



GUYANA

No. ____ of 2016

COMPETITION (TELECOMMUNICATIONS)

REGULATIONS

(Made under the Telecommunications Act 2016 (No. ____ of 2016))

ARRANGEMENT OF REGULATIONS

REGULATION

PART I

GENERAL PROVISIONS

1. Citation,
2. Interpretation.
3. Objects of Regulations.
4. Scope of Regulations.

PART II

FUNCTIONS AND POWERS OF THE COMMISSION

5. Functions of the Commission.
6. General powers of Commission.

PART III

DETERMINATIONS OF DOMINANCE AND JOINT DOMINANCE

7. Declaration of dominance and joint dominance.
8. Criteria for assessments of dominance and joint dominance.
9. Presumption of dominance.
10. Amendment of dominance and joint dominance criteria.
11. Designations of dominance in licences.
12. Procedure for dominance and joint dominance determinations.
13. Additional procedures for assessing dominance and joint dominance.
14. Review of dominance and joint dominance status.
15. List of dominant and jointly-dominant telecommunications undertakings.

PART IV

ABUSE OF A DOMINANT POSITION AND OTHER ANTI-COMPETITIVE CONDUCT

16. Anti-competitive conduct.
17. Abuse of a dominant position/
18. Proceedings to determine and cease abuse of a dominant position and other anti-competitive conduct and agreements.
19. Negative clearance rulings and prior authorisations.

PART V

THE COMMUNITY COMPETITION COMMISSION

20. Requests by the Commission for investigations by the Community Competition Commission.
21. Investigations at the request of the Community Competition Commission.
22. Powers of the Community Competition Commission and enforcement of determinations.

PART VI

PENALTIES, FINES, OFFENSES AND OTHER REMEDIES

23. Penalties imposed by the Commission.
24. Civil liability to persons suffering loss as a result of violations of these Regulations.
25. Penalty for disobedience of order of Commission.
26. Penalty for failure to obey a summons or provide documents or other information.
27. Penalty for improper filing of a complaint.
28. Penalty for disobedience of directive of Community Competition Commission.
29. Continuing offences.
30. Power to institute proceedings.

IN THE EXERCISE OF THE POWERS CONFERRED UPON ME BY SECTION 85 OF THE TELECOMMUNICATIONS ACT 2016 (NO. ___ OF 2016)

I HEREBY MAKE THE FOLLOWING REGULATIONS

PART I

GENERAL PROVISIONS

- Citation.** **1.** These Regulations may be cited as the Competition (Telecommunications) Regulations.
- Interpretation.** **2.** (1) In these Regulations unless the context otherwise requires --
- "affiliated telecommunications undertakings" has the meaning provided in subparagraph (2);
- "agreement" means any contract, arrangement or understanding between two or more persons, at least one of which is a telecommunications undertaking, whether oral or in writing and regardless of whether such contract, arrangement or understanding is, or is intended to be, legally enforceable;
- "business" means the operation of a telecommunications network, the provision of a telecommunications service, the operation or other use of a facility, and any other activity materially involving telecommunications;
- "Commission" has the same meaning as in section 2(1);
- "Community" means the Caribbean Community, including the CSME;
- "Community Competition Commission" means the Competition Commission established under Article 171 of the Treaty;
- "control" and "controlled," in relation to a telecommunications undertaking, means the power of a person to secure, by means of --
- (a) the possession of voting power, through the holding of shares or otherwise, in relation to that telecommunications undertaking; or

- (b) any other power conferred by the articles of incorporation or any other document regulating the telecommunications undertaking,

that the business of the telecommunications undertaking shall be conducted in accordance with the wishes of that person;

"COTED" means the Council for Trade and Economic Development established in the Treaty;

"CSME" means the Caribbean Single Market and Economy established in the Treaty;

"market" means those markets set forth on Schedule A to the Pricing (Telecommunications) Regulations or designated by the Commission under paragraph 8 or 9 of such Regulations, and, for purposes of these Regulations, any other market concerning telecommunications, in any geographical area, that the Commission deems necessary or appropriate to regulate in order to achieve the objects of, or to carry out its functions under, these Regulations;

No. __ of 2016

"Member State" means a Member State of the Community excluding an Associate Member of the Community;

"negative clearance ruling" has the meaning provided for in paragraph 19(2)(a);

"prior authorisation" has the meaning provided for in paragraph 19(2)(b);

"relevant market" has the meaning provided for in paragraph 12(a);

"supplemental conditions" has the meaning provided for in paragraph 16(2)(h)(vi);

"Treaty" means the Revised Treaty of Chaguaramas establishing the Community, including the CSME.

(2) For the purposes of these Regulations --

- (a) any two telecommunications undertakings are to be treated as affiliated telecommunications undertakings if one of them is the subsidiary of the other or both are subsidiaries of the same parent;
- (b) a telecommunications undertaking shall be treated as a subsidiary of another telecommunications undertaking if it is

controlled by that other telecommunications undertaking; and

- (c) affiliated telecommunications undertakings and a group of affiliated telecommunications undertakings shall be treated as a single telecommunications undertaking, and any agreement or other conduct that is prohibited, penalised or otherwise regulated by these Regulations with regard to a "telecommunications undertaking" shall be read to apply with equal force and effect to affiliated telecommunications undertakings and any group of affiliated telecommunications undertakings.

(3) References in the Act or these Regulations to --

- (a) the lessening of competition shall, unless the context otherwise requires, include references to the preventing, restricting, or distorting of competition;
- (b) the term "dominance," "abuse of a dominant position," and like terms include "joint dominance" and "abuse of a jointly dominant position," unless the context otherwise expressly requires; and
- (c) the term "anti-competitive conduct" includes abuse of a dominant position, where the context requires to achieve the objects of these Regulations.

(4) For purposes of these Regulations, the effect on competition in a market shall be determined by reference to any factor that affects competition in that market, including actual or potential competition from --

- (a) telecommunications networks, telecommunications services, facilities and other business carried out or likely to be carried out by persons not resident or carrying on business in Guyana; and
- (b) any person that is operating in violation of the Act or the Regulations.

Objects of Regulations.

3. The objects of these Regulations are --

- (a) to promote, maintain and encourage competition and enhance economic efficiency in telecommunications;
- (b) to prohibit anti-competitive conduct which prevents, restricts or distorts competition, or constitutes the abuse of a dominant position, in the telecommunications market; and

- (c) to promote the welfare and interests of consumers and other users of telecommunications services, telecommunications networks and facilities.

Scope of Regulations.

