

Malta Communications Authority **Market Review Methodology**

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01. Introduction

The Electronic Communications (Regulation) Act (Cap 399), which is based on the new European Union (EU) regulatory framework for electronic communications networks and services, requires the Malta Communications Authority (MCA) to carry out a periodic market review exercise. This entails an examination of the competitive environment of electronic communications networks, through the process of market definition and market analysis.

The MCA deems it opportune to outline the methodology that is envisaged to be adopted in relation to this process for examining the Maltese electronic communications market. In contrast to the old legislation, the new regulatory framework presents an elaborate and complex process of analysis and it is in the interest of all stakeholders to participate and cooperate in these market reviews. It is deemed that the sharing of information relative to the market review process on the part of the MCA should serve in enhancing the co-operative aspect that such an exercise inevitably entails. Hence the need to compile and publish this document.

01.1 Purpose

The purpose of this document is therefore to provide stakeholders with an outline of the MCA's intentions in relation to the methodology to be used for carrying out of the market reviews as required under the new regulatory framework. The document is structured as follows:

- background to the new regulatory framework (Section 02);
- the market definition process (Section 03);
- the market analysis process (Section 04);
- the choice and application of remedies (Section 05);
- the process for the carrying out of a national consultation and notification to the Commission (Section 06);
- the information and data gathering process (Section 07); and
- the project structure and timelines (Section 08).

02. Background

In 1999, the European Commission (hereinafter referred to as the Commission) undertook a major review of regulation of the telecommunications sector in the EU. This review resulted in the adoption, in March 2002, of a new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (the Framework Directive) and four other Directives (collectively referred to as “the Specific Directives”), namely:

- Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, (the Authorisation Directive);
- Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities, (the Access Directive);
- Directive 2002/22/EC of the European Parliament and of the Council on universal service and users’ rights relating to electronic communications networks and services, (the Universal Service Directive); and
- Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, (the Telecoms Data Protection Directive).

The new regulatory framework requires that the national regulatory authority (NRA) defines relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Directive.

In addition, the NRA is required to conduct an analysis of the effective competitiveness of the relevant markets. Where it concludes that the relevant market is not effectively competitive (i.e. where there are one or more undertakings with significant market power (SMP), the Framework Directive provides that it must identify the undertakings with SMP on that market and impose on such undertakings appropriate specific regulatory obligations or maintain or amend such obligations where they already exist. Alternatively, where it concludes that the relevant market is effectively competitive, the NRA shall not impose any new regulatory obligations on any undertaking and remove previously imposed sector specific regulatory obligations on undertakings in that relevant market. The Framework Directive further requires that the market analysis procedure under Article 16 be carried out as soon as possible after the adoption, or subsequent revision, of the *Recommendation* on relevant product and service markets by the Commission.¹

The Framework Directive, the Authorisation Directive, the Access Directive and the Universal Services Directive entered into force on the 24th April 2002, and were transposed on the 3rd August 2004 into the following local legislation:

¹ Commission *Recommendation* of the 11th 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.

- Malta Communications Authority Act, Cap 418 (hereinafter referred to as the MCA Act);
- Electronic Communications (Regulation) Act, Cap 399 (hereinafter referred to as the Act);
- Electronic Communications Networks and Services (General) Regulations 2004, LN 410 (hereinafter referred to as the Regulations);
- Utilities and Services (Regulation of Certain Works) Act, Cap 81; and
- Malta Transport Authority Act, Cap 332.

The new electronic communications regulatory framework was brought into force on the 14th September 2004 and therefore the obligations highlighted above are now incumbent upon the MCA.

This document is without prejudice to the legal position or the rights and duties of the MCA to regulate the market generally. This is not a legal document; the MCA is not bound by this document and may amend it from time to time.

03. The Market Definition Process

The Act requires the Malta Communications Authority to define relevant markets² appropriate to national circumstances, in particular the relevant geographic markets³ in our territory. This obligation applies to both the relevant markets identified in the *Recommendation* on relevant markets and additional specific markets that the MCA may consider appropriate. These 'additional' markets are referred to in Article 9(1) of the Act.

The purpose of the market definition procedure is to identify in a systematic way the competitive constraints that the undertakings operate within, in order to facilitate the subsequent market analysis procedure. As specified in the Act, the market definition exercise must be carried out in accordance with the principles of competition law taking utmost account of the *Recommendation* on relevant markets, as well as the Commission *Guidelines* on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.⁴

03.1 Recommendation on the Relevant Market

The purpose of the *Recommendation* on relevant product and service markets is to identify those product and service markets in which ex ante regulation may be warranted. The *Recommendation* identifies two types of relevant markets in the electronic communications sector to be considered:

- Markets for services or products provided to end users (i.e. retail markets).
- Markets for the inputs which are necessary for operators to provide services and products to end users (i.e. wholesale markets).

In its *Recommendation*, the Commission identified a total of eighteen (18) relevant products/service markets (refer to **Appendix 01**). Markets one (1) to six (6) correspond to the provision of connection to and use of the public telephone network at fixed locations. Together with market seven (7), which captures the provision of the minimum set of leased lines, these markets can be referred to as the 'retail markets'. The remaining eleven (11) markets (markets eight (8) to eighteen (18)) correspond to the wholesale or access markets, which are the upstream input markets required for the provision of retail products and services. **Figure 01** below depicts the eighteen (18) markets divided into fixed and mobile markets, and further subdivided between retail and wholesale markets.

² A relevant market comprises all those products and/or services which are regarded as interchangeable or substitutable by the end-user due to the products' characteristics, prices and intended use.

³ A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.

⁴ Commission *Guidelines* on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C165/03).

Figure 01 - Retail and Wholesale Markets

Fixed Markets	Mobile Markets
<u>Retail level</u> <ul style="list-style-type: none">○ Access – Residential, Business○ Call Services – Local, National, International○ Minimum set of Leased Lines	<u>Wholesale level</u> <ul style="list-style-type: none">○ Voice Call termination on individual networks○ National market for International Roaming○ Access and Call origination on mobile networks
<u>Wholesale level</u> <ul style="list-style-type: none">○ Call origination○ Call termination on individual networks○ Transit services○ Unbundled access to metallic loops and sub-loops○ Broadband Services○ Lease Lines – Trunk, Terminating Segments	<u>Wholesale level</u> <ul style="list-style-type: none">○ Broadcasting transmission services, to deliver broadcast content to end users

As mentioned above a description of these markets may be found in **Appendix 01**.

03.2 Defining Relevant Product / Service Markets

In defining the relevant markets the Commission took - as a starting point - the characterisation of retail markets over a given time horizon, taking into account demand-side and supply-side substitutability (refer to **Section 03.3**). Having characterised and defined the retail markets, the Commission then proceeded to identify the relevant wholesale markets.

3.2.1 Markets Susceptible to ex ante Regulation

Article 15(1) of the Framework Directive requires the Commission to define markets in accordance with competition law principles. To this end, the Commission has applied three main criteria to identify electronic communications markets susceptible to ex ante regulation. The three criteria as identified by the Commission are listed in Section 3 of the *Recommendation*, being:

- the presence of high and non-transitory entry barriers;
- dynamic aspects: does the market tend towards effective competition; and
- the relative efficiency of competition law.

If there are no deviations from the markets defined in the *Recommendation*, the MCA does not need to discuss these criteria for the purpose of analysing whether a market is susceptible to ex ante regulation. However, in practice the first and the second criterion are usually taken into account in the SMP assessment process.

The three criteria adopted by the Commission serve as a first test when considering whether competition law alone is sufficient to regulate a market, or whether the market is susceptible to ex ante regulation. Only markets that comply with all three criteria will be ex ante regulated.

3.2.2 Applying the Three Criteria

As mentioned above, it is only necessary to prove whether the three criteria for identifying relevant markets are fulfilled for those markets not included in the *Recommendation*. However, when the characteristics of a particular market require a new market to be identified, the three criteria need to be applied. These criteria should be applied jointly, so that failing to comply with any one of them means that the market should not be identified as a relevant market.

Furthermore, paragraph 15 of the *Recommendation* states that “*new and emerging markets, in which market power may be found to exist because of ‘first-mover’ advantages, should not in principle be subject to ex ante regulation*”. This requirement seeks to protect and stimulate innovation in the electronic communications market. As more undertakings enter the new market and ‘first-mover’ advantages are slowly lost, the market will be subject to review and regulation if the need arises.

The three criteria, in particular the third criterion, do not have to be investigated again when considering the use of remedies in the markets, regardless of whether the market has been identified by the Commission or the MCA.

03.3 Demand and Supply Side Substitutability

The definition of the relevant market concentrates on identifying constraints on price setting behaviour of operators. The principal constraints to consider are demand-side and supply-side substitution. The market definition exercise is concerned with the likely competitive response of a body of customers, which is not necessarily the majority of customers. More specifically, products will be considered to fall within the same market if they are either:

- demand-side substitutes, or
- supply-side substitutes, or
- subject to a common pricing constraint.

When assessing product substitutability based on demand and supply side criteria, reference should be made to the ‘Hypothetical Monopolist Test’ as described in the *Guidelines* on market analysis and SMP.⁵

3.3.1 Demand-side Substitution

Demand-side substitutability seeks to identify the range of products which may be viewed as reasonable substitutes for one another by the users of those products in case of a price increase of that particular product. End users will regard products/services as being interchangeable based on the products’ characteristics, price and/or the intended use/s.

Assessing demand-side substitutability is very important with respect to the inclusion or exclusion of a product in the market as it represents the most immediate and effective control measure on the suppliers of a product or service resulting from an increase in price.

⁵ For a detailed description refer to paragraph 42 of the Commission *Guidelines* on market analysis and SMP.

The process starts by looking at a relatively narrow potential definition of the market. This would normally include the product/s, which two parties produce, or the products that are subject to similar competitive constraints. The two most basic (central) products available in the potential market should normally indicate the narrowest potential market definition. The process will continue to consider how customers would react if prices were raised a small but significant amount above competitive levels, a test which is normally referred to as the 'Hypothetical Monopolist Test' or SSNIP test.

This test requires an analysis of whether consumers of a particular product or service would be likely to switch to readily available substitutes in the short term and at a negligible cost in response to a hypothetical small but permanent relative price increase (from the competitive price) in the products under consideration. Common practice in both Europe and the United States is to consider a price 5 to 10 per cent above competitive levels (the 5 to 10 per cent test is a rough guide and a common practice rather than a rule).

If a significant number of customers would switch to the alternative product, the market definition should be widened to include the substitutes. It is not necessary for all customers, or even the majority, to switch. The important factor is whether the number of customers likely to switch is large enough to prevent a 'hypothetical monopolist' from exercising market power.

Substitutes do not have to be identical products to be included in the same market. Nor need product prices be identical. For example, if two products perform the same purpose, but one is of a higher quality, they might be included in the same market. This depends on whether the price of one product, constrains the price of the other. Although one is of a lower quality, customers might still switch to this product if the price of the more expensive product increases and if they no longer felt that the higher quality justified the price differential.

The important issue is whether the 'hypothetical monopolist' could maintain prices above competitive levels. The products will still be included in the same market if the delay before substitution takes place is so short it would never be worthwhile to raise prices in the first place. As a rough rule of thumb, if substitution takes longer than one year the products would not be included in the same market. However, the answer will vary from case to case. Substitution that was possible within one year might not be included if customers would have to incur significant switching costs, for example.

If the undertaking would be prevented from setting prices above competitive levels by substitution to certain products, those substitutes can then be added to the potential market and the test applied again. This involves asking whether an undertaking, which is the only supplier of a larger group of products, would maximise profits by charging prices above competitive levels. By repeating the process a definition can eventually be reached where, under the assumptions above, a 'hypothetical monopolist' could maintain prices above competitive levels. This will usually be the market definition used. If the market were to be expanded further, the same condition should be met: a 'hypothetical monopolist' could set higher prices than an undertaking facing competition.

