OF 2026 - G1 - Guidelines

Guidelines on the Abuse of a Dominant Position

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A. Introduction

1. The Utility Regulation and Competition Office (the '*Office*' or '*OfReg*') is the independent regulator established by section 4(1) of the Utility Regulation and Competition Act (as revised) (the '*URC Act*') for the electricity, information and communications technology ('*ICT*'), water, wastewater and fuels sectors [1]in the Cayman Islands.

2. The Guidelines are to be applied taking into consideration the unique nature of the Cayman Islands' jurisdiction and the relevant markets therein. References to other jurisdictions are provided for illustrative purposes only and are not to be read as applying the rules and principles of that jurisdiction. This Guidance takes into account the fact that the Cayman Islands is a 'microstate' (i.e., a very small jurisdiction with limited population and land area), and, in consequence, recognises that competition principles, including remedies, are to be applied appropriately and proportionately in that context.

3. Cayman Islands being a "micro state" jurisdiction, which:

    - supports a relatively small sized service market (e.g., c70,000 population out of which a lower subset purchases the utility services);
    - has services provided over three Islands, with each Island having its own particular competition constraints;
    - has lower economies of scale (unless it relates to International sectoral providers); and
    - has increased provision costs (as goods/utility specialists need to be imported, thus increasing capital and operating costs).

    In the jurisdiction, the markets can only support a limited number of competitors, given the returns of the capital employed and such markets being relatively concentrated. In addition, it is likely that purchasers exert lower countervailing buyer power on monopoly pricing throughout the value chain.

[1] Schedule 1 of the Utility Regulation and Competition Act (as revised) (the 'URC Act').

4. The Cayman Islands is a territory of the United Kingdom (the '*UK*'). It should be noted that although the UK is no longer a part of the European Union (the '*EU*'), decisions adopted by EU institutions, bodies, offices and agencies before 31 December 2020, and addressed to the UK or to natural or legal persons residing in the UK, are still potentially binding.[2] Section 3 of the European Union (Withdrawal) Act 2018 (the '*Withdrawal Act'*), subject to exceptions, provides that directly effective EU legislation which was operative before 31 December 2020 forms a part of UK's domestic law.[3] Therefore, any references in this document to concepts under EU law will continue to have effect in the UK for as long as, and in so far as, EU law has legal effect in the UK (that is, unless and until the EU law to which these concepts relate is superseded by statute or an applicable court ruling).[4]

5. Given the Cayman Islands' size and market concentration, the Office recognises that some conduct may have limited observable effects due to scale. In such cases, the Office will assess whether the conduct was objectively capable of harming competition within the Islands, applying proportionality and evidence appropriate to a microstate economy.

6. The Office, when considering any allegations of an abuse of a dominant position in a market or sector for which the Office has responsibility, may be informed by among other things decisions made by the UK's Competition and Markets Authority ('*CMA*') as well as decisions made in other commonwealth and regional jurisdictions.

B. Legal Framework

7. Part 12 of the URC Act applies to, among other things, abuse of a dominant position relating to covered services.

[2] See paragraph 2.4 ii, Competition and Markets Authority, "Guidance on the functions of the CMA after the end of the Transition Period", Pg. 7, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940943/Guidance_Document_for_End_of_Transition_Period_--.pdf

[3] European Union (Withdrawal) Act 2018, Section 3, which was accessed at https://www.legislation.gov.uk/ukpga/2018/16/section/3/enacted

[4] The UK, via The Competition (Amendment etc.) (EU Exit) Regulations 2019 (https://www.legislation.gov.uk/ukdsi/2019/9780111173930/contents), in effect revoked the application of the EU competition regime and, instead, has provided for a standalone UK competition regime.

8. This advisory guideline, prepared under section 6(2)(e) of the Act, provides a source of general guidance as to the Office's consideration of section 70 of the Act relating to an abuse of a dominant position in a market or sector for which the Office has responsibility for.

9. Section 70(1) (the '*section 70 prohibition*') of the URC Act prohibits any conduct on the part of one or more sectoral providers which amounts to the abuse of a dominant position in a market or sector for which the Office has responsibility.

10. While section 70(1) states that "*an authorisation holder shall be entitled to protect its legitimate business interests",* it goes on to confirm that such 'protective behaviour' is "*subject to [the URC] Act and any other relevant Law*." Additionally, the Office will assess such justifications having regard to the necessity and proportionality of the conduct in light of its actual or likely effects on competition and consumers.

11. Section 70(2) states:

> *The conduct referred to in subsection (1) [section 70(1)] may, in particular, constitute such an abuse if it consists in –*
>
> *a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
>
> *b) limiting production, markets or technical development to the prejudice of subscribers;*
>
> *c) applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage, unless otherwise approved or exempted by the Office;*
>
> *d) making the conclusion of such contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts; and*

e) *using revenues attributed to a particular service or activity to cross subsidize unfairly or affect competition for another service or activity.*

12. Section 70(3) deems a sectoral provider with a dominant position to have significant market power ('*SMP*').

13. Finally, section 70(4) clarifies that dominant position means having a dominant position within the Islands.

14. Section 71 of the URC Act empowers the Office to investigate and determine whether the conduct of one or more sectoral providers amounts to an abuse of a dominant position.

15. It should be noted that the definition of SMP refers to a "*sectoral provider*" and other related provisions in the URC Act refer to "*undertakings*". The term "*undertaking*" is not defined in the URC Act. However, the term "*sectoral provider*" is defined in the URC Act as "*a person, whether or not an authorisation holder, who provides goods or services in a sectoral utility*", and the term "*sectoral utility*" is defined as "*a utility market or sector for which the Office has specific responsibility under any sectoral legislation*".

16. The Office will therefore consider an undertaking to be a person engaged in economic activity as a sectoral utility unless the context provides otherwise. The Office will consider sectoral providers to be a type of undertaking, and references in these Guidelines to the term "*undertaking*" should be taken to mean "*sectoral provider*" unless the context requires otherwise.

17. Where two or more separate persons form a single economic entity, the Office may consider them to be a single undertaking. The Office will assess this on a case-by-case basis.

C. Scope and Purpose of the Guidelines

18. The Guidelines are meant to assist sectoral providers and other interested parties in understanding how the Office will apply certain provisions of the URC Act. The Guidelines indicate the Office's usual position on the subject,

and the Office will generally follow the principles and approach outlined herein. Where the Office departs from such, it will explain why. The Office will update the Guidelines from time to time to take account of international best practice in the assessment of abusive conduct in the markets or sectors for which the Office has responsibility.

19. These Guidelines are advisory guidelines. They should not be taken as a statement of law, and they do not have binding legal effect. The Office reserves the right to consider other factors not covered in these Guidelines, where necessary. If the Office decides to depart from the Guidelines, the Office will inform the affected parties of its reasons for doing so.

20. These Guidelines set out the interpretation of the Act, and the assessment process of whether an undertaking is violating the Act, as well as enforcement considerations that will guide the Office's action in applying section 70 to abusive conduct by dominant undertakings. Section 70 does not prohibit an undertaking from holding a dominant position, only from abusing such a position. A dominant undertaking has a special responsibility to not allow its conduct to restrict or distort competition on the relevant market.[5]

21. The Guidelines are intended to provide greater clarity and predictability as regards to the general framework of analysis which the Office will utilise in determining whether it will pursue cases concerning various forms of abusive conduct. These Guidelines will also allow undertakings to better assess whether certain conduct would possibly result in a section 70 infringement and intervention by the Office under section 71.

