COMPETITION LAW CODE GUIDELINES

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1. INTRODUCTION

1.1. In May 2024, the Authority for Info-communications Technology Industry of Brunei Darussalam ("the Authority") conducted a preliminary exercise to determine dominance in the telecommunications retail market and consulted stakeholders on the development of guidance materials for the application of the Code of Practice for Competition in the Telecommunications Sector ("Competition Law Code"). This Competition Law Code Guidelines ("the Guidelines"), as one of the outcomes of this exercise, acts as a guidance on how the Authority will apply its Competition Law Code to Market Players.

1.2. The contents of these Guidelines are advisory in nature and not intended as a substitute for legal advice. Applicants should seek advice from their own legal counsel. The Authority reserves the right to change its policies or practices and amend this document from time to time.

1.3. These Guidelines are structured as follows:

1.3.1. **Section 2** specifies the criteria that the Authority shall use to determine whether a Market Player is dominant in a market for competition law purposes.

1.3.2. **Section 3** provides guidance on how the Authority shall determine whether a Market Player with dominance is abusing its dominant position and is therefore in breach of the Competition Law Code.

1.3.3. **Section 4** provides guidance on what constitutes a restricted agreement involving a telecommunications Market Player.

2. CRITERIA FOR ASSESSING DOMINANCE

2.1. Introduction

The Authority's process for defining a market for the purposes of applying competition law is described in the Market Review Guidelines. However, it should be noted that while Significant Market Power ("SMP") and dominance have the same definition, the key difference in assessing the relevant market lies in the different purposes for which the terms SMP and dominance are used.

2.1.1. When assessing **SMP**, the Authority shall undertake an ex-ante assessment on a forward-looking basis, with the objective of moving a market towards effective competition.

2.1.2. In contrast, when assessing **dominance**, the Authority shall undertake an ex-post investigation on a historic basis based on market conditions during the period that the alleged infringement took place.

2.2. General Principles

2.2.1. The Competition Law Code does not prohibit the holding of a dominant position. Nor does it constrain a dominant operator from competing on the merits by offering for example better products, prices and customer service than its rivals to the benefit of consumers. The Competition Law Code only prohibits the abuse of such a dominant position. There are numerous legitimate reasons why undertakings may occupy a dominant position (e.g., through innovation, greater entrepreneurial efforts or a legal monopoly). However, an undertaking in a dominant position has a special responsibility to ensure that its conduct does not distort competition in the light of the specific circumstances of each case.

2.2.2. Identifying dominance in a defined market is a prerequisite for the Authority to apply the prohibition on the abuse of a dominant position. Generally, an undertaking will be considered dominant if it has a degree of durable market power, i.e., it does not face sufficiently strong competitive constraints from, and can act independently of, competitors, customers and ultimately consumers which gives it, amongst other things, the ability to profitably maintain or raise prices above competitive levels. This is reflected in the Competition Law Code:

"Dominance" or "Dominant Position" has the same meaning as Significant Market Power and means a situation in which one undertaking ("Single Dominance") or two or more undertakings ("Joint or Collective Dominance") enjoy a position of economic strength which enables it/them to behave to an appreciable extent independently of competitors, customers and ultimately of consumers in a market within Brunei Darussalam or elsewhere.

2.3. **Assessing dominance**

The Authority shall consider a number of criteria in determining whether a Market Player is dominant in the relevant market. There are two cases to consider:

2.3.1. whether a Market Player has dominance on its own (**single dominance**); or

2.3.2. whether a Market Player has collective dominance with others (**joint dominance**).

Each case is considered below.

2.4. **Assessing single dominance**

2.4.1. The Authority considers that **market shares** are an important indicator of whether an undertaking is dominant.

2.4.1.1. **Dominance shall generally not be presumed where an undertaking has a market share of less than 40% in the relevant market**, unless there are specific circumstances which prevent competitors from being able to effectively constrain the conduct of the dominant undertaking e.g., the weak position of competitors and high barriers to entry.

2.4.1.2. **High and stable market shares in revenue term are in excess of 50% are a strong indicator of dominance.**
While market shares provide an important indicator of the relative importance of Market Players in a market, with high and stable shares are generally considered to be evidence of dominance in themselves, there are other factors which may need be taken into account, which may affect an indication of dominance based on market shares alone.

2.4.2. In assessing single dominance, the Authority shall take into account other criteria in addition to market share. However, the Authority notes that some of the criteria used in other jurisdictions are not relevant to Brunei, given the telecommunications sector structure. For example, there is no need to consider criteria such as control of infrastructure that is not easily duplicated, vertical integration, or the existence of long-term sustainable access agreements. These criteria are deemed not relevant due to the presence of a single provider of wholesale connectivity services in Brunei's market structure.

2.4.2.1. The Authority has identified four key criteria to consider alongside its assessment of market shares when assessing dominance. These are:

i. **Barriers to expansion in the market.** The Authority considers that Brunei's markets are at (or close to) the point of saturation. This means that the growth of a smaller Market Player or new entrant can only come at the expense of another Market Player.

