two products to be substitutable. For example, a customer requiring a high speed broadband service (such as a business customer) may not view a low speed broadband service to be substitutable for a high speed broadband service.
- (c) **The technical characteristics of the product or service.** A product or service may have the same end use but may not be considered substitutable by customers due to its particular technical characteristics. For example, a copper network is capable of lower technical speeds than fibre-optic cables. For customers that require high-speed broadband services, services delivered over the copper network may not be considered substitutable for services delivered over a fibre-optic cable. The Commission will generally take a technology-neutral approach to market definition, except where the physical or technical characteristics of a particular technology are sufficiently distinctive so as to result in significantly different demand and supply side responses to that technology.
- (d) **The licence categories.** The Commission's communications licensing framework provides for licence categories which cover a broad range of communications products and services. It categorises licensees into the following: network facilities providers, network service providers, applications service providers and content applications service providers. While the Commission will take into account the licence categories when defining

communications markets, the categories will not be determinative. This is because the categories tie different layers of the communications and multimedia value chain and products which may not be substitutable.

- (e) **The facilities or services listed under the license categories.** Under the *Communications and Multimedia (Licensing) Regulations 2000*, specific facilities or services are identified under each of the licence categories. For example, a network service provider individual licence may be granted to a person for providing the following network services: bandwidth services, broadcasting distribution services, cellular mobile services, access applications service, space services, switching services and/or gateway services. As for the license categories, the individual facilities and services will be considered by the Commission (if relevant) to a market definition exercise, but will not be determinative. The services and facilities listed under the license categories are the functional services and facilities that may be supplied by a licensee, and do not necessarily reflect the economic markets in which licensees may compete. For example, licensees that supply gateway services also supply switching services as part of a broader interconnection service.
- (f) **Prices and pricing trends.** A comparison of the prices and pricing trends between two products can be a useful indicator of substitutability. For example, if the pricing trend data of product A shows a decreasing pricing trend, but the pricing data for product B shows an increasing price trend over a sustained period, this may suggest that the products are not substitutable. Further, the same pattern of pricing behaviour between two products may be consistent with those products being considered close substitutes.
- (g) **Past behaviour of buyers and suppliers.** Evidence of switching by suppliers or customers between products in response to a price increase may indicate substitutability.
- (h) **Views of licensees as to the substitutability of products or services.** While not determinative, the views of licensees on the products and services that they consider to be within the same market will be considered by the Commission.
- (i) **The extent to which suppliers take into account the pricing and/or marketing practices of suppliers of potential substitute products when making their own pricing and marketing decisions.** Evidence that suppliers consider the pricing of other products or services when setting the prices for their own products may suggest that the products are considered to be substitutable.

- (j) **Categories of customers and price discrimination.** A distinct group of customers for the relevant product may comprise a separate market if it is possible for a licensee to engage in price discrimination. Price discrimination refers to the practice of supplying the same product at different prices to different customers. It occurs when a supplier has the ability to identify those customers that have substitution possibilities in relation to the product or service in question and those customers that do not have such substitution possibilities, and there is limited ability for customers from one group to resell those products to customers in the other. For example, certain types of customers may not consider high speed broadband services to be substitutable for broadband services with lower speeds. If a supplier is able to readily identify those customers and therefore engage in price discrimination in relation to those customers, this may suggest that services supplied to those customers are in a separate market to services supplied to other customers.

3.40 A common feature of communications markets is the supply of bundled products. The term 'bundling' refers to the practice of supplying more than one distinct product, for example telephony and broadband services, as a single unit. While the supply of bundles in a market does not change the Commission's approach to market definition outlined above (that is, the concept of substitutability remains paramount), it does increase the number of products or services that the Commission may need to consider for the purposes of determining the boundaries of the relevant product dimension.

