



THE TELECOMMUNICATIONS RADIOCOMMUNICATIONS AND BROADCASTING  
REGULATOR (TRBR) COMPETITION GUIDELINES

# COMPETITION GUIDELINES

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## 1. Purpose

- 1.1 This document sets out the procedures which TRBR will follow in reviewing the competitive conditions within any market in the telecommunications sector. It guides how TRBR will implement Part 5 of the Telecommunications and Radiocommunications Regulation Act No. 30 of 2009 (the "Act"). It should be noted though that these guidelines do not legally bind TRBR.
- 1.2 The telecommunications, radiocommunications, and broadcasting markets are evolving rapidly in response to new technology and changes in demand, presenting new regulator challenges for the telecom, radiocommunications and broadcasting sector. While TRBR would anticipate following the principles outlined here, there may also be differences in how individual cases or allegations of anti-competitive behavior are assessed, and TRBR reserves the right to consider other factors not listed in these guidelines. All decisions will be made on a case-by-case basis, considering the specific facts presented.
- 1.3 The guidelines consist of:
  - Section 2 - the approach to defining the relevant product market for purposes of Section 20 of the Act;
  - Section 3 - how TRBR will assess dominance for purposes of Section 21 of the Act;
  - Section 4 - a description of anti-competitive behavior under Section 22 of the Act;
  - Section 5 - a description of abuse of dominance under Section 23 of the Act.
  - Section 6 - the circumstances under which TRBR will provide pre-approval for purposes of Section 24 of the Act.
  - Section 7 - TRBR practice concerning a transfer of control under Section 25 of the Act.



## 2. The Relevant Markets

### 2.1. Defining Relevant Markets

- 2.1.1 In any competition assessment the first issue to be resolved is the definition of the relevant product and geographic market.
- 2.1.2 The relevant market for a good or service includes all goods or services that are close substitutes. These goods or services, therefore, compete directly with each other and the potential demand- or supply-side substitutions between the constraints their prices.
- 2.1.3 Defining relevant markets is an important exercise by the TRBR to ensure that we define the boundaries of the market within which TRBR will make its decisions under Part 5. Importantly, depending on the competition issue at hand, the market definition process can lead to different results. For instance, the relevant market can be defined differently when analysing dominance (current and past behavior) than when analysing proposed merger (likely future behavior).
- 2.1.4 This Section describes the standard process which will be applied by the TRBR to any case where it is required to consider the market definition. It then considers how the TRBR will implement these procedures in practice, considering the fact that the test is more of a conceptual framework than a pre-defined set of rigid rules.

### 2.2. Assessing Demand and Supply-Side Substitution

- 2.2.1 The focus for the delineation of relevant markets is upon the goods or services that are close substitutes in the eyes of buyers (i.e., demand-side substitution), and those providers who produce, or could easily switch to produce, those goods or services (i.e., supply-side substitution).
- 2.2.2 The standard approach taken by competition authorities to define a market is to apply the "hypothetical monopolist" or "SSNIP"<sup>1</sup> test. This test defines a group of products that are such close substitutes as to be considered part of the same market. The approach is to assume that the products are supplied by a "hypothetical monopolist". If it is profitable for this monopolist to maintain a "small but significant, non-transitory increase in the prices" (SSNIP) of those products then the market has been defined. The justification is that if this price rise can be maintained without a decline in profitability, then further demand-side or supply-side substitution away from the monopolist's products must be reasonably insignificant.

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<sup>1</sup> SSNIP" stands for "'small but significant, non-transitory increase in price."

- 2.2.3 Formally, under this test, a market is defined as, a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producers or sellers of those products in that area likely would impose at least a small but significant and non-transitory increase in price, assuming that the terms of sale of all other products are held constant."<sup>2</sup>
- 2.2.4 For the purposes of applying the SSNIP test, a small but significant price increase is normally interpreted to mean an increase of between 5 and 10% above the prevailing price level. "Non-transitory" is normally assumed to mean that the price rise will last for approximately one or two years.