To assess demand-side substitutability, the Commission encourages the use of evidence of consumer behaviour, historical price fluctuations in potentially competing products, price movements and relevant tariff information. In addition to price elements, the Commission suggests that other factors be taken into account, such as considerable switching costs, which may hinder consumers from substituting a

product or service for another. In the communications sector, these costs might be represented by important investments in technology, prohibitively high costs of switching terminals or long-term contracts.⁶

A typical problem often encountered in the market definition stage is the aggregation or bundling of several products or services. This is a very common problem in the communications sector as several products and services are provided in bundles, which usually result in more advantageous terms and conditions for the consumer than would otherwise be with unbundled services. This behaviour might give rise to “cluster markets”, especially where competitors match these bundled offerings. The key issue for market definition purposes is whether such aggregated or bundled services constitute relevant product markets, or whether specific elements of the several package are subject to their own patterns of supply and demand.

A case-by-case analysis would be warranted depending on the particular type of market at hand.

3.3.2 Supply-side Substitution

The issue in market definition is usually to determine products to which consumers might switch. However, substitution can also take place by suppliers. If prices rise, undertakings that do not currently supply the product might be attracted to start supplying it at short notice. This will prevent undertakings charging monopoly prices, so any supply-side substitutes should also be included in the market.

Supply-side substitutability arises when suppliers are able to switch production or other resources to the relevant products and market in the short term without incurring significant additional costs or risks, in response to a small but permanent increase in the relative price of a product. In particular, supply-side substitutability is seen as an important element for market definition “*in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy*”.⁷

On the other hand, supply-side substitutability would not be taken into account for the definition of a relevant market where it would require undertakings to incur additional significant investments, significant upgrading or adjustment of their existing networks or a long delay in the period for substitution.

As with the demand-side, substitution from a supplier should be relatively quick. If supply substitution takes longer than one year these undertakings would not normally be included in the market. Since the issue is identifying opportunities for short-run substitution, undertakings would not normally be included if they had to make a significant investment in new production capacity or other fixed assets.

According to the Commission, supply-side substitutability must be assessed in light of elements such as the overall costs of switching production to the product in question as well as any legal, statutory or other regulatory requirements which could defeat a time-efficient entry into the relevant market. Such barriers could be represented for example by delays and obstacles in concluding agreements for collocation, interconnection or access, or rights of way.

⁶ See the Relevant Market Notice [97/C372/03], paragraph 41

⁷ Ibid. paragraph 20

Supply-side substitutes will therefore be included within the market definition when it is clear that substitution would take place quickly and easily. If there is any serious doubt on this point, they should not be included but could be considered when analysing potential entry in the market.

Having regard to supply-side substitutability in the market definition procedure ensures that this procedure has regard to the principle of technology neutrality, i.e., that regulation neither imposes nor discriminates in favour of the use of a particular type of technology.

3.3.3 Chain Substitution

Two products do not have to be direct substitutes to be included in the same market. There may be a chain of substitution between them. Chain substitutability has been recognised by the Commission as another element for assessing a relevant market. Chain substitutability occurs where it can be demonstrated that although products A and C are not directly substitutable, product B is a substitute for both product A and product C and therefore products A and C may be in the same product market since their pricing might be constrained by the substitutability of product B. The Commission has recommended, however, that the chain substitutability test be used only where there is clear price interdependence at the ends of the chain and the degree of substitutability is sufficiently strong. Furthermore, when considering chain substitution care must be taken to ensure that there are no breaks in the chain that would suggest that separate markets exist.

03.4 Defining the Geographic Scope of a Market

As defined earlier, a relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different.

The geographic market is the area over which substitution could take place. Geographic markets are defined using the same process as that used to define the product market. This is mainly done by identifying demand and supply side issues which are particularly relevant to the geographic market in question. The approach adopted often depends on whether the product is a retail or wholesale product. Retail markets are more likely to be defined on the demand-side, while wholesale markets are more likely to be defined on the supply-side.

As with the product market, the objective is to identify substitutes which are so close that they would prevent a hypothetical monopolist in one area from charging monopolistic prices. The process again starts by looking at a relatively narrow area, which would normally be the area mainly supplied by the monopolist. Examination is then broadened to consider whether consumers would switch to suppliers in neighbouring areas in response to a small increase in price. If substitution is potentially so significant that it would prevent an undertaking from raising prices, the area is included in the market definition.

The evidence used to define geographic markets on the demand-side will usually be similar to the information used to define the product market, but the value of a product is often an important factor in defining geographic markets. The higher the value, the more likely customers are to travel further in search of cheaper supplies. The mobility of customers may be a relevant factor in defining the geographic market.

When assessing supply-substitutability the process starts by looking at the potential for undertakings to supply customers in neighbouring territories. As with product-market definition, substitution should be possible in the short run (for example, within one year). Supply-side substitution may not be possible within one year if undertakings need to spend significant sums on advertising or marketing, or if distribution channels are foreclosed. As with demand-side substitutability, the main evidence here will usually be similar to the information gathered on product market definition, but the level of transport costs relative to the price of a product is also an important issue. Higher relative transport costs normally mean a narrower geographic market.

03.5 Considerations

The main purpose of the market definition exercise is to identify potential markets within the electronic communications sector in order to assess whether a particular undertaking within that market has significant market power. This assessment needs to be carried out independently of already existing remedies affecting the services being assessed. Otherwise the analysis would be circular, whereby the current dominant operators are always assumed to be dominant. Consequently, when defining markets in accordance with the new framework, the process should be based on the assumption that the market in question is not regulated ('green field' approach). This would ensure that the market definition is based on the real underlying elements of the market in the absence of any regulation.

The fact that the *Recommendation* identifies eighteen product and service markets in which ex ante regulation may be warranted does not mean that regulation is always necessary or that these markets will be subject to the imposition of regulatory obligations. Regulation will not be warranted if the results of the market analysis show that there is effective competition in these markets. When defining relevant markets appropriate to national circumstances, the Act requires the MCA to take utmost account of the product markets listed in the *Recommendation*, in particular relevant geographic markets within its territory.

Finally, the Commission *Guidelines* on market analysis and SMP state that the market analyses carried out by NRAs have to be forward-looking and therefore the markets will be defined prospectively taking into account expected or foreseeable technological or economic developments over a reasonable horizon linked to the timing of the next market review. For this reason, the markets defined according to the *Recommendation* are without prejudice to the markets defined in specific cases under competition law. Markets identified in the *Recommendation*, while based on competition law methodologies, will not necessarily be identical to markets defined in individual competition law cases for the very reason that they are based on an overall forward-looking assessment of the structure and the functioning of the market under examination.⁸

⁸ Commission *Recommendation* on relevant markets (pg. 8)

04. The Market Analysis

In regulation 8(2) of the Regulations, operators having significant market power are defined as undertakings that, “*either individually or jointly with others, enjoy a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.*”

Under the previous Maltese legislative framework an undertaking was deemed to have a dominant position in a particular market if the undertaking had a market share in excess of 25 per cent. Certain regulations even specified that an operator could be deemed dominant if it provided two different forms of electronic communication networks. Thus, for example, a telecommunications transport provider (TTP) that was also licensed to operate a public fixed telecommunications systems and services or public mobile telecommunications systems and services was considered dominant

Under the obligations emerging from the new regulatory framework the determination of significant market power is no longer the ascertained on the sole basis that the operator enjoys a market share larger than 25 per cent of the particular market. The MCA is required to assess dominance in terms of competition law principles and to align the definition and method of assessment with those applied in competition law case law. Article 16 of the Framework Directive states that following the adoption of the Directive, Member States through their respective NRAs must carry out a market analysis taking into utmost account the Commission *Guidelines* on market analysis and SMP, in order to assess SMP in the relevant electronic communications markets identified in the Commission *Recommendation*.

The MCA needs to take a forward-looking, structural evaluation of the relevant market based on the current market conditions. The MCA will need to evaluate whether the market is prospectively competitive and therefore see if the lack of competition is durable or if the market is moving towards effective competition in the foreseeable future. Based on this analysis the MCA will then assess whether a particular market is effectively competitive, and if not, what course of action it would take to stimulate competitive forces in that market.

The Commission *Guidelines* define an effectively competitive market as one where there is no undertaking which holds alone or together with other undertakings a single or collective dominant position. If the relevant market is not found to be effectively competitive, the MCA will designate undertakings with SMP in that market, and will either impose appropriate specific obligations, or maintain or amend such obligations where they already exist, in accordance with Article 16(4) of the Framework Directive and the implementing Articles 9 and 39 of the Act.

04.1 Assessing Single Dominance

To identify a dominant undertaking in a relevant market the MCA will make reference to a number of economic criteria, identified in the Commission *Guidelines*, which will be the basis of a forward looking market analysis based on existing market conditions. The *Guidelines* state that a dominant position can be derived from a combination of the identified criteria, which taken separately may not necessarily be determinative. The MCA will adopt the most appropriate criteria in order to assess dominance in the particular market.

Under the previous legislative framework it was common practice to associate high market shares with dominance, as market shares are often used as a proxy for market power. However, paragraph 78 of the *Guidelines* states that *“the existence of a dominant position cannot be established on the sole basis of high market shares.”* It is therefore understood that the MCA will take a thorough and overall analysis of the economic characteristics of the relevant market, based on available information, before deciding on the existence of SMP in a particular market. Nonetheless, market shares are an excellent indicator of the size of the undertaking within a particular market, and are widely acknowledged as a main indicator of SMP.

In paragraph 78 of the *Guidelines* the Commission identified a non-exhaustive list consisting of twelve criteria by which NRAs are required to assess single dominance in electronic communications markets. These criteria are discussed briefly in turn.

Market shares

Market shares can be measured either by value as portrayed by revenues generated from services provided in the relevant market, or by volume which would include the number of subscribers or termination points, traffic volumes or capacity within the particular market.

The appropriate variable will vary between markets, although it is likely that the most appropriate measure will be volume for bulk products or services (e.g. wholesale transit of international minutes) and value for differentiated products or services (e.g. retail mobile services).

Market shares, although not in isolation, are a clear indication of the extent of market power that a particular undertaking enjoys in the market. Paragraph 75 of the *Guidelines* state that it is very unlikely that undertakings with less than 25 per cent market share are to enjoy a single dominant position.

Although, high market shares are not in themselves decisive as to whether an undertaking enjoys SMP in a market, market shares higher than 40 per cent would raise the concern of necessity of designation of SMP. The Commission *Guidelines* state further in paragraph 75 that, *“according to established case-law, very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of dominant position.”*

The development over time of high market shares is an important element in assessing single dominance based on market shares. The persistence of a high market share over time is important to prove single dominance. The ease with which undertakings can enter the market and erode that market share and the relative market shares of competitors is an important factor. However, decreasing market shares does not automatically mean elimination of dominance within the assessed time-scale, but shows only a reduction of power. Only high, frequent and persistent changes in market share can indicate a development towards effective competition.

Overall size of the undertaking

Undertakings having a large size relative to their competitors in a particular market may enjoy potential advantages, and sustain those advantages in a number of operational areas. Areas where such advantages may exist include economies of scale, finance, purchasing, production capacities, distribution and marketing. Such advantages may accrue in part due to other activities of the undertaking outside the market under consideration. A large undertaking which is present in a number of

different markets can therefore avail of its size and resources to gain competitive advantages over small sized competitors.

Control of infrastructure not easily duplicated

Investing in electronic communications infrastructure is very often an enormous and costly exercise that may not be feasibly accomplished by a large number of operators. Due to the nature of the electronic communications market only large undertakings are able to own and maintain large network infrastructures. Such control may represent a significant barrier to entry for potential competitors and may also create the opportunity for the owner of the infrastructure to eliminate the possibility of market entry.

Technological advantages or superiority

Large sized undertakings that can afford extensive research and development are likely to benefit from technological advantages, which smaller operators cannot easily replicate. Undertakings that operate in different markets and/or in different geographical territories are likely to transfer their knowledge and resources across markets, in order to sustain and benefit from these advantages wherever they are present. Such advantages may represent a barrier to entry as well as an advantage over existing (smaller) competitors.

Absence of or low countervailing buying power

The existence of customers with a strong negotiating position, which is exercised to produce a significant impact on competition, will tend to restrict the ability of providers to act independently of their customers. When buyers of a certain product or service are large and powerful, they can effectively stop an attempt to increase prices by sellers.

