Communications Regulatory Authority
State of Qatar

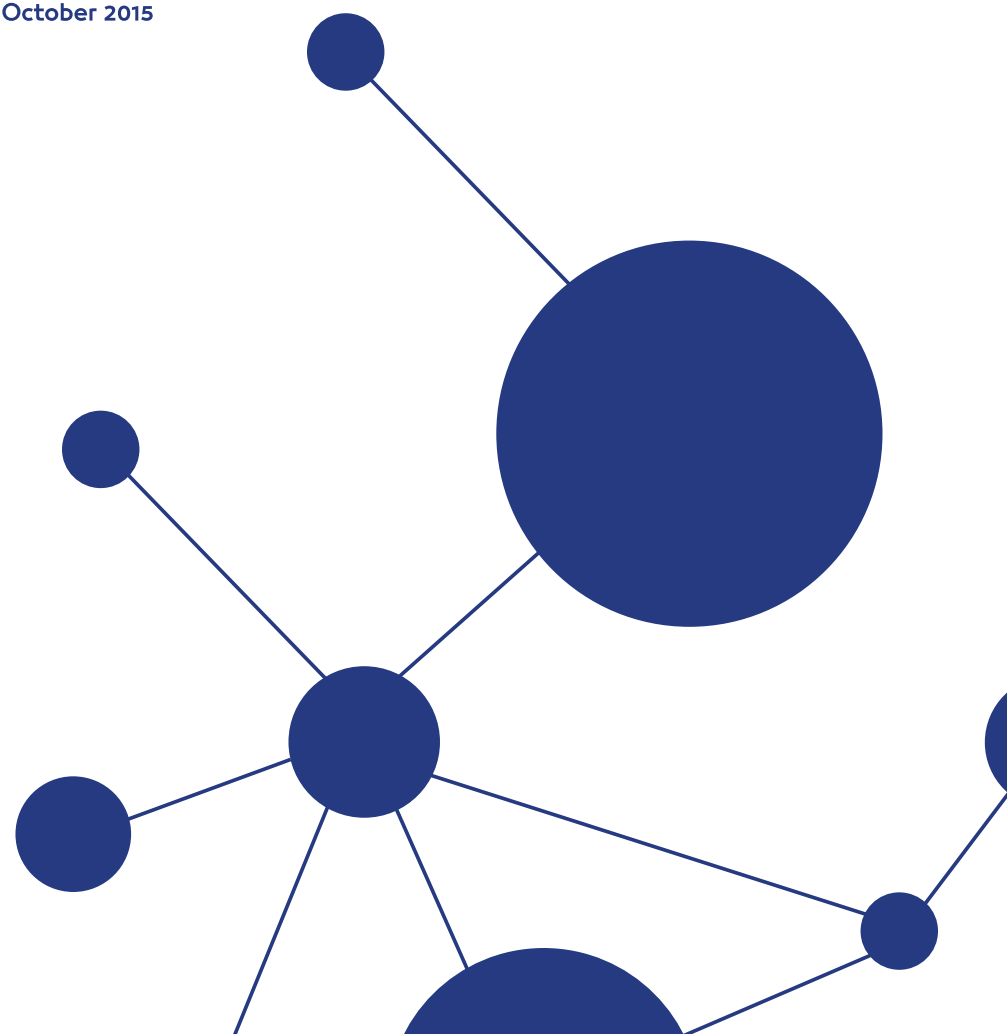
هيئة تنظيم الاتصالات
دولة قطر

COMPETITION POLICY

October 2015

COMPETITION POLICY

October 2015



The Competition Policy comprises the Statement of Competition Policy document together with the accompanying Explanatory Document.

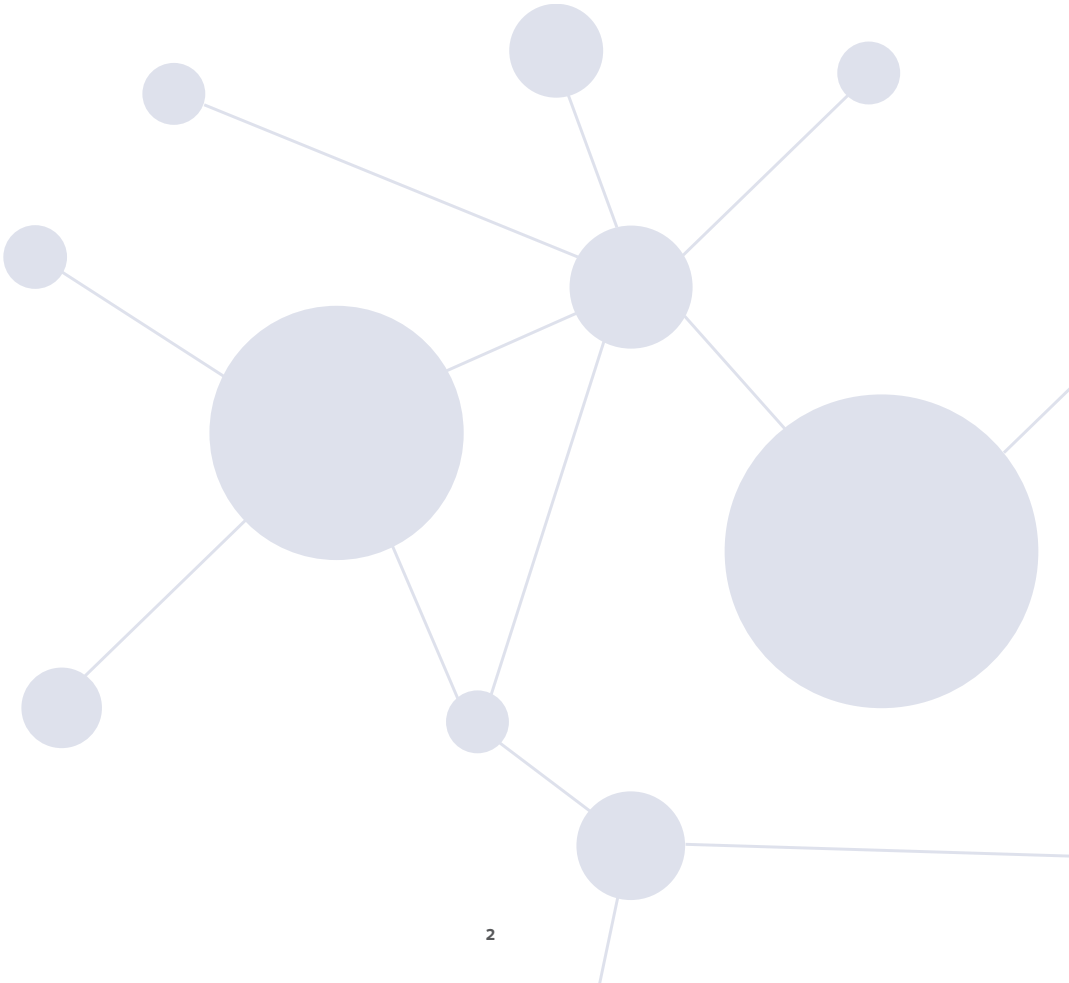


Table of Contents

Statement of Competition Policy

Explanatory Document

Part 03. **Abuse of a dominant position**

Part 04. **Merger and transfer of control**

STATEMENT OF COMPETITION POLICY

PART 01.
INTRODUCTION

Part 01. introduction

The Communications Regulatory Authority (the "Authority") is empowered to regulate telecommunications, post and access to digital media in the State of QATAR under Decree Law 42 of 2014.

Its key objective is to encourage and support an open and competitive Information & Communications Technology (ICT) sector that provides advanced, innovative, and reliable communications services in the State of Qatar.

The Authority has developed a Competition Policy in line with this statutory objective and the principles of regulation set out in the Decree Law No. (34) of 2006 ("Telecommunications Law") and in the Authority's Policy Statement of June 2014, which focuses upon enhancing the role of competition as a catalyst for investment and innovation.

The purpose of the Competition Policy is to create a stable and certain environment in which market participants understand under what circumstances the Authority will undertake ex post investigations in relation to potential anti-competitive behavior as well as the main criteria guiding its decisions.

The Competition Policy comprises this Statement of Competition Policy and an accompanying Explanatory Document. This Statement of Competition Policy details the conduct that may infringe the competition related elements of the Telecoms Law and summarizes how the Authority will assess the implications of mergers and transfers of ownership and control on competition in the relevant markets. The Explanatory Document provides more detail of the approach that the Authority would take in investigating the forms of behavior which could be anti-competitive, or when assessing the impact of mergers or transfers of control on markets.

The Competition Policy should be considered as complementary to other regulatory measures imposed by the Authority, including ex ante regulations placed on Service Providers.

All persons under the remit of the regulatory framework must comply with the Competition Policy as it is an enforceable regulatory instrument. Any decision taken by the Authority in implementing the Competition Policy is final and binding and may be used in any court proceedings.

The Competition Policy may be reviewed from time to time after any amendments being made available to interested parties for review and comment.

The Authority's approach to investigating complaints, and instructions on how to make a complaint, are set out in its published "Ex-Post Investigation Procedures". The Authority's approach to assessing market definition and market power are set out in its "Notice of the Standards, Methodology and Analysis to be applied in the Review of Market Definition and Dominance Designation and for Ex Post Competition Policy Investigations in the Telecommunication Sector in Qatar" (the "Methodology document").

The structure of the remainder of this Statement of Competition Policy is as follows:

- Section 2 describes the conduct, arrangements or concerted practices that constitute "anti-competitive practices";
- Section 3 describes the conduct that can amount to an abuse of a dominant position;
- Section 4 explains the Authority's approach to assessing the effects of mergers and transfers of control on competition in relevant markets; and,
- Section 5 explains how the Authority will determine appropriate remedies if it finds that a breach of this Competition Policy has occurred.

PART 02.

CONDUCT, ARRANGEMENTS OR CONCERTED PRACTICES THAT CONSTITUTE "ANTI-COMPETITIVE PRACTICES"

Part 02. Conduct, arrangements or concerted practices that constitute "anti-competitive practices"

Article 41 of the Telecommunications Law prohibits service providers from engaging in anti-competitive practices and Article 45 of the Telecommunications Law prohibits any "person" from engaging in any practices that prevent or substantially lessen competition. This section summarizes the key elements of this prohibition. Section 2.1 describes how agreements may prevent or substantially lessen competition and so infringe the Article 41 and Article 45 prohibitions and summarizes the different types of agreements that may be prohibited. In certain cases the Authority may not regard agreements as infringing the Telecommunications Law where the agreement generates efficiencies which offset a lessening of competition. Section 2.2 describes how the Authority will consider potential efficiencies that may be generated.

2.1 Agreements that may prevent or substantially lessen competition

Practices that involve some form of an agreement or concerted practice between independent undertakings which restrict normal competitive conduct can prevent or substantially lessen competition. Therefore, while the Authority recognizes that agreements can be an essential part of trade and most agreements do not have anti-competitive intent or effects, some agreements can prevent or substantially lessen of competition.

The Authority categorizes prohibited agreements as either having a restriction of competition as their "**object**"; or otherwise, being an agreement which has the "**effect**" of preventing or substantially lessening competition.

Agreements which restrict competition as their "object" are, by their nature, highly likely to prevent or substantially lessen competition. Therefore when investigating such agreements, the Authority will presume that such agreements lead to a prevention or substantial lessening of competition.

The Authority will consider a substantially lessening competition a significant loss of rivalry between actual or potential competitors occurring if entry or expansion on the market is made more difficult as a consequence of the agreement.

Where agreements do not have as their object a restriction of competition, the Authority will examine the effect of the agreement to determine whether it prevents or substantially lessens competition.

Agreements which **restrict competition by their object** include (but may not be limited to):

- price fixing;
- output limitation;
- sharing of markets and customers;
- bid rigging;
- limiting or controlling investments in or use of R&D; and,
- agreements for fixed and minimum resale price maintenance.[1]

The prohibition can apply to different types of anti-competitive horizontal and vertical agreements.

Horizontal agreements are agreements and concerted practices between undertakings, which operate at the same level of the production or distribution chain. Generally, horizontal agreements may prevent or substantially lessen competition in many ways, such as:

- by limiting the possibility of the undertakings competing against each other or against third parties;
- by reducing the independent decision making of the parties as a result of their substantial asset contribution to a common project, such as a Joint Venture;

1 Note that this list is not exhaustive and other arrangements may also constitute an anti-competitive agreement by object.

- by reducing the independent decision making of the parties by aligning significant financial interests of each party to the agreement;
- disclosing strategic information and thus increasing the likelihood of coordination within or outside the field of cooperation covered by the agreement; or
- by leading to commonality of costs which makes coordination on prices and output easier.

The accompanying Explanatory Document explains how different forms of agreement may be prohibited by the Telecommunications Law including:

- price / output fixing;
- market sharing;
- fixing of trading conditions;
- bid rigging;
- information sharing;
- group boycott;
- joint purchasing; and
- limiting or controlling investments in or use of R&D.

This list is not exhaustive and the Authority may, under certain circumstances, judge that other forms of horizontal agreements also have anti-competitive object or effect.

Vertical agreements are an essential part of most trade transactions. They can include any agreements to supply, license, distribute, procure agency, or franchise. Generally, vertical agreements are less likely to have anti-competitive effects than horizontal agreements because they relate to different parts of the production and distribution chain. Even if they restrict the commercial freedom of one or more parties to the agreement, they can bring about many benefits, such as aligning incentives for the parties to the agreement at different levels of the production and distribution chain. The Authority will thus assume that vertical agreements generally do not prevent or substantially lessen competition unless a specific decision concludes otherwise.

However, vertical agreements can prevent or substantially lessen competition where they:

- raise barriers to entry or expansion or lead to anti-competitive foreclosures of other suppliers or buyers; and
- soften competition or facilitate collusion between the supplier and its competitors or between the buyer and its competitors.

The accompanying Explanatory Document explains how different forms of Vertical agreement may be prohibited by the Telecommunications Law including:

- exclusive distribution agreements;
- single branding;
- resale price maintenance;
- limited distribution; and
- market partitioning.

For the avoidance of doubt, this list is again not exhaustive and there may be other vertical agreements that can have anti-competitive effects, which the Authority will investigate on a case-by-case basis.

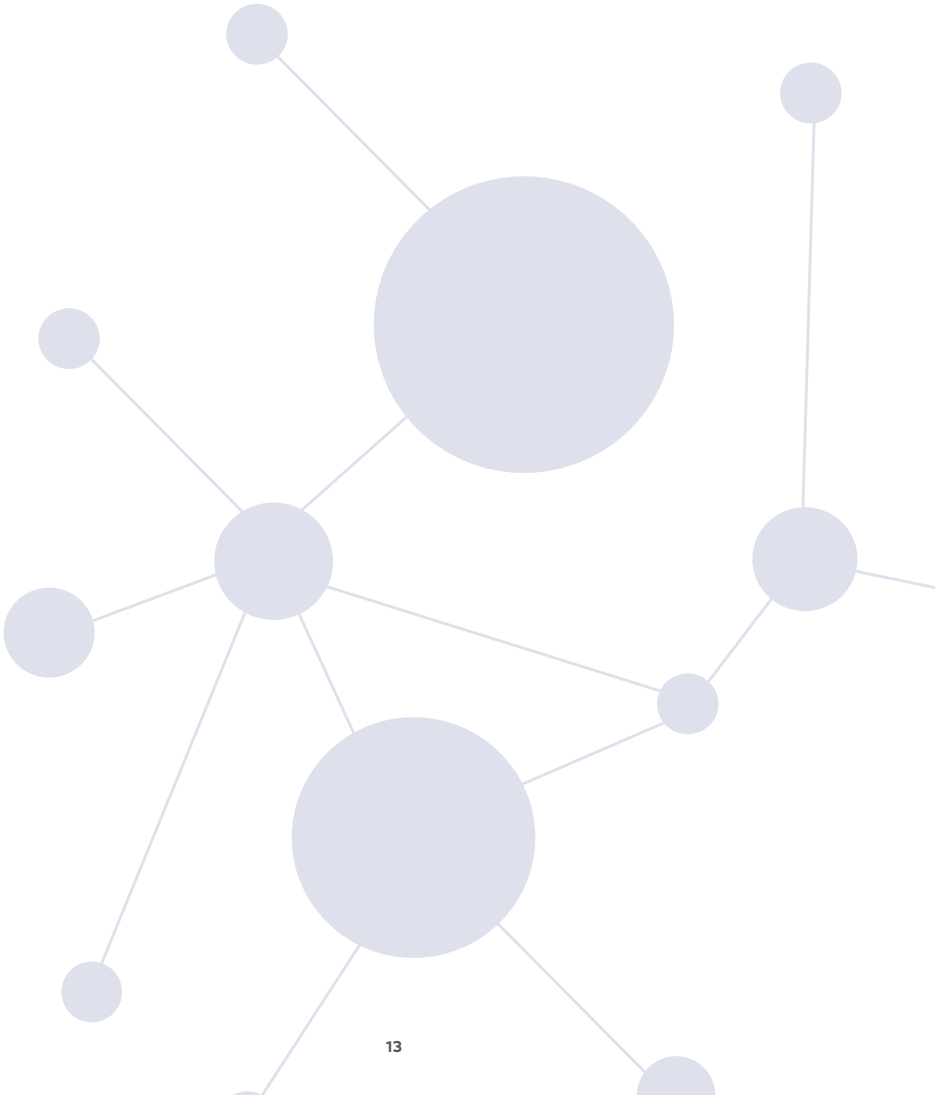
2.2 Efficiency justification

While certain agreements may have the effect of preventing or substantially lessening competition, they may also bring about off-setting economic benefits. The Authority will decide whether to permit such agreements on a case-by-case basis by considering whether and to what extent the economic benefits of an agreement outweigh its negative effects on competition. To “defend” an otherwise anti-competitive agreement or concerted practice, the parties involved will need to demonstrate that all of the following criteria are simultaneously fulfilled:

- the agreements generate efficiency gains;
- a fair share of the efficiencies are provided to consumers;
- the agreement is indispensable to the generation of the efficiencies; and,

- the agreement does not lead to an elimination of competition.

For the avoidance of doubt, the Authority does not preclude the possibility that agreements with object restrictions could generate sufficient efficiencies of the kind described to off-set any potentially anti-competitive effects. However, it considers that it would be unlikely that this could be the case, and notes that the burden of proof is on the parties wishing to claim the benefit of the efficiencies.



PART 03.

ABUSE OF A DOMINANT POSITION

Part 03. Abuse of a dominant position

Article 41 of the Telecommunications Law prohibits Service providers designated as having significant market power or a dominant position from abusing their dominance. Article 43 of the Telecommunications Law and Article 75 of the Telecommunications By-Law describe the types of conduct that may amount to an abuse of dominance and thus be prohibited.

Section 3.1 describes the types of conduct that can amount to an abuse. Section 3.2 provides more details of the circumstances that the Authority will consider, in determining whether conduct, which might otherwise be an abuse of a dominant position, is justified.

3.1 Types of conduct that can amount to an abuse

For the avoidance of doubt, the Competition Policy does not prohibit the holding of a dominant position in itself but the abuse of it. However, firms that have a dominant position have a special responsibility not to allow their conduct to impair genuine undistorted competition.

Abuse of a dominant position can be targeted at potential competitors (exclusionary abuses), or at consumers or suppliers (exploitative abuses).

- **Exclusionary abuses** can prevent or substantially lessen existing and potential future competition in a relevant market, for example either through weakening existing competitors, establishing barriers to entry or foreclosing the market. In this instance, dominant firms often forego profits in the short run in order to increase profits in the longer run. Such behavior could harm consumers by reducing competition, inducing higher prices, reducing customer choice or reducing incentives for investment and innovation.
- **Exploitative abuses** can extract rents from consumers or suppliers. These abuses can relate to price or non-price conditions imposed by a dominant operator. For example, the dominant firm may use its market power to charge excessively high prices to consumers or to reduce payments to suppliers. Such behavior directly harms consumers or suppliers.

The potentially abusive conduct can be further categorized as price based conduct or non-price based conduct. The following are examples of price and non-price based conduct which could amount to an abuse of a dominant position, however, the list is not exhaustive.

Examples of priced based abuses include:

- margin squeeze;
- anti-competitive rebates, discounts and loyalty schemes;
- unjustified price or non-price discrimination;
- cross-subsidization;
- excessive pricing;
- predatory pricing;

Examples of non-priced based abuses include:

- refusal to supply;
- anti-competitive bundling and tying, including exclusionary tying;
- customer lock-in through contract length; and
- exclusive distribution agreements.

3.2 Defenses or justification for otherwise anti-competitive conduct

When investigating alleged abuses of a dominant position, the Authority will consider whether there is any reasonable justification for the conduct in question, in which case it may choose not to make an infringement decision if the investigated service provider can demonstrate that:

- has an objective justification, or
- the conduct leads to demonstrable efficiency gains which would not otherwise be achievable and which benefit consumers.

