



Market Dominance in the Telecommunications Sector in Guernsey

Consultation Document

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1. Introduction

Over the last three years the telecommunications sector in the Bailiwick of Guernsey has undergone considerable changes which have laid the foundations for the development of a competitive market. One change is that in 2002 the former States Trading Board that provided telecommunications networks and services was purchased by Cable & Wireless – a global telecommunications company – and re-branded as Cable & Wireless Guernsey (C&WG). At the same time legal barriers to market entry by new players have been removed with the enactment of new telecommunications legislation and the removal of the incumbent's exclusive rights in certain markets. The Office of Utility Regulation (OUR) has been established to facilitate and promote competition while at the same time regulating in the wider interests of the Bailiwick.

The Director General of the OUR (DG) has licensed the incumbent operator (C&WG) and a number of new operators in the Guernsey market, including two fixed and one mobile competitor. The fixed line operators have started to provide some services to business users and recently, Wave Telecom launched a service based on Carrier Selection which is available to all fixed telephone users. The launch of Wave Telecom's competing mobile service is also imminent. At the same time, the market has seen the introduction of some new services by C&WG, including Frame Relay which is aimed at business users and broadband internet access using ADSL technology.

In September 2001, C&WG (Guernsey Telecoms Limited as it then was) was found to be dominant in the telecommunications markets in Guernsey. The fact that Guernsey has a dominant incumbent player is something that it has in common with most newly liberalising markets. The role of that dominant player is very important, both from a practical perspective and in the context of the regulatory regime. This document sets out to describe the importance of dominance and why it needs to be kept under review as the market develops. It then describes the type of information that the DG considers is necessary for the OUR to have in order to monitor market dominance. In order to collect this information, a questionnaire is being sent to all licensed operators in Guernsey at the same time as the publication of this document.

The paper describes how the DG proposes to use that information to review the current stage of development of the telecommunications market in Guernsey and the finding that C&WG is dominant, including a consideration of the various market definitions and how these will be considered in the light of new information.

This consultative document does not constitute legal, commercial or technical advice. The Director General is not bound by it. The consultation is without prejudice to the legal position of the Director General or her rights and duties to regulate the market generally.

2. Structure and Comments

2.1. Structure

The rest of this paper is structured as follows:

- Section 3:** describes the background to the concept of market dominance in the Guernsey telecommunications sector;
- Section 4:** considers the definition of Relevant Markets;
- Section 5:** sets out factors contributing to market dominance; and
- Section 6:** draws conclusions and describes the next steps

- Annex 1: Current EU Market Definitions of electronic communications markets
- Annex 2: Previous EU Market Definitions of telecommunications markets
- Annex 3: Questions posed in this paper

2.2. Comments

Interested parties are invited to submit comments in writing on the matters set out in this paper to the following address:

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The consultation period will run from 30th June to 13th August 2004. All comments should be clearly marked “**Comments on Market Dominance in the Telecommunications Sector in Guernsey - Consultation Document**” and should arrive before 5pm on 13th August, 2004.

In line with the policy set out in Document OUR 04/01 – “Regulation in Guernsey; Revised Consultation Procedures”, the DG intends to make responses to the consultation available on the OUR website. Any material that is confidential should be put in a separate Annex and clearly marked so that it can be kept confidential.

The Director General regrets that she is not in a position to respond individually to the responses to this consultation, but she proposes to issue a response to the consultation in September 2004.

3. Background

3.1. Market Dominance in the Regulatory Regime

When the regulatory regime for telecommunications was developed in the Bailiwick of Guernsey, it was recognised that, in common with jurisdictions everywhere that had opened up their telecommunications markets to competition, the Guernsey market was characterised by an incumbent operator which had legacy exclusive rights to operate in the sector.

The States of Guernsey established a new legislative framework designed to facilitate the evolution of that monopoly structure to a competitive structure wherever feasible and beneficial to the Bailiwick. The legislation acknowledges that for this transition to happen, it was necessary not just to remove the legal barriers to new operators entering the market, but to design a regulatory framework that took into account the market power of the incumbent.

