

Decision Notice 2011/01 is withdrawn pending review. The Communications Commission intends to undertake appropriate processes with a view to issuing three separate Notices respectively covering Retail Fixed Markets, Wholesale Fixed Markets and Mobile Communications Markets.

Response to consultation on telecommunications market reviews and notification of determinations

4 October 2011

Contents

Executive summary	4
Introduction	6
Background	6
The Consultation.....	7
Approach	7
Retail fixed markets	8
Introduction	8
Market definition and competition assessment.....	8
Remedies in the retail fixed markets.....	14
Proposed remedies	15
Access	15
Transparency	17
Non-discrimination.....	18
Accounting separation.....	19
Cost accounting and price controls.....	22
Wholesale fixed markets.....	24
Introduction	24
Market definition and competition assessment.....	24
Remedies in the wholesale fixed markets.....	28
Access	29
Non-discrimination.....	32
Transparency	34
Accounting separation.....	36
Cost accounting and price controls.....	38
Mobile communications markets.....	40
Introduction	40
Market definition and competition assessment.....	40
Remedies.....	42
Annex A	45
List of respondents to the consultation.....	45
Annex B WITHDRAWN.....	46
Decision Notice 2011/01: Notification of Market Power Determinations	46
Statutory powers	46

Retail fixed markets	46
Wholesale fixed markets.....	48
Mobile communications markets.....	50

Executive summary

The Communications Commission published a consultation reviewing the telecommunications markets in June 2011. A total of 6 responses were received, and we thank all respondents for their comments. The Commission has taken full account of all points raised in order to reach its conclusions and final decisions.

In the **retail fixed markets**, there are markets for retail access, retail calls from a fixed location, retail broadband and retail dedicated capacity (leased lines). Manx Telecom has SMP (Significant Market Power) in all retail fixed markets.

Competition in the retail fixed markets depends on effective wholesale access, and remedies ensuring access are addressed in the context of the wholesale fixed markets. In the retail fixed markets, Manx Telecom will be obliged not to unduly discriminate between its retail customers. Manx Telecom shall have an obligation of transparency, and will make publicly available and keep updated information about its price and non-price terms and conditions. It must publish any proposed changes 30 days in advance of their coming into effect.

The Commission accepts that the dynamics of competition may vary within a market, and so for retail leased lines at or greater than 155Mb/s. Manx Telecom will not be obliged to publish its prices for these services, nor be obliged to stick to a price list. However, it will be required to notify its prices for these services to the Commission on a confidential basis.

Manx Telecom will be obliged to produce separated accounts, and will agree with the Commission a structure and process for reporting. Manx Telecom will maintain appropriate cost accounting systems. Manx Telecom will be subject to obligations not to unreasonably bundle, and not to cause a margin/price squeeze.

In the **wholesale fixed markets**, there are markets for wholesale call origination, wholesale call termination, wholesale broadband access, wholesale on-island dedicated capacity (leased lines), and wholesale off-island dedicated capacity (leased lines). Manx Telecom has SMP in the markets for wholesale call origination, call termination, broadband access, and on-island dedicated capacity.

Manx Telecom will be obliged to meet all reasonable requests from Other Licensed Operators (OLOs) for the provision of access in the wholesale fixed markets where Manx Telecom has been designated with SMP. The access obligation includes a requirement to negotiate in good faith with OLOs requesting access, and provides that Manx Telecom cannot withdraw access to services and facilities already granted, without justification and consultation. Manx Telecom will be obliged to behave in a manner which is fair, reasonable and timely in the way in which it deals with access requests, both in terms of responding to requests and in implementing successful requests, and will be required to detail any refusal of an access request.

Manx Telecom shall be required not to discriminate in respect of access, and will be required to identify and justify any differences between the wholesale services received by its own retail operation and the wholesale services received by OLOs.

The transparency obligation applied in the wholesale fixed markets will oblige Manx Telecom to publish documentation about its wholesale products, including Reference Offers and Service Level Agreements. Manx Telecom will be obliged to publish price and non-price terms and conditions for wholesale products, except for prices for wholesale leased lines at or above 155 Mbit/s, which will be notified to the Commission. OLOs and the regulator will be notified at least 3 months in advance of the launch of a new wholesale product.

Manx Telecom will be obliged to produce separated accounts, and will agree with the Commission a structure and process for reporting. Manx Telecom will maintain appropriate cost accounting systems. Manx Telecom will be subject to obligations not to unreasonably bundle, and not to cause a margin/price squeeze. Manx Telecom shall not offer retail prices which are below its wholesale price for the equivalent product.

In the **mobile communications markets**, Manx Telecom has SMP in the wholesale market for mobile access and call origination, and MT and C&WIOM each has SMP in the wholesale market for the provision of call termination on their respective networks.

No remedies will be imposed in the wholesale market for mobile access and call origination at this time.

SMP obligations will be imposed on Manx Telecom and C&WIOM in relation to wholesale call termination on their respective mobile networks. Manx Telecom and C&WIOM shall meet all reasonable requests for the provision of access to their respective mobile networks, and shall be required not to discriminate in respect of access to their mobile networks.

Manx Telecom and C&WIOM shall have an obligation of transparency, and will notify any proposed changes to price and non-price terms and conditions at least 30 days before they are due to come into effect. Manx Telecom and C&WIOM will be obliged to produce separated accounts. The format and reporting of these accounts will be subject to agreement with the Commission. Manx Telecom and C&WIOM shall maintain appropriate cost accounting systems in respect of products, services or facilities in the wholesale mobile markets.

Manx Telecom and C&WIOM shall have an obligation not to cause a margin/price squeeze between their MTR price and their retail price.

The SMP determinations and the obligations imposed on the operators with SMP are contained in the Decision Notice, published at the end of this paper, and come into effect on the date of publication.

Introduction

Background

In 2010, the Communications Commission published its Response to Consultation on proposals for a new framework for communications regulation.¹ Having considered all responses, the Commission's recommendation was that the Isle of Man should create an approach to regulation which is specific to the Isle of Man, and which both ensures competition in the provision of services, and ensures continuing infrastructure investment. The regulatory approach should be appropriate to the size of the jurisdiction, and should focus on the Isle of Man's priorities. The Communications Commission recognised that the underlying communications legislation also requires updating.

The reviews of the telecommunications markets set out to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints which are faced by undertakings (licensees) in the market. A market review commences by defining a market, which is then analysed to assess the degree of effective competition. Should any undertaking be found to have Significant Market Power (SMP), defined as the ability to behave independently of competitors, suppliers and ultimately businesses and consumers in that market, then there is a case for regulation designed to address any actual or potential abuse of dominance. Provisions for conducting market reviews and placing additional obligations on operators with significant market power are contained in licences issued under section 5 of the Telecommunications Act 1984 (of Tynwald).

Should an undertaking be found to have SMP, the regulator should impose obligations designed to remedy competition problems. Some of the areas to be considered are already present in the Telecommunications Act licences. In particular we considered whether there are sufficient measures under the Fair Trading Act 1996 of Tynwald or the Fair Trading condition (absent a determination of Significant Market Power) of the Telecommunications Act licences to reduce or remove barriers to entry or to restore effective competition.

While the types of remedy which have been imposed in other jurisdictions are a useful guide, we note that we have the flexibility, if necessary, to develop a specific set of remedies for the circumstances in the Isle of Man. Given the strategic objectives set out in the New Regulatory Framework, the approach to remedies takes into account the need to ensure that investment in infrastructure continues, and that telecommunications services available to business and residential customers are of a high quality.

¹ Response to Consultation on Proposals for a New Framework for Communications Regulation, Communications Commission, August 2010

The Consultation

The Commission published its reviews of the telecommunications markets as a consultation in June 2011, and this constituted a notification of proposed determinations as required in condition 42.7 of the Manx Telecom licence and condition 27.7 of the Cable & Wireless Isle of Man licence. The Consultation also set out the remedies or obligations that we proposed to apply. The Commission received 6 replies to the consultation, from Cable & Wireless Isle of Man (C&WIOM); Castletown Town Commissioners; Mr Alan Croll; Domicilium; e-Ilan; Manx Telecom (MT) and Wi-Manx.

In preparing this response to consultation, all replies have been considered. Where necessary, we have sought further information and clarification in order to develop our analysis. The response to consultation includes a summary of our proposals as set out in the original consultation; a summary of responses received; our analysis of responses; and our conclusions. This document also includes a final Decision Notice which sets out the final determinations and additional obligations. The Decision Notice comes into immediate effect on the date of publication.

Approach

Because market reviews have not previously been carried out in the Isle of Man, we considered a broad starting point as a means of ensuring a full understanding of the dynamics of the telecommunications markets. We grouped markets together under the following headings:

- Retail fixed network and services, which includes retail access, retail calls, retail broadband and retail leased lines
- Wholesale fixed network and services, which includes the wholesale markets associated with the retail markets identified above
- Mobile communications

The approach to the market reviews also took into account the provisions contained in "Additional Obligations on Operators with Significant Market Power", part of the licences issued under Section 5 of the Telecommunications Act 1984 (of) Tynwald, which outlines the procedure to be followed in coming to a potential determination of SMP².

This document examines each group of markets in turn. The discussion summarises the preliminary position set out in the original consultation, then summarises relevant points raised by respondents. We present our analysis of these points, and conclusions reached.

² Part 6 of Manx Telecom Limited's licence, part 4 of the licences held by Cable and Wireless Isle of Man Limited, Domicilium (IOM) Limited, Wi-Manx Limited, Manx Computer Bureau Limited and Bluewave Communications Limited and Part 3 of the e-Ilan Communications Limited's licence.

Retail fixed markets

Introduction

The retail markets are concerned with business and residential customers buying communications services, and would include the purchase of voice calls, broadband, dedicated capacity (such as leased lines), and access to the network over which these services are provided. The retail markets we are considering are:

- Retail fixed access
- Retail calls from a fixed location
- Retail broadband
- Retail leased lines

Market definition and competition assessment

Summary of consultation proposals

Our preliminary conclusions on the definition and competition assessment of the retail fixed markets were as follows:

The geographic scope of all retail fixed markets is the Isle of Man, because there is not sufficient variation in conditions of competition between geographic areas to warrant the definition of separate geographic markets.

There is a market for **retail fixed access**, which is concerned with the provision of a physical connection from a fixed location to the public switched telephone network (PSTN). This could include homes and offices, and the connection could be used to access a range of retail services, such as voice calls and broadband services. We proposed that Manx Telecom has SMP in this market.

There is a market for **retail calls from a fixed location**, which includes calls to all destinations, and all types of call including calls to mobile and VoIP. Although the barriers to entry are lower than in the market for retail access, they are still high and persistent. While there is availability of an indirect access wholesale product, it currently addresses restricted aspects of the market, and so wholesale regulation on its own would not be sufficient to address competition problems. We proposed that Manx Telecom has SMP in this market.

There is a market for **retail broadband**. Manx Telecom's market share is very high, and it could be assumed that Manx Telecom has SMP.

There is market for **retail dedicated capacity (leased lines)**. We proposed that Manx Telecom has SMP in the market.

Summary of responses

Retail Fixed Access

All respondents except for MT agreed with our proposed market definition, and our preliminary view that MT has SMP in the market for retail fixed access. MT proposed that the retail access market should be for narrowband only, i.e. should not include broadband. MT also proposed that FRA (Fractional Rate Access) and PRA (Primary Rate Access) Integrated Services Digital Network (ISDN) may be a separate market in which lighter remedies should be applied.

Retail calls from a fixed location

All respondents except for MT agreed with our proposed market definition, and agreed with our preliminary view that MT has SMP. MT proposed that there should be separate markets for on-island and off-island calls because the pricing is distinct and the supply is different. MT proposed that their defined market for off-island calls was competitive because of the availability and use of a wholesale product and the availability and use of VoIP.

