COMPETITION GUIDELINES:

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ECS COMP. 4 to ECS COMP. 9

17 March 2010

UTILITIES REGULATION & COMPETITION AUTHORITY

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COMPETITION GUIDELINES - Overview

The Communications Act, 2009, (the "Comms Act"), which came into force on 1 September 2009, includes competition provisions that apply to the electronic communications sector (ECS).

On 18 September 2009 URCA published an initial series of guidance notes covering 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

This document covers the following subjects:

ECS COMP. 4. Who is covered by the competition provisions? The concept of "undertaking"

ECS COMP. 5. Market definition – its role in competition law

ECS COMP. 6. Anticompetitive agreements – substantive guidance

ECS COMP. 7. Abuse of a dominant position – substantive guidance

ECS COMP. 8. Guidance on the level of fines for breaches of Part XI of the Communications Act

ECS COMP. 9. How to make a competition complaint – guidance on URCA's investigation procedure

These guidance notes (collectively referred to as "Competition Guidelines") are designed to assist licensees, and other interested parties in understanding how the competition provisions of the Comms Act will apply in practice. These Guidelines indicate URCA's position on the abovementioned subjects but should not be taken as a statement of law. Relevant persons should always consult the relevant legislation and seek legal advice where appropriate.

URCA will review and update these Guidelines from time to time to take account of best practice and to reflect developments in legal interpretation and economic thinking. These Guidelines do not legally bind URCA. Whilst it is expected that URCA will follow the principles and approach outlined in these Guidelines, URCA reserves the right to consider other factors not covered in these Guidelines where necessary. If URCA decides to depart from these guidelines, URCA will provide reasons for doing so.

It is important that all interested stakeholders should have access to these Guidelines to understand URCA's current position with respect to the application of the competition provisions for governing electronic communications in The Bahamas. This document does not constitute a formal consultation paper by URCA. However, URCA will welcome all comments from all licensees and interested parties **by 30 June 2010**. Following receipt of comments, URCA may review these Guidelines and/or provide further clarification, as appropriate.

Please email us at **info@urcabahamas.bs** with any comments on how we can improve these Guidelines. Alternatively, comments may be delivered, posted or faxed to:

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GENERAL BACKGROUND

1. This Section provides the general background to the competition provisions of the Comms Act that apply to the electronic communications sector in The Bahamas. For purposes of this document, references to 'competition law' in these Guidelines mean the provisions contained in Part XI of the Comms Act.

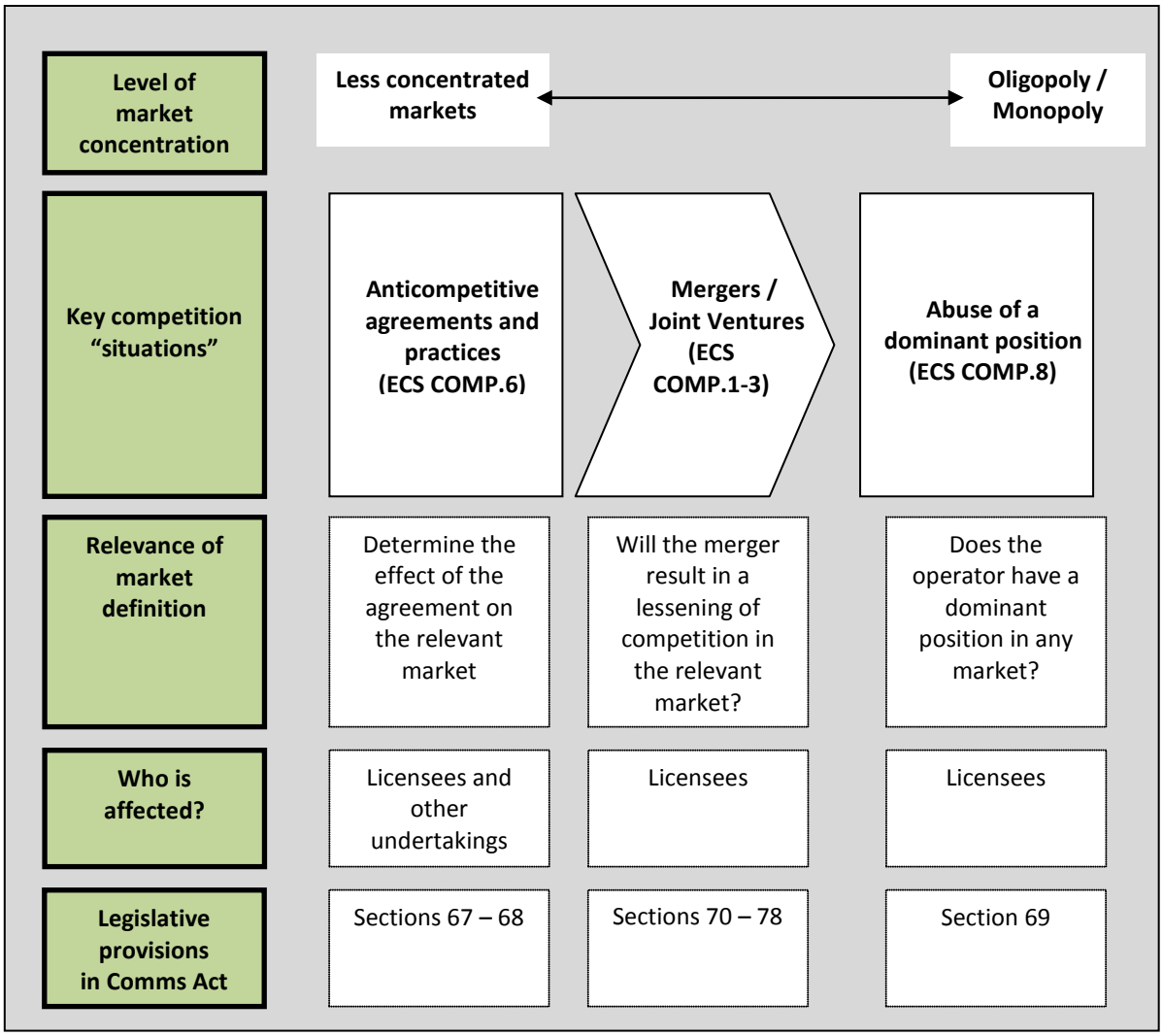
2. Part XI of the Comms Act deals with three substantive situations:

   - Sections 67 to 68 on anticompetitive agreements, that is:
     - agreements between licensees;
     - agreements between a licensee and one or more other undertakings;
     - decisions by associations of undertakings; and
     - concerted practices.
   - Section 69 on abuse of a dominant position by one or more licensees; and
   - Sections 70 to 78 on change in control of a licensee.

3. The overall objective of the aforementioned competition provisions is to protect and facilitate the effective functioning of competition in the electronic communications sector. Effective competition is beneficial for consumers and to the Bahamian economy overall because it creates incentives for lower prices, higher quality of service, and foster investment and rapid service innovation.

4. The electronic communications sector is important to The Bahamas as it underpins other areas of the economy such as trade, investment, tourism and financial services. It is therefore crucial to create an environment that will encourage the best available services at the lowest possible price. This can be achieved through proper enforcement of the competition provisions of the Comms Act, amongst others (such as the introduction of ex-ante regulatory measures), and ensuring that artificial barriers to competition are eliminated.

5. The diagram below illustrates how the three situations listed in paragraph 2 above correlate with market concentration. The diagram highlights the potential competition concerns that arise in relation to: anti-competitive agreements, mergers/joint ventures, and abuse of a dominant position.



6. These substantive situations and their relation to market concentration are briefly described below. They are addressed in more detail in the Guidance Notes which follow.

7. When applying competition law, URCA will undertake its assessment on a case by case basis, due account being taken of all the facts of the case and the dynamics of competition on the relevant market.

1. Anticompetitive agreements (see ECS COMP. 6)

8. The left-hand side of the diagram represents a situation of effective competition. In a situation of effective competition, there would be numerous suppliers competing to provide services or goods to customers. Due to the number of suppliers and customers' ability to switch providers, no single supplier acting on its own would be able to distort competition.

9. When a market is effectively competitive no single licensee or undertaking will have sufficient market power on its own to be able to operate independently of its competitors or customers. Competition may still be distorted, however, if licensees or undertakings act in a coordinated manner. Concerted practices and agreements to coordinate decisions between licensees or undertakings, whether express or tacit, are prohibited under section 67 of the Comms Act. For the purposes of these Guidelines, agreements, concerted practices and decisions between undertakings are referred to as "agreements" in these Guidelines.

10. It is worth noting that some agreements that may appear to fall within the prohibition in section 67 of the Comms Act may be exempted under section 68. An exemption will apply if the agreement:

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

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

    (iii) only imposes restrictions on the relevant licensees or undertakings that are indispensible to the attainment of benefits identified at (i) and (ii) above; and

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

11. **ECS COMP. 6** provides details of the situations affected by sections 67-68 of the Comms Act.

2. Mergers/ joint ventures (see ECS COMP. 1, 2 and 3)

12. Merger control occurs when undertakings merge. As a result of mergers markets become more concentrated.

13. Pre-screening of mergers is considered essential to maintaining and promoting sustainable competition. Merger control is a way in which markets can be monitored and controlled before they become more concentrated and hence more susceptible to either distortion by dominant operators or coordinated anticompetitive conduct.

14. ECS COMP 1 provides guidance on the procedural aspects of merger control. ECS COMP 2 provides guidance on the substantive rules relating to merger control under sections 70 to 78 of the Comms Act and should be read in conjunction with ECS COMP 1. ECS COMP 3 relates to the fees charged by URCA in the exercise of its merger control functions. As mentioned before these documents were previously published by URCA on 18 September 2009 and copies can be obtained from URCA's web site www.urcabahamas.bs.

3. Abuse of a dominant position (see ECS COMP. 7)

15. The right-hand side of the diagram represents a concentrated market place. This is characterised by a licensee or licensees having dominance or, at the extreme right of the diagram, monopoly.

16. In this substantive situation (abuse of a dominant position), a licensee that has sufficient market power that allows it to be able to act independently of its competitors or customers could abuse that market power. Section 69 of the Comms Act sets out a non-exhaustive list of the type of conduct that would be considered abusive and therefore are prohibited.

17. **ECS COMP. 7** provides guidance of the situations affected by section 69 of the Comms Act.

4. Transitional Period

18. URCA has an obligation to ensure compliance with the competition provisions of the Comms Act from its entry into force on 1st September 2009.

19. In the two substantive situations of anticompetitive agreements (**ECS COMP. 6**) and abuse of a dominant position (**ECS COMP. 7**) there is a risk that anticompetitive provisions of agreements which were entered into before the entry into force of the Comms Act (i.e., before 1st September 2009) may now be null and void by virtue of the entry into force of the Comms Act. URCA has a statutory duty to review both existing and future agreements to ensure their compliance with the competition provisions.

20. For the avoidance of doubt, URCA does not intend to apply the competition provisions of the Comms Act retroactively. On the contrary, the provisions apply for the future. Like in all cases when new legislation is introduced, all market players are under a duty to ensure that they comply with the law. Licensees and undertakings are required to self-assess their existing agreements and modify them in order to alleviate any competition concerns which might arise.

21. It is not URCA's intention to fine licensees and others who had entered into potentially anticompetitive agreements or agreements which amount to an abuse of a dominant position prior to September 2009 (the "existing agreements"). However, provisions in agreements which were entered into prior to September 2009, which fall under the relevant prohibitions are null and void and unenforceable from the date when the Comms Act came into force.

22. For existing agreements only, URCA will allow licensees and undertakings up to twelve (12) months from the commencement date (1st September, 2009) of the Comms Act before imposing fines. However, anticompetitive provisions in agreements entered into before 1st September 2009 could be unenforceable if they contravened sections 67 and 69 of the Comms Act (see **ECS COMP.8** for further details).

23. Where URCA suspects the on-going existence of an anticompetitive practice or agreement, it will begin a process of investigation. This process will provide the licensees and/or undertakings concerned with the opportunity to have any relevant queries answered by URCA, as well as allowing them the opportunity to submit any evidence, comments or justifications that they might feel are relevant in response.

5. Overview of Guidelines

24. As mentioned above, **ECS COMP. 1, ECS COMP.2**, and **ECS COMP.3** provide guidance as to the application of merger control specifically.

25. **ECS COMP. 4 'Who is covered by the competition provisions? The concept of undertaking'**, provides further clarification as to which types of entities are caught by the competition provisions of the Comms Act should their actions breach the competition provisions of the Comms Act.

26. **ECS COMP. 5 'Market Definition'**, describes URCA's approach to defining the relevant product, and geographic markets when applying its competition powers. As shown in the diagram above (paragraph 5 above and further discussed elsewhere in this document), market definition plays an important role in competition analysis and enforcement. Namely, when applying sections 67 to 68 of the Comms Act (on anticompetitive agreements and practices), URCA will define the relevant market in order to assess the effect of such agreement on that market. Similarly, when applying section 69 of the Comms Act (on abuse of a dominant position), URCA will define the relevant market in order to assess whether a licensee is dominant in that particular market. When applying sections 70 to 78 (on mergers and joint ventures), URCA will define the relevant market in order to determine whether there would be a significant lessening of competition on that market as a result of the merger.

27. **ECS COMP. 6** and **ECS COMP. 7** provide details about two substantive situations that competition provisions are designed to deal with, namely anticompetitive agreements and abuses of a dominant position. The third substantive situation, merger control, is the subject of **ECS COMP. 2**.

28. **ECS COMP. 8 'Guidance on the Level of Fines'**, outlines the basis on which URCA calculates financial penalties for infringements of the prohibition against anticompetitive agreements (**ECS COMP. 6**) and against abuses of a dominant position (**ECS COMP. 7**). Under section 70(2), as read in conjunction with section 109 of the Comms Act, URCA has the power to impose a fine on licensees and other parties who do not notify a merger. In determining the level of fine for non-notification, URCA will consider the General principles in this Guidance Note, whilst recognising that this Guidance Note deals principally with breaches of the two substantive situations above. The Guidance Note discusses the methodology used in calculating the basic amount of the fine, including factors which may be considered for adjustment to be made.

29. **ECS COMP. 9 'How to make a competition complaint and guidance on investigation procedure'**, provides consumers and businesses with an overview of how URCA will use its powers to investigate complaints which it receives, alleging that licensees or other parties have breached the provisions of the Comms Act. The Guidance Note informs parties as to the procedure for submitting a competition complaint and the general investigation procedure which will follow.

ECS COMP. 1 - 3

ECS COMP. 1, **2**, and **3** were published on 18th September 2009 and can be found on the URCA Bahamas website: **www.urcabahamas.bs.**

ECS COMP. 4 – WHO IS COVERED BY THE COMPETITION PROVISIONS? THE CONCEPT OF UNDERTAKING

PART 1: INTRODUCTION

1. Purpose of this Guidance Note

1. This Guidance Note is intended to provide clarity and transparency for licensees and prospective investors as to who may fall within the scope of the competition provisions i.e., Part XI of the Comms Act 2009.

2. Who is covered by the rules?

2. The Table below provides an outline of the relevance of each of the terms considered in this Guidance Note for ease of reference.

ANTICOMPETITIVE AGREEMENTS (sections 67-68)	• Agreements between licensees • agreements between licensees and other undertaking(s) • agreements between members of associations of undertakings
ABUSE OF A DOMINANT POSITION (section 69)	• licensee(s)
MERGER CONTROL (sections 70-78)	• licensee (change in control of licensees)

3. As shown in the table above, the statutory provisions on anticompetitive agreements have a wide realm of application, applying to agreements between licensees, or between a licensee and another undertaking, or between the members of associations of undertakings. The competition provisions dealing with abuse of a dominant position, and merger control, are applicable solely to licensees. In the case of merger control, the relevant provisions of the Comms Act apply to all cases when there is a change in control of a licensee (see Guidance Note ECS COMP.2, Merger Control – Substantive Guidance, for further details).

PART 2: DEFINING THE RELEVANT TERMS

3. Licensees

4. The term 'Licensee' is defined in the Comms Act as 'the named licensee, and any of its subsidiary undertakings notified to URCA'.

5. Essentially, the term 'licensee' refers to any person (or undertaking) that holds a licence issued by URCA (see box below for further detail).

> What is a licensee?
>
> 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;
> - a notified subsidiary undertaking of a licensee with an individual group licence.
>
> It does not cover persons who operate under a Comms Act exemption.

4. Undertakings

6. The concept of an undertaking is only relevant for the purposes of section 67 of the Comms Act (Anticompetitive Agreement). As well as applying to agreements between licensees, section 67 also applies to agreements between licensees and one or more other undertakings; and between associations of undertakings operating in the electronic communications sector in The Bahamas.

7. The following paragraphs consider a number of issues in respect of the term "undertaking".

4.1 Definition

8. The term 'undertaking' is defined in the Comms Act as meaning:

   (a) a body corporate or partnership;

   (b) an unincorporated association; or

   (c) any person;

   carrying on a trade or business, with or without a view to profit.

9. It follows that a licensee can be an "undertakings", but the term "undertaking" is wider than "licensee".

10. Accordingly, URCA will consider the term 'undertaking' to include:

- individuals,
- partnerships,
- trusts,
- charities,
- co-operatives,
- state-owned commercial organisations (including nationalised firms), and
- non-profit making organisations

that are engaged in economic activity with or without the intention of making a profit.