4. (1) Without derogation of paragraph 2(4), these Regulations shall apply to every operator, service provider and other telecommunications undertaking.

(2) With regard to telecommunications and telecommunications undertakings, these Regulations shall not apply to --

- (a) combinations or activities of employees for their own reasonable protection as employees;
- (b) arrangements for collective bargaining on behalf of employers or employees for the purpose of fixing terms and conditions of employment;
- (c) subject to paragraph 17(3)(b), the entering into an agreement insofar as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or registered trade mark or design, or any act to give effect to such a provision.
- (d) the entering into or carrying out of any agreement or other conduct that is authorised by the Commission under paragraph 19, subject to the conditions and other provisions of that paragraph;
- (e) activities expressly approved under any treaty or agreement to which Guyana is a party;
- (f) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public; or
- (g) such other business or other activity as the Minister, with the agreement of the Commission, may declare by order.

PART II

FUNCTIONS AND POWERS OF THE COMMISSION

Functions of the Commission.

5. (1) The Commission shall discharge the following functions under these Regulations --

- (a) keep under review activities in the telecommunications sector, in order to ascertain conduct that may adversely affect

competition or the economic interests of consumers;

- (b) order, on its own initiative or at the request of any person, such investigations regarding conduct as will enable it to determine whether any telecommunications undertaking is engaging in conduct in contravention of these Regulations;
- (c) conduct such inquiries as it may consider necessary or desirable in connection with any matter concerning competition or dominance;
- (d) advise the Minister on such matters relating to competition and dominance in the telecommunications sector as it thinks fit or as may be requested by the Minister;
- (e) take such action as it considers necessary with respect to the abuse of a dominant position by any telecommunications undertaking;
- (f) eliminate anti-competitive agreements and other anti-competitive conduct; and
- (g) perform such other functions as are relevant to the regulation of competition and dominance in the telecommunications sector and are consistent with the Act and these Regulations.

(2) The Commission shall --

- (a) make available to telecommunications undertakings and to consumers and other users general information regarding their respective rights and obligations under these Regulations;
- (b) undertake studies and publish reports and other information regarding matters that affect the interests of consumers and that facilitate consumer choice; and
- (c) cooperate with and assist relevant persons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with these Regulations.

(3) The Commission shall cooperate with --

- (a) the Community Competition Commission for the purpose of enforcing compliance with the provisions of Chapter Eight, Part One of the Treaty, the Act and these Regulations;
- (b) competition authorities of other Member States for the purpose of detecting and preventing anti-competitive conduct

Cap. 90:07

and exchanging information relating to such conduct; and

- (c) the Guyana Competition Commission, established under section 5 of the Competition and Fair Trading Act 2006, in the performance of the respective functions and responsibilities of such Competition Commission under the Competition and Fair Trading Act and the Commission under the Act and these Regulations.

(4) The Commission shall order investigations into any allegations of anti-competitive conduct, including abuse of a dominant position, referred to it by the Community Competition Commission under paragraph 21 of these Regulations and Article 176(1) of the Treaty, or by a competition authority of another Member State, and shall submit to the Community Competition Commission, or that other competition authority, a written report of its findings.

General powers of Commission.

No. ___ of 2011

6. (1) For the purpose of carrying out its functions under these Regulations and in addition to its powers under the Pricing (Telecommunications) Regulations, the Commission shall have power to ---

- (a) determine and declare which telecommunications undertakings are dominant or jointly-dominant in any market;
- (b) declare conduct and agreements to be anti-competitive or an abuse of a dominant position;
- (c) order the termination of any anti-competitive agreement;
- (d) prohibit the making or carrying out of any agreement that is, or would be, in violation of the Act or these Regulations;
- (e) prohibit the attachment of supplemental conditions to any transaction or agreement that is, or would be, in violation of the Act or these Regulations;
- (f) prohibit discrimination or preferences in prices and related matters;
- (g) order telecommunications undertakings to cease and desist from any form of conduct that has or is likely to have as its object or effect the lessening of competition; and
- (h) take any other action that it considers necessary to prevent or halt anti-competitive conduct, including abuse of a dominant position, or otherwise to accomplish the objects of these Regulations.

(2) In addition to and not in derogation of the powers of the Commission

under the Act and the Public Utilities Commission Act, the Commission may, in the course of inquiries, investigations and hearings under these Regulations --

- (a) summon, administer oaths to, and examine any witness;
 - (b) require the production of documents and other information from any person;
 - (c) require that any document and other information submitted to it be verified by affidavit; and
 - (d) adjourn any investigation, inquiry or hearing from time to time.
- (3) The Commission shall make findings and determinations, and issue reports and orders, on the basis of the information available to it, notwithstanding that any person may not have furnished any document or other information required by the Commission.
- (4) Hearings of the Commission under these Regulations shall take place in public:
- provided that, where the Commission considers that the circumstances warrant, it may conduct hearings *in camera*.

PART III

DETERMINATIONS OF DOMINANCE AND JOINT DOMINANCE

Declaration of dominance and joint dominance.

7. For purposes of the Act, these Regulations, and any other regulations made under the Act, the Commission may determine that --

- (a) a telecommunications undertaking holds a dominant position with respect to a telecommunications network, a telecommunications service or a type of facility, or any market if, by itself or together with an affiliated telecommunications undertaking or group of affiliated telecommunications undertakings, it occupies such a position of economic strength as will enable it to operate with regard to such network, service, facility or market without effective constraints from its competitors, potential competitors, consumers or other users; and
- (b) two or more telecommunications undertakings hold a jointly dominant position with respect to a telecommunications network, a telecommunications service or a type of facility, or any market where those telecommunications undertakings jointly occupy such a position of economic strength as will enable them, individually or jointly, to operate with regard to such telecommunications network, telecommunications service, facility or market without effective

constraints from their competitors, potential competitors, consumers or other users.

Criteria for assessments of dominance and joint dominance.

8. In making determinations under paragraph 7, the Commission shall take into account the following factors --

- (a) the relevant market, including such geographic and telecommunications services factors that the Commission may deem relevant;
- (b) technology and market trends;
- (c) the market shares of the telecommunications undertaking and other market participants;
- (d) the power of the telecommunications undertaking to introduce and sustain a material price increase independently of competitors, potential competitors, consumers or other users;
- (e) the degree of differentiation among telecommunications networks, telecommunications services or facilities in the market;
- (f) the extent to which the position of the telecommunications undertaking in markets inside or outside of Guyana affords it the economic strength to operate in the market without effective constraints from competitors, potential competitors, consumers or other users;
- (g) as to determinations under paragraph 7(a), the criteria set forth in Section 1 of Schedule A;
- (h) as to determinations under paragraph 7(b), the criteria set forth in Section 2 of Schedule A;
- (i) any other factor deemed relevant by the Commission.

