

## **Introduction**

Cable & Wireless Jamaica (“C&WJ”) is pleased to respond to the Office of Utilities Regulation’s (“OUR or “Office”) second Consultative Document on Dominant Public Voice Carriers. C&WJ notes that the telecommunications market in Jamaica has evolved considerably since the OUR issued its first Consultative Document in March 2000, and can be expected to change considerably again in the next few months. This second consultation is, therefore, a timely one.

It should be noted that due to the nature of its responses, and in order to avoid repetition of overlapping concerns, C&WJ has not followed the structure of the consultative document in its response

C&WJ proposes to address the issues below in accordance with the following headings:

- A** Examination of the OUR’s application of its framework
- B** Mobile Termination
- C** Alternatives to Services and Network Components
- D** Vertical Integration
- E** OUR Competitive Checklist
- F** Other issues.

Prior to addressing same, C&WJ wishes to:

- (i) state expressly that its failure to address any particular issue raised by the OUR in its Consultative Document does not necessarily represent agreement in whole or in part with the OUR’s position on that issue;
- (ii) expressly reserve the right to comment on any responses provided by other parties in relation to those issues; and
- (iii) request that the OUR provide C&WJ with the source of the data relied on in the compilation of the HHI in Table1.1.

## **A. Examination of the OUR’s Application of its Framework**

### ***A.1 Introduction***

The OUR has proposed a two-step approach in assessing dominance. C&WJ broadly agrees with the approach outlined, but would point to deficiencies in certain aspects of the approach and flaws in how the OUR has applied its own framework.

C&WJ notes that the OUR has set out the methodological approach to the assessment of dominance in the appendix to the consultative document. C&WJ agrees with this approach whereby the first stage is to define the relevant market by considering the extent to which there are demand or supply side substitutes for the product or service in question, and the second stage is that of analysing and investigating whether any participants in that market hold a position of dominance. Only after a rigorous assessment of the relevant market has been undertaken is it possible to effectively implement the second stage.

It must also be noted however, that certain areas in the document reflect a lack of clarity about the purpose and methodology to be used for each of the two stages. For example, the OUR's response at paragraph 2.12 to C&WJ's previous comments<sup>1</sup> on the time dimension of market definition confuses the purpose of the SSNIP test, which is to define markets, with the subsequent assessment of dominance. The 12 month time period for assessing whether price increases can be sustained is only of relevance for assessing the scope of the market – it does not suggest that the firm being assessed is dominant. At the market definition stage, the focus is on a hypothetical sole supplier of the product or service in question and whether it can sustain a significant price increase. If it cannot, due to either demand or supply side substitution, then the market definition needs to be widened to include those substitutes. Guidelines for the application of this test may be found in the US Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, Issued April 2 1992 and Revised April 1997<sup>2</sup>.

Only once the scope of the market has been defined is it relevant to assess whether any firm within that market may hold a dominant position. Further, C&WJ wishes to note that the Fair Competition Act defines an enterprise as holding a dominant position “...if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.”, not as an entity which can sustain price increases.

Notwithstanding the above, C&WJ believes that the OUR has correctly followed the methodology for defining markets and assessing dominance as far as mobile termination is concerned. It is for this reason that C&WJ is unable to comprehend why the OUR has failed to fully apply this methodology to the other identified “markets”, resulting in findings of dominance which are fundamentally flawed and unsubstantiated. C&WJ details below the areas where it believes the OUR has not applied its methodology. These have been categorised in terms of the following sub-headings: Demand and supply side substitution; Time dimension and Dominance by default.

## ***A.2 Demand and supply side substitution***

The OUR states in its appendix that the definition of the relevant market is a necessary step in determining dominance. It then discusses how the assessment of demand and supply side substitutes is a key part of this analysis. C&WJ agrees with this approach but notes that the OUR has not consistently applied this methodology. For example, the section on market definition (paragraphs 3.10 and 3.11) contains very little analysis of the possibilities for demand and supply side substitution in respect of fixed interconnection circuits. Further, in this particular regard, C&WJ assumes that the OUR has included local, long distance and international circuits and switches as part of the same market but would welcome clarification of this from the OUR.

Similarly, the OUR has asserted that fixed line transit represents a distinct market, rather than having reached this conclusion through a rigorous analysis of demand and supply side factors. For example, the OUR states that at the current stage of development fixed and mobile systems are not effective substitutes, based on functionality and price levels

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<sup>1</sup> See C&WJ Response to OUR's Consultative Document on Dominant Public Voice Carriers – April 14, 2000

<sup>2</sup> [www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.htm](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.htm)

of the services offered on these systems. It does not, however, provide any detailed evidence to support this conclusion.

C&WJ believes that the OUR should demonstrate that it has taken a rigorous approach to applying its methodology by setting out the details of this analysis.

C&WJ wishes to note, that even if there are absolute price differences between the transit services offered over a fixed network and transit services offered by an alternative network, this in and of itself, does not mean that the two services are in separate markets. For the purposes of applying the SSNIP test, it is the reactions of customers and potential suppliers to changes in the **relative** prices of the product or service under consideration that are relevant. So even if there are absolute price differences between the transit services provided by a fixed network and those provided by an alternative network, they may still be within the same market. The test should be whether changes in the *relative* price of fixed transit services would result in either demand or supply-side substitution.

### ***A.3 Time dimension***

The OUR holds the view that “dominance is assessed at a particular point in time and not in relation to future time period” but accepts that consideration should be given to “potential competition”. In its response to C&WJ’s previous comments<sup>3</sup> on the need to include a time dimension to market definition, the OUR states, “in the application of the SSNIP test, a rule of thumb is that price increases that are sustained beyond twelve months suggest that the relevant firm is dominant. For this period, potential suppliers of existing substitute products are included in the market definition.” As already noted above, this statement demonstrates the incorrect application of the SSNIP test, the purpose of which is not intended to directly address the question of dominance but only the boundaries of the market.

