|  |
| --- |
|  |
| **Guidelines** |
| **Market Definition and Competition Assessment Guidelines****Version 1.0** |
|  |
| **Issue Date: 30 September 2010** |

**Version Control:**

|  |  |  |
| --- | --- | --- |
| **Version:** | **Issue Date:** | **Reason for Issue:** |
| 1.0 | 30 September 2010 | Initial Issuance |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |

**TABLE OF CONTENTS**

1. LEGAL REFERENCES………………………………………4

2. OVERVIEW ……………………………………………………4

**3. DEFINITIONS………………………………………………….5**

**4. PURPOSE……………………………………………………...5**

**5. SCOPE………………………………………………………….6**

**6. SPECIFIC SCOPE FOR EX ANTE MARKET REVIEWS....7**

**7. SPECIFIC SCOPE FOR EX POST INVESTIGATIONS......9**

**8. APPROACH TO MARKET DEFINITION.............………....11**

**9. APPROACH TO COMPETITION ASSESSMENTS...........20**

1. **Legal reference**

## Article 12 of *Federal Law by Decree No. (3) of 2003*, as amended (the “**Telecommunications Law**”) establishes the Telecommunications Regulatory Authority (“**TRA**”) as the competent body to oversee the telecommunication sector in the UAE.

## Additionally, Article 14(4) of *Federal Law by Decree No. (5) of 2008*, amending the provisions of *Federal Law by Decree No. (3) of 2003*, specifically grants to the TRA the power to issue regulations, instructions, resolutions and procedures, “regulating and ensuring competition in the telecommunications sector...”.

1. **Overview**

## On 30 December 2009, and as amended on 30 September 2010[[1]](#footnote-2), the Telecommunications Regulatory Authority (TRA) issued its competition framework for the promotion and protection of competition in the United Arab Emirates (UAE) telecommunication sector through both *ex ante* and *ex post* intervention. The framework consisted of three regulatory instruments:

* + - Competition Safeguards Regulatory Policy, Version 1.1 (“**Competition Safeguards***”*);
		- Ex ante Competition Safeguards Regulatory Policy, Version 1.1 (“**Ex ante Competition Safeguards***”*); and
		- Ex post Competition Safeguards Regulatory Procedures, Version 1.1 (“**Ex post Competition Safeguards***”*).

## The Competition Safeguards set out the general principles for market definition and gave examples of both anti-competitive agreements and misuses of Market Power. It also set out conditions for exemptions that may apply to these anti-competitive agreements and misuses of Market Power.

## The Ex ante Competition Safeguards set out the basis for introducing further *ex ante* measures, or adapting or removing existing *ex ante* measures contained in the Regulatory Framework, as the TRA determines that such a need arises.

## The Ex post Competition Safeguards set out the processes and procedures to enable the TRA to address, on a case-by-case basis, specific allegations of anti-competitive behaviour.

1. **Definitions**

## The terms, words and phrases used in these Guidelines shall have the same meaning as is ascribed to them in the Competition Safeguards unless these Guidelines expressly provides for otherwise, or the context in which those terms, words and phrases are used in these Guidelines requires otherwise.

1. **Purpose**

## In line with Article 4 of the Competition Safeguards and Article 4.2 of the Ex ante Competition Safeguards, the purpose of these Guidelines is to outline a comprehensive set of principles that the TRA intends to apply in:

* + - defining Relevant Markets in the UAE telecommunications sector for the purpose of an *ex ante* market review and/or an *ex post* competition investigation; and
		- undertaking a competition assessment of these Relevant Markets.

## The TRA has issued these Guidelines to serve as an indicative framework for the TRA, relevant Entities and other interested stakeholders. As such, the TRA would expect to follow these Guidelines in the process of defining a market or undertaking a competition assessment. However, the TRA cannot predict all market circumstances in advance and, therefore, retains the right to depart from these Guidelines where the TRA considers that the circumstances warrant such a course of action. If the TRA considers it appropriate to depart from these Guidelines, the TRA will outline its reasons for doing so on a case-by-case basis at that time.

1. **Scope**

## The TRA will use these Guidelines for both *ex ante* purposes and *ex post* purposes. Whilst the principles that the TRA will apply in *ex ante* and *ex post* cases are similar, the application of these principles can differ, reflecting the differing nature of *ex ante* market reviews and *ex post* competition investigations. For example when conducting an *ex ante* market review, in order to determine whether it is appropriate to maintain, expand or withdraw existing, and/or introduce additional *ex ante* obligations, the TRA will adopt a forward-looking view of the Relevant Market and will take into account how competition may develop over the period of the review. In contrast, *ex post* competition investigations are conducted in response to specific concerns or allegations related to possible anti-competitive behaviour and are, therefore, retrospective in nature.