The regime has done this by using the widely recognised concept of market dominance and providing that special rules can apply to operators who have market dominance.

3.2. Legal and Licensing Provisions

The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 requires that market dominance in a relevant market is to be construed in line with UK and European precedent in this area.

The Telecommunications (Bailiwick of Guernsey) Law, 2001 provides that the DG can determine that a licensee has a dominant position in a relevant market and can include specific conditions in a licence of such an operator¹. The Law also provides that the DG may apply specific provisions in relation to interconnection with and access to telecommunications networks, to operators who have been found to be dominant².

The licence conditions consulted on and published by the OUR include a number of conditions that apply to licensees who have been found to have a dominant position. Those conditions relate to equal access, interconnection, leased circuits, separate accounts, cross subsidisation, undue preference and unfair discrimination, linked sales and price regulation.

3.3. Decisions as to Dominance

In August 2001, the Director General consulted on whether Guernsey Telecoms (GT) as it then was, held a dominant position in the fixed and mobile telecommunications markets in the Bailiwick of Guernsey³ and in September 2001, following consideration of the responses to the consultation, published a decision that GT was dominant in the fixed telecommunications networks and services markets and the

¹ Section 5 of the Telecommunications (Bailiwick of Guernsey) Law, 2001

² Section 10 of the Telecommunications (Bailiwick of Guernsey) Law, 2001

³ Document OUR01/04 'Proposed Decisions under The Telecommunications (Bailiwick of Guernsey) Law, 2001'

mobile telecommunications networks and services markets in the Bailiwick of Guernsey⁴.

Key elements of that decision included the following:

- The geographic market was defined as the Bailiwick of Guernsey
- The product and services markets were defined broadly as the fixed telecommunications network and services market and the mobile telecommunications network and services market, reflecting the definitions in law of those markets in which GT had a legal monopoly.

The DG also noted that this type of approach was appropriate and sensible given the stage of development of the market in the Bailiwick of Guernsey and that appropriate market data would be gathered in due course and the decision kept under review as the markets evolved.

3.4. Evolution of the Guernsey Telecoms Market

There have been a number of key developments in the Guernsey telecoms market since the original decision of the DG. These are summarised briefly in the following paragraphs.

3.4.1. Ownership Changes of Incumbent

Since late 2001, the incumbent fixed and mobile telecommunications operator in Guernsey has changed ownership. Until October 2001 GT operated as a States Trading Board. On 1st October 2001 the Board was commercialised becoming a limited liability company that was wholly owned by the States of Guernsey. In May 2002 100% of the company was sold to Cable & Wireless Ltd and the company has since been re-branded as Cable & Wireless Guernsey.

This particular change does not alter the structure of the market, merely the ownership of the main player. However, it does have implications for the consideration of the company's dominant position as it changes its position with regard to some key variable such as access to capital, economies of buying power etc. These are considered further in section 5.

3.4.2. Liberalisation of the Market

The second significant change has been the removal of the legal monopolies on various sectors of the telecoms market, enabling any interested party to enter the market, subject to licensing. The key dates for liberalisation were:

- The fixed telecommunications services market was opened up to competitive entry from 30 June 2002
- The fixed telecommunications network market was opened to competitive entry from 30 November 2002
- The mobile telecommunications network and services markets were opened up to competition on 1 April 2003

In parallel with the removal of exclusive rights, licences were made available in the newly opened markets and key enablers of competition were put in place including a

⁴ Document OUR 01/14 'Decisions under The Telecommunications (Bailiwick of Guernsey) Law, 2001'

Reference Offer for Interconnection and Access. At the same time, certain services and activities previously requiring a licence, such as internal wiring of self provided networks were exempted from the requirement to be licensed.

3.4.3. Market Entry

Since the opening up of the market a number of licences have been issued by the OUR to competing operators, including two fixed licences – one each to Newtel Guernsey and Wave Telecom. In addition, following a tender process, a licence to provide 2G and 3G networks and services was granted to Wave Telecom in March 2003.

Notwithstanding the issuing of licences, the commencement of telecoms services by new entrants usually takes some time due to the need to build networks and/or conclude service agreements to use the incumbent network.

