



Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009

Statement of Results

ECS 19/2011

13 October 2011

UTILITIES REGULATION & COMPETITION AUTHORITY

UBS Annex Building, East Bay St | P.O. Box N-4860 Nassau, Bahamas | T 242. 393. 0234 | F 242. 393. 0153

www.urcabahamas.bs

Contents

1. Introduction.....	1
1.1 The Consultation Process.....	1
1.2 Structure of the remainder of this Document.....	2
2. General Comments.....	4
3. Responses to Consultation Questions.....	7
3.1 Defining Relevant Service/Product market.....	7
3.2 Defining Relevant Geographic Markets.....	12
3.3 Mandatory Criteria for Assessing Market Power.....	15
3.4 Optional Criteria for Assessing Market Power.....	20
3.5 Criteria for assessing Joint/Collective SMP.....	23
4. Conclusion and Next Steps.....	30

1. Introduction

The Utilities Regulation and Competition Authority (URCA) is issuing this Statement of Results on its proposed methodology for assessing Significant Market Power (SMP) in the electronic communications sector. Concurrently with the publication of this Statement of Results, URCA has pursuant to s.39(2) of the Communications Act, 2009 ("the Comms Act") also published a separate document setting out its Final Decision (ECS 20/2011) on the methodology URCA will use for SMP (market) analysis.

On May 18, 2011 URCA published a consultation document (ECS 09/2011) on its proposed methodology for SMP analysis. The consultation document was issued under the terms of s.39(2) of the Comms Act which defines URCA's role in the determination of SMP, as:

- defining relevant economic markets in the electronic communications sector; and
- making determination of market power.

Under s.39(1) of the Comms Act:

"a licensee is an SMP licensee if the licensee, individually or with others, enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of competitors, consumers and subscribers."

Under the terms of s.39(1) of the Comms Act, URCA has a statutory duty to conduct market reviews in accordance with a framework established by URCA, including assessing whether the interim SMP presumptions applicable to Bahamas Telecommunications Company Limited ("BTC") and Cable Bahamas Ltd. ("CBL") are still relevant and appropriate. Section 116 of the Comms Act allows the aforementioned licensees to make representations, with supporting evidence, to URCA, to rebut the interim SMP presumptions as per s.116(6). This is further emphasised in the Electronic Communications Sector (ECS) Policy which states that the interim presumptions of SMP become rebuttable after 12 months from the Act coming into force.

1.1 The Consultation Process

For purposes of SMP analysis, s.39(2) of the Comms Act specifically requires URCA to establish and publish criteria:

- (a) relating to the definition of markets in the ECS; and
- (b) against which market power may be assessed.

In furtherance of URCA's remit under s.39(2) of the Comms Act, URCA has a duty to consult under s.11 of the Comms Act and give due consideration to comments received prior to introducing any regulatory or other measures. As such, on May 18, 2011, URCA issued ECS 09/2011 – "Methodology for Assessing Significant Market Power (SMP)"¹ and invited interested parties to make written submissions on the consultation.

The proposed SMP methodology reflects the requirements of the Comms Act and drew upon, where appropriate, international best practice.

The objectives of the consultation document were to:

- outline URCA's proposed methodology for SMP analysis; and
- invite comments from licensees and the general public.

The closing date for submitting responses to the consultation was June 29, 2011. On or before this deadline date, URCA received responses from two companies:

- Bahamas Telecommunications Company Limited (BTC); and
- Cable Bahamas Ltd. (CBL) - (CBL responded on behalf of itself and its affiliated companies Caribbean Crossings Ltd. and Systems Resource Group Ltd).

URCA published the responses on its website at www.urbahamas.bs, and allowed a further two (2) weeks (up to July 15, 2011) for comments on responses received.

URCA received a response from BTC before the close of the second period for responses to the consultation.

URCA wishes to thank the respondents for their comments and commitment to continued involvement in URCA's processes for the implementation of methodology for assessing SMP in the sector.

URCA has prepared this Statement of Results following its consideration of the substantive comments received. URCA stresses that its lack of response to a comment should not be taken to mean that URCA has not considered the comment or that it is unimportant or without merit.

1.2 Structure of the remainder of this Document

The remainder of this document is structured as follows:

¹ Copies of this document may be downloaded from the Publication Tab on URCA's website at www.urbahamas.bs.

- Section 2: General Comments – Summary of the general responses to the consultation, and URCA’s comments; and
- Section 3: Responses to Consultation Questions – Summaries of the responses to each consultation question, and URCA’s comments and final decisions.
- Section 4: Conclusion and Next Steps.

2. General Comments

The two respondents to the consultation made general comments on URCA's proposed methodology for SMP analysis, as summarised below. URCA identifies and responds to these general comments in this section.

In the case where a particular comment mirrors the specific responses to a question posed by the consultation document, URCA's response to the comment is made in its responses to that question.

BTC

BTC welcomed the opportunity to comment on URCA's proposed methodology and noted that the approach described in the consultation paper is generally in line with European Union (EU) best practice. BTC recognized that it is useful to follow a framework where there are well established precedents and principles. At the same time, BTC cautioned that the framework must be cognizant of the embryonic stage of development of the market in The Bahamas compared to that found in more developed countries of the EU.

BTC was of the view that consideration should be given by URCA to the principle of technological neutrality. In BTC's view, current VoIP offerings in the market, inclusive of VoIP providers not licensed by URCA, impose a pricing constraint on BTC's PSTN voice products. BTC asserted that the proliferation of those VoIP providers underscores the need to revisit the overly prescriptive and restrictive *ex ante* remedies imposed on BTC's PSTN voice services.

BTC noted the exclusion from the consultation document of a timetable or commitment on the part of URCA to carry out the program of SMP analysis. BTC therefore urged URCA to publish its plans to carry out a program of market analysis at the conclusion of this consultation process. In BTC's view the aim of such a program should be to provide clarity on the definition of markets that will be subject to *ex ante* regulations and to impose or revisit remedies previously imposed by URCA.

BTC noted that URCA planned to undertake in 2nd Quarter 2011, an SMP analysis of call termination services and stresses that this project is of utmost importance to the business at this time.

Finally, BTC stated that there is a need to take into account the cost of regulatory obligations and ensure that the cost of regulation is proportionate to the problem identified.