Retail broadband

All respondents except for MT agreed with our proposed market definition and preliminary view that MT has SMP. MT proposed that the definition of the retail broadband market needed to be more specific and detailed, in particular in identifying the boundaries between the retail broadband market and the market for dedicated capacity.

Retail dedicated capacity

All respondents except for MT agreed with our proposed market definition and preliminary finding that MT has SMP. MT proposed that higher speed leased lines (> 155 Mb/s) may constitute a separate market. MT also suggested that the definition of the market should be clarified.

Our analysis and conclusions

Retail Fixed Access

In the Consultation, we proposed that *"The retail access market is concerned with the provision of a physical connection from a fixed location to the public telephone network"*. We noted that this connection could be used to access a range of services, such as voice calls and broadband. We can clarify that this does not mean that the services carried over the access network, such as broadband, form part of the retail access market. The retail access market is to do with the actual physical connection to the end-user – the services carried over it fall into separate markets.

We have considered MT's point that the retail access provided over ISDN should be defined as a separate market. ISDN is a set of communications standards for simultaneous digital

transmission of voice, video, data, and other network services over the traditional circuits of the public switched telephone network and in the Isle of Man ISDN is supplied solely by MT. The data which has been provided to us indicates that the supply is of Basic Rate Access (BRA) and Primary Rate Access (PRA), but the data does not distinguish between the two. ISDN BRA supports 2 channels for user voice and data, and ISDN PRA supports 30 channels.

In considering whether products form part of the same market, we consider the extent to which consumers would be prepared to switch from one form of access to another in response to a small but significant non-transitory increase in price (demand side substitution), and the extent to which a supplier of one form of access would be prepared to switch supply to another form of access in response to a small but significant non-transitory increase in price (supply side substitution).

Our view is that ISDN BRA would form part of the retail fixed access market because, on the demand side, a user of fixed PSTN access would be likely to find ISDN BRA to be a good functional substitute (offering similar access to a network capable of supporting a range of retail services), and the pricing is broadly consistent³.

In the case of ISDN PRA, while the service shares the same overall functionality as PSTN and ISDN BRA, the larger number of channels means that additional network equipment in the form of a PBX (Private Branch Exchange) is required to switch calls on the customer's side of the Network Terminating Point. The pricing of ISDN PRA is not consistent with the pricing of ISDN BRA and PSTN⁴.

MT's view that ISDN may fall into a separate market may therefore be valid in the case of ISDN PRA, but in our view is not valid in the case of ISDN BRA. Our view is consistent with the position taken by other Regulators, who, if they have decided to differentiate the retail fixed market, have generally included basic rate ISDN in the retail fixed access market, and have found a separate market for higher level ISDN.

However, there is a practical problem in the Isle of Man in that the ISDN data does not clearly distinguish ISDN BRA from ISDN PRA. Only in the last year has the BRA data been collected separately, because prior to that it was collected as part of the PSTN data. We therefore took a pragmatic approach to the analysis which we believe was justified because, even if we were able to distinguish a separate market for ISDN PRA in the absence of specific data, MT would have SMP on that market, as the only supplier of the service, and would be subject to obligations. We would be willing to consider defining separate markets for ISDN PRA in future iterations of the market definition process, provided that data are available to support this.

³ According to MT's website, an ISDN2 (BRA) connection costs £99, and monthly rental costs from £25.35-34.55, depending on call package. As ISDN2 is effectively 2 lines, this equates with a connection fee of £84 for 2 PSTN lines, and monthly rental of two times £11-£19, again depending on call package.

⁴ According to MT's website, ISDN30 (PRA) has a connection charge of £125 per channel for the first 15 channels, if line plant is not already in place, and a monthly rental of £11.51-£17.53.

In any case, MT provides 100% of both PSTN and ISDN connections, with small amounts of competition from Fixed Wireless Access and fibre. Its market share is over 99% (and if a separate market were defined for ISDN PRA connections its market share in that market would be 100%). There are high and persistent barriers to entry which mean that large scale entry is unlikely for the foreseeable future.

In conclusion, there is a market for the provision of a physical connection from a fixed location to the public telephone network. This market is separate from the services carried over the physical connection. It includes access from homes and offices. At present it includes ISDN BRA and PRA, although in future it may be possible to define a separate market for ISDN PRA. Regardless of whether one or two markets are defined, however, MT has Significant Market Power due to its large (99% - 100%) market share and the existence of high and persistent barriers to entry. The geographic scope of the market is the Isle of Man.

Retail calls from a fixed location

We have considered MT's view that the market for retail on-island calls is a separate market from retail off-island calls. We agree with MT that on-island calls are not a demand side substitute for off-island calls – clearly, a customer wishing to make an on-island call would not switch to make an off-island call instead. However, MT's view that there is also no supply side substitution is based on its view that supply and pricing are different for on-island calls than for off-island calls.

There is no licensing barrier to C&WIOM offering on-Island and off-Island fixed call services. Similarly, there is no barrier to an Internet Service Provider operator offering domestic and international calls using VOIP. Our view therefore remains that, if there was a small but significant increase in the price of on-island calls, a supplier of off-island calls could switch to supply on-island calls, and would be able to do this within a short timeframe and at negligible cost.

In our consultation document we noted that MT had a market share (in the broadly defined market covering all categories of fixed call) of over 90%, calculated on the basis of call minutes; that alternative suppliers made up a very small part of the market; and that supply by these operators was not sufficient to act as a constraint on Manx Telecom's ability to behave independently of competitors and, ultimately, consumers. We therefore came to the preliminary conclusion that Manx Telecom had Significant Market Power (SMP) in the market for retail fixed calls. Nothing in the responses received has changed our views on this. Nevertheless, for the sake of completeness we have considered whether the analysis would be different if separate markets were defined for on-island and off-island calls. MT's share of minutes originated for all off-island calls taken together is in excess of 90%. We do not consider, therefore, that the finding of SMP for MT would change if the off-island calls market were defined separately.

In conclusion, there is a market for the provision of retail voice calls from a fixed location. This market includes all calls from a fixed line, including calls to Isle of Man mobiles and landlines, and calls off-island to fixed and mobile numbers. The market also includes VoIP

calls. Calls from both business and residential customers are included in the market, but calls from mobiles are excluded. The geographic scope of the market is the Isle of Man. Due to the weak position of alternative suppliers of calls, and notwithstanding the availability of an Indirect Access product covering some categories of calls, Manx Telecom has Significant Market Power in this market.

Retail broadband

We can clarify our definition of the retail broadband market as requested by MT. Our analysis considered the extent to which different retail internet access products could be considered to be potential substitutes for retail broadband provided over an xDSL network⁵.

Our view is that retail narrowband access (ie dial-up) would not form part of the retail broadband market because the services and quality of narrowband internet access would not be seen as a viable substitute by a user of retail broadband.

We consider that retail broadband offered over Fixed Wireless Access (FWA) would fall within the retail broadband market because the product characteristics, pricing and intended use of FWA-based retail broadband are broadly similar to those of DSL-based broadband.

We consider that retail broadband offered over FTTx⁶ networks (fibre) would form part of the retail broadband market because, although a customer of high end broadband delivered over fibre may not find DSL to be a good substitute⁷, a customer using DSL-based broadband would find broadband offered over fibre to be a functional substitute in terms of product characteristics, pricing and intended use.

Our view is that, given the distinct functional and pricing differences between broadband offered over DSL networks and broadband offered over leased lines, these products would not fall within the same market. Leased lines are generally marketed for use by larger organisations, and offer dedicated, transparent capacity between two points, with bandwidth which is always available and uncontended. The cost of purchasing retail leased lines means that they could not be considered as a substitute for DSL-based broadband.

We do not consider that retail mobile broadband would form part of the same market as retail DSL-based broadband. Mobile broadband is limited compared with DSL-based broadband in terms of consistency, reliability, latency and contention. It is generally held to be a complement rather than a substitute – that is, that customers would use mobile broadband while on the move, but would not see it as a good substitute for fixed broadband.

⁵ This is generally considered to be the starting point because it is the predominant form of broadband provision and constitutes the smallest product set.

⁶ Fibre to the x (FTTx) is a generic term for any broadband network architecture that uses optical fibre to replace all or part of the usual metal local loop used for last mile telecommunications.

⁷ This is because broadband over fibre could potentially be offered at significantly higher speeds than that offered over DSL

In our consultation document, we noted that Manx Telecom's market share, although it had declined slightly over the past two years, still stood at 85% at the end of Q4 2010. Barriers to entry had been reduced due to the availability of a wholesale input, and there had been entry into the market by OLOs. Our preliminary conclusion was that Manx Telecom had SMP in the market for retail broadband. Nothing in the responses received has changed our view on this.

In conclusion, there is a market for fixed retail broadband which includes ADSL, Fixed Wireless Access and (when and where available) FTTx. It excludes narrowband internet access and leased lines. It also excludes mobile broadband. The geographic scope of the market is the Isle of Man. Manx Telecom has significant market power in this market.

Retail dedicated capacity (leased lines)

MT requested that we clarify our definition of a leased line. A leased line refers to a fixed permanent telecommunications connection providing broadly symmetric capacity between two points. There is no switching, and the connection is dedicated to the user. Our definition is technologically-neutral and would include SDH, PDH and Ethernet point-to-point services.

MT has proposed that there may be a separate market for retail leased lines at speeds of 155 Mbit/s or higher. In its view, the analysis of the substitutability of leased lines of different speeds is incorrect. It states that the argument given (that a high-speed line can be substituted by many low-speed lines) is not a good argument because the converse is not true (a high-speed leased line is too expensive to be a substitute for a slower line) and because pricing differentials mean that a large number of lower capacity leased lines are also significantly more expensive than the equivalent 155Mbit/s circuit. In MT's view, there is also some speed breakpoint above which self-supply using point-to-point radio or fibre is economic, and it suggests that this is set as circuits of 155Mbit/s speed and above.

The Commission recognises that cases where substitutability is asymmetric (i.e. it exists in one direction only – consumers with a lower speed product may be happy to switch to a higher speed product, but not vice versa) create difficulties in market definition. It does not feel that sufficient evidence has been provided, in particular in terms of the economic viability of self-supply, to justify the definition of a separate market for circuits of 155Mb/s and above. It notes that, even if this were done, it is likely that MT would be found dominant in both markets. However, it is also recognised that the dynamics of competition may vary within a market, and that this may best be reflected in differentiated remedies. Less onerous and more proportionate remedies are therefore proposed for circuits at this speed. This is dealt with in the "Remedies" section, below.

Remedies in the retail fixed markets

Summary of consultation proposals on approach to remedies

In the Consultation, we noted that, in considering how to address Manx Telecom's market power in the retail fixed markets, we need to take into account the potential benefits in having increased competition in the services (such as voice calls and retail broadband) which depend on the access network, but also we need to ensure that Manx Telecom is willing and able to continue to invest in the fixed network, particularly in the roll-out of NGN (Next Generation Network) infrastructure and services. The availability of high quality communications infrastructure is of recognised importance to business and residential customers.

Under the EU system, a finding of dominance in the retail access market leads to an automatic obligation that the SMP operator must offer wholesale Carrier Select (CS) or Carrier Pre Select (CPS) in order to ensure that dominance in the access market does not constrain competition in the voice calls market. In Manx Telecom's current licence, if it is found to be dominant in the retail access market, the Commission may impose obligations relating to access and interconnection (condition 45.2).