3.2.1 Objective justification

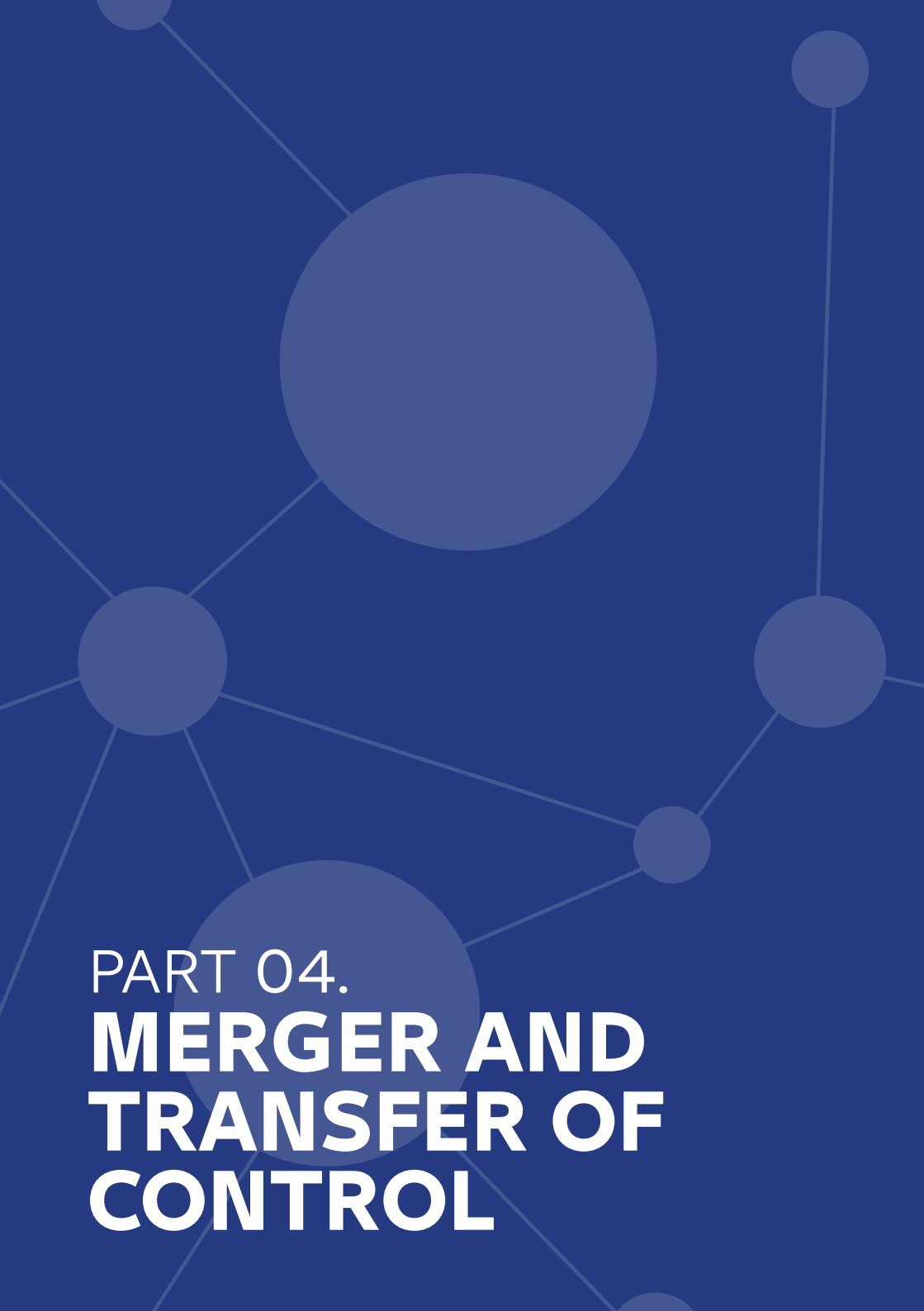
To justify abusive conduct on the basis of objective necessity, the dominant firm will need to demonstrate that **simultaneously**:

- the conduct is indispensable to the provision of the respective product or service (for example for technical or health and safety reasons), and
- the conduct is proportionate to the provision of the respective product or service, i.e. the provision cannot be achieved in a manner less harmful to competition.

3.2.2 Efficiency justification

To justify abusive conduct on the basis of efficiency gains, the dominant firm will need to demonstrate that the conduct produces efficiencies that outweigh the anti-competitive effects on consumers. This would be the case if the following four criteria were **simultaneously** fulfilled:

- the conduct brings efficiency gains by, for example, reducing costs for the provision of the services in question, and the efficiency gains are passed on to consumers;
- these efficiency gains cannot be achieved without the conduct, i.e. the conduct is indispensable to the efficiency gains;
- the efficiency gains outweigh the harm to competition and negative effects on consumer welfare resulting from the anti-competitive conduct; and
- the abusive conduct does not eliminate effective competition and thus reduce consumer welfare in the long term.



PART 04.

MERGER AND TRANSFER OF CONTROL

Part 04. Merger and transfer of control

Article (47) of the Telecommunications Law requires that parties directly involved in a merger or transfer of control are required to notify the Authority of the transaction for approval. Article (47) of the 2006 Telecommunications Law provides that "The General Secretariat in determining whether to approve such transfer, or approve it subject to conditions or reject it shall take into account the effects of the proposed transfer on telecommunications markets in the State and in particular its effects on competition in such markets and the interests of customers and the public."

This section summarizes how the Authority will assess the effects of the proposed merger on competition when deciding whether to approve the merger, reject it, or approve it with conditions. Section 4.1 summarizes the Authority's assessment of the negative effects on competition resulting from different types of merger; section 4.3 summarizes the Authority's assessment of efficiency effects of mergers; and section 4.4 describes the potential remedies that the Authority may consider in approving a merger.

4.1 Assessment of the negative effects of the transfer of control on competition

An assessment of the impact on competition of a merger or transfer of control will compare the negative and positive impacts it has on the market against a counterfactual of no merger (following the identification and definition of relevant markets).

The negative competitive impacts of the merger relate to any the lessening of competition resulting from the merger. The Authority's assessment will depend on the type of merger being considered. The sections below summarize the Authority's approach for each of:

- Horizontal mergers;
- Vertical mergers;
- Conglomerate mergers; and,
- Full function joint ventures.

4.1.1 Assessing horizontal mergers

Horizontal mergers refer to mergers between service providers involved at the same stage of a supply chain, and who are competing with each other in the same market.

The Authority considers two principal ways in which horizontal mergers can lead to a substantial lessening of competition. These are **unilateral effects** and coordinated effects. A merger gives rise to unilateral effects where the merged service provider finds it profitable to increase prices regardless of the actions of its competitors. A merger gives rise to **coordinated effects** when the change in the market structure as a result of the merger means that the merged service provider and at least one other is more likely to reach a tacit agreement not to compete as strongly. The Authority will also consider whether the effects of the merger could be limited by the presence of countervailing buyer power.

4.1.2 Assessing Vertical mergers

Vertical mergers refer to mergers between firms involved in different levels of the supply chain. These mergers are less likely to raise competition concerns because the merging firms are not direct competitors. However, there are two ways in which vertical mergers can prevent or substantially lessen competition. These are the effects of input foreclosure and customer foreclosure.

Input foreclosure concerns arise when a merger leads to a vertically integrated service provider which has the market power and incentive to restrict access to an important input. **Customer foreclosure** concerns arise when a merger leads to a vertically integrated service provider which has the market power and incentive to restrict access to an important downstream customer.

4.1.3 Assessing conglomerate mergers

Conglomerate mergers refer to mergers between firms who have activities in different markets which are not vertically related. The Authority would consider whether a substantial lessening of

competition could arise because of the possibility of exclusionary practices, for example, if a merged firm could attempt to foreclose a market through bundling or tying sales across its markets.

4.1.4 Assessing full function joint ventures

The Authority will apply the same approach to assessing full function joint ventures as it does to mergers. A full function joint venture refers to a joint venture between two or more firms which is functionally autonomous[2]. A vertical joint venture would require consideration of input foreclosure and customer foreclosure effects on the market. A horizontal joint venture will need assessment of unilateral and coordinated effects. In assessing the potential for coordinated effects the Authority will consider the potential for information flows between the firms involved in the joint venture, which could affect competition in any of the markets where any of the firms involved are active.

Joint ventures which are not functionally autonomous would be assessed as agreements between the firms involved.

4.2 Assessing the substantial lessening of competition

In analyzing whether there is a substantial lessening of competition, the Authority would take into account the extent of unilateral effects, coordinated effects and foreclosure effects.

Key indicators of the potential presence and magnitude of unilateral effects will be, amongst others: market concentration, closeness of competition, customers' ease of switching, changes in price after the merger, elimination of strong competitive force, extent of competitor capacity constraints, barriers to expansion.

On the other side, the likelihood of coordinated effects will be assessed examining, amongst others, market dynamics, Internal and external sustainability of the tacit agreement.

Finally, when assessing whether a merger will lead to a substantial lessening of competition foreclosing competitors, the Authority will principally examine the ability to foreclose, the incentive to foreclose and the impact on competition.

4.3 Assessing efficiencies of the merger

While mergers can have an anti-competitive effect on a market through a lessening of competition, they can also generate benefits for consumers.

For the Authority to consider the efficiencies as benefits resulting from the merger, these efficiencies need to be merger specific i.e., they would not have been generated absent the merger, and could not be generated by other means; they need to be passed on to consumers; and verifiable in their expected presence and magnitude. The Authority will consider the incentives of the merged service provider for realizing and passing on to consumers the efficiency savings and the time frame in which the efficiency gains will be generated.

The merging parties may seek to demonstrate the generation of merger specific benefits and to assert in good faith that they will be passed on to consumers. However, the Authority will require robust and detailed evidence to justify the efficiency benefits resulting from the merger offset any potential harmful effects of the merger.

4.4 Remedies and undertakings

The Authority may approve a merger subject to further conditions which can remedy the substantial lessening of competition which would otherwise result from the merger. Such conditions can be structural remedies, such as the divestment of certain assets; or behavioral, such as undertakings or obligations.

2 This means it is likely to have its own resources and function, as if it were a separate entity distinct from any of its "parent" firms.

The Authority's approval of a merger using such additional conditions would depend on whether they are sufficient to offset any substantial lessening of competition resulting from the merger.

PART 05.

REMEDIES FOR INFRINGEMENTS OF COMPETITION ASPECTS OF THE TELECOMS LAW

Part 05. Remedies for infringements of competition aspects of the Telecoms Law

This section presents the remedial actions that the Authority can take if a service provider is found to have infringed the prohibition on abuse of dominant positions or other anti-competitive behavior in an ex-post investigation. The Authority sets out the remedies that it may consider, circumstances under which they might be applied.

The implementation of remedies is in accordance with the Telecommunications Law (2006) and Telecommunications By-Law (2009).

- Article (4) of the Telecommunications Law outlines that the Authority has the authority to enforce remedies in response to anti-competitive behavior;
- Article (46) of the Telecommunications Law provides that such remedies can include, but are not limited to, certain forms of obligations and referrals to the public prosecutor; and,
- Article (76) of the Telecommunications By-Law adds that the Authority may consult the relevant service providers when determining the appropriate remedy, and that this can include the divestment of assets.

This section explains how the Authority will apply behavioral and structural remedies.

5.1 Approach

The remedies applied by the Authority, whether behavioral or structural, are guided by the following objectives:

- **Effectiveness**. The proposed remedies must be able to successfully resolve the competition concerns in an efficient manner. This will involve ensuring that remedies must be sufficiently well targeted and do not have adverse competition effects, and are practical to implement.
- **Proportionality**. This concerns the regulatory burden imposed by the remedies and the appropriateness of the level of intervention to the abuse of market power. Considerations of proportionality would ensure that the implementation costs of the remedy do not outweigh its benefits.

Remedies may be behavioral remedies or structural remedies. **Behavioral remedies** refer to requirements which enforce a specific behavior on the service providers involved in the alleged infringements of the competition aspects of the Telecommunications Law. **Structural remedies** refer primarily to the divestment of assets of the service provider(s). This can involve separating distinct operational functions of the service provider(s) or divesting particular assets.

5.2 Interim remedies

The Authority will consider applications from Complainants to impose an interim behavioral remedy prior to reaching a final decision in certain cases. The Authority will consider applications for interim remedies where the Complainant can demonstrate that significant and irreparable harm would be likely to result in the absence of interim remedies.

5.3 Other remedial actions

The Authority may also respond to anti-competitive behavior with other remedial actions. Specifically, the Authority may accept binding commitments; require the infringing party to publically acknowledge the Authority's decision; may issue a warning to the relevant service provider(s); or refer the matter to the public prosecutor.

EXPLANATORY DOCUMENT

PART 01.
INTRODUCTION

Part 01. introduction

The Communications Regulatory Authority (the "Authority") is empowered to regulate telecommunications, post and access to digital media in the State of QATAR under Decree Law 42 of 2014.

Its key objective is to encourage and support an open and competitive Information & Communications Technology (ICT) sector that provides advanced, innovative, and reliable communications services in the State of Qatar.

The Authority has developed the Competition Policy in line with this statutory objective and the principles of regulation set out in the Decree Law No. (34) of 2006 ("Telecommunications Law") and in the Policy Statement of June 2014, which focuses upon enhancing the role of competition as a catalyst for investment and innovation.

Generally, the application of competition safeguards is dealt with through ex-ante regulatory instruments (i.e. as provided for under the Market Definition and Dominance Designation - MDDD) and ex-post instruments. These are mostly complementary. Ex-ante regulation operates prospectively – it is tailored to address particular challenges identified in the market, for example, access to bottleneck facilities. Imposing ex-ante regulation requires the Authority to conduct an analysis of the market and, on that basis, impose regulatory remedies to limit the potential for a dominant Service Provider to engage in anti-competitive behavior. Ex-post regulation is often described as "after the fact" – typically via an investigation of an operator's behavior in response to a complaint or which is conducted at the regulator's own initiative.

The Competition Policy comprises the Statement of Competition Policy and this accompanying Explanatory Document. The Statement of Competition Policy details the conduct that may infringe the competition related elements of the Telecoms Law and summarizes how the Authority will assess the implications of mergers on competition in the relevant markets. This accompanying Explanatory Document provides more details on the approach that the Authority would take in investigating potential anti-competitive conduct or mergers.

The Authority's approach to investigating complaints, and instructions on how to make a complaint, are set out in its published "Ex-Post Investigation Procedures". This document therefore focuses on the economic tests that would be applied in any investigation.

1.1 Scope

To support its policies in investigating ex post procedures, the Authority has published a Competition Policy, which includes the Statement of Competition Policy and this accompanying Competition Policy Explanatory Document.

The purpose of the Competition Policy is to create a stable and certain environment in which market participants understand under what circumstances the Authority will undertake investigations in relation to potential anti-competitive behavior as well as the main criteria guiding its decisions.

The Statement of Competition Policy sets out:

i. behaviors which are considered anti-competitive under the regulatory framework and other common forms of anti-competitive behavior . These are further categorized into anti-competitive behaviors which may be instigated by:

   a. any person, including all service providers i.e. on a symmetrical basis; and

   b. dominant service providers who are prohibited from abusing their domivnant position i.e. on an asymmetrical basis;

ii. the approach the Authority will take when assessing the effect of mergers and transfers of control on competition; and

iii. remedies for infringements of the Competition Policy.

This accompanying Explanatory Document sets out more details on the approach that

the Authority will follow in carrying out ex-post proceedings and, by way of illustration, it also summarizes several examples from past cases, drawn from various jurisdictions.

The Competition Policy does not cover ex-ante instruments which may impose ex ante obligations on service providers, alongside the obligations set out in the Competition Policy. These include those in relation to the Market Definition and Dominance Designation (MDDD) (including instruments such as access regulations and reference offers), the Consumer Protection Code, the Advertising Code, the Retail Tariff Instruction. As set out above, the procedures for handling ex-post investigations into anti-competitive conduct are set out in a separate document.

1.2 Initiating and investigating complaints

The Authority may commence an investigation following a complaint (or notification in the case of a merger) or it may initiate an investigation of its own volition. The process for making complaints is set out the in Ex Post Investigation Procedures.

In making a decision on whether the conduct under investigation infringes the competition provisions of the Telecommunications Law, the Authority considers the evidence put to it in the complaint and evidence gathered during the course of an investigation. Furthermore, the Authority may not choose not to investigate complaints put to it which are not supported by relevant evidence and analysis.

In making a decision as part of the Competition Policy, the Authority will base its conclusions on its assessment of the evidence as to whether, on the balance of probabilities, the conduct infringes the prohibition of anti-competitive behavior (such as agreements) or abuse of dominance, or that the effects of a merger imply that there could be a substantial lessening of competition.

However, where the parties to an investigation wish to claim off-setting efficiency benefits, or other justifications, the burden of proof in evidencing such justifications is on those wishing to claim the benefit of them.

The Authority recognizes that in relation to anti-competitive agreements, in order to provide greater transparency and certainty, in some cases, parties may benefit from being able to ask Authority for advice on its likely approach, and consideration of a potentially anti-competitive agreement, prior to making the agreement. The Authority therefore considers that, in the case of agreements which raise difficult or contentious issues where there is a reasonable degree of uncertainty over whether a restriction is prohibited by the regulatory framework, the parties may ask the Authority to give an opinion on its likely approach and methodology to assessing that behaviour. The Authority may then choose to provide such advice, which will be provided in an open and transparent manner. However, parties should note that this advice does not amount to a Decision, and that the Authority is not compelled to provide advice.

Furthermore, this should not be interpreted as an obligation on firms to request approval for all of their agreements.

1.3 Compliance with the Competition Policy

All persons under the remit of the regulatory framework must comply with the Competition Policy, which is mandatory. Any decision taken by the Authority in implementing the Competition Policy is final and binding and may be used in any court proceedings.

1.4 Review of the Competition Policy

The Competition Policy may be reviewed from time to time after first being made available to interested parties for review and comment.

1.5 Structure of this Explanatory Document

The structure of the remainder of this document is as follows:

- Section 2 describes the conduct, arrangements or concerted practices that constitute "anti-competitive practices";
- Section 3 explains how abuse of a dominant position will be assessed;
- Section 4 explains the Authority's approach to assessing the effects of mergers and transfers of control on competition in relevant markets; and
- Section 5 explains how the Authority will determine appropriate remedies if it finds that infringement of the Competition Policy has occurred.

PART 02.

CONDUCT, ARRANGEMENTS OR CONCERTED PRACTICES THAT CONSTITUTE "ANTI-COMPETITIVE PRACTICES"

Part 02. Conduct, arrangements or concerted practices that constitute "anti-competitive practices"

2.1 Introduction

This section is applicable to any conduct, arrangements or concerted practices, or mergers that constitute anti-competitive practices covered under the applicable regulatory framework. In conducting investigations within the scope of this section, the Authority will analyze whether the conduct in question has the effect to substantially lessen competition.

The CRA's powers in this regard stem from Article 41 of the Telecommunications Law, which prohibits service providers from engaging in anti-competitive practices and Article 45 of the Telecommunications Law, which prohibits any "person" from engaging in any practices that prevent or substantially lessen competition.[1]

This structure of this section is as follows:

- Section 2.2 defines the types of agreements and concerted practices, as well as entities covered by the Competition Policy;
- Section 2.3 describes the agreements and practices that will be considered to have, as their object or effect, prevented or substantially lessened competition;
- Section 2.4 describes how the Authority will assess potentially anti-competitive agreements and practices; and
- Section 2.5 explains that when assessing the effects of agreements the Authority will consider potential offsetting efficiencies that may be generated ("efficiency justification").

2.2 What agreements are covered by the Competition Policy?

The Telecommunications Law prohibits any anti-competitive practices in general and specifically "practices" between "any persons" that prevent or substantially lessen competition. Conduct that involves some form of an agreement or concerted practice between independent undertakings can have an anti-competitive effect. In the following, the Explanatory Document describes:

- the meaning of Substantial Lessening of Competition;
- the concept of an agreement and concerted practices; and
- the concept of independent undertaking.

2.2.1 Meaning of Substantial Lessening of Competition

As explained above, the Telecommunications Law prohibits anti-competitive practices which lead to a *Substantial Lessening of Competition*. The Authority considers that Substantial Lessening of Competition is a significant loss of rivalry between actual or potential competitors. This occurs if entry or expansion on the market is made more difficult, if, for example, potential entrants are less likely to enter a market, or it is harder for actual or potential entrants to meet demand from existing customers. This may mean that it is easier for existing market participants to profitably increase prices. In order to assess the scope for conduct to substantially lessen competition, The Authority will typically define the relevant markets where the market participants are present, where the conduct takes place, and where the effects are felt.

2.2.2 Agreements and concerted practices

"Agreements" are defined as any form of arrangement or commitment between two or more parties that expresses their **joint intention** to conduct themselves in the market in a specific way, usually in terms of actions they would take or refrain to take. There must be a consensus between the parties involved related to what conduct is expected from each of them. The commitment to that conduct can be formal or informal, written or oral, legally enforceable or not, reached through any means, including physical meetings, via telephone, email or written exchange.

