
MARKET REVIEW GUIDELINES

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TABLE OF CONTENTS

| | | |
|----|--|----|
| 1. | INTRODUCTION..... | 3 |
| 2. | THE MARKET REVIEW PROCESS – OVERVIEW | 3 |
| 3. | GENERAL APPROACH TO CARRYING OUT A MARKET REVIEW | 5 |
| 4. | GUIDELINES FOR THE MARKET REVIEW PROCESS | 9 |
| 5. | MONITORING AND ENFORCEMENT..... | 21 |

1. INTRODUCTION

- 1.1. The Market Review Guidelines (“the Guidelines”) sets out information on how the Authority for Info-communications Technology Industry (“the Authority”) will apply the market review process outlined in Section 2.3 of the Telecommunications Code. It is intended to be read in conjunction with the Telecommunications Code.
- 1.2. The Guidelines will also be used in defining markets or assessing market players for dominance within a relevant market in the Authority’s application of the Competition Law Code.
- 1.3. The Guidelines are designed to apply to both the current sector structure in Brunei Darussalam and to a sector structure in which there may be infrastructure-based competition at some future date.
- 1.4. The purpose of the market review process is to determine whether one or more Market Players have Significant Market Power in a Relevant Market, and if so, whether there is a need for the Authority to impose any ex-ante regulatory remedies on that/those Market Player(s) by way of a Direction.
- 1.5. The Authority will take into account the previous market review findings but each market review will be conducted independently and its findings will be determined afresh.

2. THE MARKET REVIEW PROCESS – OVERVIEW

- 2.1. The market review process, as outlined in Section 2.3 of the Telecommunications Code, is a four step process:
 - 2.1.1. **Step 1:** Define economic markets at the retail and wholesale level in terms of product, geographic and end-user scope using standard competition law tests.
 - 2.1.2. **Step 2:** Apply the three-criteria test to see which of these markets are Relevant Markets – that is, susceptible to ex-ante regulation. The three-criteria test asks three questions:
 - 2.1.2.1. **Criteria 1:** Are there high and non-transitory barriers to market entry?
 - 2.1.2.2. **Criteria 2:** Is the market failing to tend towards competition?
 - 2.1.2.3. **Criteria 3:** Is ex-post competition law insufficient to deal with identified market failures?
 - 2.1.3. **Step 3:** Assess Relevant Markets from Step 2 to see if there is a Market Player or Market Players with Significant Market Power using a specified set of criteria. These include the players’ market share, any economies of scope and scale

advantage which a Market Player enjoys, and any countervailing bargaining power of customers.¹

2.1.4. **Step 4:** Where SMP is found, impose the minimum remedy required to deal with the competition problems which are likely to arise from exercise of this market power.

2.2. The market review process is illustrated in Figure 1 below:

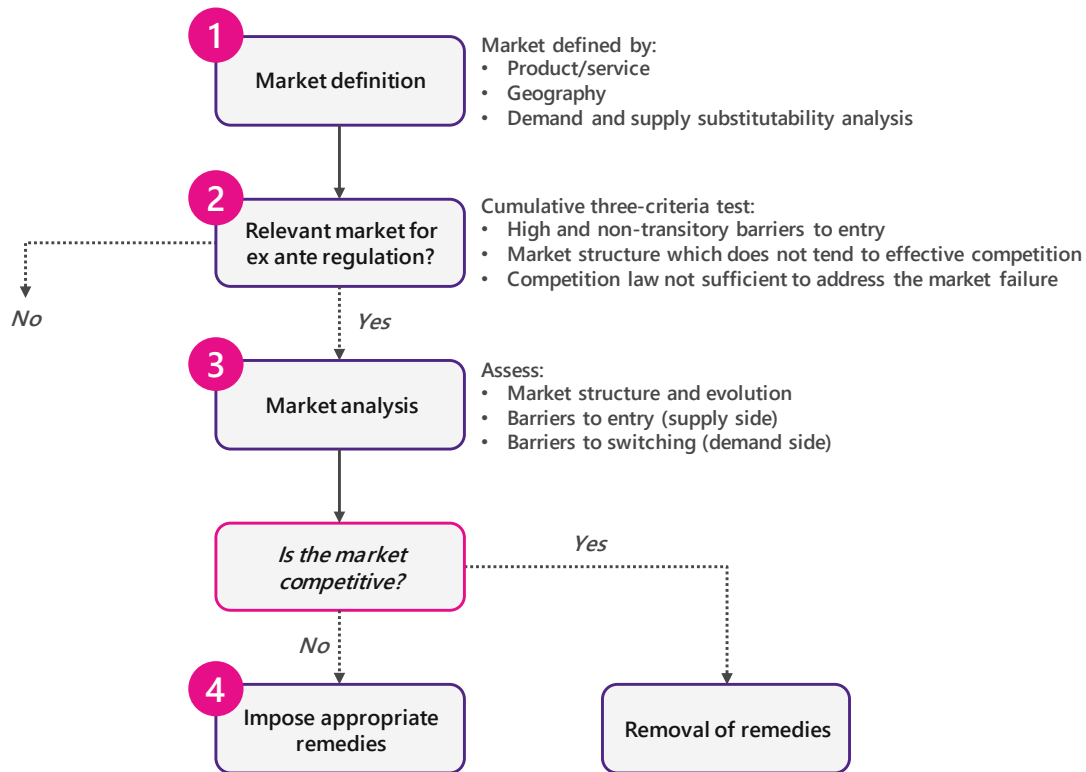


Figure 1: Market review process (Source: Plum Consulting London LLP)

