هيئة تنظيم الاتصالات
Telecommunications Regulatory Authority

Sultanate of Oman
Guidelines on Anti-Competitive Behaviour

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1. Introduction

1. These Guidelines on Anti-competitive Behaviour ("the Guidelines") are issued under the Decision No 70/2013 on Rules Governing *ex post* Anti-competitive Behaviour in the Sultanate of Oman of the Sultanate of Oman. They are designed to assist licensees and other interested parties to understand the reasons for establishing *ex post* rules on anti-competitive behaviour in the Sultanate of Oman and how these rules will apply in practice. At this scope, Annexes 1 to 7 also includes economic tests and best practices procedures the TRA will follow to assess anti-competitive behavior by the undertakings.

2. The TRA will review and update these Guidelines from time to time to take account of evolving international best practice and to reflect developments in legal interpretation and economic thinking.

3. These Guidelines explain what the position of the TRA on these matters is likely to be but they do not legally bind the TRA and the Guidelines should not be taken as a statement of law. Interested persons should always consult the relevant legislation and seek legal advice where appropriate

4. While it is expected that the TRA will follow the principles and approach outlined in these Guidelines, the TRA reserves the right to consider other factors not covered in these Guidelines where necessary. If the TRA decides to depart from these Guidelines, it will provide reasons for doing so.

2. Legislative Background

5. The competition rules of the Sultanate of Oman in the telecommunications sector comprise Articles (40) and (41) of the Act, Article 79 the Executive Regulations, Article 26 of the Licences and the Decision on Anti-competitive Behaviour in the Sultanate of Oman.

6. Articles 40 and 41 of the Act state as follows:

7. **Article 40:**

"The licensee shall not perform any conduct, take an action or omit to take an action that could prevent or restrict competition in relation to any commercial activity connected to telecommunications, if he performed a conduct, took an action or omitted to take an action in the course of providing telecommunications services or operating telecommunications system, and that action or the omission therefrom was connected to the provision of the telecommunications services or the operation of the telecommunications system.

The conduct, the action or the omission therefrom, shall be considered as preventing or restricting competition if it took any of the following forms:

a) Abuse by the licensee, alone or in participation with others, of a dominant position in the market, or a substantial part thereof.
b) Making an agreement with others to prevent competition in the manner specified in the executive regulation of the Act.
c) Providing certain concerned parties with facilities that lead to limiting or restricting competition in the market, in respect of goods and services.
d) Making changes in market structure that are conducive to preventing or restricting competition, in particular mergers in the telecommunications sector.

The Authority, shall after the approval of the Minister, issue rules pertaining to the conducts or acts or omission that could prevent or restrict competition.

The Authority shall issue the rules regulating the licensee's maintenance of records that show the financial transfer between its works and the works of its branches and take the necessary actions to handle the subsidy."

8. **Article (41):**

"The Authority shall have the function of deciding whether the conduct, action or omission therefrom, is conducive to preventing or restricting competition, through the application of the provisions of Article (40) of this Act, subject to the provisions of regulations and decisions issued for the purpose of introducing competition in the telecommunications sector, and the general principles included in the license. Before issuing a decision in this regard, the Authority shall undertake to carry out the investigations it deems necessary, and to request any information or data from the licensee, or to summon any person to express his point of view on the subject.

Before issuing the decision, the Authority shall inform the licensee of the reasons for issuing the decision, and of the measures he has to take to avoid its issuance.

The Authority shall notify the licensee of the decision it issues in this regard. It may also notify any other competent person, and take the necessary measures to remedy the reasons of the breach at the expense of the offender."

9. **Article 79 of the Executive Regulations** builds on Articles 40 and 41 of the Act by providing that:

"concerted conduct between two or more licensees in a direct or indirect manner, with the object of preventing or restricting competition in the market, shall be deemed an agreement with others to bring about any of the following matters in the telecommunications market:

- *a) The fixing of tariffs or other conditions of service.*
- *b) The pre-selection of the successful party for a contract or a work opportunity.*
- *c) The dividing-up of shares as between licensees.*
- *d) Any other agreement which the Authority considers such as to prevent or restrict competition."*

The Executive Regulations do not include any procedures or specify any sanctions for breach.

10. **Article 26 of each of the Licences issued to Class I 0perators** also prohibit certain types of undue discrimination and other anti-competitive practices. They say that:

"The Licensee shall not (whether in respect of the rates or other terms and conditions applied or otherwise) show undue preference to, or exercise undue discrimination against, particular persons or persons of any class or description as respects the provision of the Licensed Services. The Licensee may be deemed to have shown such undue discrimination if it unfairly favours to a material extent a business carried on by it in relation to the provision of the Licensed Services so as to place at a significant competitive disadvantage persons competing with that business.

The Licensee shall not engage in any other anti-competitive practices and, in particular, shall not:

a) *abuse any dominant position in any Telecommunications Service market;*
b) *enter into agreements with any other Licensed Operator or Service Provider which have as their purpose or effect the fixing of prices, allocation of customers or specific service markets or other improper restraint on competition; or*
c) *use information provided by other Licensed Operators or Service Providers for anti-competitive purposes.*
d) *Any question relating to whether any act done or course of conduct is contrary to this Condition shall be determined by the Regulatory Authority."*

11. **The Decision on Anti-competitive Behaviour in the Sultanate of Oman and the Principles and Guidelines on Anti-competitive Behaviour**

The Decision on Anti-competitive Behaviour in the Sultanate of Oman defines relevant terms and supplements Article 79 of the Executive Regulations by describing further types of Agreements that may be considered to be anti-competitive, providing for monitoring the marketplace and for the issue of Guidelines on what may constitutes anti-competitive behaviour and for investigations and determination, and by further providing, in Article 6(4), for rules to be prepared regulating the conduct of investigations and enforcement. These last rules, when prepared, will take the form of a Regulation. As is stated in Paragraph 1 above, these Guidelines are designed to assist licensees and other interested parties to understand how the *ex post rules* on anti-competitive behaviour in the Sultanate of Oman will apply in practice. Also, in Annexes 1 to 7, the TRA explains the economic tests and best practices procedures it is likely to follow when assessing anti-competitive behaviour.

3. The Relationship between Ex Ante Regulations and Ex Post Competition Rules

12. In regulatory theory, a distinction is drawn between *ex ante* and *ex post* regulation. *Ex ante* regulation comprises a set of pre-determined rules and remedies imposed by the TRA on market players who are dominant in specified markets in Oman under Articles 12, 25, 27, 46 bis and 46 bis (1) of the Act and Articles 91-94 of the Executive Regulation while *ex post* regulation comprises the framework of competition rules described in these Guidelines.

13. With regard to *ex ante* regulation, the TRA [has already determined] the markets in which operators in Oman [have been found dominant and has [announced its intention to impose] appropriate ex ante remedies on certain operators in those markets in accordance with these parts of the Act and Executive Regulations.

14. The *ex post* Rules on Anti-competitive Behaviour described in these Guidelines complement the *ex ante* remedies. Licensees are placed under additional obligations not to perform any conduct, take an action or omit to take an action that could prevent or restrict competition in relation to any commercial activity connected to telecommunications. If a licensee is in breach of Articles 40 and 41, it may be sanctioned irrespective of whether or not it is in breach of an ex ante remedy. The requirements under Articles 40 and 41 are in addition to the ex ante remedies and the ex ante and ex post regimes therefore complement one another.

15. In some cases, the TRA will impose ex ante remedies, while in others it will rely on the ex post framework alone. The justification for *ex ante* regulation is described in the Market Definition and Dominance Guidelines issued by the TRA (cite reference)

16. There are certain differences in terms of the *ex ante* and *ex post* regimes:

17. In the first place, sanctions imposed on the basis of ex post competition rules are generally intended to rectify anti-competitive behaviour that has occurred in the past, while ex ante remedies mostly seek to open up markets for competition and anticipate that, in their absence, there will be an appreciable risk of harm from dominant operators to competition and to consumer welfare.

18. Secondly, market definitions in an *ex post* review can subtly differ from those established in an *ex ante* review. On an *ex ante* determination of markets, a number of assumptions are necessarily made to support forecasts on issues such as demand side substitutability or the likelihood of supply side substitution during the ex-ante review period (typically 2 years). By contrast, an *ex-post* review tends to focus on specific services and is defined by the scope of the complaint received or the anti-competitive behaviour alleged.

19. It is important to emphasise that compliance with *ex ante* regulations alone is not a defence, in every cases, against claims of abuse of a dominant position. *Ex ante* and *ex post* regulation may run concurrently - they are not mutually exclusive.

20. Compliance with *ex ante* price controls may be an outright defence against a subsequent *ex post* claim of abuse of a dominant position but only if the service provider is required by an *ex ante* control to behave in the exact manner in which it has done so, and has not exercised any degree of discretion as to how the *ex ante* control was implemented

21. By way of example, an *ex ante* remedy in the form of a price regulation mechanism may be expressed in the form of a price ceiling but may not establish a corresponding price floor. Under this circumstance, a service provider with a dominant position might offer a service that complies with the regulated price ceiling but which remains an abuse on grounds that it is offered at below cost and therefore amounts to *ex post* predatory behaviour. Under these circumstances, the TRA could properly investigate an allegation of predatory pricing despite the fact that the dominant service provider has complied with the ex ante remedy.