22. The section 70 prohibition applies to undertakings which hold a dominant position on one or more relevant markets. A dominant position may be held by one undertaking – single dominance, or by two or more undertakings – collective dominance. References to a dominant undertaking should be

[5] In Michelin v Commission [1983] ECR 3461, it was stated that a firm in a dominant position "*has a special responsibility not to allow its conduct to impair undistorted competition on the common market*" - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0322 . The UK's Competition and Markets Authority was bound by the fundamental principle of the primacy of EC law, and had to follow the case law of the European Court in interpreting EC legislation. Hence, the Michelin v Commission judgment was followed in the UK, and is now regarded as a part of UK domestic legislation. The UK's Competition Appeals Authority followed the ECJ's judgment in its cases, e.g., Genzyme Limited v The Office of Fair Trading [2004] CAT 4.

taken to include references to undertakings that are collectively dominant, for the purposes of these Guidelines.

23. The Office will use these Guidelines in conducting *ex post* competition assessments, in accordance with Part 12 of the URC Act as outlined above, in Section B: Legal Framework. *Ex post* competition assessments are carried out in response to specific concerns or allegations relating to possible anti-competitive practices, on application by any party or on the Office's own initiative, in accordance with section 71 of the URC Act. *Ex post* competition assessments are therefore retrospective in nature.

24. In these Guidelines, the Office focuses on those types of conduct that when exercised by a dominant undertaking, could potentially have the anti-competitive object through exclusion, i.e., the foreclosure of competitors (thereby indirectly harming consumers through, for example, the increase in prices due to the lack of competitive constraints), or a direct exploitation of consumers via higher prices charged through, for example, excessive pricing – a direct manifestation of significant market power.

25. It is important to note, however, that the same types of general conduct discussed in these Guidelines may often be adopted by non-dominant undertakings, demonstrating that such conduct can represent normal competitive practices and be pursued for pro-competitive reasons. The Office will be taking an effects-based approach to the assessment of anti-competitive practices in relation to the abuse of dominance.

26. The Office will assess alleged abuses on a case-by-case basis, taking into account the specific facts and circumstances of each case. The Office will take into account the specific regulatory environment in conducting its assessment. The Office may therefore adapt the approach set out in these Guidelines to the extent that this would appear to be reasonable and appropriate in a given case.

D. Abuse of a Dominant Position - General Approach

27. The Office aims to ensure that dominant undertakings do not restrict or distort competition by foreclosing its competitors in an anti-competitive

manner, thereby adversely impacting consumer welfare by, for example, in the form of higher price levels than would have otherwise prevailed, or a reduction in quality and/or choice of products and services.

28. Dominant undertakings are to compete on the merits of the products and services that they provide. Competitors who are not as efficient, and who deliver less to consumers in terms of price, choice, quality and innovation will leave a market that is characterised by normal or effective competition.

29. It is the *exclusionary abuses* (i.e., the *anti-competitive foreclosure* and elimination of effective competition, and how it impacts consumer welfare) that are the primary concern of the Office, albeit the Office's role is to protect the competitive process and not simply protect competitors.

30. However, the Office is also concerned by potential *exploitative abuses* by dominant undertakings in situations where competitive market forces are not strong enough to prevent the dominant undertakings from causing direct harm to consumers, for example by charging consumers excessively higher prices, limiting quality or reducing choices available to consumers. The Office's role in such cases is essentially to protect consumers from direct harm caused by undertakings engaging in *exploitative abuses*.

31. The following elements are required to establish a section 70 infringement:

    I. Definition of the relevant market;
    II. A dominant position within the relevant market(s) within the Cayman Islands;
    III. Anti-competitive conduct within the relevant market(s) within the Cayman Islands and restrictions by effects of the conduct; and
    IV. Material effect on competition

D.1 Market Definition

32. A dominant position is held in relation to a market, therefore the relevant market(s) in which the undertaking competes need to be identified before an undertaking can be held to enjoy a dominant position.

33. Market definition is a tool to identify and define the boundaries of competition between undertakings, the main objective being to identify in a systematic way those competitive constraints that the undertakings involved may face.[6] Market definition is key to identifying the competitive constraints on an undertaking's conduct, both in a product and in a geographic dimension. In this regard, by identifying those actual competitors capable of constraining an undertaking's conduct and preventing it from behaving independently of competitive pressure, market definition provides a framework in which competition analysis is performed.

34. The Office has published separate guidelines on the *Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power* [7] ("the SMP Guidelines") which sets out the approach the Office expects to take with respect to the principles applied in defining relevant markets, and criteria used in assessing significant market power in the markets defined.

35. In summary, in defining the relevant market the Office will have regard to demand-side substitution and supply-side substitution as the main criteria used to inform the view on existing competition within the appropriately defined market. Supply-side substitution is considered when its effects are equivalent to those of demand-side substitution in terms of being effective and immediate. The third competitive constraint is the existence of potential competition and the extent to which it can represent an effective competitive constraint is dependent upon the conditions of entry into the relevant market. Potential competition is examined at a later stage when the position

[6] See the European Commission, *Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law*, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN. When considering a Chapter II prohibition under the Competition Act 1998, the UK's Competition and Markets Authority states that the dominant position must be held within the United Kingdom or any part of it. See Competition and Markets Authority's *Guidelines on Abuse of a dominant position:OFT402*, which can be accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf . The UK's Competition and Markets Authority also has *Guidelines on Market Definition*, which was prepared by the former Office of Fair Trading and can be accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf . The Competition and Markets Authority also refers to its *Guidelines on the Assessment of Market Power:OFT415,* which was also prepared by the former Office of Fair Trading, and can be accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284400/oft415.pdf

[7] See the Office's *Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power*: http://www.ofreg.ky/upimages/commonfiles/1507891125OF20172DeterminationandGuidelinesontheCriteriafortheDefinitionofRelevantMarketsandtheAssessmentofSMP.pdf

of the undertakings in the relevant market have been determined, and when such position gives rise to competition concerns such as whether an undertaking or a group of undertakings have SMP in the relevant market.

36. The relevant market can be described along its product and geographic dimensions which will be assessed using a number of items of evidence. For the product dimension, these may include:

- evidence of substitution in the recent past;
- patterns in price changes;
- quantitative tests;
- views of customers and competitors;
- barriers and costs associated with switching demand to potential substitutes;
- evidence on product characteristics; and
- different customer groups and price discrimination.

37. For the geographic dimension, the items of evidence may include:

- past evidence of diversion of orders to other areas;
- basic demand characteristics;
- views of customers and competitors;
- examination of the customers' current geographic pattern of purchases; and,
- barriers and costs associated with diverting orders to companies located in other areas.

38. Each of these items are described in more detail in the Office's *SMP Guidelines*.[8]

39. For the avoidance of doubt, the above list is not exhaustive, and the Office reserves the right to consider any other relevant criteria or items of evidence.

[8] See the Office's *Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power*.

http://www.ofreg.ky/upimages/commonfiles/1507891125OF20172DeterminationandGuidelinesontheCriteriafortheDefinitionofRelevantMarketsandtheAssessmentofSMP.pdf

D.2 Assessing Significant Market Power ('*Dominance*')[9]

40. Following from the identification of the relevant market in which the alleged abuse is said to have occurred, the assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of section 70. The Office, in its assessment, will have regard to the general framework of analysis set out in its SMP Guidelines.

41. As referenced in paragraph 6, an undertaking will be deemed to have SMP if, individually or collectively with other undertakings in the relevant market, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers.[10]

42. Section 70(3) further deems a sectoral provider with a dominant position to have SMP. In other words, an undertaking will *not* hold a dominant position *unless* it possesses significant market power.