Presumption of dominance.

9. (1) Without prejudice to any other factors that may support a presumption of dominance, in any assessment of dominance it shall be presumed that a telecommunications undertaking which has for a continuous period of six months or more maintained a market share of forty percent or more of gross revenues in one or more markets, is dominant in those markets.

(2) The presumption established in subparagraph (1) may be rebutted by the relevant telecommunications undertaking if it demonstrates to the satisfaction of the Commission that it is not in fact dominant based on the criteria identified in paragraphs 7 and 8 and Schedule A.

Amendment of

10. After consultation with the Commission and subject to section 85(2), the

dominance and joint dominance criteria.

Minister may, by order, amend the dominance and joint dominance criteria set forth on Schedule A to take account of any factors which he considers appropriate, save that such criteria shall at a minimum provide for consideration of the factors set forth in sections 40(1) and (5) and paragraphs 7, 8 and 9.

Designations of dominance in licences.

11. Where the Minister deems it appropriate on the basis of the factors provided in sections 40(1) and (5) and paragraphs 7, 8 and 9, he may, in the terms of a licence granted to an operator or service provider, designate such operator or service provider as dominant or jointly dominant as to specific markets, and any designation so made shall subject such operator or service provider to the provisions of the Act and the regulations governing dominance and joint dominance, subject to section 40(3) and paragraph 14:

Provided that no omission of a designation of dominance or joint dominance in the terms of a licence shall be interpreted as a determination that the relevant operator or service provider is not dominant or jointly dominant as to any market, nor shall it prejudice the authority of the Commission to designate such operator or service provider as dominant or jointly dominant as to any such market.

Procedure for dominance and joint dominance determinations.

12. Where the Commission determines to undertake an assessment of dominance or joint dominance, it shall implement the following procedures, as may be supplemented by any rules promulgated by the Commission under paragraph 13:

- (a) The Commission shall identify the market being assessed for potential dominance or joint dominance (the "relevant market") and all telecommunications undertakings providing telecommunications services, or (if applicable to the assessment) operating telecommunications networks or operating or otherwise utilising facilities, in the relevant market.
- (b) Upon undertaking an assessment under subparagraph (a), the Commission shall publish a notice in one edition of a newspaper of nationwide circulation in Guyana, advising that it is conducting an assessment of dominance or joint dominance, and identifying the relevant market and the telecommunications undertakings providing telecommunications services, or (if applicable to the assessment) operating telecommunications networks or operating or otherwise utilising facilities, in the relevant market.
- (c) Based upon the application of the criteria provided for in paragraphs 7, 8 and 9 and Schedule A, the Commission shall consider whether the circumstances in the relevant market are such that a presumption of dominance or joint dominance exists as to any telecommunications undertaking.
- (d) If the Commission concludes, on the basis of the considerations provided for in subparagraph (c), that a presumption of dominance or

joint dominance exists, it shall publish a notice of its conclusions in two editions of a newspaper of nationwide circulation in Guyana, stating --

- (i) the relevant market;
- (ii) the telecommunications undertaking that the Commission presumes to be dominant or jointly dominant;
- (iii) a summary of the circumstances supporting the presumption of dominance or joint dominance;
- (iv) the period during which any telecommunications undertaking presumed to be dominant or jointly dominant and any other interested persons may submit written representations, objections or views to the Commission, which period shall be not less than twenty-eight days from the later of --
 - (A) the date of the last publication of the notice required under this subparagraph; and
 - (B) the date of the last written notice sent to a telecommunications undertaking under subparagraph (e);
- (e) Contemporaneous with the publication of the notice under subparagraph (d), the Commission shall send written notice to each telecommunications undertaking presumed to be dominant or jointly dominant, containing the same information required under subparagraph (d).
- (f) A telecommunications undertaking presumed to be dominant or jointly dominant, and any other interested person, may submit written representations, objections or views to the Commission on any matter related to the presumption of dominance or joint dominance within the time established in the notices given pursuant to subparagraphs (d) and (e).
- (g) The Commission may request in writing from any telecommunications undertaking and from any other person any documents and other information which it reasonably requires for its assessments and considerations under subparagraphs (a) and (c) or the proceedings initiated under subparagraph (d), and such telecommunications undertakings and other persons shall provide such documents and information within twenty-one days of receipt of the Commission's written request to do so.

- (h) Subject to the confidentiality protections of the Act and the Public Utilities Commission Act, copies of written representations, objections and views submitted to the Commission pursuant to subparagraph (f) shall be available from the Commission to any telecommunications undertaking or other person, by posting on the Commission's website and upon written request and the payment, in cash or other immediately available funds, of the administrative costs for photocopying such representations, objections and views.
- (i) Within thirty days following the end of the comment period provided for under subparagraph (d), the Commission shall hold a public hearing at which any telecommunications undertaking presumed to be dominant or jointly dominant, and any other person likely to be affected by a final determination of dominance or joint dominance, may present their views.
- (j) The Commission shall make a final determination on whether a telecommunications undertaking is dominant or jointly dominant on the basis of the criteria in paragraphs 7, 8 and 9 and Schedule A and, in so doing, shall take into account the written representations, objections and views made in accordance with subparagraph (f), duly made and not withdrawn; any documents or other information provided in response to a request in accordance with subparagraph (g); and any additional such representations, objections and views presented at the hearing provided for in subparagraph (i).
- (k)
 - (i) Where the Commission finally determines that a telecommunications undertaking is not dominant or jointly dominant as to the relevant market, it shall discontinue the proceedings, and publish a notice of such final determination in one edition of a newspaper of nationwide circulation in Guyana and give written notice of the same to the telecommunications undertaking in respect of which the proceedings were initiated.
 - (ii) The Commission shall issue a final determination that a telecommunications undertaking is dominant or jointly dominant by way of order, directed to the relevant telecommunications undertaking.
- (l) Within the seven days following the issuance of any order under subparagraph (k)(ii), the Commission shall --
 - (i) publish the order in the *Official Gazette*, and such order shall take effect on the date provided for in such publication; and

(ii) post the order on its website,

and the telecommunications undertaking that has been declared dominant or jointly dominant shall publish notice of such determination by--

(w) a posting on its website;

(x) a mailing to each of its post-paid consumers and, where the declaration of dominance or joint dominance concerns a wholesale market, to each user of the relevant telecommunications service, telecommunications network or facility;

(y) the publication in two editions of a newspaper of nationwide circulation in Guyana; and

(z) any other manner required by the Commission.