However, there are likely to be barriers to achieving such growth, including end-user inertia, brand loyalty, and the effect of the barriers to competition that relate to costs for End Users when switching service providers. Collectively, these factors could contribute to the maintenance of a dominant market position;

ii. **The existence of economies of scale.** Larger Market Players are likely to benefit from economies of scale advantages in marketing and customer management, which may contribute towards obtaining (or maintaining) a dominant position;

iii. **The absence of or low countervailing buying power.** Enterprise broadband (business and government) and national high quality transmission services. Customers may enjoy some degree of countervailing buying power due to their size and strategic importance. However, countervailing buying power among mobile and residential broadband customers is likely to be limited. This means countervailing buying power may not offer an effective constraint on a Market Player's ability to act independently of its competitors, Customers and End Users; and

iv. **A highly developed distribution and sales network.** Developed sales and distribution networks can allow Market Players to more effectively reach and market to End Users. This may contribute to the maintenance of a dominant market position, particularly in cases where Market Players have exclusive deals in certain distribution channel.

2.4.2.2. The Authority also notes that other **ancillary criteria** may be relevant in assessing dominance when analysis of market share data and the above criteria are not conclusive. These are:

i. **Barriers to entry and the absence of potential competition.** The presence of a single wholesale provider can reduce barriers to entry in retail markets by eliminating the need for network deployment. However, other barriers to entry such as, limited market size and market saturation may deter new Market Players from entering or expanding within the market. As a result, the likelihood of effective potential competition may be constrained, reducing the competitive pressure in the existing market; and

ii. **Economies of scope.** Market Players offering a range of services may benefit from some cost synergies, particularly in marketing and customer management. However, where Market Players rely on a single wholesale provider, offering similar product portfolios, the potential for significant variation in economies of scope is limited. Due to this, economies of scope effects are unlikely to differ substantially across retail Market Players.

2.5. **Assessing joint dominance**

2.5.1. The Competition Law Code provides that dominance can also be held by "two or more *undertakings ("Joint or Collective Dominance")*" while the Market Review Guidelines define joint dominance as "*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*".

2.5.2. The Authority considers that:

2.5.2.1. A finding of joint dominance shall apply where two or more undertakings that are legally independent, present themselves or act together in a market as a joint entity.

2.5.2.2. This can occur when **economic, contractual links or structural factors** create an environment in which it is economically rational to adopt - on a lasting basis - **a common policy (coordinated outcome)** for their market conduct, without having to enter into an agreement or engage in explicit coordination, with the aim of selling at above competitive prices.

2.5.2.3. However, the existence of structural factors or economic links are not requirements for the Authority to establish the existence of joint dominance. Joint dominance is more likely to be found where actual or potential competitors, customers or consumers are not being able to react effectively to this coordinated behaviour, thereby reducing the level of competitive constraint in the market.

2.5.3. In assessing whether there is joint dominance the Authority shall consider whether characteristics of a market exist, that can make a **coordinated outcome** more likely. In general, a common policy is more likely to emerge in markets with fewer Market Players and markets with high levels of transparency. On this point the European Commission has noted that:

[…] 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.

2.5.4. The Authority shall also consult its Market Review Guidelines when assessing joint dominance. These list a number of **market characteristics** which may influence the competitive dynamics to be considered when assessing the prospect of joint dominance. They are:

i. transparency of other market characteristics, e.g., market share;
ii. homogeneity of products;
iii. the number of market players;
iv. similarity of cost structures across market players;
v. the symmetry of market shares;

vi. service coverage across market players;
vii. elasticity of demand; and
viii. other factors as deemed relevant (e.g. countervailing buyer power).

2.5.5. It is generally accepted that for a common policy (coordinated outcome) to arise in a market and to be sustainable over time, there are a number of **specific criteria** that should be met. The Authority will check whether the criteria listed below are met when evaluating the potential for a coordinated outcome:

2.5.5.1. The undertakings alleged to be jointly dominant have the ability to monitor the other members' compliance with the common policy ('**transparency**').

2.5.5.2. The undertakings have access to adequate deterrents to ensure that the common policy is maintained over time and that the other undertakings alleged to have dominance do not deviate from the common policy ('**deterrence**').

2.5.5.3. The foreseeable reaction of customers and current and potential undertakings ('**fringe market players, new entrants or powerful buyers**') does not endanger the results of the common policy.

2.5.6. When it is established that the undertakings concerned have adopted a common policy (coordinated outcome), the Authority shall assess whether joint dominance is present. This evaluation shall be conducted using the same criteria applied in the assessment of single dominance. For example, a collective market share of 50% or more is indicative of a position of joint dominance, unless there are other contradictory criteria.

