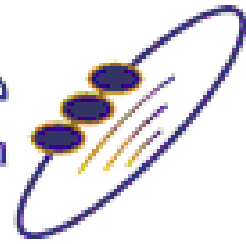


هيئة الاتصالات وتقنية المعلومات
Communications and Information Technology Commission



Guidelines for Addressing Abuse of Dominance in the Telecommunications Sector

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1. Introduction

1.1 Purpose

Once competition intensifies in telecommunications markets to a sufficient level, reliance on *ex ante* regulation of market dominance should be reduced in favour of greater reliance on market outcomes and on the application of *ex post* competition controls related to abuse of a dominant position. *Ex ante* means applying regulation in advance to prevent a potential abuse of a dominant position, before it occurs. *Ex post* means applying regulation in response to an alleged abuse of a dominant position, after it has occurred.

The Telecommunications Act (the “Act”) requires the CITC to regulate the telecommunications sector in a manner that creates a favourable atmosphere to promote and encourage fair competition.¹ The Act also establishes a series of competition-related provisions² that are complemented by the Telecommunications Bylaw’s (the “Bylaw”) chapter 4 on Competition between Service Providers, including Article 31 that relates to abuse of a dominant position.

These Guidelines for Addressing Abuse of Dominance in the Telecommunications Sector (the “Guidelines”) are issued “for the purpose of providing practical guidance ... to interested persons”³ and are intended to explain the general approach of the CITC to *ex post* analysis related to abuse of a dominant position under the Act and Bylaw.⁴

The CITC cannot provide guidance for every situation related to abuse of a dominant position. The enforcement decisions of the CITC depend on the circumstances of each case. Accordingly, these Guidelines do not constitute a binding statement of how the CITC will consider enforcement decisions in a particular allegation of abuse of a dominant position.

1.2 Objectives

These Guidelines are issued to accomplish the following specific objectives.

- Provide greater clarity and transparency⁵ by providing an indication of the approach the CITC is likely to adopt in applying *ex post* competition controls related to abuse of a

¹ Act, paragraph 3(3).

² Act, chapter 6 (Articles 24 to 27).

³ Bylaw, Article 14.

⁴ For avoidance of doubt, hereafter reference to “*ex post* analysis”, “competition controls” and “*ex post* competition controls” in this document mean those analyses and controls in relation to abuse of a dominant position under the Act and Article 31 of the Bylaw.

⁵ Act, paragraph 3(6).

dominant position. This guidance will indicate to stakeholders how the CITC will identify and address an alleged abuse of a dominant position. The CITC hopes that this will aid in stakeholder's understanding of the distinction between abuses of a dominant position and vigorous competition.

- Discourage abuses of a dominant position which service providers have an obligation not to undertake whether or not they are not subject to *ex ante* remedies or have complied with such *ex ante* remedies.
- Avoid frivolous or insufficiently documented allegations of abuse.
- Clarify the interplay between *ex ante* and *ex post* telecommunications regulation in the Kingdom.

1.3 Structure of Guidelines

The structure of the rest of these Guidelines is as follows:

- **Chapter 2 - Legal Framework:** Provides an overview of the legal framework relevant to *ex post* competition controls; a discussion of the relationship between *ex ante* and *ex post* regulation in relation to abuse of a dominant position; and a summary of the broader administrative context in which this takes place.
- **Chapter 3 - Market Definition:** Provides an overview of how the CITC will carry out the market definition process for the application of *ex post* competition controls. It summarizes considerations related to the product and geographic components of the relevant market and how the CITC will test the boundaries of that market.
- **Chapter 4 - Assessment of Dominance:** Sets out the analytical process the CITC will undertake to assess dominance in relation to an allegation of abuse of a dominant position. This includes a discussion of the factors that the CITC may consider in such an assessment and the types of information that the CITC may seek.
- **Chapter 5 – Abuses of a Dominant Position:** Provides a description of specific abuses of a dominant position, the criteria that the CITC will use to determine whether the abuse has occurred and a non-exhaustive list of the types of evidence that will be relevant to making such a determination.
- **Chapter 6 - Procedural approach:** Provides an overview of the application, proceeding, decision, enforcement and sanctions stages of CITC's review of a potential abuse of a dominant position and of how confidential information will be dealt with.

1.4 Glossary

In these Guidelines, defined terms have the meaning set out in the CITC Statutes. In addition, the following terms and expressions have the following meanings:

- **assessment of dominance:** the analytical process the CITC will generally undertake to assess dominance on an *ex post* basis in relation to an allegation of an abuse of a dominant position. Refer to Section 4 of these Guidelines.
- **bundling:** the making available for sale of multiple services, each of which is generally also available on a stand-alone basis, at a single price.
- **bundling to competitors:** an abuse of a dominant position in which a service provider requires, as a condition of supplying a service to a competitor, that the competitor acquire another service that it does not require; or the service provider offers the competitor more favourable terms or conditions that are not justified by cost differences if it acquires another service that it does not require. Refer to Section 5.11 of these Guidelines and subparagraph 31(c) of the Bylaw.
- **dominant service provider:** a service provider which enjoys a position of economic strength within a particular market, affording it the power to behave to an appreciable extent independently of competitors or users. An abuse of a dominant position can only be undertaken by a person who is dominant in a market relevant to the abuse. Dominance is analyzed under these Guidelines on an *ex post* basis.
- **evidence:** documentary or other materials in proof of the facts in issue, including facts which may be persuasive. Non-exhaustive lists of examples of evidence that may be relevant to a finding of abuse of dominance are set out in the Guidelines in relation to each category of abuse of a dominant position.
- **ex ante:** applying regulation in advance, such as to prevent a potential abuse of a dominant position before it occurs.
- **Ex Ante Dominance Framework:** the Regulatory Framework for Designation of Markets and Dominance in the Telecommunications Sector, issued by CITC decision [[X]] on [[X]].
- **ex post:** applying regulation in response to an alleged abuse of a dominant position, after it has occurred.
- **exclusionary bundling:** an abuse of a dominant position in which a dominant service provider makes available a bundle which cannot be replicated by another competitor and whose components are not available on a stand-alone basis. Refer to Section 5.10 of these Guidelines and to subparagraph 31(i) of the Bylaw.
- **failure to comply with interconnection obligations:** an abuse of a dominant position in which a dominant service provider fails to comply with interconnection

obligations of a dominant service provider that are specified in Chapter 5 of the Bylaws. Refer to Section 5.4 of these Guidelines and to subparagraph 31(g) of the Bylaw.

- **failure to provide technical information:** an abuse of a dominant position in which a dominant service provider fails to make technical information available to other service providers on a timely basis. Refer to Section 5.6 of these Guidelines and to clause 31(h)(4) of the Bylaw.
- **failure to supply essential facilities:** an abuse of a dominant position in which a dominant service provider fails to supply essential facilities to a competitor within a reasonable time after a request and on reasonable terms and conditions, where the dominant service provider has such facilities available. Refer to Section 5.2 of these Guidelines and subparagraph 31(a) of the Bylaw.
- **geographic market:** geographic area within which the price of products or services from a single product or service market affect one another. Refer to Section 3.3 of these Guidelines.
- **margin squeeze:** an abuse of a dominant position in which a dominant service provider squeezes the margin of profit available to a competitor that requires wholesale services from the dominant service provider, by: increasing the prices for the wholesale services required by that competitor; decreasing the prices of the retail services in markets where they compete; or both. Refer to Section 5.8 of these Guidelines and to clause 31(h)(1) of the Bylaw.
- **misuse of competitor information:** an abuse of a dominant position in which a dominant service provider uses confidential information that was obtained from a competitor (in order to interconnect with or supply services to that competitor) for the purpose of competing with the competitor. Refer to Section 5.7 of these Guidelines and to clause 31(h)(4) of the Bylaw.
- **predatory bundling:** an abuse of a dominant position in which a dominant service provider sells a bundle for less than the total cost of providing all of the elements in the bundle. Refer to Section 5.10 of these Guidelines and to subparagraph 31(i) of the Bylaw.
- **predatory pricing:** an abuse a dominant position in which a dominant service provider supplies customers with competitive services below cost. Refer to Section 5.9 of these Guidelines and to subparagraph 31(e) of the Bylaw.
- **pre-emption:** an abuse of a dominant position in which a dominant service provider pre-emptively acquires or secures scarce facilities or rights-of-way required by another service provider, in order to deny that service provider the use of facilities or resources, or requires or induces a supplier to refrain from selling to a the other service provider. Refer to Section 5.3 of these Guidelines and to subparagraph 31(d) and clause 31(h)(2) of the Bylaw.