In the case of Guernsey, the new fixed entrants have recently begun to provide services to business users and a Carrier Select based service was launched by Wave Telecom for all customers in May 2004. The launch date for competing 2G and 3G mobile services was 30 April 2004. However, the new operator has experienced delays in this and has been directed to remedy the delay by rolling out service by the beginning of July 2004.

3.5. Conclusion

Given these developments in the Guernsey market, the DG now proposes to commence a market data gathering exercise to facilitate a review of the market and the position of the current dominant player – C&WG.

4. Definition of the Relevant Markets

In order to consider whether a player is dominant it is first necessary to consider the scope and nature of the market in which the player is or may be dominant. In general when considering market definition the main criteria that have to be considered are:

- The relevant geographic market and
- The relevant product/service market.

4.1. *The Relevant Geographic Market*

It is necessary to define the geographical boundaries of the market for the relevant services or products. With respect to the telecommunications sector, it is general practice that the geographical scope of the relevant market(s) is determined by two main criteria:

- The area covered by the network (in practice this area corresponds to the limits of the area in which an operator is authorised to operate); and
- The existence of legal and other regulatory instruments⁵.

While the geographic market is usually defined as the area in which the operator's licence applies, there are exceptions. Any exceptions are usually on a case by case basis in response to specific concerns, where the relevant market may be defined on a route by route basis.

The Director General is of the view that the existing geographical market definition remains appropriate at this time, i.e. the geographic market is defined as the Bailiwick of Guernsey. This is in line with general practice and corresponds to the territory in which licensed operators are authorised to operate when supplying telecommunications networks and services – be they mobile or fixed.

For the avoidance of any confusion, the definition of the geographic market as the Bailiwick of Guernsey does not in any way preclude the DG from making a finding of dominance in relation to the provision of services or networks to or from the Bailiwick⁶, i.e. international telecommunications services or off-island telecommunications networks. The product and services markets are discussed later in this document.

The collection of market statistics will enable the definition of other geographic markets on a case by case basis if that is considered necessary and the DG will be pleased to receive comments on this now or in the future.

⁵ 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), para 59

⁶ The telecommunications licences issued by the OUR authorising the provision of telecommunications networks and services are described in those Licences as "*a Licence to operate and maintain the licensed Telecommunications Network and provide the Licensed Telecommunications Services (as these terms are defined in the Conditions of this Licence) within, to and from the Bailiwick*" (Document OUR 01/18)

Q.1: Do you agree that the relevant geographic market should remain defined as the Bailiwick of Guernsey? If not what do you consider to be the relevant geographic market and why?

4.2. The Relevant Product/Service Market

The next step is to define the relevant products and services that comprise the market. In broad theoretical terms the relevant product/service market(s) for telecommunications comprises all those products or services that are sufficiently interchangeable or substitutable. This concept does not just take into account the characteristics, intended use and price of the product/service, but also takes into account the conditions of competition and/or the structure of supply and demand for the market in question⁷.

In the first decision of this kind the DG concluded that the relevant product and services markets should be broadly defined as:

- The fixed telecommunications network and services market; and
- The mobile telecommunications network and services market.

This decision was based on the pragmatic approach of recognising the nature of the legal monopoly that existed at that time and using the products (telecommunications networks and services) that were defined in those monopolies. All parties to the consultation agreed that the conclusion as to dominance was unlikely to be affected by a more sophisticated analysis at that stage of the development of the market.

The following sections consider whether this pragmatic approach should be reviewed at this stage, looks at various approaches and tests that can be considered, briefly references candidate markets that have been defined elsewhere and proposes an approach for Guernsey.

4.2.1. Substitutability Tests

The most significant factor in defining the relevant product/service market is that of substitutability or cross elasticity, both with respect to the demand and the supply side. The theoretical test that has generally been applied is the hypothetical monopolist or SNIP test⁸. On the demand side this generally relates to posing the hypothetical question, to what extent would customers switch to readily available substitutes in response to a small (5-10%) increase in the price of the product that is being assessed? Once a set of products has been reached where no such substitution is likely to take place then the product market is defined⁹.

