

CONSULTATION DOCUMENT

Consultation Paper on Recommendation for market competition assessment methodology

1. The National Telecommunications Regulatory Commission is in receipt of a submission from the Eastern Caribbean Telecommunications Authority ('ECTEL') containing a consultation paper on the **Recommendation for Market Competition Assessment Methodology**.
2. A copy of the consultation document is attached.
3. The initial comments period will run from **16th February 2026 to 16th March 2026**.
4. The Comment on Comments period will run from **18th March 2026 to 3rd April 2026**.
5. Following the period for Comments on Comments, ECTEL's Directorate will revise and submit the Recommendation for **Market Competition Assessment Methodology** to the Council of Ministers for its recommendation for adoption in the ECTEL Member States
6. All responses to this Consultative Document should be written and sent by **email** to: -
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Disclaimer

This consultative document does not constitute legal, commercial or technical advice. The consultation is without prejudice to the legal position of ECTEL's duties to provide advice and recommendations to the Ministers with responsibility for electronic communications and the National Telecommunications Regulatory Commissions.

SUGGESTED GUIDELINES FOR RESPONSES TO CONSULTATION

In order to reduce administrative lags in ECTEL's public consultation processes and to enable a reasonable degree of transparency by sharing of views submitted, ECTEL hereby recommends that parties desirous of making contributions to the attached consultation follow the procedures outlined below:

- 1) Responses to consultations should be clearly labelled as a response to the particular ECTEL consultation and correctly referenced by title.
- 2) Documents should contain: the name of Party/Licensee/NTRC commenting, address, telephone, and email contacts of commentary author or corporate officer(s) responsible for the document. This information will enable ECTEL to clarify any comments where necessary, or to facilitate follow-up dialog by ECTEL where required.
- 3) The Consultation Document sets out questions on specific regulations/parts of the regulations. Commenting parties may indicate a response (concur or disagree) on the recommendation and provide explanations/reasons for each response.
- 4) Where parties have no view or interest in expressing a view on a specific recommendation, parties should indicate "no comment" and number appropriately.
- 5) Responses/comments to specific recommendations should be double spaced and numbered in sequence with the recommendation. Where comments are extensive, paragraphs should be numbered. Pages should be numbered.
- 6) Commenting parties should avoid making comments in the form of tracked changes to consultation documents.
- 7) Where possible, comment documents should be submitted in PDF format.
- 8) Where possible, parties should make explicit reference to academic articles, legislative provisions in other jurisdictions, or other sources relied on, and should provide copies of these together with comments. Accurate citations of resources relied on will suffice if copies cannot be provided.
- 9) If relevant, parties commenting on specific provisions of legal language should propose alternative language where possible. Such language should be appropriately highlighted and double spaced. Parties should avoid proposing alternative language in tracked changes to the consultation document.
- 10) Comments should be submitted via e-mail; only comments submitted via e-mail will be acknowledged.
- 11) Commenting parties should expressly indicate or highlight which parts of comment documents contain commercially sensitive or confidential information that should not be published.

ECTEL reserves the right to publish all the responses received to the consultation and provides no undertakings to refuse to publish such comments where requested, on its website or otherwise.

ECTEL is grateful to those parties adopting the recommended guidelines for submitting comments to this consultation.



**EASTERN CARIBBEAN
TELECOMMUNICATIONS AUTHORITY
(ECTEL)**

Consultation Document

Market Competition Assessment Methodology

March 2026

Market competition assessment methodology

Consultation document

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Glossary of terms and abbreviations

4G: Fourth Generation mobile

5G: Fifth Generation mobile

AL: Actual loss

ARPU: Average Revenue Per User

B2B: Business-to-business

BEREC: Body of European Regulators for
Electronic Communications

Broadband: A communications channel
which carries traffic at a rate higher than
dial-up communications

BULRIC+: Bottom-up long-run incremental
cost plus

CICRA: Channel Islands Competition and
Regulatory Authorities

CR: Concentration Ratio

CL: Critical loss

CMA: Competition and Markets Authority
(UK)

CURA: Communications and Utilities
Regulatory Authority (Isle of Man)

D2M: Direct-to-mobile

DCF: Discounted cash flow

EBITDA: Earnings Before Interest, Tax and
Depreciation

EC: Electronic Communications

ECTEL: Eastern Caribbean
Telecommunications Authority

EEO: Equally efficient operator

EoI: Equivalence of inputs

EoO: Equivalence of outputs

FDC: Fully Distributed Cost

GDP: Gross Domestic Product

GCRA: Guernsey Competition and
Regulatory Authority

HHI: Herfindahl-Hirschman Index

ID: Information disclosure

ITU: International Telecommunication
Union

JCRA: Jersey Competition Regulatory
Authority

LEO: Low Earth Orbit

MCA: Malta Communications Authority

MVNO: Mobile Virtual Network Operator

NRA: National Regulatory Authority

NTRC: National Telecommunications
Regulatory Commission

OECS: Organisation of Eastern Caribbean
States

OTT: Over-the-top

QoS: Quality of Service

RAB: Regulated Asset Base

REO: Reasonably efficient operator

RIO: Reference Interconnection Offer

ROCE: Return on capital employed

SLA: Service Level Agreement

SLG: Service Level Guarantee

SMP: Significant market power

SMS: Short message service

SSCC: Samoa Submarine Cable Company

SSNIP: Small but significant non-transitory
increase in price

URCA: Utilities Regulation and Competition
Authority (Bahamas)

WACC: Weighted Average Cost of Capital

WDM: Wavelength-division multiplex

WLA: Wholesale local access

1 Overview of competition assessment framework

1.1 Legislative context

Market competition analysis may be required for different reasons, including:

- SMP assessments to determine whether particular obligations should be placed on SMP licensees (Electronic Communications ('EC') Bill, Part VIII, section 93¹)
- investigations of potential anti-competitive business conduct which may have the effect of substantially lessening competition (Part VIII, section 90)
- reviews of the impact on competition of a licensee's proposed change of control, including mergers (Part V, section 67).

1.2 Framework overview

Market definition is the fundamental starting point for competition analysis, as this specifies the boundaries and constituents of the relevant market. Once the relevant market has been defined a cumulative three criteria test is applied to determine whether *ex ante* regulation is likely to be required. This test is widely cited as best practice² for determining market susceptibility to *ex ante* regulation. The criteria encompass high and persistent barriers to entry, a lack of market development towards effective competition and the need for sector-specific remedies to address these market failures.

If all three of these criteria are met, then further market analysis ensues to determine whether SMP is held by a licensee or licensees jointly. However, if one (or more) of the criteria are not met then the market is judged competitive and no further analysis follows. Note that an SMP assessment would be required in the event of an allegation of anti-competitive conduct which may then necessitate *ex post* remedies.

¹ ECTEL (2020), *Electronic Communications Bill – revised*, 3rd July 2020.

² See, for example, the ITU / World Bank Digital Regulation Platform, available at: <https://digitalregulation.org/ict-market-analysis-and-determination-of-dominance-guidelines>.

1.3 Summary of framework

Our framework for the assessment of market competition follows a sequential process (Exhibit 1.1).

In the following Sections details are provided of each component of the framework:

- defining the relevant market (Section 2)
- the three criteria test (Section 3)
- market power assessment (Section 4)
- remedies (Section 5).

An assessment framework for anti-competitive conduct is provided in Section 6.

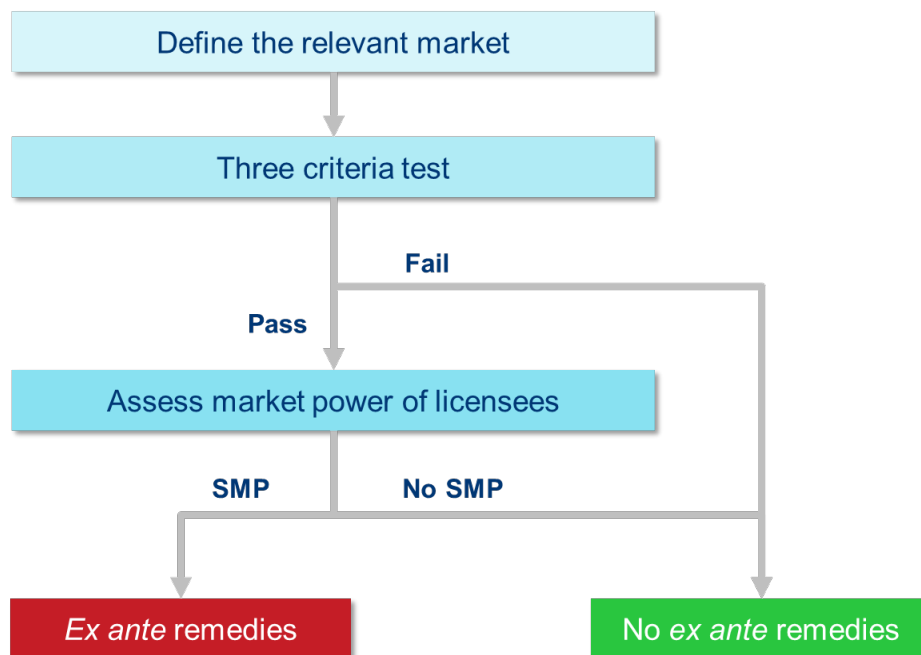


Exhibit 1.1: Competition assessment framework – process [Source: Network Strategies]

Q1. Are the steps in the process for the market competition framework clear and comprehensive or should additional / different components be included in the high-level overview?

2 Defining the relevant market

2.1 Legislative context

- (1) In Section 93 (1) of the EC Bill it states the following: Pursuant to its powers under Article 5 of the Treaty, ECTEL shall —
- (a) adopt a recommendation which identifies relevant product and electronic communications service markets within the electronic communications sector in [Name of ECTEL Contracting State], that have characteristics that may justify the imposition of specific regulatory obligations set out in this Act; and
 - (b) on behalf of, and in consultation with the Commission—
 - (i) perform market analysis in [Name of ECTEL Contracting State];and
 - (ii) assess if one or more licensees have significant market power in a relevant market in [Name of ECTEL Contracting State] and designate the licensee as having significant market power.

2.2 Framework overview

Market definition seeks to define the boundaries of a relevant economic market for a focal service or product. In the context of the EC Bill identification of relevant product and service markets within the electronic communications sectors of ECTEL Contracting States is the precursor to determining whether the imposition of specific regulatory obligations on licensees is justified³. Once defined the relevant market is the basis for an assessment of SMP and the designation of a licensee (or licensees) as dominant in that market⁴.

Defining the relevant market for a service or product in a particular geographical area is achieved through consideration of possibilities for demand-side and supply-side substitution which would constrain the price and non-price behaviour of the licensee(s). The critical issue in defining the relevant market is demand-side substitution. The European Commission describes this as: ‘the most effective and immediate disciplinary force on the suppliers of a given product’⁵.

³ ECTEL (2020), *Electronic Communications Bill – revised*, 3rd July 2020. Section 93 (1) (a).

⁴ *Ibid*, Section 93 (1) (b) (ii).

⁵ European Commission (2024), *Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645)*, 22nd February 2024. Section 23.

The subject or focus of the market analysis may be at the retail or wholesale level. In both cases the first step is to understand the perspective of the consumer or end-user, which requires definition – and subsequently assessment – of the relevant retail market or markets⁶.

Investigation of the retail market is appropriate for a market review involving wholesale services or products because demand is ultimately derived from end-users. Indeed, the very purpose of regulation is for the benefit of end-users. As stated by Ofcom, the United Kingdom regulator⁷:

Consideration of retail markets is logically prior to wholesale market definition because the demand for the upstream wholesale service is a derived demand – meaning that the level of demand for the upstream input depends on the demand for the retail service.

Note that best practice is to investigate whether the retail market is competitive in the absence of any regulation to address SMP (the ‘modified Greenfield approach’). Furthermore, if the retail market is found to be competitive using this approach then regulation is not required at the wholesale level⁸.

Only thereafter, if remedies in the most upstream market are not sufficient in themselves to address the competitive problem in the retail market, NRAs may proceed to define and analyse wholesale markets further downstream in the supply chain, again following a Modified Greenfield approach in case regulation is in place at the moment of assessment.⁹

Following best practice, the next step is to identify the related wholesale market which underlies (is ‘most upstream of’¹⁰) the retail market.

⁶ European Commission (2020), *Commission staff working document explanatory note accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code*, 18th December 2020. Section 2.1.

⁷ Ofcom (2018), *Mobile Call Termination Market Review 2018-2021 Final Statement*, Annexes 1 – 15, 28th March 2018. Section A3.14.

⁸ European Commission (2018), *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, 27th April 2018. Page 4.

⁹ *Ibid.* Page 14.

¹⁰ European Commission (2018), *Commission staff working document accompanying the document Communication from the Commission Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, 27th April 2018. Page 6.

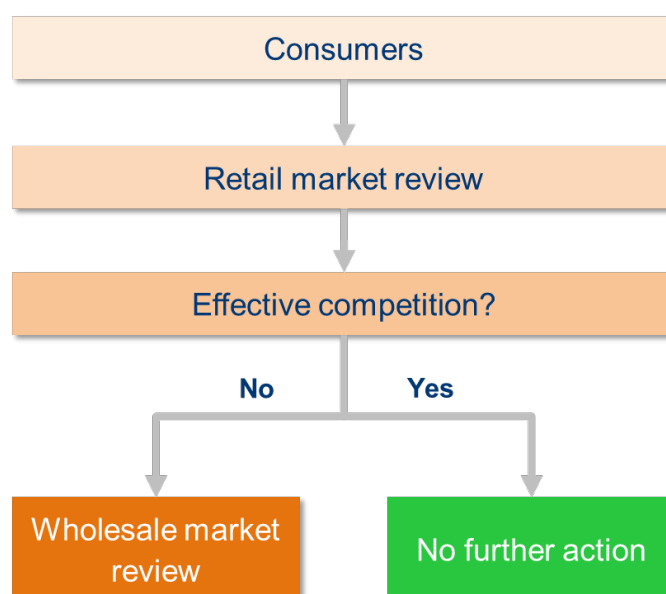


Exhibit 2.1: Overview of European Commission market review process [Source: Network Strategies]

While the starting point of a market review is typically historical and current market behaviour, overall a dynamic forward-looking assessment is required, encompassing anticipated economic, technological or market developments over a defined time-period – usually short- to medium-term. As noted by the European Commission¹¹:

Market definition is not a mechanical or abstract process but requires the analysis of all available evidence of past market behaviour and an overall understanding of the mechanics of a given sector. In particular, a dynamic rather than a static approach is required when carrying out a prospective, or forward-looking, market analysis.