11. The characteristic feature of an economic activity is that consisting in offering goods and services in a given market. When engaged in an economic activity, undertakings have an impact on the market in a capacity other than that of a consumer.

12. Whether a particular individual or organisation is an "undertaking" will depend on the facts of the case and the economic reality. Generally speaking, any entity engaged in offering electronic communications services in The Bahamas will be an "undertaking".

13. The fact that an organisation lacks a profit motive does not, in itself, mean that it is not engaged in an economic activity. Charities and non-profit making organisations, for example, are to be considered "undertakings" if they are engaged in an economic activity.

14. An entity may be an undertaking regardless of its legal status or the way in which it is financed.

4.2 Public Bodies

15. In some cases it may be necessary to consider whether public bodies in The Bahamas (for example, government departments, agencies, public authorities, municipalities, statutory corporations, commissions, communes or other public bodies) or entities entrusted with regulatory or other functions in The Bahamas are undertakings for the purposes of the competition provisions.

16. In particular, state owned corporations may act as "undertakings", as may bodies entrusted by the state with particular tasks, and quasi-Governmental bodies which carry out economic activities within the electronic communications sector in The Bahamas. In general, URCA will consider the various activities of a public body individually. Some of those activities may be outside the scope of competition law but others may qualify as "economic activity". A public body is an "undertaking" in relation to those of its activities that qualify as "economic activities" even though other functions of the public body would not be "economic activities".

4.3 The 'single economic entity' doctrine

17. Two or more legal persons that form a single economic entity are usually considered to comprise a single undertaking. As more particularly detailed below, agreements between entities within the same economic entity will not generally fall under the prohibition in section 67. The most obvious example is the relationship between a parent and a subsidiary company, though other relationships, such as between a principal and agent, may be analogous.

4.3.1 Parent and subsidiary

18. Firms within the same corporate group can enter into legally enforceable contracts with one another. If the relationship between firms in the same corporate group is so close that economically they form a single legal entity, such agreements will generally not fall within the prohibition in section 67. Where this is the case, the agreement is regarded as relating to the internal operations within a corporate group, rather than an agreement between independent undertakings. Note however that in these cases, the firms remain subject to the section 69 prohibition.

19. In considering whether a parent and its subsidiary are one undertaking, URCA will take the view that the parent and the subsidiary are one entity where the subsidiary has no real autonomy to determine its course of action on the market, such that it does not exercise economic independence. The crucial question is whether parties to an agreement are independent in their decision making or whether one has significant control over the other, to the extent that the latter does not enjoy 'real autonomy' in determining its course of action on the market.

20. As such, agreements made between companies within the same corporate group will generally not be covered by section 67 of the Comms Act. However, when a subsidiary company has the freedom to determine its own commercial behaviour, the parent and subsidiary may be regarded as separate undertakings.

21. The single economic entity doctrine means that a parent company can be liable for the activities of its subsidiaries. This means that action can be taken by URCA against the parent of the subsidiary company, or against the subsidiary itself. This can happen, for example, in cases where a subsidiary company takes part in a cartel. URCA can take action against the parent and/or against the subsidiary itself.

4.3.2 Principals and Agents

22. Similar principles apply to parent and subsidiary undertaking apply when considering the relationship between a principal and its agent. If the agent is acting under a genuine agency agreement, it will usually be regarded as forming part of the same economic entity (and therefore the same undertaking) as the principal.

23. A genuine agency agreement is one where the principal bears the financial and commercial risks under the arrangement.

4.3.3 Undertakings related by succession

24. Separate legal entities may be treated as one and the same undertaking where there is a corporate registration in which one entity succeeds another: the liabilities of the latter may be attributed to the former.

25. A mere change in the legal form and name of an undertaking does not create a new undertaking free of liability for any anticompetitive behaviour of its predecessor when, from an economic point of view, there is a functional and economic continuity between the two. To hold otherwise would mean that it would be open to a company to simply change its legal form and/or name to escape its existing liability. The determining factor is likely to be whether there is functional and economic continuity between the original infringer and the successor undertaking.

4.4 Associations of undertakings

26. The possibility that the competition provisions may be relevant to associations is explicitly recognised in section 67 by the reference to 'decisions by associations of undertakings'. As such , an association which seeks to implement and enforce an anticompetitive arrangement between its members will be covered by the rules.

27. An 'association' of undertakings is any body created for the purpose of representing the interests of its members in relation to commercial matters. The term is not limited to any particular type of association (although trade associations are the most common form of associations of undertakings).

28. In order to constitute an association of undertakings, it is necessary that the participants in the association are undertakings within the meaning of the Comms Act. As the Comms Act only applies to the electronic communications sector in The Bahamas URCA's jurisdiction under the Comms Act will be limited to activities of associations of undertakings operating in this sector.

ECS COMP. 5 – MARKET DEFINITION

PART 1: INTRODUCTION

1. Purpose of this Guidance Note

1. This Guidance Note describes URCA's approach to market definition when exercising its competition powers. After a market is properly defined, then URCA can conduct a market analysis, in order to determine whether:

    - an agreement has an effect on the relevant market;
    - a merger may lead to a substantial lessening of competition in a relevant market; or
    - a licensee holds a dominant position in a relevant market.

2. This Guidance Note provides guidance on:

    (i) the role of market definition in competition analysis and enforcement;

    (ii) defining the relevant product market;

    (iii) defining the relevant geographic market; and

    (iv) the evidence that URCA will consider when defining markets.

3. The process used by URCA for defining markets to determine whether a licensee has significant market power (SMP) will be similar to the process used for the purposes of competition assessment. However, there are some differences. For example, market definition in the context of a competition analysis focuses on specific services (i.e., it has a 'focal product' which is central to a complaint or investigation) and is usually retrospective, whereas market definition in the case of SMP analysis is forward-looking and does not proceed from an initial 'focal product'. As a result, it is often the case that the markets defined for the purposes of implementing ex-ante regulation are wider than the markets defined for the purposes of competition law analysis. URCA takes a forward-looking approach in competition assessments when conducting merger reviews but then the boundaries of the "focal point" of the review will be determined by the products and services offered by the parties.

4. URCA intends to develop and publish separate guidance on its approach to market definition for the SMP provisions in Part VI of the Comms Act in due course.[1]

[1] Under section 116 of the Comms Act, (Interim Presumptions of SMP), there is a presumption that certain licensees (listed in Schedule 4) have SMP. Any licensee that has presumed SMP must comply with the obligations that they are subject to under section 116(2) of the Comms Act. The methodology used and the approach taken for the initial assessment are explained in 'Preliminary determination on types of obligations on SMP operators' - ECS 18/2009 (in respect of BTC) and ECS 19/2009 (in respect of CBL).

1.1 Market definition

5. Within the context of competition assessment, market definition is a tool to identify and define the boundaries, delineating different services within which firms compete. The main purpose of market definition is to identify the competitive constraints that suppliers of specific products or services face. Market definition also assists analysis pertinent to the specific products or services, which provides an indication of the level of market power enjoyed by particular firms. It is the industry norm to refer to a market as defined in any one specific case as the "relevant market".[2]

6. URCA's methodology for defining the relevant market in competition law assessment under Part XI of the Comms Act is set out in this Guidance Note and is generally applicable across the competition provisions specified in paragraph 7 below.

7. The three main situations covered by the competition provisions in the Comms Act, anticompetitive agreements, abuse of a dominant position and merger control, presuppose a market definition:

   - an agreement has an anticompetitive effect in a **defined market**;
   - a merger will lead to a substantial lessening of competition in a **defined market**; and
   - an abuse of a dominant position presupposes that a licensee is dominant (or collectively dominant) in a **defined market**.

8. In addition, market definition plays a crucial role in the application of URCA's Guidance Note on the level of fines (**ECS COMP. 8**), which provides that the structure of the relevant market and the market shares of the parties involved in the infringement are crucial to a determination of the gravity of the infringement.

9. In light of the foregoing, market definition is crucial in competition law. The market definition process, however, might lead to different results depending on the nature of the issue being examined by URCA. For instance, the relevant market might be defined differently when analysing a merger (where the analysis is essentially prospective), and when analysing a potential abuse of a dominant position or an anticompetitive agreement (which essentially looks at past behaviour).

[2] It is worth drawing particular attention to the difference between the concept of a 'market` for the purpose of competition assessment and the definition of a market used in other contexts. For example, companies often use the term 'market` to refer broadly to the industry or sector where they operate. These broad references to 'markets' should be distinguished from the specific concept of a properly defined economic market, as used in competition law assessments under Part XI of the Comms Act.

PART 2: DEFINING THE MARKET

10. As previously mentioned there are two dimensions to the definition of the relevant market:

    - the relevant product market; and
    - the relevant geographic market.

    These dimensions of market definition are generally determined by reference to the extent to which customers can and would readily switch to substitute products and geographic areas respectively. This depends on the alternative sources of supply available.

2. Relevant product market

11. The relevant product market comprises all products or services which are sufficiently substitutable for each other. Defining the relevant product market therefore requires a consideration of the extent to which different products are substitutable and exercise a competitive constraint on each other.

12. In competition analysis, it may be sufficient to identify several possible 'markets' without settling on a final market definition, if the substantive competition assessment would be the same whichever of the possible descriptions of the market is adopted. For example, the objective will often be to establish whether product A and product B belong to the same product market, where the inclusion of product B would be enough to remove any competition concerns. In such situations, provided that it can be concluded that product A and product B are in the same market, it may not be necessary to consider whether the market includes other products, or to reach a definitive conclusion on the precise scope of the product market.

13. In the context of market definition there are three main sources of competitive constraints:

    - demand-side substitution,
    - supply-side substitution, and
    - potential competition.

    This Section of the Guidance Note discusses both demand-side substitution and supply-side substitution, while Section 6 discusses potential competition.

14. Demand-side substitution is the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. The

competitive constraints arising from supply-side substitution and from potential competition are in general less immediate and usually require an analysis of additional factors. Supply-side substitution is an important consideration in market definition in cases where demand-side substitution may not be conclusive, and provided that its effects are sufficiently direct and immediate. When these effects are not sufficiently direct to qualify as supply-side substitution, they are considered as potential competition and usually taken into account when assessing whether there has been any anticompetitive conduct (i.e., at the stage of market analysis, during the assessment stage), rather than when defining the market.

2.1 The hypothetical monopolist test (or "SSNIP test")

15. The assessment of demand and supply-side substitution entails a determination of the range of products which are viewed as substitutes for the focal product. In the case of demand-side substitution, this entails considering which products are viewed as substitutes by the customer. In the case of supply-side substitution, this entails considering whether potential competitors, who do not currently develop products that are substitutable from the customer's perspective, would enter the market by either developing new products or altering the products that they currently offer.

16. URCA will adopt the hypothetical monopolist test[3] when defining the relevant product market. This test is a generally accepted conceptual approach to market definition, leading to the inclusion or exclusion of all products which act as a constraint to the focal product from the relevant market, depending on whether competition from those products affects or constrains sufficiently the pricing of the product in question.

17. When applying the SSNIP test, the following question is posed: if there were only one supplier (a hypothetical monopolist) of the product or set of products under consideration (the 'focal products' in an investigation, or the product supplied by the merging parties, the "candidate market"), would the hypothetical monopolist be able profitably to raise prices, or otherwise worsen its offer, by a small but significant and non-transitory amount?

18. For the purpose of applying the SSNIP test, it is generally accepted that a "small but significant" increase in price will be an increase of 5% - 10% above the prevailing market price. Therefore, URCA will consider customers' and other potential suppliers' behaviour if the price of the focal product were increased by 5% - 10%.

19. When undertaking market definition, URCA will consider the effect of the price increase over a "non-transitory" period of time. This allows for the short-term effects of price changes to be excluded from the analysis. Generally, URCA will consider a time frame of one to two years.

20. The SSNIP test is an iterative process. If the response to the question is negative – i.e., it would be unprofitable, because for example a sufficient number of customers would

[3] Also known as the Small but Significant Non Transitory Increase in Price (SSNIP) test.

switch to other products or switch to suppliers in other geographies – then the closest substitutes are 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 because there would be no sufficient competitive constraints stopping the supplier from doing so. That set of products constitutes the 'relevant product market'.

21. The theoretical starting price for the purpose of the SSNIP test may be the prevailing market price, particularly for the analysis of merger cases. However, this may not be the case where the prevailing price has been set in the absence of sufficient competition, i.e., by an operator with market power in cases of abuse of a dominant position.

22. For example, if as a result of an operator's market power, the prevailing price exceeds the competitive price, then an erroneous market definition could occur. If the prevailing price is above the competitive level, a 5-10% increase in price may force customers to consider alternative products or services that would not normally be considered substitutable.[4]

23. The prevailing market price could also be lower than the competitive price. In the electronic communications sector this may occur when, for example, an operator with a statutory monopoly has subsidised cheaper local calls for its customers by charging higher prices in other sectors, such as for international calls.

24. Where there are pricing anomalies that URCA can identify, it may use other approaches, such as operator-specific information (where available) and/or benchmarking, to determine a reasonable starting price. The substitution analysis would then be done based on that price.

2.2 Demand-side substitution

25. The assessment of demand-side substitution entails a determination of the range of products which are viewed as substitutes by the customer.

26. URCA will consider the most appropriate methodology for assessing the extent to which customers can and would switch to substitute products.

27. When employing the SSNIP test, URCA will consider whether the small but significant non-transitory increase in price is likely to lead to a significant number of marginal customers switching to alternative products. If a sufficient number of customers would switch and the price increase would be unprofitable, then those alternative products will be included in the market definition and the process is repeated.

[4] This is known as the "cellophane fallacy", from a US case where, due to the monopoly price charged for cellophane, it was found that customers would substitute away from cellophane in response to an increase of 5-10% in the price. Customers would switch to other containers, including paper bags, as substitutes. Ordinarily paper bags would not be considered a substitute for cellophane but switching occurred because cellophane was already priced at the highest price that the market would bear, i.e., the monopoly price.

2.3 Supply-side substitution

28. Supply-side substitution refers to the ability of firms not currently supplying products in the relevant market to begin doing so, whether as a result of developing new substitutable products or altering the products they currently offer so that they become demand substitutes for the products being considered, or by increasing the geographic availability of existing products.

29. In competition law, supply-side substitution is generally of secondary importance to demand-side substitution in market definition. However, in some cases, when from a demand-side perspective two products may not be substitutable but suppliers of a particular service can easily adjust their offering in response to a small and non-transitory increase in price, then supply-side substitution may become the primary consideration for market definition.

30. In order for supply-side substitution to be viewed as a competitive constraint, it must be shown that suppliers would be able to switch production to the relevant products and market them in the short term, without incurring significant additional costs or risks, in response to small and permanent changes in relative prices. When these conditions are met, the additional supply that could be put into the market will have a disciplinary effect on the competitive behaviour of the operators involved.

31. When applying the SSNIP test in the context of supply-side substitution, URCA will consider whether the increase in price is likely to make the supply of the relevant product so profitable as to make it efficient for potential suppliers to supply that product. If this is the case, then the threat of entry by these potential suppliers will effectively constrain price setting ability of the hypothetical monopolist.

32. Supply-side substitution tends to be of greater significance in sectors where companies market a wide range of qualities or grades of goods and services. For a given final customer or group of customers, goods or services of different qualities may not be substitutable. However, the different goods or services may be grouped into one product market if most of the suppliers are able to offer and sell the various qualities immediately and without a significant increase in cost. In such cases, the relevant product market will encompass all the products that are substitutable in terms of both demand and supply.

33. When supply-side substitution is possible but it would involve significant changes to existing assets, substantial additional investments, strategic decisions or time delays, it is much less likely to constrain the price setting behaviour of the hypothetical monopolist and therefore will not be considered at the market definition stage. It may, however, be taken into account when assessing potential competition (see Section 6 below).

3. Relevant geographic market

34. As with the relevant product market, the relevant geographic market is defined by reference to competitive constraints and, again, demand-side substitution will often be determinative.

35. In essence, defining the relevant geographic market through demand-side substitution involves identifying the extent to which customers can readily switch their supplier of the relevant goods or services to a supplier in a different geographic area, depending on the alternative sources of supply available.

36. For these purposes, the SSNIP analysis can be applied in a similar way as in product market definition. Initially, a narrow, hypothetical geographic market definition is adopted. Consideration is then given to whether a hypothetical monopoly supplier in the specified area could profitably raise prices. If a price increase would not be profitable because too many customers would switch to suppliers outside the area, the hypothetical market definition is widened and the analysis repeated.

37. If the economic analysis suggests that local or regional markets may be applicable, for the purposes of analysis it is likely to be necessary to aggregate areas where the competition conditions are similar.

4. Different customer groups

38. In some cases, services may be in separate markets depending on the customers to which the services are provided. For example, international precedent suggests that in some circumstances in the electronic communications sector, there may be different markets for services provided to residential customers and to business customers.

39. Evidence of such market distinctions is often based on the suppliers' ability to differentiate products and prices between different customer groups successfully.

5. Continuous chains of substitution

40. Two products, or two geographic areas, can form a single product market, or a single geographic market, if there is a continuous chain of substitution between them, i.e. if there is evidence of a so-called "ripple effect".