4. The Objective of Competition Rules

22. The communications sector is important to Oman as it underpins other areas of the economy such as the oil and gas industries, trade, investment and tourism, and is therefore a service sector upon which the rest of the economy may develop. It is also important for social amenity and inclusiveness in Oman. The communications sector that can deliver the best available services at the lowest possible price is crucial to the creation of a successful economic and social environment in Oman. Proper enforcement of the competition provisions of the Act and elimination of artificial barriers to competition are necessary elements of this.

23. The overall objective of the competition provisions in the Act is to ensure that competition on the market takes place on merit as a means to enhancing consumer welfare and ensuring an efficient allocation of resources. . Effective competition is beneficial for consumers and to the overall economy of Oman because it creates incentives for lower prices, higher quality and variety of service, and fosters investment and rapid service innovation across all sectors of the economy. Efficient allocation and utilization of resources also lead to increased competitiveness resulting in increased overall productivity and growth.

24. TRA, in the exercise of its powers, will take action in response to certain agreements and certain practices that are assessed as being anti-competitive but will not determine what the market participants should do. The assessment of whether to act in response to certain agreement or practices should take into account that competition is the preferred mechanism to reduce inefficiencies in the market, and also the different characterizations to be accorded to business practices in different market circumstances: distorting competition

in some cases and promoting efficiencies and innovation in others. This approach will ensure that consumers are protected while promoting overall productivity and growth

5. The Market

25. Ex-post analysis of anti-competitive behavior must always start with a definition of the market alleged to be affected. A relevant market comprises all products or services which are sufficiently substitutable for each other. Defining the relevant product market therefore requires a consideration of the extent to which different products are substitutable and exercise a competitive constraint on each other.

26. The TRA will generally follow the same approach as is described in its Market Definition and Dominance Reports, relating to the definition of markets and the determination of dominance for *ex ante* purposes, when defining markets and determining dominance for *ex post* purposes but its enquiry will be into the market that is relevant to the actual complaint, will be informed by the facts underpinning the complaint and will, wherever possible, use actual data.

6. Anti-competitive Agreements

27. Under economic theory, when a market is effectively competitive, no single licensee or undertaking will have sufficient market power on its own to be able to operate independently of its competitors or customers. However, competition may still be distorted if licensees or undertakings act in a coordinated manner. Agreements to coordinate decisions between licensees or undertakings are prohibited under Article (40) of the Act and, when considering Article (40) of the Act, or Article 26 of the Class Operator Licences, the TRA will interpret the word "agreements" broadly so as to include "concerted conduct between two or more licensees in a direct or indirect manner", as described in Article 79 of the Executive Regulation and also any tacit understandings and other looser arrangements which result in such concerted conduct. All such arrangements and understandings are referred to as "agreements" in these Guidelines.

28. The TRA accepts that some agreements may not be entered into with "the object of preventing or restricting competition in the market"; on the contrary, they may have beneficial effects both generally on the economy and for competition in communications service markets. In this case, the TRA will not use its powers under Article 79 of the Executive Regulation to declare them null and void and will not impose a penalty (as described in section 6.1 of these Guidelines).

29. In reviewing whether an agreement or understanding may restrict or prevent competition, the TRA will look both at its object and its effect.

30. The object of an agreement is the meaning and purpose of the agreement, taken in the economic context in which it is to be applied. If the object of an agreement has been identified as being the restriction or distortion of competition, it is not necessary to assess the actual or potential effects of the agreement on competition and the agreement will be deemed anticompetitive.

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

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

33. Both horizontal and vertical agreements may give rise to competition concerns and consequently fall within the prohibitions under Article (40) of the Act, Article 79 of the Executive Regulation and Article 26 of the Class I Operator Licences.

34. Examples of horizontal and vertical agreements which may be caught by the prohibition include agreements which:

i. directly or indirectly fix purchase or selling prices or any other trading conditions;
ii. limit or control markets, technical development or investment;
iii. divide or allocate markets or sources of supply;
iv. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing one or more of them at a competitive disadvantage; and
v. make the conclusion of contracts subject to acceptance by any other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

6.1 Exemptions

35. Article 5(2) of the Anti-competitive Behaviour Decision provides that the Authority may:

"Following an application made by a party to an Agreement made at any time before it comes into effect, the Authority may exempt an Agreement from the provisions of Article 4 of this Decision or Article 79 (4) of the Executive Regulations if the Authority considers that it will make a positive

contribution to markets and the position of consumers which will outweigh its anti-competitive effects..”

36. Article 5 goes on to say that:

“The Authority may also, at any time, exempt an Agreement on the grounds that it is of minor importance.”

37. These possible exemptions as referred to below as “the First Exemption” and the “Second Exemption”.

38. The Authority will exercise its discretion in favour of a First Exemption if the applicant can satisfy five cumulative conditions, two positive and three negative. They are as follows:

a) the Agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress;
b) the restrictions must be indispensable to the attainment of these objectives;
c) consumers must receive a fair share of the resulting benefits;
d) the Agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question; and
e) the Agreement must not unduly disadvantage any category of consumers.

39. When these five conditions are fulfilled, the Authority is likely to conclude that restriction on competition is outweighed by its pro-competitive effects and that consumers (both actual and potential) are sufficiently compensated for the adverse effects of the restrictions of competition.

40. The burden of proving the advantages claimed for the Agreement and satisfaction of the five cumulative criteria is on the parties to the Agreement.

41. In reaching its conclusion in respect of the First Exemption, the Authority will consider whether the improvements claimed to exist by the parties to the Agreement will deliver appreciable objective advantages to consumers and whether those advantages sufficiently compensate for the disadvantages they cause to competition in the relevant marketplace.

42. In considering the issues under paragraph 38 a), the Authority will look to whether the Agreement will directly lead to clear and appreciable efficiency gains or cost or qualitative efficiencies, which might, for example, take the form of new or improved products or services, more consumer choice or improved and more cost-effective distribution.

43. In terms of paragraph b), the Authority will look to see whether the Agreement as a whole is reasonably necessary to achieve the claimed efficiencies and also at whether each of the individual restrictions is also necessary for that purpose. The decisive factor is whether or not entering into the Agreement, and each restriction, directly enable more efficient performance of the activity in question. If the same efficiencies are likely to be delivered under less restrictive conditions, those conditions are unlikely to be essential. On the other hand, if the result of eliminating a restriction would be to make the efficiencies less likely to materialize, that restriction is likely to be found "essential".

44. Paragraph 38 c) is satisfied only where consumers have a fair share of the benefit, and a share that adequately compensates them for the adverse effects of the restrictions. The Authority will look to see whether there is a pass-on of the claimed cost and quality efficiencies to intermediate or final consumers. The greater the restrictions, the more consumer benefit should be shown, and if consumers are overall, or in any significant category, worse off, the exemption will not be granted.

45. In considering issues under paragraph 38 d), the Authority will take as its starting point that short-term efficiency gains should not be at the expense of long-term elimination of competition in the market. This will require the Authority to look at the competitive context; what competitive pressures exist in the marketplace? How will the Agreement impact on competition? Are there barriers to competition and will those be affected by the Agreement?

46. In considering issues under paragraph 38 e), the Authority will be concerned to understand how the Agreement affects consumers generally and individual categories of consumers, and whether any particular category of consumers is unduly worse off. This condition makes more explicit one aspect of the sharing of benefits referred to in Paragraph 38 c). As to the Second Exemption, the Authority will exempt Agreements if it is satisfied that the aggregate share of the parties in any market affected by the Agreement does not exceed 10%.

6.2 Horizontal agreements

47. An agreement is horizontal if it is entered into between companies operating at the same level in a market. In most instances, horizontal agreements in the context of these Guidelines 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. Such agreements are often referred to as collusive agreements and they are characterised by an intention to determine market outcomes on an agreed and managed manner rather than through competition.

48. Various types of horizontal agreement may have as their object or effect the restriction of competition. Examples include agreements which directly or indirectly fix prices, fix trading conditions, share or divide up markets, fix

joint purchase or selling prices, limit or control production or investment, exchange price information, set technical or design standards and involve collusive tendering. Some of these are considered further below.

49. Where an agreement fixes prices, it will almost always infringe the prohibitions under Article (40) of the Act, Article 79 of the Executive Regulation and Article 26 of the Class I Operators Licences. There are many ways in which an agreement can fix prices, for example:

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

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

51. 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.

52. 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.

53. However, sharing of information may have perverse, anti-competitive effects. For example, participation in an industry Working Group must not be used as a means for exchange of confidential and commercially sensitive information between industry participants that reduces or eliminates competition between operators. Thus, any agreement to exchange confidential information that alters or artificially restricts conditions of trade within the Sultanate of Oman will fall within the scope of the prohibitions under Article (40) of the Act, Article 79 of the Executive Regulation and Article 26 of the Class I Operator Licences.

54. When considering a case of potentially anticompetitive information exchange, the TRA will start from the assumption that each economic operator should determine independently the policy which it intends to adopt in relation to the market. This does not prevent parties from intelligently adapting to the existing or expected conduct of their competitors, but it does prohibit any direct or indirect contact between such operators which may

allow a party to influence the conduct on the market of its actual or potential competitors, or to create conditions of competition which do not correspond to the normal conditions of the market.

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

56. The most sensitive exchange of information for the purposes of Article (40) of the Act, Article 79 of the Executive Regulation and Article 26 of the Class I Operator Licences 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.