We identified bundling of products and services as a particular regulatory challenge where an SMP operator could potentially leverage its market power, for example by cross-subsidising competitive and non-competitive elements, or tying the purchase of an element in a non-competitive market to the purchase of an element in a competitive market. We recognised the benefits of bundling to consumers and operators, but noted the danger that bundling stifles competition and constitutes a barrier to entry to the retail markets

Our proposed approach also took into account the "Identification of appropriate remedies condition" of the Telecommunications Act licences issued under Section 5 of the Telecommunications Act 1984 (of Tynwald). In particular the Commission considered whether the implications of imposition of each of the proposed remedies is proportionate and objectively justified, taking into account such of the following objectives as appeared to the Commission to be appropriate:

- ensuring that there are provided throughout the Island, except where impracticable or not reasonably practicable, such Electronic Communications Services as satisfy all reasonable demands for them;
- ensuring that users derive maximum benefit in terms of choice, price and quality;
- ensuring efficient investment in infrastructure and promoting innovation;
- encouraging the efficient use and effective management of radio frequencies and numbering resources; and
- ensuring efficient and sustainable competition.

It must also be recognised that this is the first time such an analysis has been carried out on the Isle of Man. In other jurisdictions, the system has been in place since 2003, and over

time the level of information available to both operators and regulators has improved greatly.

Summary of responses on our proposed approach to remedies

Respondents expressed a view that more detail was required in imposing obligations. C&WIOM does not believe that the remedies proposed are sufficiently detailed to explain how the Commission will ensure implementation of remedies which will be effective in delivering sustainable competition.

MT commented that the potential impact of some of the proposed remedies could have unintended and disadvantageous consequences. For example, MT suggests that the proposed remedies may expose a lack of balance in pricing between, for example, calls and access which could result in higher line rental prices and lower call prices. MT also stated that the cost of developing and introducing new wholesale products could be high given the small size of the local market, and if this was linked to obligations around the pricing of MT's own products, the result could be an increase in retail prices.

Our analysis and conclusions

We have taken on board the need to provide more detail as to how remedies will be implemented, and have used comments made by respondents in order to develop our consultation proposals. This is discussed under each type of remedy below. We note MT's point about ensuring that the impact of remedies is thought through. Our approach is based on the view that competition in the telecommunications markets has many advantages, but so too does the continuing investment which is needed to ensure that our telecoms infrastructure and services meet the needs of Isle of Man businesses and consumers.

Proposed remedies

In the Consultation, we considered potential remedies in terms of:

- Access
- Transparency
- Non-discrimination
- Accounting separation
- Cost accounting and price controls.

In the section below, under each type of remedy we summarise our proposals; the issues raised in response; and our analysis and conclusions.

Access

Summary of consultation proposals

We proposed to impose an access remedy in the retail access market, such that an OLO, with the appropriate licence, could request wholesale access to Manx Telecom's network, in

keeping with condition 43 (Network Access) of Manx Telecom's licence. An access remedy would be on the basis of a reasonable request. That is, we do not think it is reasonable to mandate a particular product in this market at this time. However, if an OLO wished to purchase a wholesale variant of an existing retail product, an access remedy would give it the right to make a request, and to negotiate with Manx Telecom as to whether it was reasonable or not.

In the retail calls market, we proposed to impose an access remedy, such that operators licensed to provide fixed call services (at the moment only C&WIOM has the appropriate licence) could request wholesale access to Manx Telecom's network for the purposes of providing voice services. This could be, for example, for the provision of Carrier Pre Selection (CPS) (see condition 45 of Manx Telecom's licence). Access would be on the basis of a reasonable request, rather than as a mandated product.

We proposed to attach conditions to the access obligation, such that Manx Telecom would be obliged to comply with the obligation in a manner which is fair, reasonable and timely. This would apply to the entire process, including the way in which Manx Telecom deals with the access request, through to any eventual implementation of an access product. Should Manx Telecom propose to refuse an access request, it must respond in writing, detailing the reasons why there is a denial of access, and any such refusals should be notified to the Regulator.

Summary of responses

MT questioned why WLR and carrier select/carrier preselect remedies are discussed in the retail market. Both C&WIOM and e-Ilan submitted detailed responses on access obligations.

Our analysis and conclusions

MT has noted that the access remedies proposed for the retail access market are wholesale remedies. This is an anomaly in the EU approach, as, under the Universal Service Obligations, an operator which is designated as having Significant Market Power in the retail access market must be obliged to offer Carrier Selection and Carrier Pre Selection⁸⁸, and other Regulators have followed this by imposing these remedies in their market analyses of the retail markets. Similarly, under Manx Telecom's current licence, if it is found to be dominant in the retail access market, the Commission may impose obligations relating to access and interconnection (condition 45.2).

However, MT is correct in identifying the anomaly, and rather than continue to follow the European pattern in approaching this, we will discuss WLR and CS/CPS below in the context

⁸⁸ Article 19, Directive 2002/22/EC on Universal Service and Users' Rights relating to electronic communications networks and services, 7 March 2002

of the fixed wholesale markets. The points raised by C&W and e-llan in response to retail fixed access will also be discussed below.

We are therefore considering remedies to do with access to the retail markets as a wholesale issue, and this is discussed under wholesale fixed market remedies.

Transparency

Summary of consultation proposals

In the Consultation, we proposed that a transparency remedy would oblige Manx Telecom to publish information about its retail prices, and about its services. It would also establish a mechanism for publishing any changes to terms and conditions, including prices. In our view, the set of information required in Manx Telecom's current licence (paras 8.2 and 8.3) would constitute a minimum requirement.

We proposed to include a specific obligation to provide transparency around the elements of a bundle. Most bundles offered by Manx Telecom include at least retail access and calls. We proposed to impose a transparency obligation on all retail markets, covering the publication of price and non-price terms and conditions and a mechanism for notifying changes to these.

Summary of responses

C&WIOM proposed that the transparency obligation needs to be more specific. C&WIOM suggest that changes to retail prices should be notified 30 days before coming into effect. Within that period, C&WIOM propose that MT should be obliged to demonstrate to the Commission that price changes do not give rise to a margin squeeze, that they satisfy non-discrimination requirements, and if part of a bundle, that the bundle can be replicated by an equally efficient operator.

MT suggests that the text needs to clarify that the proposed transparency obligation applies only to all fixed retail markets in which MT has SMP. MT also expressed a view that transparency was not appropriate in markets where it believes it faces fierce retail competition, and its view is that these markets include high end business services and multi-site contracts, and high capacity leased lines (ie at or above 155 Mbit/s). MT proposed that an alternative may be to notify certain prices to the Commission on a confidential basis, but not to publish them. MT requested clarification of how the transparency obligation would be applied to a bundle.

Domicilium agreed with the requirement for transparency, stating that the cost to MT should not be a prohibiting factor in requiring MT to provide transparency in its pricing.

Our analysis and conclusions

We confirm that the transparency obligation applies to all retail fixed markets in which MT has SMP. For the avoidance of doubt, these are the retail fixed access market; the market

for retail calls from a fixed location; the retail broadband market and the market for retail leased lines.

The information which MT will be obliged to make available is that set out in Section 9 of its licence. In addition, any proposed changes to price and non-price terms and conditions should be published one month in advance of their coming into effect. This obligation is consistent with requirements set out in Section 8 of MT's licence, which requires MT to inform its customers at least one month in advance of modifying any contract.

In its analysis of the retail market for leased lines, and in particular of high-capacity lines (speeds greater than or equal to 155Mb/s), the Commission recognises that where a market consists of products tailored to the needs of individual companies, as opposed to mass-market products, competition may be dampened by excessive price transparency. If an incumbent is obliged to publish its prices, competitors may tend to pitch their prices only slightly below those of the incumbent, rather than competing vigorously – the so-called “coat-hanger” effect. It is unlikely that the specialist/commercial consumers of higher capacity leased lines would be damaged by a lack of transparency, since they tend to be professional buyers accustomed to dealing with tenderers. For this reason, the Commission intends to relax the transparency requirement for leased lines at or greater than 155Mb/s. Manx Telecom will not be obliged to publish its prices for these services, nor will it be obliged to stick to a price list. However, it will be required to notify its prices for these services to the Commission on a confidential basis, so that it can check that the non-discrimination requirement, which will apply across the board to all leased lines, is being observed.

Non-discrimination

Summary of consultation proposals

In the Consultation, we proposed that Manx Telecom should be obliged not to unduly discriminate between its customers. This means that Manx Telecom may be obliged to justify any discrimination which it practises.

Summary of responses

C&W agrees that, where volume discounts can be justified, they should be permitted. However, its understanding of non-discrimination is that the criteria on which such discounts are available should be transparent and should be equally available to all customers who meet the criteria. C&W propose that the non-discrimination obligation should apply to ensuring that there is no discrimination between wholesale and retail customers. This means that prices should not be offered to retail customers which are lower than prices offered to wholesale customers.

The other respondents who commented on the non-discrimination obligation agreed with our proposals.

Our analysis and conclusions

We intend to address C&W's proposal regarding the differential between wholesale and retail pricing under the obligations applying to the wholesale fixed markets.

MT will be obliged not to unduly discriminate between its retail customers. The transparency obligation, whereby MT are obliged to publish their tariffs (with the exception of those for high-end leased lines), will assist the Commission in monitoring the operation of the non-discrimination remedy. The transparency obligation that MT will notify pricing of high capacity leased lines to the Commission on a confidential basis will ensure that pricing to special customers is not cross subsidised.

Accounting separation

Summary of consultation proposals

In the Consultation, we set out the objectives to be addressed in terms of maintaining the principle that there must be visibility in how costs are allocated to particular products and services, and that the information must be granular enough to demonstrate first of all that there is no discrimination, secondly that there is no cross subsidy across MT's retail products and services, and thirdly that the difference between wholesale and retail prices is such that an equally efficient competitor could compete in the market.

We proposed that the onus, initially, would be on Manx Telecom to explain how this obligation would be met, and that MT would be expected to be compliant with this obligation within 3 months of the date of it coming into effect.

Summary of responses

In addition to proposing that separated accounts are essential to ensure that MT is compliant with its non-discrimination obligation, C&W outlined its view of the benefits it believes can be achieved in producing separated accounts, and proposed that benefits could be achieved by the regulator, OLOs, consumers and by the incumbent operator itself. C&W provided evidence from its associate company in Guernsey to indicate that the cost of producing separated accounts was less than 1% of operating costs per year. C&W also noted that Article 13 of the Framework Directive makes it a requirement for European Member States to mandate that separated accounts are provided where the annual turnover of the SMP operator exceeds €50m.

Domicilium stated that the costs to MT should not prevent the Regulator from requiring accounting separation to achieve a fair wholesale pricing and operational strategy. It stated that MT was highly profitable, more so than telecoms companies generally.

Mr. Alan Croll stated that unless the Commission required MT to produce separated accounts, it was not clear how it would be able to regulate for non-discrimination or cross-

subsidies. It would also be impossible to know whether MT had set its access prices as low as possible.

MT put forward its views on accounting separation in considering wholesale remedies, and referenced this also to the retail fixed market. MT agrees with the principles set out by the Commission, and has proposed a structure for financial reporting to the Commission, which would be on a confidential basis. MT provided examples of approaches in other jurisdictions, including Luxembourg and Finland, which it believes demonstrate the possibility of lighter touch regulation.

Our analysis and conclusions

Having carefully considered the views of all respondents, we maintain the objectives set out in the Consultation that in principle that there must be visibility in how costs are allocated to particular products and services, and that the information must be granular enough to demonstrate that there is no discrimination, that there is no cross subsidy across MT's retail products and services, and that the difference between wholesale and retail prices is such that an equally efficient competitor could compete in the market.