41. In the case of product markets, if for example product A competes in a market with product B, and product B competes with product C, the pricing decisions of the provider of A can affect the ability of the provider of C to increase its prices profitably, even though A and C may not belong to the same product market.

42. Similarly for geographic markets, it is possible that different geographic areas served by different suppliers may overlap, or that, if they do not, suppliers in different geographic

areas are nonetheless constrained in their pricing decision by suppliers at a national level, so that there may be a "ripple effect".

43. If a continuous chain of substitution can be proved, it can lead to an extension of the relevant market in individual cases.

6. Potential competition

44. The third source of competitive constraint is potential competition. Potential competition is essentially the competitive constraint associated with the threat of entry by companies not currently operating in the market where such a threat is not sufficiently immediate to be treated as supply-side substitution.

45. Potential competition is not usually taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint may depend on hypothetical factors and circumstances related to the conditions of entry.

46. An analysis of potential competition is typically carried out at a subsequent stage to ascertain the position of the companies involved in the relevant market. After this stage, potential competition may be used to assess the competitive conditions in the market.

7. Evidence URCA will consider when defining markets for competition purposes

47. URCA may take into account a range of evidence when defining markets. As explained below, the type of evidence that will be of most use, and the type of evidence that would be available, will depend on the circumstances of each case.

48. In the case of a complaint, URCA will expect to be in a position to make a broad initial assessment of the possible relevant markets on the basis of the preliminary information available, information submitted by complainants and any other relevant stakeholders, as well as general market data that are submitted to URCA from time to time. URCA will not consider complaints which are not supported by evidence. Guidance on procedural issues and the kind of evidence that would be required for a prima facie case can be found in **ECS COMP. 9**.

49. URCA will seek information from the parties to an investigation. Internal company documents that pre-date the investigation are likely to provide useful evidence of the parties' views on the markets in which they operate and of the competitive constraints they face.

50. In addition to the parties directly involved in an investigation, URCA will often contact relevant third parties, such as the main customers, suppliers and competitors in the

relevant industry sector, in order to obtain their views about the boundaries of product and geographic markets and to obtain other factual evidence.

51. Requests for information of this kind will usually include questions relating to the recipient's perceptions of likely reactions to hypothetical price increases. URCA may also conduct interviews with relevant employees or carry out site visits, in order better to inform its analysis.

7.1 Evidence URCA will consider when defining the relevant product market

52. As a first step, URCA will usually carry out an analysis of the relevant product's characteristics and intended use.

53. Although the end use of goods or services is usually closely related to their characteristics, goods or services with different characteristics may have the same end use. For instance, consumers may use physically dissimilar services such as cable and satellite connections for the same purpose, for example to access the Internet. In this case, both services (cable and satellite access services) may belong in the same product market. Conversely, paging services and mobile telephony services, which may appear to be capable of offering the same service, for example dispatching of two-way short messages, may be found to belong to distinct product markets due to different consumer perceptions of their functionality and end use, depending on the circumstances of the case.

54. Where an operator uses different pricing models or includes different levels of support services when selling a good or service to different groups of customers, it may be inferred that there are different markets based on customer type. For example, analysis may lead to the conclusion that separate markets should be defined for services supplied to business and residential customers. However, it is not necessary that products are offered at the same price in order to be viewed as substitutes.

55. Furthermore, product substitutability between different electronic communications services may increasingly arise through the convergence of various technologies. Convergence allows different types of content and communications services to be delivered through the same network and provided over different platforms.[5] (By having a common infrastructure, communications technologies like Internet, voice, video and data communication can be combined and be provided through a single device and over the same network. For instance, the Internet may be used to transmit digitised voice signals in competition with traditional voice telephony services; mobile phones are now available with video, radio and the internet; radio is now available over TV platforms and the internet; and TV is available over mobile platforms and the internet. Convergence means that companies are no longer operating solely in their historical markets.

[5] Platforms are the means of delivering services to consumers and now include digital terrestrial TV, cable, satellite, fixed wireless and fixed and mobile phone lines. Services are the products/content that are provided over these platforms and include TV, radio, mobile TV, internet, messaging, vodcasting, VOIP and many others.

56. Although a product's characteristics and intended use will often provide a useful starting point for the analysis, it will usually be necessary to consider other criteria in order to assess whether two products are demand-side substitutes. The following are examples of the other types of evidence that URCA is likely to consider:

- **Evidence of substitution in the recent past:** in some cases, it may be possible to analyse information relating to recent past events or shocks in the market that offer actual examples of substitution between two products. For example, if there have been changes in relative prices in the past, the reactions in terms of quantities demanded will be highly indicative when assessing substitutability. Past launches of new products may also provide useful information, where it is possible to establish which products have lost sales to the new product.
- **Views of third parties:** as discussed above, URCA will often contact the main customers, suppliers and competitors of the companies involved in its enquiries, to gather their views.
- **Consumer preferences:** in the case of consumer products, it may be difficult for URCA to gather the direct views of end-users about substitute products. In such cases, URCA will take account of any available pre-existing evidence of consumer preferences. This includes: marketing studies that companies have commissioned in the past, recent consumer surveys, data from consumers' purchasing patterns or market research studies. Wherever possible, URCA will aim to conduct its own surveys. Where this is not possible or proves too onerous, URCA will have regard to independent surveys which have already been conducted. Such surveys will carry more weight than those conducted by the parties to an investigation themselves, although pre-existing company surveys will also be considered. When the parties subject to an investigation themselves carry out a consumer survey (or generate other evidence) specifically for the purposes of that investigation (e.g. to establish whether a significant proportion of consumers consider two products to be substitutable), URCA will of course consider the results, but it will carefully assess the methodology adopted to ensure that the evidence is robust and fit for purpose.
- **Barriers and switching costs:** although two products may appear on an initial assessment to be demand-side substitutes, there may be barriers to and/or costs of switching that mean that the products do not form one single product market. Possible examples include regulatory barriers or other forms of State intervention, the need to incur specific capital investment in order to switch to alternative inputs, the location of customers, learning and human capital investment, and uncertainty about the quality and reputation of unknown suppliers. URCA will consider whether such barriers or switching costs exist and, if so, will assess their likely impact on the level of substitution.
- **Quantitative tests:** there is a number of quantitative tests that have been designed specifically for the purpose of delineating markets, including various

econometric and statistical approaches to estimates of own-price elasticities and cross-price elasticities of the demand of a product.[6] In the electronic communications sector it can be difficult to get data of sufficient quality to apply these techniques but, where available, URCA may take such evidence into account where it can be shown to be robust and reliable, and fit for purpose.

7.2 Evidence URCA will consider when defining the relevant geographic market

57. URCA will generally take a preliminary view of the scope of the geographic market on the basis of broad indications as to customers' preferences, current geographic patterns of purchase and technical or regulatory barriers, as well as a preliminary analysis of pricing and price differences between different areas. This preliminary view will be used as a working hypothesis in URCA's further analysis to reach a more precise geographic market definition.

58. The following are examples of the types of evidence that URCA is likely to consider relevant to an assessment of the scope of the relevant geographic market:

- **Past evidence of customers diverting orders to suppliers in other areas:** information on price changes between different areas and consequent reactions by customers might be available in some cases. Generally, the same quantitative tests used for product market definition can be used for geographic market definition.
- **Basic demand characteristics:** the nature of demand for the relevant product may in itself limit the geographic scope of the market. Limiting factors might include local preferences, language, culture or lifestyle.
- **Views of third parties:** as discussed above, URCA will often contact the main customers, suppliers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the geographic market and other relevant factual information.
- **Barriers and switching costs:** URCA will consider the extent to which there are barriers or costs associated with diverting demand to companies located in other areas. Examples include regulatory barriers (e.g., licensing for particular territories), technical barriers (such as the reach or footprint of particular networks) and physical barriers (such as between islands). There may also be switching costs associated with changing from one network supplier to another (e.g. additional equipment or upgrade costs).

[6] The own-price elasticity of a product is a measure of the degree to which sales volumes fall as the price of the product rises. Own-price elasticity therefore measures the extent to which an increase in the price of a product leads to a decrease in the sales of that same product. (Own-price elasticity of demand for product A is a measure of the responsiveness of demand for product A to a percentage change in its own price.) The cross-price elasticity between two products measures the extent to which an increase in the price of one product leads to an increase or decrease in sales of the other. (Cross-price elasticity between products A and B is the responsiveness of demand for product A to a percentage change in the price of product B.)

7.3 Conclusion on Relevant Market

59. This Section of the Guidance Note has described the different types of evidence that might be relevant when URCA is defining markets in competition law assessments under Part XI of the Comms Act. This does not imply that in each individual case it will be necessary to obtain evidence in each of these areas. Different types of evidence may carry different weight in specific investigations; and it may be the case that a subset of types of evidence will be sufficient to reach a conclusion.

60. Where parties to an investigation believe that the issue of market definition is likely to be particularly complex or necessitate a departure from previous decisions, URCA strongly advises those parties to raise this with URCA as early as possible in the process.

ECS COMP. 6 – ANTICOMPETITIVE AGREEMENTS – SUBSTANTIVE GUIDANCE

PART 1: INTRODUCTION

1. Purpose of this Guidance Note

1. This Guidance Note discusses the substantive aspects of the prohibition against anticompetitive agreements. Certain agreements, decisions and practices which prevent, restrict or distort competition are prohibited (section 67 of the Comms Act) unless they satisfy certain specified conditions (section 68 of the Comms Act).

2. In particular, this Guidance Note provides guidance on:

- what constitutes an "agreement";
- when an agreement can be deemed anticompetitive, i.e. can be considered to have as its object or effect the prevention, restriction or distortion of competition; and
- the conditions which have to be satisfied for an agreement to be eligible for exemption.

2. Anticompetitive Agreements

3. Sections 67 and 68 of the Comms Act deal with anticompetitive agreements. These provisions apply to agreements which relate to electronic communications matters, and which:

    - may affect trade within The Bahamas. and
    - have as their object or effect the prevention, restriction or distortion of competition in markets in The Bahamas.

4. Such agreements are prohibited by section 67 unless they are exempt in accordance with the provisions of section 68.

5. These provisions therefore provide a legal framework for assessment which recognises the distinction between agreements with anti-competitive and pro-competitive effects:

    - section 67 prohibits agreements which restrict competition; and
    - section 68 allows those agreements which are prima facie anticompetitive but result in economic benefits sufficient to outweigh the detriment caused by any restriction of competition to be exempted.

PART 2: APPLICATION OF SECTION 67 AND SECTION 68

3. Scope of the prohibition in section 67

6. There are a number of elements to the prohibition in section 67.

7. For example, there must be an agreement between licensees or between a licensee and an undertaking, or a decision by an association of undertakings, or a concerted practice which:

   a) relates to electronic communications in The Bahamas;

   b) may affect trade within The Bahamas; and

   c) has as its object or effect the prevention, restriction or distortion of competition within The Bahamas.

8. Pursuant to section 66 of the Comms Act, URCA will follow international best practice when applying section 67 and section 68 of the Comms Act. Both sections 67 and 68 are closely modelled on EU competition law. As such, this Guidance Note takes the approach followed in those countries that have adopted the European model.[7]

4. Agreements, decisions of associations of undertakings and concerted practices

9. The provisions of section 67(1) apply to:

   - agreements between licensees;
   - agreements between a licensee and another undertaking;
   - decisions by members of associations of undertakings; or
   - concerted practices.

10. As the three concepts of 'agreement', 'decision' and 'concerted practice' overlap, URCA will generally use the term 'agreement' as covering all three concepts. The conceptual differences between the concepts are explained below.

11. The underlying principle applied by URCA is that section 67 covers any form of restrictive practices between two or more parties. Genuinely unilateral conduct will not fall within the scope of section 67.[8] As noted above (section 4.3 of **ECS COMP. 4**), when two or

[7] A number of countries outside the European Union have adopted a model similar to the European one, including Hong Kong, Bahrain, Singapore, Ukraine, China's Anti Monopoly Law is closely modelled on EU competition law principles, while most Latin American competition laws are modelled after EU statutes which penalise the abuse of a dominant position.

[8] Such conduct may fall within section 69, which governs the abuse by a licensee of its dominant position. ESC COMP. 7 provides details of the situations affected by section 69 of the Comms Act.

more legal persons comprise a single economic entity, agreements between them will not fall within the scope of section 67.[9]

4.1 Agreement

12. The term 'agreement' has a wide application and covers any form of commitment between two or more parties, whether legally binding or not, whether formal or informal and whether written or oral. It covers "gentlemen's agreements", whereby the parties have expressed their joint intention to conduct themselves on the market in a specific way.

13. An agreement may be reached through any means, including a physical meeting of the parties, via telephone, email or written exchange. For an agreement to exist for the purposes of section 67, it is simply required that the parties reach a consensus on the action they will take, or refrain from taking.

4.1.1 Agreements between licensees

14. The Comms Act defines a 'Licensee' as any person (or undertaking) that holds a licence issued by URCA. For further guidance on the concept of licensee, see **ECS COMP. 4**.

4.1.2 Agreements between licensees and another undertaking

15. As has been discussed at **ECS COMP. 4**, the term 'undertaking' is defined in the Comms Act as meaning a body corporate or partnership, an unincorporated association or any person carrying on a trade or business, with or without a view to profit.

16. Accordingly, URCA will consider the term 'undertaking' to include individuals, partnerships, trusts, charities, co-operatives, nationalised firms, state-owned commercial organisations and non-profit making organisations that are engaged in economic activity.

17. The section 67 prohibition does not apply to agreements between entities which form a single economic unit, as discussed in **ECS COMP. 4**.

4.1.3 Decisions by associations of undertakings

18. The term 'association' is not limited to any particular type of association (although trade associations are the most common form of associations of undertakings and of course the jurisdiction of URCA under the Comms Act is limited to the sphere of the electronic communications sector).

19. The concept of 'decision' includes the rules and regulations of the particular association in question, decisions binding on the members, recommendations or codes of conduct. The key consideration for URCA is whether the object or effect of the decision, whatever form it takes, is to influence the conduct, or coordinate the behaviour of, its members.

[9] Ditto - such conduct may fall within section 69.

4.1.4 Concerted practices

20. Section 67 applies to concerted practices between licensees or between a licensee and another undertaking.

21. There is no clear conceptual boundary between a concerted practice and an agreement. The main distinguishing factor is that a concerted practice may exist where there is informal cooperation, without any formal agreement or decision. An informal understanding, therefore, may be sufficient to constitute a concerted practice.

22. In essence, URCA will consider whether there is a form of cooperation between the parties (not amounting to an agreement) that is contrary to the normal competitive process.

23. In establishing whether a concerted practice exists, URCA will consider, amongst other things:

- whether the parties involved knowingly entered into cooperation;
- whether behaviour in the market is affected as a result of direct or indirect cooperation between the parties; and
- whether any parallel behaviour engaged in by the parties is a result of cooperation between the parties leading to conditions of competition which are not the normal conditions of the market.

4.2 Electronic Communication matters

24. Section 67 of the Comms Act applies to agreements which relate to what are described as 'communication matters'.

25. Section 65 of the Comms Act defines electronic 'communication matters' in the electronic communications sector as matters concerning:

- the provision of networks,
- the provision of carriage services,
- the provision or making available of services or facilities which are provided or made available –
    - by means of, or in association with the provision (by the same person or another) of, a network or carriage service; or
    - for the purposes of facilitating the use of any network or carriage service (whether provided by the same person or another); and
- content services, including broadcasting and related matters.

26. The following table lists those terms contained in the above definition of 'communication matters' that have themselves been defined in the Comms Act.

TERM	DEFINITION
Network	a) a transmission system for the conveyance, by the use of electrical, magnetic or electromagnetic energy, of signals of any description; and b) such of the following as are used by the person providing the network and in association with it, for the conveyance of the signals – (i) apparatus, equipment or facilities comprised in the network; (ii) apparatus, equipment or facilities used for the switching or routing of signals; and (iii) software and stored data.
carriage service	any service consisting in whole or in part of the conveyance of signals by means of a network, except in so far as it is a content service, including the provision of ancillary services to the conveyance of signals and conditional access or other related services to enable a customer to access a content service.
content service	a service either for the provision of material with a view to its being comprised in signals conveyed by means of a network or that is an audiovisual media service.
Broadcasting	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.

27. Section 2.2 of URCA's Guidance document on the Licensing Regime (ECS15/2009) provides further information on the above terms. This document may be downloaded from URCA's web site at **www.urcabahamas.bs**.

4.3 Effect on trade within The Bahamas

28. The section 67 prohibition applies to agreements which may affect trade within The Bahamas. For the purposes of the section 67 prohibition, The Bahamas means all or any part of The Bahamas.

29. Where an agreement or concerted practice operates or is intended to operate within The Bahamas, it will fall within the scope of the prohibition even if an agreement is reached outside The Bahamas, or if any party to it is located outside The Bahamas.

4.4 Prevention, restriction or distortion of competition

30. Section 67 applies to agreements that have as their object or effect the prevention, restriction or distortion of competition within The Bahamas. (Specific types/examples of anticompetitive agreements are discussed in more detail below.)

31. The terms 'object' and 'effect' are distinct from one another, being alternative (and not cumulative) conditions for a finding of a breach of section 67. URCA will therefore first consider what the object of an agreement is. In cases where it is unclear whether the object of an agreement is to harm competition (directly or indirectly), it will then be necessary to consider whether the agreement might have the effect of doing so, whatever its object.