1 Decree Law No. (34) of 2006 on the promulgation of the Telecommunications Law.

Thus, in the context of the Competition Policy, agreements include any expressed intentions or decisions, regardless of whether their content is subsequently followed or not. In cases where there are no explicit agreements expressing concurrence of wills, the Authority will look to examine whether the unilateral policy of one party is accepted by the other, for example by investigating conditions of the agreement and actual conduct. Firms may also have an informal understanding to cooperate without having made any formal agreement or decision. Such informal understanding would amount to "concerted practice". As there is no clear boundary between agreements, decisions and concerted practices, the Authority will generally use the term "agreements" to cover all three of these concepts.

Depending on the level of the production and distribution chain at which each of the entities is operating, agreements can be:

- **horizontal**, involving agreements and concerted practices between undertakings, which operate at the same level of the production or distribution chain, i.e. between direct competitors; and,
- **vertical**, involving agreements and concerted practices between undertakings, which operate at different levels of the production or distribution chain, i.e. which are not direct competitors.[2]

2.2.3 Independent undertakings

The Authority will adopt a broad definition of undertaking and consider any body corporate or partnership, unincorporated association, or person engaged in an economic activity, to constitute "an undertaking". Accordingly, undertakings could refer to firms, individuals, partnerships, trusts, charities, non-profit organizations, etc.. Associations are also covered by the Competition Policy. This is because they can take decisions that, when binding to their members, restrict the members' independent behavior.

The Policy applies to "**independent** undertakings" meaning that absent the agreement, the undertakings would be taking economic decisions regarding their course of action in the market independently from each other. Hence the policy does not apply to agreements between undertakings that form a single economic entity. Whether firms are considered as a single economic entity will depend on whether one party has a significant shareholding in the other party, such that it is able to exercise control (for example by appointing directors, by directing strategic investment or marketing decisions).

The Authority notes that there is no specific threshold which necessarily determines whether two parties are a single economic unit, as the degree of control exercised by one party over the other will vary on a case by case basis. However, a finding that one party has a majority shareholding in the other creates a presumption that they are a single economic unit.

Therefore, the prohibition of anti-competitive agreements may not apply to the following types of agreement:[3]

- **horizontal agreements between "*sister*" undertakings** that belong to one and the same parent company that has decisive influence over their economic behavior such that the undertakings have no real freedom to determine their course of action on the market, even if they are both active in the same product and geographic markets;
- **vertical agreements between "*parent*" and "*subsidiary*"** where there are enforceable agreements that restrict the autonomy of the subsidiary and allow the parent to take significant influence over its economic conduct[4]; and

2 Note that the Authority will generally consider vertical agreements not anti-competitive unless a specific investigation shows that they lead to prevention or substantial lessening of competition. More details are provided in Section 2.3.2.

3 Full functioning Joint Ventures will be considered as part of the merger regulation in Section 4.

4 See, for example, judgments within European Law in Case C-73/95 Viho Europe v. Commission [1996] ECR I-5457 and Case 30/87 Bodson [1988] ECR 2479. The concept of single economic entity means that Authority can take action against the parent of a

- **vertical "*agency*" agreements** where an "agent" is an entity who does not bear any, or bears only insignificant risks related to contracted economic activity, i.e. under the agreement, the principal bears the financial and commercial risks.

Note that any coordinated behavior that may occur between "sister" undertakings or a "parent" and a "subsidiary", although not falling under the framework of agreements, may be prohibited as an abuse of dominant position.

Finally, the Competition Policy is not applicable to vertical agreements with final consumers, as consumers are generally legally not considered as "undertakings" who engage in economic activity.

When investigating agreements and concerted practices, the Authority will seek to establish, by any means, whether an explicit agreement or implicit concurrence of wills (for example an informal agreement) exists. The duties on parties to provide relevant information is set out in the Ex-Post Investigation Procedures document.

This Competition Policy Explanatory Document provides substantive guidance. However, the list of practices discussed in the following section is not an exhaustive list of all agreements or coordinated practices that the Authority may consider to be anti-competitive if it assesses that they lead or, on the balance of probabilities, they are likely to lead to a substantial lessening of competition.

2.3 Forms of Agreements which could be considered to prevent or substantially lessen competition

Agreements are an essential part of trade. Most agreements do not have anti-competitive intent or effects. However, some agreements can have the restriction or distortion of competition as their purpose – such agreements are anti-competitive **"by object"**. Agreements that are anti-competitive by object, such as price fixing or market sharing, are highly likely to lead to a prevention or substantial lessening of competition. In these cases, the Authority will not consider the effects of the conduct in its investigation, since a prevention or substantial lessening of competition will be presumed.

Horizontal agreements which **restrict competition by their object** include:

- **price fixing;**
- **output limitation;**
- **sharing of markets and customers;**
- **bid rigging; and**
- **limiting or controlling investments in or use of R&D.**

Vertical agreements which **restrict competition by their object** include:

- **agreements for fixed and minimum resale price maintenance[5].**

Where agreements do not have as their object the prevention or lessening of competition, the Authority will examine the effect of the agreement to determine whether it prevents or substantially lessens competition – such agreements are anti-competitive **"by effect"**.

The following sections consider in turn the different types of anti-competitive horizontal and vertical agreements.

2.3.1 Horizontal agreements

Horizontal agreements are agreements and concerted practices between undertakings, which operate at the same level of the production or distribution chain. Generally, horizontal agreements may prevent or substantially lessen competition in many ways, such as:

- limiting the possibility of the undertakings competing against each other or against third parties;
- reducing the independent decision making of the parties as a result of

subsidiary company or the subsidiary of a parent company if one of them was involved in anti-competitive behavior.

5 Note that this list is not exhaustive and other arrangements may also constitute an anti-competitive agreement by object.

their substantial asset contribution to a common project, such as a Joint Venture;

- reducing the independent decision making of the parties by aligning significant financial interests of each party to the agreement;
- disclosing strategic information and thus increasing the likelihood of coordination within or outside the field of cooperation covered by the agreement; or
- leading to commonality of costs which makes coordination on prices and output easier.

Below, each of the following forms of (potential) horizontal agreements is described in turn:

- price / output fixing;
- market sharing;
- fixing of trading conditions;
- bid rigging;
- information sharing;
- group boycott;
- joint purchasing; and
- limiting or controlling investments in or use of R&D.

This list is not exhaustive and the Authority may, under certain circumstances, judge that other forms of horizontal agreements also have anti-competitive object or effect.

2.3.1.1 Price or output fixing

Price and output fixing agreements are an extremely serious form of anti-competitive conduct and are anti-competitive agreements by object. Such agreements do not create any consumer benefits while artificially reducing consumer welfare through lower supply and higher prices.

Price or output fixing can take many direct and indirect forms, including:

- fixing the price or output;
- setting minimum or maximum prices or outputs (either as a percentage or as an absolute value);
- agreeing on a range (either as percentage or as an absolute value) within which prices or outputs must remain;
- agreeing not to charge prices below any other market price;
- agreeing on changes and frequency of changes of prices or elements of the price structure (such as rebates).

Due to the severity of the potential anti-competitive effects of such agreements, the Authority will presume that any such agreement would lead to a substantial lessening of competition (subject to the de minimis threshold explained in Section 2.4.2).

Example: Gosselin Group and Portielje v Commission[6]

Price Fixing

Gosselin Group NV participated in a cartel on the international removal services market in Belgium, relating to the direct or indirect fixing of prices, market sharing and the manipulation of the procedure for the submission of tenders. The Commission of the European Communities stated that the cartel operated for almost 19 years (from October 1984 to September 2003). Its members fixed prices, issued false quotes ('cover quotes') to customers and compensated each other for rejected offers by means of a financial compensation system ('commissions').

The participants in the cartel fixed prices, shared customers and manipulated the submission of tenders at least from 1984 to 2003. As a result, they had committed a single, continuous infringement of Article 81 TEC.

2.3.1.2 Market sharing

Market sharing agreements are such that parties agree not to compete in specific

6 Joined Cases T 208/08 and T 209/08, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008TJ0208&from=EN

markets that can be related to specific types or classes of customers, customers in specific geographical areas, for specific types of products and services. Such agreements could result in lower consumer choice, higher prices and lower output and are anti-competitive agreements by object.

Example: Telefónica and Portugal Telecom[7]

Market Sharing

The European Commission imposed fines on the two parties for agreeing not to compete with each other on the Iberian telecommunications markets, in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anti-competitive agreements.

Instead of competing with each other by offering clients the most advantageous conditions, as is expected in an open and competitive market, Telefónica and Portugal Telecom deliberately agreed to stay out of each other's home markets.

2.3.1.3 Fixing of trading conditions

Similarly to fixing prices, competitors can agree on the trading conditions under which they will operate. Such agreements could reduce consumer choice and thus consumer welfare. They could indirectly affect prices by preventing firms from competing on service specifications. Fixing of trading conditions may include but is not exclusive to:

- agreeing on the specifics of a product or a service or the elements thereof to be supplied;
- agreeing on the specifics of a product or a service or the elements thereof to be included in the supplied package; or
- agreeing on credit terms
- agreeing restrictions on advertising and marketing (for example on the nature and quality of services offered by different market participants). Advertising is a form of information to the customers, such that the more informed customer are, the more effective competition is likely to be. As a consequence, restrictions on advertising, whether relating to the amount, nature, form or content of advertising, can lessen competition.

2.3.1.4 Bid rigging

Bid rigging (i.e. agreements to collude or cooperate when bidding) are likely to lead to a substantial lessening of competition and are anti-competitive agreements by object.

The aim of any tendering process is to allocate resources in an efficient, transparent and objective manner. This requires that undertakings which participate in the tendering process prepare and submit their bids independently. Bid rigging practices could include:

- agreeing not to bid;
- agreeing to bid at specific prices or price ranges; or
- agreeing to bid at specific terms.

If bids are submitted following collusion or cooperation, the Authority will consider them to constitute an anti-competitive practice and as anti-competitive agreements by object.

For the avoidance of doubt, undertakings are not prohibited from submitting a joint bid with one or more other undertakings if the fact that a joint bid is being submitted is disclosed.

Example: Dansk Rorindustri v Commission[8]

Bid Rigging

A cartel agreement between producers of district heating pipes allocated individual projects to designated producers and manipulated the bidding

7 Case 39839 http://europa.eu/rapid/press-release_IP-13-39_en.htm

8 Case T-21/99 http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47202&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=469875

procedure to ensure that the designated producer was awarded the assigned project.

The principal characteristics of the infringement included:

- dividing national markets and eventually the whole European market amongst themselves on the basis of quotas,
- allocating national markets to particular producers and arranging the withdrawal of other producers,
- agreeing prices for the product and for individual projects,
- allocating individual projects to designated producers and manipulating the bidding procedure for those projects in order to ensure that the assigned producer was awarded the contract in question,
- in order to protect the cartel from competition from the only substantial non-member, Powerpipe AB, agreeing and taking concerted measures to hinder its commercial activity, damage its business or drive it out of the market altogether.

2.3.1.5 Information sharing

Undertakings may legitimately share specific types of information, such as technical information required to ensure interoperability of the systems, for example. However, the sharing of information should not alter or significantly restrict the conditions of trade. Thus, sharing of confidential, commercially sensitive or strategic information is prohibited.

Such information could include but is not limited to:

- information related to current and future pricing policies, including elements of the pricing policy, costs, terms of trade, rates and dates of change;
- exchanging information on customer groups and how they change over time; and
- sharing information on future strategic policy.

The exchange of such information can lead to the reduction or elimination of uncertainties, which are inherent to the competitive process, and thus allow the parties to collude. The exchange of genuinely historic or publicly available information is less likely to be considered to have negative effects on competition than the exchange of more recent and privately known information.

However, any exchange of information related to future pricing strategies will be presumed to have anti-competitive effects. This is because it is highly likely to lead to a substantial lessening of competition.

Example: Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV[9]

Information Sharing

In 2001, five operators in the Netherlands had their own mobile telephone networks, namely Ben Nederland BV (now T-Mobile), KPN, Dutchtone NV (now Orange), Libertel-Vodafone NV (now Vodafone) and Telfort Mobile BV (subsequently O2 (Netherlands) BV and now Telfort).

Representatives of the five operators held a meeting on 13 June 2001. At that meeting they discussed, inter alia, the reduction of standard dealer remunerations for postpaid subscriptions, which was to take effect on or about 1 September 2001.

By the decision of 30 December 2002, the Raad van bestuur van der Nederlandse Mededingingsautoriteit (the Netherlands competition authority) found that the five operators had concluded an agreement with each other or had entered into a concerted practice. Taking the view that such conduct restricted competition to an appreciable extent and was thus prohibited under national law, the Raad van bestuur van der Nederlandse Mededingingsautoriteit imposed fines on those undertakings.

9 http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-06/cp090047en.pdf

2.3.1.6 Group boycott

Firms are generally free to choose with whom to trade. They can thus make individual decisions not to trade with a specific supplier or customer. However, if parties at the same level of the production and distribution chain together agree to collectively boycott certain suppliers or customers, this may reduce competition in the respective market.

Example: Protimonopolný úrad Slovenskej republiky v Slovenská sporitel'na a.s.[10]

Group Boycott

In 2009, the Competition Authority of the Slovak Republic found that three major Slovak banks – Slovenská sporitel'na a.s., eskoslovenská obchodná banka a.s. and Všeobecná úverová banka a.s. – had infringed the EU competition rules. They decided to terminate in a coordinated manner contracts concerning current accounts that the Czech company Akcenta CZ a.s. had with them and not to enter into any further contracts with it.

Akcenta is a non-bank financial institution providing services involving cashless foreign exchange transactions. It therefore needs to have current accounts in banks in order to carry on its activities, which include foreign-exchange transfers from and to abroad, including for its customers in Slovakia. In the Competition Authority's view, the three banks colluded because of their dissatisfaction with the fact that their profits had fallen as a result of the business carried on by Akcenta, which they regarded as a competitor providing services to their customers.

2.3.1.7 Joint purchasing

Joint purchasing agreements can have positive effects on competition if concluded between small and medium sized undertakings by allowing the small undertakings to achieve volumes and discounts similar to those of their larger competitors. However, an agreement between purchasers which effectively fixes the price that they are prepared to pay, is likely to have anti-competitive effects regardless of the size of the undertakings. Thus, the Authority will assess the potential anti-competitive effects of joint purchase agreements on a case-by-case basis.

2.3.1.8 Limiting or controlling investments in or use of R&D

Competitive rivalry may be reduced if undertakings agree to limit investments in or use of R&D. The Authority considers that any agreement which limits or controls investments in or the use of R&D will be considered an object restriction, such that anti-competitive effects can be presumed.

2.3.2 Vertical agreements

Vertical agreements are an essential part of most trade transactions. They can include any agreements to supply, license, distribute, procure agency, or franchise. Generally, vertical agreements are less likely to have anti-competitive effects than horizontal agreements because they relate to different parts of the production and distribution chain. Even if they restrict the commercial freedom of one or more parties to the agreement, they can bring about many benefits, such as aligning incentives for agreeing parties at different levels of the production and distribution chain.

The Authority will thus assume that vertical agreements generally do not prevent or substantially lessen competition unless a specific decision concludes otherwise.

However, vertical agreements can prevent or substantially lessen competition where they:

- raise barriers to entry or expansion or lead to anti-competitive foreclosures of other suppliers or buyers; and
- soften competition or facilitate collusion between the supplier and its competitors or between the buyer and its competitors.

10 Case C-68/12 http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-02/cp130013en.pdf

In the following, the Authority describes briefly the common forms of vertical agreements which it considers could be likely to prevent or substantially lessen competition:

- exclusive distribution agreements;
- single branding;
- resale price maintenance;
- limited distribution; and
- market partitioning.

For the avoidance of doubt, this list is not exhaustive and there may be other vertical agreements that can have anti-competitive effects, which the Authority will investigate on a case-by-case basis.

2.3.2.1 Exclusive distribution agreements

In an exclusive distribution agreement, the supplier agrees to supply only one distributor in a certain geographic territory. Simultaneously, the distributor is usually limited to selling the product or service within the respective territory and not allowed to operate in other exclusively allocated territories. If one of the parties to the agreement is dominant in the respective market, such agreements are very likely to have similar anti-competitive effects as market sharing in horizontal agreements – intra-brand competition can be reduced and the resulting market partitioning can lead to price discrimination.

Examples of exclusive agreements could include agreements between telecommunications providers and building developers to provide telecommunications services. This may substantially lessen competition if the agreement is exclusive, and the telecommunications provider is dominant.

Example

Exclusive distribution agreements

In the joined Cases C-403/08 and C-429/08, the European Commission decided that clauses in agreements between the Football Association Premier League and broadcasters that prohibited or limited broadcasters from supplying decoder cards to television viewers seeking to watch the broadcasts outside the Member State for which the license was granted were anti-competitive. The Commission concluded that such clauses prohibit the broadcasters from effecting any cross-border provision of services and enable each broadcaster to be granted absolute territorial exclusivity in the area covered by its license. As a result, it concluded that virtually no intra-brand competition could take place.

2.3.2.2 Single branding

Single branding occurs when a downstream distributor is limited to purchasing exclusively or almost exclusively from one supplier[11]. The limitation can be explicit through an obligation, or implicit through quantity obligations and loyalty rebates, for example. This could be especially problematic if the supplier market is concentrated and / or the supplier is dominant in the relevant market, as such agreements can have anti-competitive effects by:

- foreclosing the market at the supplier level;
- facilitating collusion between suppliers when it is cumulatively used; and
- preventing or substantially lessening inter-brand competition.

11 The distributor is not restricted in buying any products or services from other suppliers when these are not competing with the product or service of the single branding agreement. Franchise agreements are an extreme form of single-branding, where the retailer is required to fulfil strict contractual obligations. Under such agreements, the franchisee is awarded a license of intellectual property rights, in particular related to trade-marks and know-how for the use of and distribution of services and goods. In line with international best practice, franchise agreements are not fully exempt from the provisions of this Competition Policy. They can be defended on the basis of efficiency gains according to Section 2.5. In particular, they can be defended if the obligation to franchise is necessary to maintain the common identity and reputation of a franchise network where the duration of the non-compete, single-branding obligation should not exceed the duration of the franchise agreement itself.

Example

In assessing the effects of a single branding agreement, the CRA will consider the share of the market which is covered by the relevant agreement. For example, assume a market leader in a market for an impulse consumer product has a market share of 40%, and sells most of its products (90%) through tied retailers (tied market share 36%). The agreements oblige the retailers to purchase only from the market leader for at least four years. The market leader is especially strongly represented in the more densely populated areas like the capital, and its 10 competitors together supply another 10% of the market via tied outlets. The rivals are foreclosed from supplying 46% (36%+10%). Therefore the agreements between the market leader and its tied suppliers may lead to anti-competitive outcomes.

2.3.2.3 Resale price maintenance

Resale price maintenance occurs when a distributor agrees with a supplier on a price that the distributor will charge, or on a minimum resale price. Suppliers generally have the right to impose a maximum resale price or recommend a resale price. If both parties are not dominant in their respective market, resale price maintenance could enhance competition; for example, by allowing distributors to provide significant customer service without fearing that competing distributors would free-ride on their service. However, resale price maintenance could have anti-competitive effects, for example, by:

- foreclosing price competition in a significant share of the market if one of the companies is dominant;
- increasing transparency of prices and thus facilitating collusion between suppliers and / or distributors.

Example

Anti-competitive resale price maintenance

Where an upstream supplier has significant market power in its market, price competition among downstream distributors may provide a significant source of price competition in the market. Agreements between the supplier and the distributors that include resale price maintenance would eliminate such competition.

Thus, in the context of the communications market, any resale price maintenance agreement is likely to harm competition.

2.3.2.4 Limited distribution

A limited distribution agreement is one that restricts on the one hand the number of authorized distributors and on the other the possibility of resale. In contrast to exclusive distribution agreements, the restriction does not relate to the territory but to selection criteria usually linked to the nature of the product and to the prohibition to resell to non-authorized distributors.

Such agreements can prevent or substantially lessen competition by:

- leading to foreclosure in the distributors' market;
- facilitating collusion between the distributors; and
- reducing or effectively eliminating intra-brand competition.

Example

Limited distribution network

In some cases, limiting distribution to suppliers that fulfill certain criteria, such as know-how about the product, may be justified. In the case Brandally, Over Stock/Puma a French Court of Appeal rejected Puma's request to forbid Internet resellers to sell a supplier's products, considering that the legality of its exclusive distribution network was not established. The Court held that consumers were being denied a fair share of the profit resulting from Puma's exclusive network[12].

12 Court of Appeal of Colmar, Judgement of 24 June 2008, Case No 08/008447 Over Stock/Puma.

2.3.2.5 Market partitioning

Market partitioning occurs when a distributor is limited to reselling a product or a service to a particular class of customers. Simultaneously, the distributor is usually limited in actively selling into other allocated classes of customer. Such agreement can have anti-competitive effects mainly by:

- reducing intra-brand competition;
- facilitating price discrimination;
- when most or all of the suppliers practice market partitioning, as this means collusion at the level of the suppliers and the distributors can be facilitated.