## As set out in Figure 1 below, both *ex ante* market reviews and *ex post* competition assessments will involve a similar set of steps, albeit different processes take place within these steps. In an *ex ante* market review, the three steps (market definition, competition assessment and remedy design) must happen sequentially and the TRA considers it is important to get the input of stakeholders on these steps. At a minimum, the TRA will therefore seek to consult with concerned parties after both the market definition and the competition assessment steps of its review are completed.

## In contrast, as Figure 1 also shows, because the focus of the TRA’s *ex post* investigation will likely involve a concern or allegation of anti-competitive behaviour at a specific point in time, for any misuse of Market Power to be established, the TRA will need to ascertain that an anti-competitive practice has been entered into in a specific market for the Telecommunication Service or related product by an Entity with Market Power in that market. The TRA will therefore, undertake its market definition/competition assessment/remedy exercises simultaneously as it assesses potential anti-competitive behaviour. The TRA may consult on its findings with respect to an *ex post* investigation depending on the extent of the investigation and likely implications of any associated remedies.

Figure Applying the Guidelines in *ex ante* and *ex post* circumstances


## **Specific scope for ex ante market reviews**

## Following Article 6.1 of the Ex ante Competition Safeguards, “Any Entities designated as having Market Power in a Relevant Market may be subject to *ex ante* obligations additional to those in place under the Regulatory Framework at the time of the designation”. Further, under Article 6.2 of the Ex ante Competition Safeguards, “The nature of these additional obligations shall depend on the outcome of an assessment of the level of competition in the Relevant Market.”

## For *ex ante* purposes, the objectives of the market review exercise will be to determine whether an Entity with Market Power is at that time and during the period covered by the review able to misuse its Market Power. The starting point for the *ex ante* market review will be a market definition exercise where the TRA typically expects to begin with a broad group of Telecommunication Services or related products, and then apply the principles described in these Guidelines to determine whether the group of Telecommunication Services or related products should be further disaggregated or aggregated as a Relevant Market, taking account of the materiality test described in Section ‎8.20 of these Guidelines.

## Following the completion of the *ex ante* market definition exercise the TRA will conduct a competition assessment of each of the defined Relevant Markets to assess the effectiveness of competition in each of these Relevant Markets and to determine if any Entity holds a position of Market Power. To assess the effectiveness of competition, the TRA expects to examine existing and potential competition, as well as other possible competitive constraints in the Relevant Market.

## The final step of an *ex ante* market review will be the determination of appropriate *ex ante* obligations, if any, to be imposed in a Relevant Market and the appropriate level of those *ex ante* obligations to promote the efficient functioning of the Relevant Market.

## In maintaining or revising existing *ex ante* obligations, or in imposing new obligations, the TRA considers *ex ante* obligations should be:

## Transparent – any *ex ante* obligations to be imposed should be clearly defined and effectively communicated to all relevant Entities;

## Consistent – any *ex ante* obligations to be imposed should be consistent with the objectives of addressing the competition concerns identified in the competition assessment;

## Targeted - any *ex ante* obligation to be imposed should be the minimum obligations necessary to remedy the competition concerns identified in the competition assessment; and

## Proportional – any *ex ante* obligations to be imposed should be proportional to the harm to competition or other policy objectives sought to be remedied or mitigated by those *ex ante* obligations.

In deciding whether or not to impose *ex ante* obligations the TRA may also consider how competition in a Relevant Market may differ in the absence of imposing these *ex ante* obligations. Finally, the TRA may also reduce the scope or altogether withdraw existing *ex ante* obligations where it considers a market to be effectively competitive[[2]](#footnote-3) or prospectively competitive[[3]](#footnote-4).

##

## The TRA considers that it is important to conduct an *ex ante* market review exercise on a regular basis. This will ensure that any changes in the competitive conditions in the sector are taken into account. Such periodic reviews will consider *inter alia* whether any Relevant Markets[[4]](#footnote-5) still exist or have changed, whether any new Relevant Markets have emerged, whether any existing *ex ante* obligations should be amended or removed, and whether any new *ex ante* obligations should be introduced.

## The TRA recognises that a market review exercise is a time consuming and resource intensive activity for all concerned parties. Thus, the TRA believes that periodic reviews should not occur at such high frequency so as to overburden the resources of the industry or indeed the TRA itself. Equally, the TRA recognises that Entities require a reasonable level of regulatory certainty to be able to manage their businesses efficiently.

## Taking the above factors into consideration, the TRA considers that it will undertake an *ex ante* market review exercise once every three years. However, it does reserve the right to conduct an *ex ante* market review at other times should the TRA believe that the competitive circumstances of the sector have changed so significantly and warrant such a course of action.