4.4.1 Object

32. The object of an agreement is the meaning and purpose of the agreement, taken in the economic context in which it is to be applied. If the object of an agreement has been identified as being the restriction or distortion of competition, it is not necessary to assess the actual or potential effects of the agreement on competition and the agreement will be deemed anticompetitive. Therefore, if for example the parties to an agreement intended to enter into a cartel, but for reasons outside their control that cartel was never operational, the fact that the agreement did not have an anticompetitive ***effect*** is immaterial. It had an anticompetitive ***object***.

4.4.2 Effect

33. In assessing whether an agreement has a restrictive effect on competition, URCA will take into account the economic context in which the parties operate and the actual structure of the market.

34. Generally speaking, when assessing the effects of an agreement, URCA will consider the impact of the agreement in the relevant market and whether it can be said that its anticompetitive effects are "appreciable". Whether an agreement has an appreciable anticompetitive effect will depend on the circumstances in each case. Agreements which are illegal by object will not be subject to any "effects" analysis.

5. Section 67(2) – Types of agreement which restrict competition

5.1 Horizontal and vertical agreements

35. Both horizontal and vertical agreements may give rise to competition concerns and consequently fall within the section 67 prohibition.

36. An agreement is horizontal if it is entered into between companies operating at the same level in the market. In most instances, horizontal agreements are therefore between competitors or potential competitors and may give rise to competition concerns where they have an anticompetitive object or cause negative market effects with respect to market entry (in the case of agreements between potential competitors where the terms of the agreement are such that market entry is impeded or hindered), prices, output, innovation or the variety and quality of products.

37. Vertical agreements are those entered into between two or more companies where each operates, for the purposes of the agreement, at a different level of the production or distribution chain.

38. In general, vertical agreements are less likely than horizontal agreements to prompt competition concerns. However, they can also contain anticompetitive provisions. For example, price fixing issues are not limited to horizontal agreements between competing undertakings, but can also arise between undertakings operating at different levels in the supply chain, where a supplier directly or indirectly restricts a buyer's ability to determine its resale price.

39. The negative effects on the market that may result from vertical agreements include the foreclosure of other suppliers/buyers by raising barriers to entry (e.g. exclusivity provisions that lead to anticompetitive foreclosure), the reduction of inter-brand competition between the companies operating on a market (including the facilitation of both explicit and tacit collusion), the reduction of inter-brand competition between distributors.

40. Examples of horizontal and vertical agreements which may be caught by the section 67 prohibition are given below.

5.2 Section 67(2) of the Comms Act

41. Section 67(2) of the Comms Act provides a non-exhaustive list of agreements to which section 67 applies. It worth noting that the list does not restrict URCA's potential scope of investigation and enforcement activities. Indeed any agreement which has an appreciable adverse effect on competition is likely to fall within the ambit of section 67, notwithstanding whether or not it is mentioned in section 67(2). The list refers to agreements which:

    (i) directly or indirectly fix purchase or selling prices or any other trading conditions;

    (ii) limit or control markets, technical development or investment;

(iii) share markets or sources of supply;

(iv) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and

(v) make the conclusion of contracts subject to acceptance by any other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

5.2.1 Examples of horizontal agreements which may attract the application of section 67

42. There are various types of horizontal agreement which may have as their object or effect the restriction of competition. Examples include agreements which directly/indirectly fix prices, fix trading conditions, share or divide up markets, fix joint purchase/selling prices, limit or control production or investment, exchange price information, set technical or design standards and involve collusive tendering. Some of these are considered further at paragraph 5.2.2 below.

5.2.1.1 Price fixing

43. Where an agreement fixes prices, it will almost always infringe the section 67 prohibition. There are many ways in which an agreement can fix prices, for example:

- fixing the price itself or the components of a price, such as a discount;
- setting levels below which prices are not to be reduced;
- setting a percentage above which prices are not to be increased;
- establishing a range within which prices must remain; and
- agreeing not to charge less than any other price on the market.

5.2.1.2 Market sharing

44. Where parties agree to share markets, for example, with regard to territory or type of customer, or where an agreement results in one or more of the parties agreeing not to enter a market, such agreements will almost always infringe the section 67 prohibition. Such agreements may reduce the choice available to customers and may therefore lead to higher prices or reduced output. They are often also combined with some form of price restriction.

5.2.1.3 Information sharing

45. Licensees and undertakings may legitimately exchange information in the course of their business and indeed, this is often encouraged in order to promote available technology and enhance competition.

46. It is possible to exchange know-how and other information that will not have an impact on competition. For example, it is permissible to share information such as academic articles and research, and in some cases quality standards and operating procedures,

when the information shared does not go beyond what is required for the purposes of fulfilling that specific function.

47. Under Part IX of the Comms Act, URCA may issue codes of practice that are to be observed by licensees providing audiovisual media services in The Bahamas. Such codes of practice may include standards on advertising, sponsorship, and broadcasting content. Under section 55 of the Comms Act, URCA can allow industry Working Groups to co-regulate under URCA guidance and to develop codes of practice applicable to the content provision operations of each section of the industry. Exchange of information strictly pertaining to the development of codes of practice does not fall within the scope of the section 67 prohibition.

48. However, participation in an industry Working Group must not be used as a means for exchange of confidential and commercially sensitive information between industry participants that reduces or eliminates competition between operators. Thus, any agreement to exchange confidential information that alters or artificially restricts conditions of trade within The Bahamas will fall within the scope of section 67.

49. When considering a case of potentially anticompetitive information exchange, URCA will start from the assumption that each economic operator should determine independently the policy which it intends to adopt on the market. This does not prevent parties from intelligently adapting to the existing or expected conduct of their competitors, but it does prohibit any direct or indirect contact between such operators which may allow a party to influence the conduct on the market of its actual or potential competitors, or to create conditions of competition which do not correspond to the normal conditions of the market.

50. While genuinely historic information may be shared without fear of influencing competitive market behaviour, confidential information relating to a licensee's or undertaking's recent/current/future strategy should not in general be shared between licensees and/or undertakings. In addition, where the exchange of information involves only certain licensees or undertakings, to the exclusion of other competitors and consumers, there is more likely to be an adverse effect on competition.

5.2.1.4 Exchange of price information

51. The most sensitive exchange of information for the purposes of section 67 is the exchange of pricing information (such as information relating to prices to be charged or to the elements of a pricing policy including discounts, costs, terms of trade and rates and dates of change). The exchange of such information can lead to price coordination and consequently a decrease in the level of competition.

52. Where the exchange of price information leads to the reduction or elimination of uncertainties which are inherent to the competitive process, it is likely that it will be found to have an adverse effect on competition. For example, if operators providing electronic communications services in The Bahamas were to inform one another of confidential information relating to a proposed increase in prices to resellers, URCA

would be likely to conclude that an anticompetitive agreement was in place in breach of the provisions of section 67.

53. The exchange of genuinely historical information is less likely to be considered to have adverse effects on competition than exchange of more recent information. Similarly, aggregated information which cannot be reverse-engineered and disaggregated will be less likely to have an adverse effect on competition than data relating to individual parties. URCA will generally not object if, for example, trade associations representing similar interests exchange aggregated historical information which provides a historical picture of the output and sales of the relevant industry without identifying individual licensees or undertakings.

54. For the avoidance of doubt, it is important that aggregated data cannot be used in a way that allows parties to identify information relating to individual competitors in the market. This may be the case, for example, where the aggregated data relates to only a few players in the relevant market.

5.2.1.5 Limiting production or output

55. Agreements between undertakings which have as their object or effect the limitation of production or supply, for example by fixing quotas, will generally be caught by the section 67 prohibition.

5.2.1.6 Fixing trading conditions

56. If competitors agree the conditions on which they will supply, this may have an appreciable effect on competition. For example, if a trade association obliges its members to use common terms and conditions, this may restrict competition and thereby infringe section 67.

5.2.1.7 Joint purchasing

57. Agreements for the joint purchasing of products can be pro-competitive if they are concluded between small and medium sized enterprises in order to achieve volumes and discounts similar to their larger competitors.

58. However, an agreement between purchasers which effectively fixes the price that they are prepared to pay is likely to contravene section 67.

5.2.1.8 Collective boycott

59. If sellers join together and agree to collectively boycott certain customers, the agreement is likely to contravene section 67.

5.2.1.9 Bid rigging

60. An essential feature of any tendering process is that licensees or undertakings prepare and submit their tenders independently. Where tenders are submitted following collusion/cooperation between licensees and/or undertakings without the knowledge of the party running the tender process, they will be regarded as restricting competition and falling within the ambit of section 67.

61. Cover pricing is an example of a form of bid rigging. This is where one or more bidders in a tender process agrees to submit an artificially high price to allow another bidder to win the tender. Such cover bids are submitted as genuine bids, which gives a misleading impression as to the real extent of competition, thereby distorting the tender process and making it less likely that other potentially cheaper firms are invited to tender.

5.2.2 Examples of vertical agreements which may attract the application of section 67

5.2.2.1 Resale price maintenance

62. Under this type of agreement, minimum, fixed, maximum or recommended resale prices are agreed between the supplier and the distributor or the reseller. A supplier is generally entitled to impose a maximum sale price or recommend a sale price, provided that this does not amount to a fixed or minimum sale price in practice. The main potential negative effects of a genuine maximum or recommended sale price are a reduction in intra-brand competition and increased transparency of prices, which may facilitate collusion between suppliers and/or between distributors and is therefore likely to contravene section 67.

63. The agreement on a minimum or the agreement to fix a price for the reselling of the goods or services would generally contravene section 67.

5.2.2.2 Single branding

64. A single branding agreement is one where the buyer is induced to concentrate its orders for a particular product on one supplier. An agreement not to purchase competing products or to purchase all or most of the purchaser's requirements for the products from one supplier fall within this category. Such agreements may foreclose access to the market at the supplier level, facilitate collusion and restrict inter-brand competition and are therefore likely to contravene section 67.

5.2.2.3 Limited distribution

65. A limited distribution agreement is one where the supplier agrees to sell to only one or a limited number of buyers. Such agreements may lead to foreclosure at the buyer's level of the market, facilitate collusion and lead to a reduction, or even a total elimination, of intra-brand competition, and are therefore likely to contravene section 67.

5.2.2.4 Market partitioning

66. This type of agreement occurs where a party to a vertical agreement (e.g. a reseller) is restricted as to where it buys or resells a particular product. The main negative effect is a reduction of intra-brand competition and a partitioning of the market. Such agreements may also facilitate collusion, thereby infringing section 67.

6. Exempt agreements

67. While certain agreements may have as their effect the prevention, restriction or distortion of competition (and consequently come under the scope of section 67 of the Comms Act), they may result in economic benefits which outweigh the adverse effects on competition. Such agreements may, under section 68 of the Comms Act, be exempted from the section 67 prohibition.

6.1 Section 68 of the Comms Act

68. URCA may exempt agreements from the section 67 prohibition if the conditions in section 68 are satisfied.

69. Section 68 sets out four cumulative conditions, which must all be fulfilled for the exemption to be available. If any of the tests is not met, the agreement will not be capable of exemption.

6.1.1 The section 68 tests

a) The agreement contributes to improving the production or distribution of electronic communication services or promoting technical or economic progress in The Bahamas;

b) consumers receive a fair share of the resulting benefit;

c) the restrictions in the agreement are indispensible to the attainment of these objectives; and

d) the agreement will not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the product or services in question.

6.1.2 Application of the section 68 tests

70. The four tests are cumulative.

71. Certain types of agreement are unlikely to realise sufficient benefits to outweigh their negative effects on competition. For example, agreements between competitors to fix retail prices, agreements resulting in the hindering of market entrance, collective boycotts, market sharing agreements and agreements to restrict output are all unlikely to be exempted by the section 68 regime.

6.1.2.1 First condition of section 68: Efficiency gains

72. For the first condition of section 68 to be satisfied, the restrictive agreement must contribute to improving the production or distribution of goods and services or to promoting technical or economic progress.

73. The purpose of this first condition of section 68 is to define the types of efficiency gains that can be taken into account. The aim of the analysis is to ascertain the benefits objectively created by the agreement and the economic importance of such efficiencies.

74. For section 68 to apply, the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, so it is necessary to verify the link between the agreement and the claimed efficiencies and the value of these efficiencies.

75. All efficiency claims must therefore be substantiated so that the following can be verified:

    (a) the nature of the claimed efficiencies - it is not enough that the parties to an agreement may claim that this will result in cost savings or better economies of scale, for example. It is important to prove or demonstrate that the agreement truly contributes to improving production or distribution of electronic communications services, or promoting technical or economic progress in The Bahamas (while satisfying the other conditions of section 68).

    (b) the link between the agreement and the efficiencies - is there a direct causal link between the restrictive agreement and the claimed efficiencies?

    (c) the likelihood and magnitude of each claimed efficiency - what is the expected value of the claimed efficiencies?

    (d) how and when each claimed efficiency would be achieved.

76. The types of efficiencies contained in section 68 are broad categories which are intended to cover all objective economic efficiencies. There is considerable overlap between the various categories mentioned in section 68 and a single agreement may give rise to several kinds of efficiencies. Rather than drawing clear and firm distinctions between the various categories, URCA will usually make a distinction between cost efficiencies and efficiencies of a qualitative nature, whereby value is created in the form of new or improved products or greater product variety.

6.1.2.2 Second condition of section 68: fair share for consumers

77. For the second condition of section 68 to be satisfied, consumers must receive a fair share of the efficiencies generated by the restrictive agreement. The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers. Consumers within the meaning of section 68 are the customers of the parties to the agreement and subsequent purchasers.

78. The concept of a 'fair share' implies that the pass-on benefit must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under section 67. In line with the overall objective of section 67 to prevent anticompetitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers likely to be directly or indirectly

affected by the agreement. If such consumers are worse off following the agreement, the second (cumulative) condition of section 68 will not be met.

79. It is not required that consumers receive a share of each and every benefit identified under the first condition of section 68. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement.

80. This second condition of section 68 incorporates an implicit sliding scale. The greater the restriction of competition found under section 67, the greater must be the efficiencies and the pass on benefits to consumers.

6.1.2.3 Third condition of section 68: Indispensability of the restrictions

81. For the third condition of section 68 to be satisfied, any restrictions in the restrictive agreement must be indispensable to the attainment of the efficiencies created by the agreement in question. This condition implies a two-fold test:

- First, the restrictive agreement must be reasonably necessary in order to achieve the efficiencies.
- Second, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of these efficiencies.

82. If there are less restrictive means to achieve similar benefits, the claimed efficiencies cannot be used to justify the restrictions on competition. In practice, this means that there must not be any other economically practicable and less restrictive means of achieving the efficiencies.

6.1.2.4 Fourth condition of section 68: no elimination of competition

83. For the fourth condition of section 68 to be satisfied, the agreement in question must not afford the licensee or undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. Rivalry between parties is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation.

84. Whether competition is being eliminated depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition (i.e. the reduction in competition that the agreement brings about). The greater the reduction of competition caused by the agreement, the greater the likelihood that competition in respect of a substantial part of the products concerned risks being eliminated.

ECS COMP 7. – Abuse of a dominant position – Substantive Guidance

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PART 1: INTRODUCTION

1. Purpose of this Guidance Note

1. This Guidance Note discusses section 69 of the Comms Act on abuse of a dominant position. Any conduct on the part of one or more licensees which relates to the electronic communications sector and which amounts to the abuse of a dominant position is prohibited – and the relevant licensee(s) can be fined up to 10% of their turnover from their licensed activities and contents services.

2. This Guidance Note provides practical guidance on the application of the abuse of dominance prohibition under section 69 of the Comms Act. It covers:

- the scope of the prohibition;
- assessing whether a licensee is dominant;
- what type of conduct amounts to an abuse; and
- the consequences of infringement.

3. This Guidance Note is intended to provide clarity and transparency for licensees, by explaining URCA's current interpretation, approach, general principles, and analysis on how section 69 will operate.

4. As per section 66 of the Comms Act, URCA will follow international best practice when applying section 67 and section 68 of the Comms Act. URCA notes that the provisions in section 69 are closely modelled on European Union competition law. Accordingly, this Guidance Note conforms to the approach followed in those countries that have adopted the European model.[10]

5. Also, whenever appropriate, URCA has followed the approach advocated in the most recent European Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 (now 102) of the EC Treaty to abusive exclusionary conduct by dominant undertakings, which was published on 9 February 2009.

2. Abuse of a Dominant Position

6. Section 69 prohibits conduct by licensees which amounts to an abuse of a dominant position in the provision of an electronic communications service in The Bahamas. For the avoidance of doubt, the prohibition is on the abuse of the dominant position, not on the holding of a dominant position.

[10] See footnote 4, ECS COMP. 6

7. Licensees may have a dominant position for a number of reasons. They may have expanded organically, through gradually developing their business, or they may be the only licensee, or one of only a few licensees, in a market. When licensees have a dominant position, it is important that they do not exploit it by, for example, excluding their competitors or treating their customers or suppliers unfairly. Such behaviour could harm consumers through higher prices, reduced customer choice or reduced investment and innovation.

