Chapter 2

Market definition

Identification of markets

2.1 Section 79(1) of the Act provides that, before making a market power determination, the Director must identify and analyse the markets which are, in his opinion, the ones relevant in the circumstances of the United Kingdom and are the markets to be considered in the making of any such determination. The Director is, as noted in the Chapter 1, required to take due account of all applicable guidelines and recommendations issued by the European Commission. He is required to issue a notification of his proposals. He is entitled, by virtue of section 80(2) of the Act, to issue this notification with his proposal as to a market determination and with his proposals for setting SMP services conditions. The notification at Annex A is a single notification containing all such proposals.

Approach used to define markets

2.2 There are two dimensions to the definition of a relevant market: the relevant products to be included in the same market and the geographic extent of the market. Oftel's approach to market definition follows that used by UK competition authorities (see Office of Fair Trading Market Definition Guideline, OFT 403, March 1999, which is in line with that used by European and US competition authorities).

2.3 Market boundaries are determined by identifying constraints on the price-setting behaviour of firms. There are two main competitive constraints to consider: how far it is possible for customers to substitute other services for those in question (demand-side substitution); and how far suppliers could switch, or increase, production to supply the relevant products or services (supply-side substitution) following a price increase.

2.4 The concept of the 'hypothetical monopolist test' is a useful tool to identify close demand-side and supply-side substitutes. A product is considered to constitute a separate market if a hypothetical monopoly supplier could impose a small but significant, non-transitory price increase ("SSNIP") above the competitive level without losing sales to such a degree as to make this unprofitable. If such a price rise would be unprofitable, because consumers would switch to other products, or because suppliers of other products would begin to compete with the monopolist, then the market definition should be expanded to include the substitute products.

2.5 Markets are defined first on the demand-side. The analysis of demand-side substitution will be undertaken by considering if other services could be considered as substitutes by customers, in the event of the hypothetical monopolist introducing a SSNIP above the competitive level.

2.6 Supply-side substitution possibilities will then be assessed to consider whether they provide any additional constraints on the pricing behaviour of the hypothetical monopolist which have not been captured in the demand-side analysis. For supply-side substitution to be relevant, there would need to be additional competitive constraints arising from entry into the supply of the service in question, from suppliers who are able to enter in a relatively short period of time and at low cost, by virtue of their existing position in the supply of other services. The above-mentioned OFT Guidelines on Market Definition consider the “relatively short period” to be within a year.

2.7 There might be suppliers who provide other services but who might also be materially present in the provision of demand-side substitutes to the service for which the hypothetical monopolist has raised its price. However, such suppliers are not relevant to supply-side substitution since they supply services already identified as demand-side substitutes. As such, their entry has already been taken into account and so supply-side substitution cannot provide an additional competitive constraint on the hypothetical monopolist. However, the impact of expansion by such suppliers can be taken into account in the assessment of market power.

2.8 A third factor that should be considered is whether there are common pricing constraints across customers, services or areas such that they should be included within the same relevant market even if demand- and supply- side substitution are not present.

Market definition: wholesale voice call termination on each individual network

2.9 In Chapter 3 of the May consultation, the Director proposed the relevant market definition as wholesale voice call termination on each network (or, where the MNO operates both 2G and 3G networks, across both networks). He did so in accordance with Oftel’s normal approach to setting market boundaries (see paragraphs 2.2 to 2.8 above).

2.10 The Director’s current views on market definition remain consistent with those expressed in the May consultation, with the exception of the market in relation to services provided by ‘3’, which is brought into line with the definitions used for the other mobile networks (see paragraphs 2.36 to 2.38 below).

2.11 As the calling party pays (“CPP”) the entire price for a mobile voice call, there is a disconnection between the person paying for the calls (and so, indirectly, for the termination charge) and the person who makes the choice of the terminating network and could thereby influence the level of the termination charge (i.e. the called party).

2.12 The overall effect of this CPP arrangement in the relevant retail markets is that, while MNOs have an incentive to keep the price of those services required and paid for by the subscriber at a level to attract and retain customers, they have less incentive to keep the price of calls to mobiles from other fixed or mobile networks low.

2.13 In the wholesale market, the effect of the CPP arrangement is similar. For fixed-to-mobile calls, the MNO has little incentive to keep voice call termination charges low, because the fixed operator will pay a high charge as they have a commercial interest in ensuring that all calls made by their subscribers are terminated. For off-net mobile-to-mobile calls (i.e. from one MNO’s network to another), the MNOs pay each other for termination of calls and because, in effect, lowering termination charges would lower a competitor's costs without any offsetting benefit to the MNO, there is little incentive to keep termination charges low (see also Chapter 5 for a discussion of bilateral agreements).

