



*Oaseirys Çhellinsh*  
Communications Commission

# **Isle of Man Communications Commission**

## **Market Reviews**

### **Call for Inputs**

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## Introduction

The Communications Commission (the Commission) is about to embark on a second round of market reviews. The first round of market reviews were published in 2012<sup>1</sup>. The purpose of this review is to further assess the telecoms markets in the Isle of Man, and to evaluate the current regulatory intervention. Regular reviews are a standard part of the regulatory process.

As part of this review, the Commission seeks input from stakeholders, business users and consumers. The Commission is cognisant of policy statements and commitments made as part of the [Programme for Government](#), the work of the [Chief Minister's National Telecoms Infrastructure Committee](#) and [Council of Ministers response](#) to this. The Commission will ensure that relevant Government officers are engaged throughout the process so that any important policy decisions and advancements can be taken into account, if appropriate.

The Commission is interested in your experience of buying and using telecommunications services in the Isle of Man. The list below is a suggestion of points to address – you do not need to address all points, and you are free to add other issues.

1. Is there sufficient choice of telecom products and services? Is it important to have a choice of provider? If so, why?
2. Are there any products or services that you want to purchase, but which are not available? What are these and how would they be of benefit to you?
3. What do you think the key changes will be in how you use telecoms over the next 3-4 years? For example, will there be a change in types of services and products used? Do you envisage spending more or spending less?
4. Have you ever switched supplier for any telecoms product or service? If so, which product did you switch and why? Was it straightforward?
5. Do you purchase telecoms in other jurisdictions? If so, how does the Isle of Man compare? For example, in terms of quality, price or customer service.
6. What aspects of the Isle of Man telecoms markets do you think are particularly good? Which do you consider require improvement?
7. Please provide any other comments you wish to make

**The closing date for responses is 31<sup>st</sup> July 2018.**

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<sup>1</sup> <https://www.iomcc.im/telecoms/>

## Background

In 2010, the Communications Commission published its Response to Consultation on proposals for a new framework for communications regulation<sup>2</sup>. Having considered all responses, the Commission's recommendation was that the Isle of Man should create an approach to regulation which is specific to the Isle of Man, and which both ensures competition in the provision of services, and ensures continuing infrastructure investment. The regulatory approach should be appropriate to the size of the jurisdiction, and should focus on the Isle of Man's priorities. The Communications Commission recognised that the underlying communications legislation required updating.

The Commission imposed *ex ante* regulation<sup>3</sup>, which directly addresses structural problems in the telecoms markets to do with legacy monopoly supply. Market reviews address the objectives established in the New Framework Consultation by reviewing the telecommunications markets in the Isle of Man. The EU market review process is seen as the standard, and is replicated world-wide. The Commission carries out a simplified variant of the EU reviews, which are more proportionate for an Island of our size.

Provisions for conducting market reviews and placing additional obligations on operators with significant market power are contained in licences issued under section 5 of the Telecommunications Act 1984 (of Tynwald).

## Why Further Market Reviews

Across the world, there has been a shift in consumer demand, away from traditional services, towards over the top (OTT) services which use the internet to deliver the services that it provides. In terms of communications, examples of OTT services are WhatsApp, Snap Chat or Facebook Messenger. Whilst these services provide choice for consumers and innovative services, it does make investment more challenging for the telecoms industry. Operators are required and expected to invest in and maintain their networks. However, their ability to recoup investment is more limited.

The way that tariffs are packaged has also changed, with more inclusive minutes, texts and data being issued as part of a tariff plan. There are also discounts offered by retailers for purchasing multiple products or services from them.

Technology has moved on and investment is moving away from copper and towards fibre. At the beginning of 2018, the wholesale arm of Manx Telecom announced plans for investment in full fibre to the premises in certain areas. Initially, fibre to the premises will be available at Athol Street and Reeyt Ny Sheer, before being rolled out to other locations, including major business districts and industrial estates. This is a very positive step for the

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<sup>2</sup> <https://www.iomcc.im/telecoms/closed-telecommunications-consultations/2009-consultation-on-a-telecommunications-regulation-framework/>

<sup>3</sup> *Ex ante* regulation is the application of regulation before an abuse of power has necessarily occurred. The reasoning behind its application is that finding that an operator has SMP means that the operator is likely to have the incentive and motivation to behave in a way which exploits its market power to the detriment of competitors and ultimately to consumers. *Ex ante* regulation can be contrasted with *ex post* regulation, which investigates an incident which has already happened.