Of greater significance to C&WJ, however, is that in its assessment of dominance, the OUR has not considered any potential competition, even though this is specifically mentioned in Section 19 of the Fair Competition Act. For example, in its assessment of fixed interconnection circuits, the OUR has not taken account of the fact that the removal of legal barriers since September 2001 has made the potential for new entry a realistic possibility. Further, although price regulation currently constrains C&WJ’s ability to act independently with respect to the pricing and supply of these circuits, it should be noted that all operators now have the ability to self-provide these circuits and this will therefore act as an effective constraint on C&WJ even if price regulation were to cease.

Similarly, in its analysis of market concentration for domestic fixed line transit business (paragraphs 3.15 and 3.16) the OUR recognises that the market has been open to competition since September 2001 and that thirteen (13) domestic carrier licences and twenty (20) voice service provider licences have been issued. Such overwhelming evidence of potential new entry is usually regarded by competition and regulatory bodies as strong supporting evidence that, despite a high current market share, C&WJ would not be able to act independently with respect to the supply of such services, even if there may be a time lag before the new licence holders fully launch their services. Accordingly,

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<sup>3</sup> *ibid*

and also taking into account the previous comments on potential competition from mobile operators for transit services, C&WJ would urge the OUR to reconsider its conclusions on dominance for these services.

The same considerations would seem to apply to the OUR's analysis of international transit and switching. The OUR states that there are no legal substitutes for these services and that this means that C&WJ is dominant. The section on market concentration, however, then states that entry into the market is barred until March 1, 2003. Given that this is just three months away, C&WJ would expect the OUR to take full account of the likelihood that there will be entry and that such entry would ensure that C&WJ would not be able to act independently of its competitors and customers, even in the event that it were no longer deemed dominant.

C&WJ would therefore urge the OUR to undertake a full analysis of the likelihood of entry into these services. This is particularly in the light of the OUR's statement that international voice service is the most lucrative segment of the "market", as this suggests that it is highly likely to attract new entrants. C&WJ does not believe that it is sufficient for the OUR to merely speculate that the Minister may not exercise his discretion in licensing new entrants.

With respect to fixed call termination, C&WJ accepts that the analysis is analogous with that of mobile call termination. That is, that there are separate markets for termination on each of the fixed operators' networks and that each operator will be dominant with respect to termination of calls on its own network. Whilst there have not been any services launched by any of the 13 licensees, C&WJ would again urge the OUR to take a forward looking view of this service and to declare that all licensees will be dominant in respect of fixed call termination once they launch their services.

#### ***A.4 Dominance by default***

The OUR has stated in paragraph 1.5 that "With the exception of mobile services such as retail mobile voice access and usage, retail Internet service access and termination equipment, C&WJ is considered to be dominant in all other markets for telecommunication products and services."

Such an approach is flawed for a number of reasons:

- Using non-dominance in some markets to imply dominance in the remaining markets is inconsistent with the OUR's own framework for assessing dominance. It clearly demonstrates that no attempt has been made to define any markets, including the retail mobile service markets, retail internet access market and termination equipment market.
- It is inconsistent with the terms and mischief addressed by the Act. More particularly, the Act provides that prior to the OUR determining which public voice carriers are to be classified as dominant it must invite submissions from the public and consult with the FTC. The burden of proof is squarely placed on the OUR to demonstrate a party's dominance. The OUR throughout the consultative document seeks to make a blanket determination in undefined markets prior to consultation,

effectively reversing the burden of proof by requiring respondents to prove why the OUR's determination is faulty.

- the injustice of the approach is further exacerbated by the lack of quantitative analysis in specific markets. This removes all transparency from the process in that carriers thus classified as dominant must seek to be declared non-dominant without the benefit of any established data or positions of the regulator against which to measure the soundness of the grounds of its applications.
- One of the principal roles of the regulator is to facilitate innovation within the various telecommunication markets. Any service provider, whether dominant in certain markets or not, should be able to reap the benefits of any innovations which it produces. To predetermine C&WJ's dominance in all but three stated "markets" inhibits innovation by imposing regulation on services which may or may not fall within the said predefined markets. The OUR's approach in this regard, is therefore inconsistent with this role of the regulator.

In light of the preceding points, C&WJ recommends that the appropriate approach is to positively assess dominance in specific markets and refrain from adopting this approach of defining dominance by default.

#### *A.5 Conclusion of Examination*

C&WJ believes that the OUR has inappropriately applied its own framework, with the exception of its assessment of the mobile termination market. Accordingly, C&WJ believes that the conclusions arrived at by the OUR may be severely flawed. C&WJ therefore urges the OUR to reconsider its conclusions on dominance for the various services in relation to which it has improperly declared C&WJ to be dominant, by properly and thoroughly applying its framework in the manner set out in relation to mobile termination.

C&WJ wishes the OUR to note that this position to a great extent underpins much of C&WJ's response to this Consultative document.

### **B. Mobile Termination**

The contents of this section comprises a response to question 3.1.

C&WJ agrees that each mobile carrier should be declared dominant with respect to the provision of call termination. The reasons for this are apparent through an application of the OUR's two-step approach to the determination of dominance, which starts with the identification of the relevant product and geographic markets, before assessing the extent to which firms within those markets are in a position of economic strength. C&WJ fully supports this methodology, which is consistent with that applied by an increasing number of competition and regulatory bodies throughout the world. C&WJ sets out its analysis of mobile termination using this methodology below:

C&WJ will rely on evidence of the conclusions on market definition adopted in other jurisdictions. In this context, C&WJ notes that, within Jamaica, calls to mobile are supplied under the “calling party pays” principle. This is the same regime that applies within the UK, the rest of Europe, Australia, and a number of other countries. Calling party pays reflects the economic principle that the party who causes costs should bear those costs. One implication of this however, is that when the mobile subscriber selects which mobile network to subscribe to, he does not take into account the cost of incoming calls, as he does not have to pay for those calls. Instead, it is the customer of the fixed and mobile interconnecting network that has to bear the costs of calls to mobile phones, which therefore reduces the incentives for Mobile Network Operators (MNOs) to compete on termination rates.

### ***B.1 Market definition***

C&WJ believes that there are distinct economic markets for call termination on each individual mobile network. This view can be confirmed by the application of the standard demand and supply side substitutability tests that underlie the so-called hypothetical monopolist test<sup>4</sup>.