3. ASSESSING ABUSE OF DOMINANCE

3.1. Introduction

3.1.1. The Competition Law Code prohibits conduct on the part of one or more undertakings, acting individually or jointly, which amounts to the abuse of a dominant position in any market in Brunei Darussalam. Where the Authority has reason to consider that an abuse may have taken place by a Market Player that may be dominant, it shall undertake a market assessment to determine whether the Market Player holds a dominant position in the relevant market. The Authority shall apply the process to assessing whether dominance exists as set out in Section 2 above.

3.1.2. The Competition Law Code lists types of conduct that may amount to an abuse of a dominant position. This includes, but is not limited to:

3.1.2.1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

3.1.2.2. limiting production, markets or technical development to the prejudice of consumers;

3.1.2.3. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

3.1.2.4. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

3.1.3. When assessing whether an abuse of dominance may have occurred, the Authority shall take into account the specific market structure of the telecommunications sector, such as the existence of a single wholesale provider in Brunei, where downstream retail providers purchase their wholesale inputs on a cost oriented, transparent and at non-discriminatory terms.

3.1.3.1. Given this structure, the Authority's focus will be on the nature of competition in the retail level, **particularly on exclusionary practices between retail competitors** (horizontal conduct), rather than conduct by a vertically integrated dominant Market Player.

3.1.3.2. The Authority shall nevertheless consider any evidence which indicates that retail service providers are not able to obtain wholesale inputs on an equal basis or that a Market Player with dominance may be engaging in anti-competitive exploitative practices.

3.1.4. In general, the Authority is more likely to intervene where the alleged abusive conduct is **exclusionary** in nature, i.e., likely to lead to anti-competitive foreclosure. **Anti-competitive foreclosure** is where effective access by actual or potential competitors to suppliers or markets is hampered or eliminated by the dominant undertaking, placing the dominant Market Player in a position to profitably increase prices independently of competitive pressure, to the detriment of consumers.

3.1.5. The Authority is of the view that effective access by actual or potential competitors to suppliers or markets takes into account the different types of exclusionary conduct that a dominant Market Player could take. This means it shall consider not only full exclusion of actual or potential competition, but also conduct that has the effect of hindering the maintenance of the degree of competition still existing in the market. **This includes conduct that weakens effective competition even without necessarily resulting in the full exclusion of competitors.**

3.1.6. When deciding whether to intervene, the Authority shall take into account:

3.1.6.1. the degree or extent of dominance;

3.1.6.2. market conditions such as entry barriers, network effects and economies of scale and scope;

3.1.6.3. the importance and strength of competitors in relation to constraining the conduct of the dominant Market Player;

3.1.6.4. the position or purchasing strength of particular customers or suppliers;

3.1.6.5. the extent or impact of the conduct on the proportion of supply;

3.1.6.6. the period of time of the conduct and visible impacts; and

3.1.6.7. any direct evidence of an exclusionary strategy such as detailed plans or announcements.

3.1.7. A dominant Market Player can also engage in exploitative conduct by raising prices above the competitive level that may lead to detriment to consumers, irrespective of the conduct's impact on rivals. Such conduct includes imposing unfair (excessive) purchase prices, price discrimination or other unfair trading conditions.

3.1.8. However, given the structure of the sector, the Authority's guidance is largely focused on exclusionary conduct. This is because such conduct is most likely to be relevant to the competition law analysis of the telecommunications retail markets in Brunei. **The Authority shall, therefore, only intervene where there is indicative evidence that the exploitative conduct is capable of harming competition, in particular through consumer harm.**

3.1.9. The Authority sets out below the types of abusive conduct that it considers relevant to Brunei and explains the criteria it shall apply when assessing whether a dominant Market Player has abused its position in any of the retail markets in Brunei.

3.2. **Predatory behaviour**

3.2.1. **Predatory behaviour is where a dominant Market Player deliberately incurs a loss or foregoes profits (it incurs a 'sacrifice'**) over a short but sustained period with the object of undermining the ability of actual or potential competitors to compete. Most often the sacrifice includes pricing behaviour but can include other practices which result in a loss which could have been avoided. The Authority shall consider evidence of both price and non-pricing predatory behaviour when determining whether an infringement has occurred. Although consumers may initially benefit from lower prices or other outcomes from predatory behaviour, given the conduct is only sustained for a short period in order to cause competitors to exit the market, short-term benefits are soon outweighed by the longer-term harm to competition when, with competition excluded, the dominant Market Player is able to act independently of competition, resulting in worse outcomes for consumers.

3.2.2. The Authority shall consider whether predatory behaviour has occurred by assessing whether the dominant Market Player has been pricing below cost. It shall also assess the conduct of a dominant Market Player against economically rational alternative courses of action it could have pursued rather than incurring the loss.