CBL

CBL asserted that the consultation paper was incomplete and in some respects flawed as it pertained to the types of factors to be assessed in the market review process. CBL further stated

that a number of important principles have been omitted and these should be included in URCA's final guidance on methodology for SMP analysis. URCA understands that whilst CBL did not clearly identify those principles, it noted that some issues/principles of importance to the proposed methodology were articulated in its response to a previous consultation.²

CBL stated that the objectives of SMP analysis should be twofold: (i) to identify potential market failures, and (ii) to assess whether some licensees have SMP. However, CBL believed that once market failures are clearly identified, URCA would then be in a better position to assess appropriate remedies. CBL further stated that in the selection of the appropriate *ex ante* remedies, URCA should conform to a proper justification and proportionality assessment. CBL then noted that efforts expended by the industry, to date, to establish a regulatory framework may come to naught if the remedies that are implemented are not effectively enforced.

CBL recommended that URCA take in account the small size of the Bahamian market and its specific characteristics in order to select obligations that are adapted for the operators and that are not burdensome, as the fixed costs of regulation could not be recovered from a high number of end users.

URCA's response to comments received

URCA notes and welcomes the favourable comments on its proposed methodology as stated by BTC in its response. URCA advises that as far as pragmatically possible, URCA will ensure its SMP methodology is fit for purpose and suits the embryonic stage of development of the ECS in The Bahamas.

BTC's urging for URCA to consider technological neutrality when conducting market analysis has been noted. However, URCA is unable to substantiate BTC's assertion that VoIP represents a significant competitive constraint on BTC's PSTN business. This issue was fully considered as part of URCA's extensive consultation on SMP and at that time URCA concluded that Voice over Internet (VoI) and PSTN services are not in the same economic market. URCA also wishes it to be noted that this consultation focuses on URCA's methodology for SMP analysis and not the actual market analysis.

² CBL referred to its submission to URCA on 18 December 2009 in response to URCA's Preliminary Determination on the Types of Obligations on CBL (ECS 19/2009, issued 30 September 2009). Copies the Preliminary Determination may be downloaded from the Publication Tab on URCA's website at www.urbahamas.bs.

URCA accepts that a timeframe for conducting a full market analysis is paramount going forward. However, URCA reiterates that the purpose of this proceeding is to determine the methodology URCA will use for SMP analysis which is a precursor to URCA conducting a full market analysis as contemplated by the Comms Act and the ECS Policy. Upon publication of the final SMP methodology, URCA will publish (as part of its Annual Plan for 2012) a timetable for the first full market reviews under the Comms Act. However, as a first step and as noted by BTC, URCA has already indicated a timeline to initiate an SMP proceeding with respect to call termination services. This work stream was scheduled to commence in 3rd Quarter 2011 and not 2nd Quarter as stated by BTC.

In response to CBL, URCA again reiterates that the purpose of this consultation is not to detail or specify remedies to be imposed on SMP licensees but to establish the methodology URCA will use for assessing SMP. Further and as a general comment, URCA stresses that enforcement of existing regulatory measures is separate and apart from the subject matter under consideration (i.e., to establish a methodology for SMP analysis). In addition, URCA has initiated enforcement proceedings in a number of areas, some of which are ongoing and URCA will continue to address issues of this nature as and when required.

URCA rejects CBL's comment that the document is flawed or omitted important principles. In URCA's view the key principles underpinning the proposed SMP methodology were clearly identified in the document. Specific to CBL's comment that issues relevant to this public consultation were previously submitted to URCA, URCA reminds CBL that those concerns were addressed in URCA's March 19, 2010 Position Paper³ and do not materially impact this consultation.

Regarding the balance between regulatory obligations and cost of regulation, URCA is mindful of its statutory obligation under s.5(b)(ii) of the Comms Act. URCA notes that before introducing remedies on any operator determined to have SMP it would have "due regard" to costs and implications for affected parties. At this stage URCA is merely establishing the criteria for market analyses which are expressly required by s.39(2) of the Comms Act and the methodology prescribed herein is fit for purpose and is cost effective.

³ECS 07/2010 available at www.urcabahamas.bs.

3. Responses to Consultation Questions

3.1 Defining Relevant Service/Product market

Proposal #1: URCA proposes to utilise the SSNIP test to define the relevant service/product market. In doing so, URCA proposes to have regard to the following criteria, inter alia:

- *demand-side substitution;*
- *supply-side substitution;*
- *evidence of previous substitution;*
- *consumer preferences;*
- *barriers and switching costs; and*
- *quantitative studies.*

BTC

BTC found URCA's list of criteria to be consistent with guidelines issued by the European Commission (EC) on market definitions for SMP analysis. However, BTC raised a number of comments/concerns in relation to URCA's proposal, namely:

- The non-transitory period for market analysis should be two (2) years and be forward looking, and the starting point of the analysis should be that regulatory intervention is not needed and that a case for regulatory intervention must be made.
- It cautioned against the use of evidence of previous substitutions when defining markets. BTC noted that such information might not always be reliable given rapid technological changes coupled with changes in customer buying behaviour over time. BTC believes that evidence of previous substitution should only be relied upon if it provides: (i) evidence of substitution on a forward looking basis; and (ii) a reliable indication of future consumer behaviour.
- Regarding "barriers and switching costs", BTC cited an example which suggested to URCA, that BTC was unclear as to what URCA meant by "barriers and switching costs" and how this criterion is to be applied.
- BTC noted that it is likely to be very challenging to estimate elasticities in The Bahamas. As such, BTC recommends that URCA should also use experience from other jurisdictions, as well as surveys and data specific to the Bahamian market to inform itself of likely consumer behaviour.
- In anticipation of URCA's first market review under the Comms Act, BTC suggested that URCA commenced with a list of preliminary markets that are subject to *ex ante*

regulation. It then referenced the four high level SMP markets in s.116 and Schedule 4 of the Comms Act and suggested that these markets should form the starting point for a full market review and the application of *ex ante* regulation, where necessary. BTC urged URCA to apply the EU Three Criteria Test (TCT)⁴, as this would bring clarity on the markets that may be subjected to *ex ante* regulations. BTC also suggested that the TCT should be used to inform the determination of *ex ante* remedies to be imposed on SMP licensees and that those remedies should be proportionate and informed by benefit/cost analysis. BTC then proposed that URCA amend Proposal 1 to include a statement that incorporates the TCT.

CBL

CBL stated that URCA did not clarify what constitutes *the* starting point of the market definition process. It noted that, within the EU, eighteen (18) relevant markets were originally identified as susceptible to *ex ante* regulation but by 2007 the number had reduced to 7. Those 18 markets were then used as the starting point by National Regulatory Agencies (NRAs) to perform their market reviews. It further noted that NRAs can only regulate markets beyond those listed markets if the TCT is applied and *cumulatively met*. In commenting further, CBL noted that while URCA acknowledged the importance of the TCT in the Preliminary SMP Determination, the test was applied in an unusual way (i.e., at the end of the process rather than the beginning) due to the statutory presumptions of dominance.