57. Where the exchange of price information leads to the reduction or elimination of uncertainties which are inherent to the competitive process, it is likely that it will be found to have an adverse effect on competition. For example, if operators providing telecommunications services in Oman were to inform one another of confidential information relating to a proposed increase in prices, the TRA would be likely to conclude that an anticompetitive agreement was in place in breach of the provisions of Article (40) of the Act, Article 79 of the Executive Regulation or Article 26 of the Class I Operator Licences.

58. Aggregated information which cannot be reverse-engineered and disaggregated will be less likely to have an adverse effect on competition than data relating to individual parties. The TRA may 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.

59. It is also important to stress that aggregated data cannot be used in a way that allows parties to identify information relating to individual competitors in the market. This may be the case, for example, where the aggregated data relates to only a few players in the relevant market.

60. Agreements between undertakings which have as their object or effect the limitation of production or supply, for example by fixing quotas, will generally be caught under Article (40) of the Act, Article 79 of the Executive Regulation and Article 26 of the Class I Operator Licences.

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

competition and thereby infringe Article (40) of the Act, Article 79 of the Executive Regulation and/or Article 26 of the Class I Operator Licences.

62. 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. However, an agreement between purchasers which effectively fixes the price that they are prepared to pay is likely to contravene Article (40) of the Act, Article 79 of the Executive Regulation and/or Article 26 of the Class I Operator Licences.

63. If sellers join together and agree to collectively boycott certain customers, the agreement is likely to contravene Article (40) of the Act, Article 79 of the Executive Regulation and/or Article 26 of the Class I Operator Licences.

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

65. Cover pricing is an example of a form of bid rigging. This is where one or more bidders in a tender process agree to submit an artificially high price to allow another bidder to win the tender. Such cover bids are submitted as genuine bids, giving 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.

6.3 Vertical Agreements

66. Vertical agreements are those that are entered into between two or more companies each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain. For example, price fixing issues are not limited to horizontal agreements between competing undertakings, but can also arise between undertakings operating at different levels in the supply chain, where a supplier directly or indirectly restricts a buyer’s ability to determine its resale price.

67. Vertical agreements may be less likely than horizontal agreements to prompt competition concerns, but they can also contain anticompetitive provisions. The negative effects on the market that may result from vertical agreements include the foreclosure of other suppliers/buyers by raising barriers to entry (e.g. exclusivity provisions that lead to anticompetitive foreclosure), the reduction of inter-brand competition between the companies operating on a market (including the facilitation of both explicit and tacit collusion), the reduction of inter-brand competition between distributors.

68. Examples of anti-competitive vertical restraints include:

69. Resale price maintenance agreements are agreements under which minimum, fixed, maximum or recommended resale prices are agreed between the supplier and the distributor or the reseller. A supplier is generally entitled to impose a maximum sale price or recommend a sale price, provided that this does not amount to a fixed or minimum sale price in practice. The main potential negative effects of a genuine maximum or recommended sale price are a reduction in intra-brand competition and increased transparency of prices, which may facilitate collusion between suppliers and/or between distributors and is therefore likely to contravene Article (40) of the Act, Article 79 of the Executive Regulation and/or Article 26 of the Class I Operator Licences.

70. An agreement on minimum prices or an agreement to fix a price for the reselling of the goods or services would generally contravene Article (40) of the Act, Article 79 of the Executive Regulation and/or Article 26 of the Class I Operator Licences.

71. A single branding agreement is one where the buyer is induced to concentrate its orders for a particular product on one supplier. An agreement not to purchase competing products or to purchase all or most of the purchaser's requirements for the products from one supplier fall within this category. Such agreements may foreclose access to the market at the supplier level, facilitate collusion and restrict inter-brand competition and are therefore likely to contravene Article (40) of the Act, Article 79 of the Executive Regulation and/or Article 26 of the Class I Operator Licences.

72. A limited distribution agreement is one where the supplier agrees to sell to only one or a limited number of buyers. Such agreements may lead to foreclosure at the buyer's level of the market, facilitate collusion and lead to a reduction, or even a total elimination, of intra-brand competition, and are therefore likely to contravene Article (40) of the Act, Article 79 of the Executive Regulation and/or Article 26 of the Class I Operator Licences.

73. A market partitioning agreement is one where a party to a vertical agreement (e.g. a reseller) is restricted as to where it buys or resells a particular product. The main negative effect is a reduction of intra-brand competition and a partitioning of the market. Such agreements may also facilitate collusion, thereby infringing Article (40) of the Act, Article 79 of the Executive Regulation and/or Article 26 of the Class I Operator Licences.

7. Mergers

74. When companies or business units merge, markets may become more concentrated and competition may be reduced. Article (40) of the Act proscribes: "m*aking changes in market structure that are conducive to preventing or restricting competition, in particular mergers in the telecommunications sector".*

75. The TRA considers that regulation of merger and acquisition activities is indispensable in ensuring the emergence of a market structure that is conducive to competition. This is of particular importance to the network

services market which is limited by high market concentration, radio spectrum constraint and high sunk costs. It is the TRA's policy to intervene in merger and acquisition activities if there is a potential adverse effect on competition. In those circumstances, the TRA will prevent a merger or acquisition from going ahead, or require it to be unwound, where other remedies to address the competitive concerns cannot be devised or are considered unsatisfactory or inadequate.

76. As early guidance to licensees, the TRA advises that:

- no licensee should implement or conclude any type of merger, including but not limited to acquisition of a majority or minority interest in another licensee, a joint venture with another licensee or a transaction that involves an acquisition of assets, voting securities, or change of control of a licensee, without disclosing details of the proposed transaction to the TRA and obtaining its prior written approval
- no person should, without the prior written approval of the TRA, purchase any stocks or shares of any licensee if the result may create a Dominant position in a specific telecommunications market.

77. The TRA will, on notification, consider each merger or purchase on its merits by reference to its likely impact on competition in the marketplace.

78. If the TRA considers that a merger or acquisition of shares in another licensee may give rise to competition concerns of a significant or material nature, the TRA will invite the licensee serving notice of the proposed transaction, and any service provider directly involved in the proposed transaction to a meeting at the offices of the TRA for an informal review of the issues involved.

79. The TRA may also invite third parties and or other agencies in the Sultanate to the same meeting or subsequent meetings

80. At any meeting, the licensee serving notice of the proposed transaction and any service provider directly involved in the proposed transaction may make oral representations and may submit written representations to the TRA either before or following the meeting, or both. The TRA must take any such representations into account. The TRA may impose a reasonable limitation on the length of oral representations.

81. Following conclusion of an initial investigation by the TRA of a proposed transaction the TRA will determine whether it is content for the proposed transaction to proceed or whether instead it will initiate a full investigation of the proposed transaction. In this last case, the TRA may request further information relating to the transaction and its implications for telecommunications markets in the Sultanate of Oman and must assess the proposed transaction on competition grounds and from an economic perspective and consider and determine whether the

proposed merger or acquisition will substantially lessen competition in the Sultanate of Oman. In its assessment, and in reaching its determination, the TRA shall consider the following factors:

- the relevant market
- demand- and supply-side substitution
- barriers to entry and expansion
- the impact of the proposed transaction on customers and consumers
- the efficiencies arising out of the proposed transaction
- any harm that might arise from the concentration within that market
- other objective economic factors,

and the TRA may look beyond the formal or legal structure of a transaction in order to assess its economic effect.

82. Following conclusion of an investigation by the TRA into a proposed transaction, the TRA must issue a decision which, subject to issues of commercial confidentiality, will be published on the TRA website.

83. Further guidance on the TRA's approach to mergers and acquisitions may be published in due course in formal Merger Regulations and in Guidelines on Mergers and Acquisitions.

8. Abuse of a Dominant Position in a Telecommunications Market

84. Article (40) of the Act provides that the "*abuse by a licensee, alone or in participation with others, of a dominant position in the market, or a substantial part thereof*" shall be considered as preventing or restricting competition.

85. In assessing whether or not an operator has a dominant position in a telecommunications market for purposes of ex post competition controls, the TRA will generally conduct an inquiry to determine whether a service provider "enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors or users". Such an assessment may consider a series of factors, in addition to market share and the factors are described or referred to in Section 5 above.

86. Abuse may arise out of behaviour which is price related or not price related.

87. Looking first at non-price related actions, an abuse of dominant position may arise from the failure of a service provider with a significant position in the market to supply essential facilities to competitors within a reasonable time and on reasonable terms and conditions.

88. The TRA considers an “essential facility” to be a facility associated with a telecommunications network or service supplied exclusively or predominantly by a single service provider or a limited number of service providers, and which cannot practically be substituted by competitors for economic or technical reasons.

89. Under the Executive Regulation, the TRA has already imposed obligations regarding access and interconnection on all operators and additional obligations on operators enjoying dominance in any market.

90. Where an operator is required to allow access to an essential facility under the Executive Regulation, the provisions of that Regulation will apply and the enquiry is likely to stop there. If, however, the Executive Regulation does not require an operator with a dominant position in the market to allow access to a facility which is, on the evidence in the ex post proceedings, an essential facility, the TRA may still conclude that the operator concerned, assuming he is proved to be dominant in the relevant market, has abused its dominant position by denying access to that essential facility.

