

Wholesale Infrastructure Access Wholesale Broadband Access

Decision Notice

16th January 2023

C01/23

FOREWORD

On 8th September 2022, the Authority carried out a review of the wholesale broadband access and wholesale infrastructure access markets. Public Consultation C05/22 set out to assess the level of competition in both markets and determine whether any undertaking is found to have Significant Market Power. This concept is held to be equivalent to that of dominance under competition law and is defined as the ability to behave independently of competitors, suppliers and ultimately businesses and consumers in that market.

By the close of the consultation period, the Authority received responses from the two operators listed below:

- *Gibtelecom Ltd.*
- *GibFibre Ltd.*

This Decision Notice sets out the final position taken by the Authority in its assessment of both markets.

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1. INTRODUCTION

The Gibraltar Regulatory Authority (the "Authority") is responsible for the regulation of the electronic communications sector in Gibraltar in accordance with the Communications Act 2006 (the "Act") and its accompanying regulations.

The main purpose of a market review is to identify the competitive conditions prevailing in a market by assessing systematically, the competitive constraints that are faced by undertakings in the market. A market review commences by defining a market, which is then analysed to assess the degree of effective competition. The competition assessment determines whether any undertaking is found to have significant market power ("SMP"), which is held to be equivalent to the concept of dominance under competition law and is defined as the ability to behave independently of competitors, suppliers and ultimately businesses and consumers in that market. If there is no SMP, the market is effectively competitive and does not require *ex-ante* regulation¹. If there is SMP, then the market is not effectively competitive and *ex-ante* regulation should be imposed, at either the wholesale or the retail level, to counteract the potential negative effects of the anticompetitive measures that can result.

Each market review consists of three main components:

- Definition of the relevant market susceptible to *ex-ante* regulation;
- Assessment of competition in each market, in order to identify competitive constraints and assess whether any undertaking(s) has SMP;
- Assessment of the appropriate regulatory obligations which should be imposed, given a finding of SMP (*the Authority is obliged to impose some form of regulation where there is SMP*)².

On 8th September 2022, the Authority published Public Consultation No. C05/22 which set out to assess the level of competition in the **Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location** ("WIA") and **Wholesale Broadband Access** ("WBA") markets. The competition assessment determines whether any undertaking is found to have SMP.

In Public Consultation No. C05/22³, the Authority proposed that, as a result of Gibraltar's market conditions created by a number of factors including the unique geo-physical characteristics of the territory, operators have been able to rollout expansive high-speed access networks to their customers, without the need to purchase WIA or WBA products from other providers. From a wholesale perspective, there is effectively zero WIA and WBA take-

¹ *Ex-ante* regulation is the application of regulation before an abuse of power has necessarily occurred. The reasoning behind its application is that finding that an operator has SMP means that the operator is likely to have the incentive and motivation to behave in a way which exploits its market power to the detriment of competitors and ultimately to consumers. *Ex-ante* regulation can be contrasted with *ex-post* regulation, which investigates an incident which has already happened.

² Regulation 9 of the Communications (Access) Regulations 2006.

³ Please refer to consultation for sections on relevant legislation, description of the markets in Gibraltar, market definition and existing SMP obligations.

up in Gibraltar and therefore the Authority is of the view that this is likely to continue to be the case for the foreseeable future given that this position has not changed in the last sixteen years.

By the close of the consultation period, the Authority received detailed submissions from the respondents listed below:

- Gibtelecom Ltd.
- GibFibre Ltd.

The Authority thanks Gibtelecom Ltd ("Gibtelecom"), GibFibre Ltd ("GibFibre") for their submissions. Having considered their views, the Authority sets out in this document its conclusions regarding its assessment of the WIA and WBA markets.

2. RESPONSES TO CONSULTATION

The Authority has summarised the respondent's views and submissions under each of the questions below and after having considered these carefully, the Authority sets out its conclusions accordingly.

Q1: Do you agree with the Authority's proposed market definitions? Please give reasons for your answer.

Views of Respondents

GibFibre did not agree with the Authority's proposed market definitions. They explained that the geographical market area was not the whole of Gibraltar as it considered, "*that there is a submarket consisting of entry to data centres and provision of services to people hosted there which is not open to competition*". GibFibre added that "*those running data centres will not give access to GibFibre including by the provisions of the wholesale infrastructure access to customers in those data centres*".

Gibtelecom agreed with the Authority's proposed market definitions. They stated that the WIA and WBA markets were similarly defined in the previous market analyses and public consultations of 2007 as separate markets.

Authority's position

The Authority acknowledges Gibtelecom's agreement with the proposed market definitions.

In relation to GibFibre's comments regarding the geographical market, the Authority has the following comments.

Section 39(1) of the Communications Act 2006 provides:

"In identifying or analysing a relevant market for the purposes of this Act, the Authority must take due account of all applicable guidelines and recommendations which –

(a) have been issued or made by the European Commission in pursuance of the provisions of a European Community instrument; and

(b) relate to market identification and analysis."