3.2.3. The Competition Law Code sets the test for predatory pricing as "*pricing below the average incremental cost ("AIC") of supply*", i.e. the marginal cost of producing an extra unit of output. As in principle, predation can be assessed on the basis of whether the incremental cost of expanding output (or increasing quality) by a dominant Market Player is higher than the related incremental revenues. However, the Authority may use other cost benchmarks as well as AIC according to the facts of each case, including:

3.2.3.1. average variable cost ("AVC"): AVC are costs that vary depending on the amount of production. AVC is calculated by adding all the costs of production that are variable in the short run, and then dividing it by the total amount of production;

3.2.3.2. average avoidable cost ("AAC"): AAC is the average of the costs that could have been avoided in the short run if the Market Player had not produced a discrete amount of (extra) output;

3.2.3.3. average total cost ("ATC"): ATC is the sum of a Market Player's fixed and variable costs divided by the total amount of production. The measure includes all variable and all fixed costs (both sunk and recoverable); and

3.2.3.4. long-run average incremental costs ("LRAIC"): LRAIC is the average of all the (variable and fixed) costs that a company incurs to produce a particular product or service. LRAIC includes costs associated with development of a new product or service and other products' specific fixed costs made.

3.2.4. **The Authority considers that if a dominant Market Player is pricing below AVC or AAC, it is likely to be forgoing profits that cannot be matched by an equally efficient competitor** (an 'equally efficient competitor' is a firm that is at least as efficient as the dominant firm). In Brunei, it would be expected that all retail service providers are equally efficient. Therefore, rather than assessing whether competitors are equally efficient, the Authority shall assess whether the dominant firm is indeed pricing below its AVC or AAC **and therefore highly likely to be engaging in predatory behaviour.**

3.2.5. However, if prices are below ATC or LRAIC but above AVC or AAC, the Authority is likely to consider that the pricing conduct is predatory if there is evidence that the conduct forms part of a plan to eliminate or reduce competition in the relevant market.

3.2.6. The Authority notes that the above costing methodologies are one source of evidence which can be used to support the rationale for certain behaviours.

However, their relevance is determined by reference to the particular facts of the issue under examination and that the Authority shall take them into account along with all other relevant evidence as appropriate.

3.2.7. The broader competition law assessment conducted by the Authority shall also consider whether the conduct is **likely to enable the dominant Market Player to maintain or increase its market power (to the detriment of competition) and recoup its losses.** However, there is no specific requirement on the Authority to demonstrate that any losses have been recouped. Furthermore, the Authority shall not require evidence of actual market exit as a result of the predatory behaviour. It is sufficient to establish that exit is likely.

3.2.8. The Authority shall take into account all relevant circumstances, including but not limited to:

3.2.8.1. evidence of intent, such as an exclusionary strategy to forgo profits or discounting in order to exclude a competitor;

3.2.8.2. whether the dominant Market Player is, over successive periods, seeking to or is establishing a reputation in the market for engaging in predation through repeated threats of predatory behaviour, such as through public announcements, which have the effect of deterring entry or expansion; and

3.2.8.3. monitoring whether a dominant Market Player is targeting a specific competitor rather than engaging in conduct which does not have an impact across the retail market.

3.3. Cross subsidisation

3.3.1. **Cross subsidisation refers to where a Market Player allocates all or part of the costs of an activity in one geographic or product market to its activity in another market.** Cross subsidising from profitable products in one market to enable entry into another market is common and, in many cases, a fundamental pro-competitive strategy for firms to gain necessary economies of scale and market shares to compete effectively in markets they are currently not competing in.

3.3.2. While cross-subsidisation is a common practice, it breaches the Competition Law Code if a dominant player uses its dominant position in one market to unfairly price **with the aim to exclude or reduce competition in another market**, which it would not be able to do in an effectively competitive market i.e. not competition on the merits. Cross subsidisation is sometimes combined with predatory behaviour, as set out in Section 3.2 above.

3.3.3. In assessing as to whether an abuse of a dominant position is in contravention of the Competition Law Code, the Authority considers that it must first establish:

3.3.3.1. That the prices applied by the dominant Market Player on the adjacent market are not cost-based so that a cross subsidy exists. This is done by applying both incremental and stand-alone cost tests to the focal product to determine if an anti-competitive cross subsidy may be present. **The Authority considers that a strong indicator of an anti-competitive cross subsidy is likely to exist if the price charged for the focal product does not fall between stand-alone cost and incremental cost of the focal product.**

3.3.3.2. The Authority shall evaluate whether the pricing of the focal product is being sustained by financial support from other products. When prices the dominant Market Player charges would not have been possible without the subsidy, this may have a lasting distorting effect on competition on the market.

3.3.3.3. The Authority shall need to consider the competitive effect and other factors as a whole on a case-by-case basis to determine whether an anti-competitive cross subsidy exists, or whether it contravenes with the Competition Law Code in any particular circumstance.

3.4. **Tying and Bundling**

3.4.1. **Tying refers to situations where customers that purchase one product (the tying 'dominant' product) are required also to purchase another product from the dominant undertaking (the tied product).**

3.4.2. **Bundling refers to the way products are offered and priced together**. There are two main types:

3.4.2.1. **pure** bundling: refers to products sold jointly in fixed proportions exclusively within the bundle; or

3.4.2.2. **mixed** bundling: refers to products which are available separately, but the price of the products when sold separately is higher than the bundled price or the terms are less favourable.