43. An overall analysis of the economic characteristics and structure of the relevant market is necessary before concluding that an undertaking or group of undertakings hold a dominant position on the relevant market. The assessment will take into account the competitive structure of the market, particularly the market position of the undertaking and its competitors; any barriers to expansion and/or entry faced by existing or potential competitors; and the actual or potential constraints exerted by its customers (i.e. countervailing buyer power) for example, the credible threat of switching to competing suppliers, sponsor new entry, or even vertically integrate upstream and effectively become a new entrant itself, competing in the supply market.

[9] For the purposes of these Guidelines, the Office will consider "*dominance*" in a market and "*having SMP*" in that market to mean the same thing. Ref. s 70(3) of the URC Law.

[10] The European Court of Justice in Case 27/76 United Brands v Commission [1978] ECR 207, [1978] 1 CMLR 429 defined a dominant position as: "…*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*." The UK's Competition Appeals Authority followed the ECJ's definition in its cases, e.g., Genzyme Limited v The Office of Fair Trading [2004] CAT 4.

44. With a dominant position, the disciplinary effect from competitors, countervailing buyer power, or consumers would not be sufficiently effective, thus allowing the undertaking or group of undertakings to behave independently (in terms of setting prices, quality, quantities, etc.) of forces that would otherwise prevail under effectively competitive conditions.

45. The Office may consider that effective competitive constraints are absent even if some actual or potential competition remains.[11] In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.[12] [13]

46. Single dominance concerns normally arise in the case of undertakings with market shares of over 40%. In some cases, there may be concerns about dominance with lower market shares, as dominance may occur without the existence of a large market share.[14]

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[11] See Case 27/76 United Brands Company and United Brands Continentaal v Commission [1978] ECR 207, paragraphs 113 to 121; Case T-395/94 Atlantic Container Line and Others v Commission [2002] ECR II-875, paragraph 330.

[12] See Case 27/76 United Brands and United Brands Continentaal v Commission [1978] ECR 207, paragraphs 65 and 66; Case C-250/92 Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab [1994] ECR I-5641, paragraph 47; Case T-30/89 Hilti v Commission [1991] ECR II-1439, paragraph 90.

[13] See the Office's *Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power*: http://www.ofreg.ky/upimages/commonfiles/1507891125OF20172DeterminationandGuidelinesontheCriteriafortheDefinitionofRelevantMarketsandtheAssessmentofSMP.pdf

[14] See the European Commission, *Commission guidelines on the market analysis and the assessment of significant market power under the community regulatory framework for electronic communications networks and services*, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0711(02)&from=EN - "*…undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position on the market concerned.*" Following from single dominance concerns normally arising in the case of undertakings with market shares of over 40%, in its Guidelines, the Commission states that it "*may in some cases have concerns about dominance even with lower market shares, as dominance may occur without the existence of a large market share*." The UK also supports the European Commission's position, although there are no specified thresholds for defining dominance under the Chapter II prohibition. See the UK's Competition and Markets Authority's *Abuse of Dominance Guidelines*, which was the guidelines prepared by the former Office of Fair Trading. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf

See United Brands v Commission, op. cit. *The greater the difference between the market share of the undertaking in question and that of its competitors, the more likely will it be that the said undertaking is in a dominant position. For instance, in Case COMP/M.1741 — MCI WorldCom/Sprint it was found that the merged entity would have in the market for the provision of top-level Internet connectivity an absolute combined market share of more than [35-45]%, several times larger than its closest competitor, enabling it to behave independently of its competitors and customers (see paragraphs 114, 123, 126, 146, 155 and 196).* The UK's Competition and Markets Authority typically applies the United Brands Test when assessing whether a price

47. The Office will take into account specific circumstances in each sectoral utility when determining the relevant thresholds for market share that could indicate dominance, having regard to the characteristics of the relevant markets in the context of the Cayman Islands economy.

48. The existence of high market shares raises a concern that an undertaking *might* be in a dominant position, however, a position of dominance cannot be established by *solely* considering market shares. Thus, the Office will use a range of evidence in determining if an undertaking is effectively dominant.[15]

49. Two or more undertakings can be found to be in a joint/collective dominant position if, even in the absence of structural or other links between them, they operate in a market, the structure of which is considered to be conducive to coordinated effects – that is, it encourages parallel or aligned anti-competitive conduct on the relevant market.[16]

50. The assessment of collective dominance and of the types of abusive conduct that can be committed by collectively dominant undertakings is complex and the Office will, as with single dominance cases, undertake the assessment on a case-by-case basis, having regard to the characteristics of the relevant markets in the context of the Cayman Islands economy.

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is unfairly high, e.g., in its abuse of dominance investigation in relation to the pricing of phenytoin sodium capsules (2012 – 2016). See (1) Flynn Pharma Limited, (2) Flynn Pharma (Holdings) Limited v Competition And Markets Authority [2018] CAT 11 and (1) Pfizer Inc., (2) Pfizer Limited v Competition And Markets Authority [2018] CAT 11.

The Commission also states that "*[a]ccording to established case-law, very large market shares, in excess of 50%, are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.*" See Case C-62/86, AKZO v Commission, [1991] ECRI-3359, paragraph 60; Case T-228/97, Irish Sugar v Commission, [1999] ECRII-2969, paragraph 70, Case Hoffmann-La Roche v Commission, op. cit, paragraph 41, Case T-139/98, AAMS and Others v Commission [2001 ECRII-0000, paragraph 51.

[15] The presence of high barriers to entry is key evidence that the Office will use in its assessment of dominance.

[16] See section 70 of the URC Act, which provides that any conduct on the part of one or more sectoral providers which amounts to the abuse of a dominant position in a market or sector for which the Office has responsibility is prohibited.

D.3 Assessment of Anti-competitive Foreclosure

51. As noted above, it is the exclusionary abuses (i.e., the anti-competitive foreclosure and elimination of effective competition), and how it impacts consumer welfare that are the primary concern of the Office.

52. '*Anti-competitive foreclosure*' describes the situation where existing or potential competitors' access to supplies or markets is hampered or completely eliminated as a result of the conduct of the dominant undertaking, whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of customers and consumers.

53. The Office will address an alleged anti-competitive foreclosure at the relevant functional level(s) of the market. Such anti-competitive foreclosure may therefore be assessed at (1) the intermediate level in upstream markets, (2) at the level of final consumers in downstream markets, or (3) at both levels. In this context, the end users are all those direct or indirect users of the relevant products or services affected by the conduct, namely:

    - intermediate producers/service providers operating in the upstream markets, who use the relevant product/service as a wholesale input to the production of a downstream product/service, including a final product/service supplied in the relevant retail market; and

    - final consumers of the product/service supplied in the relevant retail market.

54. In the situation where the intermediate users are existing or potential competitors of the dominant undertaking, the assessment will focus on the effects of the conduct in question on downstream users.

55. Qualitative evidence can be relied upon to identify the likelihood of consumer harm, and where possible and appropriate – quantitative evidence.

56. The Office will normally intervene under section 70 where there is evidence to show that the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. In addition to the factors listed below, an investigation of alleged abuse of a dominant position will also rely on the

analysis of more specific factors that are discussed further in Section E below, as well as any other relevant factors.

57. The following factors are considered relevant to an assessment of whether the conduct in question is likely to lead to anti-competitive foreclosure:

- **the position of the dominant undertaking:** the stronger the dominant undertaking's position on the relevant market, the greater the likelihood that the conduct protecting that position will lead to anti-competitive foreclosure in that market.

