ITU Regional Workshop on “Competition in Telecommunications Market”
Khartoum-Sudan, 24-26 May 2016

Competition in A convergence Environment

Dr.Hisham Tahat
Legal and Regulatory Expert

• Outline of the presentation

A. **Competition law in Telecoms**

B. **Ex Ante Regulation and Ex Post Competition Law**

C. **Market power: market definition and dominant position**

D. **Remedy on the dominance position**

E. **Competition in the Converging telecom Markets**

What does competition mean?

competition?

competition?

competition?

A. Competition law in Telecoms

- **Competition is no more that rivalry between two or more businesses striving for the same customer or market or resources**
- **Competition is the most efficient and equitable mechanism available for organizing, operating, and disciplining economic markets. Competitive markets distribute resources efficiently and fairly without any need for a single centralized controlling authority.**

Why do we rely on competition?

we rely on competition to achieve certain economic and social goals or outcomes :

Ensuring that resources, products, and services are allocated to the person or persons who value them the most (allocative efficiency)

- Forcing market participants to use scarce resources as productively as possible (productive efficiency)
- Encouraging market participants to innovate, and to invest in new technologies at the best time (dynamic efficiency). The results of this are :

Reduce prices and reduce costs
Innovate
Increase production
Invest to achieve better scale and quality
Encourage consumption
Contribute to greater economic welfare – producer surplus + consumer surplus

Views in competition policy?

As the aim of NRA’s is to reach effective competition then the consensus these days appears to be :

Let competitors compete, subject to not indulging in anti competitive behaviour– that is, competition must be fair

Let competitor’s merge to acquire scale and efficiency – so long as there is not a substantial lessening of competition

Increased competition usually increases economic welfare, but not always – for example in remote areas where only one operator can be sustained (at best)

Respect the inequality between Competitors. They strive to create competitive advantage for themselves. Regulators should not try to deny competitors the benefit of their efforts and investments or to “even up” the competition

Telecom Competition Framework and Competition Law

Most countries have their general competition law that applies across the board to all sectors of the economy, incl. electronic communications.

Most of the MENA countries consider the General Competition Law as an ex post regulation that may apply if the event occurs or the anti competitive action appears.

NRA's may apply the rules in general competition law in issues that are not regulated in a telecom competition regulations. e.g Merge and Acquisition of telecom companies.

Comparison between sector competition and general competition law

Steps	Economic regulation	Competition Law
Market Selection	3 criteria test	*(all markets)*
Trigger for intervention	**Significant Market Power = Dominant position**	**Dominant position** **+ Anti-competitive behaviour**
Remedies/ Sanctions	*Ex ante* - Behavioural (e.g. compulsory access) - Structural (e.g. functional separation)	*Ex post* - Behavioural - Structural - Fines - Private damages

Outline of the presentation

A. Competition law in Telecoms

B. Ex Ante Regulation and Ex Post Competition Law

C. Market power: market definition and dominant position

D. Remedy on the dominance position

What is A telecom Competition Framework?

Competition framework may be implemented through general competition laws or through competition enhancing rules in specific sectors.

In Most MENA Countries , NRA's Competition Powers are found in:

- **The Telecommunications Act and Regulations (where relevant) which gives Regulator to issue competition regulations and govern competition in the Market.**
- **NRA's Competition Regulations which includes :**
- **The Ex ante Regulations for the Regulation of Dominance**
- **Market definition Guidelines**
- **The Rules Governing ex post Anti-competitive Behaviour**

Process to apply competition framework

EX ante Regulation

↓

Market Definition

↓

Dominance in these markets

↓

Apply remedies on Dominants

What do the terms mean?

Ex Ante

&

Ex Post

What do the terms mean?

Ex Ante

Before the event. This term is applied to regulation of telecoms markets before anti-competitive behaviour occurs

Ex Post

After the event. This term is applied to intervention under competition law to address anti-competitive behaviour after it has occurred

Who does what?

Ex Ante

Before the ev

But in some countries there is no competition Authority and the telecoms regulator must take both kinds of actions if empowered by law.

