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**Comments by Cable and Wireless Guernsey
On Market Dominance in the Telecommunications Sector in Guernsey –
Consultation Document
(Document No OUR 04/09)**

13 August 2004

INTRODUCTION

Cable and Wireless Guernsey (C&WG) is pleased to submit comments in response to the Office of Utility Regulation (OUR) Consultation Document Number OUR 04/09 on Market Dominance in the telecommunications Sector in Guernsey.

C&WG offers a wide range of telecommunications services in Guernsey, including fixed and mobile voice services, and data services. Some of these are provided at both the wholesale and retail level. Fixed services include analogue exchange lines and ISDN services carrying fixed originated voice minutes and features. Broadband, Private Circuits, Customer Premises Equipment, Directories, Managed Data and Internet Services are also offered. Our mobile services include GSM voice, SMS text messaging and more recently mobile data services based upon GPRS working, for example, picture messaging, WAP portals and Mobydata card access for laptop computers.

C&WG believes that this consultation is of fundamental importance to the ongoing development of the regulatory framework in Guernsey, especially given the extent to which its results will inform other consultations. In particular, the price control consultations¹ will need to establish the extent to which there is dominance in any specific market before considering whether it is appropriate or necessary to impose detailed ex ante regulation in the form of a price cap.

In the light of this, C&WG is concerned that the OUR should recognise that it will be inappropriate to complete the price control review until such time that it has completed this dominance consultation. Furthermore, for the dominance consultation itself to be informative and of value it is essential that the OUR collects and fully analyses the data that it has requested from C&WG and other

¹ Price Control for Telecommunications Services in Guernsey: review of Price Control Scope and Structure, Consultation Document No OUR 04/10, June 2004; Price Control for Telecommunications Services on Guernsey: Calculating Allowed Revenue and the Cost of Capital, Consultation Document No OUR 04/11, June 2004.



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market participants before reaching any final conclusions on dominance. These issues are discussed in more detail below.

EXECUTIVE SUMMARY

C&WG agrees with the methodological approach that the OUR has set out in its consultation document for market definition and the subsequent assessment of dominance within the defined markets. C&WG does not believe, however, that the consultation document demonstrates that the OUR has followed this approach in practice.

In particular, it does not agree with the OUR that it is still appropriate to define just two broad product markets: one for fixed telecommunications services and networks and one for mobile telecommunications services and networks. Indeed, it is concerned that the OUR has not presented any analysis to support its conclusions on (product) market definition. Neither has it presented any evidence to support its conclusion that the geographical scope of these markets is Guernsey.

C&WG considers it absolutely essential for the OUR to analyse the relevant markets for different products using the principles it has set out in its consultation document, and then to analyse the geographical scope of these markets using similar principles. A failure to conduct such an analysis in such a manner would mean that any resultant findings could potentially be invalid. An invalid market definition and hence an incorrect finding of dominance would mean that any attempt to impose a price control mechanism would, for example, be ultra vires.

In response to the OUR's specific questions, C&WG has made a number of suggestions on the appropriate product market definitions. In particular, it recommends that separate markets are defined at the wholesale level and at the retail level, and that further disaggregation is likely to be appropriate. C&WG discusses how distinct product markets may exist for, inter alia, fixed call origination, fixed call termination, wholesale mobile termination and internet services. C&WG urges the OUR to collect the necessary quantitative and qualitative evidence in order to perform a robust analysis of the appropriate market definitions and the assessment of competition within those markets. As is the case elsewhere, this is likely to require a number of rounds of consultation with interested parties.



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DETAILED COMMENTS ON THE OUR'S SPECIFIC QUESTIONS

Q1 Do you agree that the relevant geographic market should remain defined as the Bailiwick of Guernsey? If not what do you consider the relevant geographic market and why?

C&WG believes that the definition of the relevant geographical market is likely to vary between product/service markets and that it is neither possible nor appropriate to give a single response to this question. Furthermore, the geographical extent of any product market can only be fully assessed once the relevant product markets have been identified. This is the approach that has been adopted by the European Commission and other respected competition and regulatory authorities, including the UK's general competition authority, the Office of Fair Trading (OFT), and the UK communications' regulator, Ofcom. For example, the European Commission's guidelines on market analysis² state:

Once the relevant product market is identified, the next step to be undertaken is the definition of the geographical dimension of the market.

Similarly, the OFT's recent draft guidelines on market definition³ state:

It is often practical to define the relevant product market first and only then to define the relevant geographical market.