⁷ 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), para 44

⁸ SNIP stands for 'Small but significant Non-Transitory Increase in Price'.

⁹ In certain cases the boundaries of the relevant market may be expanded to take into consideration products/services or geographic areas which, although not directly substitutable, should be included in the market definition because of chain substitutability. This occurs when it can be demonstrated that although products A and C are not directly substitutable, product B is a substitute for both A and C and therefore A and C may be in the same product market since their pricing maybe constrained by the substitutability of product B. The same reasoning applies for defining the geographic market. Given, however, the inherent risk in unduly widening the scope of the relevant market, findings of chain substitutability have to be adequately substantiated.

On the supply side, a similar test can be conducted to see whether such a price change would lead to market entry. Clearly, the level of substitutability for most product/services with respect to the supply side will be less than that associated with the ability for consumers to substitute between various products.

Despite that fact that this test appears to be empirically based, it is generally the case that obtaining reliable accurate data on cross elasticities between various candidate products/services is extremely difficult, costly and time consuming. As such, although attempts have been made to quantify such tests, they often, despite considerable effort devoted to empirical analysis, come down to judgement regarding the characteristics of the market and the likelihood of certain consumer and supply groups substituting at the margin.

4.2.2. Examples of Candidate Markets defined elsewhere

The identification and designation of the relevant markets to which a finding of dominance can apply has undergone considerable change in the past 15 years, in part to reflect the changes that have occurred not only to the characteristics of the market (i.e. developing competition) but also technological change (e.g. mobile, internet, voice-data convergence etc.).

The original European Directives¹⁰ addressing this issue in the telecommunications sector, focussed on four key markets. These were:

- Fixed Public Telephone Network and Services;
- Provision of Leased Line Services;
- Public Mobile Telephone Services and/or Networks; and
- National Interconnect Market

Given the stage of development of the telecoms market in the EU up to January 1998, when most EU countries liberalised their markets fully, there was not a need or a requirement for a more sophisticated group of candidate markets. At that time the various markets, like Guernsey, were characterised by dominant or monopoly incumbents. Indeed the EU Commission's 5th Implementation report¹¹ clearly showed that, with the exception of the UK, incumbent operators market shares were in excess of 95%.

However, in 1999 the EU Commission, having successfully overseen the liberalisation of the internal market for telecommunications, turned its attention to addressing the growing awareness that, since the regulatory regime had been first introduced in the early 1990s, the communications market had evolved significantly.

In the first place, the rapid growth in the mobile market and the internet and the range of services that can be offered over both has contributed to a blurring of the lines between traditional telecommunication services and the new and emerging

¹⁰ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (<http://europa.eu.int/ISPO/infosoc/telecompolicy/en/dir97-33en.htm>)

¹¹ http://europa.eu.int/information_society/topics/ecomm/doc/all_about/implementation_enforcement/annualreports/5report/annex4/4_2.pdf

technologies. In recognition of this and the need to be technology neutral, the sector has been redefined by the Commission as the “electronic communications market” which is much broader than traditional telecommunications. The concern to ensure technology neutrality so as to accommodate convergence, applies equally in Guernsey as communications customers use the same technologies and have access to the same developments as those in Europe.

Secondly, the EU has progressively developed and refined the process of identification of the markets within which an operator can be found to be dominant to mirror developments in the market place and to facilitate the targeting of regulatory measures in particular markets. This reflects the fact that EU markets are gradually becoming more and more competitive with a high level of market entry in some areas.

For example this has led to the definition of “wholesale” markets, or markets for access (by new entrants) to the underlying network and services of the incumbent network operator. If these markets can be regulated to ensure fair and cost oriented access, then it is hoped that effective competition can develop in the retail market. Clearly, Guernsey is not yet at the same stage of development as EU markets in this respect.

The Commission, together with the national regulatory authorities (NRAs) in the Member States of the European Union have therefore identified an agreed list of markets where regulatory intervention would be considered appropriate. The candidate markets that have been identified are listed in Annex 1 to this consultation document – in all there are now 18 separately identifiable markets covering retail and wholesale markets. The application of the new regime took effect in July 2003, five and a half years after the full liberalisation of the markets in most EU countries and when market shares had changed significantly in some (though not all) parts of those markets.