### 2.3. Applying the SSNIP Test Practice

- 2.3.1 The SSNIP test involves an iterative process. Usually the following question is posed: if there were one supplier (the hypothetical monopolist) of a product or set of products under consideration, would the hypothetical monopolist be able to profitably raise prices or otherwise worsen its offer, by a small but significant amount over a certain period?
- 2.3.2 If the response to the question is negative; that is, the hypothetical monopolist would not be able to sustain this increase because a sufficient number of customers will switch to an alternative product or alternative suppliers in other geographic areas, then the closest substitutes are added to the product group. The procedure is repeated again until a set of products is found such that the hypothetical monopolist would be able to maintain the price increase over a one-to-two-year period. This set of products would constitute the relevant product market.
- 2.3.3 It is not necessary that all consumers or suppliers be encouraged to switch to substitutes, but enough marginal consumers or suppliers for the price change not to be profitable (i.e., maintained). The theoretical starting price for the SSNIP test would be generally the prevailing price. However, if due to lack of sufficient competition, the prevailing price is substantially distorted, TRBR can use another starting price for the SSNIP test. The substitution analysis would then be done based on that price.
- 2.3.4 Below we explain in more detail the issues that TRBR will take into account in defining the relevant market. We start by considering the product market and how the extent of demand-side and then supply-side substitution could be assessed. We then look at how the geographic market would be defined.

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<sup>2</sup> US Department of Justice and Federal Trade Commission. "Commentary on the Horizontal Merger Guidelines", March 2006, page 5.

## 2.4. Product Market – Demand Side Substitution

- 2.4.1 Assessing demand side substitution entails determining a set of products that can be reasonably regarded by the consumer as substitutes.
- 2.4.2 Key issues to consider are how long it would take customers to respond a price change and the extent of switching costs. One to two years would be an appropriate period over which to assess consumers' behaviour. If it takes consumers too long to react or switching costs are too high, then the level of demand side substitution will be more limited. Consequently, the loss of demand may not be sufficient to make the price rise unprofitable.
- 2.4.3 The issue of price in determining relevant markets and in applying the SSNIP test has become particularly challenging when considering the substitutability of services that are provided free of charge, or which are assumed to be free of charge. This occurs with certain Over the Top (OTT) services and in platform markets where, in exchange for participation in one form or another, users are able to use free voice and messaging services of various kinds. Some of the OTT services that might need to be considered in this context include WhatsApp, Facebook Messenger, and Skype. In these cases the challenge is made more difficult because of the scarcity of consumer research about the extent to which OTT services might be substituting for traditional telephony voice and messaging, and the extent to which demand has grown in response to the availability of a free option.
- 2.4.4 TRBR will assess, on a case-by-case basis, the evidence available in order to make an informed judgment regarding the likely boundaries of the relevant market. Factors that TRBR may consider analysing demand side substitution include:
- a) the historic and potential future behaviour of buyers in order to identify any potential substitution.
  - b) the functionality and characteristics of the products, in order to assess how likely it is that consumers will view them as substitutes.
  - c) customer surveys.
  - d) product price levels over time.
  - e) price correlations, to identify simultaneous price movements that are not due to cost changes or general inflation (on the basis that if goods A & B are substitutes, then an increase in the price of good A will lead to an increase in demand for good B. This in turn will increase the price of good B);
  - f) switching costs associated with switching consumption between products.
  - g) the views of market players, including, if available, commercial strategies of the market participants (for example, internal documentation providing evidence of the products which they believe to be substitutes for their own product)
  - h) own-price elasticities, which measure the sensitivity of demand for a product or service to changes in its own price; and
  - i) cross-price elasticities between products or services, which measure the



sensitivity of demand for a product or service to changes in the price of the other.