3.4.3. Tying and bundling are very common and generally promote competition, particularly if they produce benefits to customers or can be objectively justified. However, in some cases, tying or bundling by a dominant Market Player can harm competition.

3.4.3.1. In relation to tying, the Authority will usually be concerned where there is **dominance in the 'tying' market**, i.e., the Market Player is dominant in, but not necessarily in the 'tied' market, where it is not dominant in i.e., concerns arise where the dominant market player only offers the tied dominant product A if End Users purchase tying product B, which it is not dominant in supplying. This is because by tying or linking the purchase of product B to the dominant product A, competition for product B could be weakened or disincentivised in a similar way that competition is affected through the supply of

dominant product A alone. Less competition for product B may thereby lead to higher prices for End Users.

3.4.3.2. In relation to bundling, a Market Player only needs to be dominant in one part of the bundle for concerns to arise as to whether it is difficult for a competitor to replicate the bundle. Where the Market Player has a dominant position in more than one of the products in the bundle, this will make it even more difficult for competitors to replicate the bundle, which in turn can make anti-competitive foreclosure effects even more likely. The Authority shall consider mixed bundling unlikely to be anti-competitive where it has evidence that pricing is above the cost of an 'as-efficient competitor' as the dominant Market Player.

3.4.4. The risk of anti-competitive foreclosure is expected to be greater where the dominant Market Player makes its tying or bundling strategy a lasting one, such as technical tying, i.e. a product designed so that it functions only when used in conjunction with its own complementary products.

3.4.5. The Authority shall seek to understand the rationale for the dominant Market Player tying or bundling if, at face value, there could be anti-competitive effects. In determining whether to conclude that an infringement in relation to tying or bundling has taken place, the Authority shall consider **evidence of whether the conduct results in efficiencies (production, distribution, transaction costs) that outweigh any anti-competitive effects**.

3.5. **Exclusive dealing**

3.5.1. **Exclusive dealing refers to when a dominant Market Player attempts to foreclose competition by having customers enter into exclusive purchasing arrangements or offering certain rebates.**

3.5.1.1. **Exclusive purchasing:** refers to where a dominant Market Player requires customers to purchase exclusively or a significant proportion of the dominant Market Player's products. The dominant Market Player will be able to encourage customers to do this by offering some form of compensation or discount. Exclusive purchasing can therefore be beneficial to customers, but can also produce anti-competitive effects.

3.5.1.2. **Conditional rebates**: are where rebates are granted to customers to reward them for a particular form of purchasing behaviour. Usually, the customer is given a rebate if its purchases over a defined period exceed a certain threshold – the rebate attaching to all purchases (retroactive rebate) or only those purchases above a certain threshold (incremental rebate). Market Players may offer such rebates in order to attract more demand, and as such that increased demand can benefit consumers. However, rebates granted by a dominant Market Player can also have actual or potential foreclosure effects, similar to exclusive purchasing obligations.

3.5.2. When assessing whether an **exclusive purchasing arrangement** is detrimental to competition, the Authority shall assess the degree to which the arrangement:

i. will make it difficult or impossible for competitors to be economically sustainable; or

ii. prevents potential competitors from entering the market. This is more likely to be the case, where, as a result of the exclusive dealing arrangement, competitors are not in a position to act as an important competitive constraint on the dominant Market Player and/or compete for the entire customers demand due to, for example, capacity constraints or other supply issues.

The Authority will assess these factors by undertaking a counterfactual analysis considering all the evidence available including whether a Market Player that is as reasonably as efficient as the dominant Market Player could effectively compete in light of the arrangement.

3.5.2.1. The Authority is less likely to intervene in respect of an exclusive purchasing obligation if competitors can still compete on equal terms and compete for the entirety of a customer's demand.

3.5.3. With regard to **rebates**, 'retroactive rebates' in particular have the capability to produce foreclosure effects where they make it less attractive for customers to switch for small amounts of their demand which would result in a loss of the entire rebate.

3.5.3.1. This can be assessed by calculating the 'effective price', the price a competitor would have to offer a customer for switching the contestable share of their demand away from the dominant market player and thereby forgoing the rebate.

i. Where the effective price is below the AAC of an equally efficient competitor, the Authority shall consider that the rebate is capable of having a foreclosure effect.

ii. Where the effective price is between AAC and LRAIC, the Authority shall consider the impact of other evidence of foreclosure of competitors that are as efficient as the dominant undertaking.

3.5.3.2. For incremental rebates the relevant range is normally the incremental purchases that are being considered.

3.5.3.3. The Authority shall consider robust economic evidence and data submitted to it on whether a rebate is capable of hindering the expansion, or entry of, an equally efficient competitor to the dominant undertaking. However, in some circumstances, a less efficient competitor may also exert competitive constraints that can

be relevant to assessing foreclosure effects. All relevant evidence, including of possible efficiencies shall be integrated into a general competition assessment carried out by the Authority.