The JCRA in Jersey also recently considered the issue of candidate markets on which a finding of Significant Market Power¹² might be made. The final decision of the JCRA is to opt for high level market descriptions without detailed definitions. These can be considered to broadly align with the EU regime as it existed prior to the recent review with the exception of the addition of “fixed line broadband services” which is a new market listed in Jersey. The markets used by the Jersey regulator are therefore:

- Fixed line telecommunications services
- Fixed line telecommunications networks
- Leased circuits
- Mobile telecommunications services
- Mobile telecommunications networks
- Fixed line broadband services

The addition of the “fixed line broadband services” definition in Jersey may be designed to compensate for the fact that the legal definitions of “telecommunications services” and “telecommunications networks” are confined to traditional voice

¹² The Jersey regime uses the concept of “Significant Market Power” or “SMP” whereas the Guernsey regime uses the concept of dominance.

services and networks, unlike Guernsey where these definitions embrace data networks and services.

4.2.3. Candidate Markets in Guernsey

When considering the relevant market(s) applicable to telecommunications provision in Guernsey the DG is of the view that it is necessary to take into account the local conditions as well as international practice and precedent.

Technology Neutrality

First, it is clear that in Guernsey, the issue of technological neutrality and convergence of technologies is as relevant as it is in the EU generally. Guernsey has access to, and uses the same technologies as other developed western economies, and the definitions in the Guernsey legislation reflect this fact. Therefore, notwithstanding the use of the terms “telecommunications networks” and “telecommunication services” in Guernsey law, these are defined in such a way as not to be restricted to specific technologies such as public switched telecommunications networks (PSTN), but also include IP networks, broadband and other technologies

Therefore the market definitions used in Guernsey already meet the need to cope with convergence

Development of Competition

Second, it is clear that the Guernsey telecommunications market is not at the same stage as the EU markets with respect to competition where, six years after liberalisation, there has been considerable activity.

By contrast, in the Guernsey market entry is still in the very early stages of the development of competition.

Market Analysis

In this context it is useful to ensure that resources (of OUR and the market players) are not unduly wasted or diverted into discussing academic points regarding market definition which, at this stage in the evolution of Guernsey’s telecommunications sector, are likely to be of little practical relevance, materiality or value. This point was agreed by respondents to the original consultation on this topic.

The DG is of the view that it is necessary to ensure a suitable balance between theory and pragmatism is adopted and that any market definition(s) utilised can be readily reviewed and updated as the telecommunications sector develops and the direction of any effective competition that evolves becomes clearer.

OUR Proposals

The current markets on which a finding of dominance has been made are:

- The fixed telecommunications networks and services market;
- The mobile telecommunications networks and services market.

These terms are in turn defined in the legislation as follows;

“**telecommunications network**” means a network comprising telecommunications equipment for the emission, transmission, switching, conveyance or reception of messages through the agency of electric, magnetic,

electro-magnetic, electro-chemical, electro-mechanical or electro-optical energy or by optic-electronic means;

“telecommunications service” means a service consisting of the emission, transmission, switching, conveyance or reception of messages within, to or from the Bailiwick by means of a telecommunications network;

Clearly these markets therefore encompass

- wholesale markets (i.e. the provision of networks and services to competing operators, including but not limited to access and interconnection)
- retail markets (i.e. the provision of networks and services to end users)
- converging technologies including, but not limited to, broadband networks and services, IP networks and services, voice networks and services)

The DG does not at this stage have evidence that there has been market entry or any market development that significantly alters the driver for product and services market definition at this stage and currently proposes to maintain the definitions as unchanged.

It is further proposed that the data that will be gathered from the licensed operators through the market analysis questionnaires will inform a reconsideration of this position. If the data demonstrates that there has in fact been significant change in the market, then this position could be changed and it may be necessary to collect such data regularly to enable the appropriate markets to be kept under review. A questionnaire has been sent to all licensed operators setting out the data that will be collected and the first such set of data will be available for analysis by 30th July 2004.