91. An abuse could also arise if an operator which is dominant in a market:

- pre-emptively acquires or secures scarce facilities or resources from a third party if that action denies a competitor the use of facilities or resources that are essential to the operation of the competitor’s business
- requires or induces a supplier to refrain from selling to a competitor if that would impede or prevent the competitor from entering or expanding in a market
- adopts technical specifications that prevent interoperability with a competitor’s network or system
- declines to make available to other service providers technical information without which another service provider cannot provide competitive services
- makes use of information obtained from a competitor in order to interconnect with or supply services to that competitor in order to compete with the competitor.

92. Looking now at price related matters, an abuse of a dominant position may arise from the adoption of unfair pricing practices. Including:

- Price discrimination
- Predatory pricing

- Margin squeeze
- Excessive pricing
- Bundling and Tying

8.1 Price discrimination

93. There are two main issues when dealing with price discrimination:

- It is used to exploit final customers; and
- a dominant position may be used to exclude actual or potential competitors, though predatory pricing, foreclosing or margin squeeze.

94. More details about the evidence required to assess the extent to which price discrimination can be an anti-competitive strategy is provided in the Annex 2.

8.2 Predatory pricing

95. An example of abuse arising from unfair pricing practices is “predatory pricing”. Predatory pricing, results in lower short-term prices for end-users. However, it can be an abuse of dominance if a service provider with a dominant position in the market uses pricing to drive rivals from the market and then raise prices to higher-than-competitive levels, recouping its losses and reaping a subsequent windfall.

96. Predatory pricing may also serve as the basis for additional anti-competitive price-related practices such as cross-subsidization, a practice whereby a service provider with a dominant position in one market charges higher-than-normal prices for that service, and then applies up to all of the additional profit to lowering the price of a service in another market that it does not dominate. As a result, the service provider leverages its dominant position in one market to gain advantage in a competitive market.

97. Another possible example of abusive pricing practice is unfair promotional pricing, a variant of predatory pricing that relates to below-cost sales for a short, transitory period, including “loss leaders”. Promotional pricing, of course, is very often benign and advantageous to consumers, but if introduced by a dominant operator which can fund its cost out of monopoly profits in other markets, and if it is calculated to drive a rival from the marketplace, or deny its entry, it can be abusive.

98. More details about the evidence and methodology required to assess predatory pricing are provided in the Annex 3.

8.3 Margin Squeeze

99. A “margin squeeze” may arise where the margin of profit available to a competitor requiring wholesale services from a dominant service provider is too low to allow him to compete.

100. A service provider with a dominant position in the market engages in a margin squeeze when it sets retail and underlying wholesale prices at levels such that the retail price is lower than the sum of the wholesale price and the reasonable cost of transforming the wholesale service into the retail service. Those reasonable costs would include a reasonable margin.

101. Many wholesale services that are needed by competitors for the provision of retail services are price regulated in the form of a price ceiling. However, a service provider with a dominant position in the market can nonetheless engage in a margin squeeze by manipulating the relationship between wholesale and retail prices. In other words, the price regulation of wholesale services does not preclude the possibility of margin squeeze.

102. To find that a margin squeeze has occurred or is occurring, the TRA will consider the definition of relevant upstream and downstream markets and then look at the following issues:

- whether the service provider under review is “vertically integrated”, by reason of providing both a retail service and the underlying wholesale service
- whether the service provider is dominant in the market for the underlying wholesale service
- whether the underlying wholesale service is required by competitors who wish to compete in the related retail market.

103. If all of these conditions are present, the TRA is likely to consider that the service provider has initiated a margin squeeze if it adopts either of the following pricing strategies over a non-transitory period:

- increasing the price for the wholesale service required by its competitors until it approaches the price the service provider charges for the downstream retail service
- decreasing the price the service provider charges for its own downstream retail service until it approaches the price for the upstream wholesale service,

and if such behaviour is not justified objectively based on differences in supply conditions, such as differences in costs or a shortage of available facilities or resources.

104. The intended outcome of either of these strategies is that downstream competitors purchasing the wholesale service are unable profitably to transform that wholesale service into a retail service priced

competitively with the vertically-integrated dominant provider's retail service. As a result, the squeezed competitors are forced either to sustain ongoing losses or to exit the market and new competitors will be deterred from entering the market.

8.4 Excessive pricing

105. Excessive pricing is an abuse where a service provider with market power sets prices that take advantage of the strong position in the market (and the correspondingly weak position of end users) to ensure supra-normal profits.

106. Prices become anti-competitive (abusive) under Article 7 paragraph 5 of the Telecommunications Act when they are too high, interfering with the interests of the beneficiaries of the service.

107. In practice, predatory pricing implies that prices deviate markedly and without objective justification from the range of prices which could be considered as competitive. Competitive prices are prices that would result in a competitive market where prices trend towards long run cost. The deviation that arises under excessive pricing is determined by comparison against long run costs.

108. High profits may be considered to have a beneficial effect insofar as they constitute an incentive to innovate, encourage market entry, and to lead to market participants competing on quality, innovation and price.

109. In a well functioning market, existing or new entrants have the ability to drive down excessive profits through competition, i.e. the market is contestable. Ex-post intervention may be required where:

- there are substantial and non-transitory barriers to entry;
- there are no effective ways to reduce entry barriers;
- the product or service with alleged excessive prices is not subject to ex-ante regulation.

8.5 Bundling and Tying

110. Bundling end-user products may be of concern if one (or more) of the products in the bundle is one for which the service provider is dominant. The TRA is concerned with two types of end-user bundles - predatory bundling and exclusionary bundling.

111. Predatory bundles are those which can be replicated by another competitor, but are sold at predatory prices: the price of a bundle is exceeded by the total cost of providing all of the elements in the bundle. In this manner

the service provider could drive rivals from the market and then raise prices to higher-than-competitive levels, recouping its losses and reaping a subsequent windfall.

112. Exclusionary bundles are those which cannot be replicated by another competitor and are not available on a standalone basis and/or are sold below cost. One possible scenario is where a dominant supplier is the only source of one of the bundled products and requires a customer who wants that product also to buy a second product that might otherwise have been sourced from a competitor, a variant of bundling often referred to as "tying". Here the service provider could exclude its competitors by forcing some or all of its customers to deal exclusively with it.

113. To the extent a bundle of telecommunications services is offered without being subject to any relevant *ex ante* requirements, the TRA will apply the rules described here to bundles offered by a service provider with a significant position in the market for at least one of the telecommunications services included in the bundle.

114. An abuse of dominant position could arise if a service provider with a dominant position in the market:

- bundles services in such a manner that, in order to purchase a first service, the competitor must also purchase one or more other services, even if the competitor does not require them
- offers a competitor more favourable terms or conditions for one service if the competitor also purchases one or more other services, even if the competitor does not require the latter services and the more favourable terms or conditions are not justified by cost differences.

115. An abuse of dominance will be made out only where the following conditions are met:

- the first service is an essential input required by the downstream service provider in order to participate in a retail market, and
- the price charged for the bundle, or for the combination of the combined services, is lower than the combined cost of providing it.

9. Procedure

116. The TRA will, in due course, prepare and consult on a formal Regulation which, when adopted, will establish the procedures to be followed by the TRA when enforcing the anti-competition rules, and it will provide guidelines on its approach to the imposition of sanctions.

Annex 1: Economic tests and best practices procedures to assess anticompetitive behaviours

In these annexes TRA presents includes economic tests and best practices procedures the TRA will follow to assess anti-competitive behavior by the undertakings in Oman including:

- Price discrimination
- Predatory pricing
- Excessive pricing
- Margin squeeze
- Bundling and Tying
- Vertical restraints
- Unduly long term contracts

Annex 2: Price discrimination

1. In general, price discrimination exists when two units of the same physical good are sold at different prices, either to the same customer or to different customers[1]. This is not per se an anti-competitive and might be a pro-competitive strategy.

2. There are three types of price discrimination. First-degree or perfect price discrimination typically occurs when the firm succeeds in capturing the entire consumer's surplus. It occurs when a consumer (or a number of identical consumers) has unit demand and the firm knows exactly each consumer's reservation price (consumers can also decide not to buy and have a zero surplus). In this case either a non-uniform tariff or a non-linear tariff may increase the maximal welfare, with a transfer of surplus, however, from consumers to firms. This form is unlikely in practice either because of arbitrage or incomplete information.

3. Second-degree price discrimination typically occurs when the firm imperfectly captures the consumer's surplus. With this form of discrimination the firm is able to set an "incentive compatibility" constraint on the set of packages offered such that each consumer is able to self-select the package designed for him. Examples include: quantity discounts, where a firm increases efficiently its profits by charging a marginal price which declines with volume; bundling (only with mixed bundling there is an efficient discount); or inter-temporal price discrimination (when firms discriminate on the basis of time by setting high initial prices to sell to consumers with the highest willingness to pay, and cutting prices thereafter to appeal to those with lower willingness to pay).

4. Third-degree price discrimination, when the firm is able to observe some signal related to consumer's preferences (age, employment, etc.) and offers different tariffs to different groups, directly capturing the consumer's surplus. A common example in the telecommunication industry is price discrimination between residential and business customers.

[1] A broader definition would describe price discrimination as a situation where two or similar goods are sold at prices that are in different ratios to marginal costs. See Varian, 1989.

5. Price discrimination, in all its different forms, is considered to be an anti-competitive conduct when equivalent products are provided to different customers on different terms without a sound economic justification and generating a negative impact on total welfare.

Evidence required

6. There are two main risks TRA must consider when examining allegations of anti-competitive price discrimination behaviour:

   - Whether the service provider exploits end-users,; and
   - Whether a dominant position may be used to exclude actual or potential competitors, i.e. predatory pricing, foreclosing, margin squeeze as well as bundling and tying strategies. These types of anti-competitive conduct are described in more detail below.