3.41 When defining a market which is characterised by bundled products, the Commission's assessment of the product dimension of the market will also involve analysing whether the bundle is substitutable for other bundles offered in the market (if any) and whether the bundle is substitutable for its individual components. For example, in relation to triple-play packages (telephony, broadband and subscription television services), the following may be considered for the purposes of defining whether there is a separate product market for the triple-play package:

- (a) whether the individual components of the bundle are viewed by customers as complementary parts of a single "bundled" product;
- (b) whether the bundle is substitutable (from the demand and supply side) for other bundles offered in the market, such as a telephony and broadband bundle; and
- (c) whether the bundle is substitutable for its individual components, e.g. for fixed line broadband services.

Temporal dimension

- 3.42 The time dimension of the market refers to temporal characteristics of the market, such as cyclical patterns of demand or innovation/inter-generational products.
- 3.43 For example, if services have differences in the level of demand during on-peak and off-peak times, it may be necessary to consider whether services supplied during peak times are in a separate market to services supplied during off peak services. Further, if customers can defer the purchase of an existing product because a new product may be introduced in the future, it will be necessary to consider whether the new product and the existing product form part of the same market.
- 3.44 Identifying the time dimension of the market will be of particular relevance in communications markets characterised by rapid innovation and technological change. In those markets, the Commission will also consider the extent to which products that may be introduced in the future are likely to be considered substitutable for existing products.
- 3.45 In determining the relevant time dimension of the market, the key issue for consideration is whether it is possible for customers or suppliers to substitute between time periods.
- 3.46 In relation to, for example, inter-generational products, this will require a consideration of the extent to which customers consider existing products to be substitutable for products that may be introduced in the future. Factors such as the period of time in which the new product is expected to be introduced and the characteristics of the new product compared to existing products will be of particular relevance.
- 3.47 The following factors will be considered by the Commission when defining the relevant temporal dimension of a relevant communications market:
- (a) **The timing and certainty of any proposed introduction of new products.** The greater the length of time expected for the introduction of future products to the market or the less certainty there is around the introduction of those future products, the less likely it is that future products will be considered substitutable for existing products. This is because the longer a customer has to wait for new products to be introduced to the market or the less certain it is, the less likely it is that customers can and will defer their purchasing decisions.
 - (b) **The extent to which customers are willing and able to defer purchase decisions.** Where customers are willing and able to defer purchase decisions due to the belief that better products will be introduced in the market in the future, this may suggest that future products are substitutable for existing products.

- (c) **Differences in pricing or price discrimination between time periods.** For example, if new products introduced in the market are supplied at a significantly higher price to existing products, this may suggest that new products are not considered substitutable for existing products. In general, the greater the difference in price between existing and new products and the longer the period of time that this differential exists, the less likely it is that the new products will be considered substitutable for existing products.
- (d) **The characteristics of the products supplied in different time periods.** If there are substantial differences in the characteristics of products supplied in one time period versus products supplied in another, this may suggest that the products are not substitutable.

Geographic dimension

- 3.48 The geographic dimension of a market refers to the geographic area in which the goods or services identified in the product dimension are substitutable. The geographic boundaries of a market may be local, regional, national or even global.
- 3.49 Like for the analysis of the relevant product market, the process of defining the relevant geographic market 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 supplied in those geographic regions will be considered substitutable by the Commission.
- 3.50 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. In particular, the analysis will identify whether the relevant communications markets are national in scope or whether, for example, there are separate State-based geographic markets.
- 3.51 In relation to communications services, there is typically a wide variation between the outcomes of demand-side substitutability and supply-side substitutability.
- 3.52 Demand-side substitutability typically exists over a very narrow geographic area. Customers are typically only willing to consume communications services, such as fixed telephony, broadband or pay television at a given location (e.g. their home or workplace).
- 3.53 Supply-side substitutability 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. For example, consider a hypothetical situation where Licensee 1 supplies fixed

broadband services in Kuala Lumpur, while Licensee 2 currently supplies broadband services in Putrajaya. If Licensee 1 raises prices above the competitive level and Licensee 2 is able to begin supplying services in Kuala Lumpur quickly and without significant investment, then Kuala Lumpur and Putrajaya will be considered part of the same market for fixed broadband services. Conversely, if Licensee 2 is not able to supply fixed broadband services to Kuala Lumpur customers quickly and without significant investment, then Kuala Lumpur and Putrajaya would constitute separate markets for fixed broadband services.

