Competition Guidelines

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Table of Contents

1 Introduction 3

1.1 General Objectives of Competition Policy 3

1.2 Legal Background 3

1.3 Purpose and Scope of the Guidelines 5

2 Definitions and Interpretations 7

3 Ex-Post Competition Investigations related to Anticompetitive Agreements and Abuse of Dominance 11

3.1 Procedural Matters/Issues 11

3.1.1 Submission of a Complaint 12
3.1.2 Adjudication Procedure followed by URCA 14

3.2 Substantive Matters/Issues 18

3.2.1 Market Definition 19
3.2.2 Anticompetitive Agreements 27
3.2.3 Abuse of Dominance 38
3.2.4 Definition of Fines 60

4 Ex-ante Merger Control 66

4.1 Procedural Matters/Issues 67

4.1.1 Transactions to be notified to URCA 67
4.1.2 Notification of a Transaction 71
4.1.3 Notification Procedure Followed by URCA 72
4.1.4 Fees associated with the Notification 75

4.2 Substantive Matters/Issues 76

4.2.1 Market Definition 77
4.2.2 Market Analysis 86
4.2.3 Competition Concerns 89
4.2.4 Public Interest 96
4.2.5 Definition of Remedies 98

Annex I: Complaint Submission Form for Ex-post Competition Investigations 100

Annex II: The ‘Single Economic Entity’ Doctrine 104

Annex III: Measure of Cost 107

Annex IV: Measures of Concentration 108

Annex V: Merger Notification Form for Ex-ante Merger Review 110

1 Introduction

1.1 General Objectives of Competition Policy

1. Market openness and vigorous competition are crucial as they create incentives for firms to be more efficient and innovative. When firms compete, they strive to offer better products and services at lower prices which ultimately benefits consumers and businesses by providing more choices, improved quality, and cost-effective options. This is particularly true for the Electronic Communications Sector (ECS) and Electricity Sector (ES) as they underpin all other areas of the economy of The Bahamas.

2. In this context, competition policy for the ECS and ES refers to the set of regulations and provisions contained in the Communications Act, 2009 ("Comms Act") and the Electricity Act, 2015 ("Electricity Act") in The Bahamas. Competition policy is designed to promote and maintain competitive markets and its primary goal is to prevent anticompetitive practices and the creation of undue dominant positions that could harm consumer welfare and hinder economic efficiency. This framework complements the ex-ante regulatory framework applied by URCA.

3. Indeed, the ES and ECS are characterized by high and non-transitory barriers to entry[1], with a market structure which often does not tend, on its own, towards effective competition. These characteristics often lead to market failures to the detriment of consumers, businesses and the wider economy. To address these situations, URCA is also implementing an ex-ante regulatory framework as defined in its decision on Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009[2].

4. These Competition Guidelines set out URCA's Competition Policy and are designed to assist Licensees, and other interested Persons, in understanding how the competition provisions of the Comms Act and the Electricity Act will apply in practice with regards to procedural and substantives aspects and to determine if their conduct complies with these rules.

1.2 Legal Background

5. These Competition Guidelines are based on the Utilities Regulation and Competition Authority Act, 2009, ("URCA Act"), the Comms Act and the Electricity Act.

6. The URCA Act came into force on 1 August 2009. This act establishes the Utilities Regulation and Competition Authority (the "URCA") and prescribes operational rules,

[1] These barriers are usually considered as structural or legal. In these sectors structural barriers typically relate to high fixed and sunk costs.

[2] https://www.urcabahamas.bs/wp-content/uploads/2017/01/Final-Decision-on-SMP-methodology-ECS-20-2011.pdf

functions, responsibilities, powers, and duties of the Authority.

7. The Comms Act came into force on 1 September 2009, shortly after the URCA Act. It sets the legal remit of URCA and defines its functions with regards to the ECS. It is based on this Act that URCA is required to regulate the ECS, apply competition law rules or on the power to grant licenses.

8. The Electricity Act, which came into force on 30th December 2015, which extended the legal remit of URCA's functions, responsibilities, powers and duties to include the Electricity Sector (ES). Similarly, URCA is mandated to oversee the ES, enforce competition law provisions, as stipulated by this Act. The URCA Act gives URCA the authority to grant licenses.

9. Both Acts include a set of competition provisions (defined in Part XI of the Comms Act and in Part XI and XII of the Electricity Act) covering anticompetitive conduct prohibitions (i.e., anticompetitive Agreements and abuse of dominance) as well as ex-ante Merger notification from relevant Licensees or Undertakings. They also promote the overall objective of sustainable competition in licensed activities.

10. These Acts, together with the URCA Act, grant a set of powers allowing URCA to effectively conduct its duties and facilitate a swift and effective functioning of competition within the ES and ECS. The following list provides an overview of the main, relevant duties and powers granted to URCA:

    - **Power to request information**: URCA has the power to investigate any contravention, alleged contravention or any circumstance where it has grounds to suspect a contravention of any provision, and any measure issued under these acts. When conducting such an investigation in relation to a suspected breach of the competition provisions, URCA will write to the Undertakings who are subject to the investigation. 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. Where an Undertaking requests an extension of time to comply with a request for information from URCA, URCA may grant an extension of time if the Undertakings provides reasonable justification for the need of the requested extension. URCA notes that any request for information or clarification will result in the process timelines being paused until a full and comprehensive response has been received to all of URCA's requests/queries.

    - **Power to make an adjudication:** 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 these acts.

- **Power to issue an order**: in relation to these Competition Guidelines, this means to issue an order against a Licensee or Undertaking to remedy, prevent, or rectify any breach or anticipated breach of the competition provisions. This could also imply an issue of interim order in cases of urgency and due to the risk of serious and irreparable damage. URCA can act on its own initiative or at the request of any affected Person.

- **Duties to ensure the effective uses of its resources**: URCA has limited resources and must ensure that it uses its resources efficiently[3]. Therefore, URCA will prioritize investigations in accordance with its statutory objectives. Where URCA does not have sufficient resources to investigate all complaints, it will prioritize 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.

- **Search warrants**: Where URCA has satisfied a magistrate that there is reason to suspect a contravention, and that entry to specified premises is necessary, the magistrate may issue a search warrant to a peace officer.

- **Appeal from URCA's adjudication and order**: Any relevant Undertaking affected by any adjudication or order of URCA is allowed to appeal against it to the Utilities Appeal Tribunal.

11. The above list is not intended to be exhaustive of the relevant duties and powers handed to URCA. Undertakings are advised to consult the relevant legislation and seek legal advice where appropriate.

1.3 Purpose and Scope of the Guidelines

12. These Competition Guidelines are designed to assist Licensees, and other interested Persons, in understanding how the competition provisions of the Comms Act and the Electricity Act will apply in practice with regards to procedural and substantives aspects and to determine if their conduct complies with these rules. This includes guidance on ex-post competition investigations and ex-ante Merger control that could be undertaken by URCA and will specifically cover the following aspects:

- procedure URCA and the Licensee or a relevant Undertaking will usually follow when submitting a complaint about an alleged anticompetitive behavior by a Licensee, being subject to an investigation by URCA on an alleged anticompetitive conduct, or when notifying a proposed Transaction to URCA involving at least one Licensee and/or affecting the ECS or ES;

- the economic analysis URCA will conduct when investigating a suspected breach of

[3] See Section 8(2) of the URCA Act.

the competition principles or when reviewing a proposed merger; and

- the type of remedies or fines, and the principles governing their definitions, that could follow in any of these matters.

13. These Guidelines set out URCA's position on Competition Law principles but 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. URCA will undertake its assessment on a case-by-case basis, with due account being taken of all the facts of the case and the dynamics of competition on the relevant market.

14. The Guidelines apply to competition matters related to the ES and ECS and affecting markets of The Bahamas. Persons addressed by the Guidelines therefore include the following:

(i) Licensees and Undertakings operating in the ES or ECS for anticompetitive Agreements (see Section 3.2.2);

(ii) Licensees for abuse of dominant position (see Section 3.2.3); and

(iii) Licensees or relevant Undertakings affecting the Control of a Licensee for Merger control review (see Section 4).

15. Other interested Persons such as the general public or Customers (including consumers such as residential and businesses) may also file complaints to URCA if they were to suspect any anticompetitive conduct.

16. 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.

2 Definitions and Interpretations

For the purposes of these Guidelines, the following definitions will apply:

"Agreement" means any form of commitment between two or more Persons, whether legally binding or not, whether formal or informal and whether written or oral. It covers "gentlemen's agreements", whereby the Persons have expressed their joint intention to conduct themselves on the market in a specific way. For an Agreement to exist, it is simply required that the Persons reach a consensus on the action they will take, or refrain from taking. As the three concepts of 'Agreement', 'decision' and 'Concerted Practice' overlap, URCA will generally use the term 'Agreement' as covering all three concepts;

"**Association of Undertakings"** means anybody 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;

"Broadcasting" means a service which consists in the provision of:

(i) television programs;

(ii) radio programs; or

(iii) teletext services;

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

"Carriage Service" means 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;

"Comms Act" means the Communications Act, 2009;

"Concerted Practices" means any form of cooperation between the Persons (not amounting to an Agreement) that is contrary to the normal competitive process. This could be established by the following:

(i) whether the Persons involved knowingly entered into cooperation;

(ii) whether behavior in the market is affected as a result of direct or indirect cooperation between the Persons; and

(iii) whether any parallel behavior engaged in by the Persons is a result of cooperation between the Persons leading to conditions of competition which are not the normal conditions of the market;

"Content Service" means 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;

"Control" means the ability, directly or indirectly, to exert material influence over the management, policies or strategic business decisions of another Person, individually or jointly with others.

"Customers" means all direct or indirect users of the products or services, including producers that use the products or services as an input, wholesalers, retailers and end-Customers (i.e., consumers). The term 'Customers' encompass the term 'consumers' and URCA will generally use the term 'Customers' to also cover this concept. URCA will use the terms 'consumers' or 'end-Customer' only if it intends to cover this type of customer only.

"Decisions by Associations of Undertakings" means the rules and regulations of the particular association in question, decisions binding on the members, recommendations or codes of conduct. The key consideration is whether the object or effect of the decision, whatever form it takes, is to influence the conduct, or coordinate the behavior of, its members;

"ECS" means the Electronic Communications Sector of The Bahamas;

"Electricity Act" means the Electricity Act, 2015;

"ES" means the Electricity Sector of The Bahamas;

"Horizontal Agreement" means an Agreement between companies operating at the same level in the market. In most instances, Horizontal Agreements are therefore between competitors or potential competitors;

"Issued Share Capital" means, with respect to any Person, all shares, interests, participations or rights or other equivalent (however designated, whether voting or non-voting, ordinary or preferred) in the equity or capital of such Person, now or hereafter issued;

"Joint Control" means that more than one Person have or acquire Control of another Person;

"Joint Venture" means a Transaction between two or more Persons that produces a third Person, whose resources, ownership, revenues, expenses and management are joint between the different Persons for the purpose of achieving a shared objective, with each Person normally maintaining its own identity;

"Licensee" means any holder of a license issued by URCA under either the Comms Act or the Electricity Act, and includes any subsidiary Undertakings of the same Licensee notified to URCA in accordance with the relevant provisions of those Acts;

"Media Enterprise" means an enterprise involving either or both of Broadcasting and publishing newspapers;

"Merger" means where one or more Persons acquires Control of one or more other Persons on

a lasting basis. URCA may also use the term “Transaction” to refer to Merger in the following document;

“Network” means the following:

(i) a transmission system for the conveyance, by the use of electrical, magnetic or electromagnetic energy, of signals of any description; and

(ii) such of the following as are used by the Person providing the Network and in association with it, for the conveyance of the signals –

a. apparatus, equipment or facilities comprised in the Network;

b. apparatus, equipment or facilities used for the switching or routing of signals; and

c. software and stored data;

(iii) an electricity transmission and distribution system owned or operated by a public electricity supplier within The Bahamas.

“Network Sharing Agreement” means an Agreement between two or more Persons to collaborate and jointly utilize passive or active infrastructure, resources, or networks. This often results to a common Control over some previously independently owned assets by one or all members of the Agreement as it restricts the ability of the original owner to dispose of these Assets freely and imparts some Control to the other relevant Persons based on the terms of the Agreement.

“Passive Infrastructure” means the physical components or facilities that provide the foundational support for the transmission and distribution of services. In the Electricity Sector, passive infrastructure may include elements like transmission towers, substations, power lines, and related equipment that facilitate the transportation of electrical power but do not generate or consume it. In the Electronic Communication Sector, passive infrastructure typically involves the physical components of the network, such as ducts, poles, cell towers, antennas, fiber optic cables, and equipment cabinets. These elements create the necessary framework for the transmission of signals but do not actively process or generate the communication signals themselves.

“Person” means any juristic Person in the form of a natural Person, company, corporation, unincorporated association or body, partnership, Joint Venture, trust, organization, government agency, public body, entity, or enterprise (including assets amounting to a business or parts of a business with a market presence);

“Relevant Turnover” means 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 attributable to:

(i) the provision of a Network or Carriage Service or use of radio spectrum under any license

or exemption determination and a Content Service (under Section 17 of the Comms Act) including associated advertising revenue and other ancillary revenue, but after the deduction of sales rebates, trade discounts, value added tax and other taxes directly related to turnover, in The Bahamas during the relevant financial year; or

(ii) the provision of a generation, transmission, distribution or supply service, or use of any generation, transmission, distribution or supply system, under the license or exemption determination (under Section 50 of the Electricity Act). This includes, in relation to the electricity supply system in The Bahamas during the relevant financial year, associated another ancillary revenue, whether or not derived from activities authorized by the license, after the deduction of sales rebates, trade discounts, value added tax and other taxes directly related to turnover;

"The Bahamas" means all or any part of The Bahamas;

"Undertaking" means a Person carrying on a trade or business, with or without a view to profit;

"URCA" means the Utilities Regulation and Competition Authority as established under Section 3 of the Utilities Regulation and Competition Authority Act, 2009;

"URCA Act" means the Utilities Regulation and Competition Authority Act, 2009;

"Vertical Agreements" means Agreements between companies operating at different level of the value chain.

3 Ex-Post Competition Investigations related to Anticompetitive Agreements and Abuse of Dominance

17. This section discusses the procedural and substantive aspects of the ex-post competition investigations URCA may undertake. This will assist Licensees and others Persons (including the general public and consumers) in understanding the process to submit a complaint to URCA, the procedure URCA will follow to investigate any such complaint or by launching its own investigation into an alleged anticompetitive conduct of a Licensee, and the economic principles and evidence URCA will rely on during its investigation. It should be noted that URCA's assessment will be specific to the investigation it undertakes. While these decisions may reflect particular views URCA may take in general, each assessment will be grounded in the specific circumstances of each case.

18. There are two types of anticompetitive conduct that may distort the effective functioning of competition and lead to an ex-post competition investigation:

    (i) Anticompetitive Agreements: Most Agreements between market players benefit consumers and can stimulate innovation and more efficient business practices. However, they may harm competition when they are intended to coordinate behaviors on key determinants of the economic equilibrium such as price, quantity, product quality, or innovation. Such conduct can be subject to a complaint from a Licensee or relevant Undertakings or lead URCA to open an investigation on its own initiative.

    (i) Abuse of dominance: The abuse of dominance represents a situation where a Licensee holding a dominant position abuses this situation by charging excessively high prices to its Customers or by preventing, restricting or distorting competition in the ECS or ES within 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.

19. Persons concerned by the following ex-post competition investigations are:

    (i) Licensees and Undertakings operating within anticompetitive Agreements;

    (ii) Licensees holding a dominant position in the relevant market, as determined by URCA as part of its investigation.

3.1 Procedural Matters/Issues

20. The following section sets out:

    (i) the process for Licensees and other relevant Persons, including the general public and consumers, to submit complaints to URCA regarding alleged or suspected

breaches of the competition provisions related to anticompetitive Agreements and abuse of a dominant position (hereinafter 'complainants'); and

(ii) the procedure URCA will follow to assess if competition provisions have been breached.

21. URCA may initiate an investigation on its own initiative or following a complaint from a Person (including the general public and consumers). If URCA receives a complaint, it will acknowledge the complaint and then form an initial view on the merits of the complaint.

22. URCA will consider whether to open an investigation, taking into account the potential detriment caused to the ECS or ES by the alleged conduct, the expected resources required to conduct an investigation, 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.

23. URCA may only intervene where the complaint relates to conduct that has a detrimental effect on competition in the ECS or ES. URCA will otherwise not usually intervene, particularly if the relevant Persons have recourse to alternative resolution mechanisms.

3.1.1 Submission of a Complaint

24. This section provides further details on the process for Licensees and others relevant Persons (including the general public and consumers) to submit complaints to URCA regarding alleged or suspected breaches of the competition provisions related to anticompetitive Agreements and abuse of a dominant position.

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

(i) **Electronic submissions** should be sent to **info@urcabahamas.bs**.

(ii) **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, Frederick House, Frederick Street, P. O. Box N-4860, Nassau, Bahamas.

26. It is strongly recommended that complainants follow the guidance set in Annex I as the level of information provided with the complaint will be an important indicator of both the seriousness of the complaint and the amount of further resources required to investigate it. Other than in exceptional circumstances, a submission should meet these minimum submission requirements for URCA to assess whether to open an investigation.

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

28. 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.