- **the conditions on the relevant market:** the extent of barriers to entry affecting *potential* competition and the extent of barriers to expansion affecting *existing* competitors. Barriers to entry such as economies of scale and/or scope and network effects affect a potential competitor's decision to enter a market, or an existing competitor's ability to operate in the relevant market if the dominant undertaking forecloses a significant part of the relevant market. Significant barriers to entry in the upstream and/or downstream market may make it more costly for a competitor to possibly vertically integrate and overcome foreclosure.

- **the position of the dominant undertaking's competitors:** a smaller competitor may play a significant competitive role if it may be the closest competitor to the dominant undertaking, be a particularly innovative competitor, or have the reputation of cost-cutting. The Office will consider, in appropriate cases, any realistic, effective and timely strategies that competitors would deploy to counter the conduct of the dominant undertaking.

- **the position of the customers or input suppliers:** the Office will consider the possible selectivity of the conduct in question. The dominant undertaking may apply the practice only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors, thereby enhancing the likelihood of anti-competitive foreclosure. Any counterstrategies that customers or input suppliers may deploy in response to the conduct of the dominant undertaking will also be considered.

- **the extent of the allegedly abusive conduct:** generally, the higher the percentage of total sales in the relevant market affected by the alleged conduct, the longer its duration, and its regularity – the greater is the likely foreclosure effect.

- **possible evidence of actual foreclosure**: if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking as compared to its competitors may yield direct evidence of anti-competitive foreclosure.

- **direct evidence of any exclusionary strategy:** the Office will have regard to any internal documents which may contain evidence of strategies designed to eliminate existing competitors, prevent potential competitors from entering the market, or to pre-empt the emergence of a market. Direct evidence may be helpful in interpreting the conduct in question.

58. Overall, the assessment of anti-competitive foreclosure will involve comparing the factual scenario, which reflects the likely situation in future resulting from the dominant undertaking's conduct in place, against the appropriate counterfactual, which projects the likely situation in future in absence of the conduct in question or under an alternative scenario that might eventuate.

59. However, in some cases the Office might conclude that the alleged anti-competitive conduct is likely to cause consumer harm, without performing a detailed assessment of anti-competitive foreclosure. This will typically be the case in circumstances where the conduct in question restricts, prevents or distorts competition without creating any efficiencies.

60. The Office, in accordance with section 70 of the URC Act, will adopt an effects-based approach to the assessment of anti-competitive foreclosure by dominant undertakings. In line with international best practice, including the jurisprudence of the UK Competition and Markets Authority and the European Commission, the Office will assess whether the conduct in question is capable of producing exclusionary effects in the relevant market. Evidence of purpose or intent may be taken into account where relevant, but the decisive question is whether the conduct results in or is likely to result in the prevention, restriction or distortion of competition.

61. While the Office will primarily assess conduct by reference to its effects or likely effects, evidence of an undertaking's purpose or internal intent may assist in understanding the commercial rationale for the conduct. Such evidence may be particularly relevant in determining whether the conduct departs from competition on the merits. However, intent alone shall not establish an abuse absent conduct capable of producing anti-competitive effects.

62. The Office, when assessing the alleged anti-competitive act, will also examine the credibility of any efficiency or pro-competitive claims raised by the dominant undertaking and may seek evidence as to the role the asserted efficiency or pro-competitive justification played in the undertaking's decision-making process. After such evidence is collected, the Office will determine if there were other alternate means of achieving such benefits that would have resulted in a lesser impact on competitors where appropriate.

63. The effects-based approach implemented by the Office will focus on the following questions:

- Does the conduct in question have, or is it likely to have, the effect of substantially reducing competition in the relevant market(s)?

- Does the conduct depart from competition on the merits by means other than efficiency, innovation, or legitimate commercial response?

- Does the conduct result in, or is it capable of resulting in, consumer harm through foreclosure, higher prices, reduced quality, or reduced innovation?

D.4 Measures of Cost

64. In assessing certain types of abusive conduct, the Office may have to consider the relevant measure of the underlying costs to be taken into account according to the specific nature of a case. The analysis of cost data is required in cases of exploitative abuses relating to pricing, such as the assessment of excessive pricing. Likewise, in cases of exclusionary abuses, in order to determine whether even a hypothetical competitor *as*

efficient as the dominant undertaking[17] would be likely to be foreclosed by the conduct in question, the Office has to examine cost data and price data.

65. This will require that sufficiently reliable data be available. Where there is sufficiently reliable data available, the Office will use information on the costs of the dominant undertaking itself. If reliable information on those costs is not available, the Office may decide to use the cost data of competitors or other comparable reliable data.

66. In order to form the appropriate cost benchmark, the cost data will be assessed on the basis of whether they reflect (1) fixed or variable costs,[18] and (2) direct or indirect costs.[19] Another distinction will also be taken into account between sunk costs and other fixed costs.[20]

67. Therefore, there are various cost benchmarks that the Office may consider using in its assessment of abusive conduct, such as:

- average avoidable cost (AAC)[21]
- average variable cost (AVC)[22]

[17] Any intervention by the Office is to prevent anti-competitive foreclosure, therefore the Office will only intervene where the conduct in question has already been, or is capable of, weakening or eliminating the competitive constraints from those competitors that are considered to be as efficient as the dominant undertaking.

[18] Variable costs change with the level of output produced, while fixed costs remain the same.

[19] Direct costs are those that are directly attributable to the relevant product/service, while indirect costs are the costs that are joint or common in the production of the relevant product/service and one or more other products/services.

[20] All sunk costs are fixed costs. Fixed costs are deemed to be sunk when they are not recoverable, such as costs incurred in purchasing an asset that cannot be resold or reused for other purposes.

[21] The European Commission's guidance refers to the AAC as "*the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct.*"

[22] In most cases, AAC and the average variable cost (AVC) will be the same, as it is often only variable costs that can be avoided. In circumstances where the AAC and AVC differ, the AAC better reflects possible sacrifice, as it would take into account the sunk costs that an undertaking would have to incur in order predate, such as the sunk cost of expanding output.

As noted in Bishop Walker (page 303):

"*The adoption of AAC provides two main advantages over the use of AVC. First, it avoids the problem of having to achieve a precise distinction between fixed and variable costs within the specific period. Secondly, it provides a more accurate measure of the avoidable losses than AVC since it also includes product-specific*

- long-run average incremental cost (LRAIC)[23]
- forward-looking long-run incremental cost (FLLRIC)[24]
- long-run average incremental costs-plus (LRAIC+)
- average total cost (ATC)[25]

68. Figure 1 below shows the order of cost benchmarks based on the type of costs under examination (variable, fixed, sunk and common, depending on whether the dominant undertaking is a single-product or multi-product firm).

Figure 1 – Cost benchmarks

variable costs = AVC
+ fixed costs required to produce an additional unit = AAC
+ all product-specific sunk fixed costs = LRAIC (multi-product firm) or ATC (single-product firm)
+ common costs = LRAIC+ (multi-product firm)

fixed costs that could be avoided by stopping the production of the product or service in question. As a result, it provides a closer reflection of whether it would be more profitable for the firm to terminate the production than to engage in predatory pricing, i.e., it identifies those costs (variable plus fixed) which dictate the decision of whether to continue production."

23 The European Commission's guidance states the following:

"*Long-run average incremental cost is the average of all the (variable and fixed) costs that a company incurs to produce a particular product.*"

24 The Office conducted the FLLRIC proceeding in relation to the construction and validation of a FLLRIC model, initially built by Flow. The purpose of the FLLRIC model, as set out in Flow's ICT Licence, is to (1) establish cost-based interconnection rates, (2) provide cost inputs for imputation tests, and (3) quantify any access deficits. However, FLLRIC may be used for other purposes than those identified in Flow's ICT Licence. The Office may use the same or similar principles as adopted in the FLLRIC model to derive the relevant cost benchmark(s) for an assessment of alleged abusive conduct. – See: https://www.ofreg.ky/forward-looking-long-run-incremental-costing-fllric .

