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COMPETITION GUIDELINES

REPUBLIC OF LIBERIA
Liberia Telecommunications Authority
{INSERT DATE}

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1. PREAMABLE

1.1. Article 11 (1) (m) of the Telecommunications Act 2007 (the “Act”) instructs the Liberia Telecommunications Authority (“LTA”) to institute and maintain appropriate measures for the purpose of preventing service providers from engaging in or continuing anti-competitive practices, including the identification of telecommunications markets, determining dominance and abuse of dominance in identified telecommunications markets and responding to anti-competitive agreements.

1.2. Article 27 (1) of the Act; specifies that the duties and responsibilities of the LTA regarding the competition provisions in Part VII of the Act are to:

> “(a) promote efficient and sustainable competition for the benefit of end-users;
>
> (b) establish and maintain an open and transparent regulatory framework that minimizes regulatory and other barriers to entry into telecommunications markets;
> (c) make orders defining markets for the purpose of this Act;
> (d) make orders designating dominant service providers in relevant markets in Liberia, based on their market share and other factors as determined in accordance with regulations, rules and orders;
> (e) monitor and prevent abuse of a service provider’s dominant position, pursuant to Section 28;
> (f) monitor and prevent practices that would restrict competition, in accordance with Section 29;
> (g)review and decide upon proposed transfers of control of service providers, in accordance with Section 32;
> (h) undertake market reviews from time to time, to evaluate market conditions and the state of competition in those markets; and
> (i)dispose of complaints and resolve disputes related to anti-competitive practices in a timely and impartial manner.”

1.3 Article 28 of the Act prohibits certain actions or activities by dominant service providers including any activity that has the effect or is likely to have the effect of materially restricting or distorting competition in a telecommunications market.

1.4 Article 29 of the Act prohibits certain actions or activities by any service provider, dominant or not, that restricts or distorts competition in telecommunications services.

1.5 Article 30 of the Act confer to the LTA the authority to investigate any person for the purpose of determining whether an action or activity of a person constitute an abuse of dominant position under Section 28 of the Act or an anti-competitive practice under Article 29 of the Act.

1.6 Article 31 of the Act specifies the remedies the LTA may impose on persons who have breached Sections 28 or 29 of the Act.

1.7 Article 32 of the Act specifies that certain transfers or acquisition of control involving service providers will require prior authorization from the LTA.

2. PURPOSE

2.1. These guidelines set out the principles and procedures which LTA will follow in reviewing the competitive conditions within any telecommunications market in Liberia. It also provides guidance on how the LTA will implement Part VII of the Act.

2.2. While the LTA anticipates following the principles outlined here, there may also be differences in how individual cases or allegations of anti-competitive behavior are assessed, and LTA reserves the right to consider other factors not listed in these guidelines.

2.3 This document contains guidelines explaining the obligations resulting from the implementation by the LTA of the applicable competition-related provisions of the Telecommunications Act, how to fulfill them, and the procedures that the LTA will apply in connection therewith. No set of guidelines can provide specific answers to every competition question that might arise under these provisions and users are reminded that the LTA will evaluate each case in light of its own facts and that the Telecommunications Act and specific regulations promulgated by the LTA are the only authentic legal basis.

2.4 The LTA will review and update these Guidelines on a periodic basis.

3. DEFINING RELEVANT MARKETS

3.1. Introduction

3.1.1. For implementation of Part VII of the Act, markets are defined based on the degree to which one product may be substituted for another, both from the point of view of consumers (demand-side substitution) and from the point of view of suppliers (supply-side substitution).

3.1.2. On the demand side, LTA will examine how the marginal consumer would react to an increase on the price of a product he or she uses. The marginal consumer refers to a person that may easily switch to consuming another brand or product if the price of the product consumed increases relative to the alternatives.

3.1.3. On the supply side, LTA will focus on the nature of a supplier's response to an increase in the price of a close substitute of the product it produces.

3.1.4. There are three instances in which markets would need to be defined under Part VII of the Act. The first is to justify the imposition of ex ante regulations on dominant service providers. In this case the analysis is done in a forward-looking (also called prospective) manner. Importantly, the LTA will not define and analyze all retail or wholesale markets. Rather it will define only those markets where initial review suggests that the particular market may be susceptible to ex ante regulations. The following three criteria will be used to select relevant markets:

(a) the relative size of the market
(b) whether the market is concentrated, as measured by the Herfindahl-Hirschman Index, or another indicator deemed appropriate by the LTA; and
(c) if the market exhibits high and non-transitory barriers to entry or expansion.

3.1.5. The second instance in which markets would need to be defined is during an investigation of an alleged instance of anti-competitive conduct. In this case LTA's analysis will be backward-looking (retrospective), sometimes going back many years to assess the conduct of the service provider accused of behaving anti-competitively. In this case the relevant market may be defined differently than for the first case.

3.1.6. The third instance is during a review process under Section 32 of the Act examining a proposed acquisition or transfer of control. In this case LTA's analysis will be forward looking as in the first case. However, here the analysis will be performed considering the change in industry structure that would occur as a result of a transfer of control of a service provider.

3.2. Approach to define relevant markets

3.2.1. The relevant market for a good or service includes all goods or services that are considered to be close substitutes. These goods or services can therefore be deemed to compete directly with each other, and that the potential demand- or supply-side substitution between them will constrain their prices.

3.2.2. The focus for the delineation of relevant markets is therefore based on those goods or services that are close substitutes from the buyer's perspective (i.e., demand-side substitution), and those suppliers who produce, or could easily switch to produce, those goods or services (i.e., supply-side substitution).[1]

3.2.3. The LTA will follow a well-established method called the hypothetical monopolist test to define relevant markets. This method also known as a SSNIP (small but significant non-transitory increase in price) test follows an iterative process. First, LTA will start with a narrow group of products or services (say X and Y) that are deemed closed substitutes.