Ex Post

After the event. This term is applied to intervention under competition law to address anti-competitive behaviour after it has occurred

Ex Post is preferred to Ex Ante

Where it is possible, effective competition will generally deliver better outcomes than regulation. there should be reliance on ex post action.

This means that regulators need to be very clear that ex ante regulation of a market is necessary and justified only if there is :

Market Failure

Because always regulation comes with costs.

Market Failure

Market Failure means that the market has not developed into a sustainable or effective competitive market and no chance in the near future that this is happening .

The prime reason will be that the market structure gives one or more operators a position of market power that is inconsistent with competitiveness.

Do regulators need to wait for a market to fail (or prove beyond any reasonable doubt that it is not competitive) before regulating for market failure?

The answer is No

Regulators can anticipate that a market will not be competitive based on current structural characteristics. These are factors associated with dominance (or dominance criteria)

What is Effective Competition?

To be effective competition has to be sustainable in the absence of ex ante regulation.

In effectively competitive markets, consumers are protected to some degree from exploitative prices that firms, acting unilaterally or as a collusive bloc, could charge. Likewise, firms are protected from manipulation by large individual consumers (or groups of consumers) and from disruption or interference from other firms.

We should ask the following question: What would happen if there is no regulation in a particular market? If competition would continue between the firms then it may be effective. If one firm would dominate and the others withdraw from the market, current competition would not be sustainable or effective

• Outline of the presentation

A. Competition law in Telecoms

B. Ex Ante Regulation and Ex Post Competition Law

C. Market power: market definition and dominant position

D. Remedy on the dominance position

What is Market Power?

Market power is the ability of a firm to raise prices above competitive levels, without promptly losing a substantial portion of its business to existing rivals or firms that become rivals as a result of the price increase.

There may be many sources of potential power in a market

For example –

Based on intellectual property or other technological advantages

Based on being in a good financial position

Based on a good reputation and well-accepted brand

Etc…..

What is Dominance in a Market?

For our purposes dominance must be in a market

Dominance = Significant Market Power

A service provider is considered to be dominant in a market—or to have significant market power—if it can set prices and determine performance without having to unduly consider the responses of its competitors or of its customers

Put another way, a dominant service provider is one that is not constrained by the market in the pursuit of its own policies

Dominance is not unlawful

Being dominant is not in itself unlawful

A firm will usually have become dominant through a combination of wise choices and some good fortune, such as:

Weak and ineffective competitors

Creative product design and price packaging

Well performing network

Top quality professionals

Good reputation reinforced by marketing

Long term investors

No illegality is involved in any of these factors

Being dominant is not unlawful, but abusing a position of dominance is unlawful

Single and Joint Dominance

- **Single dominance is where a single firm is in a dominant position**
- **Joint dominance is where two (or more) firms are in a dominant position – but how can that be?**
- **The definition of dominance means that a firm need not be unduly concerned about the responses of other firms or customers.**
- **Surely if there are two firms in that position they are not in the same market.**
- **If the structural characteristics of the market are such that they encourage cooperation rather than competition then the firms concerned might be considered to be jointly dominant.**

Market analysis – 4 stage process

1

Market definition

1In defining markets in geographic, customer and service terms based on the boundaries of substitution

2

Market susceptibility

to ex ante regulation for dominance, based on the 3 criteria of high barriers, tendency to competition, adequacy of ex post remedies.