25 The European Commission's guidance states the following:

"*LRAIC and average total cost (ATC) are good proxies for each other, and are the same in the case of single product undertakings. If multi-product undertakings have economies of scope, LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs. In situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose equally efficient competitors."*

69. The AAC will represent the lower bound of the range of cost benchmarks that the Office will consider using when assessing the conduct in question. Given that the AAC includes only those fixed costs that are incurred over the time period associated with the conduct in question, the AAC will be lower than the LRAIC, which includes all relevant sunk fixed costs (i.e., incremental fixed costs incurred prior to the time period associated with the conduct in question).

70. As a general principle, when the price of the relevant product or service is set by the dominant undertaking below the AAC, the Office will consider that the dominant undertaking is offering the product/service under examination at a loss, at least in the short-term. This in turn means that an equally efficient competitor will be unable to compete against the dominant undertaking without also incurring the loss, at least in the short term.

71. Pricing below the AAC by the dominant undertaking can therefore lead to the exclusion of an equally efficient competitor, and it will be deemed by the Office as predatory pricing.

72. The Office will use the LRAIC+ (for multi-product firm)[26] or the ATC (for single-product firm) as the upper bound of the range of cost benchmarks for assessment of the conduct in question.[27]

73. Pricing by the dominant undertaking above the AAC but below the LRAIC+ or the ATC may be characterised as predatory strategy but further assessment of the alleged predatory intent, and its likely effect on the relevant market(s), will be required. For example, the dominant undertaking may be required to demonstrate that the pricing strategy under examination is necessary in order to increase consumer welfare in the long-term.[28]

[26] As cited in footnote 25, the Office may use the principles adopted in the FLLRIC model to derive the relevant cost benchmark(s) for an assessment of alleged abusive conduct. Where appropriate, the FLLRIC may be used as the upper bound for assessment of the conduct in question, excluding the purpose set out in Flow's ICT Licence.

[27] See footnote 26.

[28] A price decrease, as a result of pricing below the LRAIC+ (or ATC), may benefit consumers in the short-term. However, if such pricing strategy by the dominant undertaking causes harm to competition, this could lead to an increase in prices and/or a decrease in product/service quality in the future, thus reducing consumer welfare in the long-term.

74. For the avoidance of doubt, the Office will choose the most appropriate cost benchmark(s) based on the specific facts of the case, including the characteristics of the relevant market(s) and the appropriate timeframe for assessment of the effect of the conduct in question, and the availability of appropriate cost data.

75. The Office will infer that the pricing conduct of a dominant undertaking is unlikely to have an adverse impact on effective competition, thus on consumers, if an analysis of the data clearly suggests that an equally efficient competitor can compete effectively with the pricing conduct.

76. However, if the analysis of the data indicates that the pricing conduct of the dominant undertaking has the potential to foreclose equally efficient competitors, the Office will include these findings in the general assessment of anti-competitive foreclosure outlined in section D.3 above.

D.5 Consumer harm

77. A coherent theory of harm would include showing that access to the dominant undertaking's upstream service or product was necessary to allow downstream firms to compete effectively against the dominant undertaking. It would also be necessary to show that the exclusion of the downstream competitor will harm effective competition on the relevant downstream market. If downstream competition remains effective, despite the presence of a margin squeeze by the dominant undertaking, then the fact that a particular firm is excluded should not be deemed to cause consumer harm.

78. However, if it can be clearly shown that the exclusion of a competitor would at the same time prevent the introduction of an innovative product or service in the relevant downstream market, the Office may conclude that the conduct by the dominant undertaking is likely to cause consumer harm.

D.6 Objective Necessity and Efficiencies

79. The Office will assess claims put forward by a dominant undertaking that its conduct is justified. A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any

detrimental effects on consumers through the elimination of effective competition. The conduct in question must be indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

80. The onus is upon the dominant undertaking to provide all the evidence necessary to show that the conduct is objectively justified. The Office will then assess whether or not the conduct is objectively necessary and whether it is likely to result in consumer harm, weighing any anti-competitive effects against any substantiated efficiencies.

81. A dominant undertaking may also justify conduct that leads to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. The dominant undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled:

- Efficiencies have been, or are likely to be, realised as a result of the conduct.

- The conduct is indispensable to the realisation of those efficiencies. There must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies.

- The likely efficiencies brought about by the conduct outweigh any adverse effects on competition and consumer welfare in the affected markets.

- The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there are no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Office's view, conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

E. Specific Forms of Abuse

82. As noted in paragraph 14, the section 70 prohibition of the URC Act prohibits the abuse of a dominant position and not the holding of a dominant position, on a relevant market. A dominant undertaking is entitled to compete on the merits of the products or services it provides, however in doing so, it has a special responsibility to not allow its conduct to restrict or distort competition on the relevant market.

83. It is critical, but often difficult, to distinguish between aggressive competitive conduct, which may or may not harm competitors, and anti-competitive conduct, which harms competitors and is likely to lead to adverse effects on consumers in the long-term, for example, in the form of increased prices and/or a lower quality of products or services.

84. This section of the Guidelines provides an overview of specific types of conduct that in certain circumstances, may constitute an abuse of a dominant position.

85. The forms of abusive conduct described in this section of the Guidelines are not exhaustive and conduct that is not specifically described within these Guidelines should not be assumed to be beyond the scope of the section 70 prohibition.

86. As set out in Section B: Legal Framework, **section 70(2)** of the URC Act provides some examples of conduct which could constitute an abuse of a dominant position, namely conduct which:

> *[…]*
>
> *a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
>
> *b) limiting production, markets or technical development to the prejudice of subscribers;*

c) *applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage, unless otherwise approved or exempted by the Office;*

d) *making the conclusion of such contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts; and*

e) *using revenues attributed to a particular service or activity to cross subsidize unfairly or affect competition for another service or activity.*

87. There are two broad categories of abusive conduct:

I. Exploitative abuses

Exploitative abuses are those that directly harm the consumer by, for example, the charging of excessive prices.

II. Exclusionary abuses

Exclusionary abuses harm the consumer indirectly by excluding or foreclosing competitors and as a result, increases the dominant undertaking's ability to increase prices.

88. In consideration of *price-based* exclusionary conduct, it is acknowledged that vigorous price competition is generally beneficial to consumers. The Office will therefore exercise caution before making a decision to intervene and moderate price competition. Intervention will only be deemed appropriate if such pricing conduct is found to be capable of foreclosing an *as efficient* competitor, based on the appropriate cost benchmark adopted by the Office (see Section D.4 above).

E.1 Exploitative abuse

89. Exploitative abuse is a conduct by the dominant undertaking that involves imposing unfair price and/or other (i.e., non-price) trading conditions to the prejudice of customers, and it has as a consequence a direct loss of consumer welfare. For example, a price charged by the dominant undertaking is considered to be unfair when it is found to be unreasonably high (i.e., excessive) compared to the competitive price level as derived from the appropriate price benchmark. Another form of exploitative abuse is a degradation of quality or reduction of choice of products/services offered by the dominant undertaking, which cannot be prevented due to the lack of credible competitive threat from existing or potential competitors.

E.1.1 Excessive pricing

90. There are two forms of excessive pricing. Excessive pricing may be ***exploitative*** when a dominant undertaking charges high prices to its customers (those end-users or undertakings with which the dominant undertaking does not compete) or, alternatively, ***exclusionary*** when a dominant undertaking sets high prices in one market (for example, at the wholesale level raising rivals' costs) with an aim to strengthen or maintain its dominant position on another market.[29] This section addresses the form of excessive pricing that is deemed to be ***exploitative***.