## **Specific scope for ex post competition investigations**

## Article 6.1 of the Competition Safeguards specifies that “An Entity with Market Power in a Relevant Market shall not misuse its Market Power in a way which does or may restrict, prevent, or distort competition in that Relevant Market or any other Relevant Market”. Therefore, the objective of an *ex post* competition investigation is to both establish the Relevant Market which is currently being affected (or had been affected) by alleged anti-competitive behaviour, and to determine if the Entity who has (or had) Market Power in the Relevant Market is misusing (or at the time of the alleged behaviour misused) its Market Power.

## The TRA may commence an *ex post* competition investigation as the result of a complaint (from another Entity or a consumer) or on the TRA’s independent initiative. While market definitions developed for *ex ante* purposes may provide a useful starting point, for an *ex post* competition investigation the TRA expects to determine what are the Relevant Markets on a ‘case-by-case’ basis.

## The starting point for an *ex post* market definition exercise, carried out to investigate an alleged anti-competitive behaviour, is the narrow group of Telecommunication Services or related products which are the focus of the alleged behaviour. The TRA will examine, using the principles set out in these Guidelines, whether these Telecommunication Services or related products constitute a Relevant Market on their own, or whether the Relevant Market should be expanded to include any substitute (or complementary) Telecommunication Services or related products.

## Following the completion of the *ex post* market definition exercise the TRA will undertake a competition assessment of the defined Relevant Market to assess whether or not the Entity which is the subject of the investigation has (or had, over the relevant period) a position of Market Power in the Relevant Market. If the TRA concludes that the Entity has (or had, over the relevant period) a position of Market Power, it will then assess if the Entity has misused that Market Power and over what time period the misuse has occurred.

## If the TRA concludes that the Entity has misused its Market Power in the Relevant Market, the TRA will then consider what actions it should take as appropriate, including, but not limited to imposing sanctions against that Entity. Such sanctions would be determined in accordance with the principles set out in section ‎6.5 of these Guidelines and may include a fine as stipulated by the Telecommunications Law, its Executive Order or the Regulatory Framework and any other remedies or measures which the TRA considers to be appropriate and objectively justified according to the particular circumstances of the case.

## Finally, the TRA considers that the process for investigating alleged anti-competitive agreements prohibited under Article 5.1 of the Competition Safeguards may differ from the process described above for investigating potential misuse of Market Power, the principle difference being the need to determine whether the Entities subject to the agreement had Market Power in the Relevant Market. As set out in Article 5.1, and subject to the exclusions in Article 5.3 of the Competition Safeguards, an agreement or understanding is anti-competitive if it had or could have had “the objective or effect … to restrict, prevent, or distort competition in a Relevant Market”. Therefore, when investigating such agreements or understandings on an *ex post* basis, the TRA will define the Relevant Market that is currently being affected (or may have been affected) and then assess the conduct in question. If the TRA concludes that an anti-competitive agreement has been entered into, it will then consider what actions it should take, as appropriate.

1. **Approach to market definition**

## Market definition is not an end in itself but a fundamental prerequisite to determining the level of competition in a market. The TRA’s general approach to market definition will be to use the principles of demand-side and supply-side substitutability to define the relevant economic market in a number of different dimensions. This section sets out the TRA’s approach.

Overall framework for market definition

## Telecommunication Markets are defined in terms of a set of Telecommunication Services or related products and a geographic area in which competition occurs. In general, this is determined by identifying the constraints on the price setting behaviour of Entities. These pricing constraints may come from the existence of demand-side substitution and/or supply-side substitution.

## Demand-side substitution looks at the extent to which prices for the Telecommunication Services or related products are constrained by the availability of other Telecommunication Services or related products. Demand-side substitution can typically provide a more immediate competitive constraint than supply-side substitution or the threat of potential competition.

## Supply-side substitution looks at the extent to which the price for a Telecommunication Service or related product is constrained by the ability of an Entity (or a new entrant) to switch to the production of the relevant Telecommunication Service or related product in the short term in response to the increase in its price, without incurring significant additional costs or risks. Even in the absence of demand-side substitution, supply-side substitution may still provide a constraint on the ability of an Entity to increase its prices. In other words, supply-side substitution is relevant to the definition of a market even in the absence of demand-side substitution. Nevertheless, if a Telecommunication Service or related product is included within the market due to evidence of demand-side substitution then evidence of supply-side substitution would not be required to show that the Telecommunication Service or related product is in the same market.

## In order to determine the nature and extent of demand-side and supply-side substitution, the TRA will undertake quantitative tests and qualitative assessments, depending on the available data and taking account of the resources required for the different types of tests.

SSNIP test

## The most common approach to quantifying the level of demand-side and supply-side substitution is to apply the small but significant non-transitory increase in price (SSNIP or hypothetical monopolist) test.[[5]](#footnote-6) The SSNIP test also provides a framework for undertaking a more qualitative analysis where there is insufficient data or the assumptions underlying the formal SSNIP test do not hold (see Section ‎8.9).