PART 2: APPLICATION OF SECTION 69

3. Scope of the prohibition

8. The prohibition in section 69 of the Comms Act only applies to licensees who abuse their dominant position. There are two elements to the prohibition:

   (i) the licensee must be in a dominant position (alone or jointly with others) in a relevant market in the electronic communications sector in The Bahamas, and

   (ii) the licensee must be engaging in conduct which amounts to an abuse of that dominant position.

9. Under the Comms Act the 'electronic communications sector' is defined as the economic sector encompassing the provision of all electronic communications, including broadcasting.

10. As mentioned in paragraph 8 above, the prohibition under section 69 is on the abuse of the dominant position, not on the holding of a dominant position.

11. Section 69 provides a non-exhaustive list of conduct which may constitute an abuse and replicated below for ease of reference:

   a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

   b) limiting markets or technical development or the provision of services to the prejudice of consumers;

   c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

   d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

   e) without objective justification, limiting or impeding access to a network or a carriage service in circumstances where access is essential for the provision of an electronic communications service by another operator.

12.

13. In accordance with section 66 of the Comms Act, URCA will follow international best practice when applying the abuse of dominance provisions under section 69.

4. Assessing whether a licensee is dominant

14. In assessing whether a licensee (alone or jointly with others) is dominant, it is necessary to:

    (i) define the market in which the licensee is alleged to be dominant (the relevant market); and

    (ii) assess whether the licensee is dominant, or jointly dominant, within that market.

4.1 Market definition

15. In defining the relevant market, URCA will apply the principles on Market Definition, as set out in ECS COMP 5.

16. Abuse of dominance may occur in a market separate to that in which the dominant position is held. For this reason there are circumstances in which section 69 will apply when a licensee that is dominant in one market commits an abuse in a different but related market. [11]

17. The term "dominance" is a well established concept in a number of jurisdictions that have developed competition law regimes based on the European model and is not separately defined in the Comms Act.

18. In the EU the most commonly-used definition is that employed by the European Court of Justice in the United Brands case.[12] In that case, the Court defined a dominant market position as:

    "...a position of economic strength enjoyed by an undertaking[13] which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

19. The degree of independence a licensee has from its competitors, customers and consumers (as introduced in the definition of dominance above) is linked to the degree of competitive constraint exerted on the licensee in question. Accordingly, in assessing whether a licensee is dominant, URCA will consider the extent to which the licensee has faced and faces constraints on its ability to behave independently. In general, the most important constraints are likely to be existing competition and potential competition. Other factors, such as the countervailing influence of buyer power or the existence of

[11] For example, in the telecommunications sector, service providers may rely on a dominant licensee for the provision of network inputs ('the upstream market'), while at the same time competing with that licensee in retail ('downstream markets'). If the vertically integrated licensee were dominant in the upstream market, there could be scope for it to leverage that position of dominance in the downstream market.

[12] Case C-27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429

[13] See Guidance: Chapter ECS COMP.4 on the concept of an undertaking.

regulatory barriers, may also be relevant. These factors are discussed in sections 4.1.1 to 4.1.4 below.

20. The definition of 'dominance' above also corresponds with the concept of Significant Market Power in section 39 of the Comms Act. The principles used to assess whether a licensee is dominant for the purposes of section 69 are broadly similar as those used to assess whether a licensee has significant market power (SMP) for the purposes of section 39. As stated in paragraph 4 of **ECS COMP. 5**, URCA intends to issue separate guidance relating to the methodology for SMP assessment under the Comms Act.

21. For the purposes of this Guidance Note, it is important to bear in mind that a licensee with SMP for the purposes of ex-ante regulation does not necessarily hold a position of dominance in a market as defined for the purposes of ex-post assessments under the competition provisions. Similarly, a licensee may be in a dominant position even if it does not have SMP.

22. A group of licensees can be collectively dominant. 'Collective (or joint) dominance' is explained in greater detail in Section 4.1.5 below. The assessment of collective dominance and of the types of abuses that can be committed by collectively dominant licensees is complex and URCA will undertake the assessment on a case by case basis. For the purposes of this Guidance Note, references to a dominant licensee should be taken to include references to licensees that are collectively (or jointly) dominant, although the way in which an abuse is committed by jointly dominant licensees may differ in some respect, depending on the circumstances of the case. Similarly, a group of licensees can have collective SMP for the purposes of Part VI of the Comms Act

4.1.1 Existing Competition

23. When assessing dominance, URCA will consider constraints imposed by, and the relative market position of, actual competitors; that is, the market position of the allegedly dominant licensee and other competing businesses already operating in the relevant market.

24. Market shares are an important indicator of the competitive constraints that a licensee faces. It is important to assess current market shares and how market shares have changed over time. In general, a licensee is more likely to be dominant if it has enjoyed a high and stable market share over time and its competitors have relatively weak positions.

25. International precedents suggest that dominance can be presumed in the absence of evidence to the contrary if a licensee has a market share persistently above 40 to 50 per cent. In practice, international precedent suggests that it is unlikely that a licensee will be individually dominant if its market share is below 40 per cent. In some circumstances dominance could be established below that figure if evidenced by other relevant factors (such as the weak position of competitors in that market, or high entry barriers).

4.1.2 Potential Competition/Barriers to entry and to expansion

26. A persistently high market share would generally be considered to provide a good initial indication of market power. Notwithstanding, a licensee with a persistently high market share may not necessarily have market power, because of the effect of potential competition. URCA's assessment of dominance will therefore take into account constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors. These constraints are affected by the existence of barriers to entry and/or expansion. In order for potential competition to be a constraint on an operator, the threat must be credible. It is not sufficient to demonstrate that potential competition could exist. URCA will look for evidence that entry or expansion is both likely and timely before concluding that the threat to existing competitors is a credible threat.

27. Barriers to entry or expansion can take various forms, from legal barriers, to economies of scale and scope,[14] to the existence of network effects.[15] In its most general sense, a barrier to entry is a restriction on a licensee attempting to enter a market in which it does not yet have a presence, which does not apply to those licensees already operating in the market. These restrictions could be, for example, set up costs or legal requirements. The lower these barriers are, the more likely the threat of competition and consequently the lower the likelihood of there being a dominant position.

28. In assessing barriers to entry and expansion, URCA will generally seek information regarding the restrictions and costs of entering the market from potential entrants and the cost of increasing the volume of services provided by licensees already operating in the market. URCA will also look at the history of entry to the market. The level of profits earned might also be relevant, as might the rate of growth or prospective growth in the market. In certain cases, URCA will make use of benchmarks from other jurisdictions, where it considers appropriate to do so.

4.1.3 Buyer power

29. Competitive constraints may also be exercised by customers. The assessment of a licensee's alleged dominance will therefore involve considering constraints imposed by the bargaining strength of the licensee's customers (known as countervailing buyer power).

30. The power of a buyer to exert substantial influence on price, quality and terms of supply may serve to limit the market power of a licensee. This buyer power might result from the customer's size or its commercial significance, for example its ability to switch to competing suppliers or to threaten credibly to do so. However, even in the presence of

[14] In the case of economies of scale, cost savings arise from carrying on more of the same activity. With economies of scope, cost saving arise from carrying out related activities.

[15] i.e. the externality deriving from the fact that in network industries, the larger the proportion of the population connected to such a network, the greater the benefits to each of them. This means that in the absence of regulatory measures, the network provider that has the most customers would be likely to attract new customers.

powerful buyers, URCA may still find that a licensee is in a position of dominance, if buyer power cannot be shown to be sufficient to counteract the licensee's market power.

4.1.4 Intellectual property rights

31. Ownership of an intellectual property right (IPR) does not necessarily create a dominant position. When establishing whether or not dominance results from the ownership of an IPR, URCA will consider the extent to which there are available substitutes for the product, process or work to which the IPR relates and the significance of the product, process or work to the relevant market.

4.1.5 Collective dominance

32. Section 69 applies to conduct on the part of one or more licensees which amounts to the abuse of a dominant position.[16] As previously stated a dominant position may apply to two or more licensees collectively (collective/joint dominance).

33. In considering whether two or more licensees are collectively dominant, URCA, will examine whether the licensees can adopt in some respects common conduct in the relevant market, in the absence of anticompetitive agreements, decisions of associations or concerted practices (i.e. tacit collusion rather than active collusion). This can arise where licensees can adopt uniform conduct or a common policy in the relevant market, such that together they hold a dominant position as regards the other players on the market.

34. The relevant factor for a finding of collective dominance is that the relevant licensees should adopt a common conduct. The assessment of the manner in which the licensees come to adopt it, and the existence of the necessary connecting factors between them, will depend on an economic assessment of the conditions of competition in the relevant market concerned.

35. Highly concentrated markets are more susceptible to collective dominance as there is a greater opportunity for the leading players to coordinate their activities. It is more likely that parties will be collectively dominant where the leading players have relatively equal market shares consistently over time and there is little scope for new parties to enter the market.

36. Therefore, URCA will consider the following aspects of the relevant market:

- market concentration (the existence of an oligopoly) - an oligopoly arises where licensees have comparably strong market positions;
- barriers to entry – licensees are more likely to coordinate their activities if there is a relatively low risk of another more efficient competitor entering the market.

[16] Similarly, in an *ex ante* market analysis under section 39, operators could be found to have collective SMP. Section 39(1) expressly states that URCA may determine that "*a licensee is an SMP licensee if the licensee, individually or with others, enjoys a position of economic strength…*".

The electronic communications sector is broadly characterised by high barriers to entry, particularly with regards to legacy infrastructure which is difficult and costly to replicate or where the licensee would require access to scarce resources including spectrum; and

- fluctuations in market shares – stable market shares are an indicator of market power symmetry. Fluctuations tend to suggest that the market power enjoyed by a licensee may be short-lived. Having said that, it is to be expected that there will be some fluctuation in market shares following a significant change to the regulatory regime, such as that introduced by the Comms Act. Therefore, fluctuations in market shares may not be a reliable factor for the time being in The Bahamas.

30. In assessing whether licensees are collectively dominant, URCA will consider a number of different factors, including those specified below:

- the ability of the allegedly collectively dominant licensees' to monitor each other's actions;
- the incentive to not depart from a common policy (e.g. the likelihood and efficacy of any retaliatory action); and
- the inability of competitors and consumers to erode the advantages of the common policy.

31. Not all the factors need to be present for a finding of collective dominance, but the presence of some or all of these factors may indicate a market where two or more players are collectively dominant.

5. What type of conduct amounts to abuse

5.1 Overview

37. This Section of the Guidance Note provides examples of the types of conduct that may constitute an abuse of a dominant position. However, it is important to note that this Guidance Note is not exhaustive, and conduct which is not covered by or referred to within it should not be assumed to be beyond the scope of the section 69 prohibition.

38. It is not in itself contrary to section 69 for a licensee to be in a dominant position. However, there is a special responsibility on a dominant licensee(s) not to allow its conduct to impair competition in the relevant market.

39. Abusive conduct generally falls into one of two categories, namely:

- conduct which exploits customers/suppliers (exploitative abuse); and

- conduct which constitutes exclusionary behaviour in that it removes/weakens competition from existing competitors or is intended to foreclose competitors from the market (exclusionary abuse).

40. Section 69 itself provides some examples of behaviour which could constitute abusive conduct, namely conduct which:

- directly or indirectly imposes unfair purchase/selling prices or other unfair trading conditions;
- limits markets/technical development/the provision of services to the prejudice of consumers;
- applies dissimilar conditions to equivalent transactions with other trading parties;
- makes the conclusion of contracts subject to acceptance of supplementary obligations which have no connection with the subject of such contracts; and
- limits or impedes access to a network or carriage service where such access is essential for the provision of an electronic communications service by another operator.

41. URCA will generally consider that conduct is abusive when it (either directly or indirectly) negatively and unfairly affects consumers and the competitive process.

42. There are no exclusions or exemptions from section 69. However, in applying the principles set out in this Guidance Note, URCA will take into account the specific facts of each case. Where there exists a reasonable justification for the conduct in question, URCA may not treat such conduct as an abuse. Similarly to the conditions for exemption in section 68, for this to happen, URCA will look for evidence that the conduct in question is either objectively necessary (e.g. exclusionary conduct that is necessary for demonstrable health and safety reasons) or produces efficiencies which outweigh the anticompetitive effects on the consumer. In assessing the net harm to consumers, URCA will consider whether the benefits arising from the efficiencies are passed onto consumers and whether it is likely that there would be consumer detriment in the long term through the elimination of effective competition. The conduct in question must be indispensable and proportionate to the aim allegedly pursued by the dominant licensee. The possibility for an abuse of a dominant position to be justifiable, thus, may exist theoretically, although URCA considers that in practice it will be difficult for a licensee to prove its justification.

43. The onus is upon the dominant licensee to provide initial evidence to show that its conduct is objectively justified. URCA will then assess whether or not the conduct in question is objectively necessary, and whether it is likely to lead to consumer harm, having regard to any anticompetitive effects as weighed against any alleged efficiencies.

5.2 Measures of cost

44. Some types of abuse by a dominant licensee require the regulator to come to a view on the relevant measure of the underlying costs to be taken into account. In the case of exploitative abuses relating to prices, prices may be "excessive" in relation to the underlying costs of providing a service. Equally, for exclusionary abuses, to assess whether even a hypothetical monopolist as efficient as the dominant licensee could be foreclosed by the conduct in question, it will be important for URCA to examine economic data relating to costs and sale prices (in particular, to decide whether a dominant licensee is engaged in below cost pricing).

45. Since communications services are commonly characterised by high levels of capital costs it will generally be appropriate to use long run incremental cost (LRIC) of supplying the service or product in question as the cost base. In particular, when examining pricing issues LRIC is generally therefore a more satisfactory cost base than marginal or average variable cost. However, other measures of cost can be useful depending on the specifics of the investigation. Regulators and competition authorities around the world have used variants of LRIC, such as LRAIC (Long Run Average Incremental Cost), TSLRIC (Total Service Long Run Incremental Cost), as well as other cost measures when deemed appropriate. URCA recognises that the current regulatory framework at this early stage does not require the development of LRIC and therefore, URCA will choose the most appropriate costing methodology based on the specifics of the investigation and the availability of appropriate costing data. URCA has a choice of making use of available cost information when investigating anticompetitive pricing strategies in the electronic communications sector, making adjustments to the information by analysing the relationship between FDC (fully distributed costs) and LRIC costs, using benchmarks, or a combination of these approaches. Since communication services are generally provided by multi-product firms it may be necessary to consider the appropriate treatment of common costs.

5.3 Exploitative abuse

46. As discussed above, conduct which is directly or indirectly exploitative of consumers is likely to infringe section 69. URCA has a clear remit to intervene, particularly when consumer protection and the effective functioning of the relevant market cannot otherwise be adequately ensured.

47. Exploitative abuses can relate to price or non-price conditions imposed by a dominant operator. Where an operator uses its dominance to impose unfair trading conditions on other parties, that conduct may constitute an abuse of its dominance position. Price-related exploitative abuses include price discrimination (which is considered in the context of exclusionary abuses at section 5.4.1 below) and excessive pricing.

5.3.1 Excessive pricing

48. Excessive pricing occurs when the dominant licensee is able to earn greater profits than would otherwise be possible in a competitive market. It has been held that '*charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied…would be…an abus*e'.[17]

49. As a starting point, URCA will consider whether the price charged bears any relation to the economic value of the product or service being supplied. There is no established test for calculating the "economic value" of a product. URCA will look for evidence that prices are substantially higher than would be expected in a competitive market. URCA will consider one or more of the following potential measures of economic value when assessing whether an operator is engaged in excessive pricing:

- whether the price of the products or services bears any relation to the cost of provision;
- benchmarking prices against other competitive markets, i.e., whether prices are similar to those for the same product in other markets;
- whether the operator's profits persistently exceed its cost of capital (i.e. that it is has 'supra-normal' profits). Generating high profits is not of itself an abuse of a dominant position but evidence of supra-normal profits may indicate that prices are not at competitive levels and that excessive prices are being charged.

50. URCA will exercise caution prior to opening an investigation concerning alleged excessive pricing. An investigation into alleged excessive pricing will involve clarifying the methodology for identifying the "economic value" of the service and whether there are justifiable reasons for the price of the relevant services. For example, prices that appear high may be justifiable where research is risky and costly or where innovation leads to a significantly more efficient (i.e. less costly) operations.

5.4 Exclusionary abuse

51. The aim of URCA's enforcement activity in relation to exclusionary conduct is to avoid anticompetitive foreclosure, a situation where the conduct of the dominant licensee results in actual or potential competitors' effective access to supplies or markets being hampered or eliminated.

52. In cases of exclusionary abuse by a dominant licensee under section 69, URCA will usually intervene where there is evidence to show that the suspected abusive conduct is likely to lead to anticompetitive foreclosure. In assessing whether this is the case, URCA will have regard to:

- **the position of the dominant licensee:** in general terms, the stronger the licensee's dominant position, the more likely its abusive conduct will lead to anticompetitive foreclosure;

17 Case C-27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429

- **the conditions on the relevant market:** this includes assessment of barriers to entry and expansion. High barriers to entry, such as economies of scale and network effects may make it more costly for competitors to overcome foreclosure by vertical integration, for example;
- **the position of the dominant licensee's competitors:** a small company may play an important role, for example, if it is the closest competitor to the dominant licensee, or a particularly innovative or cost-cutting company;
- **the position of the customers or input suppliers:** URCA will consider the possible selectivity of the conduct in question, that is to say, for example, whether the dominant licensee only applies the practice in question to selected customers or input suppliers who may be of significance as regards the entry/expansion of competitors;
- **the extent of the allegedly abusive conduct:** URCA will consider the duration of the conduct, its regularity (and the percentage of sales in the market affected by the abusive conduct);
- **possible evidence of actual foreclosure:** in cases where the licensee has been engaging in the abusive conduct for a significant amount of time, the market performance of the dominant licensee, as compared to the performance of its competitors, may yield evidence of anticompetitive foreclosure; AND
- **direct evidence of any exclusionary strategy:** URCA will have regard to any internal documents which may contain evidence of exclusionary strategies designed to eliminate competitors, or to prevent entry into the market.