2.3. This process is modelled on the EU Electronic Communications Code², which has been wholly or partially adopted in various jurisdictions around the world. In applying it, the Authority:

2.3.1. shall take a forward-looking view when it considers likely market developments over the regulatory review period; and

2.3.2. may review more frequently specific markets where market conditions are changing particularly rapidly.

¹ Which may be end users in retail markets or access seekers in wholesale markets.

² Refer to: DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L1972>

3. GENERAL APPROACH TO CARRYING OUT A MARKET REVIEW

3.1. Conducting a market review

3.1.1. The Authority will conduct a review of a market:

3.1.1.1. either on its own or in conjunction with the review of other markets, within five years of the previous market review of that market;

3.1.1.2. at any time at its sole discretion;

3.1.1.3. in response to a request for a market review; or

3.1.1.4. when it determines there have been material changes in the market that warrant a review.

3.2. Time horizons and frequency of market reviews

3.2.1. There is a balance to be struck in determining the time horizon over which the outcomes of a market review are expected to operate. On the one hand there are limits on how far forward a regulator can look in predicting market developments with confidence; on the other it is important to give market players as much regulatory certainty as possible.

3.2.2. In order to foster regulatory certainty, and ensure regulation keeps pace with market developments, market reviews shall take place at regular intervals. Section 2.2.1.1 in the Telecommunications Code specifies that a market review must be undertaken at least once every five years.

3.2.3. However, market reviews may be undertaken sooner if there are material changes in the market. "Material changes" in this context may relate to the entry of a new Market Player; a reduction in the number of Market Players; the introduction of major new technologies; material changes in patterns of telecommunications usage or consumption; or other factors deemed to have a material impact on the telecommunications markets of Brunei Darussalam.

3.2.4. Market reviews are forward looking. Ex-ante regulations are imposed to promote the development of effective competition where otherwise there is doubt that such competition would naturally occur in the absence of such regulation.

3.2.5. If identified impediments to effective competition are likely to persist throughout the period of the review, then ex-ante regulation is justified.

3.2.6. In Brunei Darussalam, the restructuring of the sector to create a monopoly wholesale only provider was done by the Government in order to meet specific policy and economic objectives. Nonetheless, in view of this, it is therefore

appropriate for the sector regulator to impose ex-ante regulatory remedies, where necessary, to avoid outcomes which do not serve the public interest.

3.3. Wholesale and retail markets

3.3.1. Telecommunications markets are frequently interrelated, and often feature vertical linkages (for example, between retail and wholesale markets). This can have a material impact on the market review process, as remedies imposed in one market can obviate the need for remedies in related markets.