7. The anti-competitive effects of price discrimination are very difficult to prove. Results from the economic theory suggest that in most cases the welfare impact of price discrimination is ambiguous. TRA will distinguish on a case by case basis whether the conduct is anti-competitive by comparing the impact on total welfare that price discrimination will likely to generate. For example:

   - If discrimination occurs at downstream level it can be welfare enhancing as long as the monopolist expands its output (which implies a transfer of welfare from consumers to producers). This is an efficient outcome as long as a total welfare standard approach is adopted.
   - The presence of economies of scale with non-linear tariffs may increase the magnitude of the welfare gain and improve efficiency. For example, a two part tariff enables the monopolist to cover the fixed costs and open new markets by distinguishing between low and high value users.
   - A ban on price discrimination could reduce total welfare because some smaller markets are not longer be served and, in the long run, it may also reduce the incentives to innovate as well as causing inefficient entry in those market where the ban is not present.
   - In other cases, when there is a treat that entry occurs, the incumbent monopolist may price discriminate by committing to tie two products together, and “strategically” exclude the rival from one of the products. However, in terms of the impact on economic welfare, it is possible that tying have efficiency effects that enhance consumer’s utility, and that outweigh its exclusionary effects.

- At the upstream (or wholesale) level the most important issues arise when price discrimination is related to the pricing of essential inputs, i.e. access. If the upstream service provider is vertically integrated, upstream price discrimination is generally banned because of the incentives of the incumbent to undue discriminate against rivals, leveraging and or foreclosing competition at retail level.

8. As a general rule in assessing cases of price discrimination, given the large number of economic factors and risks to be considered when assessing such effects on the market, TRA will work on a case by case approach but under the rebuttable assumptions that

   - price discrimination by dominant firms at downstream (or retail) level is not per se anti-competitive.
   - price discrimination at upstream (or wholesale) level is more likely to be welfare detrimental and a priori anti-competitive

9. Under the second assumption, in the event of an alleged breach the operator subject to the complaint will be required to provide objective justification for the differential treatment in order to rebut this presumption including evidence on the cost of supply and demand paths which justify the discriminatory behavior.

Annex 3: Predatory pricing

Definition

1. In general terms a company is said to be predatory pricing when it prices at levels that are unreasonably low, whether because there are below some measure of costs or because they otherwise generate an inadequate rate of return, and where they have the purpose or effect of eliminating, disciplining or otherwise inhibiting the competitive conduct of an existing or potential rival.

2. More precisely, a predatory price is a price that is profit maximizing only because of its exclusionary or other anticompetitive effects. It is not the price level alone that is decisive for a price to be predatory, but also the firm's intention to take a rival out of the market.

3. There are three main types of predation that can be identified which include the following:

   - Reputation models: a price war may be rational in the attempt to create a reputation of being an aggressive incumbent and discourage entry.
   - Signalling models: The incumbent might deter entry by setting high price to signal high costs in the industry and deter entry
   - Financial market models "deep pocket" predation: aggressive incumbent behaviour is used to modify the expectation of the profitability of the prey

4. In Europe the first time that a precise economic test was adopted to accuse a firm of predatory behaviour was in 1986 in the AKZO case[2].

5. TRA on the basis of this test and other existing literature will consider predatory pricing:

[2] Case C62/86 AKZO Chemie BV v. Commission, [1993] 5 CMLR 215.

- Where a dominant firm is charging prices below Average Avoidable Cost (AAC)[3], it is presumed to be acting abusively: the test set out a strong presumption of undertaking's intention to abuse of its market power.
- Where a dominant firm is charging prices between AAC and average total cost (ATC) it is guilty of predation where this is done as part of a plan to eliminate a competitor: there is no presumption of illegality and the burden of proof is on the prosecutor of the complaint of anti-competitive behaviour.
- Finally, where a dominant firm is charging prices at or above AAC is not considered to be guilty of predation.

6. In circumstances where prices are below the Average Avoidable Cost the operator subject to the complaint will be required to provide evidence of its costs in order to rebut the presumption of predation.

7. In considering alleged predatory pricing TRA will take into account telecommunications-sector specific factors that may justify a different approach to pricing compared to other sectors in the economy. For example, TRA will consider, where relevant, factors such as:

    - The need to attract customers to a network to ensure that economies of scale may be achieved at the earliest time in the operation of a network. One possible consequence of this might be to offer attractive low connection and usage prices to customers to switch to a new network. These prices may not always be sustained in the longer term.

    - Economic depreciation arrangements that take account of the life cycle status of products and services provided over a telecommunications network that might differ from other sectors of the economy because of capital intensity and high fixed and common costs.

Evidence required

8. It is difficult to detect whether a predatory price is part of a rational abusive strategy or is just a single response in the course of intense competition. In order to address this matter TRA will assess:

    1. whether the incumbent is pricing below costs
    2. if there an intention to eliminate a competitor

[3] Average Avoidable Cost refers to those average costs that the vertically integrated operator could avoid if it decided to close its downstream operation but continued to provide the relevant wholesale service to other licensed operators

9. 1. To assess whether price is below costs, TRA will analyse:

- the relevant time period over which to measure revenues and costs. This is usually the time over which the alleged predatory price(s) prevailed or could reasonably be expected to prevail. However, TRA may also look at the shorter time period over which pricing were particularly aggressive.
- the relevant revenues generated over that time period, and hence the relevant price
- the relevant cost benchmark to use. TRA will typically use as a cost standard the Average Avoidable Cost.

10. But pricing below cost may also be a fully rational and efficient strategy in many cases, such as short-run promotions, unanticipated shocks and removal of old stock. TRA will keep these exceptions in mind.

11. TRA will also examine the intention relating to anti-competitive conduct, as follows

- Direct evidence via documentary proofs, such as official statements by the service provider company or its decision making body. Indications of intention are often provided in a form of written memoranda, minutes of meeting and e-mails documenting a specific policy of eliminating competitors.
- Where the conduct makes no commercial sense apart from harm to competition. This includes consideration of whether there are other strategies open to the dominant firms that would have met commercial purposes and less likely to harm competitors
- Other behavioral and contextual evidence: other possible exclusionary practices, which an incumbent can use to reinforce the effects of the predatory strategy

12. A third issue that is considered in other jurisdictions, like the US, is the feasibility of recoupment, i.e. the ability to recoup earlier losses from later profits. However, TRA believes that the evidence of recoupment is not a necessary element; but only one factor amongst others to sustain a claim of predatory pricing. .

Annex 4: Excessive pricing

Definition

1. The practice of excessive pricing is anti-competitive behaviour when it involves a dominant operator charging prices in excess of what it could normally charge in a competitive market.

2. Markets are most efficient (as measured by productive and allocative efficiency) when prices are based on the interaction of both demand and supply factors in a free market. When prices are higher than at competitive levels, consumers are worse off and overall welfare is reduced.

3. One of the objectives of competition policy is to make markets efficient and to provide consumers with competitive prices and product choices. To this end, TRA aims to create market conditions that ensure that the telecommunications market works well with efficient price outcomes. There is a need however to establish ex-post mechanisms to intervene in excessive pricing cases to address exploitative prices, particularly in circumstances where it is not possible for prices to be set by freely interacting competitive forces (i.e. demand and supply factors).

4. In competitive markets the competitive price of a service will tend towards its long run average cost, and such price is determined by demand and supply factors. The same outcome is not guaranteed when the prevailing price exceeds the competitive price due to the exercise of market power by the supplier of the service. In such cases, the price thus set will lead to allocative and productive inefficiencies. Consumer welfare will be affected by transfers of rents from consumers to service providers (as consumers will have to pay higher prices than those prevailing in a competitive market) and production may be carried out by both efficient and less efficient service providers.

Evidence required

5. The basic question that the TRA will address in an investigation of excessive pricing is whether the difference between the costs actually incurred and the price actually charged is excessive. If so,

the TRA will consider whether a price has been charged which is either unfair per se or unfair when compared to other competing services.

Determining the competitive price

6. The competitive price is the long run average cost of an efficient firm. At this price efficient firms are just covering their total costs and not earning any excess returns. If the price is above this level, then under conditions of effective competition we should expect to see entry driving prices back down to average costs, whilst if prices were below this level we should expect to see exit, thus leading to prices rising to average cost.

7. Where applicable, the TRA will give preference to the FL-LRAIC approach, whereby the setting of wholesale fees is based on forward looking long run average cost.[4]

8. Whilst a price below the competitive price cannot be excessive, a price above the competitive price level may or may not be excessive, depending on how far above the competitive price the actual price is. For example, in the short run the price could fluctuate substantially (and non-systematically) around the long term average that could deliver cost recovery and normal profit. Above cost pricing therefore is held to be a necessary but not sufficient condition for excessive pricing.

Other comparative evidence on excessive prices

Comparisons with prices of the same products/services in other markets

9. These might be useful where identical comparator products are sold in more competitive markets (e.g. markets characterized by lower concentration, lower entry barriers and no collusive behaviour), provided that these markets are subject to similar cost conditions in Oman.