53. Exclusionary conduct can be categorised as either price related or non-price related, although the dividing line between a non-price related abuse such as an outright refusal to supply and a price-related abuse such as a refusal to supply at a price that would be reasonable is not clear-cut. The following Sections of the Guidance Note look at various forms of exclusionary abuse. For the avoidance of doubt, the list below is non-exhaustive.

5.4.1 Price discrimination

54. In the context of section 69 on abuse of a dominant position price discrimination arises when a dominant licensee applies dissimilar prices to similar retail or wholesale customers for the same product. Price discrimination may be exclusionary when a dominant licensee uses discriminatory pricing structures which have the effect of foreclosing the market.[18]

[18] Price discrimination may also allow an undertaking to exploit market power by charging excessively high prices to certain customers. If so, this will be considered in accordance with the principles set out above in relation to excessive pricing.

55. Price discrimination can take two basic forms: (i) charging different prices to different customers for the same products, or (ii) charging different customers the same price even though the costs of supplying the product are in fact very different.

56. This, however, is not to say that dominant licensees must treat all customers equally or should standardise all their charges. Differential pricing by a dominant licensee may be efficient and justified.

57. Vertically integrated licensees would be expected not to discriminate against independent wholesale customers (other licensees) in favour of their own downstream operations.

58. In mobile communications a common form of price differentiation is between the prices for on-net and off-net calls. Such differential pricing can be observed in competitive markets and may be efficient. However, it may be used anticompetitively by larger operators to attempt to exclude smaller operators from the market.

5.4.2 Non-price discrimination

59. Discrimination may also relate to trading conditions other than price. URCA will assess discriminatory conduct in relation to trading conditions in the same way as it assesses discriminatory conduct in relation to price.

5.4.3 Predation

60. Predation occurs where a dominant licensee deliberately incurs short-term losses or foregoes profits in the short term so as to foreclose (or be likely to foreclose) a competitor (or a potential competitor), with a view to strengthening or maintaining its market power, thereby causing consumer harm.

61. URCA will intervene if there is evidence that a dominant licensee has deliberately incurred losses in the short term or foregone profits in order to foreclose one or more of its actual or potential competitors and, as a result, the dominant licensee would be able to maintain or strengthen its market power to the detriment of consumers.

62. In assessing predation, URCA will consider whether a dominant licensee has priced below cost. URCA will be minded to use measures of costs, as explained in Section 5.2 above.

63. In order to determine whether a conduct is predatory, URCA will not only investigate whether the dominant licensee has priced below the relevant measure of costs, but also whether the alleged predatory conduct led in the short term to revenues lower than could have been expected from a reasonable practicable and economically rational alternative conduct (i.e., whether the dominant licensee has incurred a loss or reduced profits that it could have avoided).

64. In some cases, direct evidence of a predatory strategy may be available, for example internal documents showing that there was a clear intention to incur a loss in order to foreclose entry into a market. Although this would help URCA to reach a decision that a

predatory strategy had been entered into by the dominant licensee, direct evidence is not necessary for a finding of predation.

65. Anti-competitive foreclosure can happen in the absence of competitors' exit from a marketplace. The dominant licensee may not wish to eliminate a competitor outright (which would lead to potential risks of the assets of the exiting competitor being sold at a low price and create a low cost new entrant) but adopt the strategy to prevent the competitor from competing vigorously.

66. In economic terms, for a predatory strategy to be profitable, the dominant licensee should recoup its losses when it raises its prices, but international precedent differs as to whether it should be necessary to prove that the dominant licensee would be likely to be able to increase its prices above the level persisting in the market before the conduct, thereby recouping the losses incurred. URCA will follow precedent in the UK (and across the European Union) and will not require demonstration of a likelihood of recoupment for the reasons below.

67. URCA also agrees with the European Commission's recently expressed view in its Guidance on *Enforcement Priorities in Applying Article 82 (now 102) of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* @ paras. 70 and 71, that consumers are likely to be harmed when the dominant licensee can reasonably expect its market power to be greater as a result of engaging in predatory conduct (i.e. the licensee is likely to benefit from the conduct). URCA therefore consider that it will intervene in cases where, for example, the conduct is likely to prevent a decline in prices that would otherwise have occurred without proof of likelihood of recoupment. As the European Commission states (at paragraph 71 of the Guidelines), *identifying consumer harm is not a mechanical calculation of profits and losses, and proof of overall profits is not required. Likely consumer harm may be demonstrated by assessing the likely foreclosure effect of the conduct, combined with consideration of other factors, such as entry barriers. In this context, the Commission will also consider possibilities of re-entry.* URCA endorses this position.[19]

5.4.4 Discounts and rebates

68. Licensees typically have two main reasons for offering discounts:

[19] By way of international example, URCA is aware that in the US, the Department of Justice has stated that "recoupment, when properly applied, serves as a valuable screening device to identify implausible predatory pricing claims" (Single-Firm conduct guidelines). In the US, courts have applied a stringent two-part test to predatory pricing claims: not only the alleged predatory price must fall below (some appropriate measure of) the predator's cost, but the predator must also have a reasonable probability of 'recoupment' of predatory losses through higher prices later on.

Until 2007, Australia followed the US approach. In 2007 it amended the Restrictive Trade Practices Act 1974 so that complainants and regulators would not have to show recoupment. This amendment was introduced as previously it had been considered too difficult for smaller businesses to show that dominant competitors were engaging in predatory pricing. While evidence of a company's intention to recoup losses may contribute to the proof of an allegation of predatory pricing, there is nothing which makes recoupment an element which is necessary to prove predatory pricing.

- to pass on genuine cost savings to customers (which could be pro-competitive) or
- to discourage customers from using multiple providers (which can lead to anticompetitive foreclosure).

An abuse of a dominant position may occur when dominant licensees use discounts or rebates as a mechanism to 'lock in' customers, to the detriment and potential exclusion of other competing licensees in the market or potential market entrants.

69. Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour. These are the types of discount that are most likely to give rise to the risk of exclusion of competitors. The usual form of a conditional rebate is that the customer is awarded a rebate when its purchases over a defined period exceed a specified threshold, the rebate being granted either on all purchases (retroactive rebates) or on those made in excess of those required to achieve the threshold (incremental rebates). Retroactive rebates are less likely to reflect ongoing cost savings and therefore are more likely to be abusive.

70. URCA will consider the extent to which a rebate scheme is implemented in order to deter customers from switching to an alternative supplier as opposed to simply passing on cost savings, (so called "loyalty inducing effect").

5.4.5 Exclusive purchasing

71. An exclusive purchasing obligation requires a customer to purchase exclusively or to a large extent from one supplier. This could lead to detrimental effects if the exclusive purchasing obligation has the effect of preventing the entry or expansion of competing licensees. This is particularly the case where a dominant licensee is an unavoidable trading partner for customers, the imposition of exclusive purchasing (or purchasing to a large extent) could result in competitors being unable to compete on equal terms for each customer's demand.

5.4.6 Customer 'lock in'

72. Entering into unduly long contracts with customers, providing for penalties if the contract is terminated earlier, may amount to an abuse of a dominant position ("lock-in"). Long term contracts limit the ability of customers to switch between providers. Effectively, unduly long contracts raise barriers to expansion for new entrants.

73. In assessing the anticompetitive foreclosure brought about by cases of customer "lock in", URCA will consider all the factors, including the length of the contract and justification. For example, customers may be able to receive a subsidised product if they enter into a longer contract. The length of the contract may allow the licensee to recoup the costs of the investment over the life of the contract. Therefore it is necessary to consider the length of the contract in the context of the state of development in the market. Long term contracts are more problematic in dynamic industries such as electronic communications.

74. Barriers to switching need to be taken into account. The anticompetitive effects of customer lock-in are particularly evident when barriers to switching would otherwise be low. For example, when the regulatory regime allows for number portability, the barriers to switching are reduced, but customer-lock in may still prevent switching.

5.4.7 Refusal to supply – general

75. Provided that the terms of their agreements are not anticompetitive and provided that companies comply with all relevant provisions of law, companies should be free to negotiate and enter into agreements with whichever customers they choose. However, a refusal to supply by a dominant licensee may be considered an abuse by URCA when it results in the reduction in or elimination of competition or stifles the emergence of a new product.

76. The concept of refusal to supply covers a wide range of practices, including a refusal to supply products to existing or new customers, a refusal to provide interface information, in some circumstances a refusal to license intellectual property rights, or a refusal to grant access to an essential facility or network.

77. Refusal to supply also includes offering trading conditions so unreasonable that they amount to a constructive refusal to supply. Constructive refusal could, for example, take the form of unduly delaying or degrading the supply of a product or service, or involve the imposition of unreasonable conditions in return for the supply or charging unreasonably high prices for the products and services.

78. A refusal to supply is most likely to give rise to concerns when it is by a vertically integrated dominant licensee and: (i) it relates to a product or service that is objectively necessary for the other licensees to be able to compete effectively on a downstream market; (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market; and (iii) the refusal is likely to lead to consumer harm. Generally speaking, the refusal to supply an existing customer is more likely to lead to a finding of an abuse of dominance than a refusal to supply a new customer.

79. As explained below, refusal to supply may relate to information and intellectual property rights, as well as products and services.

5.4.7.1 Refusal to supply information

80. A refusal by a dominant licensee to supply information generated by its network (e.g. calling line identification information) might be an abuse of a dominant position if, as a result of the refusal, services based on the availability of the information could be provided only by the dominant licensee.

81. The refusal by a dominant licensee to supply technical information might also constitute an abuse, for example, when a dominant licensee refuses to inform a new licensee where it can interconnect with its network.

5.4.7.2 Refusal to license intellectual property rights

82. Competition law and intellectual property law share the basic objective of promoting competition and innovation. Whilst IP law pursues this objective by providing for incentives for innovation and its commercialisation, competition law seeks to promote the conditions that make firms more efficient and innovative.

83. The mere ownership of an IP right will not automatically mean that the owner is in a dominant position. In certain cases, depending on the definition of the relevant market, it is possible that an IP owner may enjoy a dominant position in that market.

84. In general, it is a matter for the holder of an intellectual property right (IPR) to decide whether to license that right. However, it is possible that the manner in which an IPR is exercised by a dominant licensee may constitute an abuse. For example, this may be the case if the IPR is used to leverage market power from one market to another or to prevent the development of a new market. In exceptional circumstances, a refusal to license IPRs may be found to be an abuse where the use of the product protected by an IPR is necessary to allow a potential competitor access to a market in which the owner of the right occupies a dominant position.

85. In considering whether a refusal to license may be abusive, URCA is likely to consider the extent to which:

- the refusal prevents the emergence of a new product for which there is a potential consumer demand;
- the refusal is unjustified; and
- the refusal is likely to exclude competition on a secondary market.

5.4.7.3 Refusal to grant access to an essential facility

86. A refusal to provide access to an essential facility is specifically listed as an example of a potential abuse in section 69 of the Comms Act. An essential facility is one where access is essential to enable competition in the relevant market. For example, a network or part of a network may constitute an essential facility where access is essential for a licensee to provide a specified service. However, a facility will not be regarded as essential if there are other similar facilities available that are substitutes or if it is reasonably feasible to replicate the facility.

5.4.8 Margin squeeze

87. Margin squeeze may occur when a vertically integrated licensee is dominant in the supply of an input to a downstream market in which it also operates. The vertically integrated licensee could harm competition by setting a low or negative margin between the price it charges for the input in the upstream market and the price it charges in the downstream market. If an efficient downstream competitor who purchases the input is forced to exit the market or is unable to compete effectively, then margin squeeze may have occurred.

88. Margin squeeze may be more likely to occur where the upstream market consists of a facility, such as a communications network, to which downstream operators require access in order to be able to provide services that compete with the downstream services of the licensee that owns the facility.

89. For a finding of margin squeeze, URCA will consider evidence as to:

    a. whether the licensee holds a position of dominance upstream;

    b. whether the upstream input is required by downstream competitors;

    c. whether returns from the downstream operations are unprofitable (for example because of excessive wholesale prices and/or predatory retail prices); and

    d. whether the practice has at least the potential to harm competitors (i.e. evidence of actual or potential harm).

90. URCA's findings and methodology for determining whether a party is engaged in margin squeeze will depend on the level of evidence available. This will be particularly relevant to the measures of costs outlined at Section 5.2 above.

5.4.9 Tying and bundling

91. Tying and bundling are common practices which can lead to better offerings to customers in cost effective ways. However, in some circumstances tying and bundling may constitute an abuse of dominance when a dominant licensee attempts to leverage its market power from one market to a related, but technically distinct, market.

92. 'Tying' refers to the practice of a dominant licensee requiring those customers who wish to purchase one product (the tying product) to purchase an ancillary product (the tied product) from it as well. Tying can either be contractual or technical. Contractual tying arises where the customer is obliged by agreement to purchase the ancillary goods from the dominant licensee. Technical tying occurs where the key product is manufactured in such a way that it would only work with ancillary goods produced by the same manufacturer. A practice will amount to tying if the tied product is distinct from the tying product.

93. Bundling occurs when a dominant licensee only offers its products (which must be in a market where the licensee is dominant) in bundles with ancillary goods which are not intrinsically linked to the main product.

94. Tying occurs where a licensee makes the supply of one product (the 'tying product') conditional upon the buyer also buying a product that could be supplied separately (the 'tied product'). Tying may infringe section 69 where the licensee holds a dominant position in the market for the tying product. As a result of the dominant licensee 'leveraging' its position in relation to the tying product to achieve increased sales in the market for the tied product, competitors may be foreclosed the market.

95. When analysing tying arrangements therefore, it should be noted that the dominance, abuse and the effects of the abuse can be in different markets, e.g. a licensee can be

dominant in one market and impose a tie which has a foreclosing effect on a neighbouring market.

96. The following conditions need to be satisfied for URCA to impose sanctions on a dominant licensee in relation to tying and bundling of services and products:

(i) the licensee is dominant in a tying market, and the tying and the tied products are distinct products, and

(ii) (ii) the practice must be likely to result in anticompetitive foreclosure. Each of these two conditions will be considered below.

97. Whether products are "distinct products" will depend on customer demand. Products will be considered to be distinct in cases where customer demand means that, in the absence of tying or bundling, both the tying and the tied products could be produced or supplied on a stand-alone basis. Direct evidence of this can be available to show that, given the choice, customers do purchase the tying and the tied products separately from different suppliers. In the absence of direct evidence, indirect evidence can be available: for example, the presence on the market of suppliers of the tied product without the tying product, or evidence that market players with little market power tend not to tie or to bundle the products.

98. Anticompetitive foreclosure can result from tying or bundling in the tying market, in the tied market or in both markets at the same time. URCA considers that the risk of anti-competitive foreclosure is likely to be greater in the following specific circumstances, which do not constitute an exhaustive list:

- The tying or bundling strategy is a strategy which is difficult to reverse and therefore is a lasting strategy, such as in the case of technical bundling;
- A licensee engaged in bundling enjoys a dominant position in relation to a number of products within the bundle: the greater the number of products, the greater the risk of anticompetitive foreclosure, particularly when the bundle is difficult to replicate;
- When the prices that the dominant licensee can charge in the "tying" market are regulated, tying can provide the dominant licensee with an opportunity to engage in some cross-subsidisation across the bundle, increasing the price of the (unregulated) "tied" product and thereby compensating for potentially lower profits in the price regulated "tying" market.

ECS COMP. 8 – GUIDANCE ON THE LEVEL OF FINES

PART 1: INTRODUCTION

1. Purpose of this Guidance Note

1. This Guidance Note sets out the basis on which URCA calculates financial penalties for infringements of the competition provisions contained within Part XI of the Comms Act, providing guidance to licensees and other undertakings on the level of fines that they may face if they infringe the competition provisions of the Comms Act. The imposition of fines is a potential consequence of breaches of section 67 and section 69. In addition, under the terms of section 70(2), read in conjunction with section 109, URCA can impose a fine for a failure to notify a merger in accordance with section 70. In these cases, URCA will apply the principles in section 5 of this Guidance Note, modified to take into account the differences between the gravity of a non-notification (which is an infringement and must be punished) and the gravity of a breach of sections 67 and 69.

2. Fines in the context of enforcement

2. The provisions relating to fines and remedies are specified in the Comms Act, Part XVII – ENFORCEMENT. The relevant provisions are section 95 (which sets out the power of URCA to impose fines by way of order in cases of breach), to be read in conjunction with section 109 (which deals generally with fines and remedies). Pursuant to these sections, URCA may impose fines on licensees, undertakings or associations of undertakings where they infringe the competition provisions of the Comms Act 2009:

- Section 95 allows URCA to issue, concurrently with an adjudication relating to an infringement of the competition provisions, an order imposing an objectively justified and non discriminatory fine on the licensee or non-licensee.
- Section 109 states that such a fine cannot exceed ten per cent of that person's relevant turnover.