3.3.2. It is therefore important that the overall approach of applying the market review process is followed.

3.3.3. The way to apply the market review process is illustrated in **Figure 2**, and described in further detail below:

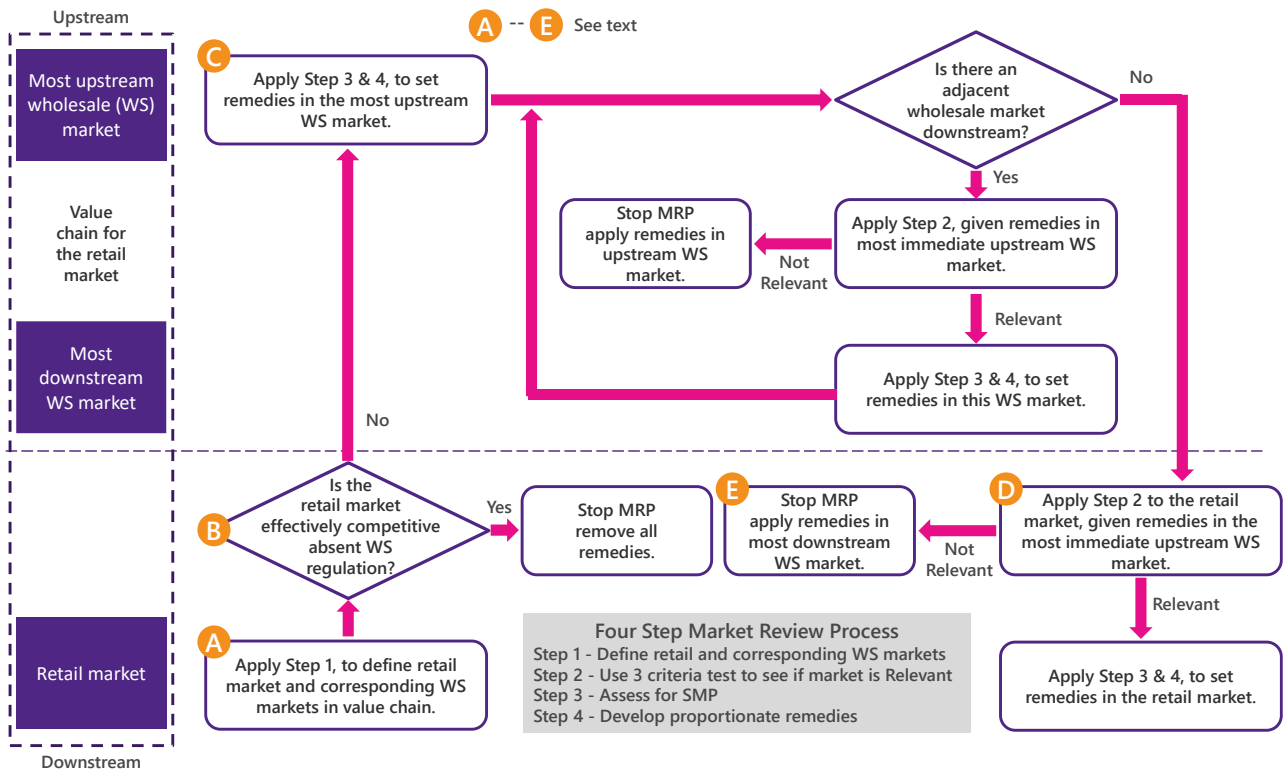


Figure 2: Applying the market review process (Source: Plum Consulting London LLP)

3.3.3.1. Process A

- (a) The starting point for a market review should be the retail market (Process A).
- (b) The Authority will first define the retail market as per Step 1 of the market review process.

- (c) Once this market is defined, it will proceed to define corresponding upstream wholesale markets in the value chain.

3.3.3.2. Process B

- (a) The Authority will then consider whether the retail market would be effectively competitive in the absence of ex-ante regulation on the corresponding wholesale market(s) (Process B).
- (b) If it is determined that the retail market would be effectively competitive *in the absence* of such regulation, the Authority will conclude that regulation is no longer needed in either the retail market or any corresponding wholesale market and remove it.³
- (c) This approach ensures that SMP-based ex-ante regulation is applied only where needed to address a lack of effective competition at the retail level.

3.3.3.3. Process C

- (a) If it is concluded that the retail market would *not* be effectively competitive in the absence of ex-ante regulation on the corresponding wholesale market(s), the Authority will then focus on the wholesale market that is most upstream of the retail market in question.
- (b) The Authority will apply Steps 3 and 4 of the four-step market review process and impose appropriate remedies in this market.
- (c) The analysis then proceeds to the adjacent downstream wholesale market in the value chain.⁴ The Authority will carry out Step 2 of the four-step market review process to determine whether that market is susceptible to ex-ante

³ This has been termed the Modified Greenfield Approach. The Modified Greenfield Approach is an approach first promulgated by the European Commission in 2007. The core philosophy is that related markets (and the regulation thereof) will be taken into account when carrying out a market review. Refer to European Commission (2018). Communication on SMP guidelines. Para 17. Available at: <https://digital-strategy.ec.europa.eu/en/library/communication-smp-guidelines>

⁴ If there are no adjacent downstream wholesale markets in the value chain (i.e. only the retail market is immediately downstream) the Authority will proceed to Process D.

regulation, after taking into account the remedies imposed in the upstream market(s).

- (i) If the Authority determines that this market is **not** susceptible to ex-ante regulation (i.e. is not Relevant), it will terminate the market review process and apply only the remedies previously determined for the upstream market(s).
 - (ii) If the Authority determines that this market is susceptible to ex-ante regulation (i.e. is Relevant), it will apply Steps 3 and 4 of the four-step market review process and impose remedies as appropriate in this market.
- (d) The analysis will then proceed to the next downstream wholesale market in the value chain and this process is repeated until there are no further downstream wholesale markets in the value chain.
- (e) If there are no further downstream wholesale markets in the value chain (i.e. only the retail market is immediately downstream of the market in question), the Authority will switch attention back to the retail market, and proceed to Process D.

3.3.3.4. **Process D**

- (a) Having worked through all wholesale markets in the value chain, the Authority will apply Step 2 of the four- step market review process to the retail market, **taking account** of the remedies imposed in the most downstream wholesale markets.
- (i) If the Authority determines that the retail market is **not** susceptible to ex ante regulation (i.e. is not Relevant), it will terminate the market review process and apply only the remedies previously determined for the upstream wholesale market(s), Process E.
 - (ii) If the Authority determines that the retail market is susceptible to ex ante regulation (i.e. is Relevant), it will apply Steps 3 and 4 of the four step market review process and impose remedies as appropriate in the retail market.