## The TRA will typically initiate its SSNIP test by considering a narrow range of Telecommunication Services or related products and then expand the definition of the Relevant Market to include all the substitutable Telecommunication Services or related products that are subsequently identified. The methodology for the SSNIP test is illustrated in Figure 2 below.

Figure Illustration of the SSNIP test


## Assessing the extent of possible demand-side and supply-side substitution is key to the market definition exercise. Where there is sufficient data, the TRA will consider whether it can determine quantitatively the extent to which two or more Telecommunication Services or related products are in the same market.

## However, market definition exercises in the telecommunication sector are often not conducted exclusively using quantitative analysis. This is a consequence of the difficulty of accurately estimating quantitatively the degree of substitution between Telecommunication Services or related products due to data and informational limitations. Further, the SSNIP test assumes that prices are set at the competitive level and this may not necessarily be the case in telecommunications markets like those in the UAE where prices are subject to regulatory intervention. Therefore, where necessary, the TRA may rely on qualitative (rather than quantitative) assessments of the degree of demand-side and supply-side substitution.

## **Assessment of demand-side substitution**

## In order to determine the extent to which Telecommunication Services or related products are demand-side substitutes, the TRA will consider their characteristics as well as the ability of consumers to switch to using a different Telecommunication Service or related product. In particular, if it takes consumers an extended period of time to react or if switching costs are high (for example, because of minimum contract duration or the need for new or expensive customer premises equipment) then the level of demand-side substitution will be limited. The TRA would usually consider a one year period as the relevant timeframe in defining the market boundaries for the purpose of assessing demand-side substitutability.

## For the Telecommunication Services or related products in question an assessment of demand-side substitution would include (but not be limited to) an analysis of:

* + - historic and forecast trends in the demand (including for example, analysis of trends in the penetration of the Telecommunication Service or related product);[[6]](#footnote-7)
		- relative price levels and the extent to which consumers may choose one Telecommunication Service or related product over another in response to changes in these relative prices levels;
		- quality of service levels;
		- the extent to which the relevant Telecommunication Service or related product is able to be replicable by, or substituted for, another Telecommunication Service or related product. Including:
			1. the perception of customers, or potential customers, as to the degree of substitutability of the relevant Telecommunication Service or related product with other Telecommunication Services or related products;
			2. the contract duration of the Telecommunication Service or related product (and any equipment associated with it such as customer premise equipment) compared to the contract duration of other Telecommunication Services or related products; and
			3. whether it is bundled or tied with other Telecommunication Services or related products;
		- Importance of switching costs relative to the value of the Telecommunication Service or related product, including actual costs (such as having to buy new equipment or a contract termination fee) and the inconvenience of switching between suppliers (such as the time/monetary value taken to switch).

Assessment of supply-side substitution

## Supply-side substitution should only look at the possible substitution from Telecommunication Services or related products which, as a result of the demand-side analysis, have not been defined to form part of the Relevant Market. For example, while consumers may not perceive a long distance call to be a substitute for a local call (and vice versa), it may be possible and profitable for an Entity which provides long distance calls to provide local calls if the price of local calls increased. If this is the case, it may suggest that local calls and long distance calls form part of the same market.

## In order to determine the extent to which there is supply-side substitution, the TRA will consider whether another Entity (or a new entrant) would be able to switch to the production of the relevant Telecommunication Service or related product in the short term (within one year) in response to an increase in available profits in the Relevant Market. Switching of production may occur through redeployment of existing capacity or from expansion of production, both of which could involve small levels of investment. If it takes an Entity (or a new entrant) a long time to react (typically more than one year) or if they would incur significant sunk costs[[7]](#footnote-8) relative to the return they would be able to earn, then the Entity (or a new entrant) would be less willing to switch production and there would be limited supply-side substitution.

## Relevant information to assess the extent of supply-side substitution would include (but not be limited to):

* + - historic evidence of entry into the market by a new entrant;
		- information from existing Entities or potential new entrants on their ability to switch production, the likely costs and the time it would take; and
		- evidence of existing Entities having spare capacity.

Relevant dimensions of market definition

## When defining a Relevant Market for the purposes of a competition assessment, the TRA will take into account the factors set out and described in the following sub-sections:

### Product market definition

### The relevant product market consists of all the Telecommunication Services or related products which consumers regard as interchangeable or substitutable for one another because of, among other factors, the Telecommunication Services’ or related products’ characteristics, prices and intended use. Even though Telecommunication Services or related products may be technically similar, if they are not perceived by consumers as being substitutes then unless there is supply-side substitution, they may not form part of the same market.