CBL referenced the transitional provisions of the Comms Act (s.116) and Schedule 4) and stated that, as the transitory period comes to an end, URCA was free to re-assess the situation and evaluate whether the particular sub-markets that it initially established were effectively characterised by SMP. CBL complained about the “*unprecedented de jure presumption of dominance of CBL and BTC, that could not be rebutted, and which led to the unnecessary imposition of ex ante measures.*”

CBL commented that URCA has a responsibility to move away from the statutory presumption of dominance and while the four high level markets now represent the *de jure* starting point to the first market review, URCA will have to determine whether those high level markets and sub-markets satisfy the TCT for *ex ante* regulations.

CBL suggested that URCA refine its approach to market definition by:

⁴The three criteria that must be cumulatively met are:

- (i) The market shows high and non-transitory barriers to entry, and
- (ii) Market structures do not tend towards effective competition in a relevant time horizon, and
- (iii) Application of competition law alone does not adequately address the market failure.

- considering additional factors such as product technical characteristics, and the customer’s use of the considered products and their prices. CBL cautioned against URCA limiting its analysis to the use of the SSNIP test as this could lead to an unreasonably narrow market definition and inappropriate regulation.
- adopting a forward-looking approach to the market definition process and consider the principle of technological neutrality.

URCA’s response to comments received

URCA agrees with BTC and CBL that the SSNIP test should be forward looking. However, URCA does not agree with BTC that the non-transitory period for the SSNIP test should be two (2) years. URCA’s review of international experience reveals that the non-transitory period considered in the application of the SSNIP test is typically one year (twelve months). That is, the SSNIP test considers whether a small, but significant non-transitory price increase from the competitive level would be unprofitable for a hypothetical monopolist in the provision of a product, due to potential demand- and supply-side substitution which may be generated by the price increase over the twelve (12) month period. In URCA’s view, it is reasonable to follow this precedent. However, URCA is mindful that there may occur instances in the future that may warrant URCA to adjust the time period for the SSNIP test, for example due to the potential for economic and technological changes in the sector. In those instances, URCA would consider a longer period for the SSNIP test. URCA understands that the SSNIP test is widely used by NRAs globally for market definition and is the recommended approach by the EC.⁵ As such and in line with URCA’s proposal, the SSNIP test will similarly constitute the starting point for defining relevant markets for SMP analysis in The Bahamas. URCA wishes to assure the industry that the test would not be applied in isolation but will be used in conjunction with other criteria to determine the relevant product/service market.

While agreeing with BTC that market analysis for *ex ante* purposes should be forward looking, URCA recognises that the information that would normally be available is historic by nature and would therefore reflect the actual state of competition on an historic basis. Notwithstanding this and given the dynamic nature of the industry, URCA would consider the historic information but would supplement this with other current relevant information when defining markets.

URCA notes BTC’s comments on URCA’s proposal to consider “*evidence of previous substitution*”. While URCA does not disagree with BTC’s comments, it is mindful that the application of this criterion must be carefully evaluated on a case-by-case basis to determine its

⁵The EU SMP Guidelines (2002/C 165/03)

appropriateness. Thus, for purposes of defining relevant markets, URCA would consider evidence of previous substitution in combination with the other criteria stated under Proposal 1.

URCA strongly disagrees with BTC's comments on barriers and switching costs. As outlined in the consultation document the existence of barriers and switching costs may prevent similar products/services from being considered effective substitutes. The presence of legal barriers or the absence of other regulatory measures, such as number portability and/or indirect access may constitute barriers and switching costs which URCA may consider under this criterion.

Regarding the additional criteria mentioned by CBL, URCA notes that the customer's use of the product in question and related prices would be captured under the Consumer Preference criterion. While URCA must always be mindful of the technical characteristics of the product, it is concerned that total reliance on this may lead to a narrowly defined product/service market and could result in a technologically specific approach to market definition. As stated elsewhere in this document, URCA does not regulate technology but regulates the services however delivered to consumers.

URCA agrees with BTC that it may be challenging to estimate elasticities in The Bahamas, especially given the lack of robust volume data and for some services, and relatively limited price changes. URCA therefore, agrees with BTC that consideration be given to experience from other jurisdictions, as well as surveys and data specific to the Bahamian market to inform itself of likely consumer behaviour.

As stated by both respondents, there existed a presumption of dominance under the terms of s.116 and Schedule 4 of the Comms Act and, arising from this, URCA imposed remedies on BTC and CBL pursuant to s.40. URCA reminds CBL and BTC that the presumptions of dominance were legislatively imposed and URCA, in accordance with the Comms Act, duly consulted on the obligations to be imposed on both operators. Further, both BTC and CBL participated in the various consultations on the final obligations imposed on both companies. Against this backdrop URCA does not accept that the final measures imposed were unnecessary.

In URCA's view the four high level markets established by the Comms Act and the sub-markets defined by URCA in April 2010⁶ could potentially serve as a starting point for URCA's first market review. However, it is URCA's considered view that it would be unwise for URCA to speculate on what or how many markets would be subjected to *ex ante* regulation after the review, or the relationship if any between those markets and the presumed SMP markets specified in the Comms Act. For completeness and in support of URCA's position, it is URCA's understanding that

⁶Obligations imposed on Operators with Significant Market Power (SMP) – Final Decision (ECS11/2010) dated 22 April 2010.

it was only after the EU national regulators had conducted their first market review that the number of markets susceptible to *ex ante* regulations were reduced from 18 (in 2003) to 7 (in 2007).

URCA is concerned with the approach to the application of the TCT as suggested by BTC and CBL. In URCA's view, the suggested approach is self-serving and may lead to outcomes that are not necessarily in the public interest and/or promote sustainable development of the sector generally.

URCA's own review of the EU experience suggests that the TCT is applied differently across the various member states. The evidence available to URCA suggests that there is no clear separation between the TCT and the SMP analysis as the first two steps in the TCT, which must be applied cumulatively, are the same as used in the SMP analysis. As the ERG concluded in its Report⁷:

"The experiences gathered to date in the first round of market analysis reveal slightly different practices regarding the application of the three criteria, depending on national circumstances. The importance given by NRAs to the three criteria as a test itself also appears to have varied depending on the specific case.

In general, experiences with the three criteria tend to confirm that in cases where both the three criteria test and SMP analysis is undertaken, it is difficult to dissociate the first criterion (barriers to entry) and also the second criterion (tendency towards effective competition) from the elements that are considered in an SMP analysis.