Many factors play a role in determining the scale of countervailing buying power on the part of the buyers. The higher the amount of purchase of services by customers or the higher the proportion of the producer's total output that is bought by a certain customer, the stronger the countervailing power might be. The higher the portion of the costs for a service in relation to the customers' total expenditure, the more sensitive consumers are to the price and quality of the service and the more ready they might be to switch suppliers. Further to this, the higher a seller's locked-in investment in specific customers (asset specificity), the more willing he will be to negotiate.

Easy or privileged access to capital markets and financial resources

In all relevant markets construction of infrastructure for the provision of electronic communications services requires substantial investment upfront. Earnings and pay back of that investment would only be possible over a medium and long term so access to capital markets and financial resources play an important role for operators in this industry.

Easy or privileged access to such financing sources may represent a barrier to entry as well as an advantage over existing competitors. Aside from internal sources (e.g. as indicated by the cash flow or revenue), the ability to procure outside capital, a firm's capital structure and its ability to increase equity capital might be considered. Further to this, access to capital might be influenced if a firm is part of a larger group or has affiliated companies.

Product/services diversification

Product or service diversification can be observed particularly in more mature markets and is characterised by the fact that an undertaking is able to provide a "portfolio" of related products and services, with the consequence that the competitive threat coming from competitors who may be unable to offer the same range of services or products would be reduced. In that sense product/services differentiation can enable the undertaking in question to secure and maintain its client basis.

Bundling may support dominance by foreclosing the market for part of the bundle to other suppliers, even where the different elements of the bundle are supplied separately. By bundling a service in the supply of which it is dominant with that of another service for which the market is at least potentially competitive, an operator with SMP can exclude rivals and so lever its dominance from the former to the latter market.

Economies of scale

Economies of scale arise when increasing production causes average costs (per unit of output) to fall. Economies of scale are common where the production process involves high fixed costs, which is often the case in communication markets. One other way in which increasing scale can lower unit costs is by allowing greater specialisation, and in turn higher productivity.

Although in principle economies of scale are desirable since they lead to increased efficiency and potentially lower prices in the market, they can also act as a barrier to entry as well as an advantage over competitors. If an operator in a particular market has achieved considerable economies of scale, (for example because it enjoyed a monopoly position in that market for a long period of time) then potential competition may be hindered since new entrants will find it very difficult to compete effectively with this operator. As a result, under these particular circumstances, economies of scale may limit competition in a market and the benefits associated with it.

Economies of scope

Economies of scope exist where average costs for one product are lower as a result of it being produced jointly with another product by the same firm. Cost savings may be made where common processes are used in production. Economies of scope are common where networks exist, as the capacity of the network can be shared across multiple products.

Although economies of scope are again desirable in principle, in a situation similar to the one just described above for economies of scale, they can serve as a barrier to entry as well as an advantage over existing competitors. In this sense economies of scope would be a factor to consider when assessing dominance.

Vertical Integration

Vertical integration refers to a situation where an undertaking or group of undertakings operating in the same market is also present in a market that is at a higher or lower level of the chain of production.

Vertical integration can promote dominance by making new market entry harder due to control of upstream or downstream markets and through the potential ability to lever market power into upstream or downstream markets (e.g. through price/margin squeeze), thereby adversely affecting competition. Vertical integration might be particularly relevant to get easier access to sales and supply markets.

A highly developed distribution and sales network

The sales and distribution system and the level of development of such a network is very important for the provision of a product or service. A well-developed network would enable the undertaking to provide its product or service in a more cost-effective manner thus increasing the possibility of influencing consumers' decision.

Well-developed distribution systems are costly to replicate and maintain, and may even be incapable of duplication. They may represent a barrier to entry as well as an advantage over existing competitors.

Absence of potential competition

Potential competition refers to the prospect of new undertakings (which are in the position to switch or extend their line of production) entering the market (e.g. due to a hypothetical price increase) within the timeframe considered by the review. The threat of potential entry may prevent firms from raising prices above competitive levels, leading thereby to situation in which no market power is exercised.

The record of past entry is one factor that can be looked at, as well as potential (structural, legal or regulatory) barriers to entry. However, in the presence of significant barriers to entry, the threat of potential competition may be weak or absent. Significant barriers to entry enable operators to raise prices and make persistent excess profits without attracting additional competition that would reduce them again. The impact of these barriers is likely to be greater where the market is growing slowly and is initially dominated by one large supplier, as entrants will be able to grow only by attracting customers from the dominant firm. However, barriers to entry may become less relevant where markets are associated with ongoing technological change and innovation.

Barriers to expansion

Competition is largely dependent on the ability of new operators to enter the market and for existing operators to expand or increase their production capacities. There may be more active competition where there are lower barriers to market growth and expansion. The higher the barriers to entry into a market, the more significant these barriers will be in assessing competition, because with high barriers to entry competition will be largely limited to existing market players.

There are two broad categories of barriers to entry – strategic and absolute. Absolute barriers exist where firms own, have access to, or are granted privileged use of important assets or resources which are not similarly accessible to potential entrants. Strategic barriers arise due to the strategic behaviour of existing market players, for

example through pricing behaviour (such as predatory pricing, price-squeezing, cross-subsidies and price discrimination) or through non-price behaviour (such as increased investment, promotion and distribution).

Sunk costs can be an important barrier to entry or expansion. These are costs which are needed to enter an industry or expand production but which cannot be recovered on exit. Existing firms, which only have to cover ongoing costs, could set prices too low to allow entrants to both recover sunk costs and compete. Other barriers to entry include: patents and other intellectual property rights, brand image (including high advertising), and distribution agreements.

04.2 Assessment of Joint (Collective) Dominance

Regulation 8(3) of the Regulations refers to a situation of dominance held by two or more undertakings in a particular relevant market. The second schedule of the Regulations describes situations under which the finding of joint dominance may be warranted and states, *“Two or more undertakings can be found to be in a joint dominant position within the meaning of regulation 8 of these Regulations if, even in the absence of structural or other links between them, they operate in a market the structure of which is considered to be conducive to coordinated effects.”*

The Commission *Guidelines* define joint dominance, within the meaning of regulation 8(3) of the Regulations, as a situation where *“a dominant position may be held by two or more undertakings that are legally and economically independent of each other.”* Within the meaning of this definition, two or more operators need not necessarily have any formal links between them in order to support a finding of joint dominance. What is required is that the undertakings under investigation are faced by *“substantially the same position vis-à-vis their customers and competitors”* within a particular market such that these market conditions may be conducive of tacit collusion or coordinated effects.

The *Guidelines* stipulate that when assessing ex ante, the likely existence or emergence of a market which is or could become conducive to collective dominance in the form of tacit coordination, NRAs, should analyse:

- (a) whether the characteristics of the market makes it conducive to tacit coordination; and
- (b) whether such form of coordination is sustainable, i.e.
 - (i) whether any of the oligopolists have the ability and incentive to deviate from the coordinated outcome, considering the ability and incentives of the non-deviators to retaliate; and
 - (ii) whether buyers/fringe competitors/potential entrants have the ability and incentive to challenge any anti-competitive coordinated outcome.

The Court of First Instance in the case of the Airtours/First Choice merger decision recently applied these principles in its judgment⁹. In its decision the Court sets out three necessary conditions for the finding of a collective dominance position:

- i) 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 the common strategy. It is therefore necessary for sufficient transparency for all firms in the oligopoly to be aware, sufficiently precisely

⁹ Case T-342/99 - Airtours plc. vs. Commission, 6 June 2002

and quickly, of the way in which the other firms' market conduct is evolving. Important criteria to meet this condition are: market concentration, transparency, mature market, stagnant or moderate growth on the demand side and homogeneity of products.

- ii) Any tacit co-ordination must be sustainable over time. Implicit in this is the view that a retaliatory mechanism of some kind is necessary, so that any firm that deviates from the co-ordinated practice would be met by competitive reactions (not necessarily only addressing the cheating firm) by other firms. The most important criterion to meet this condition is retaliatory mechanisms.
- iii) It is necessary that existing and future competitors, as well as customers, do not undermine the results expected from the common policy. This condition may be met if there are high barriers to entry.

A number of characteristics, which may indicate the presence of joint dominance, are provided in the second schedule of the Regulations. Based on the experience of available case law established by the European Court of Justice, joint dominance is likely to be found where the market satisfies a number of characteristics, in particular in terms of market concentration, transparency, and other characteristics discussed below.

Market concentration refers to a situation where the market is dominated by a few market players each having a significant market share. Collective dominance is more likely in a highly concentrated market since it facilitates coordination by reducing transaction and monitoring costs. However, even where a market is highly concentrated it does not necessarily warrant a finding that the structure of the market is conducive to collective dominance in the form of tacit coordination.

Transparency facilitates coordination in the sense that undertakings can easily obtain good knowledge of their competitors' prices and market strategies. If there is transparent information on rival's prices and output, a quick detection of cheating rivals is possible and essential for the maintenance of collusion. From this perspective, publications of prices, pre-announcements of price changes, and similar communications, are suspicious as they may facilitate tacit collusion whereas secret price cutting to certain customers is the most common form of cheating.

Mature market

It is very difficult for new entrants to penetrate in highly mature markets which are likely to be dominated by large operators. In mature market existing operators are likely to enjoy significant competitive advantages as compared to new entrants and a significant market share. Coordination amongst existing players can eliminate threats of new entrants.

Stagnant or moderate growth on the demand side

Low growth on the demand side can have two effects with respect to collusion; first it can eliminate any potential market entry since new undertakings would not be capable of attracting a sufficient number of customers; and secondly low growth in demand would not stimulate competition amongst existing undertakings to increase their customer base potential earnings.

Low elasticity of demand

Low elasticity of demand indicates that consumers are not very sensitive to any price changes. Where customer demand does not change much in response to price changes, there is less incentive to reduce prices in order to undercut competitors; hence it would require substantial price cuts to attract further demand. Elasticity of demand may be low for various reasons, including low importance of the product in customers' total spending, high switching costs and lack of consumers' ability to access and use information.

A high elasticity of demand would stimulate competition amongst existing operators and attract new entrants, since even at low changes in price the likely response from consumers would be sufficient to eliminate any incentive for coordination.

Homogenous product

The way customers perceive a product has a great influence on the pricing strategy of an operator. The more similar the products are perceived by customers the stronger the potential for price competition between providers and the easier the mutual control. Since consumers perceive products as similar, providers may decide to collude and maximise their returns. In differentiated product markets collusion is much more difficult to achieve, since competition would be based on several characteristics of the product other than price.

Similar cost structures

Similar cost structures could limit the possibility of price competition since for a given price level, similar costs will produce similar levels of profit. If firms have different marginal cost functions, their individual price preferences will differ at any given output level. This makes agreeing on a common profit-maximising price more difficult.

Similar market shares

Similar market shares may indicate that existing undertakings have similar positions in the market and therefore face very similar market characteristics. Sustained similar market shares also indicate that undertakings have very few incentives to enter into competition to attract new customers from their competitors. On the other hand large imbalances of market share between providers can stimulate competition and may make collective dominance less likely.

Lack of technical innovation, mature technology

The more mature the technology is in a particular market, the lower the scope for providers to compete by being differentiated on technology grounds. If there is technological innovation providers are likely to compete amongst themselves by differentiating their product to attract customers. Secondly, if the market is faced by continuous innovation there is a high risk of new entrants coming in the market with new products. This reduces any possibility for existing operators to coordinate efforts and take up the market. Finally, if the market is faced by continuous change existing undertakings would be uncertain of future market conditions and therefore would be less willing to collude but will compete to gain a strong position in the current market to be able to compete better in the future.

Absence of excess capacity

If existing providers are operating at 'full' capacity there is no possibility for one of the existing undertakings to increase production and lower the price sufficiently to gain a higher market share and increase expected returns. This situation is likely to increase the probability that existing undertakings can coordinate efforts and limit price competition since they would not have an incentive to deviate from that agreement.

High Barriers to entry

High barriers to entry limits potential competition from new entrants and therefore existing operators have an increased incentive to collude amongst them and reap off the benefits as if it was a single dominant firm in that market. A detailed discussion of this criterion has been already provided earlier.

Lack of countervailing buying power

Customers with a strong negotiation power can eliminate the possibility of undertakings to act independently from their customers. Countervailing buying power can reduce possibility of collusion by stimulating competition amongst existing operators.