C&WG therefore believes that a full consideration of this question will only be possible once the boundaries of the relevant product markets have been determined. In light of this, C&WG disagrees with the current stated view of the Director General that the geographical market should continue to be defined as the Bailiwick of Guernsey. This presupposes that the existing, very wide, product market definitions (of one fixed telecommunications services and networks market and one mobile telecommunications services and market) remain appropriate. As C&WG explains in more detail in response to question 2, it believes that this is no longer the case and that these very broad definitions need to be disaggregated into a number of separate product markets. The geographical scope of each of the product markets then needs to be analysed carefully.

C&WG notes the two main criteria identified by the OUR for identifying the geographic scope of any product market but would wish to emphasise that other

² Official Journal of the European Communities, "Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services", (2002/C 165/03), paragraph 55.

³ "Market Definition, draft competition law guideline for consultation", OFT 403a, April 2004



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factors will also need to be considered. The aim in defining the geographic scope of any market is to identify the constraints on the price setting behaviour of a hypothetical monopolist in a given geographical area (for example, Guernsey). Whilst the licensing regime will be relevant to the consideration of this issue and, indeed, is the most useful starting point, it will still be necessary to consider whether customers based in Guernsey would have the ability to source a particular telecommunications product or service from outside Guernsey. If they could, this would prevent a hypothetical monopolist within Guernsey from imposing a non-transitory and significant increase in price, which would mean the geographical scope of the market should be widened.

Of particular relevance here is the fact that Guernsey is part of the UK numbering scheme with the consequence being that, for some services at least, customers are able to source from UK providers who are not actually licensed in Guernsey. For example, C&WG is aware of UK-based providers such as One.Tel actively marketing its services to Guernsey residents and businesses. C&WG is not aware of how many Guernsey-based customers One.Tel has acquired to date through such direct marketing and would respectfully request that the OUR contacts UK-based operators such as One.Tel directly. Whilst it is possible that such operators have not yet attracted many Guernsey-based customers, this may change in the future and so is something that the OUR could monitor on an ongoing basis. In any event, the ability of UK-based operators to target Guernsey customers in this way is likely to act as a constraint on the extent to which a hypothetical monopolist supplier of certain communications services in Guernsey could price above the competitive level. A Guernsey-based hypothetical monopolist supplier would be aware that any attempt to raise prices above the competitive level would merely increase the incentive for customers to switch to sourcing the product/service from non-Guernsey based suppliers.

One area where C&WG is aware that non-Guernsey-based operators have successfully acquired customers in Guernsey is in access to dial-up internet services. C&WG estimate that UK-based ISPs currently terminate some 45% of all internet dial-up traffic from Guernsey customers (provided through 0800 or 0845 numbers). As discussed further below, it is conceivable that dial-up internet services constitute a separate, relevant product market. In looking at the geographical scope of this market, the evidence shows that customers actively source these services from outside Guernsey. In particular, it is clear that UK-based ISPs terminate a high proportion of traffic from Guernsey customers. As such, a hypothetical sole provider of dial-up internet services based in Guernsey would be constrained in its price-setting behaviour by the ability and willingness of customers to source these services from providers based in the UK. This justifies widening the geographical scope of the market beyond the Bailiwick of Guernsey, to include the UK. In the context of this wider geographical market it is



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clear that C&WG is not dominant. Whilst it may terminate up to 55% of the ISP traffic from Guernsey-based customers (both to Guernsey.Net and its own ISP), this translates into a much smaller proportion when the geographic scope of the market is extended to Guernsey and the UK.

A similar argument may be applied to the (retail) supply of Directory Enquiries (DQ) services in Guernsey, which is likely to represent a distinct product market. Guernsey-based customers have access to DQ services provided by UK-based suppliers, with details of their services being available through television advertising and on C&WG's website⁴. Again, this justifies extending the geographical scope of the market beyond Guernsey, which would have implications for the subsequent assessment of competition within the product market.

There may be other product markets too where the ability of customers to source from suppliers based outside Guernsey constrains the price setting behaviour of a hypothetical monopolist supplier based in Guernsey, such that the geographic scope of the market should be widened. C&WG would urge the OUR, therefore, to undertake a detailed analysis of the geographical scope of all the product markets once they are identified, using the internationally-accepted principles as set out in its consultation paper. In particular, this will mean that the OUR will have to ascertain from customers their purchasing patterns, and speak to non-Guernsey-based suppliers.

Q2 Do you agree that, given the current level of development in Guernsey's telecommunications sector, the following product/service market definitions are appropriate at this stage?