### Functional level of the market

### The functional level of the market refers to whether the Telecommunication Services or related products are sold to wholesale or retail customers. Market characteristics will typically differ along the supply chain in the telecommunication sector. This is because both the level of investment required to enter and compete as well as the nature of investment differs (for example, network investment would typically be expected to be a sunk cost). Substitution possibilities in downstream parts of the supply chain may have an impact on behaviour in upstream parts. The relationship between retail and wholesale markets is described in further detail in Sections ‎8.16 and ‎8.17.

### Geographic market definition

### Geographic dimensions define the extent to which competitive conditions and constraints are significantly different across geographic areas. Defining geographic markets may be important because individual Entities could hold Market Power in a particular geographic area (even where that area is relatively small), but may not do so where the UAE is regarded as a whole. For example, no or poor network coverage within a specified geographical area will limit the extent to which a consumer is able to switch between Telecommunication Services or related products provided by different Entities. Alternatively, an Entity may only provide a Telecommunication Service or related product on a certain call route. Further, supply side substitution may be limited by Telecommunications Licenses or other barriers to entry such as exclusive legal, contractual or other types of arrangements which limit access by competing Entities to a defined geographical area.[[8]](#footnote-9)

### In determining whether a market should be defined on a more narrow basis than a national market, the TRA will consider the extent to which demand-side and supply-side substitutability differ by geographic area based on the factors set out in Sections ‎8.10 to ‎8.14. Other factors the TRA will also consider include (but are not limited to):

* + - * the extent to which pricing differs between geographic regions and how it would differ in the absence of regulatory obligations to price on a national basis;
			* the availability of different Telecommunication Services or related products in different geographic regions;
			* the number of Entities providing the relevant Telecommunication Service or related product in each region; and
			* the barriers to entry arising from exclusive legal, contractual or other types of arrangements between a land developer, lessor, lesser, tenant in or manager of multi-tenant commercial or residential premises and an Entity, or unilateral action taken by one of the former, the effect of which is that only that Entity has access to those premises for the purposes of providing Telecommunication Services or related products to customers within those premises.

### Customer type

### The degree of demand-side and supply-side substitution (and therefore the extent of any competitive constraints) may vary between different customer segments. For example business customers may have different demand characteristics to residential customers and prepaid subscribers may have different demand characteristics to post-paid subscribers. A Telecommunication Service or related product for a business customer could be in a separate market, from that market which addresses the demands of residential customers, if a residential customer cannot switch to the Telecommunication Service offered to business customers or if the supplier of the business Telecommunications Service could not switch to providing the service to the residential customer within a reasonable timeframe.

### Temporal scope

### The definition of a market may change over time as demand-side and supply-side substitution develops as a result of the changing industry environment (for example, new technological developments, the introduction of new regulatory obligations and changing customer requirements).

### Bundling and tying

### Bundling refers to the practice of selling more than one Telecommunication Service or related product at a discount as compared to purchasing those Telecommunication Services or related products separately. Tying refers to the practice of making the sale of one Telecommunication Service or related product conditional on the purchase of another Telecommunication Service or related product. If Telecommunication Services or related products are sold together in a bundle then it is possible that even though the individual Telecommunication Services or related products within the bundle may not be substitutes, the bundle itself could be considered a Telecommunication Service or related product in its own right for the purposes of defining the market. In such circumstances, the market definition exercise may take account of both the demand-side and supply-side characteristics of the bundle and its component Telecommunication Services or related products.

Relationship between retail and wholesale markets

## When defining markets it is important to consider the different functional level of both wholesale and retail markets and to understand the link between them. Logically, retail markets are defined first, with wholesale markets defined in relation to these retail markets. This is because the demand for a wholesale input is derived from the demand for a retail Telecommunication Service and related product which it supports. Therefore, the definition of a retail market is likely to affect the assessment of whether Market Power in a related wholesale market exists, since the relevant wholesale market will generally be as broad as the demand-side substitutes in the Relevant retail Market[[9]](#footnote-10) servicing retail customers.

## Specifically, when defining a Relevant retail Market for an *ex post* competition investigation, the TRA will adopt a static approach by taking into account the impact of existing remedies imposed in related wholesale markets on the level of competition in the Relevant retail Market (for example, availability of bitstream access, or unbundled local loop). This is because the *ex post* market definition and competition assessment investigations should reflect the actual competitive constraints facing the Entity with Market Power in the period covered by the investigation.

## In contrast, when defining a Relevant retail Market for an *ex ante* market review, the TRA will adopt a dynamic approach by excluding from the definition process all existing remedies imposed in related wholesale markets. This is necessary as to do otherwise could lead to an endlessly circular process of definition[[10]](#footnote-11), whereby the wholesale market definition would depend on a retail market definition, which in turn would depend in part on the existence of remedies imposed in related wholesale markets[[11]](#footnote-12).