2.3 Dimensions of a relevant market

Five dimensions provide the basic framework for defining the relevant market¹².

¹¹ European Commission (2018), *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, 27th April 2018.

¹² ITU (2016), *Regulatory principles for market definition and identification of operators with significant market power – SMP, Recommendation D.261*, 25th October 2016. ITU guidance lists four dimensions (product, function, geography, temporal), whereas our framework includes customers as a fifth dimension. The customer dimension could be subsumed under the product dimension, however in the context of practical implementation in the electronic communications market a separate dimension is arguably more appropriate. The New Zealand Commerce Commission uses five dimensions in defining the relevant market in merger investigations. See Commerce Commission (2022), *Mergers and acquisitions guidelines*, May 2022. Section 3.14.

Products

What products do customers regard as interchangeable or close substitutes for the focal product? Key considerations include:

- product characteristics or features
- similarities in pricing
- whether the product is used by consumers for the same purpose
- customer preferences
- costs of switching from the focal product to another.

Function

The subject or focus of the market analysis may be at the retail or wholesale level. Generally markets are defined at one level of the supply chain – that is, at either the retail or wholesale level. However, for a wholesale product, an understanding of the perspective of the consumer or end-user is required, which involves an assessment of the relevant retail market or markets.

Note that it is possible that more than one level of the supply chain could be in the same market if substitution is feasible at another functional level, and movement across levels may occur without significant cost.

Timing

If there is evidence of varying prices or demand / supply conditions for the same focal product and alternative offerings across time periods or seasons, market definition may include a temporal dimension. Although this dimension is less common in electronic markets than in some other markets (for example, perishable goods), one example is peak/off-peak time considerations¹³.

Customers

If there is price discrimination among customers, markets may be defined by requirements of particular customer groups – for example:

- residential / business
- large / small business
- specific customer characteristics
- affordability.

¹³ European Commission (2024), *Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645)*, 22nd February 2024. Section 13.

Geography

Within a geographical area the prevailing competitive conditions in relation to the focal product should be the same or very similar. For example, there may be different regulatory conditions applicable to specific geographic locations, or customer switching behaviour may be affected by geographical features (for example, different islands in a jurisdiction). Thus it is necessary to consider whether there is service and / or price differentiation across areas. If such differentiation exists, a geographical boundary may be appropriate. For example, the market could potentially be regional or national or even international.

Note that the most common geographical dimension in electronic communications markets is national, as service provider licences tend to be national and regional price discrimination is in general unusual.

2.4 Preliminary review

Prior to commencing detailed analysis there are some initial fundamental issues to be considered associated with the product, function, timing and customer dimensions of the market.

Identification of the key focus

- Consider the context of the market analysis, and the product / service central to the competition matter at hand to pinpoint a focal product / service
- Provide a high-level description of a focal product / service
 - the focal product may be offered by more than one service provider
- Develop a group of alternative candidate products / services with the same purpose or end-use, including non-traditional services (as appropriate).

Substitutability – first cut

- From a consumer perspective identify key features of the focal product / service
- Discard candidate products / services which are only substitutable or interchangeable to a small degree.

Review potential temporal effects

- Consider whether timing has a material impact on demand or supply conditions

- if no, the timing dimension is irrelevant
- if yes, include temporal element in substitutability testing.

Review the potential impact of significantly different pricing models

- If pricing offers are very different (for example, for business / residential customers) consider whether separate customer segments are required
- Where a service or product is often bundled with others, check whether it is possible to untie the service / product of interest (for example, is separate pricing available?) or alternatively consider segmentation based on consumers purchasing standalone / bundled offerings¹⁴.

2.5 SSNIP test

This test initially considers the narrowest possible potential market, namely a focal product in a particular geographic location. The test consists of observing whether a small but significant non-transitory increase in price ('SSNIP') – typically between 5% and 10% – above the competitive price level of the focal product would trigger switching to an alternative product to such an extent that the price increase becomes unprofitable for a hypothetical sole supplier. If this occurs, then the alternative product is also included in the relevant product market. The test is carried out for other alternative products which may qualify as effective substitutes, further broadening the market. However, if the SSNIP is profitable then the relevant market has been identified.

Note that non-transitory is typically defined as one to two years. In other words, the test is not intended to reflect the impact of short-term pricing changes, such as promotions or discounted offers.

It is recognised that the SSNIP test has some limitations:

- it is only concerned with price competition and not any other factor via which products or services may compete (such as quality, mobility, innovation)
- the SSNIP test may define markets too broadly – that is, products may be included which are not true substitutes. This may occur when the focal product is not priced at a competitive level, but is characterised by monopoly pricing. At a relatively high monopolistic price consumers may turn to

¹⁴ European Commission (2018), *Commission Staff Working Document Accompanying the document Communication from the Commission Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*. 27th April 2018. See page 12.

other products which would not normally be regarded as substitutes under a competitive pricing regime (this is known as the ‘Cellophane Fallacy’¹⁵).

The SSNIP test provides a theoretical basis for assessing the boundaries of the market, however in some cases it may be impractical or impossible to obtain the necessary information for a practical implementation of the test. The European Commission notes that, while it does place some reliance on the principles of the SSNIP test ‘in most cases the SSNIP test serves only as a conceptual framework for the interpretation of available evidence’¹⁶. Indeed, there are many examples of regulators using the SSNIP test as an aid for analysing and judging the extent of substitutability. As such supplementary evidence should be used in defining the relevant market.

¹⁵ The origin of this term lies in the market definition in US Supreme Court’s 1956 case *United States v. E. I. du Pont de Nemours & Co* involving cellophane and other wrapping products. The Court found that other products (for example, waxed paper) were close substitutes for cellophane. Consequently it concluded that the defendant did not have market power. However the price at which cellophane was offered was at a monopolistic price level rather than a competitive price. When consumers exhibit switching behaviour at above competitive price levels this could simply mean that at such an elevated price consumers are prepared to tolerate products which are not at all close substitutes. Such behaviour would not occur in the absence of a monopolistic price level.

¹⁶ European Commission (2024), *Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645)*, 22nd February 2024. Section 31.

Trinidad and Tobago: use of SSNIP to determine whether Over-The-Top services are in the same product market as fixed voice services

In 2024 the Telecommunications Authority of Trinidad and Tobago ('TATT') determined the relevant markets for domestic retail fixed telephony and fixed broadband services¹⁷. This included consideration of whether the fixed market should be expanded to include Over-The-Top (OTT) services.

TATT made use of the SSNIP informed by domestic customer surveys and service providers' data submissions. Relying on a range of evidence, it investigated whether, following a SSNIP of 5% in the price of the domestic fixed voice products (assuming prices are at competitive levels) consumers would substitute OTT services. Survey evidence indicated that less than 10% of respondents would make fewer calls but increase their consumption of OTT services. Of those respondents using OTT applications 60% stated that their use of fixed voice services was unaffected by the availability of OTT. Only 28% of the remaining 40% of respondents mentioned making fewer fixed calls from their fixed landline. TATT concluded that the survey evidence suggested that only limited substitutability exists between OTT services and fixed voice services.

TATT also evaluated product characteristics, uptake and usage trends. A key product difference was that OTT services are typically characterised by lower quality of service (QoS) and limited or no customer support, whereas consumer survey evidence placed value on the QoS and reliability of fixed landline services.

Following its demand-side analysis, TATT concluded that OTT services could not form part of the same market as domestic fixed voice services. Supply side substitutability was also rejected on the basis of high fixed services market entry barriers, such as the network infrastructure deployment requirements and the need to develop a retail distribution network.

¹⁷ Telecommunications Authority of Trinidad and Tobago (2024), *Determination: Domestic retail fixed telephony and fixed broadband market definitions*, October 2024.

The European Commission notes that critical loss analysis¹⁸ may be used as a means of implementing the SSNIP test. In general a price increase leads to two opposite effects on profitability driven by:

- a downward impact on sales as consumers switch
- higher profit margins from sales to consumers who do not switch.

Critical loss analysis estimates the point at which these two effects offset each other. A comparison is then made between this point and the estimated likely actual loss of sales volume which would result from the SSNIP. If the critical loss exceeds the expected actual loss, a SSNIP would be profitable. This is evidence that a relevant product market has been defined. However, if the critical loss is less than the expected actual loss then it may be necessary to widen the market.

While there are a few examples of the quantitative estimates from the application of critical loss analysis, the data requirements are onerous, including marginal costs and profitability. Even in instances where sufficient data has been gathered to undertake this analysis, there are typically caveats. For example, the Irish regulator, ComReg, stated that its Critical Loss Test was ‘by no means conclusive, and is considered by ComReg alongside other information’ in its Wholesale Local Access (WLA) market definition¹⁹.

2.6 Demand side: check-list for substitutability

Demand-side substitutability is the most important consideration in determining the relevant market. As such, if regulatory resources are limited, analysis should focus on key features which assist in determining whether products / services are effective demand-side substitutes and thus belong in the same relevant market. In assessing these key features there are a number of indicators and questions which may be considered:

¹⁸ European Commission (2024), *Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645)*, 22nd February 2024, Section 89.

¹⁹ Commission for Communications Regulation (2016), *Market Reviews: Wholesale Local Access (WLA) provided at a Fixed Location Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products*, 11th November 2016. Page 188.

<i>Product / service characteristics and / or technologies</i>	• Is there functional equivalence? • Is there a clear link between particular service / product characteristics and substitutability, even in the absence of functional equivalence? • Are there distinct quality differences? • Product availability, including supply reliability and lead-times • Are there similarities in intended use of the product / service? • Is there evidence of one-directional (or asymmetric) substitution from an alternative candidate service / product to the focal service / product of interest? If there is no evidence of substitution from the focal service / product to the alternative then the latter does not belong in the relevant market, even if there is substitution from the alternative to the final service / product²⁰ • Is there evidence of a chain of substitution in which, although two products are considered not directly substitutable, a third product is a substitute for both of the products? This implies that the pricing of both products may be constrained by the substitutability of the third product. As such, both products may be in the same market although not directly substitutable²¹ • Is there evidence of substitution in response to past market changes?
<i>Subscribers and changing trends over time</i>	• Number of subscribers and evidence of fluctuations in response to price changes • Any evidence of latent demand • Likely future trends.
<i>Price similarities of potential substitutes</i>	• Relative prices • Comparable movements in price over time between products / services.
<i>Ease of switching from one product</i>	• Regulatory / legal / locational barriers

²⁰ Body of European Regulators for Electronic Communications (2014), *BEREC Report on Impact of fixed-mobile substitution in market definition*, 24th May 2021. See discussion on pages 11 to 14.

²¹ European Commission (2018), *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, 27th April 2018. Pages 17 – 19.

*to a potential
substitute*

- Costs associated with switching – for example, penalty costs to terminate a postpaid contract early, any foregone loyalty discounts and transactions costs incurred by the customer
- Any risks and uncertainty which may compromise switching.

In relation to a wholesale service or product potential interactions between the wholesale and retail level should be included in the assessment of substitutability.

*Ease of switching
to alternative
wholesale input*

Is the price-setting behaviour of the hypothetical monopolist constrained by any effective direct demand-side (or supply-side) substitutes?

If it is relatively straightforward to switch to another wholesale input then the market should be broadened to include the substitute.

*Link between
wholesale and
retail prices*

What is the probability of a change in wholesale pricing affecting retail prices?

The likelihood of pass-through of a wholesale price increase to the retail level is a relevant consideration. If the likelihood is regarded as moderate to high then fear of a consumer reaction may indirectly constrain the hypothetical monopolist.

*Retail reaction
indirectly
constraining
wholesale pricing*

Would the pass-through of wholesale price changes to retail prices lead to a change in behaviour or switching by end-users?

Sensitivity of retail customers to passed through wholesale price increases may impose an indirect constraint on the hypothetical monopolist.

United Kingdom: relevant market for mobile telecommunications joint venture proposal

Two large mobile companies sought to enter into a joint venture in the UK market in 2024. The Competition and Markets Authority (CMA) identified the relevant market as the overall retail supply of mobile telecommunications services to end-users²². No evidence was found to support market segmentation by:

- type of service (voice / SMS / data)
- type of network technology
- distribution channels.

However, after scrutinising operator submissions and their internal company documentation, it was apparent that competitive constraints, from both a demand-side and supply-side perspective, could vary among:

- customer types (for example, residential and larger businesses)
- different types of mobile service products (for example, pre-paid / post-paid, and bundles / standalone).

Nevertheless, the regulator concluded that these represented merely subsegments of the one market, and the impact (if any) of any potential variations in competitive constraints could be assessed at later stages of the competition analysis.

2.7 Supply-side: substitutability check-list

Possibilities for supply-side substitution may act as a constraining factor on a service provider's price setting behaviour, even with little demand-side substitution. In addition to the SSNIP test, any historical evidence of market entry and expansion should be considered in the supply-side assessment.

Application of the SSNIP test on the supply-side involves consideration of whether a small, non-transitory price increase in the focal service / product would induce service providers not already active in that particular market to enter with a competitive offering. Key issues on the check-list include:

²² Competition and Markets Authority (2024), *Anticipated joint venture between Vodafone Group PLC and Hutchison Holdings Limited concerning Vodafone UK and Hutchison 3G UK Limited*, 5th December 2024. See pages 71 – 73.

- whether it is practical or feasible for a new entrant within a very short period of time²³ to establish the processes / competencies required to produce and deliver the product / service
- the extent of investment / funding needed to support the new line of business
- other economic or financial barriers
- the degree of complexity associated with market entry, such as legal and regulatory requirements.

Note that in some cases a prospective supplier may already be operating in an adjacent market, and repurposing existing network infrastructure may be relatively straightforward. In these circumstances it is important to consider whether the supplier may have sufficient spare capacity available to switch markets.