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[4] In a competitive market, prices would be at a level that covers the short marginal cost of production, but in the long term, for production to be sustainable, prices would need to cover on average the long term cost of production (i.e. LRAIC), including a return on investment (i.e. a normal profit). If the prices do not achieve a normal return on average in the longer term there will be exit from the market, followed by a reduction in supply, and ceteris paribus, there would be an increase in the price for a given level of demand. The excessive profits will be competed away via new entry and the price equilibrium will therefore tend to a forward looking long run incremental cost level.

Comparisons with prices in another time period

10. Evidence that prices were substantially higher than those of a period when competition was more effective might provide evidence of excessive pricing, provided that there were no other good explanations for the price rise.

Excessive profits

11. In a competitive market, a service provider would be expected to earn ‘normal profits’ (including a mark up over efficient costs) on any particular activity. These refer to the level of profits that a service provider requires to provide a sufficient return to the lenders and shareholders that provide the service provider with finance. This rate of return is the service provider’s WACC. When the service provider’s profitability persistently exceeds an appropriate WACC, profits might be considered to be ‘supra-normal’. TRA will take into account that the return on capital should be adjusted to factor in the risks associated with the activity.

12. Often it is not the overall profitability of a service provider which is at issue but rather the profits the service provider earns from a specific line of business in a particular market where it enjoys a dominant position. Where a dominant service provider does not generate supra-normal profits overall, this does not rule out the possibility that it charges excessive prices on a particular line of business.

Annex 5: Margin squeeze

Definition

1. A margin (or price) squeeze may occur in an industry where a vertically integrated operator is dominant in the supply of an essential input for a downstream market in which it also operates. The vertically integrated operator could then harm competition by setting such a low margin between its wholesale price and the price it sets at retail level that an efficient downstream competitor is forced to exit the market or is unable to compete effectively.

2. The dominant firm could therefore squeeze downstream competitors in several different ways:

   - Discriminatory price squeeze: Where a dominant operator charges its retail rivals a higher wholesale price for essential inputs than it charges its own downstream operation.
   - Non-Discriminatory price squeeze: Where a dominant operator raises the price of essential inputs across the board (i.e. both to other licensed operators and to its own downstream operation) while reducing the retail prices in such a way as to reduce available retail margins of competitors below commercially sustainable levels.
   - Predatory price squeeze: This occurs when a dominant operator prices its retail services at a level which leaves insufficient (or even negative margins) for other licensed operators to continue in the market while maintaining an overall profit through the sale of the wholesale product

3. A margin squeeze may therefore be applied by a dominant operator to foreclose the market and avoid competitors to profitably replicate the retail offers of the vertically integrated firm with adverse impact on competition and total welfare.

Evidence required

4. The analysis of an alleged price squeeze under competition law involves the following steps:

- Assessment of dominance in the wholesale market: The dominant operator has SMP in the wholesale markets for services required to produce the retail service where, allegedly, the price squeeze occurs.
- Evaluation of the level of competition at the retail level: There are high barriers to entry / exit in the retail market and the dominant operator leverages these barriers to maximize its profits in the long term.
- Characterization of vertical integration: Dominance in the retail market is not a necessary condition but it should be demonstrated that the operator also have an operation in the retail market that will benefit from the exit of other licensed operators in this market.
- Substitutability analysis to identify the relevant market where the margin squeeze occurs: there are no substitutes for the inputs provided by the dominant operator. There are no close substitutes to the retail service using a different set of wholesale inputs.
- Price squeeze tests or margin squeeze tests[5]: these tests are aimed at demonstrating that there is no below-cost pricing and that a fair difference exists between retail and wholesale prices.
- Analysis of duration: The alleged price squeeze has had sufficiently long duration to have an exclusionary effect.

5. In undertaking the analysis required by each step TRA will be particularly interested in understanding the long term effects to competition and to consumer welfare and will be very careful not to characterize a case as a price squeeze before being sure that the above conditions are all met.

Margin squeeze test

6. The general form of the equation applicable for the margin- squeeze test is:

$$p-a \geq c1$$

7. Where

p= retail prices for the dominant operator

[5] Price squeeze and margin squeeze are in practice the same and can be used interchangeably; however price squeeze cases generally involve situations where a dominant service provider prices below costs at retail level, while margin squeeze cases generally involve situations where the dominant service provider charges wholesale prices that unduly discriminate between its downstream retail arm and other retail competitors in the market.

a= wholesale prices for the dominant operator

c1= retails costs of a hypothetically efficient operator

8. In other words, the margin between retail and wholesale price should be greater than the retail costs. Both prices and costs can represent weighted averages. For example if the test is applied to a product that is commercialised at different prices (for example promotions), the reference measure for "p" should be the "Average revenue per customer".

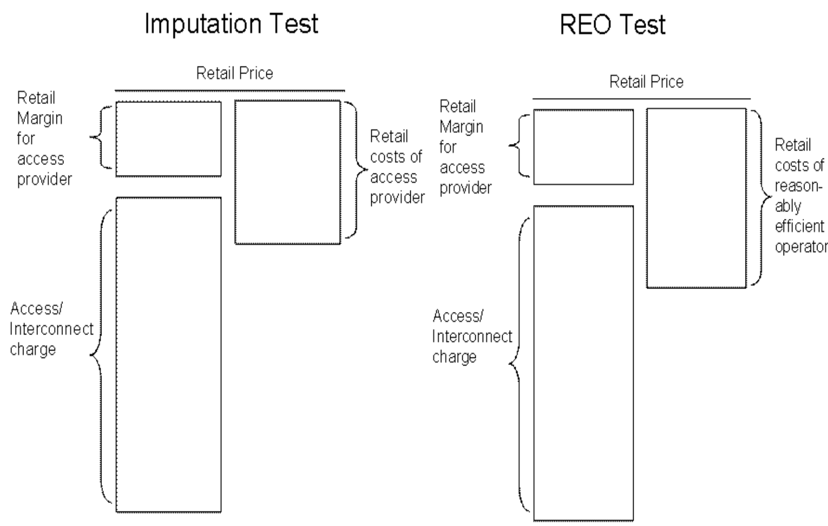
9. In terms of the costs of the incumbent, broadly, there are two tests which can be used to identify price squeeze practices:

   - An Imputation test, or 'Equally Efficient Operator' test - a price squeeze exists if the downstream arm of a vertically integrated player that is dominant in the supply of an upstream input could not trade profitably on the basis of the price of the upstream input. This test uses the retail costs of the access provider; or
   - The 'Reasonably Efficient Operator (REO)' test - a price squeeze exists if a reasonably efficient competitor could not trade profitably on the basis of the upstream and downstream prices charged by a dominant competitor. This test uses the retail costs of a reasonably efficient operator.

10. Typically, with the second test it will be easier to find margin squeezing because downstream competitors usually have higher costs as they are not as vertically integrated. Hence, adjustment for such differences may be warranted to derive the cost of an (hypothetically) equally efficient competitor.

11. The diagram below shows the difference between these tests:

Imputation Test vs. REO Test



12. The TRA will typically rely on the costs of an Equally Efficient Operator, as defined above, in conducting imputation tests but, when it is not possible to allocate the dominant undertaking's costs to downstream and upstream operations, the TRA may use the costs of a non-integrated downstream competitor To test the price squeeze other fundamental issues to be taken into account are:

a) how cost and revenues are allocated between products and upstream and downstream business units;

b) the measurement of the rate of return; and

c) the time period over which the profitability is measured.

13. The burden of proof in relation to allegations of anti-competitive behavior will remain TRA's responsibility notwithstanding the difficulty that may be experienced in obtaining and providing relevant evidence of such behaviour whether from complainants, from the company under investigation or from third parties.

14. Summarizing, TRA therefore will typically require evidence of

- costs and revenues allocation systems, pricing structures, cost of capital and appropriate rate of return as well as other financial and accounting information;
- information about products aggregation, customer number and traffic volumes
- business plans and internal strategic documentation specifically related to the business under investigation.

15. Some of the relevant issues and more specific guidelines to the evidence required are further explained in the following paragraphs.

Accounting information requirements

16. Margin squeeze is in practice an assessment of profitability which in turn requires an assessment of:

- costs
- revenues
- profitability

17. There are alternative ways to measure and assess each of the above, and TRA will therefore define the most relevant option depending on the circumstances on a case by case basis.

Costs standards

18. Typically, the appropriate measure of costs is the lower of avoidable and incremental costs.

- Avoidable costs refer to those costs that the vertically integrated operator could avoid if it decided to close its downstream operation but continue to provide the related wholesale inputs to other licensed operators.
- Incremental costs refer to the cost that another licensed operator would have to incur if it were to efficiently operate in or enter the retail market.

19. The cost standard adopted for the test has implications for the profit margin of new entrants and potential competitors. Adjustments to capture the impact of a reasonably efficient entrant provide potential entrants with a sufficient large margin to ensure they have the incentive and the ability to enter and operate in the market.

20. The TRA considers that an EEO LRAIC cost standard is consistent with competition based on merit, and with the assumption of asymmetric information between the incumbent and the retail operation of the new entrant. The use of LRAIC as a cost floor for retail activity provides a better basis for build and buy decisions. TRA, however, also recognizes that, depending on market circumstances, prices above LRAIC could potentially be required to recover common costs and joint costs based on different demand levels and to minimize the risk of cross subsidization. In some instances, therefore, a Fully Allocated Cost (FAC) is effectively the price ceiling with the price in a competitive market is consequently expected to fall within those two categories.

Revenues

21. Revenues must be allocated between the different "businesses". In some cases, one "business'" costs are another's revenues, raising complex transfer pricing questions. Where flat rate tariffs are introduced, or revenues are comprised of both a flat rate tariff and a variable unit-based charge, this raises additional complexities. Similarly, complexities are introduced when revenues are bundled.