- 3.54 The ability for suppliers to move between geographic areas is likely to depend on the technology deployed. For example, it may be easier to use mobile technology to deploy services in additional areas than it would be to build a fixed network.
- 3.55 The following factors may be considered by the Commission when defining the relevant geographic dimension of a relevant communications market:
- (a) **The geographic area in which the relevant product or service is currently supplied.** In relation to, for example, broadband connection services, this will involve identifying the footprint of the licensee's network. Generally, a licensee cannot supply broadband services beyond the current reach of its network unless it invests in new capacity. For example, if distinct fibre network operators own networks and supply services in Peninsular Malaysia and in East Malaysia, this may be a strong indication that Peninsular Malaysia and East Malaysia are separate markets for fibre network services.
 - (b) **The cost of supplying products or services to other geographic areas.** In the example given above, it may be possible for fibre network operators in Peninsular Malaysia to supply to customers in East Malaysia by building new network capacity in East Malaysia. However, if an operator is unable to build new network capacity in East Malaysia quickly and without significant investment, this would suggest that East Malaysia may be a separate geographic market to Peninsular Malaysia.
 - (c) **Differences in the costs of supplying particular products or services in particular regions.** For example, if a retail service provider that acquires wholesale inputs from infrastructure/network operators faces significantly higher input costs in a particular region, this may suggest that there is limited supply-side substitutability between regions and defining a separate geographic market may be appropriate.
 - (d) **Costs to customers of purchasing services from other geographic areas.** It may be theoretically possible for a licensee to supply to a customer in a geographic area where they do not

have network capacity, as a result of interconnection or roaming agreements. However, the price of such services may be significantly more expensive than the price offered by local suppliers, which may suggest the existence of distinct markets.⁷

- (e) **Differences in pricing or price discrimination between geographic areas.** If a licensee has the ability to offer different prices in different geographic areas, this may suggest separate geographic markets.
- (f) **The existence of legal and other regulatory instruments that impact on the area in which products or services can be supplied or acquired.** In the communications sector, the geographic reach of licences, local by-laws governing the placement of infrastructure and other regulatory instruments are relevant factors when defining the geographic dimension of a market. The fact that licences are awarded on a national rather than regional basis may be a factor in determining that the market for a particular communications service is national rather than regional.⁸ Similarly, the fact that spectrum is allocated on a national rather than a regional basis may be a factor in determining a national rather than regional markets. Further, limitations on the ability of a licensee to access land or infrastructure in certain geographic locations is also likely to be a relevant factor.

Functional dimension

3.56 Defining the functional dimension of the market involves identifying the relevant level or levels of the vertical supply chain (e.g. the production, wholesale or retail level) 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 produced 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.

3.57 In general, each level of the supply chain will be defined as a separate functional dimension of the market. However, in circumstances where

⁷ This issue arose in Case No IV/M.1430 – Vodafone/Airtouch, where the European Commission held that the market for mobile telecommunications services in EU member states was national. The Commission considered whether the “increasing availability of roaming facilities” resulted in the geographic dimension of the market being “wider than national”, since a customer had the option of subscribing to an operator based in a foreign country and using its services in the customer’s home country through roaming. However, the Commission ultimately decided that the costs of “roaming permanently” on a foreign network would be significantly more expensive than purchasing services from a national network. Accordingly, the market for mobile telecommunications services was found to be national rather than supra-national or EU-wide.

⁸ In Case No IV/M.1430 – Vodafone/Airtouch, one of the factors considered by the European Commission in finding that the market for mobile telecommunications services was national was the existence of “prevailing national licensing and regulatory frameworks”.

there is a significant level of vertical 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.