Isle of Man, as full fibre services allow for the opportunity for households to gain access, via various providers, to very high speed broadband services, such as download speeds of up to 1 Gbps.

Competition has increased between licensed operators. For example, Manx Telecom, Sure and Wi-Manx are now offering line rental products, which increases choice for users.

Additionally, there have been several licence changes since the market reviews. [Continent 8](#) was awarded an Internet Service Provider (ISP) licence on 23<sup>rd</sup> May 2013, [Wi-Manx](#) modified its licence from ISP to full on 5<sup>th</sup> November 2014, [Sure](#) modified its licence to reflect its award of Code Powers on 16<sup>th</sup> November 2016 and [BlueWave](#) modified its licence from ISP to full on 19<sup>th</sup> April 2018.

## About Market Reviews

The main purpose of a market review is to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints which are faced by undertakings (licensees) in the market. A market review commences by defining a market, which is then analysed to assess the degree of effective competition. Should any undertaking be found to have Significant Market Power (SMP), defined as the ability to behave independently of competitors, suppliers and ultimately businesses and consumers in that market, then there is a case for regulation designed to address any actual or potential abuse of dominance.

For example, if an operator is able to raise its prices significantly without fear of losing customers – perhaps because there are no competitors in the market and it is unlikely that any competitors can enter the market – then it is likely to be dominant. With ex ante regulation, if an operator has SMP, it does not mean that it has acted inappropriately, or that it has been abusing its market power. Instead, the focus is on whether, that operator could, if it chose to, do something to abuse its market power.

In order to conduct the analysis for the market review, the Commission will seek input from licensed telecommunications operators in the Isle of Man<sup>4</sup>. The Commission has carried out an introductory presentation at the licensed operator forum explaining the objectives of the review, and the Commission will follow up with some individual meetings. The Commission will also request quantitative and qualitative data which is designed to provide information about how the markets have developed, and also operators' views about the future outlook.

The Commission also plans to interview some key customers in order to learn about their experience of purchasing telecommunications services and wishes to hear from end users, as part of this Call for Inputs.

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<sup>4</sup> Manx Telecom Limited (MT), Sure Isle of Man Limited (Sure), Domicilium (IOM) Limited, Wi-Manx Limited, e-Ilan Communications Limited, BlueWave Communications Limited and Continent 8 Limited.

## Approach to Market Reviews

During the time of the previous market reviews, the European Commission (EC) Recommendation<sup>5</sup> was that seven markets should be considered as susceptible to *ex ante* regulation:

1. Access to PSTN for residential and non-residential users
2. Call origination on fixed networks
3. Call termination on fixed networks
4. Wholesale (physical) network infrastructure access
5. Wholesale broadband access
6. Terminating segments of leased lines
7. Voice call termination on mobile networks

However, because market reviews had not previously been carried out in the Isle of Man, the Commission considered a broader starting point, as a means of ensuring a full understanding of the dynamics of the market.

The previous Isle of Man market reviews grouped markets together under the following headings:

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

The approach to the market reviews takes into account the provisions contained in "Additional Obligations on Operators with Significant Market Power", part of the licences issued under Section 5 of the Telecommunications Act 1984 (of) Tynwald<sup>6</sup>, which outlines the procedure to be followed in coming to a potential determination of SMP<sup>7</sup>.

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<sup>5</sup> European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services OJ L 344 (the Recommendation).

<sup>6</sup> Licences are available to view on the Commission's website <https://www.iomcc.im/licensing/full-and-internet-service-provider-consolidated-licences/>

<sup>7</sup> Part 6 of Manx Telecom Limited's licence, part 4 of the licences held by Cable and Wireless Isle of Man Limited, Domicilium (IOM) Limited, Wi-Manx Limited, Continent 8 Technologies PLC and BlueWave Communications Limited and Part 3 of the e-Ilan Communications Limited's licence.

The market definition procedures are designed to identify in a systematic way the competitive constraints encountered by providers of electronic communication networks and services. A relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in terms of the objective characteristics of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the product in question. In essence, this leads to a definition of the market's boundaries.

Market definition is identifying the boundaries of a market for the purpose of correctly applying *ex ante* regulation. The process involves considering constraints arising on both the demand and supply sides of a market (and their interaction). The constraints are those which would apply to a so-called hypothetical monopolist, such that the hypothetical monopolist would be constrained in price setting behaviour. Hence, critical to the market definition process is the degree of substitution identified on the demand and supply-sides of the market.

If there is a lack of current or potential substitutability on either the demand or supply-side of a market, the overall scope of the market will need to be more tightly defined. If substitutability or its potential exists, a broader definition may be appropriate<sup>8</sup>. The competitive status of each relevant market can then be considered.