[1] For example, the European Commission Guidelines state that:

"According to settled case-law, the relevant product/service market comprises all those products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question. Products or services which are only to a small, or relative degree interchangeable with each other do not form part of the same market. NRAs should thus commence the exercise of defining the relevant product or service market by grouping together products or services that are used by consumers for the same purposes."

European Commission. *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services*. (2002|C 165|03). Official Journal of the European Communities. (11.7.2002). Paragraph 44

Then the following question is posed: if there were one supplier (i.e., the hypothetical monopolist) of X and Y, would the hypothetical monopolist be able to increase prices (of X and Y) by a small but significant amount and maintain it over a certain period? If the response to this question is negative, it is because a sufficient amount of customers would switch to an alternative product (say, Z) not included in the group formed by X and Y. This switch would lower the profits of the hypothetical monopolist forcing it to reduce the price of X and Y to its original level. Therefore, product Z, not included in the initial group of services, can be said to be a close substitute for X and Y and therefore within the same market. The SSNIP test is repeated again adding other services or products to the initial group until a set of services is found such that the hypothetical monopolist would be able to maintain the price increase over an extended period of time (typically one or two years) with profits. That set of products or services would constitute the relevant product market.

3.2.4. In the application of the SSNIP test the price increase generally refers to a 10-percent price increase holding the terms of sale of the products outside the candidate market constant.

3.2.5. It is important to note that a hypothetical monopolist would always lose some customers as a result of a small but significant non transitory increase on prices.[2] The real question as to whether X and Y constitute a relevant product market is whether the customers' response (switching to Z) is of such magnitude that it renders the price increase unprofitable. If the response of customers switching to Z is significant, then X, Y, and Z should belong to the same product market. If it isn't (the hypothetical monopolist is able to sustain the price increase) then X and Y constitute a relevant product market.

3.2.6. When applying the hypothetical monopolist test, the LTA will first assess demand-side substitution to come up with a group of services as the relevant product market. This process is discussed in the next section. Demand-side substitution analysis usually carries most of the weight in the definition of a relevant product market. LTA will also consider supply-side substitution effects to assess how quickly other suppliers can switch production to the relevant product without incurring significant costs or delays.

3.3. Assessing demand-side substitution

3.3.1. When performing the SSNIP test the LTA will determine a set of products that can be reasonably regarded by consumers as close substitutes. An important consideration is how long it would take, or what costs customers would need to incur, to respond to a price increase by switching to a substitutable product. For example, are there switching costs that would prevent consumers from switching to an alternative service as a result of a price increase in their service? If it takes consumers too long to react or switching costs are too

[2] For example the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) say that: "The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase." See U.S. DOJ and FTC (2010) at p. 9

high, then the level of demand side substitution will be more limited and perhaps the loss of customers may not be sufficient to make the price rise unprofitable. For example the sale of unlocked mobile phones reduces the switching costs for consumers so that one can more easily switch from one mobile network to another.

3.3.2. When assessing demand-side substitution the LTA may consider the historic trend and likely future adoption of services that will serve as close substitutes. Rather than focusing on the technology to supply these services, the LTA's focus will be on the functionality and characteristics of the products to assess how likely it is that consumers will view them as close substitutes. For example, retail consumers may be able to access Internet broadband service at fixed locations using different wireline and wireless access technologies. This could include wired or cable-based technologies such as ADSL, coaxial cable from CATV companies, or fiber-based networks (FTTH, FTTC, FTTP). It could also include wireless-base access technologies such as WiMax, 3G/4G/LTE, or satellite-based access. Nevertheless, the focus of the attention will be on the consumer's perception on whether these services are close substitutes or not. Important characteristics such as differences in download/upload speeds, differences on download capacity limits, functionality and pricing will be considered.

3.3.3. Historic trends on prices and price correlations between alternative services that are deemed close substitutes can shed light on the relative closeness of these services when delimiting the boundaries of the product market. It is important to note that important price differences may exist between products that belong to the same market. Price differences could exist because of perceived difference in product quality. They could also exist when one brand conveys a certain meaning valued by certain consumers, for example, status.

3.4. Assessing supply-side substitution

3.4.1. Supply-side substitution exists when a supplier can easily switch from supplying service X to supplying service Y without incurring significant costs and within a reasonable short period of time in response to a small but permanent increase in the relative price of Y. Under these circumstances the additional supply that can be put into the market would constrain pricing of products that are close substitutes.

3.4.2. If a product has been included within the relevant product market as a result of evidence of demand-side substitution, then evidence of supply-side substitution towards this product is not necessary.

3.4.3. In analyzing supply-side substitution LTA's focus will be on existing suppliers and their ability to rapidly switch production to alternative products as a response to a relative price increase in those alternative products. The focus will not be on the barriers to entry of potential competitors as it would typically take potential competitors more than one or two years to enter the market.[3]

3.4.4. Supply-side substitution is unlikely to pose a constraint on the pricing of a hypothetical monopolist when it involves significant changes to existing assets, substantial additional investments, or strategic decisions involving long implementation delays.

3.5. Relevant geographic markets

3.5.1. Conceptually, the definition of geographic market involves an assessment of the extent to which competitive conditions are appreciably different across geographic areas.

3.5.2. Assessing relevant product substitution in a geographic area requires assessing the degree to which consumers can readily switch from their supplier of the relevant product to other suppliers in other geographic areas. In practice, the network coverage area, or the licensed area will be considered by the LTA as the relevant geographic dimension of the product market. However, if competitive conditions vary widely from one area to another, the LTA may consider a different definition for the relevant geographic market.

3.6. Some challenges in the application of this approach

3.6.1 Measuring issues

3.6.1.1 In real world applications of the hypothetical monopolist test, the data often will not be sufficient to enable the conduct of empirical testing of the market definitions. Thus, the LTA will use the SSNIP test as a conceptual framework or thought experiment to guide the market definition logic and employ whatever data is available to confirm the logic behind the market definition.

