COMPETITION GUIDANCE:
MERGER CONTROL - SUBSTANTIVE

ECS COMP. 2

18 SEPTEMBER 2009

UTILITIES REGULATION & COMPETITION AUTHORITY

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EXPLANATORY NOTE

The Communications Act 2009 (the "**Comms Act**" or "CA 2009"), which came into force on 1 September 2009, includes competition provisions that will apply to the electronic communications sector. URCA will publish a series of guidance notes to assist licensees, consumers and other interested stakeholders understand how it is intended that these competition provisions will apply in practice.

The initial series of guidance notes will cover the following subjects:

ECS COMP. 1.	Merger control – procedural guidance
ECS COMP. 2.	Merger control – substantive guidance
ECS COMP. 3	Merger Control – Regulation on Fees
ECS COMP. 4.	Who is affected by the rules? The concept of "undertaking"
ECS COMP. 5.	Market definition – its role in competition and in regulation (for the determination of operators with significant market power)
ECS COMP. 6.	Anticompetitive agreements and practices – substantive guidance
ECS COMP. 7.	Abuse of a dominant position – substantive guidance
ECS COMP. 8.	Guidance on the level of fines

This guidance note, ECS COMP. 2, addresses the substantive aspects of merger control. **It is illegal to complete a relevant merger prior to obtaining URCA's approval** (section 70 of the Comms Act). The guidance indicates URCA's current thinking but should not be taken as a statement of law. Persons should always consult the relevant legislation and seek legal advice where appropriate.

URCA will update this guide from time to time to take account of best practice and to reflect developments in legal interpretation and economic thinking. Although these guidelines set out the approach URCA expects to take, they do not have binding legal effect. If URCA decides to depart from the guidelines, URCA will inform the public of its reasons for doing so.

Please e-mail us at **info@urcabahamas.bs** any comments on how we can improve these guidelines. Alternatively, comments may be delivered, posted or faxed to the address below:

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GENERAL BACKGROUND

1. The competition provisions set out in Part XI of the Comms Act deal with three substantive situations:

    (i) Anticompetitive agreements and practices (sections 67-68 CA 2009);

    (ii) Merger control (sections 70-78 CA 2009); and

    (iii) Abuse of a dominant position (section 69 CA 2009).

2. Openness to trade is particularly important in relatively small jurisdictions and competition law and policy facilitates trade. It does so by lowering barriers to entry.

3. Small economies may support firms of suboptimal size, due to relatively limited demand for goods and services from a relatively small population. In these circumstances, prices could be higher than in economies characterised by economies of scale and scope, and the quality of service can be lower. When a sector, such as the communications sector, underpins other areas of the economy, it becomes very important to ensure that the economy as a whole benefits from the best available services at the lowest possible prices. This can be done, amongst other things, by proper competition law enforcement, striking the right balance between ensuring that competition is operating properly in those areas where competition is feasible (thereby allowing competitive market forces to secure the best available deal for consumers) and imposing limits on the conduct of firms operating in those areas that may not support full competition (limiting the possibility for these firms to abuse their market position).

4. Figure 1 below illustrates how these three situations correlate with market concentration. The arrow highlights the potential competition concerns as the market becomes more concentrated.

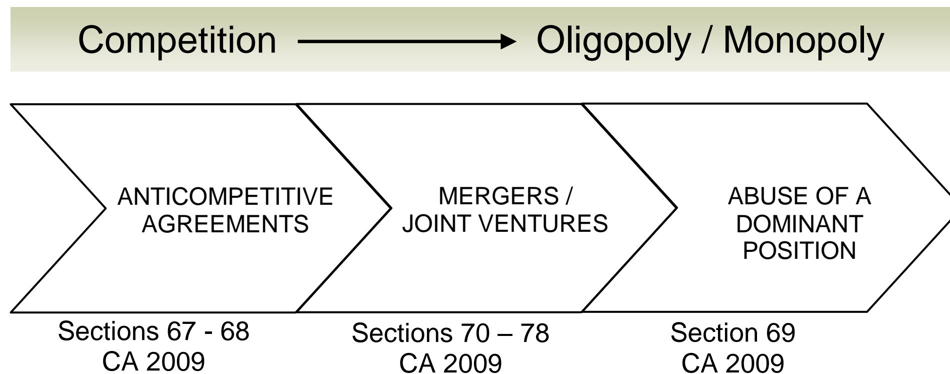

Figure 1: Competition concerns with market concentration

5. These substantive elements and their relation to market concentration are set out below.

1. Anticompetitive agreements (see ECS COMP. 6)

6. The left hand side of the arrow in Figure 1 represents a situation of near-perfect competition. In a situation of near-perfect competition, it is expected that there would be numerous suppliers competing to provide services or goods to purchasers. Due to the market being less concentrated and consumers' ability to switch providers, no single supplier acting on its own would be able to distort competition.

7. In the first substantive situation (anticompetitive agreements and practices), no single undertaking will have sufficient market power to be able to operate without restraints from its competitors or customers. Competition may still be distorted, however, if undertakings act in a coordinated manner, rather than competing with each other. Agreements to coordinate decisions between undertakings and concerted practices, whether express or tacit, are prohibited under section 67 of the Comms Act. For ease of reference, agreements, decisions between undertakings and concerted practices are referred to as "agreements" in these guidance notes.