2.4 How the Authority will assess agreements that may restrict competition

2.4.1 Factors the Authority may analyze

Agreements and concerted practices, which have the prevention or substantial lessening of competition as the object of the agreement or understanding, are presumed to have anti-competitive effects.

Agreements that may prevent or substantially lessen competition as an effect of the understanding will be assessed by the Authority on a case-by-case basis. The assessment will consider the actual effects on competition in relation to the counterfactual of what would have happened, absent the agreement.

The Authority's evaluation will assess how likely the agreement is to foreclose third parties and/or harm consumers. In its assessment of all the effects of an agreement or concerted practice, the Authority will consider the terms of the agreement in the legal and economic context in which they were made.

In particular the following factors may be relevant:

- **Nature of the agreement:** the Authority will take into account the restraints on independent conduct, their duration and the percentage of total sales on the market affected by the restraints in the agreement. Restraints may be explicit or implicit and derived from the incentives that result from the agreement. If the agreement creates barriers to entry or expansion for third parties, because it raises competitors' costs for example, it is likely to have negative effects on competition;
- **Market position of parties to the agreement:** the Authority considers that agreements and concerted practices among parties with high market power will be more likely to have negative effects;
- **Market position of competitors and buyers of the products or services that are the object of the agreement:** similarly, the market shares of competitors and downstream buyers can be indicative of their market power. Where competitors have strong market position, or the buyers are able to exercise countervailing buyer power, it is more likely they are to be able to curb the negative effects of an anti-competitive arrangement;
- **Nature of the market regarding entry barriers, maturity, concentration and level of production and supply chain:**
  - the magnitude of entry barriers, where a price increase above the competitive level would attract new entry, are less likely to be subject to sustainable anti-competitive agreements;
  - in mature markets where there is low or no innovation and demand is declining or stable, anti-competitive agreements are likely to have higher negative effects as opposed to the effects in dynamic markets where innovation or market entry to serve expanding demand can curb negative effects;
  - markets with higher concentration may mean there is a greater risk that an agreement with a given restriction between competitors might prevent or substantially lessen competition to limit rivalry in a concentrated market compared with very competitive markets;

- **Nature of the product:** In the assessment of both negative and positive effects of an agreement or concerted practice, the Authority will consider the nature of the subject of the agreement (the product) in the economic and legal context to the agreement.

2.4.2 Certain agreements may be assumed not to prevent or substantially lessen competition ("de minimis threshold")

Agreements may fall outside the application of the Competition Policy because they are not capable of substantially affecting competition in the Telecommunications market in Qatar. The Authority will generally consider that agreements and concerted practices among undertakings that fall below the following thresholds are exempt from the Competition Policy:

- **Anti-competitive agreements by object:** agreements that have as their object the prevention or substantial lessening of competition in the Qatari Telecommunications market, where the undertakings have market share lower than 5% of the relevant market and make an annual revenue lower than 1 million QAR in the relevant market.
- **Anti-competitive agreements by effect:** agreements that may have as their effect the prevention or substantial lessening of competition in the Qatari Telecommunications market, where:
  - the aggregate market share jointly held by the undertakings of a horizontal agreement does not exceed 10 % on any of the relevant markets affected by the agreement;
  - the market share held by each of the undertakings of a vertical agreement does not exceed 10 % on any of the relevant markets affected by the agreement.

2.5 Possible "defense" to anti-competitive agreements

While certain agreements may have the effect of preventing or substantially lessening competition, they may also bring about offsetting economic benefits. The Authority will decide whether to permit such agreements on a case-by-case basis by considering whether and to what extent the economic benefits of an agreement outweigh its negative effects on competition. To "defend" an otherwise anti-competitive agreement or concerted practice, the parties involved will need to demonstrate that all of the following criteria are simultaneously fulfilled:

- efficiency;
- fair share to consumers;
- indispensability; and
- no elimination of competition.

Each of these criteria is explained in turn. For the avoidance of doubt, the Authority will consider that agreements which are anti-competitive by object are unlikely to realize sufficient benefits to outweigh their negative effects on competition. For example, agreements between competitors to fix prices or output, group boycotts and market sharing agreements are all unlikely to fulfil all four criteria. The burden of proving an efficiency defense will, in any case, fall on the parties to the agreement.

For the avoidance of doubt, the Authority does not preclude the possibility that agreements with object restrictions could generate sufficient efficiencies of the kind described to off-set any potentially anti-competitive effects. However, it considers that it would be unlikely that this could be the case, and notes that the burden of proof is on the parties wishing to claim the benefit of the efficiencies.

2.5.1 Efficiency

To fulfil the first criterion, the parties to the agreement must demonstrate that there are objective benefits resulting from the agreement and these are economically important and outweigh its anti-competitive effects. The efficiencies can be in the form of cost savings or other efficiencies as a result of an agreement facilitating technological advances; enabling synergies between the parties to the agreement; economies of scale or scope.

Thus, agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress in Qatar. Any efficiency claim will therefore need to provide convincing evidence related to:

- the **nature** of the claimed efficiencies (which could be both cost and quality related) and why they constitute an objective economic benefit;
- the **link** between the agreement and the efficiencies;
- the **likelihood** and **magnitude** of each claimed efficiency, i.e. what is its expected value; and
- **how** and **when** each claimed efficiency would be achieved.

With regard to vertical agreements, potential benefits may arise if these resolve differences in incentives for different levels of the supply chain. Vertical agreements may help to:

- avoid free-riding;
- facilitate entry into a new market;
- reduce hold-up of relationship-specific investments;
- incentivize retailers to provide a quality certification role for suppliers;
- allocate risk efficiently; or
- enable the efficient use of asymmetric information.

2.5.2 Fair share to consumers

To fulfil the second criterion, the parties involved in the agreement must demonstrate that a fair share of the efficiency benefits arising from the anti-competitive agreement is passed on to consumers.

"Consumers" thereby includes all direct or indirect users of the products or services that are the object of the agreement. These include producers that use the products as an input, wholesalers, retailers and final consumers. "Fair share" implies that the pass-on is at least sufficient to compensate consumers for any actual or likely negative impact caused to them by the restriction and lessening of competition resulting from the agreement. In other words, from the perspective of consumers, the benefits of the agreement must at least outweigh its negative effects.

The parties claiming the efficiencies must provide reasonable and cogent explanation (with relevant evidence) that the benefits to consumers must be likely to occur within one to two years of the restricted terms of the agreement.

Any defense claim will therefore need to provide convincing evidence that:

- benefits passed on to consumers are at the very least compensating them for the welfare losses following an anti-competitive agreement;
- benefits passed on to consumers are higher the greater the restrictions to independent conduct and their anti-competitive effects; and
- claimed cost benefits do not arise only from a fixed cost saving, as these are less likely to be passed on to consumers.

2.5.3 Indispensability

To fulfil the third criterion, the parties involved in the agreement must demonstrate that the agreement is indispensable to the attainment of the efficiencies created by the agreement in question. This requires that simultaneously:

- the restrictive agreement is necessary in order to achieve the efficiencies – i.e. the absence of the restriction would eliminate, significantly reduce the efficiencies or make them significantly less likely to materialize; and
- the individual restrictions of competition that flow from the agreement are also necessary for the attainment of these efficiencies – i.e. that there are not any less restrictive and economically practicable means to achieve similar benefits.

Hence, the parties to the agreement must substantiate their claims regarding its indispensability in relation to both the

nature and the intensity of the restrictions following it.

2.5.4 No elimination of competition

To fulfil the fourth criterion, the agreeing parties must demonstrate that the agreement does not allow them to eliminate or substantially lessen competition in respect of a substantial part of the concerned product or service, either in the short or in the long term. In other words, the Authority will value the protection of competition higher than the potentially pro-competitive efficiency gains (such as cost savings or other efficiencies outlined above) which the agreement could bring about.

Whether the agreement would eliminate competition depends on the degree of competition existing prior to the agreement, on the level of competitive constraints imposed on the parties through the agreement and on the impact of the restrictive agreement on competition (i.e. the reduction in competition that the agreement brings about). The greater the reduction of competition caused by the agreement, the greater the likelihood that competition in respect of a substantial part of the products concerned risks being eliminated.

PART 03.

ABUSE OF A DOMINANT POSITION

Part 03. Abuse of a dominant position

This section explains how the Authority will investigate the potential abuse of a dominant position. It sets out:

- the scope of conduct which is prohibited under abuse of a dominant position, as per Article 43 of the Telecommunications Law (which prohibits an abuse of dominance) Article 44 of the Telecommunications Law (which prohibits dominant service providers from unjustified discrimination) and Article 75 of the 2009 Telecommunications By-Law ("Telecommunications By-Law") (which prohibits an abuse of dominance) [13];
- the specific types of conduct, which the Authority may consider to constitute abuse of dominance, including a general

  framework which the Authority will follow when assessing potentially abusive conduct; and
- the factors that the Authority may consider in assessing whether there is a reasonable justification for the conduct (if the conduct is objectively necessary or produces efficiencies).

3.1 The scope of prohibited conduct

The Telecommunications Law prohibits a firm from abusing its dominant position in a market, either on its own or jointly with others. Specifically, Article 75 of the Telecommunications By-Law stresses that:

"Dominant Service Providers are prohibited from undertaking any activities or actions that abuse their dominant position."

How the Authority will determine whether a firm or (firms) are dominant and thus have significant market power has been summarized in Section 3.3.2. The details of the standards, methodology and analysis employed are published separately.

For the avoidance of doubt, the Competition Policy does not prohibit the holding of a dominant position in itself but the abuse of it. A firm may have acquired a dominant position naturally, for example through organic expansion or as a result of the specifics of the market. However, firms that have a dominant position have a special responsibility not to allow their conduct to impair genuine undistorted competition.

The specific practices outlined in the next section are likely to have anti-competitive effects but do not amount to an exhaustive list of all practices that the Authority may constitute an abuse of a dominant position.

Hence, in determining whether certain behavior constitutes an abuse of power, the Authority will conduct an assessment of the effects of the specific conduct in the relevant market. The approach the Authority will adopt is described in Section 3.2. During the investigation the Authority will assess evidence as to whether conduct will prevent or substantially lessen competition, on the balance of probabilities. The Authority will not have to demonstrate that a dominant firm *intended* to abuse its dominant position to find that it has infringed the prohibition on abuse of a dominant position. The Authority will not only look into behavior that has caused actual competitive injury but also in conduct which is *likely* to lead to prevent or substantially lessen competition.

The firm under investigation can claim offsetting efficiency benefits or other justifications that off-set the negative effects on competition of its conduct. In other words, in considering whether to issue a decision in an investigation into whether conduct is prohibited, the Authority will also take into consideration any arguments provided by the dominant firm as to why the anti-competitive conduct is justified. Such arguments may show either that the conduct is objectively necessary or that it generates efficiencies and so benefits consumers. Section 3.6 provides more details of the circumstances that the Authority will consider as to whether conduct, which might otherwise be an abuse of a dominant position, is justified.

3.2 General approach to investigating abuse of dominance

This section explains the steps that the Authority will take to investigate suspected abuse of a dominant position. An investigation can be started on the basis of a specific complaint[14] or on Authority's own initiative, for example following a market review. It should be noted that the Authority will not implement the approach mechanistically, and the precise approach it takes may vary depending on the specific context of the investigation.

As part of the investigation process, the

13 Decree Law No. (34) of 2006 on the promulgation of the Telecommunications Law; Decision (1) of 2009 of the Board of the Supreme Council for Information and Telecommunication Technology on the promulgation of the Executive By-Law for the Telecommunications Law

14 A complaint with a request for investigation can be submitted to the Authority according to the rules laid in the Ex-Post Investigation Procedures (see http://cra.gov.qa/en/document/expost-complaints-investigation-procedures).

Authority has discretion to impose interim measures before it completes its full investigation, where it has reasonable suspicion that the provisions of the law are being infringed and that significant and irreparable harm would be likely to result in the absence of interim remedies[15].

During the investigation of suspected anti-competitive conduct, the Authority's analysis will consider whether the conduct is likely to foreclose, restrict or distort competition and if so, how likely it is that consumer welfare will be harmed. The conduct will be considered to prevent or substantially lessen competition should the answer to the above questions be positive.

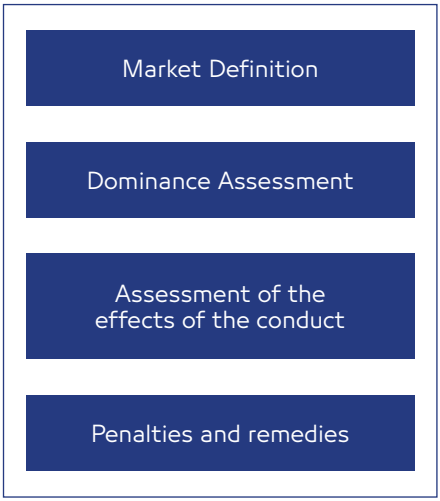
To answer both these questions, the Authority will analyze, where relevant:

- **Position of the dominant firm:** generally, the stronger the market power of the dominant firm, the more likely its abusive conduct will lead prevent or substantially lessen competition; firms that are vertically integrated, may be able to leverage market power from one market to another vertically integrated market.
- **Specific features of the market and economic context of the conduct:** this includes assessment of barriers to entry and expansion. Generally, high barriers to entry, such as economies of scale and network effects, are likely to make it harder for competitors to overcome foreclosure.
- **Positions of the dominant firm's competitors:** this includes assessing how likely it is that competition will be maintained despite the behavior of the dominant firm. Here, market shares and characteristics of the competitors may play an important role. For example, even a small company may keep the market competitive if it is particularly innovative or efficient.
- **Positions of suppliers or customers:** by looking into the specifics of the supply chain and possibly whether the conduct in question is applied selectively only to groups of suppliers or customers that are most likely to be attracted by competitors. For example, the dominant firm may be applying the conduct under consideration only to selected customers or input suppliers that are particularly important for the entry or expansion of competitors.
- **Extent of the abuse:** the Authority will consider the percentage of sales in the market affected by the abusive conduct, as well as its duration and how regularly it was performed, if applicable.
- **Evidence of exclusionary or exploitation strategy:** the Authority will take into consideration any internal documents which may contain evidence of exploitative or exclusionary strategies, or strategies to prevent entry into the market, respectively.
- **For exclusionary abuse, possible evidence of actual foreclosure:** in cases where the licensee has been engaging in the abusive conduct for a significant amount of time, the Authority will also investigate possible indirect evidence of foreclosure. For example, if the dominant firm alleged to have engaged in abusive behavior performs significantly better than its competitors, without any objective justification, then this may, under certain circumstances, indicate that an exclusionary abuse has been ongoing.
- **Any other factors that the Authority considers relevant.**

3.3 Assessment process

In making an ex-post investigation, the Authority will apply the process set out below, (and as described in the Methodology document):

Figure 1. Ex-post competition investigations process



15 See Paragraph 6.2 of Ex-Post Investigation Procedures (see http://cra.gov.qa/en/document/expost-complaints). Note that the definition of fines and sanctions is not part of the Competition Policy. These will be considered in more detail in the new Telecommunications Law.

3.3.1 Market definition

The first step in an investigation into conduct which may amount to an abuse of dominance or other anti-competitive behavior is to define the relevant markets. Once a market is defined, the Authority can undertake the relevant analysis to investigate the conduct under consideration.

A relevant market defines the set of products and the geographic area in which firms compete. The set of products are those which form close substitutes to one another, and the geographic area is that in which the set of products are close substitutes. The Authority can use market definition in ex-post competition assessments to:

- determine whether a licensee is dominant in a market;
- help assess the effects of alleged anti-competitive activity in a market; or
- help consider whether a merger would lead to a substantial lessening of competition (the CRA's approach to dealing with proposed mergers is set out in detail in Section 4 of this Explanatory Document).

In identifying potentially relevant markets in its investigation, the Authority notes that the dominant position, conduct, and effects may all occur in different markets. This is because many of the types of prohibited conduct described in this section of the Competition Policy relate to leveraging market power from a market where a party holds a dominant position to a different adjacent market. For example, refusal to supply, margin squeeze, anti-competitive bundling and exclusive distribution agreements are all examples of leveraging market power.

3.3.2 Assessing dominance

The assessment of dominance[16] is a key step in determining whether certain conduct amounted to an abuse of a dominant position. Dominance has been defined as *"a position of economic strength of a service provider in the market that permits it to act independently of customers or competitors, or to dominate one or more identified telecommunications service markets, through acting either individually or jointly with others.*[17]*"*

Such a position of economic strength can be realized by either a single firm, in which case it is classified as single firm dominance; or by a group of service providers, in which case it is classified as collective dominance.

The dominance assessment for an ex-post investigation may not necessarily correspond precisely to a dominance assessment made for ex-ante purposes. One reason for this is the different temporal perspectives of each assessment. An ex-post assessment is backward looking based on the competitive conditions at the time of the conduct being investigated. On the other hand, an ex-ante assessment is forward looking, based on what is expected to occur over the period of the market review.

3.3.3 Substantive assessment of the effects of the conduct

The assessment of the conduct will be made in accordance with this Competition Policy Explanatory Document. It will examine the effects of the conduct on competition and on consumers, compared to a case where the conduct had not taken place.

3.3.4 Imposition of remedies or sanctions

Upon completion of an investigation, the CRA may order that the conduct is remedied. The Authority's approach to setting remedies is set out in Section 5. These may include:

- An order requiring the subject of the investigation to cease the identified offending / non-compliant behavior or take whatever action necessary to avoid or remedy any harm caused or likely to be caused by such behavior;
- A financial penalty; and/or

16 In this Competition Policy Explanatory Document we consider Dominance and Significant Market Power to mean the same.

17 As defined in the Executive By Law for the Telecommunications Law 2009

- Any other penalty provided for pursuant to Telecommunications Law.

Where the Authority considers that there is a risk of significant and irreparable harm, the Authority may impose interim remedies. The CRA may also accept binding commitments from the Respondent in appropriate circumstances. Details of such commitments shall be included as part of the relevant determination made by the CRA and shared with the Complainant.

3.4 General approach to investigating price-related abuses

Some forms of anti-competitive behavior concern how dominant firms have set the prices for specific products, whilst others concern practices other than pricing. When investigating price-related abuses, the Authority may compare prices and costs in its investigations. The precise approach the Authority will take in doing this will depend on the specific case under investigation and the types of information that is available in the particular case. The Authority will conduct an evidence based analysis and rely on the best data available. Where accurate or complete information is not available, it will apply reasonable proxies and benchmarks.

However, as a general rule, the Authority will look into a number of aspects:

- **Cost base and cost standard:** in many investigations it is necessary to examine costs. The precise costing base and standard used in such an investigation will depend on the nature of the analysis being undertaken.

  The Authority will determine the most appropriate costing standard for the respective investigation.

  In accordance with best international practice, the following costing standards may be used, depending on the precise test being employed to investigate the conduct:

  - Average Variable Cost (AVC) or Average Avoidable Cost (AAC);
  - Long Run Incremental Cost (LRIC) and Long Run Average Incremental Cost (LRAIC); and
  - Average Total Cost.

  The Authority recognizes that cost information prepared according to these standards may not be readily available. Therefore, the Authority may base its decision on other cost bases/cost standards such as Fully Distributed Cost (FDC)[18].

  As the market and institutional framework matures, the Authority may gradually rely on more complex approaches for estimating costs (for example modelling the LRIC of certain categories of costs). The Authority expects that the Licensees will assist the Authority as it gradually increases the use and availability of more complex measures of costs in its ex ante and ex post regulatory frameworks. However, in all cases, the appropriate and proportionate test will depend on the specific economic circumstances of the conduct under investigation.

  The Authority will typically define cost for an "Equally Efficient Operator"[19].

- **Period of the assessment:** the Authority will determine the appropriate time period over which to assess the potential or actual anti-competitive effects of a specific conduct on a case-by-case basis. In some instances, an accounting approach over a single period may be adequate. In others, a longer term view will be required. Depending on the specifics of the abuse, the product, and the market, the economic life of a product, asset life or even customer life may be appropriate. Different approaches have different advantages and disadvantages. For example, a period by period analysis of accounting information may require that accounting costs correctly represent long-run average incremental costs, while the results of a Discounted Cash Flow

18 Cost data may be based on an HCA (Historic Cost Accounting) basis. HCA is typically the approach used in preparing internal accounting information. Though alternative cost bases such as CCA may be used where appropriate.

19 Explained in this document under "Definitions".

approach are sensitive to the time period which it covers and the terminal value of the investment under consideration.

- **Choice of reference products:** the Authority will also determine on a case-by-case basis at what level of the supply chain, and over what product set, the comparison of prices and costs will be made. That is, the Authority could assess anti-competitive behavior at the:
  - individual product level, or at bundle level;
  - customer class level, if it is likely or obvious that only certain groups of consumers are affected by the conduct under investigation; and
  - market level where the test is performed over the whole of the relevant market.

The Authority's definite choice on how to conduct an investigation will thus depend on the specifics of the case and the data available. The Authority will seek to deploy the method best suited to address the issues at stake.

3.5 What conduct will the Authority consider to be abuse of dominance?

Abuse of a dominant position can be targeted at potential competitors, consumers or suppliers. Depending on the aim of the conduct, abuse of a dominant position can be either "exclusionary" or "exploitative".