3.5.4. In assessing whether an exclusionary arrangement has had an anti-competitive effect which infringes the Competition Law Code, the Authority will focus on whether it is likely that consumers as a whole will benefit from the exclusivity arrangement. It will consider various factors including whether:

i. the conduct has the effect of preventing the entry or expansion of competitors,

ii. the terms and conditions and extent of the exclusivity agreement, and

iii. the possible existence of a strategy to exclude a competitor which is at least as efficient.

iv. Equally, it will consider if there is evidence that cost or other advantages are passed on to customers, creating efficiencies or benefits which outweigh any negative impacts on competition.

3.6. **Objective justification**

3.6.1. Where it appears to the Authority that conduct may amount to an abuse of a dominant position, the Authority shall **assess all the relevant circumstances including evidence from the dominant Market Player on whether the conduct was 'objectively justified'.** The assessment will consider on whether the conduct was **necessary, proportionate and results in substantial efficiencies** that brings benefits to consumers that outweigh any negative impacts on competition. This may include findings that:

3.6.1.1. The conduct resulted in material efficiencies such as technical improvements in quality, reduction in cost of production or distribution.

3.6.1.2. That there were no alternative ways of achieving benefits that did not require conduct which would otherwise be considered anti-competitive.

3.6.1.3. That the conduct does not eliminate a material proportion of competition from the market.

3.6.2. In reaching a conclusion, the Authority shall consider all evidence, including any objective justification claimed, throughout its assessment.

3.6.3. Where a dominant undertaking can demonstrate with sufficient degree of probability that its conduct was likely to be objectively justified (as set out above) the Authority may consider this does not result in the determination of an infringement.

4. ASSESSING POSSIBLE RESTRICTIVE AGREEMENTS

4.1. Introduction

4.1.1. The Competition Law Code establishes a regulatory framework for the assessment of agreements which have as their object or effect the prevention, restriction or distortion of competition of the telecommunications market in Brunei Darussalam.

4.1.2. The key prohibition is specified in the Competition Law Code:

'*….the Authority may take enforcement action as it deems appropriate whether on its own motion or pursuant to a complaint received from any interested party against any Market Player that enters into an agreement with another Market Player that has the object or effect of unreasonably restricting competition in any market within the telecommunications sector'*.

4.1.3. There are two key terms that are used in the Competition Law Code:

4.1.3.1. **Market Player** applies to any person, undertaking, incorporated or unincorporated and licenced or unlicenced in Brunei Darussalam or otherwise, that carries or is capable of carrying on a business or is engaged in any commercial activity related to products or services within the telecommunications sector, and such other undertakings or enterprises having a measurable effect in Brunei Darussalam. This includes, but is not limited to, owners or operators or providers of infrastructure or services for the telecommunications sector, as well as any other undertaking or entity whose activities are deemed to have an effect within the telecommunications market in Brunei Darussalam.

4.1.3.2. **Agreements**. For Section 3 to apply, there must be a form of arrangement or coordination between Market Players, namely an 'agreement' or 'concerted practice' (a form of coordination, between Market Players, in which they have not reached an agreement, but they knowingly substitute practical cooperation between them for the risks of competition) between two or more Market Players having 'expressed a concurrence of wills to cooperate' – the 'agreement' does not have to be formalised and circumstantial evidence may be sufficient to demonstrate the existence of an express agreement.

4.1.3.3. The Authority shall also consider that decisions by associations representing the interests of Market Players, such as the constitution or rules of an association, recommendations or resolutions to fall within the concept of 'Agreements'.

4.1.4. Section 3 also expressly distinguishes between restriction of competition 'by object' and 'by effect'. These concepts shall be interpreted as follows by the Authority:

4.1.4.1. **Restriction of competition by object**. Certain types of agreements between Market Players can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. In such cases, it is not necessary to examine the actual or potential effects of the behaviour on the market, once its anti-competitive object has been established. This rule shall only be applied to certain agreements between Market Players which reveal, in themselves and having regard to the content of their provisions, their objectives and the economic and legal context of which they form part, a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects. In assessing the legal and economic context, it shall also be relevant to consider the nature of the goods or services affected and the real conditions of the functioning and structure of the market(s) in question.

4.1.4.2. **Restriction of competition by effect (Restrictive effects on competition).** An agreement between Market Players may not in itself reveal a sufficient degree of harm to competition, yet it may still have restrictive effects if it has or is likely to have, an appreciable adverse impact on at least one of the parameters of competition in the market, such as price, output, product quality, product variety or innovation. To establish whether this is the case, it is necessary to assess competition within the actual context in which it would occur if the agreement had not existed.

4.1.5. The Authority finds that certain types of agreements such as price fixing are clearly an anti-competitive conduct. The Authority shall determine that a Market Player that has entered into such an agreement has contravened the Competition Law Code, regardless of the actual effect of the agreement.