Profitability

22. Finding an appropriate rate of return may also be difficult. The initial challenge is to define which rate of return is preferable:

    - Return on Turnover (ROT) or Return on Capital Employed (ROCE)
    - Weighted Average Cost Of Capital (WACC)

23. The appropriate rate of return might differ for the EEO and REO test cases. For example, the retail division of a vertically integrated firm might have a lower cost of capital because integration reduces some types of business/financial risks. Therefore, the appropriate rate of return depends on the retail costs used:

    - In the EEO case, the rate of return should be that of the retail division of the vertically integrated operator.
    - For the REO test case, the rate of return should either be an average of the rates of return of similar alternative operator or the rate of return that a hypothetical alternative operator would require to enter in that specific retail market.

24. In either case, there are complexities in identifying the right rate of return:

- The WACC for the vertically integrated operator may only be available for the company as a whole and it may be difficult to identify a stand alone WACC for the retail division only.
- Trying to benchmark rates of return of alternative efficient operator may prove difficult as many of these providers are privately held and do not disclose disaggregated financial information. Alternatively, the rate of return may be obtained by adjusting upwards the WACC for the retail division of the dominant operator as alternative operators usually bear more financial and operational risks.

Annex 6: Bundling and Tying

Definition

1. Bundling or tying occurs when a product is offered by a service provider under the condition that another product or service is also bought. There are two basic types of bundling. The first type is, “pure bundling”, where the service provider selling the bundle chooses only to sell the package and not the stand alone products. The second type of bundling is “mixed bundling”, where the service provider selling the package also sells the stand alone products. Another strategy consists involves the supply of one service (the tying product) conditional on one or more other services (the tied products) being supplied, commonly referred as tying.

2. Bundling is typically intended to provide customers with better product sets or offers in a more cost effective way. In many cases bundling can be beneficial both for consumers and service providers. For example bundling is often undertaken to take advantage of the economies of scope generated from the bundled products, and the economies of scale if the bundling conduct has significant impact on demand. Ultimately, consumers will benefit from lower retail prices and improved quality.

3. Economies of scope from bundling may arise both at wholesale (i.e. sharing key parts of the networks) and/or at retail level (i.e. sharing of marketing costs, joint billing and customer service), even though these are more likely to be significant at retail level, given that at wholesale level economies of scope of multi-products firms will exist independently from the provision of the bundled products. Bundling may also lead to savings in production, distribution or transaction costs.

4. Besides those supply side efficiencies rational there also other important motivations that generate efficiencies on the demand side for bundling:

    - As a tool to reduce price inefficiencies, i.e. via price discrimination

- Greater exploitation of consumer's willingness to pay, i.e. when customers have heterogeneous and negatively correlated valuations of different products the service provider produces.

5. TRA will consider whether these efficiencies gains are passed on consumers with adjusted prices for the bundled products.

6. However, bundling can also be used as anticompetitive tool to leverage market power from monopolistic markets into otherwise potentially competitive markets i.e. a service provider that is also dominant in one or more products of the bundle offer may harm competition by foreclosing the market for the other product that are part of the bundle

7. TRA takes the view that, given that impact of bundling is not a clear cut but can either enhance efficiency and competition or be an anti-competitive conduct increasing the barriers existing into a market, will assess bundling conduct on a cases by case basis.

Evidence required

8. Typically, the risk of anti-competitive conduct for bundling involves both pricing and non pricing strategies.

9. In the first instance, a service provider will only supply the services for which it has substantial market power within the bundle product, in order to capture the sales of other service in the bundle for which it faces competition. Alternatively the service provider could also use non pricing bundling strategies to increase the barriers to entry and expansion into the market.

10. TRA when dealing with non pricing bundling strategies will consider a number of elements which could help to identify its anti-competitive nature:

    - The current state of competition in the various markets of the bundled products, and the extent of market power the service provider has in one or multiple products within the bundle, including whether the services included in the bundle involve new or emerging technologies. The greater the number of products in relation to which there is a dominant position, the greater the likely anti-competitive foreclosure effects. For example, a service provider may be dominant in the market for access to telephony service at a fixed location and may seek to bundle the provision of competitive mobile services with the fixed service. Such a bundle would raise anti-competitive behaviour concerns and would lead to an examination of whether there is a leveraging of a dominant position in relation to one service to gain an unfair competitive advantage in the market for other, competitive, services.

- The likely future take up of the bundled products and the relationship between the services provided within the bundle, such as whether the bundled products are complementary or a combination of wholesale and retail products which typically magnify the anti-competitive impact of bundling. For example, access and call (or usage) services in a bundle are complementary and if such bundles are offered as options they may well address customer expectations and convenience. As a further example, if a dominant service provider which is vertically integrated charges a bundled price for the provision of wholesale services with non-complementary retail services in such a way that the downstream rival would not be able to replicate and in order to enhance its position in the market where it does not have significant market power (i.e. vertical leverage). As a further example, if a vertically integrated dominant service provider charge a price for the bundled provision of wholesale services with non-complementary retail services in order to enhance its position in a market where it does not have significant market power (i.e. via vertical leveraging) then this would raise anti-competitive behaviour concerns.
- Non price terms and conditions of the bundled services. The risk of anti-competitive foreclosure is expected to be greater where the dominant undertaking makes its tying or bundling strategy a lasting one, for example through technical tying which is costly to reverse.

11. When products are offered in bundles often this means offering them at discounted retail prices as compared to services that are supplied individually. In this context assessing the pricing effects of bundling may involve testing for predatory or margin squeeze strategies within multiple products.

12. With predatory pricing, TRA will assess whether the service provider is pricing its product or services below its cost of production such that it sacrifices its short term profits. In margin squeeze cases TRA will assess the replicability of the bundle by identifying whether the margins between the prices for one or multiple wholesale inputs and the retail prices of one or multiple downstream services are sufficient to cover the retail costs of the integrated service provider.

13. In both cases the cost and revenues/price benchmark to use are key elements for the assessment of foreclosure. While the issues around which costs standard to use, together with the data and information required from the operators, have been discussed in Annexes 3 and 5 of this Guideline.

14. TRA, additionally, recognizes that imputation or the reasonably efficient operator test (also known as the 'replicability test' for multiple products may add further complications to its assessment, for example:

- The market of concern may be narrower than the bundle – TRA may remove all the price and cost information relating to the non relevant market;
- The market of concern may include bundled and unbundled products – TRA may need to weight the price and cost information to reflect the ratio between bundled and unbundled products;
- Competitors may not be able to supply all products provided within the bundle – TRA where possible will try to assess the replicability of the single products when supplied on an unbundled basis.

15. As noted in paragraph 11, TRA may assess bundled service offers using Replicability Tests. Replicability as a concept is an imputation test which assesses in practice whether an operator that is equally efficient to the service provider offering the bundle is able to replicate the bundled offer under the same conditions in order to compete with the offeror. Replicability tests should validate that a bundle offer could be replicated by competitors either by their own means or by using the wholesale products provided by the offeror. If the bundled services offer is replicable in this sense, then it will not be considered to be anti-competitive.

16. TRA will also use non pricing information, as described at paragraph 8, to complement the analysis of pricing strategies within bundled products.

17. Box 1 provides a case study for bundling tests at ex-ante level using a combinatorial price squeeze test. The TRA will typically apply Method 3 (as detailed in the box in the OPTA case) in situations of alleged price squeezing via bundles in Oman. This method can be readily applied by operators themselves to ensure that they are not in breach of prohibitions on anti-competitive behaviour of this type

Box 1. The OPTA Ex-ante Combinatorial Price Squeeze Test (CPST)

As far as bundles are concerned, OPTA has designed a so-called "Combinatorial Price Squeeze Test" (CPST). There are 3 variants in which to use this test.

Method 1: **bundle discount should not be greater than the margin on the regulated service**: The method 1 variant of the CPST means that the bundle discount cannot be higher than the margin between the individual price and the cost of the regulated service in the bundle. In other words, when the bundle includes a regulated service the difference in between the discount offered on the bundle should be no greater than the margin on the regulated service itself. In that case the bundle is considered a “green service” and no ex-ante approval by OPTA is required;