- 3.58 Communications markets in Malaysia often involve complex supply chains involving a significant degree of vertical integration. Accordingly, identification of the relevant functional market will be particularly important when defining relevant communications markets.
- 3.59 The definition of the functional dimension of a communications market involves the following steps:
- (a) identification of the levels of the supply chain that are relevant to the particular product or service which is being considered;
 - (b) consideration of whether the functional levels of the supply chain are separable, such that a firm can engage in supply at one level of the market without also engaging in another level. Where functional levels of the supply chain are not 'separable', they will form part of the same functional market; and
 - (c) if the functional levels are separable, consideration of whether, in order to understand what goes on at the first functional level, the constraints imposed on a firm at the second functional level need to be considered.⁹
- 3.60 The concept of substitutability is not applicable to the process of defining the relevant functional dimension of a market. Stages of production or distribution in a supply chain are complementary, therefore considering whether one level of the supply chain is substitutable for another is not considered to be the appropriate test by the Commission.
- 3.61 In assessing whether functional levels of the supply chain are separable or subject to constraint, the Commission may take into account the following factors:
- (a) **The actual patterns of exchange between licensees at different functional levels of the market.**
 - (b) **The nature and extent of vertical integration.** In particular, the proportion of supplies between functional levels that are internal supplies against those that are supplies to third parties may be relevant. Where a market is characterised by a high degree of vertical integration, this can suggest that the levels of the market supplied by vertically integrated firms form part of a single market. However, the extent of vertical integration will not be the sole determinant of whether two functional levels form part of a relevant

⁹ *Seven Network Limited v News Limited* [2009] FCAFC 166 at [602].

market and the other factors noted below will also need to be considered.

- (c) **The efficiencies to be gained from vertical integration and the ability for non-vertically integrated firms to compete at one or more levels of the supply chain.** If an industry contains firms that can survive and prosper at one level of the supply chain without being vertically integrated, this will suggest that the level of the supply chain in question is a separate functional market. The level of vertical integration that already exists in a market may indicate they that there are efficiencies to be gained from vertical integration.
- (d) **Whether, in the event of a price increase, licensees would easily, profitably and quickly move from one level of the supply chain into another without significant cost.** For example, the retail and wholesale levels of the market may form a single functional market if, in response to an increase in wholesale prices, a retailer could vertically integrate into wholesaling quickly and without incurring significant cost. An assessment of the ease with which licensees can move between functional levels will involve considering, amongst other things, whether there are any obstacles to moving between different vertical levels and whether there are any special requirements (such as particular assets or specialisation) required to operate at each level of the supply chain.
- (e) **Whether demand from one relevant level of the supply chain affects the demand at another level.** For example, if competition at the retail level constrains the prices that a wholesaler could profitably charge, this may suggest that the retail level and wholesale level should form part of the same market.

3.62 While the actual patterns of supply between different functional levels will be relevant to the consideration of whether two functional levels form part of a single market, it is important to note that transactions between the relevant levels of the supply chain do not need to occur in practice for separate functional markets to be defined by the Commission. It may be sufficient for the purposes of defining a communications market that there be the potential for exchange. Defining a relevant functional market in which there is no current trade will be particularly important where an inability to gain access to an upstream input distorts or hinders competition in a downstream level of the market.

4 Dominant position

Meaning of a 'dominant position'

- 4.1 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, customers and ultimately of its consumers."*¹⁰

- 4.2 The ability to act independently is related to the level of competitive constraint facing the licensee in question. A licensee will be in a dominant position if it is not subject to effective competitive constraints in a communications market and has the ability to exercise substantial market power in that market.
- 4.3 A licensee will have substantial market power and therefore possess the ability to act to a significant extent independently of competitors and customers if it is capable of substantially increasing prices, either by directly increasing prices or decreasing output, above the competitive level for a significant period of time.¹¹
- 4.4 Accordingly, the assessment of dominance requires first an identification of the competitive constraints faced by a licensee in a communications market and then a consideration of the effectiveness of those constraints at limiting a licensee's power in that market.
- 4.5 The key sources of competitive constraint are existing competition, potential competition and customers. Regulation, such as access or price regulation, may also operate as a further source of constraint in some communications markets.