3

Analysis of relevant markets for dominance

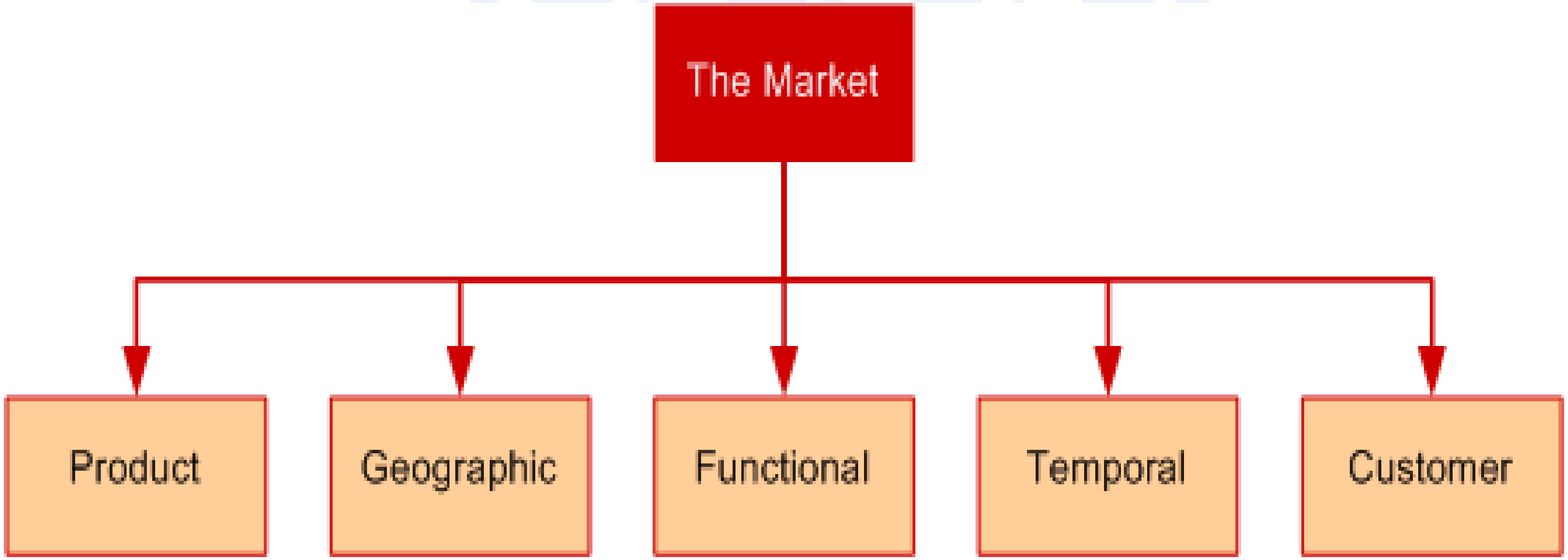
4

Remedies

that are proportionate and reasonable

There is a long list of services needs to be looked at :

A very long list of all possible telecom services



1. Market Definition

Definition is only for the purpose of regulatory market analysis – not for general purposes such as sales and marketing

Substitution and Substitutability

The boundaries of markets are the boundaries of substitution

Who decides on substitutability ?

Customers on demand side

Service Providers on the supply side

Markets have multiple dimensions

- **Services – access, usage, voice, data,**
- **Customers – residential / business; retail / wholesale**
- **Geography – international, national, regional in country, local**

1.Product Market

Two main types of market

- **Retail:** Access line + Services to end users
  - Fixed and mobile voice/data
- International Services
- Geographical Services…..etc

- (Derived) **wholesale**: Services supplied to undertakings to enable them to provide retail services
- Access to networks (different levels)
  - Termination
- Assess the substitution effects of an 5-10% price increase on the specific telecom service

2. Susceptible to ex ante regulation

This means whether a market is susceptible to ex ante regulation for dominance. It means how appropriate would such regulation be.

A single test of 3 criteria is applied to determine this.

A market is susceptible to ex ante regulation in cases where:

1. **there are high and non–transitory barriers to market entry;**
2. **there is no tendency towards sustainable competition behind such barriers; and**
3. **ex post control by competition rules is insufficient to address market failures.**

If any of the criteria do not apply then the market is considered not susceptible to ex ante regulation and such regulation should not be applied

How to select markets that potentially need to be regulated?

(1)
High and non-transitory barriers to market entry

(2)
No tendency towards effective competition over time

(3)
Insufficiency of competition law alone

Susceptible to ex ante regulation

What might count as a barrier to entry?

- Economic
- Legal

Timescale for relevant tendencies?

- Horizon of the analysis

When might ex post remedies be insufficient?