Narrow markets for *ex ante* purposes

## For *ex ante* purposes, a formal application of the market definition approach described above may lead to the definition of a number of narrow economic markets. For example, calls between particular customer groups, calls at different times of the day and different types of calls (such as calls to each international destination) could all possibly be defined in separate markets.

## However, when defining markets for *ex ante* purposes, the TRA believes that it is appropriate also to consider the development of the sector and the regulatory regime. The TRA therefore expects to apply a “materiality” test to determine whether the benefits of defining product markets on a narrow basis demands such an approach. In particular, there may be little reason to define a number of very narrow markets if:

* + - the competitive conditions for a set of Telecommunication Services or related products provided in the set of different markets are likely to be very similar;
		- the same Entities are found to be offering the same, or very similar, Telecommunication Services or related products in the set of different markets; and
		- it is reasonable to expect that the situations above will continue to prevail.
1. **Approach to competition assessments**

## This section sets out the TRA’s approach to assessing the level of competition and the assessment of Market Power in a Relevant Market.

## Following the definition of the relevant economic markets, the next step in the market review process will be to analyse the extent of competition in the market and whether there are any Entities with Market Power in a particular Relevant Market.

## To assess if any Entity has Market Power in a Relevant Market, the TRA will analyse both the level of existing competition and the level of potential competition, as well as other competitive constraints observed in the Relevant Market. For *ex post* purposes, the relevant timeframe will usually be the period of the alleged anti-competitive behaviour. For *ex ante* purposes, the relevant timeframe will usually be one year. Where competition is not considered to be effective currently or prospectively, one or more Entities in the Relevant Market could be found to have Market Power. This process is summarised in Figure 3 below.

Figure 3 Approach to a competition assessment

Analysis of existing competition in a Relevant Market

## The analysis of existing competition for both *ex ante* and *ex post* purposes will consider the extent to which existing competitors or near competitors (that is, other Entities providing similar products) in the Relevant Market provide a competitive constraint on other Entities in the Relevant Market, thus preventing any one Entity from acting to an appreciable extent independently of competitors, customers and consumers.

## **Market Share**

## The TRA will take the development, over time, of an Entity’s Market Share as the starting point for assessing the degree of an Entity’s Market Power in a Relevant Market. In particular, the TRA will keep in mind the following:

* + 1. The Market Share of an Entity can be measured in a number of different ways. For example, it can be measured using the proportion of subscribers, lines, data, minutes, sales (revenue) or capacity the Entity accounts for in the Relevant Market. The TRA will consider a range of measures depending on the context.
		2. Article 5.3 of the Competition Safeguards states that “It shall be a prima facie but rebuttable assumption that an agreement of understanding will not contravene Article 5.1 [relating to formal or informal anti-competitive agreements or understandings], if the combined Market Share of all parties to the agreement or understanding does not exceed 15% in any of the Relevant Markets affected by the agreement or understanding.”
		3. Article 6.3 of the Competition Safeguards states that it “shall be a prima facie but rebuttable presumption, that an Entity does not have Market Power in a Relevant Market if its Market Share does not exceed 40% in the Relevant Market”.
		4. On the other hand, a relatively high Market Share does not necessarily imply that an Entity has Market Power in a Relevant Market. For example, an Entity with a relatively large Market Share may not possess Market Power where barriers to market entry are very low and the perceived threat of entry relatively high (see Sections ‎9.7 to ‎9.9 of these Guidelines, which describes how potential competition can limit Market Power). In addition, where markets are emerging or expanding more quickly, high Market Shares are less indicative of Market Power than in more mature or slow-growth markets.

Additional factors

## As mentioned above, because a high Market Share in isolation does not necessarily confirm the existence of Market Power in a Relevant Market, where information is available the TRA will, in addition to Market Share analysis, consider a range of other factors for both *ex ante* and *ex post* purposes. These factors include those listed in Article 5.2 of the Ex ante Competition Safeguards, the most important of which are further elaborated under the headings below.

### Number and relative size of competitors in the market

### Changes in the number and relative size of Entities over time could indicate that there is competition in a market. If an Entity has a stable or increasing Market Share then this could indicate that the Entity has Market Power in a Relevant Market. The TRA would consider this with other factors. For example, an increasing Market Share may not be associated with lasting Market Power if the Entity has a technological advantage that might be expected to be overcome relatively easily or over a short period of time.

### Revenues and assets of the relevant Entity and capacity constraints

### The TRA will use this information to assess the extent to which an Entity or Entities are able to replicate the Telecommunication Services or related products and prices offered by other Entities. For example, if an Entity has spare capacity in its network then it may be better able to compete in the Relevant Market. Conversely, if an Entity does not have capacity on its own network, or uses access to another Entity’s network to compete in retail markets, it may be more limited in its ability to compete compared to Entities with spare capacity and/or their own networks.