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

    (i) The relevant market affected by the alleged abusive behavior;

    (ii) the source of market power of the alleged infringing Person or Persons, enabling it/them to act independently of other providers in that market;

    (iii) the alleged anticompetitive conduct, whether it relates to an Agreement that has the object or effect of preventing, restricting or distorting competition or the abuse of a dominant position

    (iv) the estimated time period over which the alleged anticompetitive conduct has taken place; and

    (v) the adverse effect of the alleged anticompetitive conduct on the complainant.

Example

If a complainant submits a claim that a Licensee is engaged in margin squeeze (see Section 3.2.3.2.2.9 for further details on such practice), it should seek to provide the following information:

(i) Evidence on the relevant market: identify the relevant upstream and downstream markets affected by the alleged abusive behavior; set out reasoning for this market definition, including reference to, for example, barriers to entry and switching, evidence of substitution and views of other relevant Persons.

(ii) Evidence on the source of market power: to bring a claim of margin squeeze, it is necessary to show that the allegedly infringing Licensee holds ownership of an essential and irreplicable wholesale input which downstream Licensees need to effectively compete, and that the infringing Licensee has a dominant position in the relevant market.

(iii) Evidence of margin squeeze, i.e. that the difference between retail prices and wholesale prices is so low that an 'efficient' competitor that depends on the wholesale inputs would not be able to compete at the retail level. Complainants should provide evidence of:

a. the relevant wholesale and retail prices;

b. their own costs in providing the retail services;

c. the products and customer segments concerned;

d. the time period of the alleged conduct; and

e. the effect of the conduct on competition in the market.

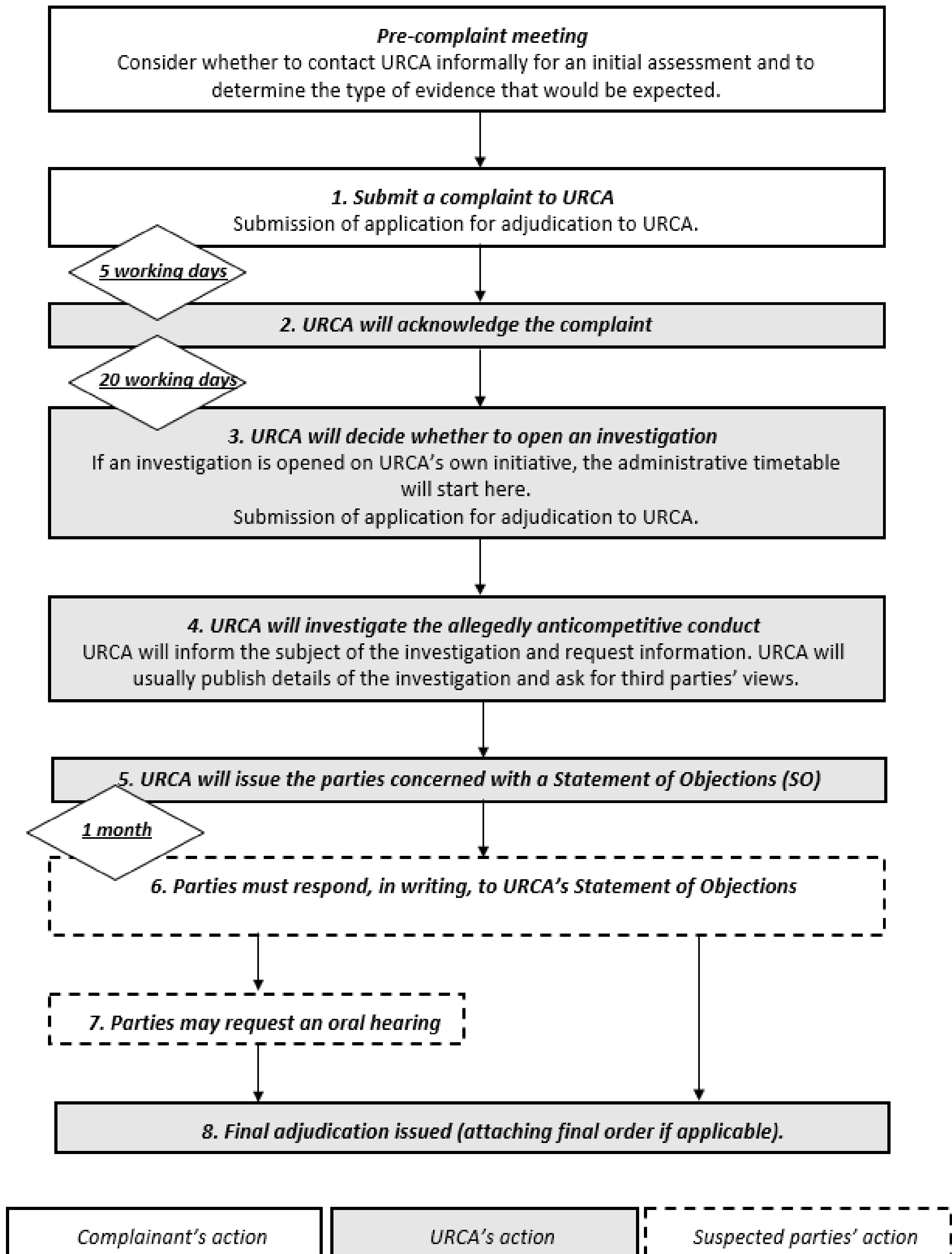
30. Complainants should familiarize themselves with the Guidelines and may wish to seek informal advice from URCA when preparing a complaint of anticompetitive conduct.

31. URCA shall only conduct an investigation if a complaint is formally submitted containing the required information set above.

3.1.2 Adjudication Procedure followed by URCA

32. This section provides further detail on the procedure that URCA intends to adopt for conducting investigations of alleged anticompetitive conduct. An outline of the procedure, and associated timeline, to be used by URCA is shown in the diagram below.

Figure 1: Diagram of the ex-post competition investigation procedure



33. 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.

34. The purpose of these meetings would be to assist complainants to 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, Persons must keep the pre-complaint meeting confidential.

35. 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.

36. 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.

37. 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 must ensure that it uses its resources efficiently. Therefore, URCA will prioritize investigations in accordance with its statutory objectives. Where URCA does not have sufficient resources to investigate all complaints, it will prioritize 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.

38. 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 Person complainant to support the alleged infringement.

39. At the time of informing the Person 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. Any public communications made by URCA at this stage shall provide complainants with confidentiality if so requested.

40. 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 may issue an **interim adjudication** prior to concluding its investigation under the procedure set out below.

41. 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 or Electricity 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.

42. 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.

43. 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.

44. 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 Persons of this action if it has already informed them that a case had been opened.

45. 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 Person, seeking further information. 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.

46. URCA's fact finding exercise may involve several rounds of questions to Licensees and other interested Persons, as well as on-site inspections.

47. After URCA has completed this fact finding exercise, it will consider whether there is sufficient evidence to form an initial case against the Person 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 Person, 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.

48. If URCA prepares a **statement of objections**, it will present substantive aspects of the analysis undertaken by URCA as part of the ex-post competition investigation (as set out in Section 3.2). URCA will allow the recipient of the statement of objections at least one month to respond to the points raised in that document.

49. The respondent should set out its defense 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.

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

51. 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 against the allegedly infringing Person to take some action, to stop taking a specified action and/or to pay a fine.

52. URCA will attempt to conclude the majority of its investigations within twelve months of starting the investigation.

3.2 Substantive Matters/Issues

53. This section discusses the substantive aspects of the analysis undertaken by URCA in any ex-post competition investigation.

    (i) Most of these investigations will start by a detailed **market definition exercise** to identify and define the market boundaries, delineating the set of products or services over which firms compete and the geographic scope in which they do so. The main purpose of market definition in an ex-post competition investigation is to identify the competitive constraints that Licensees or Undertakings subject to the investigation face.

    (ii) Following this market definition, URCA will investigate the **theories of harm** that may be brought by a claimant, or following an investigation opened by URCA, on its own initiative. These theories of harm can be analyzed through the lens of two prohibitions: anticompetitive Agreements and abuse of dominance.

        a. Anticompetitive Agreements represent certain Agreements which prevent, restrict or distort competition and are therefore prohibited.

        b. Abuse of dominance represents the situation in which a dominant player, or a jointly dominant group of players may abuse this position in order to distort competition.

    (iii) If this anticompetitive conduct were to be proven, URCA would seek to determine

an objective and non-discriminatory level of fines depending on the gravity of the case and in order to achieve deterrence of such conducts.

3.2.1 Market Definition

54. This section describes URCA's approach to market definition when conducting a competition investigation and will cover the following aspects:

(i) the conceptual framework underlying market definition;

(ii) economic principles and evidence on which URCA will rely for defining the relevant product and geographic market; and

(iii) further discussions relevant for the definition of a relevant market.

55. The economic framework described below is largely similar in its underlying economic principles to the analysis URCA would be conducting when defining markets in the context of an ex-ante Merger review or a market review to determine whether a Licensee has SMP.

56. Market definition in the context of an ex-post competition investigation focuses on specific services (i.e., it has a 'focal product' which is central to a complaint or investigation) and is usually retrospective (i.e., focusing on the market dynamics at the time of the alleged anticompetitive behavior).

57. Market definition in the context of an ex-ante Merger review is discussed in Section 4.2.1. Market definition in the case of SMP analysis can be found in Section 39(2) of the Communications Act, 2009[4].

3.2.1.1 Conceptual Framework

58. Market definition is a tool to identify and define the boundaries, delineating different products and services within which firms compete. The main purpose of market definition in an ex-post competition investigation is to identify the competitive constraints that Licensees or Undertakings subject to the investigation are facing. This provides a framework for URCA to assess, on a product and geographical scope, the extent to which Licensees or relevant Undertakings subject to the investigation may enjoy market power, or if their behaviors are constrained by other competitors operating in this market. It also allows for the calculation of market shares that would support URCA's assessment of dominance in the case of an abuse of dominance. It is the industry norm to refer to a market as defined in any one specific case as the "relevant market".

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[4] https://www.urcabahamas.bs/wp-content/uploads/2017/01/Final-Decision-on-SMP-methodology-ECS-20-2011.pdf

59. In addition, market definition plays a crucial role in the definition of the level of fines (see Section 3.2.4), as the structure of the relevant market and the market shares of the Persons involved in the infringement are crucial for the consideration of the gravity of the infringement.

60. In ex-post competition investigations, 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. However, one may note that this may be different regarding the assessment of an abuse of dominance as this may be dependent on the demonstration of dominance which is largely dependent of the market shares of the relevant Licensee.

3.2.1.1.1 <u>Competitive Constraints considered for the Purpose of Market Definition</u>

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

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

62. Demand-side substitution and supply-side substitution are the most immediate constraints considered for the purpose of defining relevant markets. Potential competition is mostly considered at a later stage of the analysis (and therefore covered in greater detail in later sections of these Guidelines) as it is less immediate and requires an analysis of additional factors.

63. 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. It entails all products which are considered as substitutes from a Customer's perspective. A 'classic' thought experiment for identifying substitutable products from a Customer's standpoint involves assuming a significant price increase of the focal product and considering which alternative products Customers might turn to for their consumption. These products are then regarded as part of the relevant market.

64. Supply-side substitution, whilst of secondary importance, is also an important consideration in market definition, especially when from a demand-side perspective

two products may not be substitutable but suppliers of a particular service can easily adjust their offering to supply the focal product. Similarly to the previous thought experiment, one may think of possible reactions from alternative suppliers following an increase in price of the focal product. If alternative suppliers are able to switch production to the relevant products and market in the short term without incurring significant additional costs, then it can be considered that there is effective supply-side substitution.

3.2.1.1.2 The Hypothetical Monopolist Test

65. The aforementioned thought experiment has been generalized through the hypothetical monopolist test (SSNIP Test)[5] which is a generally accepted conceptual approach to market definition. It is a thought experiment regularly employed by competition authorities and regulatory authorities to contemplate market definition, in addition to considering other material evidence.

66. 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), would the hypothetical monopolist be able to profitably implement a small but significant and non-transitory increase in the price?

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

68. When defining a market, 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.

69. 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 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 because there would be no sufficient competitive constraints stopping the supplier from doing so. That set of products constitutes the 'relevant product market'.

70. The theoretical starting price for the purpose of the SSNIP test may be the prevailing market price. However, this may not be the case where the prevailing price has been set in the absence of sufficient competition, i.e., by an Undertaking with market

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

power in cases of abuse of a dominant position.

71. For example, if as a result of an Undertaking'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.[6]

3.2.1.2 Relevant Product Market

72. Commonly accepted international standards recognize that a relevant product market encompasses all the products and/or services that Customers consider interchangeable or substitutable due to factors such as their attributes, pricing, and intended use.

73. 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.

Example

Generation and wholesale supply of electricity may be produced from different power plant technologies and/or energy sources. Insofar as these different production characteristics are indistinguishable to consumers, this output may belong to the same wholesale product market. However, where such characteristics affect the degree of substitutability between different types of generation capacity, this may lead to separate product markets being defined.

For example, intermittent renewable generation may only be available at certain times of the day or year (e.g., solar generation only during day time) whereas conventional gas or oil-fired generators can be called upon to produce at any time (subject to technical availability of the plant). This may lead to the delineation of separate markets for conventional and renewable generation.

74. Where an Undertaking 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 product markets based on customer type.

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[6] This is known as the "cellophane fallacy", from a US case (United States v. Du Pont & Co., 351 U.S. 377 (1956)) 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.

Example

Although residential consumers and business consumers may use physically similar services for the same purpose, they may require a different level of support and have a different willingness to pay for these services. A business consumer will typically be willing to pay a higher price than a residential consumer but for a more reliable or higher quality of service. This may lead to the conclusion that separate markets should be defined for these consumer categories.

75. Furthermore, in the case of electronic communications services, product substitutability between different 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.[7] By having a common infrastructure, communications technologies like internet, voice, video and data communication can be combined and provided through a single device over the same Network. For instance, the internet may be used to transmit digitized 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.

76. 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 analyze 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 other relevant persons**: as discussed above, URCA will often contact the main Customers, suppliers and competitors of the companies involved in its enquiries, to gather their views.

[7] 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.

- **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 Persons subject to an investigation themselves, although pre-existing company surveys will also be considered. When the Persons 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 still consider the results, but only insofar as the methodology adopted is robust and fit for purpose.

- **Barriers to switching 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 estimate own-price elasticities and cross-price elasticities of the demand of a product.[8] In the ES and ECS, 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, reliable and fit for purpose.

3.2.1.3 Relevant Geographic Market

77. The relevant geographic market can be defined as the specific area in which market players operate in the provision and demand of products or services, characterized

[8] 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.)

by sufficiently uniform competitive conditions, and distinguishable from adjacent areas due to significantly differing competitive conditions within those regions.

78. Significant variation of competitive conditions between different areas of the same country might require defining different relevant markets. For both ES and ECS, this may be the difference between Customers located on different islands and/or, in the case of ECS, urban and rural areas. As with product market definition, geographic market definition relies on the analysis of demand and supply-side substitutability.

79. Supply-side substitutability may play a greater role for geographic market definition in the ES and ECS if overlaps in market players' serviceable areas allow them to quickly respond to any price variations from competitors without incurring significant additional costs.

Example

Consider two wholesale electricity generation Undertakings (A and B) that own and operate generating assets situated across three islands (1, 2, 3) in the following way:

- Undertaking A owns and operates assets on Islands 1 and 3; and
- Undertaking B owns and operates assets on Islands 2 and 3.

Both Undertakings sell wholesale electricity to a retailer on each island which then supplies electricity to consumers across that island. There is no competitive pressure exerted across islands due to the lack of distribution and transmission interconnectivity and the high costs Undertakings face when constructing new generating assets.

Based on this set up, it may be appropriate to define three distinct wholesale electricity generation markets; Undertaking A holds a monopoly position over Island 1 (Market 1), Undertaking B holds a monopoly position over Island 2 (Market 2), whilst Undertakings A and B compete with one another on Island 3 (Market 3).

This geographic market definition may evolve if new competitive constraints are exerted across islands, for instance due to new transmission or distribution interconnection assets.

80. 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. 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 other relevant persons**: 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. clauses in existing contracts or additional equipment requirements).

3.2.1.4 Additional Considerations

3.2.1.4.1 Continuous Chains of Substitution

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

Example

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 product A can affect the ability of the provider of product C to increase its prices profitably, even though product A and product C may not belong to the same product market.

3.2.1.4.2 Indirect Competitive Constraint

82. When defining relevant markets, two products can be considered as belonging to different relevant markets while exerting competitive pressure on one another's respective markets. In such instances, this competitive pressure should be taken into account at a later stage of the analysis and should not necessarily lead to a broadening of the market.

3.2.2 Anticompetitive Agreements

83. This section discusses the substantive aspects of the prohibition against anticompetitive Agreements. Certain Agreements which prevent, restrict or distort competition are prohibited unless they satisfy certain specified conditions.

84. As stated in Section 1.3, this prohibition concerns Licensees and Undertakings operating in the ES or ECS. This shall not apply to Licensees or relevant Undertakings that form a single economic entity, as in most cases for a parent company and fully-controlled subsidiary. These would be considered as a single Undertaking. A more detailed discussion can be found in Annex II.

85. The term Agreements covers Agreements between Licensees and/or Undertakings as well as Decisions by Associations of Undertakings and Concerted Practices, consistent with the definition given for the purpose of these Guidelines (see Section 2).

86. This prohibition applies to Agreements that have as their object or effect the prevention, restriction or distortion of competition within The Bahamas. The terms 'object' and 'effect' are distinct and alternative conditions.

(i) The 'object' of an Agreement means the 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.