In this regard, the Authority has considered the following European Commission documents which provide information on the geographic market definition process within a market review procedure:

- Explanatory Note to the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation⁴ (Explanatory Note);

⁴ Explanatory Note to the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive

- BEREC Common Position (BEREC CP) on geographical aspects of market analysis⁵ (BEREC Common Position).

According to case law⁶, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are significantly different.

Significant variations of competitive conditions between different areas of a same country might therefore require the definition of separate relevant geographic markets and eventually lead to different designations of SMP and regulatory treatment of the SMP undertakings.

The first question that needs to be addressed in an assessment of the geographical boundaries of relevant markets is whether or not and under what circumstances there might be a need to adopt a geographically differentiated approach.

A clear overview regarding the different networks, active operators and product characteristics in a given geographical area, and if they are differentiated from offers in neighbouring areas, are all parameters which can be taken into consideration. Additionally, pricing and price differences are also relevant criteria for performing a geographical analysis.

The geographic scope of relevant electronic communications markets can be transnational, national, regional or local. In some countries, there are several incumbent operators of fixed networks with less than national coverage, each of which operates in a different area. In these cases, markets have usually been defined according to the area covered by each of these operators. Examples include Finland, Hungary and the Hull area in the UK⁷. This approach of using the network coverage of the incumbent(s) as a determining criterion for geographical market definition has been used in several market reviews and has remained undisputed by the European Commission and national courts⁸.

In the UK, Ofcom, when reviewing the market for retail leased lines for example, defined the area of Hull as a separate geographic market. This is because Kingston Communications (KCOM) and not BT is the incumbent provider.⁹ In fact you won't find broadband packages

(EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code SWD(2020) 337 final, 18/12/20.

⁵ BEREC Common Position (BEREC CP) on geographical aspects of market analysis (definition and remedies) of 5 June 2014, BoR (14) 73.

⁶ *United Brands*, op. cit., paragraph 44, *Michelin*, op. cit., paragraph 26, Case 247/86 *Alsatel v Novasam* EU:C:1988:469, paragraph 15; *Tiercé Ladbroke v Commission*, op. cit., paragraph 102.

⁷ BEREC Common Position (BEREC CP) on geographical aspects of market analysis (definition and remedies) of 5 June 2014, BoR (14) 73.

⁸ *Ibid.*

⁹ European Commission comments pursuant to Article 7(3) of Directive 2002/21/EC in respect of Commission Decision concerning Case UK/2016/1849. C(2016) 2597 final.

from BT, Virgin Media or any other provider that runs on the Openreach network¹⁰ (as is the case for most other providers) available in Hull as KCOM is the incumbent¹¹.

In terms of pricing, if the prices of the incumbent and alternative operators are geographically uniform, that is, do not differ between geographical areas, this may be an indication of insufficient geographical variations in competitive conditions to justify the definition of subnational geographical markets.

Additionally, the number of operators offering their retail services in a particular geographical area and the relative size of these operators, complemented by the local development of the retail market share of the operators, may provide factual information about the position of operators in separate geographical areas.

Taking all the above into account within a Gibraltar context, it is the Authority's view that geographic definition for the WIA market is national in scope i.e. the market covers the entirety of Gibraltar. This is because of a number of factors such as the extremely small market size, the conditions of competition, network coverage and product and pricing differentiation.

Firstly, the WIA market as defined in Public Consultation C05/22, is limited to the market for wholesale unbundled local loops and therefore does not encompass any infrastructure contained within data centres in Gibraltar. (See Authority's position on Q2 below). Therefore, a separate geographic market for access to data centres cannot be defined.

In any case, given that there are no wholesale transactions between operators in relation to local loops, the analysis of the WIA market was limited to the downstream market of retail access provided at a fixed location¹². The geographic definition of this market was established as being national in scope as that conditions of competition were found to be homogenous throughout Gibraltar and the market was found to be effectively competitive¹³ given the extensive roll-out of three operator networks, the increase in market shares of alternative operators over time and the range of products offered.

In terms on network deployment, there are three active operators which cover extensive areas throughout Gibraltar, often overlapping, with no specific areas¹⁴ where one operator conducts its business exclusively. Furthermore, all products and services are provided uniformly all

¹⁰ Openreach is a subsidiary of BT that runs the network infrastructure part of BT's business.

¹¹ www.cable.co.uk/broadband/guides/hull.

¹² See Public Consultation C05/22 on Wholesale Infrastructure Access and Wholesale Broadband Access, www.gra.gi.

¹³ See Public Consultation C01/22 and Decision Notice C02/22 on retail fixed access, retail local calls and retail international calls, www.gra.gi.

¹⁴ Referred to as geographic units by the European Commission (see footnote 3 above), National Regulatory Authority's must ensure that these are (a) of an appropriate size, i.e. small enough to avoid significant variations of competitive conditions within each unit but big enough to avoid a resource-intensive and burdensome micro-analysis that could lead to market fragmentation, (b) are able to reflect the network structure of all relevant operators, and (c) have clear and stable boundaries over time.

throughout Gibraltar with no difference in prices depending on location either. Therefore, there is no evidence to suggest that a separate geographic market for access to data centres can be defined.