Also, generally NRAs consider that the level of detail that was required in the assessment of the three criteria was in no instances higher than the level of detail required for SMP assessment. The same conclusions apply in relation to the burden of proof, where again the common view is that in no circumstances was the burden of proof for assessment of the three criteria higher than the burden of proof necessary to show the existence (or absence) of SMP."

In URCA's view there are no material differences between the SMP analysis and the first two criteria of the TCT as it is URCA's understanding that in practice the first two criteria of the TCT are similarly applied when an SMP assessment is performed. With the exception of assessing the third criterion (regarding the ability of competition law to address market failure), URCA therefore does not believe that applying the TCT in addition to its SMP assessment would

⁷ERG (08) ERG Report on 3 criteria test final 080604, "ERG Report on Guidance on the application of the three criteria test". http://www.erg.eu.int/doc/publications/erg_08_21_erg_rep_3crit_test_final_080604.pdf

enhance its understanding of the competitive conditions in the relevant markets. However, URCA also acknowledges that *ex ante* regulatory remedies should only be imposed where there is a risk that a SMP operator could abuse its position in that market, and that any such remedies should be proportionate to the potential abuses identified.

Therefore, before imposing remedies on SMP operators, URCA will assess potential competition concerns in those markets and consider whether *ex post* competition aspects of the Comms Act are sufficient to address those concerns. Only where URCA judges this is not sufficient will it impose *ex ante* remedies.

URCA's final decision

Having regard to Proposal 1 of the consultation, the responses received from licensees, and URCA's consideration of those responses, URCA makes the following decisions:

- In the application of the SSNIP test the non-transitory period is one year (twelve months). However, URCA reserves the right to adjust the time period for the SSNIP test to reflect economic and technological changes in the electronic communications sector of The Bahamas.
- For purposes of market definition, URCA will apply the SSNIP test and shall have regard to the criteria listed below:
 - Evidence of previous substitution;
 - Consumer preferences;
 - Barriers and Switching Costs; and
 - Quantitative Studies (including surveys, studies of other markets) where relevant and available.

3.2 Defining Relevant Geographic Markets

Proposal #2: URCA proposes to have regard to the following criteria when defining the relevant Geographic market, inter alia:

- *past evidence of customers diverting orders to suppliers in other areas;*
- *basic demand characteristics;*
- *views of third parties; and*
- *barriers and switching costs.*

BTC

BTC believed that URCA understated the importance of geographic analysis in The Bahamas. BTC noted that the archipelago includes a large number of islands and cays in which both demand and supply conditions for services differ substantially due to differences in population sizes and concentration, average income and coverage by the main providers. Consequential to that, BTC stated that there is little infrastructure-based competition and little prospect of infrastructure based competition in many of the more remote islands and cays. As an approach, BTC suggested that URCA should group islands based on the existence of network infrastructure and competition. Following on from that, BTC stated that URCA should then classify geographic areas into those that are 'competitive', 'prospectively competitive' and 'uncompetitive'. BTC believes its suggestion, if adopted, would provide homogenous markets from the perspective of supply and demand substitution which in turn would result in proportionate and targeted regulatory intervention, where necessary.

BTC illustrated its point through a discourse on next generation infrastructure, where in its view, the uncertainty of investment in those infrastructures lends itself to regulatory forbearance and/or regulators being transparent and predictable in their intervention and to interventions, if any, being proportionate to the problems identified.

CBL

CBL noted that the main objective of geographic market definition is the assessment of geographic boundaries where competitive conditions reflect sufficiently (but not perfectly) homogeneous competition conditions. CBL further stated that the pragmatic approach by most regulators is to presume that the market is national and thereafter consider criteria and dimensions that may contradict that assumption. CBL believes that this approach should be adopted by URCA.

While CBL agreed that the proposed criteria are relevant for defining the geographic scope of the relevant market it was of the view that two additional criteria should be included, namely:

- the area covered by the networks of the service providers; and
- the existence of legal and other regulatory instruments.

URCA's response to comments received

URCA recognises the impact that the archipelago nature of The Bahamas may have on the development of competition in the sector. Further, it does not disagree with BTC that there are variances in both demand and supply conditions across islands. However, should URCA adopt the cluster approach advanced by BTC, the number of geographic markets may increase to equate the number of islands and cays that comprise The Bahamas. In URCA's view this

approach would introduce more complexity and subjectivity to the SMP analysis and the degree of data granularity that will be required to undertake such a classification is currently not available and is unlikely to be available in the very near future. URCA is also of the view that BTC's proposed approach prejudices SMP analysis, has implications for the disaggregation of regulatory remedies, impacts on pricing (wholesale and retail) and could disincentivise network rollout throughout The Bahamas. URCA also considered establishing geographic clusters of islands with similar characteristics (economic, proximity to each other, etc.) for market analysis. However, it was immediately recognized that this approach would also introduce more complexity and subjectivity to the SMP analysis and raises similar concerns to those associated with BTC's proposal.

URCA agrees with CBL's suggestion and is satisfied that its approach to geographic market definition is pragmatic. To that end and in line with the consultation, URCA will presume that the market is national and, thereafter, consider criteria and dimensions that may contradict that presumption.

While URCA's list of criteria for geographic market analysis might not be exhaustive, URCA is particularly concerned as to the inclusion of the existence of network infrastructure in that list. In URCA's view this could lead to a similar outcome as BTC's proposed classification, in that, it would prejudice the SMP analysis, has implications for the disaggregation of regulatory remedies, impacts on pricing (wholesale and retail) and could act as a disincentive to network rollout throughout The Bahamas. For those reasons, URCA is of the view that at this stage of market liberalization, it will not include existence of network infrastructure amongst the list of criteria.

Specific to CBL's point on the inclusion of existence of legal and other regulatory barriers, that variable is already captured in URCA's criterion "barriers and switching costs".

URCA notes BTC's comments on investment in new and emerging technologies and the need for regulatory forbearance in growth markets given the uncertainty surrounding investment in next generation infrastructure. Again, URCA reiterates that it does not regulate technology but rather services provided to consumers. Further, given the objective of this consultation, URCA does not believe this is the appropriate forum to engage in an extensive discussion on matters relating to forbearance and *ex ante* remedies. Notwithstanding, URCA wishes to assure interested parties that prior to introducing remedies URCA will consult and have regard to submissions received from respondents.

URCA's final decision

Having regard to Proposal 2 of the consultation, the responses received from licensees, and URCA's consideration of those responses, URCA reaffirms its position to use the criteria specified in Proposal 2 when defining relevant geographic markets.