## 2.5. Product Market – Supply-Side Substitution

- 2.5.1 In order for supply-side substitution to pose a competitive constraint, it must be shown that the suppliers would be able to switch production to the relevant products within a short period of time, without incurring significant costs, in response to small and permanent changes in relative prices. Under these circumstances the additional supply that can be put into the market would constrain the behaviour of the suppliers.
- 2.5.2 Note that if a product has been included within the market as a result of evidence of demand-side substitution then evidence of supply-side substitution towards this product is not necessary. In considering the supply side, the aim is to determine if there are any additional substitute products which should form part of the market.
- 2.5.3 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.

## 2.6. Geographic Market

- 2.6.1 Conceptually, the definition of geographic markets involves an assessment of the extent to which competitive conditions are appreciably different across geographic areas. TRBR will assume that a market is national unless the evidence strongly suggests otherwise. The burden of proof lies with the person requesting a decision under Part 5 by TRBR.
- 2.6.2 Similar to the relevant product market analysis, the relevant geographic market is defined by reference to competitive constraints. Generally, demand-side substitution will be the determinant factor.
- 2.6.3 Assessing demand substitution in a relevant geographic market requires assessing the degree by which consumers can readily switch their supplier of the relevant product to suppliers in other geographic areas.
- 2.6.4 The SSNIP test can be applied to define the relevant geographic market as it is applied to define the relevant product market. Initially, a narrow geographic market is considered. The usual question is posed as to whether a hypothetical monopolist supplier in the specified area would be able to maintain a SSNIP. If the answer is no because a significant number of customers will switch to suppliers outside the area, the hypothetical geographic market is widened, and the analysis is repeated

## 2.7. Other Market Dimension

- 2.7.1 As well as considering the limits of the market on the basis of the relevant products and geographic area, there are some other dimensions that may need to be taken into account. Where relevant, TRBR will give consideration to the following issues.

## 2.8. Bundled Products

- 2.8.1 In some situations, products are sold together in a "bundle" and therefore the issue arises as to whether the bundle could be considered a product in its own right for the purpose of defining the market. This will depend on potential consumer reaction to an increase in price and whether they would switch to consuming the products separately. When determining if a bundle is a relevant product market, TRBR will consider the following factors:
- a) The potential extent of substitution between the bundle and buying the stand-alone products or services within the bundle following a 5 - 10% increase in the bundle's price. The greater the degree of substitution, the less likely that the bundle should be considered to form a separate market.
  - b) Whether there are economies of scope in producing the bundle which means that suppliers can provide the bundle more cheaply than the separate products or services. In this case, the bundle is more likely to be considered to represent a market in its own right.

## 3. Determination of Dominance

### 3.1. Presumption of Dominance

- 3.1.1 Section 21 of the Act gives TRBR the right to characterize a service provider as dominant within a particular market if:
- a) its gross revenues from that market constitute 40% or more of the total gross revenues of all service providers in that market ("Bright-line Test") OR
  - b) the service provider (i) enjoys a position of economic strength or controls a bottleneck facility in the relevant market AND (ii) such strength or control affords the service provider the power to behave to an appreciable extent independently or competitors, customers, end users or potential competitors in that market ("Market Power").
- 3.1.2 When determining whether a service provider is dominant in a relevant market, TRBR will use the Bright-line Test unless the service provider can demonstrate that the Bright-line Test should not apply in the specific circumstances because it does not have Market Power in the relevant market. In addition, TRBR reserves the right to determine that a service provider is dominant if it does not meet the Bright Line Test, but TRBR determines that it has Market Power.



### 3.2. Bottleneck Facilities

3.2.1 Section 2(1) in Part 1 of the Act defines bottleneck facilities as a "facility essential for the production of telecommunications services, which, for technical reasons or due to economies of scope and scale, and the presence of sunk costs, cannot practicably be duplicated by a would-be competitor." This language establishes a fairly low standard for a finding, because it weighs economic difficulties and **inconvenience in duplicating facilities as an alternative to technical reasons of duplication.**

### 3.3. Assessing Market Power

3.3.1 The main factors TRBR would typically consider for assessing Market Power are:

- a) the market shares of individual service providers.
- b) having ownership or controlling access to a bottleneck facility.
- c) other competitive constraints, such as high barriers to entry, large capacity relative to total market demand, existence of significant network effects, economies of scale and or economies of scope, and the degree of any countervailing buyer power; and
- d) evidence on behavior and performance.