8. Agreements that may initially appear to fall within the prohibition in section 67 of the Comms Act may be exempted under section 68 of the Comms Act. An exemption will only apply if the agreement:

   (i) shows some benefit in the production or distribution of services or promotes technical or economic process;

(ii) consumers get a fair share of that benefit;

(iii) does not impose indispensable restrictions on the relevant undertakings; and

(iv) does not give the undertakings the possibility of eliminating competition in a substantial part of the relevant market.

9. ECS COMP. 6 provides details of the situations affected by sections 67 and 68 of the Comms Act.

2. Mergers/ joint ventures (see also ECS COMP. 2)

10. Merger control sits between the position of competition on the left-hand side of the arrow in Figure 1 and the position of oligopoly or monopoly on the right-hand side of the arrow. Merger control occurs at the point where undertakings merge and markets become more concentrated.

11. Pre-screening of mergers is considered to be essential to maintain and promote competitive markets. Merger control, which is the focus of this guidance note, is a way in which markets can be monitored and controlled before they become more concentrated and susceptible to either abuse by dominant operators or coordinated anticompetitive conduct.

12. ECS COMP. 1 provides guidance on the procedural rules relating to merger control under sections 70 to 78 of the Comms Act and should be read in conjunction with this guidance note, ECS COMP. 2.

3. Abuse of a dominant position (ECS Comp 7)

13. The right-hand side of the arrow in Figure 1 shows a concentrated market place that has moved from a situation of perfect competition (on the left) towards a situation of "dominance" and, on the extreme right, monopoly.

14. In the third substantive situation (abuse of a dominant position), undertakings that have sufficient market power so as to be able to act independently of their competitors or customers are in a position where they could abuse that market power. Section 69 of the Comms Act sets out a non-exhaustive list of the types of conduct that would be considered abusive, and therefore would be prohibited.

15. ECS COMP. 6 provides details of the situations affected by section 69 of the Comms Act.

PART 1: INTRODUCTION

1. Purpose of Guidance Note

16. Under s.70 of the Comms Act, no change in control of a licensee may be implemented without URCA's prior written approval.

> ***What is a licensee?***
>
> *The change in control of a licensee must be notified to URCA (s.70 CA 2009). The term "licensee" includes:*
>
> - *the holder of an individual or class (registrable or non-registrable) operating licence;*
> - *the holder of an individual or class (registrable or non-registrable) spectrum licence;*
> - *any company that is notified to URCA under s. 21 of the Comms Act as being a subsidiary undertaking of a licensee with an individual licence.*
>
> *It does not cover persons who operate under a Comms Act exemption.*

17. The relevant licensee or acquirer must therefore notify URCA of any proposed change in control. This guidance note provides guidance on the application of the Merger Control rules under sections 70 to 78 of the Comms Act. This includes guidance on:

    (i) the questions URCA is required to consider in relation to a proposed change of control of a licensee; and

    (ii) the principles that URCA applies in deciding those questions.

18. ***Under section 70 of the Comms Act merger control is mandatory. This means that a change in control of a licensee must be notified to URCA and approved by URCA before it is completed. Parties that complete such a merger without URCA's prior approval may be ordered to de-merge and/or pay a fine.***

19. This guidance note provides clarity and transparency for licensees and prospective investors as to how URCA applies this mandatory regime. The guidance note explains URCA's thinking on how sections 70 to 78 of the Comms Act are intended to operate. It does not substitute or replace any law and, accordingly, must be read in conjunction with the Comms Act 2009. Stakeholders are advised to seek legal advice where appropriate.

20. This guidance note does not legally bind URCA. Whilst it is anticipated that URCA will follow the principles and approach outlined in this guidance note, URCA reserves the right to consider other factors not listed in this guidance note when necessary. It is

URCA's intention to review the guidance note from time to time in order to ensure it is in line with development in legal interpretation and changing market circumstances.

21. URCA will explain the analytical process used in reviewing mergers when URCA publishes adjudications relating to those mergers.

2. Merger Control

22. Companies may expand organically, through gradually developing their business or by combining forces with other companies. The latter form of expansion (the combination of forces or "merger"), can lead to benefits to consumers. The merged entity may be able to offer products and services more efficiently to consumers. The wider expertise of the new company may enable it to develop innovative services or offer existing services to consumers more cheaply.

23. Some mergers may, however, result in a lessening of competition. This could be, for example, through the creation or strengthening of a dominant position. The creation or strengthening of a dominant position is likely to harm consumers through the imposition of higher prices, reducing customer choice or reducing the incentive for operators to innovate.

24. If a merger involving a change of control of a licensee is likely to give rise to a substantial lessening of competition in a market under section 72(a) of the Comms Act, it will be prohibited by URCA under section 75(1)(b)(i) of the Comms Act, unless there are substantiated efficiencies that would outweigh any consumer harm or appropriate conditions can be put in place to resolve URCA's concerns.