### Technological advantages or superiority

### The TRA will assess whether an Entity has access to technological advantages or is technically superior which means that actual and potential competitors would not be able to achieve the same costs of production (i.e. offer competitive prices) or offer comparable products.

### Potential to leverage Market Power from one market to another

### The TRA will assess whether an Entity has the potential to leverage its Market Power from one market to another.

### For example, the TRA will assess whether an Entity is able to bundle or tie products in horizontally related markets in a way which enables it to behave to an appreciable extent independently of its competitors, customers, and ultimately consumers in a Relevant Market.

### The TRA will also assess the extent to which a vertically integrated Entity is able to leverage its Market Power from the upstream market into the downstream (retail) market. For example, a vertically integrated Entity that is the sole provider of a wholesale input for downstream products may be able to exclude competitors from the downstream market by charging high wholesale prices.

### Telecommunication Services or related products - diversification and innovation

### The TRA will consider the extent to which Telecommunication Services or related products are diversified and how these products and services are developed and introduced. This is because the level of choice available to consumers could provide evidence of effective competition.

### Movement of prices over time and whether there is any relation to the underlying costs

### The TRA will consider whether the movement of prices over time has any relation to the underlying costs as any divergence could suggest the Relevant Market is not effectively competitive. When considering relative price/cost movements, the TRA will also take account of any efficiencies in production observed over the relevant period of time. Evidence of return on capital employed (ROCE) that is greater than the cost of capital for a prolonged period of time and/or increasing over time, may indicate that the market is not effectively competitive.

Analysis of potential competition in a Relevant Market

## The TRA will consider the extent to which potential competition imposes a competitive constraint on Entities in the Relevant Market.

## Barriers to entry may prevent or deter the entry of new entrants even when incumbent Entities are earning economic profits. These may take the form of physical, geographic or legal obstacles. Barriers to expansion are similar but relate to the ability of Entities already in the market to expand supply. When these barriers are high, actual and potential competition may be more limited. When assessing the level of potential competition in a market for *ex post* purposes the TRA will take account of the impact of existing remedies on the barriers to entry and expansion.

## Among other factors, the TRA will consider:

* + 1. Access (including the terms and conditions of such access as well as access provided through regulatory requirements) to facilities, or Telecommunication Services or related products for which duplication is effectively prevented or difficult to achieve due to technical or economic considerations (including economies of scale and scope, early or first mover advantages and access to a developed distribution or sales network). Access to facilities, or Telecommunication Services or related products, of Entities found to have Market Power in Relevant Markets may be imposed by the TRA on regulated terms and conditions and this may reduce the barriers to entry to related downstream markets;
		2. Access to capital markets and financial resources (a new entrant may find it more difficult than an established Entity to attract investment and secure loans);
		3. Availability of scarce resources (such as spectrum);
		4. Regulatory and legal constraints (including patents, the requirement for a license, license obligations, price controls and any universal service obligations);
		5. Barriers to entry as described in section ‎8.15.3 of these guidelines;
		6. Customer switching costs (as described in Article ‎8.11); and
		7. Network effects[[12]](#footnote-13).

## The TRA holds the view that the relevant timeframe for assessing potential competition in a Relevant Market should be based on the likelihood that the Relevant Market may become:

## Effectively competitive - in which case a one (1) year time period is the relevant timeframe; or

## Prospectively competitive - in which case the TRA may also consider likely developments beyond the initial one (1) year timeframe for up to a further one (1) year.

Analysis of other competitive constraints in a Relevant Market

## The TRA will also consider other competitive constraints in a Relevant Market such as countervailing buyer power. This is the ability of buyers to exercise Market Power and influence prices particularly through direct negotiation. Countervailing buyer power can limit an Entity’s Market Power because it reduces the ability of the Entity to increase prices. For example, if one buyer accounts for a significant proportion of demand for an Entity’s Telecommunication Service or related product it may be able to influence the price and/or the terms and conditions of the provision of that product or service. The TRA will assess the following conditions which may enhance countervailing buyer power:

* + 1. Availability of a range other Telecommunication Services or related products and the extent to which the buyer is well-informed of this range (where a buyer is well-informed of alternatives, the buyer is more likely to be able to influence the price of the Telecommunication Service or related product);
		2. Cost of switching between Entities (if the cost of switching is low then the degree of countervailing buyer power may be stronger);
		3. Ability of the buyer to produce the Telecommunication Service or related product themselves; and
		4. Evidence of a limited number of alternative buyers of the Telecommunication Service or related product (if the Entity is dependent on a small number of buyers – or if buyers are able to co-ordinate their purchasing decisions – then this can increase countervailing buyer power).

Assessment of Market Power

## The Competition Safeguards define the concept of Market Power as “a position of economic strength enjoyed by an Entity, either individually or jointly with others, which enables it to behave to an appreciable extent independently of its competitors, customers, and ultimately consumers.”.