- 3.3.4. For many retail markets, there is only one corresponding wholesale market which, once appropriately regulated, is judged sufficient to move the retail market towards effective competition without the need for retail regulation. In this situation, applying the market review process is simply Process A followed by Processes B, C, D and E.

4. GUIDELINES FOR THE MARKET REVIEW PROCESS

4.1. Step 1 – Market definition

4.1.1. Defining a market's boundaries is the first step towards assessing whether the market should be subject to ex-ante regulation. The competitive dynamics within those boundaries can then be assessed, along with any direct and indirect competitive constraints on market players.

4.1.2. There are two main dimensions of market definition: defining the product and customer scope of the market, and defining the geographic scope of the market. In both cases, the analysis should be forward-looking across the market review period, taking into account market and technology trends and dynamics, and expected or foreseeable market and technology developments.

4.1.3. In addition, the Authority may consider whether the time dimension is also relevant. This may be the case when competitive conditions in a market change significantly over a specific period of time, such as a day or a year. Consideration of the time dimension may be relevant if there are peak or off-peak services, or significant seasonal variations in consumption patterns.⁵

4.1.4. Defining the appropriate product market

4.1.4.1. The starting point for the analysis should be the definition of retail markets. To determine the appropriate product market, a focal product should be selected. The next step is to assess demand and supply-side substitutability of the product in question:

- (a) **Demand-side substitutability** can be assessed by identifying products which end-users consider to be reasonable substitutes for the product in question. Key factors to consider here include product functionality, use cases and price.

⁵ For further information see OFT (2004) Market definition – Understanding competition law. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf

- (b) **Supply-side substitutability** can be assessed by identifying suppliers who are in a good position to supply the focal product or substitute products if prices in the market were to rise.
- 4.1.4.2. The appropriate market can then be defined by applying a test in which the analyst asks what would happen if a hypothetical monopolist supplying the focal product were to make a Small but Significant and Non-transitory Increase in Price (SSNIP) while holding all other product prices constant. A price increase of 5-10% on the current price level is typically used to conduct the test.⁶
- 4.1.4.3. The SSNIP Test may not yield an accurate market definition in cases where the prevailing prices of the product are above competitive levels. For example, a Market Player may have Significant Market Power in providing a particular product and may have already raised the price of that product above competitive level.
- 4.1.4.4. In this case, while there may exist substitutes that are able to constrain the Market Player from further raising its prices, they should not be included in the definition of the market, as they would not normally be considered to be substitutes at the competitive price level. Including these inferior substitutes into the market definition could lead to the market being defined too broadly. In such cases, the Authority will need to determine the price that would have been set by the hypothetical monopolist in a competitive market.
- 4.1.4.5. The purpose of the SSNIP test is to determine whether a hypothetical monopolist in the market would be able to sustain a price increase. A price increase might cause customers to switch to viable substitute products (if they exist). If customers switch in sufficient numbers, such a price increase would be unprofitable and unsustainable.
- (a) If the hypothetical monopolist is able to sustain a price increase of 5-10%, the market has been appropriately defined.
- (b) If the hypothetical monopolist is *not* able to sustain a price increase of 5-10%, the market definition should be broadened to include substitute products.
- 4.1.4.6. Alternatively, the SSNIP might generate supply-side substitution in which other suppliers now find it attractive, following the SSNIP, to

⁶ OECD (2012) Policy Roundtables – Market Definition. pp30-42. Available at: <https://www.oecd.org/daf/competition/Marketdefinition2012.pdf>

enter the market to offer substitute products. Again, if this effect is strong enough to render the SSNIP unprofitable to the hypothetical monopolist then the substitute products should be included within the definition of the market.

- 4.1.4.7. Note that it can be challenging to apply the SSNIP test empirically. This would require market data on customer behaviour in response to price changes, which may not be available. In this case, relevant evidence from other jurisdictions may be used to provide guidance on customer behaviour and/or market boundaries.

Note on service bundles

In many telecommunications markets, the take-up of service bundles is increasingly common. Service bundles generally consist of two or more of the following services: fixed voice, fixed internet, mobile telephony, and television services.

Service bundling may have implications for the definition of retail markets. Regulatory authorities need to consider whether a product market should be defined at the aggregated level of the bundle or at the level of its constituent services. Key factors to consider here include:

- (a) Whether the constituent services of a bundle are available on a stand-alone basis. If so, these services may exert competitive constraint on the pricing of service bundles;
- (b) Whether demand for the constituent services is correlated (i.e. does demand for fixed voice increase at the same time as demand for fixed broadband), or whether there is one core component of the service bundle;
- (c) Whether there might be other service substitutes for constituent services within the bundle – notably, OTT services; and
- (d) Whether the service bundle could be effectively replicated by Market Players which do not currently offer service bundles, given existing regulation and competitive conditions in the related markets.