2.8 Geography: regional and locational considerations

The application of a geographical dimension to the relevant market is justified only if there are clear regional or locational variations in the conditions of demand or supply. In making this assessment the following should be examined :

- any differences within regions / areas / islands of the jurisdiction in the provision of the focal service
- information on network / population coverage
- pricing differentials based on location.

The default assumption in electronic communications regulation is that markets are national.

2.9 Testing for substitutability

Both qualitative and quantitative analysis should be undertaken, supported to the extent possible by factual information.

Direct approach to the market Information may be gathered to assist in identifying market boundaries via contact with key customers / market participants / stakeholders / competitors. This could include soliciting evidence on potential responses to price changes in the product / service. It could take the form of a targeted questionnaire or request for information, including internal company documentation from market participants.

²³ Typically in this context short-term is defined as less than 12 months. See, for example, Ofcom (2021), *Wholesale Voice Markets Review 2021-26 Annexes 1-4*, 30th March 2021. Paragraph A1.28.

Quantitative studies

Econometric and statistical approaches may be applied to estimate own-price (the change in demand for a service which the price changes) and cross-price elasticities (the change in demand for one service that is caused by a change in price of the substitute service) for the demand of the product / service. This ‘revealed preference’ approach requires time-series data encompassing changes in price – preferably both increases and decreases – sufficiently frequent to trigger consumer responses.

There are challenges in obtaining sufficient data to support a robust analysis of this type. As such, prior to adopting any of these approaches it is essential to conduct a preliminary feasibility study with a focus on potential data-sets, including the quality of the data, and the number of data-points available.

Market surveys

To inform the SSNIP test or demand-side analysis, market research or surveys may be conducted to provide information on end-users’ behaviour in the proposed relevant market, including:

- service / product usage
- criteria for selecting service providers
- pricing knowledge
- switching behaviour
- sensitivity to price changes of 5% to 10%.

This ‘stated preference’ approach does have potential limitations, which may emanate from insufficient sample size, misinterpretation of questions and bias as participants seek to influence outcomes.

As such, analysis based on survey data should be considered in conjunction with other empirical evidence.

2.10 Summary: Framework for defining the relevant market

The recommended framework for defining the relevant market consists of a series of steps, each containing several tasks (Exhibits 2.2 and 2.3). A detailed investigation, encompassing all of these steps and tasks may be challenging with limited regulatory resources. In this case, as noted in Section 2.6,

the analysis should focus on indicators of demand-side substitutability. In some instances a full investigation may be hampered by a lack of available data. As such, the framework provides a list of potential options for indicators in relation to critical steps, particularly the review of demand-side substitutability.

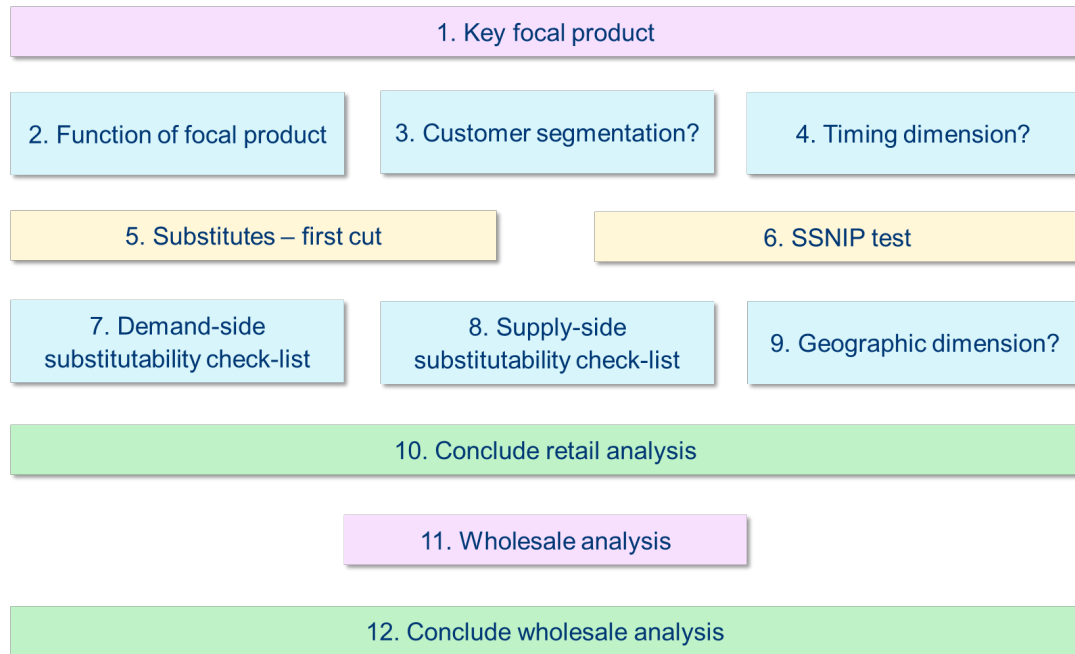


Exhibit 2.2: Framework for defining the relevant market – summary [Source: Network Strategies]

<i>Step</i>	<i>Tasks</i>	<i>Data sources</i>
1. Key focal product	- Identify the context of the market analysis (e.g. competition assessment, anti-competitive behaviour, merger) - Describe the focal product - Identify alternative candidates with same use / function.	Publicly available information on focal product. Any specific information on focal product held by NTRCs and / or ECTEL.
2. Function of focal product	- Is the focal product at the retail or wholesale level? - If retail, go to Step 3 - If wholesale: - Identify associated retail product(s) - Describe the focal retail product - Identify alternative candidates with same use / function - Go to Step 3.	Publicly available information on focal product. Any specific information on focal product held by NTRCs and / or ECTEL.
3. Substitutes – first cut	- From the consumer perspective, identify key features of the focal product - Discard alternative candidates with low level of expected demand substitutability.	Information on market uptake of focal product and alternative candidates over time from service providers.
4. Customer segmentation / pricing	- Review product pricing by customer type (e.g. residential / small business / corporates) for focal product - If very similar, no segmentation is required - If very different, consider segmentation - Review structure of focal product pricing to identify bundled offerings - ability to separate out pricing for the focal product then standalone analysis is possible - impossible to separate out pricing of focal product then a bundled product may need to be defined.	Publicly available pricing information. Pricing information from service providers.

Exhibit 2.3: Framework for defining the relevant market [Source: Network Strategies]

<i>Step</i>	<i>Tasks</i>	<i>Data sources</i>
5. Timing dimension	- Review variability over time in demand and / or supply conditions for the same focal product: - Price - Non-price - If no significant differences identified then disregard timing dimension - If significant differences identified consider applying time dimension to focal product.	Publicly available price and non-price information. Pricing and non-price information from service providers.
6. SSNIP test	Option 1: Conceptual exercise - Assume that a sole provider of the focal product increases the price by 5% for a period of at least one year - Consider whether it is likely that consumers would be motivated to switch to an alternative candidate product: - Definite no: the relevant product market has been defined - Definite yes: the alternative must be included in the relevant market, and the conceptual exercise repeated - Limited substitutability / uncertain: undertake further analysis. Go to step 7. Option 2: Critical loss test - Investigate availability of data on marginal costs and profitability of the focal product - If available, estimate the critical loss associated with an increase in price and a corresponding decrease in sales - Estimate the likely actual loss from a SSNIP of 5% - Compare the critical loss (CL) with the actual loss (AL): - CL < AL: indicates that the market should be broadened to include the alternative candidate product - AL < CL: indicates that the relevant market has been identified.	Market surveys. Information from service providers on historical reactions to price changes. Evidence from other jurisdictions. Information on product costs and profits from service providers. Information on elasticities from service providers, econometric testing and / or surveys.

Exhibit 2.3 (cont): Framework for defining the relevant market [Source: Network Strategies]

<i>Step</i>	<i>Tasks</i>	<i>Data sources</i>
7. Demand-side substitutability: check-list	• Compare focal product and alternative candidate(s) using product / service characteristics and / or technologies: ○ is there functional equivalence? ○ clear link between particular service / product characteristics and substitutability, even without functional equivalence? ○ distinct quality differences? ○ product availability, including reliability of supply and lead-times • Similarities in intended use • Evidence of asymmetric substitution ○ if no evidence of substitution from the focal service / product to the alternative then the alternative does not belong in the relevant market, even if there is substitution in the other direction (from the alternative to the focal service / product) • Number of subscribers and changing trends over time ○ any evidence of latent demand ○ likely future trends • Price features ○ relative prices ○ comparable movements in price over time between the focal product and alternative(s) • Ease of switching from focal product / service to alternative(s), including: ○ regulatory / legal / geographical or locational barriers ○ costs associated with switching ○ risks and uncertainty • Draw evidence-based conclusions / judgements on strength of demand substitutability of alternative candidates.	Submissions from service providers. Interviews with service providers. Publicly available price information. Historical data from service providers on subscriptions / traffic. Forecast data from service providers on subscriptions / traffic.

Exhibit 2.3 (cont): Framework for defining the relevant market [Source: Network Strategies]

<i>Step</i>	<i>Tasks</i>	<i>Data sources</i>
8. Supply-side substitutability: check-list	• Review historical evidence of entry and expansion in focal product market • SSNIP test conceptual exercise – in response to a 5% SSNIP what is the likelihood of market entry within 12 months, including consideration of: ○ processes / competencies required to produce and deliver the focal product ○ the extent of investment / funding which would be needed to support the new line of business ○ other economic or financial barriers ○ the degree of complexity associated with market entry, such as legal and regulatory requirements • Draw conclusions / make judgement on the strength of supply substitutability on the basis of the accumulated evidence.	Licence applications. Evidence from other similar jurisdictions.
9. Geographic dimension	• Consider whether there are regional or locational variations in the conditions of demand or supply of the focal product: ○ Identify any differences within regions / areas/ islands in the provision of the focal service ○ review impact (if any) on the focal product of network / population coverage ○ identify any pricing differentials based on location. • If no discernible differences then relevant market is defined as national • If clear differences exist then geographical / regional boundaries are necessary for the focal product.	Licence conditions. Information from service providers on coverage. Publicly available pricing information.

Exhibit 2.3 (cont): Framework for defining the relevant market [Source: Network Strategies]

<i>Step</i>	<i>Tasks</i>	<i>Data sources</i>
10. Conclude retail analysis	- Summarise results from steps 4 to 9, attaching the highest weight to the demand substitutability tests, and draw conclusion on the relevant market. - Still uncertain? Adopt a conservative approach, selecting a narrow market, and subsequently test to see impact on market assessment outcome of adopting a broader relevant market - If the focal product is a wholesale product, go to step 11.	Results of steps 4 to 9.
11. Wholesale analysis	- Undertake steps 2 to 9 for the focal wholesale product. - In examining substitutability consider the retail – wholesale dynamic: - Impact of any effective direct demand-side or supply-side substitutes or indirect retail constraints - probability of pass-through - strength of reaction to pass-through.	Submissions from service providers. Submissions from other market participants. Interviews with service providers.
12. Conclude wholesale analysis	- Summarise results from steps 4 to 9, attaching the highest weight to the demand substitutability tests, and draw conclusion on the relevant market - Still uncertain? Adopt a conservative approach, selecting a narrow market, and subsequently test to see impact on market assessment outcome of adopting a broader relevant market.	Results of steps 4 to 9.

Exhibit 2.3 (cont): Framework for defining the relevant market [Source: Network Strategies]

Q2. Are there any market features which are not reflected in the framework for defining the relevant market?

Q3. Are there any alternative approaches which may be easier to apply in practice?

3 Criteria for *ex ante* regulation of relevant market

3.1 Background

The three criteria test encompasses consideration of the following market characteristics:

- firstly, the existence of high and persistent barriers to entry
- secondly, market structure which does not tend towards effective competition within the relevant time horizon
- thirdly, the insufficiency of competition law alone to address these market failures.

The origin of the cumulative three criteria test is the European Commission's 2003 Recommendation²⁴ for identifying product and service markets in which *ex ante* regulation may be warranted in the electronic communications sector. This document recommended that national regulatory authorities undertake analysis to define relevant markets with respect to seven retail and eleven wholesale markets²⁵. Over time, with competitive and technological developments, the Commission has made some amendments, including the removal of retail services / products from the list of markets potentially requiring *ex ante* intervention²⁶. Nevertheless the three criteria test remains in the European Electronic Communications Code and many non-European jurisdictions have adopted it as best practice.

The difference in focus between the three criteria test and assessing SMP should be noted:

The three criteria test focuses on overall market characteristics and structure, for the sole purpose of identifying those markets that are susceptible to *ex ante* regulation. The assessment of significant market power, instead, determines whether a specific operator active in a market that has been identified as susceptible to *ex ante* regulation enjoys a position equivalent to dominance, namely a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and

²⁴ European Commission (2003), *Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services*, 8th May 2003.

²⁵ *Ibid*, See Annex.

²⁶ European Commission (2014), *Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*, 11th October 2014.

ultimately consumers. While a market may meet the three criteria for the purposes of the Recommendation, and is therefore considered as susceptible to *ex ante* regulation at Union level, regulation on the identified market in an individual Member State still requires the designation of an SMP operator.²⁷

Enacting *ex ante* obligations on SMP operators is a pro-competitive approach to constrain their ability to leverage market power in a relevant or adjacent market.

Although undergoing some clarification and refinement over time the Commission's basic recommended approach to market definition and SMP assessment in the electronic communications sector has remained the same since 2003. This approach is also consistent with general European Union competition law and practices.

3.2 Framework for applying the three criteria test

The focus of the three criteria test is on the general characteristics and structure of the relevant market, and therefore the required analysis is typically less detailed than an SMP assessment. Nevertheless, many of the indicators for the first and second criteria of the test are common to SMP analysis.

The recommended framework (Exhibit 3.1) identifies questions to consider prior to deciding whether each criterion is passed or not. Local regulatory authorities with the benefit of existing evidence may be in a position to answer these questions readily, assuming that the relevant market is already well understood. It may also be useful to refer to recent decisions / precedents on some matters (for example, anticipated technological changes) from other similar jurisdictions.