(ii) The 'effect' of an Agreement means the impact, or likely impact, of the Agreement in the relevant market and whether it can be said that its anticompetitive effects

are “appreciable”.

87. 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. Ultimately, any Agreement which has an appreciable adverse effect on competition is likely to be prohibited.

3.2.2.1 Types of Agreement which restrict Competition

88. Most Agreements between market players benefit consumers and can stimulate innovation, and more efficient business practices. However, they may harm competition when they are intended to coordinate behaviors on key determinants of the economic equilibrium such as price, quantity, product quality, or innovation.

89. Based on the above, the following list can provide an helpful understanding of the type of Agreements which may be prohibited:

(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 Persons, thereby placing them at a competitive disadvantage; and

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

90. This list is not intended to be exhaustive and does not restrict URCA’s potential scope of investigation and enforcement activities. Any Agreement which has an appreciable adverse effect on competition is likely to be prohibited.

91. There are usually two types of Agreement which may give rise to competition concerns.

(i) Horizontal Agreements: where an Agreement is made between Persons operating in the same market.

(ii) Vertical Agreements: where an Agreement is made between Persons operating in markets at a different levels of the value chain.

3.2.2.1.1 Horizontal Agreements

92. An Agreement is Horizontal if it is entered into between companies operating in the

same 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.

93. There are various types of Horizontal Agreement which may have as their object or effect the restriction of competition. A summary of the types of Agreement considered in this section is provided in Table 1, below.

Table 1 Types of Horizontal Agreement discussed in Section 3

Price fixing	An Agreement (written, verbal, or inferred from conduct) to raise, lower, maintain, or stabilize price levels.
Market sharing	An Agreement between competitors to share Customers or markets.
Information sharing	The exchange of information which serves to reduce or remove uncertainties inherent in the process of competition.
Exchange of price information	The exchange of elements of a pricing policy which serves to enable coordination on the price which competitors charge to Customers.
Limiting Production or Output	An Agreement to restrict the quantity of a product or service that is sold on the market which serves to inflate prices beyond the competitive level.
Fixing trading conditions	An Agreement between competitors on the conditions on which they will supply their Customers, including non-price conditions.
Joint purchasing	An Agreement under which two or more companies agree to jointly purchase all or part of their input production requirements.
Production Agreements	An Agreement under which two or more Undertakings active in the same product market agree to produce certain products jointly.
Collective boycott	An Agreement to collectively refuse to serve certain Customers.
Bid Rigging	Cooperation between Undertakings in the submission of independent tenders without the knowledge of the Person running the tender process.

3.2.2.1.1.1 Price Fixing

94. Where an Agreement fixes prices, it will almost always be considered as an anticompetitive Agreement. There are many ways in which an Agreement can fix prices, for example:

(i) fixing the price itself or the components of a price, such as a discount;

(ii) setting levels below which prices are not to be reduced;

(iii) setting a percentage above which prices are not to be increased;

(iv) establishing a range within which prices must remain; and

(v) agreeing not to charge less than any other price on the market.

3.2.2.1.1.2 Market Sharing

95. Where Undertakings 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 Undertakings agreeing not to enter a market, such Agreements will almost always be considered as an anticompetitive Agreement. Such Agreements may reduce the choice available to Customers and may allow local market players to enjoy market power leading to higher prices or reduced output. They are often also combined with some form of price restriction.

3.2.2.1.1.3 Information Sharing

96. 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.

97. 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.

Media specific considerations with regard to codes of practice

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. 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 anticompetitive Agreement.

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 Undertakings. Thus, any Agreement to exchange confidential information that alters or artificially restricts conditions of trade within The

Bahamas will be considered as an anticompetitive Agreement.

98. When considering a case of potentially anticompetitive information exchange, URCA will start from the assumption that each relevant Undertakings should determine independently the policy which it intends to adopt on the market. This does not prevent Undertakings from intelligently adapting to the existing or expected conduct of their competitors, but it does prohibit any direct or indirect contact between such Undertakings which may allow a Person 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.

99. While genuinely historic information may be shared without fear of influencing competitive market behavior, 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 Customers, there is more likely to be an adverse effect on competition.

3.2.2.1.1.4 Exchange of Price Information

100. The most sensitive exchange of information 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.

101. 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.

Example

If Undertakings providing electronic communications services in The Bahamas were to inform one another of confidential information relating to a proposed increase in their retail prices, URCA would be likely to conclude that an anticompetitive Agreement was in place.

102. 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 Undertakings. 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.

103. For the avoidance of doubt, it is important that aggregated data cannot be used in a way that allows Undertakings 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.

3.2.2.1.1.5 Limiting Production or Output

104. Agreements between Undertakings which have as their object or effect the limitation of production or supply, for example by fixing quotas, will generally be considered as an anticompetitive Agreement.

Example

In the ES context, an Agreement may be anticompetitive if it leads to a withholding of available electricity generating capacity when the electricity price exceeds the short-run generation cost of the plant.

3.2.2.1.1.6 Fixing Trading Conditions

105. If competitors agree the conditions on which they will supply, this may have an appreciable effect on competition.

Example

If a trade association obliges its members to use common terms and conditions (including non-price terms), this may restrict competition and thereby be considered as an anticompetitive Agreement unless justified on technical (e.g., interoperability) or safety grounds.

3.2.2.1.1.7 Joint Purchasing

106. 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.

107. However, an Agreement between purchasers which effectively fixes the price that they are prepared to pay for an input or product may be considered as an anticompetitive Agreement insofar as this has the effect of harming end-users situated in The Bahamas (either through higher prices, lower quality or reduced choice).

3.2.2.1.1.8 Production Agreements

108. Horizontal production Agreements are Agreements under which two or more Undertakings active in the same product market agree to produce certain products jointly. This may include the production of goods or services carried out by way of a Joint Venture or subcontracting Agreement. Such Agreements may be pro-competitive if they enable efficient specialization in production of certain goods or services and result in improved or lower cost service for Customers.

109. However, an joint production Agreement that has the effect of limiting overall output, resulting in market sharing or price fixing over the services may be considered an anticompetitive Agreement.

Example

A form of production Agreement is Network Sharing Agreements ('NSA') where Licensees share parts of their Network infrastructure with one another in delivery of services. NSAs can be pro-competitive if they enable more efficient Network roll-out, wider and denser coverage and greater variety in choice of services compared to the counterfactual scenario.

However, NSAs can limit infrastructure competition that would have otherwise flourished absent the Agreement, in turn restricting competition in downstream markets. This may be the case if an NSA has the effect of limiting the total installed capacity of infrastructure (compared to the counterfactual) or provides an incentive and ability for Undertakings to collude (e.g., by reducing flexibility to innovate or enabling the exchange of commercially sensitive information).

3.2.2.1.1.9 Collective Boycott

110. If sellers join together and agree to collectively boycott certain Customers, the Agreement is likely to be considered as an anticompetitive Agreement.

3.2.2.1.1.10 Bid Rigging

111. 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 Person running the tender process, this will be regarded as an anticompetitive Agreement.

112. 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.

3.2.2.1.2 Vertical Agreements

113. 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.

114. In general, Vertical Agreements are less likely than Horizontal Agreements to prompt competition concerns. However, they can also contain anticompetitive provisions that may have negative effects on the market (as foreclosure of other suppliers/buyers). A summary of the types of Agreements considered in this section is provided in Table 2 below.

Table 2 Types of Vertical Agreement discussed in Section 3

Agreement	Definition
Resale price maintenance	An Agreement between the supplier and distributor (or reseller) to set minimum, fixed, maximum or recommended resale prices.
Single branding	An Agreement which induces a buyer to concentrate its orders for a particular product on one supplier.
Limited distribution	An Agreement in which a supplier is restricted sell to only one or a limited number of buyers.
Market partitioning	An Agreement in which a reseller is restricted as to where it buys or resells a particular product.

3.2.2.1.2.1 Resale Price Maintenance

115. 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 represent an anticompetitive Agreement.

116. The Agreement on a minimum or the Agreement to fix a price for the reselling of the goods or services would similarly be likely considered as anticompetitive.

3.2.2.1.2.2 Single Branding

117. A single branding Agreement is one where the buyer is induced to concentrate its orders for a particular product on one supplier. An Agreement to not 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 be anticompetitive.

3.2.2.1.2.3 Limited Distribution

118. 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 of downstream competition, and are therefore likely to be considered as anticompetitive.

3.2.2.1.2.4 Market Partitioning

119. This type of Agreement occurs where a downstream buyer (e.g. a reseller) is restricted as to where it buys or resells a particular product. The main negative effect is a reduction of inter-brand competition and a partitioning of the market.

3.2.2.2 Exemptions

120. While certain Agreements may have as their effect the prevention, restriction or distortion of competition, they may result in economic benefits which outweigh the adverse effects on competition.

121. It should be noted that certain types of Agreement are unlikely to realize 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.

122. For the remaining Agreements considered as anticompetitive, they may be exempted on competition policy grounds if and only if they fulfill the following conditions:

(i) The Agreement contributes to improving the production or distribution of the focal product or promoting technical or economic progress in The Bahamas;

(ii) Customers receive a fair share of the resulting benefit;

(iii) the restrictions in the Agreement are indispensable to the attainment of these objectives or will not afford the Undertakings the possibility of eliminating competition in respect of a substantial part of the focal product.

123. The following sections are providing more details on each relevant condition.

3.2.2.2.1 First Condition: Efficiency Gains

124. For the first condition to be satisfied, the restrictive Agreement must contribute to the enhancement of production, distribution, or the advancement of technical or economic progress to an extent that would outweigh the anticompetitive effects of the Agreement.

125. Following this, URCA's analysis will seek to objectively assess the Agreement's merits and claimed efficiencies as well as their economic significance. Such efficiencies must therefore be substantiated such that the following can be verified:

(i) the nature of the claimed efficiencies – it is important for the Undertakings subject to the Agreement to prove that their Agreement truly contributes to improving production or distribution, or promoting technical or economic progress in The Bahamas.

(ii) the link between the Agreement and the efficiencies needs to be sufficiently direct - i.e., that there is a direct causal link between the restrictive Agreement and the claimed efficiencies.

(iii) the likelihood and magnitude of each claimed efficiency – i.e., the expected value of the claimed efficiencies.

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

126. The categories of benefits are broad and intended to encompass all objective economic efficiencies and wider Government policy objectives. There is often substantial overlap between the various categories mentioned. A single Agreement may yield several types of benefit. Rather than drawing clear and firm distinctions between the various categories, URCA will usually make a distinction between cost efficiencies and benefits of a qualitative nature, whereby value is created in the form of new or improved products or greater product variety.

3.2.2.2.2 Second Condition: Fair Share for Customers

127. For the second condition to be satisfied, Customers must receive a fair share of the efficiencies generated by the restrictive Agreement. The concept of a 'fair share' implies that the pass-on benefit must at least compensate Customers for any actual or likely negative impact caused to them by the restriction of competition. If such

Customers are worse off following the Agreement, the second condition will not be met.

128. It is not required that Customers receive a share of each and every benefit identified under the first condition. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive Agreement.

129. This second condition incorporates an implicit sliding scale. The greater the restriction of competition, the greater must be the efficiencies and the pass-on benefits to Customers.

3.2.2.2.3 Third Condition: Indispensability of the Restrictions

130. For the third condition to be satisfied, any restrictions in the 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.

131. In practice, this means that there must not be any other economically practicable and less restrictive means of achieving the efficiencies for this condition to be met.

3.2.2.2.4 Fourth Condition: no Elimination of Competition

132. For the fourth condition 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 focal product. 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 Undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation.

133. 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.

Example

Energy security or security of supply can be defined as the availability of energy at all times in various forms, in sufficient quantities, and at reasonable and/or affordable prices. As outlined in the Electricity Act 2015, National Energy Policy objectives include energy security.

Vertical Agreements between wholesale electricity generators, distribution and transmission infrastructure operators and retailers may have benefits to energy security that outweigh potential anticompetitive effects. Where concerns are raised on such Agreements, URCA would therefore assess the effects of any such Agreement on a case-by-case basis.

3.2.3 Abuse of Dominance

134. The abuse of dominance represents a situation where a Licensee holding a dominant position abuses its position in order to prevent, restrict or distort competition within 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.

135. 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 conduct could harm consumers through higher prices, reduced choice or reduced investment and innovation.

136. 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 belonging to a sector under URCA's scrutiny in The Bahamas, and

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

3.2.3.1 Dominance

137. Therefore, following the market definition (see Section 3.2.1), URCA will seek to assess whether the Licensee is dominant (or jointly dominant) within that market. Dominance can be defined as an economic position that allows an Undertaking to prevent effective competition and act, to an appreciable extent, independently of its rivals, Customers, and ultimately, consumers.

138. It should be noted that an abuse of dominance may occur in a market separate to

that in which the dominant position is held. This may be particularly true in the ES and ECS where a Licensee is vertically integrated and dominant in an upstream market while committing an abuse in, or primarily affecting, a downstream market.

Example

A vertically integrated electricity supplier may compete with wholesalers (in upstream markets) and/or retailers (in downstream markets) that rely on access to its transmission and distribution Network to access these markets.

In this context, there may be scope for the vertically integrated Undertaking to abuse its dominant position in the transmission and distribution markets by leveraging this market power into adjacent wholesale and/or retail markets to foreclose competition. Amongst other potential abuses, this by be done by means of margin squeeze, undue discrimination or refusal to supply the wholesale products to another Undertaking (amongst other potential abuses).

139. 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 regulatory barriers, may also be relevant. These factors are discussed further below.

140. The definition of 'dominance' above also corresponds with the concept of SMP. The principles used to assess whether a Licensee is dominant for the purposes of an abuse of dominance are broadly similar to those used to assess whether a Licensee has SMP. The analysis applied by URCA in this context can be found under its decision on Methodology for Assessment of Significant Market Power under Section 39(2) of the Communications Act, 2009[9].

141. For the purpose of these Guidelines, 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 competition investigation. Similarly, a Licensee may be in a dominant position even if it does not have SMP.

[9] https://www.urcabahamas.bs/wp-content/uploads/2017/01/Final-Decision-on-SMP-methodology-ECS-20-2011.pdf

142. A group of Licensees can be collectively dominant. 'Collective (or joint) dominance' is explained in greater detail further 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 purpose of these Guidelines, 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.

3.2.3.1.1 <u>Existing Competition and Market Shares</u>

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

144. 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.

145. International precedent suggests 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. If its market share is below 40 per cent, its dominance will need to be substantiated by other relevant factors (such as the weak position of competitors in that market, or high entry barriers).

146. Market shares may be calculated, for instance, with reference to gross revenues, total number of Customers served, usage metrics (such as call minutes, data consumed, eyeballs or time spent) or production capacity installed. This list is not exhaustive and the choice of calculation approach will depend on the market under consideration.

<u>Example</u>

If there are four Licensees competing in a relevant market, and the market leader has consistently held between 50% and 60% market share over the last ten years, then URCA is very likely to consider this Undertaking as dominant in the relevant market.

3.2.3.1.2 <u>Potential Competition / Barriers to Entry and to Expansion</u>

147. 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 undertaking, 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 potential competition is a credible threat.

148. Barriers to entry or expansion can take various forms, from legal barriers, to economies of scale and scope,[10] to the existence of network effects.[11] 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.

149. 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.

3.2.3.1.3 Countervailing Bargaining Power

150. Competitive constraints may also be exercised by Customers or suppliers. The assessment of a Licensee's alleged dominance will therefore involve considering constraints imposed by the bargaining strength of the Licensee's Customers and suppliers (known as countervailing bargaining power).

151. In the case of countervailing buyer power, 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 powerful buyers, URCA

[10] 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.

[11] 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.

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.

3.2.3.1.4 Intellectual Property Rights

152. Ownership of an intellectual property right 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.

3.2.3.1.5 Collective Dominance

153. The abuse of dominance prohibition applies to conduct on the part of one or more Licensees. As previously stated a dominant position may apply to two or more Licensees collectively (collective/joint dominance).

154. 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.

155. 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.

156. 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 Undertakings will be collectively dominant where the leading players have relatively equal market shares consistently over time and there is little scope for new Undertakings to enter the market.

3.2.3.2 Abuse

157. Once the dominance is proven, URCA will seek to assess whether the Licensee adopted any conduct which could be considered as an abuse (either exploitative or exclusionary abuse). Again, it is not in itself prohibited for a Licensee (or a group of Licensees and Undertakings) to be in a dominant position (or collectively dominant). However, there is a special responsibility on a dominant Licensee (or collectively dominant Licensees and Undertakings) not to allow its (their) conduct to impair

competition in the relevant market.

158. The following list provides useful examples of the types of conduct which may constitute an abuse:

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

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

(iii) applying dissimilar conditions to equivalent Transactions with other Persons, thereby placing them at a competitive disadvantage;

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

(v) 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 electricity or electronic communications service by another Undertaking.

159. This list is not intended to be exhaustive and does not restrict URCA's potential scope of investigation and enforcement activities. Any conduct which has an appreciable adverse effect on competition is likely to be prohibited.

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

161. There are no exclusions or exemptions to this prohibition. However, in applying the principles set out in these Guidelines, 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 of an anticompetitive Agreement, URCA will consider 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 Customer. In assessing the net harm to Customers, URCA will consider whether the benefits arising from the efficiencies are passed on to Customers and whether it is likely that there would be customer 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.

162. 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 customer harm, having regard to any anticompetitive effects as weighed against any alleged efficiencies.