Before commencing the analysis, it is important to be clear about the nature of the service under consideration. Mobile call termination is the service provided by the (MNO) serving the recipient of a call, to the network operator (which may be either fixed or mobile) of the person who originated the call. This service is therefore an interconnection service, namely a service that is either resold or utilised as an input for the provision of downstream services. The focus of this analysis, therefore, is the relationship between the network operator demanding mobile termination and the network operator supplying mobile termination. C&WJ notes, however, that the OUR has also analysed the extent of substitution at the retail level and has also commented on substitution at this level.

For the purpose of defining the relevant product market, the standard approach is to consider the demand and supply side reactions to a hypothetical monopolist supplier of call termination services imposing a small but significant non-transitory increase in termination rates. Specifically:

- (i) could network operators demanding mobile termination services react by substituting mobile termination with another service? (demand side substitution)
- (ii) could other mobile network operators readily respond to the price increase by offering mobile termination on their own networks? (supply side substitutability)

### ***B.2 Demand side substitution at the interconnection level***

To assess the existence of demand side substitution it is necessary to consider the extent to which there are any substitutes for termination on a given mobile network. Key to

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<sup>4</sup> The hypothetical monopolist test is widely used by competition authorities for market definition purposes. A description of the test may be found in the European Commission’s *Notice on the definition of the relevant market for the purposes of Community competition law* OJ C 372 of 9/12/1997 at [http://europa.eu.int/comm/competition/antitrust/relevema\\_en.html](http://europa.eu.int/comm/competition/antitrust/relevema_en.html)

this analysis is the fact that to be a credible network operator, a carrier must be able to offer its retail customers the ability to reach any other user connected to any other public network. In order to do so, network operators have no alternative but to purchase termination services from all the other operators running public networks (including MNOs). There are no substitutes for these services that would enable the network operator to offer its customers access to the customers of all other networks.

### ***B.3 Demand side substitution at the retail level***

There is also a lack of demand side substitution at the retail level. By their nature, mobile phones enable calls to be made and received at practically any location. Calls to a fixed network are not regarded as substitutes for calls to a mobile network precisely because they do not allow the subscriber to the fixed network to be contacted at, or to make calls from, any location. Therefore, if someone wishes to contact someone else with a certain degree of immediacy regardless of that person's location, the calling party will have to contact the called party by calling him on his mobile. Furthermore, the calling party can only then be able to contact the called party by calling the mobile network that he has subscribed to.

As outlined above, under calling party pays, there is little evidence that parties responsible for choosing mobile networks (that is, retail subscribers to mobile services) take into account the prices of incoming calls, as they are not the parties that have to bear the cost of those calls. There is, therefore, no competitive pressure for MNOs to lower mobile termination charges. There is also no evidence of substitutability between different types of calls.

Neither is there any evidence of substitutability between different types of calls. C&WJ agrees with the OUR's analysis that there are no alternative methods of communication to mobile termination. As C&WJ has already outlined above, it agrees with the OUR that calls to fixed lines are not effective substitutes for calls to mobile, given the different functionalities of the two types of calls. Otherwise, the significant price differentials between the two types of calls (calls to mobile compared to calls to fixed) could not be sustainable. In a similar vein, C&WJ agrees with the OUR that other services such as call-back, voicemail, SMS and paging are not effective substitutes for mobile termination. If they were, then as the OUR points out, prices would tend to equalise over time between these different services as users would switch to the cheapest means of providing them with the desired functionality. But it is precisely because they offer different functionality that such price differentials can be sustained. As the OUR notes, none of these services offer real-time communications.

Similar conclusions have been reached by other regulatory and competition bodies. For instance, in its recent clearance of the Telia/Sonera merger, the European Commission stated that its market investigations had indicated no evidence of substitutability between different types of calls.<sup>5</sup> In particular, it said, "Calls to fixed lines are not seen as an adequate substitute for calls to mobiles in view of their different functionalities, or vice versa." It further stated, "...it has been argued that other services, such as call-back, voicemail, SMS and paging have not proven to be effective substitutes for mobile termination, and will not be so in the foreseeable future."

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<sup>5</sup> Case No COMP/M.2803 – Telia/Sonera, Article 6 (2) Non Opposition under Regulation (EEC) No 4064/89 Merger procedure, 10/7/2002. Available at [add link]

In the UK, Oftel has examined whether these services are having a constraining effect on mobile termination prices<sup>6</sup>. In the case of call back, it found no evidence of commercial offers of call back being available on the market. It also found that the use of *ad hoc* call back as a substitute is likely to be very minimal due to the inconvenience of setting up such calls, and the fact that the called party has little incentive to pay for a call that would otherwise be the responsibility of the calling party.

As far as services such as Voicemail, SMS, and paging were concerned, Oftel noted that the primary purpose of each of these services is to send a brief message. They do not enable practical real-time conversation or permit the ease of conversation characterised by a telephone call. Oftel concluded, therefore, that SMS is an imperfect substitute for voice because it has its own language and symbolism and does not take place in real-time.<sup>7</sup> Oftel further noted that users of SMS tend to consider text messages as a service that is complementary to, rather than a substitute for, voice calls.

#### ***B.4 Supply side substitution at the interconnection level***

The extent to which there is supply side substitution at the wholesale level will depend on the ability of alternative suppliers to readily switch into the supply of mobile termination services in response to a small but significant price increase. C&WJ believes that there are no supply side substitutes for mobile termination services by a given mobile operator. It is impossible to substitute call termination on one network for termination on another network, because calls to a particular mobile user must be terminated on the network to which that user has subscribed.

#### ***B.5 Supply side substitution at the retail level***

A certain degree of supply side substitutability may theoretically occur at the retail level if an MNO is able to convince subscribers on competing networks to switch to its network by lowering the rates for call termination on its network. But there is evidence that mobile subscribers are generally not sensitive to mobile termination rates (because they do not have to pay for incoming calls themselves) and as such are unlikely to choose a network or switch networks on such a basis. For example, survey evidence from Oftel<sup>8</sup> suggests that only about 13% of residential customers take account of incoming call charges when choosing which mobile network to subscribe to, and the choice of handset and price of outgoing calls are given far more weight in the decision. Whilst a higher proportion (approximately 31%) of small and medium business customers take account of the cost of incoming calls when selecting a network, Oftel noted that such customers represent a very small proportion of total mobile ownership and other factors are regarded as more important. Oftel concluded therefore, that an insufficient number of consumers regard incoming call charges as an important factor such that it would effectively constrain charges or reverse the effect of the CPP for all consumers (such that the cost of calls to mobile would be a factor for consumers when deciding which network to subscribe to).