The Commission's approach to the assessment of dominance

- 4.6 In assessing whether a licensee is in a dominant position for the purposes of section 137 of the CMA, 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) barriers to entry and expansion;
 - (c) countervailing power of buyers; and

¹⁰ *United Brands Company and United Brands Continental v Commission* [1978] ECR 207 at [65].

¹¹ However, if prices are already at the monopolistic level, then a dominant firm would not possess the ability to increase prices as such increases would be loss-making. This is known as the 'Cellophane Fallacy'.

- (d) the nature and effectiveness of economic regulation (if any).
- 4.7 The Commission may derive the existence of a dominant position from either a single factor or from a number of factors that are not of themselves determinative.
- 4.8 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 MCMC will also take these into account.

Market structure and the nature of competition

- 4.9 The nature and degree of actual competition in a communications 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.
- 4.10 When analysing the nature and degree of actual competition in a communications market for the purposes of assessing dominance, the Commission will consider the following factors:
- (a) the relative market shares of each of the participants in the market in question; and
 - (b) the competitive dynamics in a market.

Market share

- 4.11 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.
- 4.12 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.¹² 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 a market.
- 4.13 However, the Commission recognises that market share can be an imperfect indicator for dominance. While a high market share often indicates a dominant position, a licensee with a significant share of the market may still be found not to be in a dominant position in that market due to other factors, including very 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 determined dominant where the potential exists for the continued prospect of competition from existing and new competitors. On the other hand, a

¹² *Hoffmann-La Roche & Co. AG v Commission* (C-85/76) [1979] ECR 461 at [41].

licensee which has a relatively low market share but is faced with less competition from only a few competitors in a market where barriers to entry are high, may be determined to be in a dominant position.

- 4.14 Therefore, a high market share will not, of itself, be considered by the Commission to be conclusive evidence that a licensee is in a dominant position.
- 4.15 Where possible, the Commission will consider changes in market share over time for the purposes of assessing dominance. The higher the market share and the longer the period of time over which that market share is held, the greater the likelihood of the existence of a dominant position. For this reason, the Commission will consider the durability of market share as an important indicator of dominance (where such information is available).
- 4.16 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.
- 4.17 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 relevant communications market.** The higher the market share held by a particular licensee in a communications 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. In general, a 'high' market share will generally be considered to be a market share of more than 40 per cent in a communications market, however this does not preclude a licensee with a market share of less than 40 per cent being found to be dominant in a market if it is not subject to effective competitive constraints.¹³
 - (b) **The changes in the licensee's 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.

¹³ The Commission notes that, in relation to the general market, the Malaysia Competition Commission (MyCC) has adopted a market share threshold of 60% as an indicator that an enterprise is dominant. Given the highly concentrated nature of communications markets in Malaysia, the Commission considers that a lower market share may indicate dominance in these markets.

- 4.18 In assessing market share, the Commission may also have regard to accepted measures of concentration, such as the Herfindahl Hirschman Index.¹⁴
- 4.19 In general, market shares will be calculated by reference to licensees' revenue figures. However, there may be other appropriate measures of market share. For example, share of subscribers or number of towers owned by a tower operator may also be used by the Commission to calculate market shares. 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

- 4.20 While market share figures may provide an initial indicator of the competitive dynamics in a communications market, the level of competitive constraint faced by a licensee in that market may not be revealed by an analysis of market share alone. Accordingly, in addition to barriers to entry and countervailing buyer power (discussed below), 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 competition in a downstream market. For example, competition at the retail level of a market may indirectly constrain the ability of a wholesale supplier to increase prices if any increase in price by the wholesaler would be unprofitable because (1) the wholesalers customers would pass on the wholesale price increase completely; and (2) end consumers are able to switch to an alternative supplier in the market (i.e. a supplier who is not supplied by and is unrelated to the wholesale supplier).
 - (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.
 - (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

¹⁴ 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.

as an effective constraint on the ability of a licensee to increase prices or reduce output.