3.6.2 Starting price

3.6.2.1 In theory the starting price in the hypothetical monopolist test should be at a level where the product price is subject to competitive constraints. Generally speaking, the LTA will tend to use the observed price as the starting price. However, the LTA will assess whether current product prices may be above the competitive level. If for example the observed price of a products (say, X) is substantially above the competitive level, using that price as the starting point for the SSNIP test may produce a different definition of the relevant market. Just because a hypothetical monopolist selling X may not find it profitable to raise the price of X any

[3] See European Commission (2002) at Paragraph 52 and 53.

further does not mean that X belongs to a broader market that includes other products priced at a lower competitive level.[4]

3.6.2.2 While there is no easy way to determine whether the observed price of say X include a substantial mark up above the competitive level, inquiring about other dimensions of products X or Y may shed light on whether the observed prices are significantly above the competitive level. For example one could assess the products characteristics and functionality, or the historical nature of the supply of these products to infer whether the supplier(s) had the opportunity to exercise market power and therefore that the observed prices of X may be a legacy from that past.

3.6.3 Regulated prices

3.6.3.1 Related to the prior point is the question of what the starting price used in the hypothetical monopolist test should be in the case where the observed prices of products X and Y are set by regulation. In this circumstance, if the regulated prices are cost-based, LTA will tend to assume the prices are set at a competitive level and therefore use the regulated price as the starting point, provided that analysis also demonstrates that the cost model used to set the prices of X and Y reflects the current cost of providing those services.[5] Should the LTA suspect that this is not the case, it may choose to start the test with a different price.

3.7 Other considerations

3.7.1 Retail and wholesale markets

3.7.1.1 In telecommunications, retail and wholesale markets have different meanings than those commonly used in other industries. Retail services refer to services sold to final consumers regardless of whether these are individuals, businesses or government. Wholesale services are those sold to other licensed service providers who use these as inputs in their provision of retail services.

3.7.1.2 The definition of relevant product markets needs to differentiate between retail and wholesale markets, sometimes referred as downstream (retail) and upstream (wholesale) markets.

[4] Using a price above the competitive level for the SSNIP test leads to a mistakenly broad definition of a relevant market. This is sometimes referred as the cellophane fallacy. European Commission (2002), Paragraph 42.
[5] See European Commission (2002), Paragraph 42.

3.7.1.3 To define markets susceptible to ex ante regulations, the LTA will start its analysis with the retail markets and then move onto the wholesale markets. The retail market analysis will shed light on the demand and supply-side substitution effects prevailing in those markets. This in turn will shed light on the nature of the demand and supply-side substitution effects in wholesale markets, because the demand for wholesale products is driven by the underlying demand for retail products.[6]

3.7.2 Bundled products

3.7.2.1 When defining the relevant product markets the LTA will consider that telecommunications services are commonly provided in a bundle. For example retail mobile service is usually composed of a bundle of services including, but not limited to, the ability to place and receive calls nationally and internationally, and the ability to send and receive text and voice messages. Accordingly, the market definition will reflect the fact that products are often sold in a bundle.

3.7.3 Over-the-top services

3.7.3.1 The LTA will also consider the demand and supply-side substitution effects posed by over-the-top (OTT) services. With the increased availability of broadband (mobile and fixed), OTT services have become a powerful competitive force to traditional retail services. For example, Voice over Internet Protocol (VOIP) applications are regularly used by consumers to bypass the international call services of the fixed and mobile operators.

3.7.4 Chains of substitution

3.7.4.1 When analyzing demand-side substitution a set of products may sometimes appear too distant to be included in the same market if the product characteristics and the prices may differ substantially. Suppose there are three different fixed-wireless Internet access products with varying download speeds with higher prices for higher speeds; for example, (a) product X has a download speed of 256 kbps; (b) product Y has a speed of 1 Mbps; and (c) product Z has a speed of 6 Mbps. Analyzing demand-side substitution between products X and Z may lead one to conclude that these products are too different to belong to the same market. However, starting the analysis with X only as a narrow tentative market, one may conclude that a SSNIP on X would not be

[6] See European Commission. *Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002|21|EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*. (December, 17, 2007). OFFICIAL JOURNAL OF THE EUROPEAN UNION. L 344|65. Paragraph 4.

profitable. This is because a non-trivial number of consumers who would be willing to put up with a slower speed at a lower price of X would switch to Y if the price difference between X and Y is reduced. Thus, one may rightly conclude that X and Y must belong to the same market. Now one may ask whether the product market should be expanded to include Z. A SSNIP on X and Y may trigger a non-trivial number of Y consumer (who care about speed) to switch to Z (given the increase on the price of Y). Then, one may rightly conclude that Y and Z must belong to the same market, and by extension X, Y and Z must belong to the same relevant market.

4 ASSESSING MARKET POWER IN A RELEVANT MARKET

4.1 Introduction

4.1.1 Section 2(1) of the Act defines significant market power (SMP) as a position of economic strength in which a service provider, acting individually or jointly with others, has the ability to act to an appreciable extent independently of consumers or its competitors. A service provider with significant market power (SMP) is said to have a dominant position.

4.1.2 SMP is commonly associated with the ability to raise prices above the competitive level without losing a significant amount of customers. This mark-up above the competitive price level may often be difficult to measure or observe. However, there are a number of market characteristics that, taken together, may suggest the presence of SMP. For example, although market share may not be a measure of market power by itself, a large market share together with other market characteristics such as high barriers to entry, economies of scale and economies of scope may suggest that a firm has SMP, and therefore, is dominant.

4.1.3 Similarly having the ability to exclude rivals by virtue of owning or controlling access to an essential facility is a sign of SMP.

4.1.4 When assessing whether a service provider has significant market power, the LTA will consider, but will not be limited to, the following criteria:

i. market share of the service provider;
ii. control of essential facilities or resource;
iii. economies of scale and scope;
iv. technological advantages or superiority;
v. absence of or low countervailing buying power;
vi. barriers to entry or expansion; and
vii. existence of sunk costs.