²⁷ European Commission (2018), *Commission Staff Working Document Explanatory Note Accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code*, 18th December 2018. Section 2.4.

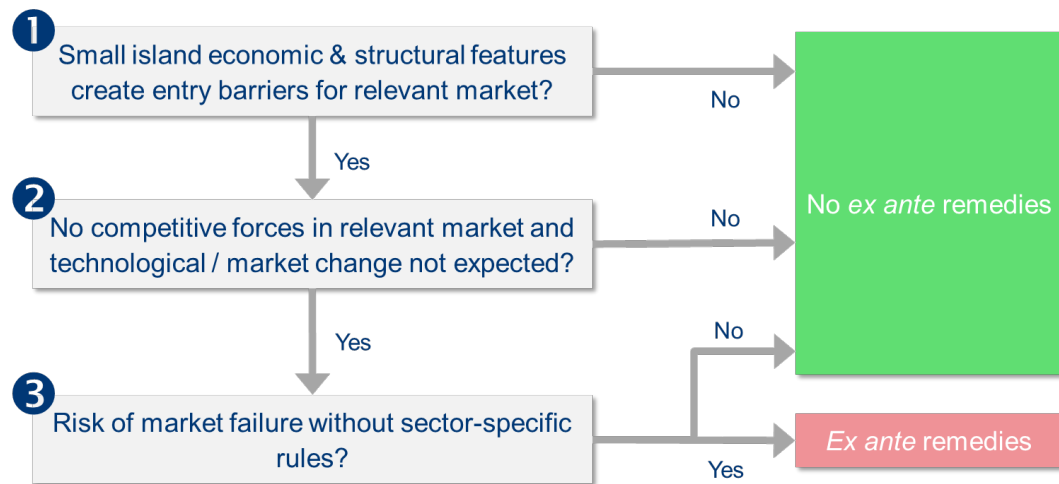


Exhibit 3.1: Framework for three criteria test [Source: Network Strategies]

1. *Barriers to entry*

Electronic communications markets in small island jurisdictions are largely characterised by high and non-transitory barriers to entry. The main reasons are the small size of the economies and a population base that is not only modest but often highly dispersed amongst islands. Such factors create economic entry barriers which, coupled with the presence of already established vertically integrated service providers, would make new market entry commercially challenging.

Thus a decision on this criteria will be based on the answer to the question: *are there any reasons to believe that the economic and structural features which characterise small island jurisdictions do not apply in respect to the relevant market. If no reasons can be identified then this criterion is passed, and the next criterion should be considered.*

Note that even if it is determined that no significant barriers to entry exist, it is not necessarily the case that effective competition exists in the relevant market. The extent of competition may be influenced by other factors such as network effects and switching costs. The purpose of this test is to determine whether *ex ante* regulation is justified as the appropriate tool to apply to a market.

2. *Competitive dynamic*

The next issue to consider is whether in the short- to medium-term market or technological changes may reasonably be expected to disrupt the market with an ensuing positive impact on competition. If there are signs that the relevant market has been relatively stable or stagnant over time (for example, market share has changed little over time), then this criterion is passed, unless there are clear indications of meaningful forthcoming technological or other changes.

As regards the importance of emerging potentially disruptive technological developments, a forward-looking perspective should be adopted. The market may tend towards effective competition in circumstances where current market are relatively stable, but there may be convincing evidence of significant technological

developments in the foreseeable future which would likely alter the competitive conditions. In this case *ex ante* intervention would not be warranted.

3. Insufficiency of competition law

If the first two criteria passed the test, then the third issue is whether sector-specific rules are necessary to address the risks to competition in a relevant market rather than sole reliance on competition law. In regard to the electronic communications market the risks of market failure are likely to be high in the absence of specific *ex ante* rules. Thus the appropriate question to ask in deciding on this test is: *whether in the local context there are any reasons to believe that this will not apply. If there are no obvious reasons then the test is passed, and an analysis of market power in the relevant market in the Contracting State is required.*

Case study: Jersey retail and wholesale mobile services fail three criteria test

In 2025 the Jersey Competition Regulatory Authority (JCRA) defined three relevant mobile markets²⁸:

- retail mobile voice and data services provided over any mobile technology
- wholesale mobile voice and data services provided over any mobile technology
- wholesale call termination services on each mobile operator's network.

The JCRA found that the three criteria test for susceptibility to *ex ante* regulation was only passed in respect to wholesale call termination services. In regards to retail and wholesale mobile voice and data services JCRA found that, despite the small size of the island jurisdiction and the recent merger of the smaller two (Sure and Airtel) of the three mobile operators, a competitive market was emerging. Key factors in reaching this conclusion were:

- the decline in market share of JT, the former incumbent operator, from 71% in 2010 to 51% in 2024
- the prospective market entry of a Mobile Virtual Network Operator (MVNO) utilising Sure's mobile network infrastructure, which was a condition of approval for the merger.

Q4. Are the steps involved in this test clear or is more detail required?

²⁸ Jersey Competition Regulatory Authority (2025), *Telecoms market review Final Decision*, 16th July 2025.

4 Assessing market power

4.1 Legislative context

The Bill defines significant market power as follows:

...“significant market power” in relation to a licensee, means that a licensee individually or jointly with others enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by affording the licensee the power to behave to an appreciable extent independently of its competitors and users.²⁹

The EC Bill states that: in assessing significant market power in respect of a licensee, ECTEL and the Commission shall take into account:

- the ability of a person to behave to an appreciable extent independently of or jointly with competitors, customers and consumers
- the market share of the licensee or the traffic volume of the licensee with respect to the size of the relevant market
- the possible significant market power of the licensee on an upstream market strengthening its leading position on a downstream market
- control of the means of access to a retail customer
- access to financial resources and experience in providing products and electronic communications services
- the ability of the licensee to influence market conditions.

4.2 Framework overview

An assessment of a licensee’s economic strength in a market ultimately involves a judgement on the extent to which this entity may engage in behaviour independently of the influence of competitors, customers and consumers. Both static and dynamic analysis of market conditions are required and ideally reliance should not be limited to only one or two indicators – such as market share or market concentration. As such, establishing the

²⁹ ECTEL(2020), *Electronic Communications Bill – revised*, 3rd July 2020. Page 22.

existence of SMP in the relevant market typically involves evaluation of a suite of qualitative and quantitative indicators³⁰ in relation to each of the players in that market.

While the evaluation should be based on current conditions in the relevant market, it should be forward-looking in nature. Potential or anticipated market developments should be considered in order to determine whether any perceived lack of competitiveness is likely to be sustained within a reasonable timeframe – typically the short- to medium-term. Note that the length of the appropriate timeframe may depend upon the characteristics of the particular relevant market.

A comprehensive assessment framework consists of four key elements (Exhibit 4.1). Two key elements are market structure and market entry / expansion barriers. In the context of small islands, market structure indicators will often demonstrate that the licensee has relatively high market share in a concentrated market, while entry and expansion barriers may also be high. Taken together these two elements may make a strong case for the operator possessing SMP in the relevant market.

The other two elements encompass an assessment of potential countervailing competitive forces facing the operator, and a behavioural / performance review to uncover proof of market competitiveness. Taken together, these two elements may provide evidence of a licensee's lack of power in the relevant market. Ultimately a judgement will be required on the relative strength and importance of each of the elements in the relevant market.

³⁰ European Commission (2018), *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, (2018/C 159/01), 7th May 2018. See Part 3.

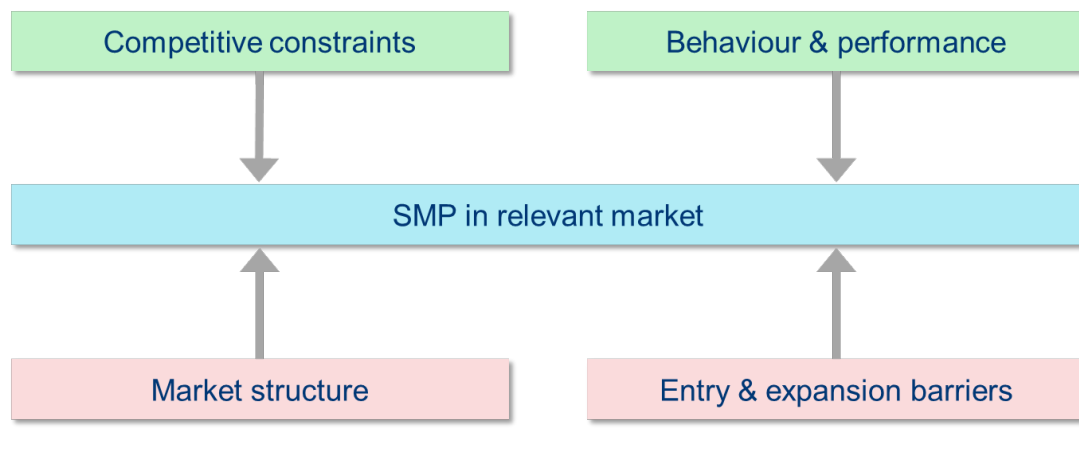


Exhibit 4.1: Framework for SMP assessment [Source: Network Strategies]

The components of each of the four elements are described in detail below.

4.3 Market structure

There are a number of standard indicators associated with analysis of market structure (Exhibit 4.2).

One of the most common indicators is market share. The European Commission applies a 50% threshold in relation to market share as follows:

According to established case-law, very large market share held by an undertaking for some time – in excess of 50% – is in itself, save in exceptional circumstances, evidence of the existence of a dominant position. Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of SMP.³¹

A second threshold mentioned by the European Commission is 40% market share, below which dominance in the relevant market is ‘unlikely’ based on case law. However, the Commission also notes the importance of conducting a detailed assessment of the features

³¹ European Commission (2018), *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, 27th April 2018, paragraph 55.

of the relevant market in circumstances where the 50% threshold is not met but market share is high.

If the market share is high but below the 50% threshold, NRAs should rely on other key structural market features to assess SMP. They should carry out a thorough structural evaluation of the economic characteristics of the relevant market before drawing any conclusions on the existence of SMP.³²

<i>Characteristic</i>	<i>Indicators</i>	<i>Notes</i>
Market context	• Number of firms in the relevant market • Firm ownership – national / international / Group subsidiary ◦ total revenue (firm / Group) ◦ market capitalisation (if listed) / asset base ◦ number of staff • Active in other geographical markets? • Vertically integrated?	While a firm may be relatively small in terms of local revenue and staff, if it is a subsidiary of a larger entity it may have substantial resources at its disposal.
Market share	Retail markets: • number of subscribers • traffic • revenue. Wholesale markets: • revenue • volume / capacity	Market share should be examined in a dynamic context – the extent to which market share has changed over time, rather than at one specific point in time. Major fluctuations in market share may indicate a lack of market power in the relevant market. Alternatively, a gradual loss of market share by a former incumbent / leader may signal growing competition.

Exhibit 4.2: Assessing market structure [Source: Network Strategies]

³² European Commission (2018), *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, 27th April 2018, paragraph 57.

Characteristic	Indicators	Notes
Market concentration	The Herfindahl-Hirschman Index (HHI) is the most commonly used measure of market concentration. It is the sum of the squared individual market shares of each firm within the market. The maximum index score is 10000, indicating one firm in the market with 100% market share. The minimum score is zero which reflects perfect competition. Concentration ratio (CR) is the combined market share of the largest firms in the relevant market. As an example, CR2 is the sum of the market share of the two largest firms in the market.	The lower the HHI index score the more competitive the market. Scores between 3000 and 5000 indicate a market with competition among two to three firms. In general scores less than 1500 indicate a competitive market; scores between 1500 and 2500 indicate a moderate level of concentration; scores over 2500 indicate a relatively high level of concentration. In merger cases, a review of the change (or delta) in HHI (pre- and post-merger) should be conducted³³. A variation in approach is to add together the market share of firms competing with a former incumbent in a relevant market and then compare the result with the market share of the incumbent³⁴.

Exhibit 4.2 (cont): Assessing market structure [Source: Network Strategies]

4.4 Barriers to entry and expansion

The ease of market entry and expansion is a key consideration for many aspects of market analysis, including:

- evaluating market power
- determining whether *ex ante* regulation is required – as the presence of high and non-transitory entry barriers is a component of the European Commission’s three criteria test

³³ The European Commission provided some guidance on HHI thresholds in *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 5th February 2004, Part III. In a market with a post-merger HHI below 1000 the Commission is unlikely to undertake extensive analysis. This is also the case for a post-merger HHI between 1000 and 2000 and a delta below 250, or for a post-merger HHI above 2000 and a delta below 150. In 2025 a public consultation was initiated on these guidelines, with the objective of updating the guidelines in 2027.

³⁴ European Commission (2020), *Commission staff working document explanatory note accompanying the document Commission recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code*, 18th December 2020. Page 18.

- considering whether a merger will substantially lessen competition.

There are three main issues to consider:

- the **likelihood** of market entry or expansion, as only the possibility of entry or expansion may be an insufficient constraint
- the **scale** of market entry or expansion, as only small scale entry may have little impact on competition conditions
- **timeliness** of market entry or expansion, as long lead times would be unlikely to exercise any constraining influence on the market.³⁵

The conditions associated with market entry and expansion have a major impact on the above issues. Therefore, an assessment of alternative forms of barriers and constraints must be conducted, including their potential to impede or prevent market entry or expansion. Typically this assessment is largely qualitative in nature. There are four main types of entry barriers and constraints (Exhibit 4.3).

³⁵ European Commission (2020), *Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code*, 29th December 2020. Paragraph 8.