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

- Exploitative abuse: conduct which exploits Customers/suppliers and enables the Licensee to increase its profit; and
- Exclusionary abuse: conduct which is aimed at excluding or removing competitors from the market.

3.2.3.2.1 Exploitative Abuse

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

165. Exploitative abuses can relate to price or non-price conditions imposed by a dominant Undertaking. Where an Undertaking uses its dominance to impose unfair trading conditions on other Undertakings, that conduct may constitute an abuse of its dominant position. Price-related exploitative abuses include price discrimination (which is considered in the context of exclusionary abuses, in Section 3.2.3.2.2 below) and excessive pricing.

166. **Excessive pricing** represents one of the most common conduct leading to an exploitative abuse. It occurs when the dominant Licensee is able to raise its prices and 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 abuse".[12]

167. 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 Undertaking is engaged in excessive pricing:

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

- whether the price of the products or services bears any relation to the cost of provision (the interested reader will find further guidance on how URCA may come to a view on the relevant measure of the underlying costs to be taken into account);

- benchmarking prices against other competitive markets, i.e., whether prices are similar to those for the same product in other markets;

- whether the Undertaking'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.

168. **Price discrimination** may also represent a form of excessive pricing. It arises when a dominant Licensee applies dissimilar prices to similar retail or wholesale Customers for the same product. It would be exploitative if it allowed the dominant Licensee to profitably raise its prices above the competitive level to certain groups of Customers. Further details can be found on such conduct in the next section.

169. 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.

3.2.3.2.2 Exclusionary Abuse

170. 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.

171. Anticompetitive 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.

172. In cases of exclusionary abuse by a dominant Licensee, 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 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**: in general terms, the stronger the Licensee's dominant position, the more likely its abusive conduct will lead to anticompetitive foreclosure;

- **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.

173. Exclusionary conduct can be categorized 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 look at various forms of exclusionary abuse. For the avoidance of doubt, the list below is non-exhaustive.

Example

A vertically integrated electricity generator also operates the sole transmission and distribution Network infrastructure within the relevant geographic market and is therefore found dominant in the market for transmission and distribution of electricity.

If the vertically integrated Undertaking refuses a request from an entrant to connect generating assets to the Network infrastructure then this may amount to a exclusionary abuse unless it can be objectively justified on technical or economic grounds (e.g., technical infeasibility or unjustifiably high investment costs for necessary Network reinforcement).

3.2.3.2.2.1 Price Discrimination

174. 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.[13]

175. 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.

176. This, however, is not to say that a dominant Licensees must treat all Customers equally or should standardize all their charges. Differential pricing by a dominant Licensee may be efficient and justified.

177. Vertically integrated Licensees would be expected not to discriminate against independent wholesale Customers (other Licensees) in favor of their own downstream operations.

Example

In mobile communications, a common form of price differentiation is between the prices for on-net and off-net calls or messages. Such differential pricing can be observed in competitive markets and may be efficient if they are representative of underlying cost differences (i.e., the cost of terminating a call on another Licensee's Network exceeding the cost of terminating a call on your own Network). However, it may be used anticompetitively by larger Undertakings

[13] 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.

by exploiting network effects and thus attempting to exclude smaller Undertakings from the market.

In the electricity sector, a transmission and distribution Network operator may differentiate transmission charges depending on the voltage level of the connected Customer. However, this may be used anticompetitively by a vertically integrated Undertaking if price differentiation is not applied equivalently to its own retail Customers and Customers of competing retailers.

3.2.3.2.2.2 Non-price Discrimination

178. Undue discrimination may also relate to other factors affecting the trading conditions. A dominant Licensee which is vertically integrated (i.e., operating at different levels of the value chain, like the wholesale and retail market) may give access to essential inputs to wholesale Customers at downgraded conditions such that they would not be able to provide the retail market with products or services of the same quality as the dominant Licensee. URCA will assess discriminatory conduct in relation to trading conditions in the same way as it assesses discriminatory conduct in relation to price.

Example

A dominant Licensee is vertically integrated such that:

- it is offering wholesale fixed Network access services (such as, for example, bitstream access) to other Licensees; and
- it is providing retail broadband services over its fixed Network.

This dominant Licensee may offer its wholesale bitstream services to the other Licensees with a lower quality of service than it would supply to itself such that the other Licensees would not be able to replicate its retail broadband services with the same level of quality as the dominant Licensee. In such a situation, the dominant Licensee would abuse its dominant position in the wholesale market to exclude competitors from the downstream retail market.

3.2.3.2.2.3 Refusal to grant Access to an Essential Facility

179. 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.

Example

An electricity grid represents an essential facility for wholesale electricity generation and retail Licensees to serve consumers. Due to high fixed costs, this facility is most often entirely owned and operated by a single Undertaking across a particular given geographic area. Indeed, it may not be economically feasible nor desirable to operate a parallel competing electricity grid to serve the same premises.

In such instances, the owner and operator of that electricity grid is expected to hold a dominant position in the transmission and distribution of electricity in its region. If the dominant Licensee also operates in wholesale generation or retail markets and refuses (directly or constructively) to grant competitors in these markets equal access to this facility for the transportation of electricity, this would likely be considered as an abuse unless justified on the basis of technical or economic feasibility.

Strategic underinvestment in electricity Network capacity by a vertically integrated Licensee may amount to a constructive refusal to supply if it restricts the ability of competing generation assets to connect to the Network or expand their generating capacity, unless such a restriction is objectively justified on technical or economic grounds. Congestion of the essential facility resulting from an inefficient use of existing capacity by a vertically integrated Licensee may also reflect an anticompetitive refusal to supply.

3.2.3.2.2.4 Predation

180. 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.

181. 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.

182. In assessing predation, URCA will consider whether a dominant Licensee has priced below cost. The interested reader will find further guidance on how URCA may come to a view on the relevant measure of the underlying costs to be taken into account in Annex III.

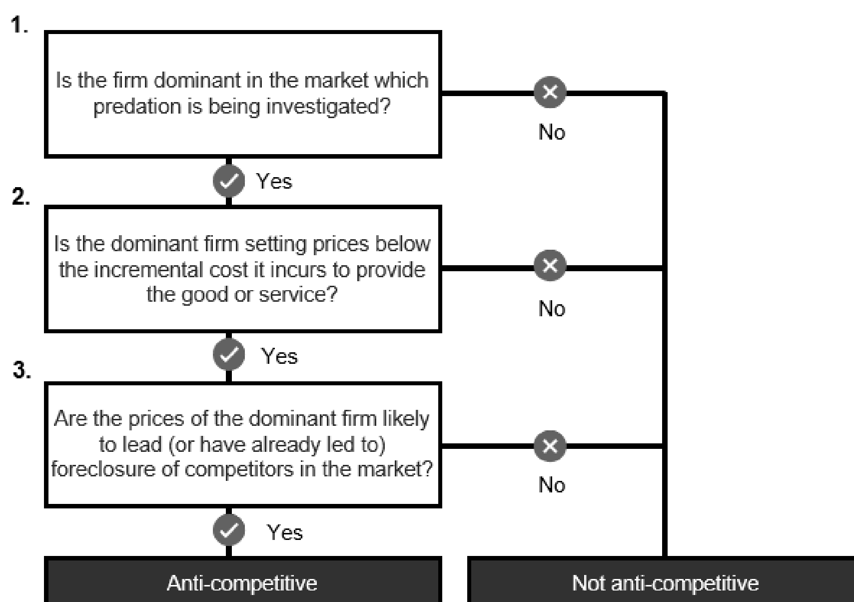
183. In order to determine whether a conduct is predatory, URCA will not only investigate whether the dominant Licensee has priced below the relevant measure of costs, but also whether the alleged predatory conduct led in the short term to revenues lower than could have been expected from a reasonable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

184. 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.

185. There is no need for URCA to prove that the losses incurred through the predatory conduct would have been recouped after the foreclosure of competitors. Indeed, considering 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, URCA 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.

186. URCA shall assess a prospective predation strategy by investigating each of the following cumulative questions:

Figure 2 URCA's assessment of a predation strategy



Example

The ECS sector has two Licensees providing internet services with the same underlying costs of providing a service. One of the two Licensees is dominant in the market. The dominant Licensee may have an incentive to provide its internet service at a price below its cost if its competitor is not able to incur such a loss and is constrained to exit the market following this price change. Once the competitor has exited, the dominant Licensee will be in a monopoly position and able to raise its price to a level above the competitive price.

Predation may also be deployed as a pre-emptive anticompetitive strategy to deter new players from entering the market due to perceived low margins.

3.2.3.2.2.5 Undue Discounts and Rebates

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

(i) to pass on genuine cost savings to Customers (which could be pro-competitive); or

(ii) to discourage Customers from switching to another Licensee (which can lead to anticompetitive foreclosure).

188. 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.

189. Conditional rebates are rebates granted to Customers to reward them for a particular form of purchasing behavior. These are the types of discounts that are most likely to give rise to the risk of exclusion of competitors. A conditional rebate usually takes the form of a customer being awarded a rebate if their purchases over a defined period exceed a specified threshold, where the rebate may be applied to all purchases (retroactive rebates) or only on those made in excess of the threshold (incremental rebates). Retroactive rebates are less likely to reflect ongoing cost savings and therefore are more likely to be abusive.

190. 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”).

3.2.3.2.2.6 Exclusive Purchasing

191. 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 such that the imposition of exclusive purchasing (or purchasing to a large extent) could result in competitors being unable to compete on equal terms for Customers’ demand.

3.2.3.2.2.7 Customer ‘Lock in’

192. Entering into unduly long contracts with Customers, including the provision of penalties for early contract termination, may amount to an abuse of a dominant position equivalent in effect to an exclusive purchasing obligation. In particular, long term contracts may limit the ability of Customers to switch between providers. As with exclusive purchasing, unduly long contracts raise barriers to expansion for new entrants and harm end-users from benefiting from more attractive tariff offerings available in the market.

193. Long term contracts can have pro-competitive benefits, such as reducing Transaction costs or allowing an Undertaking to recover initial investment costs over a longer period of time. For example, Customers may be able to receive a subsidized mobile handset if they enter into a longer contract. The length of the contract may allow the Licensee to recoup the costs of the initial investment over the lifetime of the contract. Therefore, it is necessary to consider the length of the contract in the context of the benefits resulting to end-users from it (in terms of, for example, lower monthly installments for handsets).

Example

The incumbent electricity generator enforces a new minimum contract term of 10-15 years with retailers which can prevent other electricity generators from entering the market or expanding their share of supply to retailers. Such a minimum contract term may be deemed anticompetitive if the incumbent electricity generator is unable to justify the contract length (e.g., that the long contract term is required for the viability of new investments in generation capacity).

3.2.3.2.2.8 Refusal to supply – General

194. 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.

195. 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.

196. 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.

197. A refusal to supply is most likely to give rise to concerns when it is by a vertically integrated dominant Licensee and:

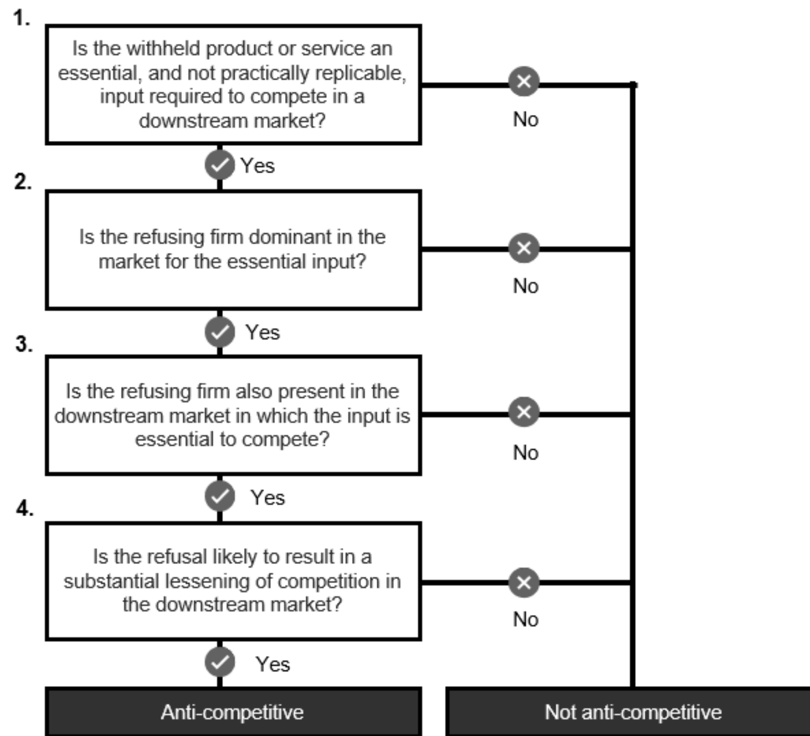
(i) it relates to a product or service that is objectively necessary for the other Licensees to be able to compete effectively on a downstream market;

(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.

198. URCA shall assess a prospective refusal to supply by investigating each of the following cumulative questions:

Figure 3 URCA's assessment of a refusal to supply



199. A refusal to supply may also relate to information, intellectual property rights, or to grant access to an essential facility.

3.2.3.2.2.8.1 Refusal to supply Information

200. A refusal by a dominant Licensee to supply information generated by its Network 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.

201. The refusal by a dominant Licensee to supply technical information might also constitute an abuse.

Example

A dominant Licensee refuses to inform a new Licensee where it can interconnect with its Network. This may represent an abuse as the new Licensee will not be competing on a level playing field with the dominant Licensee (and may well be foreclosed).

3.2.3.2.2.8.2 Refusal to license Intellectual Property Rights

202. 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 commercialization, competition law seeks to promote the conditions that make firms more efficient and innovative.

203. 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.

204. In general, it is a matter for the holder of an intellectual property right 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.

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

(i) the refusal prevents the emergence of a new product for which there is a potential consumer demand;

(ii) the refusal is unjustified; and

(iii) the refusal is likely to exclude competition on a secondary market.

3.2.3.2.2.9 Margin Squeeze

206. 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.

207. Margin squeeze may be more likely to occur where the upstream market consists of a facility, such as a communications or electricity Network, to which downstream market players require access in order to be able to provide services that compete with the downstream services of the Licensee that owns the facility.

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

(i) whether the Licensee holds a position of dominance upstream;

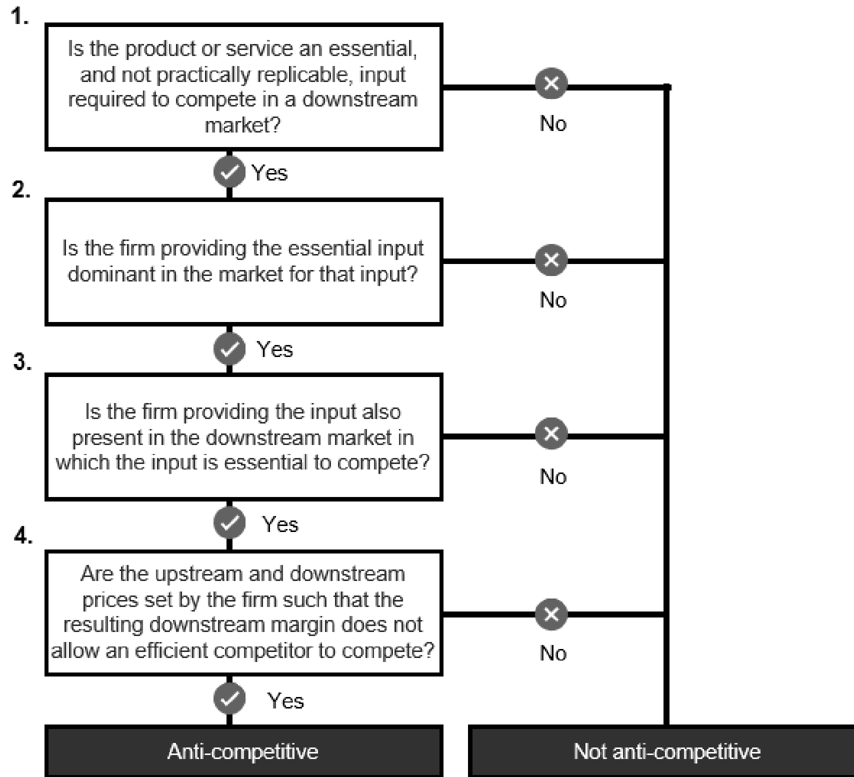
(ii) whether the upstream input is required by downstream competitors;

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

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

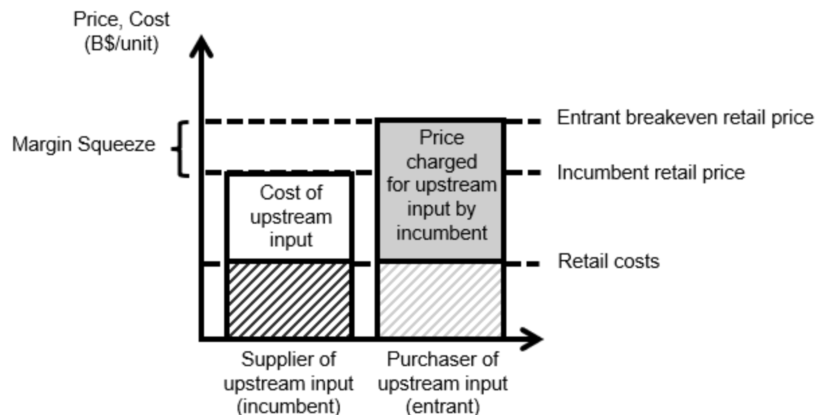
209. URCA shall assess a prospective margin squeeze by investigating each of the following cumulative questions:

Figure 4 URCA's assessment of a margin squeeze



210. With regards to the investigation of question 4 (above), URCA shall seek to establish a margin squeeze by reviewing the evidence set out in the image below:

Figure 5 URCA's assessment of margin in the context of a margin squeeze



211. In practice, URCA's findings and methodology for determining whether a Person is engaged in margin squeeze will depend on the level of evidence available. URCA will need to come to a view on the relevant measure of the underlying costs to be taken

into account in order to assess the margin squeeze. Further details can be found on such measure in Annex III.