While there have been instances where regulatory authorities have defined separate retail markets for service bundles, it should be noted that this is relatively uncommon.⁷

⁷ European Commission (2020). Explanatory Note to the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation. Available at: <https://digital-strategy.ec.europa.eu/en/news/commission-updated-recommendation-relevant-markets pp36>.

- 4.1.4.8. The Authority may also consider whether there exists a chain of substitution for the product or service in question. Chain substitutability refers to a situation where products A and C are not directly substitutable, but there exists a product B which is a substitute for both products A and C. Products A and C may therefore be in the same product market, since their pricing might be constrained by the substitutability of product B.
- 4.1.4.9. A chain of substitution may arise where current and previous generations of technologies co-exist in the market, where the price of previous generations constrains the price of current and future generations. Such a situation would imply that the different generations are in a single product market.
- 4.1.4.10. Once retail markets have been defined, the analysis should proceed to the corresponding upstream (wholesale) markets. Upstream markets are markets for inputs into a downstream wholesale or a retail market. **Figure 3** below illustrates this by showing the typical relationship between wholesale and retail market for fixed service in a jurisdiction with infrastructure-based competition.
- 4.1.4.11. The market definition process for upstream markets is similar to that outlined above, but considered from the perspective of a retail service provider (RSP) wishing to supply end-users. However, given the market restructuring in Brunei Darussalam to form a single wholesale provider, at the wholesale level the analysis is likely to focus on demand-side substitutability.

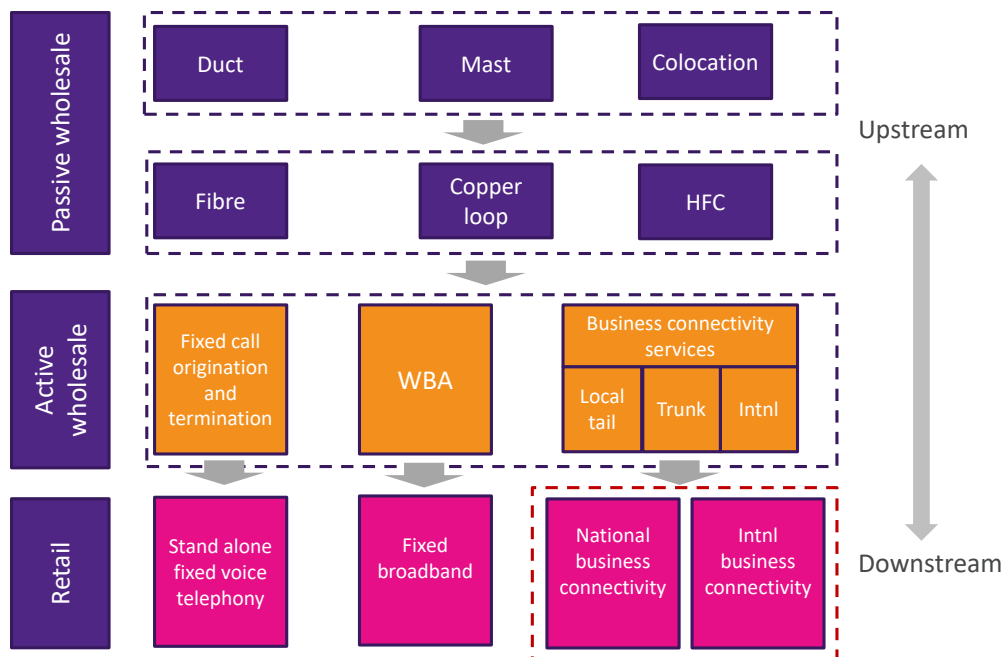


Figure 3: The relationship between wholesale and retail fixed services markets (Source: Plum Consulting London LLP)

4.1.4.12. The analysis set out above is described entirely in terms of the product scope of markets. However, this analysis applies with equal force to the customer scope of the market. For example, the analysis takes into account the fact that some products have characteristics which make them suitable for large organisations but not for consumers or small businesses.

4.1.5. **Geographic market**

4.1.5.1. Having defined the product and customer scope of a market, the next step is to identify its geographic scope. This is the geographical area in which the focal product (and any relevant substitutes) are supplied under similar competitive conditions.

4.1.5.2. Separate geographic markets should be defined only where the competitive environment is substantially different between areas. This may include factors such as a different set of available services, different pricing and a different set of market players.

4.1.5.3. The definition of geographic markets should also consider whether there exists a chain of substitution across geographic markets. For instance, this could occur where a national fixed broadband provider constrains the prices charged by regional providers in sub-national markets. In Brunei Darussalam, identifying sub-national geographic markets is likely to be unwarranted under the current sector structure for a number of reasons as follows:

- (c) Restructuring of the market has created a single national wholesale fixed and mobile supplier (ie. UNN);
- (d) UNN's pricing is national;
- (e) RSPs do not operate infrastructure and are therefore not constrained in where they can offer services; and
- (f) The small size of Brunei Darussalam means that it is unlikely that different parts of the country are going to be serviced differently. Furthermore, the additional regulatory burden (to both regulator and industry) associated with sub-national markets is likely to exceed the benefits.