4.1.5 The list above is not exhaustive but illustrates some of the factors the LTA will consider for signs that a service provider has SMP. A dominant position can be inferred from a combination of some of the above criteria which taken independently may not necessarily be determinative.

4.1.6 When assessing whether a firm has SMP in downstream (retail) markets, the LTA will take into account the existence of regulations in the upstream (wholesale) markets that may attenuate the market power of the firm in the retail markets.

4.2 Market Share

4.2.1. The market share of a service provider can provide an indicator of the potential degree of their market power. For example, a firm with a relatively high market share may be more likely to set prices above the competitive level (holding all other things constant) than a firm with a relatively small market share.

4.2.2. The market share of a firm can be determined by using more than one indicator, such as, for example, revenue, outgoing minutes, or active subscribers. The LTA may choose to use more than one indicator to compute the market share in its analyses.

4.2.3. Fluctuations in market shares over time may also indicate a market with robust competition and, as such, that the firm under analysis lacks market power. On the other hand, a service provider with a large and stable market share that it has maintained over time may be a sign of SMP.[7]

4.3 Control of essential facilities or resources

4.3.1 Control of facilities or infrastructure not easily duplicated may enable a service provider to behave to a certain extent independent from competitor or consumers. For example owning an access network, access to consumers, access to a submarine cable capacity, or having radio spectrum licenses may provide the ability to exclude rivals.

4.3.2 The ability to exclude rivals includes not only a refusal to supply, but also proposing terms for the use of those facilities that are so onerous for a competitor that it makes the use of such facilities unfeasible or impractical.

4.3.3 The LTA will assess the extent ex ante regulations constrain or prevent the party controlling the essential facility from excluding rivals.

4.3.4 To determine whether a facility or resource is essential, the LTA will consider whether the facility is controlled by a monopolist, and whether a competitor seeking access to that

[7] See European Commission (2002), at Paragraph 75.

facility is unable or finds it impractical on technical or economic grounds, to duplicate such facility.

4.4 Economies of scale and scope

4.4.1 Economies of scale exist when the average cost of a service or a product declines as the scale or capacity of the provider increases. This could make it very difficult for potential entrants to enter the market as, by definition, they would have a small scale and would be at a cost disadvantage relative to current operators.

4.4.2 Economies of scope exist when the average cost of a service or a product declines when it is produced jointly with other services or products. This could arise for example when the same network infrastructure is used to produce a variety of services. If a new entrant does not have the same variety of services to offer then it would be at a cost disadvantage relative to well established operators.

4.5 Technological advantage or superiority

4.5.1 Technological advantage provides a firm with increased ability to acquire or maintain significant market power. Technological advantage can arise from a superior product or service in terms of quality, product characteristics or functionality. In other cases, technological superiority may arise due to superior efficiency in the delivery of services which then translates into a lower average cost of service than competitors. It may also arise from owning patents that exclude others from using a particular technology.

4.6 Countervailing buyer power

4.6.1 Countervailing buyer power refers to the ability of buyers to limit the ability of service providers to exercise market power. If sufficient countervailing buyer power exists, then it can be a powerful factor to limit the seller's ability to exercise market power.

4.6.2 The existence of buyer power relates to the degree of bargaining power the buyers have over the price, quality, and the terms of supply of a service.

4.7 Barriers to entry or expansion

4.7.1 There are three types of barriers to entry: structural, legal and regulatory. Structural barriers to entry arise when markets are characterized by significant economies of scale, economies of scope and sunk costs, all of which could place a new entrant at a disadvantage relative to an incumbent firm. In that case a potential entrant would not enter.

4.7.2 Legal barriers to entry exist when for example a license or a permit is required so that a firm can provide telecommunications services. The establishment of a universal (technology neutral) licensing regime lowers but does not eliminate the barriers to entry. Also, the need for assignment of radio frequencies and the relative scarcity of these represent significant barrier to entry or expansion in the offering of new or improved services. Similarly, there can be significant barriers to entry or expansion when access to the passive infrastructure (cell towers, poles, masts, ducts) owned by other service providers is delayed by lengthy negotiations.

4.7.3 Likewise, regulatory barriers to entry stem from delays in mandatory regulatory processes. For example, delays on getting radio frequency assignments, or the difficulty and delay in getting permits and right of way to deploy fiber or build infrastructure represent barriers to entry and expansion.

4.8 Sunk Costs

4.8.1 Potential entrants may be deterred when markets exhibits significant sunk costs requirements. Sunk costs are costs that a service provider would need to incur in order to be a credible supplier of services, but which it may not be able to recover upon exit. For example, some proportion of the initial investment to deploy a network would be sunk if the firm exits the market. Similarly, market studies before entry and expenses on a marketing campaign could be largely sunk costs as the firm may find it unlikely to recover a proportion of these if it exits. In the presence of significant sunk costs, a potential entrant would not enter unless its expected profits exceed those sunk costs.

4.9 Joint dominance

4.9.1 The LTA will also consider making determinations of joint dominance when two or more service providers which individually would not be declared dominant behave as if they were one dominant service provider. This could occur if, for example, the service providers do not compete or appear not to compete with each other by following similar pricing policies with limited or no competition on non-pricing product features. Joint dominance could also exist when the companies are commercially linked by for example mutual ownership or contractual agreements that make them behave as if they were one dominant entity. Although no single condition should be enough to justify a finding of joint dominance, the LTA will show that some of the other criteria used to assess SMP of a single entity also apply to these entities.