Example

A Licensee holds a dominant position in the market for electricity transmission and also operates in the downstream supply market. The difference between the price it charges its downstream retail competitors to use its transport Network versus the price it charges its own retail Customers in the downstream market is too narrow for an efficient competitor to compete with it in the downstream retail market and still recover its costs.

3.2.3.2.2.10 Undue Tying and Bundling

212. Tying and bundling are common practices which can lead to better offerings to Customers in cost-effective ways. Indeed, it can result in more efficient and cost-effective offerings to customers which translate into lower overall costs, enabling Undertakings to provide products at a more competitive price. Moreover, tying and bundling can enhance consumer choice and convenience. Customers may appreciate the convenience of acquiring related products in a bundled package, saving them time and effort. Additionally, businesses may offer different bundles or tying arrangements, allowing consumers to choose the option that best suits their preferences and needs. 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.

213. Undue 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.

214. Undue 'tying' refers to the practice of a dominant Licensee requiring those Customers who wish to purchase one product (the tying product where the Licensee is dominant) to purchase an ancillary product (the tied product) from it as well. 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.

215. 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.

216. When analyzing tying Agreements 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 neighboring market.

217. 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) the practice must be likely to result in anticompetitive foreclosure.

218. 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 standalone 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.

219. 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 anticompetitive foreclosure is likely to be greater in the following specific circumstances, which do not constitute an exhaustive list:

(i) The tying or bundling is a strategy which is difficult to reverse and therefore is a lasting strategy, such as in the case of technical tying/bundling;

(ii) 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;

(iii) 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-subsidization across the bundle, increasing the price of the (unregulated) "tied" product and thereby compensating for potentially lower profits in the regulated "tying" market.

3.2.4 *Definition of Fines*

3.2.4.1 *Objectives and General Principles*

220. This section sets out the basis on which URCA calculates financial penalties for infringements of the competition provisions contained in the Electricity Act and Comms Act and provides guidance to Licensees and other Undertakings on the level of fines that they may face in such situation. These fines can be also imposed in situation where Licensees fails to notify a Merger before effectively proceeding to the Merger.

221. The level of the fine imposed is at URCA's discretion, although it must be objectively justified and non-discriminatory. In imposing financial penalties, URCA's objectives are two-fold:

(i) to impose penalties on infringing Undertakings which reflect the gravity of the infringement; and

(ii) to ensure that the threat of penalties will deter relevant Undertakings from engaging in anticompetitive practices.

222. Fines are not the only consequence of infringements of competition provisions of the Electricity Act and Comms Act. Unenforceability of anticompetitive Agreements, the imposition of behavioral or structural remedies, and orders to cease the infringements are other means of enforcement available to URCA:

(i) **Unenforceability** - decision or practice which relates to regulated sectors by URCA 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.

(ii) **Behavioral and/or structural remedies** - URCA is empowered to make adjudications on receipt of a complaint or notification, or on its own initiative. URCA can attach an order to an adjudication imposing behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the contravention to an end.

(iii) **Orders to cease the infringement** - URCA can order the Licensee to cease the infringement.

223. 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) and for serious abuses of a dominant position. This is on the basis that these are amongst the most serious infringements of competition law.

224. These fines cannot exceed 10 % of the Relevant Turnover (see Section 2 for a definition of the Relevant Turnover)[14]. The Relevant Turnover of a Licensee will be the sum of the Relevant Turnover of the Licensee itself and any such subsidiaries.

225. 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.

3.2.4.2 Method for setting Fines

226. 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. Although this section 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.

227. When setting the fine to be imposed for a breach of the competition provisions, URCA will generally:

(i) determine a basic amount; and

(ii) may adjust upwards or downwards according to specific factors, including, but not limited to, the factors specified below.

3.2.4.2.1 Basic Amount of the Fine

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

(i) the gravity of the infringement; and

(ii) the infringing Undertaking's turnover derived from the relevant product(s) affected by the infringement.

3.2.4.2.1.1 The Gravity of the Infringement

229. 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. Behavior which breaches the prohibition on the abuse of a dominant position, and which has, or is likely to have, a

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[14] 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.

particularly serious effect on competition (e.g., predatory pricing, or margin squeeze) is also regarded by URCA in a similar way.

230. When gaging 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 Undertakings involved in the infringement, entry conditions and the effect on competitors and relevant undertakings. 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.

3.2.4.2.1.2 Turnover from the Relevant Products

231. URCA will consider the turnover of the infringing Undertaking in the relevant market affected by the infringement in the last business year.

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

3.2.4.2.2 Step 2 - Adjustments to the Basic Amount

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

3.2.4.2.2.1 Adjustment for Duration

234. 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.

3.2.4.2.2.2 Adjustment for Policy Objectives

235. Published policy objectives for a regulated sector 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.

236. 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 Person and any special characteristics, including the size and financial position of the Person in question.

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

3.2.4.2.2.3 Adjustment for Aggravating Circumstances

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

(i) continuation of the infringement after URCA has initiated an investigation;

(ii) refusal to cooperate with or obstruction of URCA in carrying out its investigation;

(iii) continuing or repeating the same or a similar infringement after URCA has made a finding that the competition provisions have been infringed;

(iv) infringements which are committed intentionally;

(v) infringements where the relevant Person played the role of leader in, or instigator of, the infringement. URCA will also pay particular attention to any steps taken to coerce other Persons to participate in the infringement and/or any retaliatory measures taken against others with a view to enforcing the practices constituting the infringement; and

(vi) involvement of directors or senior management.

3.2.4.2.2.4 Adjustment for Mitigating Circumstances

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

(i) difficult circumstances of the relevant Person; for example, when the Undertaking is acting under severe duress or pressure;

(ii) genuine uncertainty on the part of the infringing Person as to whether the Agreement or conduct constituted an infringement;

(iii) 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 program of which employees involved in the infringement were aware but deliberately ignored);

(iv) evidence that the infringing Person terminated the infringement as soon as URCA intervened; and

(v) where the infringing Person has effectively cooperated with URCA beyond its legal obligation to do so, to enable the enforcement process to be concluded more

effectively and speedily.

3.2.4.2.2.5 Ability to Pay

240. 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 would irretrievably jeopardize the economic viability of the Person concerned and cause its assets to lose all their value.

3.2.4.2.2.6 Appeal

241. A Licensee or Undertaking affected by an adjudication and/or an order may appeal such adjudication and/or order to the Utilities Appeal Tribunal pursuant to section 111 of the Comms Act or section 67 of the Electricity Act, depending on the context.

3.2.4.3 Leniency Program

242. 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.

243. The leniency program covers only Horizontal anticompetitive Agreements (i.e., cartel Agreements). It does not cover Vertical Agreements. The first Undertaking to report the offense and supply the necessary evidence may receive complete immunity. Undertakings that apply for leniency later on may incur a reduced penalty depending on their order of arrival and their level of cooperation.

244. In this context, the necessary evidence shall include, as far as it is known to the applicant at the time of submission;

(i) A detailed description of alleged conduct, its objectives and functioning and scope of markets affected with specific dates, participants and relevant explanations.

(ii) The name and address of the Undertaking applying for leniency as well as names and addresses of all Undertakings involved in the alleged cartel.

245. Immunity shall not be granted if URCA is already in possession of necessary evidence at the time of the leniency application.

246. In addition to the conditions above, all the following conditions must also be met in order for an Undertaking to qualify for immunity:

(i) The Undertaking cooperates genuinely, fully, on a continuous basis and expeditiously throughout the application and investigation process;

(ii) The Undertaking ended its involvement in the alleged cartel following its application except for what would, in URCA's view, be necessary to preserve the integrity of its inspection;

(iii) The Undertaking has not destroyed, concealed or falsified evidence of the alleged cartel when contemplating its leniency application.

Example

Three competing Licensees regularly meet during the course of the year to discuss, amongst others, market trends they observe, technologies to develop based on customer studies and feedback, business best practices to improve cost efficiency and their pricing strategies in each customer segment.

One Licensee is having serious doubt on the legality of discussing pricing strategies and reports to URCA, which has not been aware of this practice before, providing details on the practice which enable URCA to investigate.

It appears that this practice is effectively anticompetitive and subject to fines. This Licensee will be immune from any fines as it reported the infringement to URCA and satisfied all conditions of the leniency program.

4 Ex-ante Merger Control

247. This section discusses the procedural and substantive aspects of the ex-ante Merger control URCA would undertake in any relevant Transactions notified by Licensees and relevant Undertakings Licensee (hereinafter 'notifying parties'). This will assist notifying parties in understanding the process to notify a proposed Transaction to URCA, the procedure URCA will follow and the economic principles and evidence URCA will rely on for its analysis. It should be noted that URCA's assessment will be specific to the ex-ante merger review it undertakes. While these decisions may reflect particular views URCA may take in general, each assessment will be grounded in the specific circumstances of each case.

248. Companies may expand organically, through gradually developing their business or by combining forces with other companies and through Transactions which can give rise to a number of benefits commercially, as well to the wider economy. The latter form of expansion (the combining of forces or "merger") can lead to benefits to Customers. The merged entity may be able to offer products and services more efficiently to Customers. The wider expertise of the new company may enable it to develop innovative services or offer existing services to Customers more cheaply.

249. Some Transactions may, however, result in a lessening of competition. This could be, for example, through the creation or strengthening of a dominant position. The creation or strengthening of a dominant position is likely to harm Customers through the imposition of higher prices, reduce quality or choice of customer or reducing the incentive for Undertakings to innovate. Others may also have adverse effects on the public interest.

250. URCA's ex-ante Merger control framework aims to achieve two key objectives:

(i) to enable assessment of proposed Transactions that may materially impact competition in the relevant market(s); and

(ii) to ensure that such Transactions do not substantially lessen competition, harm the public interest, and do not lead to worse outcomes for Customers.

251. If a proposed Transaction is likely to substantially lessen competition in a market, it will be prohibited by URCA unless there are substantiated efficiencies that would outweigh any customer harm or appropriate conditions can be put in place to resolve URCA's concerns.

252. Similarly, the proposed Transaction will be prohibited if it is likely to have an effect contrary to the public interest. The interested reader will find further details on the public interest analysis conducted by URCA in Section 4.2.4.

253. All Transactions falling within the scope of this Merger control framework must be

notified to, and approved by, URCA before they can be implemented, unless URCA exempts them from such requirements.

254. Persons concerned by the following ex-ante Merger review are Licensees and Undertakings affecting the Control of a Licensee (hereinafter 'notifying parties'). This would also apply where there is only a subset of the Licensee's assets affected or Joint Control of these assets (through Network Sharing Agreements or Joint Ventures).

4.1 Procedural Matters/Issues

255. The following sections sets out:

(i) the conditions regarding the nature of the Transaction and ruling in if a Transaction must be notified to URCA;

(ii) the process for notifying parties to submit a proposed Transaction to URCA in the context of ex-ante Merger control; and

(iii) the procedure URCA will follow to form an opinion on whether the proposed Transaction would have, or be likely to have, the effect of substantially lessening competition in a market in The Bahamas or an effect contrary to the public interest.

4.1.1 Transactions to be notified to URCA

4.1.1.1 General Principle

256. The notifying parties must notify URCA of any proposed Transaction involving the Licensee as the acquiring or acquired Person. This would also apply where there is only a subset of the Licensee's assets affected or Joint Control of these assets (through Network Sharing Agreements or Joint Ventures). Persons that complete a Merger without URCA's prior approval may be ordered to de-merge and/or pay a fine. If ordered to de-merge, the acquirer would have to sell its stake in the acquired business or reverse the Transaction. Selling a business pursuant to an order of a regulator is likely to depress the value of the shares (or assets). If it is necessary to sign a sale Agreement prior to obtaining URCA's approval, the Persons must include a condition precedent stating that completion of the sale is dependent on obtaining the necessary regulators' approvals.[15]

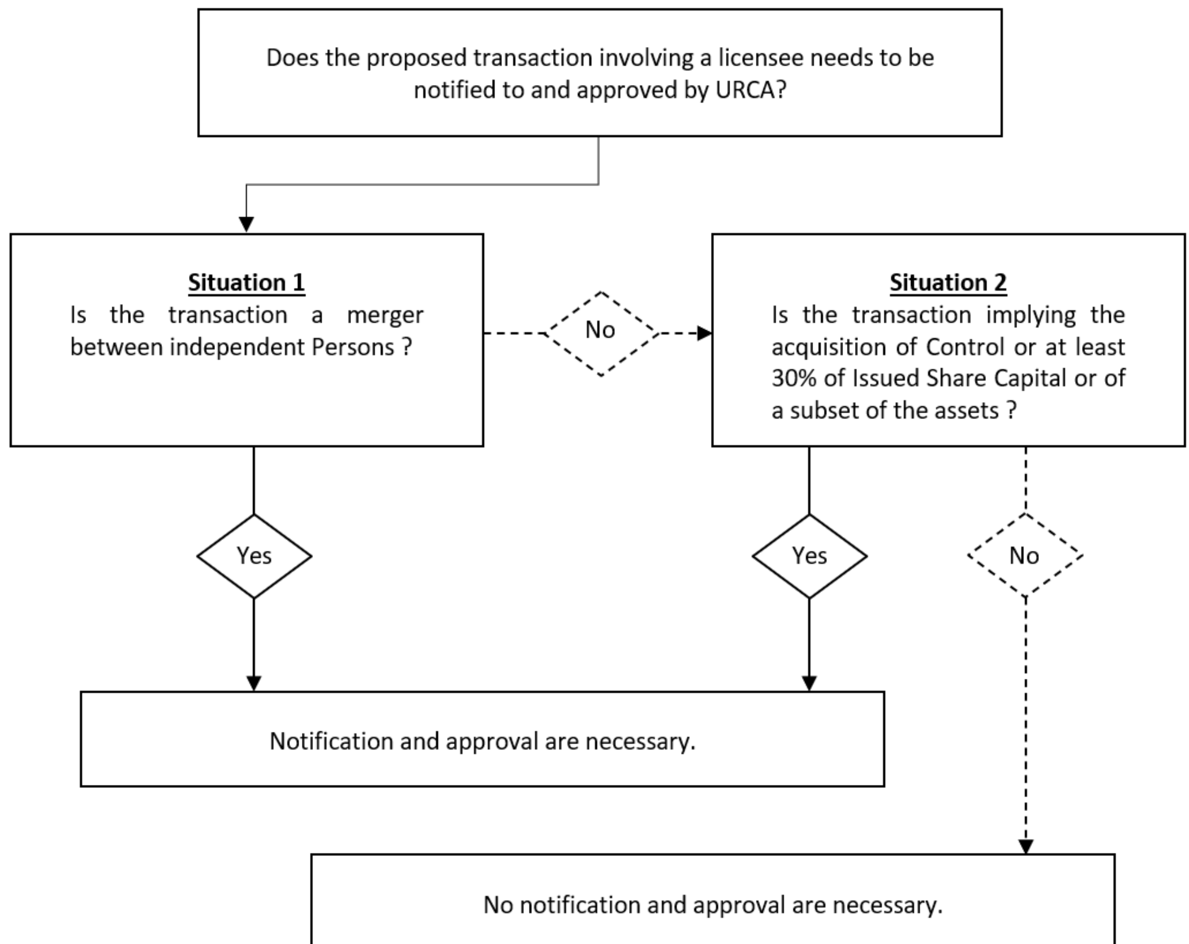
257. Both the acquiring and the acquired Persons (be it Licensee or other Undertaking) can notify the proposed Transaction to URCA. This ensures that the Transaction complies with the legal requirement to notify URCA and is not dependent on the other Person to follow the appropriate process. A corollary of this is that both the Licensee and the

[15] Note that approval of a transaction by URCA does not constitute an approval by any other authority. Parties would have to submit notifications to the Registrar of Companies and the Securities Commission (and/or any other organisation).

other Undertaking are equally responsible for notification.

258. The diagram below displays the situations in which notifying parties must submit to URCA a proposed Transaction affecting ECS or ES markets.

Figure 6 Diagram on the Transactions to notify to URCA



259. There are two types of Transactions that would need to be notified to URCA. These occur when:

(i) the Merger of two or more previously independent Persons, involving at least one Licensee and a market within or affecting the ES or ECS in The Bahamas; or

(ii) the acquisition of Control or at least 30% of Issued Share Capital or interests by one or more Persons (the "Acquiring Person") of another person(s) (the "Acquired Person"), or of a subset of the assets of the Acquired Person, where at least one of the Acquiring Person and/or Acquired Person is a Licensee and a market within or affecting the ECS or ES in The Bahamas.

260. The two paragraphs above do not apply in the case where the Transaction concerns the sale of passive infrastructure. Such Transaction should should be notified to URCA

when it:

(i) is equal to or above BSD one (1) million; or

(ii) representing at least 10% of the divesting Licensee's total number of the relevant assets should be notified by the parties.

The above thresholds apply to an individual Transaction or a Series of Transactions involving the Acquired or Acquiring Persons over a period of five (5) years.