Lack of potential competition

New entrants in the market can stimulate competition within that particular market. Lack of potential entry may leave space for existing operators to collude and dominate the market since they would not be faced by a threat of new entry. This criterion has already been discussed under heading of single dominance.

Various kinds of informal or other links between the undertakings concerned

Evidence of such links will inform an assessment of the potential for collusion. However such evidence is not a pre-requisite for finding a collectively dominant position. For example, links may exist to legitimately resolve common issues through self-regulation. Patterns of price movements are one piece of evidence that might indicate concerted action by firms, although this has to be interpreted carefully, as other reasons (e.g. increasing input prices) might be the cause for that development

Retaliatory mechanisms

The criterion is an essential element of a collusion strategy. For a collusion agreement to hold, every player of the group must have an effective retaliatory mechanism by which he can penalise the party that deviates from the agreed strategy. If retaliatory mechanisms were not in place, every member of the oligopoly would have an incentive to deviate (cheat) and reap off higher benefits at the detriment of the colluded players. Such mechanisms can deter action that might break collective arrangements.

Lack or reduced scope for price competition

In effectively competitive markets prices are generally based on the costs of producing that product or service due to the fierce competition. But in a market dominated by a few market players the potential for tough price competition can create an incentive not to compete actively. If existing providers decide not to compete but rather to collude, they would be better off by charging non-competitive prices. So a potential result of collective dominance is evidence of a history of market price movements within a narrow range.

This list of criteria is not an exhaustive list and it is mainly intended to highlight criteria that may support the existence of collective dominance. These criteria also show that structural links between undertakings are not a pre-requisite for the finding of collective dominance.

04.3 Leverage of market power

According to regulation 8(4) of the Regulations, *“where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.”*

An undertaking enjoying a dominant position in a particular market and having a presence in an associated secondary market can leverage the market power that it enjoys in the first market, and behave independently of its customers on the latter market.

The relation between the relevant market and the associated secondary market can be of a vertical or horizontal nature. Two markets are vertically related when one product is an upstream input into the production of another downstream product. For example access to the fixed telephone network is essential for the provision of retail fixed call services. Leveraging in vertically related markets can be done through a refusal to supply the essential input to the downstream competitors or refusal to allow access to the input. A refusal to supply on reasonable terms is one common example of limiting competition in downstream markets. Another possibility to leverage power is through a ‘margin squeeze’ where the vertically integrated operator tries to leverage its market power from the upstream market to the downstream market by maintaining a margin between its upstream and downstream prices which is insufficient to cover its downstream costs.

In paragraph 85 (and elaborated further in footnote 91) of the *Guidelines* the Commission states that leveraging of market power also applies to horizontal markets. The *Guidelines* outline three different associative links for horizontally related markets. Horizontal markets can exist when the suppliers and/or consumers in the two markets are identical, and where the input products or services that are used for the provision of the final service in both markets are identical.

The clearest case of different markets having common customers is when the products or services are strict complements. When the demand of one of the complementary products increase, the demand for the other is likely to increase. Holding a dominant position in one market will inevitably facilitate the leveraging of power into the market of the complimentary good. However the Commission, as explained in footnote 91 of the *Guidelines*, is not restricting horizontal leveraging to complimentary markets alone.

If the associated markets have different customers but face the same suppliers, the likeliness of horizontal leveraging through bundling or tying of the two products is weak. However, there may be the case of collective dominance, where even if customers differ, it is possible that a coordinated effect by the suppliers in one market would lead to a coordinated outcome in the associated market.

In electronic communications markets it is very common to have different markets sharing a common input product or service. This is particularly relevant for markets where the same underlying infrastructure is used to provide many different products and services. To illustrate, the Commission gave the example of wholesale call origination and wholesale call termination both requiring the same network infrastructure.

The MCA shall designate an operator as having SMP in an adjacent market within the meaning of regulation 8(4) of the Regulations if, the markets under investigation present sufficient strong links between them and there is sufficient evidence that if unregulated the SMP operator would lever its power to the adjacent market, thus increasing its overall market power.

05. The Regulatory Measures

The third and final stage of the carrying out of the market review process as set out in the new regulatory framework is the identification and imposition of remedies. Where the market analysis reveals that competition in the relevant market is not effective, and one or more operators have been found to enjoy significant market power either individually or jointly, at least one appropriate ex ante remedy must be applied in accordance with Article 9(3) of the Act and regulation 10(4) of the Regulations.

If a relevant market is subject to effective competition, i.e. there is neither single nor joint dominance in the market, no regulatory obligations shall be imposed and any current obligation will need to be withdrawn subject to a reasonable period of notice.

The choice and application of remedies shall be stirred by the following policy objectives and regulatory principles as set out in Article 4 of the Act:

- Promotion of competition;
- Contribute to the development of the internal market; and
- Promote the interests of the citizens of the European Union.

Moreover, when imposing remedies on SMP operators the MCA will ensure that the proposed remedies are justified, proportionate and as far as possible technologically neutral.

The standard remedies provided by the new regulatory framework are set out in regulations 18 to 22 of the Regulations (Wholesale obligations) and regulations 37 to 39 of the Regulations (Retail obligations).

The following are the wholesale obligations as set out in the Regulations:

- Transparency;
- Non-discrimination;
- Accounting separation;
- Access; and
- Price control and cost accounting.

In addition, regulation 17(3) of the Regulations enables the MCA to, in exceptional circumstances, impose remedies other than the abovementioned standard remedies.

05.1 Wholesale Remedies

5.1.1 Transparency

As set out in regulation 18 of the Regulations the transparency obligation may be used in relation to 'interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.'

This regulation implies that there is some natural linkage between any access or interconnection obligation and a transparency requirement making publicly available any critical technical and/or financial information to make such access or interconnection obligations feasible. Similarly there is a logical linking between the transparency requirements, accounting separation and non-discrimination.

To achieve transparency the MCA may require that operators publish a reference offer for services giving the terms and conditions available at a level of detail as required to ensure a non-discriminatory offer.

It is difficult to see many situations relating to access and interconnection where transparency by itself is likely to be an effective remedy, although the provision of publicly available information can help identify any anti-competitive behaviour or deter such behaviour by supporting an implicit threat of regulation.

The transparency obligation seems to suggest that it is really an accompanying obligation with and to other obligations in order to make the overall remedy more effective. For instance, the requirement to behave in a non-discriminatory manner towards competitors requires that parties can observe and compare easily the factors over which discrimination could take place. Additionally, accounting separation as an obligation is a natural complement to transparency in pricing and costing matters.

5.1.2 Non-Discrimination

Under the non-discrimination obligation a SMP undertaking is required to provide access to third parties under the same terms and conditions with which it provides access to its own subsidiaries or partners. In principle this obligation requires that third party undertakings seeking access be treated no less favourably than the operators' internal units.

Non-discrimination can be mandated as a remedy by itself but it is likely to be more effective if combined with other obligations. Transparency is a natural complement to this obligation as it facilitates the identification of any misconduct or discrimination at a detriment to third party access seekers.

Non-discrimination could be used to get a SMP undertaking to justify self-supplying inputs at anti-competitive prices because of significant economies of scale and/or scope gained by the SMP operator. Thus, differences in terms and conditions, even where transactions are not necessarily exactly the same, should be justified so that anti-competitive discrimination can be prohibited.

5.1.3 Accounting Separation

Accounting separation may be imposed as an obligation in relation to specified activities related to interconnection and/or access. This obligation is specifically put in place to support the obligations of transparency and non-discrimination. Accounting separation may also support the implementation of price controls and cost accounting obligations.

Accounting separation should ensure that a vertically integrated company makes transparent its wholesale prices and its internal transfer prices especially where there is a requirement for non-discrimination. Where necessary, accounting separation may identify cases in which a vertically integrated company engages in unfair cross-subsidy. Unfair cross subsidy would occur where an unjustifiably low price in one product market was facilitated by (excessive) charges in another product market.

Under regulation 20(2) of the Regulations the MCA has the discretion to specify the format and accounting methodology to be used. In addition, regulation 20(3) empowers the MCA to request, as required, operators to provide necessary accounting records, including data on revenues received from third parties in order to ensure that accounting separation provisions are being complied with.

5.1.4 Access to, and Use of, Specific Network Facilities

Undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith. However, commercial negotiation on provision of access is the exception rather than the rule.

Mandating reasonable requests for access to network infrastructure can be justified as a means of increasing competition. However, mandating of an access obligation that increases short-term competition should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the long-term.

Regulation 21 of the Regulations states that such an obligation can be imposed on SMP operators 'to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.'

The Regulations lays down a non-exhaustive list of access requirements that may be imposed on operators including unbundled access to the local loop, to negotiate in good faith, to maintain supply, and to provide wholesale services for resale. In addition there are technical, collocation, interoperability, operational support and general interconnection requirements which operators may be required to provide or adhere to.

Given the general scope of this obligation the Regulations stresses the fact that imposition of access obligations must be proportionate and justified in terms of regulation 17(4) of the regulations and must meet the objectives set out in Article 4 of the Act. More specifically regulation 21(4) of Regulations lays out conditions that must be taken into account when imposing access requirements, including the feasibility of the action, the viability of using or installing competing infrastructure and the maintenance of the initial investment decision so that long term competition is safeguarded.

In terms of the Regulations this is the most extensively described of any of the obligations reflecting its importance and its role in effecting competitive markets. Although this remedy can be mandated by itself, it is more likely that it would be accompanied by a number of other obligations depending on the nature of the problem.

A transparency obligation may be imposed in conjunction with access, perhaps in the form of a reference offer or some other mechanism which sets out availability, the technical and financial terms and conditions for such access. Non-discrimination is also likely to accompany such an obligation as often where access is required vertically integrated entities are capable of acting in ways so as to leverage market power from the upstream to the downstream firm's advantage. Imposition of a non-discrimination obligation would protect against such behaviour. Provision of

necessary information is also essential to ensure efficient monitoring of the non-discrimination requirement or whether additional obligations in terms of accounting separation are necessary to ensure effective compliance. Finally, cost control obligations may be imposed in order to establish the actual level of charges for access, based on the true cost of provision of the service.

There is a logical sequencing to the remedies that might be required but there is no way to say beforehand which combination or combinations would be appropriate. Such a decision depends on the specific problems identified through the market analysis of that relevant market.

5.1.5 Price Control and Cost Accounting Obligations

Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices are reasonable, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing.

This obligation may limit the ability of operators with significant market power to engage in a price squeeze whereby the difference between their retail prices and the access/interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition.

When calculating costs the MCA shall use a method that is appropriate to the particular circumstances, taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits. Moreover, the MCA must ensure that where a cost accounting system is mandated in order to support price controls a description of the cost accounting system is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs.

Compliance with the cost accounting system shall be verified by a qualified independent body, which can be the MCA provided that it has the necessary qualified staff. A statement concerning compliance shall be published annually.

The burden of proof to demonstrate that charges are derived from costs including a reasonable rate of return on investment rests with the operator. Furthermore, the MCA may require a full justification of the operator's prices and may require their adjustment if appropriate.

Similarly to the access obligation, the MCA is required to take into consideration the provisions of Article 4 of the Act and the need to promote efficiency. When mandating price control the MCA is required to take into account all relevant factors when setting the rate of return to ensure that investment is maintained, long-term competition is fostered and ensure that consumer gain maximum benefits. In setting up price controls guidance can be derived from observing what happens in comparable competitive markets.

05.2 Retail Remedies

The Regulations give also regard to interventions specifically concerning retail markets that are characterised by the existence of SMP. As a general rule, regulatory controls on retail services should only be imposed where relevant wholesale

measures or measures regarding carrier selection or pre-selection would fail to achieve the objectives set out in Article 4 of the Act.

This is a common theme in the new regulatory framework and the *Recommendation* on relevant markets states, that interventions on the wholesale market are preferable to interventions on the retail market. The *Recommendation* states that, “*regulatory controls on retail services can only be imposed where relevant wholesale or related measures would fail to achieve the objective of ensuring effective competition.*”¹⁰

A similar requirement is found in regulation 37(1) of the Regulations where it suggests that if measures at the wholesale level and/or the use of a carrier selection or pre-selection obligation do not suffice to resolve the problem, other obligations at a retail level may be imposed.