Finally, it is proposed that any interested party will be free to make representations suggesting that specific markets warrant disaggregation at some stage in the future. Where such representations are made, the DG proposes that the party concerned will be required to make a *prima facie* case (including submission of data) to demonstrate that a particular product/service market should be considered separately and the DG will make a decision, on a case by case basis, on whether such consideration is appropriate.

Q.2 *Do you agree that, given the current level of development in Guernsey’s telecommunications sector, the following product/service market definitions are appropriate?*

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

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

Q.3 *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 reasons for such disaggregation? If not, why and what alternative proposals would you advocate?*

5. Market Dominance

This section considers the question of what players have dominance in the relevant markets and therefore can exert market power, for example by charging higher prices, or supplying goods and services of a lower quality than would be the case under effective competition¹³. Market power often exists when a company has a high market share or when company's which together have a high market share do not actively compete with each other.

5.1. *What is Market Dominance?*

Market dominance is a pivotal concept in utility regulation as it is a necessary requirement that a firm has a dominant position within the relevant market if certain aspects of regulation are to apply. A dominant position in a relevant market means that the company(ies) has a significant capacity to distort the market through its actions and as such have a special responsibility **not** to do so¹⁴. This is often a source of frustration to dominant firms, as their basis for competing is restricted, whilst operators that are not dominant are able to deploy tactics unavailable to the dominant firm.

Dominance is generally considered to occur when a particular company(ies) can behave to an appreciable extent independently of its competitors, customers and ultimately consumers. In short, a dominant company(ies) has a position of economic strength that can prevent effective competition being maintained on the relevant market¹⁵. By definition this is clearly the case when there is no threat of effective competition. Furthermore, dominance does not require that there be no competition on the relevant market but depends on the level of appreciable influence that a particular company(ies) can exert¹⁶.

5.2. *Factors Influencing Dominance*

Dominance can be attributed to a company by virtue of a variety factors. Of particular importance is market share. Market share, however, is not the sole determinant of dominance and situations can arise when a particular company has a large market share but is not dominant. If for instance there is a serious threat of potential

¹³ Competition problems often involve other forms of conduct, such as vertical restraints or predation, rather than high profits, but it is the ability to raise prices above competitive levels which demonstrates whether a company or group of company's possesses market power.

¹⁴ *Nederlandesche Banden-Industrie Michelin N.V v Commission* case 322/81 [1985] 1 CMLR 282, para 57 - 'A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market.'

¹⁵ *United Brands Co v Commission* case 27/76 [1978] 1 CMLR 429, para 65 – The dominant position referred to in [art .82] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.'

¹⁶ In *Hoffman-La Roche & Co. AG v Commission* case 85/76 [1979] 3 CMLR 211, para 39, the court held that a finding of dominance '...does not preclude some competition...but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it.'

competition due to low entry barriers, it may well be the case that the ability to exert market power is diminished simply by the threat of entry. Such markets are extremely rare, as dominant companies generally attempt to build entry barriers, either physically or through reputation, in order to maintain their position and the ability to extract economic rents. Alternatively, there can be situations where a company has a low market share yet can still be dominant because of the relatively weak position of its competitors.

However, market share remains one of the most significant factors when considering dominance and a large market share is generally considered to be sufficient evidence to suggest dominance¹⁷, particularly if the shares have remained stable over time. Indeed, established EC case law suggests that very large market shares, which are defined as in excess of 50%, are in themselves, save in exceptional circumstances, evidence of a dominant position¹⁸.

Evidence of a dominant position via a large market share does not automatically establish that a company is dominant as this depends on the extent to which a company can behave to an appreciable extent independently of its competitors, customers and consumers. Clearly, in general terms the greater the market share, the higher the probability that this is the case. However, other factors that may need to be taken into account are:

- The overall size of the company;
- Its level of control over infrastructure that is not easily duplicated;
- The potential for technological advantages or superiority;
- The absence of, or low countervailing buying power;
- Easy or privileged access to capital/financial resource;
- Production/services diversification;
- Economies of scale;
- Economies of scope;
- Vertical integration;
- A highly developed distribution and sales network;
- Absence of potential competition; and
- Barriers to expansion

5.3. Market Dominance in Guernsey

The DG proposes to collect specific market data from all licensed operators in the geographic market. This will enable the OUR to measure the market share of each licensee in the relevant markets in the first place.