C&WJ recognises that customers usually do not take account of the costs of incoming calls when deciding which mobile network to subscribe to. Therefore, it has recently launched an advertising campaign to raise awareness of the lower retail costs of calling a

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<sup>6</sup> *Oftel Mobile Consultation* at paragraph 2.33 – 2.34.

<sup>7</sup> *Ibid.*

<sup>8</sup> Review of the Charge control on calls to mobile, Oftel, September 2001

C&WJ mobile compared to a Centennial or Digicel mobile in the hope that this will influence their choice. It is too early to judge yet whether this campaign will be successful in terms of encouraging subscribers to think about the costs of calls that will be borne by another party, and to build that information into their purchasing decision.

C&WJ also notes that the OUR discusses the possibility of callers to mobile networks selecting or pre-selecting the MNO that terminates a given call to any given mobile subscriber. This would require the use of multiple SIM cards, which would allow users to select which mobile network to use for any particular call (incoming or outgoing). This is unlikely to result in effective supply side substitution, however, for two main reasons. First, as the OUR recognises, the practice of SIM locking prevents users from switching to competing service providers and so makes the use of multiple SIMs impossible. Second, even where it is possible to use multiple SIMs, the called party must make a conscious decision to choose the cheapest terminating network for receiving calls, which raises the same issue as with the single SIM. Namely, that the called party does not usually care about the cost of incoming calls, as he does not have to bear those costs.

Even in cases where the called party does care enough about the costs incurred by callers to have multiple SIMs (for example, where the caller and called party are part of a closed user group), he would require considerable information to be able to make the appropriate choice of network. The called party would have to ensure that he knew which MNO offered the best termination rate during any particular time period, and to then make sure that the appropriate SIM card was active at that time. Furthermore, the incentives to go to this effort could be compromised if the MNO offering the lowest termination rate at any one time was not also offering the lowest origination rate too. In the event of such a conflict, it is highly likely that the called party would ensure that the SIM card installed at any particular time would be the one that offered the lowest origination rates, rather than the lowest termination rates. In sum, multiple SIM phones, even if widely available, would have little effect on the rates for mobile terminating access services. This has been recognised by Oftel in its recent review of competition in the mobile market<sup>9</sup>

The above suggests that there are separate markets for call termination for each network operator.

### ***B.6 Empirical Analysis of Mobile Termination Services***

C&WJ proposes to set out in this section, an analysis of empirical price changes and different prices offered for access to mobile termination services which it believes bears out the conclusion of the discussion above, that each individual mobile termination network constitutes a separate market.

#### *The effect of price movements for mobile termination*

It is reasonable to assume that price changes by a player or players accounting for a substantial share of the market should, in a competitive environment, lead to similar price adjustments by competitors. Where price movements have no effect on the pricing

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<sup>9</sup> Mobile Phones Inquiry, Remedies Statement, Competition Commission, July 2002 available at <http://www.competition-commission.org.uk/pressreleases/39-02REM.pdf>

of other operators, the only conclusion to be drawn is that the players are not actually exposed to reciprocal competitive pressure when taking their pricing decision.

When Digicel entered the market in April of 2001, the charge to terminate a fixed calls on its network was approximately five times more than the charge to terminate a fixed call on C&WJ's mobile network. Currently the charge levied by Digicel to terminate a fixed call to its network is more than twice that charged by C&WJ mobile. Digicel's rates in this regard, however, have at all times remained in the region of \$9 per minute. Over the same period Digicel's customer base has grown to a reported figure of in excess of 600,000. In C&WJ's view this clearly demonstrates that in the mobile call termination market, despite the price differential between Digicel's rates and those of C&WJ, Digicel has not been constrained to respond by lowering its price for this service. In Jamaica therefore, the market for terminating calls on each mobile operator's network can clearly be seen to be distinct and separate. This is consistent with related findings in other markets throughout the world.

The evidence at the retail level further supports this view. The price of a domestic call on the fixed network as compared to that on a mobile network is vastly different. The standard peak per minute rate for an inter parish call is \$1.05. The highest rate in the market for a mobile to mobile call is \$17.70 per minute. Despite the significant rate differential, the growth in the mobile market has been phenomenal, while that of the fixed line business has remained flat at best.

There is also evidence from other countries where the calling party pay principle applies that termination on each mobile network is a distinct economic market. In the Netherlands, for example, where currently none of the mobile operators are subject to regulation, there have been a number of issues in relation to mobile termination rates.

For the purposes of this response, we note that KPN Mobile substantially reduced its termination rates in June 2000 as a result of a pending investigation by the European Commission. KPN Mobile initiated an intensive advertisement campaign informing potential subscribers that the price of incoming calls to KPN Mobile were lower than those of other mobile operators. Despite this publicity, rates charged by the other mobile operators in the Netherlands remained roughly constant with no significant reduction. Despite its attempts to lure additional subscribers by reducing its mobile termination rates, KPN Mobile apparently concluded that price elasticity was very low and that the move had been ineffective. Subsequently, when it became clear that other operators did not feel constrained to follow KPN Mobile's rate cut, KPN increased its charges in November 2000.

More recently, KPN Mobile announced in a letter that it would increase its mobile termination tariffs by 1 April 2002, because other mobile operators had failed to reduce their tariffs to the level of KPN Mobile by that date. KPN wanted OPTA, the Dutch telecommunications regulator, to impose reciprocity in termination charges between mobile operators, so that smaller mobile operators would not be able to charge more than KPN.