4.1.5.4. On this basis, the presumption should be that markets in Brunei Darussalam are national, unless there is good reason to believe otherwise.

4.2. Step 2 – Identifying markets susceptible to ex-ante regulation (the three-test criteria)

- 4.2.1. Having identified and defined retail markets and corresponding wholesale markets, the next step is to identify those markets where ex-ante regulation may be justified. This step is important for two reasons:
- 4.2.1.1. under competition law, generally having market power does not lead automatically to a presumption of abuse; and
 - 4.2.1.2. imposing regulation ex-ante, before there is any proof of abuse of market power, is a significant intervention in a market. To intervene ex-ante thus requires that the *potential* for abuse of market power is high.
- 4.2.2. The EU regulatory framework for electronic communications describes the ‘three-criteria’ test for identifying markets susceptible for ex-ante regulation.⁸ This is a tried and tested approach that has been used successfully across various jurisdictions.
- 4.2.3. According to the test, ex-ante regulation may be justified for markets meeting all three criteria. This avoids the risk of imposing unnecessary regulation on markets which are (or will become) effectively competitive in the review period. Unwarranted regulation increases the regulatory burden and can generate economic distortions in the market.
- 4.2.4. In applying the three-criteria test, the market to be analysed first should be the one that is most upstream from the retail market in question in the vertical supply chain. Downstream markets can then be examined, taking into account any regulatory remedy imposed on upstream markets.

1. **Criterion 1:** High and non-transitory structural, legal or regulatory barriers to entry are present; and
2. **Criterion 2:** There is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry; and
3. **Criterion 3:** Competition law alone is insufficient to adequately address the identified market failures.

Figure 4: The three-criteria test

⁸ European Commission (2020). Explanatory Note to the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation. Available at: <https://digital-strategy.ec.europa.eu/en/news/commission-updated-recommendation-relevant-markets>

4.2.5. Each element of the test is described in more detail below.

4.2.6. **Criterion 1:** High and non-transitory barriers to entry.

4.2.6.1. Barriers to entry prevent prospective market players from entering and competing in the market. These barriers may be structural or legal and regulatory.

(a) **Structural barriers** comprise factors associated with the market's cost structure, technology, or the level of demand. For example, such barriers exist in markets characterised by high fixed costs and/or large economies of scale and economies of scope.⁹

(b) **Legal or regulatory barriers** consist of administrative measures that act to restrict entry. These can consist of direct restrictions on market entry (e.g. licences), planning permission for civil works, or the lack of available radio spectrum.

4.2.6.2. To determine the existence of such barriers, it is necessary to examine whether market entry could occur at sufficient scale and speed to constrain an undertaking abusing its market power. If so, the prospect of market entry can act as a competitive constraint on existing market players and the market would not be susceptible to ex-ante regulation.

4.2.6.3. Market barriers can be analysed by taking into account existing market conditions, expected or foreseeable market developments, and regulation in related markets (e.g. upstream wholesale markets). This is because some of the barriers listed above might be reduced by regulation in related markets, for instance through the existence of a wholesale access obligation.¹⁰

4.2.7. **Criterion 2:** The market structure does not tend toward effective competition.

4.2.7.1. This criterion relates to the dynamics within the market. Changes over time – including technological, behavioural or economic changes – can affect the level of actual and prospective competition within a market. One example of this is technological change eroding structural barriers to market entry over time. Another is the convergence of separate markets due to changing user behaviour.

⁹ A market with very large economies of scale and scope, in which one firm can serve the market at lower cost than two or more firms, is termed a natural monopoly. This could be considered a structural barrier to entry. See <https://stats.oecd.org/glossary/detail.asp?ID=3267>

¹⁰ See ERG, June 2008, *ERG Report on Guidance on the application of the three criteria test*, https://berec.europa.eu/doc/publications/erg_08_21_erg_rep_3crit_test_final_080604.pdf

- 4.2.7.2. Even where there are high barriers to entry, the market may still tend towards effective competition if there are sufficient market players behind the entry barriers, or because of technological developments, or the impact of previously imposed ex-ante regulation.
- 4.2.7.3. In addressing this criterion, the level of competition in the market should be assessed on a forward-looking basis. This assessment should cover expected developments in the market, technological developments and market trends, and consider whether the market is tending to effective competition (and if so, how soon).
- 4.2.7.4. The period over which the forward view should be taken is the period for which the market review will remain current before it is reassessed. Section 2.2.1.1 in the Telecommunications Code notes that a market review must be undertaken within five years and may be undertaken sooner if there are material changes in the market.
- 4.2.7.5. The further into the future effective competition is expected to materialise, the more likely it is that the second criterion will be fulfilled.
- 4.2.8. **Criterion 3:** Competition law alone is insufficient to adequately address the identified market failures.
 - 4.2.8.1. Ex-ante regulation should only be imposed where competition law remedies are not sufficient to address market failure. For instance, ex-ante regulation may be appropriate when:
 - (a) a regulatory remedy cannot be imposed under competition law;
 - (b) it is necessary to monitor compliance with a remedy over an extended period of time (e.g. regulatory accounting or monitoring of technical parameters);
 - (c) there is concern that the time to gather evidence and prosecute an abuse of market power ex-post might be so long that any nascent market entry and competition will have been extinguished;
 - (d) specific price and non-price terms are deemed to be needed to provide certainty to potential market entrants, reliant upon bottleneck inputs.
 - 4.2.8.2. Ex-ante regulation is also important in enabling competition in markets that are (or have been) highly concentrated, such as markets where a single supplier has or had a unique franchise.