Additional procedures for assessing dominance and joint dominance.

13. The Authority may establish, by rules which expand on and are not inconsistent with any aspect of the procedure provided for in paragraph 12, additional procedures for the assessment and determination of dominance and joint dominance, including the identification of documents and information to be submitted by telecommunications undertakings and other interested parties, applicable data formats, and times for submission of information

Review of dominance and joint dominance status.

14. (1) Where a telecommunications undertaking deemed to be dominant or jointly dominant by the Commission pursuant to section 40(1) or (5) and these Regulations, or dominant or jointly dominant by the Minister pursuant to section 40(2) and paragraph 11, considers that it has lost its dominance or joint dominance with respect to a relevant market, it may apply to the Commission in writing to be classified as non-dominant or non-jointly dominant in such market.

(2) The provisions of paragraph 12 shall apply *mutatis mutandis* to the procedure that shall be followed by the Commission in determining whether a telecommunications undertaking is no longer dominant or jointly-dominant.

(3) Should the Commission issue an order re-classifying as non-dominant or non-jointly dominant any operator or service provider that was classified as dominant or jointly dominant in its licence, the Minister shall amend any applicable terms in such licence to reflect such re-classification without the need for the procedures set forth in section 35(2).

(4) A telecommunications undertaking re-classified by the Commission as non-dominant or non-jointly dominant shall cease to be dominant or jointly dominant on the date provided for in paragraph 12(1)(i).

List of dominant and jointly-dominant telecommunications undertakings.

15. The Authority shall maintain on its website a list of any telecommunications undertakings that have been declared dominant and jointly-dominant and the markets relevant to those determinations.

PART IV

ABUSE OF A DOMINANT POSITION AND OTHER ANTI-COMPETITIVE CONDUCT

Anti-competitive conduct.

16. (1) Any conduct by a telecommunications undertaking, and any agreement between a telecommunications undertaking and any other person, which has the object or the intended, likely or actual effect of preventing, restricting or distorting competition in any market is prohibited.

(2) Without prejudice to the generality of subparagraph (1), anti-competitive conduct includes --

- (a) bundling telecommunications services, such that another telecommunications undertaking, a consumer or other user is required, when purchasing one telecommunications service, to purchase another telecommunications service that it does not require or desire;
- (b) offering a competitor, potential competitor, consumers or other users more favourable prices or related terms or conditions that are not justified by cost differences, if the consumer, potential competitor, consumer or other user were to acquire another telecommunications service that it does not require or desire;
- (c) supplying telecommunications services at prices below long run average incremental costs, unless approved in writing by the Commission in the context of a promotion;
- (d) using revenues or the allocation of costs from one telecommunications service to cross-subsidise another telecommunications service, except where such cross-subsidy is specifically approved by the Commission in writing;
- (e) deliberately reducing the margin of profit available to a competing or potentially competing telecommunications undertaking, by increasing the prices for the wholesale telecommunications services required by that competing or potentially competing telecommunications undertaking, or decreasing the prices of telecommunications services in retail

markets where they compete, to the extent that either conduct creates an unfair disadvantage to the competing or potentially competing telecommunications undertaking;

- (f) entering into any anti-competitive agreement, including:
 - (i) price-fixing agreements, pursuant to which competing or potentially competing telecommunications undertakings agree on or otherwise manipulate retail prices;
 - (ii) bid-rigging, pursuant to which competing or potentially competing telecommunications undertakings manipulate the prices or conditions in what should be a competitive tender process;
 - (iii) resale price maintenance, pursuant to which a telecommunications undertaking, which supplies a competing telecommunications undertaking or proposes to supply a potentially competing telecommunications undertaking with telecommunications services, telecommunications networks or facilities, attempts to impose restrictions on the prices charged by the competing or potentially competing telecommunications undertaking to consumers or other users;
 - (iv) exclusive dealing agreements, pursuant to which a telecommunications undertaking enters into an agreement with another party for the supply of telecommunications services, telecommunications networks or facilities on an exclusive basis and with related pricing incentives, and where that exclusivity has or may have the effect of materially lessening competition in the market;
- (g) supplying, to competing or potentially competing telecommunications undertakings, telecommunications network elements at prices above the prices offered by the supplying telecommunications undertaking for providing the retail services utilising such telecommunications network elements; or
- (h) any other agreement or conduct by a telecommunications undertaking that --
 - (i) directly or indirectly fixes purchase or selling

prices or improperly determines any other condition;

- (ii) improperly limits or controls production, markets, technical development or investment;
- (iii) artificially divides up markets or sources of the supply of telecommunications services or the use of telecommunications networks or facilities;
- (iv) constitutes bid-rigging or otherwise adversely affects tenders submitted, or to be submitted, in response to a request for bids;
- (v) applies dissimilar conditions to telecommunications undertakings in equivalent transactions, thereby causing a competitive disadvantage;
- (vi) makes the conclusion of an agreement subject to acceptance by the other party of conditions which, by their nature or according to commercial practice, have no connection with the subject of such agreement ("supplemental conditions");
- (vii) denies interconnection or access to telecommunications networks, or access to facilities, to a competing or potentially competing telecommunications undertaking, without the written authorisation of the Commission;
- (viii) constitutes predatory pricing, price discrimination, loyalty discounts or other concessionary terms, resale price maintenance, or exclusionary vertical restrictions; or
- (ix) further to Article 177(1)(c) of the Treaty, constitutes any other like conduct by a telecommunications undertaking whose object or effect is to frustrate the benefits expected from the establishment of the CSME.

(3) Any agreement or conduct within the meaning of subparagraph (1) or (2) shall be null and void, and no person shall give effect to any such agreement or conduct.

(4) The prohibitions of this paragraph 16 shall not apply to any agreement or conduct, the entry into or carrying out of which has been authorised under paragraph 19,

subject to the conditions of that paragraph, or which the relevant telecommunications undertaking has otherwise demonstrated to the satisfaction of the Commission --

- (a) contributes to the improvement of the provision of telecommunications services, the availability of telecommunications networks or facilities, or the promotion of technical or economic progress, while allowing consumers and other relevant users a fair share of the resulting benefit;
- (b) imposes on the telecommunications undertakings, consumers or other users concerned only such restrictions as are indispensable to attaining the objectives provided for in subparagraph (a); and
- (c) does not afford any telecommunications undertaking engaged in the relevant conduct or agreement the possibility of eliminating, preventing or otherwise restricting competition in respect of a substantial part of the market for the relevant telecommunications services, telecommunication networks, or facilities.