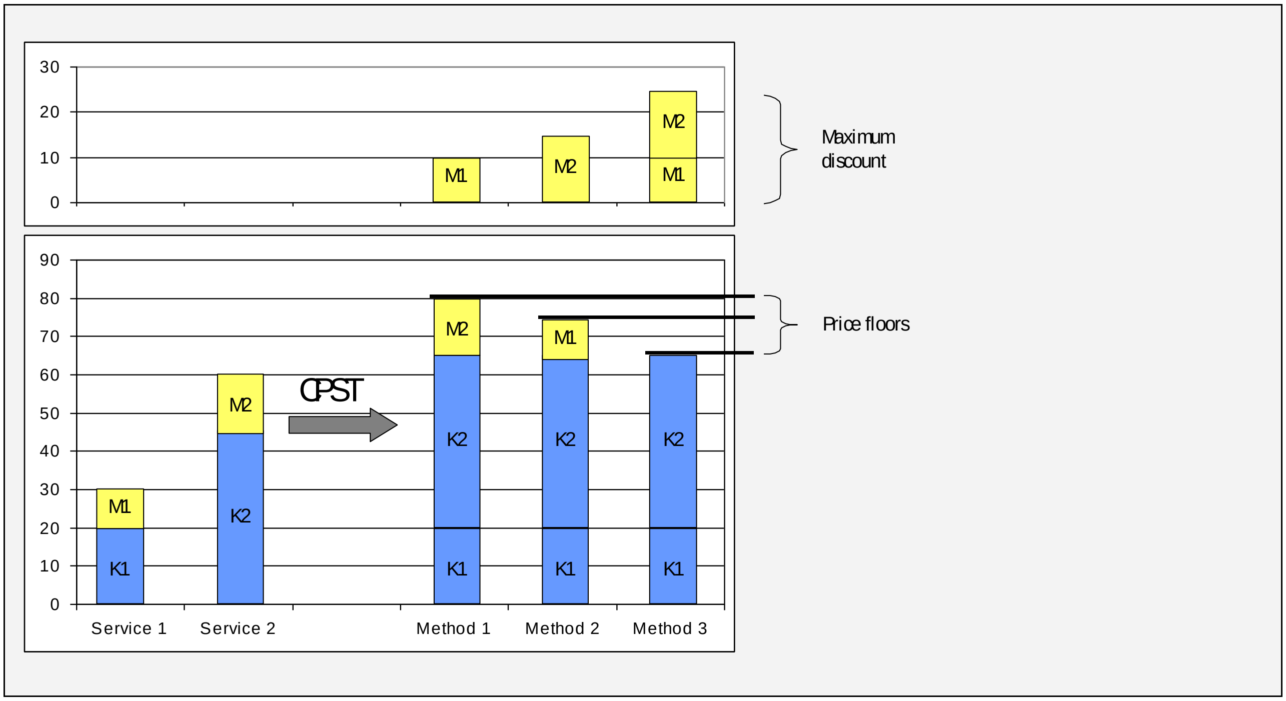
Method 2- positive margin on the unregulated service in the bundle: According to the method 2 variant of the CPST, the unregulated service must still show a positive margin, when the bundle discount is completely contributed to this unregulated service.

Method 3- price of the bundle greater than all its costs: In the method 3 variant of the CPST, the price of the bundle must be equal or higher than the sum of the costs of the services in the bundle (corrected for cost advantages due to the bundle offering). If the bundle price is higher than these underlying costs, the bundle is considered a “green service” which does not require ex-ante approval by OPTA. If the bundle price is lower, then it is considered an “orange service” which needs prior approval by OPTA. Only if the SMP operator can demonstrate that the bundle price is not anticompetitive OPTA will approve the tariffs in this case.

Example 1

- Assume a bundle consists of two services: service 1 is regulated and service 2 is not regulated;
- Service 1 has costs 20 and revenues 30; the margin is therefore equal to 10;
- Service 2 has costs 45 and revenues 60; the margin is 15;
- According to CPST, method 1, the maximum discount in the bundle is 10 (that is, the margin on the regulated service);
- According to CPST, method 2, the maximum discount is 15 (that is, the margin on the unregulated service);
- According to CPST, method 3, the maximum discount is 25 (that is, the sum of the margins on the regulated and unregulated services);
- If the individual price of the regulated service 1 is 30 and that of the unregulated service 2 is 60, then the bundle price is not allowed to be lower than 80 under method 1; 75 under method 2; and 65 under method 3.

The diagram below illustrates this example, where K1 is the cost of service 1, K2 the cost of service 2, M1 is the margin on service 1, and M2 the margin on service 2.


30
20
10
0
M2
M1
M2
M1
Maximum discount
90
80
70
60
50
40
30
20
10
0
M1
K1
M2
K2
CPST
M2
K2
K1
M1
K2
K1
K2
K1
Price floors
Service 1
Service 2
Method 1
Method 2
Method 3

Annex 7: Vertical restraints

Definition

1. Vertical restraints occur when contractual arrangements between upstream and downstream firms extend beyond simple arms-length pricing in ways which restrain their business options.

2. Service providers sometimes enter into vertical restraints that are likely to improve efficiency and so enhance welfare. Certain types of vertical restraints may also have beneficial effect on efficiency and competition, by serving to align the incentives of otherwise independent firms and by strengthening their commitment to their commercial relationship. Vertical restraints can eliminate situations of double marginalization in which a wholesale takes a margin and the retailer adds a second margin, taking the first as given. By doing so, lower outputs and profits over the whole chain can arise compared to a vertical restraint agreement in which the wholesale margin is effectively eliminated in the price setting decision for the product.

3. Vertical restraints can also raise savings in marketing and transaction costs of the parties. For example, the restrictions can help to ensure that all complementary functions — i.e. all functions that help the operations of both firms — are performed efficiently from a joint perspective, with the result that the customer receives a better service. All of these effects can lead to stronger and more effective competition.

4. However, vertical restraints could be used to prevent or reduce competition and they may, therefore, also reduce welfare. In some circumstances, the same vertical restraint could both increase the efficiency of operations and reduce competition: in such a case, the net welfare effect would depend on the balance between the two opposite effects, and the analysis will include considering whether there were other ways of achieving the benefits with less adverse effect on competition.

5. Below we provide a list of the most common types of vertical restraints:

- Non-linear Pricing: Two-part tariff with a fixed fee (also referred to as franchise fee) plus a constant per-unit charge or an aggregated rebate scheme with discounts for taking full product range;
- Quantity Forcing: A specified minimum quantity a downstream firm is required to distribute;
- Service Requirements: A specified level of pre- and post-sales service or promotional effort or the exclusive use of ancillary services or equipment/platform provided by upstream firm;
- Resale Price Maintenance: Retail price fixed by upstream firm, can also take the form of a price floor or price ceiling;
- Refusal to Supply: Selective distribution limiting the number of downstream firms able to sell given products/services;
- Exclusive Distribution: Downstream firms assigned exclusivity within a geographic area or over a particular class of consumer or products/services
- Exclusive Dealing: Downstream firms are prohibited from selling products/services from other upstream firms;
- Tie-in Sales: Downstream firms contractually required to take other products/services.

6. The likelihood that an efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those parties face competition within the relevant market.

Evidence required

7. The fact that vertical restraints may have either positive or negative welfare and competitive effects means that *per se* legal rules are highly unlikely to be appropriate in this part of ex-post competition assessment. Instead, any judgment on the overall effect of a given vertical restraint on competition and on welfare needs to rely on economic analysis of the case under consideration and firm empirical evidence.

8. The TRA will adopt an approach based on three key questions which provide a checklist to give an initial indication, prior to any full-scale investigation, of whether it is likely that a particular set of vertical restraints would be operating against the public interest. The approach is summarized in the table below.

Question	Relevant evidence
1. Is there significant horizontal market power at either upstream or downstream or both levels? (If not, issues of vertical-restraint are not likely to be of much importance)	Substantial mark ups at either or both upstream / downstream levels by comparison with products having similar characteristics; High profits Stable and substantial market shares High and stable market concentration
2. Is the reduction in product/service variety resulting from reduced competition important to the consumer? (If so, it is more likely that a vertical restraint has competition implications)	Moderate or low cross elasticities of demand between products/services. Moderate or low cross elasticities of demand between downstream firms. In mixed regimes, transfer price to constrained downstream firms being significantly above those to unconstrained firms
3. Are there significant indications of efficiency gains associated with the vertical-restraint in place? (If so, there may be an efficiency justification for the vertical restraints)	Economies of scope Search cost (for consumers to make informed decisions) Type of good sold (weaker case for simple / inexpensive products/services with repeated purchases). Mutual agreement rather than evidence of imposition.

Annex 8: Unduly long term contracts

Definition

1. Unduly long term contracts in retail and wholesale markets may be anti-competitive where they:

    a. unduly lock-in customers and prevent them from taking advantage of later alternative services and offers in the market; or

    b. have the intention or effect of weakening competitors, particularly new entrants to a market, by removing significant parts of the demand from being contestable for a long period of time.

2. Unduly long contract terms may be associated with other anti-competitive behaviour described in earlier Annexes including:

    a. Price discrimination

    b. Bundling and tying

    c. Horizontal agreements

    d. Vertical restraints

3. Long term contracts however may also represent an economic rational strategy for the operators to recover their fixed costs. For example, in the mobile industry resale, MVNO or sharing agreements are relatively long-term and typically have periods of notice that are proportionately long.

Evidence required

4. Whether the term of a contract is unduly long so as to raise issues of anti-competitive behaviour will depend on many contextual factors which will be considered by the TRA. These factors include:

    a. Whether the offer of a long contract term is one of many options available to a customer and whether the other options provide shorter contract terms;

b. Whether long term contracts are offered with the intent or effect of keeping a competitor out of the market or preventing entry to the market, in which case the time at which such contracts are introduced will be an important consideration;

c. Whether the inducements to customers to enter into long term contracts are reflective of the different costs that will be saved by the service provider involved;

d. Whether there are contractual penalties or undue cancellation fees of any kind that prevent the customer from cancelling or terminating the contract before the expiry of the contract period that are not reasonably reflective of the costs that might reasonably be incurred by the service provider in the event of such early termination; and

e. Whether there are equivalent contracts being offered by other competitors in the same services market.

5. The TRA will weigh up the advantages that accrue to customers against disadvantages, if any, that are raised for competition as a result of such contracts. In doing so, the TRA will attempt, where possible, to assess the proportion of the demand for the relevant services in the market that are actually and potentially subject to such contracts.