4.2.8.3. If all three criteria are met, then the market is susceptible to ex-ante regulation and the next stage of the analysis proceeds.

4.3. Step 3 – Assessment of significant market power

- 4.3.1. As defined under the Telecommunications Code, “Significant Market Power” refers to a situation in which one or more undertakings possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.
- 4.3.2. A Market Player with Significant Market Power may be able to increase prices or reduce the quality of its services to increase its profit, or lower its price or constrain supply so as to eliminate its competitors. In an effectively competitive market, it would not be possible for a Market Player to sustain such behaviour.
- 4.3.3. Market power may arise in a number of situations and for a variety of reasons. For instance, it may arise because of the cost structure within a market, or due to legal or regulatory barriers to entry.
- 4.3.4. The assessment of market power is related to the three-criteria test and may draw upon some of the same indicators. However, whereas the three-criteria test relates to the market as a whole, the assessment of market power examines a specific Market Player in a market that is susceptible to ex-ante regulation.
- 4.3.5. A number of factors should be considered in assessing whether a Market Player has Significant Market Power:
 - 4.3.5.1. Whether it is costly or difficult to replicate any infrastructure or services operated or provided by the Market Player. This implies the existence of high barriers to entry to the market.
 - 4.3.5.2. Whether the Market Player can act independently of market forces, for instance by restricting output, reducing quality or raising prices. A key indicator here is the market share of the Market Players in the market in question. It is unlikely that a Market Player with Significant Market Power would not have a substantial market share.
 - 4.3.5.3. Whether the Market Player has a market share in excess of forty per cent (40%). All things being equal, a larger market share indicates a greater potential to act anti-competitively and, consequently, a greater need for regulation. While market share provides a useful starting point for the assessment of market power, the Authority will not impose an absolute maximum market share above which it will conclusively presume that a Market Player has market power.

4.3.5.4. Whether other criteria suggest the presence of Significant Market Power. These may include economic conditions, technological advantages or superiority, commercial advantages, product/services diversification (including ability to offer service bundles) regulatory barriers, a lack of substitutes, easy or privileged access to capital markets/financial resources, and/or barriers to entry. Other criteria may also be considered if deemed relevant.

4.3.6. **Joint Dominance**

4.3.6.1. Joint (or collective) Dominance refers to a situation where two or more Market Player together hold Significant Market Power in a market and the Market Players in question act together to exploit their collective market power. This could involve maintaining market prices above the competitive price level or not competing in other areas, such as product quality or market investment. It could also involve denial of wholesale access.

4.3.6.2. Such coordination need not be the result of an explicit agreement to collude (i.e. a cartel). It could instead arise as a result of independent decision-making by Market Players in markets where the market characteristics are conducive to coordinated behaviour. This is termed tacit collusion. Regulators need to monitor markets for, and (if necessary) take steps to prevent, tacit collusion from damaging the competitive process.

4.3.6.3. A number of cumulative criteria must also be met in order for Joint Dominance to be sustainable:

- (a) Each Market Player engaging in coordinated behaviour must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common policy.
- (b) A coordinated outcome must be sustainable over time. This implies the existence of adequate deterrents to ensure that participating Market Players have a long-term incentive in not departing from the common policy. The deterrent must be of sufficient strength to overshadow the short-term benefits of deviating from the common policy.
- (c) The foreseeable reaction of customers and current and potential Market Players must not endanger the results of the collusive outcome.

- 4.3.6.4. Certain features of a market can make coordinated behaviour more likely to emerge. In general, coordinated behaviour is less likely to emerge in more complex markets, and/or markets with lower levels of transparency. The European Commission notes that:¹¹

*Arriving at a common understanding on coordinated behaviour is generally easier in less complex and more stable economic environments. Given that coordination is generally simpler among fewer players, it would seem relevant in particular to examine the number of market participants. Further, it may be easier to reach a common understanding on the terms of coordination if a relative symmetry can be observed, especially in terms of cost structures, market shares, capacity levels including coverage, levels of vertical integration and the capacity to replicate bundles.*¹²

- 4.3.6.5. A number of market characteristics should therefore be considered when examining the prospect of joint dominance arising, including:

- (a) Transparency of prices (in general, retail mass markets are likely to exhibit transparency of prices);
- (b) Transparency of other market characteristics, e.g. market share;
- (c) Homogeneity of products;
- (d) The number of market players;
- (e) Similarity of cost structures across Market Players;
- (f) The symmetry of market shares;
- (g) Service coverage across Market Players;
- (h) Elasticity of demand; and
- (i) Other factors as deemed relevant.