¹⁷ In the Hoffmann-La Roche case at para 41, the court held that 'although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, as save in exceptional circumstances, evidence of the existence of a dominant position.'

¹⁸ Official Journal of the European Communities: Commission Guidelines on Market Analysis and the Assessment of Significant Market Power Under the Regulatory Framework for Electronic Communications Networks and Services, para 75. ERG Working Paper on the SMP Concept for the New Regulatory Framework, May 2003, para 7

The DG proposes to consider market share as the first indicator of market dominance and believes that high market shares are a very strong indication of dominance. However, the DG recognises that it may be necessary to consider other factors and will have regard to those factors listed above in section 5.2 along with such other local issues as may be relevant when determining what players are dominant in the relevant markets.

Q.4 Do you agree with the approach to measuring dominance set out above? If not what alternative do you propose and why?

6. Conclusion

The DG proposes to consider the response to this consultation in tandem with the response to the market analysis questionnaire that is being sent to all licensed operators. The information from that market analysis will help the DG determine the state of competition in the markets and to identify operators that are dominant in the markets.

It is expected that any changes to the current findings of dominance in the telecommunications markets will be announced at the end of Q3 or early in Q4 2004 and will in turn inform the obligations and duties that are placed on licensed operators.

/ENDS

Annex 1

Annex to COMMISSION RECOMMENDATION of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and Services

Retail level

1. Access to the public telephone network at a fixed location for residential customers.
2. Access to the public telephone network at a fixed location for non-residential customers.
3. Publicly available local and/or national telephone services provided at a fixed location for residential customers.
4. Publicly available international telephone services provided at a fixed location for residential customers.
5. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers.
6. Publicly available international telephone services provided at a fixed location for non-residential customers.

These six markets are identified for the purpose of analysis in respect of Article 17 of the Universal Service Directive.

Together, markets 1 through 6 correspond to ‘the provision of connection to and use of the public telephone network at fixed locations’, referred to in Annex I(1) of the Framework Directive. This combined market is also referred to in Article 19 of the Universal Service Directive (for possible imposition of carrier call-by-call selection or carrier selection).

7. The minimum set of leased lines (which comprises the specified types of leased lines up to and including 2Mb/sec as referenced in Article 18 and Annex VII of the Universal Service Directive).

This market is referred to in Annex I(1) of the Framework Directive in respect of Article 16 of the Universal Service Directive (the provision of leased lines to end users).

A market analysis must be undertaken for the purposes of Article 18 of the Universal Service Directive which covers regulatory controls on the provision of the minimum set of leased lines.

Wholesale level

8. Call origination on the public telephone network provided at a fixed location. For the purposes of this Recommendation, call origination is taken to include local call conveyance and delineated in such a way as to be consistent with the delineated boundaries for the markets for call transit and for call termination on the public telephone network provided at a fixed location.

This market corresponds to that referred to in Annex I(2) of the Framework Directive in respect of Directive 97/33/EC (call origination in the fixed public telephone network).

9. Call termination on individual public telephone networks provided at a fixed location.

For the purposes of this Recommendation, call termination is taken to include local call conveyance and delineated in such a way as to be consistent with the delineated boundaries for the markets for call origination and for call transit on the public telephone network provided at a fixed location.

This market corresponds to the one referred to in Annex I(2) of the Framework Directive in respect of Directive 97/33/EC (call termination in the fixed public telephone network).

10. Transit services in the fixed public telephone network.

For the purposes of this Recommendation, transit services are taken as being delineated in such a way as to be consistent with the delineated boundaries for the markets for call origination and for call termination on the public telephone network provided at a fixed location.

This market corresponds to the one referred to in Annex I(2) of the Framework Directive in respect of Directive 97/33/EC (transit services in the fixed public telephone network).

11. Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.