The list of possible retail obligations mentioned in the Regulations is not an exhaustive one. However, it includes specific mentioning of the prohibition of excessive or predatory pricing, undue price discrimination or unreasonable bundling of services, which may be implemented inter alia by means of price caps or individual price controls. Furthermore, under the provisions of regulation 37 the MCA may apply appropriate retail price cap measures, measures to control individual tariffs, or measures to orient tariffs towards costs or prices on comparable markets, in order to protect end-user interests whilst promoting effective competition.

5.2.1 Leased Lines and Carrier Selection and Pre-selection

Regulations 38 and 39 of the Regulations set out provisions for the imposition of retail remedies with respect to the minimum set of leased lines and the provision of carrier selection and pre-selection services.

With regards to the minimum set of leased lines the eighth schedule of the Regulations sets out specific regulatory provisions in some detail. Those obligations mean that SMP undertakings must provide leased lines in the minimum set in a non-discriminatory manner, at cost orientated price (with associated cost accounting) a transparency requirement and according to certain quality parameters.

In addition, undertakings with SMP for connection to and use of the public fixed network at a fixed location must provide carrier selection by means of a carrier selection code and carrier pre-selection combined with carrier selection at cost orientated prices. Moreover, their direct charges to subscribers, e.g. line rentals, should not act as a disincentive to the use of such facilities.

05.3 Application of Remedies

When imposing remedies to competition problems, the MCA has to ensure that the remedies chosen are assessed on the nature of the problem identified, proportionate and justified in light of the objectives outlined in the Act. As mentioned earlier, Article 4 of the Act highlights the objectives that should guide the MCA when imposing remedies which include, the promote competition, the development of the internal market and to promote the interests of the citizens of the European Union. Within this setting, the MCA shall base the choice of remedies to be imposed on SMP operators on a set of principles that ensure compliance with the said objectives.

¹⁰ Commission *Recommendation* on relevant markets, page. 15.

The first principle stems out from the requirement outlined in regulation 17(4) of the Regulations where it requires that remedies must be based on the problem identified, be proportionate and justified in light of the objectives described before. The MCA shall therefore produce reasoned decisions in line with these obligations. This incorporates the need that the remedy selected be based on the nature of the problem identified and be accompanied by a discussion on the proportionality of the selected remedy. These decisions will include, for any given problem, consideration of alternative remedies where possible, so that the least burdensome effective remedy can be selected. The decisions adopted by the MCA will also take into account the potential effect of the proposed remedies on any related markets.

Where infrastructure competition is not a feasible option, consumers' benefits may be at risk due to limited competition. To this end the second principle to guide the MCA shall be the protection of consumers' interest where infrastructure competition is not feasible. This problem might arise due to persistent presence of bottlenecks associated with significant economies of scale or scope or other entry restrictions. The MCA will need to ensure that there is sufficient access to wholesale inputs in order to stimulate sufficient competition that will maximize consumers' benefits in terms of choice, quality and price.

At the core of the third principle is the question of whether replication of the incumbent's infrastructure is a feasible option. Where replication is viewed as a feasible option the available remedies should assist in the transition process to sustain a competitive market. Where the investment decision is more uncertain the MCA will keep an open mind and engage in on going monitoring to continually re-assess the dynamics of the market. In these circumstances, no action will be taken that might delay or otherwise stop investment in competing infrastructure where this is efficient.

A final principle to guide the MCA should be that remedies should be designed, where possible, to be incentive compatible. The MCA shall formulate remedies in such way that the advantages for the regulated party to comply with the obligations outweigh the benefits of non-compliance. Although such a practice is very difficult to apply in practice, incentive compatible remedies are likely to be both effective and require a minimum of on-going regulatory intervention.

06. The Consultation Process

Article 10 of the Act requires the MCA to publish the results of the market reviews and to provide operators the opportunity to comment on the findings prior to adopting the draft measures. Furthermore, regulation 6 of the Regulations establishes that prior to adopting the draft measures proposed in the market review the MCA is required to notify the Commission with the findings of the market reviews and the proposed remedies to be imposed on SMP operators.

The Framework Directive states that national consultations should be held at the same time as notifying the Commission in line with procedure outlined in Article 7. However, the Recommendation¹¹ on the Article 7 procedures encourages prior national consultation on the draft measure.

The MCA is of the opinion that carrying out a national consultation prior to notifying the Commission would be more beneficial for all the stakeholders. Prior national consultation would give the MCA the flexibility to incorporate comments or evidence generated through the consultation process. Moreover, the Commission would have the opportunity to comment on the market review including the response arising from the national consultation process and the replies provided by the MCA. On the other hand, the operators would have the possibility to comment and raise their concerns about the findings of the MCA before the market review is forwarded to the Commission, thus giving the operators the possibility to air their views also to the Commission prior the final decision is adopted.

Based on these considerations and in line with the obligations arising from Article 10 of the Act and regulation 6 of the Regulations, the MCA will adopt the following consultation and notification procedure.

06.1 Consultation and Notification Procedure

Following the completion of the market review the MCA shall publish the review together with the draft measures to be imposed on SMP operators for public national consultation. This national consultation will last **four** (4) weeks through which any interested party may forward comments on the consultation document.

In exceptional circumstances, the MCA may also consider extending the period of consultation if requested to do so by potential respondents. The MCA will only consider such requests if received within five (5) working days of publication of the consultation document. This is necessary to allow sufficient time to permit adequate consideration of the reasons for the request and to also allow for other parties to be made aware of any extension of the time limit should the request be approved.

The responses received through the consultation process will be acknowledged within five (5) working days in writing or through email. All views will be considered and due account will be taken of the views expressed. As required under Article 10(3) of the Act the MCA will provide a summary and its views on the comments submitted during the consultation period in a response to consultation document that will be published for the general public. Where certain issues are considered to be

¹¹ Commission *Recommendation* of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

commercially sensitive or of a confidential nature (operators need to clearly state in their submission which part/s of their responses is/are considered as confidential), the MCA shall not make publicly available such responses but only the interested parties shall be notified. The proposed time period for the MCA to issue a response to consultation document has been set to be four weeks, however this period can be decreased or extended depending on the following factors:

- the number of comments elicited during the consultation period;
- the complexity of the issues to be addressed; and
- the urgency of the matter.

Following the publication of the response to the consultation document, the MCA shall notify the Commission with the results of the market review and the draft measures including the response to consultation, as required under regulation 6 of the Regulations. During the notification period the Commission and other foreign regulatory agencies will have the opportunity to comment on the findings of the MCA and the responses of the national consultation.

Based on the findings of the market review the Commission shall either issue its final decision or decide to extend its investigations by a further two months, in which case the Commission will comment on the MCA's findings giving reasons for the extension of its investigation. The Commission can extend its investigations on a particular draft measure proposed by the MCA where the draft measure concerns:

- the definition of a relevant market which differs from that identified in the *Recommendation*, or
- a decision as to whether to designate, or not to designate, an undertaking as having SMP, either individually or jointly with others.

Where in either of these two circumstances the Commission has expressed its concern that the draft measures proposed by the MCA would either create a barrier to the single European market or where the Commission has serious doubts as to the compatibility of the draft measures with Community law, the Commission shall extend its investigations for a period not longer than two months.

Irrespective of whether the Commission issues a final decision after the initial stage of the notification process or after extending further the investigations, the MCA will take utmost account of the comments forwarded by the Commission. Following the issuing of the final decision, the MCA shall adopt as soon as possible the identified measures to be imposed on SMP operators.

Figure 02 overleaf depicts the consultation process as a flowchart.

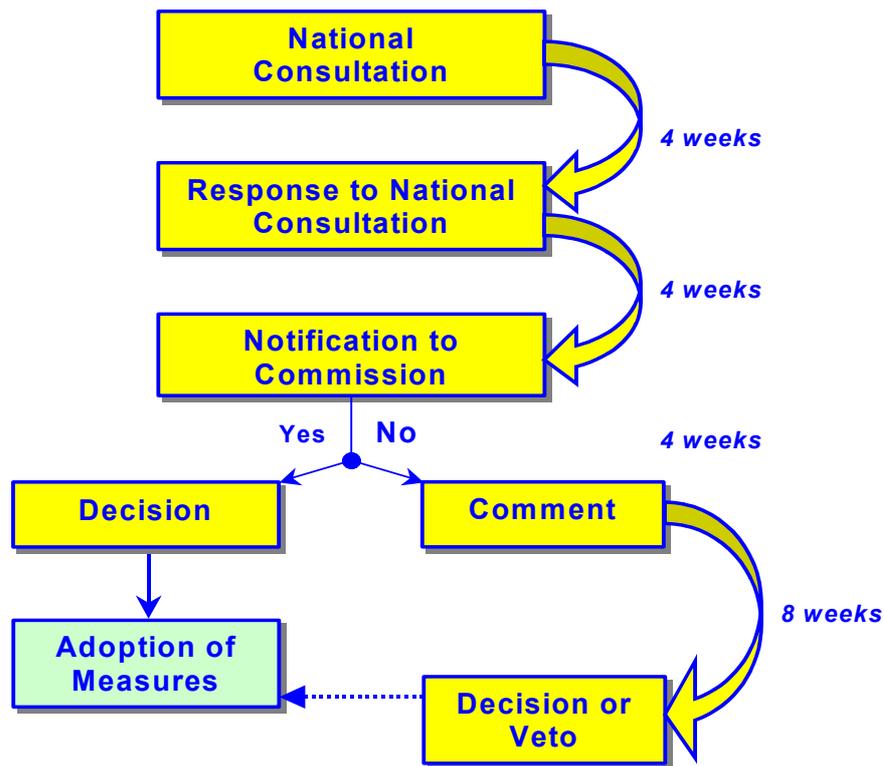


Figure 02 – Consultation Process

06.2 A Two Phase Consultation and Notification Procedure

An alternative process that could be adopted by the MCA is a two-phase national consultation and notification procedure. The adoption of a two-phase approach would be ideal where the proposed remedies, to be imposed on SMP operators, involve considerable detail at the design stage. In such a case the MCA would first carry out a national consultation and notification process (as described above) with the market review and only a high level description of the proposed remedies and following that a response to consultation document would be published and notified to the Commission.

The Commission would then issue its decision on the results of the market review and the proposed high-level remedies. Following this initial consultation and notification process the MCA would then carry out a second national consultation and notification process for the document outlining the detailed description and implementation framework for the proposed remedies. The national consultation, response to consultation and subsequent notification to the Commission would be identical to that carried out in the first phase for the market review.

Following the publication of the decision by the Commission the MCA would then adopt the proposed measures and impose them on the identified SMP operators. The following figure illustrates the flow of the two-phase approach.

A noted disadvantage with the two-phase approach is that the adoption of the proposed remedies would take a minimum of 24 weeks following the completion of the market review, as opposed to the duration of 12 weeks of the first approach.

Figure 03 below depicts the two-phase national consultation process as a flowchart.