91. Determining whether a price, excluding government fees e.g., duties, is excessive can be established by assessing:

- the price (current and historic) charged compared to the relevant cost (current and historic) benchmark and consider whether prices are persistently higher than the competitive price level as derived from the appropriate price benchmark; and/or

- the level of profitability, and whether this is persistently higher than the level of profits that undertakings would be expected to make in a competitive environment – as proxied by an appropriate level of the cost of capital for the market or sector.

[29] See Motta & Destreel (2003), '*Exploitative and Exclusionary Excessive Prices in EU Law*'.

92. The difference between the price and the relevant costs may be informed by the financial data received from the dominant undertaking, where readily available. When such information is available, the assessment of excessive pricing will be based on the level of profitability observed in the relevant market. Sustained profits exceeding a normal return on capital may constitute evidence of excessive pricing. What constitutes the normal return on capital will be determined based on the appropriate measure of investment risks associated with the supply of relevant products/services in a competitive environment.

93. Selecting the appropriate price benchmark may be informed by the historical data collected and assessed within the relevant market and/or the relevant evidence available from other jurisdictions.

94. The Office will make a decision about the approach adopted in its assessment of excessive pricing, on a case-by-case basis, depending on the information available to the Office in the course of the investigation into alleged abuse of dominance.

E.2 Exclusionary abuse

95. Exclusionary abuse is a conduct by the dominant undertaking that involves imposing price and/or other (i.e., non-price) trading conditions that have as their object or effect the prevention, restriction or distortion of competition on a relevant market.

E.2.1 Exclusive dealing

96. Exclusive dealing describes an arrangement whereby the willingness of one firm to deal with another is contingent upon that latter firm either dealing with it exclusively (exclusive purchasing) or purchasing a large share of its requirements from the supplying firm. It is commonly observed and can take numerous forms.

97. Abusive conduct arising from exclusive dealing relates to the foreclosure of competitors through the use of either exclusive purchasing obligations which hinder the ability to sell to customers or conditional or loyalty rebates schemes which have the same effect on competitors.

98. A loyalty rebate encompasses a wide range of discount schemes which have the key characteristic in that it makes the offer of the discount conditional on customers reaching certain target purchase thresholds. Loyalty rebates can be incremental, whereby the discount applies to all units purchased above a certain threshold, or retroactive, whereby a discount is applied to all units purchased once the threshold has been reached (also known as rollback rebate schemes).

99. In both categories of exclusive dealing, the competitive assessment focuses on whether exclusive purchasing or conditional rebates schemes by denying a certain part of overall market demand, renders rivals less effective competitors. The competitive analysis of both types of conduct is therefore effectively the same.

100. Loyalty rebates involve price discrimination, namely second-degree price discrimination, where certain selling practices are used to induce customers to self-select themselves to reveal whether they have a high or low willingness to pay. Loyalty rebate schemes represent a form of price discrimination in the sense that different buyers face different prices according to how much they buy in relation to their total needs. Although the application of dissimilar conditions to equivalent transactions may constitute an abuse, price discrimination can, in most instances, be pro-competitive.

Price discrimination

101. The definition of price discrimination that is generally used in competition policy is that price discrimination occurs when the same service or product is sold to different consumers at different prices that do not reflect differences in the costs of supply (in theory, selling a product/service to different consumers at the *same* price when the costs of supply are different is also price discrimination).

102. First degree price discrimination occurs when a firm is able to discriminate perfectly between its consumers by charging a different price for every unit of the product/service supplied. However, first degree price discrimination is likely to be extremely rare in practice due to the possibility consumers have for arbitrage behaviour. Moreover, first degree price discrimination

assumes that the firm has complete knowledge of its customers' willingness to pay – an assumption unlikely to be met in most markets.

103. Second degree price discrimination occurs when certain selling practices are used to induce consumers to self-select themselves to reveal whether they have a high or low willingness to pay. The most common form of second-degree price discrimination are the volume discounts. Another common form is the use of two-part tariffs where consumers pay a lump sum up front and then a per usage charge thereafter.

104. Third degree price discrimination occurs when different customers are charged different prices. For example, different prices applied to residential customers compared to prices charged to business/commercial customers.

105. Although price discrimination may be a legitimate commercial practice adopted by the dominant undertaking, the Office will assess any potential anti-competitive effect of the observed price discrimination. For example, an investigation into alleged predatory pricing by the dominant undertaking (see below the discussion about predation) may involve making a separate assessment for each group of customers who are charged different prices.

E.2.2 Tying and bundling

106. Tying and bundling are common commercial practices employed by firms, including non-dominant firms. There are often pro-competitive reasons for firms to engage in tying and bundling, such as welfare-enhancing price discrimination and pricing efficiencies.

107. Bundling is the practice of selling two or more services and/or products together at a price lower than the sum of prices for each of the products/services included in the bundle if purchased on a standalone basis. For that reason, bundling of two or more services and/or products may allow the supplier to generate or increase the demand for all the services supplied in the bundle. For example, bundling of phone services with broadband internet services may allow the supplier to generate additional demand, and therefore revenue, from the customers making and receiving calls.

108. Tying is the practice of selling one or more services and/or products ('tying' products/services) conditional upon the customer purchasing another service or product ('tied' product/service) from the same supplier. Tying of two or more products/services may take a technical and/or contractual form. The Office will use a range of criteria to assess the risk of anti-competitive foreclosure as a result of the tying practice by the dominant undertaking. For example, the criteria used by the Court of First Instance in *Microsoft Corp v Commission*[30], for establishing whether tying infringes Article 102[31], were:

I. The firm must be dominant in the supply of the tying product;
II. The tying and tied products must be two distinct products (with reference to customer demand);
III. The tying and tied products are not offered separately;
IV. The act of tying leads to the foreclosure of stand-alone competitors;
V. The tying conduct is not objectively justified.

109. Tying and bundling when engaged in by a dominant undertaking can, under some circumstances, result in softening price competition and exclude or deter competitors from remaining or entering the tied market, or even the tying market. In practice, the main competition concern relates to the alleged exclusionary impact of tying and bundling resulting from the horizontal leveraging of market power.

110. When there is lack of replicability of a competing bundle offer in the market, the potential detriment to the competition can be easily established. On the other hand, where competitors are able to replicate and offer a similar, if not equivalent, bundle of products/services, the Office will assess whether the bundle offered by the dominant undertaking introduces price discrimination (see above the discussion about price discrimination) and/or predatory

[30] See Case T-201/04 Microsoft Corp v Commission (T-201/04)[2007] E.C.R. II-3601 ; [2007] 5 C.M.L.R. 846
[31] Article 102 of the Treaty on the Functioning of the European Union provides that "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member states. Such abuse may, in particular, consist in;
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

conduct (see below the discussion about predation) that may lead to anticompetitive foreclosure.

E.2.3 Predation

111. The Office will normally intervene where there is evidence showing that a dominant undertaking has engaged in predatory conduct by deliberately incurring losses or forgoing profits in the short-term so as to foreclose (or be likely to foreclose) an existing competitor or deter entry by a potential competitor, the rationale being to strengthen or protect its position within the relevant market, thereby causing consumer harm.[32]

112. Identifying predatory pricing raises the difficulty of distinguishing between low prices that are a feature of a competitive market, such as those that result from competition on the merits of the product or service, and low prices that although benefits consumers in the short-term, are harmful to competition, and therefore are likely to have an adverse impact on consumer welfare in the long run.[33] In other words, it is critical to determine if an undertaking's price reduction in response to new entry, is representative of normal competition as its demand curve shifts inward, or is representative of predatory conduct.[34]

113. Predatory pricing is conduct that not only harms individual competitors but can also harm competition; and harm to competition results in harm to consumers in the form of higher prices, lower quality and/or reduction of consumer choice. Since harm to individual competitors is a necessary consequence of competition, it is not sufficient in allegations of predatory pricing to show that rival firms are losing market share (or have difficulty in expanding their market share) in response to pricing strategy by the dominant undertaking that results from the competition on the merits on the product or service.