2.14 Overall, the Director considers that the CPP arrangement provides each MNO with the ability and the incentive to set their voice call termination charges above the competitive level.

2.15 The Director also considers that no adequate wholesale supply or demand side substitutes for termination of calls to the subscribers of a specific MNO currently appear to exist. Current technology does not allow the termination of a call to a mobile other than on the network of the MNO to which the called party subscribes. This appears unlikely to change in the near future. At the retail level, the Director is of the view that, at present, there are no effective alternatives for callers that could act as a constraint on termination charges. In addition, callers appear to have limited awareness of the cost of calling mobiles. There is a minority of mobile users that show a higher elasticity to the price of incoming calls. The MNOs have, however, separated these users by offering them special tariffs, thus preventing this group from putting any effective pressure on the generality of termination charges levied on fixed operators and other MNOs. Technological conditions and the behaviour of called and calling parties may change over time, but the Director believes that this is extremely unlikely to happen in the next three years (covered by this review). Hence, the Director believes that, at present, there are separate markets for voice termination on each MNO's network/s. A more detailed discussion of Oftel's analysis of the market can be found at Annex A.

2.16 The Director's provisional conclusion is therefore that the provision of wholesale voice call termination by each individual mobile network operator constitutes separate economic markets and that the geographic extent of each network is also the geographic extent of each relevant market. In reaching his conclusion, the Director has taken into account the SMP Guidelines. In particular, the Director has followed the Commission's criteria for defining the relevant market as outlined in paragraphs 38-60 of the SMP Guidelines. Oftel also took the utmost account of the Commission's Recommendation on relevant product and service markets[3].

Responses to the first consultation

2.17 There were 13 non-confidential responses to the May consultation. A list of the respondents and a broad summary of their views is set out at Annex B. The arguments regarding the market definition raised by the MNOs fall broadly into six categories:

i) General approach to defining markets;
ii) Competitive constraints created by substitutes;

[3] Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services

iii) Impact of Receiving Party Pays (RPP) products;
iv) 2G and 3G markets;
v) Consistency with empirical evidence; and
vi) The market definition for ‘3’ and Inquam.

General approach to defining markets

2.18 Orange and T-Mobile suggested that the correct starting point for this Review is to first define the retail markets, which in turn would find that two markets – retail mobile access and outgoing calls and fixed-to-mobile calls – existed. This was in contrast to the Director’s use in the May consultation of “the retail market for calls to mobile.”

2.19 The Director has noted in other market reviews implementing the EU Communications Directives, and in relation to mobile termination in the past,[4] that it is appropriate to commence a wholesale market definition with an analysis of the relevant retail markets. This is because the demand for the wholesale service is a derived demand, i.e. the level of demand for the wholesale input depends on the demand for the retail service. The definition of a retail market is likely to affect the definition of the wholesale market, since the relevant wholesale market will generally be as broad as the demand-side substitutes in the relevant retail market.

2.20 An example might be if there were two different retail services, one of which was provided using wholesale input A and the second of which was provided using wholesale input B, perhaps using entirely different technologies. If the two retail services were sufficiently close substitutes to compete in the same retail market, then the relevant wholesale market will usually include both A and B. So, even if there were only one supplier of A, this would not necessarily imply that there was a separate wholesale market for the provision of A (in which the supplier of A would have a 100 per cent market share).

2.21 The relevant retail markets for this review are, as Orange suggests, the retail access and outgoing call markets (which includes the supply of mobile to mobile calls) and the retail fixed-to-mobile call markets. Oftel proposed these retail market definitions in the following market reviews: Mobile access and call origination services market[5] and Fixed narrowband retail services markets.[6]

2.22 There is, however, no inconsistency between the approach taken in this Explanatory Statement (or the May consultation) document and in those other reviews. In Annex A, the Director analyses the behaviour of retail consumers in assessing demand- and supply-side substitutes and finds that the supply of wholesale termination services by each MNO occurs in a separate market. In the

[4] Oftel, *Oftel’s further comments on market definition*, submission to Competition Commission enquiry, available at http://www.oftel.gov.uk/publications/mobile/ctm_2002/market_def0302.pdf, p.11
[5] Mobile access and call origination services market: Identification and analysis of market and Determination on market power, August 2003, available at http://www.oftel.gov.uk/publications/eu_directives/2003/mobileaco0803.pdf.
[6] Fixed Narrowband Retail Services Market: Identification and analysis of markets, Determination of market power and Setting of SMP conditions, August 2003, available at http://www.oftel.gov.uk/publications/eu_directives/2003/fix_narrow_retail0803.pdf.