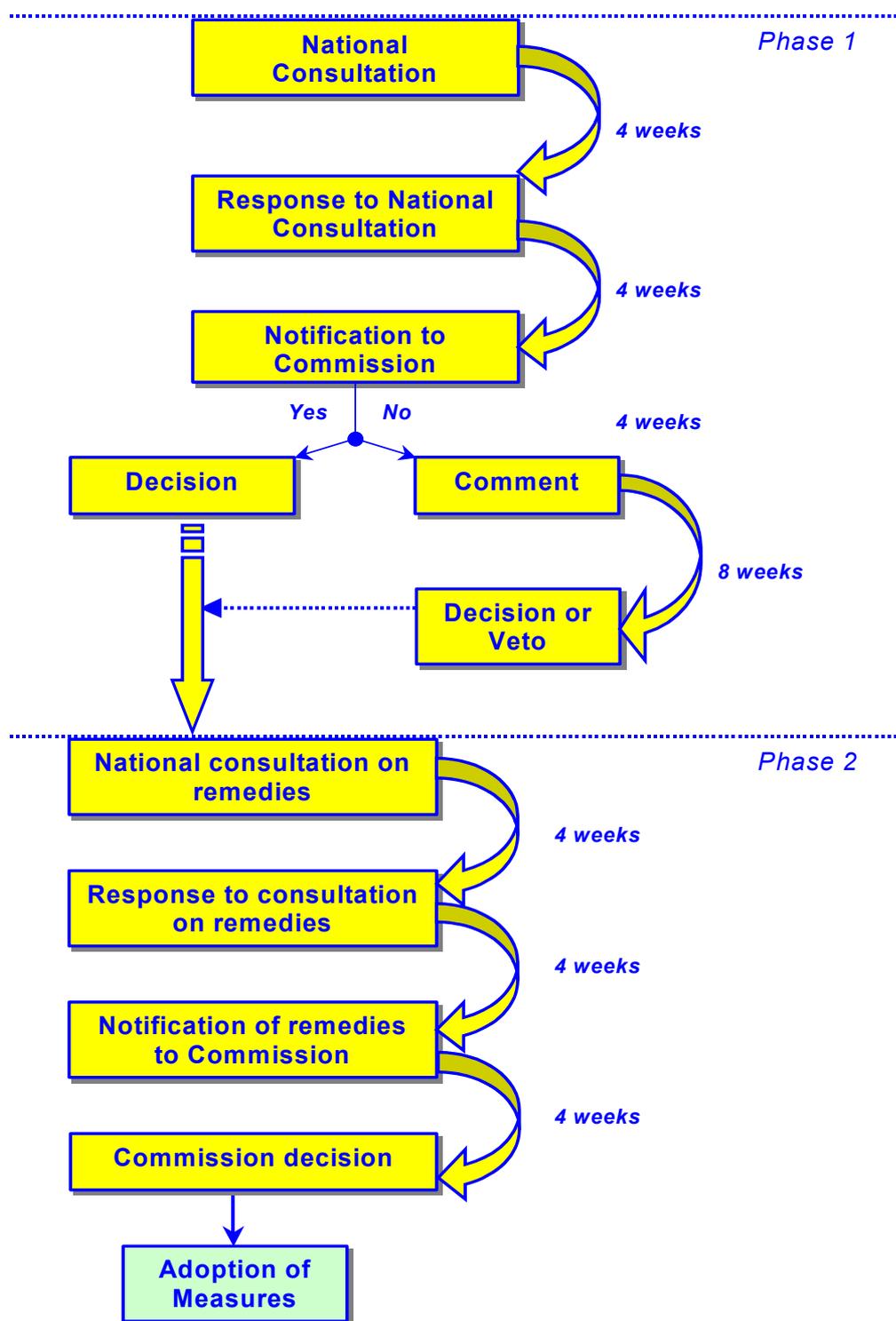


Figure 03 – Two-Phase Consultation Process

As the MCA is required to carry out the market reviews and adopt appropriate remedies ‘as soon as possible’ following the adoption of the legislation, the MCA would adopt the two-phase approach **only** where the circumstances of the market require doing so.

07. Information and Data Gathering

The MCA has already gathered a wide array of information and data which has been maintained over the past years since its inception in January 2001. This data is used to inform policy decision-making and to monitor the effects of regulation. The main sources of information and data are:

- Quarterly market information forms sent out to undertakings operating in the electronic communications sector;
- Market research carried out by the MCA on a regular or ad hoc basis;
- Price trends and other data which has to be made available to the MCA under specific license conditions or as imposed under current obligations;
- Publicly available information through operators' websites and other media sources; and
- International benchmarking data available from international organizations.

However, the carrying out of the market reviews as required under the new regulatory framework would necessitate additional data and information that would be essential for the detailed analysis of the markets. The need for additional data stems primarily from three main reasons:

1. under the current framework the assessment of dominance was mainly based on market shares, whilst now it has to be assessed based on a list of additional economic criteria identified in the Commission *Guidelines*;
2. there are eighteen (18) markets to be analysed as opposed to the five (5) markets identified under the 'old' framework;
3. current data collection has been more focused on aggregates - a detailed analysis of the markets would require a breakdown of certain variables.

For the abovementioned reasons, the MCA requires the cooperation of the operators in this sector to provide the additional information and data outlined in Tables 01- 03 below, in order to enable the MCA to carry out the market reviews. While being aware of the importance of this additional information, the MCA is conscious of the need to ensure that the process of requesting additional ad hoc data for market reviews minimizes the burden placed on operators and does not result in unnecessary duplication of effort.

A record of all data requests for the purpose of market reviews will be kept in an appropriate database within the MCA. This will ensure that any ad hoc data requested for the reviews is not already available, or has not already been requested for use in another review. Unless otherwise stated, the MCA intends to share any information received between market reviews in order to minimise the burden placed on operators.

07.1 Consistency in Provision of Data

It is important that any data submitted to the MCA for the market reviews exercise is consistent with existing data sources. For example, more detailed information on a product or service should reconcile with previously submitted aggregate data. Where possible, any additional quantitative data submitted for the market reviews will be cross-referenced with existing market information data.

It is in the interests of both the MCA and data providers to minimise inconsistencies between existing data and the submissions for the market review, as this will lead to

additional demands on operators in order to resolve any discrepancies. Where possible, data providers must cross check with data already provided to the MCA in order to ensure consistency. To this end, it is important that data providers appoint a person responsible for the submission and checking of the data. Where the person being appointed for the submission of data for the market reviews is not the same as for the submission of existing data, the operator must ensure that the information being provided by both parties is consistent and reliable.

07.2 Information and Data Requirements for the Market Definition Process

During the market definition stage the MCA will identify the products/services that make up the relevant markets identified in the Commission *Recommendation* or relevant market appropriate to the national circumstances.

Market data requested for the market definition procedure will include information necessary to examine:

- the scope of relevant markets with a regard to their product, customer and geographical dimension, including their demand and supply-side substitutability;
- the magnitude of barriers to competition (barriers to entry and barriers to expansion); and
- dynamic aspects that may increase or decrease competition in the future.

Table 01 below provides an overview of the market data that the MCA may request from operators in the context of the market definition procedure. It should be noted that this not an exhaustive list, nor are the criteria cumulative.

Table 01 – Data requirements for Market Definition

Definition/analysis of	Criteria	Variables
Product/service markets	Substitutability	<ul style="list-style-type: none"> ○ Product/Service Characteristics ○ Churn rates ○ Switching Costs ○ Price transparency on demand/supply side ○ Prices and volumes
	Bundling	<ul style="list-style-type: none"> ○ Tariffs and turnover for bundled and unbundled products
	Size of relevant market	<ul style="list-style-type: none"> ○ Turnover ○ Number of minutes and customers
Market/customer segments	Chain Substitutability	<ul style="list-style-type: none"> ○ Service/product characteristics for residential/non-residential customers. ○ Tariff options for residential/non-residential customers
Barriers to competition	Economies of scale /scope	<ul style="list-style-type: none"> ○ Network infrastructure ○ Qualitative information
Dynamic aspects	Technological innovation	<ul style="list-style-type: none"> ○ Qualitative Information

07.3 Information and Data Requirements for the Market Analysis

Following the identification of the relevant market, the MCA is required to analyse the relevant market in order to determine whether that market is effectively competitive or if any operators have a significant market power. Based on the outcome of this analysis the MCA will decide whether to impose, maintain, amend or withdraw obligations on operators. The analysis of dominance will include a detailed assessment of both single and joint dominance within a particular relevant market.

Table 02 provides an overview of the data requirements that the MCA may request from the operators for the assessment of single dominance.

Table 02 – Data requirements for Market Analysis – Single Dominance

Criteria	Variables
1. Market shares; 2. Overall size or undertaking; 3. Economies of scale;	<ul style="list-style-type: none"> ○ Turnover/Revenues ○ Number of minutes ○ Number of subscribers ○ Number of calls/SMS ○ Capacity
4. Control of infrastructure not easily duplicated; 5. Highly developed distribution and sales network; 6. Economies of scope;	<ul style="list-style-type: none"> ○ Type of network infrastructure ○ Investment/operational cost ○ Distribution and sales network (outlets etc.) ○ Bundling of services/products
7. Technological advantage or superiority;	<ul style="list-style-type: none"> ○ Qualitative information. (Product/ service characteristics)
8. Absence or low countervailing buying power;	<ul style="list-style-type: none"> ○ Share of biggest customers from turnover
9. Easy or privileged access to capital markets and financial resources;	<ul style="list-style-type: none"> ○ Qualitative information. (Financial statements and capital markets reports)
10. Products/ services diversification, Product Bundling;	<ul style="list-style-type: none"> ○ Types of products/ services bundles ○ Revenues from product/ service bundles
11. Vertical Integration;	<ul style="list-style-type: none"> ○ Control and ownership of infrastructure ○ Links/relationships between companies
12. Lack of potential competition; 13. Barriers to market entry and expansion.	<ul style="list-style-type: none"> ○ Number and dates of new market entry and exits ○ Past market shares ○ Investment/ sunk costs ○ Market growth ○ Switching costs (supply/demand)

In its assessment of dominance the MCA is also required to take into consideration the possibility of collective dominance within a relevant market. The following table provides an overview of the data requirements that the MCA may request from the operators for the assessment of collective dominance.

Table 03 – Data requirements for Market Analysis – Joint Dominance

Criteria	Variables
1. Market concentration; 2. Similar market shares;	<ul style="list-style-type: none"> ○ Turnover/Revenues ○ Number of minutes ○ Number of subscribers ○ Number of calls/SMS ○ Capacity
3. Mature market; 4. Stagnant or moderate growth on the demand side; 5. Low elasticity of demand;	<ul style="list-style-type: none"> ○ Turnover/Revenues ○ Prices ○ Market entry and exit ○ Number of minutes/subscribers ○ Number of calls/SMS
6. Homogenous product; 7. Lack of technical information, mature technology;	<ul style="list-style-type: none"> ○ Qualitative information. (Product/ service characteristics)
8. Similar cost structures;	<ul style="list-style-type: none"> ○ Investment, operational costs
9. Absence of excess capacity;	<ul style="list-style-type: none"> ○ Qualitative information. ○ Capacity
10. Lack of countervailing buying power;	<ul style="list-style-type: none"> ○ Share of biggest customers from turnover
11. Informal or other links between undertakings; 12. Retaliatory mechanisms;	<ul style="list-style-type: none"> ○ Qualitative information; ○ Price trends
13. Lack of potential competition; 14. High barriers to market entry and expansion;	<ul style="list-style-type: none"> ○ Number and dates of new market entry and exits ○ Past market shares ○ Investment/ sunk costs ○ Market growth ○ Switching costs (supply/demand)
15. Lack of or reduced scope for price competition.	<ul style="list-style-type: none"> ○ Price trends

Furthermore, the MCA may utilise additional available information to supplement the data supplied by the operators for the market definition and market analysis process. The MCA may take into consideration, where relevant, price trends and price dynamics of the market in question and also carry out a benchmarking exercise to compare the deals received by Maltese customers against similar deals received by customers in other jurisdictions. Evidence of past anti-competitive behaviour and the profitability of undertakings may also provide valuable information for the analysis.

07.4 Powers of the MCA to Request Market Data

Article 4 of the MCA Act ensures that the MCA has the powers to request from undertakings providing electronic communications networks and services all the

information, including financial information, necessary to ensure conformity with the provisions of, or decisions made in accordance with, the Act and the Regulations.

The powers of the MCA to request market data will apply to markets referred to in the *Recommendation* on relevant markets and additional markets which the MCA may consider defining under regulation 6 of the Regulations. Undertakings requested to provide information will be required to do so, according to the timeframes established and at the level of detail required by the MCA.

07.5 Timeframes and Collection Methods

The process of defining and analysing markets depends to a large degree on the timely provision of market information sought and on the reliability and accuracy of the information provided.

To this end, the initial collection of market data will be effected via requests for information in the form of detailed questionnaires, which will need to be returned to the MCA by not later than **one month** from the date of request. The information requested by the MCA (as outlined earlier) will reflect its need to carry out the market definition and the market analysis procedures in line the new regulatory framework. It is important to note, that the MCA has done the utmost, and will continue to re-assess its request for information, so as not to impose disproportionate burdens on the providers.

In order to facilitate the provision of information the MCA has tailored different questionnaires in order to reflect better data requirements for different types of electronic communications services provided in the market. These questionnaires include all the data requirements envisaged necessary by the MCA for the carrying out of the market reviews. However, it cannot be excluded that additional information may be requested from operators where particular circumstances require doing so. These occurrences are expected to be minimal if the accuracy and the level of detail of the data submitted by the operators is satisfactory.