- **Exclusionary abuses** can prevent or substantially lessen existing and potential future competition in a relevant market, for example either through weakening existing competitors, establishing barriers to entry or foreclosing the market. In this instance, dominant firms often forego profits in the short run in order to increase profits in the longer run. Such behavior could harm consumers by reducing competition, inducing higher prices, reducing customer choice or reducing incentives for investment and innovation.
- **Exploitative abuses** can extract rents from consumers or suppliers. These abuses can relate to price or non-price conditions imposed by a dominant operator. For example, the dominant firm may use its market power to charge excessively high prices to consumers. Such behavior directly harms consumers.

Conduct can be considered to constitute abuse of a dominant position if the market power, the conduct and the abuse effect are in different markets. For example, the conduct of a licensee who is dominant in a wholesale market may have effects in a downstream or related adjacent market.

The following are examples of exclusionary and exploitative behavior which could amount to an abuse of a dominant position. Each is then examined in a subsequent section.

Examples of priced based abuses include:

- margin squeeze (Section 3.5.2);
- rebates, discounts and loyalty schemes (Section 3.5.3);
- unjustified price or non-price discrimination (Section 3.5.4);
- cross-subsidization (Section 3.5.5);
- excessive pricing (Section 3.5.6);
- predatory pricing (Section 3.5.10);

Examples of non-priced based abuses include:

- refusal to supply (Section 3.5.1);
- bundling and tying, including exclusionary tying (Section 3.5.7);
- customer lock-in through contract length (Section 3.5.8); and
- exclusive distribution agreements (Section 3.5.9).

The list is not exhaustive and conduct not explicitly mentioned may also be considered to constitute abuse of a dominant position.

3.5.1 Refusal to supply

Firms are generally free to choose their trading partner irrespective of whether

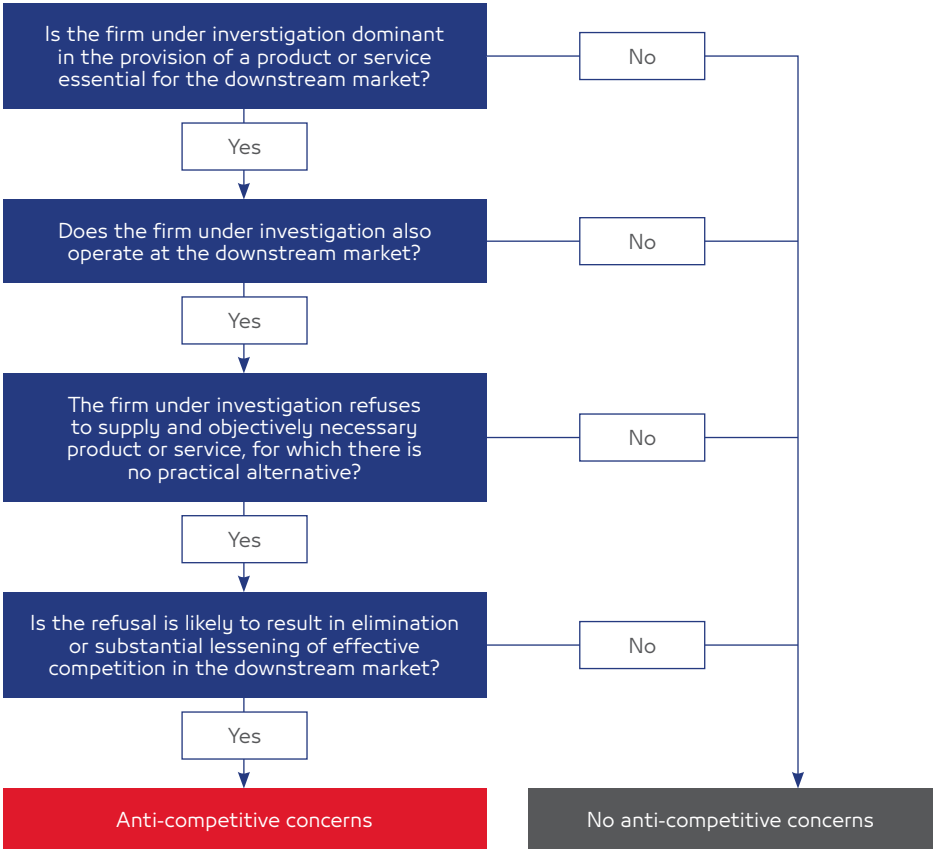
they have market power or not. However, a refusal to supply by a dominant firm that results in the prevention or substantial lessening of competition or inhibits innovation can be an abuse of a dominant position. Such conduct can harm consumers by reducing consumer choice or allowing the dominant firm to increase its dominance and charge higher than competitive prices.

Refusal to supply is likely to have exclusionary effects and give rise to concerns for the Authority when:

- a vertically integrated firm is dominant in an upstream market for the supply of an essential input to a downstream market;
    - it also operates in the downstream market where it competes with a rival for end consumers;
    - it refuses to supply an objectively necessary product or service, (i.e. a product or a service which is key input for the downstream market and for which there is no practical alternative);
    - the refusal is likely to lead to elimination or substantial lessening of effective competition in the downstream market; and as such the refusal is likely to result in consumer harm.

Figure 2 illustrates this.

Figure 2. Illustration of the process for investigating refusal to supply



Refusal to supply can be **"actual"** or **"constructive"**. Actual refusal to supply occurs when a dominant firm refuses to supply the objectively necessary product or service at all. Constructive refusal to supply includes offering unreasonable trading conditions, such as unduly delaying or degrading the supply of a product or service or charging unreasonably high prices.

Refusal to supply can target new or existing downstream rivals, and can cover a wide range of practices, including:

- **Refusal to provide access to a facility or a network:** where access to that facility or network is essential to enable competition in the relevant (downstream) market, and by not allowing competitors to use its facilities, the dominant firm forces the competitor to find alternative supply. However, if alternative supply is not available or feasible to provide, because replicating the facility is prohibitively expensive, for example, this can lead to foreclosure in the relevant downstream market. Requirements placed on the downstream rival by the dominant firm, such as forcing it to interconnect at all locations in an incumbent's network, could also amount to abuse of power if such an obligation was unnecessary, unreasonable or imposed disproportionate costs on a rival[20];
- **Refusal to supply information:** this can include information generated by the dominant firm's network which the competitor needs in order to provide a service comparable to that of the dominant firm, such as caller id for example. It can also include a refusal to supply essential technical information, such as technical specifications or information as to where a new entrant can interconnect to the incumbent's network, which would be required for the downstream rival to take the wholesale input from the dominant firm or the definition of a Leased Line. It can also include the failure to agree, within an appropriate period of time, any technical specifications or other information essential for the commercialization of the wholesale product; and
- **Refusal to provide intellectual property rights:** generally, intellectual property law seeks to promote incentives for innovation and for its commercialization. A holder of an intellectual property right who enjoys market power is generally free to decide to whom to grant a license to use that intellectual property right. However, it is possible that the manner in which a dominant firm exercises its intellectual property rights constitutes an abuse. This would be the case, for example, if the right is necessary to operate in a market but is used by the dominant firm to leverage market power from one market to another or to prevent the development of a new market.

The Authority will determine that a refusal to supply constitutes abuse of a dominant position if the following conditions are **simultaneously** fulfilled:

- the refusal concerns a product or service that is **objectively necessary** as an input to downstream market, if it is impossible or prohibitively expensive to find an alternative supply or to replicate it;
- the refusal is **likely to eliminate or substantially lessen effective competition** on the downstream market; and
- if **consumers are likely to be harmed:**

When determining whether the conduct under investigation is anti-competitive, the Authority will examine whether each of these conditions is met.

Objective necessity

The Authority will assess the **objective necessity** of the relevant product or service by assessing:

- whether the product or service is indispensable as an input for the downstream market;
- whether it is technically and economically feasible to duplicate the product or service;

20 Also note that the failure to comply with interconnection obligations does not have to be categorized as refusal to supply in order to harm competition.

- whether a viable substitute is effectively available; and
- the history of supply relationships – whether there are any sunk costs which are relationship specific, for example.

Effect on competition

The Authority will assess the **effect on competition** which is likely to result from the refusal to supply, which will depend on, but not be limited to, the following:

- the market share of the dominant firm in the downstream market – the higher the market share, the less competition there would be to eliminate;
- the capacity constraints of the dominant firm – the less capacity constrained the dominant firm is relative to downstream rivals, the greater the likelihood that the demand that could be served by foreclosed competitors would be diverted to the dominant undertaking;
- the substitutability between the dominant firm's and competitor's products – if they are close substitutes, it is more likely that the demand from foreclosed competitors would be diverted to the dominant undertaking;
- the proportion of competitors in a downstream market who are affected by the refusal to supply.

Impact on consumers

The Authority will assess the **impact on consumers** likely to result from the refusal to supply, which will depend on the effects the refusal to supply has on:

- the development of the share of the dominant firm on the market and its ability to charge prices above the competitive level;
- consumer choice; and / or
- innovation.

Should the firm under investigation consider that its behavior may benefit consumers through the creation of efficiencies, it may demonstrate those efficiencies to the Authority. The Authority will then consider these in its overall assessment (as described in Section 3.6).

The firm under investigation can demonstrate efficiency benefits which positively apply to consumers to justify its conduct. In its assessment of whether a refusal has an efficiency justification, the Authority will consider such benefits when they are sufficiently substantiated.

Example

Refusal to supply

In a recent case, the Authority considered the unilateral termination of an infrastructure access agreement as an outright refusal to supply – a conduct prohibited under Article 43(1) of the Telecommunications Law. The incumbent is the only provider of telecommunications duct infrastructure in almost all of Qatar. A refusal to allow its competitor access to its infrastructure constituted a barrier to entry as it prevented competition without such access and duplication would be impractical or unreasonable

As a result, the refusal to supply was likely to impair competition to the detriment of competitor and, other service providers reliant on the competitor's network and ultimately, consumers.

In addition, the Authority held the view that that the dominant operator has a special responsibility not to allow its conduct to distort competition in the relevant telecommunications market.

During the investigation, the Authority could examine evidence about the willingness or lack of willingness of the dominant firm to supply the essential service or facility. It could evaluate information regarding the negotiations between the parties and any proposed terms and conditions of trade. If the dominant firm faces more than one competitor on the downstream market, details of any trade agreements with other competitors will also be helpful in the investigation process.

Some refusal to supply may be justified, for example due to poor creditworthiness of the customer or lack of available capacity. The

firm under investigation will need to justify its conduct according to the criteria set out in Section 3.6.

3.5.2 Margin squeeze

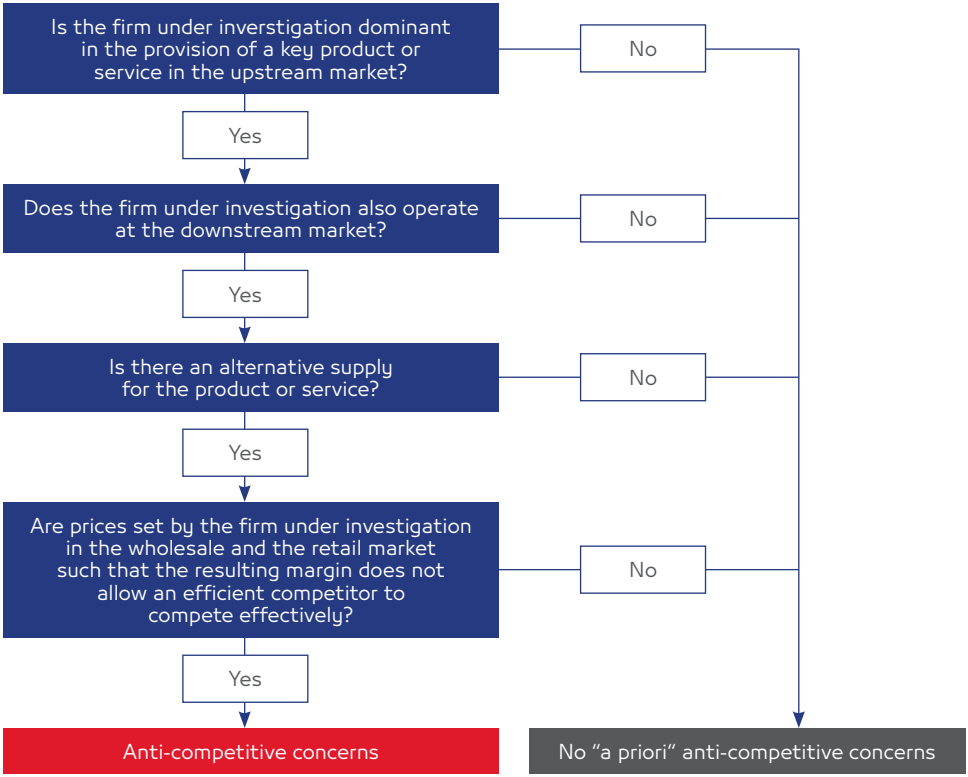
Margin squeeze occurs when a vertically integrated firm is active on more than one level of the supply and distribution chain, and supplies an important input to the downstream rivals, and sets prices in the wholesale and retail market such that the downstream rival is not able to trade profitably in the downstream market on a lasting basis.

Specifically, the Authority will conclude that a "margin squeeze" has occurred, when it finds that:

- a vertically integrated firm is dominant in an upstream market for the supply of an important input to a downstream market;
- it also operates in the downstream market where it competes with rivals;
- it supplies a key input to its downstream rival, for which there is no economically or technically viable alternative; and
- it has set prices in the upstream or the downstream market, so that the resulting rival's margin between its retail and wholesale costs and the retail price set by the vertically integrated firm would not allow an efficient competitor to compete effectively.

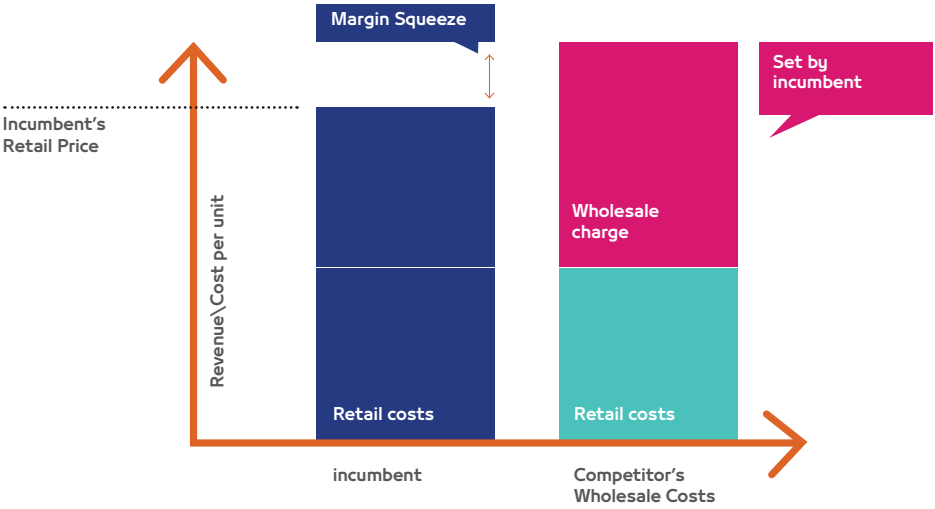
Figure 3 illustrates this approach.

Figure 3. Illustration of the process for investigating a margin squeeze



A rival's margin between its retail and wholesale costs and the retail price that would not allow an efficient competitor to compete effectively is illustrated in **Figure 4**.

Figure 4. Illustration of retail pricing leading to a margin squeeze



Note: the chart is for illustrative purposes only. Competitors will set out a range of retail or wholesale costs in combination with the wholesale input supplied by the incumbent. In general the Authority will estimate the costs of an equally competitive competitor using the costs of the incumbent.

A margin squeeze could mean that the competitive pressure the incumbent faces on the downstream market decreases, as an equally efficient downstream competitor who purchases the input cannot compete effectively and may be forced to exit the market. This may increase prices for end consumers and may decrease their choice in the long term.

When investigating a potential margin squeeze, the Authority will assess whether the margin between the price of the upstream product or service and the retail market price would allow an equally efficient competitor to recover its downstream costs, and to make a reasonable profit (described below) over a reasonable period of time. In making its assessment the Authority's consideration of a "reasonable period of time" will depend on the specifics of the abuse, the product, and the market, and may include the economic life of a product, the asset life of the products or customer life cycle.

The investigation of a margin squeeze also requires an assessment of an appropriate profitability indicator. The appropriate profitability indicator could vary on a case by case basis, depending on the context, and could include the Internal Rate of Return (IRR), Return on Capital Employed (ROCE), Return on Turnover (ROT). Typically, when assessing margin squeeze, the Authority may assess profitability using an appropriate return on capital (which can be benchmarked against similar firms, using a WACC calculation).

Example

Wholesale supply of wholesale broadband access bitstream or VULA to downstream competitors, Wanadoo España vs. Telefónica[21]

21 Case COMP/38.784 http://ec.europa.eu/competition/antitrust/cases/dec_docs/38784/38784_311_10.pdf

Over the period September 2001 to December 2006, the margin between Telefónica Espana's retail prices and the prices for wholesale broadband access at both the national and regional levels was judged to be insufficient to cover the costs that an operator as efficient as Telefónica would have to incur to provide retail broadband access.

Wholesale access at national level allowed alternative operators to offer retail broadband services throughout the Spanish territory without having to roll out any (or hardly any) network by connecting to a single, "national" access point. Wholesale access at the regional level requires that alternative operators roll out a costly network reaching up to 109 "regional" access points. Telefónica was dominant in the provision of both types of access.

The Commission used the long run average incremental costs ("LRAIC") measure in the calculation of its analysis. The Commission found that an equally efficient competitor would not have been able to trade profitably based on a period-by-period and discounted cash flow profitability approach.

Example

Mixed bundles

Bundles of a vertically integrated SP consist of wholesale inputs. In some of the wholesale markets, the SP may be dominant (e.g. fixed net), for some other products, the SP may not be dominant (e.g. international direct dialing), whilst some products may be outside the regulatory remit (e.g. content for IP-TV or handsets).

In order to gauge whether a Margin Squeeze for the products/services exists where the SP is dominant, the Authority will necessarily take into account the cost and revenues of the whole bundle.

3.5.3 Rebates, discounts and loyalty schemes

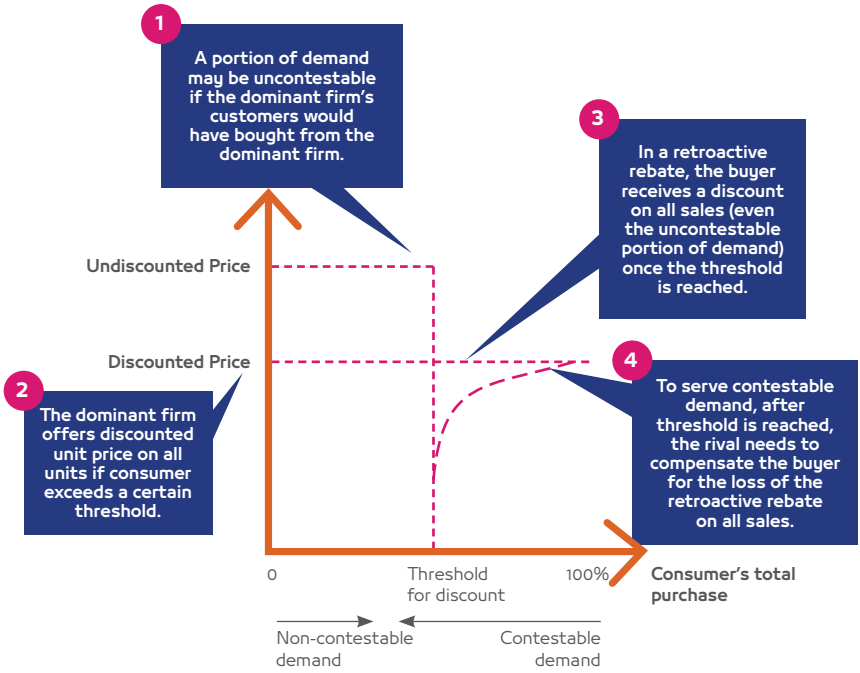
Fidelity rebates, volume discounts, and loyalty schemes are pricing practices where the unit price varies depending on the volume of output taken. They are a specific form of a customer discount scheme where rewards or discounts are granted to customers who purchase all or a specified portion of their requirements for a given product or service from the same firm. For example, customers could be offered a discount for exceeding a certain threshold of purchases.

If the firm is dominant, such discounts can "lock-in" customers since the effective unit price of the incremental output (over and above the discount threshold) can be low. In some cases, the effective price of incremental output can even be negative. Therefore customers are discouraged from using multiple providers. It can thus lead to foreclosure and could constitute an abuse of a dominant position.