4.1.1.2 Further Considerations

4.1.1.2.1 Joint Control

261. It is possible for more than one Person to raise ex-ante Merger control scrutiny if they are more than one Person to acquire each 30% of Issued Share Capital or interests of a third Person and if the acquired Person is a Licensee, or if both acquirers are Licensees. In such instance, both Transactions would need to be notified to URCA.

4.1.1.2.2 Joint Ventures

262. A Transaction should also be notified and approved by URCA when two previously independent Undertakings combine all or part of their activities so that they in effect form a single economic unit. This may occur when companies have contractual Agreements together that establish a common economic management, such as in some Joint Venture Agreements. It should be noted that such joint venture may cover only a subset of the total assets of the relevant Persons conducting the Transaction.

Example

One Licensee and another Person (a Licensee or relevant Undertaking) operating in a market affecting ES or ECS decide to cooperate to increase more swiftly the Network coverage of their respective infrastructure. This cooperation would imply pooling together their existing infrastructure and future investments through the creation of a third Person. Such Transaction would be a Joint Venture that should be notified to URCA.

4.1.1.2.3 Merger not Formalized

263. The absence of formalized Merger does not prevent the Persons from notifying the Transaction to URCA. A Transaction should be notified to URCA if the previously independent Undertakings form, in effect, a single economic unit on all or part of

previously independent assets. Factors that URCA may consider are for example, the internal profit and loss compensation between various Undertakings within a group company, and their joint liability externally.

Example

A Network Sharing Agreement formed between one Licensee and another Person (a Licensee or relevant Undertaking) operating in a market affecting ES or ECS should be notified to URCA if it involves a common Control over some previously independently owned assets from one or all members of this Agreement.

4.1.1.2.4 Beneficial Interests and Affiliates

264. Control is normally acquired by the Persons or Undertakings that are the holders of the rights or are entitled to the rights conferring Control under the contract or Transaction concerned. In situations where the formal holder of the controlling interest differs from the Person or entity having the actual power to exercise the rights, Control is acquired by the Undertaking that has power over the Licensee. The formal holder merely constitutes a vehicle for the rights. It is important, therefore, to note that the acquirer will be the Person or company who exerts Control over the Licensee, notwithstanding any different legal owner (i.e., a beneficial owner).

265. A controlling shareholding which is held by different entities in a group (affiliated companies) will be attributed to the Person exercising Control over the different formal holders of the rights.

Example

If one Undertaking has three subsidiaries, which each acquire a 11% interest in a Licensee, this Undertaking will exercise Control of 33% of the voting shares in the Licensee and would be required to notify these Transactions to URCA.

4.1.1.2.5 Sale of Passive Infrastructure by a Licensee

266. The sale of passive infrastructure assets, by one or more Licensees to one or more Persons, which may or may not be a Licensee, which are intended to be used to provide electronic communications or electricity services in The Bahamas should be notified to URCA if the sale or series of sales over a five year period (i) is equal to or

above BSD one (1) million; or (ii) representing at least 10% of the divesting Licensee's total number of the relevant assets should be notified by the parties. This may include, but is not limited to, mobile sites and towers (in the case of electronic communications) or electricity generators and transmission infrastructure (in the case of electricity).

267. Indeed, if another Undertaking or Licensee were to control a significant share of the passive infrastructure in The Bahamas, a substantial lessening of competition could occur, as the proposed Transaction would allow the Undertaking or Licensee to benefit from market power and therefore, to control prices, limit output, or engage in other anticompetitive behavior without effective constraints from rivals. This substantial lessening of competition could occur even in the case where the Undertaking would be an independent tower company without any particular activities downstream, and if this independent tower company were to hold a dominant position following the proposed Transaction.

4.1.2 Notification of a Transaction

268. This section provides further details on the process for notifying parties to submit a Transaction to URCA related to ex-ante Merger control.

269. Notification can be submitted to URCA electronically, by post, or by hand.

(i) **Electronic submissions** should be sent to **info@urcabahamas.bs**.

(ii) **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, Frederick House, Frederick Street, P. O. Box N-4860, Nassau, Bahamas.

270. It is strongly recommended that the notifying parties fill in the form set in **Error! Reference source not found.** as the level of information provided with the notification will be an important indicator of the amount of further resources required by URCA to investigate it. Applicants should provide as much information as possible and ensure the information is accurate, in order to avoid delays in the notification procedure and the Merger review by URCA. Other than in exceptional circumstances, a submission should meet these minimum submission requirements for URCA to approve the Merger.

271. Information provided within a notification should address each of the relevant elements in these Guidelines. This will include providing information on:

(i) Contact information;

(ii) Information about the companies;

(iii) Specifics of the transaction;

(iv) Financial information; and

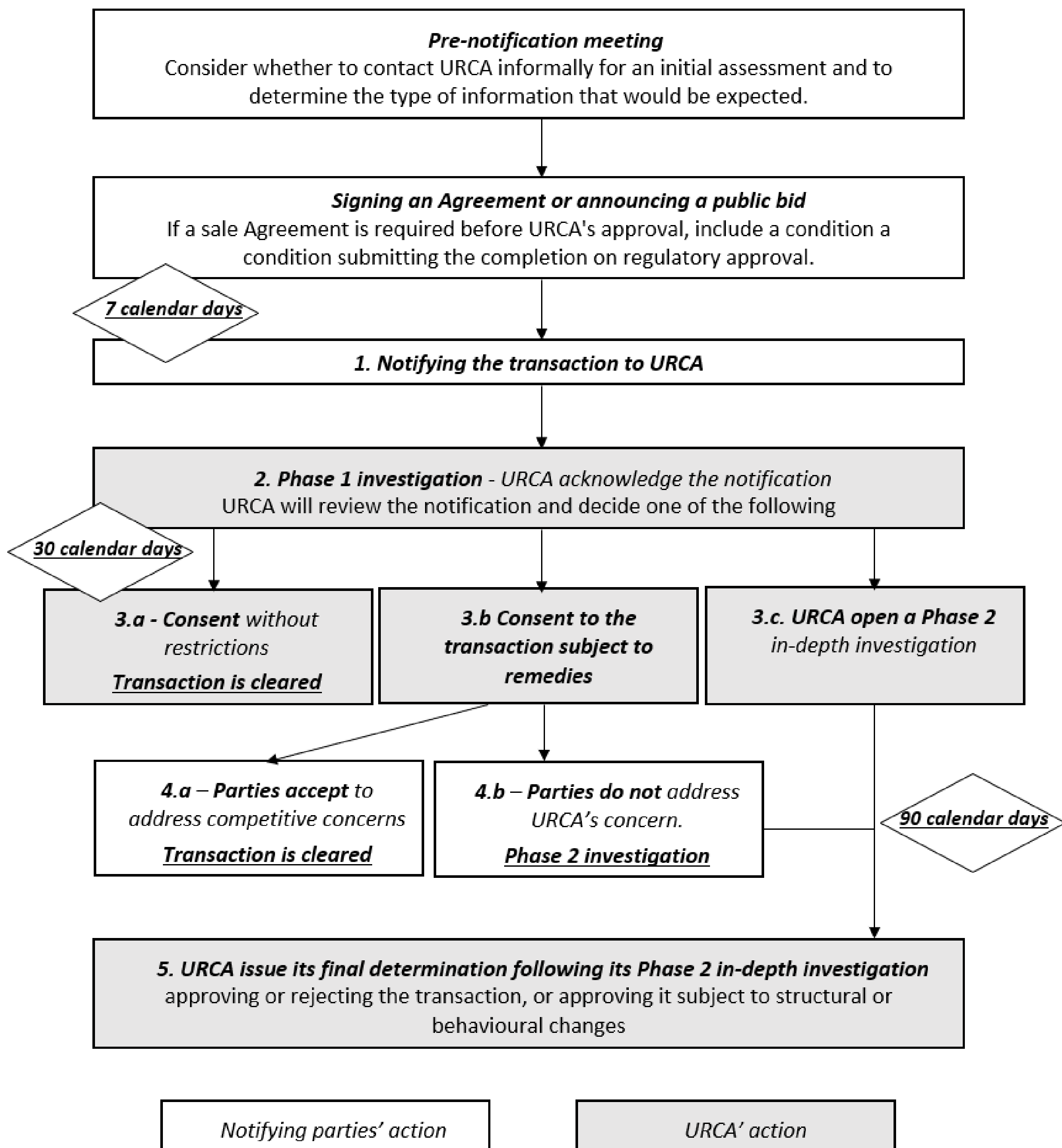
(v) Market information.

272. Notifying parties should familiarize themselves with the Guidelines and may wish to seek informal advice from URCA when preparing a notification for a Merger.

4.1.3 Notification Procedure Followed by URCA

273. This section provides further detail on the procedure that URCA intends to adopt to form an opinion on whether the proposed Transaction would have, or be likely to have, the effect of substantially lessening competition in a market in The Bahamas or an effect contrary to the public interest.

Figure 7 Diagram on the Ex-ante Merger control procedure



274. URCA strongly advises the notifying parties Transaction to contact URCA in advance of signing an Agreement or announcing a public bid for an informal and confidential **pre-notification meeting**. This is particularly important where the notifying parties are not certain whether there will be a Transaction requiring notification. Additionally, early discussions of proposed Transactions allow URCA and the notifying parties to explore potential issues and to discuss the type of information that would likely be required by URCA.

275. Following this, the Persons to the Transaction will usually **sign an Agreement or announce a public bid**. If it is necessary to sign a sale Agreement prior to obtaining

URCA's approval, URCA strongly advises the notifying parties to include a condition precedent stating that completion of the Transaction is dependent on obtaining the necessary regulators' approvals.[16] Indeed, Persons that complete a Merger without URCA's prior approval may be ordered to de-merge and/or pay a fine. If ordered to de-merge, the acquirer would have to sell its stake in the Licensee or reverse the Agreement. Selling a business pursuant to an order of a regulator is likely to depress the value of the shares (or assets).

276. The acquiring and the acquired Persons (be it Licensee or other Undertaking) **must notify URCA within seven calendar days of signing an Agreement or announcing a public bid**. The applicant can find the relevant form and associated guidance on what to submit to URCA in **Error! Reference source not found.**.

277. After receiving a completed Notification Form, URCA will **promptly review it within thirty (30) calendar days ("Phase 1" of the Merger review)**. URCA will do one of the following within this initial time period:

a) **clear the proposed transaction**: issue an adjudication giving URCA's consent to the proposed Transaction if there are no competition or public interest concerns or if any competition concerns are outweighed by substantiated efficiencies; or

b) **consent to the proposed Transaction subject to remedies:** issue an adjudication giving URCA's consent, subject to certain structural or behavioral changes or conditions on the proposed Transaction to address competition or public interest concerns; or

c) **open an in-depth Phase 2 investigation**.

278. **URCA will open an in-depth investigation** (i.e., "Phase 2" investigation) where it considers that there is a significant prospect that the proposed Transaction is likely to have adverse effects which will substantially lessen competition in the market and:

(i) the notifying parties have not suggested any proposals to eliminate URCA's concerns; and

(ii) URCA is not satisfied at that stage that the competition concerns are outweighed by substantiated efficiencies.

URCA would also open a Phase 2 investigation **if the notifying parties do not accept the remedies suggested by URCA were it consented to the proposed transaction subject to remedies in Phase 1 investigation.**

[16] Note that approval of a transaction by URCA does not constitute an approval by any other authority. Parties would have to submit notifications to the Registrar of Companies and the Securities Commission (and/or any other organisation).

279. **Within ninety (90) calendar days of opening the Phase 2 investigation, URCA will issue its adjudication**, approving or rejecting the proposed transaction, or approving it subject to structural or behavioral changes (subject to the timetable not being paused).

280. The notifying parties may propose structural "remedies" (e.g., offer to divest part of the acquired business) or behavioral "remedies" (e.g. offer to abide by certain rules) as a condition to obtain clearance. Remedies can be proposed at any time during the review process and the timetable will be paused to allow URCA to review them. Once URCA has review the proposed remedies, the timetable will resume from the point that it stopped (i.e., the timetable will not be reset to Day 1).

281. URCA may, at any time, make a **request for further information** to either or all of the notifying parties involved. When making such a request, URCA shall specify the legal basis and purpose of the request, specify what information is required and fix a time limit by which the further information must be supplied. If the notifying parties do not comply with the specified deadline, or if misleading or inaccurate information is provided, URCA may impose a fine.

282. The above timetable may be paused by URCA if either of the notifying parties fail to provide information requested by URCA within the time specified. The timetable will be restarted when URCA is satisfied that the requested information has been provided in full. The timetable will resume from the point that it stopped.

283. If there are any significant time limitations or considerations involved in the proposed transaction, these should be detailed by the notifying parties in the Notification Form.

284. Any comments from interested external Persons, either Licensees, or Undertakings operating in the relevant sector (ECS or ES depending on the proposed transaction) would be welcomed by URCA. However, the Persons are advised to submit such comments with sufficient time before the statutory deadlines for URCA completing its Phase 1 appraisal and Phase 2 investigation to allow URCA to properly consider these comments.

4.1.4 Fees associated with the Notification

285. Under Part XVI of the Comms Act and under Part X of the Electricity Act, 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.

286. Accordingly, URCA will collect a fee from all relevant Persons notifying a Merger. These fees are related to specific services that fall within URCA's regular activities, unlike annual fees, which are recurring fees that fund general URCA operations.

Additionally, they cover specific services conducted by URCA for the benefit of the notifying parties only, whereas general URCA operations (funded by the annual fees) benefit the entire sector. Following the above, the incremental cost associated with this specific service should be borne by the notifying parties only and any Persons notifying a Merger to URCA will have to pay this one-off fee which will be non-refundable even if the notifying parties were to withdraw their proposed Transaction.

287. These fees should be set on an objective, non-discriminatory, transparent and proportionate basis and seek only to cover a proportionate share of the relevant operating cost of URCA for the review of a proposed Transaction. These principles ensure that URCA's fees are fair and reasonable, and that they do not impose an undue burden on the relevant Persons.

(i) Objectivity and non-discrimination mean that URCA's fees should be applied in a consistent manner on the basis of factors applying in all relevant cases. This means that all similar Persons that are subject to the same regulatory requirements should pay the same fee. This does not mean that any Merger review would have a similar associated notifying fee as a case involving notifying parties with a larger turnover may likely be more complex and require more time from URCA compared to another case involving notifying parties with lower turnovers.

(ii) The principle of transparency means that URCA's fees should be clear and easy to understand to any relevant Persons. Also, the relevant level of any fee should be known to Persons before notifying a proposed transaction to URCA. Therefore, URCA publishes its fee schedule on its website and the associated yearly fee schedule with clear criteria defining the level of fee for any proposed Transaction.

(iii) The principle of proportionate cost recovery means that URCA's fees should only cover the costs associated to the review of the Merger. This means that URCA can also consider a scheme accounting for the level of complexity of a given Merger.

288. Fees related to Merger control will be defined according to the beforementioned principles and can be found in the Fee Schedule[17] issued each year by URCA.

4.2 Substantive Matters/Issues

289. The following sections sets out the substantive aspects of the analysis undertake by URCA to assess whether a Transaction is likely to substantially lessen competition in a market or is likely to have an effect contrary to the public interest. This analysis is covering themes presented below.

[17] For the period from the 1 January until the 31 December 2023, the applicable Fee Schedule can be found on the following link: https://www.urcabahamas.bs/wp-content/uploads/2023/02/Fee-Schedule-2023.pdf

(i) Market definition: which is a tool to identify the main competitive constraints Licensees or relevant Undertakings are facing and the extent to which they may enjoy an increased market power following the Transactions or if their behaviors are constrained by other competitors operating in this market.

(ii) Market analysis: based on this market definition, URCA will have a detailed analysis of the market, its characteristics, as well as an exhaustive overview of all credible competition concerns raised by the Transaction. This is also the stage where URCA will investigate whether the Transaction raises any public interest concerns.

(iii) Competition concerns: are analyzed by URCA once it has identified the key characteristics of the markets affected by the Transaction. The objective is to assess if the proposed Transaction give rise to a substantial lessening of competition.

(iv) Public interest concerns: URCA is required to form an opinion whether the proposed Transaction would have an effect, or would be likely to have an effect, contrary to the public interest.

(v) Remedies: depending on whether URCA identify specific concerns, URCA may recommend a set of behavioral and structural remedies to be implemented by the notifying parties and to address these concerns.

4.2.1 Market Definition

290. This section describes URCA's approach to market definition when conducting an ex-ante Merger control and will cover the following aspects:

(i) the conceptual framework underlying market definition;

(ii) economic principles and evidence on which URCA will rely for defining the relevant product and geographic market; and

(iii) further discussions relevant for the definition of a relevant market.

291. The economic framework described below is similar in its underlying economic principles to the analysis URCA would be conducting when defining markets in the context of an ex-post competition investigation or a market review to determine whether a Licensee has SMP.

292. Market definition in the context of an ex-ante Merger review is forward-looking and will define different markets covering all products and services offered by notifying parties and falling under URCA's regulatory duties. It should also take into account expected changes that would occur in the market in a foreseeable future.

293. Market definition in the context of an ex-post competition investigation is discussed in Section 3.2.1. Market definition in the case of SMP analysis can be found in section 39(2) of the Communications Act, 2009[18].