The financial reporting proposals which MT made in its response to Consultation are in effect a form of separated accounts, and the Commission considers that these represent the minimum needed to ensure that the obligations of non-discrimination are respected and that cross-subsidisation and margin squeeze are avoided. We welcome the useful information provided by C&W regarding the experience of its associate company in Guernsey, and note its view of the potential benefits of producing separated accounts.

According to the Body of European Regulators for Electronic Communications (BEREC), accounting separation can be described as follows:

"An accounting separation system is a comprehensive set of accounting policies, procedures and techniques that can be applied to the preparation of financial information that demonstrates compliance with non-discrimination obligations and the absence of anticompetitive cross-subsidies. The outputs from such a system must be capable of independent verification (auditable) and fairly present the financial position and relationship (transfer charge arrangements) between product and service markets. Using accounting separation, a National Regulatory Authority (NRA) imposes on the notified operator a set of rules on how accounting information should be collected and reported. ...

"Accounting separation provides a systematic disaggregation of costs, revenues and capital employed between disaggregated regulatory entities and services of a vertically integrated undertaking. It should also ensure that each financial report includes only costs, revenues and capital employed that are relevant to the regulatory entities and services. ...

"There should be a clear rationale for the transfer charges used and each charge should be justifiable. Charges should be non-discriminatory and there should be transparency of transfer charges in the separate accounts. ...

“For accounting separation purposes it should be assumed that a notified operator’s retail business pays the same charge for the same input service as it would (bought on its own wholesale market) if bought externally by an alternative operator.”⁹

MT will be obliged to produce separated accounts. The format and reporting requirements associated with these accounts will be subject to agreement with the Commission. The Commission expects that MT will propose an appropriate methodology, which will include the identification of key assumptions such as how it will attribute costs. The Commission expects to take into account experience in other jurisdictions, and will assess the reasonableness of MT’s approach in terms of best practice, proportionality given MT’s size and the scale of the Isle of Man market, and the extent to which MT’s proposals address the Commission’s objectives as set out in this market review. The Commission wishes to avoid the lengthy processes often associated with the production of separated accounts in other jurisdictions, but recognises that this is a new obligation for MT, and that the agreement of an appropriate format and reporting structure will involve input from MT, OLOs and from the Commission. In order to ensure that the interests of all stakeholders are taken fully into account, the Commission expects that MT should make initial proposals on separated accounts within 3 months of the publication of this Decision, and that these initial proposals will form the basis on which the Commission will consider and agree a format and reporting requirements.

⁹http://erg.eu.int/doc/publications/consult_accounting_sep/erg_05_29_erg_cp_rec_as_and_cas_fin_al.pdf

Cost accounting and price controls

Summary of consultation proposals

In the Consultation, we set out the objectives in terms of ensuring that Manx Telecom does not price excessively in the retail market, to the detriment of consumers, and also to ensure that it does not set its prices too low and cause a price squeeze, to the detriment of other operators. We identified that one option for the Regulator would be to propose price controls for retail fixed markets, which would establish price boundaries within which Manx Telecom would have to operate. An alternative would be to focus on the relationship between retail markets, and establish an obligation not to unreasonably bundle. In our view, this second option directly addresses the key issue. We would expect an obligation not to unreasonably bundle would include provision that OLOs had to be able to replicate a bundle, and also that the retail price did not constitute a price squeeze.

Summary of responses

C&WIOM expressed concern that restricting retail obligations on MT to an obligation not to unreasonably bundle failed to address what C&WIOM views as a range of additional competition problems. C&WIOM noted that in 2011 MT had raised its fixed rental price (where it faces no competition) at the same time as reducing its international call charges (where it does face competition), and that this practice would not be adequately addressed solely by an obligation not to unreasonably bundle.

MT proposed that it would be disproportionate to impose price controls in the retail access and calls markets. MT requested clarification of the obligation not to unreasonably bundle, and the obligation not to cause a margin squeeze.

Our analysis and conclusions

In the Consultation, we raised a number of questions around the issue of bundling, and specifically asked for views on how this may best be addressed. We are aware that bundling retail products and services can have benefits for operators and consumers, and we recognise these benefits. However, bundling can also be used by SMP operators to leverage market power, and this constitutes a competition problem.

From a regulatory perspective, the analytical framework for assessing whether bundling raises competition concerns is closely related to the methodology for assessing margin (price) squeeze. A vertically-integrated operator which has SMP in a wholesale input market could leverage its power into retail markets (where it may or may not have SMP) by charging a price for a bundle which is so low that equally or even more efficient operators which were relying on wholesale inputs to provide retail services could not earn a sufficient margin to compete in the retail market. In addition, bundling may also allow an SMP

operator to strengthen its position in several retail markets by leveraging its power from one to another (horizontal leverage).

Having considered all the responses to the Consultation, we remain of the view that the competition problems associated with bundling must be addressed, and that our approach needs to be clarified.

MT proposed in its response that an obligation “not to unreasonably bundle” is an obligation not to force customers to buy one product if they do not want it. This practice, more generally known as “tying”, can have negative effects from the customer’s perspective, as he or she is forced to buy unwanted products. In our view a prohibition on tying is an important element of an obligation not to unreasonably bundle. The consumer side of the obligation is that the elements of a bundle should be available as stand-alone products.

However, unreasonable bundling would also arise where an SMP operator engaged in vertical and/or horizontal leverage. In order to address this potential competition problem, MT will be subject to an obligation not to unreasonably bundle. In the retail fixed markets where MT has been found with SMP, this means that MT should not charge a price for a bundle including a product which falls in a market where MT has SMP which could not be replicated by an equally efficient operator relying on wholesale inputs. Measures addressing the pricing of wholesale inputs will be dealt with in discussing the wholesale fixed markets. In the retail markets, where MT offers bundles, it should ensure that where these bundles include a non-regulated element, such as retail mobile services (which would not be subject to SMP regulation), the non-regulated element should cover its incremental cost.

We do not agree with C&W’s assertion that retail obligations on MT are restricted to an obligation not to unreasonably bundle, as we have set out a full suite of remedies in the wholesale and retail markets designed to address competition problems.

We have considered comments from respondents regarding price controls, and note that in many other jurisdictions, price controls are common, particularly in the retail access market. We are concerned to address MT’s dominance in the retail access market, particularly in the context of its potential ability to leverage power into other retail fixed markets. We do not propose to impose a price control at this stage, but intend to closely monitor MT’s practices in the retail fixed markets.

Wholesale fixed markets

Introduction

The characterisation of the retail markets allows us to identify any wholesale inputs which may address these markets.

In order for a retail customer to make a phone call there needs to be a physical transmission channel to the customer, and a means of originating, conveying and terminating the call. The wholesale markets associated with the ability to make a phone call are the interconnection markets of wholesale call origination, wholesale transit, and wholesale call termination.

In order for a provider to be able to offer broadband services, it needs a transmission channel to a customer, so either has to own an access network, or be able to purchase wholesale inputs. In many European countries, there is a regulatory obligation for the incumbent to offer both a physical wholesale product (for example, Local Loop Unbundling) and a non-physical wholesale product (such as bitstream). Typically, an infrastructure-based physical product gives greater flexibility and control over the retail broadband product than a non-physical broadband product, but it requires more investment.

The final wholesale market is that for the supply of wholesale dedicated capacity such as leased lines, where an operator purchases wholesale leased lines on which it can base its own retail offer.

Market definition and competition assessment

Summary of consultation proposals

Our preliminary views on the definition and competition assessment of the wholesale fixed markets were as follows:

There is an interconnection market for wholesale call origination, transit and termination. The geographic scope of the market is the Isle of Man. Manx Telecom has SMP in this market. C&WIOM and Wi-Manx have SMP for wholesale call termination on their own networks.

There is a market for Wholesale Broadband Access. This market includes all forms of wholesale input which could be used to provide a retail broadband service, including physical and non-physical inputs. The geographic scope of the market is the Isle of Man. Manx Telecom has SMP in this market.

There are separate markets for on-island and off-island dedicated capacity. Both markets include the provision of dedicated capacity irrespective of the technology used in its delivery. Manx Telecom has SMP in the market for on-island dedicated capacity. On a preliminary basis, we concluded that no operator has SMP in the market for off-island connectivity.

Summary of responses

C&WIOM agreed with the proposed definitions and provisional SMP findings in the markets for wholesale call origination, transit and termination, but questioned whether C&WIOM and Wi-Manx could be considered to terminate traffic. C&WIOM noted that, in its view, MT would have SMP whether the wholesale broadband market was defined broadly as proposed, or as a series of narrow markets.

C&WIOM agreed with the proposed findings of a market for on-island dedicated connectivity, but proposed that MT has SMP also in the market for off-island connectivity. In C&WIOM's view this is because customers generally buy an end-to-end connection, and so do not distinguish the on-island part of capacity from the off-island part, and because MT has the advantage that most off-island connectivity terminates within its premises. C&WIOM noted that there were five submarine telecoms cables, owned by three different operators, serving the Isle of Man. However, it stated that one of these was owned by the Manx Cable Company and operated by E-Ilan Communications, which operated on the Island on a wholesale basis only. Another terminated in a "neutral" location where on-island operators could obtain direct connectivity to Cable and Wireless Worldwide's network. The other three (one owned by Cable and Wireless Worldwide and two by BT) terminated at MT sites and thus access to their capacity was under the control of MT. According to C&WIOM, this meant that only MT was able to provide a fully resilient off-island connectivity service.

MT expressed a view that the definitions of the wholesale fixed markets were not sufficiently specific and that this represented a risk to MT. In particular, MT believed that the assessment of the market for call origination should take into account the ability to supply voice calls using VoIP. MT questioned whether there actually was a transit market in the Isle of Man. MT questioned whether Wi-Manx could be considered to terminate traffic, as it understood that this was not the case. MT requested more clarity in the definition and assessment of the Wholesale Broadband Access (WBA) market. In MT's view, it was not clear that this market excludes broadband provided over leased lines. Further, MT proposed that the market for wholesale physical access (WPNIA) should be analysed separately from the market for wholesale virtual access, even although, in MT's view, WPNIA was very unlikely to be of interest to OLOs. MT believed that the market for dedicated capacity was different for capacity at or above 155 Mbit/s, and that this should be reflected in the market definition and competition assessment. While agreeing that no operator had SMP in the supply of off-island dedicated capacity, MT suggested that the Commission should monitor the pricing practices of the off-island cable providers for evidence of oligopolistic behaviour.

Our analysis and conclusions

Call origination, transit and termination

In order to address comments made in response to the Consultation, we requested further information from operators.

We maintain our definition of the market for wholesale call origination for calls services originated on the fixed public telecommunications network. Our assessment of the market

indicated that MT's market share of the market for wholesale call origination is in excess of 85%. We recognise MT's comment that the market assessment should take account of the ability to originate calls using VoIP, and in fact the market definition of the retail fixed calls market includes VoIP calls. This makes no difference to the finding of SMP at this point in time, but opens up the possibility that if VoIP develops further, it could provide a competitive constraint in the market for call origination.

Our analysis of additional information shows that there is no transit market in the Isle of Man. Interconnection takes place at a single point. We will therefore not define a market for wholesale transit.

We have reviewed further information provided on termination, and conclude that neither C&WIOM nor Wi-Manx terminates calls, and so their services do not fall within the market for wholesale call termination. This means that MT is the only operator in the Isle of Man which terminates calls, and that Manx telecom has SMP for wholesale call termination on its own network.