- **preventing interoperability:** an abuse of a dominant position in which a dominant service provider adopts technical specifications for its networks or systems that prevent interoperability with a network or system of a competitor. Refer to Section 5.5 of these Guidelines and to clause 31(h)(3) of the Bylaw.
- **product or service market:** the smallest group of substitutable telecommunications products or services offered by a licensed service provider within a given geographic market such that a hypothetical monopolist over that group of products or services could profitably impose at least a "small but significant and non-transitory" price increase. Refer also to *SSNIP test* and to Section 3.4 of these Guidelines.
- **SSNIP test:** a conceptual tool used in competition analysis, based on whether a hypothetical monopolist for a particular service or set of services could profitably impose and maintain a small but significant non-transient increase in price, usually taken as around 5-10 percent over 12 months, and excluding promotional offers and occasional discounts.

2. Legal Framework

2.1 Overview

Article 26 of the Act includes the following with respect to abuse of a dominant position:

Any operator dominating a certain telecommunications market or part of it, shall not undertake any activities or actions which are considered an abuse of his position. The Bylaws state the dominant operators' obligations and the rules by which a dominant operator's activity is considered an abuse.

The Bylaw includes the following Chapter 4 provisions on competition between service providers:

- Article 29 sets out the CITC's functions and duties in relation to competition;
- Article 30 requires the designation of dominant service providers;
- Article 31 sets out a non-exhaustive series of actions and activities that will be considered an abuse of a dominant position;
- Article 32 lists arrangements between two or more service providers that will be considered anti-competitive;
- Article 33 sets out the procedure by which abuse of dominance and anti-competitive practices will be reviewed;
- Article 34 enumerates the remedies available to the CITC with respect to abuse of a dominant position and anti-competitive practices; and
- Article 35 discusses anti-competitive aspects of mergers.

These Guidelines explain the general approach of the CITC to *ex post* analysis related to abuse of a dominant position under the Act and in particular Article 31 of the Bylaw.

2.2 *Ex Post* Review

The Act and the Bylaw provide for the conduct of both *ex ante* and *ex post* regulation, including with respect to abuse of a dominant position. It is therefore important to note that compliance with *ex ante* regulations alone is not a defence, in all cases, against claims of abuse of a dominant position. *Ex ante* and *ex post* regulation may run concurrently - they are not mutually exclusive.

Compliance with *ex ante* regulation may be an outright shield against a subsequent *ex post* allegation of abuse of a dominant position only if the service provider is required by an *ex ante* control to behave in the exact manner in which it has done so, and has not exercised any degree of discretion as to how the *ex ante* regulation was implemented.

For instance, an *ex ante* remedy in the form of price regulation mechanism may be expressed in the form of a price ceiling. Such a mechanism may not establish a corresponding price floor. Under this circumstance, a service provider with a dominant position might offer a service that complies with the regulated price ceiling but remains an abuse on grounds that it is offered below cost and therefore amounts to predatory pricing.

Under these circumstances, the CITC could properly investigate an allegation of predatory pricing despite the fact that the dominant service provider has complied with its *ex ante* regulation. Such a situation, which the CITC refers to as “*ex ante* regulation not exempt from *ex post* review”, can occur in all instances of abuse of a dominant position.

The relation and interplay between *ex ante* and *ex post* regulation is highlighted and discussed in greater detail in each of the sections in Chapter 5 of these Guidelines that cover the specific types of abuse of a dominant position. However, it is important to note that a complaint may be lodged even if the respondent was not designated a dominant service provider on an *ex ante* basis. Provided the CITC did not deem the complaint frivolous, the matter of dominance would be reviewed again in response to a complaint, this time on an *ex post* basis.

2.3 Administrative Context

The telecommunications competition-related framework overseen by the CITC coexists with several other competition-related agencies and instruments that inform and may influence the manner in which regulation takes place. These include:

- a Competition Law that came into force in 2004 and Competition Bylaw that came into force in 2006, relating to *ex post* control of competition and overseen by the Council for Competition Protection (“CCP”); and
- the World Trade Organization Reference Paper accompanying the Agreement on Basic Telecommunications, under which the Kingdom has assumed a series of regulatory commitments that include measures to prevent “major suppliers” from “engaging in or continuing anti-competitive practices.”

Of these, the most relevant in the context of these Guidelines is the competition regime overseen by the CCP, which runs concurrently with the telecommunications regime overseen by the CITC in the application of *ex post* competition controls in the telecommunications sector, including with respect to abuse of a dominant position. Both have jurisdiction in this regard.

3. Market Definition

3.1 Introduction

A service provider must be dominant in a market in order to undertake an abuse of a dominant position. Market definition is therefore a necessary prerequisite to identifying dominance on an *ex post* basis. How markets are defined will depend on context. Mergers are one context.⁶ *Ex ante* competition remedies and *ex post* competition controls are different contexts.

The CITC's analytical process to define relevant telecommunications markets for *ex ante* purposes is set out in the Ex Ante Dominance Framework.

The CITC's approach to *ex post* market definition in the context of an alleged abuse of a dominant position is not significantly different from the approach set out in the Ex Ante Dominance Framework. An *ex post* market definition exercise will not take place in response to every complaint filed: the CITC reserves the right not to consider a claim that it deems to be insufficiently documented or frivolous. Where a complaint proceeds, however, *ex post* market definition is to be conducted as a fresh analysis, without being constrained by how the market was defined on an *ex ante* basis.

The reason for this fresh review relates to the different nature of the *ex post* analysis. *Ex ante* market definition rests on presumptions as to market evolution, and hence is "forward-looking". By contrast, *ex post* market definition is historic, looking backward to the relevant period during which anti-competitive behaviour is alleged to have occurred.

As a result, the *ex post* market will typically be defined in a more granular manner and in a way which will often be very specific to the facts of the market and behaviour being reviewed. This may lead to differences in market definition on an *ex ante* and *ex post* basis.

Just as for *ex ante* controls, for the application of *ex post* competition controls, the CITC may define markets along a number of different dimensions, including in relation to services, geography and time. The most important dimensions tend to be services and geography. Regardless of the market dimension under review, the key to defining markets is found in the assessment of substitutability, as discussed further below.

3.2 Product or Service Market

As a starting point for defining the relevant product or service market, the CITC may consider:

⁶ Subparagraph 35.5(b) of the Bylaw describes an approach for defining markets in the context of mergers.

- customer categories, particularly where customer segmentation is important and impacts service specification,
- demand patterns and affordability, and
- terms of service, including price.

For example, the CITC is likely first to look at the following segments:

- **Retail vs. wholesale services.** Even where a service is made available both to end-users and to service providers, end-users generally demand different features, service levels and support than do service providers. Separate retail and wholesale markets will generally, therefore, be distinguished for such services.
- **Residential vs. business or institutional customers.** For certain services these categories may have sufficiently different requirements and behaviour patterns to warrant treatment as separate markets.

The ways in which service providers organise themselves to engage with and serve different segments is frequently a leading indicator of product markets. On the other hand, service provider-defined customer segmentation may be inadequate or misleading. For example, for some services it may be appropriate to consider whether making a distinction between residential and small business, on one hand, and large institutional and service provider customers, on the other hand, is more appropriate than making a distinction between a service provider-defined “residential” and “business” markets.

Ultimately the CITC will need to consider demand-side substitution (e.g. how consumers substitute between products) and possibly supply-side substitution (e.g. how suppliers may substitute between supplying different services) to define the market along a product dimension. CITC’s general approach to undertaking this assessment is discussed in sections 3.3 and 3.4 below.

3.3 Geographic Market

Markets may be national, regional or local. The geographic extent of a market will be determined by how distance and location impacts product substitutability. Although telecommunications services are generally offered on the same basis across the Kingdom and customers are not discriminated against based on their location, this does not mean that the CITC will consider all markets as national. Rather, the CITC will examine the specific factors that affect the behaviour of service providers and customers. CITC will review factors that affect supplier behaviour and reflect the geographic perspective they have on the market, including the following:

- distribution arrangements and their extent;
- market structure; and

- profitability of serving a given geography.

The CITC will also review factors that affect customer behaviour and reflect the geographic perspective they have on the market including the following:

- convenience of engaging service providers over a distance;
- transportability of the service; and
- cost and value of the service, to the extent the service is transportable, relative to the cost of provisioning the same service from a more distant location.