- 4.3.6.6. To determine joint dominance in a market, the Authority must find that the three cumulative joint dominance criteria are met, and explain how the market's characteristics facilitate and sustain the joint dominance.

- 4.3.6.7. In practice, the evidentiary threshold to assert joint dominance is high. It should be noted that, in a number of cases, National Regulatory Authorities (NRAs) have found joint dominance in

¹¹ European Commission – SMP Guidelines <https://digital-strategy.ec.europa.eu/en/library/communication-smp-guidelines>

¹² European Commission – SMP Guidelines. Para 72. <https://digital-strategy.ec.europa.eu/en/library/communication-smp-guidelines>

telecommunications markets, but such findings are often not upheld when challenged in court.¹³

4.4. Step 4 – Imposition of remedies

4.4.1. The last phase of the market review involves developing regulatory remedies to be imposed upon the Market Player with Significant Market Power to address identified market failures.

4.4.2. Regulatory remedies should be designed in accordance with the Regulatory Principles outlined in Section 1.6 of the Telecommunications Code. In particular, remedies should be the minimum required to achieve the object of the regulation, as set out in Section 6.4 of the Telecommunications Code:

To the extent that a given market is not or not yet competitive, ex-ante regulatory intervention may remain necessary. Where this is the case, the Authority will seek to impose regulatory requirements that are carefully crafted and the least obtrusive to achieve clearly articulated results, including issuing advisory guidelines, where appropriate, to clarify the procedures and standards that it will use to implement the Telecommunications Code.

4.4.3. In selecting appropriate remedies, it is therefore necessary to:

4.4.3.1. consider the existing regulations, in order to understand the burden that any proposed remedies will have on the SMP operator;

4.4.3.2. select remedies that are justified in terms of the specific market conditions, and aimed at addressing the market failures identified by the market analysis; and

4.4.3.3. choose remedies that are no more than that which are necessary and appropriate to deal with the harms or potential harms identified.

4.4.4. The fact that Brunei is a microstate should also be added to the above considerations. This impacts the application of regulation and the imposition of remedies. In particular, it implies that there is a need to:

4.4.4.1. trade-off the dynamic efficiency gains arising from greater competition in the sector against the productive efficiency losses of market players operating below minimum efficient scale. This is not a significant issue in macrostates;

¹³ See for example J R Holmes (2017), Collective dominance and oligopoly control in European competition law: Dealing with persistent oligopoly in markets such as telecommunications, Monash University

- 4.4.4.2. account for the fact that retail and wholesale prices for telecommunications services are likely to be higher in microstates than macrostates;
 - 4.4.4.3. allow for specific additional costs faced by the geographic location of Brunei, such as international undersea connectivity;
 - 4.4.4.4. accept that the prospects of market entrants are more limited than in a macrostate; and
 - 4.4.4.5. regulate in a way which keeps the costs of developing, implementing and complying with regulation to a reasonable level so as to not raise end-user prices unnecessarily.
- 4.4.5. The choice of remedy will depend on the harms (or potential harms) that need to be addressed. These may be (among others) excessive pricing, foreclosure of markets, or a reduction in quality of service. The remedy should be designed to address the identified harms (or potential harms) in the long-term interest of end users.
- 4.4.6. Possible remedies may include:
- 4.4.6.1. an obligation to supply;
 - 4.4.6.2. an obligation to publish a reference offer;
 - 4.4.6.3. an obligation not to discriminate between RSPs;
 - 4.4.6.4. price controls; and/or
 - 4.4.6.5. accounting separation.
- 4.4.7. In general, remedies should be imposed at the most upstream wholesale level, in order to preserve competition and innovation in the market. SMP-based ex-ante regulation should be applied only where needed to address a lack of effective competition at the retail level.
- 4.4.8. The market review should therefore take into account the regulation already imposed (or intended to be imposed) on related markets, including upstream markets (as per the modified greenfield approach).

5. MONITORING AND ENFORCEMENT

- 5.1.** Imposing regulatory remedies to address determined actual or potential market failures, will not achieve their desired outcomes if they are not implemented and their results monitored. The Authority will therefore satisfy itself that remedies have been implemented and monitor how markets are performing to assess the impact of the imposed remedies.

- 5.2.** The Authority will impose appropriate regular monitoring and data reporting requirements on both the SMP and other Market Players alongside the imposition of remedies on SMP Market Players.
- 5.3.** It should be expected that wherever possible the Authority will publish this market monitoring information. It may however choose to aggregate some of the information so as to protect commercially confidential information. In addition, the Authority will seek to enforce regulatory remedies where it finds they are not being followed fully or properly.

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