Abuse of a dominant position.

17. (1) Any conduct on the part of a telecommunications undertaking which constitutes an abuse of a dominant position in a market is prohibited.

(2) A telecommunications undertaking abuses a dominant position in a market if it prevents, restricts or distorts competition in such market, including, without limiting the generality of the foregoing, if it --

- (a) restricts the entry of any telecommunications undertaking into a market;
- (b) prevents or deters any telecommunications undertaking from engaging in competitive conduct in a market;
- (c) eliminates or removes any telecommunications undertaking from a market, except through lawful competition;
- (d) directly or indirectly imposes anti-competitive purchase or selling prices or otherwise engages in anti-competitive practices;
- (e) limits any telecommunications service, or the availability of any telecommunications network or facility, in a market to the prejudice of competitive market conditions;
- (f) makes the conclusion of any agreement subject to acceptance of supplemental conditions which, by their nature or according to commercial practice, have no connection with the subject of

such agreement; or

- (g) engages in any conduct that results in the exploitation of its consumers or other users or hinders entry into or expansion of a telecommunications undertaking into a market, including exclusive dealings, market restrictions, and tied selling.

(3) A telecommunications undertaking shall not be treated as abusing a dominant position in a market if the relevant conduct has been authorised under paragraph 19 or if such telecommunications undertaking otherwise demonstrates to the satisfaction of the Commission that --

- (a) its conduct is or was directed exclusively to increasing efficiency in the provision of telecommunications services, telecommunications networks or facilities in the market or to promoting technical or economic progress, and that consumers and other relevant users are or were allowed a fair share of the resulting benefit;
- (b) it reasonably is enforcing or seeking to enforce a right under or existing by virtue of a copyright, patent or registered trademark or design, for purposes other than the prevention, restriction or distortion of competition; or
- (c) the effect or likely effect of its conduct on the market is the result of its superior competitive performance.

Proceedings to determine and cease abuse of a dominant position and other anti-competitive conduct and agreements.

18. (1) Where the Commission has reason to believe that conduct prohibited under paragraph 16 or 17 may have occurred or may be occurring, or that an agreement prohibited under either such paragraph may have existed or may exist, or both as the case may be, it shall initiate an investigation into the matter.

(2) During its investigation and the proceedings provided for in this paragraph, the Commission may request in writing from any telecommunications undertaking and from any other person any documents and other information which it reasonably requires for such investigation or proceedings, and such telecommunications undertakings and other persons shall provide such documents and information within twenty-one days of receipt of the Commission's written request to do so.

(3) If, on the basis of its investigation, the Commission concludes that conduct in violation of paragraph 16 or 17 has occurred or is occurring, or that an agreement prohibited under either such paragraph did or does exist, or both as the case may be, it shall issue a written preliminary report of its findings and publish a notice thereof in two editions of a newspaper of nationwide circulation in Guyana, stating --

- (a) the telecommunications undertaking that the Commission has found to be in violation of paragraph 16 or 17;

- (b) a summary of the prohibited conduct in which such telecommunications undertaking has been preliminarily found to have engaged or to be engaging or the prohibited agreement that has been preliminarily found to have existed or to exist, or both as the case may be;
- (c) the period during which any telecommunications undertaking preliminarily found to be in violation of paragraph 16 or 17 and any other interested persons may submit written representations, objections or views to the Commission, which period shall be not less than twenty-eight days and not more than forty-five days from the later of --
 - (i) the date of the last publication of the notice required under this subparagraph; and
 - (ii) the date of the last written notice sent to a telecommunications undertaking under subparagraph (4);

(4) Contemporaneous with the publication of the notice under subparagraph (3), the Commission shall send written notice to each telecommunications undertaking that has been preliminarily found to be in violation of paragraph 16 or 17, containing the same information required under subparagraph (3).

(5) A telecommunications undertaking preliminarily found by the Commission to be in violation of paragraph 16 or 17, and any other interested person, may submit written representations, objections or views to the Commission on any matter related to such finding within the time established in the notices given pursuant to subparagraphs (3) and (4).

(6) Subject to the confidentiality protections of the Act and the Public Utilities Commission Act, copies of the Commission's written report of its findings and representations, objections and views submitted to the Commission pursuant to subparagraph (5) shall be available from the Commission to any telecommunications undertaking or other person, by posting on the Commission's website and upon written request and the payment, in cash or other immediately available funds, of the administrative costs for photocopying such report, representations, objections and views.

(7) Within ten days following the end of the comment period provided for under subparagraph (5), the Commission shall hold a public hearing at which any telecommunications undertaking preliminarily found to be in violation of paragraph 16 or 17, and any other person likely to be affected by a final determination of the matter, may present their views.

(8) The Commission shall make a final determination on whether the telecommunications undertaking has violated or is in violation of paragraph 16 or 17 and, in

so doing, shall take into account the written representations, objections and views made in accordance with subparagraph (5), duly made and not withdrawn; any documents or other information provided in response to a request in accordance with subparagraph (2); and any additional such representations, objections and views presented at the hearing provided for in subparagraph (7).

- (9) (a) Where the Commission finally determines that a telecommunications undertaking has not violated paragraph 16 or 17, it shall discontinue the proceedings, and publish a notice of such final determination in one edition of a newspaper of nationwide circulation in Guyana and give written notice of the same to the telecommunications undertaking in respect of which the proceedings were initiated.
- (b) The Commission shall issue a final determination that a telecommunications undertaking has violated paragraph 16 or 17 by way of order, directed to the relevant telecommunications undertaking.
- (c) Any order issued under subparagraph (9)(b) shall --
- (i) state the reasons for the determination;
 - (ii) require the telecommunications undertaking to which such order is directed to cease the anti-competitive conduct, to terminate the anti-competitive agreement or to cease the abuse of a dominant position, or any of the foregoing as the case may be, immediately or, in the case of a determination of abuse of a dominant position, within such other time that the Commission deems just, reasonable and in the interests of consumers and any other relevant user, but in any event within not more than ninety days;
 - (iii) impose a penalty upon the telecommunications undertaking to which such order is directed, payable within a stated time of not more than ninety days, in accordance with paragraph 23; and
 - (iv) be subject to registration in the High Court by the Commission under section 66(1) of the Public Utilities Commission Act and enforceable as a judgment of the High Court.