<i>Barrier</i>	<i>Key issues</i>
Structural	• High sunk costs, reflecting the need for significant capital investment to enter the market • Economies of scale – that is, reducing per unit costs as production increases • Economies of scope – that is, reducing per unit costs when two or more products or services are generated • Vertically integrated incumbent in control of key infrastructure may squeeze the margin between retail and wholesale price, affecting the ability of competitors to cover costs • Control of access to the customer rests with one operator – for example, an operator owns essential facilities or infrastructure which is necessary to provide retail services and is not readily duplicated • Difficulties in acquiring key inputs (for example, wholesale products) or distribution channels.
Legal & regulatory	• Licensing requirements – such as a specific licence with associated conditions for the provision of a service (for example, a mobile licence with coverage obligations) • Regulations on Quality of Service (QoS) and standards • Other administrative requirements – such as planning consents for civil works or access to rights of way • Limits on the number of permitted licensees.
Market	• Existing market maturity, implying a limited number of new customers would be available and therefore licensees have a need to entice existing customers to switch providers to increase market share • Costs incurred by consumers for switching from an existing service provider to an alternative – for example, consumers may have fixed-term contracts which are costly to break • High existing customer loyalty – for example, if the new entrant is not locally owned, the existing local supplier may be preferred • Network effects, that is the difficulty for a new entrant to break into a market with a well-established customer base where the intrinsic value of the product or service relies on the number of interconnected users. In other words, the utility of the customer increases with the number of customers using the same network.

Exhibit 4.3: *Barriers and constraints [Source: Network Strategies]*

<i>Barrier</i>	<i>Key issues</i>
Technological	• Limited or no spectrum availability – licences may be unavailable for the desired spectrum band(s) • Time to deploy new infrastructure may be substantial • If investment requirements associated with technological change are significant (for example, new generations of mobile technologies), this may hinder market expansion of smaller operators • Convergence of services and platforms ○ may promote easier market entry through, for example, facilitating bypass of traditional infrastructure / technologies ○ may increase barriers – for example, by supporting bundled offers from existing market players.

Exhibit 4.3 (cont): Barriers and constraints [Source: Network Strategies]

Malta: wholesale market for dedicated capacity found to be competitive

The Malta Communications Authority (MCA) investigated the domestic wholesale market for provision of dedicated capacity in 2022?³⁶ after identifying the relevant retail market³⁷. A single national wholesale market was defined encompassing Ethernet, Wavelength-division multiplex (WDM) and Business-to-Business (B2B) solutions. The MCA's market power decision was informed by quantitative and qualitative analysis, including:

- **trends in retail and wholesale market share** of the three market participants from 2017 to 2022, finding that alternative operators, Melita and Epic, had been consolidating market share at incumbent GO's expense. The MCA expected current market share trends to continue within the review time frame with alternative service providers continuing to pose a direct competitive constraint on GO.
- **sunk costs:** unlike the alternative operators, GO owns a ubiquitous physical infrastructure network, and so can supply wholesale dedicated capacity nationally

³⁶ The MCA notes that this market is listed as Market 2 in the Annex to the Commission Recommendation of 18th December 2020 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation.

³⁷ Malta Communications Authority (2022), *MCA analysis of the wholesale market for the provision of dedicated capacity in Malta*, 23rd December 2022,

relatively quickly and without incurring substantial costs. The MCA recognised that network duplication would be costly and time-consuming, with no certainty of recovering investment costs. However, despite the alternative operators lacking network reach, the MCA found that they could address most market requirements relatively quickly, relying on access agreements and own infrastructure investment.

- **economies of scale:** the MCA noted the large asymmetry in network coverage between GO and alternative operators and GO's 58% wholesale market share (based on connections), concluding that GO's scale enabled its costs to be split over a greater dedicated capacity customer base than its competitors. However, the MCA also noted that the combined wholesale market share of alternative operators by revenue was 56%, indicating they were serving high-end customers and therefore achieving scale economies for that market segment.
- **economies of scope:** the MCA found that the operations of all three market participants supported scope economies, although Epic may obtain lower savings than the other two given its smaller range of services and scale. Note that the MCA acknowledged that both economies of scale and scope would likely impede new market entry.
- **vertical integration:** all market participants are vertically integrated. As such, alternative operators do not rely on GO's supply of dedicated capacity and therefore there is little opportunity for margin squeezes or anti-competitive gains from GO favouring its own downstream business

The MCA also found that wholesale and retail customers of dedicated capacity tend to be large players with buying power, and that currently they were satisfied with the service. Taking into account all of the above, the MCA concluded that the market is structurally conducive to competition and therefore customers are protected through market forces. Competition was found to be working effectively at retail level and, even in the absence of wholesale SMP regulation, effective retail competition would continue.

4.5 Competitive constraints

The presence or absence of any meaningful competitive constraints on market power is another important indicator to consider. Competitive constraints may arise from the demand- or supply-side of the market and could be direct (such as new competitors using innovative technology) or indirect. An example of the latter is potential knock-on effects on retail sales from wholesale price increases.

This link between the retail and wholesale level means that the range of available substitutes at the downstream (retail) level will inform the likely range of competitive constraints acting at the upstream (wholesale) level. This is because a rise in the price of a wholesale service which is passed through to the price of retail services may cause retail customers to switch to substitute retail products, reducing demand for the wholesale input. We refer to this as an indirect constraint³⁸.

There are three main types of competitive constraint (Exhibit 4.4).

³⁸ Ofcom (2018), *Mobile Call Termination Market Review 2018-2021 Final Statement – Annexes 1 – 15*, 28th March 2018. Section A3.15.

<i>Characteristic</i>	<i>Key issues</i>	<i>Indicators</i>
Countervailing buyer power	The bargaining or negotiating power of product or service buyers can potentially act as an effective competitive constraint in the market.	• Proportion of the operator's service or product purchased by any one customer or several customers, and the size of these customers • Ability of the largest consumer(s) of the product or service to make a credible threat to switch suppliers, which in turn will be affected by: ○ availability of information on alternative supply sources ○ cost of switching suppliers ○ possibilities for self-supply in an economical and timely manner.
Retail substitution	The likelihood of significant retail switching activity in the event of a price rise (either at the retail level, or indirectly via passthrough of a higher wholesale price) may exercise some constraint on the price behaviour of existing firms in the relevant market.	• Evidence of any past switching in response to price changes • Extent / strength of barriers ○ net subscriber additions: number of new subscribers less number of customers discontinuing service ○ porting data
Threat of future competition	This issue is related to the conditions for potential market entry, however here dynamic considerations are particularly important.	Likelihood of technological advances supporting consequential future competition within the timeframe of the market analysis – for example, potential entry into a mobile market of Low Earth Orbit (LEO) satellite services using direct to mobile (D2M) technology.

Exhibit 4.4: SMP assessment – competitive constraints [Source: Network Strategies]

4.6 Behaviour and performance

Electronic communications markets in small island jurisdictions are typically characterised by a very limited number of market players. Market share and concentration indicators in these circumstances will inevitably be relatively high. However, even in markets with a small number of participants, competitive dynamics and rivalry may be strong. To test this a number of indicators relating to market behaviour and individual operator performance may be considered (Exhibit 4.5).

<i>Characteristic</i>	<i>Key issues</i>	<i>Indicators</i>
Pricing	Relatively high prices in a relevant market may indicate that a licensee is able to increase prices above the level likely to prevail in a competitive market. Evidence of this may indicate the existence of market power.	• Benchmarking study using pricing data from comparable countries including other island nations with similar characteristics, such as Gross Domestic Product (GDP) per capita, demographic / urbanisation and geographical / topographical features. In similar jurisdictions we would expect operators to face similar costs, and therefore pricing differentials may indicate that an operator is able to exercise market power to influence market conditions. • Check whether price differentials reflect variations in QoS or other underlying differences among the sample operators.
Financial results	The change over time of a number of financial metrics may be useful for gaining insights into the relationship between costs and profit. However, in many market assessment proceedings the use of such metrics has been contentious, with operators often objecting that various profit measure do not reflect the capital-intensive nature of the sector and the associated financing requirements. Both current and historical performance should be considered to identify any trends, and results may also be compared to relevant sector benchmarks³⁹	Ideally indicators of profitability and investment should relate to the particular market being investigated. However, in many cases, financial information disaggregated by line of business is unavailable. If the relevant market represents a significant proportion of the operator's total business then firm-level financial results may be used as a proxy: • Change in Earnings Before Interest, Tax and Depreciation (EBITDA) margins • ARPU • Return on Capital Employed (ROCE) • Capital investment per subscriber.

Exhibit 4.5: *SMP assessment – behaviour and performance [Source: Network Strategies]*

³⁹ The Canadian Radio-television and Telecommunications Commission (CRTC) in a review of the retail mobile wireless services market considered a number of these indicators, in addition to pricing benchmarks, as it sought to determine whether the market exhibited 'rivalrous behaviour'. Ultimately the Commission considered that the market lacked competitive rivalry based on evidence that retail prices remain high in Canada compared to other jurisdictions, profitability was high (even allowing for high investment levels) and market share remained stable over a five year period. See paragraphs 101 – 141 in Canadian Radio-television and Telecommunications Commission (2021), *Review of mobile wireless services*, 15th April 2021.

<i>Characteristic</i>	<i>Key issues</i>	<i>Indicators</i>
Innovation	In general, rapid innovation supports dynamic change in markets to the benefit of consumers who may enjoy lower prices and a greater range of products of improved quality. Innovation can take many forms – for example, new product offerings, improved processes leading to cost reductions which are then passed through to the consumer, and technological change. In a dynamic environment it becomes more challenging for any one market player to exercise market power.	• Qualitative assessment of the degree of innovation in a market • Use as a reference point innovative product and technological developments in other overseas comparable markets • Changes over time in research and development expenditure of local operators.
Financial strength	An operator's access to capital and resources may be substantial enough to support and sustain a position of market power, particularly if there are major asymmetries amongst market players.	• Ownership structure of the operator • Credit ratings (if available) • Financial indicators – for example, strength of the operator's balance sheet.

Exhibit 4.5 (cont): SMP assessment – behaviour and performance [Source: Network Strategies]

- Q5. Are all relevant SMP indicators included in the framework and / or would any amendments be beneficial?
- Q6. Should there be a specified market share threshold, above which a licensee may be assumed to have SMP without the need for further market analysis? If so, what value should be used for that threshold?

The Bahamas: SMP finding for retail fixed market

In 2024 the Utilities Regulation and Competition Authority (URCA) of the Bahamas undertook a review of the retail fixed telecommunications market in which infrastructure-based competition occurs between BTC and CBL⁴⁰. The outcome was:

- in the national fixed voice retail market BTC was found to have SMP
- in the fixed broadband retail market:
 - CBL was found to have SMP in geographic market 1 (islands where both operators offer broadband services)
 - BTC was found to have SMP in geographic market 2 (all remaining islands where only BTC has deployed infrastructure to offer fixed broadband services).

Key considerations in URCA's dominance assessment were:

- Market entry barriers remain high, despite both CBL and BTC claiming that the market entry of a LEO operator had opened 'a new frontier of competition in the Bahamas'. URCA noted that the LEO operator had not gained significant market share in retail broadband services, and that investment requirements for entry of additional LEO operators would likely create barriers to entry.
- Both operators enjoy competitive advantages: for example, BTC has access to finance and scale through its part ownership by Liberty Global, while both companies are established with well-known brands in The Bahamas. Although CBL is a smaller company, it has extensive fixed network coverage and thus presence in Geographic Market 1; in addition CBL Group also owns and operates Aliv, the second mobile operator.
- Pricing behaviour: URCA noted that CBL's prices are between 38% and 52% higher than BTC's for comparable products. As these higher prices were sustainable without the loss of customers to BTC, URCA considered this a potential indication of market power.

4.7 Joint SMP

If no licensee is found to have SMP in a relevant market, in theory it is possible that two or more operators may collectively be in a position of SMP. The European Commission defines this concept:

A collective dominant position exists where, in view of actual characteristics of the relevant market, each member of the dominant oligopoly in question, as it becomes aware of common interests, considers it possible, economically rational, and hence preferable, to adopt – on a lasting basis – a common policy for their market conduct with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice ... and without any actual or potential competitors, customers or consumers, being able to react effectively.⁴¹

Based on established case law the European Commission specifies three cumulative conditions necessary for a finding of collective dominance:

- each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common policy. This requires market transparency to support rapid and precise understanding of the evolution of other members' market conduct
- sustainability of tacit cooperation over time, with no long-term incentives to depart from a common market policy
- foreseeable reaction of customers and current and future competitors will not jeopardise expected results from the common policy.⁴²

Assessment of the above requires a forward-looking analysis encompassing structural and behavioural considerations. This typically involves hypothetical scenarios examining potential market behaviour in the absence of any regulatory remedies (the modified

⁴⁰ Utilities Regulation and Competition Authority (2024), *Retail Fixed Market Review and Assessment under Section 39(1) and (2) of the Communications Act, 2009, Statement of Results and Final Determination*, 1st August 2024.

⁴¹ European Commission (2018), *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, 7th May 2018. Section 66.

⁴² *Ibid*, Section 67.

Greenfield approach). This hypothetical analysis aims to determine whether tacit collusion is the most likely market outcome in view of both current circumstances (absent any regulation) and potential future market developments over the regulatory review period.

In assessing the existence or not of joint SMP each of the above three conditions should be considered in turn. Key issues may be identified for each condition and there are a number of indicators which may be applied to these (Exhibit 4.6).

<i>Condition</i>	<i>Key issues</i>	<i>Indicators</i>
1. Market transparency	To what extent are licensees able to observe each other's behaviour / outcomes?	• Retail prices for all customer segments available publicly • Wholesale offers are published and regularly updated • Market information is published or disclosed regularly by the regulator or industry forum • Existing links among licensees (supply contracts, joint ventures).
2. Sustainability	Are the structural conditions in the market such that coordination would be profitable and sustainable?	• Similar actual and projected market shares over time • Similar actual and projected cost structures and profitability • Limited product / price differentiation.
3. Market reaction	To what extent could the market react to constrain such activity? Are there mechanisms which would deter a licensee from coordinating with another licensee? Is there a credible threat of immediate retaliation?	• Strength of existing and emerging countervailing buyer power • Current and anticipated level of market churn • Existence of links amongst licensees which would support quick retaliation • Effectiveness of potential punitive action should a licensee break ranks (for example, refusal to supply wholesale inputs, short-term retail price war).