4.10 New Markets

4.10.1 Finally, the LTA will avoid finding that an operator has SMP in markets that are new or emerging as this could impose undue obligations on innovative service providers. Usually new markets exhibit rapid product innovation; the early innovator would acquire a significant market share quickly. By definition an innovative firm that creates a new service will have 100 percent market share. During the early stage of adoption, market shares can change rapidly as competitors catch up with the innovative firm. In this circumstances finding that the early innovator has SMP may have a chilling effect on innovation. Moreover, as competitors catch up, market shares can shift dramatically, so a finding that an operator has SMP may become obsolete very quickly, normally within one to two years.

4.11 Ex-Ante remedies and review of market determinations

4.11.1 The LTA will identify and define appropriate and proportionate ex-ante remedies where a service provider is determined to be dominant or to hold SMP following a review of the relevant markets. Ex-ante remedies impose special obligations on dominant providers to create market conditions by regulation that mirror the conditions that would exist in a competitive environment.

4.11.2 Sections 36, 37, 38 and 39 of the Act impose ex-ante interconnection regulations on dominant service providers in the wholesale (upstream) markets; while Sections 42, 44 and 46 impose regulations on dominant service providers in the retail (downstream) markets.

4.11.3 In order to adjust regulation to changing competitive conditions in each relevant market, the LTA will review periodically its market definitions and its determinations of dominant service providers when market developments warrant it.

5 ABUSE OF DOMINANCE

5.1 Introduction

5.1.1 Section 28 of the Act prohibits dominant service providers from certain actions that shall be considered an abuse of dominant position.

5.2 Failure to supply

5.2.1 Section 28(a) prohibits dominant service providers from failing to supply essential facilities to a competitor within a reasonable time after a request and on reasonable conditions, in non-discriminatory way; except when this is unfeasible due to lack or scarcity of available resources or facilities.

5.2.2 The concept of failure or refusal to supply covers a wide range of practices, including a failure to grant access to essential facilities, or a failure to provide information delaying interconnection or access negotiations, or degrading, or preventing network interconnection.

5.2.3 The LTA will count as refusal or failure to supply, conduct that includes offering interconnections or access conditions so unreasonable that they delay or preclude entry or expansion of services by competitors.

5.2.4 Similarly, supplying essential facilities to a competitor on terms and condition that are less favorable than the terms at which the dominant provider self-supplies those facilities will be deemed by the LTA an abuse of dominant position if this discrepancy cannot be explained by technical reasons, resource scarcity or any other objective justification.

5.2.5 A failure or refusal by a dominant service provider to supply information generated by its network (i.e., calling line identification information) may be considered by the LTA an abuse of a dominant position. Likewise, the failure by a dominant service provider to supply technical information might also constitute an abuse, for example, when a dominant service provider fails to inform a new entrant where it can interconnect with its network.

5.3 Anti-competitive bundling and tying

5.3.1 Tying or bundling are common practices which can lead to better offerings to customers in cost effective ways. However, in some circumstances tying or bundling may constitute an abuse of dominance when a dominant service provider attempts to leverage its market power from one market into a related, but distinct, market.

5.3.2 A tying practice refer to a sale or lease of one service (or product), the tying product, under the condition that the buyer takes also a second service (or product), the tied product.

5.3.3 Bundling refers to a practice of selling two or more products as a package. The price of the bundle is usually lower than the price of the standalone prices of its components.

5.3.4 The simplest case of bundling is quantity bundling where the same product is sold in large quantities. Another common case is when a bundle consists of two or more products, for example, national voice service and, data and Internet access sold as a package.

5.3.5 Section 28(b) prohibits a dominant service provider to require as a condition for supplying a service to a competitor, that the competitor purchases another service it does not require. In competition analysis this is also referred as anti-competitive tying. It usually involves a dominant service provider in the market of the tying product, supplying this only if the competitor also purchases a tied product which is usually sold in a market where the supplier is not dominant.

5.3.6 Section 28(c) prohibits a dominant service provider to offer a competitor more favorable terms or conditions that are not justified by cost differences if it acquires another service that it does not require. In this case, the element of coercion is more subtle than in the prior case; the discount is offered in exchange for agreeing to buy the second product that the competitor does not need. This may arise when a vertically integrated service provider sells an essential input in the wholesale market (where it is dominant) to a retail competitor but offers a discount on the wholesale product if the retail competitor also purchases a product it does not need. This kind of bundling may be of concern if it raises the competitor's costs to a point where the competitor is not able to operate profitably in the retail market. In such case, the dominant service provider could foreclose the retail market.

5.4 Preempting Competition

5.4.1 Section 28(d) prohibits a dominant service provider to preemptively acquire resources or facilities including rights of way, required by another service provider for the operation of its business, with the effect of denying the use of facilities or resource to the other service providers. For example, the LTA will consider a dominant service provider that accumulates radio frequency assignments with the purpose of foreclosing or lessening competition would be abusing its dominant position. Likewise, the LTA will consider that the accumulation of number blocks, rights of way or essential facilities or resources while denying competitors access to these under reasonable conditions may be deemed an abuse of dominant position. The LTA will analyze the particular circumstances on a case-by-case basis.

5.5 Predatory pricing

5.5.1 Section 28 (e) of the Act prohibits a dominant service provider to price services at below cost. When assessing whether prices are below cost, the LTA will use either the long run average incremental cost, or the average variable cost (AVC), or some other cost standard deemed appropriate.

5.5.2 There is a long tradition in competition analysis that views predatory pricing as a situation in which a dominant service provider deliberately incurs short-term losses or foregoes profits as to foreclose (or be likely to foreclose) a competitor (or a potential competitor), with a view to strengthening or maintaining its market power.

5.5.3 The LTA will intervene if there is evidence that a dominant service provider has deliberately incurred losses in the short term or foregone profits in order to foreclose one or more of its actual or potential competitors.

5.5.4 For a predatory strategy to be profitable, the dominant service provider should recoup its losses when it raises its prices after eliminating effective competition from the market. Therefore the existence of high barriers to entry is a necessary condition, otherwise rising prices would attract new entry and predation would be unprofitable.