Mobile access and origination review, it was explained that individual call types (e.g. mobile to mobile) were not likely to be demand-side substitutes for other call types (e.g. mobile to fixed), even though the retail market is likely to cover both access and outgoing call services due to a common pricing constraint. Consequently, substitutability between fixed and mobile wholesale termination services is not likely to be of relevance when defining the relevant wholesale markets.

2.23 In the Fixed narrowband retail services market review, the Director proposed that there were likely to be markets for retail fixed-to-mobile calls, notwithstanding limited demand-side substitution between fixed-to-mobile calls terminating on different networks.[7] The relevant wholesale markets were not considered in that review, although again it is clear that the lack of demand-side substitutability at the retail level (e.g. between fixed-to-mobile calls and fixed-to-fixed calls) would influence any consideration of the relevant wholesale markets. In other words, the proposed retail fixed-to-mobile markets are not so broad that wholesale markets for termination services need to be considered in the context of other call types.

2.24 Hence, the Director's analysis of wholesale markets in this document does take into account the relevant retail market definitions. The limited demand-side substitutability of retail call types (e.g. between calls to a Vodafone mobile and calls to an O2 mobile, or more broadly calls from a fixed line to a mobile and a fixed-to-fixed line call) is taken into account in the wholesale market definition. This is the approach taken in Annex A.

Competitive constraints created by substitutes

2.25 In their responses, mobile operators have argued that there is complementarity on the demand and supply-side, taking the view that all services in the mobile market share a common competitive condition. As explained in the review of the Mobile access and call origination services market, the Director agrees that the range of access and outgoing call services can be considered to be in the same retail market on the basis of a cluster market analysis. This is because consumers purchase such retail services as a bundle – that is, they are not solely concerned with the individual prices of particular call types but with the total price of the bundle. In other words, even though a hypothetical monopolist raising the price of one service in the bundle might not face demand or supply side-substitution, consumers do not (or are not able to) purchase single elements of the bundle in this way.

2.26 However, the CPP arrangement means that the decision to purchase a fixed-to-mobile or mobile-to-mobile call (involving the wholesale supply of a termination service to the originating operator) is not made by the consumer that purchases the bundle of access and outgoing call services. Consequently, the wholesale termination service cannot be considered to be part of the retail bundle unless consumers take into account the wholesale charges levied (i.e. for calls received by them) in their purchasing decisions. The Director does not believe that the evidence on consumers' behaviour discussed in Annex A supports this and maintains his view that termination services are therefore not linked by a cluster market analysis in the

[7] Four markets were actually proposed – with different business and residential markets in the Hull area and in the rest of the UK.

same way as the provision of origination services. Oftel has previously addressed this issue in more detail[8] and its view was supported by the Competition Commission at paragraph 2.109 of the CC report, based on its own survey evidence.

2.27 T-Mobile has suggested that SMS calls are used as a substitute for, and therefore constrain the price of, retail voice calls, arguing that Oftel's data indicates 70% of consumers who text do so to save money. The Director does not currently consider the two services are retail demand-side substitutes, and this reasoning is explained in the review on the mobile access and call origination services market[9] and in Annex A of this document. More importantly, however, the Director remains of the view that SMS offers little or no constraint on voice call termination charges, as SMS termination is offered by the same MNO providing the voice termination. Therefore, the MNO can set (i.e. raise) SMS termination charges so as to limit competitive pressure on voice termination charges should the level of substitutability at the retail level increase.

2.28 T-Mobile suggested that Oftel's analysis of substitutes from the perspective of the called party had over-emphasised the ability of MNOs to discriminate between those who 'cared' about the cost of others calling them (e.g. members of a closed user group) and those that did not. The Director's argument was that by offering low 'on-net' tariffs, an MNO was able to separate the limited number of customers who factored the cost to others of receiving calls into their purchasing decisions, while maintaining high charges for those customers (the majority) that did not (further detail is in Annex A). However, T-Mobile maintained that competitive pressure on termination charges from closed user groups would benefit all retail users, and said that the overriding market feature was that MNOs could not price discriminate (at the time of the call) in the supply of termination services, which was elsewhere recognised in the May consultation (at paragraph 3.101).[10] T-Mobile also quoted Oftel's figures which showed only a relatively small percentage of small and medium-sized businesses were taking advantage of 'private wire' services and under 20 per cent of people had changed network to be on the same network as someone else.