(10) (a) Either --

- (i) after a preliminary determination but before a final determination by the Commission under this paragraph 18; or
- (ii) within the ten days following a final determination under subparagraph (9)(b),

a telecommunications undertaking preliminarily or finally determined to be abusing a dominant position, as the case may be, may submit to the Commission a written proposal for the measures it proposes to take to cease the abusive conduct and a timetable of not more than six months within which it would fully implement such measures.

(b) If the Commission is satisfied that the measures and timetable proposed by the telecommunications undertaking under subparagraph (10)(a), or any other measures agreed to by the Commission and such telecommunications undertaking for implementation within not more than six months, would --

- (i) result in the cessation of such abusive conduct; and
- (ii) be in the public interest,

the Commission may suspend the proceedings under this paragraph or suspend the operation of an order issued under subparagraph (9)(b), as the case may be, for the time provided for in the proposal of the telecommunications undertaking or in such other agreement between the Commission and the telecommunications undertaking, and the Commission shall so notify the telecommunications undertaking in writing, setting forth the measures proposed or agreed to by such telecommunications undertaking and the time within which such measures must be implemented.

(c) A telecommunications undertaking to which the Commission has issued a written notice under subparagraph (10)(b) shall publish notification thereof in the manner provided for in subparagraphs (11)(w), (x), (y) and (z) *mutatis mutandis*.

(d) Where a telecommunications undertaking fails or neglects to give effect to the measures in the Commission's written

notice under subparagraph (10)(b), within the time provided for therein, or if at any point within such time the Commission concludes that the telecommunications undertaking is not effectively proceeding in the implementation of such measures, the Commission shall re-activate the suspended proceedings or the order issued under paragraph (9)(b), as the case may be.

(11) Within the seven days following the issuance of any order under subparagraph (9)(b), the Commission shall --

- (a) publish the order in the *Official Gazette*, and such order shall take effect on the date provided for in such publication; and
- (b) post the order on its website,

and the telecommunications undertaking to which such order is directed shall publish notice of such determination by--

- (w) a posting on its website;
- (x) a mailing to each of its post-paid consumers and, where the order concerns anti-competitive conduct, an anti-competitive agreement or an abuse of dominance in a wholesale market, to each user of the relevant telecommunications service, telecommunications network or facility;
- (y) the publication in two editions of a newspaper in nationwide circulation in Guyana; and
- (z) any other manner required by the Commission.

Negative clearance rulings and prior authorisations.

19. (1) Subject to subsection (2), a telecommunications undertaking that proposes to enter into and carry out an agreement or to engage in other conduct which it believes is or may be subject to or prohibited by these Regulations, may apply to the Commission in writing for --

- (a) a ruling on whether the agreement or other conduct is subject to these Regulations and, if it is, whether it would constitute a violation of these Regulations; and
- (b) if the Commission rules that such agreement or other conduct would violate these Regulations, the Commission's authorisation to enter into and carry out such agreement or engage in such other conduct.

(2) The Commission shall determine any application submitted under subparagraph (1), and in such determination may --

- (a) issue a negative clearance ruling, if it determines that the proposed agreement or other conduct would not result in a violation of these Regulations; or
- (b) grant a prior authorisation to enter into and carry out the proposed agreement or to engage in other proposed conduct, even where such agreement or other conduct would otherwise result in a violation of these Regulations, if the Commission concludes that such agreement or other conduct would be of significant public benefit; or
- (c) refuse to grant a negative clearance ruling or a prior authorisation.

(3) A determination made by the Commission under subparagraph (2) --

- (a) shall be in writing;
- (b)
 - (i) in the case of a negative clearance ruling issued under subparagraph (2)(a), shall clearly state the terms and conditions of the agreement, or the type of conduct, deemed not to be in violation of these Regulations, in accordance with the terms and conditions of the agreement or the details of the conduct as described in the application submitted under subparagraph (1) and such other documents and information as may be requested by the Commission and submitted by the telecommunications undertaking during the determination process;
 - (ii) in the case of a prior authorisation granted under subparagraph (2)(b), shall clearly state --
 - (A) the terms and conditions of the agreement that the telecommunications undertaking is authorised to enter into and carry out, or the type of conduct in which the telecommunications undertaking is authorised to engage, in accordance with the terms and conditions of the agreement or the details of the conduct described in the application submitted under

subparagraph (1) and such other documents and information as may be requested by the Commission and submitted by the telecommunications undertaking during the determination process; and

- (B) the time for which such prior authorisation shall be valid;
 - (iii) in the case of a refusal under subparagraph (2)(c), shall state the reasons for such refusal; and
 - (c) shall contain such other terms and conditions as the Commission may deem necessary or appropriate.
- (4) (a) A telecommunications undertaking to which a negative clearance ruling has been issued by the Commission shall not be liable for violations of these Regulations for any agreement that it enters into and carries out, or any conduct in which it engages, in reliance upon such negative clearance ruling, to the extent that the terms and conditions and performance of such agreement or the performance of such conduct complies strictly with the terms and conditions of the negative clearance ruling.
- (b) During such period that a prior authorisation granted under subparagraph (2)(b) remains in force in accordance with its terms, the telecommunications undertaking to which it has been granted shall not be liable for violations of these Regulations for entering into or carrying out any agreement, or engaging in any conduct, in reliance upon such prior authorisation, to the extent that the terms and conditions and performance of such agreement or the performance of such conduct complies strictly with the terms and conditions of the prior authorisation:
- Provided that the provisions of this subparagraph (4)(b) shall not apply in any instance in which the prior authorisation is revoked, or to the extent to which it is amended, in accordance with subparagraph (5).
- (5) (a) Subject to subparagraph (5)(b), the Commission may revoke or amend a prior authorisation granted under subparagraph (2)(b) if it is satisfied that --
- (i) the prior authorisation was granted on the basis of

documents or other information submitted by the telecommunications undertaking that was false or misleading; or

(ii) the telecommunications undertaking to which the prior authorisation was granted is in breach of any term or condition of such prior authorisation.

(b) The Commission shall, before revoking or amending a prior authorisation, serve on the relevant telecommunications undertaking a written notice specifying the default under subparagraph (5)(a) and informing it of its right to apply to the Commission to be heard on the matter, within such time as may be specified in such notice.

(6) The Commission shall maintain, in such form as it may determine, a register of all negative clearance rulings, prior authorisations and refusals issued under this paragraph 19, and such register shall be available for inspection by the public during the normal operating hours of the Commission.