In July 2002 OPTA stated that all mobile operators should reduce their termination rates in two stages, with the initial reduction to take place in December 2002 and the second reduction in April 2003. Furthermore, OPTA stated that all mobile operators should introduce cost orientated termination rates by July 2003. This has been challenged by O2

(Telfort) and the OPTA decision has been referred to the courts. A final ruling was expected in November 2002 but has not yet been forthcoming. In the meantime, however, the Dutch competition authority, NMA, has issued a report confirming OPTA's view that termination on individual mobile networks is the relevant market.

*The effect of price differences*

More empirical evidence that MNOs do not compete with each other in the market for mobile termination is demonstrated by the vastly different prices charged for termination among MNOs in the same country. For example, in the UK, BT Cellnet and Vodafone, the two MNOs that are currently regulated, charge significantly less (albeit still well above cost) than the unregulated operators, Orange and One 2 One. In fact, the peak rates charged by One 2 One are nearly 25% higher than those charged by BT Cellnet.

In France the unregulated Bouygues charges mobile termination rates that are more than 20% higher than those charged by Orange, the regulated MNO. Similar differences between unregulated and regulated MNO terminating charges exist in Belgium, Sweden, and Norway (where Netcom imposes a peak termination charge that is more than 50% higher than Telenor's).

The existence of such significant price differentials for the same service within the same geographic markets can lead to only one conclusion: that MNOs have no competitive price constraints on their mobile termination charges because each terminating network is a separate market, within which each MNO holds a dominant position.

***B.7 Market Analysis by Other Regulatory Authorities***

Several national regulators have initiated or completed consultations on mobile termination charges, certain aspects of which have been briefly referred to above. This section attempts to summarise the overall conclusions that these bodies have made on market definition, dominance and, where relevant, the appropriate remedies. It can be seen that there are a number of jurisdictions, including the UK, Sweden and the Netherlands, that have concluded that the relevant market definition for analysing mobile termination charges should be the market for terminating to mobiles on individual networks. In a number of cases, this has resulted in them attempting to impose cost orientated rates.

**Table 1 – Regulatory Overview by Country**

<b>Country</b>	<b>Termination Rate Directly Regulated?</b>	<b>Recent Developments in Termination Rates</b>
Belgium	Yes	Proximus (Belgacom Mobile) designated by BIPT (Belgium regulator) as having SMP for interconnection in mobile. BIPT stated in July 2001 that other MNOs (Mobilstar and Base) should reduce their termination rates to within 15% of Proximus. Imposed reduction on average level of interconnection charges of Proximus in Dec 2001

France	Under Review <sup>10</sup>	ART (the French regulator) has intervened three times to set level of mobile termination rates. Discussions in autumn 1999 between Art and 3 MNOs led to voluntary reductions. ART imposed 20% reduction on FT mobiles' termination rates in Oct 2000, and imposed reductions over 3 year period on Orange and SFR in Nov 2001
Ireland	Under Review	No direct regulation but ODTR has stated it supports the EC's view that termination on each network represents a distinct market.
Netherlands	Under Review	No MNOs have been designated as having SMP on interconnection market but OPTA has intervened in termination rates. OPTA intervened in dispute between KPN Mobile and O2 (Telfort) and tried to impose lower termination rates on all MNOs in Netherlands. Stated that all termination rates should be reduced in 2 stages (in Dec 2002) and (April 2003), with cost-orientated charges to be introduced from July 2003. This ruling is currently subject to appeal. But competition authority (NMa) has stated there are separate markets for termination on each mobile network
Spain	Yes	The Spanish regulator CMT has set maximum termination rates. Telefonica Moviles and Airtel Movil (Vodafone) , both of whom required to reduce interconnection charges by 17%
Sweden	Yes	PTS has designated Vodafone and Tele2 as having SMP on national interconnection market. Required to have cost-orientated charges. Currently subject to appeal
UK	Yes	Vodafone and BTCellnet (mmO2) have been subject to price caps since 1999. Oftel tried to extend price caps to all 4 operators at end 2001 on basis that separate markets on each network and each operator dominant. Issue referred to Competition Commission in Jan 2002. Final recommendations due in Jan 2003. Draft statement by CC in August 2002 supported Oftel's findings

*The UK – Oftel's approach and the preliminary view of the Competition Commission*

As the OUR is no doubt aware, Oftel has looked at the issue of mobile termination rates a number of times. In its September 2001 Consultation on Mobile Termination (which led to the current investigation of mobile termination by the Competition Commission) Oftel concluded that due to the fact that there is a limited number of potential

<sup>10</sup> Each European National Regulatory Authority will have to conduct a review of mobile call termination in order to implement the new European Regulatory Framework. The European Commission has identified mobile call termination as a relevant market that may require ex ante regulation in a draft Recommendation, and is expected to confirm this view when it publishes its Final Recommendation. The Final Recommendation is due in December 2002. Each NRA will have<sup>7</sup> to complete its review of mobile call termination services by 25 July 2003, which is the date that the new Framework comes into effect

substitutes, the relevant market definition for mobile termination is the market for termination on each mobile network.<sup>11</sup> Oftel further concluded that this meant that each mobile operator was dominant with respect to call termination on its own network and that, in the absence of regulation, mobile operators would not be constrained in their pricing of termination.

Oftel therefore attempted to impose cost-orientated rates on all the mobile operators. The mobile operators, however, refused to accept Oftel's findings and the associated licence modifications, so Oftel referred the issue of mobile termination to the Competition Commission (CC) in January 2001. The CC has not yet published its final conclusions (it must report by 6 January 2003) but it issued its preliminary findings, including its thoughts on market definition, in its July 2002 Remedies Statement<sup>12</sup>. It states:

*'The Commission's current view is that there is a separate market for termination of calls on the network of each of the four MNOs; and that calls can be terminated only on the network of the MNO to which the called party subscribes. The evidence available to the Commission to date suggests that there are at best only rather weak demand- or supply-side substitutes for termination on the network of the operator to which the called party subscribes'.*

The statement continues, stating that the Commission does not expect this definition of the market to change in the foreseeable future. The consequence of this market definition also led the CC to conclude that the MNOs are monopolists with respect to the supply of termination services on their own networks. In its discussion of possible remedies, the CC states that its current view is that the setting of charge caps is likely to be most effective in addressing the identified adverse effects.