### 3.4. Market Share

3.4.1 The market shares of individual service providers can provide an indication of the potential likely extent of any market power. For example, all other things remaining the same, a service provider with significant market share may be more able to set prices above the competitive level than a service provider with a significantly smaller market share.

3.4.2 Market shares may be calculated based on revenue or service metrics (such as subscribers or service volumes such as the number of calls). The most appropriate measure depends on the type of product, and it is likely that bulk wholesale products (such as wholesale minutes) will be best considered on the basis of quantity sold. Meanwhile, differentiated retail products (such as mobile phones) will be best considered on the basis of share of market revenues.

3.4.3 It is important to consider market share developments over time, given that a persistently high market share makes it more likely that service provider has market power. Similarly, a persistently low market share is more suggestive of a lack of market power. Relative market shares can also be important. For example, a high market share may be more indicative of market power if all of the other competitors' market shares are low. Other patterns in market share data can be insightful. If market shares have been consistently volatile, this might indicate constant innovation which suggests that competition is effective. Also, if recent entrants with low market shares have subsequently grown rapidly and attained relatively high market shares, this might indicate that barriers to expansion are low. This

again suggests that competition is occurring in the market.

### 3.5. Other Competitive Constraints

3.5.1 Assessing Market Power is not just about market share. TRBR will also consider these other indicators:

- a) constraints from existing competitors.
- b) constraints from potential competition (barriers to entry and expansion); and Countervailing buyer power

### 3.6. Existing Competitors

3.6.1 If price competition is robust, high market shares may not be a cause for concern. For example, in an oligopolistic market, although by definition there are few competitors, competition can be very effective. This could be assessed by reviewing the evolution of prices of all of the suppliers over time. In addition, consideration should be given to the suppliers' costs and hence whether prices are being pushed towards a competitive level.

### 3.7. Barriers to Entry and Expansion

3.7.1 There are different kinds of barriers to entry including but not limited to, legal barriers, economies of scale and scope, network effects, and access to essential or unique resources. A barrier to entry is a restriction on a person attempting to enter a market in which it does not yet have a presence, which does not apply to those service providers already operating in the market. These restrictions could include set up costs or legal requirements. The lower these restrictions are, the more likely the threat of competition and consequently the lower the likelihood of there being sustained and substantial market power.

3.7.2 TRBR will assess the restrictions and costs of entering the market from potential entrants and the cost of increasing the volume of services already provided by existing service providers. Similarly, TRBR will assess the costs and restrictions to increase the capacity by existing service providers.

### 3.8. Countervailing Buyer Power

3.8.1 Countervailing buyer power refers to the ability of buyers to limit the ability of sellers to exercise market power. If sufficient countervailing buyer power exists, it can help to offset the market power of the sellers.

3.8.2 In assessing countervailing buyer power, TRBR will consider the evidence of buyers and sellers having to negotiate. Countervailing buyer power is not an absolute concept but refers to the relative strength of the buyer in negotiations with prospective sellers. The extent of buyer power therefore relates to the degree of bargaining power that buyers have

over the price, quality, or terms of supply of a product or service.

## 4. Anti-competitive Behaviors

### 4.1. Anti-competitive Behaviors

- 4.1.1 This section of the Guidelines considers the various potential forms of anti-competitive conduct which could result in a breach of Section 22 of the Act. It sets out the elements required to establish a breach of Section 22 and outlines how TRBR intends to deal with any complaints it receives, including the information it would require to be provided as part of any complaint.
- 4.1.2 Section 22 of the Act prohibits any service provider, not just one designated as dominant, from engaging in anti-competitive practices in a telecommunications market. Section 22(1) prohibits conduct "which has the purpose or effect, or is likely to have the effect, of substantially lessening competition in a telecommunications market". Section 22(2) lists conduct which is *per se* anti-competitive