25. Similarly, mergers involving a change of control of a licensee will be prohibited if there is a media public interest and the merger is likely to have an effect contrary to the public interest under section 72(b) of the Comms Act, unless that effect is outweighed by substantiated efficiencies or appropriate conditions can be put in place.

26. Guidance note ECS COMP. 1 provides further information on the procedures URCA follows in analysing mergers involving a change of control of a licensee.

27. Merger control aims to prevent the accumulation and exercise of market power to the detriment of competitors and consumers. All proposed mergers involving a change of control of a licensee must therefore be notified to URCA and analysed to consider whether they would have an adverse effect on competition in The Bahamas or have adverse public interest effects.

28. URCA's adjudications on proposed mergers issued under section 75 of the Comms Act may be appealed to the Utilities Appeal Tribunal under section 111(1)(b) of the Comms Act.

PART 2: SUBSTANTIVE ANALYSIS

3. Questions to be determined by URCA

29. Under section 72 of the Comms Act, URCA is required to form an opinion on whether a proposed change of control of a licensee —

    a) would have, or be likely to have, the effect of substantially lessening competition in a market in The Bahamas; and

    b) in the case of a change of control involving a media public interest, whether the change of control would have an effect, or would be likely to have an effect, contrary to the public interest.

30. In accordance with section 66 of the Comms Act, URCA will follow international best practice when conducting its merger analysis.

4. Substantial Lessening of Competition

31. In assessing whether to approve or prohibit a proposed merger, URCA must consider whether the merger would be likely to substantially lessen competition in a market in The Bahamas. One of the electronic communications policy objectives in the Comms Act is to encourage, promote and enforce sustainable competition (section 4(a)(iii) CA 2009). This objective supports the other principles in section 4 of the Comms Act for furthering the interests of consumers and persons in The Bahamas. Competition between companies puts pressure on them to reduce prices and improve services as they compete for customers. A substantial reduction in competition between companies would limit this pressure on companies and is likely to be detrimental to consumers.

32. The term "substantially lessen competition" is not defined in the Comms Act. However, section 73 of the Comms Act sets out two principles that URCA must take into account when determining whether a proposed change of control of a licensee is likely to lead to a substantial lessening of competition:

    (i) the promotion of sustainable competition in the electronic communications sector within The Bahamas or part of The Bahamas in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside The Bahamas; and

    (ii) the market position of the licensee or licensees concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant services, the interests of the intermediate and ultimate

consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

33. In order to assess whether or not the proposed merger would give rise to a substantial lessening of competition and in order to address the two questions above, URCA will generally follow the process set out in Figure 2 overleaf. The key steps in this figure are explained below.

34. Typically, URCA will first gain an overview of the relevant market. This will occur by considering market definition and analysing the market, and in particular the level of concentration in the market. Following this step, URCA will examine the likely theories of harm. This means narrowing URCA's analysis to consider the potential effects that the merger may have on competition in the relevant market.

35. After examining potential theories of harm, URCA will usually consider the counterfactual scenario, i.e. what would happen if the parties did not merge? It is at this stage that URCA will consider whether, for example, the licensee would be likely to exit the market if it were not purchased or whether there might be an alternative purchaser.

36. URCA will then assess the ability of other competitors and potential competitors to enter the market or increase their share of the market following the merger. This will help URCA understand whether any short term lessening of competition would have lasting effects. The effect of the merger on competition is also assessed by looking at countervailing buyer power. If customers are able to influence the terms on which they acquire services from the parties to the merger, then it is less likely that the merged entity would be able to distort competition.

37. Lastly, URCA will consider whether there are any efficiencies arising out of the merger. That is to say whether the merger is likely to result in improvements which can be passed on to consumers.