PART V

THE COMMUNITY COMPETITION COMMISSION

Requests by the Commission for investigations by the Community Competition Commission.

20. (1) Without prejudice to its functions and powers under the Act, the Public Utilities Commission Act, and these Regulations, the Commission may request that the Community Competition Commission undertake an investigation under Articles 174 and 175(1) of the Treaty, where the Commission has reason to believe that business conduct by a telecommunications undertaking located in another Member State prejudices trade or prevents, restricts or distorts competition in Guyana.

(2) Requests by the Commission under subparagraph (1) shall be in writing and shall provide such information as would enable the Community Competition Commission to make a preliminary assessment whether it should proceed with an investigation.

Investigations at the request of the Community Competition Commission.

21. (1) Upon a request by the Community Competition Commission pursuant to Article 176(1) of the Treaty, the Commission shall undertake a preliminary examination of whether any business conduct by a telecommunications undertaking in the CSME, identified to it in writing by the Community Competition Commission --

(a) prejudices trade;

(b) prevents, restricts or distorts competition within the CSME; and

(c) has cross-border effects.

(2) Where a request is made by the Community Competition Commission under subparagraph (1) and Article 176(1) of the Treaty, the Commission shall examine the matter and report its findings in writing to the Community Competition Commission within such time as may be determined by the Community Competition Commission.

(3) Where the Community Competition Commission is not satisfied with the outcome of its request to the Commission under this paragraph, it may initiate its own preliminary examination in Guyana into the business conduct identified to the Commission under subparagraph (1) and Article 176(1) of the Treaty, and the Commission shall cooperate with the Community Competition Commission in such examination.

(4) Where there is a difference of opinion between the Commission and the Community Competition Commission regarding the nature and effects of the business conduct at issue under this paragraph or whether the Commission or the Community Competition Commission has jurisdiction over the matter, the Commission shall cooperate in any referral of the matter by the Community Competition Commission to COTED and, in any instance in which COTED finds that the Community Competition Commission has jurisdiction, with the investigation of the matter by the Community Competition Commission.

**Powers of the
Community
Competition
Commission and
enforcement of
determinations.**

22. (1) In conducting any investigation in Guyana upon a determination of its jurisdiction to do so by COTED under paragraph 21(4) and Article 176(7) of the Treaty or upon the request of the Commission under paragraph 20, the Community Competition Commission shall exercise the functions provided for in paragraph 5 and shall have the powers provided for in paragraph 6 and such other powers assigned to the Commission under these Regulations as may be necessary for the Community Competition Commission to conduct such investigation.

(2) Where the Community Competition Commission issues a determination after conducting an investigation under this Part, the Commission shall record such determination and shall register it in the High Court.

(3) A determination registered in the High Court under subparagraph (2) shall be binding on all parties to the matter and shall be enforced in the same manner as a judgment of the High Court.

(4) A party who is aggrieved by a determination of the Community Competition Commission registered in the High Court under subparagraph (3) may apply to the Caribbean Court of Justice for a review of such determination.

PART VI

PENALTIES, FINES, OFFENSES AND OTHER REMEDIES

Penalties imposed by the Commission.

23. (1) Any order issued by the Commission under paragraph 18(9)(b) shall include monetary penalties against the telecommunications undertaking that has been determined to be in violation of paragraph 16 or 17, in an amount of not less than five million dollars and not more than fifty million dollars.

(2) In imposing a penalty under subparagraph (1), the Commission shall have regard to --

- (a) the nature and extent of the violation, including the extent to which it was contrary to the welfare or interests of consumers and other users and the extent to which it prevented, restricted or distorted competition;
- (b) the circumstances of the violation; and
- (c) any previous determination that the relevant telecommunications undertaking violated the Act, these Regulations, or any other regulations issued under the Act.

(3) A penalty imposed under this paragraph shall be paid by the telecommunications undertaking against which it is assessed to the Commission, within the time required in the order assessing such penalty, and shall be in addition to any recovery by a person in a civil action brought under paragraph 24 and any fines imposed and payable to the Accountant General under paragraphs 25 through 28.

(4) The Commission shall utilise penalties paid over to it under these Regulations to effect any compensation that it determines to be appropriate under paragraph 24, and shall pay over the remainder of the penalty moneys, if any, to the Accountant General.

Civil liability to persons suffering loss as a result of violations of these Regulations.

24. (1) A person, and any class of persons, who believes he has suffered loss as a result of any anti-competitive conduct or agreement, or any abuse of a dominant position, that is the subject of an order issued under paragraph 18(9)(b), may apply to the Commission for compensation, and the Commission may, if it is satisfied that the person or class of persons has suffered actual loss as a result of the anti-competitive conduct or agreement, or abuse of a dominant position, order compensation to such person or to the members of such class of persons, to be paid in such amounts as the Commission shall determine from the monetary penalties imposed upon the telecommunications undertaking under section 23.

(2) Any application for compensation under subparagraph (1) shall be filed with the Commission no later than one year after the date of the relevant order issued under paragraph 18(9)(b), and no application filed after that date shall be accepted or considered by the Commission.

Penalty for disobedience of order of Commission.

25. Any person who knowingly and in any material respect fails or refuses to comply with or obey an order of the Commission under these Regulations, including the payment to the Commission of any monetary penalties imposed under paragraph 23 within the time ordered for such payment, shall be guilty of an offence and liable upon summary conviction to a fine of not less than ten million dollars and not more than seventy million dollars.

Penalty for failure to obey a summons or provide documents or other information.

- 26.** Any person who --
- (a) summoned by the Commission under these Regulations, knowingly fails to attend or to give evidence under oath before the Commission in obedience thereto;
 - (b) knowingly fails or refuses to produce any document or provide any other information required by the Commission;
 - (c) intentionally or recklessly alters or destroys any record likely to be required for any investigation commenced under these Regulations;
 - (d) gives to the Commission or any person acting under its authorisation any information which he knows to be false or misleading; or
 - (e) in any manner willfully impedes, prevents or obstructs any investigation or inquiry by the Commission under these Regulations,

shall be guilty of an offence and liable upon summary conviction to a fine of not less than one million dollars and not more than two million dollars and imprisonment for six months.

Penalty for improper filing of a complaint.

27. Any person who makes a complaint to the Commission that a telecommunications undertaking has acted or is acting in contravention of these Regulation but that the Commission finds to be vexatious, frivolous or malicious shall be guilty of an offence and liable upon summary conviction to a fine of not less than one million dollars and not more than two million dollars.

Penalty for disobedience of directive of Community Competition Commission.