- *Fixed telecommunications services and networks*
- *Mobile telecommunications services and networks*

If not what product/service market definition do you consider appropriate and why?

C&WG believes that it is completely inappropriate for the OUR to propose to maintain these two very broad market definitions when it has not yet received, let alone analysed, the responses from licensed operators to its questionnaire. It is unsatisfactory for the OUR to continue to argue that the Guernsey telecommunications sector is still at an early stage of evolution and that the very broad definitions used in 2001 are still appropriate, without apparently doing any analysis to establish that this is indeed the case.

⁴http://www.cw.com/guernsey/docs/price_lists/dq_price_list.pdf



C&WG would urge the OUR to actually follow the approach to market definition it has advocated in its consultation document, before reaching any conclusions on market definition. This approach should start by considering the *narrowest* possible market by looking at a particular service, and then considering whether a hypothetical monopolist supplier of that service would be constrained in its ability to impose a small but significant non-transitory increase in price by the presence of substitutes on either the demand or supply side. If such substitutes exist, then the market definition should be widened to include those substitutes. The same test should then be applied to this wider set of products, up to the point where no further substitutes can be identified.

C&WG notes that the OUR has included as Annex 1 the list of relevant markets identified by the European Commission (EC) and believes that this could form a useful starting point for the OUR's analysis of the market definitions that may apply to Guernsey. The list is useful in a number of respects, not least because it shows that, beyond distinguishing between the fixed and the mobile sectors, a number of other distinctions may be made to further disaggregate these very broad sectors into a series of economic markets.

In particular, the list shows that a distinction is usually made between the wholesale and retail level. This recognises that providers of retail products and services will need to have access to the underlying wholesale inputs in order to provide the retail service. The implication of this is that there is no substitution between retail products/services and the underlying wholesale product/service, on either the demand or supply side. This distinction is highlighted in the EC's guidelines on market analysis⁵, where the EC states:

*...there are in the electronic communications sector at least two main types of relevant markets to consider, that of services provided to end users (services market) and that of access to facilities necessary to provide such services (access market). Within these two broad market definitions further market definitions may be made depending on demand and supply side patterns.*⁶

The guidelines go on to state:

*A distinction should, therefore, be made between provision of infrastructure to other operators (wholesale level) and provision to end users (retail level).*⁷

⁵ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).

⁶ Paragraph 64, op cit.

⁷ Paragraph 67, op cit.



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Similarly, the list shows that within both the fixed and mobile sectors, separate markets are normally defined for call origination services and call termination services. This is particularly pertinent given that the OUR's price control consultation document itself seems to recognize that there are a series of separate product markets within these two broad sectors. For example, it identifies calls from fixed lines to mobiles as a potential service to be included in the price cap.

For services such as fixed to mobile calls to be subject to a price control, however, it will be necessary for the OUR to first, define fixed to mobile calls as a separate market; secondly to establish that one (or more) operators holds a position of dominance with respect to calls to mobile; and thirdly, that the effective remedy to prevent any abuse of that dominance (such as charging excessive prices), is to impose a price control. In addition, the OUR will need to consider whether it is appropriate to identify a separate market for the underlying wholesale service of call termination and a separate market for the retail service provided by fixed operators, who originate and carry the calls for their fixed customers.

C&WG would respectfully suggest to the OUR that such a distinction is very important as far as calls to mobile is concerned as experience from other jurisdictions has shown that dominance may exist at the wholesale level but not at the retail level. This has meant that the regulatory remedy of price control has focused on the wholesale level only, thereby ensuring that regulatory intervention has been minimized as far as possible.

So in the UK, for example, the Competition Commission⁸ endorsed the initial findings of Oftel (which has now become part of Ofcom) in relation to calls to mobile, by defining a separate market for call termination for *each* of the mobile network operators in the UK and concluding that each mobile operator was dominant with respect to termination on its own network. It then determined that the appropriate regulatory remedy for the high termination rates charged by each mobile network operator was to impose a price control on each of them. It did not, however, see a need to impose any price control on the fixed operators in relation to their retail mark-up (or "retention") on calls to mobile, as it found this market to be competitive.

⁸ Vodafone, O2, Orange and T-Mobile reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Vodafone, O2, Orange and T-Mobile for terminating calls from fixed to mobile networks, Competition Commission, December 2002.



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It is also relevant that Ofcom (and its predecessor Oftel)⁹ has reached quite different conclusions with respect to the supply of other mobile services, such as the mobile call origination market. In its recent market review it found that there was no need to impose regulation of any form, as the market for mobile call origination was competitive.