European Commission guidelines also require the geographic coverage of markets to be considered. 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 in those areas.

The market review therefore establishes the rationale for regulation in a market, and also the form which that regulation will take.

When a market has been defined, the next step is to assess the level of competition in that market. The purpose of the competition analysis is to consider whether any operator has SMP, and the analysis should look forward 2-3 years, taking into account foreseeable technical and economic developments. If there is no SMP, the market is effectively competitive and does not require *ex ante* regulation, furthermore any existing *ex ante* regulation should be removed, and no further *ex ante* regulation should be imposed (regulations such as universal service obligation regulations and other licence conditions will remain). If there is SMP, then the market is not effectively competitive and regulation should be imposed, at either the wholesale or the retail level, to counteract the potential negative effects of the competition problems that can be caused by the SMP operator. As findings of collective dominance or SMP are relatively unusual, the EU Framework Directive itself, in addition to the Guidelines, gives a list of criteria to be used in assessing it<sup>9</sup>.

SMP is equivalent to the concept of dominance under competition law. If an undertaking is dominant, it can decide on prices and levels of output itself. In a normal competitive

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<sup>8</sup> A method for identifying market boundaries is known as the hypothetical monopolist test (also known as the SSNIP test, Small but Significant Non-transitory Increase in Price test). This test assesses whether a hypothetical monopolist is able to increase price profitably for a product or service unilaterally, without affecting demand for its product.

<sup>9</sup> [http://ec.europa.eu/information\\_society/policy/ecom/doc/140framework.pdf](http://ec.europa.eu/information_society/policy/ecom/doc/140framework.pdf)

market, a firm has to concern itself about the possible reactions of competitors: if it raises prices, competitors may draw away enough customers to make the price increase unprofitable. Similarly, a firm in a competitive market must concern itself about the reaction of customers if it raises prices: they may just switch to other suppliers. A dominant firm, on the other hand, does not have to worry about this, because its competitors have insufficient power to attract away a significant proportion of its customers, and its customers have little or no choice but to do business with it. Thus the dominant firm can determine its pricing and output strategy independently.

A dominant firm will normally have a large market share. In the EC's *SMP Guidelines*, it is clear that although a high market share alone is not sufficient to establish the possession of significant market power, it is unlikely that a firm will be dominant without a large market share. The *SMP Guidelines* note that: "...very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position"<sup>10</sup>

It is important to consider any changes to market shares over time, as this will indicate trends in the market and will contribute to an assessment of whether or not the market may tend towards effective competition over the period of this review. The data requested from operators as input to the review was provided on a quarterly basis for the last two years, and will contribute to an assessment of any changes in the market structure over that time.

However, market share is not the only criterion: a high market share simply makes it possible that the operator concerned *might* be in a dominant position. Regulators must examine a wide range of characteristics of the market before coming to a conclusion as to the existence of SMP. The EC lists (non-exhaustive) criteria which can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers<sup>11</sup>.

The depth of analysis to be carried out is related to the market share finding – for example, a 100% market share which has been stable over time, and where it does not appear to be likely that this will change over the next 1-2 years would not require the same level of detailed analysis of potential mitigating factors as a situation where the market share is 50%.

In general, the approach to competition assessment involves a high level analysis of barriers to entry and expansion. In telecommunications markets, barriers to entry are often associated with large-scale investment in infrastructure over a long time, with consequent sunk costs, and could also entail an operator's need to achieve economies of scale, scope and density. Another barrier to entry could arise where a SMP operator is vertically-integrated; that is where the operator offers a wholesale and a retail service. In this case, an entrant to the market may find it difficult to compete if the SMP operator's retail arm benefits from preferential treatment from its parent company, particularly if the market entrant is dependent on purchasing a wholesale input from the SMP operator. A barrier to entry could also arise because of the existence of a scarce resource, such as spectrum. The competition assessment would take into account other factors which could dilute market

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<sup>10</sup> At paragraph 75.

<sup>11</sup> <https://ec.europa.eu/digital-single-market/en/news/communication-smp-guidelines>

power, such as countervailing buyer power, where a purchaser buys enough of the operator's services to be able to influence the pricing and market behaviour of the operator.

Should an undertaking be found to have SMP sufficient remedies must be imposed to ensure a properly functioning, competitive market. Some of the areas to be considered are already present in the Telecommunications Act licences. In particular the Commission needs to consider whether there are sufficient measures under the Fair Trading Act 1996 of Tynwald or the Fair Trading condition (absent a determination of Significant Market Power) of the Telecommunications Act licences to reduce or remove barriers to entry or to restore effective competition.