28. Any person who knowingly and in any material respect fails or refuses to comply with or obey any directive in a determination of the Community Competition Commission registered in the High Court under paragraph 22(2) shall be guilty of an offence and liable upon summary conviction to a fine of not less than three million dollars and not more than thirty million dollars.

Continuing offences.

29. For the purposes of these Regulations, where an offence continues after there has been a conviction, it shall be deemed to be a separate and distinct offence committed each day on which the offence continues and shall be punishable by a fine of at least five

hundred thousand dollars and not more than one million dollars for each such day.

Power to institute proceedings.

30. Without prejudice to the Minister's powers to institute legal proceedings under the Act and these Regulations, the Commission shall be empowered to institute legal proceedings under any provision of this Part.

Made this ___ day of _____, 2016

Minister of Public Telecommunications

DRAFT

SCHEDULE A

CRITERIA FOR ASSESSMENT OF DOMINANCE AND JOINT DOMINANCE

Section 1 -- Dominance Criteria

In making a determination of dominance, the Commission shall give consideration to the following factors:

1. Market Share and Trends in Market Shares

The persistent holding by a telecommunications undertaking of twenty-five percent or more of the total market share in terms of (i) subscriber numbers, (ii) traffic volumes, (iii) gross revenues, and/or (iv) capacity, is a factor in favour of a finding of dominance by that telecommunications undertaking in that market.

The Authority shall measure subscriber numbers based on the total number of subscriptions to all telecommunications services in the relevant market.

"Persistent" means for a period of six (6) months or more.

2. Size of the Telecommunications Undertaking's Business

An advantage over competitors or potential competitors as a result of a telecommunications undertaking's relative size is a factor in favour of a finding of dominance of that telecommunications undertaking.

Such advantages may exist as a result of economies of scale or scope, production capacities, distribution or other activities outside the relevant market.

3. Access to financial resources

Easy or privileged access to financial resources on a scale that places a telecommunications undertaking at an advantage over its competitors or potential competitors, or leads to barriers to entry by other telecommunications undertaking, is a factor in favour of a finding of dominance of that telecommunications undertaking.

4. Vertical Integration

High barriers to entry as a result of a telecommunications undertaking's controlling upstream and downstream markets, or having the potential to adversely affect competition by leveraging market power in upstream and downstream markets, is a factor in favour of a finding of dominance in respect of that telecommunications undertaking.

5. Diversification of Telecommunications Services

Where a telecommunications undertaking bundles the supply of a telecommunications service in which it is dominant with other telecommunications services, even where the bundled telecommunications services are supplied separately, and where the bundling has the effect of creating barriers to entry or leveraging the telecommunications undertaking's dominance across markets, such conduct may be a factor in favour of a finding of dominance of that telecommunications undertaking.

6. Countervailing buying power

An absence of, or low, countervailing buying power among users such that the telecommunications undertaking has the ability to increase its prices without significant loss of revenue, is a factor in favour of a finding of dominance of that telecommunications undertaking.

7. Barriers to Entry

Barriers to entry into the relevant market as a result of, for example, any of the following is a factor in favour of a finding of dominance:

- (a) Legislative or regulatory requirements;
- (b) Government policy;
- (c) Anti-competitive pricing behaviour;
- (d) Non-price behaviour such as increased promotions;
- (e) The telecommunications undertaking's owning or having access to resources or assets not similarly accessible by its competitors or potential competitors;
- (f) Sunk costs;
- (g) The telecommunications undertaking's having agreements (e.g. distribution, rights, etc.) that its competitors or potential competitors are not privy to.

8. Power of the telecommunications undertaking to introduce and maintain prices

The ability of a telecommunications undertaking to introduce and maintain prices, or to materially increase prices, in the relevant market independently of market conditions, competitors, potential competitors, consumers, and/or other users is indicative of dominance of that telecommunications undertaking in the relevant market.

9. Excess pricing and profitability

The ability of a telecommunications undertaking to set prices in the relevant market in such a manner that its profitability in that market is consistently and significantly higher than the competitive level (where prices are based on efficient costs) is indicative of dominance of that telecommunications undertaking in the relevant market.

10. Lack of active competition as to non-price factors

A lack of competition in the relevant market as to non-price factors, such as quality and variety of telecommunications services, is indicative of dominance.

11. Barriers to switching

Limits on the ability of consumers and/or other users to switch from the telecommunications undertaking's telecommunications service(s) in the relevant market to a competitor's telecommunications services, is a factor which favours a finding of dominance.

12. Consumer ability to access and use information

Limits on the information available to consumers on various aspects of the telecommunications services (e.g. price, quality, consumer service, consumer benefits) in the relevant market which, if available, would empower consumers to act based on differences between service providers in the relevant market, is a factor in favour of a finding of dominance.

13. Technological trends

A significant advantage by a telecommunications undertaking over its competitors or potential competitors as a result of its ability to provide telecommunications services using the latest or more advanced technologies is a factor in favour of a finding of dominance.

14. Degree of differentiation among telecommunications services in the relevant market

The ability for a telecommunications undertaking to differentiate its telecommunications services in the relevant market from that of its competitors or potential competitors in a manner that gives it a significant advantage over its competitors, or discourages entry into the relevant market by competitors or potential competitors, is a factor in favour of a finding of dominance.

Such differentiation may exist in terms of quality, performance, innovative or novelty features, packaging, or by advertising subjective qualities of the service.

Section 2 -- Joint-Dominance Criteria

In making a determination of joint dominance, the Commission shall give consideration to the following factors:

1. The extent to which the characteristics of the relevant market enable tacit coordination and the extent to which such form of co-ordination is sustainable.
2. If the telecommunications undertakings in question have substantially the same position vis-a-vis their consumers, other users, competitors and/or potential competitors as a single telecommunications

undertaking would have if it were in a dominant position, provided that no effective competition exists between them in the relevant market.

3. If the telecommunications undertakings in question, individually or jointly, satisfy any of the criteria for assessing dominance, in addition to the relevant market having the following characteristics:

- mature market;
- stagnant or moderate growth on the demand side;
- low elasticity of demand;
- homogeneous telecommunications services or products;
- similar cost structures;
- similar market shares by the telecommunications undertakings concerned;
- lack of technical innovation or mature technology;
- absence of excess capacity;
- high barriers to entry;
- lack of countervailing buying power;
- lack of potential competition;
- various kinds of informal or other links between the telecommunications undertakings concerned;
- retaliatory mechanisms; and
- lack or reduced scope for price competition.