C&WG suggests that a thorough investigation of the mobile sector in Guernsey would lead to very similar conclusions in relation to market definition. For example, even though Wave has only recently been issued with a mobile licence, a detailed analysis of demand and supply side substitutes is likely to find that there is a separate market for the termination of mobile calls on the Wave network, and a separate market for call termination on C&WG's mobile network. The subsequent assessment of competition within these markets is then likely to find that Wave holds a dominant position with respect to call termination on its network, and C&WG holds a dominant position with respect to call termination on its network.

Similarly, within the very broad sector of fixed services there are likely to be a series of distinct product markets. For example, in addition to there being distinct product markets for fixed voice call termination and fixed voice call origination, there is also likely to be a separate markets for data services, such as dial up internet services.

Even a very simplistic analysis of the characteristics of dial-up internet services would reveal that they represent a distinct market within the broad fixed telecoms sector. Dial-up internet services may indeed be accessed over the fixed telephone line but they offer additional functionality – namely the ability to access data – to that offered by the fixed line itself. On the demand side, therefore, customers would not regard a simple fixed telephone line as a substitute for dial-up internet services. Furthermore, it is common practice for regulators to resist imposing regulation on the retail internet service, as the underlying wholesale inputs needed to deliver the service (such as the fixed line or international capacity) are either competitively supplied or regulated. This means that imposing regulation at the retail level would be both unnecessary and disproportionate.

In this regard, C&WG would again refer the OUR to the analyses that have been conducted by Ofcom in the UK¹⁰, which have led to the identification of a distinct product market for retail dial-up (or “narrowband”) ISP services. It has further

⁹ Discontinuing regulation: mobile access and call origination market. Statement & discontinuation notice, Oftel, 4 Nov 2003. Available at: http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/discon1103.pdf

¹⁰ See for example, Review of the wholesale broadband access market Identification and analysis of markets Determination of market power and setting of SMP conditions, Final Explanatory Statement and Notification, Ofcom, May 2004.



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concluded that this market is effectively competitive. It is also relevant that Ofcom has concluded that dial-up, narrowband internet services are in a separate market to broadband services, such as DSL. Furthermore, Ofcom has found that these broadband services are competitively supplied and do not require detailed regulation.

As already noted in relation to question 1 above, C&WG believes that it is appropriate to define a distinct market for internet service provision (which the OUR may find should be disaggregated further into separate narrowband and broadband markets), with the geographic scope of that market being Guernsey and the UK. Like Ofcom, C&WG believes that this market is effectively competitive and not in need of detailed ex ante regulation.

C&WG considers that it is critical that the provision of internet services is viewed very carefully by the OUR. As has been set out above, there are many potential ways to analyse the internet market and C&WG does not consider that it would be found to be dominant in this market if a fully robust approach was adopted. This has consequent effects in relation to, for example, the need to notify new prices for internet services. Indeed, it is interesting to note that C&WG has long argued that such prices need not be notified to the OUR since it was not previously a market that required a licence. By implication, it would seem logical to assume that the OUR considers the provision of internet services to be a different market and hence worthy of separate consideration.

These examples illustrate, therefore, that it is absolutely vital for the OUR to conduct a thorough and detailed analysis of the extent to which there are a number of distinct, economic markets within the two broad sectors of fixed and mobile services. This is especially important when this analysis will feed through to all subsequent stages of determining whether there is effective competition in the defined markets and whether regulatory intervention -such as a price control - is appropriate for any of the defined markets. The OUR must be able to demonstrate that any such intervention is justified and proportionate.



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Q3 Do you agree that if an interested party considers that a product/service market should be defined on a more disaggregated basis, they should make representations providing prima facie evidence of the reason for such disaggregation? If not, why and what alternative proposals would you advocate?

C&WG is firmly of the view that it is for the OUR to undertake the initial, rigorous analysis of the relevant product/service markets, using the internationally accepted principles it has advocated in this consultation paper. The OUR will be in the best position to collect the necessary data from all market participants, especially as some data will be confidential. Indeed, C&WG is aware that it has already started this process as it has received a detailed questionnaire, which it assumes has also been sent to other parties. Having received the responses to this questionnaire, the OUR may need to ask further, specific questions of suppliers and customers to ascertain the extent of substitutability between different products and services, before reaching any preliminary conclusions on market definition. It is then good regulatory practice to invite further comments on these conclusions before adopting them as market definitions applicable at a particular point in time.