5.6 Anti-competitive cross subsidization

5.6.1 Section 28 (f) prohibits dominant service providers from cross-subsidizing a competitive service with the objective of lessening competition except when such cross subsidy is specifically approved by order of the LTA.

5.6.2 The LTA will find that a dominant service provider has engaged in cross subsidization with the objective of lessening competition if the evidence demonstrates that:

(a) it has used profits from the sale of services or products in a market not subject to effective competition to cross-subsidize the price of a product or service in a markets subject to a greater degree of competition, and

(b) its conduct has restricted or is likely to restrict competition in any telecommunications market.

5.6.3 The LTA will find that a dominant service provider has engaged in cross subsidization of a product or service in a market in which it faces competition if the evidence demonstrates that:

(a) It is selling the product or service that is subject to competition at a price that is less than the long run average incremental cost of the service, or the average variable cost (AVC), or some other cost standard deemed appropriate; and

(b) The sale of the product or service at a price below cost is likely to drive efficient rivals from the market or deter future entry of efficient rivals.

5.7 Margin squeeze

5.7.1 Section 28 (h) (i) prohibits dominant service providers from deliberately reducing the margin of profit available to a competitor that requires wholesale (upstream) telecommunications services, by increasing the prices for the wholesale services required by the competitor, or decreasing the price of the retail (downstream) telecommunications service in markets where they compete, or both.

5.7.2 The LTA will find that a dominant vertically integrated service provider has engaged in a margin squeeze (also known as price squeeze) if the evidence demonstrates that:

(a) it is dominant in the supply of an essential input for the downstream market where it competes with other service providers; and

(b) it has set such a low margin between its (upstream) wholesale price and the price it sets for its (downstream) retail services that an efficient downstream competitor may be forced to exit the market or be unable to compete effectively.

5.7.3 The LTA will find that a dominant firm has engaged in a margin squeeze if the evidence demonstrates that:

(a) it charges its retail competitors a higher price for its wholesale essential input than it charges to its retail operation; or

(b) it charges such a low price for its retail services that it leaves insufficient margin for efficient retail rivals to compete effectively; and

(c) the sale to its retail competitors of the essential input in the (upstream) wholesale market at such a high price, or the sale of its retail downstream product at such a low price has restricted, or is likely to restrict competition or future entry from efficient rivals in the downstream market.

6. OTHER ANTI-COMPETITIVE PRACTICES

6.1 Sections 29 (a), (b) and (c) prohibits collusive practices to all service providers. These are commonly referred as anticompetitive horizontal agreements. Horizontal agreements are those entered between two or more suppliers that are at the same level in the market. This means that usually these agreements are between competitors or potential competitors.

6.2 There are various types of horizontal agreements that LTA would consider subject to section 29(a), (b) and (c) including agreements which directly or indirectly fix prices or quantities supplied, share or divide up markets, limit or control production or investment, or exchange price information. Price fixing involves agreements that:

a) Fix prices or a component of a price such as a discount;
b) Set percentages above which prices are not to be increased;
c) Establish a range within which prices must be maintained; and
d) Agree not to charge less than any other price on the market.

6.3 Market sharing agreements involves parties agreeing to share or divide market according to geographic location, type of customer, or agreeing not to enter a market.

6.4 Anti-competitive exchange of price information involves an exchange for the purpose of coordinating prices to be charged to consumers. This could involve information on final prices, discounts, or other terms of trade.

6.5 Agreements to fix quantities involve those aimed at limiting supply or output for example by fixing quotas.

6.6 Bid rigging agreements, in which two or more service providers directly or indirectly determine which person will win a contract or business opportunity in a telecommunications market.

7. TRANSFER OF CONTROL

7.1 Introduction

7.1.1 The regulation of transfers of control from one service provider to another is fundamental to prevent a market from becoming overly concentrated. Highly concentrated markets are not conducive to competition and are more prone to anticompetitive conduct by dominant service providers.

7.1.2 The LTA will intervene in transfers of control involving service providers if there is a potential adverse effect on competition. In those cases, the LTA may prevent a transfer of control from going ahead, where other remedies to address the competitive concerns cannot be devised or are considered inadequate.

7.1.3 The LTA may also require a transfer of control to be unwound in the event that a party to the transfer of control failed to notify the LTA in breach of Section 32 of the Act or applicable regulation, rule, or order.

7.1.4 Section 32 (2) (a) of the Act requires prior authorization from the LTA of any transfer of control in which a dominant service provider or an affiliate of a dominant service provider, is acquiring control of a service provider. It also requires prior authorization from the LTA if the target person, whose control is being transferred, is a dominant service provider or an affiliate of a dominant service provider.

7.1.5 Section 32 (2) (b) of the Act requires prior authorization from the LTA of any transfer of control in which as a result of this transfer a person alone or with its affiliates, would become a dominant service provider.

7.1.6 To determine whether a transaction requires prior authorization pursuant to Sections 32(2) (a) or 32(2) (b), the LTA will require all parties to a transaction to notify of their intended transaction and request preliminary review. This notification requirement will apply only to transactions where the parties combined annual revenue or total assets are equal to or above a minimum threshold to be specified by the LTA in applicable regulation, rule or order.

7.2 Control

7.2.1 The transfer of control of a person could be through several means such as the acquisition of shares, assets, or through an agreement to work together in a joint venture. Furthermore, the LTA will consider that the transfer of control would not be limited to the acquisition of outright voting rights. For example, a transaction involving the acquisition of minority voting rights may nonetheless result on the acquisition of control or material influence on the acquired person. The assessment of whether this material influence amounts to a transfer of control needs to be assessed on a case-by-case basis.

7.2.2 Evidence that a transaction may amount to the acquisition or transfer of control include but is not limited to:

a) ownership of 50% or more of the voting securities, or
b) the ability to elect a majority of the Board of Directors, or
c) a combination of minority shareholding with the ability to veto strategic decisions including but not limited to: business plans, budget, major investment decisions, or appointment/removal of senior management; or
d) a contractual agreement allowing direction of management including but not limited to, pricing policies, capital investments decisions, or choice of technology; or
e) purchase or lease of a substantial proportion of assets belonging to another person, where such assets are currently in use or will be used by the acquiring person to supply telecommunications services.