3. Fines are not the only consequence of infringements of section 67 and 69 of the Comms Act, however. Unenforceability of anticompetitive agreements, the imposition of behavioural or structural remedies, and orders to cease the infringements are other means of enforcement available to URCA.

4. **Unenforceability** - An infringement of the section 67 prohibition on anticompetitive agreements will lead to unenforceability of the agreement in question. Therefore, by virtue of section 67(4), any agreement, decision or practice which relates to communication matters that may affect trade within The Bahamas and has as its object or effect the prevention, restriction or distortion of competition is void and unenforceable without any need for URCA to intervene.

5. **Behavioural and/or structural remedies** - Under section 103, URCA is empowered to make adjudications on receipt of a complaint or notification, or on its own initiative, in relation to the competition provisions of the Comms Act. URCA can attach an order to an adjudication imposing behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the contravention to an end.

6. **Orders to cease the infringement** - Part XVII of the Comms Act deals with the remedies that can be imposed on licensees who infringe any part of the Act. In case of infringement, under section 95, URCA may order the licensee to cease the infringement.

7. The level of the fine imposed is at URCA's discretion, although it must be objectively justified and non-discriminatory. Fines should be imposed not only in order to punish past behaviour, but their level should also deter the offenders from participating in illegal behaviour in the first place.

8. By way of guidance, URCA intends, where appropriate, to impose significant fines in respect of agreements which fix prices or share markets and other cartel activities (including collusive tendering and the establishment of output restrictions or quotas – for further guidance see ECS COMP 6) and for serious abuses of a dominant position. This is on the basis that these are amongst the most serious infringements of competition law.

9. In imposing financial penalties therefore, URCA's objectives are two-fold:

- to impose penalties on infringing licensees/undertakings/associations of undertakings which reflect the gravity of the infringement; and
- to ensure that the threat of penalties will deter licensees/undertakings/associations of undertakings from engaging in anticompetitive practices.

PART 2: APPLICATION OF SECTION 95 AND SECTION 109

3. Relevant turnover

10. The prohibition of anticompetitive agreements in section 67 of the Comms Act is wide enough to cover agreements entered into by licensees and non-licensees, as more particularly described in **'ECS COMP. 4 – Who is covered by the rules? The concept of undertaking'**. Thus, operators who generate a 'relevant turnover' as defined in section 2 of the Comms Act (not only licensees, but also those persons covered by an exemption determination, for example) will be capable of being fined under section 109 of the Comms Act.

11. The Comms Act defines 'relevant turnover' as: "the gross receipts in money or money's worth of the licensee, or any person in respect of whom an exemption determination has been made under section 17 (of the Comms Act) attributable to:

    (a) the provision of a network or carriage service or use of radio spectrum under any license or exemption determination; and

    (b) a content service,

    including associated advertising revenue and other ancillary revenue, but after the deduction of sales rebates, in The Bahamas during the relevant financial year."

12. Under section 109 of the Comms Act, the maximum fine URCA may impose is 10 per cent of the infringing party's relevant turnover.

13. The licensee under an individual operating licence comprises the named licensee, any subsidiary of the named licensee listed in the application for a licence and any subsidiary notified to URCA in accordance with section 21 of the Comms Act. Accordingly, the relevant turnover of a licensee will be the sum of the relevant turnover of the licensee itself and any such subsidiaries.

4. Due date

14. Any order issued by URCA imposing a fine must specify the date on which that fine will become due and payable. In specifying a date for payment of the penalty, URCA must have regard to the seriousness of the contravention, the need for an urgent remedy(or otherwise), and the conduct of the person liable to pay the fine.

4.1 Contravention of a licence condition or of the content code

15. Section 109(3) allows for a period of time during which a licensee has an opportunity to remedy the relevant contravention of a licence condition or of the content code (but not a contravention of the competition provisions, see 4.2 below).

16. Except in the case of repeated contraventions, the fine or penalty shall not be payable if the relevant contravention has been remedied by the date specified in the order.

4.2 Contravention of a competition provision

17. Unlike a breach of a licence condition or content code, no such opportunity to remedy is given for a breach of the competition provisions in sections 67 and 68 of the Comms Act.

18. This is because a finding of a breach of the competition provisions follows a more in-depth investigation, during which URCA makes a thorough assessment of all the evidence, its object or effect on a market and ultimately concludes that a licensee has acted anti-competitively and should be sanctioned for this. On the contrary, in the absence of evidence of repeated contraventions, single breaches of a licence condition are unlikely to have the same effects as a breach of the competition provisions on a market and therefore, if the licensee does not have a history of repeated breaches, there can be an opportunity for the licensee to remedy the breach.

19. Accordingly, any fines which are due in respect of a breach of the competition provisions will become payable on the due date specified in the order.

4.3 When will URCA begin to impose fines?

20. As noted in the General Background to these Guidelines, under 'Transitional Period', URCA appreciates that the new legislation represents a fundamental change in the electronic communications sector in The Bahamas, and will accordingly aim to assist licensees in understanding the applicable rules. For the avoidance of doubt, URCA will not apply the provisions of the Comms Act retroactively.

21. It is not URCA's current intention to fine licensees or non-licensees who had entered into potentially anticompetitive agreements or engaged in an abuse of a dominant position prior to the entry into force of the Comms Act ("existing agreements"). URCA will allow licensees and non-licensees up to twelve (12) months from the commencement date of the Comms Act (which is 1st September 2009) before imposing fines.

22. Existing agreements are of course not immune from scrutiny by URCA. From the entry into force of the Comms Act, licensees and non-licensees have an obligation to review their existing agreements with a view to ensuring compliance with the relevant provisions of the Comms Act.

23. URCA will of course use its full powers (including the power to impose fines) to punish anticompetitive agreements and abuses of a dominant position that have been entered into after the entry into force of the Comms Act.

5. Method for setting fines

24. Fines must be objectively justified and non-discriminatory. URCA will have regard to the following principles (in Step 1 and Step 2 below) when it sets the level of fines imposed pursuant to section 95 of the Comms Act. Although this Guidance Note presents the general methodology for the setting of fines, the particularities of any specific case, or the need to achieve deterrence in a particular case may justify departing from the methodology described below.

25. URCA will generally use the following two step methodology when setting the fine to be imposed for a breach of the competition provisions.

- First, URCA will determine a basic amount.
- Second, it may adjust that amount upwards or downwards according to specific factors, including, but not limited to, the factors specified below.

5.1 Step 1 - Basic amount of the fine

26. URCA will set the basic amount of the fine having regard to:

- the gravity of the infringement, and
- the infringing party's turnover derived from the relevant product(s) affected by the infringement.

5.1.1 The gravity of the infringement

27. The particular nature of the infringement will determine the starting point in URCA's calculation of the fine. The more severe and extensive the infringement, the higher the basic amount of the fine. As mentioned above, price fixing, market sharing agreements and other cartel activities are regarded by URCA as amongst the most serious breaches of the competition provisions. Behaviour which breaches the prohibition on the abuse of a dominant position and which has, or is likely to have, a particularly serious effect on competition (e.g. predatory pricing, or margin squeeze) is also regarded by URCA in a similar way.

28. When gauging the gravity of the breach, URCA will assess a number of factors, including the nature of the product, the structure of the market, the market share(s) of the parties involved in the infringement, entry conditions and the effect on competitors and on third parties. Damage caused to consumers, whether directly or indirectly, will also be a significant consideration. The assessment will be on a case by case basis for all types of infringement, taking account of all the circumstances of the case.

5.1.2 Turnover from the relevant products

29. URCA will consider the turnover of the infringing party in the relevant product market (and the relevant geographic market) affected by the infringement in the last business year.

30. When an infringement involves several parties, an assessment of the appropriate starting point will be carried out for each concerned party, in order to take account of the impact on competition of the infringing activity of each party.

5.2 Step 2 - Adjustments to the basic amount

31. In setting the fine, URCA may take into account circumstances that result in an increase or decrease from the basic amount as described in Section 5.1 above. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.

5.2.1 Adjustment for duration

32. URCA will consider adjusting the basic amount which may be increased or decreased to take into account the duration of the infringement. Penalties for infringements which last more than one year may be multiplied by the number of years of the infringement.

5.2.2 Adjustment for policy objectives

33. Policy objectives may be considered when adjusting the amount of the penalty. In particular, URCA may consider that it is appropriate to increase the basic amount of a fine in order to have a sufficient deterrent effect.

34. Other considerations at this stage may include, for example, URCA's estimate of any economic or financial benefit made or likely to be made from the infringement by the infringing party and any special characteristics, including the size and financial position of the party in question.

35. The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing party. Policy objectives may result in either an increase or decrease in the amount of the penalty initially calculated.

5.2.3 Adjustment for aggravating circumstances

36. The basic amount may be increased where URCA finds that there are aggravating circumstances, such as:

- continuation of the infringement after URCA has initiated an investigation;
- refusal to cooperate with or obstruction of URCA in carrying out its investigation;
- continuing or repeating the same or a similar infringement after URCA has made a finding that the competition provisions of the Comms Act have been infringed;
- infringements which are committed intentionally;
- infringements where the relevant party played the role of leader in, or instigator of, the infringement. URCA will also pay particular attention to any steps taken to coerce other parties to participate in the infringement and/or any retaliatory measures taken against others with a view to enforcing the practices constituting the infringement;

- involvement of directors or senior management.

5.2.4 Adjustment for mitigating circumstances

37. The basic amount may be reduced where URCA finds that mitigating circumstances exist, such as, but not limited to:

- difficult circumstances of the relevant party; for example, when the undertaking is acting under severe duress or pressure;
- genuine uncertainty on the part of the infringing party as to whether the agreement or conduct constituted an infringement;
- evidence of adequate steps having been taken with a view to ensuring compliance with the competition provisions (e.g. the presence of an effective compliance programme of which employees involved in the infringement were aware but deliberately ignored);
- evidence that the infringing party terminated the infringement as soon as URCA intervened ;

- where the infringing party has effectively cooperated with URCA beyond its legal obligation to do so, to enable the enforcement process to be concluded more effectively and speedily.

5.2.5 Legal maximum

38. The final amount of the fine cannot, in any event, exceed 10% of the relevant turnover of the infringing party.

39. Where an infringement is committed by an association of undertakings, the starting point for the fine will be the turnover of the association concerned. However, if the investigation suggests that the members of the association were actively engaged in promoting and implementing the anticompetitive practices, then the members themselves can be fined and the fine cannot exceed 10% of the sum of the total relevant turnover of each of its members.

5.2.6 Ability to pay

40. In exceptional cases, URCA may, upon request, take account of the licensee's inability to pay in a specific social and economic context. For example, specific payment plans could be agreed upon by URCA based on satisfactory/verifiable evidence that the imposition of a fine as provided for in this Guidance Note would irretrievably jeopardise the economic viability of the party concerned and cause its assets to lose all their value.

6. Appeal

41. Under section 111 of the Comms Act, a person affected by any act of URCA to which section 111 relates, (including an order by URCA imposing a fine), may appeal against it to the Utilities Appeal Tribunal (the Tribunal).

ECS COMP. 9 – HOW TO MAKE A COMPETITION COMPLAINT - GUIDANCE ON INVESTIGATION PROCEDURES

PART 1: INTRODUCTION

1. Purpose of this Guidance Note

1. This Guidance Note sets out the process for licensees and others to submit complaints to URCA regarding alleged or suspected breaches of the competition provisions specified in sections 67 (i.e. anticompetitive agreements) and 69 (i.e. abuse of a dominant position) of the Comms Act. With respect to merger control the procedure for review is set out in a separate document (**ECS COMP. 1**).

2. Complaints can be made against undertakings which may or may not be licensed by URCA under the Comms Act. Guidance Note **'ECS COMP. 4 – Who is covered by the rules? The concept of undertaking'** sets out the circumstances where URCA may take enforcement action against non-licensees for breach of section 67 of the Comms Act.

3. Part 2 of this Guidance Note provides an overview for complainants on the methods of submitting competition complaints to URCA and the type of information that URCA would expect to accompany a complaint, before URCA can properly open an investigation.

4. Part 3 of this Guidance Note provides an overview for complainants and investigated parties on the procedure that would be followed by URCA when conducting an investigation into allegedly anticompetitive conduct under the Comms Act.

5. Part 4 of this Guidance Note provides an overview for investigated parties about URCA's investigation powers.

6. Part 5 of this Guidance Note sets out the mechanism for appealing against an adjudication.

2. Competition complaints, disputes and regulatory investigations

7. URCA has wide ranging responsibilities under the Comms Act with regards to the relationships between licensees, subscribers and other parties involved in the electronics communications sector. The Comms Act sets out a number of mechanisms for URCA to manage disputes between parties active in the electronic communications sector and breaches of the Comms Act and other regulatory instruments.

8. Where a party has been accused of breaching the competition provisions in Part XI of the Comms Act, its actions may also constitute a breach of a licence condition or sector-specific regulation (e.g. a breach of other provisions of the Comms Act or of other regulatory measures).

9. If URCA finds that a party has breached the Comms Act (whether the competition provisions or otherwise) or any other regulatory instrument, URCA may issue an Order under section 95 of the Comms Act, requiring the infringing party to take remedial or preventative steps and pay a fine.

10. At the same time as issuing the Order, URCA must issue either a determination under section 99 of the Comms Act or an adjudication under section 103 of the Comms Act. If the contravention is primarily a breach of the competition provisions in Part XI of the Comms Act, then URCA must issue an adjudication with the Order.

11. If the contravention is primarily a breach of a different part of the legislation or regulatory instrument, then URCA must issue a determination with the Order. The procedure for issuing an adjudication differs from the procedure for issuing a determination.

12. The adjudication procedure is flexible and allows URCA a longer period of time to analyse the facts and implications of any alleged anticompetitive conduct than would be permitted when investigating a purely regulatory breach.

13. The determination procedure in the Comms Act specifies that URCA should seek to conclude an investigation within four (4) months (section 100(1)(c)). There is no such statutory time limit for concluding an adjudication investigation, although URCA will endeavour to conclude any investigation of alleged anticompetitive conduct within twelve (12) months of receiving a complaint.

14. URCA will publish separate guidance on the specific steps that will apply to investigations relating to breaches of the non-competition provisions of the Comms Act, including breaches of the content regulation provisions in Part IX of the Comms Act.

15. If URCA decides to open an investigation following a complaint about a breach of the competition provision it will conduct an initial internal assessment to ascertain whether it would be more effective for URCA to open an investigation using its competition powers or whether it should rely on sector-specific regulation, or both. As URCA's investigation progresses, it may switch between the two procedures if the focus of its investigation changes.

16. Similarly, URCA may switch to the adjudication procedure after opening an investigation following an application for a determination under section 100 of the Comms Act (rather than a competition complaint).

17. URCA will seek to resolve the competition complaint within an indicative administrative timetable of up to twelve (12) months from starting an investigation. URCA will aim to take one of the following steps within that time:

    - issue an adjudication to the subject of the complaint, ordering them to take specified action or pay a fine; or

- issue an adjudication to the subject of the complaint without an order. This adjudication may state that there has been no fault by the relevant person or that any issue has been resolved; or
- close its investigation of the complaint on administrative grounds. This may be the case where it is apparent that pursuing the investigation would take a disproportionate amount of resources or where other measures are being taken that would render the investigation to an extent redundant (e.g. a wider review of the provision of licensed services).

PART 2: SUBMISSION OF A COMPETITION LAW COMPLAINT

3. How to submit a complaint

18. URCA may initiate an investigation under the competition provisions in Part XI of the Comms Act on its own initiative or following a complaint from a third party. If URCA receives a complaint from a third party it will acknowledge the complaint and then form an initial view on the merits of the complaint.

19. URCA will consider whether to open an investigation, taking into account the alleged detriment caused to the electronic communications sector by the alleged conduct; the expected resources required to conduct an investigation (the level of information provided with the complaint will be an important indicator of both the seriousness of the complainant and the amount of further resources required to investigate it) and whether there are viable alternative routes to resolving any dispute or complaint. URCA is unlikely to consider a complaint if it appears to be vexatious or frivolous or if in URCA's view it is likely to be an inefficient use of URCA's resources.

20. Under section 8 of the URCA Act, URCA must ensure that it uses its resources efficiently. Accordingly, URCA will review complaints and prioritise them according to its statutory objectives. This review under section 8 of the URCA Act is an ongoing process and consequently URCA may reallocate resources to or from an investigation whilst the investigation is ongoing. URCA will seek to keep relevant parties informed of its progress provided that would not be prejudicial to the investigation.

21. Complaints can be submitted to URCA electronically, by post, by hand or by fax.

22. Electronic submissions should be sent to **info@urcabahamas.bs**.

23. Postal and hand delivered submissions should be marked for the attention of the Chief Executive Officer and sent or delivered to: Utilities Regulation and Competition Authority, Fourth Terrace East, Centreville, P. O. Box N-4860, Nassau, Bahamas.