3.3 Mandatory Criteria for Assessing Market Power

Proposal #3: URCA shall use the following mandatory criteria for assessing market power:

- *Licensee's Market Share*
- *Licensee's Ability to Influence Market Conditions;*
- *Access to Financial Resources;*
- *Licensee's Experience in Providing Products to the Market.*

URCA proposes to use the following thresholds when defining market share which being measured by total gross revenues in the market, total subscriber numbers, total traffic volumes or total capacity:

- *a licensee with less than 25% market share will be presumed to be a non-SMP;*
- *a licensee with at least 75% market share will be determined to be an SMP licensee; and*
- *a licensee with a market share of between 25% - 75% will be presumed to be an SMP licensee.*

URCA may consider alternative proposals from interested parties on the proposed thresholds once these proposals are supported by empirical evidence and sound reasoning.

BTC

BTC continued to emphasise that the SMP analysis should be forward looking and noted that many of the criteria listed by URCA depended upon historic data for analysis. BTC continued by stating that the competitive landscape in The Bahamas is likely to change over the coming years with the advent of liberalization.

With respect to the criteria listed, BTC stated that URCA appeared to distinguish between the four criteria listed in s.39(3) of the Comms Act (i.e., mandatory criteria) from the optional criteria listed in proposal 4. BTC argued that this categorisation suggests that URCA intends to give greater prominence to the s.39(3) criteria, and recommended that those criteria be combined with those listed under Proposal 4.

BTC stated that it was unclear as to the difference between "presumption" and "determination" as used in respect of the thresholds specified above. In the opinion of BTC they both lead to the same outcome – an SMP designation if the market share is 25% and above. In BTC's view 25% is too low and contrasts with the 40% threshold established by the EU. However, BTC agreed with URCA's proposal to implement a higher trigger (75%) than the EU benchmark for the determination of SMP to better reflect the smaller number of operators in the Bahamian market.

Specific to the criteria listed under s.39(3) of the Comms Act, BTC stated that URCA should consider change in market share as this is indicative of a competitive market or a market becoming more competitive. BTC cited the European Regulators Group (ERG), which recommends in the calculation of market share the use of volume for bulk products (wholesale conveyance minutes) and value for differentiated (branded) products. BTC suggested that URCA consider these measures of market share for purposes of SMP analysis.

BTC welcomes URCA's stated intention to focus its analysis on the actual conduct of a possible SMP licensee rather than on the theoretical analysis of the economic factor and influence. This statement was in response to URCA's discussion on a Licensee's ability to influence market conditions.

BTC stated that URCA's assessment of access to financial resources was overly simplistic and did not consider the internal strict controls and processes on capital spending imposed by large multinational organizations or the ease of access to 'soft loans' by smaller companies. While arguing that URCA should focus on the hurdle rate used by shareholders, parent companies or investment bankers, BTC was quick to point out that such a rate *"is likely to be confidential information."*

BTC again reiterated its position on a licensee's experience in providing products to the market. BTC was of the view that URCA should give due consideration to the significant countervailing costs associated with being an incumbent and those costs should be examined against the benefits of being a new entrant. In BTC's view there is a danger that reliance on this criterion will result in operators that have historically worked in The Bahamas becoming perpetual SMP operators.

In concluding, BTC proposed that URCA amend the last statement on the presumption of SMP to read:

"a licensee with a market share of between 25% and 75% will be assessed using other criteria for SMP."

CBL

While acknowledging that market share can be an important criterion for assessing market power, CBL stated that, consistent with international best practice, an arbitrary static market share threshold should never be the sole basis for a finding of SMP. It then voiced two major concerns with URCA's proposal:

- the analysis of market share data should be assessed over time as *ex ante* market analysis is prospective by nature. CBL proposes that URCA use overall market share trends rather than "static" market share in its analysis; and

- the examination of market share alone should not be conclusive. CBL requests that URCA clarify its position given the statement in the consultation document that market share “*thresholds are starting points only*”.

CBL questioned the reasonableness of URCA’s presumption of dominance based on a 25% to 75% market share. It stresses that a presumption of dominance below a market share of 40% is not consistent with international precedents and cited the EU SMP Guidelines⁸ to support its position. Further, CBL stated that it was unjustified to impose a *conclusive* determination of SMP above a 75% threshold. In CBL’s view a high market share alone is not sufficient to establish dominance, and that in the instance of high market share the presumption should not be conclusive but rebuttable.

Following on from those comments, CBL noted that:

- a presumption of dominance should only apply above 40% market share; and
- URCA should not make a finding of SMP on the sole basis of market share.

URCA’s response to comments received

URCA wishes to state categorically that it was always URCA’s intent to apply the criteria listed under both s.39(3) and Proposal 4 collectively. URCA’s listing of the criteria under two separate headings was not designed to give greater prominence to the s.39(3) criteria but was simply for presentation purposes. In line with BTC’s suggestion and URCA’s intent, URCA will merge the s.39(3) criteria with those listed under Proposal 4 into one list.

URCA agrees with both respondents that market analysis for *ex ante* purposes is forward looking by nature. However, UCRA draws attention to the potential difficulties with basing a prospective market analysis entirely on projected market shares. Consequential to that, the data available to URCA would in all instances be historic in nature. While it may not have been clear, URCA will not confine its analysis to a static market share but would consider trends in market share, provided that such information is readily available.

URCA notes that both BTC and CBL expressed concerns with the threshold levels for the presumption of dominance or in the case of CBL, for URCA’s reconsideration of the values proposed as the trigger for the presumption or determination of SMP. URCA has carefully considered the submissions on the threshold levels to be used for SMP assessment. In its deliberations URCA was cognizant that the European Commission’s SMP Guidelines states at

⁸2002/C 165/03

Recital 75 “...undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position on the market concerned.” URCA recognises that it cannot conclusively say that a licensee with less than 25% market share will be presumed to be a non-SMP licensee. However, after considering all submissions, reviewing international experiences and considering factors and characteristics specific to The Bahamas (e.g., the embryonic stage of the ECS markets), URCA considers it prudent to increase the threshold level from 25% to 40%. URCA would not likely consider a licensee with a market share of less than 40% to be an SMP licensee unless compelling evidence is provided to URCA demonstrating otherwise. As a result of this change, URCA will amend its statement to read “a licensee with less than 40% market share will not generally be presumed to have SMP.”

URCA does not disagree with BTC that the difference between “presumption” and “determination” is unclear in URCA’s consultation document, nor does URCA disagree with CBL that it is not justifiable to impose a *conclusive* determination of SMP above a 75% threshold. URCA having regard to the submissions received and s.39 of the Comms Act, has reconsidered its proposal for SMP assessment. Accordingly, a licensee with market share of 40% and above may be presumed to be an SMP licensee and will be assessed against the other criteria listed in s.39(3) of the Comms Act, and any other criteria as URCA in its sole discretion considers necessary or appropriate in the circumstances.