#### Sweden – the PTS approach

In a decision issued on 21 February 2002, the Swedish National Post and Telecommunications Agency (PTS) concluded that Europolitan Vodafone, Tele2, and Telia each have significant market power in the market for mobile termination.<sup>13</sup> As a result, PTS imposed price caps on the mobile termination charges of those three MNOs. In its decision, PTS concluded that, "each mobile network operator's own network should be regarded as a relevant market."<sup>14</sup>

In reaching this conclusion, PTS analysed, among other things, demand and supply-side substitutability for mobile termination. On the demand side, PTS found that an operator wanting to offer call termination to a certain MNO's network is required to purchase termination from that MNO. There are no substitutes for this service. On the supply side, PTS noted that the lack of available SIM-card information is an effective barrier to entry by other suppliers in the market for mobile termination.<sup>15</sup>

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<sup>11</sup>Oftel Mobile Consultation, para. 4.24.

<sup>12</sup> Mobile Phones Inquiry, Remedies Statement, Competition Commission, July 2002 available at <http://www.competition-commission.org.uk/pressreleases/39-02REM.pdf>

<sup>13</sup>Swedish National Post and Telecommunications Agency, *Determination of Companies that Have Significant Market Power in the Swedish Market for Interconnection (PTS Decision)*, 21 February 2002, Diary No. 00-14849/23.

<sup>14</sup>PTS Decision, at pp. 7-8 (translation).

<sup>15</sup>Ibid at p. 8.

Moreover, PTS determined that MNOs have the ability to increase relative prices for mobile termination without any subsequent decrease in demand or revenues. PTS noted that incentives for price reductions are missing in the market because a price reduction by one MNO does not benefit its customers but rather benefits other MNOs. PTS also emphasised that prices for terminating on mobile networks in Sweden remained unchanged for 18 years before the regulator first intervened in 1999, despite the entry by new operators and increasing penetration of mobile services during this period.<sup>16</sup> According to PTS, therefore, the evidence is clear that there is no price competition for terminating on mobile networks in Sweden.<sup>17</sup>

*The Netherlands – OPTA’s approach*

In its recent guidelines on the regulation of mobile termination, OPTA analysed the available substitutes for termination on each mobile network and concluded that each mobile network represents a separate market for mobile termination.

OPTA concluded that the mobile provider has almost complete control over access to the end users connected to its network, and therefore to the conditions of access to that network. Therefore, other operators who want to set up a call between their own customer and an end user of a mobile network have no choice. OPTA recognised that there are no technically or economically viable substitutes for the mobile terminating service and that it does not expect any alternatives to become available in the foreseeable future.<sup>18</sup>

OPTA also points to empirical evidence to support its conclusion. Specifically, the June 2000 tariff reduction by KPN was not followed by any other mobile operator. In fact, Telfort was able to actually increase its tariff in November 2000 without it affecting its market share.

OPTA concluded “...the mobile provider therefore has a monopoly on terminating access service. After all, every mobile provider is in principle able to determine the tariffs for terminating access independently of anyone else.”<sup>19</sup>

*Ireland- The ODTR’s approach*

Whilst the ODTR (Office of the Director of Telecommunications Regulation) has not published any specific documents on mobile termination, it did make reference to it in its recent comments on the European Commission’s draft recommendation on markets that may require ex ante regulation. It stated, “We welcome the inclusion of a wholesale market for call termination on individual networks...we agree with the view held by the Competition Commission in the UK that there is a separate market for termination of calls on the network of each mobile operator”<sup>20</sup>.

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<sup>16</sup> *Ibid* at p. 15-16

<sup>17</sup> The MNOs have appealed PTS’ decision to the Swedish court, which has granted a suspension of the decision pending a final decision on the merits.

<sup>18</sup> OPTA does not consider the use of multiple SIM-cards to be a viable alternative. *OPTA Consultation*, at p. 11.

<sup>19</sup> *Ibid* at p. 15-16.

<sup>20</sup> Reference: Joint Response to Consultation on the European Commission Draft Recommendation of Relevant Product and Service Markets within the Electronic Communications Sector, ODTR, 02/74, 29 August 2002

### The European Commission's approach

In a recent Statement of Objections forwarded to KPN Mobile, the European Commission (EC) has preliminarily reached a similar conclusion regarding the relevant market definition for terminating on mobile networks. Specifically, the EC has concluded that:

- (i) the provision of terminating access services on KPN Mobile's public mobile telecommunications network constitutes a separate product/services market: At retail level (demand side), users who wish to call a subscriber A of mobile network operator A, cannot at present choose an alternative mobile operator for terminating their calls to subscriber A.
- (ii) At the wholesale<sup>21</sup> level (demand side), all public network operators are under a regulatory obligation to offer calls to other networks. To do so, they must purchase wholesale terminating access services on each network, for which there are no substitutes: for a call to reach a subscriber of network A, the originating or transit operator must purchase terminating access services from network operator A.
- (iii) On the supply side, only the individual mobile network operator can offer terminating access on its own network, so that there is no substitution between network operators. Furthermore, mobile network operators are found not to compete for termination services. In general, price elasticity is found to be very low and there appears to be no competitive responses to significant price changes.

In the light of these findings, the European Commission reached the following, overall conclusion:

*"For these reasons the Commission has concluded in its preliminary assessment that there is a separate market for the termination of calls on each mobile network; and that, given the absence of countervailing market power, KPN Mobile holds a dominant position on the market for the termination of calls on its network".<sup>22</sup>*

The European Commission also seems to be reaching this view in the context of the new European Regulatory Framework, which attempts to identify those markets that may require ex ante regulation. Whilst it is yet to publish its final views on mobile termination, its draft view is that, currently, under the calling party pays system, the appropriate market definition is that for call termination on individual networks.<sup>23</sup>

### ***B.8 Definition of the market in respect of mobile termination***

In conclusion, C&WJ agrees with the OUR that the appropriate market definition is that of mobile termination on individual networks. As demonstrated above and supported by

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<sup>21</sup> Note that the reference to wholesale in this context is analogous to interconnection in Jamaica

<sup>22</sup> EC Press Release, "Commission suspects KPN of abusing its dominant position for the termination of calls on its mobile network," IP/02/483, Brussels, 27 March 2002.