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



## Current Position

The competition assessment in the last round of market reviews found the following:

8. Retail Fixed Access Markets:
  - a. Retail Fixed Access (Manx Telecom (MT) SMP)
  - b. Voice Calls From a Fixed Location (MT SMP)
  - c. Retail Dedicated Capacity (MT SMP)
  - d. Retail Fixed Broadband (No SMP, Competitive)
  
9. Wholesale Fixed Access Markets
  - a. Wholesale Call Origination (MT SMP)
  - b. Wholesale On Island Transit (MT SMP)
  - c. Wholesale Call Termination (MT SMP)
  - d. Wholesale Broadband Access (MT SMP)
  - e. Wholesale On Island Dedicated Capacity (MT SMP)
  - f. Wholesale Off Island Dedicated Capacity (No SMP, Competitive)
  
10. Mobile Communications Markets
  - a. Call Termination on Own Networks (MT and Sure SMP)
  - b. Retail Mobile Communications (No SMP, Competitive)
  - c. Wholesale Mobile Access and Call Origination (No SMP, Competitive)

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

## Outputs of the Previous Market Reviews

In the last round of market reviews the Commission introduced regulatory remedies and obligations on the relevant licensed operators, which has ensured that regulation has been appropriate and proportionate.

The EU approach to remedies generally considers the deployment of a set of regulatory tools to address structural factors such as enabling wholesale access to an incumbent's network, and behavioural recommendations that establish how the SMP operator is expected to conduct itself in the market.

The lightest remedies are those concerning transparency and non-discrimination, which prescribe how an SMP operator is expected to behave in the market. A transparency obligation could include, for example, obligations to publish prices and other terms and conditions associated with services. It could require the SMP operator to publish a Reference Offer for specific products, and to publish an outline Service Level Agreement (SLA) defining its relationship with an Other Licensed Operator (OLO). It could put in place a change mechanism for how the SMP operator will make changes, and will notify its customers.

At present, Manx Telecom's licence obliges it to publish information about access to, and use of, Publicly Available Telephone Services with respect to services provided to end-users.

Non-discrimination obligations have been imposed, which first of all, obliges the SMP operator to treat all OLOs in an equivalent manner – it cannot discriminate between them. Secondly, it obliges the SMP operator to treat OLOs in the same way as it treats its own downstream (or retail) arm. This means, for example, that where an OLO is buying a wholesale input so that it can offer a retail service, it should not be disadvantaged compared with the SMP operator's own retail operation. The onus is on the SMP operator to show that its behaviour is not discriminatory.

The most stringent obligations relate to access. Manx Telecom's current licence requires it to offer access to its network to OLOs for services in the markets where it has been found to have SMP. MT also has to make certain types of information available about the terms and conditions under which it offers access (section 43).

Obligations which support the other measures include accounting separation, cost accounting, and price controls. Generally, accounting remedies are imposed in order to ensure that the SMP operator is not discriminating against OLOs, for example by cross-subsidising some products at the expense of others, and is not leveraging its power in one market into another. Price controls can be established in the retail and wholesale markets, and usually limit the price which the SMP operator can charge. Price controls are usually put in place to address the potential for the SMP operator to impose margin squeeze<sup>12</sup>, or to cross-subsidise.

Under the terms of the current telecommunications licences, where it has made a determination that an operator has SMP, the Commission can from time to time specify additional obligations by direction in respect of a relevant network (Network Access Pricing conditions). For example, if, as a result of its market analysis the Commission considers that there is a risk that the SMP operator might sustain prices at an excessively high level or apply a price squeeze to the detriment of end users, the Commission can impose price controls.

In summary:

1. Retail Fixed Access Markets: Obligations relating to non-discrimination, transparency (notice of publication of changes to terms & conditions), unreasonable bundling, margin/price squeeze
2. Wholesale Fixed Access Markets: Obligations relating to accounting separation, cost orientation, provide reasonable access, non-discrimination, transparency (for example reference offers and service level agreements)
3. Mobile Communications Markets: Price controls for mobile termination rates, currently 1.25ppm

Manx Telecom split out its wholesale arm from its retail arm so that it can effectively demonstrate compliance with these obligations.

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<sup>12</sup> A margin (price) squeeze arises when a dominant operator, which provides a wholesale input on which other operators rely in order to compete at the retail level, prices its upstream (wholesale) services and downstream (retail) services in such a way as to prevent others from competing with it at the downstream level.