Wholesale Broadband Access

We have considered MT's proposal that the markets for Wholesale Physical Network Infrastructure Access (WPNIA) and the market for non-physical broadband access should be analysed separately. This was the practice under the original EC Recommendation on relevant markets. However, more recently the EC has reconsidered its approach, particularly given the roll-out of next generation infrastructure, and its view now is that Markets 4 (WPNIA) and 5 (WBA) should be analysed together. For example, in its comments on the Irish Regulator's notification of the WBA market, the EC stated: "*The Commission would like to reiterate its previous comment inviting ComReg to analyse markets 4 and 5 together thus ensuring a coherent approach to NGA regulation*".¹⁰ The logic of this is that the analysis can consider a retail broadband market, and can then assess whether regulation at the physical level (WPNIA) is sufficient to address any competition problems, and if not, can then assess whether regulation is required of a non-physical wholesale broadband input. This is particularly important in a NGA context, where the potential wholesale broadband products may not map exactly onto the physical/non-physical distinction associated with broadband supplied over copper.

We did not define a separate physical access market (Market 4) in the Consultation, firstly because we believed it was more useful to discuss the provision of physical and non-physical products together, secondly because there is no supply of physical access (such as Local Loop Unbundling) in the Isle of Man, and we have received no indication of demand for it, and thirdly because MT is already underway in rolling out NGA and the separation into physical and non-physical access is less relevant in an NGA context.

In order to clarify our analysis, our definition of the market starts with the smallest product set likely to address the retail broadband market. We have defined a notional retail broadband market which includes retail broadband provided via DSL, FWA and fibre. The

¹⁰ Commission decision concerning case IE/2011/1207: Wholesale broadband access in Ireland SG-Greffe (2011)7727

retail market does not include internet access provided over leased lines or over a mobile network, therefore the wholesale inputs associated with the leased lines and mobile are not considered to fall within the Wholesale Broadband Access market. Retail broadband provided via DSL is the predominant product in the Isle of Man, so our starting point is to conceptualise a wholesale product which would be an input to the provision of DSL-based broadband. This product would be provided over an incumbent's ubiquitous network. Our view is that wholesale demand for a comprehensive or ubiquitous WBA product is likely to prevail, regardless of whether the network is based on current generation (DSL) access or if fibre is overlaid (either in whole or in part) as part of an NGA upgrade, because both types of access would represent effective demand side substitutes and form part of the same relevant market.

A purchaser of a wholesale non-physical input would not be likely to switch to purchase a physical input (such as unbundled local loops) in response to a small but significant non-transitory increase in the price of the non-physical input. This is because the investment costs associated with purchasing physical inputs are significantly higher than those associated with purchasing non-physical inputs. In the context of current generation networks, MT is correct that there is not likely to be demand side substitution between physical and non-physical inputs, and that therefore Markets 4 and 5 (WPNIA and WBA) are separate markets. It is noted that, in the Isle of Man, there is currently no provision of unbundled loops at present, and we have seen no manifest demand for this service.

We therefore have the option of defining a notional Market 4/WPNIA, in which MT would have SMP as the only operator owning a fixed network which could conceivably offer LLU. MT would then be subject to SMP obligations on that notional market, including an access obligation. However, any such obligation would be subject to the usual test of reasonableness, i.e. a requesting operator would have to show that there was a reasonable business case for the requested wholesale product. It seems to us that the definition of a broader wholesale broadband access market, as carried out in the Consultation, comes to the same conclusion as the definition of a series of narrower wholesale broadband access markets. Given that there is no material difference in the outcome, we intend to maintain that there is a single wholesale broadband access market.

A purchaser of a wholesale input which is used to offer retail DSL-based broadband would be likely to view other non-physical inputs as substitutes – that is, a purchaser buying MT's current wholesale product would be likely to find that a full bitstream type product or naked DSL was a good substitute, in terms of product characteristics, functionality and intended use. The market would therefore contain all non-physical products which could be used to offer retail DSL broadband. Given the discussion above regarding technology neutrality, the market would also contain non-physical products offered over copper and fibre networks. For the avoidance of doubt, wholesale inputs associated with other types of internet access which do not fall within our defined retail market (including, for example, mobile and leased lines) would not fall within the Wholesale Broadband Access Market.

Wholesale dedicated capacity (leased lines)

We have considered carefully the points raised by C&WIOM in relation to on-island and off-island connectivity, and whether MT should be designated as having SMP in both. We consider, however, that we have defined the markets correctly and that no operator has SMP in the market for off-island connectivity. For the avoidance of doubt, however, we wish to make clear that the market for on-island connectivity includes that for facilities up to, and including, the on-island termination points of international facilities and the local access tails of international circuits. This clarifies the break point between the on-island and off-island markets, but the market definition proposed in the Consultation remains unchanged. Thus the obligations proposed below for the market for on-island connectivity regarding access, non-discrimination, transparency etc will apply equally to these facilities.

With regard to MT's proposal that a separate market should be defined for leased lines of high capacity, i.e. 155Mb/s or higher, as noted in the section on retail markets, the Commission does not feel that sufficient evidence has been provided, in particular in terms of the economic viability of self-supply, to justify such a split. It notes that, even if this were done, it is likely that MT would be found dominant in both markets. However, it also recognises that the dynamics of competition may be different within a market, and that, for example, pricing differentials between higher and lower capacity circuits may make self-supply a more economic option. It has therefore proposed less onerous and more proportionate remedies for circuits at this speed. This is dealt with in the "Remedies" section, below.

Remedies in the wholesale fixed markets

In the Consultation, we set out our overall approach to remedies in the wholesale markets, which recognised that any sustainable competition in the retail fixed markets is dependent on the availability of well-functioning wholesale inputs. However, we also recognised that the Isle of Man depends on a good quality communications infrastructure, and this needs continuing investment and a return on that investment.

An underpinning principle of telecommunications regulation is that competing operators should be able to replicate the retail services provided by the incumbent operator, either by building their own infrastructure, by purchasing wholesale inputs, or by a combination of the two. We noted that, in the Isle of Man at present, an OLO cannot replicate Manx Telecom's retail fixed access, can partially replicate retail fixed calls, and can replicate retail broadband. However, the services which can wholly or partially be replicated depend on wholesale inputs from Manx Telecom.

Our approach to remedies considered two key questions. First of all, which wholesale inputs should be made available? Secondly, where wholesale inputs are made available, under what conditions should this be done? The first of these questions was discussed in terms of an access obligation, and the second under the supporting remedies of transparency, non-discrimination, accounting separation and cost accounting and price controls.

Access

Summary of consultation proposals

Given the principle of facilitating replicability of Manx Telecom's retail products, we proposed that Manx Telecom should be obliged to offer access to wholesale inputs in all of the defined wholesale markets. We did not propose at this stage to specify products which should be offered, so that access would be made available on consideration of a reasonable request. We have proposed to define broad, technology-neutral markets, so remaining open to the possibility that OLOs may identify products which are not currently available on the market, and that they would have the right to submit a request for these products, which Manx Telecom would be obliged to consider in terms of its reasonableness. The guiding principle is that, given the preliminary SMP finding, and given the dependence on a wholesale input for competition in the retail market, an effective wholesale solution is essential.

We proposed to attach conditions to the access obligation, such that Manx Telecom would be obliged to comply with the obligation in a manner which is fair, reasonable and timely. This applies to the entire process, including the way in which Manx Telecom deals with the access request, through to any eventual implementation of an access product. Should Manx Telecom propose to refuse an access request, it must respond in writing, detailing the reasons why there is a denial of access, and any such refusals should be notified to the Regulator.

In our view, framing the access obligation in this way offers OLOs the opportunity to consider wholesale products which may not be available on the island at this time, and should encourage innovation in the provision of services. We would expect that, in making a request for access, the OLO presents a serious business case, as this is the basis for judging whether or not the case is reasonable. It is not reasonable to expect Manx Telecom to develop a series of wholesale products for which there is no likely market.

Summary of responses

C&WIOM does not agree that access should be on the basis of a reasonable request, and believes that this remedy would be insufficient even attaching the obligation that MT behaves in a manner which is fair, reasonable and timely. Instead, C&WIOM proposes that specific products should be mandated, and that mandated products should represent equivalent inputs to the inputs provided by MT for its own retail operation. C&WIOM justifies its proposals with reference to its view of difficulties in previous interaction with MT. In addressing the retail fixed markets C&WIOM believes that these products should include Wholesale Line Rental (WLR), possibly Carrier Pre Select (CPS), an enhanced bitstream type product, and naked DSL. In C&WIOM's view, WLR should be made available within 3 months, and naked DSL within 6-12 months. C&WIOM's view is that the introduction of WLR would not require capital expenditure, and involves minimal operating costs. C&WIOM expressed a view that a true wholesale service (ie not white label resale) could offer significant cost savings and efficiencies to the OLO and the incumbent. In considering

conditions attached to the access obligation, C&WIOM looked for further clarification should MT refuse an access request.

E-Ilan put forward a view that the access obligation was biased in favour of the incumbent. It expressed concern about the definitions of "reasonable request" and "fair, reasonable and timely", particularly about who would decide how these obligations should be interpreted. E-Ilan also suggested that innovation would be stifled if an OLO had to present a business case to MT, which would be a potential competitor.

MT broadly welcomed the framing of the access obligation, such that a product would not be developed until there was a requirement to provide it from a credible customer. However, MT noted that the lack of certainty as to whether there is a requirement for such a product may lead to future network design decisions which are less than optimal (either to build more flexibility than needed and suffer the consequences, or to build for own needs with wholesale customers suffering higher costs as a result).

MT believes that the proposed access obligation goes well beyond that imposed in other countries, and is a very wide-ranging and highly intrusive remedy well beyond anything that has been applied in other EU markets. MT proposed that the grounds for refusing access should be made clear, as this would help avoid unnecessary disputes. MT suggested that, as a matter of principle, additional Manx Telecom costs arising from provision of new access products must be borne by the access seekers alone, through the charges for the new products.

Our analysis and conclusions

In our view, the access obligation needs to find a balance between ensuring that OLOs have access on a wholesale basis to MT's fixed network, and ensuring that MT is not obliged to develop and supply products for which there is no reasonable commercial demand. Therefore, on the one hand, MT needs to accept that the SMP finding in a market, and subsequent access obligation, means that OLOs have a right to wholesale supply in order to address retail fixed markets, and on the other hand OLOs must recognise that access has to be on a commercial footing, and that MT is not obliged to develop products in advance of demand, nor where these products are unlikely to have a material impact on the retail market.

In our view, the rights of OLOs are based on the guiding principle that, given the preliminary SMP finding, and given the dependence on a wholesale input for competition in the retail market, an effective wholesale solution is essential, and OLOs have the right to make a reasonable request for access.

We believe that the rights of MT are clearly stated in its current licence:

"The Commission may not set any condition in relation to a Relevant Network under paragraph 43.1 unless they consider this to be proportionate and appropriate, having taken into account, in particular, the following factors:

43.3.1 the technical and economic viability, having regard to the state of market development, of installing and using facilities that would make the proposed Network Access unnecessary;

43.3.2 the feasibility of the provision of the proposed Network Access;

43.3.3 the investment made by the person initially providing or making available the network or other facility in respect of which an entitlement to Network Access is proposed;

43.3.4 the need to secure effective competition in the long term; and

43.3.5 any rights to intellectual property that are relevant to the proposal.”

In our view, these terms in the licence provide a set of criteria against which an access request may be considered.

We do not believe that mandating products is an appropriate or proportionate approach at this stage. Where other Regulators have mandated products, this has generally been because these products already exist, and the mandate ensures that they will continue to be offered. Our view is that wholesale products should be developed in cooperation between MT and OLOs, not through definition by the Regulator. Only in this way will products be designed and developed which best meet market needs. However, we appreciate C&WIOM's concerns about delaying tactics and other obstructive behaviour, and note that they have provided examples which they believe illustrate previous obstructive behaviour.