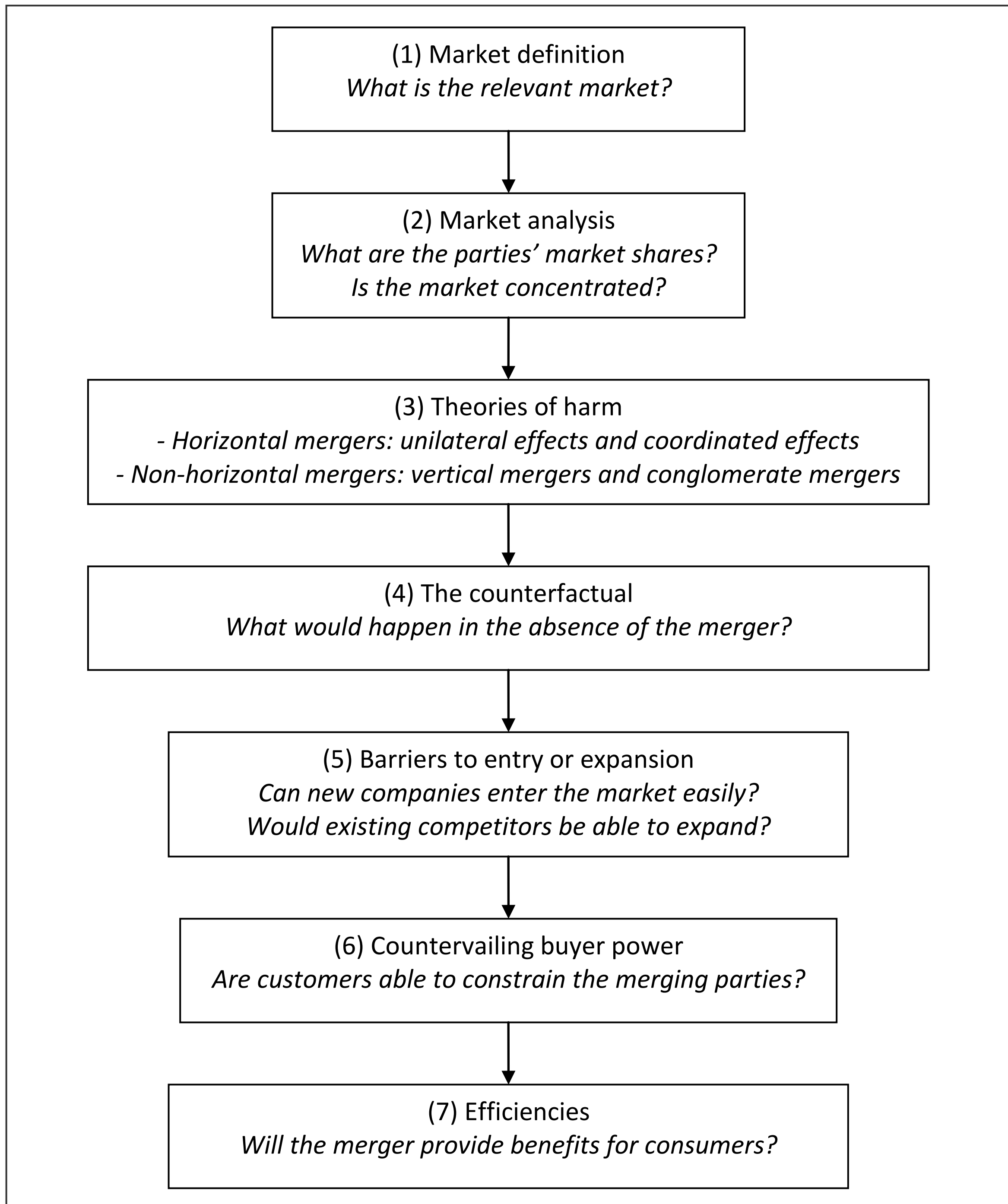

Figure 2: Does a merger substantially lessen competition?

4.1 Market definition

38. In assessing the effects of a merger, it is important for URCA to identify the competitive constraints faced by the firms involved in the merger. Defining the relevant market is therefore important in providing a framework for assessing the relevance of different constraints.

39. In defining the relevant market in merger cases involving a change of control of a licensee, URCA will apply the principles set out in the guidance note, ECS COMP. 5 (Market definition).

40. As set out in that guidance note, there are normally two aspects to the definition of the relevant market: the relevant products and the relevant geographic area. These aspects are generally decided by reference to the extent to which customers can readily switch to substitute products and geographic areas, depending on the alternative sources of supply currently available. This is usually referred to as demand side substitution.

41. However, the potential for competition from firms not currently supplying products in the relevant market will also be considered. This is usually referred as supply side substitution. This can lead to such firms being considered to be a competitive constraint in the relevant market, although they are not currently active within it.

42. URCA will consider the most appropriate methodology for market definition in the context of the merger under review. In particular, it will adopt the hypothetical monopolist test (also known as the SSNIP[1] test). This test is a widely accepted conceptual approach to market definition. First, each product supplied by each of the merger firms is considered. Then, the following question is posed: if there were only one supplier (a hypothetical monopolist) of a certain product or set of products (the candidate market), would that hypothetical monopolist be able profitably to raise prices, or otherwise worsen its offer, by a small but significant and non-transitory amount? If the response to the question is negative – i.e. it would be unprofitable, because customers would switch to other products - then those products would be considered close substitutes and added to the product group. The procedure is then repeated until a set of products is found where it would be profitable for the supplier to raise prices or worsen its offer. That set of products is the 'relevant market'.

4.1.1 Product markets

43. In order to be helpful to licensees, consumers and other interested stakeholders, URCA has set out an overview of market definitions that have historically been adopted in

[1] When the hypothetical monopolist test is applied in relation to price, it is often known as the 'small but significant and non-transitory increase in price' test - or SSNIP.

merger control cases in the following paragraphs. This is provided for the purpose of illustration only. Developments in the market place may make market definitions adopted in the past obsolete. The overview below in no way binds URCA in its merger control assessment.

44. When assessing the relevant product market(s) for mergers in the electronic communications sector, it is usual for merger control authorities to distinguish between services provided at the wholesale level (where the customers for the services are communications providers that are operating at the retail level) and services provided at the retail level (where the customers for the services are end users).

4.1.1.1 Telephony

45. In relation to telephony services, it is usual to distinguish between fixed line services and mobile services and, to date, merger control authorities have generally considered them to constitute separate markets, although there is a growing sense that mobile telephony can substitute for fixed telephony. This has occurred on the basis that, by definition, fixed services do not offer mobility because they are provided at fixed locations.[2] There may also be pricing or technical functionality differences whereby consumers do not regard the two types of services as substitutable for one another.