2.29 The Director refutes T-Mobile's suggestion that all customers benefit from the relatively small volume of price-sensitive customers. Even though MNOs are unable to price discriminate between retail end-users at the time of the call, it is not relevant to the issue of segmentation as the decision by the mobile user to be 'on-net' or to be on a private wire (or other mechanism that bypasses the termination charge) is made prior to the purchase of the termination service. The data quoted by T-Mobile is also inconclusive. The percentages of consumers and businesses quoted as having taken some action to reduce the cost of calling mobiles are broadly consistent with the percentages of the respective populations who claim to care about the cost of calling their mobile phones – indicating that these consumers may well have been successfully targeted by MNOs. Both residential users and SMEs have also revealed that other factors, such as coverage and customer service, were of greater

[8] Oftel, *Oftel's further comments on market definition*, submission to Competition Commission enquiry, available at http://www.oftel.gov.uk/publications/mobile/ctm_2002/market_def0302.pdf
[9] As discussed in more detail in *Mobile access and call origination services market: Explanatory statement and notification*, pp. 64-65
[10] T-Mobile submission, p. 19

importance to them than the cost of incoming calls when choosing the mobile network. See Annex A for more discussion on this point.

Consistency with empirical evidence

2.30 A number of MNOs argued that Oftel's market definition was inconsistent with the empirical evidence. In particular, T-Mobile suggested the 'sharp' changes in the share of mobile calls termination by particular MNOs was indicative of effective competition for subscribers and that a wider market definition was appropriate. While the Director recognises that there is a relationship between termination and origination markets, he does not agree that the evidence presented by T-Mobile is indicative of a broader market because it does not establish demand- or supply-side substitutability, or indicate whether termination and origination services are subject to a common pricing constraint.

2.31 T-Mobile also argued that the aggregate level of response that is needed to prevent a price rise from being unprofitable is far less than Oftel seems to be assuming. T-Mobile claims that it would not be able to raise termination charges by 10% (a SSNIP) because it would lose not only wholesale termination minutes but also subscribers, leading to the price rise being uneconomic. The Director has considered T-Mobile's argument but disagrees with the view presented. There is little evidence to suggest that operators would in fact lose sufficient call volumes or subscribers if termination charges were to increase – the evidence presented in Annex A suggests that both calling and called parties are unlikely or unable to change their behaviour as a result of increases in termination charges.

Receiving Party Pays (RPP)

2.32 Orange raised concerns that the Director had erroneously included the supply of voice call termination for its RPP products[11] in the wholesale market definition. The Director's view is that these (retail) products may fall into the retail mobile access and outgoing calls market, and potentially widen the scope for the wholesale termination service supplied to be a part of a broader wholesale market. While demand- and supply-side substitutability for the wholesale service would still be limited, consumers under the RPP arrangement may perceive a common pricing constraint including the supply of termination services. However, the Director was advised by Orange that the use of these products is very limited, and, in the absence of further evidence to support the market penetration of these products, the Director does not consider it necessary to re-examine the proposed market definitions. The status of RPP products in the charge control is discussed in Annex D.

2G and 3G services

2.33 All of the MNOs responded to the May consultation by stating that voice calls on 2G and 3G should not be considered as separate markets. The view of the MNOs is that, from the perspective of consumers, it is irrelevant whether calls are terminated on 2G or 3G networks.

[11] Receiving party pays is an alternative payment system whereby the mobile user pays for or contributes to the cost of terminating calls on the MNO's network.

2.34 This view is consistent with that of the Director, although it is not clear whether they arrive at the same conclusions for the same reasons. In the May consultation, the Director set out his view that, as callers are unable to choose the network on which calls terminate, voice call termination on one network would not appear to be an effective demand-side substitute if charges for termination of calls to subscribers of the other network were raised above the competitive level. Further, as the two networks are run by the same operator, this also implies that termination on the 2G network will never be a supply-side substitute for termination of calls to 3G subscribers (and vice versa). An MNO would not undercut its own charges.

2.35 The Director also considered the issue of common pricing for the purposes of the market definition and assumed that MNOs will levy a single charge on originating operators for the termination of 2G and 3G calls. The Director's view remains that this pricing policy would imply that the same price would be paid for voice call termination on the 2G network and voice call termination on the 3G network. Therefore, it would be reasonable to include both types of network in the same economic market. See Annex A for further discussion.