Where information is sought and the provision of such information is refused or delayed, the MCA may have to proceed on the basis of information already provided. The MCA may request written confirmation from a person required to provide information (such as a chief financial officer or a board director) verifying that the information provided is accurate and complete.

07.6 Information Meetings with Data Providers

To facilitate further the provision of data and information, the MCA is committed to maintain a continuous dialogue with the operators' appointed contact persons regarding the collection of data and information relating to the market review exercise. This dialogue will at first be by letter, with further meetings and forums on a company and industry basis to discuss data needs in general and provide clarification of data requirements where necessary. The MCA will also appoint a contact person/s responsible for the collection of data and information request and to whom operators can address any difficulties or issues which require immediate attention.

08. Project Structure and Timelines

08.1 Market Clusters and Project Organisation Structure

It can be easily noted that some of the markets identified in the *Recommendation* are interrelated (refer to **Appendix 01**). Based on the practices adopted by other NRAs and due consideration of local market conditions, it was established that the best approach to tackle this project would be to divide the market analysis exercise into five clusters:

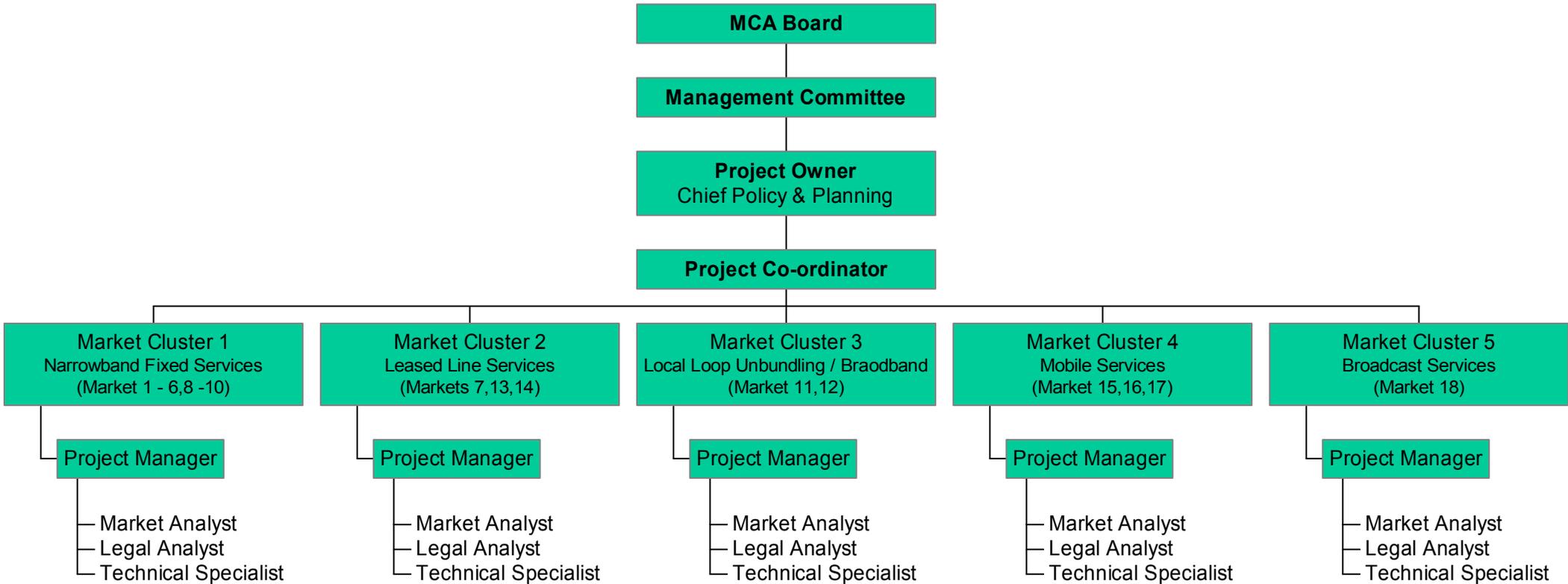
01. Narrowband Fixed Services (Markets 1-6, 8-10)
02. Leased Lines Services (Markets 7,13,14)
03. Local Loop Unbundling / Broadband Markets (Markets 11,12)
04. Mobile Services (Markets 15,16,17)
05. Broadcast Services (Market 18)

The clustering of markets would enable the MCA to analyse similar markets together. A project team for each market cluster has been identified and will be responsible to carry out the market reviews and any associated tasks related to that particular cluster. This system will reduce significantly the time that team members would require to familiarise themselves with and understand the markets under investigation.

Furthermore, due to the large amount of work that this project entails - ranging from human resource effort to the management of information - the project will include the participation of members from various units within the MCA, bringing together various areas of expertise needed for the successful completion of the project.

The ownership of the project will reside with the Chief of Policy and Planning, whilst the overall co-ordination will be the responsibility of a Project Coordinator reporting to the Chief of Policy and Planning. A project manager will be responsible for each market cluster. The diagram overleaf depicts the Project Organisational Structure followed by the responsibilities and activities of the key players:

Project Organisation Structure



08.2 Key Roles and Responsibilities

Table 04 hereunder depicts the key responsibilities and activities that each role within the context of this project is required to perform.

Table 04 - Responsibilities and Activities

Responsibility	Activities
MCA Board	Approves final decisions
Management Committee	Approves the project Monitors progress Agrees on market review recommendations
Project Owner	Project ownership and responsibility Sets strategy and provides direction Reviews final market review reports
Project Coordinator	Coordination of overall project Identifies and manages issues Provides feedback to Project Owner and Management Committee Monitors progress Monitors overall quality control and consistency Reviews draft market review reports
Project Team (per Cluster)	
Project Manager	Provides direction / coordination within cluster Organises the Market Review process in line with the established methodology Coordinates tasks and ensures time schedule Drafts Market Review report Ensures quality control Liaises with Project Coordinator / Project Owner Consultation with stakeholders via project owner
Team Members	
Market Analyst	Assesses required statistical information Assists in the Market Definition process Carries out Market Analysis Assists in the identification of Remedies Assists the Project Manager in the drafting of the report
Legal Analyst	Assists in the Market Definition process Identifies Remedies Assists the Project Manager in the drafting of the report
Technical Specialist	Assists in the Market Definition process Provides technical advice at the various stages of the analysis Assists the Project Manager in the drafting of the report

08.3 Project Implementation and Timelines

The SMP project will be tackled in three key phases:

Phase I	Designing of methodology and the identification of market information requirements
Phase II	Project Team preparatory work / assessment of market information for each market cluster
Phase III	The Market Review for each market cluster

8.3.1 Phase I – Designing of methodology

As mentioned earlier, following the enactment of the new electronic communications regulatory framework, the MCA is required to undertake market reviews of electronic communications markets according to Commission *Guidelines*. The main objective of this phase is to design a methodology to be utilised for the carrying out of the market reviews for all clusters. As part of this process, the MCA is also to take note of the current data being collected and identified additional data and information that will need to be collected for the new market review regime.

The key deliverables of Phase I of the project amongst others include:

- the development of a methodology for the carrying out of the market reviews;
- the assessment of key data and information requirements for the carrying out of market reviews, and the designing of appropriate questionnaires and mechanisms for the collection of this information; and
- the articulation of a public consultation process for the market review exercise, including a memorandum of understanding between the MCA and competition authority.

The duration of Phase I of the project is planned to be 3 months. The MCA initiated Phase I of the project in June and is expected to end on schedule by the end of September. The publication of this methodology paper, incorporating a high-level description of the data requirements and the method of consultation both at a national and EU level, summarises the work of the past three months. Detailed questionnaires will be sent out to all interested parties over the next weeks. A memorandum of understanding between the MCA and the Office of Fair Trading outlining the modus operandi with respect to regulation of the electronic communications market is also envisaged to be completed in the coming weeks.

8.3.2 Phase II – Preparatory work and assessment of information

Phase II of the project is intended for the respective project managers together with their team members to start familiarising themselves with the markets identified within their cluster and the market review procedures to be undertaken.

During this phase, each project team would be required to analyse all available documentation related to their respective clusters in order to set the basis for the respective market review/s falling within their Cluster (refer to Phase III).

The key deliverable of Phase II of the project will consist of a scoping report/presentation outlining the findings of the project teams for each market and a proposed way forward for the carrying out of the Market Review. During this phase, work on all the clusters will be undertaken in parallel. The work carried out by each cluster is expected to be completed within twenty-five (25) working days.

8.3.3 Phase III – Carrying out of Market Reviews

Following the successful completion of Phase I and Phase II, the project teams would be in a position to start Phase III of the project. This will consist of the SMP analysis for each market within the respective clusters. As identified in the Commission *Guidelines*, the SMP analysis will consist of the following three stages:

Market Definition	The identification of products/services that make up the market and the assessment of the geographical scope of that market based on the principles of competition-law.
Market Analysis	The carrying out of a forward-looking analysis based on the existing market conditions of the markets identified. This analysis should determine whether the market is competitive or prospectively competitive over a reasonable period of time, and identify operators having SMP.
Identification of Remedies	The identification of remedies to be imposed on operators having SMP.

The proposed methodology to be used for the carrying out of the market reviews is being outlined in this document. A flow chart outlining the whole process of the carrying out of market reviews under the new regulatory framework is provided in **Appendix 02**. The key deliverable of this phase would be the Market Reviews for each cluster. Phase III of the project is expected to start in November 2004 and be completed by the end of 2005, when the last Market Reviews are envisaged to be notified to the Commission. The following are indicative timelines for the completion of market reviews:

Cluster	Start Date	Finish Date
1. Narrowband Fixed Services (<i>Markets 1-6, 8-10</i>)	Nov 2004	Oct 2005
3. Local Loop Unbundling/Broadband Markets (<i>Markets 11,12</i>)	Nov 2004	June 2005
4. Mobile Services (<i>Markets 15,16,17</i>)	Nov 2004	July 2005
2. Leased lines services (<i>Markets 7,13,14</i>)	June 2005	Dec 2005
5. Broadcast Services (<i>Market 18</i>)	July 2005	Dec 2005

The market reviews for Clusters 1, 3 and 4 will start concurrently during November 2004, following the submission of data by the operators. The market reviews for Clusters 2 and 5 will start upon completion of Clusters 3 and 4 respectively.

Appendix 01 – List of Relevant Wholesale/Retail Markets

Table 04 – Comparison of markets under the old and new framework

<i>Markets under old framework</i>	<i>Markets under new framework</i>
1. Fixed Telephony Market	Market 1: Access to the public telephone network at a fixed location for residential customers
	Market 2: Access to the public telephone network at a fixed location for non-residential customers
	Market 3: Publicly available local/national telephone services provided at a fixed location for residential customers
	Market 4: Publicly available international telephone services provided at a fixed location for residential customers
	Market 5: Publicly available local/national telephone services provided at a fixed location for non-residential customers
	Market 6: Publicly available international telephone services provided at a fixed location for non-residential customers
	Market 8: Call origination on the public telephone network provided at a fixed location
	Market 9: Call termination on individual public telephone networks provided at a fixed location
	Market 10: Transit services in the fixed public telephone network
	Market 11: Wholesale unbundled access (including shared access) to metallic loops and subloops for the purpose of providing broadband and voice services
2. Leased Lines Market	Market 7: The minimum set of leased lines
	Market 13: Wholesale terminating segments of leased lines
	Market 14: Wholesale trunk segments of leased lines
3. Telecom Transport Provider, Internet & Data Networks Market	Market 12: Wholesale broadband access
4. Mobile Telephony Market	Market 15: Access and call origination on public mobile networks
	Market 16: Voice call termination on individual mobile networks
	Market 17: Wholesale national market for international roaming on public mobile networks
5. Cable Services Market	Market 18: Broadcasting transmission services, to broadcast content to end users

Legend:	Retail Markets	Wholesale Markets
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Markets under the old framework

Under the old regulatory framework¹² the MCA was required to analyse and identify dominant market players in five main markets, namely the:

1. Public fixed telephony market;
2. Mobile telephony market;
3. Cable services market;
4. Leased Lines market; and
5. Telecommunications Transport Providers, Internet and Other Data Networks Service Providers

The old framework established a methodology for the determination of operators with Dominant Market Power in which those operators having a market share exceeding 25% are presumed to have a DMP, subject to the MCA taking into account other market power criteria, such as an operator's ability to influence market conditions and the availability of financial resources.