- Irreparable harm

3. Market power and Dominance

Difficult to measure market power directly

→ Indirect measurement in two steps:

-Definition of the relevant markets: PRODUCTS/SERVICES

-Assessment of dominant position: FIRMS

Applying dominance criteria

Based on competition law concept of dominance

> ***An undertaking that either individually, or jointly with others, enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers***

Single firm dominance

- **Market share (usually above 40%)**
- **Other criteria (barriers to entry, patents,**

High market shares: Existing competition

More than 50%: presumption of dominance
Less than 25% : presumption of no-dominance

MDD report

Different Outcomes:
Some Markets are fully competitive

Other Markets are not competitive and were susceptible

• Outline of the presentation

A. Competition law in Telecoms

B. Ex Ante Regulation and Ex Post Competition Law

C. Market power: market definition and dominant position

D. Remedies on the dominance position

E. Competition in the Converging telecom Markets

C. Remedies
The how

Some comments about remedies

- **As noted already, regulators should be cautious about intervening**
- **Market development is readily distorted and competition impacted – the transaction costs of regulation are often overlooked but can be significant**
- **Regulators should impose remedies that involve obligations that are proportional to the problem and are no greater than necessary to address the risks of dominance in the market concerned**

Golden rule

Remedies for retail market dominance

Three remedies have been recommended in all cases:

1.Imposing obligations of non-discrimination and transparency

Not to discriminate between customers (in the absence of a cost or other justification); and

to make terms and conditions of service fully transparent)e.g. publish on website)

2.Imposing a price control obligation

3. Imposing accounting separation (AS) obligations in relation to all services in this market, to guard against illegal cross subsidies and to allow monitoring of compliance

Wholesale market dominance remedies

Five remedies have been adopted for all wholesale markets as follows:

1. **Obligation to supply** to all eligible licensees who request the services
2. **Obligation to publish Reference Offers**
3. **Obligations of non-discrimination and transparency**

Wholesale market dominance remedies (Continued)

4. Price control obligation

Whether cost based or cost oriented in whole sale markets and retail minus in other markets

5. Accounting separation obligation

Without separation of accounts between regulated services it will be impossible for the NRA to effective monitor compliance

Separate accounts will also enable better understanding of profitability and detection of cross subsidisation

• Outline of the presentation

A. Competition law in Telecoms

B. Ex Ante Regulation and Ex Post Competition Law

C. Market power: market definition and dominant position

D. Remedies on the dominance position

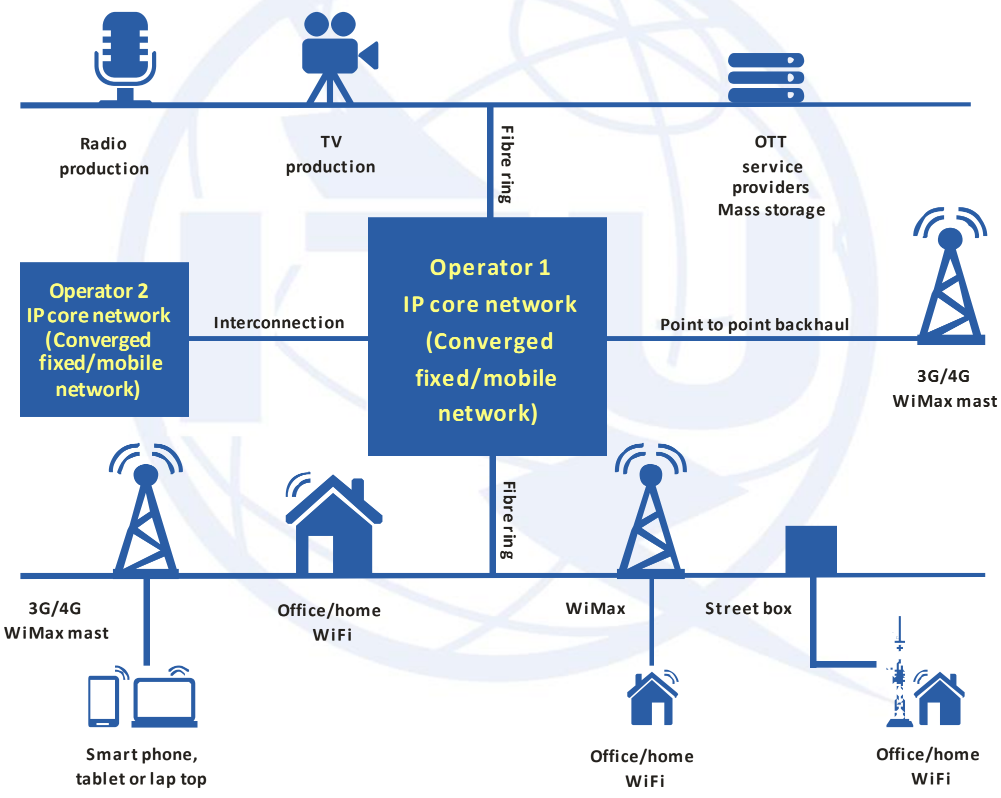
E. Competition in the Converging telecom Markets