The CITC notes that factors affecting service providers and customer behaviour are influenced by technological innovation. For instance, the Internet has facilitated the geographic extension of certain markets, particularly in services that can be delivered as applications to Internet subscribers, such as voice-over-IP voice communications services. As a result, the geographic scope of a market may well change over time.

3.4 SSNIP Test

The CITC will use the Small but Significant and Non-transitory Increase in Price (“SSNIP”) test to determine the specific boundaries of the market in question.

The SSNIP is a conceptual tool used in competition analysis. It is based on whether a hypothetical monopolist for a particular service or set of services could profitably impose and maintain a small but significant non-transient increase in price, usually taken as around 5 – 10 percent⁷ over 12 months, and excluding promotional offers and occasional discounts.

The hypothetical monopolist test is applied by starting from the smallest possible set of products in question and assessing whether it is profitable for the hypothetical monopoly supplier of that set of products to impose a SSNIP. If the SSNIP is not profitable, then customers are substituting away from the hypothetical monopolist’s products (demand side substitution) and/or other suppliers replacing its products with others at a lower price (supply side substitution). This means that the products to which these customers are substituting should be included in the relevant market.

The question is then asked whether a hypothetical monopoly supplier of this wider set of products would find a SSNIP profitable. If the SSNIP is again unprofitable, the set of products in the relevant market is again widened. This process continues until the test is passed (i.e. the SSNIP is profitable) as this signals that customers no longer have alternative products that are sufficiently close substitutes to constrain the pricing of the hypothetical monopolist.

Both supply-side and demand-side substitution should be considered in defining the market. Factors that tend to limit supply-side substitution include barriers to entry. Those that limit

⁷ It may be appropriate to vary thresholds to reflect specific circumstances of the case at hand.

demand-side substitution include functional interchangeability of products and switching costs.

While always a hypothesis-driven assessment, *ex post* market definition should, where available, look closely at empirical evidence for the time period under review, including how buyers and sellers responded in the market to price changes. The CITC will generally require evidence of this nature, including internal sales figures, marketing reports, and strategic plans. Customer surveys, past responses, and the behaviour of similar customers in other countries will also serve as additional, although less reliable, evidence as to supply- and demand-side substitution.

4. Assessment of Dominance

4.1 Introduction

This Chapter sets out the analytical process the CITC will generally undertake to assess dominance on an *ex post* basis in relation to an allegation of an abuse of a dominant position. This process is similar to the analytical process of designation of *ex ante* dominance set out in the Ex Ante Dominance Framework.

4.2 Factors Considered in Assessment

In the context of an alleged abuse of a dominant position, the CITC will generally assess whether a service provider is dominant based on whether it “enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors or users”.⁸ Such an assessment may consider a series of factors, in addition to market share.

The first set of factors that the CITC will consider are set out in Bylaw paragraph 30.2:

- number and market share of competitors;
- pricing behaviour, and the ability of any service provider to take the lead in setting prices;
- whether the service provider has dominant control over essential facilities;
- the availability of reasonable substitutes; and
- barriers to entry into the market.

The second set of factors that the CITC may consider are set out in the *Ex Ante Dominance Framework*:

- the degree of market concentration as determined by reference to revenues, numbers of subscribers or other relevant statistics;
- the evolution of telecommunications service providers’ market share over time;

and, with respect to the service provider whose behaviour is under review,

- degree to which its tariffs have varied over time;

⁸ Bylaw, paragraph 30.2.

- ability to earn profits that are higher than normal;
- financial resources and access to funding;
- vertical integration and the existence of a highly developed distribution network;
- ability to benefit from preferential or limited access to superior technology; and
- ability to obtain preferential or long-term contracts for the supply of relevant services to large users.

4.3 Information required for Assessment

The type of information required by the CITC to assess the factors above may include the following:

- Business and strategy materials, which reflect the service providers' views of what constitutes close substitutes, their availability, and the degree to which they constrain the provider's activity in the relevant market. Such materials may also address barriers to entry into the market, pricing behaviour and ability to benefit from superior technology or long-term contracts.
- Market information about the relevant market, which demonstrates the number and market share of competitors.
- Market information about adjacent markets, in which services and products from adjacent markets are used as inputs for one another, will help determine whether the service provider has dominant control over essential or required facilities, as well as reveal vertical integration and access to distribution networks.
- Price, revenue and subscription data, benchmarked against market-wide information, which provide information as to the degree of market concentration, evolution of providers' market share over time, degree to which prices or tariffs have varied over the same period, and whether profits were, in fact, higher than normal.
- Information related to excess capacity that may indicate an ability on the part of competitors or suppliers to constrain a price increase.
- Ongoing technological innovation that may indicate a close substitute for a necessary input, such as a wireless fixed link in place of a copper access line, could have been available in the market.
- Market entry by a new provider during or even following the relevant period, which may provide evidence of relevant barriers to entry.
- Exclusivity agreements.

As this suggests, the CITC's requirements for information and data from parties will often be significant in reviewing an allegation of abuse of a dominant position.

5. Abuses of a Dominant Position

5.1 Introduction

Article 31 of the Bylaw lists a series of practices that constitute abuse of a dominant position. This Chapter considers the practices referred to in that Article. Sections address each abuse of a dominant position. Each section cites the relevant sub-paragraph(s) in Article 31, defines the practice, and gives an explanation of the circumstances under which that practice may constitute an abuse of a dominant position. Lastly, a non-exhaustive account is provided of the types of evidence which will assist in determining whether or not such practice had occurred.

The specific abuses listed here are not exhaustive. The CITC retains the right to prosecute for other specific abuses of dominance that may occur from time to time, including as regards any other action or activity engaged in by a dominant service provider that the Commission determines in accordance with relevant provisions of the Bylaw, to have the effect, or to be likely to have the effect, of materially restricting or distorting competition in a telecommunications market.

As a first step in reviewing an allegation of abuse of a dominant position, the CITC will determine whether the matter is subject to *ex ante* regulation and if so, the CITC will determine whether the service provider against which the complaint is filed (the “target” service provider) is in breach of such *ex ante* regulation. If the CITC finds that the target service provider is in breach, the CITC will explore sanctions and other measures set out in the corresponding *ex ante* regulation and CITC’s general enforcement powers.

However, if the matter is not subject to *ex ante* regulation or if it is subject to *ex ante* regulation but falls under the “*ex ante* regulation not exempt from *ex post* review” situation set out in Section 2.2 above (*Ex Post Review*), the CITC will review on an *ex post* basis whether there was a breach of Article 31 of the Bylaw with respect to an abuse of a dominant position.

If the CITC proceeds to an *ex post* analysis, the CITC will first define the relevant market and determine whether the target service provider was a dominant service provider in the corresponding relevant market during the period addressed by the complaint, irrespective of any *ex ante* designation of dominance or lack of dominance pursuant to the *Ex Ante Dominance Framework*. If the target service provider was not dominant in a relevant market, on an *ex post* basis, then an abuse of dominance will not be found.

The next step will involve the CITC reviewing the specific circumstances of the allegation to determine whether or not an abuse of dominant position has taken place. In this process, the CITC will seek the following general information related to the evidence required, in addition to that set out in the corresponding Sections below (with the exception of Section 5.7):

- an accurate description of the service or facility in question;
- the commercial terms under which that service or facility was available or has been made available by other suppliers in the same geographic market, particularly during the relevant period;
- the market for that service or facility in the relevant part of the Kingdom. This evidence should address market power, market shares, close substitutes, and barriers facing a hypothetical new entrant seeking to enter the market.

Where relevant, the CITC may seek costing information from several sources to analyse the relationship between prices and costs in the context of an allegation of abuse of a dominant position. This may include cost information or cost proxies required by CITC and submitted by service providers as part of a tariff approval or notification process.

Where no costing information relevant to the alleged abuse was required as part of a corresponding tariff approval and notification process, the CITC may require that costing information be submitted according to a CITC-approved costing methodology. In the absence of such information, the CITC may construct a corresponding set of cost proxies.

In either case, the CITC may further supplement any information by, among others:

- initiating a process to approve a costing methodology;
- reviewing international data and prepare comparable benchmarks for the relevant costs in the Kingdom; and
- undertaking any other analysis that the CITC considers appropriate.