4.2.1.1 Conceptual Framework

294. Market definition is a tool to identify and define the boundaries, delineating different products and services within which firms compete. The main purpose of market definition in an ex-ante Merger review is to identify the competitive constraints that notifying parties are facing. This provides a framework to URCA to assess, on a product and geographical scopes, the extent to which Licensees or relevant Undertakings may enjoy an increased market power following the Transactions or if their behaviors are constrained by other competitors operating in this market. It also allows for the calculation of market shares that would support URCA's first screening of possible issues caused by the Transaction. The interest reader will find greater details on the measure of concentration in Annex IV. It is the industry norm to refer to a market as defined in any one specific case as the "relevant market".

4.2.1.1.1 Competitive Constraints considered for the Purpose of Market Definition

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

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

296. Demand-side substitution and supply-side substitution are the most immediate constraints considered for the purpose of defining relevant markets. Potential competition is mostly considered at a later stage of the analysis (and therefore covered in greater details at later sections of these Guidelines) as it is less immediate and require an analysis of additional factors.

297. 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. It entails all products which are considered as substitutes from a Customer's perspective. A 'classic' thought experiment for identifying substitutable products from a Customer's standpoint involves assuming a significant price increase of the focal product and considering which alternative products Customers might turn to for their consumption. These products are then regarded as part of the relevant market.

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[18] https://www.urcabahamas.bs/wp-content/uploads/2017/01/Final-Decision-on-SMP-methodology-ECS-20-2011.pdf

298. Supply-side substitution, whilst of secondary importance, is also an important consideration in market definition, especially when from a demand-side perspective two products may not be substitutable, but suppliers of a particular service can easily adjust their offering to supply the focal product. Similarly, to the previous thought experiment, one may think of possible reactions from alternative suppliers following an increase in price of the focal product. If alternative suppliers are able to switch production to the relevant products and market in the short term without incurring significant additional costs, then it can be considered that there is effective supply-side substitution.

4.2.1.1.2 The Hypothetical Monopolist Test

299. The aforementioned thought experiment has been generalized through the hypothetical monopolist test (SSNIP Test)[19] and is a generally accepted conceptual approach to market definition. It is a thought experiment regularly employed by competition authorities and regulatory authorities to contemplate market definition, in addition to considering other material evidence.

300. 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, would the hypothetical monopolist be able to profitably raise prices by a small but significant and non-transitory amount?

301. For the purpose of applying the SSNIP test, it is generally accepted that a “small but significant” increase in price will be within a 5% - 10% range above the prevailing market price. Therefore, URCA will consider Customers’ and other potential suppliers’ behavior if the price of the focal product were increased by 5% - 10%.

302. When defining a market, 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.

303. 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 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 because there would be no sufficient competitive constraints stopping the supplier from doing so. That set of products constitutes the ‘relevant product market’.

304. 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

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

the case where the prevailing price has been set in the absence of sufficient competition, i.e., by an Undertaking with market power in cases of abuse of a dominant position.

305. For example, if as a result of an Undertaking'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.[20]

4.2.1.2 Relevant Product Market

306. Commonly accepted international standards recognize that a relevant product market encompasses all the products and/or services that Customers consider interchangeable or substitutable due to factors such as their attributes, pricing, and intended use.

307. 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.

Example

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 retail product market.

308. Where an Undertaking 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 product markets based on customer type.

[20] This is known as the "cellophane fallacy", from a US case (United States v. Du Pont & Co., 351 U.S. 377 (1956)) 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.

Example

Although residential consumers and business consumers may use physically similar services for the same purpose, they may require different level of support and willingness to pay for these services. A business consumer will typically be willing to pay a higher price than a residential consumer but for a more reliable or higher quality of service. This may lead to the conclusion that separate markets should be defined for these consumers categories.

309. Furthermore, in the case of electronic communications services, product substitutability between 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.[21] By having a common infrastructure, communications technologies like internet, voice, video and data communication can be combined and provided through a single device over the same Network. For instance, the internet may be used to transmit digitized 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.

310. 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 analyze 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 other relevant persons**: as discussed above, URCA will often contact the main Customers, suppliers and competitors of the companies involved in its enquiries, to gather their views.

[21] 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.

- **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 notifying parties, although pre-existing company surveys will also be considered. When the notifying parties Persons themselves carry out a consumer survey (or generate other evidence) specifically for the purposes of that Merger review (e.g. to establish whether a significant proportion of consumers consider two products to be substitutable), URCA will still consider the results, but only insofar as the methodology is robust and fit for purpose.

- **Barriers to switching 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.

Example

A spectrum license may include roll-out obligations regarding the geographical scope of the license. In the case of a TV Broadcasting license, such roll-out obligation would represent a barrier to switch to other available technologies like Internet Protocol Television (IP-TV) at the wholesale level. In such situation, IP-TV and TV Broadcasting would be considered in two different wholesale markets.

This does not imply that URCA would disregard any indirect competitive constraints stemming from end users' ability to switch between TV broadcasting and IP-TV and vice versa, at the retail level.

- **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.[22] In the ES or ECS, 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.

4.2.1.3 Relevant Geographic Market

311. The relevant geographic market can be defined as the specific area in which market players operate in the provision and demand of products or services, characterized by sufficiently uniform competitive conditions, and distinguishable from adjacent areas due to significantly differing competitive conditions within those regions.

312. Significant variations of competitive conditions between different areas of the same country might require defining different relevant markets. For both ES and ECS, this may be the difference between Customers located on different islands and/or, in the case of ECS, urban and rural area. As with product market definition, geographic market definition relies on the analysis of demand and supply-side substitutability.

313. Supply-side substitutability may play a greater role for geographic market definition in the ES and ECS if overlaps in market players' serviceable areas allow them to quickly respond to any price variations from competitors without incurring significant additional costs.

Example

Consider two mobile Network Undertakings (A and B) that own and operate mobile Network infrastructure across three islands (1, 2, 3) in the following way:

- Undertaking A owns and operate assets in Islands 1 and 3; and
- Undertaking B owns and operates assets in Islands 2 and 3.

Both Undertakings are vertically integrated and directly supply consumers with mobile services. There is no competitive pressure exerted across islands due to the limited range of mobile infrastructure which does not allow mobiles services to be provided from the mobile infrastructure of one island to the consumers of another island.

[22] 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.)

Based on this set up, it may be appropriate to define three distinct geographical markets; Undertaking A holds a monopoly position over Island 1 (Market 1), Undertaking B holds a monopoly position over Island 2 (Market 2) whilst Undertakings A and B compete within one another in Island 3 (Market 3).

This geographic market definition may evolve if, for example, one of the Undertakings successfully expands its mobile Network infrastructure on one of the remaining islands to compete with the other Undertaking that previously held a monopoly position.

314. 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. 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 other relevant persons**: 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., clauses in existing contracts or additional equipment requirements).

4.2.1.4 Additional Considerations

4.2.1.4.1 Continuous Chains of Substitution

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

Example

In the case of geographic markets, if for example geographic market of product A partially overlap with geographic market of product B, and geographic market of product B partially overlap with geographic market of 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 geographical market.

4.2.1.4.2 Indirect Competitive Constraint

316. When defining relevant markets, two wholesale products can be considered as belonging to different relevant markets while exerting competitive pressure on each other's through the retail market. In such instances, this competitive pressure should be taken into account at a later stage of the analysis and should not necessarily lead to a broadening of the market.

Example

Following the example provided previously where consumers may use physically dissimilar services such as cable and satellite connections for the same purpose leading to a definition of a single retail product market (see Section 4.2.1.2).

Although these products may belong to the same retail product market, an analysis of wholesale markets (upstream of the retail product market) may consider these two products in different relevant markets. This may be due to the absence of demand-side substitution from an access seeker' perspective at the wholesale level. One satellite access seeker cannot easily substitute its satellite access to a cable access given the product characteristics are largely different from its perspective. Although URCA may consider relevant to define two different markets, it would consider the competitive pressure indirectly exerted through the retail market (as consumers can easily switch from one product to another) on the behavior of market players upstream at a later stage of the analysis.

4.2.2 Market Analysis

317. Once URCA has defined relevant markets, it needs to identify the key characteristics of the markets affected by the operation in order to assess whether the merging parties will have market power. Similarly to the concept defined for dominance (see Section 3.2.3.1), market power can be defined as an economic position that allows an Undertaking to act, to some extent, independently from its rivals, Customers, and ultimately, consumers. Following this, the Undertaking is able to profitably increase its prices, reduce its output or affect other competition factors without being constrained by other market players.

318. URCA will conduct this analysis on a case-by-case basis and taking utmost account of the specific circumstances. The key characteristics considered are detailed below.

4.2.2.1 Market Shares and the Degree of Market Concentration

319. The concentration of a market will be a key factor in assessing whether a proposed Transaction will give rise to a substantial lessening of competition. In general, the more concentrated a market, the more likely it is that the competitive constraints on the merging firms are weaker. Following this, a Transaction allowing the merging parties to weight more than 50 % of market shares is likely to raise competition concerns as it is also likely that a market player would be considered dominant above this threshold. Therefore, any Transaction allowing an entity to exceed that level is likely to allow the latter to act, to some extent, independently from its rivals, Customers, and ultimately, consumers.

320. However, Transaction involving a firm whose market share will remain below 50% after the Transaction may also raise competitive concerns and there could be instances were a Transaction leading to the creation of an Undertaking with less than 50% market shares would be seen as anticompetitive. One commonly used method to assess such concentration is the Herfindahl-Hirschman Index. A more detailed discussion can be found on the HHI in the Annex IV.

Example

Consider four Undertakings with the following market shares:

- Undertakings A and B have 35% market shares each;
- Undertakings C and D have 15% market shares each.

Any Merger involving either A or B is likely to raise competitive concerns as the new entity would end up with 50% market shares or more.

321. Market shares can be measured by a number of means, including number of subscribers, audience shares, sales revenue, sales volumes, production volumes, capacity, generation or reserves and URCA will adapt its analysis depending on the case.

4.2.2.2 Market Player Characteristics

322. URCA will also take into account the characteristics of the main Undertakings operating in the relevant market. Indeed, it could well be the case that despite a high level of concentration of the market, a Merger could allow smaller firms to reach the same size of a dominant firm such that they would be able to compete more fiercely.

Example

Consider three Undertakings with the following market shares:

- Undertaking A have 60% market shares;
- Undertaking B and C have 20% market shares each.

A Merger between B and C might be beneficial for the market as the new entity would reach a size closer to the current dominant player allowing the new entity to compete.

323. The list below provides a first indication of what URCA may take into account in this assessment and is not intended to be exhaustive.

(i) Market players size: the size of the merging parties as well as other competitors can affect the level of competition in the market. Indeed, a Merger allowing the parties to reach the same size as the market leader is unlikely to lead to the same effect as a Merger strengthening the leading position of an Undertaking.

(ii) Market players product range: the Merger may also have different effects depending on market players vertical integration, presence in adjacent markets, closeness of competition between the merging parties and/or against other Undertakings, etc.

(iii) Cost structure and margins: this may be particularly relevant for ES and ECS which are characterized by large economies of scale and scope.

(iv) Capacity production: this affects the competitive constraints on the merging parties from other competitors who could quickly expand their output if the merging parties were to increase their price. This relates to expansion of existing competitors which is covered in greater details below.

4.2.2.3 Products and Services Characteristics

324. Beyond market definition, products and services characteristics are an important aspect to assess the effect of a merger:

(i) if the product is an essential input for other downstream markets, the Merger may have effects on other adjacent markets;

(ii) the differentiation between products or services is also another aspect affecting the closeness of competition between market players (as explained in the previous section).

4.2.2.4 Countervailing Bargaining Power

325. As part of its Merger assessment, URCA may consider the extent to which one or more of the merging firms' Customers or supplier would be able to exercise countervailing bargaining power post-Merger.

326. For example, for a customer, an individual Undertaking has countervailing buyer power where its negotiating strength would limit the ability of the merged entity to raise its prices or otherwise lower the competitiveness of its offer.

327. The degree of concentration of markets upstream and downstream of the focal market may also be an important aspect of the Merger assessment. More concentrated are markets upstream/downstream, less likely it is, for the merging parties, to act independently of these Undertakings.

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

4.2.2.5 Barriers to Entry and Expansion

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

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

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

4.2.3 Competition Concerns

332. Once URCA has identified the key characteristics of the markets affected by the transaction, it needs to assess if the proposed Transaction gives rise to a substantial lessening of competition.

333. In other words, URCA will evaluate how the proposed Transaction impacts competition within the market given the previously mentioned market characteristics and, specifically, whether this might result in a substantial lessening of competition.

334. A substantial lessening of competition is a key concept in competition policy. It refers to a situation in which a Merger, acquisition, or business conduct significantly reduces or harms competition in a relevant market, to the detriment of consumers. In the context of ex-ante Merger review, a substantial lessening of competition can occur when the proposed Transaction allows the concerned parties to benefit from market power, enabling them to control prices, limit output, or engage in other anticompetitive behavior without effective constraints from rivals. To determine if there is a substantial lessening of competition, URCA will consider the following:

(i) if the Merger results in a single dominant player;

(ii) if there are unilateral effects from the Merger leading, for example, to an increase in prices;

(iii) if there are coordinated effects by making collusion between market participants more likely or more effective.

335. The above list is not exhaustive of the competitive concerns URCA may have, and a more detailed discussion is provided in the following sections. These concerns will then be weighed against potential benefits from the Merger, often related to efficiencies.

336. There are a wide range of tools at the disposal of URCA to assess the overall effects of a Merger and whether it gives rise to a substantial lessening of competition. URCA may further develop its methodology in line with international best practice and introduce additional measures such as diversion ratios or Gross Upward Pricing Pressure Index (GUPPI).

337. In conducting its assessment, URCA will consider the Undertakings' offerings to their Customers and will focus its analysis on the potential harm to those offerings. These theories of harm will generally fall into the following categories covered in greater detail below:

(i) horizontal effects;

(ii) vertical effects; and

(iii) conglomerate effects.

4.2.3.1 Horizontal Effects

338. Horizontal effects usually occur when the merging parties are firms that operate at

the same level of the market. These horizontal effects are traditionally classified into two categories:

(i) **unilateral effects**: This represents the effect of the Merger on the strategic decisions of the merging parties without the need for coordinated action with other market players. The classical unilateral effect following a Merger is the incentive to increase prices for the new entity, as there are fewer competitors in the market.

(ii) **coordinated effects**: This refers to the likelihood of the merging parties and other market players to adopt coordinated conduct (like anticompetitive Agreements). Indeed, economic theory predicts that collusion becomes easier to sustain as the market becomes more concentrated.

4.2.3.1.1 Unilateral Effects

339. Some of the aspects highlighted earlier (see Section 4.2.2) would provide clear insights on possible unilateral effects and represent some of the factors URCA may consider at this stage of the analysis:

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

(ii) **close competitors**: unilateral effects may arise where the merging parties are close alternatives to the other for Customers.

Example

There are four firms operating in the market and two of them are providing a high quality product while the two other companies offer a lower quality product.

- If the merging parties were offering previously a high and a low quality product, the new entity will be constrained by the remaining market players who are operating in both segments (i.e., high and low quality product) of the market.
- If the merging parties were previously both operating in the high quality (respectively low quality) segment, then the new entity is likely to raise unilaterally its prices as it would have no remaining competitors in the high quality (respectively low quality) segment of the market.

(iii) **elimination of a competitive force**: unilateral effects may arise where a Merger

eliminates an important competitive force in the market, such as a significant recent entrant or a firm that was expected to grow into a substantial competitive threat (e.g., because of a novel business model or because of a reputation for aggressive price cutting).

Example A Licensee recently entered the relevant market and adopted an aggressive pricing strategy quickly gaining market shares. Following this, another Licensee is planning to acquire this new entrant and submit a notification to URCA regarding this proposed Transaction. In such situation, URCA may consider such a Transaction to remove an important competitive constraint as this new entrant was adopting an aggressive pricing strategy and quickly increasing its market shares.

(iv) **potential competition**: unilateral effects may also arise where a Merger involves a firm that has been planning entry to the market or a firm that acts as a competitive constraint because of the threat of entry.

340. The extent to which the proposed Transaction may give rise to a substantial lessening of competition because of unilateral effects may be assessed through the quantitative tools presented below.

(i) **Diversion ratios**: The diversion ratio is a concept used to assess how Customers would switch from one product or service to another in response to a price increase. It measures the percentage of Customers who would "divert" or switch to a different product or supplier when faced with a price hike. A higher diversion ratio indicates that consumers are more likely to switch to an alternative option, which can be relevant in evaluating the competitive impact of a Merger.

(ii) **GUPPI**: It is a metric used in competition law to assess the potential competitive effects of a Merger or acquisition. The GUPPI seeks to indicate the upward pricing incentive for the merging parties in the absence of induced entry, efficiencies and product repositioning. It helps regulators to evaluate whether a proposed Merger could lead to anticompetitive price increases in the affected market.

4.2.3.1.2 Coordinated Effects

341. A proposed Transaction may give rise to a substantial lessening of competition if it makes coordination between market participants more likely or more effective (referred to as coordinated effects).

342. Coordination may take many different forms. For example, it may involve firms

keeping prices high or dividing up Customers between them. It can be explicit (i.e., involving communication) or tacit (i.e., resulting from an implicit understanding without any formal Agreement).

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

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

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

(iii) there must be little likelihood of the coordination being undermined by one of the coordinated Persons (because of the cost it would incur from deviating) or by competition from relevant Undertakings.

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

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

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

4.2.3.2 Vertical Effects

345. Vertical effects usually occur when the merging parties are competing at different layer of the value chain, therefore involving upstream and downstream relevant markets.