This market corresponds to that referred to in Annex I(2) of the Framework Directive in respect of Directive 97/33/EC and Directive 98/10/EC (access to the fixed public telephone network, including unbundled access to the local loop) and to that referred to in Annex I (3) of the Framework Directive in respect of Regulation No 2887/2000.

12. Wholesale broadband access.

This market covers 'bit-stream' access that permit the transmission of broadband data in both directions and other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to bit-stream access.

It includes 'Network access and special network access' referred to in Annex I(2) of the Framework Directive, but does not cover the market in point 11 above, nor the market in point 18.

13. Wholesale terminating segments of leased lines.

14. Wholesale trunk segments of leased lines.

Together, the wholesale markets 13 and 14 correspond to those referred to in Annex I(2) of the Framework Directive in respect of Directive 97/33/EC and Directive 98/10/EC (leased line interconnection) and to those referred to in Annex I(2) of the Framework Directive in respect of Directive 92/44/EEC (wholesale provision of leased line capacity to other suppliers of electronic communications networks or services).

15. Access and call origination on public mobile telephone networks, referred to (separately) in Annex I(2) of the Framework Directive in respect of Directives 97/33/EC and 98/10/EC.

16. Voice call termination on individual mobile networks.

This market corresponds to the one referred to in Annex I(2) of the Framework Directive in respect of Directive 97/33/EC (call termination on public mobile telephone networks).

17. The wholesale national market for international roaming on public mobile networks.

This market corresponds to the one referred to in Annex I(4) of the Framework Directive.

18. Broadcasting transmission services, to deliver broadcast content to end users.

Note

National regulatory authorities have discretion with respect to the analysis of the market for 'Conditional access systems to digital television and radio services broadcast' in accordance with Article 6(3) of the Access Directive. Article 6(3) of the Access Directive provides that Member States may permit their NRAs to review the market for conditional access system to digital television and radio services broadcast, irrespective of the means of transmission.

Annex 2

Market	Definition ³
Fixed Public Telephone Network and Services	<p>The fixed public telephone network means the public switched telecommunications network which supports the transfer between network termination points at fixed locations of speech and 3.1 kHz bandwidth audio information, to support <i>inter alia</i>: voice telephony, facsimile Group III communications, in accordance with ITU-T recommendations in the 'Tseries', and voice band data transmission via modems at a rate of at least 2,400bit/s, in accordance with ITU-T Recommendations in the 'V-series'.</p> <p>The fixed public telephone service means the provision to end-users at fixed locations of a service for the originating and receiving of national and international calls, and may include access to emergency (112) services, the provision of operator assistance, directory services, provision of public payphones, provision of service under special terms and/or provision of special facilities for customers with disabilities or with special social needs.</p>
Provision of Leased Line Services	<p>Leased lines means the telecommunications facilities which provide for transparent transmission capacity between network termination points, and which do not include on-demand switching (switching functions which the user can control as part of the leased line provision). They may include systems which allow flexible use of leased line bandwidth, including certain routing and management capabilities.</p>
Public Mobile Telephone Services and/or Networks	<p>A public mobile telephony network is a public telephone network where the network termination points are not at fixed locations.</p> <p>A public mobile telephone service is a telephony service whose provision consists, wholly or partly, in the establishment of radio communications to one mobile user, and makes use wholly or partly of a public mobile telephone network.</p>
National Interconnect Market	<p>Interconnection means the physical and logical linking of telecommunications networks used by the same or a different organization to communicate with users of the same or another organization. Services may be provided by the parties involved or other parties who have access to the network.</p> <p>The European Commission has provided the guideline information that the national market for interconnection means all interconnection services on fixed and mobile networks and includes interconnection services provided by a fixed telephony incumbent operator to itself.</p>

³ Based on the definitions in Directive 97/33/EC.

List of Questions

Q.1 *Do you agree that the relevant geographic market should remain defined as the Bailiwick of Guernsey? If not what do you consider to be the relevant geographic market and why?*

Q.2 *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?

Q.3 *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 reasons for such disaggregation? If not, why and what alternative proposals would you advocate?*

Q.4 *Do you agree with the approach to measuring dominance set out above? If not what alternative do you propose and why?*