5.2 Failure to Supply Essential Facilities

Subparagraph 31(a) of the Bylaw considers an abuse of a dominant position the failure of a dominant service provider to supply essential facilities to competitors within a reasonable time and on reasonable terms and conditions. Further, subparagraph 31(b) of the Bylaw considers it an abuse of dominant position for a service provider to discriminate “in the provision of access, interconnection or other services or facilities to other service providers except under circumstances that are objectively justified based on differences in supply conditions, including different costs or a shortage of available facilities or resources”.

An “essential facility” is defined in the Bylaw as a “facility associated with a telecommunications network or service supplied exclusively or predominantly by a single service provider or a limited number of service providers, and that cannot practically be substituted by competitors for economic or technical reasons”.

There are a number of *ex ante* obligations related to some essential facilities, including, for instance, those pursuant to a Reference Interconnection Offer (“RIO), a Reference Offer for

Data Access (“RODA”), among others.⁹ The corresponding scope of *ex post* analysis and its relationship with these *ex ante* obligations are set out in Section 5.1.

Evidence Required

In order to find whether an abuse of a dominant position under subparagraphs 31(a) or 31(b) of the Bylaw has occurred, evidence addressing the following matters will be relevant for any CITC investigation, in addition to the evidence noted in section 5.1:

- the complainant’s and respondent’s arguments, including supporting rationales, as to whether the facility should be considered an essential facility, pursuant to the definition of “essential facility” in the Bylaw
- differences in the manner in which the service or facility was supplied to the complainant and to other parties, including self-supply by the dominant service provider itself;
- evidence, such as supporting financial data or modelling, as to whether the service or facility could be practically or feasibly obtained or duplicated, from any other sources;
- the basis for any changes in the cost of supplying the service or facility;
- technical information, traffic load and other demand data, and other evidence demonstrating shortages in facilities or resources available to the complainant, to the respondent, or in a relevant market;
- evidence relied on to support a refusal to supply; and
- attempts by any party, and negotiations between the parties, to develop a good-faith solution to constraints allegedly preventing supply of or access to the service or facility.

5.3 Pre-emption

Subparagraph 31(d) of the Bylaw prohibits a dominant service provider from pre-emptively acquiring or securing scarce facilities or resources from a third party if it denies a competitor the use of facilities or resources required to operate the competitor’s business.

Clause 31(h)(2) of the Bylaw considers it an abuse of a dominant position to require or induce a supplier to refrain from selling to a competitor, provided the result would be to impede or prevent the competitor from entering or expanding in a market.

⁹ *Ex Ante Dominance Framework*, paragraph 2.5.2(e), noting that the CITC may, in a Designation Decision, order a service provider designated as dominant on an *ex ante* basis to provide access to certain essential facilities, subject to technical feasibility, on fair and reasonable terms and conditions and at appropriate prices.

There are a number of *ex ante* obligations related to scarce facilities or resources. The corresponding scope of *ex post* analysis and its relationship with the *ex ante* obligations are set out above in Section 5.1.

In examining an *ex post* allegation under Subparagraph 31(d) the CITC will, in addition to the steps set out in Section 5.1:

- Consider whether the facilities or resources in question have in fact been “pre-empted” by the dominant service provider. That is, has the dominant service provider acquired or secured all available facilities or resources? Is the dominant service provider partly or fully utilizing such facilities or resources? Can the dominant service provider show that it could reasonably be expected that it will use them in the near or mid-term?
- Consider the perspective of the competitor and whether the facility has in fact been withheld and not provided on reasonable terms and conditions within a reasonable time after the competitor’s request.

In considering an allegation under Clause 31 (h)(2) of the Bylaw the CITC would look at the evidence whether the dominant service provider required or induced a third party to refrain from selling to a competitor. Withholding the facility in this way will constitute an abuse of a dominant position if the service provider pre-empted from using the facility needed to be able to do so in order to compete meaningfully, and could not have economically duplicated the facility itself or practically obtained it from any other supplier.

Evidence Required

In order to determine whether an abuse of a dominant position under subparagraph 31(d) or clause 31(h)(2) of the Bylaw has occurred, evidence addressing the following matters will be relevant, in addition to that noted in section 5.1:

- the complainant’s and respondent’s arguments, including supporting rationale, for whether the facility should be considered a scarce resource or facility,
- differences in the manner in which the resource or facility was supplied to the complainant and to other parties, including self-supply by the dominant provider itself; and
- attempts by any party, and negotiations between the parties, to develop a good-faith solution to constraints allegedly preventing supply of or access to the service or facility.

5.4 Failure to Comply with Interconnection Obligations

Subparagraph 31(g) of the Bylaw states that it is an abuse of a dominant position for a dominant service provider not to comply with the interconnection obligations set out in Chapter 5 of the Bylaw.

There are numerous *ex ante* obligations related to interconnection, including those set out in Chapter 5 of the Bylaw, among others. The corresponding scope of *ex post* analysis and its relationship with these *ex ante* obligations are set out in Section 5.1.

Evidence Required

In order to determine whether an abuse of a dominant position under subparagraph 31(g) of the Bylaw has occurred, evidence addressing the following matters will be relevant, in addition to that noted in section 5.1:

- the dominant provider's relevant interconnection practices and interconnections with other providers;
- differences in the terms and conditions on which the dominant service provider interconnects with the complainant and with other, similarly-positioned parties, including itself;
- the ability of the complainant to participate in a telecommunications market that would be affected by the interconnection if the dominant service provider did not modify its behaviour;
- the basis for any changes in the cost of interconnecting or maintaining the interconnection between the parties;
- technical information, traffic load and other demand data, and other evidence demonstrating the exhaustion of capacity or significant change in the direction of traffic on the interconnecting links for any relevant period; and
- attempts by any party, and negotiations between the parties, to develop a good-faith solution to constraints allegedly preventing supply of or access to the service or facility.

5.5 Preventing Interoperability

Clause 31(h)(3) of the Bylaw states that it is an abuse of a dominant position for a dominant service provider to adopt technical specifications that prevent interoperability with a competitor's network or system. Interoperability refers to a system's ability to interact and function with other products or systems, present or yet to come, without any access or implementation restrictions.

There are a number of *ex ante* obligations related to interoperability, including, for instance, the obligation to comply with the CITC Technical Specification¹⁰, among others. The corresponding scope of *ex post* analysis and its relationship with these *ex ante* obligations are set out in Section 5.1.

In considering such allegation under *ex post* analysis, the CITC will consider a number of criteria:

- whether the provider of the network or system in question has a dominant position in a relevant market. Two markets are relevant. One is the market for the use of that class of network or system and of any close substitutes for such use. The other is the retail market in which, relying on interoperability with the network or system or its substitutes, the competitor would participate.
- whether the competitor actually requires interoperability with the dominant provider's relevant network or system in order to participate in the relevant market. The CITC will consider whether the competitor has the option of achieving the same result by interoperating with some other system, building its own system, or forgoing interoperability altogether.

Evidence Required

In order to determine whether an abuse of dominance under clause 31(h)(3) of the Bylaw has occurred, evidence addressing the following matters will be relevant, in addition to the evidence noted in section 5.1:

- commonly-used technical standards for the equipment or facilities in question and for equipment or facilities which are reasonably substitutable for such equipment or facilities;
- the market in which participation demands interoperability with the equipment or facilities in question;
- differences between the manner in which interoperability was withheld or made available to the complainant and to other parties;
- evidence, such as supporting financial data or modelling, as to why interoperability with the relevant system or equipment is necessary in order to compete; and
- reasons why the system or equipment cannot be practically or feasibly obtained, nor duplicated, from any other sources.

¹⁰ Act, Article 31, and *CITC Technical Specification, Issue 2*, Document GEN001, 11/07/2009 G.

5.6 Failure to Provide Technical Information

Clause 31(h)(4) of the Bylaw states that it is an abuse of a dominant position for a dominant service provider to not make available to other service providers technical information which is required by such other service provider to provide services.

There are a number of *ex ante* obligations related to the availability of technical Information, including, for instance, those related to a RIO or a RODA. The corresponding scope of *ex post* analysis and its relationship with these *ex ante* obligations are set out in Section 5.1.

In reviewing such an allegation under *ex post* analysis, the CITC will consider a number of criteria:

- whether the competitor could reasonably have participated in the market—for instance, by obtaining the required facility from another provider. In this case, the dominant service provider could not be found in breach of Clause 31(h)(4) for having refused to provide related technical information.
- whether the competitor could reasonably have obtained the information in some other manner—for instance, by downloading the manual from the Web address which the dominant provider clearly communicated to the competitor, then the dominant service provider would not be in breach either..