Furthermore, operators in the Telecommunications Transport Provider market are subject to the following criteria in assessing DMP:

1. A telecommunications transport provider will be deemed to have a DMP in this market if it is also licensed to operate public fixed telecommunications systems and services or public mobile telecommunications systems and services.
2. A telecommunications transport provider will be determined to have a DMP if a subsidiary company has 25% or more of the market for services licensed under the Internet Service Providers Regulations.

Table 04 above gives a representation of the markets analysed by the MCA under the old framework and the list of new markets that will need to be taken into consideration under the new framework.¹³ Apart from the extended number of markets, another notable difference that emerges when comparing the old with the new markets is the distinction between the retail and wholesale markets. Under the old framework no distinction was being made at a market definition level, whilst under the new framework the markets are defined in a way to allow such a difference. The following is a brief description of the retail and the wholesale markets that will be analysed by the MCA as required under the new framework.

Markets under the new framework

In its *Recommendation* published on 11th February 2003 the Commission identified 18 relevant markets which could be subject to ex ante regulation under the new regulatory framework. The MCA is required to analyse these markets and any additional new markets which may be identified during the market review exercise.

¹² Legal Notice 151 of 2000 as amended by LN70 of 2001, referred to as "the Telecommunications Services Regulations".

Legal Notice 170 of 1999 as amended by LN223 of 2000, referred to as "the Internet Service Providers Regulations".

Legal Notice 61 of 2003 referred to as "the Leases Lines Regulations".

Legal Notice 167 of 2001 referred to as "the Cable Systems Regulations".

¹³ Markets may not be directly comparable. The table gives only a graphical representation of potential breakdowns of the old markets into detailed markets under the new framework.

Retail Markets

Retail markets refer in general to the provision of a connection or access (at a fixed location or address) to the public telephone network for the purpose of making and/or receiving telephone calls and related services (markets 1 to 6). Such access and services may be supplied by several possible means in respect of the undertaking providing the service and the technology that is used. The *Recommendation* distinguishes between two different user groups; residential and non-residential, since the contractual terms and services provided in these markets may not necessarily be the same. The services provided to these two markets are further subdivided into three different markets: local, national and international calls. End users do not usually perceive these services as substitutes and therefore the Commission defined each service as a separate market. The retail market for the provision of data services over private leased lines is defined in market 7.

Wholesale Markets

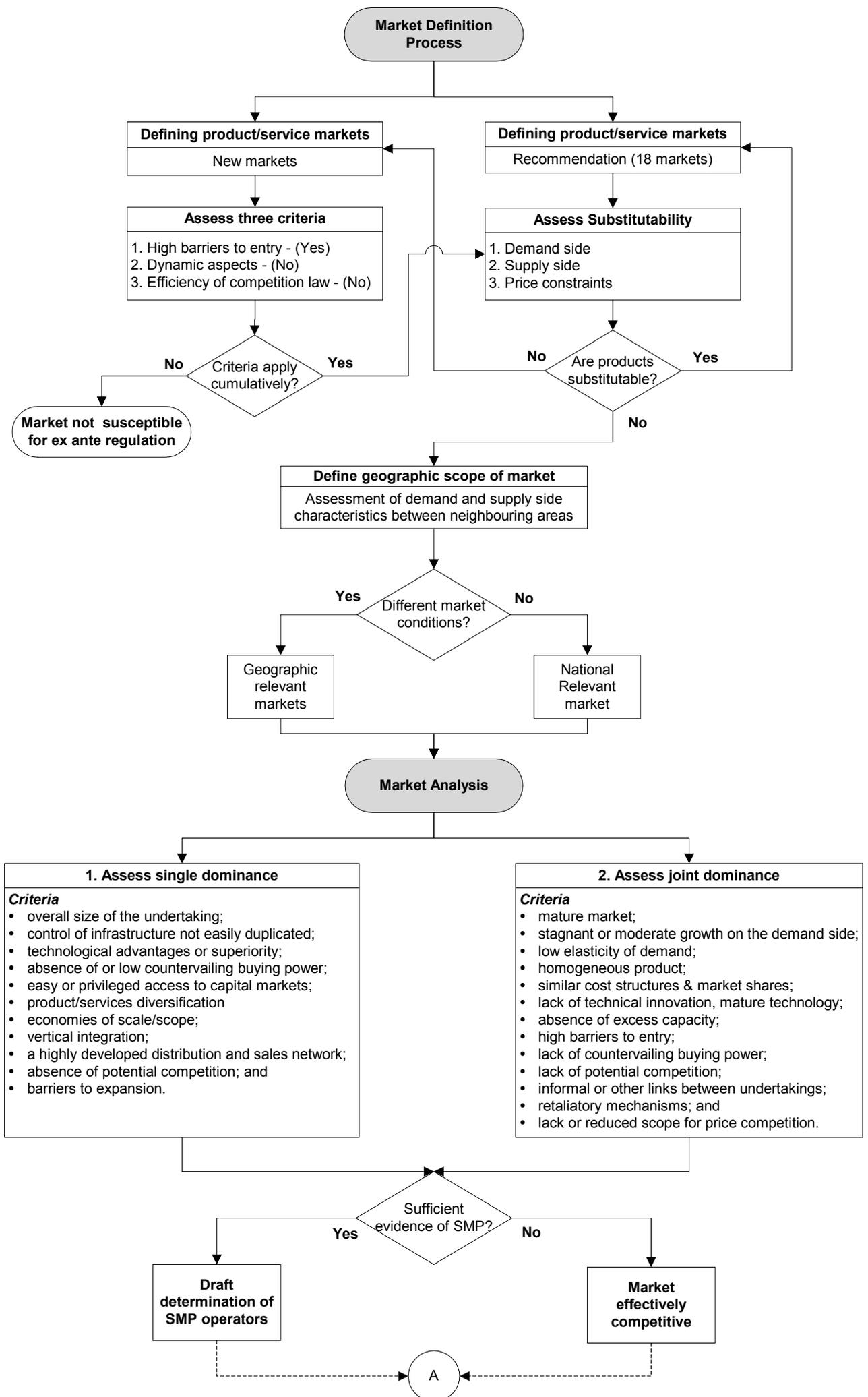
In defining the wholesale markets the Commission identified separate markets for different access/origination, transit/conveyance and termination points in the provision of the related retail services. The Commission identified separate wholesale markets for call access and origination, call transit services, and call terminating services (markets 8 to 10).

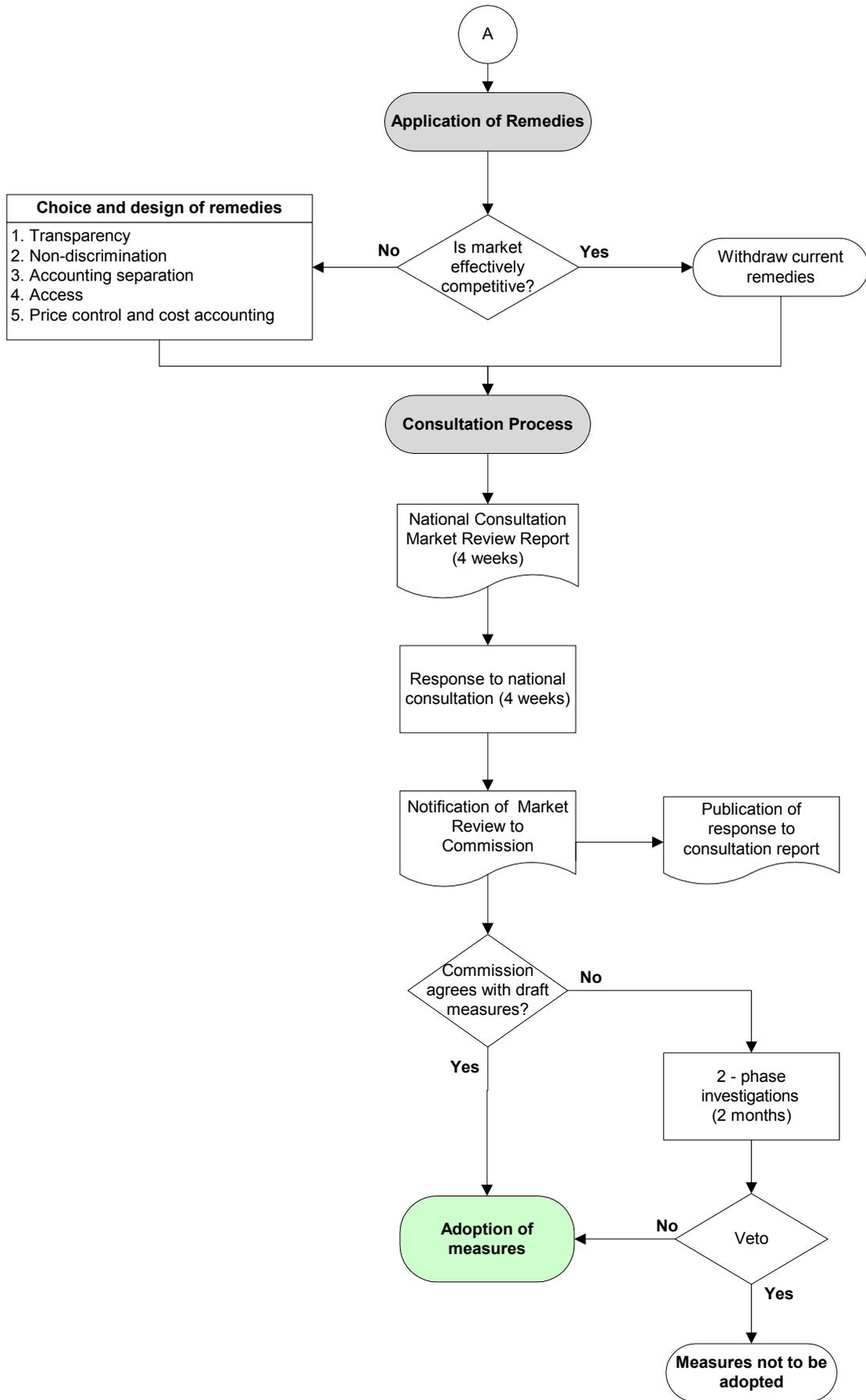
The wholesale markets for the provision of data services have been identified in markets 11 and 12. Market 11 deals with the wholesale unbundled access (including shared access) to metallic loops and subloops for the purpose of providing broadband and voice services. The unbundled access to the local loop is a vital element in the provision of broadband services to the majority of households via the PSTN network. Market 12 identifies the market for the wholesale access to broadband services, which the *Recommendation* more specifically defines as 'bitstream access'. Although the definition of market 12 does not include other possible infrastructures via which broadband services may be provided, the *Recommendation* does not preclude Member States to include other competing networks (like for example the cable networks) within this market definition. The inclusion of alternative networks will largely depend on the extent of the network characteristics and coverage, and the ability to competitively provide an alternative source of broadband access.

Leased lines may be required by end users to construct networks or link locations or be required by undertakings that in turn provide services to end users. The wholesale leased lines markets identified in the *Recommendation* are divided into two: the trunk segments market and the terminating segments which is the local tail (end part) of the leased line. These markets are defined in market 14 and 13 respectively.

Similar to the wholesale markets identified for fixed telephony services, the Commission identified three wholesale markets for the provision of mobile voice call services. Markets 15 and 16 define mobile call access and origination and mobile call termination respectively. In market 17 the Commission defined the 'national market for international roaming' as a separate market from the national call origination market. The main reason for this market stems mainly from the fact that international roaming requires licensed operators to have roaming agreements to provide roaming services. This is often considered as a significant barrier to entry since roaming agreements can only be negotiated between licensed operators only and not virtual mobile network operators.

Appendix 02 – Flow Chart of Market Review Process





References

- Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, (the Authorisation Directive);
- Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities, (the Access Directive);
- Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, (the Universal Service Directive); and
- Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, (the Telecoms Data Protection Directive).
- Malta Communications Authority Act, Cap 418;
- Electronic Communications (Regulation) Act, Cap 399;
- Electronic Communications Networks and Services (General) Regulations 2004, LN 410;
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