Convergence: Definition

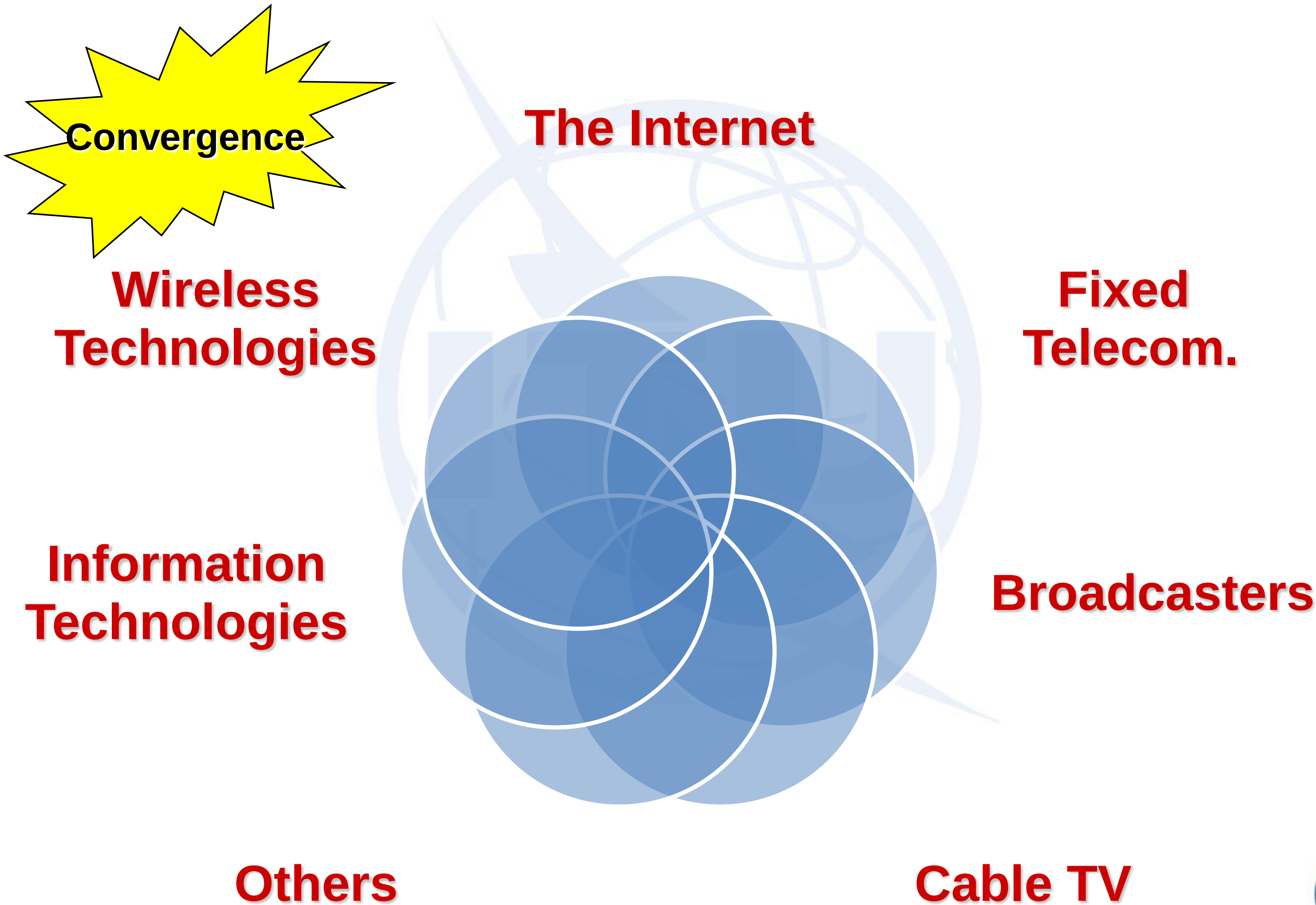
Convergence is the ability of the network to carry different services, or bringing different industries in the Telecommunications area, which were previously viewed as separate and distinct in both the commercial and the technological sense.

