



# **Revision of the Competition Guidelines**

**URCA 03/2023**

**Consultation Document**

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# 1 Introduction

The Utilities Regulation and Competition Authority (URCA) is the independent regulator and competition authority for the Electronic Communications Sector (ECS) and the Energy Sector (ES) in the Commonwealth of The Bahamas.

URCA began regulating the ECS upon its establishment in 2009 which coincided with the enactment of the Utilities Regulation and Competition Act, 2009 (URCA Act) and the Communications Act, 2009 (Comms Act). URCA subsequently gained remit in relation to the Energy Sector (ES) in 2015 in accordance with the promulgation of the Electricity Act, 2015 (Electricity Act).

In addition to its general obligations under the Comms Act and the Electricity Act, URCA is tasked with as the competition authority for the ECS and ES having remit in relation to the regulation of competition in the ECS and the ES. In this regard, URCA has previously, between September 2009 to March 2010, issued its 'Competition Guidelines' (ECS COMP. 1 to ECS COMP. 9)<sup>1</sup> which contained a series of guidance notes covering various competition law issues in relation to the ECS, which at the time was the only sector under URCA's regulatory remit.

Since the establishment of URCA's regulatory remit for the ES in 2015 with the enactment of the EA, URCA has undergone the process of building the regulatory framework in the ES in relation to required areas under the EA such as licensing, consumer protection and alternative dispute resolution. As part of this process, URCA is developing Competition Guidelines for the ES.

The Competition Guidelines set out URCA's Competition Policy and are intended to assist Licensees, and other interested persons, in understanding how the competition provisions would apply in practice with regards to procedural and substantives aspects, and to determine if their conduct are complying with these rules. They also provide guidance on how a competition complaint may be submitted.

As explained earlier, the main rationale for the revision of the current guidelines is for URCA to expand the scope of the sector-specific applications of the Competition Guidelines to include the ES. However, given the time that has passed since this first publication, the changes that have occurred in the sectors, and URCA's experience in applying the Guidelines, URCA's proposed revisions also seek:

- to structure the Competition Guidelines in a comprehensive, clear, and accessible manner;
- to clarify procedural aspects and information requirements from relevant stakeholders to mitigate any inefficiencies in URCA's investigations and assessments; and

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<sup>1</sup> Available here: <https://www.urbahamas.bs/regulated-sectors/electron-communication-sectors/competition/>

- to make the Competition Guidelines up-to-date and fit for purpose considering expected future market developments and international best practices.

As part of this review, URCA has taken into account, amongst others, its experience from the application of the Competition Guidelines to date, as the current state and foreseeable developments in the ES and ECS, and competition guidelines adopted elsewhere. This is to ensure that any insights gained from the practical applications of the Guidelines are taken into account and that the converged Guidelines remain fit for purpose. Additionally, by reviewing competition guidelines in other jurisdictions that share similar characteristics or with a well-established Competition Law doctrine, URCA aims to align its Competition Guidelines with international best practices.

The purpose of this consultation is to: (i) present URCA's proposed revisions to the Competition Guidelines; and to (ii) invite feedback from all relevant persons on the proposed revision.

## **1.1 Structure of this Document**

The remainder of this consultation document is structured as follows:

Section 1:	Continues by outlining inter alia, how persons may respond to and participate in this consultation process;
Section 2:	Outlines the legal basis and framework under which URCA is conducting this consultation process;
Section 3:	Provides a summary Overview of key Proposed Amendments to the Competition Guidelines;
Section 4:	Outlines the next steps;
Annex A:	Provides a summary of the questions raised under this Consultation Document
Annex B:	Provides a draft of the proposed Competition Guidelines

## **1.2 How to Respond to this Consultation**

URCA invites comments and submissions on this consultation document from members of the public, licensees, and other interested persons. The consultation period would be extended to 60 calendar days instead of URCA's standard 30 calendar day consultation period on account of the importance of the document and the coincidence of the end of year holidays. Responses to

this consultation should be submitted to URCA's Director of Electricity on or before 21 February 2024 either:

- by hand, to URCA's office at Frederick House, Frederick Street, Nassau, The Bahamas; or
- by mail to P.O. Box N-4860, Nassau, Bahamas; or
- by fax, to (242) 393-0237; or
- by email to [info@urcabahamas.bs](mailto:info@urcabahamas.bs).

Persons may obtain copies of this document by downloading it from the URCA website at [www.urcabahamas.bs](http://www.urcabahamas.bs).

When submitting responses, URCA urges respondents to provide supporting explanations in their submissions. URCA will then review the responses received and publish a Statement of Results on the consultation along with the final Competition Guidelines.

Any response should indicate clearly the reference to the consultation document and the questions addressed for each of the responses provided.

URCA reserves the right to make all responses available to the public by posting responses on its website at [www.urcabahamas.bs](http://www.urcabahamas.bs). Responses marked 'confidential' should provide reasons to simplify the evaluation by URCA of the request for confidentiality. URCA may, in its sole discretion, choose whether to publish any confidential document or submission.

Any response to this public consultation that does not respect the aforementioned rules may not be considered by URCA.