We understand reluctance expressed by OLOs regarding the presentation of a business case as part of an access request, but would note that the business case required is to do with their purchase of the proposed wholesale input – MT is not expected to make a judgement about the OLO's retail business plan but is expected to consider the business case against the criteria in MT's own licence.

Our intention is to maintain that access should be on the basis of a reasonable access request.

Having considered responses to the Consultation, we note that there is a degree of scepticism amongst OLOs regarding the interpretation of “fair, reasonable and timely” conditions attached to the access obligation, and regarding MT's possible reasons for refusing an access request. The conditions which we proposed in the Consultation were based on paragraph 43.4 of MT's current licence, as follows:

“The conditions specified by the Commission under paragraph 43.2 may include provision for:

43.4.1 securing fairness and reasonableness in the way in which requests for Network Access are made and responded to; and

43.4.2 securing that the obligations contained in the conditions are complied with within the periods and at the times required by or under the conditions.”

In order to provide greater clarity around what may be considered fair and reasonable, we can outline some possible reasons for MT to refuse an access request. For instance, an access request could be refused if the product was not within the defined relevant market, or was not consistent with the OLO's licence. MT could refuse if the product was not technically feasible, although there would need to be an explanation as to why this was the case. MT could raise concerns if it believed the product was not economic to supply at the volumes requested. These examples are not intended to be exhaustive but to illustrate the type of reasoning which may be appropriate, and again this should be done with reference to the criteria set out in MT's licence.

In considering MT's obligation to behave in a timely manner, it is not useful to be overly prescriptive in setting fixed times by which MT must respond to an access request, as requests will differ in terms of complexity. However, we would expect that an access request is acknowledged soon after its receipt, and that MT informs the OLO as quickly as possible of its proposed timing for dealing with the request.

We have considered in this context MT's suggestion that additional costs arising from the introduction of new wholesale products should be borne by access seekers alone. Our view is that this may sometimes be the case, but not necessarily so, and consider that the cost of developing and introducing a new wholesale product would be an integral part of judging the extent to which such a product is technically and economically viable.

Further, in considering the conditions attached to the access obligation, the requirement that an SMP operator should behave in a manner which is fair, reasonable and timely is a standard obligation throughout other jurisdictions, and sets the expectation of how the access obligation will be met. We note that in several markets in the Isle of Man wholesale products already exist, and believe the conditions may be strengthened by adding obligations that MT will negotiate in good faith with undertakings requesting access, and will not withdraw access to facilities already granted without justification and consultation.

Non-discrimination

Summary of consultation proposals

In the Consultation, we proposed that Manx Telecom should be subject to an obligation not to discriminate in its supply of wholesale products. Under the Fair Trading obligation in the Manx Telecom licence, Manx Telecom would be prevented from discriminating between OLOs. The proposal is that Manx Telecom should also be obliged not to discriminate between OLOs and its own retail operation. This does not mean that products and services have to be identical, but rather that it is possible to achieve an equivalent outcome. We are aware that Manx Telecom does not fully separate its wholesale and its retail operation. Initially, we proposed that the onus is on Manx Telecom to outline how it will not discriminate in practice, and also how it will demonstrate that it is not behaving in a discriminatory manner.

Summary of responses

C&WIOM does not believe that an approach based on “equivalent outcomes” will work in the Isle of Man and believes that an approach based on equality of input is necessary. In C&WIOM’s view, this means that the retail arm of MT should be required to use the same, or very similar, wholesale building blocks for its retail products as are made available to competitors.

MT understands that the proposed non-discrimination obligation requires that Manx Telecom should be able to show that if there is a wholesale offer, the pricing and other terms allow an equivalent outcome, but in its view this does not imply that MT will use a particular wholesale input itself. MT proposes to identify and agree a suitable set of measures with the Commission, which could include a margin squeeze test in the case of pricing, and a set of Key Performance Indicators (KPIs) for non-price metrics. MT notes that it expects that the provision of some information will be on a confidential basis to the Commission. MT does not agree with the Commission’s proposal that Manx Telecom should be obliged to note and justify any differences between the service it receives and that offered to the OLOs.

Our analysis and conclusions

The “equivalence of inputs” approach proposed by C&WIOM is akin to functional separation, which would require MT to not only separate its wholesale and retail operations, but also to engineer its wholesale products so that its retail operation purchased the same input as would be purchased by OLOs. In our view this is an extreme regulatory solution which would only be considered if other options failed. We will therefore maintain our proportionate approach based on an equivalence of outcomes.

We note that MT does not agree that it should be required to identify and justify any differences between the wholesale services received by its retail operation and the wholesale services received by OLOs. However, paragraph 32 in its licence states that:

"The Communications Provider may be deemed to have shown such undue preference or to have exercised such undue discrimination if it unfairly favours to a material extent a business carried on by it in relation to the doing of any of the things mentioned in paragraph 32.1 so as to place at a significant competitive disadvantage persons competing with that business."

The application of this paragraph in terms of *ex ante* regulation would require MT to demonstrate that it does not discriminate unfairly between its own operation and that of its competitors, and that this should be done before it acts in the market, and not as a consequence of perceived behaviour (ie it is an *ex ante*, not an *ex post* obligation which is being imposed).

The Commission notes and appreciates MT’s proposal to identify and agree a set of measures which ensure that the non-discrimination obligation is met. It envisages that these

will include a margin squeeze test as well as Key Performance Indicators (KPIs) for non-price metrics.

Transparency

Summary of consultation proposals

In the Consultation, we proposed that where Manx Telecom offers products on the wholesale market, these products should be appropriately documented. An OLO should be able to easily access technical information about wholesale products; information about prices and other terms and conditions; and process information including a change mechanism.

We proposed that a transparency obligation should include the following:

- A requirement to publish a Reference Offer for each wholesale product, including appropriate technical specifications, and including a mechanism explaining how changes to the Reference Offer will be made and notified
- A requirement to publish a standard SLA which would govern Manx Telecom's relationship with the OLO. It is increasingly seen as good practice to publish Key Performance Indicators, and this could be done as part of the SLA.
- A requirement to publish prices and non-price terms and conditions for wholesale products.
- A requirement to notify OLOs and the Regulator in advance of the launch of a new wholesale product. We invited comment on the appropriate length of notification period. In considering transparency obligations, we were also concerned to recognise Manx Telecom's commercial needs, and noted that it was likely that there are types of information which should only be available to operators with which Manx Telecom has established a commercial relationship. This could be, for example, where an operator has signed a Non-Disclosure Agreement (NDA).

We believed it was reasonable to specify a time by when Manx Telecom should be compliant with its transparency obligations, and recognised that obligations were simultaneously being imposed across all fixed and mobile, retail and wholesale markets, and that the burden would fall primarily on Manx Telecom. However, it was also essential that regulation put in place as a consequence of this review process takes effect as quickly as possible. We therefore proposed that Manx Telecom should be compliant with its transparency obligations within 3 months of their coming into effect, and invited comment on this timeframe.

We also expected that Manx Telecom would identify how it would fulfill a transparency obligation by demonstrating its compliance with the non-discrimination obligation. This might include, for example, Manx Telecom noting, and where appropriate justifying, any differences between the services received by its own downstream retail operation and by OLOs.

Summary of responses

C&W agrees with our proposals on transparency, but believes that MT should be compliant with these obligations in less than 3 months.

MT agrees with proposals on the requirement to publish Reference Offers and standard SLAs. MT also agrees that it should publish certain product-related KPIs, and should publish prices and non-price terms and conditions for wholesale products. While agreeing that Manx Telecom should notify OLOs and the regulator in advance of the launch of a new wholesale product, in MT's view the notification period should be no longer than 8 weeks, as MT believes a longer period could materially delay innovation and new services in the Isle of Man. MT notes that there will be types of information which should only be available to operators with which Manx Telecom has established a commercial relationship via contract and/or NDA. In considering the timeframe required to implement these changes, MT believes that 3 months is insufficient and that a 6 month timeframe is more reasonable. However, documentation would be published as it is completed. MT also notes that, in its view, the costs of compliance will be material and will in the end feed into wholesale (and thereby retail) prices in the Isle of Man.

Domicilium agreed on the need for a transparency obligation, stating that without it, it was severely hampered in the provision of retail services in competition with MT. It felt that the length of the negotiation period should be flexible and for discussion among the regulator, MT and access seekers, but that 6 months was the minimum acceptable. It welcomed the proposed 3-month deadline for compliance with these obligations. Mr. Alan Croll also agreed that wholesale products should be appropriately documented.

Our analysis and conclusions

We note that there is broad agreement on the content and application of the transparency obligation. There are two areas which require further consideration. The first is the period within which MT should be compliant with its transparency obligations. C&WIOM has suggested that 3 months is too long, and MT believes it is too short. However, MT has proposed to publish documentation as it becomes available, so it would become compliant with parts of its obligation within the 3 month period. In order to progress this, we will require MT to produce a timetable detailing how and when it intends to comply with its transparency obligation, and in particular to explain why any part of this would take longer than 3 months.

The second area concerns appropriate notice periods to be applied to the launch of new wholesale products. MT has made the case that the imposition of lengthy notice periods may hamper innovation, and we understand this. However, the 8 week period suggested by MT is very short for certain new products, and it is doubtful whether OLOs would be able to respond within this timeframe. In this context, it is noted that the EC recommends that, in the case of Next Generation wholesale products, the notice period should be 6 months.

Our assessment is that it may not be helpful to impose a rigid notice period to all new wholesale products. We therefore propose that the notice period for new wholesale products should be 3 months. For all new products, these time periods may be varied in agreement with the Commission. This approach will offer flexibility in introducing new products to which OLOs may speedily respond within a shorter timeframe, while still ensuring that OLOs have adequate time to plan their utilisation of new wholesale inputs.

Accounting separation

Summary of consultation proposals

As discussed in the retail market remedies section, we have considered whether it is appropriate to require Manx Telecom to produce separated accounts. We proposed to maintain the principle that there must be visibility in how costs are allocated to particular products and services, and that the information must be granular enough to demonstrate first of all that there is no discrimination, secondly that there is no cross subsidy across its products and services, and thirdly, that there is no price squeeze. Initially, the onus would be on Manx Telecom to explain how this obligation would be met.

As this is a new requirement on Manx Telecom, we proposed that Manx Telecom should be compliant with this obligation within 3 months of the date of it coming into effect.

Summary of responses

The comments of most respondents in relation to accounting separation applied equally to wholesale and retail markets, as might be expected since the issue concerns the relationship between the two. For this reason, there is some duplication between the comments in this section and the "Retail Fixed Markets" section.

In addition to proposing that separated accounts are essential to ensure that MT is compliant with its non-discrimination obligation, C&WIOM outlined its view of the benefits it believes can be achieved in producing separated accounts, and proposed that benefits could be achieved by the regulator, OLOs, consumers and by the incumbent operator itself. C&WIOM provided evidence from its associate company in Guernsey to indicate that the cost of producing separated accounts was less than 1% of operating costs per year. C&WIOM also noted that that Article 13 of the Framework Directive makes it a requirement for European Member States to mandate that separated accounts are provided where the annual turnover of the SMP operator exceeds €50m. It believed that the Commission should mandate full accounting separation as it was not possible to ensure compliance with other obligations (particularly non-discrimination) without the publication of separated accounts.

Domicilium stated that the costs to MT should not prevent the regulator from requiring accounting separation to achieve a fair wholesale pricing and operational strategy. It stated that MT was highly profitable, more so than telecoms companies generally.

Mr. Alan Croll stated that only accounting separation plus cost accounting and price control would drive down prices.