Examples are the provision of bundled packages(e.g. voice + broadband + pay TV and in some times with mobiles services offered by ISPs) .

Communications in a digital world



Trends: Communication Sector



The convergence Trend

44% of EU consumers purchase their broadband and /or pay TV service as part of a bundle offer.

The motivation of consumers are also changing from accessing text based informational materials to buying connectivity to access a range of rich media content and OTT services and this becoming a central factor for selecting a network operator .

Market Power in the Digital Area

The assessment of market power will depend on market definition. Once the market is defined, the nature of competition in that market can be considered, based on an assessment of the available qualitative and quantitative evidence in the market. Due to the ongoing changes in the communications sector, it is not necessarily the case that ownership of the traditional access infrastructure would confer market power on the owner. Traditional bottlenecks are also changing internet apps do not need wholesale input from mobile operators, limiting operators' ability to exercise market power. Although it would technically be possible to refuse access to Internet apps, an operator that restricts Internet services is likely to see large numbers of customers switch networks onto a provider who allows the Internet app. Therefore, depending on the particular circumstances of the markets and the relevant operators, traditional access SMP regulation may need to be reconsidered and, if the markets are found to be effectively competitive, to be withdrawn.

Can NRA's apply Ex ante Competition framework on this converged environment ?

The debate which is going on these a days is whether to apply new set of rules in competition to address the convergence trend , or whether the existing rules can regulate the new trend.

Three issues are facing current regulatory framework in telecom at least in the MENA region :

1- The Telecom competition framework does not cover content . From a broadcasting standards point of view, it is dealt with the Audio Visual media regulators .

2- The application of the current ex ante regulatory framework may achieve the purpose of NRA's in the convergence environment, as the content it self may not be lessening an effective competition in the market.

3- Ex post regulatory intervention could be sufficient to address any anticompetitive behaviours in this market.

Impact on Regulatory Frameworks

Dominance in the converged environment is becoming increasingly dynamic concept not well suited to the imposition of ex ante SMP regulation.

In the digital age, new products and services are constantly emerging (Substitution of the service is also there (OTTS app. Substitute SMS services),Voip apps has substituted telecom voice services …etc , barriers to entry and to expansion are evolving, market shares are volatile, old bottlenecks are replaced by new ones.

Consumer tastes and preferences are changing. Applying the framework for the assessment detailed above, a telecoms operator with a significant position in the mobile SMS and voice segments, for example, may not be able to exercise market power due to the emergence and widespread usage of Internet applications. If the relevant market is defined to encompass SMS, voice and equivalent services offered by Internet apps and telecoms operators, that particular operator may no longer have a dominant position or SMP.

In the abstract, a mixture of regulation and competition law could be optimal in minimizing the exploitation of market power within the communications sector, but only if regulation is applied equally to players which compete with each other.

Recommendation for a convergence broadband environment

- **Internet apps do not need wholesale input from mobile operators, limiting operators ability to exercise market power. Although it would be possible to refuse access to internet apps, an operator that restricts internet services is likely to see large numbers of customers switch network into a provider who allow the internet apps.**
- **Where the competitive circumstances allow, in fast moving markets, a case by case assessment under the competition rules is more likely to lead more effective competition and better outcomes for consumers than ex ante regulatory intervention. This is because any direct regulatory intervention in the market not supported by clear data can distort the incentive structure of operators.**

General Discussion