Given the importance of these guidelines, URCA will hold a **consultation workshop** on Thursday, the 18<sup>th</sup> of January at 10:00 am for interested stakeholders. The workshop will be held at URCA's offices at Frederick House, Frederick Street, Nassau, The Bahamas.

The purpose of this workshop will be to facilitate the understanding of this updated version of the Competition Guidelines. To do so, the workshop will provide the following:

- (i) the context and objectives of the Competition Guidelines;
- (ii) the recent changes and their rationale; and
- (iii) an overview of the key substantive and procedural matters.

This workshop will also provide the opportunity for participants to seek clarifications and raise concerns they may have before submitting any formal response to the consultation.

## 2 Legal Framework

URCA is empowered as the regulator of the ECS and the ES by virtue of the Comms Act and the Electricity Act, respectively. As a public body, URCA must exercise its regulatory function within the remit of and consistent with its statutory authority. This section of the consultation document therefore sets out in detail the pertinent legislative provisions under which URCA proposes to implement the proposed Competition Guidelines.

The Comms Act sets out in section 4(a) that the ECS as its main objective to further the interests of consumers by promoting competition and in particular section 4(a)(iii) dictates that this the ECS policy should “encourage, promote and enforce sustainable competition.” In a similar manner, the Electricity Act at section 6(2)(d) outlines that the principles an objective of the ES policy and electricity supply regime includes the encouragement of competition in the generation of renewable electricity.

In line with this policy standpoint, both the Comms Act and the Electricity Act contain in Part XI provisions that prohibit anti-competitive behavior. Specifically, sections 67, 69, and 70 respectively of the Comms Act contain a prohibition against anti-competitive agreements, abuse of dominant position in addition to controls in relation to merger of licensees. Similarly, sections 55, 56 and 57 of the Electricity Act respectively contains identical provisions that prohibit anti-competitive agreements, abuse of dominant position and likewise contains controls in relation to change in control in relation to licensees.

The cumulative effect of the foregoing provides the legislative framework by which URCA proposes the regulatory action in relation to the proposed Competition Guidelines.

### 3 Summary Overview of key Proposed Amendments to the Competition Guidelines

To guide the stakeholders' review of the draft revised guidelines, URCA sets out below a brief overview of the key amendments to the Competition Guidelines, in line with the key objectives set out in Section 3.1.

#### 3.1 Extension of the Competition Guidelines to the ES

The main objective of this revision is to expand the scope of the Competition Guidelines to include the ES following the Electricity Act, which adds this sector to URCA's regulatory duties. While differences exist in the structure and dynamics of the ES and ECS, they share fundamental similarities as network industries. As a result, most potential competition concerns are applicable to both sectors. Moreover, URCA considers it beneficial and in good regulatory practice to develop a single harmonized regulatory document covering both the ECS and the ES. This has the benefit of harmonizing URCA's regulatory approach (with necessary sector specific inclusions and derogations) across sectors.

Therefore, this revision primarily involves ensuring that the revised version of the Competition Guidelines accurately addresses potential competition concerns specific to the ES while the previously outlined competition concerns for the ECS need to be formulated in a generic manner to accommodate the inclusion of ES considerations. This led, in particular, to the following substantive changes:

- (i) examples related to the ES were added across the document; and
- (ii) an Electricity Sector Public Interest test (see Section 4.2.4.1 of the revised Competition Guidelines) has been drafted in line with Section 59(b) of the Electricity Act.

**Question 1:** *Do you have any comments on the inclusion of the ES in the Competition Guidelines?*

**Question 2:** *Are there any situations you are currently facing, or are expected to be facing, that the revised version is not addressing, and for which there is an uncertainty on how they would be treated, under the Competition Guidelines? If so, can you explain the situation?*

**Question 3:** *Do you have any comments regarding the proposed Electricity Sector Public Interest test?*

## 3.2 Restructuring of the Competition Guidelines

This revision also provided an opportunity for URCA to streamline the Competition Guidelines in a comprehensive, clear, and accessible manner. Therefore, the revised version of the Competition Guidelines is structured in one single document detailed in the below.

- A **first introductory section** reminding the objectives of Competition Policy, the legal background, the purpose, and the scope of the Competition Guidelines.
- A **second section** defining all relevant terms for interested readers to understand the Competition Guidelines.
- A **third section** covering all aspects related to **Ex-Post Competition Investigations**. This encompasses procedural and substantive aspects related to anticompetitive agreements and abuse of dominance. Any persons facing a complaint or who would like to submit a complaint before URCA may find necessary information in this section.
- A **fourth section** covering all aspects related to **Ex-Ante Merger Control**. This encompasses procedural and substantive aspects related to any relevant transactions that should be submitted to URCA. Any persons who wish to purchase or divest, all or part of the assets or persons operating in the ES or ECS should be familiar with the information contained in this section.

URCA has also added Annexes to the guidelines covering:

- **relevant forms** related either to complaint submission or merger notification (Annex Annexes I and V), to facilitate communication between the relevant person and URCA; and
- more detailed discussions on **specific economic concepts** underpinning URCA's assessment (see Annexes II to IV).