[32] In this document, the discussion on predatory conduct revolves around predatory pricing where the main issue is distinguishing between predation and competition. However, there are also non-price forms of predatory conduct, for example - excess capacity and brand proliferation.

[33] Bishop and Walker acknowledges that "*[t]he difficulty in distinguishing between competitive and anti-competitive price reductions is well recognised in both the economics literature and in the legal practice of the Commission and the Courts*." – pg. 301.

[34] Bishop and Walker notes that a price reduction should be associated with reduced sales if it is genuinely a profit-maximising response to the demand curve shifting in, pg. 301.

114. Accordingly, lowering of prices by the dominant undertaking in response to new entry is not by itself evidence of predatory conduct, nor is competitors' declining market share, in response to the pricing of a more efficient or innovative undertaking, sufficient evidence of predatory pricing.

115. In order to establish whether the dominant undertaking's pricing is deemed to be predatory, the Office will have regard to:

I. Sacrifice of short-run profits – this involves examining whether prices charged are below the relevant cost benchmark; and

II. Anti-competitive foreclosure – this involves examining whether the pricing strategy adopted by the dominant undertaking has, or is likely to have, as its object or effect the prevention, restriction or distortion of competition on a relevant market.

Sacrifice

116. An undertaking will be viewed as having sacrificed short-run profits over the relevant time period, if it charges a lower price for all or part of its output or expands its output and deliberately incurs losses or forgoes profits in the short-run that could have been avoided by not producing that output.

117. In line with the EU approach, the Office will use the average avoidable cost ('AAC') as the appropriate cost benchmark for assessing whether the dominant undertaking is incurring (or has incurred) avoidable losses, i.e., deliberately sacrificing profits. Therefore, a price below the AAC will be considered as predatory, having involved a sacrifice of short-run profits.

118. The Office notes that dominant undertakings can engage in conduct that involves, *ex ante*, an expectation that the activity would be profitable, but *ex post*, the strategy resulted in losses. The Office considers that a dominant undertaking should not be penalised for incurring losses where it can provide conclusive evidence that there was a reasonable expectation that the activity would be profitable.

119. Direct evidence consisting of documents from the dominant undertaking which show a clear intention to engage in predation such as a detailed plan to sacrifice in order to foreclose a competitor, to prevent new entry into the market or to preempt the emergence of a market, or evidence of concrete threats of predatory action[35], may be available and relied upon for a finding of predation. However, direct evidence is *not* necessary for a finding of predation.

120. From an economics perspective, the assessment of predatory pricing also requires an analysis of whether the undertaking has the ability to recoup in the long-run, the short-run profits that are sacrificed. In the economics literature, proof that the undertaking can expect that the long-run gains will outweigh the short-run losses incurred in predating, is necessary. A predatory strategy is said to only be rational if short-run losses can be recouped.

121. The EU jurisprudence however does not require recoupment of short-run losses for a finding of predation. The European Commission, in paragraphs 70 and 71 of the Article 82 Guidance[36] states:

> "…*consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice.*
>
> *Identifying consumer harm is not a mechanical calculation of profits and losses, and proof of overall profits is not required. Likely consumer harm may be demonstrated by assessing the likely foreclosure effect of the conduct, combined with the consideration of other factors, such as barriers to entry. In this context, the Commission will also consider possibilities of re-entry*."

[35] See Case C62/86 AKZO Chemie BV v. Commission, [193] 5 CMLR 215.

[36] Communication from the Commission – *'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02')*: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN .

122. Further, the EC Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses by dominant undertakings states:

> "*As dominance is already established, this normally means that entry barriers are sufficiently high to presume the possibility to recoup. The Commission does not therefore consider it is necessary to provide further separate proof of recoupment in order to find an abuse*".

123. The Office will follow precedent in the UK and across the EU and will not require demonstration of a likelihood of recoupment.

Anti-competitive foreclosure

124. Where the dominant undertaking's pricing is found to be above the AAC, the Office will use the LRAIC+ (for multi-product firm) or the ATC (for single-product firm) as the upper bound of the appropriate cost benchmark in order to determine whether the pricing strategy is predatory, and therefore may lead to anti-competitive foreclosure.

125. The Office will apply the equally efficient competitor analysis, if sufficiently reliable data is available, to determine whether the pricing strategy by the dominant undertaking may lead to anti-competitive foreclosure, and therefore create harm to consumers.

126. The investigation by the Office would not need to demonstrate that the alleged predatory strategy resulted, or would have resulted, in competitors exiting the market, because the dominant undertaking may adopt a pricing strategy that has disciplinary effect on other firms, forcing them to compete less vigorously on price. Such strategy by the dominant undertaking may reinforce its position of dominance in the relevant market, without necessarily eliminating the competitors.

127. Accordingly, the Office considers that consumer harm is likely to occur when the dominant undertaking can reasonably expect its market power to strengthen as a result of its predatory conduct.

128. For the sake of clarity, the Office will intervene if the dominant undertaking would be likely to raise its prices above the level prevailing in the market before engaging in the conduct, as well as where the conduct in question is

likely to prevent a decline in prices that would otherwise have occurred.

E.2.4 Refusal to supply – general

129. The Office acknowledges that all sectoral providers, whether dominant or non-dominant undertakings, should have the right to freely enter into agreements with whichever customers they choose, provided that the negotiations and agreements are made in compliance with any relevant provisions of the Act, regulations and any licence conditions. However, a refusal to supply by a dominant undertaking could potentially result in anti-competitive foreclosure leading to consumer harm.

130. A competition problem usually occurs when a dominant undertaking who is vertically integrated refuses to supply a service or product at upstream level to its competitor in the downstream market.

131. The concept of refusal to supply covers a wide range of practices, such as a refusal to supply services or products to existing or new customers, a refusal to grant access to an essential facility or network, a refusal to provide interface information, and in some circumstances a refusal to license intellectual property rights.

132. There does not have to be an outright refusal to supply by the dominant undertaking, as a constructive refusal to supply could be sufficient to prevent, restrict or distort competition in a relevant market. For example, a vertically integrated dominant undertaking could adopt a strategy of delaying the supply or worsening the conditions of supply of an upstream service or product, which amounts to a constructive refusal to supply that may result in anti-competitive foreclosure.

133. A refusal to supply by a vertically integrated dominant undertaking can take various forms, including but not limited to:

    I. Refusing or delaying the supply of appropriate technical information that is necessary for the competitor to acquire prior to purchasing the relevant upstream service or product;

II. Refusing to grant or limiting access to an essential facility that is necessary for the competitor to attain prior to purchasing the relevant upstream service or product; and

III. Refusing to license intellectual property (IP) rights that are necessary to be obtained by the competitor.

134. As a general rule, a refusal to supply by a vertically integrated dominant undertaking will be characterised as an abuse of dominance if all the following circumstances are present:

I. The refusal relates to an upstream product or service that is objectively necessary for its competitors to be able to compete effectively on a downstream market;

II. The refusal is likely to lead to the elimination of effective competition on the downstream market; and

III. The refusal is likely to lead to consumer harm.

135. The circumstances above are applicable in cases of refusals to supply or disruption of supply of existing upstream products or services, as well as refusals to supply upstream products or services that have not been previously supplied – i.e., a *de novo* refusal to supply. In general, the Office considers that the termination of an existing supply arrangement is more likely to be found to be abusive than a *de novo* refusal to supply.