46. Examples of potential markets for fixed line telephony services include:

- Provision of wholesale access to fixed line networks, which enables retail suppliers of fixed line telephony services to supply their services to end users.
- Provision of retail fixed line telephony services (i.e. to end users). Sometimes this is further segmented based on the type of customer (e.g. business and residential) and on the type of call (e.g. local calls, national calls, international calls etc).

47. Examples of potential markets for mobile telephony services include:

- Provision of wholesale access and call origination on mobile networks. Wholesale access and call origination are supplied by mobile network operators to service providers that retail mobile telephony services to end users.
- Provision of mobile telecommunications services at the retail level (i.e. to end users). To date, merger control authorities have usually considered this to be a single market, without being further subdivided by customer (e.g. business and residential or pre-pay and post-pay) or according to the network used (e.g.

[2] See for example the European Commission merger decisions in Case No COMP/M.2803 - Telia/Sonera, Case No COMP/M.1439 - Telia/Telenor and Case No COMP/M.1795 - Vodafone/Mannesmann.

between 2G and 3G networks),[3] although there have been occasional exceptions, such as the provision of services to "internationally mobile customers" (see below).

- Provision of mobile telecommunications services at the retail level to internationally mobile customers. In Europe, the merger authority considered there to be an emerging market for internationally mobile customers.[4] These are customers that travel internationally and demand a seamless service. It is possible that such a market may emerge in The Bahamas, whether at a Caribbean or wider level.

4.1.1.2 Internet access

48. At the retail level, merger control authorities have distinguished between three common forms of Internet access: (a) narrowband (dial-up service); (b) broadband (higher bandwidth services); and (c) dedicated access (leased lines used by large corporations who require high performance levels in terms of security and bandwidth).

49. Narrowband and broadband Internet access have generally been considered by merger control authorities to constitute two separate markets[5] on the basis that broadband Internet access has distinguishing features which are not available with narrowband access, including:

- the service is always on (i.e. no dial-up is required);
- it is possible to use both voice and data services simultaneously; and
- broadband has a faster downstream speed than a dial-up connection.

50. In relation to broadband, merger control authorities to date have generally considered that broadband provided through mobile technologies, such as 3G, are not yet substitutable for fixed broadband access (i.e. via copper wire technologies, such as XDSL, or cable).[6] They have also considered retail broadband internet access services for residential and small business customers to be a separate market from retail broadband internet access services for large business customers.[7]

[3] See for example the European Commission merger decisions in Case No COMP/M.4947 – Vodafone/Tele2/Italy/Tele2 Spain, Case COMP/M.3245 - Vodafone/Singlepoint, Case COMP/M.3530 - TeliaSonera/Orange and Case COMP/M.3916 - T-Mobile Austria/Tele.ring.

[4] See for example the European Commission merger decisions in Case No COMP/M.1795 - Vodafone/Mannesmann.

[5] See for example the European Commission merger decisions in Case No COMP/M.5532 – Carphone Warehouse/Tiscali UK, Cases COMP/M.4417 - Telecom Italia/AOL and COMP/38.233 - Wanadoo Interactive.

[6] See for example the European Commission merger decision in Case COMP/38.233 - Wanadoo Interactive.

[7] See the European Commission merger decision in Case No COMP/M.5532 – Carphone Warehouse/Tiscali UK.

51. At the wholesale level, merger control authorities have tended to approvingly consider the provision by network operators of access to their networks to internet service providers, who in turn provide internet access at the retail level to end users.

4.1.1.3 Broadcasting

52. In assessing relevant markets in the broadcasting sector it is usual for merger control authorities to consider the different levels of the supply chain.

53. For example, for television broadcasting, the supply chain is often considered to consist of four layers:

- Content supply/production, for example creating or recording content which can be broadcast.
- Wholesale channel provision, which is the aggregation of content into channels, which are then, in turn, supplied to television platform operators.
- Wholesale platform service provision, whereby platform operators provide services to restrict the supply of content to consumers (e.g. conditional access), or provide electronic programme guide (EPG) services to broadcasters.
- Retail service provision, whereby platform operators bundle channels into packages to retail to consumers.[8]

54. In general, when considering the different levels of the television supply chain, merger control authorities have tended to distinguish between free to air (FTA) and pay services and to find them to be in distinct product markets.[9]

55. Broadcasters tend to have two sets of customers – viewers/listeners and advertisers. In analysing the facts, URCA may have to consider whether these broadcasters operate in several markets or whether they operate in a single market with different customers (i.e. two-sided markets).

4.1.2 Geographic markets

56. In the electronic communications sector, the scope of the relevant geographic market will often be influenced by regulatory and legal issues. For example, a licence will often cover a specific geographic area, such as the whole of The Bahamas or only a specific

[8] See, for example, the UK regulator Ofcom's pay TV market investigation second consultation of 30 September 2008.

[9] See, for example, the European Commission's merger decision in COMP/M.5121 - Newscorp/Premiere. The Commission found that the provision of FTA and pay TV services to end users are in distinct product markets in Germany and Austria. The Commission found, for example, that from a viewer's perspective the "premium" content on pay TV is not substitutable with content found on FTA TV, as it is often broadcast on pay TV before being broadcast on FTA TV.

island. There may also be geographic limitations to the coverage of a network, depending on how far it has been built out.