The final point to be noted on market share is that URCA will use the most relevant indicator of market share, including market share measured by total gross revenues in the market, total subscriber numbers, total traffic (bulk or otherwise) or total capacity.

Specific to the criteria listed under s.39(3) of the Comms Act for assessing market power, BTC was the only respondent to offer comments. Pertaining to the Licensee’s ability to influence market condition, URCA notes BTC’s agreement with URCA’s position. URCA therefore has no further comment.

URCA notes BTC’s comments on a Licensee’s access to financial resources. In URCA’s view, BTC’s arguments are equally applicable to large multinational organizations, which given their size and economic strength, facilitate ease of access to global financial markets at more preferential terms relative to smaller companies. Further, URCA does not consider the ‘hurdle rate’ to be applicable as it is the internal rate used by companies for investment purposes. As BTC rightly stated that rate is confidential to the licensee, and URCA will generally not have sight or knowledge of it.

URCA reminds BTC that URCA has given consideration to BTC’s costs and as a result of that, URCA has initiated an efficiency study of BTC. Specific to the licensee’s experience in providing products to the market URCA does not envisage that learning by doing or experience gained from operating in the market is in itself bad. URCA, as proposed in the consultation document,

will consider whether established licensees could leverage their experience and knowledge in the market to secure and maintain an economic advantage that enables them, to an appreciable extent, to behave independently of alternative operators and consumers. The illustrations provided by URCA in the consultation document were the licensee's control over marketing and distribution/supply channels, and key human resources. These illustrations exemplify how URCA is likely to apply this specific criterion.

URCA's final decision

URCA will merge the criteria listed under s.39(3) of the Comms Act and those under Proposal 4. The combined list of criteria will be used to assess market power in relevant markets.

URCA has revised the threshold levels for the presumption of SMP as follows:

“a licensee with less than 40% market share will not generally be presumed to have SMP; and

“a licensee with market share of 40% and above may be presumed to be an SMP licensee.”

At the outset of any assessment of SMP in a defined market, URCA will review the relevant market shares to decide whether it could be appropriate to apply a presumption based on the above thresholds. In conducting such a review, URCA shall have regard to the criteria set out in s.39(3) of the Comms Act and, to the extent URCA considers necessary to ensure that the presumption is appropriate in all the circumstances, to the more detailed criteria set out below.

Where a licensee has a market share of less than 40% of the relevant market, no presumption of SMP will be made by URCA, and in such circumstances URCA would not likely consider that licensee to be an SMP licensee unless compelling evidence based on the detailed criteria set out below is presented to URCA demonstrating otherwise.

Where a licensee has a market share of 40% and above in the relevant market URCA may make a presumption of SMP based on the market share, the other criteria listed in s.39(3) of the Comms Act, and such of the detailed criteria set out below as URCA in its sole discretion considers necessary or appropriate in the circumstances. In the event that URCA makes a presumption of SMP in respect of a licensee in a market, the licensee may by way of representations to URCA's consultation rebut the presumption by demonstrating that it is not in a position of economic strength to behave to an appreciable extent independently of other licensees, consumers or subscribers. Such demonstration should, have regard to the following relevant criteria:

- Licensee's market share;

- Licensee’s ability to influence market conditions;
- Licensee’s access to financial resources;
- Licensee’s experience in providing products to the market;
- Barriers to entry and expansion;
- Number of active competitors
- Extent of countervailing power among buyers;
- Prices and profitability;
- Vertical relationships;
- The influence of other members of the licensee’s group;
- Economies of scale and scope;
- Overall size of the undertaking;
- Control of infrastructure not be easily duplicated;
- Technology advantages or superiority;
- Highly developed distribution and sales network; and
- Product/services diversification.

For purposes of SMP analysis, URCA may adopt one or more measures of market share, including total gross revenues in the relevant market in question, total subscribers, total traffic volumes (bulk or otherwise) and/or total capacity.

URCA will not confine its analysis to a static market share but would also consider trends in market share, provided such information is readily available to URCA.

3.4 Optional Criteria for Assessing Market Power

Proposal #4: URCA proposes to use the following additional criteria for assessing market power, inter alia:

- *barriers to entry;*
- *number of active competitors;*
- *extent of countervailing power among buyers;*
- *prices and profitability;*
- *vertical relationships;*
- *the influence of other members of the licensee’s group;*
- *economies of scale; and*
- *economies of scope.*

BTC

BTC stated that the list presented by URCA omitted some relevant criteria for assessing market power and proposed that URCA update the list to include:

- Overall size of the undertaking;
- Control of infrastructure not easily duplicated;
- Technology advantages or superiority;
- Product/services diversification; and
- Highly developed distribution and sales network.

Regarding the specific criteria listed by URCA, BTC commented as follows:

- Barriers to entry are probably the most important factor for forward looking market analysis under SMP as it will guide URCA on its approach to making the market more competitive and is the fundamental driver for competition.
- When assessing profitability, URCA must consider the riskiness of the investment, especially, in emerging product and services. BTC referenced an ERG document, which suggests that high prices may be a result of greater innovation, and low profits may be as a result of the firm's inefficiency.
- URCA should demonstrate that vertical integration is harmful before assuming that its existence presents a problem for competition.
- When considering the influence of other members of the operator's group, URCA should focus on the "potential" influence rather than the actual conduct of the operator.
- Existence of economies of scale is not a barrier to entry *per se*. However, sunk costs and switching costs associated with economies of scale may create barriers to entry and, in any analysis, URCA should concentrate on these aspects rather than on the mere existence of economies of scale.
- Economies of scope can produce benefits for consumers and may lead to greater competition by enabling new entrants to emerge from other parts of the electronic communications industry.

CBL

CBL agreed with the criteria listed in Proposal 4 of the consultation and proposed that those criteria be assessed with a view to either confirming or rebutting a presumption of dominance established on the basis of market share.

CBL also cited the EC SMP Guidelines⁹ and suggested the inclusion of other additional criteria for the assessment of SMP, namely:

- Overall size of the undertaking;
- Control of infrastructure that cannot be easily duplicated;
- Technology advantages or superiority;
- Highly developed distribution and sales network; and
- Barriers to expansion.

URCA's response to comments received

The factors listed in Proposal 4 ('Optional Criteria') are the additional criteria URCA considers relevant when assessing market power.¹⁰ URCA accepts that the phrase 'Optional Criteria' could lead to misunderstanding on the part of respondents. URCA repeats, it was not URCA's intention to give greater prominence or weighting to the s.39(3) criteria relative to those specified in Proposal 4. As such and in line with a previous response, URCA will merge the criteria listed in s.39(3) and Proposal 4 into one list.