## Where Market Power is held individually by a single Entity, this is generally referred to as unilateral Market Power in a Relevant Market.

## In addition to one Entity holding Market Power, it is possible that more than one Entity could jointly hold Market Power. This is generally referred to as collective Market Power in a Relevant Market. The TRA will assess the existence of collective Market Power in a Relevant Market by examining further whether the conditions exist for the Entities to tacitly collude[[13]](#footnote-14) in order to maintain a market outcome that is not consistent with the outcome that would be expected in a competitive market.

## In order to assess the existence of collective Market Power in a Relevant Market, the TRA will consider, in addition to the factors determining the overall level of competition described above, whether the conditions in the market are conducive to the existence of collective Market Power. These factors are explained in more detail below.

### Potential incentives to collude

### The incentive to tacitly collude will be stronger where there are few players with relatively similar Market Shares and in relatively stable or mature markets.

### Ability to collude

### Factors that facilitate the maintenance of a (tacitly) collusive agreement include transparent and simple pricing structures and levels.

### Other factors include repeated interactions between competing Entities, the level of homogeneity of Telecommunication Services or related products, the existence of similarities between competing Entities in terms of cost structures or resources, and structural links between competing Entities.

### Availability and credibility of punishment for deviating from a tacit agreement

### If there is no credible punishment strategy (such as the ability to lower prices), Entities would not be able to maintain a tacit agreement.

## The TRA will combine the analysis of actual competition, potential competition and other competitive constraints to determine whether an Entity holds unilateral Market Power or whether any Entities hold collective Market Powerin a Relevant Market.

1. The amendments made on 30 September 2010 are to clarify certain definitions. [↑](#footnote-ref-2)
2. A market where no Entity has Market Power; in other words, the competitive conditions are such that no Entity can behave to an appreciable extent independently of its rivals, customers and ultimately consumers. [↑](#footnote-ref-3)
3. A market where, given the trends observed, it is reasonable to expect that the market could become competitive over a specified time period. [↑](#footnote-ref-4)
4. In this context the term “Relevant Markets” means any Relevant Markets which have already been defined at the commencement of the market review exercise. [↑](#footnote-ref-5)
5. The SSNIP test involves examining the ability of a firm acting as a hypothetical monopolist in the market under investigation to profitably sustain a small but significant non-transitory price increase from the competitive price level (typically 5-10% for up to one year). To be able to profitably sustain such a price increase requires there to be no sufficiently close demand-side or supply-side substitutes for the product in question. For example, if following the increase in price from the competitive level, sufficient consumers at the margin instead purchased a substitute product, the price increase may not be profitable. In this case, the relevant market would also include that substitute product. Similarly, if following the price increase suppliers of other services were able over a relatively short period of time (typically considered to be up to one year) to switch to producing the hypothetical monopolist’s product, the price increase might also not be profitable. Again in this case, the market definition should be expanded to include the substitute products. [↑](#footnote-ref-6)
6. For *ex post* purposes, this will include forecasts prepared before and at the time of the alleged anticompetitive conduct. [↑](#footnote-ref-7)
7. Sunk costs relate to one-off costs that would not be recoverable if an operator were to exit the market. These may include both network and retail costs. [↑](#footnote-ref-8)
8. For example, in the UK there are two geographic markets where the relevant market for electronic communications services is not defined as national. One geographic market is Hull (Kingston) as historically there has been a legally separate provider of fixed telecommunications services in the Hull area. Further Ofcom has defined different “local” geographic markets for wholesale broadband access market in the UK to reflect different competition conditions. [↑](#footnote-ref-9)
9. For example, if a retail market is defined as broadly as “voice and mobile calls” then one corresponding wholesale market would likely be defined as fixed and mobile call origination which would have implications for the determination of Market Power. [↑](#footnote-ref-10)
10. For example, if the determination of a retail market for fixed local calls took into account a wholesale product (imposed by regulation) which enabled mobile operators to switch to offering fixed local calls within a 1 year time frame, it could lead to a wide market definition that mobile calls are a supply-side substitute for fixed local calls. A competition assessment of a market defined so widely could lead to a finding of no market power and a remedy removing the regulated wholesale product. [↑](#footnote-ref-11)
11. Therefore, two or more retail Telecommunications Services or related products are only considered to be supply-side substitutes if this substitution is viable absent of existing regulated wholesale inputs. [↑](#footnote-ref-12)
12. Network effects relate to how the value to a subscriber of joining a network is higher the larger the size of the network. Therefore, larger networks may have a competitive advantage over smaller networks where there is no interconnection between the two networks. [↑](#footnote-ref-13)
13. Tacit collusion refers to the possibility for Entities to collude without explicit agreement or even communication of their intentions to each other. [↑](#footnote-ref-14)