Fidelity rebates reduce the effective price that buyers face, above a certain volume threshold. Such rebates do not necessarily create a competition problem if they are offered in a competitive environment and if they reflect costs savings resulting from the larger volumes that the provider can sell. However, fidelity rebates could have exclusionary effects when they are offered by a dominant provider and if they are not related to any cost savings. Specifically, they could enable the dominant firm to use the 'non contestable' portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant firm in any event) as leverage to decrease the price to be paid for the 'contestable' portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitutes). As a result, it becomes less attractive to customers to switch small amounts of their demand to an alternative supplier.

An example of the impact of fidelity rebates is set out in **Figure 5**. If the dominant operator sets a discount price for all sales once a threshold has been reached, then the effective unit price for incremental output above the threshold is low, since it includes the effect of discounts which may apply to all of the customer's output (even output below the threshold, see **Figure 5**).

Figure 5. The impact of retoactive fidelity rebates on competitor pricing



In the example, the dominant firm offers a discount price on all of the units a customer purchases if the customer exceeds a certain threshold. If the dominant firm has a portion of demand that is "uncontestable", since customers would have bought from the dominant firm, then rivals can only compete on the remaining "contestable" demand. If the rival attempts to serve only the contestable demand, then they compete with the effective price of the contestable units at the discount. Depending on the structure of the discount offered, the effective unit price of contestable demand can be low (particularly if the discount is applied to all of the dominant firm's output, i.e. a "retroactive" discount).

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

The Authority will investigate whether a strategy is capable of preventing or substantially lessening the expansion or entry of equally efficient competitors by making it more difficult for them to supply part of the demand of individual consumers. It will apply the methodology explained in Section 3.2 and look specifically into:

- an estimate of the price that competing suppliers would need to offer to customers in order to compensate them for the loss of the fidelity rebate;
- whether the unit price discount is only offered on incremental sales (where a discount is applied only on incremental sales over and above a discount threshold) or "retroactive" (where a discount is applied retroactively to the entire volume of sales). Where a discount is applied only on incremental sales over and above a discount threshold, then it is more likely that entrants can compete. Where the discount is applied to all sales, (including even sales below the

threshold), then the effective unit price of marginal units above the discount threshold can be very low;

- an estimate of the capacity of existing competitors to expand sales and the fluctuations of those sales over time where data is available; and
- the application of an individualized or general threshold – individualized thresholds are more likely to make it harder for different groups of consumers to switch.

When assessing whether prices which result from fidelity rebates are an abuse of dominance, the Authority will apply the predatory pricing test described in Section 3.5.10 on the prices for the contestable portion of the dominant firm's demand. The relevant price cost test when considering whether such conduct is potentially an abuse is as follows:

- prices above the LRAIC of the dominant undertaking will be considered to allow an equally efficient competitor to compete profitably, notwithstanding the rebate;
- prices below AAC will be considered capable of foreclosing an equally efficient competitors; and
- prices between LRAIC and AAC will be further investigated on a case-by-case basis.

As set out above at Section 3.4, the Authority will apply the relevant standard, given the availability of data and information, and may use proxies for each of the cost standards where relevant and proportionate.

Example

Anti-competitive fidelity rebates or loyalty rebates

A dominant service provider can be offering anti-competitive rebates if, for example, its business contracts are offered with customer loyalty schemes which are:

locking in demand: rebates are granted for quantity targets corresponding to the entire, or almost entire, demand of a customer;

tailored to requirements: bonuses and rebates are based on quantity targets that are different for each consumer; and

retroactive: rebates which are applied to all purchases made by the customer when a threshold is reached.

discounts offered to high volume customers: which are disproportionate to cost savings generated by the volume, as such discounts; a) lock in the high value customers b) means that competitors can only compete for smaller customers

3.5.4 Unjustified price discrimination or non-price discrimination

Unjustified price or non-price discrimination occurs when a dominant firm offers similar products to the same group of customers, with differences in the terms of trade that are not related to differences in costs for the provision of a good or a service ***and*** thereby places rivals at a competitive disadvantage and or exploits consumers.

- **Price discrimination** occurs when, without any objective justification:
  - o different customers are charged different prices for the same products or service, or
  - o different customers are charged the same price even though the costs of supplying the product are in fact very different.
- **Non-price discrimination** occurs when, without any objective justification, different customers are offered different terms and conditions on a product or service. For example, offering two different customers different priority for using the network for interconnection at the same price and in similar circumstances could amount to non-price discrimination.

This does not mean that dominant firms must treat all customers equally. Price discrimination in particular, may be efficient. For example, if customer groups differ significantly in their demand, it may be more efficient if the recovery of common and fixed costs reflect customers' willingness to pay. Claims that price discrimination or non-price discrimination which places rivals at a competitive disadvantage are "efficient" and hence justified will be considered using the approach as set out in Section 3.6.

Depending on the market level where the discriminatory conduct occurs, the Authority may reach the following conclusion:

- **Discrimination in wholesale markets:** the Authority is likely to make an *"a priori"* assumption that any kind of discrimination in wholesale markets by a vertically integrated firm which is dominant in the wholesale market constitutes anti-competitive behavior (whether between different downstream Other Licensed Operators (OLOs) or between the dominant firm's downstream operation and an OLO). This is because such discrimination allows the dominant firm to leverage dominance between markets and is thus harmful to competition. Such conduct brings significant benefits to the vertically integrated firm, whilst only limited benefits, if any, are likely to flow to consumers. The burden of proof is on the dominant firm being investigated if it wishes to claim an **objective justification** for its conduct.
- **Discrimination in retail markets:** there are instances when discrimination in retail markets may have positive effects on welfare. Thus, the Authority will not make an *"a priori"* assumption that any retail price discrimination is anti-competitive and will investigate such behavior on a case-by-case basis.

The Authority will consider whether the conduct may be justified on reasonable technical, economic or commercial grounds. Where differences in price or non-price components cannot be justified by differences in underlying customer circumstances, the Authority may consider that conduct is likely to harm competition and consumers. The Authority will also consider potential effects on competition from the discriminatory offer, resulting from the ability of competitive suppliers to replicate the offer and customers' ability to switch suppliers.

Example

On-net off-net pricing

Bouygues Télécom Caraïbe against practices by the companies Orange Caraïbe and France Télécom[22]

In 2004, the Conseil de la concurrence investigated a complaint from the mobile telephony operator Bouygues Télécom Caraïbe. It was found that Orange Caraïbe and France Télécom were abusing their dominant position in the mobile or fixed telephony sector, and engaging in anticompetitive practices in the French overseas départements of Martinique, Guadeloupe et Guyane.

Orange Caraïbe had introduced different tariffs for on net (calls within its network) and off net calls (calls made by an Orange subscriber to a Bouygues subscriber).

This "overpricing" of off net calls effectively gave the Bouygues network an unfavorable, expensive image, and encouraged consumers who were able to coordinate their purchases (members of the same family, group, or company, etc.) to concentrate their subscriptions on just one network, the larger of the two (in this case Orange).The unequal market shares were particularly relevant to the Court's decision as Orange Caraïbe had an 82% share.

Relationship of on-net call charges to mobile termination rates

Products and Services in a Relevant Market, where a Telecommunication Service Provider (SP) was found to be dominant, have to be based on the cost of efficient service provisioning.

22 See:http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=134&id_article=364

For various reasons, mobile termination rates may not be exactly cost based. In order to avoid anti-competitive effects, e.g. on-net/off-net pricing differentials, the Authority requires the SPs to keep the wholesale inputs (consumed by another SP) in a reasonable relationship with the wholesale cost of their "internal products". This means that the MTR must be in a reasonable relationship to the network cost of an on-net call. The Authority recognizes that there might be some cost differences, e.g. due to routing.

In cases of potential anti-competitive behavior arising from Service Providers setting different on-net and off-net call prices, the Authority requires that wholesale inputs consumed by another SP (e.g. all termination services) are not more than 20% more expensive than the functional network cost of the equivalent internal product (e.g. half of an on-net call). Service Providers will, however, be able to rebut his presumption.

Charging different prices at different geographic locations

Charging consumers in an airport a different rate for payphone calls compared to payphone calls elsewhere would be considered discriminatory as customers requiring payphone services in an airport are likely to be a "captive audience"

3.5.5 Cross-subsidization

Cross-subsidization is observed when a firm which has a dominant position in one market uses the profit it receives from that market to reduce the prices of products or services it provides in markets where it faces greater competition. In other words, the dominant firm allocates all or part of its costs in one product or service or in one geographic area, to another product or service, or geographic area. Cross-subsidization can be exclusionary in the competitive market if it is likely to harm competition because an efficient competitor cannot compete against the subsidized prices.

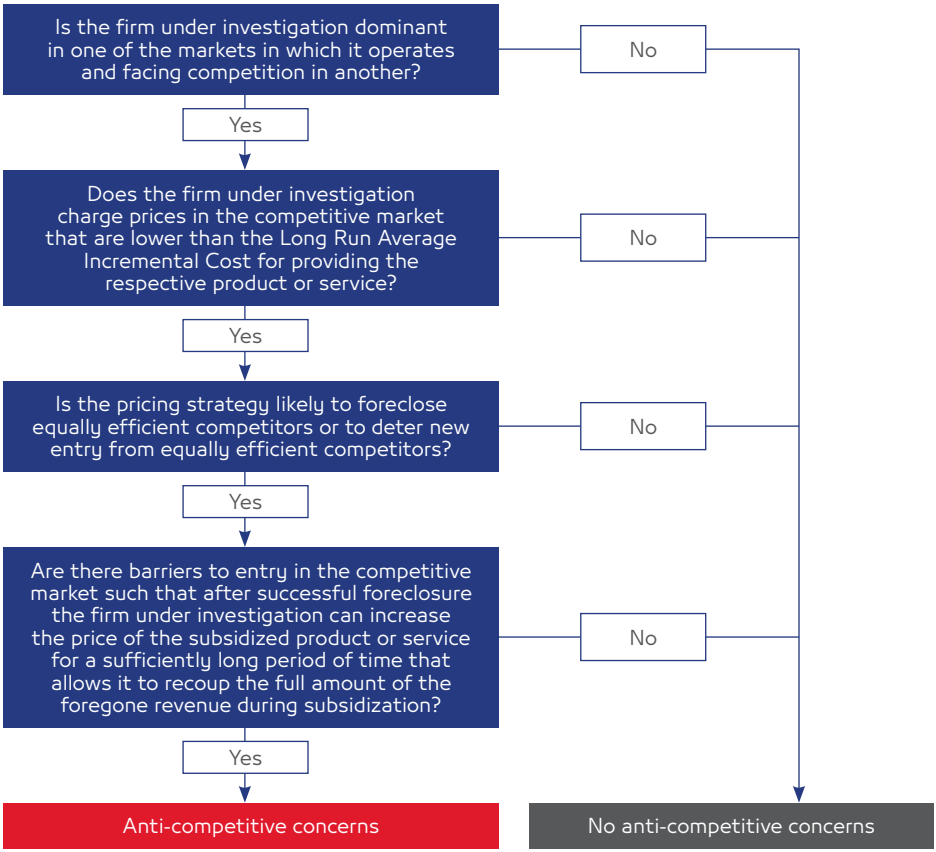
The Authority may investigate alleged cross-subsidization by looking into the cost structure of the dominant firm, how it allocates its costs to markets and how likely that allocation is to unreasonably lessen competition (or whether it has already unreasonably lessened competition).

The Authority may find that the cross-subsidization has had, or is likely to have, anti-competitive, predatory effects where:

- the prices charged for the product or service subject to competition is lower than the Long Run Average Incremental Cost for providing that product or service;
- this pricing strategy is likely to foreclose equally efficient competitors or to deter new entry from equally efficient competitors; and
- entry barriers are such that after successful foreclosure, the dominant firm can increase the price of the subsidized product or service for a sufficiently long period of time to allow it to recoup the full amount of the loss in foregone revenue on that product that it incurred during the period of cross-subsidization.

Note that the test is similar but not identical to the test for predatory pricing. **Figure 6** illustrates this process. As set out above at Section 3.4 the Authority will apply the relevant standard, given the availability of data and information, and may use proxies for each of the cost standards where relevant and proportionate.

Figure 6. An illustration of the process for investigation of cross-subsidization.



Example

Cross-subsidization from Leased Lines to mobile services

If an incumbent has a dominant position in the market for Leased Lines and faces competition in the market for mobile services, it can use its dominance in the first market to charge higher than competitive prices for fixed line and Leased Lines in order to charge lower prices in the market for mobile services, such that its rivals cannot compete. Such conduct could lead to foreclosure in the market for mobile services.

3.5.6 Excessive pricing

Excessive pricing occurs when the dominant firm sets a price that is excessive in relation to the economic value of the product and which is unfair. Hence, if charged prices have no **reasonable** relation to the economic value of the product or service supplied, the Authority could consider them to be an abuse of dominance.

For the avoidance of doubt, firms are entitled to earn a profit which is reasonable given the specifics of the market, the product and their own relative standing in comparison to their competitors. For example, prices that appear high may be the

result of a demand or a supply shock. They could also be a justifiable return for risky and costly research or for an innovation that leads to a significantly more efficient (i.e. less costly) operations.

International best practice assesses whether a certain return is excessive based on the specifics of the individual case. Both the benchmark and the test used to evaluate how returns compare against the benchmark can vary according to the specific elements of the case.

Benchmarks could be:

- costs actually incurred for supplying that product or service;
- prices charged in a similar, but more competitive market, which could be a market covering a different geography, customer group and/or time;
- prices charged by competitors in the same or a comparable market; and
- a combination of the criteria.

Similar to the cost standards discussed in relation to the investigation of potential price-related abuses of a dominant position in Section 3.4, the Authority may apply different tests and cost standards depending on the specifics of the case and the data which is available.

During an investigation, the Authority will apply one or more reasonable benchmarks best suited to evaluate the relationship between prices and costs in the context of the specific market environment and data which is available. Prices need to be in a **reasonable** relation to economic value. The Authority will reach a decision on a case-by-case basis where conduct will be individually assessed.

Within this context, the Authority will make an a priori assumption that prices of a dominant firm which are 100% higher than costs are likely to be anti-competitive. Where a dominant firm's prices are found to be above this level, the firm will be required to justify the high level of prices. However, depending on the specific economic context, in specific cases, prices above this threshold may be not considered to be excessive. Furthermore, in specific cases, the Authority may find that prices below this level are excessive.

Example

International practice on excessive pricing

International practice shows that there is not a single threshold for excessive pricing. In the case against Deutsche Post (C-399/08 P) prices exceeding the cost of providing the service by 25% were considered excessive. In the case of United Brands, a surcharge up to 138% compared to prices in other markets was excessive (Case 27/76 1978 ECR 207).

3.5.7 Bundling and Tying

Bundling refers to the selling of two or more products or services together as a package. There may be pro-competitive rationales for offering bundles. For example, bundles may reflect economies of scope, reduce "shopping costs" and provide a convenient way for customers to buy more than one product or service. However, when bundling is offered by a dominant firm, it may have anti-competitive effects.

Bundling can be achieved via contractual means, where a supplier contractually binds a customer to buying two (or more) products or services together; or as a result of technical restrictions where one product or service is compatible only with a certain other product or service.

Bundles can be pure and mixed:

- **pure bundles** occur when suppliers only offer two distinct products (A,B) when offered as a bundle (AB);
- **mixed bundling** occurs when suppliers offer two products on a stand-alone basis, and as a bundle (AB). The price of a mixed bundle (AB) is lower than the sum of the stand-alone prices of its components (A+B)[23].

23 Rebates can also be granted conditional on the purchase volume as a share of purchases of a single customer. This is in so far different from bundling that the rebate is granted on an ex-post basis. Such conduct is referred to as "fidelity rebates" and dealt with in subsection 3.5.3.

- **tying** occurs where a supplier offers one product (A) on a stand-alone basis (referred to as the "tying product") and also offers a second product tied to the first (AB) but does not offer the second product (B) on a standalone basis (referred to as the "tied product").

For the avoidance of doubt, the Authority notes that if a Dominant Service Provider supplies a bundle which contains a telecommunications service, then the bundle may fall within the jurisdiction of the Telecommunications Law (even if elements of the bundle fall outside the jurisdiction of the Telecommunications Law). Dominant providers are therefore under obligation to supply such telecommunications bundles in a way which does not amount to an abuse of a dominant position under the Telecommunications Law.

There are two potential competition concerns which relate to bundling and tying which are explained below.

3.5.7.1 Predatory pricing bundles (multi product rebates)

A bundle can be an example of "predatory pricing" in the sense that:

- the firm is dominant in at least one of the markets of the bundled product or services;
- the bundle can be theoretically replicated by a competing firm but the pricing of the bundle does not allow an equally efficient firm to profitably compete. The standard predatory pricing test on the bundle will be used to test whether the price of a bundle is predatory.

Example

Triple or Quad play bundles

It is common for telecoms providers to bundle multi-products, such as access, voice calls, broadband, TV or mobile services. A multi-product rebate may be anti-competitive if it is so large that equally efficient competitors offering only some of the components (for example just voice calls) cannot compete against the discounted bundle.

If the incremental price that customers pay for each of the dominant undertaking's products in the bundle (for example, voice calls or broadband) remained above the LRAIC of the dominant undertaking from including that product in the bundle, then it is unlikely that the bundle could be predatory since an equally competitive firm could compete.

3.5.7.2 Exclusionary tying

In some circumstances, tying may constitute an abuse of dominance. Tying can have exclusionary effects when a dominant firm uses or attempts to use tying in order to use its power from the market of the tying product to achieve increased sales in the market for the tied product. Due to its dominant position in the market of the tying product, competitors may have difficulties replicating the bundle. This could result in the foreclosure of equally efficient competitors involved in the provision of the tied product. In particular, the Authority is likely to consider certain conduct to constitute abuse of dominance if it is a type of predatory pricing, or if it is exclusionary tying, which is explained below.

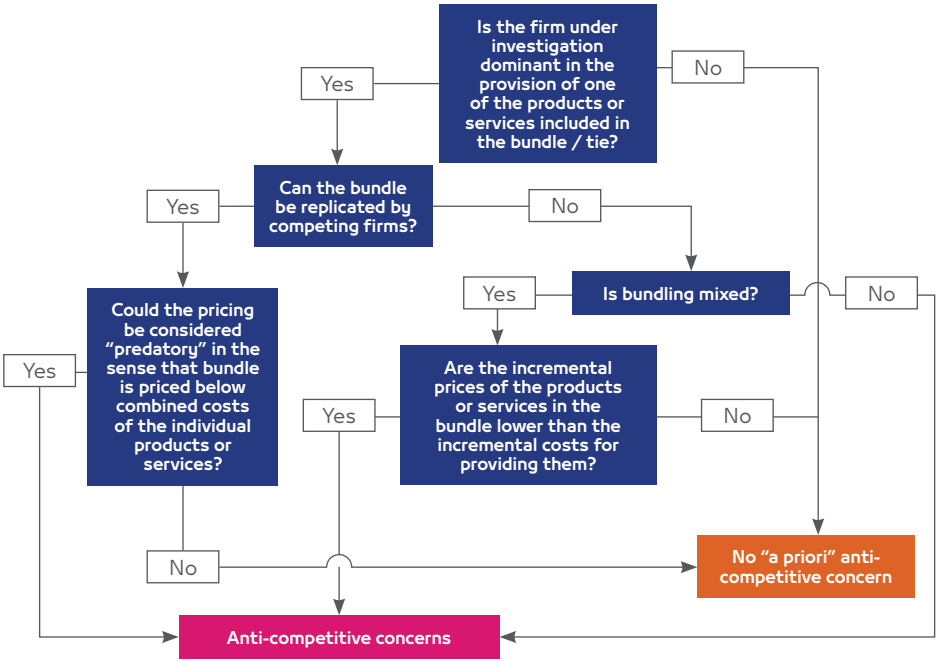
A bundling strategy can be exclusionary when:

- the firm is dominant in a tying market;
- the tying and the tied products or services are distinct; and
- the conduct is likely to result in anticompetitive foreclosure[24].

Figure 7 illustrates the process that the Authority will follow when determining whether tying or bundling is exclusionary.

Figure 7. Illustration of the process for investigating anti-competitive bundling and tying.

24 Note that when the tying firm is active in a regulated and an unregulated market, tying can provide the dominant firm with an opportunity to engage in some cross-subsidization across the bundle – by increasing the price of the (unregulated) "tied" product it can compensate itself compensating for potentially lower profits in the price regulated "tying" market.



Note: mixed bundling describes bundles where the individual elements of the bundle are simultaneously offered on an individual basis.

To determine whether products are distinct or not, the Authority will consider if, in the absence of tying or bundling, both the tying and the tied products could be produced or supplied on a stand-alone basis. Evidence for distinctness could involve observations that:

- if given the choice, customers tend to purchase the tying and the tied products separately from different suppliers;
- there are suppliers of the tied product without the tying product; and / or
- (in other geographic markets) market players with little market power tend not to tie or to bundle the products.

Anti-competitive foreclosure can result from tying or bundling in the tying market, in the tied market or in both markets at the same time. Anti-competitive foreclosure is more likely if, for example:

- tying is difficult to reverse, such as technical bundling, and therefore constitutes a lasting strategy; and/or
- the firm enjoys a dominant position in relation to a number of products or services included in the tied package.