- (d) **Innovation.** A market characterised by rapid technological change may mean that dominance will be short lived.

4.21 In addition to the above factors, the Commission will also consider the level of vertical integration present in the market in the assessment of dominance. 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. The level of vertical integration present in a communications market will be relevant to the consideration of both the nature of existing competition and potential competition.

Potential competition

4.22 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 into or expand operations in a 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.

4.23 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 no or very 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.

4.24 Barriers to entry and expansion come in many forms. Some barriers may be inherent features of a particular market. For example, this would include extremely scarce resources necessary for operation such as spectrum or limited capacity on satellites and under-sea cables. Other barriers may be due to competitor conduct in the market, such as entry into exclusive arrangements with suppliers.

4.25 In analysing whether a licensee is in a dominant position in a relevant communications 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 communications sector is characterised by high sunk costs and significant capital investment is often required for viable market entry. Telecommunications markets are an example of such a market where the high cost of building a communications network often serves as a barrier to entry or expansion by competitors.

- (b) **Access to facilities and inputs.** The communications sector is dependent on access to key resources such as infrastructure, spectrum and content. The potential difficulties associated with accessing these inputs may deter new entrants or existing participants from expanding their operations.
- (c) **Regulatory and legal requirements.** Regulatory and legal constraints such as onerous reporting obligations and obtaining licences may deter new entrants or impose additional burdens on existing participants looking to expand. In the Malaysian context, the Commission will consider the extent to which legal and regulatory factors such as the cost of obtaining a licence¹⁵ and complying with licence conditions, or local planning regimes¹⁶, may constitute a barrier to entry.
- (d) **Contractual restrictions.** The existence of long term supply contracts in a market can constitute a barrier to entry if it prevents or restricts potential entrants from accessing key inputs or customers. For example, long term contracts for sports broadcasting rights may constitute a high barrier to entry into the supply of sports channels. Preferential terms of supply enjoyed by an incumbent may also constitute a barrier to entry if those terms of supply are not offered to new entrants.
- (e) **Economies of scale and/or scope.** Significant economies of scale 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 customer 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 scope are common in communications markets due to the high fixed cost of network infrastructure and the low marginal cost of supply.
- (f) **Conduct by incumbents.** Incumbents can respond to new entrants by increasing their advertising, competing aggressively on price and in some cases by utilising anticompetitive strategies such as predatory pricing. For example, an incumbent telecommunications provider that offers below cost pricing for high speed internet at retail levels may create a high barrier to entry for other retail ISPs. Incumbents can also create information barriers or information preferences. For example, a wholesale operator that offers its subsidiaries real-time access to its databases (such as subscriber availability) but requires its competitors to lodge a

¹⁵ As at 28 February 2014, an individual licence requires a 10,000 ringgit application fee, an approval fee of 50,000 ringgit and a yearly licence fee of 0.5% of gross turnover or 50,000 ringgit, depending on which of the two is higher at the time.

¹⁶ Building new communications infrastructure and in some cases interconnection with existing infrastructure can often require lengthy approval and consent processes from all stakeholders including state governments and land owners.

formal request for the same information could creating a barrier to entry or expansion.