4.1.6. The Competition Law Code provides a legal framework for the assessment of potentially restrictive agreements, distinguishing between horizontal agreements (i.e. agreements between Competing Market Players) and non-horizontal agreements (i.e. vertical agreements). These are discussed below.

4.2. Horizontal agreements

4.2.1. The Competition Law Code prohibits Competing Market Players from entering into agreements that unreasonably restrict, or are likely to restrict, competition in any market within the telecommunications sector. This includes horizontal agreements that restrict competition between Market Players.

4.2.2. **Market Players are treated as actual competitors if they are active on the same product market and geographic market.** A Market Player is considered as a potential competitor of another Market Player if, in the absence of the anti-competitive agreement, it is likely that the former, within a short period of

time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active.

4.2.3. **Horizontal agreements that are anti-competitive by object**

4.2.3.1. **Horizontal** agreements may limit competition in the relevant market in several ways. **Agreements between Competing Market Players which are anti-competitive 'by object' are specifically prohibited in the Competition Law Code. These agreements are treated as hardcore restrictions of competition and the Authority shall not need to show their anti-competitive effects.** These include cartel-like conduct engaged in by Competing Market Players such as:

i. **price fixing** where Market Players agree to set the prices of goods or services at a certain level or the elements of the price such as a discount or a transport charge. Price fixing can also occur where Market Players agree the amount or percentage by which prices are to be increased, agree a range within which prices must remain or agree to adhere to published price lists. There are numerous means by which prices can be fixed and the Authority shall be vigilant to ensure that all forms of price fixing are challenged and sanctioned;

ii. **output restrictions** where Market Players agree to limit output or control production of products or services available on the market or limit investment. Such output restrictions may be in the form of fixing production levels or setting quotas;

iii. **bid-rigging** where Market Players collude to control the outcome of a bidding process and do not submit bids independently (generally, bid rigging does not involve joint participation in the tender and there is a pre-determined tenderer who shall win the contract notwithstanding the impression that the tender process is genuinely competitive.);

iv. **market and customer divisions** where Market Players agree to divide (or share) markets or customers among themselves, for example by territory, type or size of customer (agreements where Market Players specialize in producing certain components or goods to improve efficiency are generally not considered anti-competitive if they are part of legitimate collaboration); and

v. **group boycotts** where multiple Market Players agree to collectively refuse to deal with a particular company, or supplier (this does not preclude Market Players cooperating to limit the credit risk associated with certain customers, however, there must be appropriate rules and safeguards in place to avoid anti-competitive spill-over effects).

4.2.4. Horizontal **agreements that involve information exchange**

4.2.4.1. Horizontal agreements can also cause concerns when two or more Competing Market Players share commercially sensitive information ('information exchange'). While this is a common feature of many competitive markets, the **exchange of commercially sensitive information can facilitate coordination between Market Players and restrict competitio**n. The Authority shall take into account the nature and context of the information exchange when assessing the potential for the exchange of information to harm competition.

4.2.4.2. Generally, Competing Market Players should independently determine their economic conduct in the relevant market. This principle does not prevent undertakings from adapting themselves intelligently to the existing or anticipated conduct of their competitors or to the existing conditions in the market. However, direct or indirect contact between Market Players is not permitted where it serves:

i. to influence the conduct in the market of an actual or potential Competing Market Player, or

ii. to reveal to such an entity a course of action which a Market Player intends to pursue or contemplates adopting in the market,

where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market i.e. conditions that undermine or distort competition that would typically occur in a fair and competitive market.

4.2.4.3. The exchange of information relating to Market Players future conduct regarding prices or quantities is likely to lead to collusive outcomes and such exchanges are generally considered 'by object' restrictions of competition.

4.2.4.4. Depending on the objectives that they seek to attain, exchanges of other types of information such as costs, capacity, production, quantities, customers, plans to enter or exit markets, or concerning other important elements of a Market Player's strategy may constitute a restriction of competition by object if the exchange is capable of removing uncertainty between participants and influencing their market conduct.

4.2.4.5. The Authority shall assess exchanges of information on a case-by-case basis. In assessing whether an exchange is capable of restricting competition by effect (as it does not restrict competition 'by object'), the Authority shall have regard to:

i. the nature of the information that is being exchanged; and

ii. the characteristics of the exchange and the characteristics of the relevant market.

The information exchange must affect one or more of the parameters of competition to harm competition (for example, price, output, product quality, product variety or innovation). Generally, information that is historic, aggregated and/or public should not raise competition concerns, but this depends on the circumstances of each case.

4.2.5. **Horizontal agreements that are anti-competitive by effect**

4.2.5.1. **Horizontal agreements that do not in themselves reveal a sufficient degree of harm to competition may still have restrictive effects on competition.** The Authority assesses horizontal agreements on a case-by-case basis, considering factors such as the Market Player's ability to act independently of the agreed-upon venture, the duration of the agreement, whether the Market Players acted anti-competitively; and any other factors that help predict the likely competitive effect of the agreement.

