

Draft Regulation on “Guidelines on market analysis and the assessment of significant market power in the Eastern Caribbean Telecommunications Authority (ECTEL) Contracting States for electronic communications networks and services”

*Explanatory Memorandum – East Caribbean Telecommunications Authority (ECTEL)
Recommendation to the National Electronic Regulatory Commission*

This summary is intended to provide a brief, readable overview of the selected sections of this draft regulation and is not intended to be comprehensive or definitive. Readers are strongly advised to read the full regulation for a complete understanding of all its provisions. In this summary, Licensee means a person (generally a company) holding a licence to provide electronic communications services; Commission means the National Telecommunications Regulatory Commission in each ECTEL country; “electronic communications” services include telecommunications services.

Principles and policy objectives underlying sector specific measures (See section 3 for details of the principles and policy objectives)

- ▶ The Regulations are based on the guiding principles stated in section 3.
- ▶ In carrying out a market analysis the Commission must ensure overall development of electronic communication in keeping with policy objectives of section 3 of the Act.
- ▶ Impose ex-ante obligations on Licensees designated as having SMP where necessary to avoid these Licensees’ restricting or distorting competition or leveraging their market power onto adjacent markets.
- ▶ Conduct competitive analysis to distinguish structural barriers and regulatory barriers to entry.
- ▶ Anti-competitive practices can include, among others, three types of behaviour of a SMP Licensee i.e., its market power, practices related to monopoly power and strategies for maintaining market power.
- ▶ Identify three cumulative criteria used to identify markets likely to require regulation due to SMP, i.e. existence of high barriers to entry, absence of competitive market developments and insufficiency of competition law to address these market failures. A relevant market is one that is non-competitive on the basis of the above three criteria.

- ▶ Where relevant markets are defined and SMP Licensees are identified, the Commission may use remedies to reduce barriers to entry.
- ▶ The Commission may designate a Licensee or Licensees with SMP where the relevant market is not competitive in accordance with the Act or Regulations under the Act.
- ▶ In carrying out a market analysis, the Commission will conduct a forward looking structural evaluation of the relevant market based on existing market conditions.
- ▶ The Commission enjoys discretionary powers subject to the Act, Regulations and any other relevant enactment.

Relationship with the assessment of anti-competitive practices (section 4)

- ▶ Agreements between Licensees, decisions by associations of Licensees and concerted practices by Licensees with an objective to prevent, restrict or distort competition are examples of anti-competitive practices.
- ▶ The assessment of anti-competitive practices must use the same methodology as used to define relevant markets for assessment of anti-competitive practices.

Functions of the Commission (See section 5)

The Commission has the authority to:

- ▶ Perform regular market analysis.
- ▶ Determine if one or more operators have SMP in the relevant market.
- ▶ Impose specific obligations on a Licensee with SMP.

The Commission must consult with ECTEL on recommendations prior to using the above powers.

Functions of ECTEL (See section 6)

- ▶ ECTEL may adopt a Recommendation which identifies those relevant product and service markets within the electronic communications sector in an ECTEL Contracting

State whose characteristics may justify the imposition on certain Licensees of specific regulatory obligations set out in the Act, Regulations or other laws prescribed by the Act referred to in subsection (6) of section 3.

- ▶ on behalf of the Commission and in consultation with it, the ECTEL may -
 - perform regular market analysis in an ECTEL Contracting State, and
 - determine if one Licensee has or more than one Licensees have significant market power in the relevant market concerned in an ECTEL Contracting State.

Market Definition (see sections 7 – 12)

- ▶ The Guidelines focus on issues related to market definition and the assessment of SMP.
- ▶ Relevant market refers to the description of the products or services that make up the market and the assessment of the geographical scope of the market.
- ▶ The Commission has the authority to define product and service markets and the geographical scope, subject to ECTEL's approval. (Section 7).
- ▶ The determination of a relevant market is based on two complementary criteria, the determination in terms of products or services whether they belong to the same market, are interchangeable or substitutable in terms of supply and demand, and the determination in geographic terms.
- ▶ Another main criteria for defining the relevant market is demand-side and supply-side substitution.
- ▶ Supply-side substitutability exists when an operator that is not currently present in a given market is likely to enter rapidly in response to an increase in the price of products sold in this market. (Section 9).
- ▶ The hypothetical monopolist test (SSNIP test, "Small but Significant Non-transitory Increase in Prices") is applied to the demand and supply substitution of products and services interchangeability. The test analyses the effects that a small and permanent increase of price (5%-10%) for a service would have on demand and supply, in order to determine whether there are services considered substitutable by consumers and toward which they are likely to move if faced with such a price increase.

Geographic Market (section 11)

- ▶ The geographic market can be defined as the area in which firms are involved in the supply and demand of relevant products or services where they are subject to similar conditions of competition and where conditions of competition are different in neighboring areas.
- ▶ In the electronic communications sector, the geographic scope of the relevant market has been determined by two criteria – the territory covered by the network and the existence of legal instruments that seek to identify or distinguish a particular geographic area or nationally.