**Question 4:** *Do you have any comments regarding the new structure of the Competition Guidelines?*

## 3.3 Clarification of Procedural Aspects and Information Requirements

One other key objective of the revision of the Competition Guidelines has been to enhance the ease of submissions for relevant persons before URCA. URCA has set out to achieve this by providing clarity on procedural aspects and information requirements, streamlining the process and ensuring that relevant parties can comply more seamlessly with URCA's procedures. The aim

is to facilitate efficient and straightforward submissions, fostering a more accessible and responsive regulatory environment.

Therefore, the following changes have been implemented to the Competition Guidelines:

- **Process maps and figures** have been added or simplified throughout the document (see Figure 1 to 7). These changes are implemented to facilitate a clear understanding of the relevant persons of URCA's reasoning and each stage of the procedure for any competition matter.
- **Templates for submissions** related to any complaint or notification have been provided, enabling relevant persons to more conveniently complete the required documents. These templates clearly outline the information expected by URCA in any submission, facilitating ease of compliance for relevant persons and streamlining the assessment process for URCA (see Annexes I and V).

**Question 5:** *Are there any aspects of URCA's procedures and assessments that you believe are missing, and for which you think a process map or figure would be helpful?*

**Question 6:** *Are there any aspects of the two notification forms (see Annexes I and V) that you do not understand? Is there any information missing in your view? Please specify the Annex you are commenting on when replying to this question.*

### **3.4 Updating to Reflect Recent and Foreseeable Market Developments, and with International Best Practices**

Given the time that has passed since the first publication, this revision is also an opportunity to ensure that the Competition Guidelines are still fit for purpose and reflect current international best practices. Therefore, URCA sought to update the Competition Guidelines in light of potential and foreseeable market developments and the latest economic research and tools. The list of substantive changes can be found below.

- **Complainants (See Section 3.1):** The scope of possible complainants has been expanded to include not only licensees and other undertakings but also the General Public and consumers. Any of these persons that may suspect an anticompetitive conduct can submit a complaint before URCA.
- **Leniency program (See Section 3.2.4.3):** Leniency is a powerful factor in cartel destabilization because it introduces a strong incentive to deviate from the collusion and to report the offense and supply the necessary evidence to URCA. It also acts as a

deterrent, discouraging Undertakings from engaging in anticompetitive practices because the program's existence means there is a substantial risk from inside the cartel. It only covers horizontal agreements.

- **Scope of transactions to be notified to URCA (See Section 4.1.1):** The scope of transactions to be notified has been expanded to include not only a subset of the Licensee's assets but also joint control of a licensee's assets. This has been implemented to allow URCA to assess the possible competitive effects of network sharing agreements (or other joint ventures) as well as the divestiture of passive infrastructure (following the increasing trends from telecom operator to divest large share of their assets in relation to cell towers to third parties, namely 'TowerCos').
- **Fees associated with the notification of a transaction (See Section 4.1.4):** URCA has the power and duty to charge and collect fees from Licensees in the ECS and ES on behalf of the Government of The Bahamas and to cover URCA's annual budgeted costs of performing URCA's functions and exercising its powers under the Comms Act and the Electricity Act. Therefore, URCA has taken the opportunity of this revision to clarify the rationale for such fees and the underlying principles for defining its level.

**Question 7:** *Do you have any comments on the changes mentioned above? Please provide a detailed response for each suggested change, including supporting evidence.*

**Question 8:** *Are there aspects that you believe would be helpful in having in the Competition Guidelines and which are currently missing?*

## 4 Next Steps

URCA will carefully consider all comments and submission received within the prescribed timeline for responding to this consultation document. In relation to the consultation process, the **consultation workshop** on Thursday, the 18<sup>th</sup> of January at 10:00 am as indicated previously remains available for interested stakeholders. This Consultation process will remain open for sixty (60) calendar days (i.e. until 19 February 2024) and URCA intends to issue a Statement of Results and Final Decision (with accompanying Competition Guidelines) to this Consultation within thirty (30) calendar days following the end of the consultation period (i.e. on or before 20 March 2024), unless extenuating circumstances dictate otherwise (in which case URCA will notify the public via its website).

## 5 Annex A

**Question 1:** *Do you have any comments on the inclusion of the ES in the Competition Guidelines?*

**Question 2:** *Are there any situations you are currently facing, or are expected to be facing, that the revised version is not addressing, and for which there is an uncertainty on how they would be treated, under the Competition Guidelines? If so, can you explain the situation?*

**Question 3:** *Do you have any comments regarding the proposed Electricity Sector Public Interest test?*

**Question 5:** *Are there any aspects of URCA's procedures and assessments that you believe are missing, and for which you think a process map or figure would be helpful?*

**Question 6:** *Are there any aspects of the two notification forms (see Annexes I and V) that you do not understand? Is there any information missing in your view? Please specify the Annex you are commenting on when replying to this question.*

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**Question 8:** *Are there aspects that you believe would be helpful in having in the Competition Guidelines and which are currently missing?*

## 6 Annex B