Evidence Required

Evidence as to the dominant provider's reasonable diligence in assisting the competitor in obtaining such information, such as directing the competitor to the place where such information may readily be obtained, and as to the reasonable cost of providing such information, particularly on a large scale, will frequently be determinative in matters falling under this heading.

In order to whether an abuse of a dominant position relating to the timely making available of required technical information under clause 31(h)(4) of the Bylaw has occurred, evidence addressing the following matters will be relevant, in addition to the evidence noted in section 5.1:

- the role that such information plays or could reasonably be expected to play;
- reasons as to why such information is reasonably obtainable only from the service provider;
- the dominant service provider's reasonable diligence in assisting the competitor to obtain such information;
- any harm which could arise from any further circulation of such information;
- the reasonable cost of providing such information;

- the market in which the competitor's participation requires the information sought;
- evidence, such as supporting financial data or modelling, as to why the relevant network element is necessary in order to compete in the downstream market; and
- reasons why the network element cannot be practically or feasibly obtained, nor duplicated, from any other sources.

5.7 Misuse of Competitor Information

Clause 31(h)(5) of the Bylaw sets out that it is an abuse of a dominant position for a dominant service provider to take information that was obtained from a competitor in order to interconnect with or supply services to that competitor, and then use it to compete with the competitor. This includes any information or data that is not publicly available, including the identities of interconnecting parties, if not otherwise known, as well as geographic and volume information with respect to network interconnection, provisioning and traffic.

There are a number of *ex ante* obligations related to the use of competitor information, including, for instance, those pursuant to a request for interconnection. The corresponding scope of *ex post* analysis and its relationship with these *ex ante* obligations are set out in Section 5.1.

If the use of competitor information is found to have been an abuse of a dominant position based on *ex post* analysis, the CITC may impose sanctions and other measures. In reviewing such an allegation, the CITC will consider a number of criteria, including:

- written guidelines, as well as training materials, manuals or business process guidelines applicable to employees who handle or use competitor information;
- access to competitor information by employees in relevant areas of the business, including sales and marketing;
- the degree to which competitor information is technologically, physically and administratively secured so that internal personnel who do not require access to that information to perform their duties do (or do not) have access to it.

Evidence Required

In order to whether an abuse of dominance under clause 31(h)(4) of the Bylaw has occurred, evidence addressing the following matters will be relevant:

- the nature of the information provided; and
- the use to which the information provided by the competitor was put.

5.8 Margin Squeeze

Clause 31(h)(1) of the Bylaw considers it an abuse of a dominant position where there is a “price squeeze” of the profit margin available to a competitor that requires wholesale services from the dominant service provider.

A dominant service provider engages in a price or margin squeeze when it sets retail and underlying wholesale prices such that the retail price is lower than the sum of the wholesale price and the reasonable cost of transforming the wholesale service into the retail service. In the Kingdom, many wholesale services that are needed by competitors for the provision of retail services are price regulated in the form of a price ceiling. However, a dominant service provider can nonetheless engage in a margin squeeze as the result of the relationship between wholesale and retail prices.

There are a number of *ex ante* obligations related to pricing. The corresponding scope of *ex post* analysis and its relationship with these *ex ante* obligations are set out in Section 6.1.

In examining an allegation of margin squeeze under *ex post* analysis, the CITC will, having considered the definition of the relevant upstream and downstream markets, consider the following:

- whether the service provider under review is “vertically integrated”, either internally or in conjunction with an affiliate, by providing both a retail service and the underlying wholesale service;
- whether the service provider is dominant in the market for the underlying wholesale service or facility; and
- whether the underlying wholesale service or facility is required by competitors who wish to compete in the related retail market.

If one or more of these conditions is absent, then a margin squeeze will not be found, although the CITC will consider whether another abuse such as predatory pricing has taken place. However, if all the above conditions are present, then the CITC will likely consider that the dominant service provider is in a position to undertake a margin squeeze by sustaining either of the following pricing strategies over a non-transitory period:

- increasing the price for the wholesale service required by its competitors until it approaches the price the service provider charges for the downstream retail service, or
- decreasing the price it charges for its own downstream retail service until it approaches the price for the upstream wholesale service, in a manner that is not justified by differences in costs, a shortage of available facilities or resources, or other demonstrated differences in supply conditions.

The intended outcome of either of these strategies is that downstream competitors purchasing the wholesale service are unable to profitably transform that wholesale service

into a retail service priced competitively with the vertically-integrated dominant provider's retail service. As a result, the squeezed competitors are forced either to sustain ongoing losses or to exit the market; moreover, further competitors are deterred from entering the market.

Evidence Required

In order to whether an abuse of a dominant position relating to price squeezing under clause 31(h)(1) of the Bylaw has occurred, the CITC will generally require, in addition to the relevant information set out in Section 5.1, an imputation test to determine whether, based on objective differences in supply conditions, the margin between the wholesale and retail prices constitutes a "squeeze".

- The CITC will make use of cost information discussed in section 6.1 and the price(s) of the relevant wholesale product(s). The CITC may consider it necessary to undertake a specific costing exercise using a CITC-approved costing methodology. The purpose of such a costing exercise is to determine whether the dominant provider's retail division or affiliate, or a reasonably efficient retail competitor purchasing the wholesale service from the dominant service provider, could profitably provide the retail service under question.
- The CITC will also consider other evidence, such as availability of other sources of supply, or supporting financial data or modelling, as to why the wholesale service cannot be practically or feasibly obtained, nor duplicated, from any other sources.

5.9 Predatory Pricing

Under subparagraph 31(e) of the Bylaw, a dominant service provider cannot supply customers with competitive services below cost, defined as either long-run average incremental costs or else such other cost standard as the CITC establishes.

This practice, known as predatory pricing, results in lower short-term prices for end-users. However, it is considered an abuse of a dominant position if engaged in by a service provider that is or becomes dominant in the market for these services during the period in which it is pricing below cost. Its goal is to drive rivals from the market and then raise prices to higher-than-competitive levels, recouping its losses and reaping a subsequent windfall.

Predatory pricing may also serve as the basis for additional anti-competitive price-related practices. Paragraph 31(f) of the Bylaw establishes *cross-subsidization* as a separate category of abuse of a dominant position. Cross-subsidization is a practice whereby a firm that is dominant with respect to a particular service charges higher-than-normal prices for that service, and then applies up to all of the additional profit to lowering the price of a service in a market that it does not dominate. As a result, the service provider offers a service below cost, but rather than do so in a market that it dominates, leverages dominance from another market into a competitive market.

Some instances of *promotional* pricing may constitute a variant of predatory pricing. Such pricing relates to below-cost sales for a short, transitory period and is intended for promotional purposes, including “loss leaders”.¹¹ Because promotional pricing is sustained only over a short, transitory period, it will not generally raise an issue of predatory pricing if it meets the relevant *ex ante* requirements. A service that does not meet these *ex ante* requirements will not be considered a promotion and is subject to *ex post* competition analysis.

There are a number of *ex ante* obligations related to pricing. The corresponding scope of *ex post* analysis and its relationship with these *ex ante* obligations are set out in Section 5.1.

Evidence Required

In order to whether an abuse of a dominant position relating to predatory pricing under subparagraphs 31(e) or 31(f) of the Bylaw has occurred, evidence addressing the following matters will be relevant, in addition to the relevant information set out in Section 5.1:

- level of cost, as discussed in Section 5.1, relative to price;
- the length of time during which the pricing being examined was made available; the length of time during which customers who purchased the service continued to receive that pricing; and the time interval during which, following withdrawal of the offer from the market, any other offer was available in respect of the same service, or one that is substitutable, at rates below typical market rates;
- the intention of the dominant service provider; and
- the service provider’s ability to recoup short-run losses by setting prices higher in the longer term.

5.10 Predatory and Exclusionary Bundling

End-user or retail service bundling is not specifically named in Article 31 of the Bylaw; however, certain instances may constitute an abuse of a dominant position under Bylaw, paragraph 31(i) (“any other action or activity engaged in by a dominant service provider ... [with] the effect [...] of materially restricting or distorting competition in a telecommunications market.”