E.2.5 Margin squeeze

136. Another form of abuse of dominance by a vertically integrated dominant undertaking, which has the characteristics of a constructive refusal, is the practice of applying a margin squeeze, i.e., charging competitors excessive prices for an essential input they require in order to compete with the dominant undertaking in the downstream market.

137. Instead of refusing to supply, the dominant undertaking may charge its competitors a price for the upstream service or product at the level that does not allow the competitors to trade profitably in the downstream market on a

lasting basis, even if they are deemed to be equally efficient as the dominant undertaking.

138. An important question is how to calculate the costs of an efficient operator. The standard approach is to use the “as efficient competitor” test. This implies that a margin squeeze occurs when the difference between the downstream price and the upstream price is less than the costs of the dominant firm’s downstream business. This still leaves open the question of which cost concept is relevant.

139. When considering the relevant cost benchmark for determining what is deemed to be a reasonable margin for an equally efficient firm to compete against the dominant undertaking in the downstream market, the Office will generally rely on the LRAIC of the dominant undertaking’s downstream business, as it is the practice in Europe, in accordance with the Article 82 Guidance.

140. However, in cases where it is difficult to identify and correctly allocate all the relevant costs of the dominant undertaking to its downstream business, the Office may rely on a cost benchmark of a non-integrated undertaking, in order to determine whether a margin squeeze occurs.

141. It is insufficient to show the presence of a margin squeeze by a dominant undertaking to characterise the relevant pricing by the dominant undertaking as an abuse of a dominant position. As with other abuses, it is also necessary to establish that the margin squeeze by the dominant undertaking is likely to cause consumer harm, i.e., it is necessary for there to be a coherent theory of harm.

F. Potential Consequences of section 70 infringement

142. If the Office determines that a conduct by one or more sectoral providers constitutes an abuse of a dominant position in a relevant market, the Office may require the sectoral provider or sectoral providers to pay a penalty in respect of a section 70 infringement, in accordance with section 80(3)(a) of the URC Act. The Office, under section 80(3)(b) may also suspend or revoke any authorisation issued to the sectoral provider.

143. The Office has developed separate rules in its Administrative Fines and Penalties Guidelines[37], on how the Office will calculate penalties imposed on a sectoral provider or sectoral providers that have intentionally or negligently infringed section 70 of the URC Act.

144. Section 77 of the URC Act provides that the Office can issue written directions when it has decided that conduct infringed the section 70 prohibition.[38] Under Section 78 of the same law, the Office may apply to the court for an order "where a person fails, without reasonable excuse, to comply with a direction under section 76 or 77[…]." The court order can require "the person in default to comply with the direction within a specified timeframe" or require, if applicable, "the sectoral provider or any of its officers to do it." In addition, the Office may order the licensee to cease the infringement in accordance with section 84 of the URC Act.

145. If a licensee has failed to comply with an order made under section 84, the Office can apply to the Grand Court under section 85, and the Court may: (a) order the offending licensee to pay the Government such pecuniary penalty not exceeding two hundred and fifty thousand dollars in the case of an individual and not exceeding one million dollars in the case of any other person; (b) grant an injunction restraining the offending licensee from engaging in conduct described; or (c) make such other order as the Court thinks fit in respect of each contravention or failure specified.

146. In addition, the Office, under sub-section 79(1)(b) of the URC Act, has the power to issue interim measures if it has the grounds for believing that the section 70 prohibition has been infringed. Section 79(2) provides that the Office may issue directives without notice to the intended recipient, if it considers that it is necessary to act as a matter of urgency in certain circumstances. The Office, before giving a direction under section 79, must

[37] Access the Office's *Administrative Fines and Penalties Guidelines* on the Office's website at https://www.ofreg.ky/policies-and-guidelines

[38] A recent example of directions issued by the UK's Competition and Markets Authority, after investigating and concluding that there was excessive and unfair pricing of phenytoin sodium capsules under Chapter II of the Competition Act 1998 and Article 102 TFEU, issued directions that both the companies involved had to revise their prices in relation to the capsules within certain time frames and have "each of its subsidiaries comply with the directions." See link to the decision - https://assets.publishing.service.gov.uk/media/594240cfe5274a5e4e00024e/phenytoin-full-non-confidential-decision.pdf It should be noted that when the case was appealed to the Competition Appeals Tribunal, the Tribunal found that the Authority erred in applying the two limb test for assessing unfair pricing and remitted to the case to the Authority. The Authority appealed to the Tribunal, and the case is presently being heard by the Tribunal as of the date of publication.

give written notice to the intended recipient of the directive and afford that person an opportunity to make oral or written representations to show cause why the Office ought not to give such a direction.[39] For example, the Office may issue directives without prior notice requiring the dominant undertaking to maintain the status quo, refrain from implementing threatened changes, or continue to supply services on existing terms.

147. Remedies for infringing section 70 will, to a large extent, be case specific. The Office therefore does not see merit in developing specific guidance on remedies. Nevertheless, the Office may consider similar remedies imposed by other regional and global Regulators where appropriate, such as the remedies imposed the Competition and Markets Authority ('the CMA') in the UK.[40] Examples of remedies imposed by the CMA and its predecessor the Office of Fair Trading for abuse of dominance include: (a) financial penalties, (b) directions in relation to the pricing, access, and contract term modifications, and (c) injunctions regarding the implementation of proposed changes pending completion of the investigation.

G. Confidentiality

148. The Office will treat a complaint of an allegation of abuse of a dominant position as part of the public record. A copy of the complaint will be published on the Office's website and be copied to the parties named in the complaint. However, the complainant may request any portion of the complaint be granted confidential treatment by the Office in accordance with the process outlined in section 107 of the URC Act. Such application must be accompanied by a separate, non-confidential, editable electronic version

[39] In the United Kingdom, the typical remedies are interim payments and interim injunctions. When deciding whether to grant an application for an interim injunction, the UK Courts will generally follow the guidelines set out in *American Cyanamid-v-Ethicon Ltd* [1975] AC 396 – (1) Is there a serious issue to be tried? (2) If so, what is the balance of convenience? The Competition Appeals Tribunal has powers to grant interim relief under section 47A of the Competition Act 1998, and when deciding to grant an injunction, it has to utilise the same test as the High Court.

[40] The Competition and Markets Authority have the power to impose structural or behavioural remedies. Structural remedies are generally one-off measures that seek to restore or maintain the competitive structure of the market by addressing the market participants and/or their share in the market, e.g., prohibition and divesture. Behavioural remedies are typically ongoing measure that are designed to regulate or constrain the behaviour of parties. Examples of remedies issued by the former Office of the Fair Trading include the issuance of a penalty (£1,328,040) in the remitted case of Aberdeen Journals Limited (No. CA98/14/2002) published on 16 September 2002 (https://webarchive.nationalarchives.gov.uk/ukgwa/20140402142426/http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/aberdeen2.pdf;jsessionid=627805E928B22D78D2E7725A90DF87B0), and the issuance of a penalty (£6.8 million) in the case of Genzyme Limited (No. CA98/3/03) published on 27 March 2003 (https://assets.publishing.service.gov.uk/media/555de4c440f0b666a200015c/genzyme.pdf).

of the same material that redacts the confidential information in a way that makes it clear what has been redacted.

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