346. Although pure vertical Mergers do not entail the loss of direct competition between firms in the same relevant market, in certain circumstances they can give rise to competition concerns. This is particularly likely when the merged entity is dominant in one of the relevant markets. The two main competition concerns generally associated with vertical Mergers are input foreclosure and customer foreclosure.

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

(ii) **Customer foreclosure** occurs where a firm acquires a downstream customer and

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

4.2.3.3 Conglomerate Effects

347. Conglomerate effects occur when merging parties operate in adjacent market that are not vertically related. These firms may supply closely related products which they sell largely to the same Customers (i.e., Mergers between firms supplying complementary products), or they may supply completely unrelated products. Alternatively, they may supply the same products in different geographic markets.

348. As with vertical Mergers, although conglomerate Mergers do not entail the loss of direct competition between firms in the same relevant market, in certain circumstances they can give rise to competition concerns. This is particularly likely when the merged entity is dominant in one of the relevant markets. The two main competition concerns generally associated with conglomerate Mergers are foreclosure through tying and bundling and foreclosure through portfolio effects.

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

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

349. As with vertical Mergers, conglomerate Mergers will usually only be considered to give rise to competition concerns if the foreclosure significantly lessens competition in the affected market(s). In assessing the likelihood of foreclosure, URCA will examine the ability and incentive of the merged firm to foreclose its rivals.

4.2.3.4 The Counterfactual

350. In order to assess whether a Merger is likely to result in a substantial lessening of competition, URCA will typically consider what would happen if the parties did not merge (the counterfactual).

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

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

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

4.2.3.5 Efficiencies

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

355. Efficiencies are relevant at two stages of URCA's analysis:

(i) In assessing whether a Merger gives rise to a substantial lessening of competition, URCA is required to take into account the interests of intermediate and end-Customers and the development of technical and economic progress provided that it is to Customers' advantage and does not form an obstacle to competition.

(ii) Where URCA concludes that a Merger would give rise to a substantial lessening of competition (or, in a media public interest case, be contrary to the public interest), URCA is required to give consent if it is satisfied that any substantiated and likely efficiencies put forward by the acquirer or the Licensee are necessary and outweigh any potential harm to consumers and citizens.

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

(i) It must be demonstrated that the efficiencies are very likely to arise, and to do so within a period of time corresponding to the onset of any potential adverse effects on Customers.

(ii) The efficiencies must be Merger specific – i.e., a direct consequence of the

Merger, and should not be permitted by other less intrusive means (e.g., Network Sharing Agreements for ECS or ES).

(iii) The benefits of the efficiencies must be passed on (wholly or partially) to Customers of the merged firm.

4.2.4 Public Interest

357. Where a proposed Transaction involves a public interest, URCA is required to form an opinion whether the proposed Transaction would have an effect, or would be likely to have an effect, contrary to the public interest.

4.2.4.1 Electricity Sector Public Interest

358. A proposed Transaction involving a Licensee is deemed to affect an electricity sector public interest if at least one of the Persons involved in the Transaction has influence over a sufficient capacity of electricity generation, transmission, distribution, or supply to affect the main goal and objective of the electricity sector policy.

359. In assessing whether a proposed Transaction would be contrary to the public interest, URCA may consider:

(i) security of electricity supply and the need for electricity generation capacity to supply all electricity demanded by Customers at any given time, including during peak demand periods and taking into account schedules and expected unscheduled outages;

(ii) sustainable electricity and the expansion of electricity generation from renewable energy sources; and

(iii) the need to promote aspects of social policy including the affordability of electricity and the scope of a reliable universal service, in particular within rural areas and sparsely populated islands.

4.2.4.2 Media Public Interest

360. A proposed Transaction involving a Licensee is deemed to affect a media public interest if at least one of the Persons involved in the Transaction is a Media Enterprise.

361. In assessing whether a proposed Transaction would be contrary to the public interest, URCA may consider:

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

(ii) the need, in relation to every different audience in The Bahamas, for there to be a sufficient plurality of Persons with Control of the Media Enterprises serving that

audience;

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

(iv) the need for Persons carrying on Media Enterprises, and for those with Control of such enterprises, to have a genuine commitment to the attainment of the electronic communications policy objectives.

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

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

364. In assessing plurality, URCA will consider who exercises ultimate influence over the relevant Media Enterprises, recognizing that this may not be the Person that appears to have legal Control. URCA will also have regard to cross shareholdings, minority shareholdings and any other interests that give a Person influence over one or more Media Enterprises.

365. URCA will consider each proposed Transaction on a case-by-case basis. However, by way of example, it is likely to be concerned by a Transaction that would give one Person Control over two (or more) major providers of news for The Bahamas (e.g., a TV station providing news and a newspaper). In considering the importance of particular Media Enterprises, URCA may have regard to a number of measures, including number of subscribers, audience shares and shares of newspaper circulation.

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

367. URCA is also likely to consider the impact of the proposed Transaction on the availability of programs dealing with a wide range of subject matters, which meet the needs and satisfy the interests of as many different audiences as practicable.

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

4.2.5 Definition of Remedies

369. URCA will consider remedies where it forms an opinion that a proposed Transaction involving a Licensee would give rise to a substantial lessening of competition or would be contrary to the public interest.

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

371. There are two possible outcomes in URCA final adjudication and where there are competition concerns or a public interest concern that are not outweighed by substantiated efficiencies:

(i) URCA can deny its consent to the proposed transaction; or

(ii) URCA can give conditional consent (subject to a set of remedies).

372. Conditional consent is where URCA gives consent subject to a requirement that the acquirer or the Licensee concerned takes the action that URCA considers necessary to eliminate or avoid the substantial lessening of competition or adverse public interest effects. Such action can take two forms in terms of remedy.

(i) **Structural remedy:** It is a remedy that is related to the structure of the market. It may impose for example the divestment of some assets to competitors in order to address URCA's concerns, the creation of legally or functionally separate business units, licensing or transfer of intellectual property rights, and/or divestment of certain spectrum rights, which might include, for example, trading certain spectrum rights with other Licensees and/or returning certain rights to URCA.

(ii) **Behavioral remedy:** It is a remedy that is related to the behavior of the merging parties. Usually, it will be the prohibition of a given conduct or the injunction to adopt a conduct. This could be, for example, the requirement to provide services on a fair, reasonable and non-discriminatory basis to competitors.

373. The parties to proposed Transaction may offer a mix of structural and behavioral remedies depending on the Transaction and concerns to be removed. Structural and

behavioral remedies are not mutually exclusive.

374. It is open to the parties to put forward proposals for an appropriate order for consideration by URCA. The parties can do so either before or after URCA opens a Phase 2 in-depth investigation.

Annex I: Complaint Submission Form for Ex-post Competition Investigations

Please provide the following information, using the following form, and supply a copy of all documents supporting the complaint. Complainants are reminded that supplying misleading or inaccurate information may result in a fine being imposed by URCA.

It is strongly recommended that complainants follow the guidance below as 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. Other than in exceptional circumstances, a submission should meet these minimum submission requirements for URCA to assess whether to open an investigation.

Complainants should properly support allegations that another Person has acted anticompetitively. To this end, an indexed copy of documents supporting the facts, including (if applicable) contractual documents, correspondence, invoices and other documents may be submitted next to the form. 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). All relevant documents and not only those that support the complaint, should be provided. 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.

Please note that any documents that the complainant provides to URCA may be sent by URCA to the Person or company that is 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.

Complaint Submission Form for Ex-post Competition Investigations

1. Contact Information: *Provide the following details of the Person to whom URCA should send all correspondence relating to this complaint, stating their relationship to the complainant (e.g., legal representative)*	
Name	
Address (street and mailing address)	
Telephone number	
Email address	
Relationship to the complainant	

2. Information about the complainant: *Indicate the nature of services that the complainant provides in the ES or ECS (if relevant).*

3. Information about the allegedly infringing Person or Persons: *Provide the name of the company or companies concerned by the complaint.*

4. **Overview of the market**
4.1 Describe each product or service of the alleged infringing Person or Persons that are concerned by the alleged infringement. In particular, describe each of the markets in which the alleged infringing Person or Persons operate.

4.2 Describe, in terms of characteristics and price difference, any product(s) or service(s) that might be considered close substitutes, on the demand or supply side.

5. Overview of the alleged infringing Person or Persons position(s) in the market: *Please provide information as to why the alleged infringing Person or Persons may be able to act, to some extent, independently from its rivals, Customers, and ultimately, consumers.*
5.1 State the market shares (if known) of the alleged infringing Person or Persons.
5.2 Describe the nature of the competition against the complainant and other relevant Undertakings.

6. Overview of the anticompetitive conduct and its effects
6.1 Provide a detailed description of the complaint containing information on the factual elements of the complaint, the chronology of events and a description of contractual, statutory and other obligations that have been allegedly breached (with reference to relevant contract clauses, sections of the Comms Act or Electricity Act or other license conditions) and how the facts relate to the breach.
6.2 Provide an explanation on the two following aspects (these should be substantiated, to the best possible, with evidence and analysis as to why the alleged infringement is leading to the below mentioned effects):
a) An explanation of the effect of the alleged infringement on your activities;
b) an explanation on the effect of the alleged infringement on the ECS or ES as a whole.

Declaration: *The Complaint Form must conclude with the following declaration which is to be signed by the Chief Executive Officer or other principal officer of the notifying party.*
The complainant declare that, to the best of their knowledge and belief, the information given in this complaint form is true, correct, and complete, that true and complete copies of documents required to be submitted with this Form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all opinions expressed are sincere. Signature:____________________________________ Date:___________________ Position/Title:_________________________________

Annex II: The 'Single Economic Entity' Doctrine

376. 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 be prohibited. 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.

Parent and subsidiary

377. 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 not be prohibited. 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.

378. 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 Persons subject 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. However, when a subsidiary company has the freedom to determine its own commercial behavior, the parent and subsidiary may be regarded as separate Undertakings.

379. 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.

Principals and Agents

380. Similar principles apply to parent and subsidiary Undertaking 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.

381. A genuine agency Agreement is one where the principal bears the financial and commercial risks under the Agreement.

Undertakings related by succession

382. 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.

383. A mere change in the legal form and name of an Undertaking does not create a new Undertaking free of liability for any anticompetitive behavior 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.

Joint Venture

384. A Joint Venture is a business Agreement in which two or more Persons collaborate to pursue a specific project, venture, or business activity. Each Person contributes resources, such as capital, expertise, technology, or other assets, and shares in the risks, costs, and potential rewards of the venture. Joint Ventures are typically formed for a defined period or to achieve a specific objective.

385. Key characteristics of a Joint Venture include:

(i) **Shared Ownership**: The Persons involved in the Joint Venture each hold a share of ownership in the venture, which may be based on the value of their contributions or through negotiated terms.

(ii) **Shared Control**: Typically, decision making authority and management responsibilities are shared among the Joint Venture partners, and major decisions require consensus or are outlined in a Joint Venture Agreement.

(iii) **Mutual Goals**: Joint Ventures are established to pursue common business goals or objectives, such as market expansion, product development, research projects, or entering a new geographic market.

(iv) **Limited Duration**: Joint Ventures are often created for a specific project or time-limited purpose, and they may dissolve or continue based on the achievement of those goals.

(v) **Risk Sharing**: Persons share the financial and operational risks associated with the venture, as well as the potential for profits or losses.

(vi) **Legal Structure**: Joint Ventures can take various legal forms, including corporations, limited liability companies (LLCs), partnerships, or contractual Agreements.

386. Joint Ventures can be a strategic way for companies to leverage each other's

strengths, resources, and expertise to achieve common objectives while spreading the associated risks, to the benefit of consumers. However, they may also lead to a substantial lessening of competition, to the detriment of consumers, if they result in anticompetitive Agreements or in a single economic entity that would not have been approved by URCA.

387. Indeed, because of the aforementioned characteristics of a Joint Venture, the level of coordination between the two Undertakings might be such that URCA may consider them to be a single economic entity. Such assessment will be on a case-by-case basis, and it is important for companies entering into Joint Ventures to seek legal counsel and engage with URCA as needed to ensure that their collaboration complies with these Guidelines.

Annex III: Measure of Cost

388. 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).

389. Since electronic communications and electricity services are commonly characterized 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, when considering a fully amortized capacity with significant variable cost, short-term marginal cost (SRMC) would be more relevant to define the competitive pricing.

390. 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.

391. 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 ES and ECS, making adjustments to the information by analyzing the relationship between FAC (fully allocated costs) and LRIC costs, using benchmarks, or a combination of these approaches.

392. For electronic communication services in particular, since they are generally provided by multi-product firms it may be necessary to consider the appropriate treatment of common costs.

Annex IV: Measures of Concentration

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

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

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

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

397. Market Concentration can be measured through the Herfindahl-Hirschman Index (HHI). The HHI is calculated by squaring the market share of each Undertaking competing in a market and then summing the resulting numbers. The closer a market is to being a monopoly, the higher the market concentration (and the lower the level of competition). Therefore, in a market which has four Undertakings, two of which ("A" and "B") will merge, the pre-merger and post-merger HHIs are calculated as follows:

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

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

398. The difference between the Pre-Merger HHI and the Post-Merger HHI (also called "Delta") is therefore useful to understand how the concentration of the market evolves following the Merger and is indicative of whether the proposed Transaction may raise competitive concerns.

399. Based on the above, URCA is unlikely to identify horizontal competition concerns in a market with a post-Merger HHI:

(i) below 1,000;

(ii) between 1,000 and 2,000 and a delta below 250; and

(iii) above 2,000 and a delta below 150.

Annex V: Merger Notification Form for Ex-ante Merger Review

Please provide the following information, using the paragraph numbers of this form, and supply a copy of all documents requested. Applicants are reminded that supplying misleading or inaccurate information may result in a fine being imposed by URCA.

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.

Merger Notification Form

1. Contact Information	
1.1 State the name and contact address of each of the Persons involved in the Transaction.	
1.2 Provide the following details of the Person to whom URCA should send all correspondence relating to this notification, stating their relationship to the notifying parties (e.g., legal representative)	
Name	
Address (street and mailing address)	
Telephone number	
Email address	
Relationship to the notifying parties	

2. Information about the companies *Provide company information about each of the Persons involved in the transaction*	
Type of company	
registered office address (if different to the business address listed above)	
group structure (including all parent companies and subsidiaries)	
list of shareholders	

3. **Specifics of the Transaction** Provide the following details of the transaction:

3.1 the type and purpose of the transaction
3.2 status of transaction
3.2 how it is funded
3.4 the terms of the transaction
3.5 details of the ownership and Control of the acquiring company and the Licensee before and after the proposed merger
3.6 any potential advantages of the Transaction to Customers
3.7 any potential advantages of the Transaction to the ES and ECS
3.8 any other details or particular circumstances which you would like URCA to consider

4. Financial information
4.1 Provide details and supporting documentation of the turnover for each of the Persons to the Transaction.
You must respond to questions a) to c) if the acquirer is active in the ES or ECS, whether inside or outside of The Bahamas.
4.2 Provide details of the financial information of the Persons involved in the Transaction including:

a) annual revenues from the provision of Networks/Carriage Services/Content Services, identified by specific product and geographic markets:
You must respond to the question b) if the merging parties should reply their combined turnover is less than five million dollars (B$5,000,000).
b) copies of the certified accounts of each of the Persons for the previous two years OR copies of the annual and quarterly reports and financial statements for each of the Persons for the previous two years; or
The merging parties should reply to the question c) if their combined turnover is more than five million dollars (B$5,000,000).
c) copies of the annual and quarterly reports and financial statements for each of the parties for the previous three (3) years.

5. Market information
Please respond to question 5.1 of this section only if the acquirer is active in the ES or ECS, whether inside or outside of The Bahamas AND if the merging parties' combined turnover is less than five million dollars (B$5,000,000).
5.1 Provide a summary of the relevant market(s) affected by the Transaction. The summary should include a description of each product or service of the acquiring company and the Licensee, identification of any areas of overlap or any product(s) or service(s) which might be considered close substitutes, and the market shares of all relevant parties to the Transaction.
Please respond to questions 10 to 14 of this section only if the acquirer is active in the ES or ECS, whether inside or outside of The Bahamas AND if the merging parties' combined turnover is more than five million dollars (B$5,000,000).
5.2 Describe each product or service of the acquiring company (or companies) and the Licensee and identify any areas where the parties overlap or where they could potentially overlap. In particular, describe each of the electricity markets or electronic communications

markets in which each of the parties operate.
5.3 Describe, in terms of characteristics and price difference, any product(s) or service(s) that might be considered close substitutes, on the demand or supply side.
5.4 State the market share of the acquiring company, the Licensee and all affiliated companies in the ES or ECS.
5.5 State the names and market shares (if known) of the acquiring company's/companies' and Licensee's top 5 competitors for each product or service.
5.6 State the names of the acquiring company's/companies' and Licensee's top 5 Customers for each product or service.

6. Other
6.1 State the expected time scale for the transaction, including; (i) the exchange of contracts, (ii) completion of the Merger and (iii) any other relevant deadlines or dates of which URCA should be aware.
6.2 If the applicant believes that the interests of any of the parties involved in the Transaction would be harmed if any of the information URCA asks to be supplied is published or otherwise divulged to other parties, please submit this information separately with each page clearly marked "Confidential". Reasons should also be provided as to why this information should not be divulged or made public by URCA.

Declaration: *The Notification Form must conclude with the following declaration which is to be signed by the Chief Executive Officer or other principal officer of the notifying party.*

The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required to be submitted with this Form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all opinions expressed are sincere.

Signature:____________________________________ Date:___________________

Position/Title:_________________________________