Bundling end-user services may be of concern if one of the services in the bundle is one for which the service provider is dominant. The CITC is concerned with two types of end-user bundles—predatory bundling and exclusionary bundling. Predatory bundles are those which can be replicated by another competitor, but are sold at predatory prices, i.e., the price of a bundle is exceeded by the total cost of providing all of the elements in the bundle. In this

¹¹ As promotional pricing is not named in Article 31 of the Bylaw, a remedy in respect of anti-competitive promotional pricing may be pursued under Bylaw, paragraph 31(i) (“any other action or activity engaged in by a dominant service provider ... [with] the effect [...] of materially restricting or distorting competition in a telecommunications market.”

manner the service provider could drive rivals from the market and then raise prices to higher-than-competitive levels, recouping its losses and reaping a subsequent windfall.

Exclusionary bundles are those which cannot be replicated by another competitor and are not available on a stand alone basis and/or are sold below cost. Here the service provider could exclude its competitors by using the non-replicable product in bundles with services that are competitive.

There are a number of *ex ante* obligations related to bundling. The corresponding scope of *ex post* analysis and its relationship with these *ex ante* obligations are set out in Section 5.1.

Evidence Required

In order to whether an abuse of dominance related to predatory bundling under subparagraph 31(i) of the Bylaw has occurred, evidence addressing the following matters will be relevant, in addition to the relevant information set out in Section 5.1

- whether the bundle can be replicated by competitors;
- whether the service for which the accused service provider is dominant can be purchased on a stand alone basis;
- level of cost, as discussed in Section 5.1, relative to price. This may include documentation demonstrating whether the service or facility can be practically or feasibly obtained or duplicated, such as supporting financial data or modelling of the service's or facility's costs; and
- the length of time during which the pricing being examined was made available; the length of time during which customers who purchased the bundle continued to receive that pricing; and the time interval during which, following withdrawal of the offer from the market, any other offer was available in respect of the same bundle or its components at rates below typical market rates.

5.11 Anti-competitive Bundling to Competitors

Subparagraph 31(c) of the Bylaw considers an abuse of a dominant position where a dominant service provider

- bundles services such that, in order to purchase a first, "tying" service, the competitor must also purchase one or more other, "tied" services, even if the competitor does not require it; or
- offers a competitor more favourable terms or conditions for the first, "tying" service if the competitor also purchases one or more other, "tied" services, even if the competitor does not require the tied services. The more favourable terms or conditions are not justified by cost differences.

There are a number of *ex ante* obligations related to bundling. The corresponding scope of *ex post* analysis and its relationship with these *ex ante* obligations are set out in Section 5.1.

In considering an allegation of bundling under *ex post* analysis, the CITC will consider whether the following conditions are met:

- the seller is dominant in the market for the “tying” service;
- the “tying” service is an essential input required by the downstream service provider in order to participate in a retail market; and
- the price charged for the bundle, or for the combination of the tying and tied services, is lower than the combined cost of providing it.

The competitive harm takes place in the market for the tied service, into which the seller has leveraged its tying-market dominance.

Evidence Required

Evidence of the same nature as that described above in Section 5.10 shall be relevant to exclusionary bundling under subparagraph 31(c) of the Bylaw.

6. Procedural Approach

6.1 Introduction

The Act, the Bylaw and the Rules of Procedure give the CITC significant flexibility in the manner in which it initiates, undertakes, and concludes an analysis of alleged abuse of a dominant position. For instance, the CITC can:

- accept an application at any time from any person on any matter,¹²
- conduct the proceeding using any procedures it deems appropriate, by issuing directions on procedure or by dispensing with, varying, or supplementing anything otherwise specified in the Rules of Procedure,¹³ and
- excuse any failure to follow these procedures.¹⁴

This flexibility will allow the CITC to review and modify its procedural approach in order to best suit the issue it must review. However, in order to provide transparency and certainty to stakeholders, the CITC will ordinarily follow the procedures described below to conduct *ex post* analysis of allegations of abuse of a dominant position.

6.2 Application

The CITC will initiate an analysis of alleged abuse of a dominant position either on its own initiative, or on application by any person.¹⁵

An application to the Commission in respect of an abuse of a dominant position must be in the form provided at Appendix 1 of these Guidelines.¹⁶ In identifying the grounds for the application, the complainant must specify:

- the abuse of a dominant position that is alleged to have occurred;
- the relevant portions of the Act, Bylaw, and Sections 5 or 6 of these Guidelines defining such an abuse of a dominant position;

¹² Rules of Procedure, Article 13.

¹³ Rules of Procedure, Article 19.

¹⁴ Rules of Procedure, Article 21.

¹⁵ Bylaw, paragraph 33.1.

¹⁶ Applications which make use of this form will be deemed to comply with the instructions set out in Article 4 of the Rules of Procedure, entitled “Filing of Documents with the Commission”, and paragraphs 13.1 and 34.1 of the Rules of Procedure, which describe the contents of an application.

- the market or markets in which the alleged abuse of a dominant position has occurred;
- the specific actions that the complainant wishes the CITC to take to address the alleged abuse of a dominant position, and CITC's jurisdiction to take such specific actions; and
- suggested parties to the proposed proceeding, including the target service provider) and other relevant market participants.

The statement of facts upon which the complainant relies, which is required by paragraph 34.1(b) of the Rules of Procedure, must provide detailed reasons supporting the above-noted grounds, including:

- the relevant market in which the abuse that is alleged to have occurred, with reference to the criteria set out in Section 3 of these Guidelines;
- the target service provider's and complainant's market positions in the relevant market, with reference to the criteria set out in Section 4 of these Guidelines;
- a detailed account of all events that are material to the alleged abuse, with reference to the evidence identified in the applicable portion of Section 5 of these Guidelines;
- as much information available to the complainant in relation to the "evidence required" for the specific abuse of a dominant position as detailed in the corresponding section of Section 5 of these Guidelines; and
- reasons for the specific actions that the complainant wishes the CITC to take to address the alleged abuse of a dominant position, including details as to why such specific actions are the most appropriate to the circumstances of the alleged abuse, and any relevant timing considerations.

These detailed facts and reasons should include any data, and annex any documentation, that is available to support the complaint, including market information, cost or price data, industry and economic analysis, and any other information required to inform the Commission of the nature, purpose and extent of the application¹⁷ or that may be useful in explaining or supporting the application.¹⁸

The applicant should take care to ensure that the detailed facts and reasons filed with the complaint are sufficient to support the application. The CITC will not consider any claim filed with that, in the CITC's opinion, is not sufficiently documented.

¹⁷ Rules of Procedure, subparagraph 34.1(b).

¹⁸ Rules of Procedure, subparagraph 34.1(d).

6.3 Confidentiality

Application material

The CITC will treat an application for review of an allegation of abuse of a dominant position as part of the public record. The application will, therefore, be published on the CITC's website and be copied to the parties named in the application.¹⁹ However, the applicant may designate any portion of the application, including its name, to be Confidential Information in accordance with the definition of "Confidential Information" set forth in the Rules of Procedure.²⁰ Such designation must be accompanied by a separate, non-confidential, editable electronic version of the same material that redacts the Confidential Information, prepared in a way that makes it clear what has been redacted, such as by replacing it with square brackets or hash marks (#).

An application to review an allegation of a dominant position is a discretionary application and is not information that the applicant is required to provide.²¹ If the Confidential Information designation is claimed by the applicant, but the CITC does not approve the claim,²² then the CITC will give the applicant the opportunity to withdraw the application material containing the Confidential Information.

The CITC may elect not to continue an investigation in the event that the application information does not provide a sufficient record to conduct an investigation. This limitation is particularly relevant to any claim of Confidential Information with respect to the applicant's name. Although there are circumstances in which a lack of anonymity may substantially affect an applicant's current or future ability to negotiate with a dominant service provider, anonymity may also hinder full explanation of the problem to the target service provider.

All proceeding materials

Any party to a proceeding, including the applicant, may file a claim designating any information filed during the proceeding to be Confidential Information. However, a claim for Confidential Information designation will not automatically be approved by the CITC.

Any claim that designates Confidential Information must indicate, in each case, why the party considers that specific information to be confidential. The party must refer to the specific

¹⁹ Rules of Procedure, paragraph 13.1.

²⁰ A person who submits any of the following types of information to the Commission during a proceeding or in response to a request or decision from the Commission, may designate it as confidential, provided that the information is not already in the public domain and provided that it is clearly marked "Confidential Information":

- a) Information that is a trade secret;
- b) Financial, commercial, scientific or technical information that is confidential and that is treated consistently in a confidential manner by the person who submitted it; or
- c) Information the disclosure of which could reasonably be expected:
 - i. To result in material financial loss or gain to any person,
 - ii. To prejudice the competitive position of any person, or
 - iii. To affect contractual or other negotiations of any person.