### 4.2. Substantial Lessening of Competition

- 4.2.1 In assessing whether any conduct constitutes substantial lessening of competition, TRBR will consider the following:
- a) Impact of the conduct on existing competitors in the identified markets.
  - b) Definition of the relevant market or markets.
  - c) Impact of the conduct on further market entry.
  - d) Impact of the conduct on consumers, including the availability and pricing of products and services.
- 4.2.2 TRBR will look for a degree of interference with competition which results in identifiable harm to competitors or consumers. In addition, it will apply the following further considerations:
- a) a trivial or de minimis degree of lessening of competition will not be acted on by TRBR.
  - b) TRBR will take into account the degree of market power of the service provider.
  - c) generally speaking, a smaller degree of interference or harm resulting from the conduct of a service provider with a large degree of market power (including service providers found to be in a dominant position) may be found to constitute substantial lessening of competition. The important consideration is that overall, the effect or likely effect is substantial.
  - d) similarly, it will generally require a larger degree of interference or harm to find



substantial lessening of competition where the conduct is engaged in by a service provider with a very small degree of market power.

### 4.3. Anti-competitive Agreements

4.3.1 This section describes the types of behaviour which Section 22(2) defines as anti-competitive. It requires an agreement, whether written or oral, between a service provider and any other person.<sup>3</sup>

4.3.2 Among the agreements and practices that are subject to Section 22 are:

### 4.4. Anti-Competitive Horizontal Agreement

4.4.1 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.

4.4.2 There are various types of horizontal agreements that TRBR would consider subject to section 22 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.
- d) Agree not to charge less than any other price on the market.

4.4.3 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.

4.4.4 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.

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

4.4.6 Bid rigging agreements, pursuant to which a service provider and another person manipulate the prices or conditions in what should otherwise be a competitive tender process.

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<sup>3</sup> "Person" means any other service provider, any individual, corporation, partnership, cooperative or other legal entity.

## 4.5. Anti-Competitive Vertical Agreement

4.5.1 Vertical agreements are those entered between two or more companies operating at different levels in the market. That is, the product of one supplier is an input in the production process of the othersupplier.

4.5.2 There are several types of vertical agreements TRBR would consider subject to 22, including:

- a) Resale price maintenance agreements that impose a minimum, maximum or recommended resale price between a supplier and the distributor or reseller and
- b) Exclusive dealing agreements, pursuant to which a service provider enters into an agreement with another party for the supply of products or services on an exclusive basis, and where that exclusivity has or may have the effect of substantially lessening competition in related communications markets.

4.5.3 TRBR may also review any other agreement entered into by a service provider, such as a joint venture or similar collaboration agreement, to determine whether that agreement has the purpose or effect of substantially lessening competition

## 5. Abuse of Dominance

### 5.1. Restriction of Entry

5.1.1 TRBR notes that when considering potential abuse of a dominant position, it is essential, but often difficult, to distinguish between aggressive competition, on the one hand, and anti-competitive behaviour on the other, (for example, whether significant price reductions constitute anti-competitive behaviour or a pro-competitive response to changing market conditions). Section 23 requires an operator that is dominant in a relevant market not to engage in behaviour which would:

- a) restrict the entry of any person into any telecommunications market; or
- b) prevent or deter any person from engaging in competition with a dominant service provider in any telecommunications market; or
- c) eliminate or remove any person from that or any other telecommunications market.

5.1.2 Section 23(2) lists conduct which is per se an abuse of dominance unless it can be demonstrated that the conduct does not:

- a) restrict the entry of any person into any telecommunications market; or
- b) prevent or deter any person from engaging in competition with a dominant service provider in any telecommunications market; or



- c) eliminate or remove any person from that or any other telecommunications market

5.1.3 This list does not prevent TRBR investigating or stakeholders submitting complaints about alleged breaches of Section 23(1) through other forms of anti-competitive behaviour.

## 5.2. Refusal to Supply

5.2.1 A "refusal to supply" by a dominant service provider may be considered an abuse by TRBR when it intends or results in the reduction in or elimination of competition or stifles the emergence of a new product. The concept of refusal to supply covers a wide range of practices, including a refusal to grant access to a bottleneck facility, or a refusal to provide information delaying, degrading, or preventing network interconnection.