Market definitions will not, of course, remain static forever. This is particularly true in dynamic sectors such as the communications sector, which is characterised by high rates of product innovation and technological advances. Market definitions will therefore need to be kept under review, given that a change in the scope of a particular market can affect any subsequent conclusions on the existence of dominance in that market. The regular collection of data from suppliers by the OUR will help it to keep track of developments in particular markets.

It would be useful, therefore, if the OUR undertook to continue to collect data from suppliers of communications services to Guernsey on a routine basis (for example every quarter or half-yearly). This will help it to monitor developments that may affect the market definitions and/or the assessment of dominance that will ultimately result from this current consultation. Where this would not result in the disclosure of confidential information, such data should be published regularly, in the interests of transparency and information sharing.

Indeed, once the current position on market definitions and the assessment of dominance within those markets has been agreed, C&WG would expect the OUR to undertake to conduct regular market reviews. Again, this is good regulatory practice as followed by regulators such as Ofcom in the UK and indeed, the European Commission.



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In between these regular reviews, it should still be open to any interested party to provide qualitative evidence of changes that may affect the market definitions currently in place for regulatory purposes. This could include evidence of demand or supply side substitution that would support the adoption of a narrower - or wider - market definition.

On the demand side, for example, this could consist of evidence that its customers would not consider that another good or service would be substitutable in terms of its characteristics and intended use. Whereas on the supply side, it could be evidence to show that a supplier of a particular service would not be able to readily switch into the production of the service in question.

Similarly, it should also be open to any interested party to submit to the OUR that conditions of competition have changed within a given market, such that any existing findings of dominance need to be reviewed with a view to being removed. Any such submissions, would of course, need to be backed up with sufficient qualitative and, where available, quantitative evidence. The regular publication of market data by the OUR would naturally help in the provision of quantitative evidence.

Q4 Do you agree with the approach to measuring dominance set out above? If not what alternative do you propose and why?

C&WG agrees with the approach to measuring dominance proposed by the OUR as it conforms to internationally accepted best practice. C&WG is disappointed, however, to see that the OUR has not actually followed this approach in practice, as is evident from its conclusion that it is only appropriate to identify two markets, one for fixed services and one for mobile services. For any assessment of dominance to be reasonably robust it is essential that the first stage of market definition is also conducted in a robust manner.

C&WG is pleased that the OUR has acknowledged in section 5.2 *Factors Influencing dominance* that market share is not the sole determinant of whether any particular company is dominant and that a range of other factors will need to be considered too. It notes that the OUR has mentioned in section 5.3 *Market Dominance in Guernsey* that it is proposing to collect specific data from all licensed operators in the geographic market. Indeed, C&WG has already received such a data request. As already mentioned above, however, C&WG believes that the OUR should not assume that the geographic market is Guernsey for all defined product markets, and would request that the OUR also contacts suppliers based outside Guernsey so that it can conduct a thorough analysis of the relevant markets in both product and geographic terms. C&WG would also like to stress the importance of the OUR examining other factors in



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addition to market share, so that it can build up a full picture of the dynamics of competition within any particular market.

In this respect, C&WG is somewhat concerned by the assertion contained in paragraph 5.2 that markets with low barriers to entry are extremely rare and that dominant companies will attempt to build entry barriers. This is not backed up by any evidence and seems to be completely prejudicial to this consultation. Indeed, the statement would appear to suggest that if there has *ever been* a dominant company in a market (for example, due to the previous granting of a statutory monopoly) then that will always be the case. This is patently not true as, otherwise, governments throughout the world would never have succeeded (or indeed even bothered to try) to liberalize markets, including telecommunications markets.

If the OUR truly intends to follow internationally accepted practice for the assessment of dominance it should ensure that it approaches this with an open mind.

CONCLUSION

C&WG considers that it is vital that the OUR conduct a full and thorough market analysis before it makes a decision on market dominance.

C&WG considers that it is absolutely necessary for the OUR to consider the relevant markets for different products and then to analyse the relevant geographical market for such product.

C&WG absolutely does not accept that the two broad market definitions are acceptable in the context of the current telecommunications market.

A failure to conduct such an analysis in such a manner would mean that any resultant findings could potentially be invalid. An invalid market definition and hence an incorrect finding of dominance would mean that any attempt to impose a price control mechanism would, for example, be ultra vires. While the previous dominance findings of the OUR did not seem to cause the Utility Appeals Tribunal a concern in relation to a specific issue raised at that time, the market has progressed significantly since then. C&WG therefore considers that a more robust and thorough investigation of the market is necessary before it could accept a finding of dominance in the same way as Guernsey Telecoms previously did.