²¹ Refer to Rules of Procedure, paragraphs 11.5 and 11.6.

²² Rules of Procedure, paragraphs 11.7 and 11.8.

harm set out in a paragraph or subparagraph of paragraph 11.1 of the Rules of Procedure that motivates the request for confidentiality.

Separate reasons are required for each separate designation within a document or data file. If specific direct harm is cited as a likely consequence of disclosure, sufficient details must be provided as to the nature and extent of such harm. All written reasons will become part of the public record and posted on the CITC website.

Any party, including a respondent named in the application, may then oppose a confidentiality claim by explaining in writing, within five days of the request's filing, the public interest in disclosing the information. The CITC will take this explanation into account. However, regardless whether anyone has opposed the claim, the CITC will not approve the claim if it concludes that the claimant's written reasons were insufficient, the Confidential Information's disclosure would be in the public interest, or the benefits from its disclosure would outweigh the harm to the applicant. Furthermore, the CITC will approve no more of the claim than is necessary to avoid specific direct harm. While it may uphold a claim that an entire document or dataset is Confidential Information, or release only a redacted version of the information, it may also order that some or all parts of the information be verbally disclosed to registered participants in a closed hearing.

6.4 Proceeding

Initiation of Proceeding

No more than 14 days after the receipt of any application regarding a claim of abuse of dominant position, the CITC shall make a written determination in response to the application that either

- positively identifies the CITC's jurisdiction to hear the matter and its intent to initiate a rulemaking proceeding to review the alleged abuse of a dominant position.²³;
- defers the initiation of a proceeding in relation to the application where the CITC decides to invite the parties to consider alternative means for resolving the complaint ; or
- declines to initiate a proceeding in relation to the application where (a) the CITC determines that it does not have jurisdiction to hear the matter; or (b) the CITC concludes that the application is frivolous or insufficiently documented.

The CITC may also issue such a written determination of its own motion in order to initiate a review of abuse of a dominant position.²⁴

²³ Rules of Procedure, paragraph 13.2.

The written determination initiating a review of alleged abuse of a dominant position shall constitute a notice²⁵ and procedural direction²⁶ inviting public comment.

The written determination initiating the review shall initiate a public proceeding and contain, but not be restricted to, the information specified at paragraph 24.2 of the Rules of Procedure including, in particular:

- every market, abuse of a dominant position, and service provider that it is the proceeding's nature and objective to review;²⁷
- a list of questions to be answered or issues which persons providing comments to the proceeding may address, including questions or directions to produce material that must be addressed by one or more of the parties that the CITC shall specify,²⁸ and
- identification of parties to the proceeding, which are to include the complainant, all service providers that the Commission has designated as *ex ante* as dominant within the market, and all target service providers. These parties shall be directed to register in accordance with Article 3 of the Rules of Procedure,²⁹ and other persons with an interest in the proceeding shall be invited to similarly register;³⁰ and
- procedural directions setting out deadlines for persons to register as registered parties, for comments from registered and non-registered parties, for replies by registered parties, and any other procedural matter relevant to the conduct of the proceeding.³¹

The CITC will invite the CCP to participate in any such public proceeding.

The applicant, after having filed an application for review of abuse of a dominant position, may file a motion for suspension while it engages in direct efforts to address the matters that are the subject of the application or if it concludes that the target service provider is taking adequate voluntary measures to address its concerns.³² Where the proceeding has been initiated on the CITC's own motion, however, the CITC will not generally accept a request for suspension of the proceeding unless it concludes that the target service provider is taking adequate voluntary measures to address its concerns.

Provision of Information

²⁵ Rules of Procedure, paragraph 24.1.

²⁶ Rules of Procedure, Article 19.

²⁷ Rules of Procedure, subparagraph 24.2(b).

²⁸ Rules of Procedure, subparagraph 24.3(c).

²⁹ Rules of Procedure, subparagraph 24.3(a).

³⁰ Rules of Procedure, subparagraph 24.3(b).

³¹ Rules of Procedure, subparagraphs 24.2(c) and (d) and Articles 25 and 26.

³² Rules of Procedure, paragraph 12.3.

All responses to the questions, comments, and replies included in the procedural directions are to be filed with the CITC. These responses are to follow the format set out at Article 8 of the Rules of Procedure and, where relevant, the rules for designating confidential information set out at Article 11 of the Rules of Procedure and described above.

The CITC may further place other documents or information that it believes will be of assistance on the public record³³ However, where the public record is deficient with respect to market, technological, or international benchmarking information, the CITC may undertake best efforts to supplement the public record by obtaining readily-available information that redresses this deficiency. The CITC may also issue directions on procedure providing for an additional opportunity to file comments that take such information into account.

Nothing shall prevent the CITC from issuing further directions on procedure³⁴ or seeking further information from any party at any time during the proceeding.³⁵ CITC staff may obtain or generate its own information and analysis as a non-binding analytic tool. The CITC may also compel registered parties to provide costing and other information that the CITC considers relevant. To better assess the information it requires, the CITC may further choose to convene specific consultations on particular issues that are before it in the context of the proceeding.³⁶

Where the party required to provide information fails to do so, the CITC will decide on a case-by-case basis whether it will accept alternative information, compel that the information be produced immediately, or reserve the right to require that the information be provided later.³⁷

6.5 Decision

During a proceeding, the Commission may, in a decision, grant or deny the relief sought in whole or in part, on an interim basis.³⁸ An interim decision shall be without prejudice to the Commission's ability to issue a final decision (or to amend the content thereof), after completion of the proceeding.

The CITC will conclude a proceeding that reviews an allegation of abuse of a dominant position with the issuance of a CITC decision. The CITC will issue its decision within 45 days from the date that the public record of the proceeding has been completed by submission of the last materials whose submission the CITC has required or invited. Where this is impossible for workload or other valid reasons, the CITC shall issue a procedural direction

³³ Rules of Procedure, subparagraph 24.3(d).

³⁴ Rules of Procedure, Article 19.

³⁵ Rules of Procedure, Article 15.

³⁶ Rules of Procedure, subparagraph 16.2(d).

³⁷ Rules of Procedure, Article 15.

³⁸ Rules of Procedure, paragraph 16.6.

notifying registered parties within those 45 days, indicating that the decision has been delayed.³⁹

During that period, the CITC will submit a draft of the decision (which shall state clearly the facts and law upon which it is based) to the CCP for review before it is finalized by the CITC.⁴⁰

The CITC decision shall state clearly the facts and law upon which it is based and provide reasons that are consistent with these Guidelines.⁴¹ The decision will constitute the CITC's determinations as to whether to designate one or more service providers as dominant within one or more *ex post* markets for the time period canvassed by the review,⁴² and to whether an abuse of such dominant position has occurred within the meaning of Article 31 of the Bylaw.⁴³

As stated in Article 33.2 of the Bylaw,

a determination by the Commission under paragraph 33.1 (determination of abuse of dominance and anti-competitive practices) shall be final and binding on all parties, provided such parties received advance notice that such a decision was being considered, and had an opportunity to comment on the relevant issues before the decision was made.

Accordingly, the CITC will consider that, once released, its decision in respect of abuse of a dominant position shall be final and binding on all parties, and will expect immediate compliance from all parties. Nonetheless, Article 17 of the Rules of Procedure provides that a registered party adversely affected by a decision of the Commission may, within 15 days from the first publication of the decision on the Commission's official web site, file a motion for reconsideration. Further, Article 39 of the Act provides that the Commission's decisions can be appealed to the Minister and, if the Commission's decision is upheld by the Minister, to the Grievance Dewan according to its Act. Additional procedures are available under section 39 of the Act.

6.6 Enforcement

In the event the decision designates a service provider as dominant for the relevant period and, further, finds an abuse of a dominant position on the part of that service provider, the decision may require specific changes, including cessation, to specified actions or activities,

³⁹ Rules of Procedure, paragraph 16.8.

⁴⁰ For greater certainty, CITC may choose not to submit an interim decision to the CCP for review prior to issuance, in particular, where CITC is of the view that the issuance of an interim decision is particularly time-sensitive.

⁴¹ Rules of Procedure, paragraph 16.4; Bylaw, paragraph 33.4.

⁴² Bylaw, paragraph 30.4.