4.2 Measures of concentration

57. The structure of a market will be a key factor in assessing whether a proposed change of control of a licensee will give rise to a substantial lessening of competition. In general, the more concentrated a market, the more likely it is that the competitive constraints on the merging firms are weaker. URCA is aware that a relatively small jurisdiction such as The Bahamas may not support a large number of operators and therefore higher market concentrations than larger jurisdictions are possible in The Bahamas. Measures of market concentration will nonetheless be an important starting point for the market analysis.

58. URCA may consider a number of measures of market concentration as appropriate to the case under review. Two commonly used measures are market shares and concentration ratios.

59. A firm's market share can give a useful indication of a firm's market power – and so combining the market shares of merging firms can provide an indication of a change in market power resulting from their merger. Market shares can be measured by a number of means, including number of subscribers, audience shares, sales revenue, sales volumes, production volumes, capacity or reserves.

60. Concentration ratios measure the aggregate market share of a small number of the leading firms in a market. So, for example, the three-firm concentration ratio represents the proportion of the market supplied by the three leading firms in that market.

61. Market concentration can be measured through the Herfindahl-Hirschman Index (HHI). The HHI is calculated by squaring the market share of each operator competing in a market and then summing the resulting numbers. Therefore, in a market which has four operators, two of which ("A" and "B") will merge, the pre-merger and post-merger HHIs are calculated as follows:

$$\text{Pre-merger HHI} = [\text{Share A}]^2 + [\text{Share B}]^2 + [\text{Share C}]^2 + [\text{Share D}]^2$$
$$\text{Post-merger HHI} = [\text{Share A} + \text{Share B}]^2 + [\text{Share C}]^2 + [\text{Share D}]^2$$

62. The closer a market is to being a monopoly, the higher the market concentration (and the lower the level of competition).

4.3 Theories of harm

63. In assessing a proposed merger, URCA will consider the merging parties' offerings to their customers and will then focus its analysis on the potential harm to those offerings. These theories of harm will generally fall into four categories depending on whether the merging entities compete with each other (i.e. have a 'horizontal' relationship):

    (i) horizontal: unilateral effects;

    (ii) horizontal: coordinated effects;

    (iii) non-horizontal: vertical effects;

    (iv) non-horizontal: conglomerate effects.

64. Each of these categories is considered further below.

4.3.1 Horizontal mergers – unilateral effects

65. A horizontal merger is a merger involving firms that operate at the same level of the market. This can be contrasted with vertical mergers which involve firms that operate at different levels of the supply chain (e.g. a wholesaler and a retailer); vertical mergers are considered separately below.

66. Unilateral effects occur when a horizontal merger makes it easier for the merging firms to exercise market power independently, without the need for coordinated action with other firms in the relevant market.

67. An example would be where a worsening of either of the merger firm's competitive offerings (e.g. an increase in price) would have been unprofitable without the merger, since the firm would have suffered a reduction in sales, but where, post-merger, it becomes profitable because the sales that would have been lost to the other merger firm are now kept within the merged entity.

68. Some of the factors that URCA may consider in assessing potential unilateral effects include:

    - *number of firms and market shares:* unilateral effects may arise where there are few firms in the relevant market, the merging parties have a high combined market share and there is no alternative firm or group of firms that would be likely to apply sufficient competitive pressure.

    - *close competitors:* unilateral effects may arise where the merging parties are close alternatives to the other for customers.

- *elimination of a competitive force:* unilateral effects may arise where a merger eliminates an important competitive force in the market, such as a significant recent entrant or a firm that was expected to grow into a substantial competitive threat (e.g. because of a novel business model or because of a reputation for aggressive price cutting).
- *potential competition:* unilateral effects may also arise where a merger involves a firm that has been planning entry to the market or a firm that acts as a competitive constraint because of the threat of entry.

4.3.2 Horizontal mergers – coordinated effects

69. A merger involving a change of control of a licensee may give rise to a substantial lessening of competition if it makes coordination between market participants more likely or more effective (referred to as coordinated effects).

70. Coordination may take many different forms. For example, it may involve firms keeping prices high or dividing up customers between them. It can be explicit (i.e. involving communication) or tacit (i.e. resulting from an implicit understanding without any formal arrangement).

71. In general URCA would expect the following conditions to be satisfied for coordination to be capable of occurring:

    (i) firms need to be able to reach a common understanding on the terms of coordination – and to monitor whether each of them is complying with those terms;

    (ii) firms have to find it in their individual interests to comply with the terms of the coordination; and

    (iii) there must be little likelihood of the coordination being undermined by competition from third parties.

72. In assessing these conditions, URCA is likely to have regard to two particular factors:

    (i) whether there is evidence of pre-existing coordination; and

    (ii) whether the market is concentrated and/or there is symmetry between the market positions of the industry players (on the basis that coordination tends to be more likely where one or both of these factors is present).

4.3.3 Vertical mergers

73. Vertical mergers are mergers between firms that do not compete in the same relevant market but instead operate at different levels of the supply chain.