MT put forward its views on accounting separation in considering wholesale remedies, and referenced this also to the retail fixed market. MT agrees with the principles set out by the Commission, and has proposed a structure for financial reporting to the Commission, which would be on a confidential basis. MT provided examples of approaches in other jurisdictions, including Luxembourg and Finland, which it believes demonstrate the possibility of lighter touch regulation.

Our analysis and conclusions

Having carefully considered the views of all respondents, we maintain the objectives set out in the Consultation that there must be visibility in how costs are allocated to particular products and services, that the information must be granular enough to demonstrate that there is no discrimination, that there is no cross subsidy across MT's retail products and services, and that the difference between wholesale and retail prices is such that an equally efficient competitor could compete in the market.

The financial reporting proposals which MT made in its response to Consultation are in effect a form of separated accounts, and the Commission considers that these represent the minimum needed to ensure that the obligations of non-discrimination are respected and that cross-subsidisation and margin squeeze are avoided. We welcome the useful information provided by C&W regarding the experience of its associate company in Guernsey, and note its view of the potential benefits of producing separated accounts.

MT will be obliged to produce separated accounts. The format and reporting requirements associated with these accounts will be subject to agreement with the Commission. The Commission expects that MT will propose an appropriate methodology, which will include the identification of key assumptions such as how it will attribute costs. The Commission expects to take into account experience in other jurisdictions, and will assess the reasonableness of MT's approach in terms of best practice, proportionality given MT's size and the scale of the Isle of Man market, and the extent to which MT's proposals address the Commission's objectives as set out in this market review. The Commission wishes to avoid the lengthy processes often associated with the production of separated accounts in other jurisdictions, but recognises that this is a new obligation for MT, and that the agreement of an appropriate format and reporting structure will involve input from MT, OLOs and from the Commission. In order to ensure that the interests of all stakeholders are taken fully into account, the Commission expects that MT should make initial proposals on separated accounts within 3 months of the publication of this Decision, and that these initial proposals will form the basis on which the Commission will consider and agree a format and reporting requirements.

Cost accounting and price controls

Summary of consultation proposals

In the Consultation, we noted that there are currently no price controls in the wholesale market. We asked for comment on whether it would be appropriate to oblige Manx Telecom to move to cost-oriented pricing in the wholesale markets. This would have the advantage of providing clarity on the costs involved in supplying a wholesale input, but would have implications for the accounting and reporting practices of the incumbent.

Summary of responses

C&WIOM believes that MT should move to cost-oriented pricing and price controls in all markets, and that in the interim the retail minus margins should be improved.

MT believes cost-oriented pricing is not required because, in its view, retail minus from a constrained retail price will keep wholesale prices sufficiently low. MT suggests that where cost orientation has been imposed by regulators, it has usually been justified as a means of preventing excessive wholesale pricing. In MT's view, retail minus or "no margin squeeze" approaches are more likely to allow efficient retail pricing to influence wholesale prices. MT also notes that if cost orientation is applied, it should not be used to "cherry pick" particular products or services, and that care must be taken to avoid unintended consequences such as raising particular consumer prices.

E-Ilan suggested that any cost analysis would have to be fully open book and auditable.

Domicilium believed that MT should be required to move to cost-oriented pricing in all wholesale markets, as this was the only way to avoid a margin squeeze.

Mr. Alan Croll's view was that cost accounting and price control were needed, together with accounting separation, to drive down prices.

Our analysis and conclusions

We have considered all views on cost orientation. We believe cost orientated wholesale pricing could be an eventual aim, but that it is premature and disproportionate at this stage to impose a full cost orientation obligation at this point. The market reviews have put in place a full regulatory framework for telecommunications markets, and will involve considerable effort in implementation. Before we can consider cost orientation, it is necessary to have in place transparency, and to have the production of separated accounts. We also believe that the remedies addressing margin squeeze and bundling address the types of competition problems associated with wholesale pricing practices which are not cost oriented.

In our view, the remedies proposed in the wholesale fixed markets also constitute a guide as to how MT should go about developing and implementing new wholesale products in SMP markets, and we would expect that MT would take into account the desirability of cost oriented pricing.

In the interim, we expect that MT will continue to offer wholesale prices on a retail minus basis. We will impose an obligation that MT cannot offer retail prices which are below its wholesale price, as a specific addition to an obligation not to cause a margin squeeze.

Mobile communications markets

Introduction

The mobile communications markets are concerned with telecommunications products and services which are provided at a non-fixed location. At the retail level, customers use mobile phones for various purposes including making voice calls, sending texts (SMS), and internet access. At the wholesale level, in order to provide mobile services, operators need wholesale services, namely access and call origination, and termination. Mobile access and call origination is self-supplied by operators on their own networks, and in some countries this is supplemented by the entry of Mobile Virtual Network Operators (MVNOs), which buy excess capacity on an operator's network to run their own retail service. Wholesale mobile call termination is an input both to the retail mobile market (where the mobile operator terminates calls from other mobiles) and to the retail fixed market (where an operator terminates calls to mobiles originating from a fixed line).

Market definition and competition assessment

Summary of consultation proposals

Our preliminary conclusions on the definition and competition assessment of the mobile markets were as follows:

At the retail level, there is a single "cluster market" for mobile services which includes access, national, international and roaming calls, and SMS (text messaging). Pre-and post-pay mobile services are considered part of the same market, due to supply-side substitutability between the two. Manx Telecom has a market share of 81% in terms of subscriber numbers; however, because there are two networks available (Manx Telecom and C&WIOM), we proposed to consider regulatory options in terms of wholesale rather than retail remedies. We noted, however, that there were concerns regarding the bundling of retail mobile with other services.

At the wholesale level, access and call origination is self-supplied by the two mobile operators. Manx Telecom's market share suggests that it should be designated with SMP in this market; however, we noted that the infrastructure-based nature of competition could mitigate its market power to some extent. We invited comment on this issue.

Mobile termination is supplied by operators to themselves, to each other and to fixed operators. Where calls are made from one network to another ("off-net calls"), the calling operator has to pay a charge, known as the termination rate, to the operator on whose network the call terminates. The termination charge is set by the called network, but is paid by the caller, which means that the terminating operator could raise its rates without a constraint from either party to the call. Where calls originate and terminate on the same network ("on-net calls"), no wholesale mobile termination charge is paid. However, the retail price paid by the calling customer will include an implicit mobile termination charge for the service.

Because call termination can only be supplied by the network provider to which the called party is connected, and in line with the standard EU approach to this issue, we proposed that MT and C&WIOM should each be designated with SMP for termination on its own mobile network.

Summary of responses

MT's view was that retail regulation was not required. They did not dispute the market definitions, but stated that MT did not have SMP in the mobile access and call origination market as there was no evidence that commercial negotiations had failed and as neither Sure nor MT could act independently of each other. They warned that the entry of an MVNO could further delay market entry by an infrastructure-based player and deter further investment by existing operators. MT agreed that both it and Sure had SMP in the respective call termination markets.

C&WIOM believed that MT did have SMP in the retail mobile market. It did not question the market shares but asked why MT's was still so large, four years after C&WIOM, trading as Sure, had entered the market. It pointed out that a market share above 50% created a strong presumption of dominance. C&WIOM also raised concerns about MT's dominance in fixed markets being leveraged into the mobile market through bundling services and offers such as Groups Call Free. It called for strict regulatory measures to ensure that there was no discrimination in call charges from a fixed operator's network between calls to its own mobile network and to that of another operator.

Domicilium and Mr. Alan Croll agreed with the market definition and SMP assessment.

Our analysis and conclusions

We maintain our original conclusions on market definition. In relation to the retail mobile market, we have decided not to designate MT as having SMP in this market as the competition problems which arise (notably bundling and potential margin squeeze) are better addressed through measures aimed at the fixed markets and at the wholesale mobile termination markets. Retail regulation is generally aimed at consumer protection against excessive prices, whereas wholesale regulation is aimed at promoting competition. As the issues which arise in these markets are competition rather than consumer issues, we have decided that direct regulation in the retail mobile market would not best serve the interests of consumers and citizens in the Isle of Man.

We consider that MT has SMP in the wholesale market for mobile access and call origination. However, in a divergence from the European norm and in the interests of creating a regulatory system which is directly tailored to the needs of the Isle of Man, we have decided at this point to abstain from imposing a remedy. This is because the normal solution to SMP at the wholesale level is to impose an access obligation. In the case of this market, this would involve an obligation to supply wholesale access to a Mobile Virtual Network Operator, or national roaming to a new infrastructure-based competitor. At present there are no MVNO operators in the Isle of Man and no third infrastructure-based operator (although a licence

was issued but subsequently revoked). The Commission is conscious of the need to encourage infrastructural investment by existing as well as potential new operators, and considers that mandating access at this point could discourage this. However, if future interest manifests itself from either an MVNO operator or an infrastructure-based competitor, there may be benefits in revisiting the issue of remedies.

We consider that MT and C&WIOM each has SMP in the wholesale market for the provision of call termination on their respective networks.

Remedies

Summary of consultation proposals

In the Consultation, we proposed a set of remedies in the market for mobile call termination to be applied to MT and C&WIOM, as both have SMP on their own networks.

We proposed that SMP operators should be obliged to provide network access on reasonable request for the purposes of call termination.

We proposed that SMP operators should not unduly discriminate in the provision of access.

We proposed that SMP operators should be subject to a transparency obligation, and should give notice of changes to their Mobile Termination Rates, and these changes should be notified to the Regulator in advance of their coming into effect. We asked for comment on an appropriate notification period.

We considered whether it is appropriate to introduce a price control in the MTR market. Many European countries have *ex ante* controls on MTRs, and often set target MTRs with a glide path for achieving the desired level. The European Commission has set a target date of 31 December 2012 for Regulators to have an appropriate cost model in place to monitor cost-oriented pricing of termination rates, with an extension until 1 July 2014 for Regulators with limited resources¹¹. We proposed at this stage to set out the principles which we expect to be followed in the Isle of Man. Generally, it is expected that MTRs will continue to decrease, to bring them into line with costs. This has been the overall trend across Europe, and the Isle of Man should be no different.

In our view, the major competition problem in the mobile market is the potentially anti-competitive effect of bundling mobile services with fixed services such as retail voice calls and/or retail broadband. This may involve cross subsidies across a range of retail products (horizontal leverage), and may involve a price squeeze between the retail and the wholesale markets (vertical leverage).

We proposed to impose an obligation on the SMP operators that they should not behave in a manner which would cause a price squeeze, in terms of the difference between their MTR price and their retail prices. We proposed also to address bundling as discussed in the fixed

¹¹ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, (2009/396/EC)

markets, by seeking to maximise its advantages and minimise its disadvantages. Our view was that SMP operators should ensure that their bundles can be replicated, and that the elements of their bundles are transparent.

Summary of responses

C&WIOM agrees with proposals that as an SMP operator it should provide access to mobile call termination services on reasonable request; that it should not unduly discriminate; and that it should be subject to a transparency obligation regarding notice of any proposed price changes. C&W suggests that an appropriate notice period is 30 days. C&W questioned the discussion of bundling fixed and mobile products, and suggested that any remedies in this area could only apply to MT.

MT agrees with proposals that as an SMP operator it should provide access to mobile call termination services on reasonable request; that it should not unduly discriminate; and that it should be subject to a transparency obligation regarding notice of any proposed price changes. MT suggests that an appropriate notice period is 2 months. MT expressed disappointment that the Commission has not confirmed its support for symmetrical rates for mobile termination. MT put forward a view that some commercial behaviour by Sure is not in the long-term interest of end users, notably the bundling of mobile services with fixed services such as retail broadband. MT agrees that mobile operators should not behave in a manner which would cause a price squeeze in terms of the difference between their MTR price and their retail price.