The market definition for '3'

2.36 In the May consultation, the Director explained that '3' provides termination services on a 2G network by using the 2G network of another MNO in order to terminate calls to its subscribers. The Director's initial view was therefore that, while '3' provided wholesale voice call termination directly using its 3G network, in the case of 2G, it resold the services of another MNO. Thus, the Director's initial conclusion was that the 2G and 3G voice call termination services provided by '3' to its subscribers were in the same economic market, but the underlying conveyance on the 2G network is part of the market for termination on that 2G MNO's network. The relevant market defined by the Director was thus 'wholesale voice call termination provided to the subscribers of '3'. Representations since made to Oftel have led to a revision of the Director's initial view.

2.37 The Director's intention in defining a different wholesale market for the supply of termination services by '3' was to ensure that the relevant technical characteristics of the supply of the services were taken into account. However, it has become clear to the Director that a different market definition to that used for the supply of services by other MNOs is unnecessary. '3' effectively uses the supply of wholesale termination services by another O2 as in input into its own supply of termination services to originating operators. This is made clear in figure 1 of '3's response to the May consultation, as this shows calls to all subscribers of '3' are transited via BT's network to a gateway MSC of '3'.[12] All voice calls to '3's subscribers pass through the '3' gateway MSC and therefore, as with the other MNOs, '3' singularly controls the termination of voice calls to its network and is providing a PECN. '3' therefore has technical as well as economic (pricing) control over its customers. The relevant market definitions for services supplied by O2 and '3' should logically, therefore, include the supply by O2 of wholesale termination services to '3', and by '3' of

[12] See '3's response at p.10, available at http://www.oftel.gov.uk/publications/responses/2003/ctm0503/h3g.pdf

wholesale termination services to originating operators. The Director believes the definitions proposed in this consultation meet this objective.

2.38 The Director is therefore of the view that the correct market definition is 'wholesale voice call termination provided by '3'. This is consistent with the definition proposed for the supply of voice termination services by other MNOs.

The market definition for Inquam

2.39 The Director's initial conclusion in the May consultation document was that wholesale call termination services provided by Inquam on its Tetra network were likely to form a separate economic market, following the same logic set out above on demand and supply-side substitutes.

2.40 However, the Director understands that most calls on Inquam's network are within closed-user groups (i.e. on-net) and the majority of its customers (SMEs) are businesses sensitive to the cost of customers calling them. This might therefore suggest that Oftel's market definition and SMP assessment was incorrect.

2.41 While the majority of calls might be on-net, in the Director's view, the wholesale termination services provided by Inquam (i.e. for off-net calls) are likely to form a separate market because there are no effective demand or supply-side substitutes for these services. If this market is small in terms of volumes of calls, it is better addressed in his consideration of proportionate remedies, which the Director has done.

Conclusions on the relevant markets

2.42 For the reasons set out above and in Annex A, the Director considers that, for the purposes of markets analysed in this Review, there are six separate relevant markets as follows:

a) wholesale voice call termination provided by '3';
b) wholesale voice call termination provided by Inquam;
c) wholesale voice call termination provided by O2;
d) wholesale voice call termination provided by Orange;
e) wholesale voice call termination provided by T Mobile; and
f) wholesale voice call termination provided by Vodafone.

Forward look

2.43 Following the May consultation, the Director remains of the view that currently there are no adequate supply or demand side substitutes for termination of calls to the subscribers of a specific MNO. However, the Director considers that, as technology evolves, effective wholesale supply and/or demand side substitutes may arise and market boundaries may thus vary. Changes in the behaviour of callers and of called parties may also alter the product market boundaries over time, as awareness of the cost of calling mobiles and of methods for keeping down the cost of making and receiving calls on mobiles increases. Orange and T-Mobile both explicitly point to changes in the market which, in the near future, will result in more competitive pressure on termination charges (in particular, the increasing importance of business use). While the Director will closely monitor changes in the market and will take account of substitution changes, he nevertheless believes that it is extremely unlikely that these developments, which could lead to changes to the market definition, would alter the market definition in the period to 2005/06.