24. Fax submissions should be marked for the attention of the Chief Executive Officer and sent to: (242)-323-7288

25. URCA will review all complaints and acknowledge that complaint within five (5) days of receipt.

26. It is strongly recommended that complainants follow the guidance below on the information to be included in a competition complaint. Following this guidance will mean that URCA can quickly develop an initial assessment on the likely merits of the complaint and the scale of URCA's resources that would be required to conduct the investigation. As set out in paragraph 20 above, URCA must ensure that it uses its

resources efficiently and URCA is less likely to open an investigation where it appears that the requisite resources would be disproportionate to the benefit to the electronic communications sector of carrying out an investigation.

4. Minimum submission requirements

27. This Section of the Guidance Note is relevant to any person who wishes to submit a complaint regarding allegedly anticompetitive conduct (i.e. in relation to anticompetitive agreements or an abuse of a dominant position). Please note that the procedure for a merger control investigation under sections 70 to 78 of the Comms Act is different (see Guidance Note **ECS COMP. 1**).

28. URCA will seek to open an investigation in response to a complaint of anticompetitive conduct where the complaint relates to alleged anticompetitive conduct which appears to have a significant effect on the electronic communications sector. Where the alleged anticompetitive conduct only affects the parties directly involved in the practice (e.g. it relates to a contractual issue and does not have a significant effect on the electronic communications sector), URCA will usually not intervene, particularly if the parties have recourse to alternative dispute resolution mechanisms.

29. When submitting a complaint to URCA, the complainant should provide the following information. Other than in exceptional circumstances, a submission should meet these minimum submission requirements for URCA to assess whether to open an investigation.

Information about the complainant	• Company name (if applicable) of the complainant • A named contact at the complainant company • Telephone number, postal address and email address • If the complainant is a licensee, the nature of services that the licensee provides
Information about the allegedly infringing party	• Name of the company • Description of the services provided by the company
Overview of complaint	• Factual description of complaint • Chronology of events • Description of contractual, statutory and other obligations that have been allegedly breached (with reference to relevant contract clauses, sections of the Comms Act or licence conditions) and how the facts relate to the breach

Effect of the alleged infringement	• An explanation of the effect of the alleged infringement on your activities. • An explanation of the effect of the alleged infringement on the electronic communications sector as a whole. • Evidence or analysis supporting the alleged effects of the infringement.
Evidence supporting the complaint	• Complainants should properly support allegations that another person has acted anti-competitively. • Complaints should be specific, referring to the relevant sections in legislation and contracts. • Complaints should be fully reasoned. The reasoning in the complaint should follow the approach that URCA has set out in these ECS COMP. Guidelines and should include evidence relating to market definition, market power, the nature of the anticompetitive practices, and the effect of the practices. See further, Section 5 below.
Supporting documents	• Indexed copy of documents supporting the facts, including (if applicable) contractual documents, correspondence, invoices and other documents. • Where documents are available publicly, please provide the full title of the document and clearly identify where it is available (e.g. by providing a web link) • Provide all relevant documents and not only those that support the complaint. It is important that URCA has early sight of any documents that the party the subject of the complaint might use to rebut the allegation of anticompetitive conduct
Declaration of truth	• A statement from an officer of the company, confirming that the facts of the complaint are accurate and complete

Please note that any documents that the complainant provides to URCA may be sent by URCA to the person or company the subject of the complaint.

Any confidential information should be included in a separate confidential annex and marked "Confidential". URCA will review any information marked "confidential" to assess whether it contains commercially sensitive business secrets. URCA may disclose information marked "confidential" where, in URCA's opinion, it is not commercially sensitive.

5. Supporting evidence

30. Supporting evidence provided within a complaint should, to the extent possible, address each of the relevant elements in these ECS COMP. Guidelines. This will usually include providing evidence on:

a. market definition (see **ECS COMP. 5**);

b. the market power of the allegedly infringing party or parties (see **ECS COMP. 5**);

c. the allegedly anticompetitive conduct, whether it relates to an agreement that has the object or effect of preventing, restricting or distorting competition (see **ECS COMP. 6**) or the abuse of a dominant position (see **ECS COMP. 7**); and

- the effect of the anticompetitive conduct.

31. The complainant should follow the processes set out in the ECS COMP. Guidelines using information that is available to it.

32. For example, if a complainant submits a claim that another operator is engaged in margin squeeze, it should seek to provide the following information:

a. Evidence on the relevant market (see section 7 of **ECS COMP. 5**,): identify the relevant upstream and downstream markets; set out reasoning for this market definition, including reference to, for example, barriers to entry and switching, evidence of substitution and views of third parties.

b. Evidence on market power (see section 4.2 of **ECS COMP. 7**): to bring a claim of margin squeeze, it is necessary to show that the allegedly infringing operator has a dominant position. This can be done by reference to market shares and evidence on switching following price changes.

c. Evidence of margin squeeze, i.e. that the difference between retail prices and wholesale prices is so low that an ' efficient' competitor would not be able to compete:

- provide evidence of wholesale and retail prices (see section 5.4.8. of **ECS COMP. 7**); and
- as competitors' costs are unlikely to be available, provide evidence of own costs and efficiency of operation.

33. Complainants should familiarise themselves with the ECS COMP. Guidelines and may wish to seek informal advice from URCA when preparing a complaint of anticompetitive conduct.

PART 3: INVESTIGATION PROCEDURE

6. Adjudication procedure

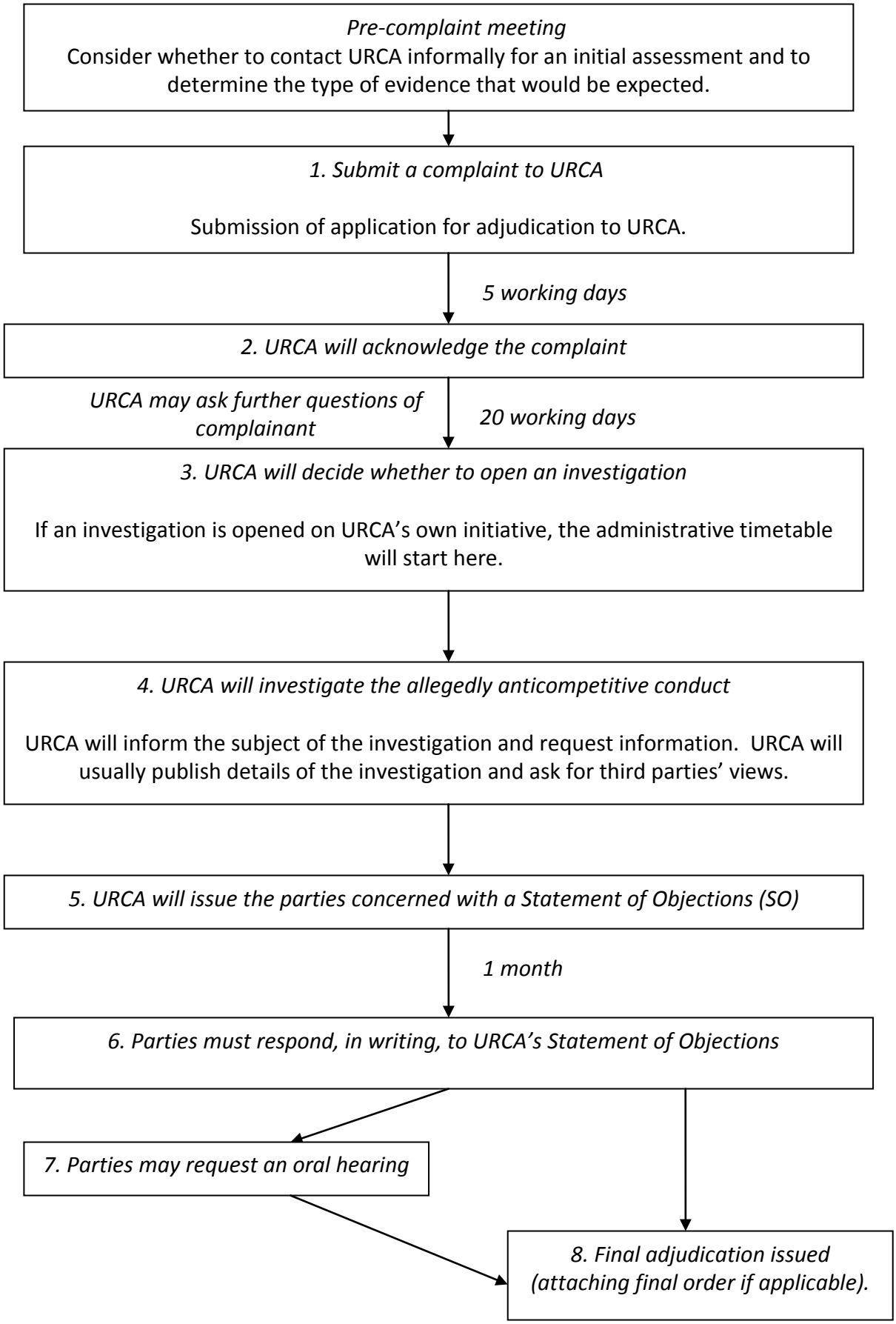
34. This Section of the Guidance Note provides further detail on the procedures that URCA intends to adopt for conducting investigations of allegedly anticompetitive conduct in breach of Part XI of the Comms Act.

35. Competition investigations are typically complex and require a proper analysis of the alleged breach in the context of the relevant market. This is why URCA has issued this set of detailed guidance on the application of the competition provisions. Competition investigations require more resources than investigations into breaches of sector-specific regulation. The Comms Act does no prescribe a detailed procedure for adjudications.

36. This Guidance Note provides URCA's current approach to alleged anticompetitive conduct but URCA may deviate from this guidance if there are reasons to do so.

37. An outline of the procedure to be used by URCA is shown in the diagram below.

ECS COMP. 9 - How to make a competition complaint – guidance on URCA's investigation procedure



39. URCA recommends that the complainant should contact URCA prior to submitting a competition complaint for an informal and confidential **pre-complaint meeting**. Although complainants will be required to submit formal complaints in line with the minimum submission requirements, URCA will meet informally regarding potential complaints.

40. The purpose of these meetings would be to assist complainants identify the relevant evidence that would be required to support a competition complaint. It is unlikely that the complainant will have complete information on the allegation at the time of the pre-complaint meeting. Therefore in order to ensure that URCA is able to give practical guidance on complaints on limited information, URCA will not be bound by statements made in these meetings and, accordingly, parties must keep the pre-complaint meeting confidential.

41. URCA will **acknowledge receipt** of a formal complaint within five working days. At that time, URCA will undertake an initial review of the complaint. The purpose of the initial review is to check that the complaint provides sufficient information to enable URCA to understand the nature of the complaint. Following this, URCA will consider whether the complaint falls within its remit.

42. URCA will then consider whether the complaint meets the **minimum submission requirements**, specified above, whether URCA has the power to investigate and whether the matter constitutes an administrative priority. URCA aims to complete this review within twenty-five (25) working days of receipt of the complaint.

43. URCA will open an investigation following a formal complaint if it has the power to investigate and resolve the complaint. URCA has limited resources and under section 8 of the URCA Act, URCA must ensure that it uses its resources efficiently. Therefore, URCA will prioritise investigations in accordance with its statutory objectives. Where URCA does not have sufficient resources to investigate all complaints, it will prioritise them following an initial assessment of the relative importance of the subject of the complaint to consumers and persons in The Bahamas and the amount of resources that would be required to resolve the complaint.

44. If URCA is able to open an investigation, it will contact the subject of the complaint directly to ask for comments on the complaint. URCA may also request further information from the complainant regarding the complaint.

45. At the time of informing the party under investigation of the complaint, URCA will usually **publish a statement** that it is conducting an investigation and it will provide a short outline of the investigation.

46. URCA will generally follow the procedure set out at paragraphs 49 to 57 below. Where it appears from an initial review of the available facts that an investigation is urgent, as irreparable harm may arise in the absence of an adjudication, URCA has the power under

section 103(3) of the Comms Act to issue an **interim adjudication** prior to concluding its investigation under the procedure set out below.

47. URCA will only issue an interim adjudication where, in addition to there being an element of urgency, it appears from the initial facts that it is likely that a licensee has breached the competition provisions of the Comms Act. Prior to issuing an interim adjudication, URCA will provide reasonable notice to those affected, allowing them the opportunity to be heard compatible with the degree of urgency in the case.

48. An interim adjudication would only be for a specified period of time. In setting the duration of the interim adjudication, URCA will have regard to the length of time it will potentially take to complete an investigation, the potential extent of irreparable harm that could be caused in the absence of an interim adjudication and the burden on the licensee that would be subject to the interim adjudication. An interim adjudication may be renewed if necessary.

49. In the vast majority of cases, there will not be such urgency. In these cases, URCA shall follow the **standard adjudication procedure** set out below. Competition investigations are complex and require an in-depth analysis of all the factual substantive elements which are described in Guidance Notes **ECS COMP. 6** (Anticompetitive Agreements) and **ECS COMP. 7** (Abuse of a Dominant Position).

50. If URCA opens an investigation, it will periodically review its file to ensure that the case remains an administrative priority. If a case no longer constitutes an administrative priority, URCA will either close its file or place the file in abeyance. Where possible, URCA will notify the parties of this action if it has already informed them that a case had been opened.

51. Once URCA has opened an investigation, it will typically contact the complainant to obtain further information on the subject of the complaint. Following this, URCA will typically write to the allegedly infringing party, seeking further information. The request for further information will usually be sent using URCA's powers under section 9(2)(a) of the Comms Act This means that the recipient will be legally obliged to provide full answers to the questions but it does not mean that they have to make representations on the case. They will later have an opportunity to submit their response to any allegation of anticompetitive conduct.

52. URCA's fact finding exercise may involve several rounds of questions to licensees and other interested parties, as well as on-site inspections. Part 4 provides an overview of URCA's investigative powers.

53. After URCA has completed this fact finding exercise, it will consider whether there is sufficient evidence to form an initial case against the party that is allegedly acting anticompetitively. If URCA considers that there is sufficient information to suggest that there is a case to be answered by the allegedly infringing party, then URCA will prepare

and issue a statement of objections. If URCA considers that there is insufficient information to prepare an initial case, it will close its investigation.

54. If URCA prepares a **statement of objections**, it will present the key facts and evidence against the allegedly infringing party. URCA will allow the recipient of the statement of objections at least one month to respond to the points raised in that document.

55. The respondent should set out its defence in full in its response to the statement of objections. The respondent may request an **oral hearing** to discuss its case face to face but this should not cause it to respond to the statement of objections any less fully.

56. If a party requests an oral hearing, URCA will usually grant an oral hearing after it has reviewed the allegedly infringing party's response to the statement of objections. The oral hearing is used by URCA and the allegedly infringing party to further discuss the issues raised in the statement of objections and the response to the statement of objections.

57. After reviewing the response to the statement of objections and any representations made in an oral hearing, URCA will consider whether to issue an adjudication or not. If URCA decides to issue an **adjudication**, it will set out its reasons in that adjudication. Additionally, URCA may issue an order under section 100 of the Comms Act, ordering the allegedly infringing party to take some action, to stop taking a specified action and/or to pay a fine.

58. URCA considers that, as it develops its procedure and its investigative tools, it will become easier to estimate the amount of time that an investigation is likely to take. Whilst it is difficult to be specific at this stage, URCA will attempt to conclude the majority of its investigations within [twelve] months of starting the investigation.

PART 4: OVERVIEW OF URCA'S INVESTIGATION POWERS

7. Power to request information

59. Under section 9 of the Comms Act, URCA has the power to investigate any contravention, alleged contravention or any circumstance where it has grounds to suspect a contravention of any provision of the Comms Act, and any measure issued under the Act.

60. When conducting such an investigation in relation to a suspected breach of the competition provisions contained within Part XI of the Act, URCA will write to the parties/undertakings who are subject to the investigation.

61. In accordance with section 9(2)(a) of the Comms Act, URCA will specify a time limit for responding to a request for information. URCA will not usually permit extensions to the deadline for responding to a request for information and can take enforcement action for failure to fully respond to a request on time.

62. When setting the time to respond, URCA will take account of the volume of information requested, the seriousness of the alleged offence and the urgency of the investigation.

8. Search warrants

63. Section 10 of the Comms Act sets out the procedure for obtaining a search warrant. Under section 10, where URCA has satisfied a magistrate that there is reason to suspect a contravention of the Act, and that entry to specified premises is necessary to enforce the provisions of the Act, the magistrate may issue a search warrant to a peace officer.

64. The peace officer may be accompanied by an authorised representative of URCA when entering the specified premises in order to carry out an inspection and seize any relevant apparatus, equipment and documents, as prescribed by the terms of the warrant. When carrying out such an inspection, it is the duty of any person on the premises to assist the peace officer, accompanied by an URCA representative, to the extent reasonably required.

65. When conducting an on-site investigation, URCA may inspect, copy and retain any documents in accordance with section 9(2)(b) of the Comms Act.

PART 5: APPEALING AN ADJUDICATION

66. An adjudication under section 103 of the Comms Act may be appealed to the Utilities Appeal Tribunal ("**UAT**"). The UAT has exclusive jurisdiction to hear appeals against adjudications.

67. In accordance with section 111(6) of the Comms Act, the UAT may hear an appeal on the merits.

68. It is expected that the UAT will publish its rules and guidance for submitting appeals against regulatory measures of URCA.