74. Although vertical mergers do not entail the loss of direct competition between firms in the same relevant market, in certain circumstances they can give rise to competition concerns. The two main competition concerns generally associated with vertical mergers are input foreclosure and customer foreclosure.

75. Input foreclosure occurs where a firm acquires a downstream customer and then raises the costs of (or restricts access to) an important input to other downstream customers. Input foreclosure will usually only be considered to raise competition concerns if it significantly lessens competition in the downstream market. In assessing the likelihood of input foreclosure, URCA will examine the ability and incentive of the merged firm to foreclose its downstream rivals.

76. Customer foreclosure occurs where a firm acquires a downstream customer and then restricts its upstream rivals' access to that customer (or raises their costs of dealing with that customer). Customer foreclosure will usually only be considered to raise competition concerns if it significantly lessens competition in the upstream market. In assessing the likelihood of customer foreclosure, URCA will examine the ability and incentive of the merged firm to foreclose its upstream rivals.

4.3.4 Conglomerate mergers

77. Conglomerate mergers are mergers between firms in different relevant markets that are not vertically related. These firms may supply closely-related products which they sell largely to the same customers (i.e. mergers between firms supplying complementary products), or they may supply completely unrelated products. Alternatively, they may supply the same products in different geographic markets.

78. As with vertical mergers, although conglomerate mergers do not entail the loss of direct competition between firms in the same relevant market, in certain circumstances they can give rise to competition concerns. The two main competition concerns generally associated with conglomerate mergers are foreclosure through tying and bundling and foreclosure through portfolio effects.

79. Foreclosure through tying and bundling occurs where the merged firm uses its market power in one market to foreclose competitors in another by employing selling practices that link the products it sells in the separate markets together.

80. Foreclosure through portfolio effects occurs where the merger gives the merged firm a product range advantage (and consequently increased market power for its portfolio of products) because customers value variety and therefore wish to purchase both of the merged firm's products together.

81. As with vertical mergers, conglomerate mergers will usually only be considered to give rise to competition concerns if the foreclosure significantly lessens competition in the

affected market(s). In assessing the likelihood of foreclosure, URCA will examine the ability and incentive of the merged firm to foreclose its rivals.

4.4 The Counterfactual

82. In order to assess whether a merger is likely to result in a substantial lessening of competition, URCA will typically consider what would happen if the parties did not merge. This prospective-looking scenario is called the counterfactual.

83. When assessing a notified merger, URCA will presume that the counterfactual scenario is the *status quo* prior to the proposed merger (i.e. the effects of the merger will be compared to the pre-merger scenario).

84. This presumption may be rebutted by the merging parties or, indeed, may be disregarded by URCA in light of the facts surrounding the merger. The presumption would be rebutted where it is likely that there would be a change to the market structure even if the merger did not take place. This is likely to be the case where there is evidence to suggest that one of the merging parties would have exited the market or that one of the merging parties, which is a potential but not actual competitor to the other party, would have entered the market.

85. If the parties wish to rebut the presumption of the status quo by asserting that one of the parties would have exited the market but for the proposed merger, then they should provide evidence that the exiting party was failing or provide some other substantiated reasoning why that party was exiting. When considering the rebuttal, URCA would also consider whether any third parties might have acquired the exiting party and whether such a merger would be less likely to reduce competition than the proposed merger.

4.5 Barriers to entry and expansion

86. Although a merger may reduce competitive rivalry, entry by new players and/or expansion by existing players may be sufficient to deter or defeat any attempt by the merged firm to exploit that reduction in rivalry. For this to be the case, entry and/or expansion must be shown to be timely, likely and sufficient to act as a competitive constraint.

87. As part of its merger assessment, URCA may consider the extent to which there may be barriers which adversely affect the likelihood, timeliness and sufficiency of other players' ability to enter (or expand in) the market. Examples of barriers to entry (or expansion) include legal barriers (such as the requirement for a licence), preferential access to essential facilities, high sunk costs, economies of scale, first-mover advantages, brand loyalty and network effects (i.e. where the more customers a network has, the more highly customers value the network).

88. In general, the higher the barriers to entry, the less likely it is that the merged firm will be constrained by entry.

4.6 Countervailing buyer power

89. As part of its merger assessment, URCA may consider the extent to which one or more of the merging firms' customers would be able to exercise countervailing buyer power post merger.

90. An individual customer has countervailing buyer power where its negotiating strength would limit the ability of the merged entity to raise its prices or otherwise lower the competitiveness of its offer.

91. If all customers of the merged entity would possess countervailing buyer power post-merger, this could alleviate any adverse effects resulting from a merger. However, if this would only be the case for some customers, URCA would assess the extent to which the countervailing buyer power of these customers may be relied upon to protect all customers.

4.7 Efficiencies

92. Mergers that could harm competition could also give rise to efficiencies that can be passed on to customers. Examples of possible efficiencies include cost savings or increased network effects (i.e. the greater the size of the network, the higher value customers place on that network).