Q2: Do you agree that the market for wholesale infrastructure access and wholesale broadband access should no longer be subject to ex-ante regulation? Please give reasons for your answer.

Views of Respondents

GibFibre stated that part of the wholesale infrastructure access market which relates to data centres should remain regulated via ex ante regulation.

Gibtelecom agreed with the Authority's position that both WIA and WBA should no longer be subject to *ex-ante* obligations and for all associated SMP obligations on the company to be removed. They added that as pointed out by the Authority, despite Gibtelecom's publication of a regulatory-approved Reference Unbundling Offer (available even before the 2007 public consultations), no other operator has ever made use of the services available therein. For the record, as this is something that does not appear to have been covered in the public consultation document, Gibtelecom also produced a Reference Offer for Wholesale Broadband Services towards the end of 2014 when it received a request to produce one from an alternative operator. As with the Reference Unbundling Offer, this was also ultimately not taken up by any other party.

Authority's position

In Public Consultation C05/22, the Authority defined the market for Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location as the following:

"WIA provides a connection between the local serving exchange/access node (often referred to as the Point of Presence) and the customers premises, with this connection being either provided by the operator themselves or purchased/rented from another operator through a wholesale agreement. For the purposes of this review and as per the previous market assessment¹⁵, the WIA market is limited to the market for wholesale unbundled local loops".

Furthermore, the Authority explained that at the wholesale level, operators purchase WIA i.e. Local Loop Unbundling (LLU) services, and WBA inputs such as broadband services, to provide retail services to customers (or indeed wholesale services to other operators). Using LLU, an operator takes control (full control or partial control) of the local loop from the local exchange to the customers premises. The operator is then able to supply retail services to its customers, or sell wholesale services, such as those sold in the WBA market, to other operators.

The WIA market, therefore, does not encompass any scenario in which access to a data centre is involved given that it only concerns the physical path between the exchange and the customer's premises. Furthermore, all the products and services relating to local loops are contained within Gibtelecom's Reference Unbundling Offer with their corresponding charges and service level agreements. These will include the provision of either voice services,

¹⁵ Public Consultation 02/07, Response to Consultation 14/07 and Decision Notice 04/08 – www.gra.gi.

broadband services or both, mostly connecting residential customers and differ from the services provided by data centres which include hosting, data processing, data storage and bandwidth solutions to business entities.

Regarding Gibtelecom's comments, the Authority acknowledges their agreement that the WIA and WBA markets should no longer be susceptible to *ex-ante* regulation. The Authority also notes that, despite being available at the time, no operator has ever signed an agreement with Gibtelecom in relation to its Reference Offer for Wholesale Broadband Services.

***Q3: Do you agree with the proposed notice period of 30 calendar days for the removal of all SMP obligations?
Please give reasons for your answer.***

Views of Respondents

GibFibre did not agree for the reasons set out above because there is a substantial portion of the market which is still subject to the exercise of SMP and there are significant barriers to entry in relation to data centres.

Gibtelecom accepted having a notice period of 30 calendar days for the removal of all SMP obligations.

Authority's position

The Authority notes the respondent's comments above and is of the view that a notice period of 30 calendar days for the removal of all SMP obligations should be adopted.

With regards to GibFibre's comments, please refer to the Authority's position with regards to question 1 and 2 above.

3. REMOVAL OF SMP OBLIGATIONS

With reference to the evidence presented in the analyses carried out in Public Consultation C05/22, the Authority concludes that there is no proof of dominance on the part of any operator and that no undertaking enjoys SMP in any of the identified wholesale markets.

Given these conclusions and considerations, the Authority does not deem it justifiable to mandate regulatory obligations on undertakings in the wholesale broadband access and wholesale infrastructure access market.

Therefore, pursuant to the provisions of section 40(5)(b) of the Act, the Authority hereby withdraws all existing SMP obligations imposed upon Gibtelecom in these markets.

The Authority considers that it is important to keep a close watch on the progress and developments in these markets. To this end, the Authority intends to analyse future market trends on an ongoing basis and remains committed to conducting any further analyses of the WIA and WBA markets if necessary.

In accordance with the provisions of section 40(6A) of the Act as well as the need to ensure a smooth transition from a regulated market to a non-regulated market, the Authority shall ensure that the parties affected by the withdrawal of an SMP obligation receive an appropriate notice period. The Authority shall, therefore, adopt a notice period of 30 calendar days following the publication of this final decision notice concerning these markets.

Given the nature of the WIA and WBA markets, the Authority believes that this notice period is sufficient to allow all stakeholders to make necessary arrangements for the new regulatory approach to the wholesale markets identified in the market review.

The notice period for the removal of all SMP obligations shall be 30 calendar days following the publication of this final decision notice.

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