Exhibit 4.6: *Framework for assessment of joint SMP: cumulative conditions and indicators*
[Source: Network Strategies]

Given the nature of the required analysis, deriving definitive proof to support a joint SMP finding is often challenging. Above all it is essential to note that this is not a mechanical process. From the European Commission's guidance on determining joint SMP:

... it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination. The assessment of criteria should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical coordination as a basis.⁴³

4.8 Reaching conclusions on SMP

The final judgement on whether the relevant market is characterised by effective competition will be informed by the results of the above analysis, together with a consideration of the impact (if any) of any likely market developments within the regulatory time-period. The evidence for the judgement must be carefully summarised.

If the market is found to be effectively competitive then no operator wields SMP. However, if this is not the case then the next step is to designate one or more operators as having SMP, and decide on whether it is necessary to apply regulatory remedies to the market and (if so) the appropriate form of these remedies.

Q7. Are there examples of potential joint SMP in the absence of individual SMP in a relevant electronic communications market of any of the Contracting States?

Q8. Is the assessment framework for joint SMP workable or are there alternative approaches which should be considered?

⁴³ European Commission (2018), European Commission (2018), *Commission staff working document accompanying the document Communication from the Commission Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, 27th April 2018. Page 32.

5 Obligations and remedies

5.1 Legislative context

A number of obligations may be placed on SMP licensees by national regulatory commissions on the recommendation of ECTEL. These potential obligations are listed in Section 95 (1) of the EC Bill.

The majority relate to wholesale markets:

- provision of interconnection for the purpose of originating, transiting or terminating traffic, providing the interconnection under prescribed terms and conditions;
- provision of wholesale services to other licensees for resale and, if necessary, to offer prescribed minimum features, functionality or other attributes;
- meeting reasonable requests for access to, and the use of, specified network elements and relevant facilities and services and to provide access under prescribed specifications, terms and conditions;
- providing access or interconnection or both, subject to prescribed terms and conditions that are transparent, including the publication of reference access or reference interconnection offers, or both;
- the obligation to provide carrier selection and related terms and conditions in the prescribed manner;
- providing prescribed types of wholesale access or interconnection prior to the introduction of prescribed downstream services that rely on inputs by a licensee or its subsidiaries, partners or affiliates.

Some obligations apply to both retail and wholesale markets:

- transparency and non-discrimination in the provision of retail services to retail customers and wholesale services to other licensees, including the requirements to:
 - apply equivalent terms and conditions in equivalent circumstances to retail customers or to other licensees
 - in the case of wholesale services, provide facilities, services and information to other licensees under the same conditions and of the same quality as the licensee provides

for its own internal purposes or to those of its divisions, subsidiaries, partners and affiliates;

- comply with prescribed requirements relating to the pricing of wholesale and retail tariff regulation regimes of electronic communications, including obligations relating to the cost orientation of prices and transparency;
- not to unreasonably bundle other services with a prescribed service, whether provided by the licensee, its subsidiaries, partners or affiliates, including a prohibition against:
 - anti-competitive tying arrangements;
 - offering bundles at retail prices that are predatory or cannot be replicated by an efficient competitor.

Finally, there are some reporting obligations which may be imposed to increase transparency:

- to establish and maintain a cost accounting system in accordance with cost allocation and separation rules that are prescribed for the purpose of ensuring that a vertically integrated licensee's costs and revenues are properly attributed or assigned to specific activities and facilitate the detection of anti-competitive cross-subsidies by an independent auditor;
- to publish audit information in a format that contributes to an open and competitive market while preserving the confidentiality of accounting data prescribed as commercially sensitive.

Section 95 (2) specifies that in order to support the retail tariff regulation regime, a determination of the cost accounting methods shall be published by the Commission, on the recommendation of ECTEL, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs.

In the event of persistent market failures despite the implementation of the above obligations Section 95 (3) states that the Commission, on the recommendation of ECTEL, may direct a licensee to:

- transfer its wholesale supply business to an independent economic entity, distinct of the economic entity operating the retail electronic communications service, or

- divest specified assets under conditions set out by the Commission, and the Commission shall approve the company interested in acquiring the divested assets before divestment occurs.

5.2 Framework overview

Ex ante regulation applies specific obligations on licensees designated as having SMP in a relevant market which has been identified as non-competitive on the basis of the three criteria test.

In recommending pro-competitive obligations on SMP licensees, first and foremost it is essential to consider the local market context. The population (as at 2023) in the five Contracting States ranges from around 47,000 (St. Kitts and Nevis) to around 179,000 (Saint Lucia) with GDP per capita (as at 2023) ranging from EC\$26,765 (Commonwealth of Dominica) to EC\$61,021 (St. Kitts and Nevis).

Since all Contracting States are characterised by very small populations and economies, both regulatory authorities and market participants are likely to face resource constraints. Thus any proposed obligations on SMP licensees should be proportionate and aim to achieve objectives in the most cost-effective manner possible. Note that Section 95 (5) of the EC Bill allows for an assessment of proportionality⁴⁴.

Best practice SMP remedies⁴⁵ encompass a range of possible obligations (Exhibit 5.1), including light-handed options such as transparency and non-discrimination requirements (numbered 1 and 2 in the Exhibit), through to the imposition of structural change on the market via requirements for functional or structural separation of the SMP licensee (numbered 6 and 7 in the Exhibit). Identifying appropriate remedies requires case-by-case analysis. Note that an increasing level of costs will be incurred by both the SMP licensee (for

⁴⁴ Assessments of proportionality will be addressed in a separate Determination on Regulatory Impact Analysis.

⁴⁵ These remedies are listed in Articles 69 to 78 of European Commission (2018), Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, 17th December 2018.

compliance) and the regulator (for monitoring / enforcement) as stronger remedies are imposed.



Exhibit 5.1: SMP ex ante obligations [Source: Network Strategies]

5.3 Transparency

Effective application of the obligations to the SMP licensee involves oversight and subsequent regulatory action in the event of non-compliance. Two recommended obligations should be considered to assist with oversight and to incentivise the SMP operator to ensure compliance. The focus of both of these is transparency which can have a powerful effect on market behaviour, as well as facilitating new market entry.

Reference offers

An SMP operator may be required to submit reference offers for wholesale products in the relevant market. In the first instance, a draft reference offer would be submitted to the regulator for approval. Subsequently the final reference offer(s) should be made publicly available on the SMP operator's website. Regular updates of the reference offer should also be required to ensure that any technical or other changes are reflected.

At a minimum reference offers should encompass⁴⁶:

- terms and conditions for the provision of the particular service or product
- details of operational processes
- service supply and quality of service parameters
- any other general terms and conditions.

*Information
disclosure
regulations*

An SMP operator may be required to submit an information disclosure (ID) in relation to the relevant market on a regular basis. This could be monthly, quarterly or annually, depending on the nature of the service or product involved. Key information which may be required in the ID disclosures includes, but is not limited to:

- financial information
- quality of service and performance metrics
- prices, terms and conditions
- capacity, including spare capacity
- current and forecast demand.

The precise requirements of the ID disclosure will depend upon the nature of the product. It is essential to define these requirements very precisely. In this respect, some regulators provide templates to be completed by the SMP operator(s)⁴⁷.

⁴⁶ Body of European Regulators for Electronic Communications (2019), *BEREC guidelines on the minimum criteria for a reference offer*, 5th December 2019.

⁴⁷ As an example, the New Zealand Commerce Commission provides detailed guidance on ID disclosure requirements to regulated wholesale broadband access providers. See Commerce Commission (2025), *Fibre Information Disclosure Determination 2021 (consolidated May 2024)*, 27th February 2025. Available at: <https://www.comcom.govt.nz/regulated-industries/fibre/information-disclosure-requirements-for-fibre/current-information-disclosure-requirements-for-fibre/>.

Samoa: Provision of Reference Interconnection Offer by dominant provider of international bandwidth

The Office of the Regulator in Samoa found that the Samoa Submarine Cable Company (SSCC) was dominant in the wholesale international Internet capacity market for the Tui Samoa Cable, following consideration of market share and other factors. It was required to publish a Reference Interconnection Offer (RIO). This consisted of terms and conditions for a capacity purchase agreement and a capacity lease agreement, together with access guidelines and a services and charges book. The regulator approved the RIO in 2023⁴⁸.

5.4 Non-discrimination

The Bill encompasses clauses relating to non-discrimination which should prevent the SMP licensee from treating wholesale customers differently in equivalent circumstances from its own retail business. In other words, there should be no unjustified differences in terms, conditions, or access. However, more specific pro-competitive obligations may be placed on the SMP licensee: equivalence of inputs (EoI) and equivalence of outputs (EoO).

<i>Equivalence of inputs</i>	The European Commission defines EoI in relation to access products and associated services necessary for providing wholesale inputs. Services and information must be provided to internal and third-party access seekers on the same terms and conditions, including price and quality of service levels, within the same time scales, using the same systems and processes and with the same degree of reliability and performance ⁴⁹ .
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<i>Equivalence of outputs</i>	EoO is defined by the European Commission as the provision to access seekers of wholesale inputs that are comparable, in terms of
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⁴⁸ Office of the Regulator (2023), *Order of the Regulator No. 2023/T02, Approval of Samoa Submarine Cable Company (SSCC) Reference Interconnection Offer (RIO)*, 14th August 2023. Available at: https://www.regulator.gov.ws/images/ORDERS/Telecom/2023/ORDER_OF_THE_REGULATOR__SSCC_RIO_2023.pdf.

⁴⁹ European Commission (2024), *Commission Recommendation (EU) 2024/539 of 6 February 2024 on the regulatory promotion of gigabit connectivity*, 19th February 2024, page 15.

functionality and price, to those provided by the SMP licensee internally to its own downstream businesses, albeit using potentially different systems and processes⁵⁰.

In considering whether to apply an EoI or an EoO obligation, the choice should be governed by proportionality since EoI obligations are more stringent than EoO. The SMP licensee may be offered the opportunity to voluntarily commit to provide wholesale inputs on an EoI or EoO basis.

To ensure that non-discrimination obligations are being met, it is important to include a requirement for the SMP licensee to provide regular reports and / or publish performance indicators. Examples of the latter include fault repair times, order completion times and statistics on service availability⁵¹. Service Level Agreements (SLAs) and Service Level Guarantees (SLGs) may also be required⁵².

5.5 Accounting separation

Accounting separation is an obligation on SMP licensees to provide separated and transparent accounts for regulated wholesale and retail services or products. Separated accounts provide cost information on separate lines of business (for example, retail / wholesale), and as such are at a higher level of disaggregation than annual financial statements.

The transparent information provided in separated accounts has many benefits for regulatory purposes including:

- elucidation of potential cross-subsidisation amongst or between products
- assists in identifying margin squeezes
- monitoring internal transfer pricing
- identifying relationship of wholesale prices to cost.

⁵⁰ *Ibid.*

⁵¹ The New Zealand regulator requires public disclosure of key performance indicators for the provision of wholesale fibre access. See: Commerce Commission (2020), *Equivalence and non-discrimination – guidance on the Commission's approach for telecommunications regulation*, 30th September 2020.

⁵² European Commission (2024), *Commission Recommendation (EU) 2024/539 of 6 February 2024 on the regulatory promotion of gigabit connectivity*, 19th February 2024, See Annex 1.

Accounting separation is reflected in the Bill in Section 95 (1)(i) as an obligation which may be imposed on an SMP licensee. There is also an associated audit requirement (in Section 95 (1) (j)).

Isle of Man: SMP operator must provide separated accounts in relation to regulated markets

In the Isle of Man Manx Telecom has been designated as having SMP in the following markets:

- wholesale local access
- wholesale broadband access
- wholesale fixed voice call termination
- wholesale traditional interface leased lines
- wholesale modern interface leased lines
- retail fixed access
- retail traditional interface leased lines.

Manx Telecom has an obligation to maintain separate accounting records for its regulated operations⁵³ to ensure that it is not abusing its dominant position. The separated accounts are used by the Communications and Utilities Regulatory Authority (CURA) to review regulatory obligations such as cost orientation and to check that there are no margin squeezes or anti-competitive cross-subsidisation⁵⁴.

5.6 Wholesale access

The EC Bill lists a number of obligations which may be placed on SMP operators to provide wholesale access and interconnection services in a transparent, timely and non-discriminatory manner. Importantly, it provides for wholesale services to be offered to other

⁵³ An example of Manx Telecom's separated accounts is publicly available on its website, See: <https://www.manxtelecom.com/media/zzfdny2r/2022separatedregulatoryaccountspafinal.pdf>.

⁵⁴ See <https://www.cura.im/telecoms/manx-telecom-separated-accounts/>.

licensees on an equivalent basis as it provides the services for its own internal purposes or to its own related entities.

The obligations encompassed in the Bill are consistent with best practice pro-competitive remedies and detail a comprehensive suite of complementary options, namely:

- access to infrastructure access including ducts, buildings, masts, and cabinets
- interconnection on transparent terms and conditions
- co-location
- unbundling, including backhaul and dark fibre
- technical and operational transparency
- access to provisioning systems
- provision of timely information on technical interfaces
- access to up-to-date databases.

The appropriate inputs to be subjected to obligations may be identified with reference to a number of key characteristics or issues, including:

- whether the input is required for downstream competition
- whether the input is a ‘bottleneck’ or essential service which is economically or technically non-replicable
- whether it is technically feasible to supply the input to third parties
- whether applying the obligations to the specific inputs is a proportionate approach
- whether there are likely to be any implications for future investment / impact on dynamic efficiencies.

5.7 Price control and cost accounting

A light-handed approach to price control encompasses imposing obligations for:

- pricing transparency
 - all prices must be published and up-to-date
 - prices for components of bundles must be available and published on a standalone basis.
- notification of proposed changes – any proposed price change must be notified to the regulatory authority with justifications required for any increases.

Should more prescriptive obligations be necessary, the main options for price control encompass:

- cost-orientation, including price caps
- retail-minus
- benchmarking.