93. Under the Comms Act, consideration of efficiencies is relevant at two stages of URCA's analysis:

    (i) Under section 73(1)(b) of the Comms Act, in assessing whether a merger gives rise to a substantial lessening of competition, URCA is required to take into account the interests of intermediate and ultimate consumers and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

    (ii) Under section 75(1)(b)(iii) of the Comms Act, where URCA concludes that a merger would give rise to a substantial lessening of competition (or, in a media public interest case, be contrary to the public interest), URCA is required to give consent if it is satisfied that any substantiated and likely efficiencies put forward by the acquirer or the licensee are necessary and outweigh any potential harm to consumers and citizens.

94. In general, in order for URCA to take account of claimed efficiency gains, it would expect all of the following criteria to be met:

- It must be demonstrated that the efficiencies are very likely to arise, and to do so within a period of time corresponding to the onset of any potential adverse effects on customers.
- The efficiencies must be merger specific - i.e. a direct consequence of the merger.
- The benefits of the efficiencies must be passed on (wholly or partially) to customers of the merged firm.

5. Media Public Interest Cases

95. Under section 72(b) of the Comms Act, where a change of control of a licensee involves a media public interest, URCA is required to form an opinion whether the change of control would have an effect, or would be likely to have an effect, contrary to the public interest.

5.1 When does a change of control involve a media public interest?

96. Under section 74 of the Comms Act, a change of control of a licensee (see paragraph 16 above for an explanation of who is a licensee) is deemed to involve a media public interest if at least one of the persons involved in the transaction is a media enterprise.

97. The term "media enterprise" is defined in section 74(2) of the Comms Act as an enterprise involving either or both of (a) broadcasting and (b) publishing newspapers.

98. The term "broadcasting" is defined in section 2 of the Comms Act as a service which consists in the provision of:

    (a) television programmes;

    (b) radio programmes; or

    (c) teletext services;

    so as to be available for reception by members of the public.

5.2 URCA's analysis

99. Under section 74(3) of the Comms Act, in assessing whether a proposed change of control would be contrary to the public interest for the purpose of section 72(b) of the Comms Act, URCA should consider –

(a) the need for the accurate presentation of news and the free expression of opinion in media;

(b) the need, in relation to every different audience in The Bahamas, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;

(c) the need for the availability throughout The Bahamas of a wide range of content services, which (taken as a whole) are both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(d) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment of the electronic communications policy objectives.

100. The "media public interest" is not defined in the Comms Act. As a concept it is expected to evolve as trends in consumers' use of media change. In exercising URCA's powers in relation to content regulation (Part IX of the Comms Act) and public service broadcasting (Part X of the Comms Act), URCA will engage with stakeholders, including operators and the public (as appropriate), on issues of content regulation and broadcasting. URCA will consider comments received from stakeholders in the context of Parts IX and X of the Comms Act when assessing the media public interest in a proposed change in control of a licensee.

101. In general, when applying the media public interest test, URCA will seek to ensure a minimum level of plurality, with the control of media enterprises spread across a sufficient number of people to ensure that a variety of different media voices and opinions continue to be heard.

102. In assessing plurality, URCA will consider who exercises ultimate influence over the relevant media enterprises, recognising that this may not be the person that appears to have legal control. URCA will also have regard to cross shareholdings, minority shareholdings and any other interests that give a person influence over one or more media enterprises.

103. URCA will consider each change of control on a case by case basis. However, by way of example, it is likely to be concerned by a transaction that would give one person control over two (or more) major providers of news for The Bahamas (e.g. a TV station providing news and a newspaper). In considering the importance of particular media enterprises, URCA may have regard to a number of measures, including number of subscribers, audience shares and shares of newspaper circulation.

104. In considering plurality, URCA may consider any relevant audience in The Bahamas. URCA may therefore consider the effect of a change of control on a particular social group or type of viewer or listener.

105. URCA is also likely to consider the impact of the change of control on the availability of programmes dealing with a wide range of subject matters, which meet the needs and satisfy the interests of as many different audiences as practicable.

106. URCA will be concerned to maintain a diversity of high quality programming and to protect the interests of viewers and listeners. In assessing this issue, URCA may have regard to the previous track record of the acquirer in providing content services, including the historic level of investment in those services and the quality and range of programming involved.

6. Remedies

107. URCA will consider remedies where it forms an opinion that a proposed change of control of a licensee would give rise to a substantial lessening of competition or, in a media public interest case, would be contrary to the public interest.

108. The only exception to this is where URCA is satisfied that any claimed efficiencies are necessary and outweigh any potential harm to consumers and citizens. In that case, URCA may consent to the change of control without any remedies being proposed by the merging parties.

109. There are two remedy options available to URCA. It can deny its consent to the change of control or it can give conditional consent.

110. Conditional consent is where URCA gives consent subject to a requirement that the acquirer or the licensee concerned takes the action that URCA considers necessary to eliminate or avoid the substantial lessening of competition or adverse public interest effects. Such action can take the form of a structural remedy (e.g. divestment) or a behavioural remedy (e.g. a requirement to provide services on a fair, reasonable and non-discriminatory basis).

111. It is open to the parties to the change of control to put forward proposals for an appropriate order for consideration by URCA. The parties can do so either before or after URCA opens an in-depth investigation under section 78(2) of the Comms Act.