The relevance of a market likely to be regulated (section 12)

- ▶ Beyond the definition of a market and its boundaries, the Commission must demonstrate how the market is relevant for ex-ante regulation, that is to say, why it is necessary to apply a specific regulatory treatment to this market.
- ▶ Prior to applying ex-ante regulation in a market, the given market must meet the following criteria:
 - a) the existence of high and persistent barriers to entry;
 - b) a lack of progress toward effective competition;
 - c) competition law alone is insufficient to address these market failures.

These three criteria are cumulative and must be satisfied for a market to be considered as relevant.

Finally, the insufficiency of competition law alone to address market failures is evaluated mainly from the perspective of anti-competitive behaviors, the desire to ensure the development of long-term competition and the need for specific regulatory tools (such as price control or accounting separation) to remedy the identified competition risks.

Assessing Significant Market Power (sections 13, 14, 15 & 16)

- ▶ The definition of Significant Market Power (SMP) is outlined in section 13. The Act defines a Licensee having SMP as one that individually or jointly with others enjoys a position of economic strength that enables it to hinder the maintenance of effective competition in the relevant market by providing the Licensee the power to behave to an appreciable extent independently of its competitors and users.
- ▶ The criteria for assessing SMP are outlined in section 14. These include factors such as (among others) the market share(s) of Licensees, potential competition, barriers to entry and ability to increase prices without causing new entrants. Although a high market share alone is insufficient to determine whether a Licensee holds SMP, it is unlikely that a Licensee without a significant share of a relevant market would be in a dominant position in that market. Licensees with market shares of 25% or less are unlikely to enjoy a (single) dominant position in a market, while single dominance concerns normally arise where a Licensee has market share over 40 %. The Commission may consider that market shares over 50% are in themselves, except in exceptional circumstances¹, evidence of a dominant position.
- ▶ The criteria used to determine market shares are: revenues, number of subscribers in the retail markets for voice or fixed or mobile data, the traffic carried, the capacities available in wholesale access markets and any other relevant criterion under the respective market.
- ▶ The Commission determines the criteria for the economic conditions of the c market being considered.
- ▶ The potential development of existing competitors or potential entry by new competitors are strong indicators of the position of operators in the market. For example, barriers to entry may be evaluated by determining the extent to which a

¹ E.g.: a volatile market share is an indicator of competition insofar as this may be indicative of an innovative dynamic challenging market positions

Licensee in the market can increase its price above the competitive level without causing new entry.

- ▶ The Act and regulatory best practices provide for several additional criteria that may be used by the Commission.
- ▶ A Licensee which has SMP in a specific market may also be deemed to have SMP in a closely related market, where the links between the two markets allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the Licensee.
- ▶ The Commission under such circumstances may determine that the operator has SMP in both markets at the same time and may impose any of the obligations provided for in the Act. (Section 15)
- ▶ Collective dominance is likely to occur in oligopolistic markets characterized by a lack of effective competition and in which no single Licensee has significant market power. In that case, the Commission may ascertain whether the structure of the oligopolistic markets in question was conducive to coordinated effects in those markets, even in the absence of structural or other links between the Licensees concerned. In proving tacit coordination, the Commission does not need to demonstrate evidence of an express agreement or express contact between the oligopolists, but rather only that the outcomes in the market are indicative of results that would arise from tacit coordination (Section 16).

Imposition, maintenance, amendment or removal of obligations on SMP operators (Section 17)

- ▶ Where, following a market analysis, a Licensee is designated as having significant market power in a given market, the Commission may impose, as applicable, the obligations set forth in section 76 of the Act.

Transnational markets: joint analysis by several Commissions in the ECTEL Contracting States (Section 18)

- ▶ ECTEL, in consultation with the Commissions established in the ECTEL Contracting States, may identify product and service markets that are transnational, i.e.: covering the whole of the Contracting States or a substantial part thereof (e.g. roaming, access to undersea capacity).
- ▶ The Commissions must jointly conduct the market analysis and decide whether obligations need to be imposed.
- ▶ The joint analysis must follow similar procedures as those done in a single market analysis or as in public consultation.

Imposition of certain specific regulatory obligations on non-SMP operators (Section 19)

- ▶ The foregoing sections of these Guidelines do not prevent the Commission from imposing specific obligations on Licensees other than those that have been designated as having SMP, where it is required to comply with the Act, Regulations or other laws prescribed under the Act.

Collection of Information (Section 20)

- ▶ The Commission has the authority to collect all information necessary to assess market power.
- ▶ Licensees are required to provide the Minister, the Commission and ECTEL with any accounting, financial, cost, technical and other information required to carry out their functions under the Act, and the Treaty.
- ▶ The Commission or ECTEL will give the Licensee reasons justifying the request for information.

Publication (section 21)

- ▶ The Commission must publish all information that would contribute to an open and competitive market, acting in accordance with the Act and the rules on commercial confidentiality.
- ▶ This confidentiality obligation applies equally to information that has been received in confidence from another public authority.

Public consultation mechanisms (section 22)

- ▶ The Commission must hold a public consultation on any proposed decision to determine SMP and impose specific obligations.

Adoption of the final decision (section 23)

- ▶ The Commission must notify ECTEL of the names of the Licensees that have been designated as having SMP and the obligations imposed on them once its decision is final.
- ▶ The Commission must publish on its website this information.
- ▶ The Commission must ensure that up-to-date information is made public in a manner that guarantees all interested parties have access to that information.