All obligations must support cost recovery, so that SMP licensees may recover efficiently incurred costs as well as earn a reasonable return on capital⁵⁵. It is therefore essential that price control obligations are evidence-based. As such, all of the above options entail quantitative analysis of varying degrees of complexity, depending upon the selected approach. As an example, a number of alternative methodologies may be applied to support decisions on cost-oriented prices for regulated wholesale products, all of which consist of modelling costs of networks and services, such as:

- Fully distributed cost (FDC) – allocates total historical or current costs of the SMP operator across all services
- Regulated Asset Base (RAB) – the value of the assets used to provide regulated services is set by the regulator as a reference point, along with a reasonable rate of return and investment and depreciation allowances, to inform a decision on allowable revenues / prices
- Long-run incremental costing – derives the incremental cost of providing the regulated service on a forward-looking efficient basis. This may be implemented using two alternative approaches:
 - top-down, which uses as a starting point the operator’s actual accounts
 - bottom-up, typically models the network of a hypothetical efficient operator.⁵⁶

In general the European Commission endorses the bottom-up long-run incremental cost-plus (BULRIC+) costing methodology for setting prices for regulated wholesale access services in the markets as the most effective method for ensuring recovery of efficiently incurred

⁵⁵ The European Commission identifies this as a key principle in implementing regulated wholesale pricing. See European Commission (2024), *Commission Recommendation (EU) 2024/539 of 6 February 2024 on the regulatory promotion of gigabit connectivity*, 19th February 2024. Page 8.

⁵⁶ Each year BEREC publishes the results of a survey of price control and cost accounting methods used in the European Union countries for price control of regulated services. See, for example, Body of European Regulators for Electronic Communications (2024), *BEREC Report Regulatory Accounting in Practice 2024*, 5th December 2024.

costs⁵⁷. However, each of the categories of price control has advantages and disadvantages which must be considered in the context of small island jurisdictions (Exhibit 5.2).

<i>Price control method</i>	<i>Advantages</i>	<i>Disadvantages</i>
Cost orientation	• Encourages efficient investment decisions • Provides incentives for efficient market entry and exit • Encourages cost minimisation as inefficiencies cannot be passed on to others • Promotes efficient use of existing infrastructure	• Highly data intensive • Requires many assumptions • Lengthy implementation period required • Challenging to select appropriate efficiency standard
Retail minus	• May be quicker to implement than cost oriented approaches • Data requirements tend to be lower than full cost models • Supports downstream players obtaining a reasonable margin	• Implementation challenges (e.g. imputing retail price with multiple tariff options; determining an appropriate margin) • May require frequent updating as tariffs change • Requires a retail service that corresponds to the wholesale product (some wholesale products are only one input to a retail service)
Benchmarking	• Quicker to implement than other approaches • Data requirements less onerous than other approaches • May reflect competitive pricing if sample data is confirmed as cost-based.	• Difficulties in selection of comparator jurisdictions with sufficiently similar characteristics • Sample size may be low, particularly in the absence of publicly available information on cost-based wholesale pricing

Exhibit 5.2: *Price control methods – advantages and disadvantages [Source: Network Strategies]*

⁵⁷ European Commission (2024), *Commission Recommendation (EU) 2024/539 of 6 February 2024 on the regulatory promotion of gigabit connectivity*, 19th February 2024. Page 9.

Bahamas: *Ex ante* remedies for the retail fixed market

Following an SMP finding in the retail fixed market, URCA imposed *ex ante* obligations⁵⁸:

- for the retail fixed voice services market BTC, an SMP licensee, is obliged:
 - to continue current standalone fixed voice tariff plans to residential and business customers, with any proposed changes to be notified in advance to URCA
 - not to increase its prices of entry-level standalone fixed voice plans above the previous year's inflation rate without justification and prior approval from URCA
- for the retail fixed broadband services market SMP licensees have the following obligations:
 - BTC and CBL to continue offering their current standalone fixed broadband plans and bundles including fixed voice and fixed broadband services to residential and business customers, with any modifications to be notified to URCA in advance
 - BTC and CBL to not increase prices of entry-level standalone fixed broadband plans above the previous year's inflation rate without justification and prior approval from URCA
 - BTC must offer geographic uniform prices for all its retail broadband services.

Non market specific *ex ante* obligations were also applied:

- Both SMP operators are required to develop **separated accounts** and submit these to URCA on an annual basis.
- Both SMP operators are required to **notify** URCA of any amendments, introductions or withdrawals of their retail tariff plans.
- Both SMP operators must **publish** currently available residential and business tariff plans including price and non-price terms.

5.8 Functional and structural separation

Accounting separation is designed to address price discrimination, however in circumstances where there is a risk of sustained non-price discrimination it may be necessary to consider introducing an obligation involving further degrees of separation. Options range from creation of a separate wholesale division in a vertically integrated company to full structural separation in which separate legal entities are established under common ownership. There are a number of intermediate options involving varying levels of business separation and governance arrangements⁵⁹. Another option is a requirement for divestment of certain assets.

Implementation of functional or structural separation can be an extremely costly and complex exercise. Consequently, imposition of such remedies is highly unusual in very small markets and should be considered only as a last resort to address persistent anti-competitive issues impervious to simpler remedies. This is reflected in the Bill, Section 95 (3) which states that separation remedies may apply ‘in the event of persistent market failures despite the implementation of the above obligations’.

Q9. How effective would light-handed remedies be in incentivising competitive behaviour in electronic communications markets of the Contracting States? Please give reasons.

Q10. Are there any specific remedies, appropriate in the context of the markets of Contracting States, which should be explored in more detail in the framework?

⁵⁸ Utilities Regulation and Competition Authority (2025), *Regulation of retail prices for SMP operators – Rules. .Statement of Results and Final Decision ECS 03/2025*, 12th June 2025.

⁵⁹ Cave, Martin (2006), *Six Degrees of Separation: Operational Separation as a Remedy in European Telecommunications Regulation*, Communications and Strategies, 2006.

6 Anti-competitive conduct

6.1 Legislative context

Section 90 of the EC Bill prohibits licensees from engaging in any anti-competitive business conduct which has the purpose or effect of substantially lessening competition in the electronic communications market.

Section 94 of the EC Bill states that ‘a licensee shall not take advantage of its significant market power in a market for the supply of an electronic communications service with a view to preventing, restricting or distorting competition in the market’.

Anti-competitive agreements or understandings are prohibited (Section 91), however agreements which have the effect of promoting technical or economic progress or improving production or distribution of goods and electronic communications services may not be considered anti-competitive.

The definition of ‘anti-competitive business conduct’ provided in the Bill encompasses:

- Conduct related to price
 - direct or indirect fixing of purchase or selling prices
 - predatory pricing
 - price discrimination
- Other non-price related conduct
 - the limitation or control of production, markets, investment or technical development
 - the artificial dividing up of markets or restriction of supply sources
 - the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions that results in a competitive disadvantage
 - making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations which, by nature or according to commercial practice, have no connection with the subject matter of the contract
 - unauthorised denial of access to networks
 - exclusionary vertical restrictions.

6.2 Framework overview

Anti-competitive conduct may take many forms, but in general is characterised by the exercise of market power to restrict or lessen competition in markets. Moreover, SMP in a relevant market may support anti-competitive behaviour in related or adjacent markets. In some cases the aim of the behaviour is to cement or even strengthen the existing strong market position to the detriment of other market players and consumers. Often the conduct simply reflects an ability and willingness to use market power to extract economic rent – that is, to charge excessive prices to access seekers and / or end-users.

Investigations of alleged or possible anti-competitive behaviour take place *ex post* or after the event with a focus on either anti-competitive agreements or understandings, or abuse of a dominant position in the market. This is in contrast to studies which aim to identify markets which may require *ex ante* regulation. Nevertheless the first steps in identifying anti-competitive behaviour are typically the same as those for market studies considering *ex ante* regulation – namely, to define the relevant market and conduct an assessment of market power.

Note that when a licensee is designated as having SMP it does not necessarily follow that their market power is being used anti-competitively.

The key concepts in the EC Bill in relation to identifying anti-competitive behaviour are ‘purpose or effect’ and ‘substantially lessening competition’. Furthermore, in prohibiting anti-competitive agreements, arrangements or understandings among licensees, Section 91 of the Bill adds to purpose and effect, ‘**likely to have** the effect of substantially lessening competition in any market for the supply of an electronic communications service’ [our emphasis]. All of these concepts are common in relation to investigations of abuse of market power, and the proposed framework for identifying anti-competitive behaviour has been informed by best practice, both in general and in the context of the electronic communications sector. Note that in some jurisdictions (such as the European Union), general competition law is applicable to alleged cases of anti-competitive conduct in the electronic communications sector, while in others (such as the OECS) sector-specific legislation has been adopted.

6.3 Preliminary analysis

The EC Bill clearly identifies anti-competitive conduct, such as price discrimination and predatory pricing. Following an allegation of such behaviour, an investigation should follow to determine whether the service provider is in fact engaging in illegal conduct. In an *ex post* anti-competitive conduct investigation the process for identifying the relevant market is very similar to that of establishing SMP in markets liable for *ex ante* regulation. Firstly, the relevant market should be defined and clearly the starting point for this is the focal product or service that is the subject of the investigation. However, rather than being a forward-looking analysis, typically the focus will be on the market features that prevailed at the time of the alleged illegal conduct. Secondly, analysis should be conducted into the structure of the relevant market and conclusions drawn on the presence of operators or service providers with SMP.

6.4 Abuse of SMP

In general abuse of dominant position in a market falls into one of two categories⁶⁰:

- exclusionary conduct in which a dominant operator uses unfair practices to exclude competitors from the market
- exploitative conduct in which a dominant operator uses its power to exploit customers.

In the electronic communications market there are many price and non-price forms of exclusionary conduct which may have a substantial detrimental impact on competition (Exhibit 6.1).

Norway: Margin squeeze assessment for mobile services

The Norwegian regulator has developed a mobile margin squeeze model which it used to assess economic margins in the market for mobile access and origination – a market in which Telenor holds SMP. The Microsoft Excel modelling tool is available in Annex 4 of Nasjonal Kommunikasjons myndighet (2024), *Decision on designating undertakings*

⁶⁰ European Commission (2009), *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Official Journal of the European Union, 24th February 2009.

with significant market power and imposing specific obligations in the market for access and call origination on public mobile telephone networks Case 2300455, 9th April 2024. Model documentation is also available in Annex 5, and data requirements are specified in Annexes 6 and 7. These Annexes may be accessed at: <https://nkom.no/ekom-markedet/markeder/marked-15-tilgang-til-mobilnett>.

<i>Type of conduct</i>	<i>Key issues</i>	<i>Indicators</i>
Margin squeeze	A vertically integrated firm with dominance in an upstream (wholesale) market may set the margin between wholesale prices for a key input (or inputs) and retail prices at a level which constrains the ability of efficient competitors to operate profitably in the downstream retail market. Thus the conduct could consist of excessively high wholesale prices for a key input and / or relatively low pricing of retail services.	• Extent to which the input is required for delivering the retail service • Availability of credible substitute inputs or possibilities for avoiding need for the input • Extent of alternative viable supply sources, including potential market entry or investment • Evidence of actual or potential harm to competitors • Economic tests: could an efficient competitor could operate profitably under current pricing terms⁶¹?
Predatory pricing	A substantial and sustained price reduction by a dominant operator, aimed at harming a competitor, reducing market competition, prompting market exit or deterring market entry. The dominant operator may forego short-term profits or even incur losses as a means of eventually reducing the competitive constraint it faces in a market.	• Relationship of the dominant operator's prices to underlying cost, using evidence based on: ○ costing studies ○ benchmarking ○ operator's internal documentation. • Impact on the dominant firm's revenue during the period of alleged predatory pricing, using evidence based on: ○ counterfactual study: comparison of the operator's likely revenues with and without the conduct ○ operator's internal documentation.

Exhibit 6.1: *Framework for assessment of exclusionary conduct and indicators [Source: Network Strategies]*

⁶¹ The 'equally efficient operator test' (EEO) considers whether the SMP operator with the same wholesale charges as those applied to its rival could operate profitably at the retail level. Note that this test implicitly assumes that the competitor is able to operate at the same level of efficiency as the larger dominant operator. The 'reasonably efficient operator test' (REO) is the same test, except that the efficiency standard invoked is that of a reasonably efficient operator obtaining a normal rate of return in the retail market rather than the actual operator. This standard accepts that the smaller competitor may have some cost / scale disadvantages compared to the dominant operator. The 'adjusted EEO test' is an intermediate test which applies the dominant operator's cost base but makes adjustments for the scale of the competitor.

<i>Type of conduct</i>	<i>Key issues</i>	<i>Indicators</i>
Bundling / tying	Bundling is selling products together at a lower price than the individual prices combined, while tying makes the purchase of a product conditional upon purchasing another product. While often bundles may be beneficial for consumers, in some circumstances these practices may adversely affect the ability of rivals to compete effectively. For example, a dominant operator may employ tying practices by exercising its power in one market to lessen competition in a separate market in which it is not dominant.	• Possible for the products to be offered on a standalone basis? • Any business rationale which might satisfactorily explain the conduct or indicate that efficiencies may be achieved which will benefit the market? • Dominant operator's position in the product markets included in the bundling or tied deals – if dominant in multiple relevant markets the likelihood of anti-competitive effects increases • Ability of the dominant operator to engage in cross-subsidisation • Evidence of the impact of the conduct on market entry / exit.
Refusal to supply / denial of access	A vertically integrated dominant firm may directly or indirectly refuse to supply a downstream competitor with an input essential for provision of downstream services. Indirect refusal to supply could involve application of terms & conditions which effectively prevent the competitor acquiring the input.	• Availability of credible substitute inputs or possibilities for avoiding the need for the particular input • Extent of alternative viable supply sources, including potential market entry or investment • Likely impact on the downstream market.
Discriminatory practices	A vertically integrated dominant operator may apply both price and non-price discrimination. For example, when supplying essential inputs to a downstream competitor the terms and conditions may affect the rival's ability to offer retail products of the same quality as the dominant operator's retail products.	• Importance of the input(s) to the supply of a downstream product • Evidence in differences between the input provided to the competitor and the same input supplied by the dominant operator to its retail arm • Evidence of actual or potential harm to competitors.

Exhibit 6.1 (cont): Framework for assessment of exclusionary conduct and indicators [Source: *Network Strategies*]

Exploitative conduct typically involves a direct impact on consumers (Exhibit 6.2). A common example is sustained relatively high prices in a retail market characterised by one or two dominant players.