Our analysis and conclusions

Both MT and C&W agree that each operator should be obliged to provide access to mobile call termination services on reasonable request on their respective networks; that the operator should not unduly discriminate; and that the operator should be subject to a transparency obligation regarding notice of proposed price changes. We have concluded that an appropriate notice period for changes to MTR prices is 30 days, because this is in line with the notification period required for consumers.

We confirm our agreement with the European Commission's Recommendation on the regulatory treatment of fixed and mobile termination rates (Document 2009/396/EC), which recommends that termination rates should be symmetric and based on the costs of an efficient operator. In our view, asymmetric rates are only ever a short-term interim solution.

We maintain that mobile operators should not engage in a price squeeze between their MTR price and their retail price. In order for a margin squeeze to occur, it is only necessary for a firm to be dominant in the upstream market. It is not necessary to prove dominance in the downstream market. C&WIOM and MT are each dominant in their own (upstream) markets for mobile call termination. We believe this approach is justified as the Fair Trading Condition of the licenses issued to C&WIOM and MT currently states that conduct may constitute an abuse where it involves *applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*.

In the Consultation, we expressed concern about the bundling of mobile and fixed products. We have taken account of C&WIOM's comments on the treatment of bundles. Our concern is to ensure that SMP operators do not engage in a price squeeze, and to ensure that, when mobile is bundled with one or more fixed products, this is not done in a way which is detrimental to competition and to the interests of consumers. Taking account also of C&WIOM's input on the usefulness of separated accounts in the context of the fixed markets, we will oblige both SMP operators to produce a form of separated accounts which will demonstrate compliance with the obligation not to cause a price squeeze. We expect that MT and C&WIOM will make proposals to the Commission within 3 months of the date of publication of this Decision.

We note that many other Regulators have imposed price controls in the MTR markets. Our view is that MTRs in the Isle of Man have been decreasing, and it would not be proportionate to introduce price controls at this time. However, should the MTR price increase or give cause for concern, we would revisit this conclusion.

Annex A

List of respondents to the consultation

Cable & Wireless Isle of Man

Castletown Town Commissioners

Alan Croll

Domicilium

e-Ilan

Manx Telecom

Annex B **WITHDRAWN**

Decision Notice 2011/01 is withdrawn pending review. The Communications Commission intends to undertake appropriate processes with a view to issuing three separate Notices respectively covering Retail Fixed Markets, Wholesale Fixed Markets and Mobile Communications Markets.

Decision Notice 2011/01: Notification of Market Power Determinations

Statutory powers

This Notification of Market Power Determinations is issued in accordance with Part 6 "Additional Obligations on Operators with Significant Market Power" of the Licence granted to Manx Telecom Limited under Section 5 of the Telecommunications Act 1984 (of Tynwald) and Part 4 "Additional Obligations on Operators with Significant Market Power" of the Licence granted to Cable and Wireless Isle of Man Limited under Section 5 of the Telecommunications Act 1984 (of Tynwald).

The Commission has presented its preliminary reviews of the telecommunications markets¹², and notified its proposed determinations, as required¹³. The Commission has taken account of the submissions received in response to this consultation. The provisions of the consultation document and of the response to consultation document shall, where appropriate, be construed with this Decision.

This Decision applies to Manx Telecom Limited and Cable and Wireless Isle of Man Limited and comes into effect on 4 October 2011.

Retail fixed markets

Market definition

The **retail access market** is a market for the provision of a physical connection from a fixed location to the public telephone network. This market is separate from the services carried over the physical connection. It includes access from homes and offices.

There is a market for the provision of **retail voice calls from a fixed location**. This market includes all calls from a fixed line, including calls to Isle of Man mobiles and landlines, and calls off-island to fixed and mobile numbers. The market also includes VoIP calls. Calls from both business and residential customers are included in the market, but calls from mobiles are excluded.

¹² "Consultation paper on telecommunications market reviews and notification of the proposed determinations", June 2011

¹³ condition 42.7 of the Manx Telecom Limited licence; condition 27.7 of the Cable & Wireless Isle of Man licence.

There is a market for **retail fixed broadband** which includes ADSL, Fixed Wireless Access and (when and where available) FTTx. It excludes narrowband internet access and leased lines, and excludes mobile broadband.

There is a market for **retail dedicated capacity** (leased lines). The market includes all dedicated capacity which provides broadly symmetric capacity between two points, where there is no switching, and the connection is dedicated to the user. The market definition is technologically neutral and would include SDH, PDH and Ethernet point-to-point services.

In all retail fixed markets, the geographic scope of the market is the Isle of Man.

SMP designation

Having determined that the retail fixed markets are not effectively competitive, Manx Telecom Limited is designated as having SMP on the Markets for:

Retail fixed access
Retail voice calls from a fixed location
Retail fixed broadband
Retail dedicated capacity

SMP obligations in relation to retail fixed markets

Obligation of non-discrimination

Manx Telecom Limited will be obliged not to unduly discriminate between its retail customers.

Obligation of transparency

Manx Telecom Limited shall have an obligation of transparency.

Without prejudice to the generality of this obligation, Manx Telecom Limited shall make publicly available, and keep updated, information as described in Section 9 of its licence.

Any proposed changes to price and non-price terms and conditions should be published 30 days in advance of their coming into effect.

For retail leased lines at or greater than 155Mb/s. Manx Telecom Limited will not be obliged to publish its prices for these services, nor will it be obliged to stick to a price list. However, it will be required to notify its prices for these services to the Commission on a confidential basis, so that it can check that the non-discrimination requirement, which will apply across the board to all leased lines, is being observed.

Obligation of accounting separation

Manx Telecom Limited will be obliged to produce separated accounts. The format and reporting requirements of these accounts will be subject to agreement with the Commission. The Commission expects Manx Telecom Limited to make initial proposals within 3 months of the publication of this Decision.

Obligations relating to price controls and cost accounting

Manx Telecom Limited shall maintain appropriate cost accounting systems in respect of products, services or facilities in the retail fixed markets.

Manx Telecom Limited shall be obliged not to unreasonably bundle.

Manx Telecom Limited shall have an obligation not to cause a margin/price squeeze.

Wholesale fixed markets

Market definition

There is a market for **wholesale call origination** for calls services originated on the fixed public telecommunications network.

There is a market for **wholesale call termination**.

There is a market for **wholesale broadband access**, which includes physical and non-physical access, and which includes access over current and next generation infrastructure.

There are separate markets for **on-island dedicated capacity** and **off-island dedicated capacity**.

The geographic scope for all wholesale fixed markets is the Isle of Man.

SMP designation

Having determined that the wholesale fixed markets for call origination; call termination, broadband access; and on-island dedicated capacity are not effectively competitive, Manx Telecom Limited is designated as having SMP on the Markets for:

Wholesale call origination

Wholesale call termination on its own network

Wholesale broadband access

Wholesale on-island dedicated capacity

SMP obligations in relation to wholesale fixed markets

Obligations to provide access

Manx Telecom Limited shall meet all reasonable requests from OLOs for the provision of access in the wholesale fixed markets where Manx Telecom Limited has been designated with SMP.

Manx Telecom Limited shall be required to negotiate in good faith with OLOs requesting access.

Manx Telecom Limited shall not withdraw access to services and facilities already granted, without justification and consultation.

Conditions attached to the access obligations

Manx Telecom Limited shall behave in a manner which is fair, reasonable and timely in the way in which it deals with access requests, both in terms of responding to requests and in implementing successful requests.

Where a request for the provision of access, or a request for the provision of information is refused or met only in part, Manx Telecom Limited shall provide the objective criteria for refusing same to the OLO which made the request. Manx Telecom Limited's response shall be fair, reasonable and timely.

Obligation of non-discrimination

Manx Telecom Limited shall be required not to discriminate in respect of access.

This means that it shall ensure that it does not discriminate between OLOs in equivalent circumstances providing equivalent services, and that all services and information are provided to OLOs under the same conditions and of the same quality as the services and information that Manx Telecom Limited provides for itself.

Manx Telecom Limited will be required to identify and justify any differences between the wholesale services received by its retail operation and the wholesale services received by OLOs.

Obligation of transparency

Manx Telecom Limited shall have an obligation of transparency.

Without prejudice to the generality of this obligation, in all of the wholesale fixed markets in which it is designated with SMP, Manx Telecom Limited will:

- publish a Reference Offer for each wholesale product, including appropriate technical specifications, and including a mechanism explaining how changes to the Reference Offer will be made and notified

- publish a standard SLA which would govern Manx Telecom Limited's relationship with the OLO. This will include Key Performance Indicators.
- publish prices and non-price terms and conditions for wholesale products. Manx Telecom Limited is not obliged to publish prices for wholesale leased lines at or above 155 Mbit/s, but prices shall be notified to the Commission.
- notify OLOs and the Regulator in advance of the launch of a new wholesale product. The notice period for new wholesale products is 3 months. For all new products, this time period may be varied in agreement with the Commission.

Manx Telecom Limited will be required to produce a timetable detailing how and when it intends to comply with its transparency obligation, and in particular to explain why any part of this would take longer than 3 months.

Obligation of accounting separation

Manx Telecom Limited will be obliged to produce separated accounts. The format and reporting requirements of these accounts will be subject to agreement with the Commission. The Commission expects Manx Telecom Limited to make initial proposals within 3 months of the publication of this Decision.

Obligations relating to price controls and cost accounting

Manx Telecom Limited shall maintain appropriate cost accounting systems in respect of products, services or facilities in the wholesale fixed markets.

Manx Telecom Limited shall be obliged not to unreasonably bundle.

Manx Telecom Limited shall have an obligation not to cause a margin/price squeeze.

Manx Telecom Limited shall not offer retail prices which are below its wholesale price for the equivalent product.

Mobile communications markets

There is a wholesale market for **mobile access and call origination**.

There is a wholesale market for the provision of **call termination on a mobile network**.

SMP designation

Manx Telecom Limited has SMP in the wholesale market for mobile access and call origination.

Manx Telecom Limited and Cable and Wireless Isle of Man Limited each has SMP in the wholesale market for the provision of call termination on their respective networks.

The geographic scope of all mobile markets is the Isle of Man.

SMP obligations in relation to wholesale mobile markets

No remedies will be imposed in the wholesale market for mobile access and call origination at this time.

The Commission is imposing SMP obligations on Manx Telecom Limited and Cable and Wireless Isle of Man Limited in relation to wholesale call termination on their respective mobile networks.

Obligations to provide access

Manx Telecom Limited and Cable and Wireless Isle of Man Limited shall meet all reasonable requests for the provision of access to their respective mobile networks.

Obligation of non-discrimination

Manx Telecom Limited and Cable and Wireless Isle of Man Limited shall be required not to discriminate in respect of access to their mobile networks.

Obligation of transparency

Manx Telecom Limited and Cable and Wireless Isle of Man Limited shall have an obligation of transparency.

Manx Telecom Limited and Cable and Wireless Isle of Man Limited shall notify any proposed changes to price and non-price terms and conditions at least 30 days before they are due to come into effect.

Obligation of accounting separation

Manx Telecom Limited and Cable and Wireless Isle of Man Limited will be obliged to produce separated accounts. The format and reporting requirements of these accounts will be subject to agreement with the Commission. The Commission expects Manx Telecom Limited and Cable and Wireless Isle of Man Limited to make initial proposals within 3 months of the publication of this Decision.

Obligations relating to price controls and cost accounting

Manx Telecom Limited and Cable and Wireless Isle of Man Limited shall maintain appropriate cost accounting systems in respect of products, services or facilities in the wholesale mobile markets.

Manx Telecom Limited and Cable and Wireless Isle of Man Limited shall have an obligation not to cause a margin/price squeeze between their Mobile Termination Rate price and their retail price.