The relationship between the market definitions and the European Commission's recommendation

2.44 In Chapter 1 and at paragraph 2.1 above, it has been explained what the Director must do before making a market determination and that he must take due account of the SMP Guidelines and the Commission Recommendation. The European Commission has, in its Recommendation (point 16 of the annex thereto), defined the following as a relevant wholesale market in accordance with Article 15(3) of the Framework Directive:

> "Voice call termination on individual mobile networks"

2.45 T-Mobile questioned whether the Director's definitions in the May Consultation were consistent with the Commission's Recommendation. However, T-Mobile did not indicate why it thought the Director's definitions might have differed from the Commission's recommendation. The Director notes that his definitions in paragraph 2.42 explicitly use the words "wholesale", although it is clear that the Commission's Recommendation sub-heading (which indicates all of the markets following are wholesale markets) indicates this is not a source of difference. The Director's definitions explicitly mention the network operators, but do not specify separate definitions for operators with both 2G and 3G networks. Whether this is a different definition hinges on whether the Commission Recommendation was intended to mean individual network operators (where both network types are owned), or whether the definition implied that call termination services delivered on 2G and 3G networks were to be explicitly analysed as separate markets.

2.46 The Director is uncertain whether his market definition is consistent with that in the Commission Recommendation. He believes it unlikely that the intent was for separate analysis of voice calls terminated on 2G and 3G networks, where these networks were owned by the same operator. However, for the avoidance of doubt, as he recognises there is the potential for the definition to be perceived as slightly different, he has decided it may be necessary to identify a different market to that in the Commission Recommendation.

2.47 The Explanatory Memorandum to the Commission Recommendation (section 3.2), sets out three criteria to be taken into account in the identification of markets, namely:

- barriers to entry and the development of competition;
- 'dynamic aspects' i.e. whether the market has characteristics that will tend towards effective competition; and
- the relative efficiency of competition law and complementary ex-ante regulation.

2.48 The Director considers that it is necessary to identify a market based on the provision of wholesale voice call termination services on the public mobile networks of the MNOs. As noted in Annex A, the Director's proposed definitions simply reflect the (likely) common pricing constraints across MNOs existing 2G and (future) 3G networks in the UK. That is, it may be impractical or impossible for a mobile operator with both types of network to charge differently for termination services based on the type of network the call is terminated on. The Director notes that the Commission's identified market does not explicitly distinguish between 2G and 3G services, and that there is no difference in the underlying logic of the definition in terms of demand or supply-side substitutability. Given the underlying similarity in competitive conditions (where an MNO provides termination on both 2G and 3G networks), the Director believes that the factors identified above for identification of a market are satisfied. The barriers to entry and prospects for competition for termination on 2G and 3G networks appear very similar where the MNO controls termination on both networks (see Chapter 3 for the Director's analysis of barriers to entry). The dynamic aspects are also very similar, as any substitutes to voice call termination on individual networks will likely affect both 2G and 3G services. For reasons identified in Annex N and in Chapter 5 of this explanatory statement, he also considers the identified market is suitable for consideration of ex-ante regulation.

The relationship between the market reviews and Competition Act 1998 and Enterprise Act 2002 investigations

2.49 The economic analysis carried out in this explanatory statement is for the purposes of determining whether an undertaking or undertakings have SMP in relation to this market review. It is without prejudice to any economic analysis that may be carried out in relation to any investigation or decision pursuant to the Competition Act 1998 or the Enterprise Act 2002.

2.50 The fact that economic analysis carried out for a market review is without prejudice to future competition law investigations and decisions is recognised in Article 15(1) of the Framework Directive which provides that:

"…The recommendation shall identify …markets …the characteristics of which may be such as to justify the imposition of regulatory obligations …without prejudice to markets that may be defined in specific cases under competition law…"

2.51 This intention is further evidenced in the European Commission's SMP guidelines, which state:

Paragraph 25 "… Article 15(1) of the Framework Directive makes clear that the market to be defined by NRAs for the purpose of ex ante regulation are without prejudice to those defined by NCAs and by the Commission in the exercise of their respective powers under competition law in specific cases." (This is repeated in paragraph 37).

Paragraph 27: "…Although NRAs and competition authorities, when examining the same issues in the same circumstances and with the same objectives, should in principle reach the same conclusions, it cannot be excluded that, given the differences outlined above, and in particular the broader focus of the NRAs' assessment, markets defined for the purposes of competition law and markets defined for the purpose of sector-specific regulation may not always be identical."

Paragraph 28: "…market definitions under the new regulatory framework, even in similar areas, may in some cases, be different from those markets defined by competition authorities."

2.52 In addition, it is up to all PECNs to ensure that they comply with their legal obligations under all the laws applicable to the carrying out of their businesses. It is incumbent upon all operators to keep abreast of changes in the markets in which they operate, and in their position in such markets, which may result in legal obligations under the Competition Act 1998 or Enterprise Act 2002 applying to their conduct.