Countervailing buyer power

- 4.26 Countervailing buyer power exists where there are one or more customers in the market who are able to constrain the independence of the relevant firm, particularly its ability to set prices or terms of supply.
- 4.27 The countervailing power of buyers can function as a competitive constraint on a licensee, preventing it from behaving independently and from setting prices above the competitive level.
- 4.28 The Commission will consider the following factors to determine whether there is countervailing buyer power in a relevant communications market:
- (a) **The number and size of customers 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 customers to bypass the supplier by acquiring the products or services from another supplier.** This will include a consideration of the costs of switching suppliers. However, in some cases, it may be very difficult for customers to switch suppliers or sponsor new entry, even where the customers have strength in terms of market share. For example, a large fibre broadband provider who buys duct access (at Layer 0) from an infrastructure owner would have to make a large initial investment to deploy a fibre network within those ducts. Even though the fibre provider may be a very significant customer for the duct access provider, the fibre provider would face very high costs to switch to another duct access provider (i.e. it would have to physically move its network to a competitor's ducts). The high cost of switching suppliers means that the fibre broadband provider is unlikely to have significant countervailing power.
 - (c) **The ability for customers to bypass the supplier by 'sponsoring' market entry.** A customer with significant financial resources may wield significant countervailing power in a market if it can 'sponsor' a new entrant to enter the market.
 - (d) **The ability of the customer to vertically integrate to bypass the supplier.** For example, two mobile network operators (MNOs) may each own a physical network and compete with each other in Area A. However, in Area B, the first MNO may have no physical coverage and may 'roam' on the network of the second MNO. In other words, the first MNO becomes a buyer of the second MNO in Area B. If the first MNO has the ability to easily set up a parallel

mobile network in Area B, this may constrain the supply behaviour of the second MNO, whose ability to raise prices or impose favourable access terms would be affected by the first MNO's 'threat' of entering the market in Area B.

- (e) **The switching costs borne by customers in the market.** The switching costs of customers should be compared against the switching costs of suppliers. If suppliers face a higher switching cost than customers, this could indicate the existence of countervailing buyer power.

Economic regulation

- 4.29 The effect of access regulation under the Access List will be considered by the Commission in order to determine whether a licensee is being sufficiently constrained in a communications market. The existence of access regulation will not prevent a licensee from being determined to be in a dominant position if it does not provide an effective constraint on the ability of a licensee to act independently in a market. For example, a licensee which is subject to regulated pricing may still have the ability to act independently in the market by restricting output. Further, access regulation may only constrain the activities of licensees in relation to particular products supplied in a market rather than more generally in the market. For example, a licensee may be subject to regulated pricing for only one component of a bundled product or in particular areas.

Joint or collective dominance

- 4.30 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.
- 4.31 The CMA does not directly contemplate the existence of joint or collective dominance in a communications market. However, the Commission may determine that a licensee is dominant in a communications market exhibiting oligopolistic characteristics.
- 4.32 Finally, co-ordination between licensees in the form of an 'understanding, agreement or arrangement' which provides for rate fixing, market sharing, boycott of a supplier of apparatus or boycott of another competitor is absolutely prohibited under section 135 of the CMA.

Corporate groups

- 4.33 The Commission takes a broad view of the meaning of "licensee" for the purposes of section 137 of the CMA so that a licensee is responsible for any intra-company arrangements within the licensee's group of companies. The licensee should also be responsible for intra-company transactions, including transactions where a non-licensed company acquires content and

on-supplies that content to the licensee (who is a member of the same group of companies).

- 4.34 This approach is similar to the approach taken in the European Union (**EU**). A parent company and any subsidiaries over which the parent exercises “decisive influence” are deemed to be part of the same undertaking for the purposes of the EU competition rules. Where there is a finding of dominance, this applies to the undertaking as a whole. Moreover, where a subsidiary is found to have infringed the competition rules, the parent company can be held liable for the subsidiary’s conduct in certain circumstances. The same approach applies under the EU telecoms rules. Thus, in markets in which BT, for example, has been designated as having Significant Market Power (SMP), this SMP designation applies to BT plc and any subsidiaries. Ofcom uses the definitions of parent and subsidiary set out in UK company law, rather than the EU concept of “decisive influence”. However, the effect is broadly the same.
- 4.35 The Commission will take into account all of the licensee’s group companies for the purposes of determining dominance under section 137 of the CMA and a determination that a licensee is in a dominant position will apply to all of the licensee’s group companies.