⁴³ Bylaw, paragraph 33.1

at a prescribed time, subject to prescribed conditions.⁴⁴ In order to address more complex violations, the CITC decision may also

- establish periodic reporting requirements, either to ensure that the CITC's instructions are adhered to or to determine their ongoing impact on markets, competitors and users;⁴⁵ or
- request that the infringing provider participate in mediation with those affected by its abuse of a dominant position in order to develop a solution.⁴⁶

In drafting the decision, the CITC may combine any of the above-noted remedies. For instance, the CITC could require that parties resolve a particular aspect of the behaviour under review through mediation during a specified number of days following the decision and report that resolution to the CITC for approval, failing which a specified sanction will automatically apply.

6.7 Sanctions

In addition to the above-noted remedies the CITC may also, in the context of a decision designating *ex post* a dominant service provider whose actions have constituted an abuse of a dominant position, apply any of three measures that are in the nature of sanctions.

First, the CITC may require the provider to publish an acknowledgement and apology in a newspaper of wide circulation, in the manner specified in the CITC decision.⁴⁷

Second, the CITC may refer the matter to the Violations Committee to impose a financial penalty.⁴⁸ Whether this sanction should apply and, if so, its amount, is to be considered by the "Violations Committee" pursuant to the provisions of Articles 94 and 95 of the Bylaws.

Third, the CITC may require divestment by the service provider of ownership of some lines of business or require that those lines of business be carried out in a separate company with separate books of account.⁴⁹ However, the CITC may decide to use this sanction only in the case of repeated breaches of remedies previously ordered in respect of abuse of a dominant position, and then only after a second and subsequent hearing giving the service provider under review the opportunity to make comments,⁵⁰ followed by a finding that such a decision

⁴⁴ Bylaw, subparagraph 34.1(a), clauses 1 and 2.

⁴⁵ Bylaw, subparagraph 34.1(e).

⁴⁶ Bylaw, subparagraph 34.1(c), referring to Articles 44, 45 and 46 of the Bylaw.

⁴⁷ Bylaw, subparagraph 34.1(d).

⁴⁸ Bylaw, subparagraph 34.1(b); Act, paragraphs 37(15), 37(3) and 38(1); Bylaw, paragraph 95.3.

⁴⁹ Bylaw, paragraph 34.2.

⁵⁰ Bylaw, paragraph 34.2, subparagraph (a).

is an effective means of putting an end to the continuation of the abuse.⁵¹ As a result, this sanction may be adopted under either or both the *ex post* and *ex ante* frameworks.⁵²

6.8 Other Remedies

The remedies set out in sections 6.6 and 6.7 are without prejudice to any rights that an aggrieved party may have in respect of damages or injunctive relief under Saudi law.

⁵¹ Bylaw, paragraph 34.2, subparagraph (b).

⁵² Dominance Framework, paragraph 2.5.3.

Appendix 1: Abuse of a Dominant Position Complaint Form

Note: CITC reserves the right not to consider a claim that it deems to be insufficiently documented or frivolous. Any claim of confidentiality must be made in accordance with the provisions of Section 7.2 of the Guidelines.

Section 1: General Information

A: Applicant's Contact Information

Name:

Contact Information:

B: Company or Person Complained Against

Name:

Contact Information:

C: Alleged Abuse of a Dominant Position

Check all boxes that apply.

Non-Price-Related Abuses

Failure to supply
essential facility

Interoperability

Pre-emption

Technical Information

Interconnection

Competitor Information

Price-Related Abuses

Price Squeezes	<input type="checkbox"/>	Predatory Pricing	<input type="checkbox"/>
Exclusionary Bundling	<input type="checkbox"/>	Predatory Bundling	<input type="checkbox"/>

D: Facilities or Services at Issue

List all of the products or services in respect of the abuse of a dominant position is alleged.

E: Ex ante Regulation of Facilities or Services at Issue

For each of the facilities or services listed above provided by the Respondent please indicate whether there is an *ex ante* remedy whose objective was to prevent or identify the alleged abuse of a dominant position. If so, please indicate whether this complaint relates to the alleged non-compliance of the Respondent as regards the *ex ante* remedy in question. Alternatively, please indicate whether this complaint relates to an alleged abuse of dominant position in relation to facilities or services provide by the Respondent for which there is no related *ex ante* remedy.

F: Relevant Dates

Identify when the abuse of a dominant position is alleged to have occurred.

Start Date	End Date

G: Relief Sought and Jurisdiction

Concisely state the remedy or remedies sought, and the provisions in the Act or the Bylaw that provides for CITC jurisdiction to take the actions or to compel that the specific actions be undertaken

H: Additional Parties Recommended

List any additional service providers that you consider should be a party to the proceeding, and the reason that the service providers should be added - for example, if they can provide evidence of the complaint, if they have been affected by the abuse of a dominant position, or if they have participated in the abuse of a dominant position.

No.	Service Provider Name	Reasons
1.		
2.		
3.		
4.		
5.		

I: Submission Date

Date (MM / DD / YYYY):

Section 2: Relevant Markets

Complete for each of the products or services identified in Section 1.
Please attach additional sheets as necessary where more than two markets are alleged to be involved.

J: Product(s) or service(s) identified in Section 1 that fall into this market

a. Market. Please indicate the name of the market. Please indicate whether the market in question has been designated by the CITC as a market for *ex ante* remedies pursuant to the *Ex Ante Dominance Framework*. If not, please also fill out section **e.** below.

b. Identify the customer segment scope of the market by checking the appropriate box:

Retail Wholesale

Residential Business or Institutional

c. Identify the applicable geographic scope of the market by checking the appropriate box and indicating the appropriate region:

Scope	Specific Region
Global	<input type="checkbox"/>
National (KSA)	<input type="checkbox"/>
Province	<input type="checkbox"/>
Municipal	<input type="checkbox"/>
Other geographic scope	<input type="checkbox"/>
<p>d. Identify all corroborating evidence which is attached to this application in support of the above, such as: customer surveys, advertisements, market research, or international benchmarks:</p>	
<p>e. To be completed only in case where the proposed market in a. has not has been designated by the CITC as a market for <i>ex ante</i> remedies pursuant to the <i>Ex Ante Dominance Framework</i>. Please provide rationale for considering this proposed market as a relevant telecommunications market.</p>	

Section 3: Assessment of Dominance

Complete for each of the markets identified in Section 2.

Please attach additional sheets as necessary where more than two markets are alleged to be involved.

K: Market Listed in Section 2
List all known market participants whom you believe held at least a 10 percent market share, measured on any reasonable basis, during the period in which the behaviour at issue took place. Please indicate your best estimate of these firms' market shares at the start and end dates listed in item E on this form. If there are more than ten competitors, please enter "Other" in row 11 and indicate their total combined market share.

No.	Market Participant	Est. Market Share		Basis for Estimate (refer to attached material where provided)	Notes
		Start Date	End Date		
1.	(Respondent)				
2.	(Applicant)				
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					
11.	(All other competitors)				

If you consider that the respondent is dominant in this market, list the reasons for that view. Please indicate whether the CITC has designated the respondent as a dominant service provider for the market in question pursuant to the <i>Ex Ante Dominance Framework</i> . If not, please provide full rationale for considering this service provider as a dominant service provider for the market in question.

List the systems, networks, products or services which are at issue and you assert are required as inputs to compete in this market, if any.

<i>Input</i>	<i>Supplier(s)</i>	<i>Why the input is essential</i>	<i>Corroborating evidence or argument attached to support this assertion</i>
1.			
2.			
3.			
4.			

Section 4: Infringements Alleged

L: Complaint

List the provision of the Bylaw that the respondent is alleged to have breached, identify how the respondent breached the bylaw, and any supporting evidence that has been attached to this complaint.

Provision of Bylaw	Nature of the Breach	Attached Evidence

Section 5: Chronology

M: Chronology

Please provide a detailed chronology of all of the individual events (e.g. agreement signed, letter received, interconnection undertaken at data centre, etc.) that, in fact, took place and are relevant to this complaint.

Date	Description of Event	Title of Attached Corroborating Evidence

Section 6: Summary of Attachments

N: List of Attachments

Summarize all of the attachments that are listed in sections 2-5 above, with reference to the section(s) in which the attachment is referred to, and whether confidentiality is claimed over the document.

Document Title / Description	Section(s)	Confidentiality Claim
		<input type="checkbox"/>
		<input type="checkbox"/>
		<input type="checkbox"/>
		<input type="checkbox"/>
		<input type="checkbox"/>
		<input type="checkbox"/>
		<input type="checkbox"/>
		<input type="checkbox"/>