Example

Bundling fixed line and mobile services

In the telecommunications sector, an incumbent may have a dominant position in the provision of fixed line and broadband service and face competition in the mobile service provision. If it only offers its fixed services when bundled with mobile services, then this could lead to foreclosures in the mobile service market.

Bundling a technical appliance with operational service

Non-competitive tying could also occur if one mobile service supplier has exclusive distribution rights over an appliance that is highly valued by consumers.

3.5.8 Customer lock-in through contract length

Long term contracts limit the ability of customers to switch between providers by providing for penalties if the contract is terminated earlier.

In a competitive market, long contracts may increase efficiency by allowing suppliers to earn returns on costs spent to win the customers, such as marketing activities, and the provision of technical know-how and advice. In some markets parties have to invest significant amounts, and long term contracts enable parties to an agreement to share investment risks.

However, long-term contracts can reduce the customers' ability to respond to other improved offers. Especially in markets where one provider is able to exercise market power, long-term contracts could "lock-in" customers and thus raise barriers to entry by making it harder for actual or potential competitors to acquire customers.

Hence, the optimal contract length will depend on the specifics of the relevant market. Thus, when investigating whether a given contract length can amount to an abuse of dominance, the Authority will weigh the potential benefits against the potential harms of the contractual conditions under investigation within the specific context of the development of the market. It may, without limitation, look into:

- barriers to switching;
- what share of customers take the offer and is therefore "tied up";
- availability of the same service in alternative contracts (at the same or different periods of time); and
- the upfront costs necessary to offer the product or service in question.

The Authority notes that there are also ex ante instruments relating to customer lock in which impose obligations on licensees (such as the Consumer Code). The ex post provisions set out in the Competition Policy should be considered as complementary to other regulatory measures imposed by the Authority, including ex ante regulations placed on Service Providers.

Example

Introduction of longer contracts when new licenses are awarded: Jersey Telecom[25]

In April 2006, Jersey Telecom (the incumbent provider of fixed and mobile telephony on the island) launched 18 month contracts for its mobile services, offering larger discounts on handsets than were available with 12 month plans. This followed the award of licenses to two new entrants to the mobile market, Cable & Wireless and Airtel.

3.5.9 Exclusive distribution agreements

Exclusive distribution agreements require the customer to purchase exclusively or to a large extent from one supplier. They do not necessarily constitute an abuse of a dominant position. However, they can have exclusionary effects when, for example, a dominant firm is an unavoidable trading partner for customers and the imposition of an exclusive distribution agreement results in competitors being unable to compete on equal terms for each customer's demand. This could prevent entry or expansion of competing firms. For more details see Section 2.3.2.

Example

Excusive purchasing agreements: Van den Bergh Foods

The European Commission found that it was an abuse of a dominant position for Van den Bergh Foods to provide

25 See, "JCRA Media Release: 30th *August 2006: JCRA requests Jersey Telecom to withdraw 18 month mobile plans in long term interests of competition and consumers"*, for more information

freezer cabinets free of charge to retail outlets on condition that they were used exclusively for the storage of its ice cream. By this means, Van den Bergh Foods was able to achieve exclusivity, which the Commission found was an abuse of a dominant position.

3.5.10 Predatory pricing

Predatory pricing occurs when a firm incurs short-term losses or foregoes profits in the short term in order to (likely) foreclose a competitor (or competitors), with the ultimate objective to strengthen or maintain its market power. It can also be used as a strategy to prevent entry into the market which over the longer term, if effective, can substantially lessen competition in the relevant market. Therefore it can result in a loss of consumer welfare as prices, which were temporarily lowered, can then be increased above the competitive level when the dominant firm no longer faces competition.

When investigating behavior that may amount to predatory pricing, the Authority will consider whether:

- **The predating firm is dominant:** if it is not dominant, it is unlikely that the predatory pricing strategy would enable it to recoup its losses in the second period through setting high prices.
- **The predating firm sacrifices short run profits by setting prices below costs.**
- **Predation leads or is likely to lead to foreclosure or to prevent market entry:** if competitors remain in the market or new firms enter the market, the dominant firm will be unlikely to be able to increase prices in the second period to such an extent that allows it to recoup its losses from the predatory pricing.

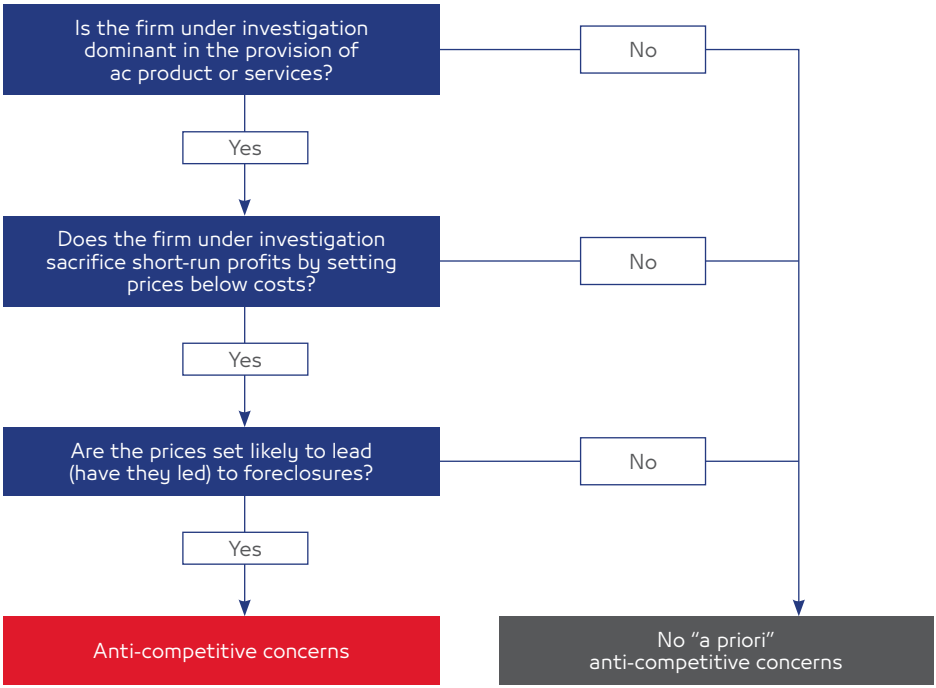


Figure 8. An illustration of the process for the investigation of predatory pricing

Note that for the predatory strategy to be effective, the dominant firm should be able to recoup losses from the first stage through earning higher revenue in the second stage. However, when investigating a conduct that may amount to predatory pricing, the Authority will not attempt to determine whether the conduct was an effective exclusionary practice and the dominant firm was able to recoup losses. Rather, the Authority would deem any behavior as predatory pricing and thus abuse of a dominant position based on evidence regarding the **sacrifice of revenue and the likelihood of foreclosure.** That is, the Authority will deem behavior to be predatory if it finds that the dominant firm has priced below the relevant measure of costs and that the alleged predatory conduct led in the short term to revenues lower than could have been expected from a reasonable practicable and economically rational alternative conduct (i.e., whether the dominant licensee has incurred a loss or reduced profits).

As a general rule, the Authority will consider the following cost standards related to predatory pricing abuses and where the data is not available or incomplete, the Authority may apply equivalent standards or reasonable proxies and estimates where data is available (see Section 3.4):

- **Prices above Average Total Cost,** (which can be proxied by Long Run Average Incremental Cost (LRAIC)), will not be considered predatory;
- **Prices below the ATC but above the Average Avoidable Cost (AAC)** may be predatory. Prices lower than ATC can indicate that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market. Any prices between AAC and LRAIC will require further investigation, as described below; and
- **Prices below the AAC** will be considered predatory. Prices below AAC indicate that the dominant firm is sacrificing profits in the short term by not recovering its variable costs and that an equally efficient competitor cannot compete effectively.

When investigating a case where prices are between AAC and LRAIC, the Authority will follow the general methodology outlined in Section 3.2 to determine how likely it is that the dominant firm's conduct could have anti-competitive effects and lead to consumer harm.

In addition it may take any of the following qualitative and / or quantitative evidence into account as is relevant to the case, such as:

- whether the dominant firm is better informed about cost or other market conditions, or whether it can distort market signals about profitability;
- whether there is indication that the dominant firm is trying to prevent entry by building a reputation for predatory conduct in multiple markets and / or successive periods of possible entry;
- whether targeted competitors are dependent on external financing and predatory conduct would increase their borrowing costs in the future;
- whether any internal documents provide evidence for predatory intent; and
- Other evidence where relevant.

The firm under investigation will need to provide justification for any pricing strategy which the Authority finds predatory or likely to be predatory.

Example

Predatory pricing of broadband services: Wanadoo[26]

In 2003, the EU Commission concluded that France Telecom's Internet access subsidiary, Wanadoo, had charged predatory prices for consumer broadband internet access services. The Commission found that conditions for predatory pricing were met:

26 EC COMP/38.233

Wanadoo was found dominant at the retail level;

Wanadoo was found to have priced below its average variable cost between March and August 2001 and below its average total cost between August 2001 and October 2002; and

documents which provided evidence of anti-competitive intent were found.

3.6 Defenses or justification for otherwise anti-competitive conduct

When investigating alleged abuses of a dominant position, the Authority will take into account the specific facts of the case. This also includes considering any reasonable justification for the conduct in question, in which case it may choose not to pursue an infringement decision. Conduct may be justified:

- either because it is objectively necessary, or
- on the basis of demonstrable efficiency gains which would not otherwise be achievable and which benefit consumers.

3.6.1 Objective necessity justification

To justify abusive conduct on the basis of objective necessity, the dominant firm will need to demonstrate that **simultaneously:**

- the conduct is indispensable to the provision of the respective product or service (for example, for technical or health and safety reasons); and
- the conduct is proportionate to the provision of the respective product or service, i.e. the provision cannot be achieved in a manner less harmful to competition.

3.6.2 Efficiency justification

To justify abusive conduct on the basis of efficiency gains, the dominant firm will need to demonstrate that the conduct produces efficiencies that outweigh the anti-competitive effects on consumers.

This would be the case if the following four criteria were **simultaneously** fulfilled:

- the conduct brings efficiency gains by, for example, reducing costs for the provision of the services in question, and the efficiency gains are passed on to consumers;
- these efficiency gains cannot be achieved without the conduct, i.e. the conduct is indispensable to the efficiency gains;
- the efficiency gains outweigh the harm to competition and negative effects on consumer welfare resulting from the anti-competitive conduct; and
- the abusive conduct does not eliminate effective competition and thus reduces consumer welfare in the long term.

The Authority notes that the burden of proof lies with the dominant firm to demonstrate that conduct which might otherwise be an abuse of dominance is either objectively necessary or will lead to long term efficiency gains.

Examples

Efficiency savings which may justify otherwise anti-competitive conduct

Fidelity rebates: volume based rebate systems that achieve cost or other advantages which are passed on to customers may be considered. For example, if the party under investigation can provide evidence of economies of scale.

Refusal to supply: efficiencies may arise if the conduct is necessary to allow the dominant undertaking to realize an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account.

Alternatively, a refusal to supply may be justified if innovation will be negatively affected by the obligation to supply, or that the structural changes in the market conditions that imposing such an obligation will bring about, including the

development of follow-on innovation by competitors, (provided that the party claiming the efficiency can demonstrate that the efficiencies are verifiable and outweigh any anti-competitive effects, that the conduct is indispensable to the realization of the claimed efficiencies, and that the conduct does not eliminate competition).

Predatory pricing: In general, it is considered unlikely that predatory conduct will create efficiencies. However, it is possible that low pricing enables the dominant firm to achieve economies of scale or efficiencies related to expanding the market to the benefit of consumers. If making such a claim, however, the burden of proof is on the party under investigation to demonstrate that the efficiencies are verifiable and outweigh any anti-competitive effects, that the conduct is indispensable to the realization of the claimed efficiencies, and that it does not eliminate competition.

Tying or bundling: tying and bundling practices may lead to cost savings in production or distribution that would benefit customers. For example, these

PART 04.

MERGER AND TRANSFER OF CONTROL

could be through economies of scope, provided the benefits will be passed onto consumers.

Part 04. Merger and transfer of control

4.1 Introduction

This section provides information on the approach the Authority will undertake in assessing a merger or transfer of control in the telecommunications sector. It focusses on, and is most relevant to, the service providers directly involved in the merger or transfer of control.

Article (47) of the Telecommunications Law states that:

"The General Secretariat in determining whether to approve such transfer, or approve it subject to conditions or reject it shall take into account the effects of the proposed transfer on telecommunications markets in the State and in particular its effects on competition in such markets and the interests of customers and the public."

This Competition Policy Explanatory Document describes the Authority's assessment of the impact of the merger or transfer of control (including a full function joint venture) on competition in the relevant markets.

The remainder of this section outlines the process which must be followed by the parties involved in the merger or transfer of control, and explains the Authority's assessment of competition effects resulting from it.

4.2 Notification obligations

As stated in the Article (47) of the Telecommunications Law, the parties directly involved in the merger or transfer of control are legally required to provide notification of the transaction:

"No transfer of control of a Service Provider shall become effective by any transaction without one or more parties providing written notification of the intended transaction to the General Secretariat".

This notification should inform the Authority on:

- **Information about the merger.** The merging parties, the type of transaction and consideration, timing and terms of the merger, and the resulting ownership structure;
- **Information about the merging parties and the terms of the transaction.** This includes the relevant individuals for correspondence, the turnover of each merging party from the sale of products and provision of services, other transactions undertaken by the merging parties in these relevant markets within the past two years; and
- **The rationale for the merger.**

4.3 Assessment of effects of the transfer of control on competition

The assessment of the impact on competition of a merger or transfer of control will trade off the negative and positive impacts it has on the market. The assessment of both impacts will involve the choice of an appropriate and accurate counterfactual. The negative competitive impacts of the merger are primarily the substantial lessening of competition resulting from the merger, with consideration of any countervailing buyer power. The positive competitive impacts of the merger are primarily any efficiency savings that result from it.

4.3.1 Assess the merger against a counterfactual of no merger

The Authority will measure the impact of a merger by comparing expected competitive outcomes in relevant markets if the merger occurs, to those if it doesn't occur, i.e. the counterfactual[27] (following the identification and definition of relevant markets). Often, the latter is measured using the status quo in the market. In other words, it is assumed that the competitive outcomes in the absence of the merger will be similar to the current competitive outcomes.

27 The Authority notes that in assessing a merger there may be several plausible counterfactuals.

However, if the market is dynamic or unstable, that assumption will not always be an accurate reflection of the state of the market in the absence of the merger. For example, this can be because of failing firms, new entrants, and growing or declining markets. In particular, a counterfactual that draws on the presence of failing firms would need to demonstrate that competitive outcomes would be similar or worse in the absence of the merger. A case for a failing firm can be supported by evidence of financial difficulties that imply its exit from the market and of its assets being lost from the market if it were to exit.

The Authority expects the merging parties to take this into account as part of the notification obligations when establishing the rationale for the merger. The Authority will also independently reflect these considerations when establishing its own view on whether the merging parties have chosen an appropriate counterfactual and if not, what the appropriate counterfactual should be.

4.3.2 Does the transfer lead to a "substantial lessening of competition"

The first stage in assessing the competitive impacts of a merger is to examine whether it will lead to a substantial lessening of competition (SLC).

A "substantial lessening of competition" refers to the impacts of the transfer on competitive outcomes in a market. The UK's Merger Assessment Guidelines describe it as a *"significant effect on rivalry over time, and therefore on competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to SLC will be expected to lead to an adverse effect for customers"*.

In accordance with this description, the Authority considers a transfer of control that significantly reduces the competitive pressure on service providers to substantially lessen competition. The Authority would also expect it to have adverse effects on outcomes for consumers.

In analyzing whether there is a substantial lessening of competition, the Authority would take into account the extent of unilateral effects, coordinated effects and foreclosure effects. In this section, the Authority describes what it may analyze when evaluating each of these effects.

The Authority's assessment of the expected competitive outcomes post-merger may differ based on the nature of the merger. Different competition concerns arise depending on whether it is a horizontal, vertical or conglomerate merger.

Accurately estimating a merger's impact requires an understanding of the market dynamics before and after the merger, which will usually require the Authority to define the relevant markets affected by the merger or transfer.

4.3.3 The evaluation also involves assessing potential efficiencies

To evaluate the overall impact of the merger on the market, the Authority would also take into account any resulting positive impacts on competition within the market. Any positive impacts should be measured relative to the counterfactual in order to determine whether they are generated specifically by the merger. In addition, the Authority will consider whether the positive impacts can be generated through other means than the merger.

The principal source of such positive impacts that the Authority will consider are efficiency gains that may be generated by the merger, and they are assessed separately in Section 4.9. The Authority expects the merging service providers to provide robust evidence of any benefits they claim to be generated by the merger.

4.4 Assessing horizontal mergers

4.4.1 Introduction

Horizontal mergers refer to mergers between service providers involved at the same stage of a supply chain, and who are competing with each other in the same market.

The Authority considers two principal ways

in which horizontal mergers can lead to a substantial lessening of competition. These are unilateral effects and coordinated effects, and the Authority's approach to assessing each of these is described below.

4.4.2 Unilateral effects

A merger gives rise to unilateral effects when the merged service provider finds it profitable to increase prices regardless of the actions of its competitors. The Authority identifies some key indicators of the potential presence and magnitude of unilateral effects:

- **Market concentration.** Assessing the change in the number of competitors in the market and their relative market shares can indicate scope for unilateral effects. If a market is more concentrated as a result of the merger, where fewer service providers have higher market shares, then it could lead to an increase in prices on the market.
- The Authority notes that, in the case of horizontal mergers, it may use the following thresholds to assess whether the transfer of control is likely to lead to a substantial lessening of competition.
    - o If the post-merger market share of the merged entity will be less than 25%, then the concentration is unlikely to give rise to concerns; or
    - o Where the post-merger market share of the merged entity is greater than 50%, then it is likely to lead to a substantial lessening of competition.
- The Authority may also consider evidence using the Herfindahl-Hirschman Index (HHI). In particular, it would consider that there is unlikely to be a substantial lessening of competition where the HHI:
    - o Is less than 1000;
    - o Is between 1000 and 2000 and the and delta (i.e. the change in pre and post-merger HHI) is less than 250;
    - o Is greater than 2000 but the delta is less than 150.
- **Closeness of competition.** Mergers between parties that are particularly close are more likely to lead to unilateral effects. Generally, a greater closeness of competition indicates higher expected unilateral effects of the merger. The Authority can assess closeness of competition in three ways:
    - o Customers' observed substitution patterns. If customers consider the merging service providers' products as close alternatives, then it could imply substitution between the merging service providers has been an important source of competition in the market. The Authority can observe this through the customer responses to price changes between the merging service providers. Customer churn and porting data could be used to analyze the extent to which customers of the merging parties consider products to be substitutes.
    - o Customer segment analysis. Merging service providers who target the same segment of the market are more likely to be close competitors. Their products are less likely to be significantly differentiated from each other, thereby forming close substitutes to each other.
    - o Competitive interactions. It may be possible to identify competitive interactions which have occurred between the merging service providers and which can indicate the closeness of competition between them. This could involve strategic responses of one service provider to the others with regards to the product, its price and marketing approaches. Historic information on the commercial strategies of service providers in the market could be used for the Authority's assessment of competitive interactions.
- **Customers' ease of switching.** Unilateral effects are more likely where customers have little choice of alternative supplier, for example because of the level of switching costs.
- **Changes in price after the merger.** The Authority can use analytical tools

to directly estimate the change in prices after a merger.

- **Elimination of strong competitive force.** If one of the merging service providers is imposing a strong competitive restraint on the market, a merger may eliminate the restraint they impose on the market.
- **Extent of competitor capacity constraints.** The supply-side capabilities of other competitors affect their ability to restrict the market power of the merged service provider. A merged service provider generally has greater incentive to restrict supply and increase prices, and this incentive is greater when competitors are unable to respond by increasing their output.
- **Barriers to expansion.** A merged service provider may be in a better position to restrict the supply of inputs required by other suppliers in the market. For example, the merging service providers may own or have control of key inputs required by other operators. If this is the case, the merged service provider may be in a stronger position to prevent the expansion of other competitors by limiting access to these inputs. Such an input could be access to network infrastructure, which other operators require in order to initiate or expand service provision.

Example:

Merger effects acquisition of Telefónica Ireland by Hutchison 3G[28,29]

In its 2014 assessment of a merger between Telefónica Ireland by Hutchison 3G (Three), the European Commission had concerns that the merger, as initially notified, would have removed an important competitive force from the Irish mobile telecommunications market to the detriment of consumers.

The merger would bring together the second and the fourth largest mobile network operators in Ireland. Since its entry in 2005, Three had been an important competitive force on the Irish market, for instance by offering attractive data offers to consumers. The merger would have removed this force and created a larger company facing only two competitors. In addition, the market was characterized by high entry barriers for new competitors and no countervailing buyer power from end consumers. Therefore, the Commission was concerned that the merger, in its original form, would have led to higher prices and less competition.