<i>Type of conduct</i>	<i>Key issues</i>	<i>Indicators</i>
Excessive pricing	This arises when a dominant operator is able to increase prices to a supra-normal level in a relevant market. A key challenge in identifying this form of anti-competitive conduct is establishing what a normal rate of expected return is for the market in question. Deploying network infrastructure in small islands typically costs more than in larger more urbanised and populous jurisdictions, and often operators are unable to reap the benefits of economies of scale and scope.	• international price benchmarking of the focal product. Note: comparable jurisdictions must be selected – that is, operators from small island nations with similar features to ECTEL States. • specific characteristics of the focal product which may justify higher prices – such as development costs • rate of return comparisons for a dominant player (or players) in the relevant retail market over time against a local benchmark weighted average cost of capital (WACC) • international benchmarking comparison (from comparable jurisdictions) of the rate of return over time for a dominant player (or players) in a relevant market. • comparison of the price of the focal product with underlying costs using: ○ costing studies ○ benchmarking ○ the operator's internal documentation.

Exhibit 6.2: *Framework for assessment of exploitative conduct and indicators [Source: Network Strategies]*

<i>Type of conduct</i>	<i>Key issues</i>	<i>Indicators</i>
Price discrimination	Typically involves the supply of the focal product on a discriminatory basis, with one group of customers offered exactly the same product at a lower price than another. Another form is charging a uniform price to customers despite difference in supply costs for different customers or customer groups. Such conduct by a dominant operator is anti-competitive if it has the effect of substantially lessening competition in the market, for example through bolstering network effects which then discourages market entry.	• Are there valid reasons for price differential? Note that the EC Bill S92 permits a 'reasonable allowance' for the cost of providing services, recognises different quantities, capacities, locations, time-periods and performance characteristics, as well as responses to competitor's strategies. • evidence of underlying cost or other differences that would explain the differential pricing • the extent and duration of the practice within the relevant market • the characteristics and size of the respective customer groups, and their significance to competitors in the relevant market • evidence of actual or potential harm to competitors.

Exhibit 6.2 (cont): Framework for assessment of exploitative conduct and indicators [Source: Network Strategies]

Q11. Does the framework adequately capture the characteristics of anti-competitive behaviour? If not, please give reasons.

Q12. Are there any omissions or recommended amendments which should be considered in relation to the assessment criteria?

Guernsey: addressing excessive wholesale broadband access prices of dominant operator

The Guernsey Competition and Regulatory Authority (GCRA) defined a national wholesale broadband fixed access market in 2019 and found that Sure, a vertically

integrated operator, is dominant in this market⁶². Subsequently in 2023 the GCRA reviewed whether charges to retailers by Sure are excessive⁶³.

Firstly, the GCRA considered retail broadband prices, noting that one benchmarking comparison showed that Guernsey's retail prices were among the most expensive in Western Europe, along with Gibraltar, the Faroe Islands, Iceland and Norway⁶⁴. Moving to the wholesale level, the GCRA decided that results from a benchmarking approach may not be sufficiently robust to inform a decision on this matter, particularly with the challenges of obtaining publicly available reliable data from comparable jurisdictions. As such, a cost modelling approach was adopted using the Discounted Cash Flow (DCF) methodology which was regarded as more appropriate for small jurisdictions and less complex than top-down or bottom-up approaches. Assumptions used in the analysis were clearly stated and amended following consultation. The analysis identified that Sure's wholesale broadband prices were higher than the efficient level of its costs.

The GCRA's remedy encompassed a cap on the weighted average price of the whole range of Sure's wholesale broadband products. It was noted that this remedy gave Sure some flexibility in its pricing. Moreover, it would achieve an appropriate reduction in charges while still enabling Sure to recover efficient costs and not undermining Sure's ability to finance its fibre network rollout⁶⁵.

⁶² Guernsey Competition and Regulatory Authority (2019), *Statutory Notice of a Final Decision Broadband Market: Review and SMP Findings*, 20th March 2019.

⁶³ Guernsey Competition and Regulatory Authority (2023), *Final Decision – Wholesale Broadband Pricing*, 18th December 2023.

⁶⁴ Guernsey Competition and Regulatory Authority (2023), *Proposed Decision – Wholesale Broadband Pricing*, 23rd May 2023. Page 10.

⁶⁵ Guernsey Competition and Regulatory Authority (2023), *Final Decision – Wholesale Broadband Pricing*, 18th December 2023.

6.5 Anti-competitive agreements

Agreements or understandings between or among market players may have or may be likely to have anti-competitive effects and outcomes. Such agreements may be horizontal or vertical in nature:

- the parties to horizontal agreements are direct competitors – that is, they operate at the same level of the production or distribution chain.
- vertical agreements involve parties who do not directly compete with one another – that is, they are from different parts of the value chain.

Horizontal or vertical agreements, with the purpose of substantially lessening competition in a market, may be formal or informal.

Examples of anti-competitive horizontal agreements include arrangements regarding:

- price fixing
- information sharing
- bid rigging
- dividing up customers or markets
- restricting or limiting product or service supply or output
- limiting or controlling investment or technical development.

Anti-competitive objectives and effects tend to be much less common in vertical agreements, although possible issues may arise if such arrangements:

- affect ease of market entry or expansion – for example, exclusive agreements
- facilitate collusion amongst market participants.

The following common framework for regulatory assessment of anti-competitive agreements may be applied to all of the above examples.

<i>Step</i>	<i>Issue</i>	<i>Indicator</i>
Define the relevant market for the focal product	Identification of market features, including boundaries of the market.	Characteristics of focal product: • level of demand • number of subscribers Follow procedure for defining relevant market, if required.
Examine the agreement	Establish whether agreement has object or effect of substantially lessening competition.	• Duration • Extent / nature of restraint on independent behaviour • Percentage of the market likely to be affected.
Identify parties to the agreement	If the market share of each of the parties is relatively low (for example, below 10%) anti-competitive effect less likely.	Market share
Review state of market competitiveness pre-agreement	The agreement is more likely to have anti-competitive effects where the market, prior to the agreement coming into force, is mature with stable demand and low innovation.	• Concentration ratio • HHI • Extent of entry barriers
Review state of market competitiveness post-agreement	If time elapsed since agreement came into force, there may already be changes with knock-on competitive effects.	Price changes after the agreement.
Mitigating factors	The parties to the agreement to be invited to present evidence that resultant efficiency benefits or cost savings will outweigh any potential anti-competitive effects.	• Anticipated benefits to consumer / economy; how agreement supports delivery of these, and why necessary • Scale of expected benefits • Demonstrate agreement is unlikely to substantially lessen competition.
Final decision	Balance likelihood of anti-competitive effects against claimed efficiency benefits – reflected in the legislation as improved production or distribution of goods or promoting technical or economic progress.	Largely a qualitative decision, informed by some metrics where possible (for example, the percentage of the market affected by the agreement).

Exhibit 6.3: *Framework for assessment of anti-competitive agreements [Source: Network Strategies]*

The Channel Islands: anti-competitive agreement involving market partitioning and slow deployment of 5G infrastructure

Two organisations, JT Group Limited with home base in Jersey and Sure Group Limited with home base in Guernsey, both operate competing mobile networks in both islands. In 2020 a joint investigation was initiated by the Channel Islands Competition and Regulatory Authorities (CICRA) into an alleged anti-competitive agreement between the two organisations and a statement of objections was issued⁶⁶.

At issue were several exchanges of information between the two parties regarding the development of a ‘bilateral home network scenario’ which included a gradual 5G deployment by each operator in their home islands (after a period of at least two years) and JT removing its 4G mobile infrastructure in Guernsey. Internal company communications obtained by CICRA indicated that the operators were aware that this strategy could have a significant detrimental impact on a third mobile player, Airtel, with inferior coverage and a reliance on co-location with JT in Guernsey. At that time Sure had a 56% and JT a 20% market share in Guernsey. Given this context, it was concluded that the agreement/concerted practice would likely materially strengthen Sure’s already powerful market position, potentially adversely affecting the market structure and lessening competition, and that financial penalties were appropriate⁶⁷.

6.6 Remedies

If, following a review of alleged anti-competitive conduct a licensee with SMP is found to have abused its position then remedial action is justified (Exhibit 6.4). There are three main types of remedy: directive, punitive and structural. The most appropriate remedy should be considered on a case-by-case basis, and will depend upon the nature, severity and impact of the offence, as well as the perceived need to prevent or deter future occurrences.

⁶⁶ Channel Islands Competition and Regulatory Authorities (2020), *Statement of Objections*, 20th January 2020.

⁶⁷ Guernsey Competition and Regulatory Authority (2021), *Case C1471G JT and Sure Decision*, 20th December 2021. See page 81.

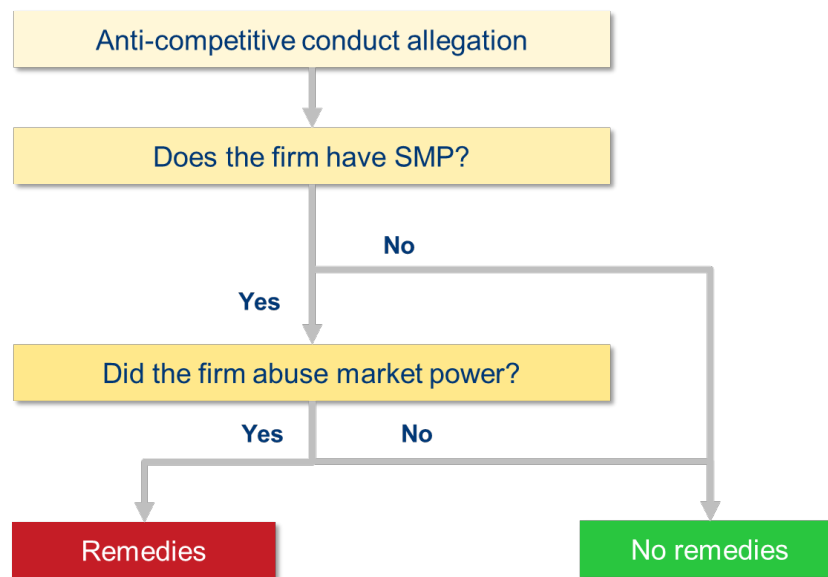


Exhibit 6.4: Framework for anti-competitive conduct: review process and remedies [Source: Network Strategies]

The characteristics of the different types of remedy are summarised below.

Directive

- Orders to cease abusive conduct
- May entail specific changes to remedy damages to competition
- Ongoing monitoring required.

Punitive

- Company fines and penalties
- Pay compensation to competitors and/or customers
- Individual fines for Board members or company officers with direct responsibility for the conduct.

Structural

- Only applicable if serious anti-competitive conduct likely to occur again
- Conduct must clearly damage competition
- Many options available for remedies depending on the particular circumstances (see Section 5.8).

Annex A: Definitions

The following provides definitions for technical and economic terms used in the text. Where a term has been defined in the EC Bill we have applied the same definition. For terms undefined in the Bill we have used definitions which are commonly applied by regulatory authorities in the electronic communications sector.

<i>Accounting separation</i>	An obligation on SMP licensees to provide separated and transparent accounts, encompassing cost information on separate lines of business, for regulated wholesale and retail services or products.
<i>Asymmetric substitution</i>	A form of substitution where consumers switch from one type of service to another, but typically do not substitute in the opposite direction.
<i>Cost-oriented</i>	Pricing for an electronic communications service which is reasonably aligned with the underlying cost of providing the electronic communications service.
<i>Critical loss</i>	The percentage reduction in sales that would make a hypothetical small price increase (5–10%) unprofitable for a monopolist if it controlled the market.
<i>Dynamic efficiencies</i>	Improvements in performance, innovation, and cost structures which emerge over time, driven by investment in new technologies and infrastructure.
<i>Economies of scale</i>	As total production increases, the per unit costs of production decline.
<i>Economies of scope</i>	The per unit costs of production decline when two or more products or services are generated.
<i>Electronic communications</i>	A type of transmission, emission or reception and, where applicable switching or routing of:

- voice, data, text, sound, audio, video, animation, visual images, moving images, pictures, pulses, signals or other information, or
- a combination of the above

using wire, radio frequency, optical, other electromagnetic means or by way of any other technology, whether with or without the aid of tangible conduct. Telecommunication is included but content services are not included in the definition of electronic communications.

*Exclusionary
vertical
restrictions*

Contractual arrangements or informal business relationships between vertical related firms that impair the competitiveness of the upstream or downstream market.

*Focal service /
product*

A specific service or product which is the starting point for definition of a relevant market.

*Hypothetical
monopolist test*

See SSNIP test.

Oligopoly

A market structure characterised by a small number of firms dominating the provision of a particular service.

Margin squeeze

An anti-competitive practice where a vertically integrated service provider sets the margin between its wholesale and retail prices at a level which adversely affects the ability of others to compete in the downstream market, even if all service providers operate at a similar level of efficiency.

Pass-through

The extent to which changes in wholesale costs or other input costs are reflected in the prices charged to retail consumers.

*One-directional
substitution*

See asymmetric substitution.

<i>Predatory pricing</i>	An anti-competitive pricing strategy under which a licensee with SMP deliberately sets low, typically below cost or below market level, prices for a given retail service, with the goal of undermining the profitability and commercial viability of competitors, with the expectation to raise prices and recoup the lost revenues after competitors have been driven from the market.
<i>Service Level Agreement (SLA)</i>	A formal agreement between a service provider and a customer that defines the minimum level of service performance the provider commits to deliver.
<i>Service Level Guarantee (SLG)</i>	A guarantee of service reliability or quality given by a service provider to customers.
<i>Significant market power</i>	In relation to a licensee, means that a licensee individually or jointly with others enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by affording the licensee the power to behave to an appreciable extent independently of its competitors and users.
<i>SSNIP test</i>	A hypothetical small but significant non-transitory increase in price, used for a substitutability test to determine the boundaries of a relevant market in competition analysis. Also known as the hypothetical monopolist test.
<i>Static efficiencies</i>	The extent to which efficient outcomes are delivered at a specific point in time. This may encompass an assessment of: • Allocative efficiency: resources being allocated to products and services most valued by consumers • Productive efficiency: products and services being produced at the lowest possible cost.