<sup>23</sup> European Commission, Working Document, Public Consultation on a draft Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector, June 2002

an increasing number of regulatory bodies, each mobile operator has full control over the conditions for termination on its network for calls to its own subscribers. There are no viable substitutes on either the demand or supply sides for mobile termination on each operator's network.

### ***B.9 The assessment of dominance in respect of mobile termination market***

The natural consequence of the conclusion on market definition is that each mobile operator is dominant with respect to calls terminated on its own network, regardless of its relative market position for other services, such as mobile call origination. Each mobile operator, regardless of its size and share of mobile subscribers, would, in the absence of any regulation, be able to set its termination rates independently of other mobile operators.

That this is the case has been demonstrated by the OUR in this consultation document, where it notes that Digicel's mobile termination charge is significantly greater than C&WJ's termination charge.

Furthermore, this dominance will remain regardless of whether there is any further entry into the mobile market. Each mobile operator will still be dominant as far as termination of calls on its own network is concerned, regardless of how many operators are offering mobile services.

### ***B.10 The appropriate remedy***

The implication of this conclusion that each mobile operator is dominant with respect to call termination on its own network is that, without regulatory controls, termination rates will be set in excess of costs. C&WJ would therefore urge the OUR to follow the approach that is increasingly being advocated by regulatory bodies in Europe, and impose cost-based termination rates on all mobile operators. Furthermore, C&WJ would encourage the OUR to calculate these rates using available cost information from operators within this jurisdiction.

## **C. Alternatives to Services or Network Components**

This section comprises a response to question 3.2

C&WJ refers to its previously stated position that the OUR has inappropriately applied its framework for the determination of dominance, with the sole exception of its application to mobile termination. C&WJ wishes to state that in the context of same, its response to Question 3.2 at this stage, is limited to requesting that the OUR review its application of the framework. It is our belief that appropriate alternatives to the services or network components will emerge through this process.

## **D. Vertical Integration**

This section comprises a response to question 3.3

C&WJ wishes to emphatically state its concern related to the phrasing of the question 3.3 which it believes to be prejudicial to C&WJ. The phrasing presumes dominance in undefined markets, allowing for assertions / allegations unsupported by data or

substantive market analysis by other respondents to this document. As a result of this, and in combination with the implicit presumption of enhancement of dominance, the question seems to encourage responses unfavourable to C&WJ as opposed to impartial and substantive responses, which one would hope to be the purpose of a consultative document.

C&WJ is pleased however, to receive the acknowledgement of the OUR that vertical integration does not necessarily lead to dominance in a particular market, and further that even where a vertically integrated entity is dominant, it does not necessarily lead to abuse of dominance. In this regard, C&WJ maintains that the several competitive safeguards presently in place, prevent it from operating without constraints, and are also capable of doing so, even where not actively pursued at this time.

More particularly, C&WJ makes note of the following:

- (i) The OUR despite not yet having made rules pursuant to Section 83 of the Telecommunications Act (the Act), may still rely heavily on the mandatory provisions of inter alia, sections 29 and 30 thereof. These provisions have been enforced for quite some time and are embodied in the Reference Interconnection Offer deposited with the OUR. This has resulted in effective regulation of the provision of access to network elements owned by C&WJ in that such access is provided on a cost basis, on a transparent and non-discriminatory basis;
- (ii) Another competitive safeguard which C&WJ wishes to highlight is the Price Cap regulation of all retail services offered by C&WJ, with the exception of retail mobile, internet and PABX sales and rental. This provides an effective constraint on our retail pricing, and in turn an effective constraint on wholesale pricing which is based thereon;
- (iii) Section 83 of the Act also relates only to Rules in respect of the local loop and accordingly, deferment of the making of rules in relation to that area, should not be relied on as a basis for asserting that no competitive safeguards exist;
- (iv) The Fair Competition Act (FCA) in no way limits the jurisdiction of the Fair Trading Commission in respect of competition issues within the telecommunications industry. The Fair Trading Commission (FTC) under section 5 of the FCA therefore has the power to not only investigate where the OUR believes it prudent, but to investigate of its own motion where it believes that an entity is engaging in anti-competitive practices, including abuse of dominance, discrimination or other anti-competitive activities. The absence of rules pursuant to Section 83 of the Telecommunications Act in no way inhibits its powers. Further, it is the view of C&WJ that the OUR should guard against over-regulation by producing rules and regulations in relation to issues over which the FTC also has jurisdiction;
- (v) The FCA further empowers the FTC to request information / documentation from entities under investigation by it, and provides for penalties where entities refuse to comply with requests. Accordingly, C&WJ is unable to understand why the OUR would consider an immediate paucity

of data to be a factor which would inhibit the FTC's effectiveness in carrying out its statutory mandate.

- (vi) The OUR has not yet completed its consultation on accounting separation started in 2000, despite several requests from C&WJ that this issue be taken forward. It is the sincere hope of C&WJ that the OUR will therefore not seek to rely on the failure to have "proper regulatory accounts" as a presumption that the said C&WJ seeks to extend its dominance in the international voice service market to the mobile voice service market.

## **E. OUR's Competitive Checklist**

C&WJ wishes to express its concerns regarding this table, referred to as a competitive checklist.

The first aspect of our concern is that conceptually, the table is not consistent nor compatible with any approach we have seen used by other national regulatory authorities. More particularly, the categories do not reflect specific markets, and accordingly, the "check list" and "assessment" are misplaced. It is C&WJ's position that the assessment column should properly contain reviews of specific markets (which would be identified under the heading "Category") with reference to the various criteria relevant to such an analysis. The approach to assessment of competitive indicators in respect of particular markets, which C&WJ maintains is or should be the purpose of such a table, is therefore not attained by Table 4.1.

The second aspect of our concern is related to the content of this table. We propose to make our comments in accordance with the order in which the issues appear in the table.

### *Interconnection and interconnection charges.*

C&WJ has no objection to the facts as set out in relation hereto.