4.2.5.2. More specifically, the Authority shall have regard to the following factors in assessing whether the agreement has restrictive effects:

i. the **nature and content** of the agreement;

ii. the **economic and legal context** in which the Market Players concerned operate, the nature of the goods or services affected, and **the real conditions of the functioning** and the **structure of the market** or markets in question;

iii. the extent to which the parties individually or jointly have or **obtain some degree of market power** and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power; and

iv. the appreciable nature of the **restrictive effects** on competition.

4.2.6. **Pro-competitive effects**

4.2.6.1. Horizontal agreements may, however, achieve 'pro-competitive benefits' or 'efficiencies' such as reductions in the cost of operating, developing, producing, marketing or delivering any telecommunications infrastructure or services. **The efficiencies must be capable of being substantiated and must result from the economic activity that forms the nature of the agreement.** In general, efficiencies stem from an integration of economic activities whereby Market Players combine their assets to achieve what they

could not achieve as efficiently on their own or whereby they entrust another Market Player with tasks that can be performed more efficiently by that other entity.

4.2.6.2. The Authority shall expect that:

i. consumers receive a fair share of the economic benefits;

ii. the restrictions must be indispensable to the attainment of the objectives pursued by the agreement; and

iii. that the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the goods in question.

4.2.7. **Exemptions**

4.2.7.1. Competition Law Code provides that the Authority shall generally exempt Agreements between Competing Markets Players that do not have an aggregate market share of more than 20% in the relevant market. **This exemption does not apply to the agreements that contain hardcore 'by object' restrictions.**

4.3. **Vertical agreements (non-horizontal agreements)**

4.3.1. **Vertical** agreements are agreements entered between two or more Market Players, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relate to the conditions under which the parties may purchase, sell or resell certain goods or services.

4.3.2. **The Competition Law Code prohibits Markets Players from entering into vertical agreements with other entities that are not competing Market Players, such as suppliers or distributors, which unreasonably restrict, or are likely to unreasonably restrict, competition in any market within the telecommunications sector.**

4.3.3. **However**, most vertical agreements do not generally have an adverse impact on competition. It is generally the case that **restraints in vertical agreements are less likely to raise competition concerns than horizontal agreements absent some form of market power by one or more of the parties to the agreement on the relevant market** (or unless the agreement forms part of a network of similar agreements).

4.3.4. In assessing the effects of a vertical agreement on competition, the Authority shall have regard to the following non-exhaustive list of factors:

4.3.4.1. nature of the agreement;
4.3.4.2. market position of the parties;
4.3.4.3. market position of competitors;

4.3.4.4. market position of the buyers of the products concerned;
4.3.4.5. entry barriers;
4.3.4.6. level of trade;
4.3.4.7. nature of the product; and
4.3.4.8. dynamics of the market e.g., rate of change in technology.

4.3.5. **The Competition Law Code states that agreements between non-competing Market Players are generally prohibited if their effect, or likely effect, is to prevent, restrict, or distort competition in the market**, specifically in the following circumstances:

4.3.5.1. **Resale price maintenance ("RPM") agreements where the manufacturer or supplier sets the price at which a reseller must sell their product, typically in the form of requiring the dealer or reseller not to resell the products below a specified (minimum) resale price.** However, the use of recommended resale prices or maximum resale prices does not constitute RPM, provided there is no attempt to make buyers adhere to the recommended prices when reselling the products.

RPM can be imposed directly such as through contractual means or indirectly, including through incentives to observe a minimum price or disincentives to deviate from a minimum price such as fixing the resale margin or making the reimbursement of promotional costs by the supplier subject to the observance of a given price level.

4.3.5.2. **Exclusive dealing is where a Market Player agrees to supply, purchase or distribute goods or services to or from another Market Player on an <u>exclusive basis</u>** and can also restrict competition whether or not it leads to market foreclosure. This shall typically be the case where the agreement raises barriers to entry for other suppliers or buyers or limits choice for customers and consumers.

Vertical market allocation agreements, which assign specific customers or markets to resellers, can in certain circumstances negatively affect competition, for example by preventing resellers from competing for the same customers or markets. Such agreements can result in higher prices and reduced choices for consumers.

4.3.5.3. Exclusive distribution, exclusive customer allocation or exclusive supply in a vertical agreement can lead to efficiencies and help to encourage relationship-specific-investment and lessen the risk of hold-up for the buyer or free rider problems ultimately leading to greater competition. The Authority shall therefore assess such agreements in their legal and economic context. Without some form of market power by one or more party to the agreement, the vertical agreement should not give rise to significant competition concerns.

4.3.5.4. **As a general rule, the Authority considers that vertical agreements are unlikely to raise competition concerns when each of the Market Players party to the agreement have less than 25% market share in their respective markets.** This exemption shall not, however, apply to agreements that contain hardcore restrictions (e.g. RPM). Above this threshold, the Authority shall assess the possible anti-competitive effects of a vertical agreement on a case-by-case basis.

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