5.2.2 Refusal to supply also includes offering trading conditions so unreasonable that they pose a threat of reducing or eliminating competition.

5.2.3 A refusal to supply is most likely to give rise to concerns when it is by a vertically integrated dominant service provider and

- (i) it relates to access to a bottleneck facility that other service providers need to compete effectively in a downstream market;
- (ii) the refusal is likely to lead to the elimination of effective competition in the downstream market; and
- (iii) the refusal is likely to lead to consumer harm.

5.2.4 A refusal by a dominant service provider to supply information generated by its network (e.g., calling line identification information) might be an abuse of a dominant position if, as a result of the refusal, services based on the availability of the information could be provided only by the dominant service provider. The refusal by a dominant service provider to supply technical information might also constitute an abuse, for example, when a dominant service provider refuses to inform a new entrant where it can interconnect with its network.

## 5.3. Price Discrimination

5.3.1 Price discrimination can involve charging different prices to other service providers for interconnection or products for which no cost difference exists. This, however, is not to say

a dominance service provider must treat all customers equally or should standardize all its charges.

- 5.3.2 Differential pricing by a dominant service provider may be efficient and justified. A vertically integrated service provider may not discriminate against independent wholesale customers (other licensees) in favour of their own downstream operations.

#### 5.4. Predatory Pricing

- 5.3.3 Predation occurs where a dominant service provider deliberately incurs short-term losses or foregoes profits in the short term so as to foreclose (or be likely to foreclose) a competitor (or a potential competitor), with a view to strengthening or maintaining its market power, thereby causing consumer harm.
- 5.3.4 TRBR 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 and, as a result, the dominant service provider would be able to maintain or strengthen its market power to the detriment of consumers.
- 5.3.5 In economic terms, for a predatory strategy to be profitable, the dominant service provider should recoup its losses when it raises its prices. Economic literature over the past decade or so is tending to the view that the opportunity to recoup losses is no longer regarded as a necessary condition for predatory pricing.
- 5.3.6 When assessing whether prices are below cost, TRBR will compare the average variable cost to the price being charged for the product by the operator. If the price is lower than the average variable cost, this would be a strong indication of predatory pricing.

#### 5.5. Margin Squeeze

- 5.5.1 Margin squeeze may occur when a vertically integrated service provider is dominant in the supply of an input to a downstream market in which it also operates. The vertically integrated service provider could harm competition by setting a low or negative margin between the price it charges for the input in the upstream market and the price it charges in the downstream market. If a downstream competitor who purchases the input is forced to exit the market or is unable to compete effectively, then margin squeeze may have occurred.
- 5.5.2 For a finding of margin squeeze, TRBR will consider evidence as to whether:
- a) the service provider holds a position of dominance in a related wholesale market (upstream);
  - b) the upstream input is a bottleneck facility required by downstream competitors.
  - c) returns from the downstream operations are unprofitable (for example, because of

- excessive wholesale prices and/or predatory retail prices); and
- d) the practice harms or has the potential to harm consumers and is not in their long-term interests.

## 5.6. Tying and Bundling

- 5.6.1 Bundling is a common practice which can sometimes lead to better offerings to customers in cost effective ways. However, in some circumstances tying and bundling may constitute an abuse of dominance when a dominant service provider attempts to leverage its market power from one market to a related, but distinct, market.
- 5.6.2 'Tying' refers to the practice of a dominant service provider requiring those customers who wish to purchase one product (the tying product) to purchase an ancillary product (the tied product) from it as well.
- 5.6.3 Anti-competitive bundling occurs when a dominant service provider only offers its products (which must be in a market where the service provider is dominant) in bundles with ancillary products which are not intrinsically linked to the main product, (the tying-in product). It is important to determine whether a bundle is "mixed" or "pure". A mixed bundle is one where the various services in the bundle are reasonably available separately, albeit not at the same prices. A pure bundle is where the various services are not reasonably available separately. The latter are more likely to be considered anti-competitive.
- 5.6.4 The following conditions need to be satisfied for TRBR to impose sanctions on a dominant service provider in relation to tying and bundling of services and products:
  - c) The service provider is dominant in a tying market, and the tying and the tied products are distinct products, and
  - d) The practice must be likely to result in anti-competitive foreclosure of the market for the tied product.
- 5.6.5 Whether products are "distinct products" will depend on customer demand. Products will be considered to be distinct in cases where customer demand means that, in the absence of tying or bundling, both the tying and the tied products could be produced or supplied on a stand-alone basis.