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7.3 Review Process

7.3.1 The LTA will apply a two-step approach in which parties first notify the LTA of their intended transaction and request preliminary review to determine whether it requires prior approval pursuant to Section 32 of the Act. Such notification shall be submitted at least one hundred and twenty (120) days prior to the completion date of the intended transaction, and shall be accompanied by at least the following information:

a) the identification of all persons involved in the transaction, including buyers, sellers, their shareholders and affiliated companies, and any persons having a greater than 5% ownership interest in all such persons;

b) a description of the nature of the proposed transaction and summary of its commercial terms; and

c) financial information on the persons involved in the proposed transaction, including their most recent annual financial statements including information on annual revenues from all telecommunications markets in Liberia and the value of their total assets allocated to telecommunications services and copies of their most recent annual or quarterly financial report.

7.3.2 The LTA may request additional information regarding a notification at any time.

7.3.3 Within thirty (30) days of a duly completed notification and request for preliminary review, the LTA will:

a) Issue a notice indicating that the transaction does not require prior approval from the LTA pursuant to Section 32 of the Act; or
b) Issue a notice requiring the parties to request an approval review pursuant to Section 32 of the Act; or
c) Issue a notice initiating a preliminary review of the proposed transaction and following such review it shall take one of the actions set out above.

7.3.4 Where a proposed transaction involves any of the circumstances described in Section 32(2) of the Act, the transaction will require prior approval of the LTA. The parties shall submit a written notification and request approval at least ninety (90) days prior to the completion date for the intended transaction. The request shall be accompanied by at least the following information:

a) the identification of all persons involved in the transaction, including buyers, sellers, their shareholders and affiliated companies, and any persons having a greater than 5% ownership interest in all such persons;

b) a description of the nature of the proposed transaction and summary of its commercial terms;

c) financial information on the persons involved in the proposed transaction, including their annual revenues from all telecommunications markets, identified by specific markets, the value of assets allocated to telecommunications services and copies of any recent annual or quarterly financial reports;

d) a description of the telecommunications markets in which the persons involved in the proposed transaction operate; and

e) analysis and arguments, supported by data, of the likely effects of the proposed transaction on competition in the relevant telecommunications market and the sector generally, including a description of any positive, pro-competitive effects of the transaction that the parties may wish to identify or any conditions on the transaction for the mitigation of its possible negative effects on competition that the parties may wish to volunteer.

7.3.5 The LTA may request additional information regarding an application at any time.

7.4 LTA response to the approval request

7.4.1 Within sixty (60) days of receipt of a duly completed application for a transfer of control that requires approval under Section 32(2), the LTA shall:

a) approve the transfer of control without conditions;

b) approve the transfer of control with such conditions as are reasonably related to promoting the development of open and competitive telecommunications markets and maximizing the benefit of the transaction for telecommunications consumers;

c) deny the transfer of control; or

d) issue a notice initiating an investigation of the proposed transfer of control, and following such investigation it shall take one of the actions set out above.

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7.5 Types of mergers

7.5.1 For ease of exposition we define mergers as a transaction between two or more persons (or parties) that result in the transfer of control from one party to another. Mergers can be classified in two broad categories, (a) horizontal and (b) non-horizontal mergers.

7.5.2 Horizontal mergers are those between two or more service providers that operate at the same level in the supply chain of telecommunications services. For example, a merger of two mobile network operators. These types of mergers are the most problematic because they eliminate one competitor in a relevant market.

7.5.3 Non-horizontal mergers can be further subdivided into vertical and conglomerate mergers. Vertical mergers refer to mergers between parties that operate at different levels of the supply chain of telecommunications services. For example, a merger between a provider of (upstream) wholesale internet connectivity and a provider of (downstream) retail fixed internet services.

7.5.4 Conglomerate mergers are those between parties that operate in different markets. For example, between a mobile network operator and a cable TV provider, or between two cable TV companies operating in different geographic markets.

7.6 Main concerns in merger analysis

7.6.1 The main concern of a merger is that it changes the structure of a market which may in turn change the behavior of firms and lessen competition. If a merger is likely to lessen competition, then prices may increase, consumption of a product may fall, product quality may worsen, product variety and innovation may decline, or some combination of the aforementioned effects.

7.6.2 The LTA will be particularly concerned if as a consequence of a merger, the post-merger entity is likely to become dominant or strengthen its dominant position in a relevant market.

7.6.3 While mergers may increase concentration in a relevant market, this would need to be weighed against the potential efficiency gains to the post-merger entity before reaching a view as to whether the merger would substantially lessen competition or not.

7.6.4 When analyzing the competition effects of a merger, the LTA will compare these relative to the counterfactual case of no merger. Because the analysis is prospective in nature, the analysis will consider the industry dynamics and how this would affect the counterfactual. For example, if one of the merging parties is a firm that is failing, the counterfactual would need to consider the likelihood of this firm exiting the market if the merger does not take place. Thus, pre-merging conditions may not prevail. Likewise, the counterfactual will need to consider if a new firm is likely to enter the market.

7.7 Theories of competitive harm

7.7.1 There are two main theories of how mergers could harm competition. The first one is based on the so-called unilateral effects, or changes on the conduct of the post-merger entity that arise without any kind of coordination with other firms in a relevant market. These effects arise because the merger changes the structure of the market. A profit maximizing firm would change its conduct in response to these new market conditions. This change in conduct may lessen competition.

7.7.2 A second way in which a merger could harm competition is by so-called coordinated effects. These arise when the market structure is changed in such a way as to make the merged entity and its competitors more likely to coordinate their conduct lessening competition. For example, by dividing or allocating geographic markets, or coordinating a price increase to the detriment of consumers.