The Commission's quantitative analysis based on diversion ratios and margins predicted average price increases across all Mobile Network Operators in the post-paid private segment of 6% and market wide average price increases across all voice segments of 4% in the baseline case.

The Commission also had concerns that after the merger, Three could frustrate or terminate the network sharing agreement with another operator after the merger. This would have limited the rival's options to achieve a nationwide coverage, including for its roll-out of 4G/LTE services.

4.4.3 Coordinated effects

A merger gives rise to coordinated effects when the change in the market structure as a result of the merger means that the merged service provider and at least one other is more likely to reach a tacit agreement not to compete as strongly.

In a similar approach to its assessment of collective dominance, the Authority will assess the likelihood of coordinated effects by examining three areas:

- Market dynamics:
  - In a more transparent market, it would be easier to reach a collusive agreement because service providers can observe each other's actions. This can facilitate the service

28 European Commission Press Release IP/14/607, "Mergers: Commission clears acquisition of Telefónica Ireland by Hutchison 3G, subject to conditions", 28 May 2014.

29 European Commission Case No COMP/M.6992, "Commission Decision of 28.5.2014", p. 160

providers' identification of a focal point to collude on. In addition, transparency also makes it easier for the coordinating service providers to observe deviations from the tacit agreement.

- Internal sustainability of the tacit agreement as evidenced by the structure of the market:
  - For service providers to have the right incentives to coordinate, they need to have similar structures and strategies. Service providers who target different segments of the market or which have different aims are less likely to adopt a common action. Having a similar cost structure is also important for maintaining a common price, because the service providers would be affected by cost fluctuations in a similar way.
  - Where there are many firms in the market it may be more difficult to coordinate conduct.
  - The sustainability of coordinated effects also depends on the ability of service providers to credibly enforce a punishment for deviations from the tacit agreement. For coordinated effects to be viable, such punishment should be timely and large enough to deter service providers from deviating.
- External sustainability of the tacit agreement
  - For coordinated effects to be sustainably profitable, the market should be characterized by high barriers to entry and a lack of countervailing buyer power. Both factors would enable the tacit agreement to have a more certain impact, as it is unlikely to be undermined by competitive pressure from new entrants or from buyers.

4.5 Countervailing buyer power

The realization of unilateral or coordinated effects could be limited by the presence of countervailing buyer power. If customers have sufficient negotiating power, it could place a competitive constraint on the market such that the merging service providers cannot act anti-competitively. The Authority considers three potential sources of buyer power: firms can easily switch their purchases to other suppliers; firms can sponsor entry; and firms can vertically integrate with their suppliers.

For countervailing buyer power (CBP) to exist, it must have an effect on all customers in the market. Such buyer power is more likely to stem from, but not limited to, large and/or commercially important customers.

CBP can also be manifested through buyers refusing to buy other products from the merging service provider. It can therefore have an impact on other markets in which the merging service provider is active.

4.6 Vertical mergers

Vertical mergers refer to mergers between firms involved in different levels of the supply chain.

These mergers are less likely to raise competition concerns because the merging firms are not direct competitors. However, the Authority identifies two ways in which vertical mergers can raise competition concerns. These are the effects of input foreclosure and customer foreclosure.

4.6.1 Input foreclosure

Input foreclosure concerns arise when a merger leads to a vertically integrated service provider which has the market power and incentive to restrict access to an important input. The merged service provider could, for example, restrict supply to downstream competitors. The Authority believes that this would have a particularly strong impact on competition if the upstream pre-merger service provider is a dominant supplier of an important input since it implies there are few viable alternative upstream suppliers.

4.6.2 Customer foreclosure

Customer foreclosure concerns arise when

a merger leads to a vertically integrated service provider which has the market power and incentive to restrict access to an important downstream customer. For example, an upstream competitor could be prevented from accessing the customers of the downstream part of the merged firm. The Authority believes that this would have a particularly strong impact on competition if the downstream pre-merger service provider is dominant in its market, since it implies there are few contestable alternative downstream customers for the competing upstream provider.

4.7 Conglomerate mergers

Conglomerate mergers refer to mergers between firms who have activities in different markets which are not vertically related. For example, a merger between a firm which is present in telecommunications markets and a firm which is present in TV markets could be considered as a conglomerate merger.

However, the Authority would consider whether a substantial lessening of competition could arise because of the possibility of exclusionary practices. For example, a merged firm could attempt to foreclose the market through bundling or tying sales across its markets. Such a strategy can be used anti-competitively to foreclose competitors. In assessing whether a conglomerate merger will lead to a substantial lessening of competition, the Authority will examine in three stages:

- the ability to foreclose;
- the incentive to foreclose; and
- the impact on competition.

A merged conglomerate could have the ability to leverage its position through bundling if it is dominant in at least one market. Its incentive to foreclose may encourage switching away from single-product competitors with the objective of gaining or protecting market power.

Therefore, the potential impact of the merger will be assessed using the bundling framework set out in Section 3.5.7. The Authority will consider whether the merged party can leverage market power via bundling. The competitive dynamics around the impact of bundling can often be complex and depend on the relative position of the merging parties in each market. However, the Authority considers that the following factors could be relevant:

- dominance in at least one of the markets is more likely to suggest a merger which could negatively impact on competition, although this is not exclusively the case;
- bundling of the merged parties' products must be technically and economically feasible; and/or
- the Authority will consider whether bundling is likely to be predatory (i.e. whether the merged party has incentives to price in a predatory way).

4.8 Full function joint ventures

The Authority applies the same approach to assessing full function joint ventures as it does to mergers. A full function joint venture refers to a joint venture between two or more firms which is functionally autonomous. This means it is likely to have its own resources and function, as if it were a separate entity. After identifying whether the joint venture represents a vertical or horizontal relationship, it will address whether the full function joint venture will lead to a substantial lessening of competition. A vertical joint venture would require consideration of input foreclosure and customer foreclosure effects on the market. A horizontal joint venture will need assessment of unilateral and coordinated effects. In assessing the potential for coordination effects, the Authority will consider the potential for information flows between the firms involved in the joint venture, which could affect competition in any of the markets where any of the firms involved are active.

Joint ventures which are not functionally autonomous would be assessed as agreements between the firms involved. They are therefore not subject to the notification process described in Section 4.2.

4.9 Assessing efficiencies of the merger

While mergers can have anti-competitive impacts on a market through a lessening of competition, they can also generate benefits for consumers. The Authority's assessment of efficiencies in mergers consists of three broad stages:

1. Identify the types of potential efficiencies resulting from the merger;
2. Evaluate their presence, magnitude and timeliness (considering efficiencies over the medium term up to 12-24 months from the transaction);
3. Assess the resulting impact on the competition in the market.

For the Authority to consider the efficiencies as benefits resulting from the merger, these efficiencies need to be merger specific (i.e., they would not have been generated absent the merger, and could not be generated by other means); they need to be passed on to consumers; and verifiable in their expected presence and magnitude. The Authority will consider the incentives of the merged service provider for realizing and passing on to consumers the efficiency savings and the time frame in which the efficiency gains will be generated.

The merging parties may seek to demonstrate the generation of such benefits and to assert in good faith that they will be passed on to consumers. However, the Authority will require robust and detailed evidence to justify the efficiency benefits resulting from the merger. The merging parties will need to provide evidence of how the efficiency gains will be achieved; the likelihood of realizing them; when they will occur; their magnitude; and credible evidence of why they would be passed on to consumers.

Efficiencies gained from a merger can arise in various forms. The Authority identifies some conventional forms of potential efficiency gains. These are:

- **Cost efficiencies.** A merged firm may be able to allocate production in a more efficient way than the pre-merger firms, and this could reduce marginal costs. While they can also affect fixed costs, these are less likely to be passed on to consumers than marginal cost reductions.
- **Economies of scale.** A merged firm may achieve lower average unit costs as a result of the merger. These can be:
  - o short-run economies of scale, which can be achieved through eliminating the duplication of tasks; or
  - o long-run economies of scale, which can be achieved through specialization, investing in more productive equipment and marketing for a combined brand.

The savings through such economies of scale are more likely to be passed on to consumers if they reduce variable costs rather than fixed costs. It is therefore important for the merging parties to demonstrate what specific costs are reduced in the process of realizing economies of scale.

- **Sharing of know-how.** The merger could allow the relevant firms to share information on best practice in a way that enables them to reduce costs. Each of the merging firms may have differing knowledge sets or capabilities, such as those protected by patents. When merged, knowledge sharing can enable synergies that enable more efficient joint production.
- **Innovations and R&D.** A merger could generate efficiency through innovation-led technological progress in three ways:
  - o a merged firm may undertake R&D in a more cost efficient way;
  - o it may also generate synergies through the combination of innovation across the merging firms; and
  - o it can improve incentives for investing in R&D by internalizing some of the external spillover effects that can deter R&D.
- **Increased purchasing power.** The larger merged firm may be better placed to

negotiate with its suppliers than the pre-merger firms. This could reduce costs when the suppliers to the merged firm are in an imperfectly competitive market. In this scenario, a merged firm could exert buyer power in negotiations that could enable it to reduce its costs.

Assessing the presence and expected magnitude of efficiencies is a more complex task. While the Authority has listed some potential forms of efficiency gains, the service provider may realize other forms of efficiency gains which the Authority will analyze using the framework described above.

Example

Merger efficiencies: acquisition of Telefónica Ireland by Hutchison 3G[30]

In its 2014 assessment of a merger between Telefónica Ireland by Hutchison 3G (Three), the European Commission examined four forms of efficiency that the merger could generate:

Network related economies of scale efficiencies. However, the Commission considered that network economies of scale efficiencies were ***not likely to be merger specific*** to the extent that similar savings were to be implemented through the existing network sharing agreements. Therefore the Commission did not consider that these were relevant efficiencies in its assessment of anti-competitive effects.

Non-network economies of scale. The efficiencies would enable the combined business to make larger investments in service quality than would be possible for parties on a stand-alone basis. However the Commission found that the scale efficiencies related to fixed costs which were unlikely to be passed on to consumers and therefore concluded that these were not relevant efficiencies in its assessment of anti-competitive effects.

Faster and more extensive LTE coverage than in the absence of the merger. However the parties **could not demonstrate to the *appropriate evidential standard that the* claimed efficiencies were *verifiable, merger specific and would benefit consumers.***

The merged entity would be more able to maintain broadband services in Ireland's most sparsely populated areas. The Commission found that there was some scope for efficiencies, ***but they were unlikely to be sufficiently large to outweigh anti-competitive effects***.

4.10 Remedies and undertakings

The Authority may approve a merger subject to further conditions which can remedy the substantial lessening of competition which would otherwise result from the merger. Such conditions can be structural remedies, such as the divestment of certain assets; or behavioral, such as undertakings or obligations.

The Authority's approval of a merger using such additional conditions would depend on whether they are sufficient to offset any substantial lessening of competition resulting from the merger.

Example:

Remedies acquisition of Telefónica Ireland by Hutchison 3G[31]

In its 2014 assessment of a merger between Telefónica Ireland by Hutchison 3G (Three), the European Commission accepted commitments from the parties which addressed concerns that, absent commitments, the merger would have led to higher prices and less competition.

H3G submitted commitments based on two components:

First, H3G offered a package aimed at ensuring the short-term entry of

30 European Commission Case No COMP/M.6992, "Commission Decision of 28.5.2014", pp. 174-5, 208

31 European Commission Press Release IP/14/607, "Mergers: Commission clears acquisition of Telefónica Ireland by Hutchison 3G, subject to conditions",28 May 2014.

two mobile virtual network operators (MVNOs), with an option for one of them to become a full mobile network operator by acquiring spectrum at a later stage.

Second, H3G offered a package aimed at ensuring that a rival firm remained a competitive mobile network operator in Ireland.

The Commission therefore concluded that the transaction, as modified by the commitments, would not raise competition concerns.

PART 05.

REMEDIES FOR INFRINGEMENTS OF COMPETITION ASPECTS OF THE TELECOMS LAW

Part 05. Remedies for infringements of competition aspects of the Telecoms Law

5.1 Purpose

This section concerns the remedial actions that the Authority can take if a service provider is found to have infringed the prohibition on abuse of dominant positions or other anti-competitive behavior in an ex-post investigation. The Authority sets out the remedies that it may consider, circumstances under which they might be applied, and how the Authority will assess what the appropriate remedies are. Specifically, this section explains how behavioral and structural remedies may be applied.

5.2 General principles

The remedies applied by the Authority, whether behavioral or structural, are guided by these objectives:

- **Effectiveness.** The proposed remedies must be able to successfully resolve the competition concerns in an efficient manner. This will involve ensuring that remedies must be sufficiently well targeted and are practical to implement.
- **Proportionality.** This concerns the regulatory burden imposed by the remedies and the appropriateness of the level of intervention to the abuse of market power. Considerations of proportionality would ensure that the implementation costs of the remedy do not outweigh its benefits.

The consideration of these objectives means that determining the appropriate remedies will be based on a case-by-case assessment and not applied formulaically.

5.3 Legal framework

The implementation of remedies is in accordance with the 2006 Telecommunications Law and Telecommunications By-Law.

Article (4) of the Telecommunications Law outlines that the Authority has the authority to enforce remedies in response to anti-competitive behavior:

"The General Secretariat shall have the following powers and authorities: ... 4. setting and enforcing the appropriate remedies to prevent service providers from engaging or continuing anti-competitive practices".

Article (46) of the Telecommunications Law then expands that such remedies can include, but are not limited to, certain forms of obligations and referrals to the public prosecutor:

"The General Secretariat may issue decisions to remedy anti-competitive practices or abuse of dominance and in particular the following:

1 *obliging the concerned persons to cease the actions or activities causing such practice or to make specific changes in such action or activities to eliminate or reduce their negative impact on competition;*

2 *obliging the concerned service providers to submit periodic reports to the General Secretariat to determine the extent of their compliance with its decisions;*

3 *refer the matter to the public prosecutor to initiate criminal proceedings against the violator."*

Article (76) of the Telecommunications By-Law adds that the Authority may consult the relevant service providers when determining the appropriate remedy, and that this can include the divestment of assets.

"In addition to the provision of Article (46) of the Law and any other remedies identified by the General Secretariat from time to time in accordance with this By-Law, the General Secretariat may require the Service Provider involved in the abusive action or anticompetitive practices, and the persons affected by such actions or practices, to meet and attempt to determine remedies for such actions or practices.

In case of repeated breaches of an order made by the General Secretariat to prohibit a Dominant Service Provider from the abuse of its dominant position or other anti-competitive action or activities, the General Secretariat may issue an order requiring

the Service Provider to divest itself of some lines of business provided that:

(1) the Service Provider is notified in writing prior to issuing such an order to allow the Service Provider to provide its comments regarding this matter.

(2) the General Secretariat determines that such an order is an effective measure to end an abuse of dominant position or anti-competitive practices."

The Authority therefore has the authority to implement both behavioral remedies, such as obligations, and structural remedies, such as divestments. These are described and explained below.

5.4 Behavioral remedies

Behavioral remedies refer to requirements which enforce a specific behavior on the service providers involved in the alleged infringements of the competition aspects of the Telecommunications Law. They impose more than a declaration of intent not to behave in a certain way by the service providers involved.

Behavioral remedies will relate to the prevention of certain anti-competitive behaviors conducted by the relevant service provider(s). These remedies will seek to prevent the activities that result in a negative impact on competition and as a result, they would constrain the ability of the service provider(s) to abuse their market power.

Behavioral remedies could include instructing the service provider(s) on actions that they cannot undertake, or can impose requirements of the service provider(s). Examples of the latter include, among others, reporting requirements on the quality of service and requirements to publish separated regulatory accounts.

Where the conduct found to be anti-competitive relates to an agreement, the remedy may be to sever the part of the agreement which the CRA finds is anti-competitive. The Authority may also replace a clause which is anti-competitive with an alternative, which remedies the anti-competitive effects which have been identified.

The Authority will determine the appropriate behavioral remedy based on the aforementioned objectives of effectiveness and proportionality. Therefore, they will take into account the gravity of the anti-competitive conduct and the ability of the service provider(s) to conduct similar activity in the future. They will also take into account the regulatory burden imposed by such a remedy and whether the Authority deems it to be justifiable relative to alternative remedial options.

The Authority has broad discretion to apply the appropriate behavioral remedy (consistent with the Statement of Competition Policy and its Explanatory Document) in order to mitigate any identified anti-competitive effects. Therefore remedies in some cases may extend beyond requiring the concerned party to cease the conduct, or may affect conduct in relation to products or services beyond the scope of the investigation.

The remedies can include the imposition of a requirement to provide products or services, at prices set by the Authority, where the prices set by the Authority are set to a level to mitigate the harmful effect on customers of the infringing conduct identified by the Authority.

5.5 Structural remedies

Structural remedies refer primarily to the divestment of assets of the service provider(s). This can involve separating distinct operational functions of the service provider(s) or divesting particular assets.

Structural remedies are generally a more extreme form of regulatory intervention than behavioral remedies. In this regard, the Authority will generally only have recourse to structural remedies where there are no available behavioral remedies which can practically and proportionately bring the infringing conduct to an end.

The objective of such remedies is to create a market structure which is self-sufficient at resolving incentive problems and the ability to behave in an anti-competitive manner. For example, in the case of a vertically integrated service provider, structural remedies could involve a separation of the

upstream and downstream functions into different entities.

The Authority will determine the appropriate structural remedy based on the objectives of effectiveness and proportionality. Structural remedies generally have a lower regulatory burden and are simpler to implement but they impose a greater degree of intervention into the market. The Authority therefore will consider the trade-off between these factors (as well as other factors relevant to the specific case) when considering the implementation of a structural remedy.

5.6 Interim remedies

The Authority will consider applications from Complainants to impose a behavioral remedy prior to reaching a decision in certain cases. The Authority will consider applications for interim remedies where the Complainant can demonstrate that significant and irreparable harm would be likely to result in the absence of interim remedies.

It considers significant damage to be where undertakings will be put at significant competitive disadvantage, including cases such as significant financial loss, damage to goodwill or reputation.

It considers irreparable damage to be damage which cannot be remedied at a later stage (such as insolvency, but it could also include other less severe damage).

5.7 Other remedial actions

The Authority may also respond to anti-competitive behavior with other remedial actions. Specifically, the Authority may accept binding commitments; may require the infringing party to publically acknowledge the Authority's decision; may issue a warning to the relevant service provider(s); or refer the matter to the public prosecutor.

5.7.1 Binding undertakings in lieu of an infringement finding

The Authority may decide to accept binding undertakings offered by a party in lieu of a finding of infringement. Once such undertakings have been accepted by the Authority they shall be binding on the party, and the Authority's decision to accept undertakings will have the same legal effect as an infringement decision and / or Order.

5.7.2 Requirements on the infringing party publically acknowledge the Authority's decision

The Authority may require infringing parties to undertake to publicly acknowledge the Authority's decision by publishing an announcement in a local newspaper or other outlet. The format and wording of the announcement would be subject to approval by the Authority or, in some cases, may be drafted by the Authority.

5.7.3 Warnings

Using the objectives in Section 5.2, the Authority may consider some anti-competitive behavior to not be severe enough to warrant a behavioral remedy. For such cases, the Authority may issue a warning to the relevant service provider(s) relating to its future conduct in the market.

5.7.4 Criminal prosecution

Equally, the Authority may consider some anti-competitive behavior to be a very severe infringement of the Law. In accordance with Article (46) of the 2006 Telecommunications Law, the Authority may refer such cases to the public prosecutor for criminal investigation.

Annex I Definitions

Average avoidable cost (AAC) is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output. During investigations of potential abuses of a dominant position, this would be the amount allegedly the subject of abusive conduct.

Average variable cost (AVC) is the average over the variable costs for an output. In most cases, AAC and the average AVC will be the same, as it is often only variable costs that can be avoided.

Average total cost (ATC) is the unit cost that includes all fixed costs and all variable costs.

Equally efficient operator is a (hypothetical) operator that would incur the same costs in order to provide the same product and/or service under the same market conditions (economic, geographic and regulatory). The equally efficient competitor does not have to possess the same assets (i.e. network) and technologies as the firm in question and can achieve the same efficiency level in a different manner.

Fully distributed cost (FDC) based on Historical Cost Accounting (HCA) is an accounting approach to identifying costs which distributes all costs (direct joint and common) between its various products and services.

Internal Rate of Return (IRR) is a discount rate which equates the revenue streams of a given project with the investment and other costs of the project

Long run incremental cost (LRIC) comprises all costs that a company incurs in order to produce a particular product increment. Incremental costs correspond to a time horizon where all factors of production, including capital equipment, are variable in response to changes in demand due to changes in the volume or in the structure of production. Therefore all investments are considered as variable costs. These costs consider changes to input costs that organizations are able to predict and account for. Long-run average incremental cost (LRAIC) is the average LRIC per unit of output for the given increment or products.

Return on capital employed (ROCE) is the ratio of accounting profit to capital employed.

Return on turnover (ROT) is the ratio of accounting profit to turnover.

Stand-alone costs (SAC) are the costs that a firm would face producing a given product, where the firm produces no other goods.

www.cra.gov.qa