## 6. Pre-Approval of Certain Conduct

### 6.1. Pre-approval

- 6.1.1 Certain conduct which falls within the scope of Sections 22 and 23 may actually not have an adverse effect on competition. Prior to engaging in any conduct prescribed by Section 22 or 23, a service provider may seek TRBR approval of such conduct.
- 6.1.2 TRBR will apply the analysis set forth in these Guidelines to determine whether the proposed agreement in the case of Section 22 or the proposed action by a dominant service provider in the case of Section 23 will not or is not likely to substantially lessen competition or otherwise inhibit competition in the relevant telecommunications market.
- 6.1.3 An approval by TRBR of certain conduct under Section 24 of the Act must not be taken to amount to a contravention of any provision under Part 5 of the Act.
- 6.1.4 The burden of showing a compelling case for a pre-approval will be on the applicant. If TRBR is of the view that there is no compelling case, or that the applicant is seeking pre-approval rather than obtaining its own private legal advice, it will refuse the application.
- 6.1.5 TRBR may impose conditions or accept binding undertakings in relation to pre-approvals, especially in relation to factors that have not been anticipated or disclosed in the application and which, when they subsequently arise, warrant cancellation of the pre-approval. Other appropriate conditions or acceptance of undertakings may also be attached to pre-approvals if the TRBR considers that to be appropriate, having regard to the objects in Section 1 and the policies reflected in the Act.

## 7. Transfer of Control

### 7.1. Transfer of Control

- 7.1.1 Pursuant to Section 25 of the Act, TRBR must approve any transfer of control involving a service provider under the following circumstances:
  - a) A dominant service provider or its affiliate acquires control of another service provider; or
  - b) Another person acquires control of a dominant service provider or its affiliate; or
  - c) The transfer of control results in a person, alone or with its affiliates, controlling a service provider which meets the Bright-line Test; or
  - d) The transfer of control results in a person, alone or with its affiliates, having Market Power in a telecommunications market in Vanuatu.



- 7.1.2 The term **control** means the power to determine the actions of another person in any manner, whether directly through the ownership of shares or other securities or indirectly through an agreement or arrangement of any type. Evidence of control includes, but is not limited to:
- a) Ownership of 50% or more of voting securities.
  - b) The ability to elect a majority of the Board of Directors.
  - c) A contractual agreement allowing direction of the management or policies

## 7.2. Basis of Review

7.2.1 Where a proposed transaction involves any of the circumstances described in Section 25(1), the transaction will require prior notification and the approval of TRBR. The service provider shall submit a written notification and request for approval, at least sixty (60) days prior to the completion date for the intended transaction, to 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 10% 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) a description of the effects of the transaction on the control of telecommunications networks, including any interconnection or access arrangements with other service providers.

7.2.2 TRBR may request additional information regarding an application at any time.



### 7.3. TRBR Response.

- 7.3.1 Within 28 days of receipt of a fully completed application, including any additional information requested by TRBR, TRBR shall issue a notice initiating an inquiry or other public proceeding regarding the proposed transaction. Following such proceeding, TRBR shall take one of the following actions:
- (a) approve the proposed transaction without conditions.
  - (b) approve the proposed transaction with such conditions as TRBR determines are necessary to prevent or compensate for any substantial lessening of competition resulting from the transaction; or
  - (c) deny approval of the proposed transaction.