7.8 Competition assessment – Horizontal mergers

7.8.1 Because horizontal mergers involve the elimination of one competitor, the market would become more concentrated. In such case, unilateral effects become important and prices would likely increase absent any significant improvement in operational efficiency.

7.8.2 Unilateral effects are not limited to prices; the effect of eliminating one competitor may be reflected in the elimination of a product that is a close substitute, thus, reducing product variety, or even reducing product quality due to less competition.

7.8.3 On the other hand, as a result of the merger, the merged entity may increase its operational efficiency due to increased economies of scale or scope. This positive effect may counteract the anti-competitive effect of increased concentration.

7.8.4 When analyzing horizontal mergers the LTA will also consider the kind of competitor that would be eliminated. For example, the likelihood of an increase on prices may be more significant if an aggressive competitor were eliminated instead than a failing competitor.

7.8.5 On the other hand if a failing competitor is eliminated, a merger of two non-dominant competitors may create a more powerful rival to a dominant service provider increasing competition post-merger.

7.8.6 The LTA will also consider the likelihood of increased coordinated effects post-merger. Coordination does not require an explicit agreement such as a cartel; rather it can be tacit. Some factors that increase the likelihood of coordination are:

a) Market transparency: if firms know each other's prices and or discounts, then price coordination becomes easier among competitors.

b) Product homogeneity: if products are relatively homogeneous then coordination becomes more likely.

c) Stable demand for each firm's products: in mature markets, the product demand of each firm is relatively stable which makes coordination easier.

d) Existence of an aggressive firm: in a post-merger market where there is an aggressive firm, coordination effects become less likely as these firms usually follow their own strategy.

e) Cross shareholding: If a firm has equity participation in a competitor, then coordination becomes more likely. This may be the case even if its shareholding does not confer control over the competitor. The fact that the financial performance of a firm is affected by the profits of a competitor in which it has participation may be enough to deter aggressive competition.

7.8.7 The LTA will consider other market characteristics such as the ease of entry or expansion that may affect competition in the post-merger years. For example, would the merger affect the likelihood of new firms to enter, or the ability of existing firms to expand post-merger?

7.8.8 The LTA will consider also the effect of the merger on the operating efficiency of the merged entity. For example, it may be plausible that the merged entity may achieve cost savings. For example, instead of two separate accounting systems and accounting personnel, one single accounting system would suffice with a reduce head count on the accounting department. The same would apply for upper management as only one CEO would be needed. Also the merger would eliminate the need for duplication of office space, or allow savings in advertising.

7.9 Competition assessment – Vertical mergers

7.9.1 Vertical mergers are less likely to raise competition concerns than horizontal mergers. This is not to say that vertical mergers are exempt from unilateral or coordinated effects. Rather, these concerns are generally counterbalanced by the likely increase in operational efficiency that may result from vertical integration. Whether one effect is stronger than the other is the key question the LTA will answer in these types of merger reviews.

7.9.2 Vertical mergers may raise concerns when one of the merging parties has a dominant position in either the upstream or downstream markets. Unilateral anti-competitive effects may arise if for example, one of the merging parties has a dominant position in the upstream market while the other party faces competition in the downstream market. This is especially the case if the source of dominance stems from control of an essential bottleneck facility that the downstream competitors need. In this case the merger could increase the likelihood that the merged entity may try to increase its rival costs in the downstream market by providing the required input at a higher cost than it provides to its downstream operations. Alternatively, the merged entity may degrade the quality of the input it supplies to its competitors in the downstream market to degrade their service and foreclose this market.

7.9.3 On the other hand, vertical mergers can have pro-competitive effects when they increase the operational efficiency of the merged entity. In this case some of the gains in efficiency could be passed onto the consumers in the form of lower prices and increased consumption. A vertical merger is likely to increase efficiency if it reduces transaction costs between the merging parties. Examples of transaction costs include the cost of negotiations, bargaining, and reaching an agreement on the terms of supply of the upstream input to the downstream entity. Another source of efficiency gains arises when the assets of the upstream entity are interrelated with the assets of the downstream entity. That is, when investment decisions in the upstream market depend to a certain extent on the timing and characteristics of the investment decisions in the downstream market. A third source of efficiency gains arises when vertical integration eliminates a chain of monopolies charging each other monopoly prices, thus creating welfare losses (i.e., double marginalization) that can be reduced when the entities are vertically integrated.

7.9.4 The LTA will also assess whether the merger may raise concerns about coordinated effects. This could arise if market transparency on prices, output and quality increases. For example, if the merger allows the merged entity access to information on competitors' prices, output and quality of service in downstream markets the likelihood of coordinated effect may increase.

7.9.5 The LTA will assess whether the pro-competitive effects of vertical integration outweighs the anti-competitive effects, and consider whether regulations can effectively reduce or eliminate the likelihood of anticompetitive effects post-merger.

7.10 Competition assessment – Conglomerate mergers

7.10.1 Unlike horizontal mergers, conglomerate mergers do not involve the loss of a competitor in the same market. Therefore, these mergers raise less concerns than horizontal mergers. There is also a potential gain on efficiency resulting from these mergers especially if the product markets are related (i.e., complementary products).

7.10.2 Concerns of unilateral effects arise if the merged entity increases its market strength by bundling or tying the products in two or more separate markets and attempting to foreclose competitors. This possibility becomes more likely if one of the merging parties has a dominant position in a relevant market.

7.10.3 Coordinated effects may also raise concerns in highly concentrated markets if the competitors of the merged entity in one market also compete with the merged entity in another market.

8. PROCEDURES IN COMPETITION-RELATED PROCEEDINGS

8.1 The LTA will, in due course, prepare and consult on a formal Regulation that, when adopted, will establish procedures to be followed by the parties to competition-related proceedings and by the Authority when enforcing the anti-competition rules explained in these Guidelines.