### *Sharing of facilities and Co-Location.*

Facilities Sharing is dealt with under sections 54 and 55 of the Telecommunications Act. The Act specifically provides that carriers can request to share facilities of other carriers and that where disputes arise as a result of refusal to share, the aggrieved carrier can apply to the court for redress. C&WJ merely wishes to remind the OUR that there is no provision in the Act related to the power of the FTC or the OUR to make any determination in such matters, nor in any other related matters. It is therefore C&WJ's position that as the OUR cannot order carriers to share their facilities or offer co-location, it also follows that the OUR cannot empower the FTC in the manner it purports to, through its determinations. C&WJ trusts that the OUR is not seeking to legislate through its determinations and suggests that the FTC would have jurisdiction over such matters only if it could support an allegation of anti-competitive behaviour related to the sharing, and could show that such behaviour does not fall within the areas which the Act gave the Court direct responsibility for resolving under Section 55.

C&WJ's comments on the costing in relation to sharing of facilities may be found at section F.4.

Access lines and carrier pre-selection.

C&WJ wishes to emphasize once more that access lines and connections to local switches will become less of “bottleneck facilities” as other fixed service providers begin to operate. We note that GOTELE Telecommunications have actually started offering service to the public. Further, cable operators currently have lines into people’s homes, so that they also provide an alternative which can ameliorate these perceived barriers.

C&WJ’s comments on carrier pre-selection may be found at section F.3.

Directories.

C&WJ fails to comprehend the means by which the OUR expects it to demonstrate that it is offering its interconnect directory service on a non-discriminatory basis, other than its provision for such terms in the Reference Interconnection Offer approved by the OUR.

Numbering

C&WJ would submit that inclusion of this category is inappropriate for the purposes of this consultative document.

Resale switched international voice minutes

C&WJ wishes it to be noted that it has moved beyond a draft agreement and that it has a standard form Agreement which has already been signed by 7 service providers. Negotiations are underway with other entities.

## **F. Other Issues**

### ***F.1 Local loop unbundling***

Under Section 83(1) of the Act, the OUR does not have jurisdiction to conduct proceedings on this issue, until Phase III. This is confirmed within the body of the Consultative Document in paragraphs 3.25 and 4.8 respectively.

At this time, C&WJ merely notes that it finds it curious that the OUR has chosen to mention Section 83(1) of the Act but has excluded from the discussion the key requirements that must be satisfied in exercising Section 83(1), especially when these requirements have at least partially been set out by the OUR in relation to number portability.

The excluded requirements are set out in Section 83(2) of the Act and effectively require the OUR to make rules:

*“only if it is satisfied on reasonable grounds that such rules are necessary in the interest of consumers and that –*

- (a) *the benefits likely to arise from the rules outweigh the likely cost of implementing them; and*
- (b) *the requirement to comply with the rules will not impose an unfair burden on any carrier or service provider.”*

In the interests of obtaining informed and impartial responses from all stakeholders in the telecommunications industry, C&WJ recommends that the OUR provide a full and accurate description of the legal requirements in its consultative documents and determinations, rather than the selective excerpts set out in this Consultative Document.

### ***F.2 Number portability***

Under Section 83(1) of the Act, the OUR does not have jurisdiction to conduct proceedings on this issue until Phase III.

C&WJ submits that the OUR has set out an incomplete set of requirements in para 3.54. Whilst Section 37 of the Act does indeed require a cost-benefit analysis to be carried out, the OUR fails to mention that in making rules on this issue, it must also be satisfied that:

*“the requirement will not impose an unfair burden on any carrier or service provider.”*

In the interests of obtaining informed and impartial responses from all stakeholders in the telecommunications industry, C&WJ recommends that the OUR provide a full and accurate description of the relevant legal provision in its consultative documents and determinations, rather than the selective excerpts set out in this Consultative Document.

### ***F.3 Carrier pre-selection***

In paragraphs 3.55 and Table 4.1 of this document, the OUR has for the first time in regulatory proceedings discussed a particular form of indirect access, that is, carrier pre-selection.

In light of the fact that no substantive proposals or questions have been raised by the OUR in respect of this issue, C&WJ is unclear as to the reason why carrier pre-selection has been mentioned in this Consultative Document.

Notwithstanding this, C&WJ is concerned that to the extent that it has been mentioned, the OUR has failed to provide an accurate description of the regulatory pre-requisites related to carrier pre-selection. C&WJ’s concerns are two-fold:

- In Table 4.1 the OUR states that “Carrier pre-selection is a method of indirect access” and “Carrier pre-selection is not specifically addressed by the Act”. This statement by the OUR seems unclear – if carrier pre-selection is indeed a method of indirect access, and the fact that Section 36 of the Act deals with indirect access, then the Act addresses, albeit by implication, carrier pre-selection; and
- Since Section 36 of the Act refers to any form of indirect access (which includes carrier pre-selection), C&WJ would suggest that the OUR should have set out the criteria which govern whether it can make rules on the issues, specifically covered by

sub-sections (a) and (b) requiring cost-benefit analyses and ensuring that the requirements do not impose an unfair burden on any carrier, respectively.

In the interests of all stakeholders in the telecommunications industry, C&WJ recommends that the OUR provide a full and accurate description of the legal requirements in its consultative documents and determinations, rather than the partial coverage as set out in this Consultative Document.

#### ***F.4 Facilities sharing and co-location***

C&WJ wishes to remind the OUR that Section 54 of the Telecommunications Act provides that in the event of entry onto the land or facilities of a “providing carrier”, the “providing carrier shall be entitled to reasonable compensation in relation to that entry, to be determined in accordance with the relevant provisions of the Land Acquisition Act.”

C&WJ also wishes to state that as the OUR is not empowered by its creating statute to make rules in relation to co-location, it trusts that the OUR will not seek to regulate through the back door of its legislation, by seeking to expand its powers as reflected in paragraph 4.8. C&WJ’s further comments on the issue of jurisdiction are to be found in section E above.

#### **Conclusion**

Cable & Wireless Jamaica thanks the OUR for the opportunity to have presented the responses set out herein, and looks forward to receiving the OUR’s comments thereon.

**CABLE & WIRELESS JAMAICA LIMITED**

**20 DECEMBER 2002**