URCA notes BTC's comments on some of the criteria listed in Proposal 4. URCA disagrees with BTC that barriers to entry are the most important factor for SMP analysis. URCA will not give priority or assign greater weighting or importance to any one factor or group of factors. Instead, the criteria for assessment will be considered in the context of the relevant market taking into account the particular and relevant circumstances.

In relation to profitability assessment, URCA agrees with BTC that consideration be given to the riskiness of the investment. As was stated in the consultation document, "*In examining market power... focus is usually directed on the process of price formation in the relevant market*". As part of that process, URCA will consider the riskiness of the investment.

URCA disagrees with BTC that URCA should first demonstrate that vertical integration is causing a problem in the market before assuming that vertical integration is of itself a problem. URCA accepts that vertical integration can arguably bring some benefits to the market. URCA also accepts that the very nature of vertical integration lends itself to control of essential facilities

⁹2002/C 165/03

¹⁰ See s.39(3)(e) of the Comms Act.

and this may incentivise operators to behave anti-competitively. This in turn may hinder the development and effectiveness of competition and may ultimately allow an integrated operator to act independently of competitors, consumers and subscribers. As such, URCA considers that both the licensee structure and behaviour are relevant and important in any SMP analysis.

URCA welcomes BTC's proposition on the influence of other members of the Licensee's Group. However, URCA is of the view that it will be less onerous on URCA and the licensee to consider the potential influence of other members of the Licensee's Group than to demonstrate the existence or otherwise of actual influence, especially where the burden of proof rests with the licensee to demonstrate the non-existence of any such influence.

URCA does not disagree with BTC's comments regarding economies of scale and scope. However, the view advanced by BTC highlights only one aspect of those criteria and does not consider the consolidation of market power arising from economies of scale or unfair cross-subsidization between bundled and standalone services or between monopoly and competitive services that may arise from economies of scope.

URCA appreciates and accepts the additional criteria proposed by CBL which URCA notes are in line with the EC SMP Guidelines.

URCA's final decision

Having regard to Proposal 4 of the consultation, the responses received from licensees, and URCA's consideration of those responses, URCA has maintained the criteria listed in Proposal 4 but will amend that list to include the following additional criteria:

- Overall size of the undertaking;
- Control of infrastructure that cannot be easily duplicated;
- Technology advantages or superiority;
- Highly developed distribution and sales networks;
- Product/services diversification; and
- Barriers to expansion.

3.5 Criteria for assessing Joint/Collective SMP

Proposal #5: URCA proposes to use the following additional criteria for assessing Joint SMP, *inter alia*:

- *Market Concentration;*

- *Cost Structures;*
- *Market Share;*
- *Homogeneous services/products;*
- *Elasticity of demand;*
- *Potential competition;*
- *Market entry; and*
- *Countervailing Buyers' power.*

URCA proposes to use the following Hirshman-Herfindahl Index (HHI) parameters to gauge market concentration:

- *Un-concentrated if the HHI is less than 1000;*
- *Moderately concentrated if the HHI is between 1000-1800; and*
- *Highly concentrated if the HHI is greater than 1800.*

BTC

BTC asserted that the list of criteria specified is rather different from that used in one of the few findings of joint dominance (the mobile market in Ireland). BTC thereafter cited extensively from a Market Analysis of Irish Commission for Communications Regulation (ComReg), which identified a number of criteria for consideration of joint dominance, namely:

- The degree of market concentration;
- The incentive to coordinate;
- The ability to coordinate:
 - The ability to detect cheating;
 - Enforceability of compliance; and
 - Actual and/or potential market constraints.

BTC considered the list of criteria identified above to be superior to URCA's proposal, as it, in BTC's view, concentrates more on the behaviour of market participants than on the features of the market. BTC thereafter argued that it is important that URCA demonstrates that joint dominance exists, rather than that there is a potential for joint dominance before imposing any remedies.

BTC cited an ERG document that listed three necessary conditions for a finding of collective SMP, namely:

- Each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common strategy;
- Any tacit coordination must be sustainable over time; and
- It is necessary that existing and future competitors as well as customers do not undermine the results expected from the common policy.

BTC raised no objections to the use of the HHI as detailed by URCA. However, BTC was of the view that the HHI should not be considered in isolation, but should be applied in conjunction with penetration rate, the HHI at the moment of entry, and the relative strength of the regulator and/or the regulatory regime.

Specific to the criterion of cost structures, BTC asserted that cost symmetry is very unlikely between operators in The Bahamas. In BTC's view, differences in cost structures are likely to deter operators from coordinating their activities in a way that would make a joint SMP finding possible. BTC concluded that if that is what is implied by URCA, then BTC agreed with URCA's assessment.

BTC proposed that URCA include the following additional criteria for assessing joint dominance:

- Incentives to coordinate;
- Ability to detect cheating;
- Market constraints
- Transparency;
- Mature market;
- Growth in demand; and
- Retaliatory mechanisms.

CBL

CBL noted that joint/collective dominance is a highly complex concept and that there is a relative lack of precedents establishing joint dominance and this is indicative that it is very difficult for joint dominance to occur in practice. CBL stated that in general terms joint dominance requires a number of different economic factors to be present and for them to coincide to support a finding of joint dominance. Arising from those comments, CBL noted that

the approach set forward in the consultation does not take these complexities into account and appears to omit some critical aspects of the test for joint SMP or joint dominance.

CBL referenced the EU General Court's decision in *Airtours v Commission* which outlined three criteria for a finding of joint dominance. Those criteria notwithstanding, CBL stated that there is a lack of precedents establishing joint dominance and that this is indicative of the fact that it is very difficult for joint dominance to occur in practice. CBL cited examples of the rebuttal of joint dominance by the European Commission or by national Courts of Appeal to support its position.

CBL stated that the list of criteria set out by URCA under this part omitted important factors and does not take account of the case-law development on joint dominance. CBL submitted that the list set out by URCA should be revised to include the following additional criteria:

- Mature market;
- Stagnant or moderate growth on the demand side;
- Low elasticity of demand;
- Similar cost structures;
- Similar market shares;
- Lack of technical innovation, mature technology;
- Absence of excess capacity;
- High barriers to entry;
- Lack of countervailing buying power;
- Lack of potential competition;
- Various kinds of informal or other links between the undertakings concerned;
- Retaliatory mechanisms; and
- Lack or reduced scope for price competition.

URCA's response to comments received

URCA notes BTC's comments on the list of criteria presented by URCA under this proposal, specifically BTC's comment that URCA's list is at variance with those used by ComReg of Ireland. After careful review of ComReg's list as presented by BTC, URCA is of the view that this list is in essence reflective of the Judgement of the Court of First Instance (CFI) in the Case *Airtours vs.*

the Commission.¹¹ The CFI established three criteria for assuming the existence of joint dominance in an oligopolistic market, which were modified by the CFI in 2006.¹² The three criteria are the same as those stated in the ERG revised Working Paper¹³ mentioned by BTC and codified in the EU's SMP Guidelines¹⁴ for the assessment of collective SMP, namely:

*“(a) Whether the characteristics of the market makes it conducive to tacit collusion; and
(b) Whether such form of coordination is sustainable that is, (i) whether any of the oligopolists have the ability and incentive to deviate from the coordinated outcome, considering the ability and incentives of the non-deviators to retaliate; and (ii) whether buyers/fringe competitors/potential entrants have the ability and incentive to challenge any anti-competitive coordinated outcome.”¹⁵*

URCA's reading of the EU's SMP Guidelines and the Airtours case confirms URCA's understanding that focus is on the potential for joint dominance rather than on conclusive proof that joint dominance exists.

URCA does not agree with CBL that there is a relative lack of precedents establishing joint dominance. URCA has carefully considered existing case-law on joint dominance and has reviewed existing precedents.¹⁶ URCA's review reveals that ComReg was able to find joint-dominance based on market failures at the retail level and the refusal of Mobile Virtual Network Operators (MVNOs) of access at the wholesale level, and that the EU Commission supported ComReg's assessment. However, ComReg withdrew its finding on procedural grounds - the three operators alleged that ComReg had denied them natural justice by not hearing their arguments before making its joint dominance ruling.

The Spanish Comisión del Mercado de las Telecomunicaciones (CMT) found joint SMP on the Mobile Access and Call Origination market, which finding was endorsed by the EU Commission in January 2006. In 2005, France Autorité de Régulation des Communications Électroniques et

¹¹Case T-342/99, *Airtours vs. the Commission* [2002] ECR II-2585, [2002] 4 CMLR 317.

¹²*Independent Music Publishers and Labels Association (IMPALA) vs. Commission*, Case T-464/04 [2006] E.C.R. II-2289.

¹³[ERG 903] 09 rev1]

¹⁴See para. 96 [2002/C 165/03]

¹⁵EU's SMP Guidelines at para. 96 [2002/C 165/03]

¹⁶Specifically those referenced by CBL in its submission to this consultation.

des Postes (ARCEP) notified the EU of a case of joint SMP, but withdrew after the EU's critical comments regarding assumptions of retail market failures. However, a subsequent investigation by the French Competition Authority (Autorité de la concurrence) revealed the existence of a cartel. In Poland the Office of Electronic Communications (Urząd Komunikacji Elektronicznej - UKE) notified the EU of a case of joint SMP, but withdrew draft measures after the EU Commission's critical comments. Following those comments the UKE mandated MVNO access on the basis of the EU's Article 5 procedures.

The Malta Communications Authority (MCA) found evidence for joint SMP under mature, highly concentrated market conditions without significant potential for expansion. The MCA withdrew its notification of joint dominance after the EU Commission initiated proceedings to adopt a Veto decision. In its April 2008 consultation¹⁷ the MCA suggested that the current market framework appeared not to consider factors that were unique to the Maltese Communications markets.

The MCA, in addressing its concerns, stated that while it was *"proposing to withdraw all existing regulations as established under the MCA decision entitled "Dominant Market Positions in the Telecommunications market" published August 2003. This is being proposed without prejudice to any other general obligations of undertakings at law.*¹⁸

However, the MCA is cognisant that the withdrawal of obligations in this market will affect a number of market players. In order to have a smooth transition from a fully regulated market to a non-regulated market the MCA is proposing that, in accordance with Regulation 10(3) of the ECNSR, the existing obligations will be withdrawn 12 months following the adoption of the final decision concerning this market."

URCA recognises that case-law on joint dominance is still at an embryonic stage. This can be gleaned from the 2008 European Court of Justice (ECJ) modification of the Impala case.¹⁹ In that Case the ECJ stated that the criteria established by the CFI and reflective in the EU SMP Guidelines must not be considered in isolation to avoid a mechanical approach.

Based upon its understanding of the issue of joint dominance, URCA will seek to follow the criteria as established by the EU CFI and upheld by the ECJ. However, URCA is mindful of the

¹⁷See p. 79 Wholesale Broadband Access Market: Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies. Dated 11 April 2008 at http://www.mca.org.mt/sites/default/files/consultations/M12%20Final%20Consultation%20Doc%20110408_0.pdf.

¹⁸ibid p. 78

¹⁹Case C-413/06 (10 July 2008)

uniqueness of the Bahamian market which may impose demand and supply side constraints as demonstrated by the Maltese Case.

URCA will therefore adhere to the list of criteria as detailed by the EU SMP Guidelines.²⁰ That list is superior to that presented by BTC, and was used by URCA to guide its list of criteria under this part. For the avoidance of doubt each of the criterion listed by URCA under this proposal is contained in the EU's SMP Guidelines. URCA therefore agrees with CBL that the list should be revised to include the criteria detailed by the EU SMP Guidelines. However, given that URCA's list reflects those criteria to some extent, URCA will include those EU SMP Guidelines criteria not as yet contained in URCA's list.

Specific to BTC's comments on the HHI and cost structures, URCA will be guided by international best practice when seeking to ascertain whether the characteristics of the market makes it conducive to tacit collusion. That approach lends itself to the use of an appropriate indicator to evaluate market concentration. URCA will use the HHI as that indicator for market concentration together with the other criteria to assess joint SMP. While URCA recognises that there may be some merit in BTC's statement on cost structures, URCA will not rely solely on cost structures in its assessment of joint SMP.

URCA's final decision

Having regard to Proposal 5 of the consultation, the responses received from licensees, and URCA's consideration of those responses, URCA has maintained the criteria listed under Proposal 5 and will include in that list the following additional criteria:

- Mature market;
- Stagnant or moderate growth on the demand side;
- Lack of technical innovation, mature technology;
- Absence of excess capacity;
- Various kinds of informal or other links between the undertakings concerned;
- Retaliatory mechanisms; and
- Lack or reduced scope for price competition.

²⁰2002/C 165/03 at para. 97.

4. Conclusion and Next Steps

Alongside publication of this Statement, URCA will publish a separate document setting out the methodology it will use for SMP analysis. URCA will also present in its Annual Plan for 2012 a timetable for the first full market review under the Comms Act. However, as previously stated and as a first step, URCA will use the methodology to identify operators with SMP in call termination services.